KINGS CHAMBERS

Restraint of trade: enforceability of Post-Termination Restrictions

Tina Rañales-Cotos
Business & Property Department
25 September 2024

Enforceability

- Prima facie void and unenforceable as they prevent open competition
- Require justification by the party seeking enforcement
- Must pass test of reasonable necessity
- What is reasonable is highly fact- and context- sensitive

Enforceability (ctd)

- 1. Legitimate business interests in need of protection?
- 2. What the covenant means when properly construed?
- 3. No wider than reasonably necessary ?
- 4. If not, can it be saved ?
  - **Sparta Global v Hayes** [2024] IRLR 426 at [20]
  - **TFS Derivatives Ltd v Morgan** [2005] IRLR 246 at [36]-[38]
  - **Office Angels Ltd v Rainer Thomas & O'Connor** [1991] IRLR 214 at [21]-[25]
  - **Herbert Morris Ltd v Saxelby** [1916] 1 AC 688 at p707

1. Legitimate business interests ?

- **Thomas v Farr** [2007] ICR 932 at [42]
  - Some subject matter which an employer can legitimately protect by a legitimate covenant
- **Stenhouse Australia v Phillips** [1974] AC 391; [1974] 2WLR 134 at 400 E per Lord Wilberforce
  - Employer's claim for protection must be based on the identification of some advantage or asset inherent in the business properly regarded as his property (in a general sense)
  - Unjust to allow the employee to appropriate for his own purposes even though the employee may have contributed to its creation

2. What does the covenant mean ?

- **Boydell**
  - Niche business of bile acid derivatives selling to pharmaceutical companies
  - 12-month non-compete main issue – not involved in any activity for any competing business
  - HC granted interim injunction after severing some of its wording
  - Appealed and issues on appeal how the covenant construed and whether too wide
  - Boydell argued non-compete too broad and would prohibit from working in any capacity for say high street pharma businesses
  - CA upheld decision of HC
  - Test is whether 'plain and obvious' that covenants unenforceable (assuming all facts in C's favour and with any permissible severance)
  - Natural and ordinary meaning and unless disputed facts court is as well able as trial J to construe
  - Burden of the clause directed to specialist activities of NZP, so the words relating to group companies not obviously incapable of severance
  - As a matter of construction, ignore the fantastical – covenants must be limited in circumstances which the court considers the parties had in their contemplation
    - **Home Counties Dairies v Skilton** [1970] 1 WLR 526 CA
  - Validity principle – alternatives "realistic" ? Parties deemed entered into valid not invalid agreement

3. No wider than reasonably necessary ?

- **Jump Trading International v Verition Advisors** [2023] IRLR 787
  - Length
  - Unusual PTR
  - Which length needed to be justified?
  - Void for uncertainty ?
  - 24 months too long ?
    - Non compete during any notice period, garden leave and the non compete period
    - Non compete means zero to twelve month period after termination date as elected by the Company within 20 business days following the notice of termination
- CA no difference between zero to twelve PTR and PTR for fixed period of 12 months but expressly gives employer discretion unilaterally to reduce period
- CA not obviously and inevitable void for uncertainty given mechanism for resolution left open subject to maximum permissible period of 12 months
- Justification of maximum possible period of restraint at time contract entered into (not at time of election) – relied on confidential information shelf life of up to 2years

3. No wider than reasonably necessary ?

- **Sparta Global Ltd v Hayes** [2024] IRLR 426
  - Breadth
  - 2 agreements – investment agreement (IA) and employment agreement (EA)
  - Employee gave undertakings reflecting EA
  - Employer sought to inj to enforce IA "better protection":
    - 12 months instead of 6
    - Not limited to activity which competes
    - Not limited to kind of work he did
    - Not limited to clients with whom he dealt
    - Went beyond what Sparta appears to have (at an earlier stage) considered necessary
  - Inequality of bargaining power is relevant (significant factor – see **Dwyer**)
  - Nature of the agreement – more akin to a contract of employment
  - Sparta unlikely to persuade the trial judge that the IA covenants were reasonable
  - *"such a clause appears to be stamped with unreasonableness"*

3. No wider than reasonably necessary ?

- **Literacy Capital plc v Webb** [2024] EWHC 2026 (KB)
  - Length and breadth
  - Sale of business case in the medical field – loan agreement with a 10 year nationwide non-compete
  - HC unarguably void and unenforceable
  - Too wide and too long and no simple and clean way to sever (see **Boydell**)
  - Protecting the business makes sense (albeit not for too long) but protecting the other, different businesses makes no legitimate sense because D did not have expertise in any or most of those fields

4. Can the covenant be saved?

- Severing or blue-pencilling part of the covenant
- **Egon Zehnder v Tillman** [2019] UKSC 32 – 3 criteria [82] to [87]
  - Court must continue to adopt a cautious approach to severance
  - Trivial importance or mere technical no longer the test
  - 'blue pencil' test remains valid – removal without necessity of adding to or modifying the words of what remains
  - Adequate consideration for the remaining terms – ignore in usual situation
  - Crucial whether removal not generate any major change in overall **legal** effect
  - For employer to establish removal would not do so
- **Boydell**

Interim injunctions

- **American Cyanamid Co v Ethicon Ltd** [1975] AC 396
  - 1. Is there a serious question to be tried?
  - 2. Would damages be an adequate remedy for either of the parties injured by granting/not granting the injunction ?
  - 3. If not, where does the balance of convenience lie ?
- **Planon v Gilligan** [2022] EWCA Civ 642
- **Boydell v NZP Ltd** [2023] EWCA Civ 274 at [14] per Bean LJ
  - Cyanamid 'seminal status' but neither a statute nor a biblical text
  - Employment cases of far more limited scope may be unjust to stop at serious issue to be tried
  - Statutory test for the grant of an injunction is whether it is just and convenient
  - **Lansing Linde Ltd v Kerr** [1991] IRLR 80 where not possible to hold a trial until the period of the covenant has expired or substantially expired, preliminary view of the prospects of success at the "balance of convenience" stage of the analysis

Interim Injunctions (ctd)

- Mandatory injunctions – in effect final orders, not simply **Cyanamid** approach, high degree of assurance that the relief sought is appropriate in assessing the course that has the least risk of injustice
  - **Capita v Darch** [2017] IRLR 718 applying **Zockoll v Mercury** in context of delivery up applications
- Springboard injunctions – substantive relief in advance of trial, court should assess the strength of each side's case (liability and period of advantage) without conducting mini-trial
  - **Forse v Secarma** [2019] IRLR 587

1. Serious issue to be tried ?

- Frivolous or vexatious, or otherwise demonstrably bad
- Reasonable prospect of success or reasonably arguable i.e. arguability threshold
  - **Planon [1-2]**
- Not a demanding test
  - **Jump Trading** at [46]
- Note jurisprudence gathering around this concept
  - **Lansing Linde**
  - **Boydell**
- Need for evidence to support RPS an employer cannot have an injunction just because he seeks one
  - **Caterpilar v de Crean** [2012] IRLR 410
- Refusal to give undertakings in correspondence not necessarily to be treated as evidence of a threat or intention to breach
  - **RMS Tenon Ltd v Cocking** [2013] EWHC 846 (QB)
- Mere suspicion not enough
  - **CEF v Mundey** [2012] IRLR 912
- Clouds of suspicion not the same as cogent evidence of wrongdoing sufficient to warrant injunctions court asked to grant
  - **Capita v Darch**

2. Damages an adequate remedy ?

- **Employer** (covenantee)
  - **D v P** [2016] EWCA Civ 85 at [15]
  - In cases such as these damages are not what an employer wants
  - Damages usually unquantifiable and rarely, is ever, provide the covenantee (employer) with an adequate substitute for an injunction
- **Employee** (covenantor)
  - **Planon** at [111] no presumption that damages will be an inadequate remedy for the employer and an adequate remedy for the employee ?
  - Unrealistic to argue damages adequate remedy for employee (since employer has resources to honour the cross-undertaking
  - Except in cases of very wealthy defendants, or where the claimant employer is offering paid garden leave for the whole period of the restraint, the argument has no traction
  - Risky for new employer to continue to employ in face of non-compete injunction breach would be a contempt of court

3. Balance of convenience

- Speedy trials
  - Usual order in covenant cases
  - **Mimo Connect Ltd v Buley** [2023] EWCA Civ 909 – covenant cases cry out for an order for speedy trial (CA)
  - **Jump Trading** – even where delay defeated application for interim injunction (upheld CA) no 'queue jumping' issues
  - **Guy Carpenter & Ors v Howden & Ors** [2023] EWHC 1114 (KB) – D's u-turn
  - **City Site Solutions Limited v Baker & Ors** [2023] EWHC 2064 (KB) – cried out for speedy trial, citing **Mimo**
  - **Sports Direct.Com Retail Ltd v Newcastle United Football Club Limited & another** [2024] EWCA Civ 532 CAT refused mandatory interim injunction and ordered speedy trial, refusal of relief made a speedy trial more urgent, CA agreed
- Delay
  - Unreasonable delay
  - Consider nature and consequences of the delay
  - Unjust in all the circumstances to grant the relief sought – prejudice
  - **Planon** – bar to relief and upheld on appeal to the CA particularly given duration in new post by time of appeal
  - **Boydell** – not a bar to relief sensible exchanges
  - **Jump Trading** – bar to relief prejudice to employee further atrophying his skills and to new employer assembled a team
  - Correspondence is a good thing
  - Promptly engage in substantive arguments/proposals
  - Don't allow employee to join competitor
  - Don't wait until the end of the notice period

3. Balance of convenience (ctd)

- Context and nature of the contract in question
  - Example of an employee with a small shareholding in a company as a part of that person's employment which the court treats differently from a commercial agreement
  - **Ideal Standard v Herbert** [2019] IRLR 431 at [28]
  - Not a binary question and the nature of the arrangement between the parties and the way it came to pass must be carefully weighed by the court and situated along a calibrated spectrum
    - **Sparta** at [48]
- Notice period
  - Vulnerability of being dismissed with 1 week's notice and in probationary period weighed against 12-month restriction
  - Purported to prohibit entirely non-competing activity while working for a competitor (in any capacity)
  - Length of period of notice can be an indicator of unreasonableness of duration of restraint
  - **Quilter Private Client Advisers Ltd v Falconer** [2020] EWHC 3296 (QB) [175(2)]
- Inequality of bargaining power
  - Significant factor in determining reasonableness
  - No opportunity to negotiate terms
  - May make an agreement more akin to a contract of employment
  - **Dwyer (UK Franchising) Ltd v Fredbar Ltd** [2023] FSR at [65], [71] and [77]