

# When Key Employees leave

<b>INTRODUCTION</b>	<b>1</b>
The importance of this seminar	1
<b>PART I - LEGAL PRINCIPLES</b>	<b>3</b>
1. Rights of employers	3
<i>Information that employers can protect</i>	3
<i>Trade secrets</i>	3
<i>Other confidential information</i>	3
<i>General information</i>	3
<i>Restraint of trade clauses</i>	4
<i>A reasonable restraint of trade clause</i>	4
<i>An unreasonable restraint of trade</i>	9
<i>Damages for breach of a restraint of trade</i>	10
2. Duties of employees	11
<i>Duties of an employee who is about to depart</i>	11
<i>Duty of fidelity</i>	11
<i>Duty of confidentiality</i>	14
<i>Implied terms and equitable obligations for confidential information</i>	16
<i>Implied terms</i>	16
<i>Equitable obligations</i>	17
<i>Fiduciary obligations</i>	17
<i>Introduction</i>	17
<i>Cases</i>	18
<i>Tort liability</i>	21
<i>Tort of inducement of breach of contract</i>	21
<i>Conspiracy</i>	23
3. Third party liability	24
<b>PART II - THE EMPLOYMENT CONTRACT: ANTICIPATING PROBLEMS</b>	<b>26</b>
1. Express covenants in restraint of trade	26
<i>The primary principles</i>	26
<i>The need for consideration</i>	26
<i>Evidence of consideration</i>	27
<i>Deferred consideration</i>	28
<i>Restraint introduced during employment</i>	28
<i>Capital nature of monetary consideration</i>	28
<i>Restraint must fit particular circumstances</i>	28
2. Notice of termination	29
<i>Relationship of resignation notice to restraint period</i>	29
<i>Using the resignation notice period as an effective restraint</i>	30
3. Garden leave	32

4. Restraint on engagement or solicitation of other employees	34
5. Confidentiality clauses	35
<b>PART III - REMEDIES</b>	<b>36</b>
1. Enforcement of restraints on employment	36
<i>Proceedings to enforce a restraint covenant in an employment contract</i>	36
<i>Forum</i>	36
<i>Urgency</i>	37
<i>Interim injunction</i>	38
<i>Proceedings against the new employer</i>	38
<i>Procedure up to hearing</i>	39
<i>Undertakings by the defendant</i>	40
<i>Court encourages employees to apply for relief from covenant</i>	41
<i>Difficulties with proactive approach – policy; jurisdiction; cost</i>	42
<i>Public policy</i>	42
<i>Court's jurisdiction questionable</i>	42
<i>Cost</i>	43
2. Enforcement of confidentiality obligations	43
<i>The cause of action</i>	43
<i>Equitable interlocutory remedies</i>	43
<i>Interim injunctions</i>	43
<i>Anton Piller orders</i>	44
<i>Substantive remedies</i>	45
<i>Permanent injunction</i>	45
<i>Discovery or destruction</i>	45
<i>Monetary relief</i>	46
<i>Deciding on a remedy</i>	46
<b>Appendix 1 - Sample contract clauses</b>	<b>47</b>
a. Preamble for inclusion in longer restraint provision	47
b. Standard restraint clause	47
c. Clause for restraint of trade in consideration of capital payment	48
d. Clause for restraint of trade - payment of consideration deferred	49
e. Confidentiality - short clause	49
f. Confidentiality - full clause	49
g. Clause restricting engagement or solicitation of other employees	51
h. Resignation - garden leave/other duties option	52
<b>Appendix 2 - Precedent pleadings for injunction restraining threatened or alleged breach of restraint of trade covenant</b>	<b>53</b>
a. Statement of claim - threatened breach	54
<i>General allegations</i>	55
b. Interlocutory application for interim injunction - threatened breach	58
c. Statement of claim - alleged breach has occurred	61
<i>General allegations</i>	62

d. Interlocutory application for interim injunction - alleged breach has occurred	65
e. Notice of opposition - alleged breach has occurred	70
f. Notice of opposition - threatened breach	68
g. Undertaking of defendant as to confidentiality	72