***David Lee Rapp and Prime Energy Markets FZCO v Ahria Esphandiar Roushanbakhti and Axis Limited*, CFI-017-2026.**

Tessa Jade Heise[1] & Arran Dowling-Hussey[2]

Non-compete clauses strike a balance between appropriately protecting an employer's confidential information and not operating as a restraint on trade. It is well established that clauses will normally be limited to a period of six to twelve months. A time span which is longer than that may notionally arise but would usually be seen as excessive. They also need to be proportionate in terms of the industry and geographical scale and scope. A clause that restricts someone from competing/ soliciting/ dealing in a particular way with (say) '*any other company or business within the DIFC or UAE which competes with the business of the company*' would be expected to be valid, see inter alia *Griet v Guido LLC [2016] DIFC SCT 172* but a clause that casts its geographical net more widely could be problematic.

There are different types of non-compete clauses typically:

(a) Non-Compete such that an employee will be stopped, for a period from working for a competitor in a defined industry;

(b) Non-solicitation, which as with all of these types of clauses hopefully fall in to '*it does what it says on the tin territory*', such that an employee is barred from making commercial approaches to former clients/ colleagues; and

(c) Non-dealing which bars an employee from dealing with former clients regardless of how the contact between that employee and clients may have arisen.

A recent oral judgment by Mr. Justice Pelling, of the DIFC Courts, gives useful guidance on the use of non-compete clauses where DIFC jurisdiction applies. The application looked to rely on the clauses, by way of an order for interim relief, arose where an oil and energy trading company, called *Prime Energy Markets FZCO* ('*Prime Energy*'), sought to stop its employee a Mr. Roushanbakhti from going to work for a competitor called *Axis*.

[1] Tessa Jade Heise is a barrister practising from 4-5 Gray's Inn Square in London. She can be contacted at theise@4-5.co.uk

[2] Arran Dowling-Hussey is a barrister practising from 4-5 Gray's Inn Square in London. He is registered as a Part II Practitioner at the DIFC Courts. He can be contacted at adhussey@4-5.co.uk

A suite of non-compete clauses in Mr Roushanbakhti's employment contract and a shareholder's agreement that contained a non-exclusive DIFC jurisdiction clause underpinned the Claimants application. The non-compete in the shareholders agreement, set out as running from the date of cessation as a shareholder could (the court found) not apply in circumstances where Mr Roushanbakhti had in fact never become a shareholder. Whereas it was found that there was a serious issue to be tried in respect of the non-competes in the employment contract and undertaking.

Mr. Justice Pellin found that the Claimants' unjustified delay, of two months, in bringing an application, to rely in this instance on three months long non competes meant that that it was not in balance of convenience to order interim relief. An additional deciding factor for the Court, in reaching this conclusion, was that it held that there was a significant question as to whether *Prime Energy* would be able to meet an award of damages should any interim injunction granted turn out to be wrongly granted.

Conclusion

Care has to be taken when bringing non-compete applications. There are a range of issues which have to be weighed and considered. 'Washing one's dirty linen' in public can have reputational issues. A 'Barbara Striesand' effect can apply in that a far larger amount of people may become aware of issue/s (and for longer) than otherwise might have been the case. There is a temporal and financial cost in committing to such an application and it can be the case that the loosing applicant will seem to some in their industry as engaging in bullying behaviour. The outgoing employee will not have the same resources and support network as the wider company that is seeking to enforce a non-compete. It can be more practical for an employer to have a 'gardening leave' period which is a measure which is squarely allowed for under DIFC Employment Law (No 2) of 2019 see *inter alia* Article 62(5). Where an employee is placed on gardening leave, they can be required to take any outstanding annual leave see *Omar Ben Hallam v Natixis* (CFI 016/2025).

Employers need to act promptly when seeking to rely on non-compete clauses and should when bringing an application to the DIFC Courts be relying on clause/s that are well drafted and proportionate. The written judgment in this case is not yet available and further comment will be offered on this helpful decision as may be necessary.