

Brachers Bitesize

# Are restrictive covenants worth the paper they are written on?

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Presented by:

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Employment Law and HR



**Welcome**

# Today's Presenter



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Specialist Employment Lawyer for over 20 years.  
Acts mainly for employers across a range of industries.

Colin was recently named as a 'Recommended Lawyer' in the Legal 500 2021 directory.

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# Today

- Polls
- Are they enforceable?
  - Design and drafting
  - Contractualisation
  - Maintenance
- Government Proposals for Statutory controls



# Poll 1

Do your contracts contain post-termination restrictions on competition “restrictive covenants”?



# Poll 2


Were they specifically designed for your current organisations needs?



# Poll 3

When did you last review them?





**Are they worth the  
paper they are  
written on?**



# Are they enforceable?

- **Yes, if:**
  - Designed properly
  - Drafted properly
  - Contractualised properly
  - Maintained and preserved properly
  - Enforced properly

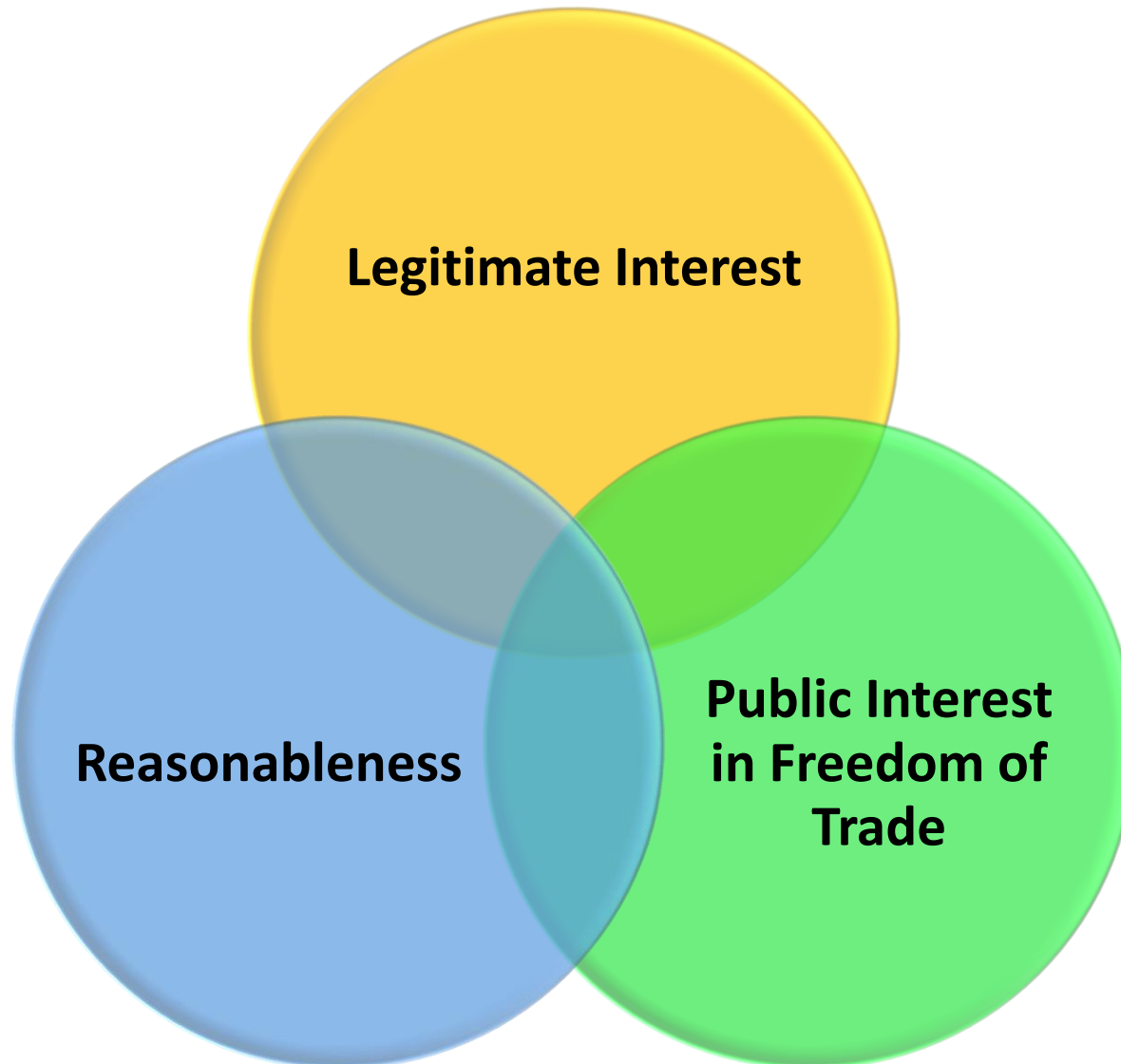


**Designed and  
drafted properly**

# Restraint of Trade Law

- Any contractual term restricting an employee's activities after termination **is void** for being in restraint of trade and contrary to public policy...
- Unless:
  - It has a legitimate proprietary interest that it is appropriate to protect.
  - The protection sought is no more than is reasonable having regard to the interests of the parties and the public interest.

# Restraint of Trade



# Restraint of Trade

- The starting point is they are void.
- So it is an uphill start to persuade a court to uphold and enforce them.
- It is not however impossible.

# Legitimate Proprietary Interest

- To be enforceable, a restrictive covenant must be designed to protect a legitimate proprietary interest of the employer.
- Legitimate interests include:
  - an employer's trade connections with customers
  - an employer's trade connections with suppliers,
  - an employer's confidential information; and
  - maintaining the stability of the employer's workforce.

# Reasonableness

- Post-termination restraints are enforceable if they are reasonable, having regard to
  - the interests of the parties; and
  - the public interest.
- The public interest element is important to bear in mind.



# Reasonableness

- Restrictions must be no wider than necessary.
- 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."*

(Herbert Morris Ltd v Saxelby [1916] 1 AC 688.)

# When is it judged?

- The question of reasonableness has to be considered at the point when the covenant was entered into, not in the light of subsequent events.
- BUT:
  - The reasonableness will also fall to be further assessed at the point you seek an injunction to enforce as part of the balance of convenience test.

# Tougher in employment?

- Restrictive covenants in employment contracts are generally viewed more strictly than those in commercial contracts, such as those between a seller and a buyer.
- They are usually less likely to be regarded as reasonable, because of the inequality of bargaining positions between employer and employee.
- This is why restrictions in employment contracts are normally much shorter than those in commercial agreements or business sales.

# Main Types of Restrictions

## Non Compete

Not allowed to work in competition

Most severe

Hardest to justify

Tend to be shortest period

## Non Deal

Not allowed to have any business dealings with customers or suppliers

Less severe as can work for a competitor

Harder to police compliance

Easier (but not easy) to enforce)

## Non Solicit

Not allowed to solicit customers or suppliers

Can work with former customers / suppliers if not solicited

Hard to police compliance.

Easier (but not easy) to enforce)

# Other Common Types

- Non deal/interference with suppliers
- Non poaching of key employees (inc team moves prevention provisions)
- Non employment of key employees?
- No holding out
- Confidential Information/Trade Secrets
- Non solicit/non deal with agents/brokers/intermediaries?

# Key Design Common Issues

- Geography/Territory:
  - Is a geography appropriate in a modern world?
  - How do you define it?
  - How do you justify it (at the time the contract is entered into) – no more than adequate.
  - What if you fail to define one?
  - Set territory versus evolving:

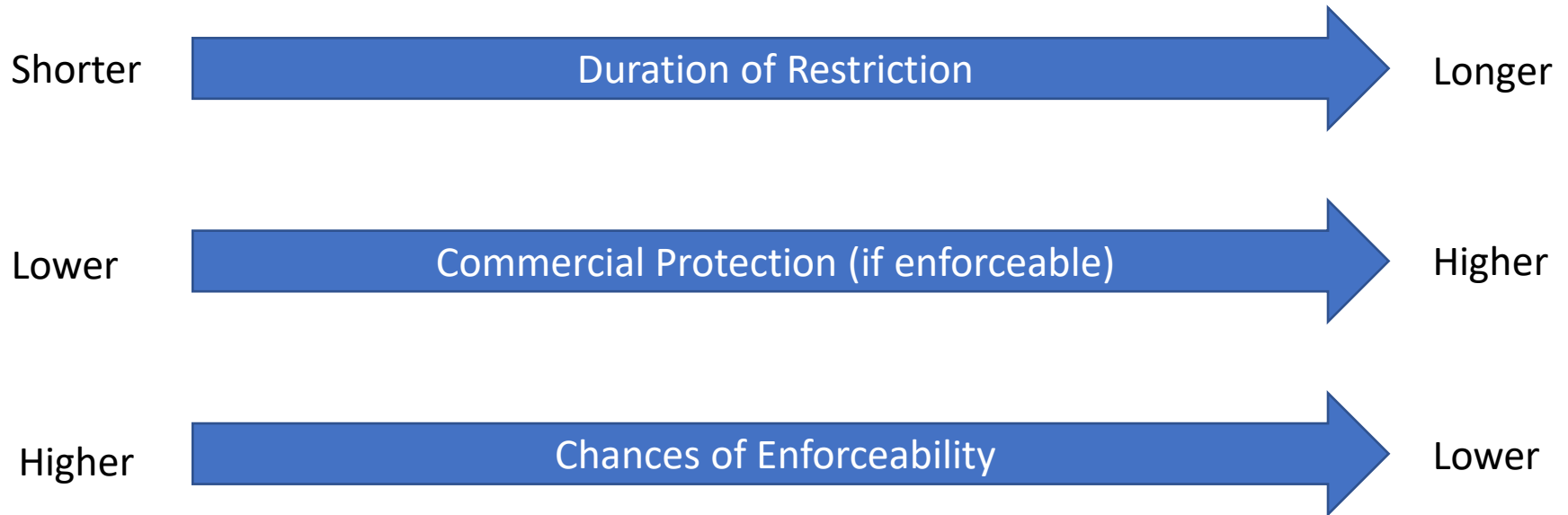




# Key Design Common Issues

- Future Time Period:
  - Different time periods for different restrictions?
  - Offset for time spent on garden leave?
  - How will you justify the chosen time period as being reasonable at the time the contract was entered into?
  - 3 / 6 / 9 / 12 months – why not – 2 / 4 / 6 / 8 / 10 ....?
  - Commercial desire vs Legal Enforceability

# Key Design Common Issues



A blurred background image of a business meeting. In the foreground, a person's hand is visible holding a silver pen. In the background, another person in a white shirt and tie is looking down at a document. The overall scene is professional and focused on business operations.

# Contractual Issues

# Contractually Enforceable

- Restrictive covenants are a contractual concept.
- So you need a legally enforceable contract i.e.
  - Offer
  - Acceptance
  - Consideration
  - Intention to create legal relations
- You also need certainty i.e. clear and precise terms a court can enforce.
- Not legally required to be in writing but never seen an attempt based on oral contract!

# Contractually Enforceable

- Problem areas:
  - Restrictions in documents other than the contract of employment i.e. a non contractual handbook – are they contractual or incorporated into the employment contract?
  - Restrictions in a unsigned contract are they binding?
  - Restrictions introduced during the employment are they binding?

# Contractually Enforceable

- An employer seeking to enforce restrictive covenants will be expected to adduce evidence that the employee agreed to the restrictions.
- It is for the employer to prove.

# Contractually Enforceable

- Tenon FM Limited v Cawley 2018
  - Ms Cawley commenced employment with Tenon in 2008
  - Promoted a few years later to a role in the senior management team.
  - Left to join a competitor,
  - Tenon relied on the restrictive covenants contained in her employment contract.
  - Ms Cawley maintained she was not bound by these as she had refused to sign the employment contracts that had been presented to her at different stages of her career.



# Contractually Enforceable

- The High Court accepted Ms Cawley's version of events.
- They refused to grant Tenon's injunction for interim relief.
- It rejected Tenon's assertion that Ms Cawley had signed the employment contracts and had regard to the fact that Tenon had failed to produce the signed documents and neither had it provided a credible explanation for this failure.

# Contractually Enforceable

- Where an employee is shown to have signed a restrictive covenant, the presumption is that such a document is binding.
- Peninsula Business Services Ltd v Sweeney 2004
  - Mr Sweeney argued that he was not bound by a restrictive term in a commission plan requiring him to be in employment on the commission payment date.
  - He claimed that this had not been specifically brought to his attention before he signed it.
  - This was despite a rubric on the document, below the signature line, which stated:

# Contractually Enforceable

- Found that where a document is signed there is effectively a presumption that it is binding, in the absence of fraud.
- The fact that the employee has not read the agreement or may not be aware of its contents is immaterial.
- Therefore, where an employee argues that they did not fully appreciate the implications of the restrictive covenants, or that they did not receive legal advice, these arguments are likely to fail.

# Consideration

- Basic fundamental requirement for a legally valid contract.
- At the start of employment:
  - There is no need to assign specific consideration to restrictive covenants in an employment contract in order to make them enforceable.
  - Where the covenants are contained in a contract of employment signed at the start of the employment relationship, consideration will take the form of the employee's regular salary, benefits and any other remuneration paid by the employer.

# Consideration

- During employment is more complex:
  - Decorus Ltd v Penfold 2016
  - The High Court held that there was valid consideration when an employee entered into new restrictive covenants as part of a three phase process:
    - a new appraisal system had been introduced,
    - he had been given a pay rise which was out of sync with his normal pay rise, and
    - he continued to be employed, albeit under a new contract of employment.

# Consideration

- Delivery Group Ltd and another v Yeo 2021
- An increase to the notice an employee was entitled to receive from his employer (from 12 weeks to six months, with the employee also being required to give six months' notice) was adequate consideration for entering into new restrictive covenants.
- The employee had himself given evidence that he saw the increase in notice period as being a "real benefit", only seeking to reinterpret matters during the course of his employer's application for an interim injunction to enforce a number of the restrictive covenants after he had left the business to work for a competitor.

# Consideration

- Re-Use Collections Ltd v Sendall and another 2015:
  - Restrictive covenants were included in a new contract of employment signed by an existing manager during their employment.
  - Were found to be unenforceable for lack of consideration.
  - This was despite the fact that the manager received a package of benefits, including a pay rise, around the same time.

# Consideration - Summary

- A contractual variation must be supported by consideration.
- This can take different forms. It does not have to be money.
- Consideration will not be an issue if the change is to the employee's advantage, because the advantage will itself be capable of constituting consideration i.e. a promotion, a pay rise, new benefits etc.
- Where the change is to the employee's detriment, the courts and tribunals will often find consideration in the employee's continuation in the same employment.



# Consideration - Summary

- However, it may be harder to establish consideration where the change to the employment contract will not take effect for some time (for example, restrictive covenants that will only become relevant on termination of employment) or where the improvements/benefits do not clearly go with the new/amended restrictions.
- In such cases, it is likely to be more difficult for employers to rely on the concept of continued employment as consideration for the change, and it **may be prudent to allocate specific consideration to the change.**

A blurred background image of a business meeting. A person in a white shirt and tie is visible, holding a pen. Another person's hand is pointing at a document. The scene is brightly lit, suggesting an office environment.

**Maintained  
Properly**

# Promotions and Changes to Job Role

- Are you reviewing the need for/appropriateness of any restrictions for the new/amended role?
- Presents two risks:
  - Are the restrictions (if any) you already have still commercially effective?
  - Are they still enforceable on restraint of trade grounds?
- Note (absent a valid contractual variation for the new role) this is still judged on the original terms when they were entered into.

# Promotions and Changes to Job Role

- Example:
  - Jack started in 2010 as a Junior Sales Representative covering Kent paid £25K per annum.
  - His signed contract from 2010 contains 12 month post termination non competition clauses.
  - He has just resigned from his role as National Sales Director.
  - No new contract was ever issued.
  - Will a 12 month non compete clause work?

# Promotions and Changes to Job Role

- Example:
  - Jack started in 2010 as a Junior Sales Representative covering Kent paid £25K per annum.
  - His signed contract from 2010 contains 3 month post termination non solicitation and non deal clauses but not non compete.
  - He has just resigned from his role as National Sales Director.
  - No new contract was ever issued.
  - Do you have adequate protection?

# TUPE

- Be aware.
- Can lead to unexpected interpretations of restrictions.
- Can undermine the effectiveness of the restrictions from a commercial perspective and leave the new employer exposed.

# Loss by breach of contract

- If an employer commits a repudiatory breach of contract it cannot enforce the contract (somewhat questioned but yet to be overturned).
- It cannot therefore enforce the restrictions.

# Loss by breach of contract

- Risk areas:
  - Termination for gross misconduct?
  - Termination with payment in lieu (without a clear PILON power)?
  - Not following a PILON clause properly?
  - Constructive dismissal cases
- Clauses seeking to overcome this do not work.





# Reform Proposals

# Government Announcement

- Government Response to Consultation published 12 May 2023.
- Originally 3 options:
  - Employer to pay for them
  - Ban them entirely
  - Limit them

# Government Announcement

- Proposal is to limit to 3 months.
- Non Compete clauses only.
- Not non solicit and non deal.
- Employees and workers only.
- Not clear how this fine line will be achieved.

# Government Announcement

- Wider enforceability tests will still apply.
- When - *“When parliamentary times allows”*
- Not clear what the impact will be on existing non compete clauses longer than 3 months.

# Alternatives to Longer Non Competes

- Notice Periods and Garden Leave
- Internal controls on information
- Non solicit and non deal?



# Questions