

RESTRAINTS OF TRADE ON A PROPERTY PRACTITIONER

There seems to be a fervent belief that restraints are no longer valid. Not quite so!

You cannot stop someone from competing with you – but generally, you can stop someone from targeting old clients of an agency or using the agency's data base if the agent signed a restraint of trade. A restraint is there to protect a company's goodwill and intellectual property, which are very much, "protectable interests", and that is exactly why we have restraints of trade.

Herewith some interesting questions we have received from agents in the past:

1. What if an agent has worked for an agency for a long time; has no restraint of trade in his/her employment contract and leaves after having focused on a certain area after he/she was given "exclusivity" by the agency. - Can the agent hold the agency to any kind of a restraint? (Yes, you read that correctly.)

Answer: The agent has no right of any exclusivity after leaving the agency. The mere fact that the agency granted a concession of sorts for however long, ends, the moment the agent leaves - unless of course there is an express agreement to the contrary – which we have yet to see in any employment agreement!

2. What about the mandates that he/she took whilst with the agency? Who does that belong to? May he/she take these with him/her?

Answer: Any mandate taken whilst employed by an agency, belongs to the agency and not to the agent - unless there is an express agreement to the contrary.

3. Assuming the agency does agree to allow the agent to "take the sole mandate", or put differently, agrees to release the seller from the mandate to conclude a new mandate with the agent under his/her new agency, does this then mean that the former agency has now permanently "waived" any "right" to try and convince the seller, to nevertheless, remain with the former agency?

Answer: The mere fact that the agency said to the agent that he/she may get the seller to terminate the existing mandate and sign a new one without penalty, does not amount to a waiver by the agency to never contact that seller again. The seller is now as much fair game to the agency as to the agent and the agency may therefore pursue the seller as well to try and obtain a mandate too.

Solution: To avoid problems or expectations upon termination of services, one needs to canvass these issues properly in an employment contract.