FOREWORD

A simplistic consideration of the law of employee competition might suggest it can be understood by an analysis of the law of restraint of trade. That might have been true when the question in issue was whether a hairdresser could leave his or her salon and set up in competition on the other side of town. But these days the issues are likely to be much more sophisticated. Typically, a group of employees will together leave a high tech company and go as a team to work for a competitor, or set up on their own. How can the employer stop this? And how can they stop the employer stopping it?

As with most fields of human activity, the relevant legal principles cannot be analysed within the framework of a single legal category. The modern practitioner has to trespass into a range of legal fields, quite apart from the obvious starting point of contract. For example, the economic torts in particular are material where workers are induced to leave at the behest of a competitor; fiduciary obligations may arise where senior employees or directors take such a step; equitable principles relating to the protection of confidential information will come to the fore where the employer is in fear of losing business plans or formulae; and sometimes aspects of intellectual property may be relevant depending upon the nature of the information which employees may be hoping to take with them to use in the new set up.

In addition to these issues surrounding the substantive law, difficult questions may arise concerning the appropriate remedy and in particular, whether a claim for damages or a restitutionary claim exists in a particular context.

This book admirably analyses the relevant legal rules, but in addition, and of particular importance to the practitioner, it focuses on practical questions facing a prospective litigant: the importance of interlocutory relief; the nature of evidence required to maximise success; how to obtain freezing orders over assets; and where international disputes are concerned– and they are becoming increasingly common in a shrinking world – the proper forum for initiating proceedings.

One reason why this work provides such a valuable combination of scholarly and practical wisdom is that it combines the insights of specialist and highly expert barristers of Blackstone Chambers with the direct practical experience of solicitors at Olswang. These different perspectives are particularly valuable, for example, when dealing with the increasingly common problem, now given full consideration in this second edition, which arises when an employer suffers the loss of a team of employees who move en bloc to a rival or to set up in competition.

Another valuable dimension of this book is the draft documents, and in particular the model contractual terms. These are designed to assist a party to anticipate potential legal problems and to provide for them in advance, thereby avoiding costly and unnecessary litigation.

This second edition, like the first, is produced in user friendly form with flow charts and tables where appropriate. In addition, there is now a link to a Blackstone Chambers' website so that readers will be able to keep up with developments and not to have to wait with eager anticipation the third edition! The first edition of this book was a great success. I am

confident that with each new edition it will grow in stature: a wise and scholarly work but providing solutions to everyday problems; valuable to academic and practitioner alike.

Sir Patrick Elias
Lord Justice of Appeal
Royal Courts of Justice
December 2010

PREFACE

Since the first edition of this book appeared four years ago, there has been a substantial number of important cases which have brought about significant developments in the law of employee competition.

One notable feature has been the increasing importance of the *international dimension* to litigation to enforce restrictive covenants and protect trade secrets. The challenges of cross-border litigation in this field are vividly illustrated by the cases of *Samengo-Turner v Marsh McLennan* in the Court of Appeal and *Duarte v Black & Decker* at first instance. The former case involved the interpretation of the Judgments Regulation on jurisdiction which gave rise to the grant of an anti-suit injunction to restrain New York proceedings on the ground that the employees had a right to be sued *only* in England as the place of their domicile, notwithstanding a New York exclusive jurisdiction clause. The latter case interpreted the Rome Convention on the law applicable to contractual obligations (since superseded by the Rome I Regulation) to the effect that English law of restraint of trade trumped Maryland law, despite this being the parties' chosen law, to determine the enforceability of a restrictive covenant in proceedings brought in England. This important trend is reflected in the creation of a new Chapter 7 in this second edition dedicated solely to the international dimension where these developments are examined in detail.

Shortly after the first edition of this book was published, the House of Lords re-fashioned the law of *economic torts* in the combined appeals under the name of *OBG v Allen*, one of which was *Mainstream Properties v Young*, an employee competition case. This decision brought about some much needed clarification of the law relating to inducement of breach of contract, an important element of claims against prospective employers who recruit employees from a competitor. This decision is explained at length in Chapter 2 on Duties.

Another area where employee duties have come under close scrutiny in recent years is in relation to *team moves*. Questions have arisen as to when employees are under a duty to disclose their knowledge of attempts to recruit them and their colleagues, whether springboard injunctions can be granted to deprive a competitor of an unfair headstart even when no misuse of confidential information is involved, and what disclosure orders can be obtained to discover the extent of a competitor's recruitment efforts (for example, *UBS v Vestra Wealth*, *Tullet Prebon v BGC*, *Vestergaard v Bestnet*, *Aon v JLT*). One contributor, at least, did his best to re-shape the nature and content of the *mutual duty of trust and confidence* in *RDF Media v Clements*, although whether that attempt has survived subsequent cases is open to question. These developments are discussed extensively in Chapters 2 (Duties), 9 (Pre-action Steps), and 10 (Injunctions).

As well as covering the major developments in law and practice in this field up to 1 October 2010, we have sought to maintain some of the distinctive approaches adopted in the first edition, such as the uniquely valuable checklists at the end of most chapters, and added novel features, such as the flow charts at the end of the International Dimension chapter and a new glossary of computer terms as part of Appendix 1 on Computer Forensic Investigations.

Speaking of teams, this edition has again been a collaborative effort between members of Blackstone Chambers (several of whom have appeared in a number of the recent leading cases), Olswang solicitors (who, as well as contributing substantively to key chapters, have meticulously updated checklists and shared their valuable know-how in the form of detailed sample clauses reproduced in the appendices), and Strotz Friedberg (formerly DGI Forensics, who have provided an updated guide to computer forensic investigations). I would also like to express my gratitude to those who contributed to the first edition but who due to other demands on their time have been unable to continue their involvement this time round, namely Kate Gallafent, Brian Kennelly, Tom de la Mare, Melanie Adams, Julia Palca, Paul Stevens, and Ed Wilding.

It can be difficult to keep abreast of the many cases and developments in this area. To assist in that effort, occasional papers from contributors, updating the contents of this book, will appear on the Blackstone Chambers website at http://www.blackstonechambers.com/practice_areas/employment.html.

The professionalism, efficiency and ongoing support of OUP has ensured the appearance of this expanded, second edition on time, and for that my special thanks go to Faye Judges, Briony Ryles, and also to Roxanne Selby whose idea this book was in the first place.

I am also very grateful to the Honourable Lord Justice Elias for writing a new Foreword to this second edition, who contributed so much to the law of employee competition when at the Bar, and who continues to do so from the Bench.

Paul Goulding QC
Blackstone Chambers
October 2010

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APPENDICES

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INTRODUCTION

Paul Goulding QC and Ivan Hare

A. Aim

1.01 There has been a resurgence of employee competition disputes in recent years. These have presented lawyers with new challenges as well as engaging them in familiar battles. Clients are on the look-out for creative thinking, effective remedies, and workable solutions. On occasions, this is achieved through litigation; on others, by avoiding it.

1.02 The new challenges have appeared in numerous guises. Some have a highly practical aspect, others a more legal content. Often, both are present. For example, take team moves. A desk of traders or brokers moves en masse from one bank to another. What are the legal issues involved? How can an employer discover what is going on? How can the team coordinate its move whilst acting lawfully? How can the new employer most effectively poach a team from a rival whilst limiting its exposure to injunctions and damages claims?

1.03 New legal questions have recently come to the fore. When does an employee owe fiduciary duties? Is an employee or director under a duty to disclose his own misconduct? What is the impact of the Convention rights to privacy and freedom of expression on breach of confidence claims? How long can a period of garden leave be enforced? In what circumstances can an employer recover restitutionary or gain-based damages if he cannot prove actual loss from unlawful competition?

1.04 Then there are the legal disciplines which appear on the margin of employee competition cases, unfamiliarity with which can unnerve the legal adviser. What about the international dimension? This is in play when, for example, a restrictive covenant in the contract of a US employee seconded to the United Kingdom is sought to be enforced throughout Europe. What is the proper law of the contract? In which forum should proceedings be commenced? How can an injunction be enforced in other jurisdictions? When are European and UK competition law principles relevant? Then there are the intellectual property issues which

sometimes rear their heads. Is there a claim to copyright or passing off or a trade mark infringement?

1.05 These legal questions need to be considered in the changed climate of court proceedings. The Civil Procedure Rules require parties to consider their pre-action steps carefully before rushing headlong into litigation. The ability of the court to fix speedy trials has also altered the legal landscape fundamentally. A trial can be fixed in a matter of weeks frequently rendering pointless a full-blown fight at the interim stage. Parties and their advisers are under a duty to examine alternative ways of resolving their disputes than through the courts, such as via mediation.

1.06 The scope of disputes about unlawful competition is not, of course, confined to employment. Restrictive covenants are often an essential element of an agreement between a vendor and a purchaser, whether of a business or shares in a company. Increasingly, partners leave one firm, and join another. This has been a notable feature affecting solicitors as the market for legal services has become more fluid. Does garden leave conflict with the rights of a partner? Is the enforceability of a restrictive covenant between partners to be tested as if it were akin to an employment, or to a vendor-purchaser, covenant, or by some different standard? Finally, what about joint venturers? If an investor funds a new business, does he have a legitimate interest which merits protection by an enforceable covenant? To this extent, the title of the book is inadequate since its scope is beyond competition concerning employees alone. Economy of words dictated the title, but wherever the phrase 'employee competition' is used below, it should be taken to encompass competition in these other spheres too, including vendor-purchaser, partnership, and other commercial arrangements.

1.07 The aim of this book is to cover the whole of this new terrain; to examine the legal issues in detail; and to provide practical guidance. For this reason, most chapters conclude with a checklist of points which we hope will be valuable for the hard-pressed adviser when there is not time for an in-depth analysis of the law. Likewise, the appendices contain advice on forensic investigations, drafting of covenants, sample clauses and court documentation, as well as other relevant materials.

1.08 It is undoubtedly the case that new issues will emerge in this field in the coming years, which will require treatment in future editions of this work. Pending the next edition, there is a companion website where a link may be found to occasional papers from the authors of this book relating to or updating the material which is found here. The website address is http://www.blackstonechambers.com/practice_areas/employment.html.

B. Structure of the book

1.09 The book consists of four parts: substantive law, pre-action steps, remedies, and the appendices.

Substantive law (Chapters 1 to 8)

1.10 Chapters 1 to 8 examine in detail the substantive law relevant to employee competition. This begins with a brief section on the doctrine of restraint of trade with which this chapter concludes. This doctrine underpins the whole of the book since it embodies the public policy considerations of freedom to work and freedom to contract which, whilst often in tension with one another, come into play when the court reaches decisions in individual cases.

Chapter 2 explores the duties owed by employees, directors, and others which are relevant to unlawful competition. These duties are founded in contract, equity, and statute. The latter is of recent importance in view of the codification of a director's duties in the Companies Act 2006. The central duty of good faith and fidelity is considered both as a fiduciary and a contractual duty, and recent case law on the duty to disclose misconduct, as one incident of this duty, is discussed. One particular manifestation of breach of this duty—diverting maturing business opportunities—is examined in detail. The liability of third parties, such as the new employer, for unlawful competition is considered in a section on the economic torts, a subject of recent detailed examination by the Court of Appeal and House of Lords. Finally, there is a separate section on team moves, looking at the legal and practical implications of a group departure to a rival employer. **1.11**

Chapter 3 deals with confidential information and the database right. The elements of the duty of confidence are described and the impact of the Human Rights Act 1998 in this area is explained. The difficult question of 'what is confidential information?' is discussed, with particular reference to the role of express confidentiality clauses. The defences to, and remedies for, a claim of breach of confidence are explained in detail. The little-known database right is also explained, which is a valuable addition to an employer's armoury in situations where an employee has removed part of a database, such as a client list. A claim for database right infringement has certain advantages over common law confidential information claims which are highlighted. **1.12**

Garden leave is the subject of Chapter 4. This notion has become well established on the battleground of employee competition yet is still of comparatively recent origin. This chapter explores the emergence of garden leave against the background of the rule against specific performance of contracts of personal service, which still has an important role to play (especially in cases involving celebrities in the sports and entertainment worlds). The circumstances in which a right to work arises, and the corresponding importance of garden leave clauses, is then discussed. There are, broadly speaking, two ways in which an employee may be subjected to garden leave, namely through its imposition by an employer and through its enforcement by the court. Both aspects are considered, in the course of which issues such as the appropriate length of garden leave, and the parties' respective rights during the garden leave period are explained. **1.13**

Central to any book on employee competition is the enforceability of restrictive covenants. This topic, which is tackled in Chapter 5, has had a new lease of life recently due, in part, to the appearance of new forms of restrictive covenant (such as those found in employee benefit arrangements) and recent case law. A seven-stage approach is adopted covering incorporating and changing covenants, the nature of a restraint, repudiation, construction, legitimate interests, reasonableness (including severance), and discretion. The subject of repudiation, in particular, receives extensive treatment in the light of recent Court of Appeal dicta suggesting that *General Billposting v Atkinson* may no longer be good law. Particular difficulties relating to covenants in the context of a TUPE transfer are also discussed. **1.14**

Chapter 6 looks beyond the employment relationship to issues of unlawful competition in other fields. This includes restrictions entered into between vendors and purchasers (such as on the sale of a business or shares), between partners pursuant to a partnership or limited liability partnership (LLP) agreement, and between business partners (for example as part of a joint venture or shareholder agreement). **1.15**

1.16 Chapter 7 is an entirely new chapter for the second edition of this work, and addresses the international dimension of employee competition. The creation of a stand-alone chapter dedicated to this topic reflects its increasing importance at the present time. The issues covered in this chapter include jurisdiction (where to sue), applicable law (what law governs the issues), and enforcement of judgments obtained overseas. The chapter discusses in detail important European measures including the Judgments Regulation and the Rome I and II Regulations, as well as important recent decisions such as *Samengo-Turner v Marsh & McLennan*[1] and *Duarte v Black & Decker*.[2]

1.17 Finally in this section, Chapter 8 provides an introduction to a number of related concepts, which arise from time to time in the context of employee competition disputes. These include competition law which inhabits some of the same ground as restraint of trade, and a basic understanding of which is useful and is provided here; sports cases, which have thrown up particular problems with regard to competition issues involving sportspeople, officials, and governing bodies; human rights concepts and institutions are explained; and, finally, an overview of intellectual property rights is provided, with an introduction to copyright, inventions and patents, registered trade marks, and passing off.

Pre-action steps (Chapter 9)

1.18 Bridging the sections on substantive law and remedies is Chapter 9, which provides a practical discussion of the pre-action steps which might prove useful and should always be considered. This chapter is written in three sections: from the perspective of the claimant employer, the defendant employee, and the defendant employer respectively. It explains the many tactical considerations that can have such a bearing on the outcome of disputes, and suggests steps that can and should be taken to maximize the chances of a successful outcome both through the courts and through negotiation. A further discussion of team moves, with the focus on the practical steps that might be taken to advance and to resist such moves, is also included.

Remedies (Chapters 10 to 12)

1.19 The final three chapters provide a comprehensive examination of the range of remedies available in employee competition cases.

1.20 Chapter 10 covers the remedy most frequently sought, namely interim injunctions. It explains the different types of injunction—prohibitory, springboard, and mandatory—and looks at the test applied by the courts in deciding whether to grant an interim injunction (*American Cyanamid* and its later refinements). The important requirement of an undertaking in damages is considered here, including which parties can benefit from it, when security may be necessary, and how damages are assessed when the undertaking is enforced. Other interim remedies are often sought in addition to, or in place of, more conventional interim injunctions, such as search, delivery up, disclosure, *Norwich Pharmacal* and freezing orders, and the relatively new remedy of an interim declaration. These are all discussed.

1.21 The increasingly important topic of damages is the focus of Chapter 11, together with other remedies. The principles of compensatory damages are explained, and the recent ground-breaking judicial recognition of the availability of restitutionary or gain-based damages for

[1] [2008] ICR 18, CA.
[2] [2007] EWHC 2720 (QB).

breach of contract is examined. The nature of an account of profits and equitable damages are discussed, in addition to more obscure yet important subjects such as exemplary damages, liquidated damages, and tracing as well as other remedies.

Finally, Chapter 12 provides an essential procedural guide to commencing and conducting High Court employee competition litigation. This will be of value to those less experienced in this arena, with an explanation of the rules on statements of case, making an application, disclosure, evidence, trial, judgments and orders, appeals, costs, and mediation and settlement. It will also be of use to the more experienced High Court litigator, for example in its detailed discussion of pre-action and third party disclosure, and the nature and form of Tomlin orders. **1.22**

Appendices

The last section of the book consists of twelve appendices, which are designed to provide practical guidance and precedents for use in advising clients and conducting litigation. **1.23**

Of particular and novel interest, Appendix 1 contains a guide to forensic investigations which can be an invaluable weapon in unearthing evidence of unlawful competition. This is written by a specialist in the field, with a great deal of experience in the conduct of such investigations. It is especially useful for those with only a rudimentary understanding of the world of technology, and contains helpful guidance on what can be done, as well as what should not be done, in order to retrieve and preserve evidence. **1.24**

Appendix 6 contains a note of practical guidance on drafting restrictive covenants. This could have formed part of Chapter 5 but has been kept separate to enable easy reference, particularly for those involved in drafting such clauses. **1.25**

Appendix 12 contains a table summarizing the leading employee competition cases. These are all discussed elsewhere in the book. The purpose of the table is to provide a resource which can be easily and quickly consulted in order to provide a feel for the sorts of periods for which restrictions are enforced by the courts in various contexts. **1.26**

The remaining appendices contain sample materials of one form or another. These include sample employee duties, confidential information, and garden leave clauses and restrictive covenants (Appendices 2, 3, 4, 7, and 8), sample pre-action letters (Appendix 9), and sample pleadings and other documentation for court applications (Appendices 10 and 11). These are all produced subject to the usual but important health warning. They contain *sample* documentation. Their purpose is to provide ideas as to what might be useful. They should not be copied wholesale or without regard to the facts and circumstances of the individual case. But they will, hopefully, prove to be a useful resource. **1.27**

C. Restraint of trade

Public policy

The doctrine of restraint of trade is one of a number of legal tools for giving effect to judicial perceptions of public policy. The doctrine is therefore part of the broader legislative and common law scheme which limits freedom of contract in order to prevent parties from enforcing agreements to achieve certain illegal ends (such as contracts to commit or conceal **1.28**

criminal offences, to sell public offices, or to interfere with the course of justice) or which contain terms which are considered unfair or unconscionable.[3]

1.29 The particular public policy which motivates the law on restraint of trade was defined in the following terms by Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co*:

> The public have an interest in every person's carrying on his trade freely: so has the individual. Interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void.[4]

1.30 In other words, the law seeks to give effect to two distinct interests: the autonomy interests of the individual employee to engage in economic activity of his own choosing and that of the public in general that the unit of production represented by the worker's efforts should be permitted to make a contribution to society.[5] However, set against this is the traditional judicial attachment to freedom of contract which seeks to uphold bargains freely entered into.

> As long as the restraint to which he subjects himself is no wider than is required for the adequate protection of the person in whose favour it is created, it is in his interests to be able to bind himself for the sake of the indirect advantages [such as employment or training under competent employers] he may obtain by so doing.[6]

1.31 When the doctrine was originally formulated in the Elizabethan era, all restraints of trade were considered contrary to public policy.[7] Gradually, this doctrine was relaxed so that partial restraints (as opposed to those extending throughout the country) might be enforceable.[8] The modern law operates as a common law presumption of unenforceability, save to the extent that the covenant is found to be reasonable.

1.32 Some commentators have described restraint of trade as the counter-point to the employee's obligations of fidelity to his employer which is more usually labelled the duty of trust and confidence. Among other things, the employee's duty of trust and confidence prevents him from improperly competing with his employer's business by, for example, working for a competitor in his spare time.[9] Thus the duty of trust and confidence requires the employee in some ways to identify his own goals with the economic aims of his employer whereas the

[3] *Chitty on Contracts* (30th edn, 2008), ch 16. The most comprehensive work on the subject is JD Heydon, *The Restraint of Trade Doctrine* (3rd edn, 2009). It is important to distinguish restraint of trade from the equitable doctrines which govern unfair or unconscionable bargains and which require the court to be satisfied that the defendant has behaved in a morally reprehensible way (*Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] EMLR 229, 316–18 *per* Parker J).

[4] [1894] AC 535, HL, 565. In the *Nordenfelt* case itself, the House of Lords was prepared to enforce by injunction a covenant not to engage in the manufacture of guns or ammunitions for a period of twenty-five years. Given the nature of the business and the fact that customers were limited to domestic and foreign governments, it was not considered unreasonable for the purchaser of Mr Nordenfelt's patents and business to enforce the restriction.

[5] Simon Brown LJ referred to the latter as 'the public interest in competition and proper use of an employee's skills' in *J A Mont (UK) Ltd v Mills* [1993] ILR 172, CA.

[6] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, HL, 707 *per* Lord Parker of Waddington. Lord Pearce referred to the distinction between restrictions which are 'directed towards the absorption of the parties' services and not their sterilization' in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, HL, 328.

[7] *Colgate v Bacheler* Cro Eliz 872, 78 ER 1097, KB. Lord Hodson traced the doctrine back to Magna Carta in *Esso v Harper's*, n 6 above, 317.

[8] *Mitchel v Reynolds* (1711) 1 P Wms 181, 24 ER 347, Ch.

[9] *Hivac v Park Royal Scientific Instruments* [1946] Ch 169, CA. See further, D Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2nd edn, 2005), ch 7.

doctrine of restraint of trade vindicates the employee's right to assert his own distinct interests and engage in legitimate competition with his employer's business.[10] In reality, the contrast is not as neat as this suggests since the interests of both parties are being balanced within the doctrine of restraint of trade and in defining the mutual obligation of trust and confidence.[11] For example, it has been held that the duty of trust and confidence requires that 'each party must have regard to the interests of the other, but not that either must subjugate his interests to those of the other'.[12]

1.33 A further element of policy is the relationship between common law concepts of restraint of trade and domestic and European competition law. This relationship is discussed further at paragraphs 8.06 to 8.73 below.

Defining the doctrine

1.34 As with all areas where the law is underpinned by public policy and subject to a test of reasonableness, there is substantial scope for uncertainty in the application of the doctrine. This uncertainty is exacerbated by the fact that the underlying public policy is likely to change over time.[13] Indeed, some judges have been reluctant to define the dividing line between contracts which are in restraint of trade and those which merely regulate the normal commercial relations between the parties and are therefore enforceable, preferring to rely on 'a broad and flexible rule of reason'.[14] Perhaps the most frequently cited definition is that provided by Lord Denning MR in *Petrofina (Great Britain) Ltd v Martin*:

> Every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, so long as he does nothing unlawful: with the consequence that any contract which interferes with the free exercise of his trade or business, by restricting him in the work he may do for others, or the arrangements which he may make with others, is a contract in restraint of trade. It is invalid unless it is reasonable as between the parties and not injurious to the public interest.[15]

Applying the doctrine

1.35 Once it is established that the doctrine applies, the test is a three-stage one: first, does the restraint protect a legitimate interest of the party protected; secondly, is it reasonable between the parties; and, thirdly, is it contrary to the public interest?[16] The burden is on the proponent of the restraint to demonstrate that it is in the interests of the parties, but on the party challenging it to show that it is contrary to the public interest.[17]

1.36 In the context of employment, three interests have most frequently been recognized as legitimate: the protection of trade connections; the preservation of trade secrets and confidential information; and maintaining the stability of the workforce. However, the categories of

[10] See MR Freedland, *The Personal Employment Contract* (2003), 171–86.
[11] Freedland, n 10 above, 172. As Freedland also points out, the legal techniques involved in implying obligations into contracts are very different from those which control the express terms within them.
[12] *Nottingham University v Fishel* [2000] ICR 1462, 1493C *per* Elias J; [2000] IRLR 471, 483.
[13] *Panayiotou v Sony*, n 3 above, 320.
[14] *Esso v Harper's*, n 6 above, 331 *per* Lord Wilberforce, 298 *per* Lord Reid, and 324 *per* Lord Pearce.
[15] [1966] Ch 146, CA, 169.
[16] *Esso v Harper's*, n 6 above, 300–1 *per* Lord Reid.
[17] *Herbert Morris v Saxelby*, n 6 above, 700 and 707–8 *per* Lord Parker.

legitimate interest that may be protected by reasonable restraints are not closed.[18] It is clearly established that the desire to restrict competition is in itself illegitimate.

1.37 Reasonableness is one of the most common concepts in legal analysis, but its meaning is heavily dependent on context. In some areas, it permits the employer or other decision-maker to enforce their decisions so long as they fall within a broad range of reasonable responses. In other areas, the judges get closer to substituting their own view of appropriate balance between the competing interests. The court is likely to take into account a number of factors, including the bargaining position of the parties, whether the contract was in standard form, whether the restraint exceeds the terms of the contract and the surrounding circumstances.[19]

1.38 The judges have offered some general guidance as to how the task should be approached. First, all aspects of the covenant should be analyzed to decide the full extent of the restriction. In the course of this enquiry, the court may well ask itself whether a covenant of narrower scope would have been sufficient to protect the employer's legitimate interests. The court will also not enforce a covenant which does not in fact offer any protection to the employer since if the covenant is not affording any benefit to the employer, its only effect is to restrain the employee. Both of these principles are illustrated by *Office Angels Ltd v Rainer-Thomas,* [20] in which an area restriction was held to be unjustified since a more limited non-solicitation or non-dealing clause would have offered adequate protection. The area restriction was also found to be inappropriate because most of the business' clients placed their orders by telephone and the location of the clients' offices was therefore irrelevant.

1.39 It is equally clear that the court will take account of the consideration for the promise, although it will not generally assess its adequacy.[21] This latter principle serves the pragmatic end that the court is not in a position to know which part of the overall consideration relates to the restraint in cases where the restriction is contained in the contract of employment which also includes a series of other employee obligations for which he may expect to be remunerated. However, there is also a more principled justification: since the law is, at least in part, concerned with vindicating the public interest, employers ought not to be able to purchase more protection than is reasonably necessary.[22]

1.40 The courts have also reiterated that they are concerned with the reasonableness of the restriction and do not wish to be drawn into an assessment of its proportionality as this might lead them down the road to examining the costs and benefits to the parties. In *Allied Dunbar (Frank Weisinger) Ltd v Weisinger*,[23] Millett J expressed the view that a focus on proportionality could too easily lead to the court assessing the adequacy of the consideration. However, judges have become more familiar with the concept of proportionality and have acknowledged its advantages over the less precise and sophisticated test of reasonableness in

[18] *Dawnay, Day & Co Ltd v D'Alphen* [1998] ICR 1068, CA, 1107–8 *per* Evans LJ.
[19] *Panayiotou v Sony*, n 3 above, 330–6.
[20] [1991] IRLR 214, CA.
[21] *Esso v Harper's*, n 6 above, 323 *per* Lord Pearce.
[22] *J A Mont v Mills*, n 5 above.
[23] [1988] IRLR 60. The *Weisinger* case should be treated with some caution because it did not concern the enforceability of the covenants against an ex-employee, but against the vendor of his business as a self-employed salesman of financial services and products.

the field of public law.[24] As such, it is likely that proportionality will have a broader role to play in assessing restraints of trade that the *Weisinger* case would suggest.

The temporal extent of the doctrine

1.41 Although frequently relied upon after the termination of an employment contract, the doctrine of restraint of trade is not so confined. For example, in *Watson v Prager*,[25] the court held that the agreement entered into between the boxer Michael Watson and his manager Mickey Duff was subject to judicial supervision before termination. The agreement was held to differ from commonplace commercial contracts and hence to be subject to the requirement of reasonableness for two reasons. First, the parties were prevented by the British Boxing Board of Control from freely negotiating their own terms. Secondly, the agreement contained an inherent conflict between the defendant's duties as a manager to arrange a proper programme for his boxer and negotiate favourable terms for him, on the one hand, and Mr Duff's own financial interests as a promoter which might incline him to reduce the fighter's share of the purse (thereby increasing his own share), on the other. The contract failed the test of reasonableness because the manager was entitled to impose conditions on the boxer (including the share of the purse) unilaterally and because it contained an option for the manager to renew the contract for three years which was considered too long and therefore in restraint of trade.

1.42 Restraint of trade also applies to periods of garden leave. These are periods where the contract remains in force, but where the employee is no longer actively working for the employer. During periods of garden leave, the employee is therefore prevented from working for another employer, but also from working for his own employer. This situation naturally gives rise to concerns about restraint of trade.[26] Courts have therefore recognized that there may be circumstances in which garden leave clauses are inserted in an attempt to circumvent the law on restraint of trade and that the courts may have to control their enforcement:

> [Garden leave] is a weapon in the hands of the employers to ensure that an ambitious and able executive will not give notice if he is going to be unable to work at all for anyone for a long period of notice. Any executive who gives notice and leaves his employment is very likely to take fresh employment with someone in the same line of business not through any desire to act unfairly or to cheat the former employer but to get the best advantage of his own personal expertise.[27]

1.43 If the garden leave clause is enforceable, the question arises whether the employer is entitled to enforce all the restrictions which apply during the period of the contract of employment or only the more limited set which apply post-termination. The Court of Appeal has indicated that it is the former in *Symbian Ltd v Christensen*.[28] In this case, a clause prohibiting the

[24] *De Smith's Judicial Review* (6th edn, 2007), 11-077–085.

[25] [1991] 1 WLR 726.

[26] In cases where there is no contractual right to impose a period of garden leave, it may be found to be a repudiatory breach to do so thereby releasing the employee from the effect of the restraint (*William Hill Organisation Ltd v Tucker* [1999] ICR 291, CA). The circumstances are likely to arise where an employee requires continued performance or exposure to the market to maintain his skills.

[27] *Provident Financial Group v Hayward* [1989] IRLR 84, CA, 86 *per* Dillon LJ. In this case, Dillon LJ also stated that a garden leave clause would not be enforced by injunction where it prohibited an employee from working in a business which had nothing to do with that of his employer.

[28] [2001] IRLR 77, CA.

employee from taking any other employment 'during the term of this agreement' was fully applicable and could be enforced by means of an injunction to restrain the employee from working for a particular competitor during his period of garden leave. Although not directly addressed by the Court, the granting of injunctive relief on these facts suggests a distinction between the non-availability of such relief where it would compel the employee to work for the employer and its availability to police a period of enforced idleness.

1.44 Generally, the courts' approach to restraints of trade during the currency of the employment relationship is more flexible than that applied to post-termination restrictions. Whereas post-termination restrictions are either upheld or not, the courts have, for example, been prepared to grant an injunction for less than the full period of garden leave if the full period is considered to be unreasonable.[29] It may be that this more flexible approach is one which will eventually have an impact on post-termination restrictions too.

Conclusion

1.45 From this introduction to the law on restraint of trade, it is clear that this is an area of developing doctrine and one in which the courts are confronted with competing arguments of policy on a daily basis. The remainder of this book addresses how these conflicts are addressed in practice.

[29] *GFI Group Inc v Eaglestone* [1994] IRLR 119. See further, paras 4.55–4.59 and 4.221–4.223 below.