

## Case Update: Dwyer v Fredbar in the Court of Appeal

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In our [previous article](#) about post-termination restrictive covenants we discussed the High Court case of [Dwyer \(UK Franchising\) Limited v Fredbar Limited \[2021\] EWHC 1218](#) as an example of covenants being found unreasonable and therefore unenforceable. Since then, the Claimant has appealed the judgment and the Court of Appeal has once again found in favor of the Defendant. So what does this mean for those trying to enforce, or avoid, restrictive covenants?

### The Facts

The facts of the case are set out in our previous article (link above). However, in short, the Claimant (Dwyer) is the franchisor of 'Drain Doctor', a very large emergency plumbing and drainage franchise. In contrast, the Defendant essentially consisted of Mr. Bartlett, an individual who ran his business from home and had no previous plumbing experience other than a brief course provided by Dwyer.

The franchise agreement was terminated in mid-2020, and Mr. Bartlett then began to trade as 'Daily Drains'. Dwyer alleged that this was in breach of the post-termination restrictive covenants in the franchise agreement. The High Court disagreed, holding that the restrictions were too wide because they effectively left Mr. Bartlett unable to be employed by a similar business for 12 months even if there was no confusion with Drain Doctor, and unable to use his home as a registered address even if operating elsewhere. The judge took into consideration the inequality of bargaining powers between Dwyer and Mr. Bartlett in reaching his conclusion.

### The Court of Appeal Judgment

Dwyer appealed to the Court of Appeal ([Dwyer \(UK Franchising\) Limited v Fredbar Limited \[2022\] EWCA Civ 889](#)), alleging that the High Court judge considered irrelevant and impermissible factors in reaching his decision. Despite Dwyer's arguments, the Court of Appeal agreed with the High Court and held that the covenants were not enforceable.

The inequality of bargaining powers was a significant factor in the Court of Appeal's decision. Dwyer's contractual terms were standard and the agreement was presented to Mr. Bartlett on a 'take it or leave it' basis. Much was made of the money that Mr. Bartlett had invested and the financial risk he had assumed in entering into the franchise agreement in the first place.

In a departure from the High Court judgment, the Court of Appeal viewed the franchise agreement as more akin to an employment contract than to the sale of a business. This helped support the argument that the bargaining power between the parties was unbalanced, and shows that the true nature of any franchise agreement must be properly considered when deciding whether the restrictive covenants are reasonable.

The Court of Appeal also deemed the length of time that the franchise agreement had been in operation as relevant. The post-termination restrictions did not distinguish between whether the franchise had been short-lived or long-running. In fact, Mr. Bartlett had only been operating the 'Drain Doctor' franchise for 18 months, 4 of which were during the pandemic, and this fed into the conclusion that a 12 month restriction was not reasonable. However, the judgment did concede that a 12 month covenant might have been reasonable if the franchisee had been well-established and successful.

## Key Takeaways

This judgment highlights the fact that every franchise agreement is different, and that such agreements do not form a special category of their own in restrictive covenant cases. Some franchise agreements will be genuine business-to-business contracts, but where the relationship between the parties is more akin to an employment relationship, the courts will likely draw a comparison with employment contracts instead.

In a similar vein, a standout point from both the High Court and Court of Appeal judgments was the focus on inequality of bargaining power. The courts were both willing and keen to consider the specific circumstances of the parties, including the degree of risk undertaken by Mr. Bartlett and the potential financial impact he could experience if things went wrong.

Every case is fact-specific and there are no hard and fast general rules about what makes an enforceable covenant. You certainly should not assume that simply because a restriction is 12 months or less, it will be considered reasonable. It is important to consider the length of time that a franchise had been running for in the first place; restrictions drafted in relation to the franchise's duration, rather than a blanket 12 months, might have had more success.

In short, the Court of Appeal has really emphasized the importance of tailoring post-termination restrictive covenants to the particular situation at hand.

*Grace Walker also contributed to this article.*

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