

**Restrictive covenants:
a refresher**

Colin McDevitt

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Restrictive Covenants

Restrictive Covenants in the Employment Arena

- An Overview/Refresher
- Caselaw guidance on restrictive covenants

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Overview/Refresher

- Need for/purpose of restrictive covenants
- Restrictive covenants are an unlawful restraint of trade, UNLESS
 - i. There is a legitimate proprietary interest
 - ii. The protection sought is the minimum reasonably necessary with regards to the parties' and the public interests

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**Overview/Refresher
Key Principles**

- Reasonableness at the time of entering into the covenant
- Legitimate interest
- Employment v commercial contracts
- Sole purpose of preventing competition is insufficient
- Restrictions must be no wider than necessary

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**Overview/Refresher
Key Principles**

- Legitimate Interests includes:
 - Trade connections (customers, clients, suppliers), goodwill
 - Trade secrets and confidential information
 - Stability of the workforce
- Define the legitimate interest, carefully

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**Overview/Refresher
Categories of Restrictive Covenant**

- Non-solicitation
- Non-dealing
- Non-compete
- Non-poaching
- [Trade secrets and Confidential Information]

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Overview/Refresher
No More Than Necessary

- Geographical restrictions
- Duration

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Overview/Refresher

Severability

- Blue pencil
- Consideration
- No major change

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Tillman v Egon Zehnder Ltd [2019] UKSC 32

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Overview/Refresher
Discharge of Restrictive Covenants

- Wrongful dismissal
- Constructive unfair dismissal
- PILON

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Garden Leave

- Stockbroker
 - Garden leave for 12 months and restrictive covenants that would specifically apply during garden leave.
 - Upheld
 - The 12-month injunction was a reasonable way of protecting his employer's legitimate interest in retaining its clients, as it would take the firm's investment managers a long time to forge new client relationships.

3PB JM Finn & Co Ltd v Holliday [2013] EWHC 3450 (QB)

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Garden Leave Followed By Covenants: No Set-Off

- After sales manager: crushing and screening equipment manufacturer
 - Garden leave for 3 months, followed by 8 months restrictive covenants (with no set-off)
 - Upheld
 - The lack of a set-off provision in the contract did not make the restrictive covenants unenforceable. The total period of 11 months was not excessive in the circumstances.

3PB Extec Screens & Crushers Ltd v Rice [2007] EWHC 1043 (QB)

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Non-compete: 6 Months With Geographical Restriction

- Agronomist
 - 6 months post-termination from being engaged in work, supplying goods or services of a similar nature which compete with the employer to the employer's customers, working for a trade competitor within the company's trading area (specified to be Kent, West and East Sussex, Hampshire, Wiltshire and Dorset)
 - Not upheld (cont ...)

3PB Bartholomews Agri Food Ltd v Thornton [2016] EWHC 648 (QB)

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Non-compete: 6 Months With Geographical Restriction

- The employee was only a trainee when the clause was entered into and its terms were "manifestly inappropriate" for a junior employee
- Too wide: applied to all customers, not just those with whom the employee had contact (1% of e/er's turnover)
- no definitions clause so it was uncertain what phrases such as "of a similar nature" meant
- The non-compete clause provided that the employer would continue to pay him for the duration of the 6 months post-termination, even if he was being paid by a new employer was contrary to public policy



Bartholomews Agri Food Ltd v Thornton [2016] EWHC 648 (QB)

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Non-Compete: 3 Years – Share Sale Agreement

- Area manager supervisor for company providing "supported living" services to children & vulnerable adults
- Restrictive covenant contained in a share sale agreement for the sale of ½ of the issued share capital of the company and was given by both the former director and shareholder of the company and her civil partner, who had been employed as area manager supervisor
- Both agreed not to materially compete with One Step for 3 years or solicit its significant clients or customers. However, shortly after leaving the company they incorporated a new company and began carrying on business in competition with One Step (cont ...)



One Step (Support) Ltd v Morris-Garner and another [2014] EWHC 2213 (QB)

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Non-Compete: 3 Years – Share Sale Agreement

- Upheld
- In construing the non-compete covenant, the court found that the 2 companies were competing in the same market for business from local authorities in the same 2 regions, and it followed that both individuals were in breach of the non-compete covenant.
- the 3 year period was not unreasonable in the circumstances: One Step plainly had a legitimate interest in restraining the employee because she had been very closely associated with the first defendant both personally and professionally.



One Step (Support) Ltd v Morris-Garner and another [2014] EWHC 2213 (QB)

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Non-Compete: 1 Year – Goodwill Agreement

- Financial adviser
- 12 months: from being engaged, concerned or interested in, or providing financial support, management services or technical, commercial or professional advice to any other business supplying goods and/or services competitive to the employer
- Upheld
- The non-compete clause was contained in a "goodwill agreement" (rather than the employment agreement) under which the employee sold the value of the goodwill in the client base he brought with him to the employer.

3PB Merlin Financial Consultants Ltd v Cooper [2014] EWHC 1196 (QB)

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Worldwide Restriction – 1 Year

- Engineer: research and development
- Involvement, in any capacity, with any business which is similar to and competes with any business with which the employee was concerned in the 12 months before termination. 12-month duration, no geographical limit
- Upheld
- Lack of territorial limit was not unreasonable given the international nature of Dyson's business. There was no uncertainty in the phrase "similar to and competes with any business being carried on by the company". The phrase meant a business that competes by reason of the similarity in the nature of both businesses.

3PB Dyson Technology Ltd v Strutt [2005] EWHC 2814 (Ch)

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Information Available on Social Media

- Junior recruitment consultant
- Any client or prospective client (teachers and schools) with whom consultant had dealt in last 12 months of employment. Duration of 6 months
- Upheld
- The fact that recruitment information was widely available on social media did not undermine the employer's legitimate interest

3PB East England Schools CIC (trading as 4myschools) v Palmer and another [2013] EWHC 4138 (QB)

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Information Innocently Acquired

- Senior insurance broker and manager of commercial department for company which arranged commercial all risks insurance cover
- 1 year post-termination
- Upheld
- Innocently learned and not deliberately memorised information was still capable of protection. This included client lists since the identification of clients was linked to other confidential information, such as details of renewal dates, claims made, premiums charged and fee rates

3PB SBJ Stevenson Ltd v Mandy [2000] IRLR 233

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Team Move: Breach of Implied Duty of Fidelity – No Restrictions

- Operations manager at a marine biology laboratory
- No formal contract of employment and no post-termination restrictions
- The employee planned to take over the employer's premises, incorporate a company with a similar name, register similar domain names and facilitate the recruitment by the competitor of a substantial section of the employer's workforce
- Held: Breach of the implied duty of fidelity by failing to inform the employer of the planned poaching raid, discussing confidential information about staff salaries with the competitor, arranging meetings with his colleagues at his home and colluding with the competitor in identifying and recruiting members of staff

3PB Thomson Ecology Ltd and another v APEM Ltd and others [2013] EWHC 2875 (Ch)

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Speaker



Colin McDevitt, Barrister
T: 01962 868 884
E: colin.mcdevitt@3pb.co.uk

London 020 7538 8055
Birmingham 0121 289 4333
Bristol 0117 928 1520
Oxford 01865 793736
Winchester 01962 868884
Bournemouth 01202 292 102

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