**DRAFTING AND NEGOTIATING EFFECTIVE**

**EMPLOYMENT CONTRACTS**

**RESTRICTIVE COVENANTS AND**

**GARDEN LEAVE CLAUSES**

**DO YOU NEED THEM?**

**MAKING THEM WORK**

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**Restrictive Covenants and Garden Leave Clauses**

**Introduction**

When an employee enters into a contract of employment it is quite normal for these to contain an express garden leave clause and restrictive covenants. It is less usual for the restrictive covenants to include a “non-competition” covenant but most employers want to ensure that employees do not walk away and take business with them and the only means of protecting the customer base (or for instance ensuring that other employees are not poached away) is through post-termination restrictive covenants.

It is also a vital area “to get it right” for employers and solicitors alike. The common practice of including a “blanket” restrictive covenant is simply dangerous. Restrictive covenants will not be enforceable if they are unreasonable or wider than is necessary to protect legitimate business interests and they also have to be accurate. Whilst there have always been attempts to make a covenant more “reasonable” through e.g. the use of a severability clause (designed to ensure that even if one part of the overall covenant protection fails then another part survives) the only truly effective way to ensure protection is to sit down with the employer and carefully define the protection required (be it competitor, customer, proposed customer, restrictive business, employees still remaining at the business or whatever). Time taken at that stage will be well used when it comes to dealing with enforceability.

Of course restrictive covenants may fall away for reasons other than the manner in which they are drafted. The way in which an employee resigns or is dismissed may leave an employer in breach of contract and therefore unable to (selectively) rely on the contract to enforce post-termination restrictive covenants. Other issues may arise e.g. the relevance of restrictive covenants entered into by an employer in company A prior to a sale to company B where the restrictive covenants have limited relevance but cannot, at least for a certain period, be changed because of the Transfer of Undertakings Regulations. In addition an employer will often seek to introduce new covenants and this is fraught with danger even if this happens through a compromise agreement on the termination of an individual’s contract.

Nevertheless the key area, when it comes to the enforceability or not of restrictive covenants, is how they are drafted and in most cases the more simple a covenant the more effective it is. It is important to understand the rules as to what is or is not a protectable interest and it is important also to see this in the context of clauses protecting confidential information (which is protected under common law but where a contract should always set out more specific detail in order to maximise the employer’s protection).

Finally, there remains the position of the garden leave clause. This is on the whole easier to enforce than a restrictive covenant. During a period of garden leave the individual is still employed which also gives the employer a considerable amount of protection. The downside is obviously that the employee is being paid full pay and benefits. It may be harder to enforce a restrictive covenant that would normally be triggered on the effective date of termination if an individual has already “worked” out a period of garden leave but the attractions of an express garden leave in the contract of employment (which again has to be sensibly drafted) are considerable.

Garden leave clauses can be effectively used in dealing with the departure of many employees e.g. a dismissal which is unfair brought about by commercial considerations where the employer wants to keep control of the individual as well as reaching an amicable agreement but doesn’t want the employee on the company’s premises. Most valuable of all however a garden leave clause, if reasonable, will allow an employer the option of preventing an employee from joining any other company for the period of notice. Other benefits include the fact that the very existence of a garden leave clause has a deterrent effect on many employees seeking to join a competitor (and will make them less attractive to that competitor because of the delay in their arrival).

There is little doubt for most employers that most employees, particularly those at the senior level, need both restrictive covenants and garden leave clauses. The next stage is to ensure that they work.

**Restrictive Covenants**

**The starting point**

***“Interference with individual liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and therefore void.”*** *per Lord MacNaughten in Norden felt v Maxim Guns and Ammunition Company [1894].*

However, legitimate business interests can be protected.

**Legitimate business interests:**

1. Customer/Trade connections or goodwill (also connection with suppliers);
2. Trade Secrets or Confidential Information; and
3. Other legitimate interests.

In order to be a legitimate means of controlling employees post termination of contract an employer can only seek what a court would regard as “adequate” protection. A general restraint of trade is not a legitimate protection.

**The means of protecting legitimate interests:**

1 Non-competition covenants e.g. area covenants which seek to prevent the employee carrying on a similar business within a certain radius of the premises of the ex-employer;

2 Non-solicitation/non-dealing covenants (clients) preventing the ex-employee from dealing with the customers and preventing the ex-employee from soliciting business from customer/suppliers of the ex-employer;

3 Non-enticement covenants (employees) preventing an ex-employee from directly or indirectly enticing or poaching away his former colleagues; and

4 Confidentiality covenants. Breach of confidence is a common law wrong not confined to an employment relationship or to cases where there is a contract. Both current and former employees are under an implied obligation not to use or disclose information if it amounts to a trade secret or is so highly confidential that it requires the same protection as a trade secret. Confidentiality covenants enable the parties to take an objective view as to what constitutes confidential information.

**Confidential information/trade secrets**

*Faccenda Chicken v FowIer* [1984] ICR 589, [1986] 3 WLR 288.

This is still the leading case in this area. It confirms that the confidential information must be treated as confidential by the employer but after termination of employment if the information has become part of the employee’s general skill and knowledge, he can use the information as he wishes.

Trade secrets (such as chemical formulae, designs or special methods of construction) or information in the nature of a trade secret, even if learnt by heart may not be used before or after employment.

In *Lansing Linde Ltd v Kerr,* trade secrets were defined as:

1 used in a trade or business;  
2 if disclosed to a competitor would cause real damage; and

3 which the employer has sought to limit dissemination of or not encouraged or permitted widespread publication.

The long line of authorities following the *Faccenda* case (e.g. *FSS Travel)* have given guidance on the information, which is a) likely to come into employee’s hands and b) may be treated as being protectable by way of an express covenant. An example of “confidential information” may be:

“names, addresses and contact names of customers, suppliers, manufacturers, negotiated prices paid by the company; company price lists; renewal dates; brokerage; negotiated prices paid by customers to the company."

**Covenants in employment contracts v business sale agreements**

Courts are more likely to enforce express covenants in a business sale agreement than in an employment contract and are likely to scrutinise more closely the covenants in an employment contract. The main reason is that the courts recognise there is a greater equality of bargaining power between the parties in respect of business sale agreements. See *Systems Reliability Holdings plc v Smith* [1990] IRLR 377. So what are the key drafting points for employers to bear in mind?

**Drafting Points**

1 The employee should only be restrained from carrying out the sort of business in which he is engaged as an employee.

2 Employees should not be restrained from carrying out too wide a range of activities where all the expertise lies in a restricted field.

3 Consider the business/activity of the employer;

4 Consider the duration of the covenant, the starting point, what is the minimum time required to protect the customer connection i.e. the time in which the ex-employer can recruit new staff and allow time for the development of good relations between the new staff and the customer.

5 Do not stray too far from the “recognised” restrictive covenants (e.g. unusual covenants will be scrutinised and it is more likely they will not be enforceable).

6 Is consideration required (i.e. is the covenant contained in the offer of employment or introduced alongside a pay rise or single bonus payment)?

7 Can a covenant be introduced on termination of employment?

8 Area covenants - can a worldwide covenant be enforced?

1. Non-solicitation/non-dealing with clients - contact with customers; frequency of dealings; potential customers; why have a non-dealing clause?

It is difficult to do more than give an overview on restrictive covenants and explain the principles involved because each case is different. However at the back of this guide there are some case summaries which may be of interest to see how restrictive covenants were interpreted/enforced/not enforced in different situations. In addition though covenants should be tailored to the individual and here are some straightforward precedents which might also be interest.

**Protection for employers** - **simple covenant clauses**

**Non-compete**

*“The Employee hereby covenants with the Company that he will not for the period of twelve months after the termination of the Employment without the prior written consent of the Company either alone or jointly with or on behalf of any person directly or indirectly:*

*carry on or set up or be employed or engaged by or otherwise assist in or be interested in any capacity in a business anywhere within the United Kingdom which is in Competition with the Business carried on by the Company at the date of such termination”*

(N.B. Competition and Business to be carefully defined to ensure e.g. de minimis competition not included)

**Non-dealing clients**

*The Employee hereby covenants with the Company that he will not for the period of 12 months after the termination of the Employment without the prior written consent of the Company either alone or jointly with or on behalf of any person directly or indirectly:*

*seek to procure orders for business from or the custom of or otherwise have business dealings with any person, firm or company who during the 12 months immediately preceding the date of such termination has been a Client of the Company with whom the Employee has had dealings with or been in the habit of dealing with.”*

**Non-solicitation clients**

*“The Employee hereby covenants with the Company that he will not for the period of 12 months after the termination of the Employment without the prior written consent of the Company either alone or jointly with or on behalf of any person directly or indirectly:*

*in connection with the carrying on of any business in competition with the Company solicit or entice away from the Company any Client who has at any time during the period of 12 months immediately preceding the date of such termination had dealings with or been in the habit of dealing with the Employee”*

(N.B. For both non-dealing and non-solicitation Client to be defined in a way that minimises confusion particularly if intention to include prospective client)

**Non-solicitation of employees**

*“The Employee shall not at any time during the continuance of the agreement, and for a period of one year hereafter, directly or indirectly and whether on his own behalf or on the behalf of any third party solicit, entice away or employ any Senior Employee of the Company.”*

(N.B. Senior Employee to be defined to include only a senior category of employee and perhaps direct reports).

1. The aim of the restrictive covenants should be to:­- Give the best possible chance of being found to be enforceable;
2. To prohibit/limit the competitive activities of the employee to the maximum extent consistent with their being enforceable.

The following points should be borne in mind:

1. The covenants should be clear and certain.
2. Words used are given their ordinary meaning.
3. The covenant must be interpreted in the context of the agreement as a whole to give the effect of the intention of the parties.
4. Extravagant interpretation of the covenant can be ignored.
5. The Court has no power to re-write the covenant  
    (Blue pencil test - two conditions must be satisfied:
6. it must be possible to remove the unenforceable provision without the need to add or modify the wording that remains;
7. the words to be severed must constitute a separate and independent promise and be capable of being severed without the severance affecting the meaning of the part remaining.)

Introducing post-termination restrictive covenants during the currency of the employment

The following points need to be considered:­

1 The need for consideration;

2 The consent of the employee express or implied;  
3 Dismissal of an employee who refuses.

**Enforcement of Restrictive Covenants**

Before granting an injunction:

1 The Court will require to be satisfied:

1. that the employer has evidence to support the allegation that the employee is or is about to act in breach of the post-termination covenants or in breach of his/her duty of confidence; and
2. that any restrictive covenant is prima facie valid; and
3. that damages would not be an adequate remedy.

The Court will then proceed to consider the balance of convenience as to whether the employer will suffer more if the injunction is wrongly refused than the employee will suffer if it is wrongly granted. In cases where the potential loss to the employer is disproportionate to any loss which the employee might suffer, the employer may well obtain an injunction. If the delay before trial of the action is likely to have the effect that the grant of the interlocutory injunction will finally decide the dispute against the defendant, some assessment of the merits may be required.

Seeking an injunction is a reasonably expensive procedure. The employer will also find that if the Court is minded to grant an injunction, it will be necessary to give a cross-undertaking in damages and show that he could afford them. If it is found at the substantive hearing that the restrictive covenant was, in fact, void he will also have to compensate the ex-empIoyee to the extent that the ex-employee had suffered loss by virtue of the injunction.

Some of the legal costs may be recovered at the substantive hearing if the employer succeeds, but this assumes that the matter will be pursued to a substantive hearing (which, in practice, does not often occur) or that the employee will pay or contribute to the costs under the threat of such proceedings.

Accordingly, in order to justify commencing injunction proceedings, the threat in commercial terms of breach of the restrictive covenant will have to be such that an investment of this order would be worthwhile.

**Garden Leave**

**What is garden leave?**

The phrase “garden leave” describes a period where an individual remains an employee but is not required to come into work and has to stay at home “tending the garden”. There are advantages for both employer and employee (particularly the former) to such an arrangement and provided that a garden leave clause is contained within a written contract, is reasonable in duration and is properly drafted then it will be enforceable.

**Have a well drafted express garden leave clause**

A typical garden leave clause might be as follows:

“The Company reserves the right to require the Executive to remain away from work for all or part of the notice period set out in [clause •] whether the Executive or the Company gives notice. The Executive agrees to comply with any reasonable conditions laid down by the Company and whilst on full remuneration and benefits during such time accepts that the Executive is only permitted to work for any person, firm, client, corporation or on the Executive’s own behalf with the Company’s prior written permission which is not to be unreasonably withheld.”

***[N.B. If the notice period is longer than 6 months it may be sensible to indicate that the garden leave is for a maximum 6 month period irrespective of the actual notice period to avoid any suggestion of “abuse” to restraint of trade.]***

**Incorporation**

It is important that an express clause is incorporated within a written contract of employment. This is because although it is possible that there is sometimes an implied right for an employer to put an employee on garden leave it is usually very difficult for an employer to force an employee to stay away from the workplace whilst remaining as an employee. The usual position, without an express garden leave clause, is that an employee told to “go home” (albeit on full remuneration) can claim that the employer’s actions amount to a repudiatory breach of contract. In other words, they can treat themselves as constructively dismissed and the proposed period of garden leave is of no effect.

The key decision in this area is the case of *William Hill Organisation Limited v Tucker* (1998 IRLR 313) where the seniority of the individual and the need for him to be practising his skills in the market place or to be seen in the market place prevented an implied right being established for the employer to put the employee on garden leave. Whether or not an employer can unilaterally put an employee on garden leave depends upon the construction of the contract but the William Hill case emphasised that it will be rare (but not unknown, see *SBJ Stephenson v Mandy* (2000 IRLR 233) also mentioned below) for an employer to retain such a right without an express garden leave clause.

**What period should a garden leave clause seek *to* cover?**

Obviously the garden leave period cannot be longer than the notice period because the employee is effectively working out their notice “at home”. There is however also a concern by the courts that the garden leave clause is not abused and the individual’s skills do not atrophy. Three key cases in this area are *Evening Standard v Henderson* (1987 IRLR 64), *Provident Financial Group v Hayward* (1989 IRLR 84) and *Eurobrokers v Rabey* (1995 IRLR 206). They can be summarised as follows.

*Evening Standard Company v Henderson*

Mr Henderson was employed by the Evening Standard as a Production Manager. He gave two months’ notice intending to join a competitor (Mr Robert Maxwell, deceased) even though his contract required him to give one year’s notice. The newspaper offered to pay him for the full 12 month period regardless of whether he presented himself for work (a significant factor in the Court’s decision) and on a balance of convenience the Court of Appeal enforced what was, in effect, a one year covenant restraining Mr Henderson from undertaking employment with or providing assistance to his intended future employer. There was no express garden leave clause but the Court did however look closely at whether or not the employer was abusing the situation (and obviously decided it was not) in reaching its conclusion.

*Provident Financial Group v Hayward*

Here the Court of Appeal came to a different conclusion. Mr Hayward was the ED of the estate agency business of Provident Financial Group. He resigned without indicating who his new employer was going to be and started to work out an agreed period of six months’ notice (a wide obligation confirmed in his contract of employment). After two months he was put on garden leave on full salary and simply told he couldn’t work for anyone else for the unexpired period of notice. One month later he told his employers that he intended to leave immediately and was going to work as a Financial Controller of a chain of estate agents owned by a supermarket chain (Asda). The Court rejected the employer’s application for an injunction preventing him from doing so because there was no real prospect of serious or significant damage to the plaintiffs from the defendant working for his new employers (they would not abuse the confidential information he had and anyway it was said to be of little interest to Asda). Seeking to keep Mr Hayward “out of the market” in this way was an abuse and the fact his skills would (clearly) not atrophy in some 3 months was not considered relevant by Lord Justice Taylor.

*Eurobrokers v Rabey*

Eurobrokers were successful in enforcing a (maximum) period of six months’ garden leave even though the broker, who had to stay at home and out of the market, put forward a strong case that such an exclusion would cause him considerable prejudice. His skills (he said, in offering 3 months to the employer) were inextricably linked to being in touch with the market on a daily basis but it was held to be reasonable to keep him at home on full pay for the period of notice. The court held that there was a real customer connection and even in the fast world of money broking, the employer was entitled to the full 6 months’ protection. There was no obligation to provide Mr Rabey with work.

Incidentally, the garden leave clause (which we drafted) stated that in the event of Mr Rabey giving inadequate or no notice of termination:

“The company may elect to waive your breach of contract and hold you to the terms of this agreement for the notice period or a maximum period of six months, whichever is the lesser period, in circumstances where it is reasonable to believe that you will be interested or concerned in any business company or firm carrying on the business of money-broking.”

Enforcement is an “equitable” remedy and therefore reasonableness is the key. As is clear from the cases mentioned, some employers seek to abuse garden leave provisions and careful drafting and implementation is required. If the notice period is more than 12 months it is very unlikely that garden leave can continue for the whole of the notice period and indeed many believe that a maximum period of 6 months is appropriate as mentioned above. Limiting the maximum length of garden leave where the notice is (say) over six months is not an obligatory step but is likely to be a sensible one. It is also important to ensure that the employee receives full pay and benefits during this period including any commissions and bonuses which would otherwise have been paid. This explains the reference in the draft clause above that refers to “full remuneration and benefits” and the importance of trying to be as reasonable as possible; hence the reference to the fact that the company’s prior written permission will not be unreasonably withheld if the employee asks for permission to work in, perhaps, a non-competitive business whilst on garden leave. This is not to suggest that the employer has to accept such a request but the overall impression from the employer should be one of reasonableness and this will obviously assist the employer who is seeking to enforce the garden leave period as well as helping to undermines any argument from the employee that the employer is merely seeking to abuse its position and (the usual situation) simply preventing him from joining a competitor in restraint of trade.

**Practical Steps**

Although a garden leave clause must not be abused an employer will simply require an employee to stay at home and this is helpful because an employer can never, in practice, insist on an employee working out his or her notice in the workplace. The employee would be on full pay and benefits as if a working employee (to avoid a breach of contract by the employer and subsequent claim for constructive dismissal by the employee). During the period of garden leave, however, the individual is still an employee and is effectively working out his notice “at home” (hence the common reference to “garden leave”).

The best practice is normally to indicate to an employee that he is initially to be asked to remain at home on garden leave. This allows the dust to settle. It also gives the employer more flexibility as to how long the garden leave continues and minimises the chance of an employee claiming the right to put him on garden leave has been abused (in contrast to the position where an employer indicates categorically from the outset that an employee is required to spend the whole of, say, a 12 month period of garden leave at home without contacting customers, clients, employees etc).

Interestingly, in the case of *SBJ Stephenson v Mandy* (2000 IRLR 233), the court held there was no repudiatory breach by the employer asking him to remain at home on paid leave whilst exit arrangements were made. It is not therefore unknown for a court to find that an employee is only entitled to be paid, and not entitled to demand to work, without an express garden leave clause.

**The advantages of garden leave for the employer**

The principal flexibility of garden leave is that it is totally up to the employer whether to use it or not. Nevertheless, the main advantage is that the employee continues to be bound by duties of fidelity as an employee and cannot work for any competitor (or indeed any other employer) without consent from the actual employer. Reasonable restrictions can be imposed upon the employee during the period of garden leave and the employer is therefore in a stronger position than if it were relying on restrictive covenants which can of course sometimes prove unenforceable. The cost will be no greater than making a PILON (indeed the cost will be staggered as payments will invariably be made monthly in common with normal salary). It is therefore our preferred way of dealing with the situation when employees are not to be asked to work out their notice period (or, at least, all of it) but an employer wants to keep alive ongoing restrictive covenants.

There are other advantages. One key is that garden leave acts as a deterrent to employers tempted to “poach” key employees who rarely want to wait 6 months for them to start.

**The advantages of garden leave for the employee**

These are less but many employees are delighted to have a period of garden leave. It means they don’t have to go into work and they are effectively on a period of paid holiday. They can also do a lot during this period (even if they are directors) to plan for any new job that they are going to have (or of course look for such alternative employment). In the case of *Baiston v Headline Filters* (1990 FSR 385) the court held that a senior executive had, during the period of notice (which obviously includes any period of garden leave) considerable flexibility. Legitimate activities are likely to include the ability of the employee to write business plans, talk to new employers (provided he didn’t actually compete or misuse confidential information during the period of notice), arrange recruitment (provided the employer’s staff weren’t solicited) and even put in new telephone lines in anticipation of his starting work after the end of his garden leave period. This is obviously a non-exhaustive list although in practice both employer and employee are often disappointed as to what kind of activities are legitimate, the former waiting more restrictions and the latter expecting greater freedom.

What an individual can do at the end of employment obviously depends upon whether there are any ongoing restrictive covenants although an employer cannot necessarily enforce covenants after a significant period of garden leave (the courts will need convincing further business protection is necessary). During his notice period, however, provided that he does not act in a way which the court would deem to be inconsistent with his ongoing duties as an employee (of the employer which has put him on garden leave) he is not in breach of contract. Obviously he has to be careful because the employer will no doubt be checking what he does do and can lay down reasonable restrictions. Nevertheless, even if he is shown to be in breach of contract the employer’s remedy is fairly limited (effectively restricted to dismissing the employee for gross misconduct which will simply end the employment and allow the employee to join his new employer straightaway). The employee is therefore in a fairly strong position whilst on garden leave (albeit “out of the market”) particularly because he is being paid full salary and benefits.

**Departing employees**

An express garden leave clause will allow a “cooling” off period in the event of a dispute between the employer and an employee which will maximise a chance of a negotiated settlement if this is what the employer and employee want. Without an express garden leave clause the employer has, in effect, to make an immediate decision as to how the employment is going to end and the employee may act in the heat of the moment. This may not be in anyone’s interest and an express garden leave clause often allows a necessary window for conciliation and a chance for reason to replace emotion.

There is no reason why agreement cannot be reached with an employee that he remains working for a short period and then receives a payment in lieu at the end of the ‘handover” period. Most commonly however severance terms though a compromise agreement are agreed during such a garden leave period.

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| **GARDEN LEAVE** | |
| **Advantages** | **Disadvantages** |
| Protects business provided there is an express clause within contract of employment e.g. deterrent to competitors. | Full pay and benefits required and therefore costly. |
| Easier to enforce than restrictive covenants. | Difficult to police and monitor e.g. employee unworried about being summarily dismissed. |
| During garden leave period, individual bound by employee’s ongoing duties and “trust and confidence” obligations. |  |
| Employer’s genuine discretion as to whether used. | Sometimes unenforceable (e.g. too long in duration or abused or simply not “triggered” quickly enough). |
| Allows cooling off period of benefit to employee and employer alike | May mean post-contract restrictive covenants  unenforceable at EDT (e.g. no longer any legitimate business interest to protect). |

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**Schedule**

**Case Summaries**

***Alliance Paper v. Prestwich [1996]* IRLR 25, HC.**

A court will in principle be prepared to enforce a restrictive covenant prohibiting the solicitation of employees working “in a senior capacity” though a more detailed provision differentiating senior from junior staff is obviously helpful.

(Note: Such clauses are best linked to specific senior employee jobs - not people because people move on - related to the role of the employee to be bound by the covenant).

***American Cyanamid Co v Ethicon Limited* [1975] 1 All ER 504 HL**

Where a party seeks an interlocutory injunction, this is a discretionary remedy for the court to consider

and in ordinary circumstances the claimant will have to show that:

(a) there is a triable issue; and

(b) the balance of convenience is in favour of granting an injunction.

(Note: The *Cyanamid* principle is relevant under the Woolf system as for instance confirmed in the case of *BFI Optilas v Blyth* [2002] All ER 287. It is generally also accepted now that the employer must also demonstrate that there is a perceived, actual or potential harm which is real and justifies the court allowing some restraint).

***Bridge v Deacons* [1984] AC 705 PC**

This case concerned partnerships rather than companies but a very wide covenant preventing a partner in Hong Kong from dealing with any clients of the firm (even those with whom he had not had any dealings) for a period of 5 years was upheld showing how extensive a restrictive covenant can be in respect of an equity partner though see the case of *Thurston Hoskin and Partners v Jewill Hill & Bennet* (5/2/002) CA where a strong covenant was upheld against a salaried partner.

(Note: A salaried partner is in a totally different position because they are employed. An equity partner is however in a similar position to a person who has a share in a business being sold and is then retained as an employee. See *Systems Reliability Holdings* [1990] IRLR 377).

***Cantor Fitzgerald International v Bird & Others* [2002] IRLR 867 HC**

Restrictive covenants cannot be enforced where the employer is in repudiatory breach of the contract of employment even if the covenants are otherwise reasonable. Any new employer must make enquiries as to whether there are grounds e.g. constructive dismissal for an employee ignoring reasonable covenants.

(Note: There are a number of restrictive covenant cases involving companies such as Cantors. In this case employees joined a competing firm of inter-dealer brokers. In the case of two of them the High Court found that Cantors had been in breach of the implied contractual term of trust and confidence in a manner in which they sought to persuade them to accept a change in the way that they were remunerated. Covenants prohibiting non-solicitation or dealing for a period of 20 weeks after termination of employment in respect of those clients with whom the employees had been actively involved during the previous 12 months were therefore only enforced in respect of the third employee and the new employer who had unlawfully induced him to breach his contract without enquiry as to whether there were proper grounds to justify his action e.g. a sound allegation of constructive dismissal).

***Credit Suisse Asset Management Limited v Armstrong and others* [1996] IRLR 450 HC**

There is no judicial basis for a set off between time spent on garden leave and the period covered by a valid post-termination restrictive covenant. In other words, if an employer went on garden leave and the contract ended in 6 or 12 months’ time (whatever the period may be) this could lead to a further period of protection for the employer through a restrictive covenant but only if legitimate and the court does not rule out the possibility that where a long period of garden leave has elapsed (perhaps substantially in excess of a year) the court may decide on grounds of public policy not to grant any further period of protection based on the restrictive covenant.

(Note: In practice the employer will have to show that the further protection being sought, given that the employer will have been non-active for a period of, say, a year is really necessary and it is admitted that this will be increasingly difficult to do. In other words aggregating garden leave and restrictive covenants is increasingly unlikely.)

***Credit Suisse First Boston (Europe) Ltd v. Lister* [1998] IRLR 700, CA.**

This TUPE case follows on from *Morris Angel* and emphasises that an employer cannot make changes to restrictive covenants (or to the contract at all in fact other than a favourable variation) if the changes are for reasons connected with the transfer i.e. the transfer was not merely the occasion for the change in terms but the reason for it. Harmonisation of transferred employees’ post termination covenants is therefore unlikely to be justifiable in the short term period after a transfer.

(Note: Harmonisation is a very difficult area after this case and others, in particular, *Wilson v St Helens Borough Council.* Employers have to be patient if any variation is to be enforced/enforceable).

***Dawnay Day v. de Branconierd’Alphen* [1997] IRLR 442, CA.**

An employer has a legitimate interest in maintaining a stable, trained workforce, and this interest can be protected by a covenant prohibiting the solicitation of senior employees, so long as that covenant goes no further than is reasonable.

(Note: A restrictive covenant can prevent the solicitation of staff but has to be drafted by reference to, for instance, senior staff with whom the employee worked. It cannot be so wide that it would include people such as (to take an extreme example) the cleaners who the employee has never met (see also *Hanover)* Dawnay Day had been followed in a number of cases including *TSC Europe (UK) Limited v Massey* [1999] IRLR 22 where the covenants sought to apply regardless of the employee’s seniority and even where they had commenced employment after the employee left. Both conditions were held to be unreasonable. Incidentally the fact the covenant was for 3 years post EDT may well have been enforceable on similar principles to *Systems Holdings).*

***Eurobrokers v Rainey* [1995] IRLR 206**

A period of 6 months garden leave was enforced even though the court accepted there was a real customer connection for the broker who had resigned to join a competitor.

(Note: The court accepted that a 6 month garden leave period was reasonable. The position may have been different from a 12 month garden leave period although in many cases this is enforceable).

***Evening Standard v. Henderson* [1987] IRLR 64 CA**

This, together with *Provident Financial Group plc v Hayward* is still one of the key Court of Appeal cases on restrictive covenants. The court upheld a claim for an injunction and a period of enforced non-competition (Mr Henderson had intended to join a rival paper after only working part of his notice) provided he was paid for the full period of notice and that the employer didn’t abuse the garden leave clause (in this particular case it was determined that there was no abuse particularly given the employee’s intentions).

(Note: There is no express garden leave in the *Evening Standard* case which is invariably expected now (see *William Hill)* but the key point is that the court will consider “reasonableness” and “abuse” as well as the wording of the contract.)

***General BilIposting v. Atkinson* [1909] A.C. 118, HL.**

If an employee is dismissed by his employer in breach of contract, the employer cannot rely upon post-termination restrictive covenants which are contained in that contract of employment.

(Note: This key House of Lords decision confirms that where an employer is in breach of contract it cannot then selectively rely upon the contract for other purposes e.g. in respect of ongoing restrictive covenants and this is one of the main benefits of having an express garden leave clause or PILON clause i.e. giving the employer the opportunity to prevent the employee from actually “working” out his notice without breaching the contract of employment). *GFI Group Limited v Eaglestone* [1994] IRLR 119.

Highly paid employees are more likely to be held to the full term of their contract under an express garden leave than other employees.

(Note: The employer has to pay full salary and other benefits including those benefits likely to be earned during the period of enforced non-competition but even where the employer can keep the contract alive through an express garden leave clause he will not be able to insist upon the employee actually working for him. See *Evening Standard Ltd v Henderson).*

***Hanover Insurance Brokers Ltd v. Shapiro* [19941 IRLR 82, CA.**

A contractual provision which seeks to prohibit (post employment) an employee from soliciting/poaching any employees of his former employer, will not be enforceable if it is stated to apply regardless of the seniority of the staff covered by it and regardless of whether the employees it covered had joined the staff of the employer after the relevant employee had left.

(Note: The point here is that the covenant can’t be too wide, after all, why should employers want protection against solicitation of the office cleaner who the departing employee has never met? The rule is to keep it at senior employees and those, perhaps, managed by an are happy to deal with the departing employee being as specific as possible (see also *Dawney Day)).*

***Hollis & Co v Stocks* [20001 IRLR 712 CA**

A reminder that where the restricted area of a non-competition covenant corresponds with the geographical location of the employer’s clients, this was likely to be reasonable.

(Note: This case involved a firm of solicitors. The covenant in the solicitor’s contract prevented him from working within a 10 mile radius. Although this was held to be reasonable for the reasons given above, the 10 mile radius did not include any big cities. Even a short area covenant may be unreasonable in an urban setting. On the other hand, if a covenant protects information of which, because of the nature of the industry, is of national or even international commercial significance, then a covenant covering the whole of the UK or even a worldwide restriction may be justified. See for instance *Scully UK Limited v Leigh* [19981 IRLR 259. In any event it is important to state a specific area or the covenant will be regarded as worldwide and other than in rare circumstances, impossible to uphold.)

***J A Mont (UK) Limited v Mills* [1993] TLJ 172 HC**

The court refused to uphold the non-competition restrictive covenant entered into in return for a lump sum payment upon termination of employment.

(Note: This was one of my cases. The court refused to apply “garden leave” reasoning even though the employee was being paid through a severance package at an equivalent rate to that he would have received as an employee. It is also a reminder that restrictive covenants agreed in, perhaps, a compromise agreement for a specific consideration still have to be reasonable in order to be enforced and there is no certainty that the introduction of covenants at that time (and for financial consideration) makes them more enforceable than covenants contained within the original employment contract. It is also important to remember the principle that any introduction of or amendment to a covenant whilst an individual is employed has the best chance of being enforced if it is made in response to a promotion and/or increase in salary to show adequate consideration (rather than merely the continuation of employment)).

***Lansing Linde Ltd v. Kerr* [1991] IRLR 80 CA.**

Where an employer is seeking an interlocutory injunction to enforce a post-termination restrictive covenant, if it is the case that by the date of a full trial all or most of the period of restraint will have expired, the court in determining whether to grant an injunction, ought to consider the strength of the plaintiff’s chances of success at trial.

(Note: This is a pre-Woolf case but the principle is still sound and is a fair one. The court is after all concerned about the balance of convenience and fairness for both sides.)

***Littlewoods Organisation Limited v Harris* [1978] 1 All ER 1026 CA**

A restrictive covenant should be construed so as to render it valid and enforceable but the court will not rewrite a relevant provision.

(Note:: Unusually in this case the court upheld a non-competition covenant. It is sometimes thought that the court will operate a “blue pencil” and allow covenants deemed to be reasonable whilst knocking out the rest but the better view today is that the whole covenant stands or falls and the *Littlewoods* authority is as important now as it ever was in that unless a company limits itself to obtaining protection over the narrowest possible group of legitimate business interests (whether competitors, customers, suppliers or employees), then the post-termination covenant is unlikely to be enforceable. Obviously bear in mind *General Billposting* in that the covenant is only potentially enforceable if the employer avoids breaching the contract first e.g. the manner of dismissal).

***Living Design (Home Improvements) Limited v Davidson* [1994] IRLR 69**

The court only had a limited power to save restrictive covenants that would otherwise be unenforceable, through the mechanism of severance even where the contract contains an express provision permitting such a severance. It is only possible where the enforceable part of the covenant is clearly separable.

(Note: There has been a general move away from “severance” and although some contracts of employment will still include e.g. a radius covenant where protection may be sought in one sub-clause “within a quarter a mile of the head office” with protection being sought in different sub-clauses for increasingly wide geographical areas, this is not recommended. The best covenants will self-contained and limit themselves to protecting the employer’s legitimate business interests and will only be as wide as is absolutely necessary to do this.)

***Office Angels Limited v Rainer-Thomas* [1991] IRLR 214**

There must be a “functional correspondence” between the protected area in a non-competition covenant and the actual operations of the employer’s business. An employer is however permitted to seek to protect the stability of their workforce including, in this case, the employment agency’s base of temporary workers which is part of their goodwill and a legitimate subject of protection. If the existence of the protectable interest is established the covenant must be no wider than is reasonably necessary for the protection of that interest.

(Note: The *Office Angels* bears reading because it deals with a number of relevant issues in the area of restrictive covenants. The point about “functional correspondence” is that the territorial scope to a non-competition covenant (and this should always be a defined area) must legitimately arise from the commercial interest concerned e.g. the likely distribution of customers. It is certainly not a question of putting a pin in a map and then arguing later as to what is or is not reasonable.)

***Provident Financial Group plc & another v Hayward* [1989] IRLR 84 CA**

The employee resigned and was put on garden leave after 2 months of a 6 month notice period but nevertheless sought to join a competitor. The application for an injunction was refused because there was no real prospect of serious or significant damage to the original employer who simply wanted to keep the individual “out of the market”.

(Note: This CA decision is different to the *Evening Standard* one reflecting the court’s concern about “abuse”. Significantly the fact that the individual skills would not “atrophy” was not considered relevant in this case but in more recent cases it often is).

***Rock Refrigeration v. Jones* [1996] IRLR 675 CA.**

A restrictive covenant which purports to apply even in circumstances where the employer wrongfully terminates the contract, is not rendered unenforceable merely for that reason. If, however, the contract is in fact wrongfully terminated by the employer, the covenants will be rendered unenforceable.

(Note: This case clarified the law relating to covenants as previously the statement that they would apply “however the contract was terminated” was held to make the covenants void because such a statement contemplated the employer trying to enforce them when in breach of contract which has never been possible (see *General Billposting).)*

#### **Scully UK Ltd v Lee (1998) IRLR 263**

An employer needs to establish that a particular covenant was reasonably necessary for the protection of the employer’s interest in confidential information. One of the passages of the judgement reads “In cases where a restrictive covenant is sought to be enforced, the confidential information must be particularised sufficiently to enable the court to be satisfied that the plaintiff has a legitimate interest to protect that requires an enquiry as to whether the plaintiff is in possession of confidential information which it is entitled to protect, sufficient detail must be given to enable that to be decided but no more is necessary.”

***Systems Reliability Holdings Plc v Smith* [1990] IRLR HL**

Even though Mr Smith only had a 1.6% sharehoIding in the company purchased by SRH an international non-competition covenant effective for 17 months after the sale was upheld.

(Note: Covenants in sale agreements where there is equity consideration for them are much more powerful than those simply contained in an employment contract).

***Symbian Limited v Christensen* [2001] IRLR 77**

This case (involving an employee who wanted to join a “competitor” within the 6 month period of notice even though there was an express garden leave clause) indicates that in addition to an express garden leave clause it is sensible for any employer to include a contractual obligation preventing the employee from performing other duties (whether competitive or not) for third parties during the period of the contract).

(Note: The court was not keen to enforce the garden leave clause and looked at it in a similar way to a post-termination restrictive covenant i.e. could the employer say that their legitimate business interests have been undermined and that they needed protection? In other words even with an express garden leave clause an employer can’t assume that it will be enforced).

***Thomas v Farr plc* (February 2007)**

The Court of Appeal considered the reasonableness of a 12 month post-termination non-compete restrictive covenant for the managing director of an insurance broker. On the facts it was upheld.

***Wincanton Limited v (I) Cranny (2) SDM European Transport Limited* [2000] IRLR 716, CA**

A non-competition covenant will be too wide if it extends beyond the particular field of activity in which the employee is personally engaged. Furthermore, a “non-solicitation” covenant will be enforceable if the scope of the covenant is limited in that it restricts the ex-employee only to the extent that is necessary to protect the ex-employer’s legitimate interests.

(Note: Standard stuff but some of the latest restrictive covenant guidelines.)