Blackstone
CHAMBERS

Restrictive Covenants

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A. INTRODUCTION

1. Whereas the common law originally prohibited all restraints of trade as contrary to public policy, the modern position is that such restraints are unenforceable, unless they extend no further than is reasonably necessary to protect the (ex-) employer's legitimate business interests. This talk sets out the general principles that the court considers when analysing whether restrictive covenants are reasonable and enforceable, and how these apply in practice to certain types of restraints.

2. Beyond this overview, more comprehensive information on these topics can be found in Goulding on *Employee Competition* and Bloch and Brearley on *Employment Covenants and Confidential Information*.

B. THE DEFAULT LEGAL POSITION

3. During employment, including during the notice period, an employee is restrained by the implied duty of fidelity (and possibly also by fiduciary duties).[2] The precise scope and content of the duty of fidelity is a question of fact which depends on the circumstances of each case. Generally, this determines what the employee can do whilst employed. It includes a duty not to compete with one's employer or use any of one's employer's business sensitive or confidential information, irrespective of the degree of confidentiality, save for the proper performance of one's duties.

4. After termination of employment, the only general restraint on the (former) employee relates to the use of trade secrets and confidential information akin to trade secrets, which means that there is no *general* restriction against someone competing against their former employer. Goulding J in ***Faccenda Chicken Ltd v Fowler*** [1984] ICR 589, at 598F to 600D, distinguished between three types of information: (i) information which is not confidential, (ii) confidential information acquired during the normal

[2] For a discussion about the distinction between the duty of fidelity, and a fiduciary duty, see ***Imam-Sadeque v Bluebay Asset Management (Services) Ltd*** [2013] IRLR 344 at §§122-5

course of employment which remains in the employee's head and becomes part of his or her own experience and skills, and (iii) confidential information in the form of specific trade secrets. Upholding this judgment, the Court of Appeal[3] added that when considering whether information falls into the third category (trade secrets), the court should have regard to (a) the nature of the employment and the status of the employee, (b) the nature of the information, (c) whether the employer had stressed the confidentiality of the information to the employee, and (d) whether the information could be isolated from other non-confidential information. In practice, trade secrets may include secret processes, chemical formulae and special methods of construction. [4]

5. While there are no general restraints regarding the second category (information acquired during the normal course of business which remains in the employee's head), it is always unlawful for an employee to take, or deliberately to memorise for use post-termination, copies of the employer's business sensitive/confidential information (***Roger Bullivant v Ellis*** [1987] ICR 464). If an employee does so, the employer may be able to apply for a springboard injunction to cancel out any unlawful head-start gained by taking the information (***QBE v Dymoke*** [2012] IRLR 458).

6. Additional protection is also available under the Trade Secrets (Enforcement, etc.) Regulations 2018, the definition of trade secrets being slightly wider than under the common law.[5] The Regulations provide for the court to make various interim and final orders, including the prohibition of the unlawful activity, seizure or delivery up of infringing goods, compensation in lieu of an injunction, damages appropriate to the actual prejudice suffered, and corrective measures.

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[3] [1986] 3 WLR 288 at pp. 300-301

[4] See further ***SBJ Stephenson Ltd v Mandy*** [2000] IRLR 233

[5] See ***Trailfinders v Travel Counsellors*** [2020] IRLR 448 at §14, this covering Goulding J's second as well as third category. Under Regulation 2, "trade secret" means information which: "*(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.*"

C. RESTRICTIVE COVENANTS - GENERAL PRINCIPLES

7. Further to the general restraints discussed above, employers generally agree with the employee what s/he can do post-termination by way of restrictive covenants (also known as post-termination restrictions, post-termination restraints or PTRs). Further, if an employee seeks to take advantage of unlawful acts carried out when s/he was an employee (e.g. theft of a database), the court can (via a springboard injunction) effectively impose restraints even though none were agreed in the employment contract.

8. When determining whether a restrictive covenant is enforceable, the court will follow a three-stage process, set out by Cox J in the oft-cited case ***TFS Derivatives Ltd v Morgan*** [2005] IRLR 246 (emphasis added):

> *"37. Firstly, the court must decide what the covenant means when properly construed. Secondly, the court will consider whether the former employers have shown on the evidence that they have legitimate business interests requiring protection in relation to the employee's employment […].*
>
> *38. Thirdly,* ***once the existence of legitimate protectable interests has been established, the covenant must be shown to be no wider than is reasonably necessary for the protection of those interests****. Reasonable necessity is to be assessed from the perspective of reasonable persons in the position of the parties* ***as at the date of the contract****, having regard to the contractual provisions as a whole and to the factual matrix to which the contract would then realistically have been expected to apply."*[6]

9. Legitimate business interests may include protecting confidential information, relationships with clients, relationships with prospective clients, maintaining a stable and trained workforce, maintaining good supplier relationships, maintaining

[6] See also ***Quilter Private Client Advisers Ltd v Falconer*** [2022] IRLR 227 at §162, where Calver J set out a similar three-stage test for determining whether a restrictive covenant is enforceable. Calver J derived his summary from ***TFS v Morgan*** and ***Office Angels v Rainer-Thomas & O'Connor*** [1991] IRLR 214. In ***Apex Resources Ltd v Macdougall*** [2021] S.L.T. 781 at [12] and [16], the Scottish Court of Session (Outer House) approved the questions identified in ***Quilter Private Client***.

introducers of work or business, deal opportunities, or a candidate base for search consultancy, for example. Legitimate business interest does not extend to weakening or limiting competition for the employer's own sake. Further, the courts carefully guard legitimate competition as a matter of public interest.

10. Care should be taken if the parties choose to specify in the employment contract the business interests the covenants are designed to protect, as it may not be possible to justify the covenants on the basis of interests not so specified at a later date[7] – it is often preferable simply to refer to legitimate business interests without (for example) specifying that the interests relied upon are 'confidential information' or 'customer connection'.

11. Whether the clause in question is reasonably necessary for the protection of the employer's legitimate business interests is judged as at the time the contract was entered into. This includes consideration not only of the employee's responsibilities at the time the contract was entered into but also the reasonable expectations of the parties, for example, if it is anticipated that a new hire may have a higher than usual degree of client engagement and faster rate of progression. A subsequent change of circumstances, such as a promotion, however, will not render an unenforceable covenant otherwise enforceable (***Patsystems Holding Ltd v Neilly*** [2012] IRLR 979 at §33; ***Bartholomews Agri Food Limited v Thornton*** [2016] IRLR 432 at §22). Employers should therefore review restrictive covenants prior to an employee being promoted or, where circumstances change, seek fresh written and signed agreement from the employee.

12. A clause is not reasonable simply because it protects legitimate interests; it will not be considered reasonably necessary if the employer could achieve the same result by a much less restrictive route, or if the impact on the employee is overly oppressive. In a similar vein, if the clause is drafted too broadly so as to capture activity that would not

[7] See ***Office Angels v Rainer-Thomas & O'Connor*** [1991] IRLR 214 (CA) at §39

harm the employer's legitimate interests, it will not be enforceable (see more on drafting and severing in section E below).[8]

D. RESTRICTIVE COVENANTS – STANDARD TYPES

13. Standard types of restrictive covenants, discussed in turn below, include:
    a. Area/non-competition covenants,
    b. Non-solicitation covenants,
    c. Non-dealing covenants,
    d. Non-solicitation of staff, and
    e. Confidentiality clauses.

a. Area/non-competition covenants

14. The most draconian restriction is to stop an employee working for a competitor altogether, either within a limited geographical area, or occasionally worldwide for a limited period of time. Given the onerous nature of such covenants, they will only be enforceable where the business interest could not be protected by a less restrictive provision (e.g. to allow an employee to join a competitor but not to deal with their former clients). It may similarly be appropriate if lesser restrictions could not adequately be 'policed' (***Tradition v Gamberoni*** [2017] IRLR 698 at §96; ***TFS v Morgan*** [2005] IRLR 246 at §84).

15. **Protection of confidential information**: The courts are often more willing to uphold more onerous restrictions where they are required to protect confidential information. In cases where a senior employee knows a great deal about confidential information such as marketing and business plans, new products about to be launched, or costs and margins, it may be that no matter how discreet s/he intends to be, s/he would inevitably make use of that information if going to a competitor. In

[8] See also the judgment of Sir Christopher Slade in ***Office Angels v Rainer-Thomas & O'Connor*** [1991] IRLR 214 (CA) for further general principles as to the enforceability of restrictive covenants, and a seven-staged approach set out in Goulding's *Employee Competition* practitioners' text at §6.08.

such a case, lesser restrictions such as a clause requiring the delivery up of information upon termination may be insufficient.

16. Two examples[9] of the above are:

    a. ***Thomas v Farr & Hanover Park Commercial*** [2007] ICR 932, in which the Court of Appeal upheld a covenant preventing the former employer, who had been Accounts Director, Operations Director and finally Managing Director, from working for a company competing with the "Business" for a period of 12 months from termination. "Business" was defined broadly as the business of providing the specified services and any other business carried on by the company to which the employee had rendered "Material Services" or about which he had acquired confidential information or by which he had been engaged at any time during the 12-month period prior to termination. Such an onerous restriction was considered reasonable where the employee had been privy to all major strategic and operational decisions and had overall responsibility for all of Farr's existing business. This information was considered akin to a trade secret and a lesser, non-solicitation covenant would have been inadequate. In dismissing Mr Farr's appeal, Toulson LJ held that the difficulty for either party in determining what does and does not constitute confidential information in such a case, may support the reasonableness of a non-competition clause.

    b. ***Law By Design Ltd v Ali*** [2022] IRLR 610, in which the High Court enforced a covenant preventing a former employee at a boutique law firm from competing with the "Restricted Business" of the firm for a period of 12 months from termination. "Restricted Business" was defined in the agreement as being those parts of the firm's business which the employee had been materially involved with during the 12 months prior to termination. The employee had

[9] A third example is ***Dyson Technology Ltd v Pellerey*** [2015] EWHC 3000, only made public in 2018 due to the commercial sensitivities of the case.

been a very senior solicitor at the firm with access to confidential information such as client contacts, charge-out rates and the status of ongoing matters. The firm had a legitimate interest in protecting its confidential information, and a non-solicitation clause or a restriction protecting confidential information would have been difficult to police due to the difficulty of identifying confidential information which might be used for solicitation of work from a shared client. A 12-month restriction reasonably reflected the "shelf life" of the confidential information and the employee's ability to remember it (see §92-93 and 96).[10]

17. **Commercial agreements**: The courts are also more likely to find long non-competes enforceable when they are found within commercial agreements. This is in large part because the parties are considered more likely to have equal bargaining power and to have freely negotiated the terms (e.g. ***Morris-Garner v One Step (Support) Ltd*** [2019] A.C. 649; ***Hydra plc v Anastasi*** [2005] CLY 1208 at §42). It is possible for an agreement between a business and an "employee-shareholder" to be approached on this basis where both sides are experienced commercial parties (***Guest Services Worldwide Ltd v Shelmerdine*** [2020] 2 All E. (Comm) 455 §41-43).[11] Conversely, parties do not necessarily have equal bargaining power merely because they are both businesses, and the parties' contractual freedom will have less weight as a factor where their bargaining power is unequal (***Credico Marketing Ltd v Lambert*** [2022] EWCA Civ 864

[10] The Court held that a further shareholder agreement restriction, under which Ms Ali was prohibited for 12 months from competing with *any* part of LBD's business in operation in the preceding 12 months, was not enforceable. It was wider than reasonably necessary for the protection of the firm's legitimate business interests as it would prevent a shareholder from involvement with any firm that indirectly or directly competed for work in England and Wales. Permission to appeal was sought on a narrow point (the meaning of being involved in work to "a material extent") and was refused by Whipple LJ.

[11] In *Guest Services*, the court upheld a 12-month post-termination restrictive covenant in a shareholders' agreement which prevented "employee shareholders" from engaging in business that would be in competition with the company for so long as they were shareholders and for the 12 months after they ceased to be shareholders, even if they had ceased to be employees before that time. The court noted that there is a spectrum of shareholder situations, not just two categories (of shareholders proper and ordinary employees with a share participation scheme). In *Guest Services*, the shareholders' agreement had been made between "experienced commercial parties" (para 43). *cf Law By Design Ltd v Ali* §110*,* where the parties were not akin to parties to a commercial arrangement involving the sale of part of the business.

§68)[12]. Long non-compete covenants may also be crucial in facilitating certain types of commercial agreements, such as vendor-purchaser agreements (where absent covenants preventing a seller from competing with a buyer, the latter may be unwilling to purchase the business at all).

18. **The length of the restraint:** The reasonableness of the period of restriction will depend on the nature of the interest protected. If the purpose of the covenant is to protect confidential information, the starting point is the currency of that information. In ***Advanced Business Software and Solutions Ltd v Fowler*** [2016] EWHC 3709 (Comm), a 12-month restriction was upheld given that the employee had been very senior, with access to confidential information including public contracts, which the High Court held at §18 "*can take some time to percolate through the system".* Context is key: a 12-month restriction may be unreasonable if the confidential information would be out of date within six months; but reasonable even if it remained relevant for longer but the dangers posed by its misuse diminished over time, while the impact of a longer restriction on the former employee would be severe. Uncontradicted evidence of an industry standard may also be relevant in assessing reasonableness (***TFS v Gamberoni*** at §109).

19. **The area**: The reasonableness of the area covered by the covenant also depends on the type of interest to be protected. A wider area may be reasonable where business secrets are involved; whereas, in enforcing restrictions intended to protect customer contacts, there must be a 'functional correspondence' between the area of restraint and the location of the customers. See for example, ***Office Angels v Rainer-Thomas*** [1991] IRLR 214, in which the restriction on the worker from working within 1,000 metres of the agency's branches in the Greater London area included most of the City

[12] In this case, a post-termination covenant between two businesses was unenforceable: it was not in the public interest to prevent competition between businesses absent a factor rendering the knowledge and experience particularly special. While the courts must "give considerable weight to the fact that the covenant has been agreed by the parties" in "many business cases", "where the parties do not have equal bargaining power, this is a factor of little or no weight".

of London and some 400 agencies, with no relevant functional correspondence to the location of customers.

20. A degree of evidence to explain the purpose of the area of restriction must be presented by the employer (***Adorn SPA Ltd v Amjad*** [2017] EWHC 1313 (QB) at §§26-27). The question is not where the person lives or operates from, but the location of the market s/he will be serving (***Rush Hair Ltd v Gibson-Forbes & anor*** [2017] IRLR 48 at §78, in the context of a hair salon). However, Cox J in ***TFS v Morgan***, in the context of an equity derivatives brokerage, noted at §53 that traditionally defined territories may have limited relevance in today's technological era. She held that a non-compete covenant seeking to protect both confidential information and client relationships was reasonable despite no territory having been defined.

21. **Relation to the work carried out**: The restriction must relate to the work that the employee carried out. The more narrowly defined and specific the definition of a competitive business is, the greater the chance of the covenant being enforceable. In ***Wincanton Ltd v Cranny*** [2000] IRLR 716 the restriction related to "*any business of whatever kind within the UK which is wholly or partly in competition with any business carried on by the employer*". The Court of Appeal concluded this was too wide since it extended beyond the particular field in which the employee had been personally engaged.[13]

22. **Government consultation on non-competes:** The Department for Business, Energy & Industrial Strategy ran a consultation between December 2020 and February 2021 on proposals to limit the operation of post-termination non-compete clause.[14] The Government has not yet announced whether any changes will be made following this consultation.

[13] See also ***Tim Russ & Co (A Firm) v Robertson*** [2011] EWHC 3470 (Ch); and ***Ashcourt Rowan Financial Planning Ltd v Hall*** [2013] IRLR 637

[14] https://www.gov.uk/government/consultations/measures-to-reform-post-termination-non-compete-clauses-in-contracts-of-employment

b. Non-solicitation covenants

23. Non-solicitation covenants are concerned with preventing an ex-employee from using his or her knowledge of and influence over customers to entice them away after the termination of employment. Compared to non-compete covenants, non-solicitation is a relatively limited restriction on an employee's freedom to trade post-termination and is generally an easier type of covenant to justify.

24. **The nature of solicitation**: Solicitation involves an element of persuasion. However, it does not necessarily exclude situations in which a client approaches the employee first; the court will look at all the circumstances. In ***Croesus Financial Services Limited v Bradshaw*** [2013] EWHC 3685 (QB), the employee was found to have solicited clients, having arranged for old clients to email him, which he then followed up with meetings.

25. **The business interest**: A necessary first step is to consider the nature of the relationship between the clients and the employee and the significance of this to the business. In ***East England Schools CIC v Palmer*** [2014] IRLR 191, the employee worked for a recruitment agency which matched teachers with schools in Essex. The employee argued that the six-month non-solicitation clause in her contract did not protect a legitimate business interest because information about schools and teachers were in the public domain, and schools sign up with several agencies at one time. The High Court rejected this, holding that the clause was reasonable on the basis that: (i) the employee was the named person that clients associated with the agency, such that the building of relationships with those clients was central to her role; (ii) while schools could choose between agencies, their relationships with a particular agency could mean it approached one ahead of its competitors, and (iii) the employee had detailed knowledge which went beyond what was publicly available.

26. There is no general distinction that companies will have a more legitimate business interest to protect in respect of more senior or higher-paid employees. Attempts to establish such a distinction were rejected in ***Adorn SPA Ltd v Amjad*** at §13 in the

context of the relationship built between beauty therapists and their clients. The court stressed that the issue was whether there was a valuable trade connection belonging to the employer capable of being protected.[15]

27. **The identity of the clients**: Integral to determining the nature of the business interest to be protected is to define the identity of the clients with which the restriction is concerned. This will usually be limited to clients that the employee has personally dealt with/accessed confidential information about within a defined period prior to termination. However, depending on the facts an employer may be able to justify a prohibition on soliciting any clients of the business, without limiting it to those that the employee had dealings with/confidential information about.[16] A clause which attempts to extend the restriction to *potential* customers may be harder to enforce (see e.g. ***Associated Foreign Exchange Ltd v International Foreign Exchange (UK) Ltd*** [2010] IRLR 964; and ***International Consulting Services (UK) Limited v Hart*** [2000] IRLR 227).

28. **The length of restraint**: As above, the length of the restraint must not exceed what is reasonably necessary to protect the employer's customer connection. In ***Romero Insurance Brokers Ltd v Templeton*** [2013] EWHC 1198 (QB), a 12-month non-solicitation clause was considered reasonable given that the insurance policies that the employees dealt with generally renewed annually. Had the renewal period been shorter, the 12-month restraint likely would have been unenforceable. A sensible approach is to consider the time required for the employee's successor to establish a relationship with and gain influence over the business contacts. Relevant factors may include: the employee's level of seniority in the business, the extent of his or her role in securing new business, the loyalty or otherwise of customers in the relevant market and how quickly this moves (***Associated Foreign Exchange Ltd v International Foreign Exchange (UK) Ltd).*** Industry standards may also be relevant – 12-month non-solicitation clauses have been held reasonable as representing the standard in both

[15] See further §§9–10 and: ***Brake Brothers Ltd v Ungless*** [2004] EWHC 2799 (QB) and ***FSS Travel & Leisure Systems Ltd v Johnson*** [1998] IRLR 382

[16] See ***Safetynet v Coppage*** [2013] I.R.L.R. 970 (CA)

the financial advice industry (***Croseus***) and the fashion industry (***Premier Model Management Ltd v Bruce*** [2012] EWHC 3509).

c. Non-dealing covenants

29. Proving who first approached whom in respect of former employees and clients and whether this amounts to solicitation, is often a tricky business. As such, employers may include a non-dealing covenant restricting the ex-employee from dealing at all with the client's business during a period. In ***John Michael Design Plc v Cooke*** [1987] ICR 445, the Court of Appeal upheld a two-year non-dealing covenant against a former associate director of a firm of shop fitters, even where certain clients stated no intention of continuing to deal with the ex-employer. Similarly, the Court of Appeal in ***Beckett Investment Management Group Ltd v Hall*** [2007] ICR 1539, held that a 12-month restriction on financial advisers dealing with clients of their former employer was reasonable, given the seniority of the employees and the resources required (and time likely to be taken) for the employer to maintain client loyalty following their departure.

30. In contrast, a non-dealing covenant was unenforceable where it applied indiscriminately to all of the company's customers, the employee having dealt with customers contributing to only two percent of the company's turnover in ***Bartholomews Agri Food Ltd v Thornton*** [2016] IRLR 432. Further the clause restricted the employee from working in six counties, which was considered an unreasonable restraint of trade.[17]

[17] See also ***Capita plc v Darch*** [2017] IRLR 718 in which the court refused an injunction while doubting the enforceability of a non-dealing clause purporting to restrict the employee from dealing with clients of whom he had been made aware or informed of by others whilst employed, as well as those with whom he had dealt personally.

d. Non-solicitation of staff

31. It is accepted that an employer generally has a legitimate interest in ensuring the stability of its workforce (***Dawnay Day & Co v de Braconier d'Alphen*** [1998] ICR 1068). However, clauses prohibiting the solicitation of staff are likely only to be considered reasonable where the particular class of staff is sufficiently limited (see e.g. ***Hydra plc v Anastasi***, where there were only 12 employees; c.f. ***CEF Holdings Ltd v Mundey*** [2012] IRLR 912). For example, it may be justifiable to restrict solicitation of senior managers or those with access to highly confidential information, but unjustifiable if the covenant extends to preventing solicitation of administrative or cleaning staff.

32. Sometimes employers seek to include a prohibition on former employees employing any other employees, rather than just soliciting those employees. Obiter comments in ***Dawnay Day*** (at p. 1096) suggest that non-employ covenants should never be enforceable, but in other cases (e.g. ***TFS v Morgan***) they have been enforced, although without apparent argument as to enforceability.

e. Confidentiality clauses

33. Further to the implied terms and regulatory provisions on confidentiality discussed at paragraphs 3-6 above, carefully drafted confidentiality covenants are useful tools for employers. However, due to the challenges in drawing the line between confidential information and the general skill and knowledge of the employee, and in policing breaches of confidence, employers often opt to protect their confidential information by means of non-competition covenants. Indeed, such challenges may justify a non-compete covenant (***Lawrence David Ltd v Ashton*** [1989] IRLR 22 (CA) at p. 27).

34. Where confidentiality covenants are entered into, precision is key as broad or vague definitions of confidential information will render the clause unenforceable. See, for example, ***Ixora Trading Inc v Jones*** [1990] FSR 251, in which the vague reference to "*all knowledge acquired arising out of or in the course of the contract*" was struck out.

In this context, it is crucial not to rely on boilerplate wording in a precedent contract, but to have the client identify the specific material regarded as confidential.

35. Courts require precision partly for reasons of principle, and partly for practical reasons. HHJ Davies in ***Reuse Collections v Sendall*** [2015] IRLR 226 stressed at §163 that it would be wrong to allow employers to define confidential information in such a broad way so as to achieve protection against actual competition "*through the back door*". Further, it is a cardinal rule that an injunction must be framed with sufficient precision to enable the person enjoined to know what s/he is prevented from doing (***Lawrence David Ltd v Ashton*** [1989] ICR 123 (CA) at 132D). As to the latter, a fully particularised particulars of claim may be required when pursuing an injunction restraining the misuse of confidential information (***Caterpillar Logistic Services (UK) Ltd v Huesca de Crean*** [2012] ICR 981 at §68, §73).

36. While express confidentiality covenants unlimited in time may appear excessively broad, these are enforceable to the extent that they relate to trade secrets or confidential information akin to trade secrets, effectively replicating the implied term (***Caterpillar Logistic Services*** at §66). The starting point for the length of such a restriction is the currency of the information, as discussed at paragraph 18 above.

E. DRAFTING, INTERPRETING & THE 'BLUE PENCIL'

37. Guidance as to the proper construction of restrictive covenants was given by the Court of Appeal in ***Prophet PLC v Huggett*** [2014] IRLR 797, which made clear that the drafting of covenants can be too narrow as well as too broad. The relevant clause in that case stated: "*The Employee shall not… for 12 months… be interested in any business which competes with the Company provided that this restriction shall only operate to prevent the Employee being so… interested in connection with any products which he was involved with whilst employed hereunder*." The judge at first instance found that, if the covenant were read literally, it would give the company no protection because it was the only company which provided the products in question. He found that it was necessary to cure the apparent mistake in the drafting by adding

the words "or similar thereto" at the end of the clause, so that the covenant would cover similar products.

38. The Court of Appeal agreed *in principle* that when considering an ambiguous provision, and there is a clear choice between an interpretation with an absurd result and another which makes business sense, the latter should be favoured (§33 per Rimer LJ). Such an approach can, however, only be adopted in a case in which the language of the provision is truly ambiguous and admits of clear alternatives as to the sense the parties intended to achieve. The Court will not rewrite the covenant by adding in new words. Here, the clause in question was not ambiguous, albeit toothless in providing protection to the employer.

39. The Supreme Court in ***Tillman v Egon Zehnder Ltd*** [2020] AC 154 confirmed[18] the tripartite test as to whether words can be severed, or 'blue pencilled' from a covenant:
    a. Can words be severed without adding or changing the language?
    b. Is there still consideration for what remains?
    c. Can the offending wording be removed without changing the character of what survives, which remains the sort of agreement the parties originally entered into?

40. The Supreme Court held that the first criterion only permits the courts limited power to delete the contractually agreed words; what the court cannot do is rewrite the covenant. The Court held that the words "*or interested*" in the relevant covenant could and should be severed. These words would have had the unjustifiable effect of preventing the employee from being a passive shareholder. Their severance did not require any additional words to be added to the clause and would not generate any major change in the restraint's overall effect (§§81-91).

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[18] As set out in ***Sadler v Imperial Life Assurance Company of Canada*** [1988] IRLR 388 and ***Beckett Investment Management Group Ltd v Hall*** [2007] ICR 1539.

F. GARDEN LEAVE – AN ALTERNATIVE

41. A common alternative to restrictive covenants, not least due to the uncertainties surrounding their enforcement, is to include garden leave provisions in the employment contract. This requires the employee to spend all or part of his or her notice period away from the workplace, to keep him or her away from competitors, customers, staff and confidential information. During this time, the employee also remains subject to the duty of fidelity towards the employer.

42. **Express and implied terms**: The absence of an express garden leave provision in a contract does not necessarily preclude the employer from imposing garden leave. However, if the contract can be construed as including a right to work, any attempt to impose garden leave absent an express garden leave clause amounts to a breach of contract (***William Hill Organisation Ltd v Tucker*** [1999] ICR 291). The implied right to work is subject to the qualification that the employee has not, as a result of some prior breach of contract or duty, "*rendered it impossible or reasonably impracticable for the employer to provide work*" (***SG&R Valuation Service v Boudrais*** [2008] IRLR 770 at §24). Indeed, where an employee breaches the duty of good faith, the employer may be released from the obligation to provide work (***Standard Life Health Care Ltd v Gorman*** [2010] IRLR 233).

43. **Enforcement:** An injunction to aid the enforcement of garden leave is justified on similar grounds as a restrictive covenant, except that the court considers the reasonableness of the provision as at the date of enforcement, rather than when the contract was entered into (***Tullett Prebon Plc v BGC Brokers LP*** [2011] IRLR 420 at §§221-2; ***ICAP Management Services Ltd v Berry*** [2017] IRLR 811 at §§108-9). Further, the court has discretion over the duration of the garden leave, balancing the employee's need to work and exercise his or her skills, against those of the employer in protecting its legitimate business interests (***Tullett Prebon v BGC*** at §224; ***JM Finn & Co Limited v Holliday*** [2014] IRLR 102 at §59). Whereas with restrictive covenants the duration of the covenant specified in the contract will either render it enforceable

or not; with garden leave a court may decide that it would not be reasonable to enforce garden leave for the entirety of a very long notice period, but enforce garden leave for a shorter period.

44. **Interaction with covenants:** While garden leave provisions can be viewed as an alternative to post termination restrictions, often both are used side by side. The Court of Appeal in ***Credit Suisse Asset Management Limited v Armstrong*** [1996] ICR 882 held that the existence of a garden leave clause was a relevant factor in determining the enforceability of a restrictive covenant, and that the Court would *"leave open the possibility that in an exceptional case where a long period of garden leave had already elapsed, perhaps substantially in excess of a year, without any curtailment by the court, the court would decline to grant any further protection based on a restrictive covenant"* (p. 894). Subsequently, it became common for employers to include a 'garden leave set-off' clause in their contracts, allowing for the period of a restrictive covenant to be reduced by the amount of time the employee has spent on garden leave. Recent attempts to take this further, arguing that covenants are unenforceable due to the absence of such a set-off, have found little favour (***Square Global v Leonard*** [2020] IRLR 607 at §189).

G. APPLICATION & ENFORCEMENT

a. Getting the employee signed up

45. Ordinarily, an employee must have signed an agreement containing restrictive covenants in order to be bound by them. This is because an employee can only be taken to have accepted by conduct (e.g. by carrying out the job) terms which have immediate effect (***Jones v Associated Tunnelling*** [1981] IRLR 477). However, in ***FW Farnsworth Ltd v Lacy*** [2013] IRLR 198, an employee was found impliedly to have accepted a new contract containing restrictive covenants (provided following a promotion) by the fact that he had applied for private medical insurance cover. He

was found to have been bound by the terms of the new contract from the date he applied for the medical insurance (§§70-4).

46. Further to the issue of signing, consideration must have been provided. In ***Reuse Collections***, the High Court found at §82-83 that covenants in a contract of employment signed by the employee around the time he received a pay rise were unenforceable for lack of consideration. It had not been made clear to the employee that the salary increase was conditional on his signing the new contract.

b. The danger of repudiation and affirmation

47. Restrictive covenants do not apply where the employer is in repudiatory breach of contract and the employee has accepted that breach as bringing the agreement to an end[19]. This is known as the 'General Billposting Rule'[20], and while the principle has been the subject of criticism (e.g. ***Rock Refrigeration Ltd v Jones*** [1997] ICR 938 at pp. 958-9 per Phillips L.J.), it remains good law (***Brown v Neon Management Services Ltd*** [2018] EWHC 2137 (QB) at §§171-4). The rule may be engaged, for example, where the employer breaches the implied term of mutual trust and confidence, terminates the contract without notice, makes a payment in lieu of notice ('PILON') in circumstances where there is no right to do so, or orders the employee to take garden leave where there is no applicable garden leave clause.

48. If an employee resigns on notice, this will have the effect of affirming the contract in a breach of contract claim, leaving the covenants intact. In order to free themselves of the covenants, the employee would need to resign with immediate effect. This does not, however, affect, constructive unfair dismissal claims in the Employment Tribunal.

49. Employers should be aware of employees engineering a constructive dismissal case against them with the intention of being released from their covenants. The Courts

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[19] For the principles governing the acceptance of a repudiatory breach and affirmation in employment contracts see ***Société Générale, London Branch v Geys*** [2013] 1 AC 523 and ***Sunrise Brokers LLP v Rodgers*** [2014] EWHC 2633 (QB).

[20] See ***General Billposting Co Ltd v Atkinson*** [1909] AC 118

are also alive to this risk. They carefully scrutinise allegations of repudiatory breach by employees who secured alternative employment prior to resigning (particularly in team move cases: ***Tullett v BGC Brokers LP*** [2010] IRLR 648 at §86[21]).

50. Further, the High Court in ***Square Global Ltd v Leonard*** suggested at §§145-6 that the employee may be entitled to claim constructive dismissal by relying on a repudiatory breach by the employer even if this was not the reason s/he left his employment at the time. Accordingly, those representing both employees and employers should be alive to extraneous matters beyond the reasons given for the resignation.

c. Enforcement pre-action

51. Once an issue as to the potential breach of covenants arises, it is important to gather evidence quickly. Unless seeking to go without notice, undertakings should be sought swiftly as part of a pre-action letter.[22] If no satisfactory response is received within the time stipulated, it will be necessary to consider with the client and Counsel whether it makes commercial sense to pursue further action. It is worth noting that employers seeking to retain the employee and make them work their notice period cannot require the employee actually to perform work (rather than enforcing garden leave).[23]

d. Emergency relief application

52. Careful consideration must be given to the question of what notice to give to the other side: whether to go on formal notice, with informal notice or without notice. The latter two options require either exceptional urgency or (in the case of a without notice application) persuading the court that giving notice to the employee would subvert the purpose of the order sought (e.g. if there is a proper basis for saying that the

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[21] Here, Jack J cited and approved Brearley & Bloch (3rd ed.), paragraph 9.68: *"The courts will, however, continue to scrutinise closely the arguments of employees (particularly highly paid individuals and teams moving to a competitor of their employer) who have already secured alternative employment prior to resigning, and who construct arguments of repudiatory breach as a means of avoiding notice periods and irksome covenants. In such cases the argument will fail: (a) often at the first hurdle of whether there has been a repudiatory breach at all; or (b) sometimes, because any such breaches have been waived."*

[22] See ***Affinity Workforce Solutions Ltd v McCann*** [2019] EWHC 2829 (Ch)

[23] Further, forced labour is outlawed under s. 236 of the Trade Union and Labour Relations (Consolidation) Act 1992 and human rights law.

employee is likely to destroy evidence). Applications without notice or on informal notice entail a duty of giving full and frank disclosure, so if the employee is under surveillance, for example, it may be necessary to disclose this. A failure to give full and frank disclosure can result in relief that would have been granted had the employer gone on notice being refused at the return date.

53. In proceeding, the following will be necessary: claim form, application notice, draft order (including a penal notice), a witness statement of an appropriate person within the organisation (including confirmation that a cross undertaking in damages will be given and exhibit with the latest accounts, and full and frank disclosure where the application is without notice), the court fee and a schedule of costs.

54. If proceeding without formal notice (which means three clear days' notice), directions for the return date of the injunction are normally three working days later, with a schedule of costs to be served 24 hours in advance. The granting or refusal of interim relief is discretionary, and usually based on the *American Cyanamid* principles, beginning with whether there is a serious question to be tried. If the interim relief would effectively dispose of the whole action (e.g. if the covenants are so short that the trial would not be heard before they ended), the court may apply a higher standard as to whether the applicant would likely succeed at trial (***Lansing Lindle Ltd v Kerr*** [1991] 1 All ER 418). In this context, directions may be given for a speedy trial.

H. ANNEX - CHECKLIST

55. The following is a (non-exhaustive) example of questions to tackle with the client before giving advice on which covenants are best to protect their legitimate business interests, and which stand the greatest chance of being enforceable. The particular questions to cover will depend very much on the circumstances:

- What is the nature of the business, and does it do other work in addition to what the employee is involved in?

- Who are the business' customers? How frequent are the dealings?
- How many customers are there and are they easy to identify?
- How long does it take to build these client relationships?
- Is the business in a specific geographical area and is there a correlation between the customers and that location?
- Who are the suppliers to the business and how many suppliers of a particular item are there in the marketplace?
- How does the hierarchy and structure of the business work?
- Where does the employee fit into that hierarchy?
- What are the employee's duties and does s/he have specialised skills?
- Where will the employee actually work and will s/he have to do work for other areas of the business (or other companies in a group structure)?
- Will the employee have direct contact with customers and/or suppliers and, if so, how regularly and for what reasons?
- Will the employee be privy to trade secrets or confidential information? What information is confidential and to what degree? How long would it take for key confidential information to lose its currency?
- Are there natural cycles or renewals of customer contracts or tenders?
- What is the intended notice period?
- Does the employer need protection against the poaching of key employees?