

Restrictive covenants: drafting & enforcement top tips

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This morning's agenda

Welcome and introduction	Matthew
Purpose and different types of restriction	Hayley
Limitations on the scope of restrictions	Matthew
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Remedies – injunctions, compensation, costs	Nick
Q&A	All

Purpose and different types of restriction

Hayley Ainsworth
Solicitor

Employers: how to protect your business using restrictive covenants

What are restrictive covenants?

Clauses prohibiting an employee from undertaking certain actions for a certain period after they have left employment.

Can include approaching other employees, suppliers, customers or competitors.

Employers: how to protect your business using restrictive covenants

Why do we need restrictive covenants?

- Protect (legitimate) business interests
- Protect confidentiality
- Protect intellectual property
- Particularly important with strategic personnel e.g. those dealing directly with customers, suppliers, confidential information

Employers: how to protect your business using restrictive covenants

Types of Restrictive Covenants:

Non-compete

Prevent employee taking on role that competes with business

Non-poaching

Prevent employee approaching former colleagues to join new business

Employers: how to protect your business using restrictive covenants

Types of Restrictive Covenants:

Non-solicitation

Prevent employee persuading clients to move business

Non-dealing

Prevent employee having any dealings with former clients

Limitations on the scope of restrictions

Matthew Clayton
Partner

Legitimate business interest

- Post-termination restrictions only enforceable if they are protecting a ‘legitimate business interest’ of the employer, e.g.
 - confidential business information
 - customer connections
 - commercial relations with suppliers
 - stable workforce
- Restrictions should be tailored to address such issues as are relevant to the business
- Merely preventing competition isn’t a legitimate business interest

Reasonableness

- Restriction should go no further/wider than is necessary to protect the legitimate business interest
- Could the interest be protected with a narrower restriction? Examples:
 - Geographical restriction to protect customer connections may not be justifiable if the customers can be identified and protected via a non-dealing/non-soliciting restriction
 - Ban on soliciting/dealing with ‘any customers’ – what about old customers, or those whom the employee didn’t have any contact with?
 - Ban on poaching ‘any employee’ – even the office junior?
 - Period of restriction

Reasonableness

- If restriction too wide, it will be prima facie **void**
- Court won't re-write it to be reasonable, but
 - blue pencil test/severance
- Reasonableness is judged as at the date the employment contract made, not at date of enforcement
 - scope of restriction should be suitable to status of employee at time of signing
 - regular reviews during career – promotions etc

Enforcement process: pre-action

Matthew Clayton
Partner

Discovering competitive activity

- Three possible scenarios
 - competition during employment
 - acts preparatory to competing after employment has ended
 - competition after employment has ended
- In every case, need to:
 - gather information
 - take key decisions
 - settle a strategy to reflect the key decisions
- Take professional advice at the earliest possible stage
 - lawyers
 - IT forensics
 - PR

Discovery during employment

- Investigating prior to informing employee
 - what is the employee doing or intending to do?
 - who else is involved - other employees?
 - are customers involved?
 - where will the employee be operating from?
 - are customers/suppliers being targeted?
- Collection of evidence
 - colleagues
 - customer/supplier files
 - electronic diaries, internet and email records
 - logs of telephone calls & (if relevant) recordings
 - Mobile phone memories/SIM cards/home & mobile phone bills
 - photocopying records

Discovery during employment

- Collection of evidence continued....
 - security videos/security passes/swipe records
 - unusual requests for information
 - unusual or unexplained behaviour
 - irregular customer contact, sudden lavish entertaining
 - social networking sites – blocking colleagues?
 - Companies House records
 - NB data protection and monitoring considerations
- Analysis of what legal obligations breached – needs legal advice
- Suspend the employee?
- Locking down IT systems

Discovery during employment

- Strategic considerations
 - dismiss, garden leave or retain?
 - threaten or institute legal proceedings?
 - steps to reinforce customer/supplier relationships?
 - steps to reassure and motivate other employees?

Enforcement: pre-action

- Letters before action
- Return of company property e.g. laptop, mobile phone, documents
- Contractual undertakings
- Undertakings to the court
- Mediation

Enforcement process: emergency injunctions

Nick Southwell
Partner

Emergency injunctions

- Don't delay.....
- Procedure
 - Application notice
 - Witness statements
 - Particulars of Claim
 - Hearing
 - Directions
- Undertakings to court

Emergency Injunctions

- *American Cyanamid v Ethicon Ltd* [1975] AC 396
 - is there a serious issue to be tried?
 - are damages an adequate remedy?
 - does the balance of convenience favour an injunction?
- *Lansing Linde v Kerr* [1991] 1 WLR 251
 - The grant of interim relief will effectively dispose of the proceedings.
 - higher test – is the claimant “likely to succeed” at trial

Cross undertakings

Remedies:
injunctions, compensation, costs

Nick Southwell
Partner

Final Injunction & Damages

- Final injunctions are typically granted either by consent or following a party proving its case at trial.
- Common law measure for damages is to put the claimant in the same position it would have been in had the contract been performed
- For breaches of covenant the onus is on the claimant to show that it has suffered a loss by demonstrating the profit it would have made had the defendant complied with the restrictive covenants, and calculating the difference between this and the profit it actually made
- Wrotham Park Damages
- Account of profits

Costs

- Costs are at the discretion of the court however conventionally the loser pays the winner's costs
- Costs of application for an interim injunction are commonly reserved to trial
- Very expensive
- Without prejudice offers

If you want to know more...

Today's speakers and their contact details:

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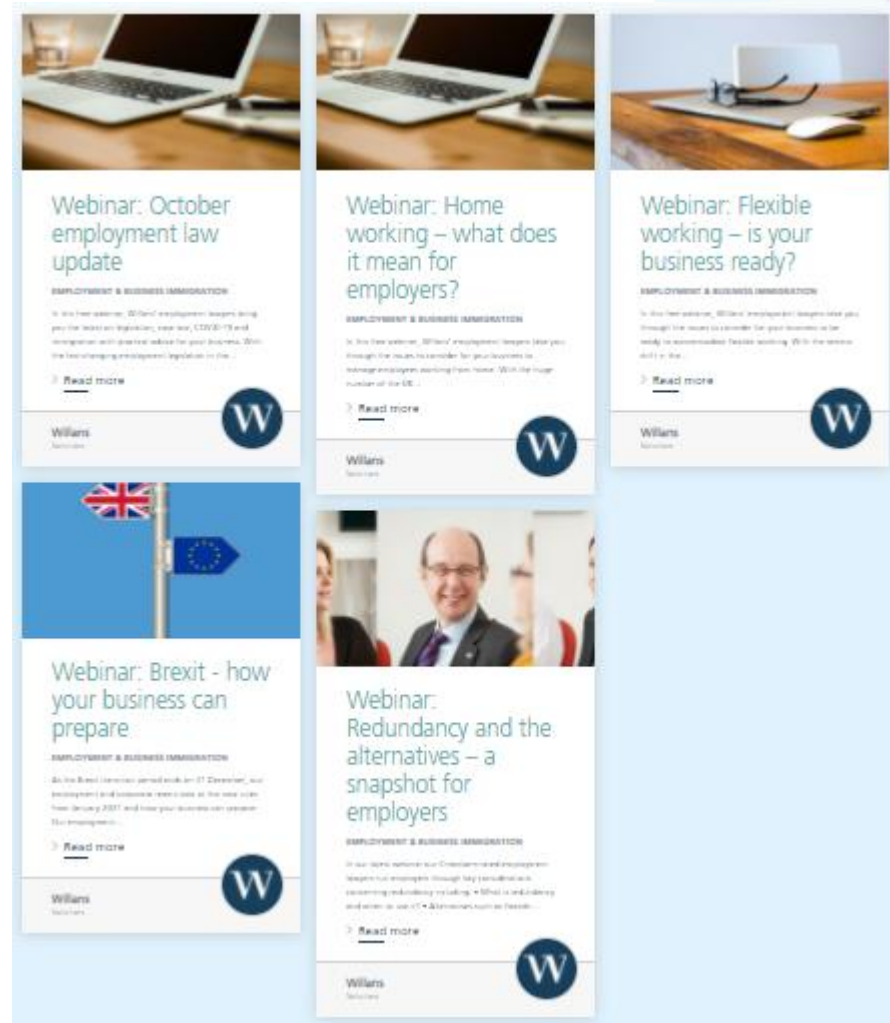
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