

Challenging a consent order

In most circumstances a consent order signed by both parties and sealed by the Court is invariably and understandably thought to be the end of a matter. The case law does, however, highlight the risk of a specific term being challenged and varied by a Court if it is subsequently found to be void and unenforceable as a matter of general law.

The case

In the 2001 case of *Gerrard Ltd -v- (1) Michael Read (2) Christows Asset Management Ltd*, although the Court declined to exercise its jurisdiction to vary an order it reiterated its power to do so in appropriate circumstances.

Read had been a stockbroker employed by Gerrard under the terms of a written employment contract containing a number of post-termination covenants designed to protect customer information and confidential information. Read resigned on 30 September 2000 giving six months' notice. Claiming that he had been constructively dismissed he entered into a compromise of that claim on 6 October 2000. Pursuant to that agreement he spent three months on garden leave thereby leaving Gerrard's employment on 31 December 2000.

Read commenced employment with Christows on 5 February 2001. As a result of admitted misappropriation and misuse of Gerrard's confidential information, Gerrard obtained a springboard injunction against both Read and Christows.

The parties then entered into a consent order, paragraph 3 of which contained a non-dealing injunction preventing both Read and Christows from dealing with an

identified list of Gerrard's clients for a period of nine months expiring in April 2002.

Christows applied for a variation of paragraph 3 of the consent order to reduce the period in which Read was prevented from contacting clients to 3 January 2002. Read argued in support that paragraph 3 was an unlawful restraint of trade and that the period of restraint should be the same as that in his contract of employment. Gerrard contended that the Court had no jurisdiction to vary the Court order and, in the alternative, that there was no basis for doing so here.

The Court's decision

The Court held that its jurisdiction to vary a consent order, whether interim or final, extended to discharging a term that as a matter of general law was void and unenforceable, such as an unlawful restraint of trade, while leaving the remainder of the order in force. The question to be considered was whether the restriction was reasonable in the interests of the parties and of the public.

Further, the Court held that the restriction term of six months in the contract was of marginal relevance. The length of the springboard period depended on the extent of any advantage gained. Having agreed to a nine-month springboard restraint, which the Court had sanctioned, there was a substantial onus on Read to show why a Court should revisit the matter. Read had obtained legal advice on the matter and would no doubt have been advised about the restraint clause. The situation was somewhat different to that of a clause in a contract of employment where the employee usually has no choice but to accept the employer's terms. There was no

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basis for assuming that at the time of this consent order Read did not have good reasons for submitting to the restraint provision.

Finally, the Court held that there was a public interest in holding parties to the terms of a consent order to which, with the benefit of legal advice, they were willing to be bound.

Conclusions

This case illustrates the fact that parties, with the benefit of legal advice, will usually be bound by the terms of any consent order entered into. However, it is plain from the Court's ruling that where a party, particularly an individual acting without legal representation, has signed a consent order which can subsequently be shown to contain provisions which are void and unenforceable as a matter of general law, that part of the consent order is open to possible challenge. Under the circumstances, whilst it may be tempting to impose harsh terms on an individual who has acted in breach of a restraint of trade

clause in a contract of employment, for example, care should be taken to ensure that any such term is one which the Courts are likely to find reasonable and lawful. If good consideration has been given in return for a clause which might in itself otherwise appear harsh, that consideration should be clearly spelt out.

This information sheet has been prepared to highlight some key issues relating to challenging a Consent Order. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at January 2009 and may be affected by subsequent changes in the law.

Should you require any specific legal advice on the issues covered, please contact Kamal K Aggarwal by email at kamal.aggarwal@ts-p.co.uk or call Kamal on 01322 623700.