

# Reality Check

## Tailoring Restrictive Covenants...

*It is common practise for employers to protect themselves from their former employees by not allowing them to approach and work with old contacts through restrictive covenants.*

### Bartholomews Agri Food v Thornton

The problem is that unless the covenants are viewed as 'enforceable' by only going as far as reasonably necessary to protect the businesses interests, the courts will view the restrictive covenants as 'unlawful restraints of trade'.

In the case of agricultural merchant, Bartholomews, Thornton had started working for them in 1997 as a trainee agronomist. He had signed a contract which contained post-termination restrictions but although he was promoted during his 18 years there, he remained on his initial contract.

Thornton resigned and started working for a competitor of Bartholomews, and they unsuccessfully applied for an injunction.

### Why wasn't it successful?

1. Within the covenant was an unusual provision that Thornton be paid by Bartholomews during the six month period of restrictions, even in the instance that he got a non-competing job. Because of this, Bartholomews were confident that the court would view the restriction as enforceable. Unfortunately for them this was not the case, as the court viewed it as against public policy to allow an employer to purchase a restraint.
2. Because the restrictions were imposed when Thornton was still a trainee, when he did not have any client contacts, the injunction was classed as "manifestly inappropriate". If the restriction was unenforceable at the time it was made, it will remain this way despite any changes that might have happened to Thorntons circumstances.
3. You might think then, that it would have been better for Bartholomews to have updated Thorntons covenant when he was promoted. Well that still wouldn't have convinced the courts. The restriction went further than necessary to protect the business, as it sought to prevent Thornton from dealing with every single Bartholomews customer.

### How to make restrictive covenants stand up in court

- Restrictive covenants need to be relevant to the role and the level of the employee. Make sure you consider the legitimacy of the risk and the reasonability of the protection that the covenant enforces.
- Always review and update restrictions, especially when employees change roles
- Do not use a "bog standard" clause. Bespoking them with reference to the industry, role, and the seniority of the employee is vital.
- Buying a restraint is a waste of money. Any clause that involves paying an employee during the restriction period will not convince a court to enforce it.

*If you require support tailoring your restrictive covenants then please get in touch and give us a call on 01256 328 428.*