

# Protecting Your Business

- Managing Key Personnel



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## Employment Matters

Peter Byrne  
Head of Employment Law



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### Objectives

- Ensure that you are getting the best from your employee whilst they are working for you
- Managing the employee's departure
- Preventing potential damage that can be caused by the employee
- Provide a means to take action if necessary



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## During Employment

- Whole Employment Clauses
  - Prevents working for two or more masters with potential divided loyalties, if any at all
  - If an employee is contemplating leaving, prevents them setting up a new business when you are paying them to work for you
  - Prevents them acquiring an interest in a competing business



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## Confidentiality

- Acknowledge that the employee will be aware of confidential information during the course of employment
- Identify what constitutes confidential information
  - Customers
  - Suppliers
  - Pricing Strategy
  - Operating profit levels



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## Confidentiality

- Restrict the use of this information other than in the course of employment
- Prevent the disclosure of any such information for the use of a future employer
- Prevent the public disclosure of such information
- Provide for the return of all confidential documents when requested by the employer



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## Pay in Lieu of Notice

- If you want to “pay in lieu” there must be a contract term giving you the power to do so
- The power should always be discretionary in favour of the Employer



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## Pay in Lieu of Notice

- Can provide for the payment of “pay in lieu” by instalments through the notice period
- Be aware of potential tax implications if agreeing to provide an exit package by way of a compromise agreement



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## Garden Leave

- Has to be an express clause providing that the employee does not have to be provided with work during his notice period
- Can also provide that the employee is required to work on a designated “special project”



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## Garden Leave

- Benefit of damage limitation
  - Prevents an employee competing while on notice
  - Enables you to get other staff to deal with client base
- If clause does not exist, and you place employee on garden leave, likely to be breach of contract



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## Post Termination

- Ordinarily, no restrictions on employee once left your employment unless contained in the contract
- Clauses must protect a legitimate trade interest
- Should be no more protective than what is regarded as reasonably necessary



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## Post Termination

- Status of Employee is crucial in every case
  - Must look at realistic harm that the employee can cause
  - Senior executive can do more harm than a trainee
  - Level of protection that would be permitted would differ



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## Post Termination

- Types of restrictions permissible
  - Non competition
  - Poaching customers
  - Attempting to interrupt line of supply
  - Poaching staff
  - Geographical restrictions but only where justified



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## Post Termination

- Must be certain
  - Employee must be able to clearly identify what he or she can and, more importantly, cannot do.
  - Must not allow for breach without employees knowledge
  - Must be limited in time to a reasonable period



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## Post Termination

- If geographical restriction, this should be necessary and for no larger area than is reasonable
  - World wide exclusion never upheld
  - Country wide would probably be too much



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## Post Termination

- Cannot prevent the departing employee from working at all
- Always include clear definitions
- Can include prospective clients or customers



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## Post Termination

- Should always be defined as a category of people with whom the employee has had personal dealings in the period leading up to his termination
- Always make Post Termination Restrictions joint and severable



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## Post Termination

- A Breach of Contract by the employer may prevent the enforceability of any post termination restrictions
  - Paying in lieu when there is no clause to that effect in the contract
  - Placing an employee on Garden Leave when no contract term exists to that effect
  - Claims of Constructive Unfair Dismissal, if upheld, will render post termination restrictions unenforceable



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## Shareholders & Directors

Business Law Department



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## Dismissing Key Personnel

- Employees as Shareholders
- Employees as Directors
- Employees as both



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## Employees as Shareholders

- Dealing with one could leave the other
- Directorship may require shareholding
- Rights of a Shareholder
- Articles of Association
  - Forfeiture of shares
  - Pre-emption
  - Unfair prejudice
  - Derivative Actions



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## Employees as Shareholders

- Shareholders Agreement
  - Confidential
  - Voluntary transfers
  - Involuntary/Deemed transfers
  - Trigger Events
  - Good Leavers and Bad Leavers
  - Restrictive Covenants



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## Employees as Shareholders

- Buy Out or Buy-Back?
  - Buy Out – other shareholders buy
  - Buy-Back – company buys its own shares
  - Taxation?
- Employees as Potential Shareholders?
  - EMI schemes
  - Other share schemes



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## Employees as Directors

- Office or Employment?
  - Directorship is “office”
  - Directors may also be employees
  - End one and not the other?
  - Depends on contractual terms
  - Constructive Dismissal links the two?



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## Employees as Directors

- Removal of Directors
  - Resignation
    - Voluntary or contractually compelled
  - Retirement by Rotation
    - Not in new companies
  - Vacation of Office
  - Disqualification
  - Companies Act procedure



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## Employees as Directors

- Removal of Directors – the Companies Act Procedure
  - Sections 168 - 169
  - Notice Periods
  - Right to Make a Statement (if reasonable)
  - Speaking at the GM
  - Necessary majority
  - Compensation or Damages?



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## Employees as Directors

- Payments for loss of office
  - New rules from 1 October 2007
  - Wider definitions
  - Connected persons covered
  - Covers non-cash and more
  - Shareholder approval needed
  - If not Directors personally liable
  - Contractual payments, compromises and permitted



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# What happens when things go wrong?

Robin Stephens  
Head of Commercial Litigation



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# Who am I?



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# I stop people doing things



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### The Scenario

- The phone rings
- Your man has left
- He's moved in across the road
- His new business name is the same and has the same corporate colours
- He's mailing all your customers
- Customers are being confused



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### The Evidence

- Show me the documents!
- Can you prove your rights are being infringed?



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### What do we tell the court about

- Breaches of employment contract
- Contractual notice period
- Misuse of confidential information
- Breaches of Intellectual Property rights
- Passing off
- Breach of duties as a director/employee



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## The Team

- The solicitor
- The barrister
- The accountant
- The expert
- The witness
- You



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## The Solicitor

- Gets documents in order
- Sends court forms in
- Ensures court fees are paid
- Interviews witnesses
- Briefs accountant
- Engages barrister
- Makes sure paperwork is served
- Corresponds with defendants solicitor
  - Writes nasty letters



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## The Barrister

- Presents the case at court
- Reviews the evidence
- Arranges the time at court
- Drafts statement of case
- Make sure you get what you came for



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## The Accountant

- Proves any fraud
- Verifies your financial position
- Verifies your losses



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## The Expert

- Proves what has been happening by computer records



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## The Witnesses

- Employees provide evidence of what our man was doing
- Customers to say that they were confused



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You!



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What are we after?

An injunction



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Types of Injunction (1)

- Without notice
- On notice



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## Types of Injunction (2)

- Interim
- Final



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## Types of Injunction (3)

- Freezing
- Search and Seize
- Mandatory or prohibitory



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## Court Requirements

- Full and frank disclosure
- Return day
- Undertaking in damages (with evidence)
- Claim form and witness evidence to be filed



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### What factors will the Court look at then?

- Did you act promptly
- Balance of convenience
- Is there a serious issue to be tried



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### What happens then?

- The injunction is served
- The matter goes back on the return day
- The court either continues the injunction, the defendant offers undertakings, or the injunction is discharged
- The matter proceeds to a final hearing (or is settled)



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