

## EMPLOYMENT UPDATE

# Restrictive covenants

The Court of Appeal recently upheld a decision refusing to enforce a 12-month non-compete clause. This note provides an overview of the judgment and key practical takeaways.

## Background

### Restrictive covenants in employment contracts

Many employment contracts contain clauses which seek to restrict what an employee can and can't do after termination of the employment relationship (known as "restrictive covenants") e.g. a non-compete clause seeks to prevent an employee from competing with their former employer (such as working for a rival business).

### When are these covenants enforceable?

Such covenants are enforceable only if the employer can demonstrate that the clause: (i) protects one of its legitimate business interests; and (ii) is reasonable in all the circumstances. Non-compete clauses are traditionally harder to enforce than others.

The courts will consider many factors to assess enforceability including: the length of the restriction; the geographical scope; the seniority of the employee; the employee's access to confidential information, clients and other sensitive relationships; and the standard industry practice.

### How do you take action to enforce a covenant?

An employer may seek an injunction to prevent a former employee (and any new employer) from acting in breach of a restrictive covenant. The courts may grant such an injunction on an interim basis pending the outcome of a full trial. The courts will consider:

- > Is there a 'serious' issue to be tried? This is a low bar that seeks to limit frivolous, obviously bad claims.
- > Are damages (i.e. money) an adequate remedy instead of an injunction?
- > Who would be more inconvenienced if the injunction was or was not granted?
- > Plus any special factors.

## Planon v Gilligan – Key points

### Facts

Mr Gilligan was employed by Planon as an account manager and was later promoted to Sales Manager. Mr Gilligan's contract included a 12-month non-compete clause. His

employment ended on 23 August 2021 (having given 1 month's notice) and he joined a rival on 2 September.

Planon applied for an interim injunction on 22 October 2021, which was heard on 5 November 2021. By this time, Mr Gilligan had been working for the rival for 2 months. The court refused an injunction to enforce the non-compete (on different grounds from the appeal). On 18 November 2021, Planon appealed, and the appeal hearing took place on 5 April 2022.

### Decision

The Court of Appeal upheld the judge's decision not to grant an injunction with three particular points of note:

1. Planon argued that the court should ordinarily grant an interim injunction to enforce a reasonable covenant, unless exceptional circumstances apply. This was given short shrift by the Court of Appeal – at interim stage the court retains discretion to refuse an injunction if particular hardship would be caused to the employee.
2. By the time of the appeal, Mr Gilligan had been working for a competitor for 7 months. Planon had likely already suffered the full extent of the damage to its legitimate business interests. The Court of Appeal also noted Planon's delay from 2 September to 22 October 2021 in making its application.
3. The Court of Appeal stated it was "*unrealistic*" to argue that damages would be an adequate remedy for Mr Gilligan if an injunction was granted at interim stage but then the non-compete clause was proved at trial to be unenforceable, since he would be without enough income to cover his numerous financial commitments for months (e.g. mortgage).

## Practical takeaways for employers

- > Review all restrictive covenants to ensure you have the best chance of enforceability.
- > If an employee has breached, or may breach, a restrictive covenant, do not delay in seeking advice and taking action.
- > On exit, consider options such as placing an employee on gardening leave for the term of the covenant or continuing to pay the employee.

The full judgment is available [here](#).

**If you would like any further advice or assistance on this development, please contact Jamie Feldman ([jamie.feldman@northridgelaw.com](mailto:jamie.feldman@northridgelaw.com)).**

This note should not be treated as legal advice and only provides general information on the issues discussed.

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