Garden leave, the right to work and restraints on trade

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Garden Leave, The Right to Work and Restraints on Trade

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***BearingPoint Australia Pty Ltd v Hillard* [2008] VSC 115; BC200802664**
***Tullett Prebon (Australia) Pty Ltd v Purcell* (2008) 175 IR 414; [2008] NSWSC 852; BC200807684.**

Employers concerned to protect confidential information and customer connections after the termination of the employment relationship are often advised to include post employment restraints in the contract of employment. Such restraints may seek to cover working for a competitor, solicitation of customers and the poaching of continuing employees. Lawyers approach the drafting of post employment restraints with caution. Although courts do enforce them, there is always the concern that a court will find a restraint — even one that has been most carefully considered and drafted — goes beyond what is reasonable to protect the legitimate interests of the employer in protecting customer connections, confidential information and the maintenance of a stable workforce. Perhaps in response to the difficulty surrounding the drafting and enforcement of post employment restraints employers seem to increasingly be relying upon the practice of directing an employee to take 'garden leave' while the period of notice runs its course.

How effective this practice might be has been the subject of litigation in the United Kingdom,[1] the United States[2] and to a lesser extent here in Australia.[3] Two recent Australian cases must now cast doubts upon the effectiveness of the practice of sending an employee on garden leave instead of relying on a post employment restraint. In *BearingPoint Australia Pty Ltd v Hillard*[4] the Victorian Supreme Court refused to grant an injunction preventing an employee from working while on a period of 180 days garden leave on the basis that to grant the injunction would be in effect to order specific performance of the contract of employment. More recently, in *Tullet Prebon*

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1 See, eg, *Provident Financial Group PLC & Whitegates Estate Agency v Hayward* [1989] 3 All ER 298; [1989] ICR 160; [1989] IRLR 84; *William Hill Organisation Ltd v Tucker* [1999] ICR 291; [1998] IRLR 313; [1998] EWCA Civ 615; *In the Matter of Symbian Ltd v Christensen* [2000] EWHC 458 (Ch) and on appeal [2000] EWCA Civ 517; *SG & R Valuation Service Co v Boudrais* [2008] EWHC 1340 (QB); and *TFS Derivatives v Morgan* [2004] EWHC 3181.

2 See, eg, the recent decision of the US District Court for the District of Massachusetts in *Bear, Stearns & Co, Inc v Sharon* 550 F Supp 2d 174. For discussion of the potential approach in the United States, see G T Lembrich, 'Garden Leave: A possible solution to the uncertain enforceability of restrictive employment covenants' (2002) 102 *Columbia L Rev* 2291.

3 *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32; BC200100100. For some comment on the practice of garden leave, see also G McCarry, 'Termination of Employment, Payment in Lieu of Notice, Garden Leave and the Right to Work' (1999)12 *AJLL* 1.

4 [2008] VSC 115; BC200802664 (*BearingPoint*).

(Australia) Pty Ltd v Purcell,[5] the NSW Supreme Court, applying the doctrine of restraint of trade, refused to grant an injunction preventing the employee from working for a competitor during a period of garden leave that ran until the expiry of the contract's fixed term, a period of more than one year.

Before turning to examine the approach taken in these two cases it is useful to say a little more about what is meant by garden leave and why employers might seek to rely upon the practice. The contractual basis relied upon by each of the employers in *BearingPoint* and *TP Australia* to direct the employee to take garden leave will then be examined. We will see that in *BearingPoint* the employer relied upon an implied contractual right to send the employee on garden leave, whereas in *TP Australia* the contract of employment contained a comprehensive express garden leave clause. The note will then concentrate on the different approaches taken in *BearingPoint* and *TP Australia* to the enforcement of the practice of garden leave. The note then concludes that courts will not allow an employer to use garden leave to restrain employees to any greater extent than would be possible under a reasonable post employment restraint clause.

What is Garden Leave and Why Use It?

Garden or gardening leave is a euphemism for a practice that involves the employer directing an employee not to attend work during the period of notice of resignation or termination of the employment.[6] The employee might be given no work or limited duties, and/or be required to be available during the notice period to, for example, assist with the completion of work or ensure the smooth transition of work to their successor. Otherwise, the employee is given no work and is directed to have no contact with clients or continuing employees. During the period of garden leave, the employee is paid their salary and any other contractual benefits that he or she would be paid were they continuing to render their services to the employer. It is argued that because the employer is still remunerating the employee the practice of garden leave is contractually permissible or, to put it another way, does not amount to a repudiation of the contract by the employer.

Based on the premise that the contract remains on foot during the notice period, it is assumed that the employee therefore remains bound by their continuing implied duty of good faith and fidelity and by any express clauses in the contract of employment with respect to, for example, exclusive service. These obligations would be sufficient to prevent the employee from soliciting current customers and employees, or working for a competitor while the notice period runs.[7] The business is further protected because the employee is physically prevented from having continued access to confidential information

5 (2008) 175 IR 414; [2008] NSWSC 852; BC200807684 (*TP Australia*).

6 This note concentrates on garden leave in the context of termination of employment. It can, however, arise in other situations. For example, Madgwick J considered the right to send an employee on garden leave in the context of determining whether an employer ordered to reinstate an employee was required to provide the employee with work: *Blackadder v Ramsey Butchering Pty Ltd* (2002) 118 FCR 395; [2002] FCA 603; BC200202318 at [61].

7 These duties do not generally survive beyond the termination of the employment. Thereafter an employer will need to rely upon any express contractual terms prohibiting competition and the application to those terms of the doctrine of restraint of trade, intellectual property

and intellectual property. So, garden leave is seen as having the same function or achieving the same result as a post employment restraint. The obvious disadvantage to the employer is that it must continue to pay the salary and other benefits without receiving the usual consideration in return.

It is further assumed that because the contract is still on foot a court will enjoin an employee for the period of the garden leave from acting in breach of any of those continuing employment obligations such as joining a competitor or soliciting the business of existing customers. It is this issue of enforceability of the continuing duty of good faith and fidelity during garden leave that was particularly tested in *BearingPoint* and *TP Australia*.

An Implied Right to Direct an Employee to Take Garden Leave and the Duty to Provide Work

In the absence of an express term, the courts do not approach the issue of garden leave by asking whether there is to be implied into the contract of employment a right to send an employee on garden leave and, if yes, the limits on the exercise of that right.[8] Instead, whether an employer is entitled to direct an employee to take garden leave during the contractual period of notice has been answered by determining whether the employee has the right to work, or rather, whether the employer has a duty to provide the employee with work. If there is no right to work or no duty to provide work, the courts have been ready to hold that the employer can direct the employee to take garden leave on the basis that to do so does not involve a repudiation of the contract of employment by the employer not providing work.

Whether there is an implied duty to provide work continues to be the subject of academic and judicial debate. It is beyond the scope of this note to revisit that debate but something must be said of the courts' approach to the issue in the context of garden leave cases. In Australia, despite a comment made by Callinan and Heydon JJ in their joint judgment in *Blackadder v Ramsay Butchering Services Pty Ltd*,[9] the current position remains that there is no generally implied duty for an employer to provide work so long as the contract stays on foot and the employee continues to be remunerated.[10] An express term in the contract requiring the employer to provide work aside, whether there is a duty to provide work depends upon an analysis of the terms of the particular contract and its surrounding circumstances. This is the approach that has been consistently taken in the English authorities to date.[11]

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rights and the continuing duty of confidentiality. For discussion, see R Owens and J Riley, *The Law of Work*, Oxford University Press, Oxford, 2007, pp 233–47.

8 This point was made by Mr Justice Cranston in the England and Wales High Court in *SG & R Valuation Service Co v Boudrais* [2008] EWHC 1340 at [18].

9 (2005) 221 CLR 539; 215 ALR 87; [2005] HCA 22; BC200502369 at [80]. For comment on this case, see J Riley, 'Pensioning off Lord Asquith's Cook' (2005) 18 *AJLL* 177.

10 *Ramsey Butchering Services Pty Ltd v Blackadder* (2003) 127 FCR 381; 196 ALR 660; [2003] FCAFC 20; BC200300382 and cited with approval in *BearingPoint* [2008] VSC 115; BC200802664 at [88].

11 See, eg, *William Hill Organisation Ltd v Tucker* [1999] ICR 291; [1998] IRLR 313; [1998] EWCA Civ 615; *SG & R Valuation Service Co v Boudrais* [2008] EWHC 1340.

It has been relied upon and followed in Australia.[12]

Although each case depends upon the particular contract, the courts have developed categories of employment relationships in which a duty to provide work will, or will more readily, be implied. For example, the courts have found a duty to provide work in theatrical engagements, where the employment is for a specific project, where the position is specific or unique, where the skills in question require frequent exercise in order that they be enhanced and preserved, and where the promised remuneration depends on the employer providing an opportunity to earn it.[13]

It has been argued that recent cases demonstrate that the circumstances in which a court will find a right to work have been expanding.[14] Be that as it may, a case-by-case approach, while flexible, carries with it uncertainty. The outcome depends upon the court's interpretation of the terms of the particular contract in the context of the surrounding circumstances. Interpretations or impressions as to whether the employment falls into one of the above categories might reasonably differ. So, for example, in *BearingPoint* the court found that there was no duty for the employee to be provided with work, in circumstances arguably not so very different from those in *William Hill Organisation Ltd v Tucker* where the court found that there was a duty to provide work.[15]

BearingPoint is a management technology consulting company.[16] Robert Trevor Hillard (Hillard) was employed as its managing director of information management. His contract was terminable on the giving of 180 days notice. There was no express garden leave clause in the contract. Hillard had become dissatisfied with his work. He had started to look around. This was known to BearingPoint. Ultimately, Deloitte Touche Tohmatsue (Deloitte) offered him a non-equity partnership. Hillard signed a letter of intent with Deloitte but maintained that this did not constitute an acceptance of Deloitte's offer and that he had not resigned from BearingPoint. He wanted to keep his options open. BearingPoint of course took a different view. It wrote to Hillard asserting that by his conduct he had resigned. It said it would try to get him to change his mind but, in the meantime, he would be removed from 'active client facing work' and that (presumably subject to any change of mind) his employment would end in 180 days. He was instructed that during that period he was not to attend the office or contact any of BearingPoint's clients, prospective clients or employees without consent. His laptop computer, without which he could not perform his role, was taken from him. Not long after, another employee was engaged to carry out his duties and functions. BearingPoint continued to pay Hillard his remuneration although there was a dispute over some stock entitlements.

Hillard responded in writing to BearingPoint stating that by removing him from contact with clients, employees or from his duties generally

12 *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32; BC200100100; *BearingPoint* [2008] VSC 115; BC200802664.

13 These examples were given by Morritt LJ in *William Hill Organisation Ltd v Tucker* [1999] ICR 291; [1998] IRLR 313; [1998] EWCA Civ 615 at [16].

14 *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32; BC200100100 at [17].

15 [1999] ICR 291; [1998] IRLR 313; [1998] EWCA Civ 615.

16 The facts of the case are set out: [2008] VSC 115; BC200802664 at [2]–[78].

BearingPoint had placed him on garden leave. As there was no express garden leave clause in his contract of employment Hillard asserted that placing him on garden leave was a repudiation of the contract. He said that he was accepting this repudiation as bringing the contract to an end. Hillard thus regarded himself as free to take up employment with Deloitte's, asserting that express post employment restraints in the contract were unreasonable. BearingPoint responded by seeking undertakings from Hillard that he would not contact their clients or solicit current employees, or take up employment with Deloittes until the end of the notice period. Hillard refused to give those undertakings and told BearingPoint that he would be taking up employment with Deloittes. BearingPoint sought an interlocutory injunction. Before the matter came on for hearing Hillard hedged his bets and gave 180 days notice of termination in the event that his reliance upon what he said was BearingPoint's repudiatory conduct had not in fact brought the contract to an end.

When the matter came on for final hearing the first point that the court had to deal with was whether in directing Hillard to take garden leave for the duration of the 180 day notice period, thus depriving him of work and sterilising his ability to work, it had repudiated the contract of employment. Following the approach outlined in the earlier cases above the court asked whether, in the circumstances of *this* contract, BearingPoint was obligated to provide Hillard with work or merely pay him the amount it was required to pay him under the contract.

Hillard argued that he was contractually engaged to perform the specific functions and responsibilities of information manager and that there were no terms in the contract that supported his removal from that position. Further, he pointed to the fact that part of his remuneration was contingent on his continuing to perform work. The nature of his work was skilled. In a fast moving industry he would have difficulty maintaining those skills and would risk falling behind if he did not work. He argued that his employment involved not only remuneration, but the opportunity to keep his name and talents prominent in the market. His arguments were persuasive and on reading them one might be forgiven for thinking that there was enough there (as was the case in *William Hill Organisation Ltd*) for the court to find that his employment fell into one of those categories in which a duty to provide work might be implied. But the court held that Hillard did not have a right to work. Instead, the court held that his contract should be construed to contain an implied term that BearingPoint was entitled to direct Hillard to go on garden leave for the duration of the 180 day notice period. The court accepted a construction of the contract that entitled BearingPoint to vary or modify Hillard's duties to the extent of being able to remove him from all contact with clients and staff in the circumstances then prevailing, that is, his intention to resign and work for a competitor. While bonuses were tied to performance they were entirely at the discretion of BearingPoint. This put paid to an argument that his remuneration was tied to work. While Hillard's position was important, it did not fall into the category of 'unique or special' and nor did his skills and expertise require frequent exercise during the notice period in order that they be enhanced and preserved. The court said that Hillard could maintain his skills through reading, attending workshops, communicating with

experts in the field and the like.[17] So a direction to Hillard that he spend the contractual notice period of 180 days on garden leave did not repudiate the contract. The contract remained on foot.[18]

Once the court had determined that the contract remained on foot, the question was whether the court was prepared to grant an injunction, enforcing the garden leave by preventing Hillard from engaging in any other employment, in particular with Deloittes, and from contacting clients, prospective clients or continuing employees during the 180 day notice period. The court refused to grant the injunctions sought on the basis that to do so would in effect amount to an order of specific performance of the employment contract. An analysis of the court's approach to the enforcement of garden leave will be taken up later in this note. But first, consideration is given to whether including an express garden leave clause in an employment contract is advisable in pre-empting the uncertainty surrounding an implied right to direct an employee to take garden leave.

An Express Garden Leave Clause — The Solution?

Perhaps because of the uncertainty surrounding the implications of an entitlement to send an employee on garden leave, or to put it more accurately, whether in any particular case there is a duty to provide work, there is anecdotal evidence that employers are now being advised to include an express garden leave clause in the contract of employment. It might also be argued that the failure to put an express garden leave clause in a contract, when the parties have the ability to bargain for one, should weigh against the finding of an implied right.[19] Indeed, Madgwick J in *Blackadder v Ramsey Butchering Pty Ltd*, in the context of a discussion on the duty to provide work, said that an employer had the option of including a garden leave clause in the contract of employment.[20] It is also interesting to note that there have been some applications for garden leave clauses to be inserted into awards.[21]

An express garden leave clause might be drafted to cover a number of issues: that the employer in the event of notice of resignation or termination has the right to direct an employee not to attend work, not to perform their usual work or have contact with clients and employees; that in those circumstances it is agreed that the employer has no obligation to provide work; how the employee will continue to be remunerated; and that otherwise the parties' obligations under the contract will continue. This was the approach taken by TP Australia in its contract of employment with Simon Purcell.

TP Australia carried on business as a brokerage in the wholesale financial market, facilitating trading activities between major dealers such as

17 [1999] ICR 291; [1998] IRLR 313; [1998] EWCA Civ 615 at [92]–[107].

18 Ibid, at [130].

19 This argument was put and, although not accepted, was said to be one that had 'its attractions': *SG & R Valuation Service Co v Boudrais* [2008] EWHC 1340 at [14].

20 (2002) 118 FCR 395; [2002] FCA 603; BC200202318 at [61].

21 See, eg, *Clerical and Administrative Staff (International Freight Forwarding and Customs Clearing Industry) Award 1992 re Award simplification* [2003] AIRC 804; PR934444; 9 July 2003. The employer's application was refused on the basis that a garden leave clause could lead to 'confusion and potential disputation': at [24].

commercial and investment banks.[22] Purcell was a broker. He had been employed since 1999 by TP Australia in the interest rates swaps and derivatives market. Most recently, in July 2007, he had entered into a fixed term contract with TP Australia. Although for a fixed term of two years, the contract could be terminated by either party on the giving of three months notice to the other, provided that, such notice could not expire before the end of the two year term.

The contract went on to acknowledge that should TP Australia wish to terminate the employment or should Purcell wish to leave it might not be appropriate for him to continue performing his duties having regard to his position and his access to confidential information. In those circumstances, it was expressly agreed that TP Australia would not be required to provide Purcell with any work and that he might not be required to attend work. TP Australia agreed that it would meet Purcell's contractual entitlements during any period that he was not required to work, except for any bonus or profit share determined by reference to personal performance. The clause then went on to provide that for so long as Purcell would not be required to work he would remain employed and be bound by all of the terms of the contract. Further, during the period of garden leave he could not work for any person, have any contact with a defined category of clients with whom he had had dealings during a defined period, nor have contact with a defined category of employees of TP Australia, without TP Australia's prior written consent. TP Australia also expressly reserved to itself the right to require Purcell to mitigate his loss by obtaining alternative employment that it considered acceptable.

The clause was comprehensive. It addressed expressly the question of whether the employer had an obligation to provide work that had been the central issue in the earlier cases on garden leave. The clause went further in dealing with the parties' rights and obligations during any period of garden leave. The parties expressly acknowledged the continuation of the employment and that Purcell remained bound by the terms of the contract. Those terms included that Purcell perform his duties 'faithfully and diligently', devote all of his working time and attention to TP Australia, and that he not accept employment or render services to a competitor of TP Australia. The garden leave clause spelt out what contact Purcell could have with clients and continuing employees. It also provided that during the period of garden leave Purcell could not work for any person without the consent of TP Australia.

In repudiation of his contract, Purcell resigned his employment with TP Australia, with immediate effect, when the two year term had still more than a year to run. He had found another job. TP Australia elected not to accept Purcell's repudiatory conduct and affirmed the contract. It also elected to exercise its rights under the garden leave clause. Purcell was told that he was not required to attend work and he was reminded of his contractual obligations. He would continue to be paid his base remuneration in accordance with the garden leave clause.

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22 The facts of the case are set out: (2008) 175 IR 414; [2008] NSWSC 852; BC200807684 at [2]–[21].

Purcell started the job he had accepted with one of TP Australia's competitors. TP Australia sought injunctions restraining him from doing so or otherwise contacting clients or continuing employees in breach of the garden leave clause until the expiration of the term of the contract in July 2009.

The garden leave clause in Purcell's contract certainly pre-empted any argument as to the contractual right to send Purcell on garden leave. The court did not need to consider whether in not providing him with work TP Australia had repudiated the contract.[23] Therefore the contract — as was the case in *BearingPoint* — remained on foot.[24]

The question then was whether the court would, in effect, enforce the clause by granting the injunctions sought. We will see that despite the use of an express garden leave clause — and a particularly comprehensive one at that — TP Australia was ultimately in no better position than BearingPoint when it came to enforcing garden leave. The effectiveness of the garden leave clause fell down at the point of enforcement. It is thus to a discussion of the enforcement of garden leave clauses — and hence their effectiveness — that this note now turns.

The Problem of Enforcing a Contract for Personal Services

The general rule is that equity will not intervene to specifically enforce a contract to render or receive personal services. An exception has been made in cases where the contract contains a limited negative covenant and where to grant the injunction would not leave the defendant idle and so, in effect, enforce a contractual obligation to provide personal services.[25]

The principal argument that Hillard relied upon in *BearingPoint* was that to enforce his contractual obligations by granting injunctive relief restraining him from taking up employment, including with Deloittes, while on garden leave would be in effect to order specific performance of his employment contract with BearingPoint. It was submitted that express terms in the contract prohibiting him from engaging in 'any other employment, business or occupation during his employment' was simply the 'flip side' of the requirement in the contract that he 'devote whatever hours were necessary to discharge his obligations' under the contract. Hillard's counsel argued that these terms were not limited negative covenants but that their enforcement would amount to a complete prohibition on Hillard working elsewhere without BearingPoint's consent. So, it was argued, to grant an injunction would effectively force Hillard to remain idle (although remunerated) during the period of garden leave.

The court accepted the argument that to grant the injunction would be, in

23 There was some argument in the case as to whether TP Australia had itself repudiated the contract in going beyond the terms of the garden leave clause by withdrawing Purcell's access card, which Purcell sought to rely upon as bringing the contract to an end. The court rejected this argument: at [25]–[26].

24 (2008) 175 IR 414; [2008] NSWSC 852; BC200807684 at [28].

25 For a review of the relevant principles here see the decision of the NSW Court of Appeal in *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 at 346–7. Cf *Turner v The Australasian Coal and Shale Employees' Federation* (1984) 6 FCR 177 at 193; 55 ALR 635.

effect, to order the employment contract to be specifically performed. Hillard would have had no option but to sit out his enforced garden leave, as he would not be able to earn an income from elsewhere during the period. The court went on to hold that it followed, as a matter of logic, that Hillard should also not be restrained from contacting clients or prospective clients of BearingPoint or employees of BearingPoint during the remaining period of the notice. It is not clear why that follows. An injunction in those terms would not have had the effect of enforcing the provision of personal services or otherwise have left Hillard idle. The point was not explained.

So BearingPoint was left with pursuing a claim for damages for breach of contract if Hillard breached the terms of his employment contract during the remaining period of garden leave.[26] The contract contained a clause setting out a formula for estimating the damages BearingPoint would suffer if Hillard left early. BearingPoint did not plead this clause and argued its loss would be 'difficult to identify and quantify'.[27]

Unfortunately for BearingPoint, the court also found that the 'extraordinarily' broad post employment restraints (even in an amended limited form) were unreasonable restraints of trade.[28]

The Application of the Doctrine of Restraint of Trade

In considering injunctive relief in the context of garden leave the court in *William Hill Organisation Ltd v Tucker*, held that relief had to be justified on similar grounds to those necessary to uphold a post-employment restraint.[29] In an earlier case, reference was made for the potential for 'abuse' of garden leave clauses.[30] This approach has been followed in subsequent cases in the United Kingdom[31] and in Australia.[32]

Although the judgments in these cases were based on whether the court should exercise its discretion to grant injunctive relief, the language is familiar. It is similar to that used in determining the reasonableness and legitimacy of restraint of trade clauses.

In *BearingPoint*, the court heard argument that the implied term permitting garden leave was an unreasonable restraint of trade because it sterilised Hillard absolutely. The court did not deal with the restraint of trade argument directly. Rather, it approached the argument by considering the discretionary nature of injunctive relief. It held that an injunction requiring Hillard to go on garden leave for the remainder of his lengthy period of notice of 180 days was principally directed towards preventing him, for as long as possible, from competing with BearingPoint. The court held that this was not a legitimate purpose and on that ground also refused to grant the injunction.[33]

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26 [2008] VSC 115; BC200802664 at [151].
27 Ibid, at [151].
28 Ibid, at [156].
29 [1999] ICR 291; [1998] IRLR 313; [1998] EWCA Civ 615 at [25].
30 *Provident Financial Group PLC & Whitegates Estate Agency v Hayward* [1989] ICR 160 at 168; [1989] 3 All ER 298; [1989] IRLR 84.
31 *In the Matter of Symbian Ltd v Christensen* [2000] EWHC 458 and on appeal: [2000] EWCA Civ 517.
32 *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32; BC200100100 at [86].
33 [2008] VSC 115; BC200802664 at [150].

In *TP Australia*, the court expressly dealt with the argument that the restraint of trade doctrine applies during the term of the employment. It recognised the overlap between the equitable discretion to grant injunctive relief and the common law doctrine of restraint of trade but expressly held that the doctrine of restraint also applies to restraints *during* the term of employment including any period of notice or garden leave.[34]

The contract between TP Australia and Purcell contained an express garden leave clause which itself contained negative covenants. There were also a number of restraint clauses in the contract that were expressed to apply during the two year term and for three months after termination of the employment. These restraints covered solicitation of clients, poaching existing employees and working in competition. The restraint against post employment competition would operate at TP Australia's option to be exercised by it on giving Purcell notice and paying him a month's remuneration. This restraint also interacted with the right to direct Purcell to take garden leave so that if he were sent on a period of garden leave that period would be set off against the three month post employment restraint on competition.

The question then was whether these restraints were void as unreasonable. With respect to the garden leave clause itself, the court found that there was no restraint involved in Purcell not being provided with work; the restraint was in him being precluded by the clause from seeking work elsewhere during the period of garden leave.[35]

The court started by noting that the 'pendency' of a contract of employment will *usually* be sufficient justification to support the reasonableness of a restraint *during* the term of employment.[36] It is important here to remember that the court found that the contract between TP Australia and Purcell remained on foot. In resigning more than three months before the expiry of the term Purcell had repudiated the contract. But TP Australia had elected to affirm it. As a general proposition it should follow that the restraints in the garden leave clause that TP Australia was seeking to enforce (and the express restraints) were to be considered as restraints operating *during* the employment. However, the court went on to hold that although the contract remained on foot this was not 'a complete description of the situation'.[37] It drew a distinction between the contract of employment, on the one hand, and the relationship of employer and employee, on the other. The contract had survived Purcell's repudiatory resignation but the relationship of employer and employee had not survived because the 'substratum of trust and confidence' no longer existed.[38] The court referred to this relationship as the

34 (2008) 175 IR 414; [2008] NSWSC 852; BC200807684 at [37]–[46] and [55]. In making this finding the court relied upon the decision in *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126; 181 ALR 337; [2001] HCA 45; BC200104556 in which the High Court held that the doctrine of restraint of trade may apply to a commercial contract for the regulation and promotion of trading during the existence of the contract and that any such restraint must be justified by reasonableness.

35 (2008) 175 IR 414; [2008] NSWSC 852; BC200807684 at [55].

36 Ibid, at [40].

37 Ibid, at [29].

38 Ibid, at [30].

'actual employment'.[39] The actual employment had come to an end when Purcell resigned. TP Australia could not unilaterally reinstate the 'actual employment' by sending Purcell on garden leave and continuing to remunerate him.[40] The court reached this result even though the parties had expressly agreed in the garden leave clause that Purcell during a period of garden leave would 'remain employed' by TP Australia.

The question of whether there is a distinction between the contract of employment and the relationship of employment has been the subject of debate in Australian cases.[41] In *TP Australia* the court did not explore what impact the termination of the employment relationship might have on the survival of other mutual obligations such as good faith and fidelity although, as noted above, the court said that 'trust and confidence no longer existed'. It was not necessary for the court to explore this given that TP Australia was relying for relief upon express terms of the contract. However, the full consequences of this distinction on the parties continuing contractual obligations in the context of garden leave clauses might need to be considered in subsequent cases.[42]

The distinction drawn meant that the starting point for commencement of the post employment restraints was the date upon which Purcell resigned. It was then that the 'actual employment' had come to an end. The court held that up to the time of Purcell's resignation, and during the contractual three month notice period — particularly given that any part of that taken as garden leave was to be offset against the post employment restraint against competition — restraining him from competition and solicitation would be reasonable. Restraining him during the remainder of the contractual fixed term would be an unreasonable restraint of trade. In that regard the court very clearly rejected the argument that in considering the reasonableness of the restraint it should take into account the fact that Purcell would continue to be remunerated for the remainder of the contractual term.[43] As to the operation of the express restraint clauses after the actual employment had come to an end, the court

39 Ibid.

40 Ibid, at [32].

41 The distinction was accepted by Brennan CJ, Dawson and Toohey JJ in the High Court in *Byrne & Frew v Australian Airlines* (1995) 185 CLR 410 at 427–8; 131 ALR 422 at 432; [1995] HCA 24; BC9506439. It is a distinction that is not without its detractors: see, eg, the judgments of Gray J in *Gregory v Philip Morris* (1987) 77 ALR 79; 19 IR 258 and *APESMA v Skilled Engineering Pty Ltd* (1994) 122 ALR 471; 54 IR 236; (1994) 1 IRCR 106. For comment, see A Forsyth, 'Automatic v Elective Theory Revisited' (1994) 7 *AJLL* 246.

42 In a recent English case, VC Scott in the England and Wales High Court of Justice held that while the contract remained on foot after the employer had elected to affirm the contract in response to the employee's repudiatory resignation, it was the conduct of the employer in sending an employee on garden leave (pursuant to an express garden leave clause) that put an end to the employment relationship because doing so 'fundamentally and irretrievably undermines the employment relationship between the parties'. The express garden leave clause not only absolved the employee from doing any work but forbade him from taking any part in the work of his employer, entering upon his employer's premises or approaching any of his co-employees: *In the Matter of Symbian Ltd v Christensen* [2000] EWHC 458 (Ch) at [41]–[42]. The decision was upheld on appeal but the Court of Appeal declined to comment on the question of whether the implied duty of good faith continued during a period of garden leave: [2000] EWCA Civ 517.

43 (2008) 175 IR 414; [2008] NSWSC 852; BC200807684 at [85]–[86].

held that the restraint period of three months was also reasonable. In coming to that conclusion the court had regard to the nature of TP Australia's business, the legitimate interest that it had in its customer connections and in maintaining a stable workforce. A period of three months was no more than was reasonable for the legitimate protection of those interests.[44]

The court then went on to hold that Purcell should be restrained for a period of six months from the end of his actual employment. It reasoned that TP Australia had been under no obligation to invoke the gardening leave clause. It could have required Purcell to work out the three month notice period, still be bound by his contractual obligations of fidelity, and thereafter relied upon the express post employment restraints of three months.[45] So the court arrived at a total restraint period of six months. This is an unusual approach. What the court has done here is, in effect, enlarge the terms of the post employment restraint to arrive at what it considered to be a reasonable result.

Having reached a conclusion as to what period of restraint post 'actual employment' was reasonable, the court went on to consider whether it should exercise its discretion to grant an injunction preventing Purcell from acting in breach of the restraints. It is here that the approaches taken in earlier cases to the specific enforcement of an employment contract converge. Given that the restraint was limited to the market in which TP Australia operated, an injunction enforcing it would not prohibit Purcell from pursuing other fields of employment. In other words, it would not have the effect of indirectly requiring him to provide his services with TP Australia or otherwise remain idle.[46] There then remained the question of whether the court should exercise its discretion to grant an injunction. Consistent with the usual approach to the exercise of such discretion, the court considered whether an injunction would continue to serve any legitimate interest, whether it was just in all the circumstances that TP Australia be left to a remedy in damages and whether the hardship to Purcell would be disproportionate. The court concluded that it would not decline the injunction on discretionary grounds.

Conclusion

Employers considering sending an employee on garden leave, even pursuant to an express clause, must now re-consider the effectiveness of the practice. That a court might exercise its discretion not to grant an injunction restraining an employee from conduct in breach of his or her contractual obligations during a period of garden leave is not new ground. However, there seemed to be some flexibility in the discretionary approach. The courts may have drawn into consideration the language of restraint of trade but were also able to consider the wider context beyond a strict application of those principles. *TP Australia* makes it clear that the doctrine of restraint of trade applies during a period of garden leave. It follows that in drafting garden leave clauses employers will need to bring the same considerations to bear as those involved when drafting post employment restraints. Additionally, it seems from

44 Ibid, at [53].
45 Ibid, at [68].
46 Ibid, at [84].

TP Australia that the reasonableness of any restraints during a period of garden leave will have an impact on the court's consideration of the reasonableness of any post employment restraints. But, *TP Australia* went further than that. In holding that a repudiatory breach brings the employment relationship to an end the application of the restraint doctrine applied with full force because the court was no longer considering the application of the doctrine to a restraint during employment. This narrows even further the potential for an effective garden leave clause.

It is interesting to note that the contract between Purcell and his new employer (TP Australia's competitor) provided for a 'loan' to Purcell of $200,000 repayable only if he ceased employment or resigned without complying with the contract's notice provisions. Perhaps we will see an increase in this practice and consequent litigation on whether such a clause is in effect a penalty.