

CML4607F

Law for Engineers

Tutorial 1

Instructions: Read the below set of facts and answer the question(s). Use the mark allocation to guide the length of your answer. Prepare your answer and bring it to the tutorial class (which takes place during the lecture timeslot) on **23 February 2024**.

Facts:

Aakira is an engineer and owns Waterwise Systems (Pty) Ltd. (private company) based in Rondebosch. Waterwise Systems develops water saving mechanisms and does business in the Cape Town area. Aakira also works for the company and recently developed “SupaSave”, an effective water-saving showerhead. Waterwise Systems is highly profitable, with substantial goodwill. However, Aakira decides to sell the company as running Waterwise Systems, though profitable, has been stressful and exhausting. Aakira proceeds to sell Waterwise Systems to Robert and backpacks through Indonesia for 6 months.

Aakira returns from her trip feeling rejuvenated and decides to start another water saving business, Water Warriors (Pty) Ltd. in Paarl (a town in the Western Cape area, approximately 60 km from Rondebosch). Aakira receives a letter from Waterwise Systems, managed by Robert, warning her that she must close her business (Water Warriors) or face legal action. Waterwise Systems bases its argument on the following clause contained in the contract of sale:

“upon conclusion of this contract of sale, Aakira agrees and undertakes that she will never be employed by, directly or indirectly, or in any manner be involved in a business or enterprise that develops or manufactures, or is in any manner involved in the water or water saving industry, as a competing business to that of Waterwise Systems within the Western Cape”.

Answer the following question:

Aakira believes that she is entitled to practice her profession as an engineer and wants to know whether Robert/Waterwise Systems has a valid claim against her. Advise Aakira fully.

TOTAL: (15 marks)

Suggested answer:

The contract of sale contains a restraint of trade clause (1) which aims to restrain Aakira (and her business) from competing with the legitimate interests of the purchaser (1). In the case of restraint of trade clauses there are two conflicting interests, namely freedom of contract and freedom of trade (1). The clause is enforceable (by the purchaser) provided it is not against the public interest (1). This requires that the aforementioned interests are balanced/weighed to determine whether it is reasonable in the circumstances (1). The test for reasonability requires a consideration of the following:

*First, whether the purchaser of Waterwise has some legitimate interest (1) that deserves protection. Goodwill is an intangible asset which forms part of the contract of sale and is a recognised interest (1). *Could potentially argue in favour of trade secrets and clients over which the seller (Aakira) may exert some influence (bonus mark).*

*Having established that Waterwise has a legitimate interest deserving of protection, the second step is to determine whether the restraint protects this interest or goes beyond it (1) (i.e. whether the clause is formulated too widely). This is determined by considering the duration of the restraint, the area over which it applies and its scope (1). *Students may argue for or against, marks will be awarded based on application, not whether the answer is correct.*

- *The duration is unreasonable: “never be employed by, directly or indirectly, or in any manner be involved in” restricts both employment and the running of a business related to the water/water saving industry (1).*

- The area may be reasonable: “Western Cape”. From the facts it is clear that Waterwise serves the Cape Town “area” which may include surrounding towns (1).
- The scope is unreasonable: “develops or manufactures or is in any manner involved in the water or water saving industry”. Restricts both her profession as engineer and founder of similar businesses (1).

The court will balance the protection of Robert’s legitimate business interests and Aakira’s freedom of trade, occupation and profession to determine whether the clause should be enforced, in whole or in part (1). It is possible for the court to sever parts of the clause that it finds unreasonable (1). Based on the above assessment, the court is likely to find the area of restriction reasonable, but may require that the duration and scope be amended (1).