

## How contractors should handle restrictive covenants: part 2 - the law

Many contractor contracts include restrictive covenants which prohibit the contractor from working directly for the client, and often, for the [client's subsidiaries](#) or even in a specific geographic area for a given period of time.

These clauses in contracts are legitimate, and judges will enforce them. But agencies sometimes abuse these clauses, using them to try and increase their margins of profit, or to change contract conditions. This isn't legitimate, and please see [Part 1](#) of this series which explains how you should handle such cases.

But it is important too to understand the law behind the actions you will take, and so we explain how it all works.

### UK Law Frowns on Restraint of Trade

UK law frowns on restraint of trade of any kind, as [Professor John N. Adams](#), formerly of the University of Sheffield, and the author of the definitive work on UK contract law, explains.

### Process of Reasoning

"Restraint of trade is the area of law to which restrictive covenants belong, and any restraint of trade included in a contract must be justified by a clear process of reasoning. All covenants in restraint of trade are prima facie unenforceable at common law and are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public."

### They Can't Lock You In

Agencies sometimes will [try to lock you in](#) to specific contract terms when contracts come up for renewal, and then cite the restrictive covenant in the contract to prevent you from working direct with the client. This isn't enforceable in law.

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Professor John N. Adams

Adams cites one of the most important cases involving restrictive covenants: Schroeder Music Publishing Company Limited –v- Macaulay. The case involved a young and unknown song writer who entered into an agreement to provide exclusive services with a publishing company for five years. The song writer assigned the full copyright for the whole world in each of the original songs created at any time during the agreement in exchange for a small advance on royalties.

The court ruled that the restrictive covenant was unreasonable. "It went beyond protecting the interests of the publishing company, and locked the songwriter in completely. The songwriter had been subjected to a 'take it or leave it' contract, and the court ruled that it was not a fair one," Adams explains.

### Lack of Case Law

There are other court rulings in restraint of trade cases which the courts can refer to that are similar to Macaulay v. Schroder. But there is, unfortunately, no specific case law involving contractors and restrictive covenants when the clauses are used in ways for which they were not intended, as Jonathan Little of the London-based law firm [Jones Day](#) explains. Nonetheless, the principles of law in restraint of trade are clear enough.

### The Elephant Test

The key phrase is "legitimate protectable interest." If a restrictive covenant protects a legitimate interest of the agency, then the clause is valid and enforceable. It is entirely legitimate for an agency which has spent time and money recruiting you to prohibit you from working directly for the client. If agencies didn't do this, they wouldn't ever make any money.

In determining what a legitimate protectable interest is, the courts will apply the 'Elephant Test.' This is a truly lawyerly invention: try and explain what an elephant looks like; you will find that you can't. But you know what an elephant is, and you recognise one when you see it. This is how the courts will seek to determine if there is a legitimate protectable interest--i.e. does it sound like it is fair?

So if, when contract renewal time comes up, an agency says that you must accept a lower fee to do the same job for the same client, or that you should do two jobs for the same money, just say that you will go work directly for the client if the agency insists. When the recruitment consultant at the agency threatens you with the restrictive covenant, just cite this article and warn that the consultant is out of line.

Should the recruitment consultant threaten to sue, point out that the law is on your side. Most of the time, you'll come to an agreement with your agency on that basis without too much trouble.

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