

Sterilising Talent: a Critical Assessment of Injunctions Enforcing Negative Covenants

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Abstract

The law favouring the grant of injunctions to enforce negative covenants in employment contracts is producing mischief and requires review. The author argues that in cases involving the enforcement of post-employment restraints which sterilise the capacity of employees to continue a career, plaintiff employers should be put to the test of proving damages. A number of principles support this view, not the least being that the grant of such injunctions can be punitive, and most certainly anti-competitive. Combined with a general weakening of the doctrine making restraints of trade that go further than is reasonable to protect a legitimate business interest illegal, and a readiness to recognise a 'stable workforce' as such an interest, injunctions enforcing restrictive covenants have enabled employers to restrict the career choices even of employees who have not signed such agreements.

I A Mutant Gene Passed Down from English Law

One of the most undeservedly influential cases from 19th-century England is surely *Lumley v Wagner*,¹ in which the Lord Chancellor, Lord St Leonards, made an exceptional decision to grant an injunction to enforce a promise in a personal services contract.² Like a mutant gene, that decision has evolved over time to create a monstrous distortion in contemporary Australian employment law.³ It is now the case, in 21st-century Australia, that a corporate employer may rely on a restrictive covenant in an employment contract to prevent a talented individual from taking up a position with a competitor after the termination of the employment contract, in any part of the globe, for a year (or possibly longer),

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¹ (1852) 1 De GM & G 604; 42 ER 687 ('*Lumley*').

² R P Meagher, J D Heydon and M J Leeming describe *Lumley* as the '*fons et origo* and prototype' of the enforcement by injunction of negative covenants in contracts for 'special services': see R P Meagher, J D Heydon and M J Leeming, *Meagher Gummow & Lehane's Equity: Doctrines and Remedies* (LexisNexis, 4th ed 2002) 755 [21-220]. The pedigree and status of the doctrine of *Lumley* is fully expounded in I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (Lawbook, 4th ed 1990) 561-92. Recent cases often cite *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337, 346-8 ('*Curro*'), which approved and followed *Lumley*.

³ This case also confronted critical resistance in the United States: see commentary on the rule's 'regressive effect' in Lea S VanderVelde, 'The Gendered Origins of the *Lumley* Doctrine: Binding Men's Consciences and Women's Fidelity' (1992) 101 *Yale Law Journal* 775, 776, 792-9.

without meeting the usual threshold for justifying injunctive relief in place of an order for damages.⁴

The ramifications of this state of affairs are enormous. Real people — fallible human beings who often make optimistic agreements in the absence of knowledge of future circumstances — are being held actually to perform an agreement not to compete, and not simply to pay for the damage that their ill-advised and now broken contract has caused another. In the general commercial contract field, we are accustomed to rational economic arguments, asserting that contracts are tools for allocating and pricing the risks of bargaining in an uncertain universe.⁵ Hence, the appropriate, economically justifiable remedy is usually payment of damages, to shift the real cost of the breach to the person who has agreed to take responsibility for that risk. Employment contract law, however, has become infected with a harsh, pharisaical morality. The language in many decisions awarding injunctions echoes a punitive sentiment: ‘you made your bed — now lie in it’. This is often expressed as ‘the defendant is the author of his or her own misfortune’.⁶

Some judgments express this as the inevitable consequence of the defendant’s own contract, as if the court now has no power but to grant the injunction. See Lord Cairns’ statement in *Doherty v Allman*, decided in 1878, but still very much alive in Australian law:

My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a court of equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such a case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not a question of the balance of convenience or inconvenience, or of the amount of damage or injury — it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves.⁷

As morally appealing as this may sound to the righteous, it is a sentiment that ‘does not accord with equitable principle’.⁸ According to Dr Spry, all equitable

⁴ See *HRX Holdings Pty Ltd v Pearson* [2012] FCA 161 (1 March 2012), where an injunction was granted prohibiting a recruitment specialist from taking up employment in Australia or New Zealand until the expiry of a two-year restraint. See also *Seven Network (Operations) Limited v Warburton (No 2)* [2011] NSWSC 386 (12 May 2011), where a television station executive was restrained for eight months. In *Miles v Genesys Wealth Advisers Ltd* [2009] NSWCA 25 (24 February 2009) a restraint of 30 months was upheld, although this case arguably involved protection of the purchase of business goodwill, and not only breach of an employment contract.

⁵ See generally Stephen Waddams, ‘The Price of Excessive Damages Awards’ (2005) 27 *Sydney Law Review* 543.

⁶ See *Bulldogs Rugby League Club Ltd v Williams* [2008] NSWSC 822 (8 August 2008) [66]; *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995 (25 September 2006) [49].

⁷ (1878) 3 App Cas 709, 719–20, cited by Austin J in *Bulldogs Rugby League Club Ltd v Williams & Ors* [2008] NSWSC 822 (8 August 2008) [47].

⁸ Ian C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (Law Book Company, 4th ed, 1990) 573.

remedies are discretionary, and similar discretionary factors are to be taken into account in cases involving negative covenants as in other cases. The *Lumley* doctrine does, after all, wield the potential to corrupt the orthodox principle to which it is an exception: that equity ought not to order specific performance of a contract for personal services.⁹ This principle is broken only in the rarest of circumstances.¹⁰ It is a principle that protects individuals from slavery, and the community from impediments to enjoying the considerable benefits of a free and open labour market.¹¹ Despite these concerns, however, a line of authority has begun to cement the exception as a new rule.¹²

Many readers, particularly those experienced in advising employers and employees on restrictive covenants in employment contracts, will be thinking: ‘So what?’ Applications for injunctions to enforce restrictive covenants have become routine business for employment law practitioners. It is current orthodoxy that so long as the restrictive covenant in question passes a very flabby test of ‘reasonableness’ so that it is not struck out as an illegal restraint of trade, courts determining these claims will generally move directly to issuing an injunction.¹³ Few cases give any serious consideration to the question ordinarily considered in other commercial contract matters: would damages be so inadequate as to justify exceptional injunctive relief?¹⁴ Frequent reiteration of the same authorities has all but obliterated dissenting views.¹⁵ The mutation has become the norm and is being replicated in advice to litigation-shy clients: if you have signed a contract containing an oppressive restraint clause, you had best observe the restrictions, no matter the hardship, lest your misery be compounded by legal fees in unsuccessfully defending a claim.

Emboldened by plaintiff employers’ successes in the decided cases, employer lawyers are drafting increasingly onerous restraints for inclusion in

⁹ Spry, above n 2, 585; Meagher, Heydon and Leeming, above n 2, 714 [20-055]. See also J W Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia* (LexisNexis, 5th ed, 2007) 949 [40-08], citing Mason J in *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 CLR 552, 573, for the view that Lord Cairns statement in *Doherty* is ‘not accurate’.

¹⁰ One such exception was *Hill v C A Parsons & Co Ltd* [1972] Ch 305, where the court was prepared to grant an order that an employment contract of a long serving engineer, close to retirement, should remain on foot despite the employer’s attempt to dismiss him without his proper notice period, but only for a period long enough to entitle him to claim the benefits of a pension scheme, and in circumstances where he was not required to serve out the term.

¹¹ The danger of extending the *Lumley* doctrine was recognised early on in *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416 at 428, cited in *Atlas Steels (Australia) Pty Ltd v Atlas Steels Ltd* (1948) 49 SR(NSW) 157.

¹² See especially *Curro* (1993) 30 NSWLR 337.

¹³ The doctrine making illegal certain restraints of trade is discussed briefly below.

¹⁴ *BearingPoint Australia Pty Ltd v Robert Hillard* [2008] VSC 115 (18 April 2008) was an exception. In that case, the existence of a liquidated damages clause allowed Habersberger J to find that the employer should be left to its remedy in damages, given that the quantum of this relief had already been agreed in the contract: at [151]. The existence of a liquidated damages clause did not however dissuade Brereton J from granting an injunction for six months in *Tullett Prebon (Australia) Pty Ltd v Purcell* [2008] NSWSC 852, [102].

¹⁵ *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995 (25 September 2006) is frequently cited as a case justifying the grant of injunctions in these instances. For a case which holds the line against injunctions in such cases, see *Tradition Australia Pty Ltd v Deane Gunson* [2006] NSWSC 298 (13 April 2006) (Barrett J).

service contracts, knowing their power to operate ‘in terrorem’.¹⁶ It is not only the most senior executives who are subject to these restraints. By the power of the word-processed precedent document, restraints that were once considered appropriate only to preserve the value of goodwill purchased from a business owner are now appearing in contracts for moderately-paid salary earners.¹⁷

This article argues that it is time for a serious reconsideration of the line of authority that has brought Australian employment contract law to this pass. Notwithstanding the view of the learned authors of *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies*, that it is now ‘idle to dispute its merits, since it is firmly entrenched’,¹⁸ this article argues that the decision in *Lumley* is not a sound basis for contemporary developments in the enforcement of restrictive covenants in employment contracts.¹⁹ The argument mounted here is based on a number of propositions, each of which will be expounded more comprehensively in the succeeding parts of this article.

First, *Lumley* is weak authority upon which to have built this inapposite legal development, because the facts and circumstances of the case were peculiar. The case concerned an obligation not to compete during an ongoing contract of short duration. It does not provide a firm basis for extending the principle to apply to competition after the proper termination of an employment contract.

Second, the principle has come to be applied in ways which produce irrational and anti-competitive outcomes, so the general public interest would be served by applying a more stringent requirement that an employer must demonstrate that damages would be inadequate before grant of an injunction. The approach adopted in the jurisdiction of New York ought to be applied in Australian cases.²⁰ Indeed, the approach adopted generally in commercial contract disputes ought to apply also in post-employment restraint clauses. The fact that employment cases involve the lives and livelihoods of citizens, and can affect the wellbeing of their dependants also, is more reason to favour a remedy that preserves individual liberty.

Third, the principle as currently applied is unnecessarily harsh to individual citizens, and is arguably being applied in a punitive way. We are regularly reminded, in the commercial law field, that contract law is based on voluntarism,

¹⁶ Andrew Stewart, ‘Confidentiality and the Employment Relationship’ (1988) 1 *Australian Journal of Labour Law* 1, 15.

¹⁷ See, eg. *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995 (25 September 2006); *Otis Elevators Co Pty Ltd v Nolan* [2007] NSWSC 593 (24 May 2007); *Ecolab Pty Ltd v Garland* [2011] NSWSC 1095 (14 September 2011) (*‘Ecolab’*) (marketing manager on a salary of \$94 220). In *Ecolab*, the injunction was ultimately refused, but only because the employer seeking it had made the employee redundant.

¹⁸ Meagher, Heydon and Leeming, above n 2, 756.

¹⁹ The learned authors, Carter, Peden and Tolhurst agree that *Lumley* ‘sits uneasily with equitable principles governing the issue of injunctions’: Carter, Peden and Tolhurst, above n 9, 952 [40-08].

²⁰ For general discussion of the approach taken to these matters under New York law, see Thomas M Hogan ‘Uncertainty in the Employment Context: Which Types of Restrictive Covenants are Enforceable?’ (2006) 80 *St John’s Law Review* 429.

and contractual remedies are not punitive.²¹ To the extent that an injunction is capable of levying a cost upon the defendant which is far greater than a reasonable estimate of the loss to the plaintiff, injunctions are appropriately characterised as penalties and ought to be impermissible.

Finally, the issuing of injunctions, rather than awards of damages, potentially affects the interests of third persons who were never parties to the original bargains. The doctrine of privity of contract, which protects bystanders from the burdens of the contracts of others, can be compromised by the ill-advised grant of certain kinds of injunctions, particularly those directed against the solicitation of the former employer's clients and staff. Authorities that have interpreted 'solicitation' very broadly have contributed to this problem.²²

To be fair, the *Lumley* doctrine alone is not responsible for the current state of Australian (and particularly New South Welsh)²³ law on the enforcement of post-employment restrictive covenants. The argument concludes with some reflections on the unfortunate confluence of the *Lumley* doctrine with a corresponding weakening of the ancient common law doctrine making restraints of trade that are contrary to the public interest in free and competitive markets illegal.²⁴ In combination, these developments have produced a state of affairs that sees the legal system complicit in the sterilisation of the talent of individuals, and the stifling of competition in the market for services.²⁵

II Lumley v Wagner

A Case Distinguishable on its Facts

Lumley concerned a contract struck between Benjamin Lumley, the lessee of Her Majesty's Theatre in London, and Joseph Bacher, acting as a theatrical agent for

²¹ See *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 397 [28] (Spigelman CJ); 352 [266], 361–5 [294]–[299] (Heydon JA).

²² See *Barrett v Ecco Personnel Pty Ltd* [1998] NSWCA 30 (24 November 1998) [20], [35], upholding *Ecco Personnel Pty Ltd v Barrett* [1996] NSWSC 475 (6 October 1996) (Young J), and other cases following it. For some examples, see *Ecolab Pty Ltd v Klen International Pty Ltd* [2007] FCA 1376 (17 August 2007) [54]; *Wright v Ryan* [2005] NSWCA 368 (27 October 2005); *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd* (2004) 207 ALR 136; *Michael Wilson and Partners Ltd v Nicholls* [2008] NSWSC 501 (23 May 2008).

²³ The law on restraints of trade in New South Wales has been much affected by the *Restraints of Trade Act 1976* (NSW). Consideration of the implications of that legislation is beyond the scope of this article.

²⁴ In *Herbert Morris Ltd v Saxelby* [1916] AC 688, 699, Lord Atkinson stated that: 'The general public suffer with [the person restrained], for it is in the public interest that a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and all of those who desire to employ him.' See Harlan M Blake 'Employee Agreements Not to Compete' (1960) 73 *Harvard Law Review* 625 for an historical review of the doctrine making illegal restraints of trade. The purity of the doctrine has been much eroded in recent times, especially in New South Wales, where it is becoming increasingly easy to establish a sufficiently 'legitimate interest' to justify enforcement of a post-employment restrictive covenant.

²⁵ See William van Caenegem 'The Mobility of Creative Individuals, Trade Secrets and Restraints of Trade' (2007) 14 *Murdoch University Electronic Law Journal* 265 <https://elaw.murdoch.edu.au/archives/issues/2007/2/Elaw_mobility_creative_individual.pdf>.

Albert Wagner and his daughter Johanna, a young opera singer. This contract provided that Johanna should sing at Her Majesty's on a number of occasions over a period of three months for a certain fee. After the initial contract was made, it was alleged that Lumley and Bacher had agreed an additional clause, enjoining Miss Wagner from singing in any other venues during the three-month term of her contract. During this term, however, Bacher entered into another contract with Frederick Gye, the lessee of Covent Garden Theatre, committing Johanna to an exclusive engagement there. Lumley sought, and the Lord Chancellor granted, an injunction enjoining Johanna from singing at Covent Garden for the remainder of the three-month term of her engagement.

Confined to its own circumstances, *Lumley* is a tolerable decision, and it is no part of the argument here that the decision itself should be overturned. Lumley had no doubt incurred some expense and foregone the engagement of alternative performers to promote the Wagner program of concerts. He could not force her to sing — to this day there is no scope for an order of specific performance of the obligation to serve in a contract for personal services²⁶ — but he could ensure that she could not draw audiences away from his venue by singing for a competitor during the term of her engagement with him. It was a short engagement. Resting her voice for a matter of weeks was unlikely to impair Miss Wagner's operatic career. Any financial penalty consequent upon the injunction was likely to be felt more acutely by the agent who had mismanaged her affairs by double-booking her. The principle ought not to be applied in cases with very different facts, such as the cases (dealt with below) concerning claims for very long periods of restraint which seriously interfere with the liberty of working people to pursue their careers.

Further Reasons for Distinguishing Lumley

Another reason for exercising caution in applying the *Lumley* doctrine to contemporary post-employment restraint cases is that the Lord Chancellor's decision to grant an injunction instead of damages was based on three assumptions that are questionable in contemporary Australian law.

On the merits of an injunction relative to the alternative of an award of damages, he opined that the jurisdiction of chancery:

operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give.²⁷

He based this observation on the somewhat eccentric proposition that English contract law was based (even in 1852) on principles of 'good faith which exist in [England] to a much greater degree than any other [European country]'.²⁸ One is

²⁶ See *Tradition Australia Pty Ltd v Gunson* [2006] NSWSC 298 (13 April 2006) [12] (Barrett J), following *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448, 459 and *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 428.

²⁷ (1852) 1 De GM&G 618, 619; 42 ER 687, 693.

²⁸ *Ibid.*

tempted to surmise that this assertion owed more to English patriotism in the presence of German defendants, than to any accurate assessment of the relative status of obligations of good faith in the common law and civilian legal systems. While many Australian courts remain reluctant to give effect to any general obligation of good faith in employment contracts, it seems harsh to hold ex-employees to a good faith standard.²⁹

The second of his assumptions was that the grant of an injunction might ‘prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre’.³⁰ This rationale for granting an injunction is no longer relevant. Juries do not assess damages in such cases, and judges charged with this responsibility must base damages awards on evidence of actual or probable loss.

The third assumption — that the employee is able to ameliorate any inconvenience caused by the injunction by completing the original contract — is apparent in the Lord Chancellor’s statement that ‘the injunction may also, as I have said, tend to the fulfilment of her engagement; though in continuing the injunction, I disclaim doing indirectly what I cannot do directly’.³¹ The Lord Chancellor recognised that it was completely contrary to principle to issue an injunction that would indirectly require Miss Wagner to sing at Her Majesty’s. Then, and now, the common law eschews the enslavement of labour.³² Being left without gainful occupation for the remainder of the term of her contract may, however, have created its own impetus for Miss Wagner to honour her engagement. She had this option, because her initial contract with Lumley had not been terminated. This is not the case in many of the restrictive covenant cases decided in Australia today. Injunctions are often granted to keep an ex-employee out of a fresh engagement, when the initial employment contract has been terminated and will not be reinstated. In one case, injunctions were sought and obtained against two employees, when the employer initiated the termination of the employment contracts.³³

Lumley Applied

Given the eccentricity of the case, it is surprising that *Lumley* has remained so influential in contemporary case law. This is perhaps because it received strong endorsement from a unanimous bench of the New South Wales Supreme Court of Appeal in *Curro*,³⁴ a case concerning a high profile television presenter who was contracted to provide ‘special services’ for a ‘relatively short period’.³⁵ In this

²⁹ See, eg, *Heptonstall v Gaskin and Ors (No 2)* [2005] NSWSC 30 (9 February 2005) [22]; *McDonald v Parnell Laboratories (Aust)* [2007] FCA 1903 (7 December 2007) [96]–[91]; *Van Efferen v CMA Corporation Ltd* [2009] FCA 597 (4 June 2009) [79]–[86].

³⁰ *Lumley* (1852) 1 De GM&G 618, 619; 42 ER 687, 693

³¹ *Ibid* 620.

³² Spry, above n 2, 570.

³³ *IceTV v Ross* [2007] NSWSC 635 (3 July 2007). This case was followed by a series of appeals, culminating in *Ross v IceTV* [2010] NSWCA 272 (22 October 2010).

³⁴ (1993) 30 NSWLR 337, 346–8 (Meagher, Handley and Cripps JJA).

³⁵ *Ibid* 348.

case, the court asserted that an injunction would be granted to enforce a negative covenant, where the ‘balance of discretionary factors is in the plaintiff’s favour’.³⁶ Those discretionary factors include whether the grant of an injunction will cause hardship (a matter discussed below). These features of *Curro* — that the services must be ‘special’, the injunction is for a short period, and there must still be an assessment of discretionary factors — appear to have been weakened in a number of subsequent cases.

One of those cases was *Bulldogs Rugby League Club Ltd v Williams*,³⁷ in which a well-known rugby league player (Sonny Bill Williams) was ordered not to play rugby union in France for the remainder of a five year contract with Canterbury-Bankstown Bulldogs Rugby League Club in Sydney. Five years is hardly a ‘relatively short term’, especially in the context of a career in a contact sport requiring considerable youth and vigour. Like *Lumley*, the case involved special services under a contract still within its term, but the injunction was to run for an unconscionably long time — long enough to stifle the football career of the player. It was clear at the time this case was heard that the motivation of the club in bringing an action against him was purely vengeful.³⁸ Stopping him from playing in France was not going to increase the football crowds in Bankstown. The football fields of Toulon are by no means as proximate to Sydney stadiums, as Her Majesty’s was to Covent Garden in 1852.

It is not only footballers who have been relegated to the benches for long periods by an application of the *Lumley* doctrine. Other cases include those in which talented executives, financial advisors and sales people have been prevented from changing jobs. In *Seven Network (Operations) Limited v Warburton (No 2)*,³⁹ Pembroke J granted an injunction lasting for eight months to delay Mr Warburton (who had been second in command at Seven, and coveted a top position) from taking up the role of chief executive officer at Network Ten. It was clear that Mr Warburton would lose this case at paragraph [3] of the judgment, as soon as Pembroke J referred to ‘one of the abiding principles of a civilised system of law such as ours’, that ‘contracts are meant to be observed’. Pembroke J proceeded to apply *Curro*,⁴⁰ but did not make any detailed assessment of the usual discretionary factors for grant of equitable relief (although he did consider the doctrine making illegal restraints of trade that go further than is necessary to protect the employer’s legitimate business interest, in deciding to grant the injunction for a shorter term than requested.)⁴¹

³⁶ *Ibid.*

³⁷ [2008] NSWSC 822 (8 August 2008).

³⁸ Postings on a (now defunct) web page dedicated to Sonny Bill Williams’ news and views in November 2008 revealed widespread antagonism towards him, and threats of a lifetime black ban on playing NRL football: <<http://www.sonnybillwilliams.info/2008/11/>>. For Sonny Bill’s side of the story, see Brad Walter ‘French Leave: How Sonny Bill Found Freedom in Toulon’, *Sydney Morning Herald Weekend Edition*, 6–7 June 2009, 3.

³⁹ [2011] NSWSC 386 (12 May 2011) [93].

⁴⁰ (1993) 30 NSWLR 337.

⁴¹ *Seven Network (Operations) Ltd v Warburton (No 2)* [2011] NSWSC 386 (12 May 2011) [94].

In *HRX Holdings Pty Ltd v Pearson*,⁴² Buchanan J restrained a recruitment specialist from changing jobs for a period of 20 months. It appears that Mr Pearson was a talented recruiter, with an extensive network of valuable contacts, before he decided to accept a management position with HRX. He had worked with Morgan & Banks from 1995 until 2005 when he joined Ms Leslie, who had set up HRX. In September 2011, Mr Pearson decided that he wanted to return to a large organisation and accepted a post with Talent2, a company associated with Mr Pearson's former colleagues at Morgan & Banks. The report of the case does not document details of the 'dissatisfaction with management practices' that prompted Mr Pearson to decide to go back to a large organisation after spending six years in a boutique firm, but one can imagine that tensions might easily arise in what was essentially a two-person firm. Buchanan J was prepared to enforce Mr Pearson's two year non-compete clause by issuing an injunction. The justification for this decision appears to be that Mr Pearson was a uniquely talented person (a person of 'quirky brilliance'⁴³) who had become the face of HRX, and was the person with whom all clients had dealt.

Once Buchanan J decided that the restraint protected a legitimate interest, he moved directly to ordering the injunction without reflecting on any of the usual discretionary factors. It appears to have been enough that the terms of the contract provided that Mr Pearson would be paid his usual HRX remuneration during all but three months of the restraint period. What that sum might be, and how it compared to the remuneration Mr Pearson could earn if he were permitted to take up a post with Talent2 is not recorded in the judgment.

The fact that an employer is willing to compensate an employee during a restraint period has been held to be insufficient to legitimise a restraint that goes further than is reasonable to protect a legitimate interest of the employer. This was affirmed by Brereton J in *Tullett Prebon (Australia) Pty Ltd v Purcell*.⁴⁴ 'Compensation for remaining out of the market, however generous, does not create a legitimate protectable interest where none otherwise exists.' Buchanan J had already determined, however, that the restraint in HRX was legitimate, because Mr Pearson's unique talents had made him the 'human face' of HRX.⁴⁵ This represents a considerable extension of the concept of a legitimate interest. Once upon a time, an employee's own personal charisma and talents would not qualify as the kind of property-like interest over which a former employer could legitimately claim ownership⁴⁶ — but that takes us into an argument best left until later in this article.

III Pro-Competition Reasons for Confining the *Lumley* Doctrine

It is by no means clear why the usual limits on equitable intervention should have been eroded in this field. These bargains are still merely contracts. The appropriate

⁴² [2012] FCA 161(1 March 2012).

⁴³ *Ibid* [53].

⁴⁴ [2008] NSWSC 852 (21 August 2008) [87].

⁴⁵ *HRX Holdings Pty Ltd v Pearson* [2012] FCA 161 (1 March 2012) [58].

⁴⁶ See J D Heydon, *The Restraint of Trade Doctrine* (LexisNexis, 3rd ed 2008) 117–21.

remedy for breach of a contract is damages.⁴⁷ The difficulty of assessing damages with complete accuracy does not prevent courts from doing their best to arrive at a figure in other contexts, so they should not renege on their responsibilities in this field.⁴⁸ They should certainly not award an injunction simply because a plaintiff is unable to demonstrate any actual damage.

This is especially so since the common law has been entirely resistant to enforcing contracts of service for the benefit of workers. It took the introduction of statutory rights to provide ordinary workers with opportunities for reinstatement after unfair dismissal,⁴⁹ and in practice, decision-makers enforcing those statutory regimes have shown a considerable resistance to finding that employees should be reinstated.⁵⁰ Compensation is the more usual remedy.

One of the most cogent reasons for preferring the usual principle that equitable relief should be exceptional in breach of contract cases (and particularly in cases involving personal services) is that an injunction has the potential to produce inefficient outcomes.⁵¹

By issuing an injunction, a court hands one party to the dispute a property-like right.⁵² The winning party can subsequently negotiate with the loser to surrender that right for a price. While the injunction remains, the winner cannot be made to negotiate a fair and reasonable price. The court has handed the winner the right to hold out for so long as the injunction lasts. This could result in an entirely inefficient result: the party with the benefit of the injunction may gain very little from a great loss suffered by the enjoined party.

Lord Westbury LC was wise to this as long ago as 1863:

I hold it ... to be the duty of the court in such a case as the present not, by granting a mandatory injunction, to deliver over the defendants to the plaintiff bound hand and foot, in order to be made subject to an extortionate demand that he may by possibility make, but to substitute for such mandatory injunction an inquiry before itself, in order to ascertain the measure of damage that has been actually sustained.⁵³

⁴⁷ In *Birdanco Nominees Pty Ltd v Money* [2012] VSCA 64 (4 April 2012), the Victorian Court of Appeal did in fact award damages for breach of a restrictive covenant.

⁴⁸ See Carter, Peden and Tolhurst above n 19 [35-17].

⁴⁹ Reinstatement rights for individuals claiming protection from unfair dismissal were introduced into federal industrial relations law in the *Industrial Relations Reform Act 1993* (Cth). Now see the *Fair Work Act 2009* (Cth) pt 3-2.

⁵⁰ For statistics showing that of 2771 arbitrated cases finding that an applicant had been dismissed harshly, unjustly or unreasonably, only 260 resulted in reinstatement of the applicant, see Australian Industrial Relations Commission and Australian Industrial Registry, *Annual Report of the President of the Australian Industrial Relations Commission and Annual Report of the Australian Industrial Registry* (1 July 2005–30 June 2006) 14–15. The resistance to specific enforcement of contracts for personal services remains strong, even when statutory provisions mandate consideration of reinstatement as the primary remedy.

⁵¹ See *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 15.

⁵² For a thorough analysis of this argument see Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089.

⁵³ *Isonberg v East India House Estate Co Ltd* (1863) 3 De G J & S 263, 273; 46 ER 637, 641.

Parties will not always act in an economically rational manner, so by granting an injunction the court takes the risk of sanctioning an economically inefficient and punitive result. Whether one considers that to be a shortcoming in the administration of justice depends on one's perspective on the purpose of commercial law. If it is principally concerned to support the economically rational arrangements of commercial parties, an injunction ought not to be granted in such a case, and the court should exercise its power to determine damages on a principled basis. See, for example, the reasoning in *Redlands Bricks Ltd v Morris*,⁵⁴ where the House of Lords held that a mandatory injunction requiring a defendant to undertake expenditure ought not to be granted in circumstances where the cost to the defendant would be out of all proportion to the benefit to be enjoyed by the plaintiff. The same reasoning makes sense in a negative covenant case. If the defendant will suffer greatly, and the plaintiff gain little by the grant of the injunction, there is no economic justification for granting an injunction.

IV Punishment

Unfortunately, this sound common sense has not been followed in recent negative injunction cases. For example, in *Otis Elevator Co Pty Ltd v Nolan*, Brereton J said:

I am of the view that the mere fact that the injury to the plaintiff is slight or non-existent is insufficient to justify declining an injunction on discretionary grounds; so also is the mere fact that enforcement of the injunction would occasion considerable hardship to the defendant.⁵⁵

Mr Nolan was a brand-new recruit to Otis. After the initial orientation seminar during his first couple of days of work, he experienced 'cold feet' and decided that he would rather take up another job offer he had received instead. Otis sought to restrain him from taking up the other position for six months. The only thing that saved Mr Nolan from six months of unemployment following his abortive start at Otis was his ability to prove that he had gained absolutely no valuable confidential information about Otis during the orientation seminar. His other arguments, based on hardship, met deaf judicial ears. Mr Nolan was held to be the author of his own misfortune. The same was said (by the same judge) of young Mr Birt in *John Fairfax Publications Pty Ltd v Birt*.⁵⁶

This punitive sentiment does not appear to depend on any finding that when damages are large and impossible to assess it is unjust to allow the defendant to escape sanction. Even in a case where the parties had themselves expressly provided a liquidated damages clause to be applied in circumstances where the defendant employee had failed to serve the full term of a contract, Brereton J granted an injunction, on the following reasoning:

While the fact that there is a 'liquidated damages' provision arguably removes one factor which would otherwise tell in favour of the inadequacy of damages — namely, difficulty of calculation — it does not make it any more just that

⁵⁴ [1970] AC 652.

⁵⁵ [2007] NSWSC 593 (24 May 2007) [30].

⁵⁶ [2006] NSWSC 995 (25 September 2006) [49].

Mr Purcell should be able to escape from his contractual obligations at the price of paying damages. Equity holds parties to their agreements, rather than allowing them to escape from them at the price of damages.⁵⁷

This statement appears to be at odds with the more ancient maxim that equity follows the law. It suggests that Australian contract law has become a tool for enforcing morals, not for oiling the wheels of commerce. It certainly does not accord with the view expressed by the House of Lords in *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*:

It is true that the defendant has, by his own breach of contract, put himself in such an unfortunate position. But the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance.⁵⁸

The risk that a person breaching an injunction may be prosecuted for contempt of court raises the prospect that the ultimate penalty for what was nothing more than breach of a contract may escalate to indefinite incarceration: a strange result indeed in a liberal democracy in which courts exercising civil jurisdiction have been at pains to assert that neither contract law nor equity allows punitive remedies.⁵⁹

A defendant whose genuine claims of hardship have been ignored may well be tempted to breach an injunction. A law which orders a person to suffer on pain of incarceration for contempt of court, even when the plaintiff bringing the suit will gain little or nothing from the defendant's misery, is frankly punitive. The 'sanctity of contract' rhetoric has injected a high moral tone into these cases, as if the court should play a role in punishing the wicked employee who has dared to walk away from an employer in pursuit of more attractive remuneration. If courts are to enforce contracts for moral reasons, they had better be sure that the morality they enforce conforms to the expectations of the community.

Is it in fact the case that the ordinary reasonable Australian believes that it is a fair thing to be denied a liberty to change one's mind when an attractive lifetime opportunity comes one's way? Is it truly standard Australian morality that people should *not* be allowed to buy their way out of an earlier obligation for a fair price, in order to free themselves for a new opportunity? In this author's view, commerce has its own bloodless, economically-based legal remedy — damages. There is no reason to lend commerce the coercive powers of the old chancery jurisdiction to allow commercial arrangements to override the individual human right to pursue one's own life choices. The machinery of the state's legal system ought not to be called into service to constrain our natural physical liberty to lead our own lives, just because we made a private agreement with another person at an earlier time. There are no debtors' prisons anymore.

The 'sanctity of contract' arguments should be resisted with great force. They represent an insidious attempt by those who have the power to make private

⁵⁷ *Tullett Prebon (Australia) Pty Ltd v Purcell* [2008] NSWSC 852 (21 August 2008) [102].

⁵⁸ [1998] AC 1, 15 (Lord Hoffman).

⁵⁹ See the extensive treatise on this subject in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, particularly at 363 [299]. See also *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 12 (Lord Hoffman).

contracts favouring their own economic interests to effectively enslave the labour of those who need to work for a living. There is very little ‘sanctity’ in contracts that are regularly offered on a ‘take it or leave it’ basis, and are rarely negotiated, let alone properly understood by the parties themselves.

V Impact on Third Parties

The final reason why the enforcement of restrictive covenants by injunction is to be avoided is that injunctions potentially harm third parties who were strangers to the original contract. Many restrictive covenants restrain departing employees from soliciting business from the clients for whom they performed services while in the employ of the original employer. Standard clauses now also restrain employees from inviting former colleagues to go with them to the new establishment. The meaning of ‘solicitation’ now includes occasions when the client or former staffer makes the first overture to the departing employee,⁶⁰ so these clauses have the potential to restrict the liberties of people who never signed up for such restrictions. Clients who have been very happy with the services of a particular financial adviser, for example, can have the benefit of that advice withdrawn for as long as two or three years. One rationale in *Miles v Genesys Wealth Advisers Ltd*⁶¹ for granting a 30-month injunction restraining the defendant from servicing former clients was the ‘close and productive relationships’ he had developed with clients. Surely those close relationships are also a reason why clients should not be thrust back out into the market to find a new advisor, if the clients want to maintain those relationships. There is no sacred contract to which the clients are a party that binds the clients’ consciences to forego the services of their preferred provider.

See too *IceTV v Duncan Ross*,⁶² in which two innovators (Ross and Vogel) in the media technology field lost their positions with IceTV when it struck financial difficulties as a consequence of other legal proceedings. They had been in negotiations with Mobilesoft on behalf of IceTV when their employment was terminated. Mobilesoft had never become an IceTV client, and yet IceTV was able to obtain an injunction preventing Ross and Vogel from doing any consulting work for Mobilesoft following the termination of their employment by IceTV, on the basis that Mobilesoft had been a ‘potential’ client of IceTV. There is no discussion in the case about the impact of the decision on Mobilesoft, and whether it was at all legitimate to limit Mobilesoft’s options for obtaining services in the marketplace.

Likewise, pity the poor junior employee whose working life has been a joy because he or she has been able to work with and learn from a ‘quirkily brilliant’

⁶⁰ See *Barrett v Ecco Personnel Pty Ltd* [1998] NSWCA 30 (24 November 1998) [20], [35], upholding *Ecco Personnel Pty Ltd v Barrett* [1996] NSWSC 475 (6 October 1996) and other cases following it. For some examples, see *Ecolab Pty Ltd v Klen International Pty Ltd* [2007] FCA 1376 (17 August 2007) [54]; *Wright v Ryan* [2005] NSWCA 368 (27 October 2005); *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd* (2004) 207 ALR 136; *Michael Wilson and Partners Ltd v Nicholls* [2008] NSWSC 501 (23 May 2008).

⁶¹ [2009] NSWCA 25 (24 February 2009) [38].

⁶² [2007] NSWSC 635 (3 July 2007). For background to the case, see Joellen Riley ‘Innovation Put on Ice? How Overly Jealous Intellectual Property Protection Discourages Creativity and Productivity’ (2008) 20(7) *Australian Intellectual Property Law Bulletin* 102.

personality. If the personality leaves to go to another business, why should the junior not be entitled to accept or seek an invitation to follow? So long as the junior employee observes the termination provisions in his or her own contract, there is no reason — in morality, nor in economic rationality — to prevent the junior from exercising complete freedom in his or her own choices of employment. And yet this has been the outcome in some cases. In *Hartleys Ltd v Martin*,⁶³ a personal assistant of two brokers was prevented from taking up employment with the brokers when they left to start a new firm. The personal assistant, Ms Briggs, was not a party to the proceedings in which Hartleys obtained an injunction. There is no record in the judgment of the case that she was even asked to give evidence. Yet the result in the case, ordering the brokers that they must not employ her for three months, was made without any consideration of what impact it would have on her. She had already resigned from Hartleys when the order was made. History does not record what she did during that three months. Was she effectively forced to return to Hartley's? Was she kept out of employment entirely during that period? This case provides a very clear illustration of the potential for such injunctions to punish the innocent.

Ironically, there is authority (albeit English, and several decades old) holding that a contract made directly between two rival traders agreeing not to poach each other's staff will be struck down as an illegal restraint of trade.⁶⁴ Such an anti-competitive agreement was not even enforced by an award of damages, let alone an injunction.

VI Another Culprit: Slackening of the Doctrine Making Restraints of Trade Illegal

Most of the cases dealt with above (with the exception of the Sonny Bill Williams case) concerned applications for injunctions to enforce restrictive covenants in employment contracts. This kind of covenant is itself a peculiar kind of negative covenant, because it is generally subject to scrutiny by a common law doctrine, making illegal (and therefore entirely unenforceable) any restraint of trade that goes further than is reasonable to protect a legitimate interest of the covenantee (in the cases discussed here, generally the original employer).⁶⁵

Pure non-compete clauses are unenforceable under this doctrine, because they do nothing more than protect the original employer from competition from a former employee, and this is the very thing that the doctrine forbids.⁶⁶ However if the employer can assert some pre-existing interest that the employer is entitled to protect, and the restraint goes no further than is reasonable to protect that interest, the restraint is not illegal under this doctrine. In New South Wales, restraints that

⁶³ [2002] VSC 301 (7 August 2002).

⁶⁴ See *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch 108.

⁶⁵ See *Herbert Morris Ltd v Saxelby* [1916] AC 688, 699; Harlan M Blake, 'Employee Agreements Not to Compete' (1960) 73 *Harvard Law Review* 625.

⁶⁶ See *Marlov Pty Ltd v Murat Col* [2009] NSWSC 501 (5 June 2009).

might otherwise be held to be illegal can be saved to the extent that they can be made reasonable by reading them down.⁶⁷

Interests that are legitimately protected by a restraint include trade secrets, confidential information, and ‘customer connections’.⁶⁸ More recently, case law in England and Australia has also been willing to accept that an employer has an interest in a ‘stable workforce’ sufficient to justify a reasonable restraint against poaching staff.⁶⁹ Whereas once it was generally necessary to demonstrate the existence of a property-like interest belonging to the employer to justify a restraint, it now appears that quite ephemeral interests are sufficient. The fact that an employee has had discussions with a potential client about future work was enough to justify a restraint in *IceTV v Duncan Ross*.⁷⁰ Knowledge of merchandising strategies for laying out supermarkets was considered to be sufficiently confidential to warrant protection in *Woolworths Ltd v Olson*.⁷¹ In *Seven Network (Operations) Ltd v Warburton (No 2)*,⁷² Mr Warburton’s knowledge of the terms of sponsorship deals was enough to justify restraining him until that information was deemed to have become stale from a commercial point of view.

It certainly appears to be the case in these employment matters that an employer can define any commercially valuable information as ‘confidential information’, and any commercially useful relationship, as a ‘customer connection’. The consequence of characterising these interests in this way is that they become interests which have historically been protected in equity by breach of confidence actions. Equity has generally been prepared to issue an injunction in a case of a threatened breach of confidence, so long as the subject matter of the complaint is truly confidential information.

The trouble with the employment cases is that employers are often granted an injunction which goes further than an order restraining use of the allegedly confidential information. Injunctions are granted preventing the employee from taking up a position with a competitive firm, on the basis of the argument articulated in *Littlewoods Organisation Ltd v Harris*,⁷³ that it is easier to protect

⁶⁷ See the *Restraint of Trade Act 1976* (NSW). This legislation is well explained in *Woolworths Ltd v Olson* [2004] NSWCA 372 (6 October 2004) [41]–[47].

⁶⁸ See Heydon above n 46, 115–32.

⁶⁹ For English authorities, see *Office Angels Ltd v Rainer-Thomas* [1991] IRLR 214; *Dawney, Day & Co Ltd v De Braconier d’Alphen* [1998] ICR 1068; *TSC Europe (UK) Ltd v Massey* [1999] IRLR 22; *Alliance Paper Group plc v Prestwich* [1996] IRLR 25. These cases are discussed in Adrian Brooks, ‘The Limits of Competition: Restraints of Trade in the Context of Employment Contract’ [2001] *University of New South Wales Law Journal* 346. For Australian authorities, see *Aussie Home Loans v X Inc Services* [2005] NSWSC 285 (7 April 2005) [26] (although ultimately White J did not uphold the particular restraint in this case); *Kearney Australia Pty Ltd v Crepaldi* [2006] NSWSC 23 (10 April 2006) [58]; *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717 (18 July 2006) [55]; *Informax International Pty Ltd v Clarius Group Ltd* [2011] FCA 183 (4 March 2011) [50]–[54]. For a critical view of covenants against poaching staff, see Joellen Riley ‘No “poaching”? Why Not? A Reflection on the Legitimacy of Post-Employment Restrictive Covenants’ (2005) 19(1) *Commercial Law Quarterly* 3.

⁷⁰ [2007] NSWSC 635 (3 July 2007), affirmed in *Ross v IceTV* [2010] NSWCA 272 (22 October 2010) [93]–[107].

⁷¹ [2004] NSWCA 372 (6 October 2004) [6].

⁷² [2011] NSWSC 386 (12 May 2011) [82].

⁷³ [1977] 1 WLR 1472, 1479.

confidential information if one removes all temptation to disclose it. This argument, while it makes some common sense, becomes oppressive when it favours the former employer's desire for a guarantee against possible leakage of some marginally valuable information, over the interest of the ex-employee in pursuing their chosen profession. The former employer is granted much more than it would be entitled to claim, according to the doctrine making non-compete covenants illegal, on the basis that the employee might not honour a more limited injunction addressing only the confidential information in issue.

Other remedies are available for breach of confidence. In an appropriate case, a former employer could obtain an account of profits if confidential information were abused in circumstances giving rise to a profit for the ex-employee, or for any new employer with sufficient knowledge of the breach of confidence,⁷⁴ so refusal of a *Littlewoods*-type injunction keeping the ex-employee out of the market would not necessarily rob the former employer of any remedy if the employee did prove dishonourable.

Often the justification for allowing the more extensive injunction is that there is a clause in the contract by which the employee has expressly conceded that the employer's interest in confidential information or customer connections can only be protected by a prohibition on working for any competing firm. The sanctity of contract arguments emerges again, to justify enforcing this agreed clause. In *Seven Network Operations Ltd v Warburton (No 2)*,⁷⁵ Pembroke J said that a restrictive covenant should even be enforced in circumstances where an employee was not aware of the clause in the contract, based on the authority of *Toll (FGHCT) Pty Ltd v Alphapharm Pty Ltd*,⁷⁶ that the 'enforcement of a commercial contract does not depend on a party's knowledge of its terms'.⁷⁷ Yet such clauses potentially permit an otherwise illegal restraint of trade. According to other High Court authority (*Maggbury Pty Ltd v Hafele Australia Pty Ltd*), the doctrine making such restraints illegal operates in the face of freely-bargained commercial agreements, even between well-advised parties.⁷⁸ The restraints doctrine is not to be confused with a separate ground for vitiating such onerous agreements: unconscionable dealing. The equitable doctrine against unconscionable dealing protects weak individuals from ill-considered decisions, but the common law doctrine making certain restraints of trade illegal protects the community and the public interest at large from the anti-competitive consequences of private deals. It ensures that the support of the legal system in enforcing contracts is withdrawn from those contracts that are harmful to the public interest.⁷⁹

This principle is often forgotten in the contemporary decisions of single judges.⁸⁰ One reason for this may be that the courts are so focused on the interests

⁷⁴ See Meagher, Gummow and Leeming, above n 2, 1139–41 [41-135].

⁷⁵ [2011] NSWSC 386 (12 May 2011) [3].

⁷⁶ (2004) 219 CLR 165,177–8 [43]–[44].

⁷⁷ *Seven Network Operations v Warburton (No 2)* [2011] NSWSC 386 (12 May 2011) [3].

⁷⁸ (2001) 210 CLR 181, 203 [56], (Gleeson CJ, Gummow and Hayne JJ).

⁷⁹ See also *HRX Holdings Pty Ltd v Pearson* [2012] FCA 161 (1 March 2012) [35] for a case in which the fact that the employee had negotiated the clause was considered to be a ground for enforcing a restraint.

⁸⁰ One refreshing recent exception is the decision of Sifris J in *Wallis Nominees (Computing) Pty Ltd v Pickett* [2012] VSC 82 (14 March 2012), where he refused to enforce an unreasonable restraint.

of the corporate employer that they neglect to weigh in the balance the interests of the human citizens in these cases. An example of the kind of reasoning that leads Australian courts to quick conclusions in favour of corporate employers arose in *Informax International Pty Ltd v Clarius Group Ltd*.⁸¹ The court was considering a restraint based on the employer's supposed interest in a stable workforce. Counsel for the defendant employee canvassed an argument that cases asserting this interest constituted a dangerous line of authority, because of the potential to treat employees as chattels. Perram J dismissed this argument by drawing an analogy with an aspect of intellectual property law:

Without wishing to become embroiled in that debate unnecessarily it may be useful to observe that just as there is difference between ownership of the copyright in a book and ownership of copyright in individual words, so too there may be a real conceptual distinction between the notion that an employer might have interests in the arrangement of its staff as a whole and the notion that it has an interest in any particular employee.⁸²

With respect, this analogy is misconceived. The fact that a particular combination of words in a literary work can be protected from copying does not restrain anyone from using the individual words many millions of times over in all manner of other works. People are not like words. If the legal system concedes employers a right to preserve a stable workforce sufficient to stop departing employees from offering jobs to former colleagues, then the individual human beings in the workforce (unlike the words in the book) are subjected to a limitation on their freedom to choose their own stories. People are not property. They are not like 'apples and pears',⁸³ and they are also not like trademarks or copyrighted works. The propensity of our courts to extend by analogy the matters over which employers can claim legitimate interests is partly to blame — along with the *Lumley* doctrine — for the deformities in contemporary employment law.

VII A Further Culprit: Interlocutory Applications

It has been argued above that when operating in the field of voluntary employment agreements, equity has no business developing coercive and punitive remedies. Perhaps one reason that this development has occurred is that these cases are often decided on an urgent interlocutory basis. The easy rules for obtaining an interim injunction established by *American Cyanamid Co v Ethicon Ltd*⁸⁴ may also be to blame for the development of the law in this field. All that is required is a 'serious question to be tried',⁸⁵ and an assessment of the balance of convenience. Where defendants are unrepresented (as they often are in these proceedings), the court hears an unbalanced argument.

There is an argument for introducing more rigid requirements for assessing the balance of convenience in these cases. In defamation cases, where the policy of

⁸¹ [2011] FCA 183 (4 March 2011).

⁸² *Ibid* [50].

⁸³ *Hanover Insurance Brokers Ltd v Shapiro* [1994] IRLR 82, [16].

⁸⁴ [1975] AC 396.

⁸⁵ *Ibid* 407.

the law is to guard freedom of speech jealously, courts have had no difficulty in finding that the balance of convenience almost invariably favours refusal of an injunction restraining the allegedly defamatory imputation.⁸⁶ Perhaps it is time to identify a similar presumption that applies in cases where the enforcement of a negative covenant would prevent an individual from pursuing a chosen career. At least our courts might adopt the approach taken by courts in New York faced with similar questions:

A party seeking the drastic remedy that a preliminary injunction confers must establish a clear legal right to that relief under the law and upon undisputed facts set forth in the record ... To prevail on a motion for preliminary injunction relief, the movant must clearly demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favours the movant's position.⁸⁷

Presently, a legal system that allows such an injunction to be granted even without proof of serious harm to the claimant,⁸⁸ and in the face of hardship to a defendant, allows an intolerable incursion into citizens' liberties. It is not enough to dismiss such an incursion on the ground that those citizens bound themselves by contract. Contract law provides its own remedy of damages. There is no good reason for equity to do anything but 'follow the law' in such cases.

VIII Conclusion

The arguments mounted in this article are likely to confront robust criticism from the practising lawyers who advise in this field of law. These cases do involve difficult contests, between the interests of employers who want to preserve the value of their investments against competition from defectors, and the interests of those defectors who, often with very good reason, seek release from a commitment required of them at the time of their engagement. It is easy for those committed to furthering the employers' interests to argue in favour of 'sanctity of contract', and to assert that the employees who are subject to these restraints earn large sums of money and so are adequately compensated for the restrictions they have voluntarily accepted. This does not address the obvious question: if the first employer's job is so good, why does the employee wish to leave? The court in *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* spoke wisely in saying that all employers have it within their own power to keep their staff — by 'paying good wages and making employment attractive'.⁸⁹

In any event, the argument here is not that employers should have no remedy at all for breach of a covenant not to compete, so long as the covenant goes no further than is reasonable to protect a legitimate business interest. The argument

⁸⁶ *Australian Broadcasting Corporation v O'Neill* (2006) 229 ALR 457. For commentary, see David Rolph, 'Showing Restraint: Interlocutory Injunctions in Defamation Cases' (2009) 14 *Media and Arts Law Review* 255–91.

⁸⁷ *Jacobi Tool & Die Manufacturing Inc v Mondy* 2007 WL 3325854 (NY Supp), 3.

⁸⁸ See the statement of Brereton J quoted above in the text and cited in n 55.

⁸⁹ [1959] Ch 108, 125.

is simply that employers who claim that such a covenant does indeed protect a valuable property or property-like right should be put to the test of demonstrating the damage that they will suffer by the employee's breach. If an employer cannot demonstrate any real loss, the claim ought to be refused. Much vindictive litigation may be avoided by cutting off the peculiar branch of law generated by *Lumley*, and the law may better reflect the economically rational virtues of commerce, and the more forgiving morality of the broader Australian community.

