



Executive Restraints of Trade Are Effective ...

In the recent high profile case of Seven Network (Operations) Limited v James Warburton [2011] NSWSC 386 the Supreme Court of New South Wales upheld contractual restraints preventing James Warburton from commencing as CEO with the rival Channel Ten network.

James Warburton had a fixed term employment contract that did not contain any contractual restraints. However, Warburton had entered into a Management Equity Participation Deed, which contained a so-called cascading or waterfall restraint clause restraining him from engaging in any business, which competes with Channel Seven for:

- the period of 12 months from the date [Warburton] ceases to be employed ..., unless that period is held invalid for any reason by a court of competent jurisdiction;
- in which case, the period of 6 months from the date [Warburton] ceases to be employed ..., unless that period is held invalid for any reason by a court of competent jurisdiction;
- in which case, the period of 3 months from the date [Warburton] ceases to be employed ...

In March this year, Warburton accepted the CEO role with rival Channel Ten. Channel Seven immediately put Warburton on gardening leave for the remainder of his fixed term contract expiring in October 2011. The Court held that directing Warburton to leave Channel Seven's premises immediately and not perform any further duties, did not constitute a repudiation of Warburton's contract of employment but rather re-affirmed Seven's obvious desire to enforce the employment contract.

▶ *Reasonableness of the Restraint*

The Court held that the use of a waterfall or cascade clause with severable alternatives was not void for uncertainty as contended by Warburton. The complexity in the drafting style adopted did not mean the restraints could not be given effect in a meaningful way and were unworkable.

On the question of the reasonableness of the restraints of trade, the Court held that the length of twelve months was reasonable as so judged at the time Warburton entered into the Management Equity Participation Deed. However, the question of equitable discretionary relief must be addressed at the time of the hearing and Channel Seven required no more than nine months from the date Warburton was put on gardening leave for the reasonable protection of its legitimate commercial interests in such things as its confidential information in differential rates and trading terms enjoyed by advertisers and agency buying groups. This leaves Warburton free to commence with Channel Ten on 1 January 2012.

Warburton was ordered to pay 70% of Channel Seven's legal costs as well.

▶ *Recommendation*

We recommend Employers review their current contracts of employment and check whether the restraints of trade are properly drafted and likely to be enforced in that they go no further than is reasonably necessary for the protection of the Employer's legitimate commercial interests. The use of cascade or waterfall clauses, which may appear complex, has again been vindicated although careful attention is required in their drafting. Should you require any further assistance please contact one of the following practitioners at Madgwicks:

Tim Greenall | Special Counsel
T +61 3 9242 4721
E tim.greenall@madgwicks.com.au

Francine Clancy | Lawyer
T +61 3 9242 4708
E francine.clancy@madgwicks.com.au

▶ For information on Tim Greenall, Special Counsel, please click [here](#)