

- b. a compliance order in relation to an alleged breach of a settlement agreement reached between the parties;
- c. an order for the sum of \$6,000 to be paid to it by Ms Timmins under the settlement agreement;
- d. the imposition of penalties, payable to Propertyscouts in respect of each breach;
- e. interest on the sum claimed; and
- f. its legal costs.

[2] At the start of the Authority's investigation meeting, counsel for Propertyscouts revised its application, accepting that an order for Ms Timmins to repay the \$6,000 paid to her under the settlement agreement is not possible, as the Authority does not have jurisdiction to order damages as part of a compliance order. This was made clear by the full Employment Court in *South Tranz Limited v. Strait Freight Limited* [2007] ERNZ 704. Propertyscouts is seeking that a penalty be imposed upon Ms Timmins in the sum of \$6,000 instead.

[3] Propertyscouts also stated at the start of the investigation meeting it was relying upon the employment agreement as a *back-up* only, in the event that the settlement agreement was found not to be enforceable.

[4] Ms Timmins denies that she has acted in breach of either the employment agreement or the settlement agreement and that her activities since leaving the employment of Propertyscouts do not fall within the scope of the restraint of trade clause that Propertyscouts relies upon.

Background facts

[5] Propertyscouts carries on business as a property management company, managing residential and commercial properties in the Dunedin area. It employed Ms Timmins as a property manager pursuant to an employment agreement dated 3 April 2012 (the employment agreement).

[6] On 27 August 2013 the parties entered into a settlement agreement (the settlement agreement) which contained the following material terms:

BACKGROUND

- A. *The Employee was employed by the Employer as a Property Manager.*
- B. *The Employer has completed an employment investigation in relation to the Employee's conduct and found serious misconduct. The Employee has raised a personal grievance with the Employer regarding the investigation into her conduct.*
- C. *The parties have agreed the basis upon which the dispute between the Parties will be resolved, without admission of liability by either party.*

1. TERMINATION DATE

1.1 The Employee's employment shall cease on 26 August 2013.

2. TERMINATION PAYMENTS AND OTHER BENEFITS

2.1 The Employer will pay to the Employee's bank account the compensatory sum of \$6,000.00 under s.123(1)(c)(i) of the Employment Relations Act 2000 within seven days of signing this agreement.

2.2 [omitted]

3. FULL AND FINAL SETTLEMENT

3.1 The Employee agrees that this Agreement contains the full and final settlement of all matters relating to her employment relationship with the Employer and its termination and fully and finally satisfies any and all claims, entitlements and rights the Employee has or may have now or in the future against the Employer.

3.2 The parties

(a) Submit to the exclusive jurisdiction of the Employment Relations Authority and/or Employment Court in respect of the enforcement of this Agreement;

(b) agree that except for enforcement purposes neither party shall bring the terms of this Agreement before the Authority or the Court whether by action, appeal, application for review or otherwise. ...

4. [omitted]

5. CONFIDENTIAL INFORMATION

5.1 The Employee shall not use or disclose any confidential information from or concerning the Employer without:

(a) The prior written consent of the Employer

(b) A requirement at law to do so.

- 5.2 *For the purposes of this Agreement confidential information includes, but is not limited to, any information regarding the Employer in any format or media and whether disclosed or made available orally that is a commercial, operational, technical or financial nature.*
- 5.3 [omitted]
- 5.4 [omitted]
6. **RESTRAINT OF TRADE AND NON-SOLICITATION OF CLIENTS**

- 6.1 *The Employee shall comply with the provisions of clause 7.5 of the Employment Agreement dated 3 April 2013 for the period stated in that clause.*
- 6.2 *The Employee acknowledges that:*
- (a) *The value of the monetary remuneration made by the Employer to the Employer [sic] under clause 2 of this Agreement has been assessed and is dependent upon the Employee complying with the undertakings contained in this clause 6 of this Agreement for the proper preservation of the goodwill of the Employer's business;*
 - (b) *The undertakings required of the Employee in this clause 6 are fair and reasonable.*

7. **GENERAL**

- 7.1 *The Employee acknowledges that she has had the opportunity to obtain legal and/or other professional advice about the terms of this Agreement.*
- 7.2 *This Agreement shall be governed by New Zealand law*
- 7.3 *In the event that part of this Agreement is determined by law to be invalid or unenforceable, that part of the Agreement will be modified so that it is enforceable, or if it cannot be modified [sic] will be severed and the remaining parts of the Agreement shall continue to bind the parties.*

[7] The settlement agreement was executed by Ms Timmins and by Mr Milton Weir on behalf of Propertyscouts and witnessed by their representatives, Ms Peart and Mr de Wattignar. The settlement agreement also includes a certificate signed by a mediator of the Mediation Services, and I am satisfied that the requirements of s.149 of the Employment Relations Act 2000 (the Act) have been complied with.

[8] The material part of clause 7.5 of the employment agreement referred to in the settlement agreement, and which Propertyscouts says has been breached by Ms Timmins, provides as follows:

7.5 RESTRAINT OF TRADE AND NON-SOLICITATION OF CLIENTS

(a) [omitted]

(b) *The Employee agrees that for a period of six months following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work of the same nature as could be reasonably associated to the 'style and function' of Propertyscouts and further, they shall not provide any associated service to any client or customer of the Employer with which the Employee had any contact or dealings whilst employed by the Employer.*

[9] On 11 October 2013 Ms Timmins incorporated a company called Let Smart Limited (Let Smart). Ms Timmins is the sole shareholder and director of this company, the business classification of which in the Companies Office Register is *Rental of Residential Property*. Let Smart has a website which it uses to advertise residential properties for rent within the Dunedin area. Let Smart also advertises properties for rent on Facebook and advertises properties on Trade Me.

[10] On 10 February 2014 Propertyscouts' lawyers wrote to Ms Timmins advising her that she was in breach of her settlement agreement *by engaging in the business of residential property rentals through your company Let Smart Limited*.

[11] The letter went on to state the following:

The monetary remuneration you accepted under the Settlement Agreement was dependant on compliance with your undertakings as to restraint of trade and non solicitation of clients. As you have engaged in work of the same nature as Propertyscouts Limited within the restraint of trade period you are in breach of the Settlement Agreement. This entitles Propertyscourts Limited to seek orders through the Employment Relations Authority requiring you to honour your agreement.

We demand that you immediate cease and desist from operating the residential letting business trading as 'Let Smart' and that you provide the attached undertakings to our client by 5pm Wednesday 12 February 2014.

In the event that you fail to take the required action, we will seek orders from the Employment Relations Authority requiring the same

and will seek repayment of the \$6,000 compensation money which you agreed was compensation for the restraints agreed to in that Settlement Agreement.

[12] The undertakings sought by Propertyscouts of Ms Timmins included that she was to cease operating the business of residential lettings with immediate effect and not to recommence operation until 27 February 2014, as well as to immediately take down from public view the Let Smart website and Facebook pages and to cease all advertising, including on any vehicle, of a residential lettings business under the name of Let Smart or any other name until 27 February 2014.

[13] The undertaking also required that Ms Timmins immediately repay the sum of \$6,000 *in acknowledgement of the breach of the terms of the settlement agreement between us dated 27 August 2013.*

[14] It is understood that Ms Timmins refused to give the undertakings.

The Issues

[15] Propertyscouts' statement of problem was lodged with the Authority on 18 February 2014 and did not seek an injunction against Ms Timmins, presumably on the basis that the six month restriction on her activities under the terms of the employment agreement and the settlement agreement was about to expire. Therefore, I believe that the following issues are the relevant ones to determine in this matter:

- (a) Is the Authority precluded from investigating whether the terms of the restraint of trade clause incorporated into the settlement agreement is enforceable, as is submitted by counsel for Propertyscouts?
- (b) If the answer to question (a) above is in the negative, are those terms enforceable?
- (c) If the answer to either question in (a) and (b) above is in the affirmative, did Ms Timmins breach the terms of the settlement agreement?
- (d) If the answer to the question at (c) above is in the affirmative, should a penalty be imposed upon Ms Timmins?

- (e) If the settlement agreement is not enforceable, did the employment agreement, which is relied upon in the alternative, survive the termination of Ms Timmins's employment and the entering into of the settlement agreement?

Is the Authority precluded from investigating whether the terms of the restraint of trade clause incorporated into the settlement agreement is enforceable?

[16] It is a trite principle of common law that restraint of trade clauses are *prima facie* unenforceable because they are contrary to the public interest. In order for them to be enforceable, such clauses must be reasonable as between the parties and in the public interest. In practice, this means that the employer must have some proprietary right, such as in the nature of a trade connection or confidential information, which the restraint goes no further than is reasonably necessary to protect. The importance of this general principle to New Zealand employment law was recently reiterated in the Employment Court case of *Transpacific Industries Group (NZ) Limited v. Harris and Smart Environment Law Limited* [2013] NZEmpC 97.

[17] However, it is the position of PropertyScouts that, as the restraint of trade in question is contained in a settlement agreement that complies with s.151 of the Act, and is enforceable by the parties under s.149(3) of the Act, there is no scope to enquire whether the terms of the restraint of the settlement agreement are reasonable.

[18] Subsection 149(3) of the Act provides as follows:

Where, following the affirmation referred to in sub-section (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so, –

(a) those terms are final and binding on, and enforceable by, the parties; and

(ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and

(b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

[19] There have apparently been no cases before the higher courts of New Zealand dealing with the enforcement of a restraint of trade clause which is incorporated into a

s.149 settlement agreement. Counsel for Propertyscouts refers me to *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111, in which Her honour Judge Inglis stated at [20]:

The combined effect of these [s.149(1) and s.149(3)] provisions is that a settlement agreement which has passed through the s 149 process cannot be challenged or set aside, except with the possible exception of duress on public policy grounds.

[20] There is no suggestion that Ms Timmins entered into the settlement agreement under duress.

[21] Although the common law position is that any restraint of trade clause has to be reasonable to be enforceable, the terms of s.143(3) appear to be clear that, once s.149(2) has been complied with, and the mediator has then signed the settlement agreement, those terms become final and binding upon the parties, and enforceable by them. This conclusion means that the statutory scheme in s.149 effectively ousts the common law principle in relation to restraint of trade clauses enunciated above. Whilst this could lead to circumstances where a term is entered into which would otherwise be unenforceable, (where the term of a restraint was unreasonably long, say) parliament appears to have concluded that the safeguards imposed by the requirements of s.149(2) present enough of a safety net for that risk to be alleviated.

[22] The corollary of this conclusion is that I am precluded from assessing whether the terms of the restraint of trade clause would otherwise be enforceable under common law principles, and I must move directly to the next step, which is to judge whether Ms Timmins breached the term of the restraint of trade clause.

Did Ms Timmins breach the terms of the settlement agreement?

[23] The first step in deciding this question is to ascertain what is meant by the clause that Propertyscouts alleges has been breached. Counsel for Propertyscouts says that it is only the first half of clause 7.5(b) that has been breached. This clause can be broken down into the following elements:

The Employee agrees that

- a. for a period of six months following the termination of their employment for whatever reason;

- b. they shall not, either personally, or as an employee, consultant or agent for any other entity or employer;
- c. seek to solicit or carry out any work of the same nature as could be reasonably associated to the 'style and function' of Propertyscouts.

[24] During the investigation meeting I asked Mr Weir what he understood the clause to mean but, understandably perhaps as he is not a lawyer, he was unable to give a clear indication, effectively saying that he did not want Ms Timmins to compete with him for six months and that is the sole reason he paid her \$6,000. Whilst this answer would normally have caused me to consider carefully whether a clause expressing such an intent was enforceable, this is not open to me for the reason already set out above. However, it is still necessary to understand what the clause is purporting to prevent in order to assess whether it has been breached.

[25] Analysing the words of the clause by giving them their ordinary meaning, I believe that the clause effectively seeks to prevent Ms Timmins from carrying out the same work as Propertyscouts does. The words *style and function* do not appear to add much to the clause, but I believe that they can be understood to refer to what Propertyscouts does (function) and how it does it (style).

[26] The Authority heard evidence from Mr Weir on behalf of Propertyscouts as to the business it carries out. Although when the business started it did what was called *casual letting*, by the time the settlement agreement was entered into it concentrated on property management, and did not do casual letting. Casual letting is simply seeking tenants for a landlord, with some ancillary activities such as carrying out pre-let and post-let inspections. Mr Weir said that he does have landlords approach the company saying that they only wanted the company to find tenants and not to manage the properties, but that he tries to persuade the landlords to let the company manage their properties as well. He said that they had a good success rate in converting such landlords.

[27] Ms Timmins gave evidence that, during the period of the restraint, her company handled only four lets. One involved her cousin's cousin, one involved her partner, one was as a result of a referral by her bank manager and one came about as a result of an advertisement placed on behalf of a tenant. In other words, Ms Timmins'

evidence is that three of those four clients would not have gone to PropertyScouts in any event.

[28] Ms Timmins said that she was not aiming at any particular market and did not preclude servicing the student let market whereas Mr Weir said that PropertyScouts aimed at the middle and high end of the market. Ms Timmins also said that her company was simply not set up to do property management. Apart from the first week's rent, all rent is paid directly to the landlord by the tenant (unlike in PropertyScouts) and any maintenance issues that arise with a property she has let is dealt with between tenant and landlord, whereas PropertyScouts arranges repairs on behalf of its landlords.

[29] Effectively, once Ms Timmins has let a property, she will have nothing more to do with the property unless she was paid extra to carry out a periodic or exit inspection. She has never yet carried out an exit inspection.

[30] Ms Timmins' company did carry out several elements of the job she did with PropertyScouts, as was demonstrated by an analysis of her job description with her former employer, but I do not accept that that fact alone means that she was acting in breach of the restraint clause. The restraint clause prevents her from doing the same work as PropertyScouts, not the same work as she did when she worked for PropertyScouts.

[31] PropertyScouts states that every element of Let Smart's business is a core element of its business. That appears to be true. However, I do not accept that that fact alone, either, means that Let Smart is in competition with PropertyScouts as they offer different services, namely casual lets versus full blown property management. An analogy may be that both a GP and a urologist (say) consult with and examine patients, seek details of their symptoms, decide on treatments and prescribe medication. One would not, however, regard them as in competition with one another. Rather, they act in complementary ways. Similarly, if a landlord approached Let Smart wanting a property management service, I am satisfied that it would not be able to provide it. It cannot, therefore, be said to be depriving PropertyScouts of business, and cannot therefore be in competition with it.

[32] Whilst Mr Weir effectively said that Let Smart's activities deprived him of the opportunity to convert the landlords using Let Smart to property management clients,

I believe that the two companies market to and serve fundamentally different markets. In my opinion, the work that Ms Timmins' company carries out is not work that competes with that of Propertyscouts. Propertyscouts' *style and function* are strongly geared around winning and retaining clients to which it will provide property management services, which appear to earn it the bulk, if not all of its income. It attracts clients which suit that level of service. Let Smart is, on the other hand, according to Ms Timmins' uncontested evidence, the only company in Dunedin that provides a pure letting service and does not in any real sense conduct property management. It will attract a different sort of clientele. It is speculation that Propertyscouts could convert Let Smart's clients to buy property management services.

[33] Accordingly, I do not find that Ms Timmins breached the term of the restraint clause at 7.5 (b) of the employment agreement, incorporated by reference into the settlement agreement. Accordingly, no penalty falls to be imposed upon Ms Timmins.

Does the employment agreement survive the termination of Ms Timmins's employment and the entering into of the settlement agreement?

[34] It is not necessary to consider this question because I have found that the settlement agreement was enforceable, albeit not breached. However, I will briefly consider the question.

[35] The settlement agreement does not contain any clause that says that it replaces or supersedes all other agreements between the parties. It does provide at clause 3.1 that the Agreement *contains the full and final settlement of all matters* relating to Ms Timmins' employment relationship with Propertyscouts and its termination *fully and finally satisfies any and all claims, entitlements and rights* that Ms Timmins *has or may have now or in the future against* Propertyscouts. It is arguable that this full and final settlement clause, in itself, does not operate to supersede the surviving terms of the employment agreement.

[36] However, clause 6.1 of the settlement agreement records Ms Timmins agreeing to comply with the provisions of 7.5 of the employment agreement. The corollary of this, when one examines Propertyscouts' argument that the employment agreement can be separately complied with, is that Ms Timmins was bound by clause

7.5 by operation both of the employment agreement and the settlement agreement. However, the settlement agreement provides that separate consideration is given, (the \$6,000 under clause 2) in respect of Ms Timmins entering into the Agreement to comply with clause 7.5 of the employment agreement. This is the purported effect of clause 6.2(a) of the settlement agreement.

[37] The fact that the settlement agreement purports to provide separate consideration for Ms Timmins agreeing to be bound by clause 7.5 of the employment agreement strongly suggests that their mutual intention was that, upon her ceasing to be an employee, the employment agreement also ceased to take effect, which necessitated the restraint of trade clause being incorporated into the settlement agreement with fresh consideration being given.

Conclusion and comment

[38] I find that Ms Timmins has not breached the terms of the settlement agreement as alleged by Propertyscouts and that no penalty should be imposed upon her.

[39] I take this opportunity to note that the payment of \$6,000 is expressed in the settlement agreement to be a *compensatory sum paid under s.123(1)(c)(i) of the Act*. In other words, it was a payment, expressed in its entirety to be paid as compensation for humiliation, loss of dignity and injury to Ms Timmins' feelings, presumably to settle her personal grievance.

[40] However, the settlement agreement also refers at clause 6.2(a) to the same payment being dependent upon Ms Timmins complying with the undertakings contained in clause 6 (which incorporate the restraint of trade clauses at clause 7.5 of the employment agreement). The payment of the sum of \$6,000 therefore appears to serve a joint purpose, even though the whole of the sum of \$6,000 was paid to Ms Timmins tax free under s.123(10)(c)(i) of the Act.

[41] Section CE9 of the Income Tax Act 2007, headed *restrictive covenants*, provides as follows

When this section applies

- 1 This section applies when—*
- (a) a person (person A) gives an undertaking that restricts, or is intended to restrict, their ability to perform services as an employee, office holder,*

or independent contractor, whether or not the undertaking is legally enforceable; and
(b) a person, whether or not person A, derives an amount for the undertaking.

Income

2 *the amount is income of person A.*

[42] It is probable, therefore, that any payment given to Ms Timmins for re-entering into those restraint of trade clauses should have been treated as taxable. It appears, however, that the \$6,000 was not treated as taxable in reliance upon Inland Revenue Department *Public Ruling – BR Pub 06/05*, which provides that a payment made genuinely and entirely under s.123(1)(c)(i) of the Act is not treated as taxable by the Inland Revenue Department.

[43] I draw no definitive conclusions as to whether part of the payment of the \$6,000 to Ms Timmins should have been taxed under s. CE9 of the Income Tax Act, as that falls outside of the jurisdiction of the Authority. However, to avoid complications that could arise from similar situations, a better route when entering into a settlement agreement which settles an employee's claims would be for separate consideration to be expressly allotted to any promise to comply with restrictive covenant/restraint of trade undertakings, and for that consideration to be treated as taxable in the hands of the recipient.

Costs

[44] The parties are encouraged to seek to agree how costs should be dealt with between them. However, if they fail to agree within the period of 28 days from the date of this determination, Ms Timmins may seek a contribution to her legal costs by serving and lodging a memorandum from her advocate within a period of a further 14 days and Propertyscouts shall have the right to respond by way of a memorandum of counsel which should be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority