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April 2020

## EMPLOYMENT SPOTLIGHT : THE IMPORTANCE FOR EMPLOYERS TO SEEK LEGAL ADVICE ON REVIEWING A CANDIDATE'S POST-TERMINATION RESTRICTIONS

### Introduction

Post-termination restrictions (“**PTRs**”) are commonly found in employee’s contracts to restrict the activities of a former employee following termination of his employment. Courts in Hong Kong readily provide judicial relief to those seeking to enforce PTRs so long as it can be shown that the PTRs are (a) reasonable in the interests of the contracting parties and (b) reasonable in the interests of the public.

Please refer to our previous practice note “Employment spotlight: Post termination restraints” summarising issues relating to PTRs in Hong Kong.

This practice note examines the potential claims and liabilities the recruiting employer (“**New Employer**”) may face on hiring an employee who is subject to enforceable PTRs (“**Former Employee**”).

### Potential claims against New Employers who recruit Former Employees who are subject to enforceable PTRs

There are several claims a former employer could potentially bring against a New Employer in connection with their involvement in wrongful conduct by the Former Employee. These could include:-

- (1) Inducement of breach of contract: This is where a party knowingly and intentionally procures a breach of contract by another party, and the plaintiff is able to demonstrate that it has or will suffer damages as a result.
- (2) Causing loss by unlawful means: This is where a party commits an act intended to cause loss to another party which is unlawful and would be actionable if the injured party had suffered loss.
- (3) Conspiracy: This is where there is an agreement or understanding between two or more parties to injure

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the plaintiff. In the context of actionable torts in PTRs, this could include:-

- a) conspiracy to injure: where the predominant purpose of the agreement is to injure the plaintiff and the plaintiff suffers loss as a result; and
- b) unlawful means conspiracy: where the agreement involved an unlawful act which caused loss to the plaintiff.

Depending on the facts, these claims may interrelate and overlap. Where it is found that the New Employer has acted unlawfully, it may be held liable to pay damages (including the cost of the legal proceedings).

## Seeking legal advice in relation to PTRs

It is therefore important for New Employers to seek legal advice on the enforceability (or otherwise) of the Former Employee's PTRs before making a job offer to the Former Employee.

The significance of obtaining legal advice in relation to PTRs has been highlighted in the recent English decision of the Court of Appeal in *Mr David Allen t/a David Allen Chartered Accountants v Dodd & Co Limited*, [2020] EWCA Civ 258.

The brief facts are that Mr. Pollock, an employee of the claimant, David Allen, joined a competitor, Dodd & Co Ltd. ("**Dodd**"). A claim in tort was brought against Dodd for inducing a breach of contract by Pollock. Prior to employing Pollock, Dodd had sought legal advice on whether the PTRs that Pollock was subjected to were enforceable. The legal advice given was to the effect that the PTRs were likely to be unenforceable given their duration, (which Dodd's legal advisors considered was likely to be held to be too long). The legal advice was subsequently found by the court to be incorrect as the PTRs were held to be enforceable by applying the principle of severance to the unenforceable parts. The issue raised in appeal was that as Dodd had sought and relied on legal advice that PTRs were probably unenforceable, "*what amounts to a sufficient state of mind to make a person liable in tort for inducing a breach of contract.*"

It was found that Dodd did not have the sufficient knowledge required to be liable for inducing a breach of contract. Although Dodd was aware of the existence of PTRs, it was enough to show that (a) it sought legal advice, and (b) the legal advice relied upon was to the effect that it was more probable than not that by Pollock joining a competitor there would be no breach of the PTRs. It was acknowledged by the court that a legal advice would seldom be unequivocal and even if it was, it would always run the risk of being wrong as there is an inherent difficulty in predicting a legal outcome. An insistence on definite legal advice would have a chilling effect on legitimate commercial activity. Therefore, the court held that as long as it can be shown that an employer sought legal advice regarding enforceability of PTRs and acted in reliance of an advice (which is to the effect that it is more probable than not that no breach will be committed), the employer cannot be said to have the required knowledge or state of mind for adducing liability.

## Takeaway points for New Employers

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Prior to offering a role to a Former Employee, a New Employer should seek legal advice on any PTRs that the Former Employee may be bound by. Specifically, when considering the enforceability of the PTRs, New Employers should seek inter alia advice on:-

- (1) the meaning of the PTRs;
- (2) the interests which the PTRs seek to protect (such as confidential information, trade secrets, stability of workforce); and
- (3) the reasonableness of the PTRs with respect to the interests they seek to protect.

If the legal advice given to the New Employer is to the effect that the PTRs are enforceable or likely to be enforceable, it should not disregard the advice and should proceed with caution.

## **Conclusion**

Prior to offering a contract of employment, a New Employer should carry out its due diligence. Where the Former Employee is potentially subject to PTRs, it should seek legal advice regarding its enforceability. A New Employer who acts prudently and seeks legal advice regarding the enforceability of PTRs, may be able to protect itself from liability if it can be demonstrated that reliance was placed on legal advice which was to the effect that the PTRs would not be enforceable.

For further information in relation to Post-Termination Restrictions and other employment law related matters, please do not hesitate to contact Andrea Randall ( [andrearandall@gallhk.com](mailto:andrearandall@gallhk.com) / +852 3405 7688 ).

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*\*This article was first published by Hong Kong Lawyer*

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