Commercial: Tillman v Egon Zehnder Ltd [2019] UKSC 32

Dominic Bright

When part of a post-employment covenant is in unreasonable restraint of trade, in what circumstances should the court sever, and remove it, so as to leave the employee bound by the remainder of it?

Unreasonable restraint of trade?

Lord Wilson – who gave the leading judgment, with which the rest of the Supreme Court agreed – succinctly summarised this appeal in the following terms:

> "A company employs a business executive pursuant to a written agreement. Following the termination of her employment she wishes to become employed by a firm whose business is in competition with that of the company. The company contends that her proposed employment would breach a covenant in the agreement. She answers that the covenant is void at common law because part of it is in unreasonable restraint of trade."

"Non-competition covenant"

The relevant clause – entitled 'COVENANTS' – provided for five restraints following the end of employment, all limited to the immediate six months following it. The "non-competition covenant" was central to all issues. It provided (with emphasis added) that the employee would not

> 'directly or indirectly engage or be concerned *or interested* in any business carried on in competition with any of the businesses of the Company or any Group Company which were carried on at the Termination Date or during the period of 12 months prior to that date and with which you were materially concerned during such period.

"Broad, practical, rule of reason approach"

The restraint of trade doctrine ("the doctrine") was rightly acknowledged as

> "one of the earliest products of the common law. It epitomises the nation which developed it: a nation which has ascribed central importance to the freedom of all of us to work - in the interests both of the self-sufficiency of ourselves and our families and of our common prosperity."

The "broad, practical, rule of reason approach" to determining whether the doctrine applies in *Proactive Sports Management Ltd v Rooney* [2011] EWCA Civ 1444, [2012] IRLR 241 was endorsed. On the assumption that 'interested' restrains the employee from holding shares in the specified businesses, it falls within the doctrine.

'Unreasonable restraint'

The employer argued that, when properly construed, the word 'interested' in the "non-competition covenant" does not prohibit an employee from holding shares in the businesses there specified. The natural construction of the word 'interested', however, consistent with long-standing authority, and in want of a realistic alternative meaning, so as to engage the validity principle, meant that it covers a shareholding. Accordingly, it was in unreasonable restraint of trade.

Severance principle and the Beckett *criteria*

To sever the impugned part of a restraint of trade covenant, so as to retain the remainder, three criteria prescribed in *Beckett Investment Management Group Ltd & Ors v Hall & Ors* [2007] EWCA Civ 613, [2007] ICR 1539 had to be satisfied:

1. "the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains" ("the blue pencil test");
2. "the remaining terms continue to be supported by adequate consideration"; and
3. "the removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all'".

Applying the severance principle: 1) the words 'or interested' are capable of being removed from the "non-competition covenant", without the need to add to, or modify the wording of the remainder; and 2) removal of the prohibition against her being 'interested' would not generate any major change in the overall effect of the restraints. Accordingly, 'or interested' should be severed, and removed.

The modern employment relationship

Reflecting the modern realities of the relationship between employers and high-ranking employees, the Supreme Court justifiably opined that:

> "High-ranking employees can do particular damage to the legitimate interests of their employers following termination of their employment; and it may be that, when they enter into their post-employment covenants, they are able to negotiate with their employers on nearly an equal footing."

International: "Devil Take the Hindmost" Anti-Suit injunction to maintain historic investment adage rejected by Privy Council

Timothy Frith

In May 2019 the Privy Council delivered its Judgment in UBS AG New York v Fairfield Sentry Ltd (In Liquidation) (British Virgin Islands). The appeal, with leave of the Court of Appeal of the Eastern Caribbean Supreme Court ("the ECCA"), was an appeal against the judgment of the ECCA dated 20 November 2017 which dismissed the "UBS" appeal against the first instance Judge's refusal to grant an anti-suit injunction to restrain the liquidators of Fairfield Sentry Ltd ("the liquidators") from pursuing proceedings in the United States under section 249 of the British Virgin Islands' Insolvency Act 2003 ("the IA 2003"). This section empowered the High Court of the BVI ("the High Court") to set aside voidable transactions, such as an unfair preference or an undervalue transaction, and to make orders to restore the position to what it would have been if the company had not entered into such transactions.

The dispute arose out of the multi-billion dollar Ponzi scheme which Bernard L Madoff operated through his company Bernard L Madoff Investment Securities LLC ("BLMIS"). Fairfield Sentry Ltd ("Sentry"), was a "feeder" fund. Between 1997 and 2008 Sentry invested some US$7.2 billion in BLMIS. After Mr Madoff's fraud came to light following his arrest in December 2008, the High Court made orders to wind up each of Sentry, Sigma and Lambda.

Ponzi schemes have in common with many asset bubbles that those who invest early and realise their investment before the crash can make significant profits, while those, who invest later or otherwise retain their investment in the scheme when it crashes, lose everything. As an anonymous pamphleteer during the South Sea Bubble of 1720 stated, a case of "devil take the hindmost".

The liquidators' claims were an attempt to modify that historic adage and share the pain among investors irrespective of when they exited the feeder fund. The liquidators did this by raising proceedings in the United States under section 249 of the IA 2003 and on common law grounds sought to recover funds paid out to investors in Sentry who redeemed their shares at valuations which, as hindsight reveals, bore no relationship to the actual value of their shares. Proceedings were commenced against several hundreds of defendants in the United States and they are currently before the US Bankruptcy Court in New York. By order dated 6 December 2018 United States Bankruptcy Judge, Bernstein J, dismissed the liquidators' claims at common law against all defendants except to the extent that the claims alleged a constructive trust against defendants who had knowledge of the Madoff frauds but allowed the statutory avoidance claims under section 249 of the IA 2003 to proceed.

The dispute between the liquidators and investors who redeemed their investments before the crash had been strenuously undertaken both in the BVI, and in the United States. UBS as a potential debtor of the liquidators' claims under section 249 of the IA 2003 sought an anti-suit injunction from the BVI courts to restrain the liquidators from proceeding with their claims in the United States. After Leon J dismissed UBS's application for an anti-suit injunction and the ECCA dismissed its appeal, UBS appealed to the Board with the leave of the ECCA.

The Privy Council in a firm judgment rejected the appeal and found that the anti-suit injunction was misconceived as (1) the liquidators were officers of the BVI High Court and they raised the proceedings in the United States with the authority of the High Court. If there were grounds for preventing the liquidators from proceeding with the US claims, the High Court would not need to grant an injunction but could revoke its permission for the proceedings to continue. The High Court had not done so. (2) It was a question for the US courts whether they should apply BVI law as the liquidators requested but that it was perfectly open for them to do so.

Property: Housing Allocation and Religion: R (aoa Z and others) v LB Hackney, Agudas Israel Housing Association Limited [2019] EWCA Civ, 1099, 27 June 2019

Barbara Zeitler

S. 29 Equality Act 2010 ('EqA') prohibits service providers from discriminating, whether directly or indirectly, in relation to a protected characteristic such as ethnicity or religion. There are exemptions to this prohibition. A charity is not prevented from restricting the provision of benefits to particular groups of persons if it can be justified as a proportionate means of achieving a legitimate aim or is for the purpose of 'preventing or compensating for a disadvantage linked to the protected characteristic' (S. 193 EqA). Nor does the prohibition prevent a person from taking positive action to alleviate disadvantage (S. 158 EqA).

The Agudas Israel Housing Association ('AIHA') is a charitable housing association with properties in a part of Hackney with a substantial Orthodox Jewish community. AIHA's primary object is to provide social housing for the benefit of the Orthodox Jewish community. LB Hackney has nomination rights to properties owned by AIHA. Hackney nominates those on the housing list to AIHA who are not Orthodox Jewish, but in practice, given the dearth properties in the area, only members of the Orthodox Jewish community are allocated housing.

The Appellant, a mother with four children who is not a member of the Orthodox Jewish Community, challenged the allocation policies of Hackney and AIHA. It was common ground that AIHA's arrangements for allocating housing amounted to direct discrimination on the grounds of religion. The Appellant was unsuccessful before the Divisional Court which held, having considered evidence about the specific housing needs of members of the Orthodox Jewish Community and about anti-Semitism, that the discrimination was lawful for two reasons. First, because the arrangements were a

proportionate means of overcoming a disadvantage shared by members of the Orthodox Jewish Community, and thus permitted by S. 158 EqA. Second, the arrangements were made pursuant to a charitable instrument, and were either a proportionate means of achieving a legitimate aim; or were for the purpose of compensating for a disadvantage linked to a protected characteristic, and permitted by S. 193 EqA.

The Decision

The Court of Appeal robustly dismissed the appeal. AIHA's allocation policy was permitted by S. 193 EqA because it prevented disadvantage. As regarded the proportionality assessment, which is an alternative route to exemption under S. 193, the lower court had heard detailed evidence and an appeal court should be slow to interfere. There had not been an error of law that would allow the appeal court to interfere. Further, the exception under S. 158 was engaged, allowing AIHA to take positive action to alleviate disadvantage.