Restrictive Covenants

In the situation described in this problem, a restrictive covenant would be the best way to protect the company's interests. Although the implied terms of employee confidentiality regarding company information would be valid in this case, they wouldn't stop an employee working with rivals. All doubt should be removed by the inclusion of a clause in which the employee undertakes not to carry on a particular trade or profession for a period after the termination of the contract. It would permit the company to seek a interim interdict in court against Dr MGleam and Ms Wilkes preventing them from breaching the covenant.

Restrictive covenants are common in many contracts (partnership, share holders, buyer-seller) including employment contracts. *Prima facie*, such rules are illegal and unenforceable unless the covenantee (the side who gains from the restriction) can invoke the *restraint of trade doctrine* which was introduced into law as a result of the famous House of Lords case of **Nordenfelt v. Maxim Nordenfelt**.

To prove that the covenant is justified, the covenantee must show three things. That the covenant is necessary to protect a legitimate interest of the covenantee (it's not sufficient to avoid future competition with the covenantor). The restraint in the covenant must be reasonable as between the parties, and that the restraint is in the public interest. It is interesting to note that few cases where a covenant is held to be reasonable have been viewed as being contrary to public interest.

These three criteria are not yes/no questions and therefore courts will examine the practical effects of a covenant as much as its form. The method to determine the reasonableness of a covenant is to examine; the spatial area the restriction covers, the duration for which it applies and the nature of the restriction imposed. The covenant can legitimately protect trade secrets or trade connections, but the House of Lords has held that it is not permissible for the employee to protect himself from the competition of his employee after his service has terminated **(Fitch v.** Dewes). Note that many cases on covenants are English; the law is similar in this subject however. In any case (no pun intended) the English cases are persuasive.

There are no hard and fast rules governing the duration of the restraint; in the past courts have enforced worldwide covenants (limited in time) as is the case in **Bluebell Apparel v. Dickson**. Courts have also set aside UK wide covenants for smaller businesses too **(Dumbarton Steamboat Co. v. Macfarlane)**

The multi-national nature of the company leads one to believe that the a worldwide covenant would be possible, however significant sections of the

globe (Canada, South America, Africa) are not operated in by the company. Remembering that courts will interpret 'reasonable' more narrowly for employer-employee covenants, it would be wise not to try for a world-wide restraint. This simply means that the covenant would specify that the covenantor would not work within the districts where the company has markets when the contract ends. As courts do not alter covenants and can just enforce or strike them down, it is in the firm's interest not to tread over the fuzzy distinctions of what is 'reasonable'. It must be remembered that (in theory at least) the restriction on the covenanter's employment must be the **minimum necessary** to protect the employer's legitimate interest.

The fact that both employees have senior positions in the company is useful for the covenantee, as it makes it more likely that the covenant will be held to be reasonable due to the confidential information that they will be privy to.

The covenant must be restricted to the kind of work that is being done for the company. In the past courts have not enforced contracts that prevented the covenantor working for rivals on ANY type of research whatsoever. (**Commercial Plastics v. Vincent**)

Although a certain time frame must be set for the covenant to be effective, this is a specialized issue that must be decided in conjunction with the employer and employee. In the past, life-time covenants have been enforced (**Fitch v. Dewes**) however the circumstances were vastly different. The fast-moving and competitive nature of the electronics market leads to the conclusion that an extremely lengthy time period would not be acceptable.

The nature of Ms Wilkes' relationship with clients of the firm will put her in a position of influence and a term in the contract preventing her from dealing with past and present clients for a set period of time would be held to be entirely reasonable. Dr McGlean's knowledge of the company's development plans and practices would most certainly fall under the trade secrets aspect of a reasonable covenant.

"The prohibition against disclosing secrets is practically worthless without the restriction against entering the employment of rivals."

SOS Bureau Ltd v Payne

Note that a clause in the contract whereby the employee would agree that all terms in the covenant are reasonable would be of little value. The courts have seen this as 'an illegitimate attempt to oust the jurisdiction of the courts.' **(Lord Dervaird, Hinton & Higgs Ltd v. Murphy)**

It is important to stress that if the contract of employment is wrongfully terminated by the covenantee, then the covenantor is no longer bound by it. (**General Billposting Co. Ltd. v. Atkinson**)

The courts tend to interpret 'reasonable' more strictly in the relationship between employer-employee than buyer and seller. It would therefore be wise not to make the covenant too wide by including a world-wide restraint.

For safety's sake, the contract could be put together in a manner which would put the three parts (duration, nature, spatial area) separately. In this fashion, if a judge were to construe the covenant as being unreasonable, one term could be 'blue penciled' without canceling the whole covenant.(**Mulvein v. Murray 1908**)

As all sources state that it is within the rights of the company to protect their trade secrets and trade connections, it is entirely reasonable for Dr McGlean and Ms Wilkes to sign a covenant restricted their right to trade with past and present clients of the company within the districts the company operates in and for a specified period of time. Dr McGlean's covenant would specifically treat the subject of electronic engineering and Ms Wilkes' would be in terms of marketing and connections. Such terms would prevent the employees getting 'poached' by rivals and would be held as reasonable and enforceable in a court of law.