

Case Update



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Non-competes – when are they enforceable?

The employee in this case worked for a global executive search firm. She was recruited initially as a consultant but was later promoted to partner. She subsequently resigned to join a competitor in the US. Her employment contract contained a post-termination non- compete, which provided that she should not "engage or be concerned or interested in" any competing business for six months after the end of her employment. The employer sought an injunction to enforce the non-compete but the employee argued it was too wide to be enforceable.

The Court of Appeal ruled that the non-compete was too wide, as the words "interested in" prevented even a minor shareholding in a competitor for investment purposes. The Court of Appeal initially said these words could not be removed from the non-compete to narrow it. However, on appeal, the Supreme Court has now ruled that the offending words could be removed to make the non-compete enforceable.

This case is helpful for employers as it suggests it will be easier than previously thought for courts to enforce post-termination restrictive covenants by taking out words which make the covenant too broad. However, it also highlights the need for careful drafting. Courts will only enforce such restrictions if they go no further than is reasonably necessary to protect the employer's legitimate interests (e.g. confidential information or client connections). Courts will not rewrite an unreasonably wide covenant to make it enforceable – they will simply strike out an unenforceable covenant in its entirety. Courts can remove words from a covenant to make it enforceable but they will only do so if: (i) the words can be removed without having to add to or modify the wording of what remains; and (ii) the removal of the words does not create a major change in the overall effect of the restrictive covenants. Employers should therefore ensure that restrictive covenants are drafted as tightly as possible without having to rely on any words being severed by the courts.

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