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# Protecting your Business through your Contract of Employment

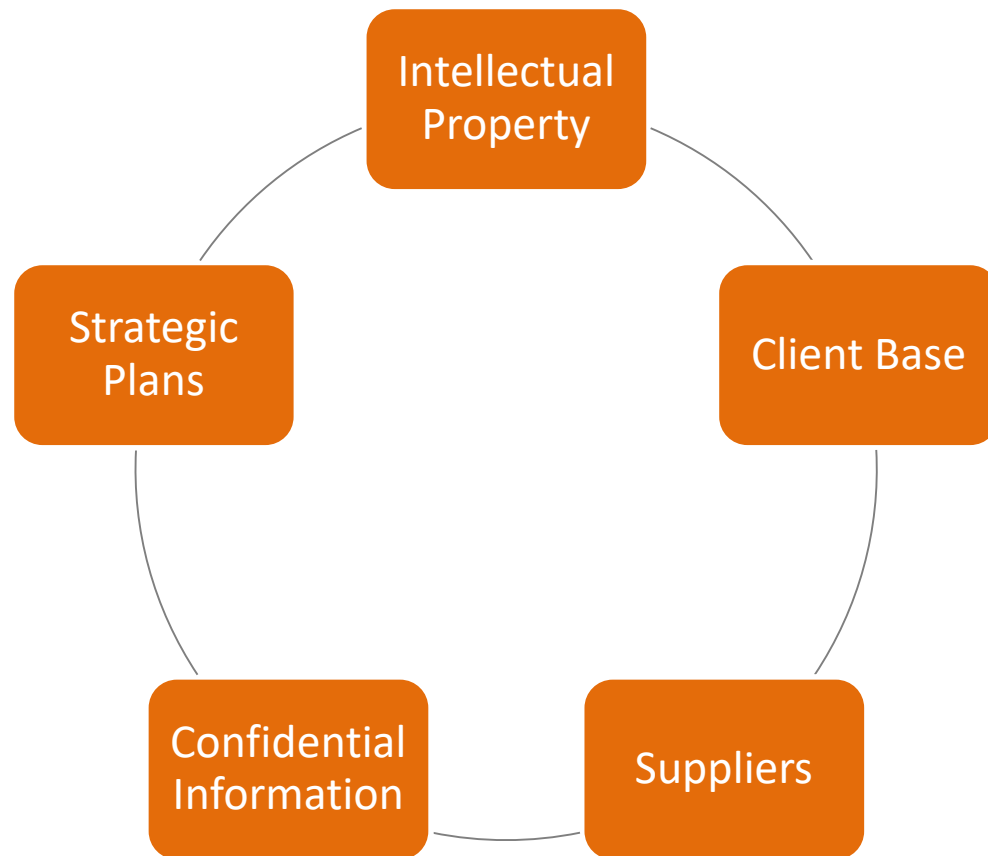
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Restrictive Covenants

## Why use restrictive covenants?



## Initial considerations

Trade Secrets and Confidential Information

Employee Role and Duties

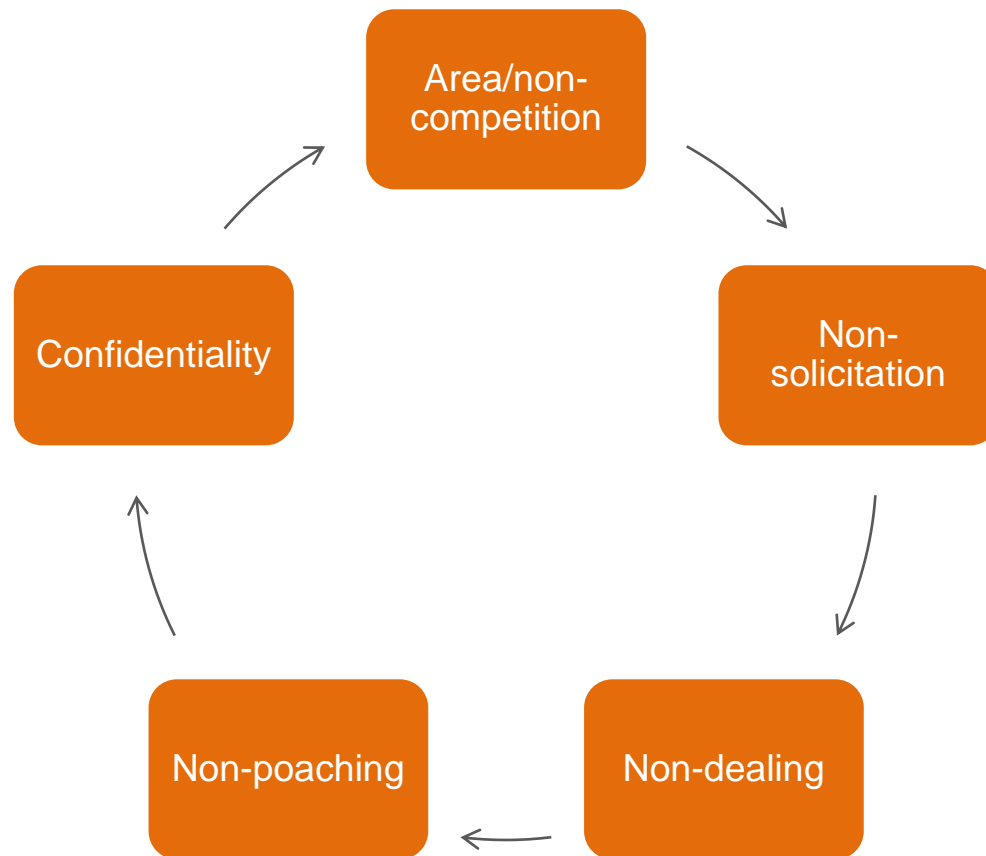
Suppliers

Location

Customers

Nature of  
Business

## Types of Restrictive Covenant



## Confidentiality – what can be protected?

- Trade Secrets – with or without express provision
- ‘Mere’ Confidential information – express provision required



## Scope of the covenant

- Covenants will not be enforced if they go beyond what is reasonably necessary to protect the legitimate business interests of the employer
- Court will not re-write a covenant that is too broad to make it enforceable
- But it will 'blue pencil' (i.e. delete) provisions to make the rest of it enforceable in appropriate circumstances

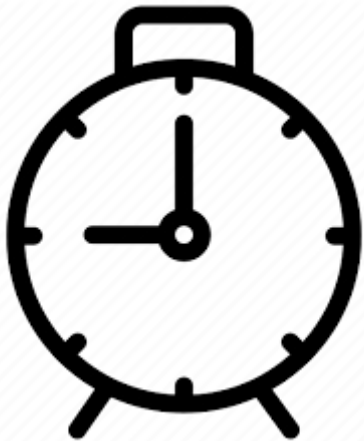


## Variation

- Restrictive covenants must be supported by consideration
- Issues arise where covenants are added or varied following promotion
- Prudent to include a clause stressing that continuing employment or any pay rise/benefit is conditional upon acceptance of new contract of employment



## Bartholomews Agri Food Ltd v. Thornton [2016] EWHC 648



- Clause restricted employee from engaging in work supplying goods or services of a similar nature to any of the employer's customers
- Employee didn't work with them directly
- Clause was held to be wider than necessary to protect the employer's legitimate business interests
- Appropriateness of covenant judged in line with circumstances in existence at the time of signing
- Covenants should be updated as employees are promoted into more senior roles

## Duration of Restrictive Covenant

- Must be for a limited time
- Consider when threat to employer's legitimate interest will be less than material
- Realities of role and industry relevant

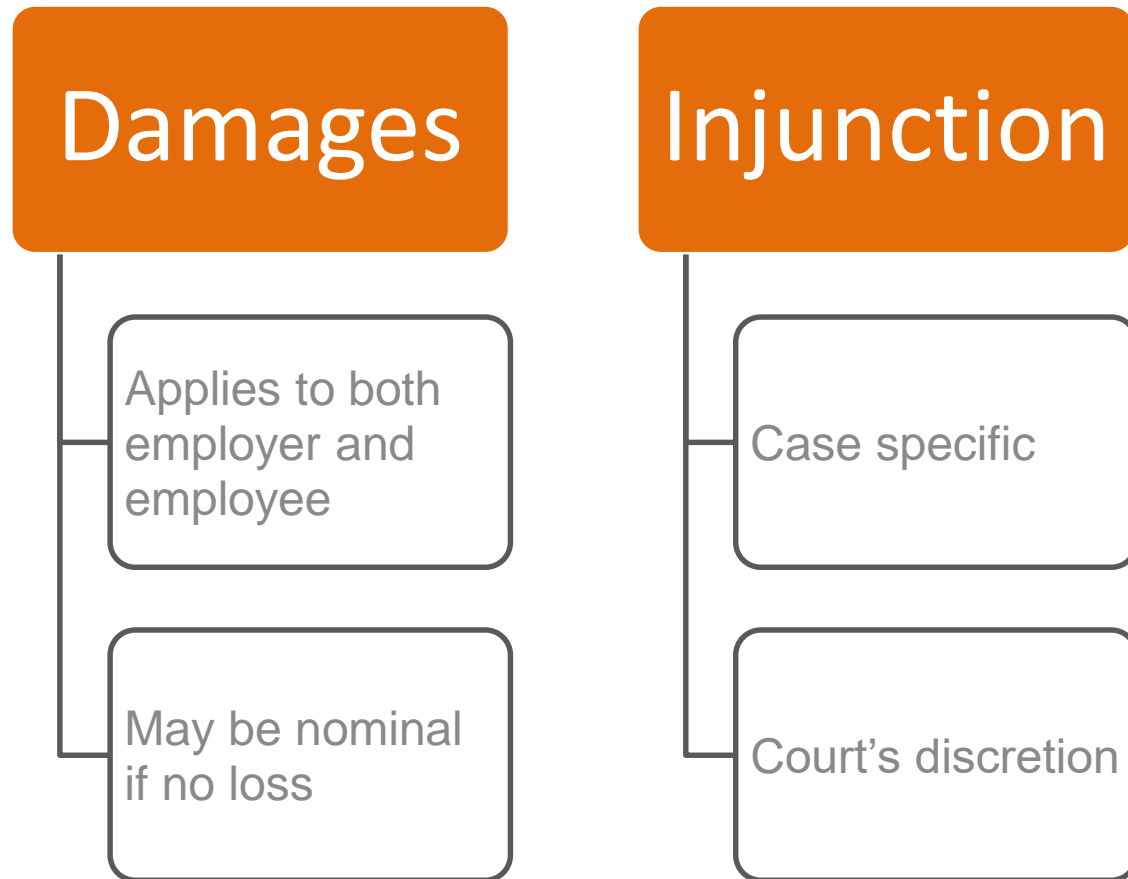


## Formalities

- Contractual term
- Should be expressly documented
- In Employment Contract
- Clear and well defined
- Review and update where necessary on promotion/role change



## Remedies



## Be aware

- Covenants not binding if employer is in repudiatory breach





Garden Leave

## What is Garden Leave?

- Retain employee for notice period
- Pay salary and contractual benefits
- Keep them out of the market place



## How and when?

- Where it is provided for in the employment contract
- Deterrent power
- Set-off in relation to restrictive covenants





## When it is not provided for in the contract

- Contractual right to be provided with work?
- Express or implied
- Could amount to breach of contract
- If no contractual right, employee can be prevented from working



## When is the right to work implied?

William Hill Organisations Ltd v. Tucker [1998] EWCA Civ 615

- Implied contractual right to work accepted
- Employers failure to provide work amounted to repudiatory breach of contract
- Breach allowed employee to bring the contract to an end
- Freed the employee to join a competitor

## Breach of implied term of trust and confidence

- Garden leave imposed by an employer can amount to breach of implied term of trust and confidence
- Particularly where there is no legitimate interest which is under threat
- Can amount to breach even in instances where there is an express garden leave clause in the contract



## ICAP Management Services Ltd v. Berry and another [2017] EWHC 1321

- Court considered the enforceability of the garden leave provision
- Employee would not suffer financial detriment
- No evidence employees skills would stagnate
- Employee had agreed a similar garden leave provision with new employer
- Employer needed to evidence legitimate business interests needed protecting
- Court persuaded that confidential information was in need of protection

## Case Study

- Employee in a sales role
- Approached by a competitor to take a commensurate role at their company
- Employee has approached other members of staff to move to competitor to join their new team
- Has access to customer data
- Restrictive covenants in the employment contract date back to employee joining the company in an administrative role
- Contract contains a non-compete clause for an indefinite period of time
- Has access to confidential trade information relating to products but no confidentiality provision in the employment contract

## Considerations

- Can further staff loss be prevented?
- Can loss of existing customers to competitor following employee move be prevented?
- Can the employee be bound by historic covenants in the employment contract
- What is the impact of the lack of time limitation on the non-compete clause?
- Is trade information protected despite lack of express provision in the contract?

## Questions?



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