



Uruguay. Services include international tax and estate planning, asset protection planning, strategic corporate planning, retirement planning, pre-migration planning, succession planning, international trading and investment structures, and licensing and royalty structures<sup>1</sup> (“the services”).

[2] The applicant, Asiaciti Trust New Zealand Limited (“Asiaciti NZ”) is one of the companies in Asiaciti Trust. Asiaciti NZ has three directors, Graeme Briggs, the founder based in Singapore, Kevin Taylor and Lauren Willis, both of whom are based in the Auckland office.

[3] Asiaciti NZ provides a range of international trustee services for private clients who wish to use New Zealand as a base for their international investment activities<sup>2</sup>.

[4] The respondent, Lee Harris was employed by Asiaciti NZ as an assistant trust administrator from 13 June 2011 until 15 February 2013.

[5] Ms Harris and Asiaciti NZ entered into an individual employment agreement dated 9 June 2011 (“the employment agreement”). The agreement contained confidentiality and non competition clauses.

[6] During 2012, Ms Harris became disenchanted both with the professional development she was receiving and her salary level at Asiaciti NZ. Ms Harris sought employment elsewhere. On 18 February 2013, Ms Harris commenced employment as a foreign trust administrator with Staples Rodway, a New Zealand accounting firm which is an independent member of Baker Tilly International, an association of CA and consulting firms with offices worldwide<sup>3</sup>.

[7] Asiaciti NZ says by commencing employment with Staples Rodway, within 12 months after termination of her employment with it, Ms Harris is in breach of the non competition clause (“restraint”) in her employment agreement. Ms Harris says the restraint is not valid and not enforceable.

[8] Despite attempts by the parties to settle the employment relationship problem between themselves including providing undertakings, no resolution was reached.

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<sup>1</sup> [www.asiacititrust.com](http://www.asiacititrust.com)

<sup>2</sup> [asiacititrust.com](http://asiacititrust.com)

<sup>3</sup> [www.staplesrodway.co.nz](http://www.staplesrodway.co.nz)

Mediation was attempted but unsuccessful and so the matter proceeded to an investigation by the Authority.

[9] Asiaciti NZ seeks orders pursuant to section 161 of the Employment Relations Act 2000 (“the Act”) restraining Ms Harris from breaching the restraint and from directly or indirectly being employed by Staples Rodway or any associated entity of Staples Rodway. In the event the Authority finds the restraint to be unreasonable, Asiaciti NZ seeks an order that the clause be modified to give it effect pursuant to section 8 of the Illegal Contracts Act 1970.

[10] Ms Harris opposes such orders claiming the restraint to be unreasonable and unenforceable. Ms Harris says the restraint cannot be saved by modification and that Asiaciti NZ’s proprietary interests are sufficiently protected by the non solicitation and confidentiality clauses in the agreement as well as by the undertakings she has provided.

### **Issues**

[11] The Authority must determine the following issues:

- (a) Is the restraint of trade clause contained in clause 9.1 of Ms Harris’ employment agreement reasonable and enforceable by Asiaciti NZ ?
- (b) If the restraint of trade clause is not reasonable and enforceable, should the Authority modify it pursuant to section 8 of the Illegal Contracts Act 1970?
- (c) If the restraint of trade clause is reasonable has Ms Harris breached it?

### **First Issue**

**Is the restraint of trade clause contained in clause 9.1 of Ms Harris’ employment agreement reasonable and enforceable by Asiaciti NZ ?**

[12] Ms Harris’ employment agreement contained a restraint of trade clause in the following terms:

**9. Non-competition by the assistant trust administrator**

**9.1** *The assistant trust administrator agrees that she shall not directly or indirectly be employed by any corporation or firm carrying on the business of the company or the group or by any associated entity of such a corporation or firm wherever*

*located for a period of trial (trials) months after termination of this Agreement for any reason whatsoever. The company may at the written request of the assistant trust administrator agree in writing to waive this clause on such conditions as the company may consider fit. The company agrees that this waiver would not be unreasonably withheld.*

[13] Clauses 9.2–9.5 contain provisions restricting other activities of a departing employee such as carrying on a competing business with Asiaciti NZ and non-solicitation of clients and employees. Clause 8 imposes obligations on employees regarding the disclosure of Asiaciti NZ's confidential information.

[14] All employees of Asiaciti NZ have the same restraints and obligations in their employment agreements, no matter how junior or senior they are. This is because all employees have access to confidential information such as client lists, fee structures, and specific client information.

[15] The employment agreement was subject to a trial period of 90 days, during which time Asiaciti NZ was able to terminate Ms Harris' employment by giving her 2 weeks notice in writing. The employment agreement also provided that in the event of redundancy, Asiaciti NZ could give an affected employee one months notice of redundancy but was not required to pay redundancy compensation. Other terms of employment such as hours of work - 37.5 a week, sick leave -5 days a year and holidays - 4 weeks a year were all standard.

[16] Asiaciti NZ seeks to enforce clause 9.1 of the employment agreement to prevent Ms Harris being employed by Staples Rodway or by any other competitor of Asiaciti NZ for a period of 12 months from the date of termination of her employment with it. The 12 month restraint will expire on 15 February 2014. Asiaciti NZ says enforcement is necessary to protect its proprietary interests.

[17] In April 2010 Ms Harris sent an email to Asiaciti NZ expressing her interest in the assistant trust administrator role being advertised by it. Ms Harris enclosed a copy of her curriculum vitae, marketing outline for her own business entitled Harris Legal Services' gifting service together with references from recent employers. Ms Harris noted in her email that she had:

*... extensive experience in the area of trusts and gifting... set up in response to the difficult economy on my family's return from Europe. The Marketing Outline I have attached will give you an indication of*

*the initiative I have taken to promote my business and an initial indication of the depth of my trust knowledge.*

[18] Ms Harris was only able to commit to a part-time role and so her application was not pursued further. In May 2011, Ms Willis contacted Ms Harris asking whether she was still interested in the assistant trust administrator role as the person who was in that role had left. Ms Harris replied that she was definitely interested in the role and told Ms Willis that she had passed the Society of Trust and Estate Practitioners (“STEP”) Foundation Certificate and had commenced study for the diploma. Ms Willis responded attaching the job description and indicating the salary band was \$40,000 - \$55,000. Ms Harris informed Ms Willis that upon her return to New Zealand she could start immediately, that she was:

*... currently studying my STEP papers fulltime and apart from my business which I conduct during the evenings, I have no other commitments.*

[19] Ms Harris and Ms Willis met on 2 June to discuss the position. Ms Willis was aware of Ms Harris’ legal services business prior to the interview. There was no discussion about restraints of trade. The next day, Ms Harris received the agreement which included a *non competition* clause (“restraint”) which she was concerned about. Upon receipt of the agreement, Ms Harris telephoned Ms Willis to talk about the restraint. Ms Harris kept a note of her telephone discussion with Ms Willis. The file note records as follows:

3.6.11

*Re: Rot provns in E/C*

*T Lauren advised thought the provs (9.1 + 9.2) were harsh plus oppressive plus unlikely to be enforceable. She had the same discn with the owner when she started + thought the same. However the owner is not prepared to negotiate – he has been burnt before and it is not negotiable. I advised happy to leave it in as didn’t think it was enforceable.*

[20] Ms Harris says Ms Willis told her that she had had the same conversation with Graeme Briggs, Asiaciti NZ’s owner about the restraint when she started. Ms Willis was concerned about the effect of the restraint in a redundancy situation and was told the clause was not negotiable. Ms Harris says she told Ms Willis she did not think the clause was enforceable and that Ms Willis agreed with her.

[21] Ms Willis agrees she had a conversation with Ms Harris about the restraint. Ms Willis says she told Mr Harris she also had tried to negotiate the restraint clause

with Mr Briggs before she started at Asiaciti NZ but that Mr Briggs would not negotiate. Ms Willis made her own decision to accept the role anyway. Ms Willis denies agreeing with Ms Harris during this conversation that she believed the clause to be unenforceable.

[22] I prefer Ms Harris' evidence on this matter. Ms Willis' recollection of the interview process was vague as was her recollection of the conversation with Ms Harris about the restraint. Ms Willis did not make a note of her conversation with Ms Harris.

[23] Ms Harris had a clear recollection of the interview process, of her meeting with Ms Willis and of her telephone conversation about the restraint. Further, Ms Harris had compelling reasons in my view for her clear recollection. Ms Harris' family was in financial difficulty. Ms Harris had been looking for a job for quite some time without success and so had set up her own trust gifting business. Ms Harris decided to pursue a career in the area of international trusts and had paid for and completed some of her STEP qualifications. The decision about the position at Asiaciti NZ was therefore very important to Ms Harris and her family. Ms Harris made an immediate file note of the discussion about the restraint because of the importance of the issue.

[24] It is my finding that Ms Harris signed the employment agreement believing the restraint to be unenforceable and believing Ms Willis agreed with her view. Ms Harris signed the employment agreement because she had been looking for a job for some time, her family was in financial difficulty and she was told the clause was not negotiable.

[25] Ms Harris commenced employment with Asiaciti NZ on 13 June 2011 as an assistant trust administrator on a salary of \$55,000 gross per annum. Ms Willis was aware when employing Ms Harris that Ms Harris had her own trust gifting business.

[26] Ms Harris' job description was contained in Schedule 1 to the agreement. It stated:

*The Company will employ you in the position of Assistant Trust Administrator. The main functions of your position are:*

- *Assistance with establishing new trusts, companies and limited partnerships.*

- *Setting up files for new trusts, companies and limited partnerships.*
- *Updating and maintenance of the trust and company database.*
- *Liaison with referrers including major international banks and lawfirms.*
- *Day to day administration of structures including:*
  - *Assistance with the preparation of trustee, company and limited partnership resolutions,*
  - *Preparation of bank account opening forms,*
  - *Administration of structure bank accounts,*
  - *Preparing payment instructions,*
  - *Ensuring all appropriate structure documentation is collected and filed,*
  - *Assistance with company secretarial functions,*
  - *File reviews,*
  - *Liaison with client intermediaries,*
  - *Liaison with other ATG offices where necessary in relation to client structures.*
- *Daily office administration assistance.*

[27] Ms Harris' role was primarily administrative and very much an assistant role. Ms Harris had very little experience with foreign trusts and all her work was checked by Ms Willis or Mr Thompson including emails and letters before they were sent out. Ms Harris did not initiate business relationships with new clients and was not involved in negotiating fees, fee structures or with the strategic planning or development of Asiatici NZ. Those areas and all matters of governance were the domain of the directors Ms Willis and Mr Thompson. Legal work was handled by Asiatici NZ's in-house legal counsel. Ms Harris was assigned clients for whom she provided advice and assistance but not at a senior level.

[28] Ms Harris was good at her job and was keen to develop her skills in the international trusts area for her own benefit and that of Asiatici NZ with which she hoped to have a career. Ms Harris completed the STEP diploma, a qualification held by an extremely limited number of individuals in New Zealand and tackled her work

at Asiaciti NZ enthusiastically. Ms Harris' fluency in the French language meant she was able to add value to Asiaciti NZ when dealing with its European clients.

[29] Asiaciti NZ has a number of international Managed Trust Companies (MTC's) as its clients. Asiaciti NZ administers the MTCs and their underlying trusts. Asiaciti NZ has service agreements with the MTCs for whom it provides various services including provision of accounting functions, administration, banking in New Zealand.

[30] In addition Asiaciti NZ has key relationships with law firms, accountancy firms and banks. Ms Harris had day to day dealings with 5 of Asiaciti NZ's largest MTC clients and developed friendships with two or three staff members employed by those clients. Those staff members were in similar administrative type roles to that of Ms Harris, they were not in senior or governance roles.

[31] In my view Ms Harris was "*... an important employee and perhaps even at the heart of [Asiaciti NZ's] operations having been one of the persons having direct dealings with customers...*" It does not follow that Ms Harris "*...was a senior employee or otherwise in a position of great importance and one requiring an appropriate degree of the utmost trust and confidentiality. Her salary and other terms and conditions of employment were indicative of the no greater than low to middling level of seniority which she had within the company's operation.....She gave advice... and she took steps which were important but not necessarily exclusive or final in the conduct by [Asiaciti NZ] of its commercial arrangements with its clients*". ...<sup>4</sup>.

[32] Ms Harris did not feel valued by Ms Willis who did not encourage her initiatives to develop her own skill set and career with Asiaciti NZ and who, she believed did not adequately remunerate her. An example of this behaviour cited by Ms Harris was a comprehensive document on New Zealand Trusts prepared by her in July 2012 which she hoped to use to promote Asiaciti NZ. Ms Harris prepared the document in her own time and asked for Ms Willis' feedback which was never forthcoming. Another example was when Ms Harris successfully completed her STEP diploma. Ms Harris asked Ms Willis if the title of her position could be changed from that of assistant trust administrator to trust administrator to reflect her qualification. Ms Willis' response was discouraging.

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<sup>4</sup> *Debtor Management (NZ) Ltd v Quail* [1993] 2 ERNZ 498, 504

[33] Another example related to Ms Harris' requests for salary increases which she felt were not keeping step with her qualifications and skills. Ms Willis was of the view Ms Harris' salary was what the market was paying for trust administrators and she was not prepared to increase it to the levels requested by Ms Willis. At the investigation meeting it became clear that Ms Willis' salary research consisted of consideration by Ms Willis of a legal salary survey and asking her husband who was employed by a competitor of Asiatici NZ, his views on what would be an appropriate salary for a trust administrator type role.

[34] By the beginning of 2013, Ms Harris had formed the view that she would not progress far with Asiatici NZ and began looking for another job. She successfully obtained a position as a foreign trust administrator with Staples Rodway and commenced employment on 18 February 2013. Staples Rodway is an accounting firm which provides international trust services in addition to a wide range of accounting services. It provides similar services to that of Asiatici NZ and is a competitor. Asiatici NZ says by taking up employment with Staples Rodway, Ms Harris is in breach of the restraint.

### **The Law**

[35] In a relatively recent decision of the High Court in *Ryan v. Mason*<sup>5</sup> Justice Andrews considered the law in respect of restraints of trade. Andrews J referred to the Court of Appeal decision *Brown v. Brown*<sup>6</sup> in which Richardson J said:

*It is well settled law that to be enforceable a covenant in restraint of trade should be no wider than the circumstances of the case reasonably require. Reasonableness in the relevant sense relates to the legitimate interests to the parties in the covenant and to the wider public interest.*

[36] Justice Andrews also referred to *Bates v. Gates*<sup>7</sup> in which Thorpe J affirmed the principle expressed in *Brown v. Brown* and stated the subsidiary principles relevant to an employment contract:

(a) *That restraints by employers on employees are scrutinised with particular care and enforced only to the extent that they*

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<sup>5</sup> [2012] NZHC 3105

<sup>6</sup> [1980] 1 NZLR 484

<sup>7</sup> [1986] 1NZELC 95269 at 95273

*are required to protect a proprietary interest of the employer;*

- (b) *That such a restraint is generally unreasonable if its injurious effect on the employee is greater than its benefit to the employer;*
- (c) *That reasonableness is to be measured at the time the covenant was given, although developments necessary within the contemplation of the parties at that time may be taken into account;*
- (d) *That the question whether or not the agreement was a fair agreement in all the circumstances or was a one-sided arrangement only entered into because of the superior bargaining power of the employer is relevant to reasonableness;*
- (e) *That while the principal parameters used to determine reasonableness are the area, nature and duration of the restraint, those are not to be considered as separate factors, since reasonableness depends upon the assessment of all relevant surrounding circumstances; and*
- (f) *That the nature of the employer's business and of the relationship between the employee and the customers or clients of that business are important in considering whether restraint is reasonably necessary.*

[37] Justice Andrews referred to *Fuel Espresso Limited v. HSIEH*<sup>8</sup> in which the Court of Appeal accepted that the adequacy of consideration may also be relevant in determining the reasonableness of the restraint.

[38] The restraint contained in clause 9.1 is very wide, it has no geographical boundaries and prevents Ms Harris for a period of 12 months “*after termination of this Agreement for any reason whatsoever*” from working not only for any company carrying on the business of Asiaciti NZ but also any company carrying on the business of Asiaciti Trust. The businesses of Asiaciti NZ and Asiaciti Trust are not specified in the restraint. Ms Willis relied on the recital in the agreement as providing a definition of the business being carried on by Asiaciti NZ and Asiaciti Trust. The recital stated:

*WHEREAS the company and fellow subsidiaries of Asiaciti Trust Group Limited (hereinafter called “The Group”) specialise in the provision of international fiduciary and trust deed services and carry*

*on business from offices in Hong Kong, Singapore, New Zealand, the Cook Islands, Uruguay and elsewhere ...*

[39] However, this recital is not linked to the restraint. On a plain reading of the restraint Ms Willis is precluded from being employed by a company carrying on the business of Asiaciti NZ and Asiaciti Trust. The business being carried on by those companies includes :

*International tax and estate planning, asset protection planning, strategic corporate planning, retirement planning, pre-migration planning, succession planning, international trading and investment structures, and licensing and royalty structures* [“the services”].

[40] In my view law firms, accountancy firms, financial institutions and banks are all organisations which could offer the services and would therefore be regarded as carrying on the business of Asiaciti NZ and Asiaciti Trust.

[41] It was accepted by Ms Willis that a law firm or an accountancy firm such as Staples Rodway carrying on the business of Asiaciti NZ and Asiaciti Trust would be covered by the restraint. The effect of this then is to preclude Ms Harris from obtaining employment with a law firm or an accountancy firm, anywhere in the world if that law firm or accountancy firm was carrying on business providing the services.

[42] At the time of signing the agreement containing the restraint, which is when the reasonableness of a restraint is assessed<sup>9</sup>, Ms Harris had little experience with foreign trusts and was employed at a modest salary which in my view reflected her junior status. The salary paid to Ms Harris was not adequate consideration for the wide and onerous restraint imposed upon her. Further, there was no other form of consideration offered in the form of mutual promises such as elevation to partner status as occurred in *Ryan v Mason* (supra). Ms Harris understood from her discussion with Ms Willis the restraint was not enforceable. Ms Willis informed Ms Harris the restraint was not negotiable. This falls in to the category of a one sided arrangement as described in *Ryan v Mason* (supra). Ms Harris had little choice but to sign the employment agreement.

[43] Ms Harris’ employment was subject to a 90 day trial period to enable Asiaciti NZ *to assess her suitability for the role of Assistant Trust Administrator*. If not suitable Asiaciti NZ could terminate Ms Harris’ employment by giving her two weeks

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<sup>9</sup> *Brown v. Brown* ibid 5

notice and Ms Harris would not be able to pursue a personal grievance on the grounds of unjustified dismissal. Asiaciti NZ could have terminated Ms Harris' employment during the trial period and the restraint would have prevented Ms Harris from working for any company carrying on the business and providing the services of Asiaciti NZ and Asiaciti Trust anywhere in the world for 12 months.

[44] Similarly, Ms Harris' employment could have been terminated on the grounds of redundancy by Asiaciti NZ, which would have meant she would have received one month's notice, no redundancy compensation and been prevented from working for any company carrying on the business of Asiaciti NZ and Asiaciti Trust anywhere in the world for 12 months.

[45] The effect of the restraint in such circumstances as these would be harsh and oppressive and contrary to public policy in my view. Also, the restraint would go far beyond what was necessary in such circumstances to protect Asiaciti NZ's proprietary interests.

[46] Ms Willis says Ms Harris had access to its confidential information including details about fees, tailored fee structures and specific client information which would enable her to target Asiaciti NZ's most valuable clients and the restraint was necessary to protect it from such a situation. In my view the confidentiality clause in the agreement provides sufficient protection in that regard. Further, the fact that Ms Harris had access to this confidential information does not mean she could use it to target Asiaciti NZ's clients. Examples of employees who have access to such confidential information in organisations include the pay clerk, trust account clerks in law firms, accounts clerks. Typically such employees do not have the level of expertise and are not in positions of seniority which would enable them to use such information to their advantage. In my view this was the case with Ms Harris.

[47] In my view the restraint is too wide, and is harsh and unreasonable. The restraint prohibits Ms Harris from employment. "*The injurious effect of the restraint and of an injunction enforcing it on [Ms Harris] would in my view be significantly greater than the benefit (if any) to [Asiaciti NZ]*"<sup>10</sup>. I consider the restraint in clause 9.1 to be unenforceable.

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<sup>10</sup> *Debtor Management (NZ)Ltd v Quail* supra p510-511.

## Second Issue

### **If the restraint of trade clause is not reasonable and enforceable, should the Authority modify it pursuant to section 8 of the Illegal Contracts Act 1970?**

[48] Section 8 of the Illegal Contracts Act 1970 provides as follows:

8. *Restraints of trade*
  - (1) *Where any provision of any contract constitutes an unreasonable restraint of trade the court may-*
    - (a) *delete the provision and give effect to the contract as so amended; or*
    - (b) *so modify the provision that at the time the contract was entered into the provision as modified would have been reasonable, and give effect to the contract as so modified; or*
    - (c) *where the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand, decline to enforce the contract.*
  - (2) *The court may modify a provision under paragraph (b) of subsection (1), notwithstanding that the modification cannot be effected by the deletion of words from the provision.*

[49] I am not persuaded that a restraint such as contained in clause 9.1 was warranted in the circumstances. Asiatic NZ's proprietary interests are sufficiently protected by the other restrictive provisions contained in the employment agreement and by the undertakings provided by Ms Harris. I am of the view I should not exercise my power under s 8 of the Illegal Contracts Act to modify the restraint.

[50] In the light of these findings, I am not required to consider whether Ms Harris is in breach of the restraint contained in clause 9.1 of the agreement.

## Costs

[51] Costs are reserved. The respondent has 14 days within which to file and serve a memorandum as to costs and the applicant has 14 days from receipt to file and serve its reply.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**