

Restrictive Covenants in Employment Contracts:

Providing the ring of confidence to employers?

The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void.

Lord Macnaghten¹

The doctrine of restraint of trade is probably one of the oldest applications of the doctrine of public policy; cases go back to the second half of the sixteenth century and as early as 1711 it was laid down in *Mitchel v Reynolds*² that a bond to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good, though if it be upon no reasonable consideration or to restrain a man from trading at all, it is void.³

But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not: and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.

Lord Denning MR⁴

If the Court is to uphold the validity of any covenant in restraint of trade, the covenantee must show that the covenant is both reasonable in the interests of the contracting parties and reasonable in the interests of the public;

A distinction is, however, to be drawn between (a) a covenant against competition entered into by a vendor with the purchaser of the goodwill of a business, which will be upheld as necessary to protect

¹ *Nordenfeldt v Maxim Nordenfeldt Guns and Ammunition Company* [1894] AC 535, 565

² (1711) 1 P.Wms. 181

³ 19th Ed., Chitty on Contract, Vol.1, para 16-075

⁴ *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472, 1479 B-C

the subject-matter of the sale, provided that it is confined to the area within which competition on the part of the vendor would be likely to injure the purchaser in the enjoyment of the goodwill he has bought, and (b) a covenant between master and servant designed to prevent competition by the servant with the master after the termination of his contract of service;

In the case of contracts between employer and employee, covenants against competition are never as such upheld by the court. As Lord Parker put it in *Herbert Morris Ltd v Saxelby*⁵ at p.709: “I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the apprentice or servant would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer’s trade secrets as would enable him, if competition were allowed, to take advantage of his employer’s trade connection or utilize information confidentially obtained.”

The subject-matter in respect of which an employer may legitimately claim protection from an employee by a covenant in restraint of trade was further identified by Lord Wilberforce in *Stenhouse Ltd v Phillips* [1974] AC 391 (at p. 400) as follows:

“The employer’s claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation.”

If, however, the Court is to uphold restrictions which a covenant imposes upon the freedom of action of the servant after he has left the service of the master, the master must satisfy the Court that the restrictions are no greater than are reasonably necessary for the protection of the master in his business: (see *Mason v Provident Clothing & Supply Co Ltd* [1913] AC 724 at p. 742 per Lord Moulton). As Lord Parker stressed in *Herbert Morris Ltd v Saxelby* (supra) at p. 707, for any covenant in restraint of trade to be treated as reasonable in the interests of the parties “it must afford *no more than* adequate protection to the benefit of the party in whose favour it is imposed.” [Lord Parker’s emphasis].

Sir Christopher Slade⁶

⁵ [1916] 1 AC 688

⁶ *Office Angels Ltd v Rainer Thomas & O’Connor* [1991] IRLR 214: this case is perhaps the best starting place for the law today; alternatively there is the summary by Gloster J in *Brake Brothers Ltd v Ungless* [2004] EWHC 2799, which can also be found at paragraph 130 of Wyn Williams J’s judgment in *Kynixa Ltd v Hynes* [2008] EWHC 1495 (QB)

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.

Cox J⁷

It is not disputed that in principle an employer who finds himself in the position of these employers, faced with the widespread “poaching” of staff by a competitor, is entitled to protect himself within the limits that the law of contract allows, and that employees must accept reasonable steps to that end, as part of their duty of co-operation with their employer.

Buxton LJ⁸

1. The present approach to determining whether a restraint clause could be enforced is to consider whether:
 - i. The employer has a legitimate business interest requiring protection in relation to the employee in question;
 - ii. The clause in question is no wider a protection than is reasonably necessary for the protection of those interests.

To make a clause stick that is the formula to be complied with.

Making the clauses stick

2. There is no record of how often employees have simply abided by the restrictive covenants in the contract, but presumably many, if not most, do. There is no record of how many do not, and how many avoid action being taken by the employer as the employer does not know or suspect a clause is being broken. To borrow from Mrs Beaton, first you have to catch your rabbit.

⁷ *TFS Derivatives v Morgan* [2005] IRLR 246, para 38

⁸ *Willow Oak Developments v Silverwood* [2006] EWCA Civ 660; [2006] ICR 55, para 1

3. One way or another, knowledge will have to filter to the employer. Once it has, the employer either has sufficient to act upon it by seeking enforcement of the restrictive covenants, or the employer will have sufficient information to seek assurances from the employee that the covenants will be complied with (failing which action will be initiated to enforce the obligations) or the employer will need to keep on hunting.
4. In the absence of co-operation by the employee with the clause and with knowledge that it has been breached or there is a credible threat to it being breached then an injunction (or undertakings in lieu) or (more rarely for the employer) a declaration will have to be sought. If the clause in issue is to stick:
 - i. Get the scope of the clause plausibly right for the business and the employee concerned. Express terms are required for restrictive covenants, they will not (other than as appears below under “Fallback positions”) be implied. The terms will be construed having regard to the contract as a whole, and its employment context including what it was reasonable to envisage the employee doing over the years.⁹ The court will not be put off from upholding a clause because of improbable possibilities that the clause would cover and for which the clause would be unreasonable;
 - ii. Get the evidence right for the business and the employee concerned, this necessitates being quite specific over the knowledge and information that it is sought to be protected¹⁰;
 - iii. Ensure that the clause and the evidence stays current with the law as it develops and how the business and the employee concerned develops.

⁹ *Thomas v Farr Plc* [2007] EWCA Civ 118; [2007] IRLR 419: it was accepted by T that the information that F was seeking post-employment to prevent any use of was information that at the time of the contract it was reasonably foreseeable that T would be exposed to at a later date. This is a question of fact and *Thomas* can be contrasted with *WRN Ltd v Ayriss* [2008] EWHC 1080 (QB) where the employees future prospects at the time the employment contract was entered into were held not to be relevant as any future role for A would probably have involved a new employment contract

¹⁰ *FSS Travel & Leisure Systems Ltd v Johnson* [1998] IRLR 382

5. It is important therefore to periodically review the restraint clauses to assess their continuing suitability and it is important to keep the evidence up to date and clear because if it becomes necessary to try to enforce a clause delay will generally be the enemy of the employer and the friend of the erring employee. You do not want the damage to have been done before you could get going, or injunctive relief to be refused because of delay, or to go off at half cock because you are in a mad scramble to get the matter before the court.

Freedom of contract

6. The agreement by the parties to the restrictive covenants is indicative of their prima facie reasonableness; in theory the parties know where their best interests lie, how to protect them and therefore what is reasonable as between them.
7. For most employees their freedom is to say “yes” or “no” to the terms offered by the employer. In many, if not most, areas of employment the terms of employment amongst employers will be similar if not identical; so not much freedom in practice there.
8. The approach more recently of the courts seems to me to focus less on what is in the public interest in terms of the free movement of labour and the freedom to compete, but to concentrate more on the relative bargaining strength of the parties. Other issues in relation to restrictive covenants apart, the more equal their power the more likely the clause in issue is likely to be upheld; the greater their inequality the less likely the clause is to be upheld (except on those rare occasions when the inequality is in the employee’s favour). The unconscionability of the bargain in all the circumstances should be a better barometer of whether a clause should be upheld or not.

Five basic restrictions

9. There are three basic methods to protecting the employer’s position, but five restrictions that typically are applied:

- i. Restriction as to occupation;
- ii. Restriction on solicitation (of employees as well as customers);
- iii. Restriction on dealing;
- iv. Restriction as to time;
- v. Restriction as to location;

Time will be an essential companion of any of the other four. Location will be used in conjunction with time and at least one of the other three. The other three may or may not be used in conjunction with each other.¹¹

10. Whether to apply a restriction as to location and/or occupation and the duration for which such a restriction should last, if they are to be made to stick, will be the result of a proper consideration of the commercial needs of the enterprise that you are seeking to protect and the nature of the role that the employee played with the company.
11. The restriction as to occupation could either stipulate an occupation or a role or specify a list of competitors or competitors generally. Stipulating a list of competitors is permissible¹² but has the shortcoming that it will not prevent ex-employees setting up in competition. A non-solicitation obligation may cover customers or employees of the enterprise or both.
12. In formulating any such restrictive obligation it is necessary to take into account what the law will uphold and what it will not. However, it is not unlawful in itself to stipulate for an obligation knowing or believing that the law would not uphold the obligation. Whilst the law will not enforce an

¹¹ It is common to use them in combination and as an entire package. However, in *WRN Ltd v Ayriss* supra, HHJ Richard Seymour QC observed that to be protected by more than one covenant covering the same territory was fundamentally at odds with the basic requirement that a restrictive covenant should impose restrictions that are no more than reasonably necessary to protect the employer's business

¹² *Duarte v Black and Decker Corporation* [2007] EWHC 2720 (QB); [2007] All ER (D) 378

agreement that is in unreasonable restraint of trade, so that the agreement is unenforceable in that regard, if the parties wish to implement it they are at liberty to do so and will not be acting unlawfully.¹³

13. The courts have accepted that the appropriate means of protecting an enterprise's goodwill and customer contacts are appropriately formulated solicitation, dealing and area restraint covenants. This also applies to the protection of confidential information or trade secrets:

If the managing director is right in thinking that there are features in his process which can fairly be regarded as trade secrets and which their employees will inevitably carry away with them in their heads, then the proper way for the plaintiffs to protect themselves would be by exacting covenants from their employees restricting their field of activity after they have left their employment, not by asking the court to extend the general equitable doctrine to prevent breaking confidence beyond all reasonable bands.¹⁴

14. The only consideration for the employer in formulating an obligation is the need of the enterprise that it is to serve. Though usually that enterprise will wish to have an obligation which will or probably will or arguably will or just might be upheld by a court, some enterprises on some occasions may prefer an obligation that they desire or that they believe will be abided by or that will be sufficient to put anyone off from challenging it. They may also wish thereby to put off any competitor from approaching their employees and luring them away.

15. The scope of any obligation will be determined by such features as what the enterprise does, the market for that activity, the position of the employee in the enterprise, the role of the employee, the qualifications required of such an employee, the market for such an employee, the transferability of the skills of such an employee, the likely knowledge that the employee will carry away in his head, the usefulness of such an employee to a competitor, the length of

¹³ *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269; *Boddington v Lawton* [1994] ICR 478, 491 A-G

¹⁴ *Printers and Finishers v Holloway* [1964] 1 WLR 1, 6; approved in *Faccenda Chicken v Fowler* [1987] Ch 117

time it will take to re-organise the enterprise (if that is needed), the length of time it may take to replace the employee (though regard is to be had to the length of the notice period), the limited market for replacements, the lifespan of information before it is outdated, the lifespan of skills or knowledge of the markets before they become outdated, the nature of the enterprise's connection with its customers and the durability of customer connections.

16. The reasonableness of the clause is to be judged as at the time the contract is entered into. It will include that which could reasonably be envisaged as developing in the future.

A note on 'information'

17. There is a distinction between that information which an employer can require to be treated as confidential during a person's contract of employment and that which an employer can require to be treated as confidential after termination. Only information properly classed as a trade secret or being of such a highly confidential nature as to acquire the same protection attracts post-employment protection.¹⁵ Therefore it is not just an assertion from an employer that will suffice.
18. There is a broad range to what may be considered confidential to a business. Customer lists and intellectual property are habitual residents for confidence. Financial statements showing projected profitability, profit margins, strategic planning in relation to projected costs, supply chains, trade discounts, acquisition targets, market research, penetration of new markets, tackling competitors, investment requirements, introducing new products, key customer accounts and high performing employees will also be residents. Each will have its own particular shelf life, but only to be replaced by some new planning in relation thereto.

¹⁵ *Faccenda Chicken v Fowler* [1987] Ch 117

19. Four elements contribute to the mix which may attract protection: the nature of the employment; the nature of the information; the extent to which the employer impressed the information's confidentiality on the employee; the ease with which the information could be isolated from other information the employee was free to use. The fact that the distinction between what is and what is not a trade secret or confidential can be very hard to draw, may support the reasonableness of a non-competition clause.
20. Three general circumstances prompt consideration of a need for a non-competition clause: the employee will be exposed to commercially valuable information (and it will be difficult to police compliance with any obligation of confidentiality); the nature of the enterprise is that customers may be difficult to identify; the nature of the enterprise is that customer loyalty is usually to the employee rather than the enterprise.
21. The fact that a company may provide the employee with information that was not necessary for the employee to do their job does not alter its confidential nature. Typically salesmen will be part of a territorial team but each have a more limited territory of their own within that territory. Nevertheless they will be likely to receive information on the performance of the team in relation to the territory as a whole.

Playing the man and not the ball

22. The object of a restraint clause is to protect legitimate commercial interests. This does not include preventing a valued employee joining a rival (try a lengthy notice period with provision for garden leave).
23. However, it has been held that a restraint clause that was intended as a disincentive to an employee leaving where the interest being protected was the poaching of staff by a competitor was permissible.¹⁶ No-poaching clauses are

¹⁶ *Willow Oak Developments Ltd v Silverwood* [2006] ICR 1552

permissible to prevent one employee from inducing others to leave following his own exit, but such clauses are in no different a position to any other clause, reasonableness still applies.¹⁷ An ex-employee who has knowledge of employees' qualifications, pay, conditions through his position with his former employer is one circumstance; an ex-employee who has been informed of these things by the employees themselves is quite another.

Interpretation of clauses

24. The principles of interpretation that apply to a covenant in restraint of trade are those, as indicated at the outset, that apply to the construction of any other written term, the principles in *Investors Compensation Scheme v West Bromwich Building Society* apply.¹⁸ Those principles are:

Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear.

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible

¹⁷ *Dawney, Day & Co Ltd v De Braconier D'Alphen* [1997] IRLR 442 (CA)

¹⁸ [1998] 1 WLR 896, 912H – 913E; *Arbuthnot Fund Managers v Rawlings* [2003] EWCA Civ 518, [2003] All ER (D) 181, para 21, Chadwick LJ

meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.¹⁹

The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.²⁰

25. In a specifically employment context, Harman LJ in *Home Counties Dairies Ltd v Skelton*²¹ put matters as follows:

It is the first principle in construing written documents, whether wills or any other document in writing, to consider the circumstances at the time when they were made and the position of the parties to them.

26. Agreements in restraint of trade, like other agreements, must be construed with reference to the object sought to be attained by them.²² It is not the function of the court to strive to give a covenant a meaning which is compatible with public policy if that is not the meaning that the parties intended it to have. The court will answer the question: “what did these parties intend by the bargain which they made in the circumstances in which they made it?”²³

27. Whilst a court will not officiously strive to keep alive a covenant in restraint of trade, it will not necessarily take an option that might be available to it to render such a term futile. The background circumstances or context in which the contract is made when taken into account may alter the manner in which

¹⁹ see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749

²⁰ see *Antaios Compania Naviera SA v Salen Rederiana AB* [1985] AC 191, 201: “if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

²¹ [1970] 1 WLR 526 (CA), 533

²² *Haynes v Doman* [1899] 2 Ch 13, 25; *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472

²³ *Arbuthnot Fund Managers Ltd v Rawlings* [2003] EWCA Civ 518

an apparently express term could be construed. A contract which identified in its definition section “company” as being a particular company, in which the contract persistently referred to “the Company (or Subsidiary Company)” but in which the covenant in restraint only referred to the “company” and the company did not carry on any of the activities that it was sought to restrain, nevertheless could rely on the clause in so far as the court would read “company” so as to include reference to any subsidiary, as that reflected the realities of the contractual circumstances (the employees worked for a subsidiary who did carry on the activities that it was sought to restrain).²⁴

28. Regard must not only be had to the drafting of the clause but to the definition of any term used in the clause to ensure that it goes no wider than is reasonably necessary for the protection of the objects in mind. Defining “Customer” to include all persons who are negotiating with a company at the time of the departure of an employee and in a twelvemonth period leading up to his departure will make the enforceability of any covenant incorporating that term an unlikely one as it covers customers with whom the employee had never had any contact. It may be necessary therefore within the definition clause to provide for a modified meaning as regards restrictive covenants or to provide in the restrictive covenant for a more restrictive meaning.²⁵

Getting your ducks lined up...

29. When it comes to enforcement, time is short, so the thought that has gone into the covenants and periodic revisions should put an employer in a better position to act speedily and thoroughly than one who has relied on ‘standard’ clauses and has not re-visited matters since their inception. A memorandum of the purpose and aims of the covenants should be made at the time of their conception for later use (those who were responsible for drawing them up may

²⁴ *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613 in which the court of appeal rejected the defendant/respondent’s literal interpretation as it would produce a futile result, which could not have been the parties’ intentions at the time the contract was made and took the line that the subsidiaries were in effect in this case agencies through which BIMG directed its activities.

²⁵ *WRN Ltd v Ayris* supra, where the covenants failed because they prevented A from having contact with customers with whom he had personally never had any dealings

have moved on before they ever fall to be enforced; the court will usually require quite explicit justification and information before it will uphold a covenant, the less work you have to do to provide the evidence the better).

30. Normally, restrictive covenants will come before the court on an application for an injunction by the employer. The court is at the interim injunction stage concerned with whether it is plain that the covenants in question would not be enforceable even after trial. In the absence of it being plain, then the court must regard the covenant as having a reasonable prospect of being upheld.²⁶
31. Unless there are disputed facts which might have a bearing on the construction of the contract, and the resolution of that dispute would require a trial, then the court is in as good a position at the interim stage to construe the contract as any court hearing a trial. In any event there is likely to be an order for a speedy trial, and that can be a matter of 3 or 4 weeks later (and occasionally sooner).

Time

32. This is the one essential that cannot be altered by ‘construction’ or ‘interpretation’. A time stipulation will be specific, even if the clause states that the restriction will apply forever. It will only be non-specific where the clause fails to state a time period, in which case it will be inferred that it is to apply forever.
33. If it is too long, that clause goes or that part of that clause (if it is severable) goes (though there will be rare occasions where “forever” will be reasonable). Although in an effort to save restrictive covenant clauses there has been resort to clauses that permit the reduction of the stipulations in the restrictive covenants to that which would be enforceable, such clauses have not as far as I am aware found favour with the courts as they constitute a direct invitation to

²⁶ *Arbuthnot Fund Managers Ltd v Rawlings* supra

the courts to re-write the clause in issue, a matter on which the courts retain their aversion.

34. Getting the time right requires a careful analysis of what it is that is being protected, though in the end this is unlikely to produce a time period of slide rule precision, it will still be likely to be a time period based on an impression of what is necessary. Where information is relevant it will be the durability of the information to be protected that will guide the period to be selected in relation to trade secrets.
35. Recruitment, training, familiarisation, introduction to customers, introduction to the products, period in which to build rapport with customers are all features that may be pertinent to time in relation to other clauses. As litigation always carries some risk of defeat (and this particular area can hardly be said to be an unqualified field of success for either employer or employee) and as it will usually not be known exactly when the reasonableness or otherwise of the clause will be called into question, then some regard should be had to what sought of time period the courts have upheld in similar circumstances.
36. Lord Denning MR thought that 12 months was typical for such clauses and was an unremarkable period in the main. More recently Tugendhat J observed that periods of 12 months are commonly upheld by the courts.²⁷
37. For most covenants the time stipulation will have an arbitrary element too as the employer will only usually be providing an estimate of the duration for which the enterprise needs protecting.
38. Time may relate to the duration of any restriction and be a qualifying condition in relation to specific interests of the employer. 'Reasonableness' will attach to each time stipulation in a non-solicitation or non-dealing clause so that each period must pass muster.

²⁷ *Extec Screens & Crushers Ltd v Rice* [2007] EWHC 1043 (QB): the dispute in issue at the time was whether 3 months of garden leave should count towards 8 months of post employment restriction; on the construction of the covenant in issue, "No".

39. The notice period is also designed to accommodate an employer's insecurities about recruitment, training, familiarisation and necessary introductions and development of relationships. The period of notice will be a counter argument to the reasonableness of a restraint clause that relies on these features and to the additional time feature of such a clause in particular.
40. The use of a garden notice clause is also designed to accommodate an employer's insecurities about these features as well as accommodate fears relating to confidentiality and customer contact more specifically. Again the length of the period will be a counter argument to the reasonableness of a restraint clause and in particular in relation to the time element.²⁸ It will therefore usually be prudent to include a set off provision in relation to a garden notice clause and a restrictive covenant.

Steiner UK Ltd v Spray (1993) (unreported) CA upholds 6 month non-competition clause for a very young hairdresser.

Naish v Thorp Wright & Puxon (1998) (unreported) 8 years non-compete clause upheld.

Location, Location, Location

41. Geographical restraints have become less popular over the years. Non-dealing and non-solicitation clauses have tended to be preferred. They are of greater specificity and are less apt to give rise to an unanticipated argument. But geographical restraints remain pertinent for some forms of business: those with a peripatetic customer base, typically, businesses that rely on footfall or where requests for their services are intermittent and unpredictable.
42. In principle the wider the geographic zone stipulated for in the covenant then the more likely it is that the covenant will be unenforceable. Absent any geographical restriction then the covenant would apply worldwide and it will

²⁸ see *Extec* etc n.25 supra

only be in rare circumstances that such a restriction will be upheld. Of course when considering the specific aspect that is sought to be restrained that may have the effect of limiting the scope to which the worldwide ban would apply. In principle a worldwide ban is only likely to apply where the market place is small, the employee is someone of high rank within the enterprise and no effective form of policing otherwise exists.

43. However, in genuine restraint of the divulgence, advertently or inadvertently, of business secrets then a worldwide ban will be more likely to stick and it may be thought a geographical stipulation would in any event be otiose i.e. if you are not entitled to divulge your ex-employer's business secrets then it matters not that the clause applies in Madras as well as Malton, Lahore as well as Leeds.

Steiner (UK) Ltd v Spray (1993) a restriction on competing within 3 miles of Norwich City Centre was upheld.

Naish v Thorp Wright & Puxon (1998) a restriction on competing within a 14 mile radius of a veterinary surgery practice was upheld.

*First Choice Recruitment v Hancock*²⁹ a restriction on competing within 10 miles of an office in Bedford of which H was the former branch manager was unenforceable.

*Office Angels Ltd v Rainer-Thomas*³⁰ where a non-compete clause in the City of London within 1,000 metres of the branch at which R-T had been a branch manager/consultant was unenforceable.

*Hollis & Co v Stocks*³¹ non-compete clause in relation to an assistant solicitor within a radius of 10 miles of the office held to be enforceable. The location

²⁹ [2003] EWHC 2332 (QB); [2003] All E R (D) 64; there were 18 similar businesses in the area.

³⁰ [1991] IRLR 214 (CA)

³¹ [2000] IRLR 712

was a small rural town; the 10 miles radius did not include the 2 major cities in the area; the firm was a one partner firm who did typical localised work for repeat generations of families in the area.

44. Note that the restriction that foundered in *Office Angels* was extremely modest in scope but set in an urban landscape; the much wider scope that succeeded in *Hollis* was set in a much more rural landscape. That differentiation can be expected to endure so that more latitude will be afforded to clauses relating to rural and quasi-rural areas and less latitude will be given to clauses relating to urban areas.
45. On rare occasions a much wider restraint will be upheld, including one that is worldwide, but these will generally be in respect of high ranking employees who are able to negotiate a large part of their contract of employment and for whom any restriction maybe compensated for in the remuneration package.
46. It is possible that a wider territorial restraint could be enforceable even where the restraint is in relation to a territory that is much larger than the territory with which the employee had dealings when employed. It is not untypical for companies to disseminate information of a confidential nature that covers an overall department's or sales team's performance but which contains information which is of no specific relevance to the employee in terms of the territory that is covered for the employer but which would be of relevance to another employer if the employee went to work in the territory to which that information relates.³² Presumably though if the company did not have a legitimate aim in disseminating the information then it would be less likely that a wider geographical restraint would be upheld.

³² *Norbrook Laboratories (GB) Ltd v Adair* [2008] EWHC 978 where A had been employed in an area of Northern England, but received information that went further than that territory and had a restraint that covered the United Kingdom and Ireland

The blue pencil

47. The doctrine of severance may ride to the rescue of a covenant that is defective in one or more respects except that with respect to time.³³ If the period is too long there will be no saving it.

48. But the doctrine is of limited applicability:

The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but it is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only.³⁴

... a contract which contains an unenforceable provision nevertheless remains effective after the removal or severance of that provision if the following conditions are satisfied:

the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains;

the remaining terms continue to be supported by adequate consideration;

the removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all.'³⁵

Trying to save the unenforceable

49. As restrictive covenants are vulnerable, then an enterprise might try as a long-stop to use a severability and/or deeming provision by way of contractual provision to save the situation. Severability clauses are now typical in commercial agreements but on their own in an employment agreement would

³³ *Norbrook* supra, Elizabeth Slade QC (as Slade J then was) blue pencilled 'prospective customers' and 'direct access to and/or' from a solicitation and dealing clause so as to give effect to it

³⁴ *Attwood v Lamont* [1920] 3 KB 571, obiter but none the worse for that; however, in so far as *Attwood* suggested that where severance was established in an employment case the court still retained a discretion not to order it, then it is not to be followed: *T Lucas & Co Ltd v Mitchell* [1974] Ch 129, 136H-137B

³⁵ *Sadler v Imperial Life Assurance of Canada Ltd* [1988] IRLR 388, para 19; approved in *Beckett Investment Management Group Ltd v Glyn Hall* [2007] EWCA Civ 613.

seem to be otiose given the court accepts that if a clause can be severed then the parts may be saved in any event.

50. However, given that restrictive covenants are void as being against public policy unless satisfying the specified general requirements of protecting a legitimate business interest in relation to that employee and not being any wider than is reasonably necessary to protect that interest in relation to that employee, then it is hard to see how any such clause could ride to the rescue of a covenant that would otherwise be void.
51. It is also hard to see how any such clause would not involve an attempt to get the court to re-write the covenant in issue. Such a clause, described by one court as a “plank in a shipwreck”, has been tried and rejected.³⁶

Late inclusion

52. If the contract of employment does not contain restraint clauses it is possible to introduce them subsequently or to alter those that may exist. There is an element of peril in doing so in that if the proposition to the employee is that they must agree or be dismissed then a clause that is subsequently held to be unreasonably wide may render the dismissal unfair.³⁷ A clause that is valid in its width may provide a fair reason for dismissal should the employee refuse to sign.³⁸
53. However, a clause that is unreasonable in its scope may nevertheless still provide a fair reason for dismissal and a clause that is reasonable in its scope may still result in an unfair dismissal. An outlandish clause would (probably)

³⁶ *Townends Grove Ltd v Cobb* [2004] EWHC 3432 (Ch), on an interim application for an injunction.

³⁷ *Forshaw v Archcraft Ltd* [2006] ICR 70 but the reasonableness of the covenant is to be considered at the fairness stage rather than the “other substantial reason” stage in an unfair dismissal claim: *Willow Oak* supra

³⁸ *Willow Oak* supra

not survive the first hurdle for the employer to surmount: whether the refusal to sign could be the kind of reason that could justify a dismissal.

54. An outlandish clause and one that is unreasonable may assist in undermining the employer at the second stage: whether the employer had a genuine belief that dismissal for that reason was justified; even a clause that is reasonable may not get the employer past that stage. Whether the clause is reasonable or unreasonable an employer may fail the third hurdle, the fairness of the decision to dismiss, if the approach to dealing with the employee had not been fair.
55. Therefore the circumstances in which it is sought to introduce such a clause may prove to be more important than the clause itself. Poaching of staff, soliciting of customers by an ex-employee, revealing trade secrets may all provide the immediate conditions in which an employer may seek to introduce a clause or amend an existing clause and which would pass muster at all three stages.
56. The revision of the employment contracts by a new HR manager or by Solicitors would also be likely to be legitimate occasions that would enable an employer to pass all three stages; similarly, a response to a change in the law or a further declaration of the law by the courts. But the attempt to introduce a clause as a response to difficulties in the workplace that relate to matters unconnected with such a clause, and difficulties that would not immediately lead anyone to think that the employer may be parting company with employee in the not too distant future, may not surmount the first hurdle and would probably result in a fall at the second hurdle.

Severance agreements

57. If the covenants were not present in the original contract of employment, or any subsequent contract, or have become outdated, then it is possible to introduce the covenants via a severance agreement if the opportunity arises for one (which frequently it will not). An agreement at the point of departure,

apart from filling a gap, provides for the immediacy of agreement and that if an issue does arise in relation to the covenants their reasonableness will be judged at a much later date in the employment cycle. But don't forget to include consideration for the severance agreement.³⁹

Fallback positions

58. The duty of fidelity imposes no inhibition on an employee competing with an employer once he has left.⁴⁰ The freedom to compete, once an employee has left that is unrestrained by a non-compete covenant, carries with it a freedom to prepare for future activities. The mere fact that activities are preparatory to future competition will not be conclusive in favour of an employee. The duty of a fiduciary is to act solely in the interest of his employer. Clear words are needed to restrict the ordinary freedom of an employee who is considering quitting his employment and setting up in competition to his former employer.⁴¹

Recentish clauses of interest

59. A non-competition clause for three years within England, Scotland or Wales, and one lasting two years for the same geographic area has been accepted as lawful by the employee. But the first clause was part of a sale purchase agreement of a company in which the employee received cash and shares to the value of £2,000,000 and in which the employee was retained in the capacity of director after the takeover.⁴²

³⁹ *WRN Ltd v Ayris* [2008] EWHC 1080 (QB) the employer forgot the consideration and the agreement was therefore not binding

⁴⁰ *Robb v Green* [1895] 2 QB 315

⁴¹ *Helmet Integrated Systems Ltd v Tunnard* [2007] IRLR 126, para 49

⁴² *RDF Media Group Plc v Clements* [2007] EWHC 2892 (QB); [2007] All ER (D) 53: if the company to whom the defendant had wished to go had been located on the Isle of Man or the Channel Islands would the geographic restriction have bitten? (The claimant and defendant are involved in television programme production and it may be that the Isle of Man and the Channel Islands are not locations for such companies except when making a programme).

60. A restriction on working for a number of named competitors for a period of two years was rejected.⁴³
61. A restriction for 12 months in a non-dealing covenant was upheld having regard to the seniority and importance of the employees, the evidence about business patterns, the logistics of replacing the employees, and the uncontradicted evidence of an industry standard. Amongst other matters this would allow the employer time to gain the confidence of the clients so that they remained loyal to the company as opposed to those they had been dealing with.⁴⁴
62. An injunction to restrain from soliciting or dealing with any client who had at any time during the 12 months immediately preceding the employee's resigning from his employment carried on any investment business with the employer and with whom the employee had business dealings during that period was granted in relation to a senior ex-employee who had previously sold his business to the company of which the employer was a subsidiary. In addition an injunction was granted not to solicit or deal with any person who had been a prospective client of the employer within 6 months of the employee's leaving date.⁴⁵
63. An extended definition for "Relevant Client" to be applied to a non-dealing clause was severed so as to make the clause effective for the remainder.⁴⁶
64. The provision by an employer of confidential information that went beyond information required by the employee to do her job, nevertheless having the character of confidential information still justified a territorial restriction that

⁴³ *Duarte v Black and Decker supra*; the employee (who had sought a declaration that his covenants did not restrain him) had the inestimable comfort and advantage that his new employer would hold open his position if the covenants were upheld.

⁴⁴ *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613

⁴⁵ *Arbuthnot Fund Managers Ltd v Rawlings* [2003] EWCA Civ 518

⁴⁶ *Beckett Investment etc v Hall supra*

was greater than the territory in which the employee had actually been employed.⁴⁷

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⁴⁷ *Norbrook Laboratories (GB) Ltd v Adair* [2008] EWHC 978 (QB): A worked in territory confined to the North of England but had a contractual restriction for the United Kingdom and Ireland.