[2015] WASC 491

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	BEND-TECH GROUP (A FIRM) -v- BEEK [2015] WASC 491
CORAM	**:**	PRITCHARD J
HEARD	**:**	8 DECEMBER 2015
DELIVERED	**:**	22 DECEMBER 2015
FILE NO/S	**:**	CIV 2819 of 2015
BETWEEN	**:**	BEND-TECH GROUP (A FIRM) Plaintiff AND ANDREW DAVID BEEK Defendant

Catchwords:

Injunction - Interlocutory injunction - Restraint of trade - No serious question to be tried - Balance of convenience does not favour injunction

Legislation:

Nil

Result:

Application for interlocutory injunction dismissed

Category: B

Representation:

Counsel:

Plaintiff	:	Mr C J Graham
Defendant	:	Mr M D Cox

Solicitors:

Plaintiff	:	Borrello Graham Lawyers
Defendant	:	MDC Legal

Cases referred to in judgment:

Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd [1973] HCA 40; (1973) 133 CLR 288
Attwood v Lamont [1920] 3 KB 571
BDO Group Investments (NSW-Vic) Pty Ltd v Ngo [2010] VSC 206
Brightman vLamson Paragon Ltd [1914] HCA 90; (1914) 18 CLR 331
Buckley v Tutty [1971] HCA 71; (1971) 125 CLR 353
IF Asia Pacific Pty Ltd v Galbally [2003] VSC 192
Integrated Group Ltd v Dillon [2009] VSC 361
Jardin and Jardim Investments Pty Ltd v Metcash Ltd [2011] NSWCA 409; (2011) 285 ALR 677
Mason v Provident Clothing & Supply Co Ltd [1913] AC 724
Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 2] [2013] WASC 375
Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] AC 535
Putsman v Taylor [1927] 1 KB 637
Smith v Nomad Modular Building Pty Ltd [2007] WASCA 169
Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (1992) 38 FCR 1
Twinside Pty Ltd v Venetian Nominees Pty Ltd [2008] WASC 110
Workplace Access and Safety Pty Ltd v Mackie [2014] WASC 62

1 **PRITCHARD J**: Bend-Tech Group is a partnership which operates a metal fabrication business for the resources and industrial sectors. One aspect of its business involves the rolling, bending and curving of metal pipes and other metal components, and the provision of other bespoke pipe-bending services to meet the needs of its customers.

2 Mr Beek commenced working for Bend-Tech in 2005 when he was 21 years old. He was employed by Bend-Tech until 1 April 2015, apart from a 12-month period between August 2011 and July 2012, when Mr Beek went to work in his father's air conditioning business. His employment with Bend-Tech ceased on 1 April 2015.

3 Bend-Tech says that Mr Beek was employed pursuant to a written contract of employment which contained a restraint clause. The restraint clause is set out at [20] of these reasons. In summary, the restraint clause has two components of present relevance: a 'non-solicitation clause' in cl 18.1.5.2, which purports to prohibit Mr Beek from endeavouring to solicit or entice customers from Bend-Tech, and a 'non-competition clause' in cl 18.1.6, which purports to prohibit Mr Beek from working (whether as a principal, or as an employee or agent of another entity) in any business of a similar kind to that of Bend-Tech, within Western Australia. In each case, the period of prohibition is for 12 months from the date on which Mr Beek's employment terminated (the restraint period).

4 Bend-Tech has brought an application for an urgent interlocutory injunction seeking to restrain Mr Beek from breaching the non-solicitation clause and the non-competition clause for the balance of the restraint period.

5 For the reasons set out below, I am not persuaded that the interlocutory injunction should be granted.

6 In these reasons for decision I deal with the following matters:

1. Factual background;

2. Principles in relation to the grant of an interlocutory injunction;

3. Whether Bend-Tech has established that there exists a serious question to be tried; and

4. The balance of convenience, including whether damages would be an adequate alternative remedy.

1. Factual background

7 Bend-Tech read an affidavit of James Arthur Fawkes sworn 6 November 2015 and an affidavit of Alan Philip Bryant sworn 6 November 2015. Mr Beek relied on an affidavit he swore on 4 December 2015.

8 It is apparent that a large number of factual matters are in dispute. In the narrative that follows, I have endeavoured to set out the essential background facts in terms as neutral as possible, acknowledging the factual disputes where they apparently exist.

Overview of Mr Beek's employment at Bend-Tech

9 When Mr Beek commenced work for Bend-Tech he initially worked as a pipe bending operator. He did so until August 2011. That role involved setting up machines and carrying out the bending work orders that Bend-Tech received. Mr Fawkes deposed that while he worked at Bend-Tech, Mr Beek was trained in every aspect of metal bending and rolling to carry out Bend-Tech's bending work, and 'would have' learned some novel methods and designs which were generated to work on particular projects.

10 When he returned to Bend-Tech in July 2012, Mr Beek worked as a Bending Supervisor, managing one or two employees engaged in what is known as mandrel bending work. Mr Fawkes deposed that in this role, Mr Beek learned 'the tooling set ups that we use, and the way that we bend certain metal for certain clients'.[1] Similarly, Mr Bryant deposed that Mr Beek knew nothing about bending and fabricating metal when he started working at Bend-Tech and that Mr Bryant believed that Mr Beek 'learnt everything he knows about bending and fabricating metal from working at Bend-Tech'.[2]

11 Mr Bryant also deposed that while Mr Beek worked in the role of a Bending Supervisor, Mr Bryant introduced him to Bend-Tech's suppliers in Malaysia and Taiwan. Mr Bryant deposed that the machinery used for mandrel bending and for curving pipes was not made in Australia. Mr Bryant deposed that over the years he has learnt which overseas suppliers 'produce the most reliable machines at the best prices'.[3]

[1] Affidavit of James Arthur Fawkes [42].
[2] Affidavit of Alan Philip Bryant [15] - [16].
[3] Affidavit of Alan Philip Bryant [26].

12 Between June 2013 and October 2014, Mr Beek worked in the role of Production Manager to replace Mr Bryant while Mr Bryant was on leave. When Mr Bryant returned from leave, Mr Beek resumed his role as a Bending Supervisor.

13 There is also a dispute about Mr Beek's role in the Production Manager's position. Mr Fawkes claimed the role involved a high level of responsibility which involved more management and less hands-on work than that of a Bending Supervisor. Mr Bryant deposed that in the role of Production Manager his job involved overseeing Bend-Tech's workshop and all of the projects which were going on.

14 Mr Fawkes deposed that in the role of Production Manager, Mr Beek was responsible for managing the firm's projects and was in contact with Bend-Tech's customers on a day to day basis, and saw what was purchased from suppliers. Mr Fawkes also claimed that in this role, Mr Beek had access to Bend-Tech's 'Customer Relationship Management System' which recorded the details of all of Bend-Tech's customers, including their customer order histories and invoices. Mr Fawkes also deposed that as the Production Manager Mr Beek was entitled to access information about any projects being undertaken by Bend-Tech, including the costing of jobs.

15 Mr Bryant also deposed that as a Bending Supervisor, and as the Production Manager, Mr Beek had 'a great deal of exposure to Bend-Tech's customers'.[4] Mr Bryant claimed that Mr Beek was 'introduced to the directors and owners of our customers and he developed a relationship with them on a first name basis'.[5] Mr Bryant deposed that 'building relationships with customers was part of [Mr Beek's] job and the services that Bend-Tech offers to its customers'.[6] He also deposed that Mr Beek learned about the design and layout of Bend-Tech's marketing emails while performing these roles.

16 Mr Beek disputes the evidence of Mr Fawkes and Mr Bryant as to what his roles as Production Manager and Bending Supervisor actually entailed. Mr Beek deposed that as the Production Manager he was not involved in the pricing of Bend-Tech's work other than occasional small domestic jobs, and as a Bending Supervisor, says he did not do any pricing at all, but rather this was organised by a sales team. Mr Beek also denied having day to day contact with Bend-Tech's customers, or that he

[4] Affidavit of Alan Philip Bryant [31].
[5] Affidavit of Alan Philip Bryant [33].
[6] Affidavit of Alan Philip Bryant [34].

was on first name terms with them, and claimed that his job did not involve looking after clients. He acknowledged having limited day to day contact with Bend-Tech's suppliers.

17 Mr Beek deposed that although he had access to the Customer Record Management System, he was not taught how to use it, and he did not in fact use it.

Entry into a written contract of employment

18 There is no dispute that, although Mr Beek commenced as the Production Manager in July 2013, he did not sign a written employment agreement until January 2014. That was the first occasion on which the terms of Mr Beek's employment with Bend-Tech had been set out in a written contract.

19 There is a dispute as to whether Mr Beek received any consideration for entering into the written contract on January 2014. Mr Beek says he was not given a choice about signing the contract, and did not receive any bonus (by which I understand him to mean anything extra) for doing so. Counsel for Bend-Tech submitted that consideration was provided, although there was no direct evidence of that fact in the affidavits filed in support of the injunction application.

20 That written contract contained the restraint clause, which was in the following terms:

> **18. RESTRAINT**
>
> **18.1. Acknowledgement**
>
> 18.1.1. The parties intend that the restraints contained in the Employment Agreement operate to the maximum extent;
>
> 18.1.2. The Employee acknowledges that the extent, duration and application of the respective restrictions contained in the Employment Agreement are not greater than is reasonably necessary for the protection of the interests of the Employer and its goodwill but that, if such restriction is reduced by any Court of competent jurisdiction or found to be void or unenforceable but would be valid if part of the working of this agreement was deleted and/or the period was reduced, those restrictions apply with such modifications as may be necessary to make the restraints valid and effective.
>
> 18.1.3. In the event of any breach by the Employee of the Employees obligations under the Employment Agreement then, in addition

and without prejudice to any remedy which the Employer may have, the Employer is entitled to seek and obtain injunctive relief in any Court of competent jurisdiction.

18.1.4. The 'Employee acknowledges and agrees that;

18.1.4.1. the Employer has bargained for the covenants set out in the Employment Agreement in consideration for the experience, knowledge and information which the Employee will gain and the compensation for which the Employee with earn under the Employment Agreement; and

18.1.4.2. the only effective, fair and reasonable manner in which the interests of the Employer can be protected is by the restrains imposed on the Employee by this document.

18.1.5. The Employee shall not, during the Restraint Period, either on the Employees own account or for any person or other legal entity, solicit or entice or endeavour to solicit or entice from the Employer;

18.1.5.1. any director, manager, officer, employee, servant or contactor of or to the Employer or any related entity of the Employer; and/or

18.1.5.2. the custom of any person who has during the Restraint Period or any time during the 12 months prior to the date of termination of the Employment Agreement been a customer, supplier, client, operator, distributor or licensee of the Employer or related entity of the Employer.

18.1.6. The Employee shall not, without prior written consent of the Employer, from the date of termination be a principal interested or engaged or act as an adviser or consultant in or be an employee, agent or officer of or an adviser or consultant to any entity which carries on a business of a similar kind to that of the Employer or any related entity or any entity which competes (whether directly or indirectly) with the business of the Employer or any related entity of the Employer for the Restraint Period in the Restraint Area.

18.1.7. '**Restraint Period**' means twelve months.

18.1.8. '**Restraint Area**' means Western Australia.

21 There is a dispute between the parties about the terms on which Mr Beek worked in the role of Production Manager and the terms on

which he resumed work as a Bending Supervisor, namely whether he was promoted and then demoted, or whether he worked in Mr Bryant's position during the period he was away, on the understanding that once Mr Bryant returned he would resume working in his former position on the same terms and conditions as before. There is thus a dispute about the terms on which Mr Beek recommenced working as a Bending Supervisor once Mr Bryant returned to work. Mr Beek says there was no written agreement, and the terms of the employment relationship must be implied from all the circumstances. In any event, he says the restraint clause no longer applied after he ceased to work as the Production Manager. In contrast, Bend-Tech says some of the terms, or at least the restraint clause, set out in the Production Manager contract continued to apply.

22 There is also a dispute as to whether Mr Beek resigned from Bend-Tech, or whether his employment was terminated, although that is of no present moment.

The alleged breach of the restraint clause

23 Mr Fawkes deposed that prior to Mr Beek leaving Bend-Tech, he learned of rumours that Mr Beek was planning to leave and set up his own business, providing the same services as Bend-Tech. At that point, Mr Fawkes pointed out to Mr Beek what Mr Fawkes regarded as the restraint clause in Mr Beek's contract of employment. Mr Beek disputed the applicability of any such restraint clause.

24 Mr Fawkes deposed that in May 2015 he became aware that Mr Beek had commenced a metal bending business operated by a company called Tarian Pty Ltd under the name WA Bending. Mr Fawkes deposed that he has become aware that Mr Beek is the director of Tarian Pty Ltd, the principal place of business for which is Wildfire Road Maddington, about 1.1 kilometres away from Bend-Tech's premises. Mr Beek became a director of Tarian Pty Ltd on 1 February 2015. Mr Beek acknowledged that he registered WA Bending's business name on 20 March 2015, but claimed that he did not engage in any work for WA Bending until after 16 March 2015. He deposed that he 'spent the first 3 months after leaving Bend-Tech setting up a workshop, getting machinery and doing market research. During this time I did not contact clients because I wanted to have the operation up and running before securing work. To date WA Bending has only earned a modest amount of revenue'.[7]

[7] Affidavit of Andrew David Beek [21].

25 In May 2015, Mr Fawkes became aware that Mr Beek had contacted Mr Barry Bloomfield, who Mr Fawkes says is a director of one of Bend-Tech's customers. Mr Fawkes learned that Mr Beek informed Mr Bloomfield that he had set up his own business, called WA Bending. Mr Bloomfield provided Mr Fawkes with a copy of an email sent to him by Mr Beek. That email enclosed a copy of a brochure from WA Bending, which set out the services WA Bending offered, and invited Mr Bloomfield to visit WA Bending's website.[8]

26 Mr Beek deposed that he did not know Mr Bloomfield was a customer of Bend-Tech. He claims that Mr Bloomfield is in fact one of Bend-Tech's competitor.

27 Mr Fawkes deposed that he has seen the website for WA Bending which indicated that WA Bending offers the same kind of work as Bend-Tech offers its customers, including mandrel bending and section rolling work. Mr Fawkes deposed that Mr Beek advertises the same type of services on his social media pages.

28 In November 2015, Mr Fawkes was informed by Mr Chester Sprigg, a manager of Steeldale Industries, that Mr Beek had contacted him also. (It appears that Steeldale is a customer of Bend-Tech's also.) Mr Beek contacted Mr Sprigg by email on 14 September 2015 to advise him that 'if you would like to try us for any mandrel bending or section rolling please send me an email. [W]e would be happy to help in any way.'[9]

29 Mr Beek says Mr Bloomfield encouraged him to approach other companies, including Mr Sprigg of Steel Dale Industries. Mr Beek denies any contact with Mr Sprigg apart from the one email referred to by Mr Fawkes.

30 Mr Bryant deposed that in May 2015 he spoke with a supplier from Taiwan, Mr Wu, to whom he had introduced Mr Beek. Mr Wu advised that he had been contacted by Mr Beek about getting some tools made up by the supplier.

31 Mr Beek admits he contacted Mr Wu, but said that he did not buy any of WA Bending's machinery from him.[10]

32 Mr Beek also deposed that bending machines were not scarce or difficult to locate in Western Australia, Australia or overseas, and there

[8] Affidavit of James Arthur Fawkes, annexure JAF-4.
[9] Affidavit of James Arthur Fawkes, annexure FAF-10.
[10] Affidavit of Andrew David Beek [75].

was no special art or knowledge to locating suppliers. His evidence was that 'new machines come with instructions on how to use the machine to bend, and suppliers are usually willing to provide training'.[11] Mr Beek deposed that WA Bending has purchased machines from domestic suppliers.

33 Further, in about August 2015, Mr Bryant learned from the owner of another of Bend-Tech's suppliers, K-Craft, that Mr Beek had contacted that owner.

34 In August 2015, Mr Bryant visited one of Bend-Tech's customers, Allstruct Engineering, and saw WA Bending stationery on the owner's desk.

35 Mr Bryant also deposed that in the two to three months prior to November 2015, he heard from other customers (Artex, ETMS and Steeldale Industries) that they had been receiving marketing emails from WA Bending.

36 Not surprisingly correspondence has ensued between Bend-Tech's solicitors and Mr Beek and his solicitors asserting, and disputing, Mr Beek's obligation to comply with the restraint clause.

Evidence of impact on Bend-Tech's business

37 Mr Fawkes deposed that bending and rolling services generate just under 20% of Bend-Tech's revenue. He says that since WA Bending started trading, Bend-Tech's sales have decreased by about 17%, compared with the previous six month period. He deposed that if Bend-Tech's monthly sales continued to decline, that part of the business will be in jeopardy, and in turn that could impact on the wider metal fabrication services that Bend-Tech provides. Mr Fawkes deposed that he believed that Bend-Tech was losing custom to WA Bending. However, he did not advance any evidence of a connection between the decrease in business, and loss of customers.

Bend-Tech's services and its customers

38 Mr Fawkes deposed that Bend-Tech uses particular methods to bend and curve pipes, and that there was novelty in the way that Bend-Tech performs its rolling and bending services, arising from the way in which the pipes were bent and the combination of machines used. However, he accepted that Bend-Tech's 'competitors could probably work out how to

[11] Affidavit of Andrew David Beek [41].

do the work by reverse engineering our processes if they had details of what those internal processes were'.[12]

39 Mr Beek disputes that the methods used by Bend-Tech involve novel processes. He says he was never informed that their methods were confidential or involved specialist knowledge, and to the best of his knowledge, none of them were patented. Mr Beek's view was that none of Bend-Tech's methods were unique, that they were widely used in the bending industry, and that they could easily be found on the internet. He pointed to a number of other companies which also carry out work using the mandrel bending or section rolling methods.

40 Mr Fawkes also deposed that Bend-Tech had few competitors, and its rolling and bending services were quite specialised even among its competitors, because of the specialised machinery and knowledge required in the operation of the machinery.

41 Mr Fawkes deposed that about 80% of Bend-Tech's work is produced for its Perth clients, while the balance was for clients in the rest of Western Australia. He further deposed that Bend-Tech has around 250 customers, and historically has had a high level of customer loyalty, and that most of Bend-Tech's business is generated by repeat customers. The most profitable of its work is its special bending services, which are undertaken for about 10 customers, but the demand for these services is unpredictable and varies over time. Mr Fawkes' belief was that Bend-Tech's competitors (apart from WA Bending) were 'probably not geared up to do that work'[13] (that is, the special bending work). Mr Fawkes deposed that because of the nature of Bend-Tech's services, it was critical for Bend-Tech 'to maintain long term relationships with its customers so that it is in a position to capture work from customers and generate revenue when demand is high, to financially carry its operations when demand is low'.[14]

Effect of proceedings on Mr Beek

42 Mr Beek deposed that he has done nothing more than use the skills and knowledge he has acquired to earn a living, and does not have any other skills, trade or qualifications to earn a living. He says he is the sole income earner for his young family, and cannot afford not to work.

[12] Affidavit of Andrew David Beek [29].
[13] Affidavit of James Arthur Fawkes [21].
[14] Affidavit of James Arthur Fawkes [23].

2. Principles in relation to the grant of an interlocutory injunction

43 The principles in relation to interlocutory injunctions were set out by Beech J in ***Twinside Pty Ltd v Venetian Nominees Pty Ltd***.[15] They are:

(i) whether there is a serious question to be tried or a prima facie case;

(ii) whether the plaintiff will suffer irreparable injury for which damages will not be an adequate compensation for the plaintiff, and

(iii) whether the balance of convenience favours the grant of the interlocutory injunction.

44 The requirement that damages be an inadequate remedy is not an essential precondition that an applicant must satisfy. Instead, the adequacy of damages is treated as a matter relating to the balance of convenience.[16]

45 Furthermore, the consideration of a prima facie case and the balance of convenience are not independent.[17]

3. Whether Bend-Tech has established that there exists a serious question to be tried

46 Counsel for Mr Beek did not dispute that if the restraint clause was valid and enforceable, Mr Beek's conduct had breached it. However, Mr Beek's case was that Bend-Tech had not established a serious question be tried because the restraint clause was neither valid nor enforceable.

47 The principles in relation to the validity of restraint clauses in employment contracts were set out by the Court of Appeal in ***Smith v Nomad Modular Building Pty Ltd***.[18] McLure JA (as her Honour was then) quoted from Lord Macnaghten in ***Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd***[19] who observed that for a restraint of trade to be justified, the restriction must be reasonable:

> reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so

[15] ***Twinside Pty Ltd v Venetian Nominees Pty Ltd*** [2008] WASC 110 [7] - [11].
[16] ***Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 2]*** [2013] WASC 375 [20] (Edelman J).
[17] ***Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 2]*** [2013] WASC 375 [22] (Edelman J).
[18] ***Smith v Nomad Modular Building Pty Ltd*** [2007] WASCA 169 [6].
[19] ***Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd*** [1894] AC 535, 565.

> guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.

48 A restraint may be justified as protecting more than one legitimate interest.[20]

49 A restraint will be reasonable in relation to the restraining party if it is necessary for the adequate protection of that party and reasonable in relation to the party restrained if it preserves the fullest liberty of action consistent with that protection.[21] Although the question of reasonableness is determined at the date of the contract, subsequent developments can be considered to determine whether the agreement was reasonable at the date of contract, having in mind the best estimate that the parties could make for the future.[22]

50 In the present case, the interests on which Bend-Tech sought to rely as the justification for the restraints imposed were not entirely clearly identified, but they appeared to be its customer connections and confidential information.[23]

51 As is apparent from the outline of the factual background above, there are clearly factual disputes in respect of a number of key matters relevant to establishing that the restraint clause is valid and enforceable. There is clearly a factual dispute in relation to whether consideration was given when Mr Beek entered into the contract governing the Production Manager position. Similarly, there is also clearly a factual dispute as to whether the methods of bending used by Bend-Tech involve novelty, whether Mr Beek had access to confidential information in the course of his employment as a Production Manager or otherwise, and the extent to which Mr Beek developed relationships with clients of Bend-Tech. These factual disputes will need to be resolved at trial, and I have not relied upon them for the purpose of determining whether a prima facie case exists.

52 Having said that, I have nevertheless reached the conclusion that Bend-Tech has not made out a prima facie case that the restraint clause is valid and enforceable. (I would emphasise that I have reached that

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[20] ***Jardin and Jardim Investments Pty Ltd v Metcash Ltd*** [2011] NSWCA 409; (2011) 285 ALR 677 [91] (Meagher JA, Campbell & Young JJA agreeing).

[21] ***Smith v Nomad Modular Building Pty Ltd*** [2007] WASCA 169 [8] (McLure JA), citing ***Brightman v Lamson Paragon Ltd*** [1914] HCA 90; (1914) 18 CLR 331, 337 (Isaacs J); ***Buckley v Tutty*** [1971] HCA 71; (1971) 125 CLR 353, 376 (the Court).

[22] ***Smith v Nomad Modular Building Pty Ltd*** [2007] WASCA 169 [7]; ***Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd*** [1973] HCA 40; (1973) 133 CLR 288, 318 (Walsh J); ***Putsman v Taylor*** [1927] 1 KB 637, 643 (Salter J).

[23] Cf ***Lindner v Murdock's Garage*** [1950] HCA 48; (1950) 83 CLR 628, 633 - 634 (Latham CJ), 650 (Fullagar J), 654 (Kitto J).

conclusion solely on the basis of the evidence relied on for the purpose of the interlocutory injunction application. Needless to say, the question of the validity and enforceability of the restraint clause will fall for determination at the trial on the basis of whatever evidence is advanced at the trial.) I have reached the view that Bend-Tech has failed to establish a prima facie case that the restraint clause is valid and enforceable for two reasons.

53 First, counsel for Mr Beek submitted that the restraint clause was a term of Mr Beek's employment only while he occupied the position of Production Manager, and that the term did not apply once Mr Beek ceased working in that position and resumed working in the position of a Bending Supervisor. The contract of employment specifically refers to the position of Production Manager. No separate written contract was entered into by the parties when Mr Beek resumed his position as a Bending Supervisor, and no written contract applied to the position of Bending Supervisor when he previously held it. Furthermore, there was no evidence as to what was said, or agreed orally, between the parties as to the terms of Mr Beek's employment once he resumed the Bending Supervisor position. These matters will all no doubt fall to be explored at the trial in more fulsome evidence. For now, however, the evidence leaves me with a real doubt that the restraint clause continued to form part of the terms of Mr Beek's contract of employment even after he ceased in the position of Production Manager.

54 Secondly, the restraint clause is very widely drawn, so much so that having regard to the evidence at present, I am left with real doubt that it can be said to be necessary for the adequate protection of Bend-Tech's interests, or reasonable in relation to its operation on Mr Beek.

55 Turning first to the non-solicitation clause, that clause prohibits Mr Beek from seeking to solicit or entice persons who, during the 12 months prior to, or after, the termination of his employment on 1 April 2015, were customers of Bend-Tech. The clause not only seeks to prevent him from making use of information about the customers of Bend-Tech, or of relationships with customers that he may have formed, but also purports to prevent him from soliciting customers of whom Mr Beek will have no knowledge (that is, persons who became customers of Bend-Tech after he ceased employment with Bend-Tech). It was not disputed by counsel for Bend-Tech that Mr Beek would not know the identity of customers who had brought their business to Bend-Tech after Mr Beek ceased his employment. (Bend-Tech has not been willing to provide Mr Beek with a list of customers referred to in the non-solicitation clause,

and Mr Beek has declined to provide an undertaking that he will comply with the non-solicitation and the non-competition clauses.) In so far as the non-solicitation clause seeks to prevent Mr Beek from contacting clients whose identity he cannot know, a real question arises as to whether the clause is void for uncertainty, but that question need not be determined for present purposes. It suffices to say that it is difficult to see how the non-solicitation clause can be considered necessary for the protection of Bend-Tech's interests or how its operation could be said to preserve the fullest liberty for Mr Beek consistent with preserving Bend-Tech's interests, so as to be 'reasonable' in the relevant sense.

56 As for the non-competition clause, this clause effectively prohibits Mr Beek not only from acting as a director of Tarian Pty Ltd, but also of using the skills he has accumulated over the course of virtually the whole of his working life to earn a living in the employ of any business similar to that operated by Bend-Tech. Counsel for Bend-Tech conceded that the non-competition clause was too wide in so far as it sought to prevent Mr Beek from working in a business of a similar kind to Bend-Tech, or which was indirectly in competition with Bend-Tech.[24]

57 Furthermore, an employer is not entitled to seek to stop a former employee competing against it unless a narrower restraint in respect of the interests involved (here Bend-Tech's customer relationships and its confidential information) would be inadequate to protect those legitimate interests. Here it is far from clear that the non-competition clause protects Bend-Tech's interests in a manner materially different from the protection of those interests advanced by the non-solicitation clause.

58 Counsel for Bend-Tech submitted that any over-reach of the non-solicitation clause and the non-competition clause could be resolved by severing those parts of the clauses which were unreasonably wide. The role of severance in the context of restraint clauses in employment contracts is strictly circumscribed.[25] Severance is not permissible simply because a blue pencil can be used to remove the offending clause without changing the meaning of the remainder. The principle was summarised by Younger LJ in the following passage from ***Attwood v Lamont***:[26]

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[24] ts 103.

[25] ***IF Asia Pacific Pty Ltd v Galbally*** [2003] VSC 192 (Dodds-Streeton J), citing ***Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc*** (1992) 38 FCR 1, 66 (Hill J).

[26] ***Attwood v Lamont*** [1920] 3 KB 571, 593; see ***IF Asia Pacific Pty Ltd v Galbally*** [2003] VSC 192 [174] (Dodds-Streeton J); ***Integrated Group Ltd v Dillon*** [2009] VSC 361 [35] (Hargrave J); ***Allison & Anor v BDO (NSW-Vic) Pty Ltd*** [2010] VSC 35 [20] (Judd J).

> The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only.

59 It is well accepted that courts should exercise great caution in engaging in the process of severance because the effect of doing so is for the court to come to the assistance of an employer when 'the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master.'[27]

60 In my view, it is not appropriate to consider whether portions of the restraint clause should be severed for the purposes of this interlocutory injunction, and in the absence of a final determination about the validity and enforceability of the restraint clause as a whole. That is all the more so when the application before the Court is for an interlocutory injunction in terms which reflect the restraint clause to its full extent.

4. The balance of convenience

61 Given my conclusion that I am not satisfied that a serious question to be tried has been established in relation to the application of the restraint clause, it is, strictly speaking, unnecessary to go on to consider the question of balance of convenience, but for completeness I do so nevertheless. In my view, the balance of convenience does not favour the grant of an interlocutory injunction in this case for three reasons.

62 First, the application for injunctive relief has been made after a considerable delay from the first occasion on which it came to the attention of Bend-Tech that Mr Beek may have breached the restraint clause. No explanation was offered for the delay. The correspondence attached to the affidavits suggests that intermittently over the past seven months there has been correspondence between the parties in relation to the restraint clause. Nevertheless, the result of the delay in bringing the present application is that there remains less than four months of the restraint period under the restraint clause. This ameliorates to a considerable extent the fact that if an interlocutory injunction is not granted Bend-Tech will be deprived of the benefit of the restraint clause itself (to the extent that it is valid and enforceable).

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[27] ***Attwood v Lamont*** [1920] 3 KB 571, 594; see ***Mason v Provident Clothing & Supply Co Ltd*** [1913] AC 724, 745 (Lord Moulton); ***BDO Group Investments (NSW-Vic) Pty Ltd v Ngo*** [2010] VSC 206 [41] (Croft J), cited in ***Workplace Access and Safety Pty Ltd v Mackie*** [2014] WASC 62 [51] (Edelman J).

63 Secondly, even if it is assumed that the restraint clause is valid and enforceable, and that Mr Beek's conduct was in breach of his obligations under the restraint clause, there was no evidence to suggest that that conduct had had any adverse impact on Bend-Tech's interests. Although Mr Fawkes deposed to a downturn in Bend-Tech's revenue, that may simply be explicable by a decline in the business of existing customers (particularly in the current economic climate), rather than by the loss of customers. I do not overlook the difficulty for an employer in demonstrating that a customer or customers have stopped bringing business to the employer. But in a case of this kind where Mr Fawkes' evidence was that Bend-Tech relies on repeat business from a core group of customers, I would have expected some attempt to establish a link between Mr Beek's conduct and the downturn in Bend-Tech's business.

64 Thirdly, if an injunction were granted in the terms sought, Mr Beek would be left in a position where he was unable to act as a director of Tarian Pty Ltd, or to seek employment for any employer in a similar business. I do not accept the submission made by counsel for Bend-Tech that because Mr Beek took 12 months off while he worked in his family's air conditioning business, he has alternative means of earning income apart from working in the pipe bending and metal fabrication industry. There was no evidence that there was any realistic alternative employment open to Mr Beek if he were precluded from working for Tarian Pty Ltd or for any other employer in the industry. That is a significant outcome for anyone, much less for one who supports a young family.

65 Finally, I have taken into account the fact that damages are ordinarily an inadequate remedy in cases of this kind, and that it will be a rare case in which an injunction will be declined on the basis that damages are a sufficient remedy. But that difficulty in assessing damages seems to me to apply equally to an employee who, if an interlocutory injunction is granted, but the employer fails at trial, may want to pursue compensation or damages through the undertaking offered by the employer.

66 In all of the circumstances, I am not persuaded that an interlocutory injunction should be granted in this case. The application should therefore be dismissed.