

CASENOTE: *Devine Real Estate Concord Pty Ltd & Ors v Agha* [2019] NSWSC 786**On appeal: *Agha v Devine Real Estate Concord Pty Ltd* [2021] NSWCA 29 (9 March 2021)**

Devine Real Estate Concord (**'Employer'** or **'Devine Group'**) and related entities sought relief against Mr Agha and other persons. The Employer accused Mr Agha and Mr Coombe of obtaining confidential information and competing with the Employer in breach of a valid restraint of trade. Mr Agha was a minority shareholder and director of the Devine Group. Mr Coombe was an employee. Justice Sackar of the Supreme Court:

- a. made suppression orders in relation to certain persons named in the proceeding;
- b. found that Mr Agha was bound by an employment agreement, and as a shareholder after a previous real estate agency (in which he was a minority shareholder) purchased the assets of that previous entity in mid-2009. Mr Agha became a 20% shareholder in the Concord business of the Employer and later acquired further shares; and
- c. found that whilst Mr Coombe worked from about 2012, and it was disputed whether Mr Coombe ever signed an employment agreement.

Overlapping obligations and restraints existed with the shareholders' agreement signed by Mr Agha and the employment agreement also signed by him. The employment restraints ranged from 12 months' to 3 months' duration. The shareholders' agreement contained longer restraints, of up to 3 years in duration.

A. Hearing – first instance interlocutory

Sackar J heard the application for interlocutory relief, which was delayed due to the illness of one counsel. Evidence was produced that client lists were forwarded to Mr Agha's personal email addresses on 15 November, 23 November, 28 November and 4 December 2017, and again on 8 December 2017. Mr Agha became a franchisee of Belle Property Australasia.

The Employer argued that Mr Agha had breached obligations to it, including by emailing confidential client lists from 15 November 2017 to 8 December 2017 to his personal email address; by systematically sabotaging client lists by changing phone numbers; removing sales agency agreements and correspondence; accepting instructions from at least 6 clients of the Devine Group whilst still an employee of Devine Group; disclosing confidential information; enticing the Second Defendant to leave employment with the Devine Group; and finally competing with the Devine Group and diverting business from the Devine Group for approximately 3 months after termination of his employment.

Sackar J found that whilst Mr Coombe's employment agreement was not located, it was probable that it was signed in similar terms to Mr Agha's. His Honour found it to be enforceable against Mr Coombe.

B. Appeal: - leave to appeal against injunction

Mr Agha and Mr Coombe sought leave to appeal. The grant of leave was not opposed by the respondents to the appeal.

Payne, White and McCallum JJA heard the appeal; with White JA delivering the main judgment. Mr Agha's grounds of appeal dealt with inferences from evidence which the first appellant argued were not available to the primary judge. One example is sufficient: Mr Agha argued that

an expert report was insufficient for Sackar J to conclude that Mr Agha had sabotaged records kept by the Devine Group. Each of the presiding judges found that there was a basis; and such appeal grounds were devoid of merit.

Two appeal grounds challenged the primary judge's finding that Mr Coombe had entered into an employment agreement providing the same terms for protection of confidential information and restraints as Mr Agha. White JA reviewed the evidence which supported the conclusion of the existence of such a document and found:

- a. the director's evidence was to the effect that Mr Coombe "would have signed an employment agreement with Concord in or around October 2013." That evidence did not travel further than Mr Devine's belief or understanding;
- b. Ms Tara Mazzei was the HR manager for the Devine Group and deposed that the Devine Group is a member of the Real Estate Employers Federation (or REEF). Ms Mazzei exhibited the form of REEF Contract available to Devine Group as at late 2012. This document was the same as, and contained the same provisions as in Mr Agha's employment agreement for the operation of the restraint. It was not evidence of the signing or agreement by Mr Coombe; and
- c. evidence of Ms Mazzei looking for and not finding Mr Coombe's signed employment in a locked filing cabinet.

No other evidence supporting the existence of a signed contract was provided. Whilst upholding Sackar J's judgment in terms of Mr Agha, White JA (with other members of the Court agreeing) allowed the appeal based upon the conclusion that express obligations of fidelity and restraints were not imposed upon Mr Coombe by any employment agreement. Other allegations in the appeal were dismissed.

Rationale of the decision

This judgment is unexceptional as regards breaches of obligations, and use of confidential information. Significantly - it is a reminder of the limitations of the use of inferences derived from evidence (particularly where the inference sought is that a document existed and imposed obligations upon a litigant). Sackar J's first-instance finding that an employment agreement existed despite it not being in evidence highlights a frequent allegation in employment law – that of the lost or missing contract of employment.

Leaving aside where there is an adoption of express terms by conduct¹ or where evidence of a personally actually signing those terms is available² evidence of a 'belief' that a document exists or existed is seldom conclusive. Unless evidence can be adduced of a form of agreement by an employee can be adduced, no such allegation should be made.

I have seen this case described as a 'precedent'³ for the proposition that when an employment agreement cannot be located, then it cannot be relied upon. Because the main point is one of evidence, this does not seem an over-arching point of principle. But it does require those seeking to prove the existence of a document, to the civil standard.

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¹ See for example Empirnall Holdings (1988) 14 NSWLR 523.

² And it was not in this case.

³ Presumably what is meant is 'authority'.