Court limits scope of non-solicitation restrictions

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A Hong Kong court recently considered the enforcement of a non-solicitation clause against an employee who was employed as a delivery worker.(1)

Facts

The plaintiff's main business was the sale of edible ice cubes to restaurants and other end users under the brand of Shiu Pong Ice. The defendant was employed by the plaintiff between October 2007 and November 2010 and then from January 2011 and January 2012. He was employed as a delivery worker; whose main duty was to deliver ice cubes to clients in accordance with daily delivery orders. While carrying out his duties, the defendant was partnered with a driver who was also employed by the plaintiff.

On 15 February 2012 the defendant joined another company, Noble Gainer Ltd, in a sales and customer service role. Noble Gainer was an affiliate company of a group that was in the ice manufacturing and provision of cold storage business. From April 2011 the group's business branched out into the edible ice cubes retail market and it began selling directly to end customers.

Noble Gainer recruited several of the plaintiff's employees in early 2012. The defendant was one of them.

Issue

The plaintiff alleged that the defendant was in breach of Clause 9 of his employment contract, which read as follows:

> *employee is willing and guarantees that during the employment with the company or after leaving employment, within ten months he cannot... interfere and solicit the company's existing customers from acquiring goods etc.*

The plaintiff's case contended that the defendant had joined a competitor and solicited the plaintiff's customers within 10 months of the termination of his employment (regardless of whether confidential information was used).

Findings

The court held that it was for the plaintiff to adduce evidence which proved that the defendant had solicited business from customers. However, the plaintiff's evidence of the defendant visiting customers and soliciting sales was contradictory and the court found it unreliable. The court did not accept that the defendant had solicited business as the plaintiff had alleged.

It is generally recognised that the only legitimate interests which an employer is entitled to protect are trade secrets and customer connections "to the extent that the employee may have gained

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influence over the customers so they would be likely to follow the employee to his new employment". The rationale for this protection is that trade secrets and customer connections may be regarded as assets of the business and form part of the employer's property.

The court found that the defendant, in his capacity as a delivery worker, had not built up customer connections that would support the plaintiff's alleged protection of its legitimate interests. The court relied on the fact that customers are likely to decide which provider to buy ice cubes from based on the price, as opposed to an individual delivery worker.

The court also found that the defendant would make nearly 100 deliveries each day. In these circumstances, the court found that it was unrealistic to contend that the defendant could have built any relationship with customers that would have cultivated loyalty among the plaintiff's customer base.

However, the court expressly stated that this does not mean that employees tasked with the delivery of commodities are unable to build relationships with customers that fall under their employer's 'legitimate interests'. The court referred to the case of *Home Counties Dairies Ltd v Skilton* [1970] 1 WLR 526, in which a milkman who was found to be "a familiar and probably influential character well known to every householder" in evidence was recognised to have built customer connections that were considered valuable assets of his employer.

Comment

The court's observations in this case as regards the enforceability of non-solicitation clauses reiterate the well-established position that an employer has no right to be protected against competition *per se*. Employer's must be prepared to encounter competition in their trade or business. A covenant in restraint of trade is *prima facie* unenforceable unless the employer seeking to rely on it can show that the clause is reasonable with reference to the interest to be protected and public interest. This should always be considered on a case-by-case basis.

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Endnotes

(1) *Winta Investment (Hong Kong) Ltd v Ng Kam Chit* [2018] HKEC 890.