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Update Summary

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UPDATE 41

OCTOBER 2023

**INJUNCTIONS:
Law and Practice**

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Material Code 41725141

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UPDATED COMMENTARY

Summary for Injunctions update 2 of 2023

Author Sydney Jacobs has updated the following material.

Restraining breaches of contracts for services

Lack of seniority was a relevant consideration in assessing the reasonableness of the restraint in *JMB (NSW) Pty Ltd (t/as McGrath Central Coast) v West* [2020] NSWSC 1380, though potential for promotion of a more lowly employee may be relevant. See [15.2050].

The author also explores three related sub-propositions regarding reasonableness but notes that the demarcation line between them is “not always being etched with clarity”. See [15.2052].

A constructional approach where words of limitation are sought to be implied, so as to narrow the geographic scope to that which is reasonable, is discussed in light of *Butt v Long* (1953) 88 CLR 476; 27 ALJ 576; [1953] HCA 76. See [15.2060].

Extensive new commentary is inserted regarding customer connection and non-solicitation clauses as follows:

- meaning of “non solicit”, see [15.2420];
- meaning of “solicit, canvass or secure the custom”, see 15.2430]; and
- non solicitation v non dealing clauses, see [15.2440],

Restraining unidentified trespassers

The author has reviewed a series of cases in the UK where the court considered whether they have the power or jurisdiction to make orders, on either an interlocutory of final basis, against persons in groups where their identity is unknown, such as sit-ins. The situation in New Zealand is also considered. See [28.185].

Restraining a Nuisance

Cases addressing the common law, including cases against councils in New South Wales, have been grouped together for ease of navigation. See [29.634].

O'Brien v Pittwater Council (2016) 22 DCLR(NSW) 14; [2016] NSWDC 32, focusing on defences raised by councils under the *Civil Liability Act 2002* (NSW) is examined in detail. See [29.710].

Injunctions to Restrain Misleading or Deceptive Conduct

The general position is that a Crown instrumentality must proffer the usual undertaking as to damages if it seeks an injunction exercising private rights as opposed to those rights pressed pursuant to a statutory duty. See [30.550].

Specific Performance

New commentary discusses the proposition that the adoption by a party of an erroneous construction of the contract is not necessarily fatal to the proposition that, none the less, the party remains ready and willing to perform the contract according to its terms properly construed. See [33.590].

Reference is made to *Frankel v Paterson* (2015) 230 BPR 35,391; [2015] NSWSC 1307 where it was held that courts do not make declarations that a party has a right on certain grounds. The declaration is only that a party has a right. See [33.670].

However, the court can make conditional orders for specific performance: *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207; cited with approval by Bergin J (as his Honour then was) in *Perpetual Trustee Company Ltd v Meriton Property Management Pty Ltd* [2005] NSWSC 623. See [33.2060].

Costs Orders

The author notes that, there seems to have been nuanced shifting over the decades of what the “usual order” as to costs is, as regards interlocutory injunctions. Commentary of the differences in approach are to be found in *Rema Tip Top Asia Pacific Pty Ltd v Gúrterich (No 2)* [2018] NSWSC 899. See [34.600] - [34.650].

The author also addresses costs in freezing orders/mareva cases. See [34.800].

Forms and Precedents

A new precedent has been added for an injunction to restrain breach of a non-disparagement clause. See [APX1.900].

