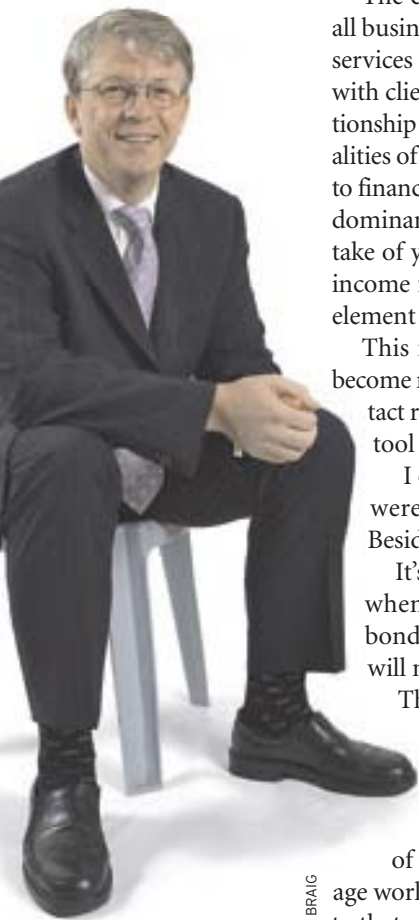


I'm in chains

Ropes, restraints, shackles and safewords. Not everyone is into it, but they should be because bondage is good for business, especially if it's done right. PETER BOBBIN tells how.



PETER BRAIG

NOT EVERYONE is into bondage. If you are, your choice is likely to be driven by whether you tie the knots that bind or find yourself being tied in perhaps awkward and interesting positions.

Before your mind starts racing as to how bondage fits into *Asset* magazine, I should explain I'm talking about restraints on trade – bondage in the contractual sense. Wikipedia – the internet encyclopedia – has a reference to bondage that seems apt: bondage involves people being tied up or otherwise restrained.

Everyone should be into it. A financial planning business that has not, at least in part, been built on bondage is like a fool and his money; they will soon be parted.

The client-sourced income flow is the lifeblood of all businesses. Common among all successful financial services businesses is the strength of the relationship with clients. However, the building blocks of this relationship are different for each. Some rely on the personalities of key people and others have a unique approach to financial planning methods. Yet others enjoy size and dominance in the market. No matter which view you take of your business, the client relationship (and the income flow that it represents) will always be the key element that needs to be protected.

This is where the irons and shackles of restraints become necessary. Bondage, in the form of a client-contact restraint, is simply a commonsense and practical tool to protect and maintain a business.

I often hear the comment: "I thought restraints weren't worth the paper they were written on. Besides, no one owns the client."

It's true. Some restraints don't work – but only when they've been incompetently created. Poor bondage means the master and servant power play will not play out as planned.

The most recent bondage plays involved AMP v Manning in March this year followed by the more successful *Koops Martin v Dean Reeves* two months later.

There are lessons to be learned from both of these cases. The most important is that bondage works, provided it is precise and clear, it is limited to that which is important and potentially threatened, and it must be carried out properly.

Let's look at the judgements to pick out the key issues of a successful bondage.

Get the party right. Justice Raymond Finkelstein said that one of AMP's claims was hopeless because the wrong party was named. AMP Services Limited employed a Ms Manning and had the benefit of the restraint agreement in its contract of employment with her, yet it was AMP's subsidiary Arrive Wealth Management that needed the restraint. Absent a rectification order, it is not possible to read "Arrive" for "AMP".

Protect only what is threatened. The law in Australia is clear. The public policy that a person has the right to earn an income means that restraints will always be read down. For this reason, AMP again failed because "the unreasonableness of the restraint lies in the fact that it is wider than necessary ... if the restraint had been limited ... it may have been lawful".

Define what is confidential

Don't give it away, anyway. One of the claims was that Manning misused confidential information. This can be valuable, as the court noted: "It is true that in some circumstances the use of client contact details to solicit business can amount to a breach of duty if the client contact details are confidential." But when marched out of the office, Manning was allowed to take her tele-phone SIM card which contained client contact details. The court's view was that it was "simply not possible for Arrive (AMP) now to complain about the use of the information on the SIM card. Clearly, Arrive did not regard client contact details as part of its confidential information."

Expect only to be compensated for what is lost. AMP's claim was for \$4.3 million. However, while finding that Manning had breached a duty to AMP, Justice Finkelstein also found that commonsense required him to note the fact that each client lost had decided independently to follow Manning. "This was inevitable given the close relationship between Ms Manning and her clients," he said. "Indeed, had Ms Manning waited out the notice period before speaking with her clients, I am sure that most would have followed her."

What is lost is not capital but income. This view of the court is well settled in the comment that "the 'value' of

a client to the business over a specific period of time ... is a particularly challenging one since there is no standing relationship of client-value as a function of time. Nevertheless, the 'value' of a company's client is ultimately the income that client brings the company."

What can be learned from this case is what does not work and what should not be done. The other decision is more instructive on what happens if you get it right.

Prohibiting the enticement of clients to leave is not enough; if the relationship is strong it is necessary to restrain the acceptance of work as well. In fact, *Koops Martin v Dean Reeves* provides a sample restraint clause that worked. The employee was prohibited from enticing away clients but in the view of the court this was not enough since "accepting instructions to act for former clients who initiate contact with the departed employee is not within the concept of solicitation or enticement, which involve action initiated by the former employee, as distinct from responses to approaches from former customers ... The stronger the customer connection which the employee develops, the less will solicitation be required; the strongest connections are those in which the client will follow unsolicited because of his or her connection with the employee, notwithstanding that that connection belongs to the employer. An anti-solicitation covenant is insufficient to protect an employer's customer connection in that context."

The only way to deal with the issue is to restrain the acceptance of work. This was the success of the bondage maker in *Koops Martin v Dean Reeves*.

HOW TO PUT IN PLACE A GOOD RESTRAINT

"Some bondage practitioners go through a process often called 'negotiation' with potential partners ... Negotiation is essentially a conversation conducted well before any ... activity has begun in which each party frankly outlines what they are interested in and what their boundaries are, and out of that shared information comes a mutual agreement about potential bondage play ... This frank and forthright exchange allows both parties to feel confident about bondage activity and to understand their partner's needs. Due to the vast range of activities and intensities that are possible in bondage ... negotiation is an excellent technique to make sure both parties have realistic expectations." Wikipedia

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Employee restraints are harder to prove. The court was clearly of this view when it stated that "a more rigorous approach is applied to restraints in employment contracts than in contracts for the sale of goodwill" and an "employer is not entitled to be protected against mere competition". Remember, these comments come from a judgment where the restraint worked; the former employer succeeded.

So who should be the target of your bondage plans? The key to answering this question is deciding what relationships are important and who can have an impact upon them. The most obvious is the dealer/Australian Financial Services Licensee binding their employed authorised representative. Perhaps you can now see why bondage and business development managers are connected. There is no reason why bondage cannot also apply to a contracted financial planner.

More interesting is the use of bondage in the come'n'go agreements that are so prevalent in the contracted financial planner relationship. The most common is where the principal financial planner restrains key staff. Any principal financial planner who has not built their business in part on the use of restraints is foolish. How can they claim a business value based on a multiple of income when they take no care to protect that income stream?

And what about their clients? They are both the fodder and the casualty of the friendly fire in the battleground for securing the income necessary for a successful business. ☆