

THE LIMITS OF COMPETITION: RESTRAINT OF TRADE IN THE CONTEXT OF EMPLOYMENT CONTRACTS

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I INTRODUCTION

Traditionally, one of the two major areas in which legal principles concerning the restraint of trade operate has been the area of employment contracts.¹ For reasons of public policy, the law has imposed serious limitations on the enforceability of provisions purporting to affect an employee's freedom to work 'outside' their employment contract. This can be observed in a course of judicial decisions stretching back well over a century. The judgments in some of the cases have been so strongly worded that some legal practitioners are now of the opinion that restraint clauses are *totally* inoperative. That opinion is, however, very far from accurate, and an examination of recent case law shows that developments in the *types* of work available have led to an increasing use of contractual restraints. This article surveys the application of the principles relating to such use in British and Australian reported cases in the last decade.

There is implied in all employment contracts, in the absence of express statement, a duty of faithful service. This involves a promise on the part of the employee to perform well and faithfully the work contractually agreed. That duty is a compendium of three sub-duties: to perform the work (the duty of obedience), to perform it *well* (the duty to work with care and skill), and to perform it faithfully (the duty of fidelity). This last duty is itself composed of distinct elements – for example, the duty of confidentiality whereby the employee must not disclose or misuse confidential information of the employer. The duty of fidelity can also involve – in appropriate circumstances – a duty not to compete with the employer.² However, the circumstances that will bring into play an *implied* duty not to compete are unusual. For the most part, protection against competition must be sought in express contractual provisions. To understand the scope that the law allows to such provisions, it is necessary to consider separately competition during the period of employment and competition after the employment has terminated.

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1 The other being, put simply, sale of a business enterprise.

2 See *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169. See also below, Part III.

II POST-EMPLOYMENT COMPETITION

The general rule at common law is that a former employee is completely free to engage in activities in competition with a former employer, a position deriving from the common law's proclaimed commitment to freedom of trade.³ Any restriction on that freedom must be expressly provided by valid restrictive covenants.⁴ Moreover, the general rule is that a restrictive covenant is *prima facie* void and can achieve validity only if it is 'reasonable', in the interests of the parties and in the public interest. It will be reasonable only if:

- (a) the employer has a genuine interest requiring protection – either confidential information or goodwill;
- (b) the restriction is limited to the employer's interest;⁵
- (c) the restriction is for a period no longer than necessary for the protection of that interest; and
- (d) the restriction relates to a geographical area no larger than necessary for the protection of the employer's interest.⁶

The first requirement is absolute: in its absence, the covenant fails totally. A covenant that does not comply with any of the remaining requirements can be saved by reading down, but only where that can be done simply by the excision of unreasonable words or parts, leaving a sensible and reasonable covenant without the need to add any additional words.⁷

3 So well established is this commitment that where an employer seeks an interlocutory injunction against a former employee on the basis of an *implied* duty not to compete, the injunction will be refused on the grounds there is no serious issue to be tried: see *Wallace Bogan & Co v Cove* [1997] IRLR 453.

4 It is usually not accurate to speak of 'restrictive covenants' since today few if any employment contracts are by deed. However, the phrase 'restrictive covenants' has become almost universally used for contractual restraints on future employment and an insistence on the accurate phrase 'restrictive clauses' would interrupt the text of this article by its variation from the norm.

5 Thus for a restraint to protect goodwill, it is essential that the conduct so restrained amounts to competition. An ex-employee cannot be restricted from being involved with businesses of the same type that are *not* in competition with the former employer: see *Scully UK Ltd v Lee* [1998] IRLR 260.

6 The limiting effect of this requirement is diminishing with the globalisation of the economy. See *Scully UK Ltd v Lee* [1998] IRLR 260, 263 (Aldous LJ):

The fact that the clause is not limited to the United Kingdom does not, in my view, make it unreasonable. Business is becoming increasingly international and the covenant is to protect dissemination of confidential information. That is not constrained by national boundaries.

Nor, in appropriate cases, are customers constrained by national boundaries, with the result that a covenant protecting goodwill could also be enforceable despite a very wide geographical coverage.

7 The addition of words must be distinguished from the *interpretation* of words, which in the context of the other terms of the contract bear a narrower and more specific meaning than in ordinary parlance. This was the justification Lord Denning gave for upholding the covenant in *Littlewoods v Harris* [1978] 1 All ER 1026, 1035-7. However, it is difficult to disagree with Browne LJ in dissent that the alleged *interpretation* was not required by the context, and that it amounted to an adding of words '[which] is something ... this court cannot do': *Littlewoods v Harris* [1978] 1 All ER 1026, 1046 (Browne LJ).

Thus the common law provides no implied restriction on the freedom to compete after employment has ended. However, if the competing employment will involve the former employee in using or disclosing confidential information of the former employer, the former employee can be enjoined from entering into or continuing in that competing employment. This protection of confidential information derives not only from the implied contractual duty of confidentiality but also from the rules of equity. The result is that confidential information has protection without any express provision, but goodwill must be expressly protected by covenant. In saying that only goodwill needs an express covenant, I am not suggesting that restrictive covenants deal only with goodwill. Many deal with confidential information. The idea behind an express covenant restricting future employment in order to protect confidential information is that if an employee is not so bound, there will be nothing on which the employer can act until a disclosure or misuse has taken place (or is imminent). In most cases where a former employee, possessed of confidential information, is employed by a competitor, the former employer would not learn of a disclosure until after the event and it is frequently the case that the harm done cannot be adequately compensated. The former employer has more chance of learning of a proposed new employment with a competitor than of a proposed disclosure subsequent to such employment and thus more chance of acting to enforce the restraint before any disclosure has taken place. It is of course necessary that there *is* confidential information, ie, an interest deserving of protection. The following discussion of restrictions on competition relates only to restrictions for the protection of goodwill. While there are many earlier cases dealing with restrictive covenants for the protection of confidential information, in which the court needed to ensure that the area of employment in which the restraint operates is no more extensive than is necessary for the protection of that information (ie, that it does not extend to encompass employment where the information is not relevant), the cases in the period surveyed deal with covenants designed for the protection of goodwill.

Employers may protect their goodwill by restraining the ex-employee (for a reasonable period) from undertaking or being involved in a competing business. A related restraint can be found in what are often referred to as 'non-solicitation' covenants: a former employee (or partner) will be restrained for a particular period from soliciting – or at times even from accepting – the custom of persons who were clients of the former employer (or partnership) while the covenantor was associated with the business. This more limited type of restraint is appropriate where the former employee or partner intends, or is likely, to set up in business on their own account (or to enter another partnership). It is worth noting that the most frequent source of cases dealing with such restraints today are various types of agencies – advertising, real estate, employment, insurance

Note that in New South Wales, the *Restraint of Trade Act 1976* (NSW) s 4 (3) allows a reading down to a reasonable covenant by recasting the phraseology of the interest, time and geographical limitations, providing that the unreasonable nature of the restraint does not indicate a failure to attempt to frame the restraint reasonably.

and finance broking – where the customer base is perhaps the main asset of the business.

A The Reasonableness of the Limitations

Where protection of goodwill is sought by means of the broader restriction on employment in the same field, the courts will scrutinise very carefully the description of the field, and the geographical and temporal extent of the restriction, to ensure that it does not go further than necessary. For example, in *Spencer v Marchington*,⁸ the former employer was the proprietor of two employment agencies, one in Banbury and one in Leamington Spa, of which the plaintiff had been the manager. The contract contained a clause restricting her, for two years after employment ended, from being in any way (alone, in partnership, as servant or agent or officer):

engaged or concerned or interested in the business of any employment agency within a radius of 25 miles of the office address, Banbury, Oxfordshire, and 10 miles from 47th Parade, Leamington Spa.⁹

On termination of the employment, the plaintiff set up her own employment agency in Banbury. When she brought an action for money allegedly due under her contract with the defendant, the defendant counter-claimed for damages for breach of the restraint clause. The High Court held that the restraint was too wide in relation to the reference to a 25 mile radius from Banbury; 'it was not necessary to extend the area beyond 20 miles at the most'.¹⁰ John Mowbray QC, sitting as Deputy High Court Judge, stated:

The object of the rule of public policy against too wide an area is not primarily to protect the employee ... it is to protect the market open to prospective customers, to maximise the number of, in the present case, employment agencies available to them and to promote competition amongst them. But the area in the restriction here ... would not only prevent Mrs Spencer from serving customers inside the 25 mile area but also outside the area ... and for quite a substantial distance outside the area ... Prospective customers outside the 25 mile radius who would normally look to Oxford, for instance, or Northampton, as the centre at which they could find an employment agency, would be deprived of the possibility of going to an agency there with which Mrs Spencer was concerned.¹¹

Two points can be made about this. First, this argument, based on protection of the market rather than the employee, is fatal to a restraint where, as here, the centre of the circle of restraint is a comparatively small place (Banbury) but the radius chosen means that the circle contains larger, inherently focal places such as Oxford. Second, the argument is unblushingly capitalist, advocating the maximisation of competition amongst businesses, whereas earlier cases spoke of the individual employee's rights to exercise their profession or skills. Moreover, this orientation is somewhat at odds with the justification for denying protection of confidential information in cases like *Printers and Finishers Ltd v*

8 [1988] IRLR 392.

9 Ibid 393.

10 Ibid 396.

11 Ibid.

Holloway:¹² that the information has become mixed with the former employee's stock of knowledge which they have a right to exercise, at the expense, where necessary, of the employer's property in the information.

In one of the very few Australian cases (during the period under consideration) that consider the validity of post-employment restraints that expressly limit the former employee's area of employment,¹³ an injunction was refused because of the unreasonable extent of the restraint clause. In *Interpersonal Pty Ltd v Reynolds*,¹⁴ the clause sought to prohibit the former employee from providing services as a personnel placement consultant (for placement of secretarial and administrative staff) at any place within the Sydney or Melbourne metropolitan area for three months after termination. Justice Young in Equity, noted that the restraint covered a vast area 'involving most people likely to be employed within Australia in secretarial positions',¹⁵ and concluded that the hardship on the defendant was such that an injunction should be refused.

B The Effect of Wrongful Dismissal on Restraint Clauses

A restraint on employment was also held 'grossly unreasonable' in *Briggs v Oates*,¹⁶ although apparently this was not because of the area or length of time of the restraint. The defendant was employed as a solicitor (under the title of 'salaried partner') by a partnership constituted by the plaintiff and one other. Unknown to the defendant, the deed of partnership provided that the partnership would expire on 31 August 1983. The defendant's contract contained a clause whereby he

shall not at any time either during the continuance of this agreement or during the period of five years after it shall have determined, for whatever reason, practise as a solicitor from an office within a radius of five miles from Market Place, Huddersfield, nor shall he solicit or endeavour to entice away from the firm any person or persons who was or were clients of the firm prior to or during the continuation of this agreement. Nor shall he at any time within such period of five years from determination of the agreement, for whatever reason, either directly or indirectly, either on his own behalf or in relation to any persons, firm or company, accept or carry out instructions for or on behalf of any such persons as aforesaid, excepting persons, firms or companies introduced as clients of the firm by [himself].¹⁷

As with many restraint clauses, this contains a number of separate prohibitions: on practise as a solicitor within the designated area for the designated time; on solicitation of clients of the employing partnership; and on acceptance of instructions from clients of the employing partnership for the

12 [1964] 3 All ER 731.

13 Two cases – *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317 and *Kone Elevators Pty Ltd v McNay* (1997) ATPR 43 830 – dealt with clauses prohibiting post-employment use or disclosure of confidential information. In each case, the court examined whether the taking of a particular job by the former employee would involve use of such information.

14 (1994) 55 IR 357.

15 Ibid 358.

16 [1990] IRLR 473.

17 Ibid 475.

designated time. Without any more, the clause is open to attack. In respect of the first prohibition on practise, it is arguably unreasonable in time and area, Huddersfield being a populous industrial centre. This prohibition is also rather nonsensical since it does not exclude practising as an employee of the employing partnership: read strictly, it would have the effect of being inconsistent with the fundamental clause of the contract whereby the employee promises to work ('practise as a solicitor') for the employer! In respect of the second prohibition on solicitation, it is too broad in referring to persons who were clients prior to, but not during, the agreement. This objection could have been cured by 'blue pencil' severance.¹⁸ However, the clause is also arguably too broad since there is no time limitation, so it is effectively an indefinite ban on solicitation. Yet it has been constantly acknowledged that the client-employee 'attraction', which justifies restraints for the protection of goodwill, may not be indefinite and may be taken to have disappeared after an appropriate break in contact. In respect of the third prohibition on acceptance of instructions, severance of the reference in the previous prohibition to previous clients, introduced into the third prohibition by the words 'person or persons *as aforesaid*'¹⁹ would be necessary before the third prohibition could be reasonable as to the interest to be protected. Even then, the five-year restriction is arguably too long, and this could not be cured by deletion since that would leave an indefinite and therefore even more unreasonable restraint.

Perhaps surprisingly, the Court made no reference to any of these matters. Instead, it found the unreasonableness in the fact, contended by the plaintiff, that the clause was intended to remain binding even in the event of a wrongful dismissal. This contention was based on the wording of the restraint: 'shall not at any time ... during the period of five years after it shall have determined, *for whatever reason*'.²⁰ The circumstances of the termination made this contention necessary. When the defendant was employed, the plaintiff had been in partnership with one Reece. As mentioned, the partnership deed provided that the partnership would come to an end on 31 August 1983. The defendant's contract of employment was for a term of five years, terminating on 3 September 1984. Some time early in 1983, the defendant learned from the plaintiff that the partnership would end on 31 August. On 31 March, the defendant informed the plaintiff that he was not prepared to continue to work for the firm unless Reece was a partner, and that he would regard himself as constructively dismissed when the partnership expired. He clarified this position in a letter of 6 April:

[T]he dissolution of your partnership with Ian Reece would have the effect of terminating my agreement, and that if such dissolution came about and you decided to offer me employment, I would feel unable to accept such an offer ... if you and Ian continue in partnership on whatever terms I have no intention other than to continue as a salaried partner for the remainder of the term of my agreement.²¹

18 This refers to striking out offending words, presumably with a blue pencil which would stand out against the black ink of legal documents. See above text.

19 *Briggs v Oates* [1990] IRLR 473, 475.

20 *Ibid.*

21 *Ibid.*

After 31 August 1983, the defendant set up in practice with Reece in Huddersfield, about 120 yards from the offices of the former employer – a clear breach of the restraint clause *if* it were enforceable.

It is well established that a contract of employment entered into by a partnership is terminated by a change in the constitution of the partnership, unless it is expressly stated to be with the partnership as from time to time constituted, and that the termination is wrongful if it occurs without proper notice in the case of a contract of indefinite duration or if it occurs before the expiry of a fixed term.²² The plaintiff therefore contended that Oates's contract had been with the partnership as from time to time constituted. However, after detailed examination of the contract, the Court held that it was with the two partners as at the time it was entered into, namely, Briggs and Reece. Therefore, the expiry of the contract had the effect of a wrongful dismissal of Oates, which he had clearly accepted as releasing him. In normal circumstances, this would release him from all further obligations, including any restraint clauses.²³

The plaintiff therefore had to argue that the particular restraint was so worded as to survive the rescission. Justice Scott held that the argument was unsound, and that, despite the wording of the restraint, the defendant was discharged from it by his election to accept the plaintiff's repudiation. He went on to add that, even if he were wrong on this point:

A contract under which an employee could be immediately and wrongfully dismissed, but would nevertheless remain subject to an anti-competitive restraint, seems to me to be grossly unreasonable. I would not be prepared to enforce restraint in such a contract.²⁴

The sentiments in this last quotation are easily acceptable, but the law is perhaps questionable. The authorities as to what makes a restraint on competition 'reasonable' or 'unreasonable' do not look to the circumstances of the termination but to the work done and contacts made by the former employee pre-termination. One could, however, argue that the categories of 'unreasonableness' are not closed. Additionally, the result could have been reached by focussing not on reasonableness, but on the effect of rescission, by stressing that Scott J was not, and could not be, 'wrong on this point'. Rescission releases the employee from further obligations. It is irrelevant that the restraint clause is not limited to the period after a proper termination. The cases in which the effect of rescission on restraints has been examined have all, by definition, been directed to the situation which follows a wrongful termination, and have dealt with restraints which were not expressed to operate only in the event of a proper termination.

A number of subsequent cases have taken up the issue of covenants expressed to take effect on the termination of the covenantee's employment, however caused. While such expression will not affect the outcome of a case where the termination amounted to a wrongful dismissal (as in *Briggs v Oates*), it may be

22 See, eg, *Kaufman v McGillicuddy* (1914) 19 CLR 1.

23 *Ibid.* See also *General Billposting Co Ltd v Atkinson* [1909] AC 118 ('General Billposting'); *Measures Bros Ltd v Measures* [1910] 2 Ch 248.

24 *Briggs v Oates* [1990] IRLR 473, 478.

crucial in the event of a dismissal with proper notice or dismissal following repudiatory breach by the employee. If the 'however caused' phrase is held to make the covenant *unreasonable*, then the covenant will be unenforceable unless the offending phrase can be severed. If the covenant is simply one that will not apply in the event of rescission by the employee, then it may be applied where the termination occurs lawfully.

In *Living Design (Home Improvements) Ltd v Davidson* ('*Living Design*'),²⁵ the covenant was expressed to govern the period following termination 'however that comes about and whether lawful or not'. The Court of Session held that the clause was manifestly wholly unreasonable, and that it could not be saved by severance. 'Blue pencil' severance was allowable only where what is struck out is of trivial importance or is technical,²⁶ which in this case was very doubtful. A different approach was taken in *PR Consultants Scotland Ltd v Mann* ('*PR Consultants*').²⁷ There, the covenant merely referred to 'termination of his employment hereunder (howsoever caused)',²⁸ without specific reference to lawfulness. The Court of Session denied that the phrase made the covenant unreasonable. Lord Caplan distinguished *Living Design* on the basis of its specific reference, and held that the phrase 'howsoever caused' was not able to cover unlawful termination, but merely the many ways of lawful termination. There would, his Lordship said, 'be no effective purpose in providing against a termination caused by the employer's unlawful conduct' since 'by the operation of the principle of mutual contractual provisions the restrictive covenant would not be available to' the employer.²⁹

A third version of the 'howsoever' phrasing was considered in *D v M*.³⁰ The covenant restrained solicitation of customers. It stated that 'if this appointment ... is terminated for any reason whatsoever ... he shall not ... for a period of 36 months following the termination date'³¹ solicit any persons customers of the employer during the 12 months preceding the termination date. 'Termination date' was defined in the contract as 'the date on which this agreement shall determine irrespective of the cause or manner'.³² The High Court held that the restraint was unenforceable as it stood and that the offending parts could not be severed since they were not 'of trivial importance, or merely technical'.³³ Justice Laws stated that the covenant was unreasonable, on the authority of *Living Design* and *Briggs v Oates*.³⁴ It would, arguably, have been open to the Court to construe 'irrespective of the cause or manner' as referring to the various possible *lawful* terminations as was done in *PR Consultants*. It is possible that the High Court's approach was affected by the surrounding issues. The defendant had

25 [1994] IRLR 69.

26 *Mason v Provident Clothing Co* [1913] AC 724.

27 [1996] IRLR 188.

28 *Ibid* 189.

29 *Ibid* 192.

30 [1996] IRLR 193.

31 *Ibid* 195.

32 *Ibid*.

33 *Ibid* 197.

34 *Ibid* 197-8.

been summarily dismissed by the plaintiffs and there was a serious contest as to whether the dismissal was justified by alleged misconduct. Additionally, the case was one in which the grant or refusal of an interlocutory injunction would in effect dispose of the action. Thus, to construe the covenant as reasonable would have the effect of justifying an injunction in circumstances where a final hearing, if the case had proceeded so far, would have shown the covenant to have lapsed on the termination.

Thus, at this stage of judicial development, there were two situations: covenants that on construction referred only to 'whatsoever' method of *lawful* termination (which were acceptable), and those which on construction referred to all terminations, lawful or unlawful (which were unreasonable). However, the matter was taken further by the Court of Appeal in *Rock Refrigeration Ltd v Jones and Seward Refrigeration Ltd*.³⁵ Lord Justice Simon Brown held that the earlier cases on the issue had proceeded on an erroneous footing:

The law applicable to covenants and restraint of trade simply has no relevance to the present situation. Of course, covenants which purport to subject ex-employees to greater restriction than their erstwhile employers can justify are unenforceable, and elementary it is too that the legitimacy of such covenants falls to be determined as at the date they are entered into and not by reference to the circumstances in which the employment eventually terminates. But in my judgment the most basic premise upon which the whole restraint of trade doctrine is founded is that, but for the doctrine's application, the covenant in question would otherwise operate to restrain the employee unduly. In other words the doctrine applies only where there exists an otherwise enforceable covenant. It renders unenforceable what otherwise would be enforceable.

The whole point about the *General Billposting*³⁶ principle is that, in cases of repudiatory breach by the employer, the employee is on that account released from his obligations under the contract and restrictive covenants, otherwise valid against him, accordingly cannot be enforced. Once that principle was decided, its future application necessarily postulated that such restrictive covenants upon their true construction would otherwise be enforceable against employees.³⁷

C Restraint on Future Employment Versus Restraint on Solicitation of Customers

Since the common law's approach is, *prima facie*, opposed to all these restraints, an attempt to protect goodwill by a restraint on future employment in the field will frequently be struck down if the former employer's (or partnership's) goodwill could be adequately protected simply by a non-solicitation clause. For example, in *Spencer v Marchington*, Mowbray QC stated that the prohibition on future occupation in the relevant field within a 25-mile radius of the former employer's premises was too wide:

35 [1996] IRLR 675.

36 [1909] AC 118; *Measures Bros Ltd v Measures* [1910] 2 Ch 248.

37 *Rock Refrigeration Ltd v Jones and Seward Refrigeration Ltd* [1996] IRLR 675, 678. *General Billposting Ltd v Atkinson* [1909] AC 118 is authority for the principle that a rescission for repudiatory breach frees the innocent party from all contractual obligations binding on them; but obligations for the benefit of the innocent party continue in force. See also above text and n 20.

especially as there was another equally, or almost equally, good way of protecting Mrs Marchington's goodwill. I mean a clause forbidding Mrs Spencer to have to do with existing customers of [the former employer].³⁸

The same point, that a non-solicitation clause would have been adequate, resulted in the unenforceability of part of the restraint clause under examination in *Office Angels Ltd v Rainer-Thomas and O'Connor*,³⁹ which also concerned an employment agency. The plaintiff company had 34 branches throughout London and South-West England. The defendants were employed in the branch at Bow Lane, in the City of London. The major part of the agency's business involved placement of temporary office workers. The two defendants were employed under contracts of employment containing a clause whereby each agreed:

(a) That he or she will not, at any time during the six months immediately following the termination of his or her employment, whether on his or her own account or on behalf of any other person, firm or corporation solicit custom from, deal with or supply (in connection with the trade or business of an employment agency) any person, firm or corporation who or which was a client of the company at any time during the period that the employee was employed by the company;

(b) That he or she will not at any time during the six months immediately following the termination of his or her employment whether on his or her own account or on behalf of or in the course of employment by any other person, firm or corporation, engage in or undertake the trade or business of an employment agency within a radius of 3 000 metres of the branch or branches of the company at which the employee was employed for a period of not less than four weeks during the period of six months prior to the date of such termination or in the case of branch or branches in the Greater London area then within a radius of 1 000 metres.⁴⁰

The defendants left, after giving proper notice, and became directors and shareholders of their own agency in Fenchurch Street, within the restricted area.

In relation to clause (b), the first point was to determine whether it protected a genuine interest of the former employer. Protection of goodwill traditionally is concerned with the clients or customers of the employer. Clause (a) protected this by its prohibition on dealing with clients. Clause (b), however, prohibited the former employees from carrying out the type of business in which the former employer was involved – on behalf, that is, of any client, whether or not they were in any way connected with the former employee. Such a prohibition obviously goes further than is necessary to protect goodwill if that simply means clients or customers. The plaintiff contended, however, that what clause (b) was protecting was the former employer's connection with the pool of temporary workers. In the Court of Appeal, Sir Christopher Slade, with whom Mann and Butler-Sloss LJ agreed, accepted that this was a part of 'goodwill' which an employer was entitled to protect, though it must be acknowledged that this finding was not particularly strongly expressed:

38 *Spencer v Marchington* [1988] IRLR 392, 396.

39 [1991] IRLR 214.

40 *Ibid* 216.

[N]o authority has been cited to us in which it has been held that the only interest which an employer is entitled to protect is its connection with its customers ... [the plaintiff's] pool of temporary workers is an important source of its revenue, because it enables it to supply staff to its employer-clients who will pay it commission. In principle, I can see no reason why the plaintiff's trade connection with its pool of temporary workers should not in law be capable of protection by a restriction no greater than is reasonably necessary for such purpose.⁴¹

With respect, this argument is not completely convincing. The problem can best be seen in the light of the comment of Judge J in the court below, quoted by Sir Christopher Slade:

For a company who provides temporary workers to employers, the attraction, retention, and above all quality of those temporary workers is a crucial business asset. If I may say so without offence, they are 'the product' which the company is selling. It cannot of course prevent the workers from leaving ... but the base of temporary workers is a part of the plaintiff's goodwill which I consider is a legitimate subject of protection.⁴²

Leaving aside the preliminary question whether it makes sense to speak of a company's product as part of its goodwill, it is not strictly correct to speak of the temporary workers as the agency's product: only at the time that the agency sends a temporary worker to a client, may the worker be described as a 'product'. However, the facts disclose that many of the temporary workers in the 'pool' were registered concurrently with other agencies. Thus, at the time when the workers are merely 'on the books', they are available to be sent to a customer, if free, they are not 'a product'. The correct analogy is to an item available from a wholesaler, which an employer may purchase in order to construct a product for sale to a customer. A restraint prohibiting a former employee, in carrying out a subsequently established business, from purchasing particular ingredients for the products of their business would not be accepted as protection of a legitimate interest.

However, even if the pool of temporary workers was an interest of the plaintiff which might legitimately be protected, clause (b) went further than necessary to protect that interest – it did not merely prohibit the defendants from placing members of the pool; it prohibited all involvement in the business of an employment agency in the specified area. Sir Christopher Slade did not take that point. Instead he raised the fact that it did not identify that interest as the one to which it was directed: the introductory words of the clause referred specifically to 'clients'. Therefore, he stated, clause (b) had to be examined to see if it went further than was necessary for the protection of the 'client' portion of the plaintiff's goodwill. While he accepted that there might be circumstances where a mere non-solicitation clause would not be sufficient for the protection of 'client-goodwill' – because the agency might not be aware that the former employee's competing firm was 'whittling away the plaintiff's trade connection' – he denied that an area restriction on employment would protect that connection, since clients normally placed their 'orders' by telephone and it

⁴¹ Ibid 219.

⁴² Ibid 218.

would be of little concern to them whether the competing firm was within or without the area produced by the circle of restriction;

While a covenant containing a territorial restriction in a suitably drafted form might well have been justifiable as a means of protecting the plaintiff's connection with its pool of temporary workers, I am not satisfied that a covenant containing any territorial restriction was necessary or appropriate for the protection of its trade connection with its clients.⁴³

Even if that view were wrong, clause (b) was still unacceptable because there was no 'functional correspondence' between the particular area of restriction expressed and the clients of the plaintiffs. For these various reasons, Sir Christopher Slade concluded:

[T]he restriction imposed by clause ... (b) placed a disproportionately severe restriction on the defendants' right to compete with the plaintiff after leaving its employment and went further than was reasonable in the interests of the parties.⁴⁴

Nor could the plaintiff fall back on clause (a) for protection. That had been held unreasonable in the court below, and the plaintiff had not cross-appealed that finding. The fault in clause (a) was that it prohibited solicitation of or dealing with all clients of the plaintiff – ie, 6 000 to 7 000 clients of its 34 branches, whereas the defendants had been involved only with the 100 or so clients of one branch. This was clearly unreasonable, and could not be cured by deletion; rewording would be required, which the Court will not do. (The situation is different in New South Wales ('NSW'), where such rewording is statutorily authorised by the *Restraint of Trade Act 1976* (NSW).⁴⁵)

D Non-Solicitation Clauses

The above cases demonstrate the close scrutiny to which the courts will subject clauses restricting future employment. Even non-solicitation clauses, however, can be struck down as going beyond the restraint necessary for the protection of the employer's genuine interest. A non-solicitation clause came under the scrutiny of the Court of Appeal in *Rex Steward Jeffries Parker Ginsberg Ltd v Parker* ('*Rex Steward*').⁴⁶ Parker had been employed as joint managing director of the plaintiff advertising agency. His contract contained the following non-solicitation clause:

On termination of this contract by either party, you will not for a period of 18 calendar months from the date of such termination directly or indirectly as principal, agent, director, partner, proprietor, employee or otherwise of any concern, business or businesses in competition with the business or businesses carried on by this company during the period of your employment with it solicit the custom or business of any person, concern, firm or company who to your knowledge is or has been during the period of your employment a customer of the company or associated companies so as to harm the goodwill of the company or so as to compete with the company.⁴⁷

43 Ibid 221.

44 Ibid.

45 See above n 7.

46 [1988] IRLR 483.

47 Ibid 484.

Parker argued that he had been wrongfully dismissed and was thus not bound by the restraint. The argument was a weak one: he had received one week's notice of redundancy plus six months' pay in lieu of the six months' notice required by the contract, which expressly provided that it might be determined 'by the giving in writing of six calendar months' notice on either side or the payment of six months' salary in lieu thereof'.

This, according to Parker's counsel, gave him

a prima facie right to six months' notice of dismissal, and although there is in the contract of employment the alternative provision for the payment of six months' salary in lieu, on its proper construction that does not remove the contractual entitlement, but merely recites the consequences of failure to give notice.⁴⁸

In other words, counsel was presenting the reference in the contract to payment of salary in lieu of notice as liquidated damages for failure to give notice. He based this contention on the judgment of Sir John Donaldson P in *Dixon v Stenor Ltd*,⁴⁹ where the then President of the National Industrial Relations Court stated: 'If a man is dismissed without notice but with money in lieu, what he receives is, as a matter of law, damages for breach of contract'.⁵⁰

This is clearly correct, although it might be more completely accurate to say 'what he receives is, *in effect*, damages'. Where a contract does not expressly provide for payment of wages in lieu of notice, the termination in that manner is a breach of contract. However, since the measure of damages for failure to give notice is the equivalent of wages for the notice period, the payment in lieu means that there is no loss to be compensated in damages and thus no action, in that the loss has been compensated already. As Glidewell LJ pointed out in *Rex Steward*,⁵¹ the crucial distinction between *Dixon v Stenor Ltd* and the case before him was that there was no express provision in the contract in *Dixon v Stenor Ltd* for payment in lieu. His Lordship quoted with approval the judgment of Hawser J at first instance: 'In my view, the clause offers two alternative methods of lawful determination (that is by six months' notice or six months' wages)'.⁵²

Not surprisingly then, the Court of Appeal rejected Parker's argument on this point. Parker also argued that the restraint clause was unreasonable, and it was so held at first instance, on the grounds that the reference to a 'person, concern, firm or company' etc who 'is or has been during the period of your employment' a customer, covered persons who became customers after Parker ceased to be employed by the agency. The extension of the restraint to customers of associated companies was also held to be unreasonable. The Court therefore severed the phrase 'is or' and the reference to associated companies, and upheld the rest of the clause.

Parker appealed, arguing that the clause was unreasonable and could not properly be made reasonable by severance. He claimed that the 18-month period was too long and that severance alone could not make this reasonable as it would

48 Ibid 485.

49 [1973] IRLR 28.

50 Ibid.

51 *Rex Steward* [1988] IRLR 483, 485.

52 Ibid.

leave a permanent bar on solicitation. The Court of Appeal dismissed the appeal. As to the length of the restraint, they considered 18 months reasonable in the case of an employee in a position such as managing director, though it might well be excessive in the case of an employee in a lesser position. As to severability, the Court of Appeal interpreted the restraint as composed of a number of separate prohibitions: on solicitation of those customers of the plaintiff company who had been customers at the date of termination of Parker's employment contract; on solicitation of those customers who had become customers of the plaintiff after that date; and on solicitation of customers of companies associated with the plaintiff company. It held that the second and third of these could be validly severed, leaving the central prohibition on solicitation of those customers who were customers of the plaintiff at the date of termination as a reasonable restraint.

As mentioned above, where there is no issue of confidential information and the former employer's interest is merely in protecting goodwill, a non-solicitation covenant has much more chance of being upheld than one prohibiting employment or engagement in a business in the same field. Non-solicitation covenants do not limit the type of work, but merely prohibit performing it for the former employer's customers. Earlier cases limited the scope of such covenants to customers with whom the former employee had had relevant contact such that an 'attraction' might have developed causing the customer to 'follow' the former employee to the new business. In more recent cases, the courts have exhibited a willingness to expand the scope of non-solicitation covenants, or at the least have refused to narrow it. In *Dentmaster (UK) Ltd v Kent*,⁵³ the Court of Appeal ruled in favour of an interlocutory injunction to enforce a restraint on solicitation of persons who had been the employer's customers during the last six months of the employee's employment and with whom he had dealt at any time during the course of his employment. Lord Justice Waite denied that it was unreasonable to restrain the ex-employee from soliciting customers with whom he had not had any recent connection, particularly given the restriction to those who had been customers within the six months preceding termination. In *International Consulting Services (UK) Ltd v Hart*,⁵⁴ the High Court (Strauss QC sitting as Deputy High Court Judge) upheld a restraint which prohibited solicitation not merely of customers but of persons with whom the former employer had 'negotiated' as prospective customers, and even where the former employee's contact with such persons had been unconnected with the negotiations:

53 [1997] IRLR 636.

54 [2000] IRLR 227.

I do not think it is necessary to seek to establish any general rule as to whether a restraint on dealings with prospective customers is valid. In the present case, I think that it is justifiable. Because of the complexity of the subject-matter of the negotiations and the long period of time over which they are often conducted, ICS did in my view legitimately regard the connection with customers resulting from negotiations as forming part of their business goodwill which required protection. The fact that the restraint operated even where Mr Hart's contact with the customer was unconnected with the negotiations, and was a long time in the past does not quite tip the balance. Because of his central and influential position, it could reasonably be considered that any previous contact might give him a rapport with the customer, and that he might have some input as a consultant into the preparation of a proposal for negotiations, even if he had no actual contact with the customer in connection with the negotiations.⁵⁵

The case of *Scully UK Ltd v Lee*⁵⁶ expanded the scope of non-solicitation covenants beyond *customers* of the former employer to agents and distributors 'since they are a link in the plaintiff's customer connection'.⁵⁷ However, the Court of Appeal held in that case that such a clause could not restrain contact with the former employer's suppliers — there being no goodwill to protect in that relationship.

However, a clause restraining solicitation of customers/clients with whom the former employee had not had contact was refused enforcement in the NSW case of *Burwood Night Patrol Pty Ltd v Lagarde*.⁵⁸ The plaintiff company had some 1 000 clients and the defendant had had contact with some 300 of them. Chief Justice McLelland in *Equity* based his reasoning on the underlying principle that

the interest of the plaintiff which may be legitimately protected by such a restraint is not the bare prospect of competition by the former employee, but rather the prospect of the former employee taking advantage of a personal relationship developed during the period of his employment ... legitimate protection might be sufficiently granted by confining the operation of any injunction to contact ... with persons, firms or companies with whom the defendant did have personal contact as an employee of the plaintiff company.⁵⁹

E Restraints on Recruitment

The cases examined so far certainly do not demonstrate any across-the-board judicial rejection of restraints on competition. In fact, many suggest a wider application of such restraints. As Evans LJ stated in *Dawnay Day and Co Ltd v De Braconier, D'Alphen* ('*Dawnay Day*'),⁶⁰

⁵⁵ Ibid 232.

⁵⁶ [1998] IRLR 259.

⁵⁷ Ibid 264.

⁵⁸ [1993] 51 IR 118.

⁵⁹ Ibid 120. This 'confining of the operation of the injunction' is possible by the reading down of unreasonably wide clauses authorised by the *Restraint of Trade Act 1976* (NSW); see above n 7.

⁶⁰ [1997] IRLR 442.

far from confining the circumstances in which covenants in restraint of trade may be enforced to certain categories of case, and defining those categories strictly, the courts have moved in the opposite direction. The categories are not rigid, and they are not exclusive. Rather, the covenant may be enforced when the covenantee has a legitimate interest, of whatever kind, to protect, and when the covenant is no wider than is necessary to protect that interest.⁶¹

That interpretation was borne out by the judgment of the Court in *Dawnay Day*, which recognised a restraint on a former employee recruiting employees of the former employer. This represents a substantial judicial development. The availability of an injunction to enforce a non-recruitment covenant was discussed in *Hanover Insurance Brokers Ltd v Schapiro* ('*Hanover Insurance*').⁶² Lord Justice Dillon rejected the claim, on the basis of long-standing authority:

[T]he difficulties in law in the way of a non-poaching agreement between employers are very clearly explained in the decision of the court in *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd*⁶³ ... In particular, the employee has the right to work for the employer he wants to work for if that employer is willing to employ him ... Mr Serota submits that an insurance broker depends on its staff and the team will of its staff, and that the goodwill of an insurance broker's business depends on its staff. So in a sense it does, as with any other company, but that does not make the staff an asset of the company like apples or pears or other stock in trade, nor does it entitle HIB to impose a covenant against competition on the defendants.⁶⁴

It did not take long, however, for a new approach to make itself evident. In *Alliance Paper Group plc v Prestwich* ('*Alliance Paper*'),⁶⁵ the High Court granted an injunction enforcing a non-recruitment covenant. The covenant was limited to persons employed by the ex-employer in a senior capacity during the last six months of the defendant's service. Levy QC (sitting as a Deputy High Court Judge) noted an unreported decision delivered shortly after *Hanover Insurance* – that of the Court of Appeal in *Ingham v ABC Contract Services Ltd* ('*Ingham*')⁶⁶ – in which Leggatt LJ had upheld a non-recruitment restraint on an executive, finding that:

They [the former employers] have a legitimate interest in maintaining a stable trained workforce in what is acknowledged to be a highly competitive business. That is an interest which the plaintiffs are entitled to protect against solicitation and enticement by the defendant.⁶⁷

Deputy High Court Judge Levy noted that counsel for the plaintiff former employer had pointed out that the statement of Dillon LJ in *Hanover Insurance* (that such a covenant was unenforceable) was obiter, but the above passage from Leggatt LJ in *Ingham* was not.⁶⁸ That may be technically true, but it rather downplays the remarks of Dillon LJ. The progress of *Hanover Insurance* to the Court of Appeal had been somewhat complex. Injunctions had been granted, discharged, and then reinstated, and there had been some inaccuracies in the

61 Ibid 446.

62 [1994] IRLR 82.

63 [1959] Ch 108.

64 Ibid 84.

65 [1996] IRLR 25.

66 (Unreported, Court of Appeal (Civil Division), Russell and Leggatt LJ, 12 November 1993).

67 Quoted in *Alliance Paper* [1996] IRLR 25, 287.

68 *Alliance Paper* [1996] IRLR 25, 28.

pleadings in the early stages. The result was that the Court of Appeal was dealing with an appeal by the employee defendant and cross-appeal by the employer plaintiff. The non-recruitment issue was part of the cross-appeal. Both appeal and cross-appeal were dismissed. While dismissal of the appeal may have made the discussion of the cross-appeal technically obiter, it was not obiter in the sense of relating to an issue which had not been before the court.

In the *Dawnay Day* case, the Court of Appeal again upheld an injunction enforcing a non-recruitment covenant, though not as a matter of course. The covenant in question prohibited recruitment of any director or senior employee of the relevant employer. Lord Justice Evans referred to the submission of counsel for the appellant ex-employees that *Hanover Insurance* had not been cited in the *Ingham* case. He noted that counsel for appellant and respondent had agreed that neither *Hanover Insurance* nor *Ingham* were binding in the case before him. He went on:

I would agree with Leggatt LJ that an employer's interest in maintaining a stable, trained workforce is one which he can properly protect within the limits of reasonableness by an undertaking of this sort. But it does not follow that that will always be the case.

The clause can be regarded as objectionable because it restricts not only rights of the former employee to recruit staff for his new business, but also the opportunities of the remaining employees to learn about future employment possibilities for themselves. However, their ability and right to do so through making enquiries of their own, and through advertisements and other channels of communication in the normal way is not restricted at all. The employer's need for protection arises because the ex-employee may seek to exploit the knowledge which he has gained of their particular qualifications, rates of remuneration and so on, which the judge included in his general description of specific confidential information which the managers acquired.⁶⁹

The validity of a non-recruitment clause subsequently came before the High Court in *TSC Europe (UK) Ltd v Massey* ('*TSC Europe*').⁷⁰ In the covenant in question, the defendant had promised that he would not 'solicit, procure or induce ... any employee of ... TSC Europe to leave his employment with such company'.⁷¹ Deputy High Court Judge Peter Whiteman QC held that the plaintiffs had an interest in maintaining a stable, trained workforce which they could protect *within the limits of reasonableness*, but that the covenant in the case before him was not reasonable, in that it extended to all employees of the plaintiff company and not merely senior or essential employees, and that it prohibited recruitment of persons who had become employees of the plaintiff company *after* the termination of the defendant's employment there. These 'vices' had the consequence that the covenant was more than reasonably necessary to protect the plaintiff company's legitimate interests. This finding, according to the Deputy High Court Judge, was in line with the decision of Evans LJ in *Dawnay Day* that an employer's interest in a stable trained

69 *Dawnay Day* [1997] IRLR 442, 448.

70 [1999] IRLR 22.

71 *Ibid* 23.

workforce can only be protected by a *reasonable* covenant.⁷² In an even more recent case, *SBJ Stephenson Ltd v Mandy*,⁷³ Bell J continued an injunction enforcing a non-recruitment clause as applying to all employees of the plaintiff, stating 'I have no hesitation in finding that the stability of SBJ's workforce as a whole was a legitimate interest of SBJ which it was entitled to protect'.⁷⁴

However, his Honour noted that the plaintiff company had invested a great deal in staff training and that the staff worked as a close team. The decision does not, therefore, support an unlimited non-recruitment covenant in the absence of such special circumstances.

Several points need to be made about the development of the law on non-recruitment covenants. First, the originating decision in *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd*⁷⁵ concerned an agreement between two rival manufacturers not to 'poach' each other's employees. It was not a situation in which the covenantor had formerly been employed by the covenantee. Thus, it was a clear restriction on the ability of non-parties – the employees – to choose their place of employment. Neither party to the agreement, as covenantee, had any *influence* against which the other deserved protection. The situation is clearly different when the 'poacher' has previously worked with the 'game'. Second, in three of the cases – *Alliance Paper*, *Dawnay Day*, and *TSC Europe* – the employment contracts were accompanied by contracts of sale in some form.⁷⁶ The covenanting employee sold or transferred a business and undertook employment with the purchaser. Thus in all the cases, the covenantor had, through the period of being 'fellow employees', an *influence* over other employees, as well as particular knowledge of their terms of employment, which could well predispose the other employees to follow the covenantor to another business. And in the three cases of 'sale', the qualities and capacities of the workforce were, to some extent at least, what the covenantor had sold to the covenantee – and been paid for. The 'mixed' nature of the agreements containing the non-recruitment covenants was referred to by the courts in all three cases, and it was a common point that a rigid categorisation was neither a necessary nor appropriate starting point for consideration of the applicable principles. Judge Levy QC in *Alliance Paper* said:

72 Care needs to be taken with the headnote of this case, which claims that there was 'no material difference between the covenant in the present case and those held to be unenforceable' in *Hanover Insurance and Dawnay Day*. The agreement in *Dawnay Day* was both a joint venture agreement and a service agreement. There were two clauses dealing with non-recruitment: one purported to apply to all employees, the other to 'senior employees'. It was the latter that Evans LJ discussed and upheld. The former had been rejected at first instance as unreasonably broad, and was not in issue in the Court of Appeal.

73 [2000] IRLR 233.

74 Ibid 238.

75 [1959] Ch 108.

76 In *Alliance Paper* and *TSC Europe*, the sales were 'normal' sales of a business. In *Dawnay Day*, the business (through the defendants) entered into a joint venture with the investment bank Dawnay Day and Co Ltd, as a result of which the joint venturers set up the business of Dawnay Day Securities Ltd, with the defendants as managers of DDS.

the covenants into which [the defendant] entered should be viewed not only as those of an employee entering into a service contract, but also as those of the person who negotiated the sale of the shares.⁷⁷

Lord Justice Evans in *Dawnay Day* stated that the vendor-purchaser and employer-employee categories were neither rigid nor exclusive.⁷⁸ Judge Peter Whiteman QC stated in *TSC Europe* that the question was one of substance and not of form, and that it was not necessary to allocate a contract to a category in order to decide on the standard of reasonableness to be applied to a covenant; 'the test of reasonableness is to be applied by considering the substance, not the form, of the transaction, and by reference to all the circumstances of the case'.⁷⁹

III COMPETITION DURING THE PERIOD OF EMPLOYMENT

Consideration of the common law position here initially requires the introduction of another formulation of the employee's composite duty of fidelity: that the employee should act 'faithfully and in the employer's best interests' and not the employee's own. It is against that conception of the employer's 'best interests' that 'competition' must be considered. In one sense, 'competition' will always be against the employer's best interests, and will therefore always be a breach of the employee's duty. However, 'competition' is a word that is frequently used loosely.

Concurrent employment with more than one employer is not 'competition' in the sense that we must use the term. Nor is concurrent employment with more than one employer in the same field necessarily competition. Nor is it necessarily competition if the employee conducts their own business in the same field as the employer during their 'spare time'. Special facts will be necessary to turn concurrent work into competition breaching an implied duty to work in the employer's best interests. The case of *Hivac v Park Royal Scientific Instruments Ltd* ('*Hivac*')⁸⁰ provides an excellent example of the requisite type of 'special facts'. In *Hivac* a number workers employed by the plaintiff manufacturer of valves for hearing aids worked in their spare time for the defendant who had just commenced manufacturing such valves. At the time this spare-time employment commenced, the plaintiff employer had an absolute monopoly in the small and specialised market for hearing aid valves. Moreover, wartime labour restrictions meant that the defendant could not have obtained any labour and therefore could not have entered the market unless its labour force was made of spare-time workers. The spare-time work was held to be a breach of contract. Another possible example given by Lord Greene MR in the course of his judgment in *Hivac* was that of a solicitor's clerk who worked Monday to Friday for one solicitor, and Saturdays for another solicitor in the same town. In the first case, the opposition to the employer's best interests lies in the fact that the spare-time

77 *Alliance Paper* [1996] IRLR 25, 27.

78 *Dawnay Day* [1997] IRLR 442, 446.

79 *TSC Europe* [1999] IRLR 22, 26.

80 [1946] Ch 169.

workers enabled an incursion into the employer's monopoly in a limited market. In the second example, the opposition would lie in the fact that professional ethics could mean that the clerk would be prevented in carrying out his Monday-Friday employer's wishes that he act on a particular case because he had already become involved in the same case – for the opposing party – in the course of his spare-time work.

Without an express duty of exclusive service, it will not be a breach for an employee to work in their spare time in a field of work different from that of the employer's business, for this cannot possibly be a source of anything contrary to the employer's interests.⁸¹ Nor will it be a breach of duty for an employee to work in their spare time for another business in the same field as the employer, if the work is routine and the businesses in the field are not in a situation of close competition, for example, a service station attendant who works in his spare time for another service station. For a breach to exist, it is necessary that the spare-time work gives to the spare-time employer an advantage that could not be gained except by the services of the particular employee, or imposes on the main employer a disadvantage that would not be suffered if the employee were not engaged in the spare-time work.

A Exclusive Service Clauses

The duty of faithful service is not, without such special facts as those outlined above, an exclusive service clause. Without such facts, an employer who wants exclusive service must obtain an express agreement to that effect. Such clauses – whereby the employee promises not to work for anyone else (or for specified others) for the duration of the employment – are directed either at the protection of confidential information or goodwill, but predominantly the latter. They are not theoretically necessary to protect confidential information that is already protected by the implied duty of confidentiality. However, as with post-employment restraints, it could be more secure to have a ban on the 'second' employment itself rather than merely on disclosure in the course of it. To the extent the clauses are directed at the protection of goodwill, they are clearly aimed at competition – not so much by the employee but by the concurrent employer. Where the employee's services to clients on behalf of the first employer are of value, the first employer will lose a 'competitive edge' over other firms or businesses if those services can be accessed otherwise than through the first employer. In theory, the common law places no barrier to the inclusion in employment contracts of exclusive service clauses, whether they amount to a promise not to undertake any concurrent employment or merely concurrent employment within the first employer's own area of business.

However, the theoretical freedom to include such clauses in employment contracts is of limited value if the clauses cannot be enforced. Breach of an

81 However, there could be rare situations where the spare-time work creates threats to attributes of the employee for which the employer had engaged them; eg, a tenor engaged for a season at the Metropolitan Opera may work in his spare time in the freezing room of an abattoir, thereby creating a risk of colds and consequent harm to his voice!

exclusive service clause has always been remediable by damages, where loss flowing from the breach can be established and quantified. However, this can be difficult. The best way to gain the benefit of the clause would be by an equitable remedy – an order for specific performance of the contract, or an injunction prohibiting breach of the clause. Such a route to enforcement was subject to the orthodoxy (until the second half of the 20th century) that equitable remedies were not available for breach of employment contracts. This was presented as a matter of jurisdiction – equity cannot, may not, specifically enforce contracts of service; it was an established principle that equity would not do indirectly, by injunction, what would have the effect of specific performance in situations where specific performance was not permitted. Clearly, an injunction prohibiting breach of a clause indirectly has the same effect as an order for specific performance of it.

Throughout the 1960s and 1970s, the orthodoxy changed. The barrier to equitable remedies came to be recognised not as a matter of jurisdiction, but as a matter of discretion. Equitable remedies are discretionary, the exercise of discretion being based on the application to the facts of the case of established criteria. Statements about the availability of equitable remedies in employment situations came to focus on the fact that certain of the established criteria would usually, or frequently, lead the courts to decline to exercise their discretion to grant the remedy sought.⁸² However, even in the 19th century, when the view was that the barrier to equitable remedies in employment contracts was jurisdictional rather than discretionary, it had been recognised that injunctions would be available against a breach of contractual stipulations that were negative in substance. An exclusive service clause is negative in substance. It is a promise ‘not to work for’ anyone else, anyone else in the same field, or even a particular competitor.

To fully appreciate current developments in this area, we must go back a century and a half. The *locus classicus* of the law as to specific remedies for breach of exclusive service clauses is the judgement of Lord St Leonards in *Lumley v Wagner*.⁸³ In that case, the operatic soprano Johanna Wagner had contracted to sing for Lumley at Her Majesty’s Theatre for a season of three months. The contract contained an exclusive service clause whereby she would not, during those three months, sing for anyone else at any other theatre. In breach of the clause, she refused to perform at Lumley’s theatre, and signed on with Gye to sing at Covent Garden – the operatic equivalent of gazumping. Lord St Leonards granted an injunction against breach of the exclusive service clause – prohibiting her from carrying out the arrangement with Gye. He denied that in so doing, he was indirectly enforcing what by orthodoxy he could not – the promise to sing for Lumley.

82 One such criterion, relevant to employment, was that equity eschews orders that would require continuous supervision. This was seen as making employment contracts (and building contracts) an inappropriate field for equitable remedies.

83 (1852) 1 De G M & G 604.

B 'Special Services'

There was no direct challenge to the decision in *Lumley v Wagner* to enforce exclusive service clauses, but it was almost universally confined. It was appropriate only if the prohibited area of employment involved 'special services' – services of a particular and defined type. A clause banning 'working for anyone else' would not be enforced. This was because the effect of the injunction would be to force the person concerned to either perform the positive requirements of the contract or starve. In other words, it *would* have the effect of specific performance of the positive promise to work for the other contracting party. Injunctions of similar type were granted subsequently in *Warner Bros Pictures Inc v Nelson*⁸⁴ (concerning the actor Bette Davis) and *Warner Bros Pictures Inc v Ingolia*⁸⁵ (concerning the actor/singer Connie Stevens). In both cases, the limitation of enforcement to clauses prohibiting only special services was stressed. In the reasoning in the *Nelson* case, the judge pointed specifically to the fact that Bette Davis was a woman of intelligence, and that all areas of employment other than film acting were left open to her. In these cases, the focus appeared to be on whether or not the enforcement of the clause would cut off access to employment. The clause would be enforceable if it limited employment only in the area of certain specified services and if a realistic field of employment remained open nonetheless. But over the years, 'specified services' seemed to transmute into 'special services'. The area for application of the *Lumley v Wagner* doctrine came to be restricted to the *type* of specified services involved in the seminal cases – broadly speaking, performance in the entertainment industry.

This is illustrated by a NSW case from the period with which this article is concerned. In *Curro v Beyond Productions Pty Ltd* ('*Curro*'),⁸⁶ the appellant was a television presenter. She and her company, Talking Heads Productions,⁸⁷ had contracted with the respondent company to work on the production and presentation of its program *Beyond 2000*. The contracts, entered into in 1991, were for one year with options on the part of Beyond Productions Pty Ltd to renew them for further terms each of one year in the two subsequent years. The 1992 option was exercised, with the effect that the second term was due to expire on 11 August 1993. The contracts contained an exclusive service clause – cl 2(iii) – whereby Curro agreed not to:

84 [1937] 1 KB 209.

85 [1965] NSW 988.

86 (1993) 30 NSWLR 337.

87 Many of the cases concerning exclusive service clauses concern persons who would have been independent contractors rather than employees. The doctrines were developed without reference to this distinction, though it may help to explain later developments.

engage in any other presentation activity during the term of this Agreement, including the making of any advertisement or commercial announcement whether for use on television or radio or in the print media or any exploitation of her role as a presenter of the Programs without the prior written consent of Beyond, such consent not to be unreasonably withheld.⁸⁸

In February 1993, Curro accepted an engagement with Channel 9 to work as a television reporter on the *60 Minutes* program. Beyond Productions applied for an injunction, which was granted on 31 March. Curro appealed, arguing, inter alia, that the negative stipulations were void as unreasonable restraints of trade and that they could not properly be enforced by injunction.

In consideration of Curro's challenge to the authority of *Lumley v Wagner*, the Court indicated its intention 'to endeavour to state in a concise form what we understand the law to be on this topic'.⁸⁹ That law, it said, until recently had reflected three principles:

[F]irst, that under the doctrine enunciated by Lord Cairns in *Doherty v Allman* (1878) ... a court of equity would always grant an injunction to enforce a negative contractual promise made for consideration; secondly, that, by way of exception a negative promise would not be enforced by injunction if that would have the practical effect of compelling specific performance of a contract of personal service or if it would force the defendant either to perform that contract or remain idle (with overtones of destitution); and thirdly, by way of exception to the exception, in the case of special services a promise not to take employment with a competitor would, under the doctrine of *Lumley v Wagner*, be restrained.⁹⁰

However, 'it is no longer possible to state the law with such precision'⁹¹ because the rule in *Doherty v Allman* could no longer be maintained and the second had been departed from in *Hill v C.A. Parsons*,⁹² *Turner v Australasian Coal and Shale Employees Federation*,⁹³ and *Gregory v Phillip Morris*.⁹⁴ The Court then turned to the rule in *Lumley v Wagner* – which it noted had been followed by Australian courts 'with varying degrees of enthusiasm'⁹⁵ – and stated that the appellants' contention that it should not be followed could not be accepted.

The Court listed the various providers of 'special services' in relation to whom the doctrine had been applied – opera singers, film stars, actresses, rock singers, football players and newspaper production managers – and stated that 'how many other occupations fit within this category can be left to the course of subsequent decisions'.⁹⁶ To the appellants' argument that one reason that the doctrine should be rejected was that no satisfactory definition of 'special services' could be formulated, the Court replied that it was true, as it was of 'many other terms of practical utility, both non-legal (eg, beauty, elegance) and

88 *Curro* (1993) 30 NSWLR 337, 340.

89 *Ibid* 346.

90 *Ibid* 346.

91 *Ibid*.

92 [1972] Ch 305.

93 (1984) 155 CLR 635.

94 (1988) 80 ALR 455.

95 *Curro* (1993) 30 NSWLR 337, 347.

96 *Ibid*.

legal (eg, reasonableness, unconscionability)'.⁹⁷ One could respond that, in relation to the non-legal terms, the comment is irrelevant, and in relation to the legal ones it is disingenuous. Nevertheless, the subsequent Australian case of *Network Ten Ltd v Fulwood*⁹⁸ also falls within the traditional approach. There an injunction was sought to enforce such a clause in the contract of a television news presenter. Justice Young in the Supreme Court of NSW held the clause itself to be unremarkable in the particular field of employment, but declined to enforce it by injunction, given that there were only weeks of the contract remaining, and that the application for injunction had been delayed without adequate explanation. There was also doubt in the judge's mind as to whether it had been sufficiently established that damages would be an inadequate remedy.

C Specified Services

The problem in the approach so steadfastly upheld in *Curro* is that a definition of 'special services' cannot be formulated (as *Curro*'s counsel had argued) because it is a *non-existent* category. The idea behind Lord St Leonards' reference in *Lumley v Wagner* was that there were many other remunerative occupations open to Wagner. If that were true in her case, it is true also on every occasion where a restraint specifies a particular occupation. Theoretically, there will always be scores of other occupations that a particular person could engage in if restrained by contract from engaging in a specified occupation. It would only be where the positive promise was 'to work for employer A' and the negative promise 'not to work for anyone else' that enforcement of the negative promise would actually present the choice of fulfilling the positive promise or remaining idle. Thus, there are no 'special services', merely *specified* services.

Moreover, reality is different from theory. If all a person's training and experience is in relation to one type of occupation, it is in reality quite untrue to say that the person could easily go and earn remuneration in some other occupation. And this is particularly so with respect to the types of occupation in relation to which this dubious doctrine has been applied – occupations which require not merely training and experience, but (excluding newspaper production managers and possibly footballers) *art*. The doctrine is in reality merely the exhibition of a shocking philistinism. Would we really say to Don Plácido Domingo, if he attempted to breach such a clause, '*Pues hombre!* You can always go and manage a restaurant, or sell insurance, or work in a bank'? Perhaps Lord St Leonards would have done so; but would he have spoken in similar terms to a surgeon, an engineer, an architect, a butcher or a baker? To the extent that there is anything 'special' about the services in relation to which *Curro* noted the doctrine as having been applied, it is that most are artistic *and* well paid. Essentially, the doctrine recognises that Johanna Wagner, Bette Davis or – according to my example – Plácido Domingo, *would* remain idle during the period of the restraint if it were enforced, but that they would have sufficient previous earnings such that they would not 'starve' as a result of the idleness.

97 Ibid.

98 (1995) 62 IR 43.

But of course, the services of the surgeons, engineers, and architects hypothesised are also well-paid, hence my accusation of philistinism. At base, the doctrine says to practitioners of the performing arts, 'we do not wish that surgeons, engineers, architects, butchers or bakers remain idle, because we – *society* – want what they do. But we do not need, nor do we care about, what *you* do'.

It is also a questionable practice to subject providers of these 'services' to a restriction to which 'ordinary workers' would not be subjected when we consider other aspects of the common law's treatment of performance contracts. For example, the traditional exception of performers from the 'rule' that there is no obligation on an employer to provide work to do as well as the agreed remuneration⁹⁹ is contradictory to the idea that the performer could 'go off and do something else'. This exception recognises the importance to the performer of the opportunity to continue to practise their particular art. Is it logical to say, on the one hand, that an impresario would be compelled to give Domingo the agreed role to sing while the Capital Territory Health Commission would not have been compelled to give the surgeon Mann operations to perform,¹⁰⁰ and, on the other hand, that the impresario could compel Domingo not to sing for others whereas the Capital Territory Health Commission could not have compelled Mann not to perform operations for other health authorities? The NSW Court of Appeal noted that Lord St Leonards had said

to defendants in *Mme Wagner*'s position that

it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has I believe had a wholesome tendency towards the maintenance of ... good faith.

This rationale for such injunctions should be emphasised as learned counsel for the appellants at times seemed aghast at the suggestion that a Court of Equity should hold parties to their contracts.¹⁰¹

I would imagine that the suggestion at which counsel 'seemed aghast' was that courts of equity should hold only one class of workers to their contracts, leaving the surgeons, engineers, architects, butchers and bakers to 'depart from their contracts at their pleasure'.

In summary then, it is the falsity of the supposed category of 'special services' in theory and in practice – a category to which counsel for Curro rightly objected as beyond formulation – which undermines the 'rule' in *Lumley v Wagner*. The 'rule' is wrong when it suggests that there is such a category, the adherents of which have an ability, not enjoyed by others, to leave to find remunerative occupation elsewhere. Performers have no greater ability to do so: to the extent that their ability to change occupations differs from that of 'ordinary' workers, it is less, not greater. And the 'rule' is objectionable in its alleged foundation on

99 See below text.

100 *Mann v Capital Territory Health Commission* (1981) 54 FLR 23.

101 *Curro* (1993) 30 NSWLR 337, 347.

good faith. If it were truly so founded, it would be applied to all categories of workers, or at least to all well paid categories. In truth, it is founded on an unworthy amalgam of envy and philistinism. It is a great pity that the Court of Appeal turned away from the opportunity to consign this historical monstrosity to the dustbin where it belongs.¹⁰²

D A Way Out of the *Lumley v Wagner* Cul-de-sac

The objectionable element of the doctrine applied in *Curro* is that it operated differentially on performing artists and employees in other occupations. This could be avoided in two ways: by holding all exclusive service clauses unenforceable, or by enforcing them in all areas of work, *providing* they were reasonably necessary in the circumstances to protect the employer's interest. This latter approach was taken in the British case of *Provident Financial Group PLC and Whitegates Estate Agency Ltd v Hayward* ('*Provident Financial*'),¹⁰³ involving theoretically 'concurrent' employment with a competitor. This case was decided shortly before, but not considered in, *Curro*. The defendant had been employed as financial director of the plaintiff company. His contract of employment contained a clause providing that, during the period of employment, he would not 'undertake any other business or profession or be or become an employee or agent of any other person or persons or assist or have any financial interest in any other business or profession'. Clearly this clause was intended to provide expressly for exclusive service.¹⁰⁴ The defendant tendered notice of resignation on 1 July 1988. The contract provided for 12 months' notice, but by consensual variation it was arranged that the employment would terminate on 31 December 1988. At the beginning of September, the plaintiffs decided that they did not wish the defendant to work out his notice further, although they were prepared to continue to pay him until 31 December, provided that during the remaining four months of the notice period he did not work for anyone else. In other words, as in *Spencer v Marchington*, the defendant was directed to take 'garden leave'. On 13 October, the defendant informed the plaintiff that he intended to commence employment as financial controller with another chain of estate agents.

The plaintiff professed to be concerned about protection of confidential information, and sought an injunction prohibiting the defendant entering that employment until the termination of his contract with it, as partial enforcement of the exclusive service clause. The injunction was refused and the plaintiff

102 This is not an argument that persons employed outside the area of performance should be compelled to observe exclusive service clauses by injunction rather than merely be encouraged to do so by the spectre of damages. It is an argument that all employees should be treated alike, preferably by such clauses being unenforceable, leaving employers to the protection of the duty of faithful service. If not, the remedy for breach should be in damages only.

103 [1989] IRLR 84.

104 However, the clause is another example of bad drafting. As it stands, it does not prohibit concurrent employment with another employer in the same field — which, one would have imagined, would be the main thing that the initial employer would want to prevent! The Court of Appeal dealt with the clause on the basis that it prohibited concurrent *limited-area* employment.

appealed. The Court of Appeal dismissed the appeal. An obvious argument for refusal would have been that since the proposed employment was in the same field as the plaintiff, the clause – with its reference to ‘any *other* business or profession’ – did not apply to the situation, and any injunction would have to be based on the implied duty of confidentiality rather than on the express clause. However, that point was not taken and the Court of Appeal directed its attention to whether or not it would enforce the clause.

Lord Justice Dillon noted, after setting out the facts, that the short answer was that the decision of the court below to refuse the injunction was a matter of discretion, and that the decision was not open to appeal, since the judge could not be shown to have misdirected himself. However, he stated that

the case has a wider importance because these clauses are imposed on many senior executives and it may be that such executives are hardly in a position to negotiate over the terms of their contracts of service.¹⁰⁵

Therefore, His Lordship went on to examine the case in relation to the question whether the injunction sought would *indirectly* have the effect of specific performance, and noted that to grant the injunction would not be to present the employee with the choice between performance and starving (as it was put in *Warner Bros Pictures Inc v Nelson*¹⁰⁶) because the employer was prepared to pay the defendant in full during the remainder of the notice period. The issue was not, therefore, whether the case concerned the traditional category of ‘special services’. The point with which Dillon LJ was concerned was the attempt of one employer to prevent an employee from working for another while they were denied occupation by the first employer. His Lordship was of the opinion that such a prohibition would be enforced only where the new employment during the remainder of the term of the old would cause serious detriment to the original employer. The plaintiff alleged that there would be such detriment because of the confidential information possessed by the defendant. His Lordship stated, however, that the particular confidential information would not be of any benefit to the company for which the defendant proposed to work and in relation to which the injunction was framed.

His Lordship then went on, in terms of general principle:

Of course additionally the defendant will, by his activities, be helping Asda [the proposed new employer] which is in competition, to put its business on a sound economic basis. He may therefore make it a better run business. Now merely helping a competitor in that sort of way could not be restrained after the termination of the service agreement. On the other hand, for an employee to foster the profitability of a rival during the continuation of his employment could well, in appropriate circumstances, be restrained either under a clause in the contract like those in the defendant’s contract, or as a breach of the duty of good faith. I can well see that, if the notice under a contract for employment is not for an excessive period after notice the employee is no longer required to work his notice, it may yet be said

¹⁰⁵ *Provident Financial* [1989] IRLR 84, 86.

¹⁰⁶ [1937] 1 KB 209, 216.

forcibly and correctly for the employer that the risk of his going to a rival and fostering the rival's business before the expiration of his notice is one against which the employers are entitled to be protected because of the damage that it will do them.¹⁰⁷

Thus, the 'principle' on which his Lordship based these comments is very similar to that applied in *Hivac*, where the spare-time work of the employees concerned – enabling the rival company to establish their business – was restrained as constituting a breach of the duty of good faith. The judgment is significant in this because earlier commentary on the *Hivac* case tended to present it as turning very much on the special circumstance of the wartime labour restrictions. Lord Justice Dillon, however, states a principle of much broader application – one that would have even stronger application, surely, in circumstances where the employee was still carrying out duties for the original employer, as in *Hivac*.

I referred in the preceding paragraph to the 'principle' in quotation marks because Dillon LJ presented the consideration of the risk to the original employer as 'questions of discretion as to whether or not an injunction should be granted'¹⁰⁸ rather than as 'questions of principle'. In the event, in exercising that discretion, His Lordship concluded that no such risk existed during the remaining six weeks of the defendant's contract with the plaintiff and consequently dismissed the appeal. Lord Justices Taylor and Mann also stated that, as a matter of discretion, the injunction should be refused.

E Garden Leave

Most cases involving obligations of exclusive service in the period under consideration deal with situations of actual or alleged garden leave, in circumstances similar to those in *Provident Financial*. Thus, for example, in *J A Mont (UK) Ltd v Mills*,¹⁰⁹ the defendant's job as sales and marketing director disappeared after his employer amalgamated with the plaintiff company. The plaintiff attempted to find an alternative position, but that proved not to be possible. It was agreed that the employment should terminate, but that, as severance pay, the defendant should receive the equivalent of one year's salary. The severance agreement contained a clause whereby 'this total payment is made on condition that you do not join another company in the tissue industry within one year of leaving our employment'.¹¹⁰

The defendant subsequently received an offer of employment as joint managing director from another company in the tissue industry, which he accepted. The plaintiffs sought an injunction to enforce the restraint clause, which was given at first instance but on limited terms, to apply only to named companies in the paper tissue industry. On appeal, the injunction was set aside. It should be noted that the employment contract had contained a term requiring 12 months' notice to be given by the employer (and six months' by the employee).

107 [1989] IRLR 84, 87.

108 Ibid 88.

109 [1993] IRLR 172.

110 Ibid 174.

Thus, for an earlier lawful termination, there had to be a variation. The severance agreement was such a variation – substituting earlier termination on consideration of the payment of the 12 months' salary. That consideration was also available to support a valid restraint clause. The question was whether it was valid.

The High Court held the restraint clause to be unreasonably wide and thus unenforceable. The judge at first instance had erred in believing that he could fashion and enforce a lesser restraint. Such an approach had never been allowed. Justice Laws (the judge at first instance) had found apparent support for the approach adopted in the judgment of the Court of Appeal in *Provident Financial*, seeing that case as 'herald[ing] an approach somewhat more relaxed, flexible or practicable than may be gleaned from some of the old cases'.¹¹¹ Lord Justice Simon Brown pointed out the misinterpretation and misapplication of *Provident Financial*. In that case, the employment contract was continuing during the contractual notice period, but the employee was on garden leave. The restraint clause, which was partially enforced by a limited order, was as to employment with another employer during the term of the contract. Here, the contract had been terminated. The restraint in the severance agreement was a *post-employment* restraint. The severance pay did not convert the case into one of garden leave, and the situation could not be treated as if it were a garden leave case. Moreover, Simon Brown LJ denied that the only principle underlying refusal to enforce *post-employment* restraints was that of ensuring that employees could earn – would not have to choose between the previous employer on the one hand and idleness and starvation on the other – a choice obviated here by the severance payment. The 'flexible' order approved in *Provident Financial* was dependent on the fact that the employment still continued.

The deciding factor in *J A Mont (UK) Ltd v Mills* was thus that, in the circumstances, the restraint was in fact a post-employment one and not one for exclusive service during the period of the employment contract. In *GFI Group Inc v Eaglestone*,¹¹² the restraint considered by the High Court was a true exclusive service clause:

The employee shall not, without the consent of the company, during the continuance of this agreement be engaged or interested, either directly or indirectly, in any capacity in any trade, business or occupation whatsoever, other than the business of the company.¹¹³

Eaglestone, a foreign exchange options broker, gave the 20 weeks' notice required by his contract. GFI discovered that he intended to start working for a competing firm before the 20 weeks expired, and applied for an order enforcing the restraint clause, undertaking to pay all salary to the end of the notice period. The High Court gave an order for the lesser period of 13 weeks. Justice Holland noted that damages would not be an adequate remedy, and that the balance of convenience favoured the grant of an order. The single reason supporting the

111 Cited by Simon Brown LJ: *ibid* 174.

112 [1994] IRLR 119.

113 *Ibid* 120.

reduction of the period of the contractual restraint was that two other brokers employed by GFI had already commenced work with the proposed new employer, after the completion of the four weeks' notice required by their contracts. His Honour considered that the damage to GFI resulting from the breach by Eaglestone had to an extent already occurred as a result of those lawful transfers, and for that reason reduced the period of restraint.

It is to be noted that the exclusive service clause in Eaglestone's contract was framed in very broad terms and was not confined to the employer's competitors. It prohibited employment 'in any capacity in any trade business or occupation whatsoever'¹¹⁴ during the term of the contract. No reference to this was made in the decision of the case. Additionally, the field of the contract employment was not that of entertainment, to which the earlier cases had been confined. This was true also, of course, in *Provident Financial*. In concluding his decision, Holland J delivered himself of some thoughts that echo those of the NSW Court of Appeal in *Curro*:

I cannot, however, part from this matter without emphasising strongly one point that has been very much to my mind throughout the hearing. My understanding of the position of the defendant is that he is in a trade in which his word is presumably his bond and because his word is his bond and because of the support of his employers and because also of his own talents, he has prospered. I have heard various arguments and suggestions, supported by passages in affidavits, to the effect that for some reason, when one moves from the deals that he makes across a desk to his own employment contract, his word ceases to be his bond and, in essence, the matter simply becomes one of supply and demand. I deprecate that. If I had not the reasons that I have given, I would be strongly motivated to hold him to his word; that is to hold him to that 20-week period, and if there is a current impression that these periods in these contracts negotiated with these highly paid, highly skilled employees do not have the meaning that they purport to have, then the sooner that is corrected the better. I believe persons like the defendant should contemplate keeping to their word.¹¹⁵

The sentiments are very similar to those I objected to as hypocritical in *Curro*. The saving grace is that here, the keeping of employees to their word is not being confined to artists and performers. His Honour's reference to 'highly-paid' employees also escapes the earlier tinge of philistinism, in that it appears to recognise the countervailing arguments deriving from the financial needs of employees on lower pay and of lower skills, such as provoked reluctance in *Hivac* to say anything limiting of the rights of such persons to take on spare-time employment.¹¹⁶

F The Relationship of Garden Leave and Post-Employment Restraints

The decision in *Euro Brokers Ltd v Rabey*¹¹⁷ introduces a somewhat different scenario – a provision for a fixed contract term of one year after which it could be terminated by six months' notice, and a six-month restraint on taking

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* 123.

¹¹⁶ *Hivac* [1946] Ch 169, 174.

¹¹⁷ [1995] IRLR 206.

employment with a competitor *after* the contract terminates. Clause 10 of the contract provided:

Should you give inadequate notice or no notice to terminate your employment under clause 2 ... the company may elect to waive your breach of contract and hold you to the terms of this agreement for the notice period or a maximum period of six months whichever is the lesser period, in circumstances where it is reasonable to believe that you will be interested or concerned in any capacity in any business, company or firm carrying on the business of money-broking.¹¹⁸

The employee sent the employer a letter of resignation 'with effect from today's date',¹¹⁹ intending to take up employment with a competitor of the plaintiff employer. The employer elected not to accept the repudiation involved in the absence of notice. It informed Rabey he would not be required to attend for work but would continue to receive salary and benefits until the end of a six-month period, and sought an order to enforce the (alleged) purport of cl 10. In other words, the employer sought to enforce a six-month garden leave. Also, the employer indicated that, at the end of that period, they would not seek to enforce the post-employment restraint.

Reid QC, sitting as Deputy High Court Judge, found that there was a serious question to be tried, in terms of the plaintiff's prospects of an injunction at trial. He found also that the balance of convenience favoured the plaintiff. There was no evidence that Rabey would be disadvantaged by not commencing new employment until the end of the garden leave: 'There is no evidence that his earnings are dependent on [his] cutting edge being finely honed' at the end of it.¹²⁰ The Deputy High Court Judge therefore granted the injunction. In argument, counsel for the defendant employee submitted that a garden leave provision (cl 10 being treated as such) would only be enforced if work were made available to the employee during the relevant period. Reid QC rejected this argument as not supported by the cited authorities.

There are questionable leaps within his Honour's judgment. The important factor, to my mind, is that the contract did not contain an exclusive service clause. There was no express statement limiting the employee's rights to 'spare-time' work during the term of the contract. Such a limitation would have to be drawn from the implied duty of fidelity, as in *Hivac*. However, no argument was directed to whether the circumstances paralleled those in *Hivac*. It seems to have been accepted that cl 10 had the effect of an exclusive service clause once it was brought into play by a resignation without adequate notice and a refusal by the employer to accept that breach and rescind. However, cl 10 does not on its terms require exclusive 'service'. It states that the employer will be entitled, following an inadequate notice to 'hold you to the terms of this agreement for the notice period...'. The terms of the agreement to which the employee would be 'held' under cl 10 were, effectively, to carry out work as ordered by the employer. If the employer did not provide work during the relevant period, there was nothing in the contract to prevent the employee filling the idle time with work for

¹¹⁸ Ibid 207.

¹¹⁹ Ibid.

¹²⁰ Ibid 209.

someone else (provided it did not involve disclosure of confidential information and was not a breach in a *Hivac* sense). Admittedly, cl 10 referred to a 'holding' to the terms of the agreement only where 'it is reasonable to believe that you will be interested or concerned in any capacity in any business ... carrying on the business of money-broking'. Thus, one can surmise that the clause was an attempt to provide a limited exclusive service requirement during an enforced garden leave during the notice period.

In the event, whether it was justifiable or not, Reid QC treated the case on the basis that cl 10 had the effect it seems to have been aiming for. It is on that basis that his Honour's comments as to 'idleness' are to be considered – will an exclusive service clause be enforced during a garden leave period? Or is this unacceptable as condemning the employee to the choice, regarded as untenable in *Warner Bros Pictures Inc v Nelson*, of working for the employer or remaining idle and starving? As Reid QC pointed out, in a garden leave situation, starving will not result from enforcing the exclusive service clause. Therefore, a refusal to enforce by injunction would have to be justified solely on the ground that the injunction would condemn to idleness. His Honour quoted from the judgment of Taylor LJ in *Provident Financial*:

Whether idleness and starvation are to be considered conjunctively or disjunctively, I do not think a case such as that before us raises any such spectres. The defendant here is to have his full salary ... No starvation. Even considering idleness per se as a separate matter, it can hardly arise in this case. The defendant's skills as an accountant ... are unlikely to atrophy in a period of three months. Nor is he likely to suffer severe withdrawal symptoms for loss of job satisfaction over that period.¹²¹

This passage, His Honour interpreted, presented idleness as being a matter of discretion only and not an absolute bar to the granting of an injunction. With respect, I would suggest that both Taylor LJ and Reid QC were mistaken in considering the 'idleness and starvation' issue as relevant in garden leave situations. The issue is derived from cases¹²² where enforcement of the negative clause would amount to an indirect enforcement of the positive promise to work for the employer, in that idleness and starvation would be the only alternative to fulfilling that promise. If enforcement of an exclusive service clause during a period of garden leave is to be refused, it would have to be on the grounds that garden leave itself is a breach by the employer of a duty to provide work, so that the employer would not be entitled to the assistance of equity in circumstances where they had not 'done equity' themselves. The duty to provide work has traditionally been held to apply in exceptional circumstances only – effectively only in the field of entertainment and performance.¹²³ However, that limitation appears to be breaking down.¹²⁴

121 *Provident Financial* [1989] IRLR 84, 88.

122 Namely, *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209 and *Lumley v Wagner* (1852) 1 De G M & G 604.

123 See, eg, the statement of principle in *Curro* (1993) NSWLR 337, 343.

124 The possibility that the duty extended further than the previously limited field was in fact raised in *Provident Financial* [1989] IRLR 84, 87. It has subsequently been further developed in *William Hill Organisation Ltd v Tucker* [1999] ICR 291.

In two further British cases deriving from the area of finance management and securities, the 'ancillary' question arose as to the relationship between an exclusive service clause – plus garden leave and a post-employment restraint on competition. It was submitted in each case that where the employers had protected themselves from competition through the activities of key employees through a contractually determined period of garden leave, it was not appropriate to extend that period of protection by subsequently enforcing the post-employment restraint. In the first case, *Credit Suisse Asset Management Ltd v Armstrong*,¹²⁵ the Court of Appeal held that, prima facie, the presence of the garden leave clause did not justify it in declining to give appropriate effect to the restrictive covenant. However, that was subject to the basic principles that the covenant was limited to the degree of protection of the covenantor's interest that was 'adequate'. Thus in appropriate circumstances, a prior period of garden leave might have accorded sufficient protection to that interest, so that the post-employment restraint went beyond what was 'adequate'. There was no justification for limiting the scope of the post-employment restraints, which either stood or fell on the question of adequacy. Orders to enforce garden leave clauses could be more flexible:

The court can exercise its discretion in deciding the permissible length of garden leave but, if the restrictive covenant is valid, the employer is entitled to have it enforced, subject to all the usual grounds on which an injunction may be withheld, such as delay and a finding that damages would be an adequate remedy in the circumstances. Moreover, it is to be remembered that the existence of a garden leave clause may be a factor to be taken into account in determining the validity of a restrictive covenant as at the date of the contract.

I would, however, add a caveat. Terms which operate in the restraint of trade raise questions of public policy. The opportunity for an individual to maintain and exercise his skills is a matter of general concern. I would therefore leave open the possibility that in an exceptional case where a long period of garden leave had already elapsed, perhaps substantially in excess of a year, without any curtailment by the court, the court would decline to grant any further protection based on a restrictive covenant.¹²⁶

That possibility was borne out in the second case, *Credit Suisse First Boston (Europe) Ltd v Padiachy*.¹²⁷ There an interlocutory injunction was sought to enforce a post-employment restraint following three months of garden leave. Justice Longmore held that there was not a serious question to be tried; it was most unlikely that the court at final hearing would have enforced the restraint, in that the period of garden leave meant that there was no further need for protection from competition and thus no foundation for the restraint.

G The Relationship Between Garden Leave and a Duty to Provide Work

The case of *William Hill Organisation Ltd v Tucker* ('William Hill')¹²⁸ affects the issue of exclusive service clauses plus garden leave by extending the scope

125 [1996] IRLR 450.

126 Ibid 455.

127 [1998] IRLR 504.

128 [1999] ICR 291.

of the 'exceptional' duty to provide work, previously limited to three categories of situation – where the employment affords necessary reputation and publicity, where it affords privileges and powers, and where the remuneration is calculated on the basis of piece rate or commission. The Court of Appeal declined counsel's invitation to find a duty to provide work in the duty of mutual trust and confidence as discussed in *Mahmud v Bank of Credit and Commerce International SA*.¹²⁹ Lord Justice Morritt noted that there were two propositions available for the presence of a duty to provide work within the contract,

a narrow proposition and a broad one. The narrow proposition was that an employee appointed to a particular and unique position may not be excluded from that position in the absence of his consent or a term in the contract entitling the employer so to do. The broad proposition was that it is a guiding principle, not a universal rule, when construing a contract of employment, that the employee's interest in doing his job, as well as being paid his salary, is now recognised; in particular in the case of skilled workers and others who benefit from practising their skills either because their remuneration depends on it or because their career prospects would be thereby advanced ... neither party appears to support the broad proposition.¹³⁰

The narrow proposition was, however, contended for by the employee and accepted by the court. The duty was not confined to 'entertainment' cases, but would arise from the construction of the particular contract in its particular circumstances. The need to maintain and develop skills was one such circumstance. The contract under consideration in the case was that of a senior dealer in a 'spread betting' business. Lord Justice Morritt concluded the appellant employer was under a duty to provide work, and so could not put the employee on garden leave. The post of senior dealer was a specific and unique one: the skills necessary required their frequent exercise, the contract expressly imposed an obligation to work throughout the set hours, the staff handbook contained the comment that 'the most important asset in any business is its employees and the [employer] is prepared to invest in its staff to ensure that they have every opportunity to develop their skills', and there was an express power of suspension but one limited to cases requiring time to investigate serious allegations of breach of discipline. As to the last two points, Morritt LJ noted that '[i]f the employer were to be entitled to keep its employee in idleness, the investment in its staff might be as illusory as the limited power of suspension would be unnecessary'.¹³¹ The Court of Appeal held that there could not be an injunction to enforce an exclusive service clause during a period of garden leave in such a case. Where the contract gave rise to a duty to provide work, garden leave could only be justified by an express clause in the contract, and even then injunctive relief would have 'to be justified on similar grounds to those necessary to the validity of an employee's covenant in restraint of trade'.¹³² Thus, while extending the scope of the 'exceptional' duty to provide work beyond the entertainment area, the Court of Appeal did not go so far as to make

129 [1997] ICR 606, 621.

130 *William Hill* [1999] ICR 291, 297.

131 *Ibid* 301.

132 *Ibid*.

such a duty the rule rather than the exception. There must be some special feature of the job to bring the duty into operation.

IV CONCLUSION

A number of significant developments in the doctrine applying to restraint clauses in employment contracts can be identified as having occurred in the period examined in this article.¹³³ In relation to post-employment restraints, the development of agency work and financial services has increased the importance of restraints for the protection of good will. Moreover, the nature of such businesses means that the clauses utilised are becoming increasingly complicated and that, in examining the reasonableness of a restraint's operation, the courts must undertake extremely complex analysis. Additionally, new types of restraint are gaining ground, and the question of reasonableness will involve not merely the breadth of limitation as to interest, time and geographical extent, but also the choice of the type of restraint that will protect the employer 'adequately but no more than adequately'. Thus, restraints on future employment may be found unacceptable when a restraint on solicitation would have given adequate protection to the particular interest.

In relation to restraints during the period of the employment, British courts have apparently discarded the objectionable category of 'special services' (confined to the entertainment industry), for the more logical one of 'specified services', accepting exclusive service clauses as legitimate provided the restraint on 'other' employment is confined to the specific field of business in which the employer is concerned and provided that the restraint is otherwise reasonable.¹³⁴ In assessing reasonableness, the employee's temporary loss of the opportunity of exercising their particular skills is a matter to be weighed against the employer's loss in those skills being exercised for a competitor. Effectively, the British courts have introduced into the consideration of exclusive service clauses the types of consideration previously developed in relation to post-employment restraints. Moreover, they have recognised the relationship between exclusive service clauses and post-employment restraints where the practice of garden leave has the effect of a post-employment restraint. They have also begun to treat the contracts as a whole when assessing restraints, rather than dealing *seriatim* with the various clauses. Thus while an exclusive service clause and a post-employment restraint clause may each be reasonable on their wording, to allow operation to both could go beyond the protection of the employer which would be adequate in the particular circumstances.

133 It must be acknowledged that the impetus for development comes from the British courts. Australian courts have not broken new ground in this area, but with both countries subject to the same evolutionary forces within their economies, there is little doubt that the British developments will be taken up here.

134 This is a matter on which Australian courts have been noticeably more 'traditional' than their British counterparts. However, despite the apparently categorical adherence to the traditional approach in *Curro* (1993) 30 NSWLR 337, it is my belief that the tide will turn in this country also.

The cases surveyed make it abundantly clear that covenants restricting an employee in relation to 'outside the contract' employment, whether concurrent or subsequent, are by no means obsolete or generally inoperative. They are becoming more frequently included in employment contracts, and their operation and applicability are the source of lengthy judicial analysis. They will be enforced provided the employer has a genuine interest to protect and provided that the covenant goes no further than is necessary to protect that interest. The situations in which the employer *has* a genuine interest in limiting competition by the employee have increased rather than decreased, with the spread of agency work and financial services, and new types or aspects of interest have been recognised. There is no indication that the developments in these areas will diminish; rather, their scope is likely to continue to increase exponentially. A detailed understanding of restraint of trade principles is more than ever essential to employment lawyers.