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RESTRAINT OF TRADE CLAUSES IN EMPLOYMENT CONTRACTS: CURRENT NEW ZEALAND ISSUES

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I INTRODUCTION

An employment law issue which has come to recent attention is the use of restraint of trade clauses. Traditionally, these clauses have prevented employees competing with the employer after their employment terminates. The competition could consist of the employee setting up their own business, or working for a competitor of the ex-employer.

Competition from an ex-employee can cause an employer legitimate concern. During their employment, the employee may have been privy to confidential information. This "inside information" could then be used by the employee to compete unfairly with the employer. Further, clients of the employer may have been closely associated with the employee. This creates a danger that the employee may take those clients with them when their employment ceases.

These two situations have caused employers to provide, in the employment contract, that an employee will not compete with the employer on the termination of their employment.

The common law doctrine of restraint of trade applies to these clauses. The effect of the doctrine is to make the clause prima facie invalid, because it is contrary to public policy. However, an employer can enforce the clause by showing that the clause protects a proprietary interest and is reasonable in doing so.

While this paper will give a brief overview of the established principles of common law relating to restraints of trade, the primary focus will be on current and perceived future issues. Current issues include the interaction of section 104 of the Employment Contracts Act 1991 with the modifying power contained in section 8 of the Illegal Contracts Act 1970. This has implications for the another major topic of the paper: current issues in relation to interim injunctions. The paper will also look at possible future extensions of the restraint of trade doctrine to the areas of garden leave and secondary employment.

II RESTRAINT OF TRADE CLAUSES AT COMMON LAW

A Basic Definition

Restraint of trade clauses have been used in a number of different situations.[1] The vendor of goodwill of a business can agree with the purchaser not to compete by carrying on a similar business. Traders or manufacturers may reach an agreement on the methods of carrying on business.[2] Also, an employee can agree that on the termination of their

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1 A Szakats *Introduction to the Law of Employment* (3 ed, Butterworths, Wellington, 1988) 59.

2 This type of restraint of trade agreement raises different issues than those within the ambit of this paper, for example compliance with the Commerce Act 1986.

employment, he or she will not compete against the employer, either by working for a rival employer or starting up their own business.

This paper focuses on the last of these. While the principles which apply in the other two situations are similar, it is recognised that "[t]he courts have developed a practice of viewing the position of an employee as particularly special and significant when dealing with restraint of trade claims by an employer."[3]

Restraint of trade clauses in the employment context raise their own particular considerations. For example, a restraint of trade clause typically restricts an employee's ability to work, whether it be in a specific industry or in a specified geographic area. This may deprive the employee of their livelihood, causing hardship.

The definition of "restraint of trade" and the requirements of legality are laid down by the common law. In the context of employment law, the definition of "restraint of trade" was the subject of judicial debate.[4] In one case, a restraint of trade clause was defined as one where "...the covenantor agrees... to restrict his liberty in the future to carry on trade with other persons not party to the contract..."[5]

This definition is too narrow to be an adequate exposition of "restraint of trade". A covenant in restraint of trade may bar the ex-employee from competing with the employer by setting up business in competition. This may not involve the employee "carrying on trade" with other people.

A definition with a different focus is found in the *Esso Petroleum*[6] case, where Lord Reid defined "restraint of trade" as a contract where a person gives up a freedom they otherwise would have had.[7]

This definition is preferable to the extent that it focuses on the freedoms which an employee has given up or had confined. However, taken out of context it could be very broad.

This paper adopts the following definition of "restraint of trade":

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3 Mehigan and Griffiths *Restraint of Trade and Business Secrets: Law and Practice* (Longman, London, 1986) 59. See also *Business Associates Ltd* v *Telecom Corporation of New Zealand Ltd* (1992) 4 TCLR 685, 698.

4 J D Heydon *The Restraint of Trade Doctrine* (Butterworths, London, 1971) 55.

5 *Petrofina (Great Britain) Ltd* v *Martin* [1966] Ch 146, 180 per Diplock LJ.

6 *Esso Petroleum Co Ltd* v *Harpers Garage (Stourport) Ltd* [1968] AC 269.

7 This definition is not without it's difficulties: Heydon, above n4, 57.

> A provision in an employment contract under which a person agrees to accept additional restrictions as to the work which he or she may undertake during or after the term of that employment contract.

In the employment situation, what has been labelled a "restraint of trade" has typically involved an employee contracting not to work in a similar activity to the employer when their employment ceases.[8] The restraint could also involve a financial burden on the employee, eg the payment of commission or a percentage of profits to the ex-employer.

The restraint of trade doctrine has been applied when a person does not agree to the restraint imposed on them. The restraint may be imposed by the rules of an external body to which the person is subject.[9] For example, in the *Kemp* case[10] it was held that rules of the NZRFL requiring clearance before a player could operate overseas were a restraint of trade.

B Competing Interests

Restraint of trade clauses involve a number of competing interests. One objective of the law is freedom of trade, as "[c]ompetition is a good and necessary thing."[11] The public has an interest in workers being able to carry on their trade freely, benefitting society. Valid restraint of trade covenants may lead to monopolisation.[12] Workers who have skills should be free to utilise them.

Freedom of trade can conflict with the principle of freedom of contract: when two parties enter a contract freely they are bound, and the function of the court is to enforce that contract.[13] Freedom of contract would entail that an employer and an employee are free to make their own contract, and if this includes a restraint of trade then the court should enforce it. Parliament has emphasised freedom of contract in the Employment Contracts Act 1991. One of the underlying themes of the Act is an increasing reliance on contractual rules to govern the employment relationship.[14]

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8 Anderson et al *Employment Law Guide* (Butterworths, Wellington, 1993) 535.

9 *Nagle* v *Fielden* [1966] 2 QB 633.

10 *Kemp* v *New Zealand Rugby Football League Inc* [1989] 3 NZLR 463; (1989) 2 NZELC 96,790.

11 *Laser Alignment (NZ) 1984 Ltd* v *Scholz* [1993] 2 ERNZ 250, 259.

12 M Jefferson "Evading the Doctrine of Restraint of Trade" (1990) 134 Solicitors Journal 532.

13 *Printing & Numerical Registering Co* v *Sampson* (1875) LR 19 Eq 462, 465.

14 See, for example, the long title of the Employment Contracts Act 1991. There is a marked emphasis on negotiation between the parties.

Another object of the Act, however, is to provide for freedom of association.[15] The nature of restraint of trade clauses means that by promoting freedom of contract, the employee's freedom of association may be hindered. The effect of a restraint of trade clause is to limit the employee's freedom of association.

Restraint of trade clauses thus engender a conflict of legal principle and a clash of public policy. The desirability of employees moving freely between jobs has already been discussed. However, a public policy critique must not overlook the major argument in favour of restraint of trade clauses: an employer may have an interest that legitimately deserves protection. For instance, the employer may be trying to build up a business and will wish to prevent the employee taking customers with them when their employment ceases.

Because of these different interests at stake, the law fetters freedom of contract in relation to restraint of trade clauses. This is reflected in the common law requirements as to validity.

C Validity

Common law rules regarding restraint of trade apply in New Zealand.[16] At common law, it is established that restraint of trade clauses are prima facie void, as being contrary to public policy.[17]

However, the clause may be enforced if the employer can show a proprietary interest deserving protection, and that the clause is reasonable in protecting that interest. Reasonableness is judged from the point of view of the parties, and with regard to the public interest.[18]

1 Proprietary interest

To justify a restraint of trade clause, an employer must be doing more than protecting themselves from competition.[19] The employer must identify an asset in the business which

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15 Paragraph (a), long title of the Employment Contracts Act 1991. This right is also guaranteed in s17 Bill of Rights Act 1990.

16 Section 11(a) Illegal Contracts Act 1970.

17 *Herbert Morris Ltd* v *Saxelby* [1916] 1 AC 688, 700 per Lord Atkinson.

18 *Debtor Management (NZ) Ltd* v *Quail* [1993] 2 ERNZ 498, 506.

19 *Stenhouse Australia Ltd* v *Phillips* [1974] AC 391, 400; *H&R Block Ltd* v *Sanott & another* [1976] 1 NZLR 213, 218.

is his or her property. Usually this "proprietary interest" consists of trade connections,[20] or trade secrets.[21]

At common law an employee is not permitted to reveal truly confidential information, even after their employment has ceased.[22] However, an employer may wish to have the added protection of a restraint of trade clause because it is unclear exactly what amounts to "confidential" information. A restraint of trade clause may prevent possible disclosures before they can occur, by precluding the employee working in a situation where the information might pass.

Recently it has been recognised that an employer is able to protect the goodwill of his or her business.[23] It appears that this is merely an alternative formulation of the protection afforded to customer connections. Holland J stated that "...the primary purpose of the restraint of trade clause was to protect the goodwill of his firm by ensuring that the clients of the firm for whom the [employee] had come into contact should not go with the [employee] on his ceasing his employment."[24]

2 Reasonableness

The reasonableness of a restraint of trade clause is analysed from the point of view of the parties at the time they entered the contract. The court can also take into account developments which would have been reasonably in contemplation of the parties.[25]

(a) Duration, area and scope

The main inquiry as to reasonableness centres on the duration, area and scope of the restraint. On all three, the restraint must be no wider than is necessary to protect the employer's interests.[26] What is reasonable depends on the facts of a case, and the inquiry is objective. The three inquiries are inter-related, as a reasonable duration may depend on the scope of activity which is prohibited.[27]

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20 *Herbert Morris*, above n17, 710; *Graphic Holdings Ltd* v *Dunne* (1988) 2 NZELC 95721, 95728; *Business Associates Ltd*, above n3, 698.

21 *Broadcasting Corporation of New Zealand* v *Nielsen* (1988) 2 NZELC 96040, 96047.

22 *Penninsular Real Estate Ltd* v *Harris* [1992] 2 NZLR 216, 218.

23 *Cooney* v *Welsh* [1993] 1 ERNZ 1, 6.

24 Above n23.

25 Above n23, 5; above n3, 21.

26 *Brown* v *Brown* [1980] 1 NZLR 484, 495 per Richardson J.

27 Above n23, 8.

The duration of the restraint is looked at in relation to the length of time the employee has been employed. Also, in the recent *Force Four* case, Travis J looked at duration in relation to the amount of time before the contract expired.[28]

The nature of the area covered by the restraint will be taken into account. In *MA Watson Electrical Ltd* v *Kelling*[29] the restraint covered an area with a radius of fifteen kilometres. What made the area unreasonable was the fact that it covered Auckland city, so the employee was "...prevented from gaining employment in the largest market in the country."[30]

The scope of activities prohibited is important, and a restraint may be unreasonable if the employee is completely prohibited from working in any capacity in a given field.[31]

(b) Employee-related factors

The employee must have been privy to confidential information, or been in contact with the employer's customers.[32] If not, it will be difficult for the employer to argue that a restraint is necessary to protect any proprietary interest. It is questionable whether the employer would even have a proprietary interest to protect.

Also, the court may look at the relative bargaining strengths of the parties. If an employee only agreed to a restraint clause because of the employer's superior bargaining power, it is unlikely that the clause will be reasonable.[33] Lack of legal advice will be taken into account.

A restraint is generally unreasonable if the injurious effect on the employee is greater than the benefit to the employer.[34] An employer may be able to avoid this problem with a garden leave clause, as the employee would be paid while the restraint was in place. However, as will be discussed, garden leave clauses may themselves be subject to the restraint of trade doctrine.

(c) Time restraint entered into

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28 *Force Four NZ Ltd* v *Curtling* Unreported, 14 June 1994, Employment Court Auckland Registry AEC 30/94, 18.

29 [1993] 1 ERNZ 9.

30 Above n29, 14.

31 Above n29, 15; *Bates* v *Gates* (1987) 1 NZELC 95269, 95273; above n26, 495.

32 *Bates*, above n31, 95273.

33 Above n29, 17; *Bates*, above n31, 95272; above n18, 508.

34 *Bates*, above n31, 95272; *Key Graphics (Auckland) Ltd* v *Verhoeyen* (1989) 2 NZELC 96566; *Force Four*, above n28, 6.

In the *Radio Horowhenua* case, the restraint of trade was imposed as a variation of the original contract. Goddard CJ distinguished this from the restraint being agreed to at the start of employment, when it is presumed to be freely negotiated.[35] A restraint imposed from the outset is presumed to be freely negotiated because "...the employee had a choice between accepting the job on those terms or declining it."[36]

This distinction seems illogical. Because a contract is negotiated at the beginning of an employment relationship is insufficient reason to presume that it was freely negotiated. The time at which a restraint is entered into is relevant, but not in ascertaining whether it was freely negotiated.

When an employee agrees to a restraint of trade being imposed, the employer must give valuable consideration. If the restraint is part of the original bilateral contract between the parties, consideration poses no problem. However, recent cases have emphasised the importance of consideration if a restraint is imposed later. In the *Force Four* case, Travis J found that the absence of consideration for a subsequently imposed restraint "...militate[d] strongly against the restraint being found to be reasonable in Mr Curtling's case."[37]

(d) Termination of employment

If a restraint clause applies irrespective of the reason for the employment contract's termination, the court is less likely to view the restraint as reasonable.[38]

It should be noted that even if a restraint clause is found to be reasonable in it's terms, it will be of no effect if the employee was wrongfully dismissed.[39] Whether the same can be said of a finding of unjustifiable dismissal under the personal grievance procedure is yet to be explored.

(e) Public interest and the Bill of Rights Act 1990

Restraint clauses must be reasonable in the public interest. This consideration was raised in the *Medic Corporation* case.[40] The court took account of the public's interest in decreasing the cost of medical treatment.

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35 *Radio Horowhenua Ltd* v *Bradley* [1993] 2 ERNZ 1085, 1096.

36 *Force Four*, above n28, 6.

37 *Force Four*, above n28, 17.

38 Above n35, 1097; above n28, 15.

39 *General Billposting Ltd* v *Atkinson* [1909] AC 118. What amounts to wrongful dismissal is a complex issue beyond the scope of this paper.

40 *Medic Corporation Ltd* v *Barrett* [1993] 3 ERNZ 523.

A consideration which has not yet been fully explored is section 17 of the Bill of Rights Act 1990. This provides that for the right to freedom of association. It was suggested in the *Debtor Management* case that this provision may render a restraint clause containing blanket restrictions unlawful.[41]

The potential impact of the Bill of Rights Act is uncertain. It would appear to make it much more difficult for the employer to argue that the restraint was reasonable. The Bill of Rights Act states that everyone is entitled to freedom of association. A restraint of trade clause attempts to cut down this right.

Under section 5 of the Bill of Rights Act, freedoms may be subject to reasonable limits prescribed by law.[42] The limit in a restraint of trade situation, however, is prescribed by the employer in the employment contract, not by law. Also, it should not be possible to argue that the limit is prescribed by law because the restraint is enforceable at common law. The common law is not prescribing this limit, but merely failing to find it void.

It can also be questioned whether a restraint of trade is demonstrably justified in a free and democratic society. Employees could emphasise the word "free", and that workers should be free to move within the job market. For the employer to enforce the restraint, he or she must demonstrate that it is justified in limiting this freedom. The proprietary interest protected should be an important one, and an employer should have to show more than a suspicion that the employee will act adversely to it if not restrained.

The Bill of Rights Act and the freedom of association should become a weighty public interest consideration.

At common law, if a restraint was found to be unreasonable the contract became void. However, under the common law principle of severance the clause could be severed from the remainder of the contract, or the objectionable elements severed from the clause.

When severing a clause, the court would not rewrite the contract.[43] It had to be possible to "blue pencil" the unreasonable elements, with the remaining elements making grammatical sense. Severance could only occur if "...the term is divisible into separate covenants...".[44]

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41 Above n18, 510. Colgan J did not deal with the point fully as it had not been raised by counsel. Also, a similar suggestion was made in the *Radio Horowhenua* case, with reference to section 14 of the Bill of Rights (the right to freedom of expression).

42 Section 5 of the Bill of Rights Act 1990 provides that the freedoms in the Act may be subject to reasonable limitations prescribed by law which are demonstrably justified in a free and democratic society.

43 *Chitty on Contracts* (20 ed, Sweet and Maxwell, London, 1989) vol 1, para 1284.

44 Above n12, 532; *Attwood* v *Lamont* [1920] 3 KB 571.

III POSSIBLE EXTENSIONS OF THE RESTRAINT OF TRADE DOCTRINE

While the restraint of trade doctrine[45] has previously been applied to restraints operating after the termination of employment, it has the potential to apply in two other areas.

A Garden Leave

The doctrine may apply to what is known as "garden leave". Garden leave is when "...the employee is made subject to a lengthy notice requirement, during which the employer continues to pay the employee his normal wage, though not requiring him to actually work, in return for which the employee is bound not to take employment elsewhere during that period."[46]

Employment does not cease until the notice period has expired.[47] An employee who is subject to a garden leave clause is being restrained before their employment has terminated. It can, however, be argued that garden leave amounts to a restraint of trade. Whether a clause is in restraint of trade or not "...is to be determined not by the form the stipulation wears, but...by it's effect in practice."[48] In practice, if an employee is kept on lengthy garden leave, he or she is prevented from finding work elsewhere.[49]

In New Zealand, it seems to have been suggested that garden leave is not covered by the doctrine. In *Radio Horowhenua Ltd* v *Bradley*, Goddard CJ stated that if remuneration is payable during the restraint, "[s]uch an arrangement goes a long way towards negativing an intention to exercise dominion over the person of the employee."[50]

Be that as it may, the legal effect of remuneration is questionable. The intention of an employer to exercise dominion over an employee is not a prerequisite to finding a restraint of trade. The only way payment of remuneration detracts from finding a restraint of trade is the lack of hardship to the employee.[51] Hardship to the employee, however, is but one factor considered by the court.

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45 Now referred to as "the doctrine".

46 *Halsbury's Laws of England* (4 ed, Butterworths, London, 1992) vol 16, Employment, para 17, p 23. See also *Rank Xerox New Zealand Ltd* v *U-Bix Copiers (NZ) Ltd* Unreported, 20 December 1985, High Court Auckland Registry A 1407/85.

47 Above n1, 268.

48 *Stenhouse Australia Ltd* v *Phillips*, above n19, 402.

49 This has been argued by Paul Gouldring "Injunctions and Contracts of Employment: The Evening Standard Doctrine" (1990) 19 ILJ 98, 101.

50 Above n35, 1096.

51 See above Part II C.

On the basis of legal principle it seems plausible that a garden leave clause could be covered by the restraint of trade doctrine. This conclusion is acceptable in terms of public policy. If garden leave clauses were not subject to the doctrine, employers could effectively buy a restraint. Garden leave has a similar practical effect to conventional restraint clauses, and by paying compensation the employer could avoid the restraint of trade doctrine.

If the law enabled employers to buy a restraint, one positive result may be that paying compensation could involve serious consideration by the employer as to whether it was necessary to restrain the employee.

However, negative consequences may also result. If an employer has decided it is worth restraining an employee, to get "value for money" he or she may draft the restraint more restrictively than they otherwise would have. Not being subject to the restraint of trade doctrine, this unreasonable clause may never be subjected to judicial review.

On the whole, it seems preferable that garden leave clauses be subjected to the restraint of trade doctrine.

B Secondary Employment

Another issue for future consideration is whether a restraint which operates during the term of employment could be covered by the doctrine. Such a clause would prohibit the employee engaging in secondary employment during their spare time. In terms of the legal definition of restraint of trade, it may be possible for the doctrine to cover such restraints.

There is little authority as to whether the doctrine covers restraints on secondary employment. In the American Restatement (First) of Contracts, promises by the employee not to compete during the term of service were included in the definition of "restraint of trade".[52]

The definitions of restraint of trade set down in the *Petrofina* and *Esso Petroleum* cases[53] may cover restraints operating during employment. On the *Petrofina* test, the employee is agreeing to restrict their liberty to carry on trade in the future. "In the future" could mean any time after the conclusion of the contract.

The application of the *Esso Petroleum* test is more problematic. One must ask whether the employee is giving up a freedom they otherwise would have had. The issue then becomes: does an employee have the freedom to enter secondary employment?

One of the terms implied by law into an employment contract is the employee's duty to serve

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52 Section 516(6) Restatement (First) of Contracts. See Handler and Lazaroff "Restraint of Trade and the Restatement (Second) of Contracts" (1982) 57 NYULR 669, 673. This reference has been deleted in the Restatement (Second) of Contracts: section 188(2)(b).

53 See above n5 and n6.

the employer with good faith and fidelity.[54] This duty is somewhat amorphous, and the New Zealand Court of Appeal has stated that it has no fixed test.[55] It prohibits conduct that a person of ordinary honesty would regard as dishonest towards the employer.[56]

Part of the duty of fidelity is the duty of faithful service. This duty is breached "[w]hen secondary employment in the employee's spare time adversely affects the employer's interests..."[57] If an employee undertakes secondary employment in a similar enterprise to their first job, and the work is of a similar character, they may be acting in breach of the duty of fidelity.[58] This is the traditional statement of the duty.

Recently the New Zealand Court of Appeal gave a wider interpretation of the duty in *TISCO Ltd* v *Communication & Energy Workers Union*[59]. The Court held that "[a]ny conduct by an employee which is likely to damage the employer's business, for instance by impairing its goodwill, or to undermine significantly the trust which the employer is entitled to place in the employee, could constitute a breach of duty."[60]

This is a wider exposition of the duty than that expressed in *Hivac*, and it does not require that the employee undertake work of a similar nature. The *TISCO* case involved an employer who serviced electronic equipment, and an employee who, in his spare time, bought and repaired similar equipment for resale.

In the Employment Court Goddard CJ held that as the employee did not intend to injure the employer, the duty of fidelity was not breached.[61] The Court of Appeal, conversely, found that even though employer and employee were operating in different markets, there was a risk of direct competition, and the employee posed a risk to the goodwill of TISCO's customers.[62] This undermined the trust required in an employment relationship.

In light of the *TISCO* case, the primary inquiry as regards the duty of fidelity, is no longer whether the secondary employment is of a similar nature. Instead, the focus is on the risk

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54 *Schilling* v *Kidd Garrett Ltd* [1977] 1 NZLR 243, 247.

55 Above n54, 248.

56 *Robb* v *Green* [1895] 2 QB 315, 316.

57 Above n1, 168.

58 *Hivac Ltd* v *Park Royal Scientific Instruments Ltd* [1946] Ch 169; *Philip Kunick Ltd* v *Smyth*, quoted in Szakats, above n1, 169.

59 [1993] 2 ERNZ 779.

60 Above n59, 782.

61 *TISCO Ltd* v *Communication & Energy Workers Union* [1992] 2 ERNZ 1087, 1100.

62 Above n59, 782.

which the secondary employment poses to the employer's business. A court will also inquire whether the relationship of trust between employer and employee is jeopardised. This makes breach of the duty extremely dependant on the facts in a case.

If the secondary employment which is prohibited by a restraint clause infringes the duty of fidelity, it should not be subject to the restraint of trade doctrine. The restraint clause would not be taking away a liberty that the employee otherwise would have had. Therefore, the clause would not satisfy the definition of "restraint of trade" in the *Esso* case.

Also, if the clause was subject to the doctrine, it would be prima facie void. The employer would have to show that it was reasonable and protected a proprietary interest. This would undermine the duty of fidelity. To enforce the duty codified in the restraint clause, the employer would have to prove a proprietary interest.

Because breach of the duty of fidelity depends heavily on the facts in a given case, it is not possible to lay down a blanket rule (that clauses prohibiting secondary employment which is likely to damage the employer's business are not subject to the restraint of trade doctrine). Whether a clause prohibiting secondary employment is subject to the doctrine can only be determined in light of the specific secondary employment undertaken by the employee.

What is proposed, therefore, is a two-fold inquiry:

(a) Is the secondary employment prohibited by the clause in breach of the implied duty of fidelity?

(b) If so, the clause is not subject to the restraint of trade doctrine, and is governed by the implied duty of fidelity.
If not, the clause is subject to the restraint of trade doctrine. The employer must then prove that the clause is reasonable and protects a proprietary interest.

In practice, whether the clause is governed by the implied duty or the restraint of trade doctrine an employer will adduce similar evidence. For instance, the risk to the employer's business (under the implied duty analysis) and a proprietary interest (under the restraint of trade doctrine) would involve similar evidence.

The one area where the distinction may be significant is for part-time workers. The wide formulation of the implied duty laid down by the Court of Appeal in *TISCO* could have serious consequences for these workers. People who work a number of part-time jobs may be prevented from earning a proper living.

If an express term prohibited secondary employment, the employee would benefit if it was analysed under the restraint of trade doctrine. The clause is presumed to be void, and a factor considered under reasonableness is the degree of hardship to the employee. If the employee is prevented from earning a living, this would be a strong consideration against enforcing the clause.

To summarise, whether a clause prohibiting secondary employment is covered by the restraint of trade doctrine depends on whether, in a given case, the secondary employment breaches the implied duty of fidelity. A blanket rule is not advisable, and cases must be

looked at individually.

IV ENFORCING RESTRAINT OF TRADE CLAUSES: THE STATUTORY POWER TO MODIFY

Recently, a major restraint of trade issue has been the extent of the courts' power to modify unreasonable clauses. As discussed above,[63] at common law the ability of courts to modify an unreasonable restraint was severely curtailed. This ability has been expanded under New Zealand statute law.

A Illegal Contracts Act 1970

Section 8(1) of the Illegal Contracts Act 1970 provides:

> Where any provision of any contract constitutes an unreasonable restraint of trade, the Court may -
> (a) Delete the provision and give effect to the contract as so amended; or
> (b) So modify the provision that at the time the contract was entered into the provision as modified would have been reasonable, and give effect to the contract as so modified; or
> (c) Where the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand, decline to enforce the contract.

In exercising the modification powers contained in section 8(1)(b), a court has more freedom to modify the contract than under common law severance. The clause need not consist of separate covenants, and there is no limit on how the court can modify the contract.

Section 8 raises a number of issues. The first is: when can a court modify a restraint? Section 8(1)(b) itself does not give any guidance.

On the basis of statutory interpretation, section 8(1)(c) implies that an unreasonable clause should be modified unless it would alter the bargain to a great extent. This approach was taken in the *H & R Block* case, where Somers J indicated that the section gives the court a true discretion as to whether a covenant should be modified. In the case, Somers J modified the clause, because there were "...no inhibiting factors or factors of sufficient cogency to lead me to exercise any discretion I might have against the plaintiff."[64] This approach was affirmed by the High Court in *Cooney* v *Welsh*.[65]

Recently, Smellie J appears to have departed from this approach in the *MA Watson* case: "[c]learly what is called for, however, is a careful, balanced, judicial appraisal of what is

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63 See above Part II C.

64 Above n19, 220. This approach has been followed: above n26; *Bates* v *Gates*, above n31.

65 Above n23, 7.

required to reach a fair and reasonable result."[66] This approach does not involve a presumption in favour of exercising the discretion. It is a more balanced approach, analysing the "justice" of the final result.

In the case, Smellie J declined to exercise the discretion because of the superior bargaining position of the employer, and the employee's lack of understanding of the covenant. It is questionable whether these factors would have been considered "cogent" by the judge in *H & R Block*. It seems likely that if it is followed, the more balanced approach in *MA Watson* will lead to fewer modifications of restraint of trade clauses.

It has been suggested by the Employment Court that the section 8 power to modify unreasonable clauses should not be exercised if insufficient consideration was given for the restraint.[67]

The second issue pertaining to section 8 is the meaning of the word "modify". The Court of Appeal has held that "modify" is not confined to moderating or limiting covenants - it may mean simply varying or changing.[68] A court could make a restraint clause more restrictive than the parties had agreed on (as the High Court did in *Cooney* v *Welsh*).

While this reasoning may seem acceptable on the wording of section 8(1)(b), it is difficult to see when a court could justify making a restraint more restrictive. The power to modify only arises if a restraint is unreasonable. If a clause is considered unreasonable, a court could not easily justify increasing the restraint.[69]

Another issue in relation to section 8 is the potential to use it to modify grossly unreasonable restraints. Prima facie, section 8 would not preclude such a use. However, it has been suggested that clauses drawn with no attempt at reasonableness should not be enforced. In *Mason* v *Provident Clothing & Supply Company Ltd*[70] Lord Moulton indicated that if an employer has deliberately drawn the clause too widely, the courts should not assist the employer by modifying the clause to the maximum that might have been drafted. These sentiments were adopted in the context of section 8 by Barker J in *Greenwich* v *Murray & Stewart*.[71]

This is a sound conclusion. If courts modified grossly unreasonable clauses, employers may

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66 Above n29, 17.

67 Above n28, 21; above n29, 23. See the discussion concerning lack of consideration in above Part II C 1.

68 *Cooney* v *Welsh* [1993] 1 ERNZ 407, 410 per Cooke P.

69 The High Court has only once attempted to increase a restraint, and it was later over-ruled by the Court of Appeal (see *Cooney* v *Welsh*, above n68).

70 [1913] AC 724, 745.

71 (1979) 1 NZIPR 181, 186.

deliberately draw a clause too widely, and hope that the employee did not challenge it. Even if the employee did challenge it, the court would trim it down to make it acceptable.

The *Greenwich* approach sends a different message to employers. If clauses are deliberately drawn too widely, they will not be modified and enforced. Employers must make a genuine attempt to draft a reasonable clause.

Currently, the major issue in relation to section 8 is its relationship to section 104 of the Employment Contracts Act 1991.

B Employment Contracts Act 1991[72]

The Employment Court has jurisdiction to apply section 8 of the Illegal Contracts Act under section 104(1)(h) of the EC Act:

> (1) The Court shall have jurisdiction -
> (h) Subject to subsection (2) of this section, to make in any proceedings founded on or related to an employment contract any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts:

However, when exercising the section 8 discretion, the Employment Court is subject to a restriction in section 104(2) of the EC Act:

> Where the Court has under subsection (1)(h) of this section the power to make an order cancelling or varying a contract or any term of a contract, it shall, notwithstanding anything in subsection (1)(h) of this section, make such an order only if **satisfied beyond a reasonable doubt that such an order should be made and that any other remedy would be inappropriate or inadequate**. (Emphasis added.)

Section 104(2) sets a double requirement to be satisfied before the Employment Court can modify a restraint clause. The court must be satisfied beyond reasonable doubt that:

> (a) the order should be made; and
> (b) any other remedy would be inadequate or inappropriate.

The hurdle facing the employer, in having to prove these elements beyond reasonable doubt, has been set at the highest possible level.[73] It has been noted by the judiciary and commentators alike that the application of the criminal burden of proof to civil proceedings is bizarre.[74] It can well be argued that the civil burden of proof would be more appropriate.

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72 This will now be referred to as the EC Act.

73 *BFS Marketing Ltd* v *Field* [1992] 2 ERNZ 1105, 1118.

74 Above n73, 1118; above n35, 1097; above n18, 512; *DB Breweries Ltd* v *Marshall* Unreported, 21 February 1994, Employment Court Auckland Registry AEC 2/94, 11; *Dunedin United Friendly Societies Dispensary* v *Windle* Unreported, 12 July 1994, Employment Court Christchurch Registry CEC 25/94, 21; *Mazengarb's Employment Law* (Butterworths, Wellington, 1994) para 1038, B/78.

The reason for the double requirement remains unclear. It has been suggested that "[i]t possibly derives from an abundance of caution on the part of the Government, which was plainly determined to exclude so far as possible opportunities for intervention in employment contracts under the new minimalist bargaining regime."[75]

If a hearing is in the High Court (rather than the Employment Court), and a restraint clause is found to be unreasonable, it is more likely that the court will be able to modify it. Section 104(2) of the EC Act is only relevant if the Employment Court is exercising jurisdiction. It is irrelevant if a case is being heard in the High Court or the District Court.[76] In the Employment Court, in addition to the test based on section 8 of the Illegal Contracts Act, section 104(2) of the EC Act must be satisfied.

The effect of section 104(2) is to exclude the intervention of the Employment Court in many restraint of trade cases. Chief Judge Goddard has said that "[t]his bizarre but rigorous double requirement...could rarely be met in the case of an unreasonable restraint of trade."[77] The result is that often an unreasonable restraint cannot be modified. Many employers will therefore be defeated, and unable to restrain a former employee.

The stringency of the section 104(2) test is in complete contrast to the High Court's approach to section 8 of the Illegal Contracts Act. On the *H & R Block* approach, a restraint could be modified unless there was a cogent reason not to.

Section 104(2) also seems diametrically opposed to the policy in the EC Act of creating a specialist Employment Court. It has been stated that labour law matters are preferably dealt with by the specialist court.[78] Giving the Employment Court a very limited power to modify unreasonable restraint clauses does not encourage employers to bring claims to the Employment Court.

The important question is: when must proceedings be heard in the Employment Court?

C Jurisdiction of the Employment Court

Section 3(1) of the EC Act provides that:

> This Act shall apply to all employment contracts and the Tribunal and the [Employment] Court shall, subject to the provisions of this Act, have exclusive jurisdiction to hear and determine any proceedings **founded on** an employment contract. (Emphasis added.)

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75 *Mazengarb's Employment Law*, above n74.

76 *Medic Corporation Ltd* v *Barrett* [1992] 2 ERNZ 1048, 1063.

77 Above n35, 1097.

78 *NZ Labourers Union* v *Fletcher Challenge Ltd* [1988] 1 NZLR 520, 526.

This means that whenever a claim is "founded on" an employment contract, it must be heard in the Employment Court. The meaning of the words "founded on" has been the subject of judicial debate.

A narrow interpretation of "founded on" would require that a party must proceed upon or be dependant on an employment contract.[79] This interpretation has been accepted in the High Court.

A wider interpretation of "founded on" has been accepted in the Employment Court. The *Hurford* v *International Insurance Brokers Ltd*[80] case involved a deed in restraint of trade separate from a written contract of employment. Colgan J found that the action was "founded on" an employment contract, as the two documents were "inextricably linked" and there was a very clear connection between them.

The wider approach to the Employment Court's jurisdiction is preferable. Hammond J has pointed to the possibility of "pleading around" section 3[81]. For example, if a claim is framed in terms of a breach of an equitable obligation it may not be founded on an employment contract. On the narrow approach to the words "founded on", the EC Act would have failed to eradicate jurisdiction demarcation disputes. Because a specialist employment jurisdiction has been created, it would be preferable to widen the original jurisdiction of the Employment Court as much as possible.[82]

The jurisdiction of the Employment Court depends on the status of the deed and the parties. If the deed is not connected to the employment contract or if there was no employer/employee relationship between the two parties, the Employment Court would not have exclusive jurisdiction.[83] Until either the High Court or the Employment Court determines that the case involves a contract of service the Employment Court does not have exclusive jurisdiction.[84]

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79 *Diamond Advertising Ltd* v *Brunton* [1993] 1 NZLR 169, 180; *Medic Corporation Ltd* v *Brunton*, above n76, 1063.

80 [1992] 2 ERNZ 449, 463.

81 Above n11, 257.

82 Above n78. The Court of Appeal seems to have taken a similar widening approach to the Employment Court's jurisdiction in *Ogilvy & Mather (NZ) Ltd v Turner* [1993] 2 ERNZ 799. The case involved a claim for wrongful dismissal which could have been brought as a personal grievance in the Employment Tribunal. The Court of Appeal held that the possibility of bringing a personal grievance does not extinguish the Court's jurisdiction under section 104(1)(g).

83 *Hurford*, above n80, 464. See section 3(1) of the EC Act.

84 *NZ Couriers Ltd* v *Curtin* [1992] 2 ERNZ 541.

Cases which appear to have been founded on an employment contract have been decided in the High Court. The *Cooney* v *Welsh* case[85], heard in the High Court, involved a deed in restraint of trade which was entered in addition to an employment contract. The court did not discuss section 3 of the EC Act. The factual background in *Cooney* seems very similar to that of the *Hurford* case, which held that the separate deed in restraint of trade was founded on an employment contract.

Cooney v *Welsh* should have been heard in the Employment Court. In the case, the employment ceased on 31 August 1992, and so was after the commencement date of the EC Act.[86] Holland J even acknowledged that "[w]e are dealing with a restraint of trade provision arising from a contract of employment."[87] If the case had been heard in the Employment Court, section 104(2) may have altered the result.

V ENFORCING RESTRAINT OF TRADE CLAUSES: THE INJUNCTION

The validity of restraint of trade clauses is often considered in the context of interim injunction applications.[88] The aim of an interim injunction is to grant the plaintiff temporary relief until a substantive hearing. It is a discretionary remedy.[89]

A The Legal Test for Interim Injunctions

Before an interim injunction will be granted, the court considers a number of factors:

(a) the threshold test;
(b) the balance of convenience;
(c) whether the award of damages would be more appropriate; and
(d) the overall justice of the case.

1 Threshold test

There has been some uncertainty as to the threshold test for restraint of trade clauses. In *American Cyanamid Co* v *Ethicon*[90] (which did not involve a restraint of trade) the House of Lords stated that the test is whether a plaintiff can establish a serious question to be tried. This involves satisfying a court that the claim is not frivolous or vexatious. In the recent case

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85 Above n23.

86 The EC Act came into force on 15 May 1991.

87 Above n23, 4.

88 Above n8, 541.

89 NZLS Seminar *High Court Interlocutory Procedures - an update* (June - August 1990) 87.

90 [1975] 1 All ER 504, 510. This test has been applied in a number of New Zealand restraint of trade cases: *Castle Parcels Ltd* v *Dale & Ors* (1989) 2 NZELC 96774; *Astec Corporation Ltd* v *Smytheman* [1986] 2 NZLR 354.

of *Dunedin United Friendly Societies Dispensary* v *Windle*[91], Palmer J assumed that this was the threshold test to be satisfied.

However, the threshold test was stated to be somewhat higher in the *Armourguard Security*[92] case, which involved a restraint of trade. Wylie J stated that justice required more than a serious issue must be shown before an ex-employee is deprived of the right to work. In restraint of trade cases, a "prima facie case" must be shown.

This issue is presently unresolved in New Zealand. In the *DB Breweries* case, Colgan J applied the more conventional "arguable or serious case" test. However, he did not purport to decide the issue and said "...I would prefer to leave the question open for subsequent argument and determination in another case."[93]

In practice, it would be difficult to differentiate between an arguable case and a prima facie one. On either standard, it will be difficult to ascertain whether the test is being applied consistently by judges.

In any event, the difference between these two tests may not be of crucial importance. The New Zealand Court of Appeal has stated that the threshold test and the balance of convenience are merely aids in determining where the overall justice lies.[94] Thus, the overall justice appears to be the ultimate test. If a court is looking at the overall justice of a case, the difference between an arguable case and a prima facie one will not be as significant. Regardless of whether a plaintiff has established an arguable or prima facie case, the overall justice is the predominant consideration.

However, should a decision be necessitated as to the nature of the threshold test, the slightly higher "prima facie" case test is preferable. As Wylie J stated in the *Armourguard Security* case, restraint of trade clauses are prima facie invalid. An employee should not be deprived of the right to work lightly.[95]

2 Balance of convenience

Palmer J recently indicated that the balance of convenience is the guiding principle in

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91 Above n74, 22.

92 *Armourguard Security Ltd* v *Geraghty* (1988) 2 NZELC 95739, 95743.

93 *DB Breweries Ltd* v *Marshall*, above n74, 3.

94 *Klissers Farmhouse Bakeries Ltd* v *Harvest Bakeries Ltd* [1985] 2 NZLR 129, 142 per Cooke J. Applied in *Ogilvy & Mather (New Zealand) Ltd* v *Darroch* [1993] 2 ERNZ 58, 62.

95 See also above n8, 541.

granting interim injunctions.[96] In light of the Court of Appeal's decision in the *Klissers* case, this cannot be an accurate statement of the law.

What is usually considered under the balance of convenience is the risk of harm to the employer's business if the injunction is not granted (and it eventuates at trial that the employer is in the right); and the nature of the injury that the employee will suffer if the injunction is granted (and it eventuates that the employee succeeds).[97]

In some cases the court seems anxious to protect the employer's business interests. In the *Medic Corporation* case, while Holland J professed to give importance to the employee's ability to earn a living, he was quick to point out that if the employee used the confidential information damage could be done to the employer's business. If damage was caused it would be difficult for the employer to prove the quantum.[98]

One factor which should be considered under the balance of convenience is the length of time until a hearing. It is a particular problem with restraint of trade clauses that an interim injunction could effectively decide the matter. This will happen if the clause has expired by the time of the hearing.[99] The injunction operates as a "de facto determination" of the clause's validity.

Judges in recent cases have shown increasing awareness of this problem. For example, in the *DB Breweries* case, Colgan J acknowledged that if an injunction was granted it would truly be interlocutory, as the case was scheduled for hearing within seven weeks.[100]

The length of time before a substantive hearing should be an important consideration in every interim injunction case. It is undesirable for an interim injunction to be a de facto determination of the case. Such hearings involve affidavit evidence, without the advantage of cross-examination. A court will often assume that a plaintiff will be able to prove the facts

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96 *Dunedin United Friendly Societies Dispensary v Windle*, above n74, 24.

97 See *DB Breweries Ltd*, above n74, 13.

98 Above n76, 1060. Difficulty in assessing damages is not a reason why the court should not do so: above n71, 187.

99 *Ogilvy & Mather (New Zealand) Ltd* v *Darroch*, above n94, 63. See also M Jefferson "Interlocutory Injunctions and Covenants in Restraint of Trade Affecting Employees" (1989) 133 Solicitors Journal 232, 232.

100 Above n74, 2; *Dunedin United Friendly Societies Dispensary*, above n74, 22. An example of previous lack of regard for this factor can be found in *NFC International Holdings (NZ) Ltd* v *Arlidge* Unreported, 27 October 1989, High Court Auckland Registry CP 1895/89, 9.

it alleges at a full hearing.[101]

If an interim injunction operates as de facto determination that the clause is valid, the employee is placed at a great disadvantage. The employer has been able to enforce a restraint (which is presumed to be invalid) on the basis of unproven facts.

3 Availability of damages

This consideration is often given only cursory examination. Sometimes not discussed at all, it is often said that damages would be too difficult to calculate.[102] One of the problems with awarding damages is the possible inability of the employee to pay them.[103]

The possibility of awarding damages should be given more attention. The problems with interim injunctions being a de facto determination of the case have been discussed. Unless there is a great risk to the employer's business if the injunction is not granted, the injunction should be declined and damages considered at the substantive hearing.

4 Overall justice

This factor was stated to be the ultimate test by the Court of Appeal in the *Klissers* case.[104] The overall justice will not necessarily favour the same party as the balance of convenience does. If the balance of convenience is not substantially in favour of the plaintiff, it does not necessarily follow that the injunction should be granted.[105] The amount of time before a substantive hearing can also be considered under the overall justice.[106]

B Consideration of Section 8 of the Illegal Contracts Act and Section 104 of the EC Act at the Interim Stage

A current issue in relation to interim injunctions for restraint of trade clauses is whether the possible application of section 8 at trial should be considered at the interim stage. In *Castle Parcels* v *Dale* Henry J held that section 8 should not be invoked on an interim injunction application.[107] His reason was that once a clause is varied under section 8, it becomes

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101 *Ogilvy & Mather (New Zealand) Ltd* v *Darroch*, above n94, 62.

102 For example: *Medic Corporation*, above n76, 1060; *NFC International Holdings (NZ) Ltd*, above n100, 9.

103 *DB Breweries*, above n74, 14.

104 Above n94.

105 *DB Breweries*, above n74, 16.

106 *Ogilvy & Mather (New Zealand) Ltd* v *Darroch*, above n94, 71.

107 *Castle Parcels* v *Dale*, above n90, 96,777.

binding on the parties. Section 8 does not envisage a temporary finding. On this approach, if a court found a restraint to be unreasonable, no injunction could be granted. The employee would be free to disregard the clause.

To ignore section 8 at the interim stage would mean that in most cases it would never arise. Many restraint of trade cases never reach a substantive hearing, as the term of the clause will have expired.

This can be contrasted with the approach taken in the *Key Graphics* case. In that case, Tompkins J commented that the possibility of a restraint clause being found unreasonable is not relevant to interim injunction proceedings. If a court did reach that conclusion, section 8 of the Illegal Contracts Act could be exercised to modify the clause.[108]

This approach ignores the basis on which an interim injunction is granted. The party seeking to enforce the clause must present at least a serious argument that the clause would be enforced at a substantive hearing. A restraint of trade clause must be reasonable, so reasonableness is relevant in interim proceedings.

The *Key Graphics* approach seems incompatible with the more restrictive interpretation of the section 8 discretion to modify expressed in the *MA Watson* case. As discussed above, in *MA Watson* Smellie J did not apply a presumption in favour of exercising the discretion. On the *MA Watson* approach to section 8, it is unreasonable to assume that section 8 will automatically modify an unreasonable clause.

Most importantly, the *Key Graphics* approach is not appropriate in light of section 104(2) of the EC Act. At the interim stage, if the proceedings are subject to the EC Act it cannot be assumed that a court will modify the restraint at a substantive hearing. It would be more realistic to assume the opposite: that if the restraint was found to be unreasonable, the employer would be unable to satisfy section 104(2) and no modification would take place.

The preferable approach is the compromise reached in the *DB Breweries* case. Colgan J held that the section 8 power to modify should not be the sole reason for upholding a restraint clause by injunction. However, the possibilities of the final outcome cannot be ignored.[109] The potential application of section 8, therefore, must be considered. For the injunction to be granted, DB had to establish an arguable case that the court would be satisfied beyond reasonable doubt that a modification should be made and that other remedies would be inadequate or inappropriate.

In the *DB Breweries* case, Colgan J tied considering the probability of modification to the

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108 Above n34, 96,571. Other cases where the restraint of trade clause has been modified and the injunction granted: *Target Recruitment Services Ltd* v *Lewin & Ors* (1988) 2 NZELC 95704; *Bates* v *Gates*, above n31; *Cooney* v *Welsh*, above n23.

109 Above n74, 11. Adopted in *Dunedin United Friendly Societies Dispensary*, above n74, 22.

short time lapse before a substantive hearing.[110] He contrasted this with the *Greenwich* case, where Barker J did not see the existence of a right to recast the contract as a reason for granting an injunction. In the *Greenwich* case, there was no indication as to when a substantive hearing would take place. If there was likely to be a substantial delay before a hearing, a judge would be reluctant to grant an injunction.

The *DB Breweries* approach is a compromise between those proposed in *Key Graphics* and *Castle Parcels*. Colgan J does not ignore the possibility that section 8 may be utilised at trial (as the *Castle Parcels* approach does). However, Colgan J does not assume that, if required, section 8 will modify an unreasonable clause (as Tompkins J does in *Key Graphics*). The plaintiff must establish an arguable case for the exercise of section 8 if the clause was found to be unreasonable.[111]

This approach may lead to some injustice. If an employer can establish an arguable case that the clause could be modified at trial, an injunction can be granted. A potentially unreasonable clause is being enforced. In the *DB Breweries* case, for example, once the employer established a prima facie case, a fairly broad clause was enforced.[112] At least in *DB Breweries*, though, the case was scheduled for a prompt hearing.

The rationale of Colgan J, in linking a consideration of the possibility of modification to the time before trial, seems reasonable. If a fairly prompt trial is likely, the possibility of later modification could be allowed for in granting an injunction. However, if a prompt hearing is unlikely, a court should be slow to grant an interim injunction solely because at trial it could be modified and enforced. Granting an injunction in that situation could decide the matter finally.

As the *DB Breweries* case illustrates, the impact of section 104(2) of the EC Act is linked to a consideration of section 8 of the Illegal Contracts Act. At the interim injunction stage, on the basis of the *DB Breweries* approach, the plaintiff must make out an arguable case that section 104(2) is satisfied. However, whether section 104(2) adds anything to the considerations involved in an interim injunction scenario is doubtful.

The second limb of the section 104(2) test (that any other remedy would be inappropriate or inadequate) is similar to an element considered for any interim injunction: whether damages would be an appropriate remedy. The first limb of the section 104(2) test (that the order should be made) is something that the court will be considering in a general manner

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110 Above n74, 11.

111 In some cases, as in *DB Breweries* itself, this will involve establishing an arguable case that section 104(2) of the EC Act would be satisfied.

112 In the *DB Breweries* case, Colgan J acknowledged that the scope of the prohibition was so wide that it was likely to be found unreasonable (above n74, 8).

anyway.[113]

At the interim stage, therefore, the section 104(2) test may not add any substantive considerations. It is more likely that its major effect will be on the burden of proof. As the *DB Breweries* case has made clear, the plaintiff must establish an arguable case that the court will be satisfied beyond reasonable doubt that a modification should be made.[114] The beyond reasonable doubt standard may increase the amount of evidence an employer must bring before an injunction will be granted.

The effect of section 104(2) may be more dramatic in relation to final injunctions, which do not involve the same structured analysis of threshold issue, balance of convenience, availability of damages, and overall justice. In these cases, section 104 adds an extra, and very stringent, requirement which must be satisfied in the Employment Court before the injunction can be granted.[115]

C Jurisdiction of the Employment Court in relation to Injunctions

Finally, an issue which has been given recent consideration is whether the Employment Court has jurisdiction under section 104(1)(h) of the EC Act to grant injunctions. In the *Medic Corporation* case, Temm J suggested that the Employment Court does not have such a jurisdiction.[116]

However, this approach has not been followed in the Employment Court. In *X* v *Y Ltd & New Zealand Stock Exchange*[117] Colgan J stated that section 104(1)(h) cannot be read in isolation. The Employment Court was intended to have all the tools previously possessed by courts of ordinary jurisdiction. Colgan J did not accept the argument that because injunctions were specifically mentioned in other parts of the Act, the remedy was impliedly excluded in this part of the Act.

Colgan J's approach has been upheld by the Court of Appeal in *Board of Trustees of Timaru High School* v *Hobday*[118], where Casey J held that the wording of subsection 104(1)(h) is wide enough to encompass the High Court's powers to make interim injunctions.[119]

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113 See for instance *Key Graphics*, above n34.

114 Above n74, 12.

115 See the discussion at above Part IV B.

116 *Medic Corporation*, above n76, 1064; *Mazengarb's Employment Law*, above n74, A/77.

117 [1992] 1 ERNZ 863.

118 [1993] 2 ERNZ 146.

119 See also *Northern Local Government Officers Union Inc.* v *Auckland City* [1992] 1 ERNZ 1109, 1129.

VI CONCLUSION

The first conclusion which can be drawn from this paper is that the limits of the restraint of trade doctrine have not yet been fully tested. It is at least arguable that it could be extended to cover garden leave clauses, and at least some clauses prohibiting secondary employment. This is an issue which will have to be decided by future litigation.

The introduction of section 104(2) of the EC Act has greatly complicated the area. Unless compelled to do so, an employer would be well advised to avoid the jurisdiction of the Employment Court. If an employer can bring a claim in the High Court, section 104 is avoided altogether. In this sense, section 104 is problematic because it undermines the jurisdiction of the Employment Court.

This paper has canvassed a number of complex issues in relation to the use of interim injunctions to enforce restraints of trade. An emerging consideration which has been highlighted is the delay before a substantive hearing. It is hoped that the current trend will continue, and that awareness of this factor will influence the granting of interim stays.

In conclusion, employment law relating to restraint of trade is far from static, and has the potential to be used in new and creative ways by litigants.

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