

Poaching Clients and Stealing Information: How to reduce the risk to your business

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Contractual Protections

How to reduce the risk

Richard Gvero, Miranda Mulligan

Protections

Employment contract

Implied confidentiality protection; express term better

Competition restrictions? Garden leave?

Legitimate business interest

Reasonable extent

Main type of covenant



Non-competition



Non-solicitation

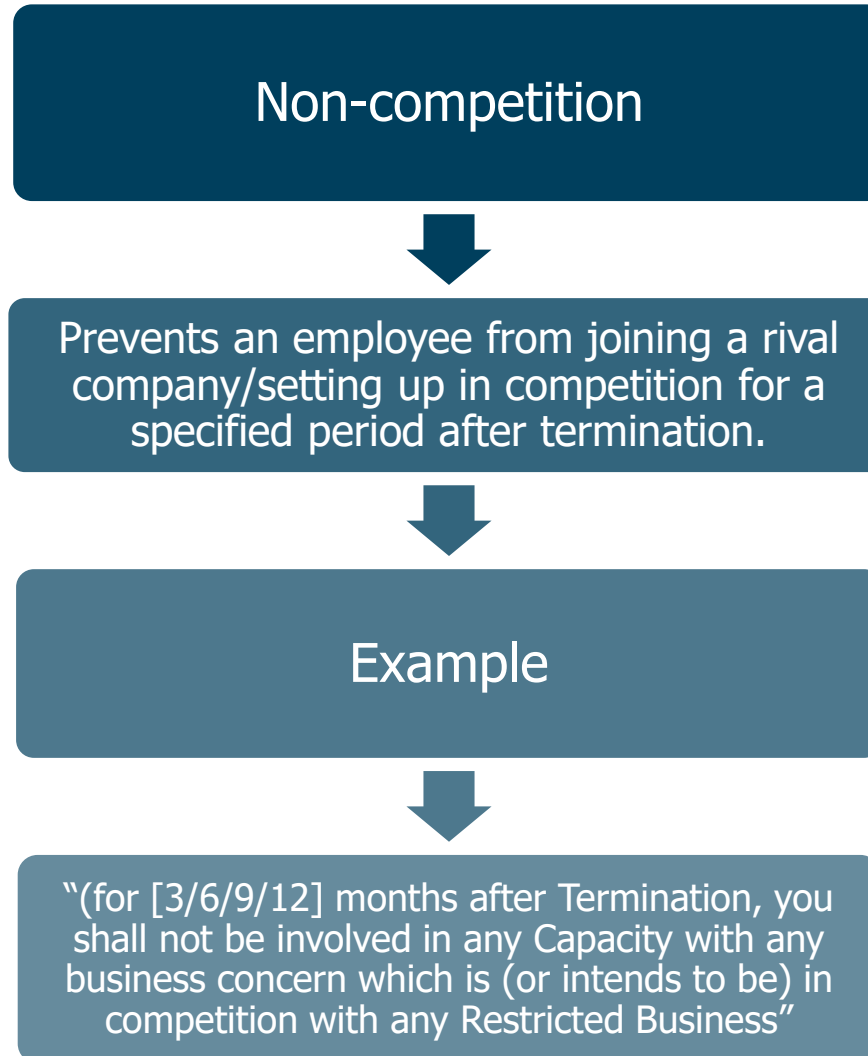


Non-dealing



Non-poaching

Non-competitive



Non-solicitation

- Prevents an ex-employee contacting a customer of their former employer with a view to obtaining their business
- Employee does not always need to make the first contact, but it will be a fact of question and degree.
- If you want to prohibit any contact with customers, you will want to consider a non-dealing covenant alongside non-solicitation

Example:

“for [3/6/9/12] months after Termination, solicit or endeavour to entice away from us [and/or any Group Company] the business or custom of a Restricted Customer with a view to providing goods or services to that Restricted Customer in competition with any Restricted Business”



Non-dealing

Non solicitation covenants can be extended to cover any business dealing with the customer. These types of covenants avoid the difficulty of proving that the employee made an approach.

Example:

“for [3/6/9/12] months after Termination, be involved with the provision of goods or services to (or otherwise have any business dealings with) any Restricted Customer in the course of any business concern which is in competition with any Restricted Business”

Non-poaching

- Preventing ex-employees from soliciting ex-employees may protect the stability of an employer's workforce.
- You should consider how long after termination the outgoing employee's influence will continue

Example:

“for [3/6/9/12] months after Termination in the course of any business concern which is in competition with any Restricted Business, offer to employ or engage or otherwise endeavour to entice away from us [and/or any Group Company] any Restricted Person;”



Confidentiality Provisions

Express confidentiality provisions within the employment contract:

- You shall not use or disclose to any person either during or at any time after your employment with the Company any confidential information.
- Confidential information means any information or matter about the business or affairs of the Company or any of its business contacts or about any other matters which may come to your knowledge in the course of your employment, and which is not in the public domain or which is in the public domain as a result of your breach of this agreement.

Drafting Considerations

Reasonable - no further than necessary to protect business

Reasonable – relevant to business and role

Reasonable – limited in TIME and SPACE Consider:

Consider:

- Frequency of client contact
- Time to rebuild relationships
- “Shelf life” of confidential information
- Geographical scope of business
- Geographical scope of employee role
- Staff turnover and recruitment market

Drafting Pitfalls

Restriction too long e.g. junior employee easily replaced/minimal influence on customers

Restriction too wide geographically e.g. employer's business does not operate in Scotland yet restriction UK wide

Restriction relates to customers with whom employee has had no contact

Restriction backstop re customers too long – 6/12/24m?

Restriction too onerous for junior employee who has had no access to sensitive information or no customer contact

Restriction no longer relevant because of role change; reasonableness of restriction assessed at date of contract

Consultancy Agreements



Contract for services – after the end of employment



Can include further restrictive covenants



Restrictions can be more onerous in arm's length commercial context

Conclusion

Restrictions do work

But need to be tailored to employee and business

And must be designed to protect business interests

In a reasonable way

Not just to avoid competition

Remedies

What happens if things go wrong?

John Wiblin

Typical business assets include:

- Machinery, plant and equipment
- Stock in trade
- Intellectual property
- Relationships with repeat clients and suppliers (+ temporary workers in the case of employment businesses)



Most valued assets

The most valued assets of your business may come under attack

- from the INSIDE (employees or former employees)
- from the OUTSIDE (competitors, trading partners)

The attack may be

- by fraud
- by theft of physical assets e.g. stock
- by theft of information and trade secrets e.g. a customer database
- by unlawful competition e.g. by former employees or agents under restrictive covenants



Protection

You can protect yourself after it happens with

- an injunction
- "*the law's two nuclear weapons*"
Lord Justice Donaldson
 - Freezing Order (a.k.a. *Mareva* injunction)
 - Search Order (a.k.a. *Anton Piller* order)

But also available

- Imaging Order
- Order for delivery-up of listed documents

Breach of restrictive covenant



Stopping someone from doing something
OR making someone do something

Remedy = INJUNCTION

"IT IS ORDERED THAT:

Until the later of [x date], trial, or further order of the court, the Defendant shall not, directly or indirectly, contact the clients or customers of the Claimant for the purpose of soliciting their business."

Stolen database



YOU KNOW the defendant has your database or other property

Remedy = ORDER FOR DELIVERY-UP and DELETION

When you know your business is under attack

But perhaps you don't know

- Who is involved
- How much you have lost
- AND if you sue, the proof you need to demonstrate those things will be destroyed before trial

Remedy = SEARCH ORDER or IMAGING ORDER

Speed

How quickly can one get an order of this kind?

Do I have to tell the other side first?

- *General rule: 2 days' notice*
- *Urgent cases: informal notice*
(*'without notice on notice'*)
- *Very urgent or where there is risk that the purpose of the order will be defeated if notice is given – without notice*



How does it work?

Two stage process

1. Interim order: evidence on paper only
(if without notice then followed by a 'return day')
2. Trial: oral hearing with cross-examination

What do you have to do?

- Give a cross-undertaking in damages
- Give evidence on oath (for remedies other than an injunction)
- Supervising solicitor (for remedies other than an injunction)

What if the defendant doesn't comply with the court order?

PENAL NOTICE

"IF YOU [NAME] DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS THE RESPONDENT TO BREACH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED."



Any Questions?



Meet the Speakers

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Upcoming event: Keep It in the Family

If you are concerned about your retirement years and want to keep your assets “in the family” please come to the free seminar.

We live in an ageing population where 25% will require care in old age due to illness or disability. Set this against the ever-receding welfare state and you may have to rely on your hard-earned assets to provide you with care. Even if you will not need care, or if you can provide care out of your investments, your family may end up paying inheritance tax on your estate when you die, or your loved ones end up not being able to help you if you lose your ability to make decisions.

Our solicitors will provide an overview of the law and appropriate solutions.

Date: 12 October 2022

Location: Hertford Castle, SG14 1HR

Agenda

- | | |
|----------|---|
| 11:00 am | Registration, tea, coffee and biscuits |
| 11:15 am | Presentation |
| 12:15 pm | Questions |
| 12:30 pm | Sandwich lunch and an opportunity to talk to the speakers |
| 1.30 pm | Finish |
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Booking

Booking is essential so please reserve your place by 28 September.

T 01992 300333

E bookings@longmores.law

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