EMPLOYEE COMPETITION

Covenants, Confidentiality, and Garden Leave

THIRD EDITION

Edited By

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INTRODUCTION

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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? 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? Can an employer enforce garden leave without paying the employee? In what circumstances can an employer recover gain-based or negotiating 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, an employee domiciled in England is sued by the US parent of his employer under an incentive plan subject to foreign law and exclusive jurisdiction. In which forum should proceedings be commenced? What is the applicable law?

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. There has been a growing trend towards greater use of arbitration to resolve employee competition disputes bringing with it the advantages of confidentiality and flexibility.

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? Limited Liability Partnerships (LLPs) are now widespread in the professional and financial services fields, and raise many interesting questions. For example, does the doctrine of repudiation apply to LLPs so as to render restrictive covenants unenforceable? Finally, what about joint ventures? 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 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 computer forensic investigations, forensic accounting (relevant in the quantification of damages claims), PD31 and practice, 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. In the meantime, regular updates on new cases and related topics will be provided in the form of *Employee Competition Bulletins* which are available at www.blackstonechambers.com.

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.

1.11 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 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. Finally, there is a separate section on team moves, looking at the legal and practical implications of a group departure to a rival employer.

1.12 Chapter 3 is new in this 3rd edition and considers the liability of third parties, such as the new employer, for unlawful competition. It does so by examining the economic torts of inducement of breach of contract, causing loss by unlawful means and conspiracy, in addition to dishonest assistance, knowing or unconscionable receipt, and third party liability for legal costs incurred in litigation.

1.13 Chapter 4 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.

1.14 Garden leave is the subject of Chapter 5. This notion has become well established on the battleground of employee competition since its introduction in the 1980s. 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, are 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, whether an employer must always pay an employee during garden leave, and the parties' respective rights during the garden leave period are explained.

1.15 Central to any book on employee competition is the enforceability of restrictive covenants. This topic, which is tackled in Chapter 6, has had a new lease of life recently due, in part, to the appearance of new forms of restrictive covenant (including those found in deferred remuneration arrangements, such as LTIPs and stock plans) 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, whilst particular difficulties relating to covenants in the context of a TUPE transfer are also discussed.

1.16 Chapter 7 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 agreement, and between business partners (eg as part of a joint venture or shareholder agreement).

1.17 Chapter 8 has been rewritten for this edition, and addresses cross-border disputes. 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 recast Brussels I Regulation on jurisdiction and the enforcement of judgments (effective from January 2015), and the Rome I and II Regulations on contractual and non-contractual obligations respectively. It also examines significant recent case law including *Petter v EMC Corporation*, in which the Court of Appeal granted an anti-suit injunction in relation to proceedings brought in Massachusetts in order to protect an English-domiciled employee's rights under the Brussels I Regulation.[1]

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*, freezing orders, and interim declarations. 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 evolution of restitutionary or gain-based damages for breach of contract is examined. The nature of an account of profits and equitable compensation are discussed, in addition to more obscure

[1] [2015] EWCA Civ 828, [2015] IRLR 847.

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, settlement, and arbitration. 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 thirteen appendices, which are designed to provide practical guidance and precedents for use in advising clients and conducting litigation. **1.23**

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 2, which is new, covers forensic accounting and is written by experts who have given evidence in team move cases. It provides useful guidance on the assessment of damages in employee competition cases. Appendix 3 sets out the basic principles of domestic and European competition law, which occasionally overlap with the law on restraint of trade. Appendix 4 is another new feature of this edition and describes employee competition in the United States. It provides an introduction to US law and procedure in this field, which will be helpful for those practitioners who deal with cross-border disputes involving multinational corporations. Appendix 8 contains a note of practical guidance on drafting restrictive covenants. **1.25**

Appendix 13 contains a table summarizing the leading employee competition cases. These are all discussed elsewhere in the book. The purpose of the table is as 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 5, 6, 7, 9, and 10), sample pre-action letters (Appendix 11), and a sample Order (Appendix 12). 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 **1.28**

common law scheme which limits freedom of contract in order to prevent parties from enforcing agreements to achieve certain illegal ends or which contain terms which are considered unfair or unconscionable.[2]

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.[3]

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.[4] 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.[5]

1.31 When the doctrine was originally formulated in the Elizabethan era, all restraints of trade were considered contrary to public policy.[6] Gradually, this doctrine was relaxed so that partial restraints (as opposed to those extending throughout the country) might be enforceable.[7] 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 occasionally labelled the duty of trust and

[2] *Chitty on Contracts* (32nd edn, 2015), ch. 16. The most comprehensive work on the subject is J D 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, 316–19 *per* Jonathan Parker J).

[3] [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.

[4] 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] IRLR 172 (CA). In *Dinsdale Moorland Services Ltd v Evans* [2014] EWHC 2 (Ch), [41], it was held to be 'by no means fanciful' to suggest that the parties to an employment contract cannot themselves agree that a post-termination restrictive covenant is reasonable in the public interest so as to create an estoppel.

[5] *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.

[6] *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. 5), 317.

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

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.[8] 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 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.[9] 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.[10] 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'.[11]

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 in Appendix 3.

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.[12] 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'.[13] 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.[14]

Applying the doctrine

1.35 It has been said that there are two stages involved in reaching the conclusion that a contract is in restraint of trade. At the first stage, the court has to address the question of whether the doctrine of restraint of trade is engaged, that is, whether the contract is one to which the

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

[9] See M R Freedland, *The Personal Employment Contract* (2003), 171–86.

[10] Freedland (n. 9), 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.

[11] *Nottingham University v Fishel* [2000] ICR 1462, 1493C *per* Elias J.

[12] *Panayiotou v Sony* (n. 2), 320.

[13] *Esso v Harper's* (n. 5), 331 *per* Lord Wilberforce, 298 *per* Lord Reid, and 324 *per* Lord Pearce. The 'rule of reason' has been described as an overriding principle, which underlies and is reflected in all the other statements of principle in *Esso v Harper's: Panayiotou v Sony* (n. 2), 320.

[14] [1966] Ch 146 (CA), 169. See also *Nordenfelt* (n. 3), 565 *per* Lord Macnaghten; *Schroeder Music Publishing Ltd v Macaulay* [1974] 1 WLR 1308, 1313C *per* Lord Reid; *Provident Group Plc v Hayward* [1989] ICR 160, 168C *per* Dillon LJ; *Mont (UK) Ltd v Mills* (n. 4), [40].

doctrine of restraint of trade applies at all, and, at the second stage of the process, whether the restraint of trade is reasonable.[15] However, it has been suggested that the line between the two stages is not clear-cut and that the analysis has to be an iterative one between them. In particular, the matters that might be raised under the second stage might also be relevant to the question whether the doctrine of restraint of trade is engaged at all.[16]

1.36 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?[17] 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.[18]

1.37 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 the maintenance of the stability of the workforce.[19] However, the categories of legitimate interest that may be protected by reasonable restraints are not closed.[20] It is clearly established that the desire to restrict competition is in itself illegitimate.[21]

1.38 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 courts are 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.[22]

1.39 The courts have offered some general guidance as to how the task should be approached. First, all aspects of the covenant should be analysed 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*,[23] 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

[15] *Proactive Sports Management Ltd v Rooney* [2011] EWCA Civ 1444, [2012] IRLR 241, *per* Arden LJ, [57] summarizing the approach of Jonathan Parker J in *Panayiotou v Sony* (n. 2).

[16] *Proactive* (n. 15) *per* Arden LJ, [59].

[17] *Esso v Harper's* (n. 5), 300–1 *per* Lord Reid.

[18] *Herbert Morris v Saxelby* (n. 5), 700 and 707–8 *per* Lord Parker.

[19] As to the need for a proprietary interest which is different from an employee's skill and knowledge, see: *Stenhouse Australia Ltd v Phillips* [1974] AC 391, 400 *per* Lord Wilberforce; *Herbert Morris Ltd v Saxelby* (n. 5), 709 *per* Lord Parker.

[20] *Dawnay, Day & Co Ltd v D'Alphen* [1998] ICR 1068 (CA), 1107–8 *per* Evans LJ.

[21] *Esso v Harper's* (n. 5), 304F *per* Lord Morris; *McEllistrim v Ballymacelligott Cooperative & Dairy Society Ltd* [1919] AC 548, 564 *per* Lord Birkenhead LC.

[22] *Panayiotou v Sony* (n. 2), 330–6.

[23] [1991] IRLR 214 (CA).

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.

1.40 It is equally clear that the court will take account of the consideration for the promise, although it will not generally assess its adequacy.[24] 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.[25]

1.41 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*,[26] 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 the field of public law. As such, proportionality may have a broader role to play in assessing restraints of trade that the *Weisinger* case would suggest.

The temporal extent of the doctrine

1.42 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*,[27] 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.

1.43 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

[24] *Esso v Harper's* (n. 5), 323 *per* Lord Pearce.
[25] *J A Mont v Mills* (n. 4).
[26] [1988] IRLR 60.
[27] [1991] 1 WLR 726. The doctrine of restraint of trade was also held to apply during the continuance of a contract in *Esso v Harper's* (n. 5); and *Schroeder v Macaulay* (n. 14).

gives rise to concerns about restraint of trade. 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.[28]

1.44 There is some debate in the authorities as to whether the negative restrictions on competition during employment are subject to the restraint of trade doctrine, in the sense that they are unenforceable unless reasonable, or whether restraint of trade considerations are relevant only in relation to the exercise of the court's discretion to enforce garden leave by injunction. In *Finn & Co Ltd v Holliday*, Simler J said:

> During the currency of the employment relationship, when an express negative covenant or the implied duty of good faith apply to prevent an employee working for another employer, the doctrine of restraint of trade will not apply to such a restraint; nor is there a need to justify an express contractual garden leave provision by reference to this doctrine.[29]

However, when it came to the question of remedy, Simler J said:

> Accordingly, an injunction sought to aid or enforce a garden leave clause must be justified on similar grounds as a restrictive covenant. This means that the claimant must demonstrate a legitimate interest to protect and must show that the injunction sought extends no further than is reasonably necessary to protect that legitimate interest.[30]

The difference in the courts' approach to the enforcement of pre- and post-termination restraints was considered by Underhill J in *Sunrise Brokers LLP v Rodgers*:

> The obligation of an employee not to work for a competitor during the currency of his employment cannot be equated with an obligation under a clause providing for post-termination restraints; and the principles governing their enforcement by injunction are different. In the former case the obligation arises inherently from the employee's duty of fidelity to the employer; and the court will, rightly, be very ready to enforce it, subject only to the constraints discussed above deriving from the rule against enforcement of a contract for personal services. In the latter case the restraint on the employee's activities is *prima facie* unlawful and requires to be fully justified in accordance with well-known principles.[31]

1.45 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.[32] It may be that this more flexible approach is one which will eventually have an impact on post-termination restrictions too.

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[28] *Provident Financial Group v Hayward* (n. 14), 165 *per* Dillon LJ.

[29] *Finn & Co Ltd v Holliday* [2013] EWHC 3450 (QB), [2014] IRLR 102, [57]. See, also, *Elsevier Ltd v Munro* [2014] EWHC 2648 (QB), [2014] IRLR 766, [55].

[30] *Finn v Holliday* (n. 29), [61].

[31] [2014] EWCA Civ 1373, [2015] ICR 272, [41].

[32] *GFI Group Inc v Eaglestone* [1994] IRLR 119. See further paras 5.55–5.59 and 5.235–5.237.

Conclusion

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 regular basis. The remainder of this book addresses how these conflicts are addressed in practice. **1.46**