

Mass law firm exodus doused by restraints

After a coordinated resignation, eight former Herbert Smith Freehills ran FREE for the HILLS (don't you just love puns!) to take up shop at White & Case, a big wig Wall Street firm that's trying to crack our Australian shores.

Stung like spurned lovers, the rest of the HSF partners rushed off to court seeking an urgent injunction to stop the runaway defectors in their tracks, relying on the restraints in two partnership agreements.

We hear that HSF was seeking to enforce 14 clauses across the two agreements, which make us think that someone over there needs to revisit their approach to drafting. However, the restraints essentially boiled down to your typical prohibition on poaching staff and clients, and non-competition that would prevent the former partners from joining a competitor like White & Case for a period.

When the dust settled, as is often the case, no one came out happy (but both claimed victory) as the ex-partners were allowed to join White & Case but were prevented from taking HSF staff and clients with them for six months.

In upholding part of the restraints, the NSW Supreme Court said the departing partners were "commercially and legally sophisticated" when agreeing to the partnership agreements and the Court was hesitant to "substitute its own commercial judgment for theirs".

This reflects a growing trend in courts' handing of restraints as they increasingly adopt a "your choice, your problem" approach. While we don't like the thought of people grovelling to the courts to fix their bad decisions, this approach does seem to devalue the long-standing core principle that restraints are unenforceable (because they infringe on personal freedom of choice and are anti-competitive) other than to the extent of what's reasonably necessary to protect legitimate business interests.

What would the Court say if a "commercially and legally sophisticated" person signed a contract to jump off a bridge? Extreme, but you get our point.

Questions? Give us a call.



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