



### 1. RESTRAINT OF TRADE

Knox v Rydon, [2007] NSWSC 198

Supreme Court of New South Wales  
02 March 2007  
White J

**CATCHWORDS:** RESTRAINT OF TRADE – Solicitor – Clause in partnership agreement – Application for interlocutory injunction restraining former partner from providing legal advice to clients of partnership, or enticing any person employed by the partnership from continuing employment – Whether clause valid – Balance of convenience – Injunction in the terms sought would not serve the purposes of the clause – Limited injunction ordered. **LEGISLATION CITED:** Corporations Act 2001 (Cth)

In *Lindner v Murdock's Garage* (1950) [83 CLR 628](#), a case concerning a restraint of trade affecting an ex employee, Latham CJ said (at 633-634):

*"Where an employee has access to trade secrets or other confidential information he may be restrained by agreement from communicating those secrets or such information to other persons, and particularly to competitors in trade with his employer. Again, an employee who is brought into personal contact with the customers of his employer may by agreement effectively bind himself to abstain after his term of service has been completed from soliciting the customers of his former employer. In these cases the covenant in restraint of trade is not a covenant against mere competition but is a covenant directed to securing a reasonable protection of the business interest of the employer, and in the circumstances is not unjust to the employee. The interest which can validly be protected is the trade connection, the goodwill of the business of the employer."*

27 It was submitted that, it was at least seriously arguable that the restraints against competition in the partnership agreement were invalid, insofar at least, as they sought to restrain Mr Rydon from providing legal advice to clients of the firm with whom he had had no connection. This argument was advanced in *Bridge v Deacons* [1984] AC 705 (at 709):

*"In the employer and employee cases the position is different because there is no transfer of goodwill. An employer can only protect himself against an ex-employee making illegitimate use of the connection or information acquired while he was an employee. The nature of the interest which it is legitimate to protect is different from that in a vendor and purchaser case. In the latter case the legitimate interest is defined by reference to the business in which the goodwill is being transferred and the whole of the connection of the business can be protected, whereas in employee cases protection is limited to the connections of the employee himself."*

28 In the present case, Mr Rydon did not acquire an interest in the goodwill of the partnership. Hence it was submitted that the present case is analogous to employer and employee type cases, and is distinguishable from cases involving restraints against solicitors where the solicitors did acquire a share of the goodwill on being admitted to partnership.

29 Whether this is so or not, I think there is a serious question to be tried that the covenant is valid both in its application to clients with whom Mr Rydon dealt when he was a partner, and in respect of other clients of the firm (*Rouen & Ors v Ryan* [2001] NSWCA 230 at [10]-[11]).



30 The position of a partner entitled to share profits but not liable for losses, and not entitled to a share in the capital of the firm, is *sui generis*. The validity of the covenant in restraint of trade, as it applies to him, is to be determined by asking what were the legitimate interests of the plaintiffs which they were entitled to protect, and then whether the restraint is wider than is reasonably necessary to afford that protection. It must be at least seriously arguable that the other partners of the firm had a legitimate interest in protecting the goodwill of the partnership, notwithstanding that there was no sale of that goodwill to Mr Rydon on his becoming a partner.

31 The balance of convenience favours the granting of the injunction to restrain the defendant from providing legal advice, or assisting others to do so, in respect of such clients. It could be difficult both to determine whether there had been any breach of the covenant and to assess damages for breach of the covenant, if the injunction were withheld.

32 However, there is a difficulty in that Mr Rydon says that he does not know the identity of all persons who were clients of the firm in the relevant period. It may be that:

*"The risk of an unwitting breach can be averted by the covenantor inquiring of prospects whether they have within the relevant period been customers of the covenantee."* (J D Heydon *The Restraint of Trade Doctrine* Second Edition, page 126).

33 However, the better course would be for the defendant to know in advance what is the scope of the restraint to which he is to be subject. The plaintiff does not oppose its being a condition of the injunction that the plaintiff provide to the defendant a list of the firm's clients for the appropriate period, provided that the defendant proffers an undertaking to the Court to keep the contents of that list confidential. The defendant has indicated through his counsel that he is prepared to proffer such an undertaking.

34 I therefore propose to make orders in accordance with paragraphs 1 and 2 of the short minutes of order handed up by counsel for the plaintiffs, amended in the way indicated during argument, by the insertion of the words "*in the twelve-month period*" where they appear in both of those paragraphs, but subject also to the orders providing that "*they will operate upon the plaintiff providing to the defendant a list of the persons who were, in the twelve month period prior to 1 December 2006, a client of the legal firm then conducted by the plaintiff*". In due course, I will note the undertaking to be given to the Court by the defendant to keep that list confidential.

## **2. LOCAL COURT PRACTICE NOTE 3 OF 2007**

Local Court of New South Wales

Practice Note 3 of 2007

Issued pursuant to section 15 of the *Civil Procedure Act 2005 (CPA)*

1. This Practice Note commences on 1<sup>st</sup> March 2007.
2. This Practice Note applies to proceedings in the General Division of the Local Court and, unless the Court otherwise orders, it applies to any such proceedings (irrespective of when the proceedings were commenced) in



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which the first Defence is filed after the commencement of this Practice Note.

### **3. Objectives and Purpose**

- 3.1 The objective of this Practice Note is to ensure, by directions pursuant to section 62 of the CPA, that the court's practice and procedure is applied with a view to determining proceedings justly and in a timely manner.
- 3.2 The purpose of this Practice Note is to advise that this objective may, in an appropriate case, result in the Court limiting the time that may be taken in the examination, cross examination or re-examination of witnesses.

### **4. Directions as to conduct of the hearing**

- 4.1 At the Call Over, the Court upon fixing the matter for hearing shall in addition to any other case management direction make a direction that the parties shall hand to the Magistrate conducting the Review (paragraph 7.5 of Practice Notice 1 of 2005) a document (Civil Listing Advice) in the form attached to this Practice Direction providing a List of witnesses and a reliable estimate of time required for the examination in chief, cross examination or re-examination of each witness.
- 4.2 At the Review, the Court, upon being satisfied that the estimate time is reasonable having regard to the objectives set out in section 56(1) CPA and to those matters set out in sections 62(4) and 62(5) CPA, will confirm the hearing date.
- 4.3 The Court, if it is not satisfied that the estimated time is reasonable, will make such directions in accordance with section 62(3) of the CPA as may be necessary having regard to the overriding objectives set out in section 56(1) CPA and to those matters set out in sections 62(4) and 62(5) CPA.
- 4.4 If a party unduly exceeds the estimate of time for examination in chief or cross examination of a witness, the court may, of its own motion or upon the application of any other party, consider limiting further questioning of the witness.
- 4.5 In determining whether or not as to what, if any, extent to limit further questioning, the court will have regard to the principles set out in Part 6 of the Civil Procedure Act.

### **3. LOCAL COURT PRACTICE NOTE 2 - 2007**

#### **Local Court of New South Wales**

#### **Practice Note 2 of 2007**

#### **Issued pursuant to section 15 of the *Civil Procedure Act 2005 (CPA)***

1. That so far as this Practice Note is inconsistent with Practice Note 1 of 2000, Practice Note 1 Of 2000 is superseded.
2. This Practice Note commences on 1<sup>st</sup> March, 2007.

#### **3. Objectives and Purpose**

3.1 The purpose of this Practice Note is to indicate a limitation on the maximum amount of costs that will generally be awarded in proceedings to which this Practice Note applies.<sup>1</sup>

3.2 Where the amount claimed is \$20,000 or less the Court's discretion as to costs in proceedings will in general terms be exercised so that the maximum amount of costs awarded in respect of the proceedings, after the first defence is filed, is limited pursuant to Rule 42.4 of the Uniform Civil Procedure Rules, 2005 (UCPR). Maximum costs should NOT be considered as the standard amount to be awarded. Costs will be subject to agreement or assessment in appropriate proceedings, however, the amount of costs should not exceed the maximum unless the court otherwise orders.

3.3 Costs mentioned in this Practice Note do not include general disbursements but do include Counsel's fees.

#### **4. Limitation on Amount of Costs to be Awarded.**

4.1 This Practice note applies to proceedings in the General Division in which the amount claimed does not exceed \$20,000 and to all matters transferred from the Small Claims Division to the General Division.

4.2 Unless the court otherwise orders, this Practice Note applies to

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<sup>1</sup> See Part 6 of Civil Procedure Act, 2005



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proceedings no matter when commenced where the first defence is filed

or (in the case of a matter commenced in the Small Claims Division) where the matter is transferred from the Small Claims Division to the General Division, after the commencement of this Practice Note.

4.3 Unless the Court in a particular case determines otherwise, the discretion of the Court as to costs incurred after the first defence is filed will be exercised as if a maximum costs order under r 42.4 of the Uniform Civil Procedure Rules 2005 (“the UCPR”) had been made in the proceedings at the time of filing of the first defence in the terms set out below (“the maximum costs order”). Costs up to and including the filing of the first defence will not be included in the amount specified in the maximum costs order, but may be ordered in addition to that amount

4.4 **Rule 42.4 Maximum Costs Order.**

The discretion of the court to award costs shall be exercised so as not to exceed the following amounts:

- (a) where the plaintiff succeeds – 25% of the amount awarded by the court
- (b) where the defendant succeeds – 25% of the amount claimed by the plaintiff.

5. **Maximum Costs Order for Matters Transferred From the Small Claims Division to the General Division**

5.1 The Rule 42.4 Maximum Costs Order for matters commenced in the Small Claims Division and subsequently transferred to the General Division is as follows: -

- 1. Pursuant to Rule 42.4 of the UCPR, the maximum costs which may be recovered by a successful party shall be fixed at \$2,500.

6. **Variation of Rule 42.4 Maximum Costs Order**

6.1 An party seeking to vary the Rule 42.4 Maximum Costs Order or such other Rule 42.4 Orders as may be in force may make application at any time but not later than two weeks prior to the first Review date.

6.2 An application for a variation of the Rule 42.4 Maximum Costs Order or such other Rule 42.4 order as may be in force: -

- 6.2.1 must be made by way of notice of motion;



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6.2.2 must be served by the applicant on each party who may be affected by the application no later than five days before the return date of the motion.

6.2.3 the notice of motion must be supported by an affidavit containing information as to the importance of the subject matter of the proceedings and the complexity of the proceedings (section 60 CPA);

6.2.4 the supporting affidavit must include an estimate of the recoverable party/party legal costs of the party as at the date of the application, and an estimate of the recoverable party/party legal costs which will be incurred between the date of the application and the completion of the trial; and

6.2.5 the supporting affidavit must NOT annex a bill of costs of the party making the application.

6.2.6 The notice of motion must specify an amount sought as an alternative maximum costs order.

6.3 A party who may be affected by an application for variation of the Rule 42.4 Maximum Costs Order may file at the registry and serve on all other active parties an affidavit responding to the notice of motion. That affidavit may specify an amount sought as an alternative maximum costs order.

6.4 The Court will determine an application for a variation of the Rule 42.4 Maximum Costs Order up until the time of first Review and may make the following orders: -

1. An order that the Rule 42.4 Maximum Costs Order shall continue to apply
2. An alternate Rule 42.4 order
3. Such order as the court deems appropriate.

## 7. Court's Discretion as to Indemnity Costs

7.1 This Practice Note does not affect the power of the Court to exercise its discretion to depart from the orders specified herein or make orders for indemnity costs in appropriate cases.



## 4. ACCESS TO JUSTICE PROBLEMS IN CANADA – AS IN AUSTRALIA

Taking your own counsel



BERNARD WEIL/TORONTO STAR

Kathrine Farris is representing herself without a lawyer in a wrongful dismissal and harassment suit against her former employer.



### **Judges, lawyers offer proposals to help provide a fairer system**

Some ideas from judges and lawyers for reducing the number of people who wind up in court without a lawyer and helping those who appear before them:

- **ALTERNATIVES TO TRIALS:** Setting up a provincial arbitration system for wrongful dismissal claims could be faster and cheaper than court.

Ending pre-trial hearings, known as examinations for discovery, that tend to reduce the chance a person represents themselves because they can no longer afford a lawyer.

The federal government has an arbitration system in place for non-union employees of federally regulated industries, such as airlines and trucking companies. But these hearings can still be costly.



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- **CHANGE THE PROCESS:** Adopting a more inquisitorial procedure in cases where at least one of the parties has no lawyer.

Judges could actively question witnesses, suggest possible legal arguments and even retain experts, says Dalhousie University Prof. Rollie Thompson.

In cases where the opposing party has a lawyer, it may be wise to give unrepresented litigants the choice of proceeding under conventional adversarial rules, Thompson said.

- **CUT THE GST:** Eliminating the GST on legal fees and allowing individuals to claim a tax deduction for legal expenses, just as corporations do.

Later this month, the Supreme Court of Canada will look at whether the B.C. government has the right to impose a 7 per cent tax on lawyers' services. In a 3-2 ruling, the B.C. Court of Appeal struck down the tax provision in 2005, saying it offends the principle of access to justice.

Ordinary citizens, unable to secure legal aid or pay punitive legal bills, fight a 'David and Goliath' battle as they argue their own cases in court

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Tracey Tyler  
LEGAL AFFAIRS REPORTER

Something is missing these days from Canadian courtrooms.

It's called lawyers.

In their place are ordinary people – single parents, contractors, stockbrokers and teachers – struggling to present their cases without experience or a law degree.

With a routine civil trial estimated to cost \$60,738, and legal aid programs hard-pressed to serve even the poor, judges reckon that anywhere between 40 and 85 per cent of those appearing before them do so without lawyers.

Canada's Chief Justice Beverley McLachlin says the numbers are becoming "alarming."

"Some don't want to spend the money on a lawyer, but the reality, I think, is most are not able to pay," says Justice Barbara Hamilton of the Manitoba Court of Appeal.

Kathrine Farris is one of them.



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Four years ago, Farris was fired as a commercial real estate agent, but with the help of Mary Cornish, a human rights and employment lawyer in Toronto, she filed a \$7.5 million wrongful dismissal and sexual harassment lawsuit against the Staubach Company and two Canadian subsidiaries.

They are all part of a real estate empire founded by former Dallas Cowboys quarterback Roger Staubach.

The defendants deny the allegations and say Farris received reasonable compensation in lieu of notice.

Since turning to the justice system in 2003, Farris has paid legal bills of \$197,443.58.

But she still owes another \$219,658.65 in fees, disbursements and GST. A trial could still be years away.

Farris began representing herself early last year and is now considering bankruptcy.

"I feel like I'm strapped to a torture table with no end in sight," she says.

Going without a lawyer creates tremendous difficulties not only for individuals but also for the entire justice system, says Hamilton, speaking about the problem at a recent legal conference.

Often, very little time is spent on the issues in a case, because judges are too busy explaining procedure to "unrepresented litigants," who may have never ventured into a courtroom.

"While many are respectful, some are disruptive. Some are well-educated, others are barely literate," Hamilton said. "Everyone is just trying to get through the day."

In a libel case in Saskatchewan, a man who couldn't figure out how to prepare a statement of defence simply bundled up newspaper clippings, printouts from the Internet and copies of unrelated court decisions and sent them to the judge, describing them in an affidavit as his "potpourri documents."

The judge, William Gerein, said the affidavit "reads like a bad speech" filled with "disjointed verbiage" and is "only marginally consistent with what the law requires."

Justice Robert Armstrong of the Ontario Court of Appeal was left shaking his head after poring over a court brief written by John Susin.

He's a contractor who is representing himself in a civil case involving a dredging job on Lake St. Clair.

In a 2005 ruling, Armstrong called the brief "repetitious and confusing."

"I do not say this in order to `scold' Mr. Susin, as I appreciate that he is not a lawyer, but merely to indicate that I have found it extremely difficult to ascertain exactly what it is that Mr. Susin is attempting to submit on a number of points."



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In spring 2006, Farris squared off against Staubach Company lawyers in a tiny University Ave. courtroom.

Tall with cascading curls and an authoritative black suit, she cut an impressive figure.

On the bench was Thomas Hawkins, a case-management master whose job is sorting out pretrial procedural wrangles in the Superior Court of Justice.

Farris begged him to end the pretrial hearings where she was being cross-examined by the companies' lawyers.

She has now attended 29 days of hearings and answered 10,474 questions.

Farris asked Hawkins to order the company's lawyers to submit their remaining questions in writing and allow her to answer them at home.

That's a "drastic step," he told her, adding that she would have to make a formal request with a "cross-motion."

"I don't know how to cross-motion," she lamented.

The defendants asked Hawkins to order Farris to turn over her full medical records.

She had given them only an edited version, said Arie Gaertner, a lawyer representing Staubach Ontario Inc.

The thought of Gaertner getting his hands on intimate details plunged Farris into a panic.

"I want him on as tight a leash as possible when it comes to (keeping) my medical records (confidential)," she said.

Hawkins told Farris that, since she is claiming damages for mental suffering as part of her lawsuit, the defendants' request for complete medical records isn't unusual.

Farris knows that, by suing, she set the stage for "a David and Goliath battle." But crawling away in the face of what she considered unjust treatment would have "poisoned" her approach to life.

"I come from a family where, if you have a problem, you confront it," she says.

One factor that led Farris to begin representing herself was that Cornish doesn't take cases on a contingency fee, where lawyers get no money upfront, but a percentage of any settlement or damages awarded.

Contingency fees are seen as perfectly suited to wrongful dismissal cases.

But not all lawyers accept contingency cases because they assume the risk of funding the litigation. If they lose, they don't get paid.



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"The agreement Kathrine and I had from the beginning was based on her paying as we went along," Cornish said.

Helping drive up costs has been the companies' vigorous defence – including an unsuccessful bid to prevent Staubach from testifying and an attempt to have her lawsuit put on hold until the Ontario Human Rights Commission rules on a complaint she filed.

The case has become so costly that even Gaertner has joked about adding a "Kathrine Farris wing" to his house.

After Farris began acting as her own lawyer, she ventured into the Great Library at Osgoode Hall, home to Canada's largest private collection of legal books and documents – about 150,000, which stretch from floor to ceiling.

Overwhelmed, she went home feeling depressed.

A year ago, her friends held a fundraiser at a Toronto restaurant and raised enough to cover some of her legal bill. But even representing herself, she faces potentially enormous expenses.

If her case goes to trial, Farris needs transcripts from the examinations for discovery, which – at up to \$4.90 a page – could cost \$36,000.

Farris is now self-employed as a commercial real estate consultant, but her foray into the legal world has taken over much of her life. She often wakes up in "a cold sweat."

"I still believe my outcome will be positive when I get to court," she says, trying to stay optimistic. "The problem is, I can't get there."

part of an ongoing series on the law

### 5. FOREIGN STATES IMMUNITY ACT





Lawyer Adam Slattery (L) is representing Chinese Australian, Zhang Cuiying, in a NSW Supreme Court case against the former leader of the Chinese Communist Party, Jiang Zemin. (James Burke/The Epoch Times)

A civil lawsuit against former leader of the Chinese Communist Party Jiang Zemin, may see the Australian courts set a precedent on the extent diplomatic immunity can protect foreign members of state.

Adam Slattery, a lawyer representing Chinese Australian, Zhang Cuiying, told *The Epoch Times* the success of his clients case revolved around Australia's Foreign States Immunity Act, which protects foreign members of state from the jurisdiction of the Australian courts.

Ms Zhang was detained in 2000 and tortured for eight months after appealing in Beijing for an end to the persecution of the spiritual practice, Falun Gong. She is suing Jiang Zemin for wrongful arrest, torture and false imprisonment.

Mr Slattery said Ms Zhang case highlighted legal inadequacies in affecting justice for crimes committed in foreign states, particularly when legal proceedings could not be issued in those states.

"We are drawing the courts attention to an area of law where we have not made any kind of principle in relation to it," he said. "Whatever decision comes out of it will set some kind of precedent."

Mr Slattery said the "immunity" act takes for granted that foreign states abide by the same principles and have the same respect for rule of law that we have in Australia.

"If a foreign state does not have those norms, then we shouldn't allow them immunity for not carrying out those norms," he said. "Some of those norms come under the covenants of civil and political rights."

Red China, more than most, would fall into the category of a foreign state that has little respect for the law or human rights.

Late last year, an Amnesty International report highlighted China's deteriorating human rights record across a range of areas, including freedom of speech and spiritual practice. Worse still a recently updated report compiled by former Canadian secretary of State, David Kilgour, and internationally respected human rights lawyer, David Matas has concluded that thousands of Falun Gong practitioners have been incarcerated without trial and slaughtered to service China's lucrative organ transplant business.

Falun Gong, a spiritual practice based on slow meditative exercises and a moral philosophy, gained popularity in the early 90s and had over 70 million adherents until the crackdown in 1999.



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Ironically, 1999 was also the year that the concept of rule of law was written into the Chinese constitution. It appears, however, to have been afforded the same level of respect in Beijing, as China's international human rights agreements. According to Mary Ann Toy, the Sydney Morning Herald's Beijing correspondent, China's head security chief and member of the nine-man Politburo, Luo Gan, lashed out at "Western" initiatives earlier this month saying an independent judiciary was not appropriate for China, and "all law enforcement activities should be lead by the party".

Ms Toy went on to say that corruption and political intervention was common in China, "with prosecutors and judges answering to Communist Party committees who discuss and decide such cases often in advance of the trial".

Mr Slattery said it was important to acknowledge that individuals in some countries could commit atrocities without fear of reprisal, and the only way to affect justice was to initiate proceedings outside that country.

It was also pertinent to consider that acts of torture were not usually committed by the state but by individuals, he said. As diplomatic immunity is ultimately protecting the state, it would not necessarily apply to individuals.

This would certainly be the case with Jiang Zemin whose orders to destroy Falun Gong are well documented.

Mr Slattery said an additional problem with the diplomatic immunity statute was that documents once issued, had then to be served on Jiang Zemin by the Chinese Government.

To do that the documents had to go via Australia's Department of Foreign Affairs and Trade (DFAT) which, after three years, had still not passed them on.

Former Chinese diplomat Chen Yonglin told Channel Nine's Sunday programme in 2005 that he had read coded reports that said a DFAT official was assisting the Chinese Government on the case.

Ms Zhang said documents obtained through the freedom of information act confirmed Mr Chen's claims and she was concerned that DFAT was deliberately holding up the case in the hope that it would be dismissed for exceeding the time limit.

In the courts Mr Slattery said there was a lot of complexity surrounding the issue but the bottom line is that "immunity" is just not meant to cover acts of torture or other similar human rights violations.

"If you spoke to the common person they would think it is obscene that Australia should give immunity to a foreign state that has tortured people," he said.

Ms Zhang's case is presently before the NSW Supreme Court. Mr Slattery said a judgment on the status of the case was due Monday March 5 but the judge had requested another week to make her decision.



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