

Notaries Practice Rules 2014 - Rules 3, 4, 7 and 11

Restrictive Covenants in Employment Contracts

A notary, also practising as a solicitor and employed as such by a firm of solicitors, had been requested by the notary's employers to agree to certain restrictive covenants contained in a contract of employment to be issued by the firm of solicitors.

The restrictive covenants would not have any effect until termination of the notary's employment by the firm of solicitors, but, at that point the notary would be prevented for a period of nine months (unless the solicitor's firm consented in writing) from providing or seeking to provide notarial services to a restricted or prospective client as defined in the contract. In addition the notary would be prevented from engaging with any aspect of the business of such a restricted or prospective client if that would cause or contribute to that client ceasing or reducing his/her dealings with the firm of solicitors.

The Master of the Faculties was asked to rule as to whether the notary could in conscience agree to these clauses in the contract of employment in view of the requirements of the Notaries Practice Rules 2014. The Master noted that, whilst the commercial rationale of the solicitors in seeking to impose the contentious clauses on the notary was readily comprehensible, he did not consider that the notary could agree to any of the provisions compatibly with the duties as a public notary. Rule 11.2.1 of the Practice Rules requires the notary to "ensure that his independence and integrity as a notary is fully recognised in writing in any contract of employment entered into by him". Notarial 'independence' include being available to any party requiring notarial services and the Master drew attention to the terms of the Oath on admission as a notary, the key words of which are "I will faithfully make contracts or instruments for or between any party or parties requiring the same...". The effect of the clauses required by the solicitor's firm would be to make the notary's notarial practice, and its extent, subject to the prior written consent of the solicitors for a period of time and that would conflict with both rule 11.1.1 and the terms of the Oath.

The principles set out in 7.2 of rule 7 of the Practice Rules recognises "a person's freedom to instruct a notary of their choice". However the effect of the clauses in the contract would be that for limited periods the potential client's freedom of choice would be subject to the written consent of the solicitors. That would be in conflict with rule 7. In addition the principle set out in 7.3. recognises "the notary's ability to act in the best interests of the client". The best interests of a 'restricted or potential client' might require the notary to act for them, yet this would be in conflict with the clause in the contract unless consented to by the solicitors, and those best interests might require cessation or reduction of business with the solicitors or not dealing with the solicitors. In addition, the notary, being prevented from practising for a three-month period, could affect the interests of not merely the restricted or prospective clients but other persons seeking the notary's services.

The principles set out in 7.4 recognises "the good repute of the notary [and] of the notarial profession". If the carrying on of the notary's notarial practice, post cessation of the employment, were restricted as envisaged in the clauses of the contract, it was in the view of the Master unarguable but that the principle in 7.4 would be offended.

Since the restricted covenants would impair the notary's notarial practice in the way set out above, and involve breach of the notarial Oath and the Practice Rules, the Master did not see how the notary could, consistent with the obligations to the Oath and the Rules, agree that the restrictions are "reasonable in all the circumstances". The Master did not therefore see how the notary could agree to the proposed clauses.

The Master noted that the solicitors might argue that their consent, as set out in the clauses, would not be unreasonably withheld, and that if it were so withheld the notary would have a remedy in the Courts. However nothing in the clauses expressly stated that consent would not be unreasonably withheld and, in consequence of the notary's agreement the restrictions were reasonable in all the circumstances, it would be difficult for the notary thereafter to contend that consent was being unreasonably withheld if it had a commercial rationale in the terms as set out. In any event, notarial independence would be compromised by the mere fact that the written consent of the solicitors would be needed under the terms of the proposed restrictive covenants.

In addition the Master was unimpressed by the arguments advanced by the solicitors that the clauses would only bite post cessation of the notary's employment by them. He regarded it as disingenuous to suggest that this would justify the notary entering into the restrictive covenants prior to termination if the restrictive covenants could place the notary in breach of the notarial duties post cessation of employment.