The History

- Dyers Case 1414 Justice Hull
  - 6 month restraint void for apprentice dyer
- Sir Edward Coke
  - Chief Justice, Attorney-General, legal writer
- Mitchell v Reynolds 1711 Chief Justice Parker
  - 5 year restraint for sale of bakery
- Maxim Nordenfelt 1894 Lord Macnaghten
- And Australia?
  - Kaufman v McGillicuddy, High Court 1914
The Drafting

» Threshold Question:
  • Employee with or without a Business Interest?

» Who is the Employer?

» How Long?
  • Cascading / Waterfall / steps clause

» How Far?
  • How relevant?

» What Activity?
  • What Business or Industry?

» Who? Only Customers?
  • Investors, referrers, suppliers
  • What is solicitation

» And Employees?
  • What’s the loss?
  • Team moves and an employer’s interest in a stable workforce
Garden Leave, Confidentiality, and Intellectual Property

» Garden Leave
  • Few cases, policy issues

» Relationship with Confidential Information
  • Truly confidential
  • Know how
  • Must be specific

» Intellectual Property Considerations
  • Copyright, Patent, Domain name
Before The Litigation

» Ethics
  • Who is Your Client?
  • Suing at all costs, and overarching obligations

» Assess the Clause
  • Capable of severance

» Evidence
  • From customers? Expert evidence, IT

» Commercial Considerations
  • Competing in the market
Litigation

» Affidavits, Undertakings and Injunctions
  • Springboard Doctrine, Anton Piller Injunction

» Compensation
  • Loss of profit, valuing goodwill

» Defining scope
  • Assessed when contract executed

» Effect of Repudiation
The World

» No Employee Restraint Permitted
  • California, Russia, India

» Employee restraint but at a price
  • Germany, China, and a different kind of price, Hong Kong

» Employee restraint subject to statute
  • New South Wales, Georgia

» Employee restraint subject to judicial policy
  • Victoria, England, New Zealand, New York
Hero or Villain?

» Samuel Slater
  - Took English textile secrets to establish American textile industry

» Pierre Samuel Du Pont
  - Used US legal system to extend scope of confidential information

» Harold Hirsch
  - Expanded category of trade mark protection for Coca Cola in 1920s

» Huanjuan Jin
  - Attempted to take mobile phone technology secrets from US to China, still in jail, despite appeal
The Advice

» Beware Precedents and Templates
  • Covering letter of advice

» Purpose? Protect Goodwill
  • Ex-employer and ex-employee may compete

» ASSESS THE RISK
  • Industry - Duopoly, oligopoly, many players
  • Business - Conglomerate, part of a business
  • Product/Service - Price sensitive, patent, confidential information
  • Employee - Extensive know how, pre-existing industry contacts
Conclusion: Beware Precedents, Be Ethical, Be Commercial

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