INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

How to protect the employer's interests after the termination of employment contracts – aspects of labour law in general and sports law in particular

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IBLC Sports Law Subcommission

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INTRODUCTION

When signing employment contracts, employers and employees usually do not think about the problems that may arise at the end of such cooperations. However, it is our task as their advising lawyers to protect our client's interests after the termination of such contracts. Therefore we would like to draw your attention on means to protect these interests of employers in general, such as restrictive covenants and garden leave – before we will have a look into the world of sports and see how it deals with respective problems.

1. Employment Law

What are restrictive covenants?

Information is key for the success of every business.

Thus, restricting the use of this information by employees after their employment has ended has proved to be vital to protect the business and/or customer contacts. A former employee having insider-knowledge of the prices, technology, market strategy, customer- or client-base is often an attractive asset to a competitor seeking to enter the market and/or enhancing its existing business.

In order to provide for a certain level of protection for employers they may want to protect the use of the information vital to their business by post termination restrictive covenants.

A contractually agreed restrictive covenant is typically designed to prohibit an employee from competing with his former employer for a certain period after the employee has left the business. Furthermore, it aims to prevent a former employee from soliciting or dealing with customers and or other employees of the former employer by using knowledge of those customers and the business gained during the prior employment.

Standard types of restrictive covenants, which are often used by employers, are:

- non-competition covenant,
- non-solicitation covenant,
- non-dealing covenant
- and non-poaching covenant.

Garden leave

Another opportunity to increase the impact of a post termination restrictive covenant – if lawfully agreed upon - is to agree on a garden leave clause in the initial employment contract. Based on such clause an employer can require an employee to spend all or part of the notice period at home whilst the employee continues receiving the regular remuneration.

Thus, a garden leave clause prevents the employee from taking up other employment with a competitor whilst still being employed with the employer. However, it also enables the employee's successor to establish himself and develop relationships with the employee's (former) customers and contacts. A further advantage of such a clause is that whilst on garden leave, the employee is no longer privy to the business' confidential information. Additionally, it has to be noted that all information such employees do have will become out of date until the garden leave ends.

Finally, at the end of the garden leave period the restrictions resulting from the post termination restrictive covenant may step in and further deter the employee from competing with the business of the former employer.

However, from the employee's perspective such garden leave provision contained in the employment contract, if lawfully agreed upon, may prevent the employee from further practicing (and training) his specific occupation. This may be considered a huge disadvantage when it comes to profession, where actively pursuing your occupation is key (e.g. for professional athletes, surgeons, etc.).

2. The Impact of Employment Law on the World of Sports

In some kinds of sports, athletes and coaches are employed by clubs or associations, so the rules of employment law apply. However, the world of sports has always the tendency to set their own rules of law, claiming that the regular laws are not suitable for the relationships in sports. Therefore we are interested in learning if the above mentioned means of protection the employer's interests at the end of an employment contract are found in sports employment contracts and/or if there are any special provisions in athlete's employment contracts in your jurisdiction.

Transfer Fees

Once upon a time, (football) sports clubs and associations have invented the transfer fee system: If a player wanted to switch the club (the employer) after the termination of his contract, the new club had to pay a transfer fee to the former club. The reason

for this was mainly that the former club wanted to be compensated for the education and the improvements of the player. This was similar to the situation of "normal" former employers who do not want their competitors to benefit from the know-how that a "normal" employee gathered during his employment.

This system had to be abolished in 1995 after the judgment of the European Court of Justice in the "Bosman" case, C-415/93. It was decided that the obligation for the new club to pay a transfer fee after the termination of a player's contract infringe the freedom of movement for workers.

Since then, transfer fees may only be claimed in the European Union, if a player wants to switch the club during the term of validity of his employment contract. Therefore the duration of the contract has become an important aspect of the player's contracts.

Now, how are these issues dealt with in your jurisdiction?

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BIBLIOGRAPHY

If you add a bibliography at the end of your report, please use the style below.

- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
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1. Employment Law

1.1. Restrictive covenants

1.1.1 Is the principle of A POST TERMINATION RESTRICTIVE COVENANT known in your legal system? If yes, how can this principle be defined? Where does the principle have its origin? (Civil Code, case law, etc)

In many UK industries, post-termination restrictions are used widely in senior employee contracts (and some consultancy contracts).

As identified in the general reporter's introduction, post-termination restrictive covenants are express contractual terms which limit an employee's activities after his/her employment has ended. They are intended to mitigate the damage caused by ex-employees using their employer's confidential information, trade secrets and the connections with employees/clients and suppliers to compete after they leave.

The law governing post-termination restrictive covenants in the UK is founded in our common law system (case law). However, an employer's ability to enforce such restrictions in the UK is heavily influenced by public policy and, in particular, the common law doctrine of "restraint of trade". The UK courts take the view that it is in the public interest that employees can move jobs and make use of their knowhow/skills. Covenants that restrain this movement will generally be void and unenforceable. The UK courts will only enforce post-termination restrictive covenants to the extent that they go no further than is reasonable and necessary to protect an employer's legitimate business interests. The legitimate interests commonly recognised by our courts are:

- the protection of the employer's trade connections (for example, with customers/clients/suppliers);
- maintaining the stability of the employer's workforce; or
- the protection of the employer's trade secrets/confidential information.

These are all seen by the UK courts as the employer's "property". A desire to restrict competition alone is not considered a legitimate business interest in the UK.

1.1.2 At what stage in the employment relationship between employee and employer are post termination restrictive covenants agreed upon in your jurisdiction? Is there any relevant case law?

Employers and employees can enter into post-termination restrictive covenants at any point during the employment relationship. They are commonly agreed at the start of the employment relationship, on a promotion or when an employee leaves

the business under a settlement agreement. They can also be introduced in the body of employee benefit arrangements such as option agreements.

The timing of when the covenants are agreed can have an impact on enforceability. In the UK the court will apply a 3-stage process for assessing the enforceability of covenants:

- what does the covenant means when properly construed;
- whether the employer has a legitimate interest which needs protecting;
- whether the covenant is no wider than is reasonably necessary for the protection of those legitimate interests - *TFS Derivatives v Morgan [2005]*.

The third stage of the test is assessed at the date the covenant was entered into, not the date when the dispute arises - *WRN Ltd v Ayris [2008]*. This has important implications for covenants agreed at the start of the employment relationship, particularly if the employee's role has subsequently changed. In *PAT Systems v Nelly [2012]* a covenant was held to be too wide for the junior position the employee held when he entered the contract. The fact that the employee was later promoted to a more senior role made no difference to enforceability. If the employer had intended the covenant to apply to the more senior role, it should have restated the covenant unequivocally.

If covenants are repeated in a settlement agreement on termination, their reasonableness will be judged at that time they are repeated. As public policy is in favour of settling disputes, our courts are generally less willing to say that covenants in a settlement agreement are unenforceable. Employees will also have taken independent legal advice on the terms of a settlement agreement. So, a court may be more inclined to take the view that there is equality of bargaining power.

1.1.3 Once the employment contract is signed, is there a general obligation of non-compete also in the absence of an express agreement after the termination of the employment? Are there specific statutory provisions or precedents referring to this? Could whistle blowing be regarded as a part of the employee's post termination restrictive covenant?

There is no general obligation not to compete during the employment relationship or after it terminates. However, employees are bound by the implied duty of good faith and fidelity (*Faccenda Chicken Limited v Fowler [1986]*) which provides some protection against competition at least during employment. The duty ends with the termination of the employment relationship so express restrictive covenants are generally required to restrict competition after termination.

The duty of fidelity is a duty to provide honest, loyal and faithful service whilst the employment contract is in force. Put simply, the employee must not put himself in a position where his duty to his employer and his own interests conflict. In certain circumstances, the duty will therefore oblige employees, during their employment, not to: compete; take steps to compete after employment; solicit staff or clients; or

use/disclose the employer's trade secrets or confidential information. However the scope of the duty is not fixed. It depends on various factors including the nature of the role, the seniority of the employee, the industry and the express terms of the contract.

The following principles regarding competition during employment can however be taken from the authorities. During employment:

- an employee may not compete with the employer during working hours (which is likely to be a breach of both the express terms of the employee's contract regarding working hours as well as the duty of fidelity);
- an employee may not compete with the employer during their spare time if the activities will inflict substantial harm on the employer.

  The case law suggests that this aspect of the duty applies to different classes of employee in different ways. At one end of the scale are the employees for whom the type of work makes competition inappropriate – i.e. skilled/experienced workers who hold confidential information. In *Hivac v Park Royal Scientific Instruments Ltd [1946],* five skilled manual workers breached the duty of fidelity when they worked in their spare time for their employer's competitor. At the other end of the scale are manual workers who the courts have held are free to compete in their spare time. In *Nova Plastics v Froggatt [1982]* - the court held that an odd job man was allowed to work for a competitor outside working hours.
- employees may not, in certain circumstances, even take steps to compete with their employer after termination. The authorities draw a line between preparatory steps during employment (which are allowed) and active competition during employment (which is a breach of the duty of fidelity). It is often a difficult distinction to make out. Buying an off the shelf company, arranging premises and finances will not be in breach of the duty of fidelity (*Balston Ltd v Headline Filters Ltd [1987]).* Neither would an indication of an intention to compete provided that competition does not take actually place – see *Laughton and Hawley v Bapp Industrial Supplies Ltd [1986].*
- employees may not solicit other staff to join a competing business. However, the employee can take preparatory steps to do so. In *Tithebarn Ltd v Hubbard EAT 532/89* Mr Hubbard told a colleague of his intention to establish a competing business and invited him to join the new business. The court held this was not in breach of the duty of fidelity- it was merely a preparatory step.

  By contrast, in *Marshall v Industrial Systems & Control Ltd [1992]* Marshall drew up a business plan for a competing business and approached another employee to join him. This was a breach of the duty of fidelity - there was a concrete plan to compete in place and to poach an existing client.
- employees must not use confidential information or trade secrets for their own benefit. However, after employment, the duty of fidelity only prevents use, disclosure etc. of information that amounts to a trade secret.

That said, the duty of fidelity can be used to prevent an ex-employee using confidential information that was acquired during employment but used after employment to compete with the employer. This is known as the springboard doctrine. Ex-employees are not allowed to use confidential information (such as customer lists) at the expense of their former employer to gain a competitive advantage which would include competing with their ex-employer or soliciting customers etc.

An employee's right to blow the whistle in the UK is, in a sense, a carve-out from any post-termination confidentiality obligation implied or express. Provided that any disclosure made by the employee meets the test of a protected disclosure set out in the Employment Rights Act 1996 ("ERA"), any express contractual term which tries to waive the employee's right to make such disclosures ("gagging clauses") will be unenforceable Section 43J(1) of the ERA. In the UK, the balance of the public interest falls in favour of the employee when it comes to their right to "blow the whistle", as many high profile NHS cases have highlighted.

Whilst the duty of fidelity provides some protection from competition during employment, the scope of the duty is often uncertain. Employers in the UK normally opt for the certainty of express contractual clauses clarifying the employee's obligation not to compete/use confidential information i.e. restrictive covenants that apply during and after employment and express confidentiality obligations.

In addition to any express or implied contractual duties, certain employees owe fiduciary duties. These implied duties arise in equity (rather than common law) and impose more onerous obligations not to compete during employment. A fiduciary is someone that agrees to act for or on behalf of another person in circumstances which give rise to a relationship of trust and confidence, for example, a director.

The duties of a fiduciary include: undivided loyalty, to avoid a conflict of interest, not to make a secret profit and confidentiality. A director's fiduciary duties have been codified in the Companies Act 2006. Whereas the duty of fidelity requires the employee not to allow his interests to conflict with his duties, a fiduciary must act in the best interests of his employer. The doctrine of restraint of trade will not limit the scope of a fiduciary duty.

By way of example, in *G Attwood Holdings Ltd v Woodward and Ors 2009*, Mr Atwood was the Operations director. He resigned with a colleague to set up a rival business. The court said that he had breached his fiduciary duty by failing to tell the Company of the threat of competition from himself, by taking preparatory steps which included approaching customers, retaining documents which belonged to the company including confidential information.

1.1.4 Which obligations regarding post termination restrictive covenants exist on the employer's side in the absence of an express agreement? Are there specific statutory provisions or precedents governing employer's duties after the termination of the employment in your jurisdiction?

In the UK, employers' obligations with regard to post termination obligations prior to termination tend to be limited to ensuring that the covenants are incorporated into the employee's contract and are binding on the employee. In addition, to enforce post-termination covenants, the employer must not be in prior repudiatory (fundamental) breach of contract. If they are, the covenants (and any other post-termination obligations) are unenforceable.

There are no specific obligations on the employer's side regarding post-termination restrictive covenants which exist after employment without express agreement. However, in terms of general duties (unrelated to post-termination restrictive covenants) the employer owes a duty of care to its employees when it gives a reference and general obligations (arising out of Equality Act 2010 and Employment Rights Act 2006) not to discriminate against ex-employees on the grounds of certain protected characteristics (sex, race, disability etc) or to treat an ex-employee less favourably for having blown the whistle.

1.1.5 What kind of different restrictive covenants that may be available and can be agreed between employer and employee in your jurisdiction? (see the examples in the introduction). Please describe how these can be defined and how they work in your jurisdiction.

Restrictive covenants in the UK broadly divide into direct (standard) covenants and indirect (atypical) covenants.

The former are express covenants to protect the ex-employer's legitimate interests. The latter are less direct means of protecting an employer's interests and preventing competition though penalizing employees financially if they decide to leave/compete with their employer.

Atypical covenants include deferred remuneration schemes, clauses requiring repayment of training costs and no show clauses which penalize an employee who fails to join a new employer. Atypical covenants may, depending on the facts, be restraints of trade and if so, need to be justified as reasonable if they are to be relied upon. Given the remit of this questionnaire we have focused on express restrictive covenants.

Express restrictive covenants are the most common means of restraining post-termination activities in the UK. All four types of restrictive covenant identified in the introduction – non-competition, non-solicitation, non-dealing and non-poaching – are used fairly widely within many UK industries.

Non-solicitation of customers

Non-solicitation covenants prevent the ex-employee from actively approaching customers in competition with their former employer. They protect either the employer's trade connection with customers or its confidential information.

In the UK, solicitation involves an element of persuasion with a view to gaining business on the part of the ex-employee (*Towry EJ Ltd v Barry William Prosser Bennett & Others [2012]).* For example, an employee telling a customer he is leaving to join a new named firm is unlikely to amount to solicitation. However, if the employee went

on to tell the client to contact the new company, this would cross the line into solicitation.

Generally non-solicitation clauses are viewed more favourably by the UK courts than non-competition clauses or non-dealing clauses as the extent of the restriction is narrower .

Non-dealing with customers

Non-dealing clauses in the UK prevent ex-employees from passively dealing with a customer even if the customer approaches them first. Again, they protect either the employer's trade connections or its confidential information. Because the restriction is broader, they are more difficult to enforce in the UK. Non-dealing covenants may be justified where an employee has dealt directly with a customer over a period of time and where policing a non-solicitation or confidentiality clause may be difficult *Croesus Financial Service Ltd v Bradshaw & Another [2013]*.

Non-compete

Non-compete covenants are the hardest to enforce in the UK. They can be used to protect confidential information or trade connections.

They prevent the ex-employee from being engaged or running a competing business, within a certain area or from being employed or engaged by named competitors. Non-compete covenants may be enforceable in the UK where, by the nature of the business, it would be difficult to prove a breach of confidentiality, non-solicitation or non-dealing covenants. In that situation the only way to protect trade connections or confidential information may be to prevent the ex-employee joining a rival for a reasonable period of time.

Covenants to protect supplier connections

UK courts may also uphold covenants to prevent the solicitation of or interference with the former employer's suppliers. It may be more difficult for employers to identify a legitimate interest where suppliers are concerned. However, it may be possible if there is an exclusive or limited supply relationship or where the identity of the suppliers or the terms on which they supply are confidential.

Covenants to protect workforce stability

The UK courts also recognise that an employer's investment in recruiting and training its workforce can make the protection of the stability of the workforce a legitimate interest. Covenants preventing solicitation of colleagues are fairly common in the UK.

It can be difficult sometimes to define/prove solicitation of staff. If an ex-employee tells his colleagues that he is taking a new job elsewhere and is subsequently followed, that is unlikely to amount to solicitation. However, if he takes steps to encourage his colleagues to move with him that is likely to be a breach.

Because of the difficulty proving solicitation of staff, employers often include covenants preventing even the employment of former colleagues or being employed in the same business as their former colleagues. These are more difficult to enforce

as they prevent the free movement of employees. See paragraph 1.1.7 below. However, they are often included for deterrent purposes.

Confidentiality

As mentioned at 1.1.3, employees have a general duty of confidentiality (as a facet of the duty of fidelity) during employment founded in common law. During employment this duty applies to all confidential information. After termination, it applies to information that is strictly confidential (equivalent to a trade secret) only. UK employers therefore use express confidentiality terms both to extend the protection for confidential information after the employment relationship has terminated and to make clear the categories of information that it considers are confidential. Employers who agree exit terms with departing employees often extend the obligation of confidentiality to prevent any disclosure relating to the circumstances leading to the employee's departure – i.e. a non-gagging clause. As explained at paragraph 1.1.3 above, theses clauses cannot be used to prevent an employee blowing the whistle.

1.1.6 What are the conditions for a valid post termination restrictive covenant in your jurisdiction? (e.g. prerequisites like minimum age, minimum salary, minimum employment period; way of termination of employment, etc.). Please describe the conditions applicable and how these work in your jurisdiction.

Like any contract term, to be legally binding restrictive covenants must be incorporated into the employment contract. There must be offer, acceptance, consideration and intention to create legal relations. Whilst consideration is fairly easy to identify at the start of the employment relationship, it can be more difficult to identify if covenants are introduced during employment. This has led to a further debate in the UK courts about whether consideration for covenants needs to be "adequate". Where covenants are introduced during an employment relationship, the need to identify adequate consideration for the restrictions is likely to be more important.

Often you find that restrictive covenants are not enforceable because they have not been incorporated into the contract. For example they are included in an employee handbook or a separate document and have not been signed or incorporated into the contract by reference.

As mentioned above, an employer's prior breach of contract will also render the covenants unenforceable *General Billposting v Atkinson [1909]*. In the UK employers attempt to get round this rule by providing that their covenants will apply on termination "howsoever caused" and/or termination "whether lawful or not". To date these clauses have not been upheld by the courts.

An employee does not have to receive a minimum salary or have worked for a minimum period to enforce a covenant in the UK. However, any additional consideration received for a restrictive covenant, is a legitimate consideration to take into account in determining reasonableness of a covenant. (See comments above

regarding consideration for covenants introduced during the employment relationship).

The test for validity is outlined at 1.1.3 above and includes 3 steps:

- what the covenant means when properly construed;
- whether the employer has a legitimate interest which needs protecting;
- whether the covenant is no wider than is reasonably necessary for the protection of those legitimate interests - *TFS Derivatives v Morgan [2005]*.

The potential legitimate interests that the employer may be seeking to protect are listed at 1.1.1 above although this list is not exhaustive.

In addition, the following principles are relevant to the construction of the covenant:

- Covenants should usually be interpreted using common sense. If the covenant could have more than one meaning, one of which would be unenforceable, one of which would not, generally the court will take the enforceable construction.
- The courts cannot re-write a covenant to make what would be an unenforceable covenant enforceable.
- The court can sever or "blue pencil" unenforceable covenants or parts of covenants provided that:
    - the unenforceable provision must be capable of being removed without having to add to or modify the wording of what remains;
    - the remaining terms must continue to be supported by adequate consideration; and
    - the removal of the unenforceable provision must not so change the character of the contract that it becomes a different contract.

  Beckett Investment Management Group Limited v Hall [2007].

Factors that will be relevant to reasonableness - the third aspect of the test for validity include:

- the duration of the restraint;
- the geographical extent of the restraint;
- how clearly defined the business covered by the covenant is;
- whether the restraint relates only to the business in which the employer was engaged at the time of the termination and in which the employee has been engaged during the employment;
- whether a lesser form of restraint would have given the employer adequate protection;
- whether the covenant covers only customers or potential customers over whom the employee has recent influence or confidential information

- whether the covenant covers only suppliers or potential suppliers of core goods or services over whom the employee has recent and real influence or confidential information; and
- whether the covenant covers only senior employee's over whom the employee has recent influence or confidential information.

Allied Dunbar (Frank Weisinger) Ltd v Weisinger [1988]

1.1.7 What is the potential scope of a post termination restrictive covenant in your jurisdiction? (e.g. taking into consideration time, geographical scope, content, interest, activities; etc.). Please describe how that works in your jurisdiction and what pitfalls have to be observed for both employers and employees.

The potential scope of post-termination restrictions will depend on whether they go no further than is reasonable and necessary to protect the employer's legitimate business interests. The burden of proving reasonableness is on the employer.

It is difficult to generalize about the acceptable scope of restraints in the UK as each case will be decided on its own facts. Covenants must be drafted on a case by case basis to reflect the individual employee in question and the business in which they work. What is reasonable for one employee may not be for another.

The relative bargaining power of the parties may be a factor in deciding whether covenants are reasonable. The more junior the employee, the more difficult it may be to justify the covenant. Senior and well-paid employees who have negotiated their contracts individually may be more likely to be held to bargains they strike.

Covenants in general

Generally, to be reasonable, the restrictions:

- must be limited to a business of the same nature as the employer's business otherwise the employer will not have a legitimate interest to protect. For example if an employer sells apples and pears but tries to prevent the employee from approaching clients to sell them bread, it is unlikely that the covenant will be enforceable as the employer does not sell bread.
- must only stop ex-employees from carrying out the sort of business they were employed to do. The covenant should not prevent the ex-employee from working for competitors in an entirely different capacity. So, a covenant preventing a salesman retraining and joining a competitor's HR team, is unlikely to be enforceable.
- must provide no more than the minimum protection necessary to protect the employer's interests. So, for example, if the employer's legitimate interest could be protected adequately through a non-solicitation covenant, a non-competition covenant is unlikely to be enforceable.
- must last for no longer than is reasonable and necessary to protect the employer's legitimate interest. The reasonableness of the duration will depend on the circumstances. It is not an exact science. If the legitimate interest for

which protection is sought is confidential information, the covenant should last no longer than the shelf life of the confidential information or if the legitimate interest is the trade connection or the stability of the workforce, the time it would take for the successor/company to re-establish its customer/supplier/employee links and influence (taking account of the cycle of the business/employment).

6 months to 1 year are the durations most commonly used by employers for non-solicitation and non-dealing covenants. However it does not mean that a longer period could not be enforced nor that those are reasonable periods in every case.

Non-compete provisions often last for a shorter period of time as they are more onerous. However, more recently the UK courts have appeared open to enforcing longer non-competition covenants (i.e. 12 months). See *Dyson Technology Ltd v Strutt [2005]* where it was held that confidential information had a 12 month shelf life) and *Prophet Plc v Christopher Huggett [2014]* where it was held that as business was renewed on an annual basis a 12 month non-competition covenant was justified for a software sales manager both taking account of trade connections and confidential information the individual held.

Garden leave provisions may also have an impact on the duration of restrictive covenants. Most contracts include a set off provision. i.e. that any time spent on garden leave reduces the period of post–termination restrictions. However this is not an absolute necessity. The court will look at the overall reasonableness of the combined restraints. *Tullet Prebon and others v BGC Brokers LP and others [2010]*

Non-solicitation/dealing with customers covenants

To be reasonable, non-solicitation/dealing with customer's restrictions:

- must only cover the period during the employee's employment. If the covenant covers extends to customers acquired after termination, it is likely to be unreasonable.

It is also good practice to limit the covenant to those customers with whom the employee has had contact and preferably to those with whom the employer has had more recent contact (such as 12 months before termination). If the employee only deals with a small selection of customers, a limitation to those with who he dealt may be an absolute necessity.

In terms of customer restrictions, if the employee has a managerial position and knowledge of the customer base without direct contact, or is recognized by the customer base as the "face" of the business, a wider restriction could be binding *Safetynet Security Limited v Leonard Coppage and Freedom Security Solutions Limited [2012]*.

For those in a managerial position, a non-solicitation clause can refer to customers who people reporting into the employee had contact with. See *First Global Locums Ltd v Cosias [2005]*.

- as they relate to potential customers in the UK are more problematic. Courts will only uphold covenants covering potential customers as long as the prospects are more than just people who have been identified as potential customers but are people with whom the employer has had some dealings (involving the investment of significant time and resources) with a view to establishing a business relationship.

  If the employee initially bought the customers to the employer when he/she started work, this will not prevent a non-solicitation clause from binding (*Hanover v Schapiro [1994]).* However this may be relevant to the length of the restriction.

Non-competition covenants

- Some industries use defined area non-competition covenants which prevent ex-employee from undertaking specified activities within a particular geographical area. For example, within 10 miles of the ex-employer. This type of covenant is increasingly less popular in the UK as it can be difficult to pick the right area for the restriction. If a business sector tends to be located in a particular area such as the city of London or another financial centre, an area covenant may make the non-compete unenforceable as it could prevent an employee from earning a living.
- Also modern communication methods mean that area covenants may be of little practical use. For example if most of someone's work can be done remotely, an area covenant may not work. An area covenant may still be enforceable where a business has a localised customer base – for example, relies on foot traffic.
- The UK courts take a practical approach to the geographical scope of general non-competition covenants. If there is no geographical restraint identified, the covenant will be taken to be worldwide. In *Commercial Plastics Ltd v Vincent [1964*] the restrictive covenant had no geographical limitation. The Company's operations were almost entirely in the UK. The court said that the covenant was wider than is reasonable and necessary. The employer only needed protection for competition in the UK. However if the employer operates in a worldwide market and has a legitimate interest to protect, a worldwide restraint could be justifiable. In *Norbrook Laboratories Ltd v Smyth [1997]* the employer traded in 46 countries in most parts of the world. A worldwide restriction was therefore justified.

Employee covenants

- To be enforceable, covenants against soliciting employees should usually be limited to employees of a particular level of seniority or to employees of a class in respect of whom the employee might be expected to exert some influences, such as his team or who hold confidential information about the ex-employer.
- However in certain cases, such as *Hydra Plc v Anastasi [2005]*, the court was prepared to enforce a non-solicitation covenant that applied to all employees. However there were only 12 employees in the company.

- The employment of former colleagues (as opposed to poaching them) (see *White Digital Media Ltd v Weaver and another [2013]*) is less reasonable to insist upon. However in *TFS Derivatives v Morgan [2005]*, the court did uphold a non-employment clause.
- The duration of non-solicitation of employees' covenants will depend on how long it is likely to take the ex-employee's successor to build up the same relationships with staff/the shelf life of the confidential information the ex-employee will have over staff – for example their remuneration terms etc.

Confidentiality covenants

- Express confidentiality covenants are often used by employers to identify which information is considered confidential by the company. They are rarely time limited provided that the information remains confidential.
- Express clauses can extend protection after employment to cover confidential information (not just trade secrets). However, a confidentiality covenant does not give the employer carte blanche to claim all information acquired during employment is confidential. Covenants cannot prevent an employee using his skill or know how after employment.
- These covenants may also strengthen the enforceability of the other covenants where seeking to protect confidential information as they demonstrate that confidential information is likely to be disclosed to the employee.
- It is generally accepted in the UK that the duty of confidentiality is not impacted by an employer's breach of contract (repudiatory or otherwise).

1.1.8 What are the possible sanctions against the employee in the event of a breach of a post termination restrictive covenant? Describe how that works in your jurisdiction and provide for practical information about the dos and don'ts.

An employer seeking to enforce restrictive covenants would typically take steps to obtain an injunction i.e. to obtain an order from the court to stop the employee from acting in breach of his or her obligations. Alternatively, or if the employer is not successful in obtaining an injunction, it may seek damages from the employee for breach of the covenants.

Pre-action

In most cases, before issuing a claim, the employer should send the employee and new employer a "letter before action" to set out the employee's obligations, the alleged anticipated or actual breaches of covenants and the employer's proposals for a resolution of the issues without the need for legal proceedings.

The old employer may not have any real evidence that the new employer has been involved in unlawful activities but by sending it a letter before action it will ensure that the new employer is on notice of any express obligations in the employee's

contract and, if there are further breaches, this may assist the old employer in establishing liability against the new employer at a later date.

The proposed resolution will normally be for the employee to give contractual undertakings to the employer which if later breached would put the employer in a more advantageous position to obtain an injunction.

Injunctions

The types of injunction which an employer can apply for include:

- an injunction enforcing a garden leave obligation;
- an injunction enforcing post-termination restrictions;
- an injunction against using confidential information belonging to the employer; and
- a springboard injunction to prevent a defendant obtaining an unfair commercial advantage as a result of an unlawful act

The court has a broad discretion to grant injunctions. An application for an interim injunction is usually made at the same time as, or after, the claim is issued and served on the defendants, until the matter can be determined at a full trial. The rules relating to granting both interim and final injunctions are the same but are approached evidentially in different ways. An application for an interim injunction is decided usually on the basis of written witness evidence alone, and often at short hearings, whereas a full injunction will involve pre-trial disclosure of evidence and witness evidence being given "live" with an opportunity for cross examination.

The principles to be taken into account by a court in determining whether or not to grant an injunction were considered by the House of Lords *in American Cyanamid Co v Ethicon Ltd [1975] AC 396 (HL*). The employer must establish that they have a real prospect of succeeding in the claim; damages for the relevant breaches is not an adequate remedy; and the employer would be most prejudiced if the court decided not to grant the injunction, having regard to all the circumstances of the case. In relation to the last of these principles, at the interim stage, the court will usually strive to maintain the current status quo as between the parties and, as a result, it is essential that employer act urgently to ensure that when the injunction application is heard by the court, it is not in the position of trying to undo something which has already happened (e.g. customers having been solicited or employees already having started work for the competitor).

Practically, in employee competition cases, the interim injunction is often the employer's goal, and once interim relief has been obtained there the case will settle without the need for a full trial.

Damages

In addition or as an alternative to injunctions, the employer is likely to seek some form of financial remedy from the court for the employee's breach of contract.

A claim for damages for breach of contract is the main sanction. The employer is entitled to damages that would put it in the same position as it would have been in had the contract been complied with. If the court accepts that the covenant is enforceable and the employee breached the covenant, it will consider whether that breach had caused the employer loss and how that loss should be assessed. Practically, however, it can be difficult for employers to show what loss has been suffered directly as a result of a breach of a covenant and the employer is expected to take steps to mitigate their losses from when these arise.

An alternative remedy to damages is a claim for an account of profits. An account of profits is the main sanction if an employee has additional equitable obligations implied by law as a result of the particular nature of their role with the employer; for example, fiduciary obligations which are applicable to executives (see section 1.3 below). If the court accepts that such obligations apply to the employee, the employer may be entitled to recover the profits that the defendant has been able to make as a result of the relevant unlawful conduct. This is only ordered where the court is satisfied that other available remedies alone would be inadequate, and that the employer has a legitimate interest in preventing the activity and depriving the employee of the profits.

Outside of the courts, possible sanctions might include the withholding of sums due to the employee under a contract such as a bonus or severance payment to offset against the employer's losses.

1.1.9 What are the possible sanctions against the new employer in the event of a breach of a post termination restrictive covenant by the employee of the former employer? Is it a matter of unfair competition in your jurisdiction?

In the event of an anticipated or actual breach by a former employee of their restrictive covenants, as noted above, a starting point would usually be for the old employer to write to the new employer to put them on notice of the employee's obligations.

Thereafter, in the event of a breach of a covenant by the employee, the former employer may be able to bring an action against the new employer in tort for inducing the former employee to breach the employment contract, or for conspiracy, and claim damages. The new employer must have been aware of the breach or have unreasonably relied on assurances by the employee that they would not be in breach, and therefore the initial letter putting them on notice is important. Also, as is the case when suing the former employee, damages can only be claimed for loss caused and this can be difficult to show.

Practically, the new employer may be a more attractive target for a claim for damages as it will usually have more funds at its disposal than a former employee.

If the new employer is not aware of the employee's post-employment obligations, there would be no claim against the new employer in the event of a breach of such obligations by the employee.

1.1.10 When an employer has invested money in an employee's training, is there any possibility for the employer to get a refund from the employee, in case of breach of the post termination restrictive covenant, and under which conditions?

If the employer wishes to be able to re-coup money which it has invested in an employee's training in the event they leaves his or her employment and/or breaches his post-employment obligations, this must be agreed contractually between the parties. Otherwise, the employer would have no claim to re-coup such training costs.

In the UK, any remedy for a breach of contract must go no further than putting the victim of the breach back in the position they would have been had the breach not occurred and, if a contractual term provides for a remedy which goes further, such term would be considered to be a penalty clause which would not be enforceable. Therefore, any provision in a contract that requires an employees to repay the costs of their training in the event that they leaves his or her employment and/or breaches his post-employment obligations in the event that they breach a restrictive covenant must be drafted carefully to ensure that the repayment (or partial repayment) compensates the employer for its loss and does not penalize the employee.

Given that an employer should benefit from the training it provides to the employee during employment, typically, a repayment clause must provide that the amount to be repaid on termination of employment is reduced pro-rata over a period of time after the employer has incurred the expense of the training.

1.1.11 What are the possibilities of lawsuit for the employee in case of the employer's disadvantageous actions during a period covered by a restrictive covenant (e.g. the employer prevents the employee from finding a new job by spreading out rumours)?

If an employer takes steps to damage the employee's reputation with a view to preventing him from finding new employment, the employee may have common law claims for an injunction or damages against the employer for defamation.

Defamation is an untrue statement that disparages the reputation of a person in the estimation of right thinking members of society. If the statement is in a written form (e.g. a reference) it would be libel and where it is in a verbal form (e.g. a verbal statement or reference) it would be slander.

The main elements of the cause of action that need to be proven by the employee are that:

- the statement must lower the employee's estimation in the standards of society;
- it must cause or be likely to cause serious harm to the employee's reputation; and

- in the case of libel, the statement must have been published, and the employer must have been responsible for the publication (where employees have made statements, e.g. on social media, their employer may also be held responsible).

The employer will be able to rely on a defence if the statement was true, it was an honest opinion or a matter of public interest.

Aside from making an untrue statement that disparages the reputation of the employee, if the employer simply makes a misstatement by providing inaccurate information, it is possible that the employee could claim against the employer for making a negligent misstatement. For example, if the employer provides a reference to a new employer, it owes the employee a duty to take reasonable care in the preparation of the reference in the absence of which the employer would be liable if the employee suffered damage as a result of the reference.

1.2 Garden Leave

1.2.1 Does the concept of "garden leave" exist in your jurisdiction? How does it work, what is the scope and what are the prerequisites?

The concept of "garden leave" exist in UK law and describes a period during an employee's notice period which an employee remains on normal salary and bound by their contract of employment but is requested, usually under an express term of the contract, not to attend the office or contact clients or customers.

Usually, if an employer wishes to place an employee on garden leave, it would do so pursuant to an express term of the contract which sets out the employer's rights in this regard. For example, the employer would usually have a right to stop the employee carrying out their regular duties and assign them no duties or alternative duties. The employer may also have the right to exclude the employee from its premises and from having further access to customers, clients and staff and to prevent the employee from working for a competitor. It is normal that the employee would continue to receive his or her basic salary and contractual benefits during garden leave. However, potentially, an express garden leave clause may exclude the employee from earning any bonus or performance related pay to take account of the fact that the employee would not be contributing to the employer's business.

If the contract does not contain an express term entitling the employer to place the employee on garden leave, a court would consider whether the employee has a contractual right to work in determining whether the employer's actions are lawful in accordance with the contract. Generally, the view of the courts is that in most cases there is no implied contractual right to work, but simply a right to be paid. Therefore, an employer would be under no obligation to provide an employee with work, meaning that placing the employee on garden leave would not be a breach of contract, even without a garden leave clause.

In determining whether there is an implied right to work the courts will consider all the circumstances, including the extent to which:

- the skills necessary to perform the employee's role needed regular use;

- the employee may be deprived of bonus or commission opportunities through forced garden leave; and

- the employee is ready and willing to do the work

1.2.2 Talking about garden leave provisions: do employees – or certain types of employees – have a right to be "actively employed" in your jurisdiction, e.g. so that a garden leave provision would not – or not be fully – be enforceable for an employer and the employee would have a "right" to continue working until the end of the employment? What is the respective legal framework in your jurisdiction?

As noted above, generally, the view of the courts is that in most cases there is no implied contractual right to work, but simply a right to be paid. If there is an express garden leave clause in the contract, it will be difficult for the employee to argue that the clause is unenforceable unless the notice period or remainder of the term of the contract for which the employer wishes to enforce the garden leave obligation is excessively long. If there is no express garden leave clause in the contract, the employee may be able to argue that the employer is in breach of contract by attempting to require the employee to be on garden leave.

The courts will examine the contract and the facts and circumstances of each case where there is no express garden leave clause, or enforcement of an express clause is alleged to be unreasonable, and in certain cases, they have held that due to the nature of the particular contract and the type of work being carried out, there may be an implied contractual right to work. For example, in a case where the employee worked in a bookmakers compiling the odds for bets , frequent and continuous use/knowledge of the market being necessary to preserve the skills needed, coupled with an obligation on the employee to work the hours necessary to fully carry out his duties, meant that there was a right to actively work.

Other considerations might be whether the employee is placed at a disadvantage, as discussed at 1.2.1 above, leading to a reduction in, for example, commission or bonus. Factors in favour of enforcement of garden leave might be where the employee is unwilling to do the work, or where the employee has breached the duty of good faith – even if this places the employee at an economic disadvantage.

1.3 Are there any other specific means to protect the employer's interest at the end of an employment contract in your jurisdiction? Please explain in detail and provide for practical guidance.

Aside from garden leave obligations and post-termination restrictive covenants, UK law implies other obligations on employees.

Confidentiality

UK law implies a duty of confidentiality into contracts of employment which applies during the employment. However, once the employment has terminated, the duty of

confidentiality is more limited, so employees are only obliged to keep trade secrets confidential e.g. highly secret formulae or ingredients, and not mere confidential information (i.e. anything that does not amount to a trade secret). This duty applies regardless of whether or not specific restrictive covenants have been provided for in a contract of employment, but of course it is highly recommended that confidentiality provisions are included to offer employers greater protection over a greater range of confidential information.

Fiduciary obligations and Directors Duties

Certain employees will be subject to fiduciary duties. Remedies for a breach of fiduciary duties can include requiring the employee to account for profits (as mentioned under Damages at 1.1.8 above) as well as injunctive relief and damages.

Employees subject to the more onerous fiduciary duties include those who are directors (whose duties are codified in the Companies Act 2006), and also those in a position of trust in relation to other employees or assets of the company. This might include some senior managers, as long as such managers have responsibility over the employer's money, property or particular employees, and could use those employees for their own benefit. Without high level responsibility for example for strategy or financial matters of the business, this might be difficult to show.

Fiduciaries have duties not to make a secret profit from their position, to avoid conflicts of interest, and duties of confidentiality and undivided loyalty to their employer.

The no conflict rule requires fiduciaries to avoid any conflict or real possibility of a conflict of interest is judged on an objective basis, and there need not be loss by the employer or a gain by the employee for there to be a breach of this duty. Directors' duties to avoid a conflict of interest continue after they have ceased to be a director, and so they are not permitted to use any information or property they became aware of at the time he was a director. So, fiduciaries who may be contemplating leaving the company and provide information to a competitor, such as the terms and conditions applying to other employees' contracts, could be breaching their fiduciary duties even where the information is not confidential and would not amount to a breach of the duty of good faith applicable to all employees.

There is also a duty for fiduciaries to disclose their own misconduct, as part of the duty to act in the best interests of the company, so any breach of the duty of fidelity may also be a breach of the duty to disclose. The duty may also extend to disclosing and discouraging other activities that could damage the business, such as the attempted poaching of employees by a competitor.

Loss of economic interests

Employees may also be at risk of losing other economic interests on termination.

Loss of share or share option rights?

Share option schemes may entitle employees to shares or share option rights in the company, outside of the employment contract. Such shares may vest during the employment or at a future date, and future vesting could be used as a bargaining chip with the employee to comply with their post termination restrictions.

Item Software (UK) Ltd v Fassihi [2004] EWCA Civ 1244
British Midland Tools v Midland International Tooling [2003] EWHC 466 (Ch)

2. The World of Sports and Employment Law

2.1 General questions

2.1.1 Does employment law apply to the relation between athlete's and sports clubs/Associations in your jurisdiction? Are there relevant differences between the kinds of sports and between professionals and amateurs?

Definition of "employee"

Under section 230(1) of the ERA an employee is defined as "an individual who has entered into or works under [...] a contract of employment". Under section 230(2) of the ERA, a contract of employment means "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

A "contract of service" is to be distinguished from a "contract for services", where a person gives service as an independent contractor. There is no statutory definition of these terms and the category into which a particular contract falls is determined according to case law. The most common judicial starting point is the decision of the High Court in *Ready-Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968]*. Based on this case the irreducible minimum for a contract of service is that:

- An agreement exists to provide the servant's own work or skill in the performance of service for the master in return for a wage or remuneration;
- There is control of the servant by the master; and
- The other provisions are consistent with a contract of service.

Control means that the employer tells the employee not only what to do, but also how to do it. Whilst it may be tempting to argue that the skill of an individual athlete means they are beyond the control of the club who pays them and they determine for themselves how to play their sport, such arguments are not sustainable in light of the decision of the Court of Appeal in *Walker v Crystal Palace Football Club Ltd [1910]* where it was found that a footballer was required to obey the general directions of his club and during any particular match, the particular instructions of the captain, or whoever it might be who was the delegate of the authority of the club for the purpose of giving those instructions.

Differences between professionals and amateurs and between sports

An athlete who receives payment for his sporting activities will normally be classed as professional. If he receives no payment, or only receives reimbursement of the expenses he has incurred, then he will be considered to be an amateur.

Professional athletes, club managers and coaching staff who are paid by a club will be covered by the normal rules of employment law (both the common law and statute).

Many clubs operate academies, where they train and develop young players. These clubs may enter into contracts with their young players. For example football clubs may enter into scholarship agreements with their academy players. The academy player agrees to participate in the club's football development programme and education programme and the club agrees to pay him at least the National Minimum Wage. For the purposes of the ERA these scholarship agreements are contracts of employment.

In some sports professional athletes are not employed by a club, but instead are in business on their own account and are self-employed, for example snooker and tennis players.

If an athlete is an amateur or is self-employed, he will not enjoy full employment law protection, but will still benefit from some limited statutory protection, for example in respect of discrimination. Furthermore it should be noted that whilst Article 45 of the Treaty on the Functioning of the European Union ("TFEU") provides that EU free movement rules apply only to workers and professional players in the framework of an economic activity, the free movement rules actually also apply to amateur sport as the European Commission considers that following a combined reading of Articles 18, 21 and 165 TFEU, the general EU principle of prohibition of any discrimination on grounds of nationality applies to sport for all EU citizens who have used their right to free movement, including those exercising an amateur sport activity.

2.1.2 Are there specific employment law provision (statutes, rules of sports associations) applicable for athletes in your jurisdiction? In particular regarding post termination restrictive covenants and/or garden leave provisions and/or the right to continue to work?

There are no particular statutes which apply to athletes. However the relevant associations have rules which are incorporated into employment contracts between clubs and athletes.

Contract terms may also be derived from collective agreements entered into between sport's governing body and players' trade unions. Major examples include footballers' and cricketers' contracts negotiated by the Professional Footballers' Association and the Professional Cricketers' Association respectively. Such standard contracts will be supplemented by confidential personal terms.

Express terms in a player's standard contract deal with issues such as fitness, exclusivity and discipline. Of particular importance are clauses which require players to obey both the rules of the club and relevant sporting bodies such as the Premier and Football Leagues and the England and Wales Cricket Board. In the case of any conflict between a club's rules and those of a governing body it is specified that the

rules of the latter prevail. Both footballers' and cricketers' contracts also contain clauses rendering it a disciplinary offence for a player to bring the game into disrepute.

In football, there are no particular provisions regarding post termination provisions or garden leave. However, there are rules which may temporarily interfere with a player or manager's ability to work. For example, in the event of a disciplinary matter under the FA or the Premier League's Rules, possible sanctions include not only fines and reprimands, but also suspension.

- In 2013, (before his infamous antics in the World Cup), Luis Suarez received a 10 match suspension from the FA for biting the arm of an opponent. This exceptional ban comprised the standard 3 match ban for violent conduct, plus a further 7 matches. The sanction was particularly high, as Suarez had already received a warning about his conduct when he received an 8 match ban in 2011 for racially abusing an opponent.

- Managers can also be suspended, for example in March 2014, an FA Disciplinary Commission imposed a record 7 match ban on the then Newcastle manager, Alan Pardew, for headbutting an opposition player, as well as £60,000 fine. The first three matches were a total stadium ban, with the remaining four a touchline ban. Pardew was also fined £100,000 by his club and given a formal warning

- Owners of football clubs can also face bans imposed by an FA Disciplinary Commission. In December Dave Whelan, the owner of Wigan football club was given a six-week ban "from all football-related activity" and fined £50,000 for making racist comments. Fortunately for the club, he was not involved in the day-to-day running of the club, or in transfers and was not a signatory on deals, limiting the impact of this in the January transfer window.

The particular rules regarding player transfers, mean that football clubs do not usually need to impose restrictive covenants or garden leave provisions on players. However, such provisions are relevant for managers. In these circumstances the common law doctrine of restraint of trade, as discussed in section 1 above, will apply.

An application to enforce a contractual garden leave provision in a manger's contract was considered by the High Court in the case of *Crystal Palace v Bruce (2010).* Shortly after Bruce had been appointed as the manager of Crystal Palace football club, he discovered the manager's position at Birmingham City was available. Crystal Palace would not let Bruce talk to Birmingham and he resigned, claiming that the club had repudiated his contract. Crystal Palace alleged that his resignation was in breach of his employment contract but refused to accept his resignation, and sought an injunction enforcing his contract of employment, in particular a nine-month 'garden leave' provision, under which Bruce would still be paid by the club but would not be required to attend at his place of work nor be entitled to contract with another

employer. Traditionally the English courts have been reluctant to grant specific performance of an employment contract, in effect forcing employer and employee to continue working together. However, in this case it was contended that Crystal Palace might well be prejudiced if Bruce was allowed to join Birmingham City, on the basis that staff and players might simply follow Bruce to Birmingham, he had confidential information on players and other matters, and was proposing to go to a direct promotion rival. Mr Justice Burton granted an interlocutory injunction for around 2 months. The matter was then settled between the parties after the two clubs had played each other and once Birmingham City's former manager Trevor Francis had been appointed manager of Crystal Palace and adequate compensation had been agreed between the two clubs.

More recently in Scotland, Ally McCoist, the manager of Rangers football club handed in his 12 months notice in December 2014. He stated that he intended to work out his notice. However, Rangers placed him on garden leave shortly thereafter.

2.1.3 **Is there a specific court or arbitration system for employment matters between athletes and clubs in your jurisdiction? Are those arbitration proceedings obligatory before going to court?**

There are specific systems for resolving employment matters between athletes and clubs in England, for example the Board of directors of the Premier League may adjudicate on certain matters as they see fit with a right of appeal to the Premier League Appeals Committee. However, athletes and clubs also have access to the courts in the normal way. There is no requirement to go through arbitration proceedings first.

2.2 Transfer Fee System and termination of contracts

2.2.1 a) For the EU Member States: Describe how the Bosman case has changed the situation in your jurisdiction and if/how the sports associations and the legislator have responded to this judgement.
b) For the NON-EU Members States: Was there a similar judgement or event that changed the system in your jurisdiction?

<u>The pre-Bosman situation in England</u>

Long before the Bosman case, the English courts had already been called upon in *Eastham v Newcastle United Football Club [1964]* to decide a challenge to the English football transfer system based on the common law doctrine of "restraint of trade" (discussed at 1.1.1 above).

At that time a "retain and transfer" system operated in England.

Any footballer playing for one of the 92 professional clubs in the Football League had to register with both the Football Association and the Football League and could only play for his registered club. Players were registered and employed by their club for a fixed period of 12 months at a time.

Between 1 May and the first Saturday in June each year, clubs had to inform their players whether they were being placed on the "retained" list. If retained the player was entitled to a reasonable wage (which was then £420 per year). The player remained a registered player of his club and could not play for any other Association club. However, he was not necessarily re-employed by his club to actually play for them, unless a new contract of employment was signed. Clubs could retain players for an indefinite period of time without ever agreeing a new contract of employment.

The ban against playing for any other club extended to clubs within the Scottish, Northern Irish or Irish Associations and to all clubs which were members of FIFA, which included the clubs of nearly all countries where association football was played except Australia. Once a professional player had been registered with a Football Association club, that club had the power to retain him and thereby prevent him from being transferred to any other club. In these circumstances the player would be restricted from seeking any employment as a professional footballer anywhere in the world except Australia, or any other association football playing country which did not belong to FIFA.

If a club was willing to release a player, he would be placed on the transfer list. However, the player could not be transferred without his consent and he would normally only move to a new club where he was willing to agree a new contract of employment. Even if a player was named on the transfer list and wanted to transfer, he could not seek re-employment except with a new club willing to pay the transfer fee specified by his current club. Only a very small part of the transfer fee went to the player, most of it went to his old club.

By the closing day of each season clubs had to forward to the League two lists: the "retain list" of professional players whom they wished to retain; and the "transfer list", a list of professional players whom they wished to transfer, specifying the transfer fee. The retention and the transfer systems might operate separately or together. The transfer list enabled the club to obtain a transfer fee for a player it no longer required. The retain list enabled the club, provided that it offered a reasonable wage, to hold on to the player until either he re-signed with that club or it received an offer for him which it considered acceptable. A player could be retained without being put on the transfer list or be put on the transfer list without being retained, or could be put on both. If a club wished to transfer a player, it would often still include him on the retention list, to ensure they obtained their desired transfer fee for him. The League did not fix or control the transfer fee, but until it had been paid or secured a transfer could not be registered.

The player was only able move to a different club for free if his fixed term contract of employment had ended and he had not been registered, retained or put on the transfer list by his club.

Each year the League circulated the lists amongst the clubs. A player who was unhappy with the terms offered for retention, or with the transfer fee placed on him, or who was unable to arrange his transfer with his employing club, had a right of appeal to the League's management committee which would adjudicate on any difference or dispute between a member and a player on application of either party. However, if the retain and transfer systems were operated together, and a player was placed on both lists, all he could do was to apply to have the transfer fee reduced, but he could not go outside the League.

In 1959 George Eastham fell out with his club, Newcastle United. His contract of employment was due to expire. He refused to sign a new contract and requested a transfer, but Newcastle refused to release him and he was placed on the retain list. At the end of the season Eastham went on strike. Newcastle did eventually agree a transfer fee in October 1960 to release Eastham to Arsenal. Notwithstanding this, Eastham sued Newcastle United, the Football Association and the Football League and sought a declaration that the retention and transfer system was void as an unlawful restraint of trade.

It was held that the retention provisions, which operated after the termination of the player's employment and not as the exercise of an option causing the employment to continue, did substantially interfere with the player's right to seek employment and therefore operated in restraint of trade. Although the element of restraint in the transfer provisions was less severe than in the retention system, the two systems when combined were in restraint of trade and, since the defendants had not discharged the onus on them of showing that the restraints were no more than was reasonable to protect their interests, were in unjustifiable restraint of trade, and that, as such, they were ultra vires. Although Eastham had now obtained his transfer, the court could make a declaration that the retention and transfer rules and regulations were invalid.

As a result of the Eastham case, the English Football League implemented a revised transfer system in 1963. The retention element was abolished. When a player's contract of employment expired, his club had to either agree to transfer him, or offer him a new contract of employment on at least the same basis as his previous contract (in respect of remuneration and duration). If the club refused to offer such terms it had to allow the player to leave on a free transfer.

If a new contract of employment was offered, the player was not obliged to accept it. The player could instead negotiate a move to another club but this was subject to the clubs agreeing a transfer fee. If a fee could not be agreed between the two clubs, then the Professional Football Compensation Committee would determine the transfer fee to be paid. In practice, a player's desire to move could still be frustrated if the

other club was not prepared to pay the required fee or accept that the amount of the fee should be determined by the Compensation Committee.

The implications of Bosman – transfer fees

The Bosman case then took things a step further, as it meant that a player would be allowed to make an international transfer within the EU for free if their existing contract had expired, even if their club offered them a new contract which they had rejected and a transfer fee could not be agreed.

Although Bosman covers the situation where an out of contract player wishes to move from a club in one Member State to a club in a different Member State, rather than between clubs in the same country, to pre-empt the possibility of litigation the regulatory bodies in Britain made voluntary changes to the domestic transfer system outlined above.

In the Bosman case one of the justifications advanced for the practice of transfer fees, was the need to compensate lower league clubs who had invested in training players and to ensure the "trickle down" of money through the different divisions. The Advocate General suggested that the aim of trickle down and training compensation is justifiable in the context of football, but transfer fees need to properly reflect training costs, rather than the amount the player had been earning pre-transfer and should only be payable where the club can properly take credit for training the player and he did not just join them as an experienced, fully trained professional.

As a result of this, the English transfer rules were changed. They now provide that compensation for an out of contract player is only required if the player is under the age of 24 and has been offered a new contract on no less favourable terms. In the event of a dispute about the amount of compensation to be paid, the matter is to be determined by the Professional Football Compensation Committee, whose regulations specify that they should take into account:

- the status of each of the transferor club and the transferee club;
- the age of the player;
- the training model(s) on which the player was engaged with the transferor Club;
- the amount of any fee paid by the transferor club upon acquiring the registration of the player;
- the length of time during which the transferor club held the registration of the player;
- the terms of the new contract offered to him by both the transferor club and the transferee club;
- his playing record including any international appearances;
- substantiated interest shown by other clubs in acquiring the registration of the player; and

- any cost incurred by either club in operating an academy including (without limitation) the cost of providing the following for players attending that academy:

1. living accommodation;
2. training and playing facilities;
3. scouting, coaching, administrative and other staff;
4. education and welfare requirements;
5. playing and training strip and other clothing;
6. medical and first aid facilities;
7. friendly and competitive matches and overseas tours;
8. any other cost incurred by either club directly or indirectly attributable to the training and development of players including any fees paid by the transferor club upon acquiring a player's registration.

There are separate rules for the calculation of training compensation if the registration of an Academy Player is transferred.

The implications of Bosman – quotas

The second limb of the Bosman judgment concerned the compatibility with EU law of national rules which imposed quotas on the number of foreign players that could be fielded in a match. The European Court ruled that where such players were EU nationals then quota systems were unlawful.

However, in 2005, as a result of renewed concerns about the number of foreign footballers playing for European clubs, UEFA adopted its home grown players rule ("the HPG rule"). This requires clubs participating in the Champions League and the UEFA Cup to have a minimum number of home grown players. "Home grown players" are carefully defined as players who, regardless of their nationality, have been trained by their club or by another club in the same national association for at least three years between the age of 15 and 21. This minimum is currently set at 8 out of the maximum squad of 25 players. The HGP rule was designed to support the promotion and protection of quality training for young footballers in the EU and increase the competitive balance between clubs.

In 2008, the European Commission found that the approach followed by UEFA in adopting the HGP rule complied prima facie with the principle of free movement of workers while promoting the training of young European athletes.

Similar HGP rules were adopted voluntarily by the English Premier and Football Leagues in 2010. A HGP is a player irrespective of nationality or age who has been registered with any club affiliated to FA or Football Association of Wales for a period of three seasons or 36 months prior to his 21st birthday or the end of the season in which he turns 21. Clubs can supplement their squad with as many players as they like aged under 21.

According to a poll from the Professional Football Players' Observatory, at that time English clubs employed the highest proportion of expatriate players in Europe, with 59.2% coming from abroad. Liverpool had the highest percentage in Europe of expatriate players within their squad, measuring 90%.

However, since UEFA's HGP rule risked having indirect discriminatory effects on the basis of nationality and since its implementation had been gradual over several years, the Commission decided to carry out further analysis on the effects of the rule. A further study by a consortium of UK universities was launched in June 2012 and the findings published in August 2013.

The main conclusion of the study is that it cannot be categorically established that the restrictive effects of the HGP rule on the free movement of workers are proportionate to the very limited benefits for competitive balance and the training and development of young players. The study also argues that the very modest benefits of the HGP rule are likely to be achieved in a more substantial manner by the adoption of alternative and less restrictive means, particularly those which do not have discriminatory effects. The study further notes that UEFA, in conjunction with the key football stakeholders, holds the necessary experience and expertise to explore these alternatives and should be afforded the reasonable time of three years to do so. The Commission currently has a number of infringements open in this area and continues to monitor UEFA's HGP rule.

On 14 October 2014 a new co-operation agreement was signed between the European Commission and UEFA, for a period of three years until 31 December 2017. It remains to be seen what the implications of this will be for the HGP rule at both an international and national level.

2.2.2 Are there specific laws or regulations of sports associations (different from the general rules) dealing with the termination of athletes' employment contracts in your jurisdiction? Are such contracts usually open-ended or do they run for a fixed term? Are there any restrictions for fixed-term contracts in your jurisdiction?

Compared to other jurisdictions, English employers and employees are generally free to agree fixed-term contracts and there are no particular restrictions on the circumstances in which a fixed term contract can be used.

However, there are some protections for employees working under fixed term contracts. The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) came into force on 10 July 2002 and implement EU Directive 99/70/EC of June 1999 on the Framework Agreement on Fixed-term Work. Under the Fixed-term Employees Regulations fixed-term employees are entitled not to be treated less favourably than comparable permanent employees by

reason of their fixed-term status, unless the employer is able to objectively justify the different treatment.

Under Regulation 8, employees who have been continuously employed for four years or more on a series of successive fixed-term contracts are automatically deemed to be permanent employees (that is, employed on an indefinite contract) unless the continued use of a fixed-term contract can be objectively justified. This includes cases where the original contract has been renewed or extended, or where a different contract has been entered into after the expiry of the original contract. It does not include cases where there has only been one fixed-term contract (of whatever duration) that has not been renewed or extended.

It is possible for this rule on successive fixed term contracts to be varied under a collective or workforce agreement. This might:

- Increase or decrease the four-year limit on the total duration of successive fixed-term contracts before employment becomes permanent;
- Fix the maximum number of successive fixed-term contracts which can be issued before employment becomes permanent; and/or
- Agree a list of objective reasons that would justify the renewal or successive use of a fixed-term contract.

In the case of professional footballers, a standard contract of employment has been negotiated between the Premier League and the Professional Footballers Association ("PFA"). This contract notes that the fixed term period reflects the special relationship and characteristics involved in the employment of football players. The contract may be for any period of time, but the expiry date must be 30 June, unless it is a monthly contract, a week by week contract, or it is for a Contract Player under 18 (in which case it cannot last for more than 3 years).

Week by week contract are permissible, these operate on a rolling basis and can be ended by either party on 7 days notice.

It is also possible to agree a contract for a fixed period of one month. This can be extended an unlimited number of times, but if a club intends to do extend a monthly contract for a third or subsequent time, it must give the player at least 7 days notice of its intention to do so.

However, most footballers contracts are usually agreed for a set number of years.

When a footballer's contract is terminated by the club or the player, notification must be sent to the Premier League. If it is ending by mutual termination, both the FA and the secretary of the Premier League must be informed.

2.2.3 Can a player switch the club during the term of the employment contract for a certain transfer fee without the consent of the former club in the absence of a

respective clause? Is it obligatory in your jurisdiction to agree on such a clause and a certain transfer fee?

In England, there are not only restrictions on transferring between clubs, but on players and clubs approaching each other regarding transfers.

A player who is not under contract to a particular club may be approached at any time. Otherwise, there are particular "tapping up" rules which govern approaches made by clubs to players and vice versa.

Players who are under contract must not be approached without the consent of their employing club. Similarly players should not approach other clubs. Any breach is a disciplinary matter. Players and clubs need to be very careful about making public statements saying they are interested in each other, as this would fall foul of the rules on the basis it is an indirect approach. In practice, conversations will normally be held with the player's agent.

The only exception to this is that approaches may be made between the third Saturday in May and the 1 July where a player who will be out of contract on 1 July and who has received no offer from his club or who has received but declined an offer.

There are particular rules regarding young Academy players. Clubs cannot poach an Academy player registered with another club, save that on 1 January following commencement of the player's under 16 year, a club can make an offer to a player for him to join them once he is aged 17.

A player who is under contract can only be transferred with the consent of his club and agreement of a transfer fee.

2.2.4 What are the remedies for the former club in your jurisdiction, if a player switches the club during the term of the employment contract without the consent of the former club and without the payment of an agreed transfer fee?

Please see s.s.1 and 2.2.3 above

2.3 Are there any further conflicts between employment law and the employment practice of sports clubs and associations in your jurisdiction? Please describe relevant cases or judgements.

<u>Wrongful dismissal</u>

If an employer dismisses an employee in breach of contract, this will be a wrongful dismissal.

The most common type of wrongful dismissal is termination of employment without giving the notice provided for by the contract. However, such claims are normally pre-empted by the parties agreeing compensation for the notice period and this is also the practice with sports clubs.

A wrongful dismissal may also arise if the employee resigns in response to the employers breach of contract, in particular if the employer breaches the implied term of mutual trust and confidence. Football provides some very specific examples of this. For example in the case of *Kevin Keegan v Newcastle United W.S.L.R. 2009*, the manager of Newcastle United FC had been promised that he would have the final say in the recruitment of players to the club. The Uruguayan International, Ignacio Gonzalez, was recruited against his express wishes and he resigned in response. Keegan was awarded damages by the Managers' Association Tribunal on the basis that the club's behaviour destroyed trust and confidence. Similar cases have arisen were a club sold players against the manager's wishes.

Unfair dismissal

Employees have a right under section 98 of the Employment Rights Act not to be dismissed unfairly. This is not dependant on whether they are dismissed in breach of contract. A dismissal will be unfair if the employer did not have a fair reason for dismissing the employee or because they failed to act reasonably or follow a fair dismissal procedure.

In practice football clubs will often dismiss managers unfairly. They often do not have a fair reason (it usually relates to poor performance by the team on the pitch) and they need to act decisively and do not have time to go through a fair process. However, the cap on compensation for unfair dismissal (£78,335) means this remedy is often of little interest to the manager.

It is common practice for football clubs and managers to agree in advance in the contract the compensation that will be payable if the manager is dismissed. This is designed to reduce disputes at a later date and to help keep matters out of the public eye.

Conflict between Tribunals

Different decisions can sometimes be reached by the specialist sporting tribunals and the Employment Tribunal.

Denis Wise was dismissed by Leicester City Football Club in accordance with his contract, for punching a teammate whilst on a club tour. He exercised a contractual right of appeal to the Football League Disciplinary Committee which conducted a full re-hearing including the calling of relevant witnesses. The Committee found that Wise had been guilty of serious misconduct but noted that there had been procedural irregularities at club level. It decided to overturn the dismissal and replace it with a two weeks' fine. The Club appealed to the Football League Appeals Committee against the Committee's decision. The main point of appeal was that, having found serious misconduct, the Committee had no power to say that dismissal was

disproportionate, and should have upheld the dismissal. The Appeals Committee upheld the appeal and reinstated the dismissal but without rehearing the case.

However, Wise also brought an Employment Tribunal claim and the Employment Appeal Tribunal held that, given the initial procedural irregularities, the Appeals Committee failure to conduct a re-hearing prior to deciding to overturn the Disciplinary Committee's decision was an unreasonable procedural defect and therefore Wise had been unfairly dismissed. *Wise v Filbert Realisations (formerly Leicester City Football Club (In Administration).* (Note there is normally no rule of law that only a full re-hearing is capable of rectifying initial procedural defects and there will be circumstances where an employer has acted reasonably without a full re-hearing being conducted.)

Conclusion

Whilst many sports clubs will argue that regular laws are not suitable for the relationships in sports, in England sports clubs and athletes can still be held to account by the courts. Such court proceedings will normally be in the public domain and are likely to attract press coverage. Therefore it is unsurprising that clubs are increasingly entering into employment contracts which provide for very specific arrangements on termination, to try and buy their way out of litigation in advance.

It is ironic that whilst clubs may publicly be celebrating a new signing, behind the scenes they are already imagining how the relationship may end.