

## Post-Termination Covenants in the Spotlight Again

### 1. INTRODUCTION

The recent case of *Axiom Business Computers Ltd v Frederick*<sup>1</sup> which came before the Outer House of the Court of Session in Scotland considered two restrictive covenants contained within a sales director's terms and conditions of employment. The first covenant restricted her from working for a competitor of her employer after the termination of her employment. The second covenant which restricted her from soliciting customers of the employer was the subject of much more debate in the Outer House of the Court of Session.

The judgment of Lord Bracadale in *Axiom* analyses a number of the common law cases on contracts in restraint of trade and raises, in particular, a number of interesting points in respect of the enforceability of restraints on employees from canvassing, soliciting or dealing with customers of their former employer. In particular, it again raises the questions as to whether a covenant which attempts to restrict the employee from canvassing customers (i) with whom they initiated contact or negotiations, (ii) with whom they had had no contact or dealings, or (iii) who had been past customers of the employer prior to the commencement of their employment, will be treated as enforceable by the courts. This case note explores these issues and others.

### 2. THE FACTS

The employer was a company engaged in the development, sale and installation of computer software programmes and hardware to commercial customers. Their customers were principally law firms to whom they sold electronic time recording and billing systems. The employer entered into commercial arrangements with customers in respect of computer training and in respect of ongoing maintenance and support. A consultancy service was also offered to clients. The employee was the sales director and was heavily involved in client relations and management, including sales and maintenance. Accordingly, she operated at the 'coalface' of the employer's business.

When she was dismissed on the basis of gross misconduct,<sup>2</sup> on the balance of convenience, an interim interdict<sup>3</sup> in terms of the restrictive covenants was granted in favour of the employer at the initial hearing which came before the court. The question which subsequently came before the Outer House was whether the original interim interdict restricting her activities should be recalled.

<sup>1</sup> 2003 GWD 37-1021.

<sup>2</sup> Although she denied such allegations which were subject to separate proceedings.

<sup>3</sup> The Scottish equivalent of an interlocutory injunction.

### 3. THE ISSUES

#### A. Identification of Legitimate Proprietary Interest of the Employer

Professor Freedland recently stated the following:<sup>4</sup>

In a number of recent cases, the courts take a searching look at whether the employing entity has demonstrated a legitimate interest sufficiently concrete to sustain a post-employment restraint on economic activity competing with that of the employing entity; that becomes a more and more prominent and difficult question as the economic activity in question, whether in the manufacturing or service sector, becomes more and more heavily invested in highly specific knowledge and information technology.<sup>5</sup>

Accordingly, in reviewing a restrictive covenant, the first matter which a court should consider is whether an employer has a legitimate interest to protect in imposing such a covenant. Identification by the court of the existence of the employer's interest is paramount. The scope of the legitimate interest depends on a number of factors, including the position of the employee, the quality, nature and amount of the employee's exposure to clients, the effect of the employee's post-termination actions, the nature and scope of the employer's business and goodwill and the nature of the restrictive covenant itself.<sup>6</sup> It is equally possible that a court might hold that it is impossible to identify any legitimate interest demanding protection.<sup>7</sup>

As stated, depending upon the nature of the covenant, the character and content of the legitimate business interest will differ. For example, in the context of a covenant restricting an employee from poaching or soliciting a former employer's *employees*, it was only recently<sup>8</sup> held by the courts that an employer will be entitled to impose such a condition. This is based on the employer's legitimate interest in maintaining a stable and well trained workforce. This can be compared with most forms<sup>9</sup> of the covenant which constrain an

<sup>4</sup> M. Freedland, *The Personal Employment Contract* (Oxford: OUP, 2003) p 182.

<sup>5</sup> For judicial expression of this policy, see *International Consultant Services UK v Hart* [2000] IRLR 227, 231, para 26 per Nicholas Strauss QC; Lord Wilberforce in *Stenhouse Ltd v Phillips* [1974] AC 391, 400; *Office Angels v Rainer-Thomas* [1991] IRLR 214, 217 per Sir Christopher Slade; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 301 per Lord Reid.

<sup>6</sup> In some respects this makes matters circular, in the sense that in order to determine whether a restrictive covenant is valid depends on the nature and scope of the employer's legitimate business interest, which in turn depends on the nature and scope of the covenant itself! However, this is undoubtedly the case, as this case note will demonstrate.

<sup>7</sup> For example, in the situation where the general skills, expertise and experience which the employee uses and possesses when working with the employer are wholly different from that used and possessed when such employee takes up employment with a new employer or in the somewhat strange situation where an employee is remunerated and works for a dormant employer which sells nothing, has no actual or prospective customers, and possesses no other employees, trade competitors, confidential information or trade secrets!

<sup>8</sup> See eg *Ingham v ABC Contract Services Ltd* (unreported) 12 November 1993, *Hanover Insurance Brokers Ltd v Schapiro* [1994] IRLR 82 and *Dawnay Day & Co Ltd and Another v D'Alphen and Others* [1998] ICR 1068, 1110–1111 per Evans LJ.

<sup>9</sup> Most of the forms of non-solicitation of customers covenants are explored below.

employee from soliciting *customers* of the employer. Clauses of the latter type have been recognised as satisfactory to protect the business connections of an employer for some time.<sup>10</sup> This was the case with regard to the non-solicitation of customers covenant in *Axiom*. Lord Bracadale held that, given the nature of the employer's business, they had a legitimate interest in protecting their business connections and customer base, namely actual customers and prospective customers with whom negotiations had begun. This was a valid conclusion as the *Axiom* business was IT-based and the employee's exposure to clients was high.

## B. Proportionality

Once the legitimate interest of the employer has been identified, a proportionality test comes into play. As Professor Freedland states:

In each case, the legitimacy of the employing entity's interest in the restraint is, in effect, weighted against the extent of the negative impact of the restraint upon the worker. [This is an example] . . . of adjudication about proportionality . . .<sup>11</sup>

Essentially, it is incumbent upon the court to determine whether the covenant is no more than reasonably necessary to secure and protect the identified legitimate business interest. This will involve a balancing exercise, with the consequences of enforcement against non-enforcement for each of the parties weighed up. In *Axiom*, the non-solicitation of customers covenant was held to be valid. In the cases of *Jack Allen (Sales & Service) Ltd v Smith*<sup>12</sup> and *Re Living Design (Home Improvements) Ltd*,<sup>13</sup> it was held by Lords Johnston and Cameron of Lochbroom respectively, that on the evidence there was nothing to suggest that the proprietary interest and goodwill of the employer would be damaged in any material way by the actions of the employee. Likewise, in the case of *PR Consultants Scotland Ltd v Mann*,<sup>14</sup> where, on balance, the restriction was found to be enforceable since it did not stop the ex-employee from remaining in business, but simply restricted who he could make contact with.<sup>15</sup>

The treatment of the non-solicitation of customers covenant in *Axiom* can be compared with the form of this type of covenant which featured in *Office Angels* and *Scully (UK) Ltd v Lee*.<sup>16</sup> In *Office Angels* and *Scully*, the relevant non-solicitation of customers covenants were struck down on the basis that they were wide enough to cover areas beyond which the employer actually operated. Hence, the clause was unenforceable on the basis of the disparity between the scope of the protection sought and the legitimate business interest which the employers were entitled to defend. However, *Office Angels* and *Scully* can be

<sup>10</sup> See eg *Stenhouse* and *AGMA Chemicals v Hart* 1984 SLT 246, 248 per Lord Hunter.

<sup>11</sup> See *supra* n 4.

<sup>12</sup> [1999] IRLR 19.

<sup>13</sup> 1999 GWD 10-450.

<sup>14</sup> [1997] SLT 437.

<sup>15</sup> [1997] SLT 437, 441–2, per Lord Caplan. In this case, he could not make contact or deal with customers of the employer with which he had had prior dealings or contact.

<sup>16</sup> [1998] IRLR 259.

contrasted with *Littlewoods Organisation Ltd v Harris*<sup>17</sup> where the Court of Appeal essentially eschewed this issue and held that the words ‘trade or business’, although wide in scope, could be reinterpreted as referring to any trade or business in which the employee might use confidential information acquired when working for the employer.

In general, it is also recognised that whether a covenant is no more than what is reasonably necessary for such protection is relative to the type of restraint. In other words, in considering the proportionality test, certain covenants are treated more liberally than others.<sup>18</sup> For this reason, we will now investigate the two types of covenant which featured in *Axiom* and draw certain conclusions.

### C. Covenant Restricting the Employee from Working for a Competitor

The court came to the view that the following clause 6(b) in the director’s<sup>19</sup> contract of employment was unenforceable:

you will not seek or accept employment (whether as employee, agent, director or otherwise) with any of the employer’s competitors in the field of computer systems for a period of one year after termination of your employment with the employer.

The reasoning of the Outer House was based on four principal factors. Firstly, the court recognised that, in comparison with post-termination covenants restricting the solicitation of customers, the common law had adopted a stricter approach with respect to the enforcement of post-termination restraints on the employment of a former employee. A classic example of this in terms of Scots law is the case of *Scottish Dairy Farmers Co (Glasgow) Ltd v McGhee*<sup>20</sup> and in terms of English law, the case of *Bridge v Deacons*.<sup>21</sup> Post-termination restraints on the employment of a former employee are only justified where it is considered necessary to protect the trade secrets or the customer base of the employer.<sup>22</sup> In *Axiom*, the court held that such protection was already afforded by the existence of the post-termination covenants in subclauses 6(a) and (c) of the

<sup>17</sup> [1977] 1 WLR 1472. Likewise, in *Hollis & Co v Stocks* [2000] IRLR 712 it was held that a covenant which could be read literally as restricting an employee from undertaking any work at all within a specific geographical area should be construed purposively and restricted to any work ‘as a solicitor’ and that, therefore, it was not void as an unreasonable restraint of trade.

<sup>18</sup> Which amounts to more circularity

<sup>19</sup> In the absence of a restrictive covenant, an employer will have some protection on the departure of a director, see eg (1) *Hunter Kane Ltd v Alan Watkins* (ChD) [2003] EWHC 186 where it was confirmed that the employer will have a remedy where it can be shown that the director’s departure was prompted by a desire to take for himself the business contacts and maturing business opportunities that belonged to the employer in breach of his duty of fidelity and loyalty and general fiduciary duties and (2) the ratio of *Faccenda Chicken Ltd v Fowler* [1986] ICR 297 which restricts the employee, in certain circumstances from disclosing confidential information and trade secrets.

<sup>20</sup> [1933] S.L.T. 142

<sup>21</sup> [1984] AC 705, 713 per Lord Bridge.

<sup>22</sup> The Outer House referred to *Office Angels* as the authority for this proposition. However, *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 701–2 per Lord Atkinson is, of course, the primary authority.

employee's contract which provided protection for the employer with respect to the preservation of trade secrets and solicitation of customers. As a result, the non-competition covenant represented additional unwarranted protection for the employer which was not legitimate in the circumstances. This is a somewhat concerning aspect of the decision, given the fact that restrictive covenants in contracts of employment and service agreements are usually drafted to include the full range of restrictions<sup>23</sup> alongside each other.

Secondly, the absence of any territorial restriction meant that the restriction could be construed to be worldwide in scope. Thirdly, the generality of the market rendered the clause unenforceable. Rather than restricting the scope of the market to 'the field of the sale and supply of computer systems and software to the legal profession and the commercial market', it extended to 'the field of computer systems'. Finally, clause 6(b) did not prevent the employee from being self-employed in the field of computer systems. On this basis, Lord Bracadale held that it was difficult to see why she could not work for a competitor. Accordingly, the interim interdict was recalled in so far as it related to clause 6(b).

#### **D. Covenant Restricting the Employee from Transacting Business with the Customers of the Employer**

##### (i) General

Clause 6(c) was in the following terms:

you will not for a period of 18 months after termination of your employment seek to transact business with any of the employer's customers with respect to the provision of any goods services or facilities including computer hardware, software and related systems in which the employer deals and with those (sic) provision, during your employment with the employer you have been involved. For the purpose of this term 'customers' includes those with whom the employer has concluded business transactions as well as those with whom you, on behalf of the employer, have already had dealings whether or not such dealings have resulted in the conclusion of a business transaction.

It was held that clause 6(c) was valid and did not go beyond what was required to protect the legitimate business interests of the employer. This was despite the fact that the clause was unrestricted in terms of a period of time as to the class of customers from whom the employee could not seek to transact business. In other words, there was nothing in the clause to say whether the ex-employee could canvass or solicit persons who had been customers of the employer, say 20 years ago, even though this was prior to the commencement of her employment with the employer. As was argued by the ex-employee's counsel:

with respect to Clause 6(c) the [employ]ers had sought to give an extended meaning to the word 'customers'. It included actual customers and prospective customers. There was no

<sup>23</sup> For example, in basic terms, covenants restricting the employee from (i) working for a competitor of the employer, (ii) setting up in business in competition with the employer, (iii) canvassing, enticing, inducing, soliciting or dealing with the customers of the employer, (iv) interfering with the suppliers of the employer and (v) canvassing, enticing, inducing, soliciting or poaching the employees of the employer.

backward time limit as to what transaction would be included. This meant that the time period went back to the point where the business started around 1980. It therefore included customers of the [employ]ers who had concluded transactions prior to the commencement of the [employee]'s employment. It was not sought to restrict to those who had recent connections with the [employer] or dealings with the [employee].<sup>24</sup>

Lord Bracadale expressed the following opinion relative to this argument:

I accept that it is not necessary to place a backstop in terms of time on the restriction. I prefer the construction of the clause contended for by [counsel for the employer] that the intention was to protect the present customers and those who have been customers during the employment of the [employee]. In my opinion it is legitimate for the [employ]ers to seek to protect their business connections. I do not consider that the terms of clause 6(c) are unreasonably wide.<sup>25</sup>

A number of points can be made in relation to this section of Lord Bracadale's judgment.

(ii) Was the covenant too wide on the basis that it restricted the employee from soliciting persons who had been customers prior to the commencement of her employment?

On the face of it, clause 6(c) appears to extend to persons who had been customers of the employer prior to the employee commencing employment with the employer. The contractual provision failed to include any constraint to the effect that it only applied to persons who were customers during the course of her employment. As a matter of law, it is unclear on what grounds Lord Bracadale was entitled to assume that the ex-employee was restricted from soliciting customers to the extent that they were present customers or persons who had been customers during the period of her employment with the company. It is one thing to base such an adjudication on the intention of the parties as set out in a written covenant. However, it is wholly another thing to assume such a proposition without offering an explanation as to the basis on which such a conclusion can be drawn. As an alternative proposition, Lord Bracadale could have afforded the covenant its more natural meaning (ie that it extended to the employer's customers prior to the commencement of the employee's employment), but then justified this on the basis that a covenant in these terms was necessary to protect the interests of the employer.

Moreover, it is difficult to reconcile the assumption which Lord Bracadale made with the *obiter dicta* of Romer LJ in the Court of Appeal case of *Gilford Motor Co Ltd v Horne*,<sup>26</sup> where commenting on the non-solicitation covenant considered by the court in the case of *Dubowski & Sons v Goldstein*<sup>27</sup> (which restricted the employee from soliciting or interfering with any of the customers of the employer), he stated the following:

<sup>24</sup> At para [15].

<sup>25</sup> At para [33].

<sup>26</sup> [1933] Ch 935.

<sup>27</sup> [1896] 1 QB 478.

The limitation that is necessary [in such a covenant], of course, is a limitation to persons *who are customers during the employment of the covenantor*.<sup>28</sup>

Moreover, in the case of *Plowman & Son Ltd v Ash*,<sup>29</sup> Harman LJ, commenting on the *ratio decidendi* of *Gilford*, stated the following:

the Court of Appeal . . . [held] that it was a legitimate trade interest of the employer to protect his customers, *provided they had been customers within the employee's time*, from the solicitations of the ex-employee.

On the same point, in the Outer House case of *Hinton & Higgs (UK) Ltd v Murphy*<sup>30</sup> it was held that a restriction covering customers of the employer outwith the period of the employee's employment was unenforceable unless it could be demonstrated that it was necessary for the legitimate protection of the employer.<sup>31</sup> This lends further support to the contention that Lord Bracadale's assumption in *Axiom* was one which he was not empowered to make.

(iii) If the covenant attempts to restrict the employee from soliciting customers of the employer with whom she had had dealings, is this enforceable?

This is an issue which was not specifically explored in *Axiom*. It appears to have been understood that such a covenant was enforceable. It is submitted that the approach of Lord Bracadale in this regard was correct. The observations of Sir Christopher Slade in *Office Angels Ltd v Rainer-Thomas*<sup>32</sup> and Lord Wilberforce in the Privy Council case of *Stenhouse v Phillips*<sup>33</sup> indicate that it is settled law that a non-solicitation clause which is restricted to customers with whom the employee had in the past personally dealt with can fall within what is regarded as a reasonable restraint for the protection of the employer's business.<sup>34</sup> For example, in the recent case of *Arbuthnot Fund Managers Ltd v Rawlings*,<sup>35</sup> at a preliminary hearing it was held by the court that an employer had a reasonable prospect of succeeding at a trial in relation to a clause of this type. Likewise, in the cases of

<sup>28</sup> [1933] Ch 935, 969.

<sup>29</sup> [1964] 2 All ER 10, 12.

<sup>30</sup> [1989] SLT 450.

<sup>31</sup> *Ibid*, 452B.

<sup>32</sup> [1991] IRLR 214, 224, per Sir Christopher Slade: 'If clause 4.5(a) had been suitably drafted in narrower terms, so that it covered only Bow Street branch clients of the [employer] with whom the employee had had dealings during her period of employment, I have little doubt that its validity would have properly been upheld. Possibly a covenant against solicitation or dealing with could properly have been framed in terms rather wider than this.'

<sup>33</sup> [1974] 1 All ER 117, 123b-c: 'The clients, whom the [employee] may not solicit, though widely defined . . . and including prospective clients, are limited to clients of the [employer's] group [of companies] with whom the [employee] has had dealings or negotiations . . . This means that the covenant against solicitation in practice only extends to the comparatively small number of clients with whom the [employee] has dealt directly.'

<sup>34</sup> The Scottish case of *A & J Beveridge v Levi* (1996, unreported, A.B. Wilkinson QC) is also authoritative.

<sup>35</sup> [2003] EWCA Civ 518.

*Cantor Fitzgerald International v Bird*<sup>36</sup> and *Wincanton Ltd v Cranny*<sup>37</sup> it was assumed that such a covenant was valid. In a clause of this type, it is submitted that the more important issues regarding validity tend to involve an assessment as to whether (i) the temporal restriction is longer than is reasonably necessary<sup>38</sup> or (ii) an associated company, partner or joint venture partner of the employer could also be conferred the benefit of the covenant.<sup>39</sup>

(iv) What is the position with regard to a covenant which attempts to restrict the employee from soliciting customers of the employer with whom she had had no contact or dealings?

In *Axiom*, as highlighted by the employee's counsel, on the face of it, the covenant actually extended to persons who had been customers of the employers with whom she had had no recent connections or dealings. The court held that this was not a matter which rendered the clause unenforceable. In the similar case of *Dentmaster (UK) Ltd v Kent*<sup>40</sup> it was held that a clause prohibiting the ex-employee from soliciting customers for a period of six months, but which was limited to any person or business that had been a customer within the previous six months, was not unreasonable. As in *Axiom*, the *Dentmaster* covenant was wide enough to restrain the employee from approaching clients of the employer with whom he/she had made no contact. Unlike *Axiom*, the *Dentmaster* clause incorporated certain self-limiting factors, one of which was the six-month restriction on the class of persons who had been customers. One assumes that the inherent reasonableness of this temporal restriction was an important factor in Waite LJ's decision. One wonders what Waite LJ's judgment might have been if the class of controlled customers had extended to any person or business that had been a customer of the employer within the previous twelve or more months.<sup>41</sup>

However, the fact that the covenant in *Axiom* was *prima facie* wider than the type in *Dentmaster* does not necessarily lead to the conclusion that the *Axiom* covenant was invalid as a matter of law. The same point was considered in *International Consultant Services UK v Hart*.<sup>42</sup> In *Hart*, it was stated that non-solicitation clauses are often upheld even though they prohibit dealings with customers with whom the employee had never had any contact at all. The authorities cited for this proposition by counsel in *Dentmaster*, which Nicholas Strauss QC accepted, were the decisions of the Court of Appeal in *Gilford*<sup>43</sup> and *Plowman*.<sup>44</sup>

Nonetheless, it is not always the case that *Gilford* and *Plowman* are applied as passively as they were in *Hart*. The judgment of the Chancery Division in *Austin Knight (UK) Ltd v*

<sup>36</sup> [2002] IRLR 867.

<sup>37</sup> [2000] IRLR 716.

<sup>38</sup> See eg *Stenhouse*.

<sup>39</sup> See eg *Stenhouse* and *Dawney Day*. In answering this question, one must revert to first principles, see eg the analysis of Lord Wilberforce at p. 400 in *Stenhouse* and Evans LJ in *Dawney Day* at pp 1106G–1108E.

<sup>40</sup> [1997] IRLR 636.

<sup>41</sup> For example, see the case of *Aramark plc v Sommerville* [1995] SLT 749.

<sup>42</sup> [2000] IRLR 227.

<sup>43</sup> *Supra* n 26 above.

<sup>44</sup> *Supra* n 29 above.

*Hinds*<sup>45</sup> distinguished *Gilford* and *Plowman* on the basis that the range of customers to which the employee was exposed was limited to a small number within the employer's Newcastle branch. Apart from these limited customers, the employee held no sway over any other customers of the employer. On the basis that the covenant would prevent the employee from approaching such customers, the covenant was deemed to be unenforceable. Similarly, in the case of *Gledhow Autoparts Ltd v Delaney*,<sup>46</sup> the employee was a travelling salesman who sold accessories to the lighting systems of motor cars and electric light bulbs. A non-solicitation covenant in his contract of employment prevented him from soliciting any person, firm or company within the area where he had been entitled to sell on behalf of his employer. One of the reasons why the Court of Appeal found the restraint to be invalid was that it restricted the employee from soliciting for orders persons with whom he had had no contact whatsoever.<sup>47</sup> *Austin Knight* and *Gledhow* appear to be the only cases which have not applied *Gilford* and *Plowman*.<sup>48</sup> What is certain is that the combination of *Austin*, *Gledhow*, *Axiom* and *Hart* only goes to vindicate the opinion of Harman LJ in *Plowman* as follows:

the limits of the doctrine are very widely set out and differ a good deal, as it seems to me, from case to case, so that no one is a binding authority for any other because the circumstances differ.

What is also interesting about *Axiom* is that Lord Bracadale failed to do what the court did in *Dentmaster*, *Plowman*, *Gledhow* and *Stenhouse*. That is, there is no evidence from the *Axiom* judgment that he made any enquiry as to whether the restrictive period (of 18 months) was longer than was reasonably necessary to protect the legitimate interests of the employer. It would be remarkable if *Gilford* and *Plowman* were treated as blanket authorities for a proposition that any covenant which restricts an employee from soliciting customers with whom they had had no dealings was inherently valid, regardless of the length of the temporal restriction. It is submitted that it is conceptually better to treat *Gilford* and *Plowman* as the authorities for a staged test. The satisfaction of the first test being whether the clause meets the criteria of *Gilford* and *Plowman* in restricting the employee from soliciting or transacting with clients with whom they had had past dealings. If this was fulfilled, the second stage would then involve a consideration of whether the period of controlled customers was too long. It is submitted that this is in keeping with the underlying philosophy of the court's task of searching for a form of wording which is no more than is adequate or reasonably necessary to protect the employer's legitimate business interests and connections.

<sup>45</sup> [1994] FSR 52.

<sup>46</sup> (1965) 1 WLR 1366.

<sup>47</sup> *Ibid* at 1377.

<sup>48</sup> In fact, *Gilford* and *Plowman* were not even cited by counsel or the judges in *Gledhow*.

(v) Can an employee be prohibited from canvassing or soliciting prospective customers with whom he/she had made initial contact and/or commenced negotiations?

Another point which is often hotly debated is whether an employer has the right to restrict an employee from canvassing or soliciting potential customers of the employer with whom they had made initial contact or negotiated deals on behalf of the employer prior to the termination of their employment contract. One might assume that such a covenant must be enforceable, given that in *Gilford* and *Plowman* it was held that non-solicitation clauses are often upheld even though they prohibit dealings with customers with whom the employee had never had any contact at all.

However, somewhat bizarrely, the common law on this point is unclear. For example, in the case of *Gledhow*, a further basis on which the covenant was held to be too wide was that it covered potential customers with whom the employee had made some sort of initial contact or relationship which might be expected to subsequently develop. However, despite the fact that the covenant was struck down on this basis, Diplock LJ expressed no final view as to whether a covenant of this type could legitimately have extended to potential customers with whom the employee had negotiated. Therefore, he left this as a moot point<sup>49</sup>.

*Hart* was another case to consider the issue of prospective customers within this context. Mr. Hart had frequent contact with prospective clients in the course of negotiations, in which his role was to secure the business of customers for the employer and subsequently offer ongoing technical expertise. He often represented his employer at conferences where there would be significant contact with possible new customers. The Court came to the view that a non-solicitation covenant which restrained him from canvassing or soliciting prospective customers could on occasion, be valid. Due to the nature of the business and the contact and negotiations which had been made by Hart with the potential customers,<sup>50</sup> the covenant was held to be satisfactory. However, the court refused to lay down a rule of universal application. In essence, the court followed the Diplock LJ approach in *Gledhow*.

This issue was again raised in *Axiom*. The court unhesitatingly held that it was legitimate to protect the interests of the employers with respect to negotiations. The employers were in the IT service industry which involved continuous negotiations, consultations and contact with prospective customers and existing customers. The employer would examine prospective customer's requirements and design systems to suit these particular needs. Thereafter, training, education and continuous support in the use of the systems was supplied which included maintaining, amending and upgrading systems. The employer had invested significant time and resources in negotiations with prospective

<sup>49</sup> Ibid at 1377.

<sup>50</sup> Based on the long period of time over which negotiations were held, the employer could legitimately regard the connection with customers resulting from negotiations as forming part of their business goodwill which required protection. 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.

customers with a view to forming a relationship.<sup>51</sup> There is much to support Lord Bracadale's analysis in identifying the scope of the employer's business and using this as a basis for supporting the view that there was a valid interest of the employer demanding protection.

On the basis of the authoritative Court of Appeal case of *Gledhow*, one might submit that the court perhaps went too far in *Axiom*. The strand of such argument would be that there is a danger that in future, *Axiom* could be treated as having established a principle that it is legitimate for an employer to be protected from a former employee soliciting customers with whom they had negotiated prior to the termination of their employment. This is not what *Hart* and the more authoritative Court of Appeal case of *Gledhow* state.

However, it is submitted that this is not the appropriate line to take. Lord Bracadale ought to be congratulated for injecting some common sense into the situation. After all, it is illogical to have a law which states that a non-solicitation covenant restricting employees from soliciting customers with whom they have had no contact is enforceable, while at the same time stating that there is no universal principle that an employee can be prohibited from canvassing or soliciting prospective customers with whom he/she had made contact and/or commenced discussions. Although *Gledhow* is a Court of Appeal case, it is argued that it is not as authoritative as *Gilford* and *Plowman*. For this reason, the opinion of Diplock LJ should be doubted and *Axiom*, *Gilford* and *Plowman* preferred.

(vi) A comparison of restraints on the solicitation of customers and employees

It is fascinating to compare the treatment of the non-solicitation of customers restriction in *Axiom* with that of the non-solicitation of employee covenants in the cases of *Dawnay Day* and *TSC Europe (UK) Ltd v Massey*.<sup>52</sup> If *Axiom* had been dealing with a covenant restricting the solicitation of employees instead of customers, it would undoubtedly have been too wide. The absence of any categorisation of the class of persons subject to the restriction would have been fatal. *Axiom* serves to reinforce the fact that restrictions on the poaching or solicitation of employees will be treated more strictly than those of the customer variety. This reflects (i) Evans LJ's somewhat reluctant attitude towards enforcement of post-termination restrictions on the solicitation of employees in *Dawnay Day* and (ii) the fact that this is a class of restraint which has only recently been subject to judicial approval.

Such judicial approval was provided for the first time by the Court of Appeal in *Ingham v ABC Contract Services Ltd*.<sup>53</sup> Leggatt LJ and Russell LJ held that an employer had a legitimate interest in protecting its bank of employees from being canvassed, solicited, induced or enticed away by a former employee by the imposition of a non-poaching restriction. This was predicated on the basis that the employer was entitled to protect its

<sup>51</sup> In *Dawnay Day* it was held that an employer could legitimately protect post-termination customers and business where matters were in an advanced state of preparation for such prospective customers or new business when the employee's contract was terminated, i.e. future customers.

<sup>52</sup> [1999] IRLR 22 (ChD).

<sup>53</sup> 12 November 1993 (unreported).

legitimate interests in maintaining a stable, trained workforce in a highly competitive business.<sup>54</sup> *Ingham* was decided by the Court of Appeal on 12 November 1993. However, what is noteworthy is the fact that *Ingham* failed to take into account the opinion of Dillon LJ in the Court of Appeal in *Hanover Insurance Brokers Ltd v Schapiro*.<sup>55</sup> In *Hanover*, Dillon LJ, with whom Nolan LJ agreed clearly stated that:

Although the goodwill of a business may depend on its staff, that does not make the staff an asset of the company like apples or pears or other stock in trade. Nor does it entitle an employer to impose a covenant against competition on a former employee. A restriction which seeks to prohibit a defendant from poaching any employee, irrespective of expertise or juniority and including those who entered employment after the defendant left, is invalid as a covenant against competition in the same way as is a covenant not to canvass persons who became customers only after the defendant ceased to be employed.<sup>56</sup>

*Ingham* attempted to lay down a clear principle in ignorance of *Hanover*. *Hanover* was subsequently used by Evans LJ in *Dawnay Day* to permit the court to disapply the principle based on well-reasoned exceptions.

*Dawnay Day* considered both *Ingham* and *Hanover*. Evans LJ in the Court of Appeal held that the *Ingham* principle was valid. However, he went on to say that such a proposition is not one of universal application. Much will depend on the facts of each case. Evans LJ was essentially saying that the court could disapply the principle where an exception is justified based on the super-principle that the covenant exceeds what is reasonably necessary to protect the employer's legitimate business interests. For example, it is likely that a non-poaching covenant which fails to identify a certain class of employees according, to skill, seniority, expertise or time will be held to be too wide. In addition, a clause which purports to restrain a former employee from soliciting a future employee of the employer is also likely to be unenforceable. Much will depend on the nature of the wording in the covenant.

Not long after the decision of the Court of Appeal came *TSC Europe* where it was held by Judge Peter Whiteman QC that on the facts before him, the employer had a right to protect its legitimate interests in maintaining a stable, trained workforce.<sup>57</sup> Having established this, he went on to hold that a non-poaching covenant which applied to all employees was wider than reasonably necessary to protect the employer's legitimate interests. This was due to the fact that the clause caught all employees, past, present and future and made no distinction between the seniority of the employees who fell within the ambit of the clause. On the basis of the fact that the clause made no attempt to restrict the class of employees, the clause was unenforceable.<sup>58</sup>

<sup>54</sup> In *Ingham*, the employer was an employment agency.

<sup>55</sup> [1994] IRLR 82. This case was decided on 20 August 1993.

<sup>56</sup> [1994] IRLR 82, 86 per Dillon LJ.

<sup>57</sup> Peter Whiteman QC was well aware of the position of Evans LJ in *Dawnay Day* regarding the uniform application of this principle at 30, paras 58–62. See also *SBJ Stephenson Ltd v Keith Anthony Mandy* [2000] IRLR 234 which is also authority for proposition that an employer has a legitimate business interest in proscribing their employees from being poached.

<sup>58</sup> [1999] IRLR 22, 29, paras 50–9. See also the opinion of Robert Walker J in the High Court decision of *Dawnay Day* [1997] IRLR 286, 296. This point was not in issue in the Court of Appeal decision.

#### 4. CONCLUSION

*Axiom* reiterates how difficult it is to draft a non-competition covenant in appropriate terms. Surprisingly, *Axiom* suggests that where a clause prohibiting (i) the disclosure of non-confidential information and (ii) the solicitation of the employer's customers is contained within an employee's contract of employment, this will render any supplementary further non-competition covenant too wide. In addition, the absence of a temporal restriction and concise description of the market the employer was seeking to protect in a non-competition covenant will be fatal.

*Axiom* also demonstrates the difference between the treatment of non-competition covenants and those proscribing the employee from soliciting customers of the employer. The courts adopt a more relaxed attitude to covenants of the latter type, especially those restricting an employee from canvassing or dealing with prospective customers (i) with whom they initiated contact or negotiations and (ii) subject to the cases of *Austin Knight* and *Gledhow*, with whom they had had no contact or dealings. As ever, the enforceability of such covenants will depend on the nature of the employer's legitimate business interest and whether the covenant is no more than adequate to protect such interest.

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## Data Protection and Subject Access Requests

### 1. INTRODUCTION

The legislative framework for data protection has its roots in the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981).<sup>1</sup> The Convention, which was concerned only with computerised data, was given effect in the UK through the Data Protection Act 1984. In 1990, the European Commission proposed a directive dealing with data protection within the EU. This proposal resulted in the Data Protection Directive<sup>2</sup> (the 'Directive') which increased the scope of data protection legislation considerably. In particular, it brought certain manual files within the scope of data protection legislation for the first time. In the UK, the Directive was enacted by the Data Protection Act 1998 (the 'DPA'). Technology has developed considerably since the Convention was agreed in 1981 and, even if one takes the period since 1995, there have been major developments. In particular, the growth of the internet, the use of word processing and email and the convergence of digital technologies have

<sup>1</sup> 1981 Cm 8341.

<sup>2</sup> Council Directive on the protection of individuals with regard to the processing of personal data and the free movement of such data (95/46/EC).