

## Are restrictive covenants in franchise agreements enforceable post-Dwyer?



In the recent case of *Dwyer (UK Franchising) Ltd v Fredbar Ltd* [2022] EWCA Civ 889, the Court of Appeal held that a 12-month post-termination restriction in a 10-year franchise agreement was unenforceable. While this may not be a surprise to employment lawyers, this case drove a coach and horses through the standard 12 months restriction that has been sought by franchisors for years.

To be clear, this case does not mean that all post-termination restrictions (or all 12 month restrictions) in franchising agreements are unenforceable, but a franchisor should think carefully before adopting a blanket restriction across all franchise holders. So what lessons can and should be learned post- Dwyer?

### Are restrictive covenants enforceable?

In the UK, the starting position is no. A restrictive covenants contained in a franchising contract will be unenforceable unless the franchisor can show that they are reasonably required to protect a legitimate business interest and the restriction goes no further than necessary to achieve that purpose. So limited restrictions can be included where they can be justified by the franchisor.

### What factors should be considered?

To justify such a restriction a franchisor will typically argue that they are necessary to protect the goodwill in their business, but this must be weighed up against the franchisee's interests and public policy to allow free trade. The case of *Dwyer* provides a helpful reminder of the factors that can be taken into account when balancing these

interests, including:

- The bargaining power of the parties. In this case, the franchisor was a major business whereas the franchisee had no previous experience in the trade.
- Whether the restriction was negotiated? In Dwyer, the contract was not specifically negotiated and was presented by the franchisor as “take it or leave it”.
- The goodwill that the franchisor is trying to protect. The franchisee in Dwyer was starting a business from scratch in a location where the franchise had no trading history, but a 12 month restriction was imposed notwithstanding when the contract terminated.
- Whether the restriction was reasonable at the time the contract was entered into. In this case, the Court held that the failure of the franchisee was foreseeable and the franchisor knew that the financial consequences of failure could be serious for the franchisee.

In conclusion, the Court in the Dwyer case held that a 12-month non-compete was not necessary to protect the franchisor's legitimate interests where there was early termination. However, the Court emphasised that this case was decided on its own facts and in a different scenario where a franchisee is well-established business with greater bargaining power, or where the franchisee was inheriting a franchise that was already well-established, the same restriction might well have been enforceable.

## Key takeaways

Clearly Dwyer was decided on a specific set of facts, but franchisors would be foolish to ignore the lessons that can be learnt from this case and a franchisor who continues to adopt a standard 12 month restriction across its portfolio will be liable to challenge. A restriction is more likely to be enforceable where it is tailored (or indeed negotiated) with reference to the goodwill that the franchisor is trying to protect and a tiered approach can be considered if the franchisor wishes to adopt a consistent approach across its franchise.



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