

## High Court demonstrates importance of well-drafted restrictive covenants as enforcement succeeds “in its entirety”

Restrictive covenants restrict what employees can do for certain periods of time following termination of the employee's employment. Employers should review restrictive covenants whenever an employee, director, or consultant changes their role.

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Restrictive covenants are routinely found in contracts of employment. They can also be found in staff handbooks, offer letters, bonus plans and share schemes.

They restrict what employees can do for a certain periods of time following termination of the employee's employment.

In the recent case of Richard Baker Harrison -v- Brooks the employer brought a claim against two former employees to enforce obligations of non-competition, confidentiality, and other post-termination restrictions. The employer alleged the employees had established a start-up competitor, and that they had actively sought to transfer business away from them to their own start-up, in breach of their contractual obligations. In an overview of the key principles, the employees were found to be in breach of their implied duties and in the case of one employee a fiduciary duty. The High Court also held that the scope and duration of the non-solicitation and non-dealing covenants (12 and 9 months respectively) were no more than was reasonable.

Finding it to be “trite law that during the currency of the employment relationship the employer is entitled to protect confidential information whether it amounts to a trade secret or not”, Judge Obi was satisfied that the employer's “customer/supplier connections, the stability of its workforce and the protection of its confidential information are all legitimate business interests requiring protection”.

It is a common misconception that employers never enforce restrictive covenants. On the contrary, courts regularly enforce restrictive covenants in employment contracts.

When considering restrictive covenants in employment contracts, the devil is in the detail, and due care must be exercised as to whether they achieve a legitimate business interest.

In order to enforce a restrictive covenant, an employer must demonstrate that the clause protects one or more of its legitimate business interests. Secondly, the employer must show that the clause is reasonable in that it only goes as far as is necessary to protect a legitimate business interest of the employer.

Legitimate business interests which an employer is entitled to protect by way of post termination restrictions include:

- The employer's confidential information and/or trade secrets
- An employer's connections with clients
- The stability of the employer's workforce

In assessing whether a clause is enforceable, the court will consider the following as at the date the covenant was entered into:

- Is the restriction reasonably limited in time?
- Is the clause reasonably limited in geography?
- Does the clause go further than is necessary to protect a legitimate business interest?

Employers should review restrictive covenants whenever an employee, director or consultant changes role. Usually that person gains access to new know how covering suppliers, customers or know-how.

## Contact



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