Neutral Citation Number: [2017] EWCA Civ 1054

Case No: A3/2017/1597

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE MANN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2017

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE PATTEN
and
THE RIGHT HONOURABLE LORD JUSTICE SALES

- -

Between:

MARY CAROLINE TILLMAN	**Appellant**
- and -	
EGON ZEHNDER LIMITED	**Respondent**

- -
- -

Mr Daniel Oudkerk QC (instructed by **Simmons & Simmons LLP**) for the **Appellant**
Mr James Laddie QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondent**

Hearing dates: 11th July 2017

- -

Approved Judgment

Lord Justice Longmore:

Introduction

1. On 5th January 2004 Ms Mary Caroline Tillman began employment with the respondent Egon Zehnder Ltd as a Consultant under a written contract of employment containing post-termination restrictive covenants and dated 16th December 2003. In 2006 she was promoted to Principal and in 2009 to Partner. In 2012 she was appointed as co-Global Head of the Financial Services Practice Group. On 23rd January 2017 she gave notice to Egon Zehnder and was put on garden leave and on 30th January 2017 it terminated her employment with immediate effect. She wishes to take employment with a United States firm Russell Reynolds Associates ("RRA") and the question in this appeal is whether Egon Zehnder can restrain her from doing so for the six month period after termination. She asserts that the restrictive covenant in her contract of employment is in unreasonable restraint of trade since it prevents her from becoming a shareholder in a competitor. The fact that she does not propose to become a shareholder is, she says, irrelevant. Mann J has held that, on its true construction, the covenant does not prevent her from becoming a shareholder in a competitor. The covenant was not, therefore, in unreasonable restraint of trade and was enforceable. The judge proceeded to grant an injunction restraining Ms Tillman from working for RRA for the six month period in the covenant.

2. It is significant that during her employment she was permitted to take a shareholding in a publicly quoted competitor provided that it did not exceed 5% of the company's total equity.

3. The clauses containing the relevant covenants are 4.5 and 13.2:-

> "4.5 You shall not, during the course of your employment, directly or indirectly, hold or have any interest in, any shares or other securities in any company whose business is carried on in competition with any business of the Company or any Group Company, except that you may hold or have an interest in, for investment only, shares or other securities in a publicly quoted company of up to a maximum of 5 per cent of the total equity in issue of that company.
>
> …
>
> 13.2 You shall not without the prior written consent of the Company directly or indirectly, either alone or jointly with or on behalf of any third party and whether as principal, manager, employee, contractor, consultant, agent or otherwise howsoever at any time within the period of six months from the Termination Date:
>
> …
>
> 13.2.3 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 such period."

Factual Background

4. Egon Zehnder Ltd is a global executive search firm specialising in executive search and advisory services. It is the UK subsidiary of a worldwide group ("the EZ group") whose holding company is Swiss. The company seeks to identify the needs of employer clients and headhunts senior executives. In common speech, it is a "headhunter".

5. The EZ group operates in each country through a locally incorporated company. All UK-based employees are employed by Egon Zehnder Ltd. However, there is very considerable cross-group engagement with a worldwide approach to business planning.

6. The group has nine practice areas of which "financial services" is the relevant one for the purposes of this appeal. Within that practice area, practitioners may be members of Global Practice Groups, core global group members, members of regional practice groups, core regional group members and local group members. Each segment of the business has a sub-group leader. The financial services area is very important for the EZ group and currently generates 22.5% of global revenue billing.

7. Before joining Egon Zehnder, Ms Tillman had a high-powered job as European Managing Director and COO of JP Morgan. She began work as a consultant with Egon Zehnder in the financial services practice area on 5th January 2004 on the terms of a letter of appointment which set out her contract of employment. There was a hope and some expectation on both sides that she would be quickly promoted if she found the work congenial; that hope and expectation was amply fulfilled for 13 years. Further background is set out in the judgment.

The question of construction

8. Ms Tillman submits that clause 13.2.3 prevents her from being engaged or "concerned or interested in any business carried on in competition with any business" of Egon Zehnder. If she acquired a shareholding in a competitor, she would be "interested" in a competing business. Egon Zehnder agrees that if the word "interested" covers the acquisition of a shareholding, however minor, the clause would be in unreasonable restraint of trade because it would be wider than would be necessary for the protection of the company's interests after termination. But it says that the clause does not cover the acquisition of a shareholding at all. Clause 4.5 of the contract shows that the parties can specifically prohibit the acquisition of shareholdings when they wish to do so; they did not wish to do so after termination and therefore made no provision restricting the acquisition of shareholdings in a competitor after termination and Ms Tillman was (and is) free to acquire shareholdings in competitors if she wishes to do so, provided that she does not actively participate in the competitor's business.

The Judgment

9. The judge agreed with Egon Zehnder's submission. He began by setting out the general principle set out in Chitty, Contracts, 32nd edition (2015) para 16-085:-

> "All covenants in restraint of trade are prima facie unenforceable at common law and are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public. Unless the unreasonable part can be served by the removal of either part or the whole of the covenant in question, its inclusion renders the covenant or the entire contract unenforceable. A covenant in restraint of trade (if unreasonable) is void in the sense that courts will not enforce it, but if the parties wish to implement it they would not be acting illegally and the courts would not intervene to prevent them from doing so. It has been held that "a covenant which is unenforceable ab initio should simply be disregarded unless and until it is subsequently and explicitly re-agreed". … The validity of a covenant in restraint of trade is assessed at the date when the contract is entered into."

He emphasised the requirement that the question of validity must be judged as at the time when the contract was made (January 2004) not when Ms Tillman became co-Global Head of her group (in January 2012). He recorded Mr Laddie QC's submission for Egon Zehnder that, in the light of clause 4.5, it would be commercially anomalous if the post-termination non-compete covenant prohibited all shareholdings (including the innocuous 5% holding in a public company) because the post-termination covenant would then be wider than the applicable covenant during employment. He then said:-

> "I consider that there is sufficient ambiguity in the expression "directly or indirectly … interested in any business" to justify considering indicia as to what was really meant. All three concepts – "engage", "be concerned" and "interest" – are linked to the concept of "business", not an entity. The first two connote a close connection in the nature of a real involvement in the actual conduct of the business. The third imports a lesser connection, but it is capable of taking its colour from the first two. It would cover an actual interest in the business (as in a partnership, for example). It would be capable of stopping there, with an "indirect" interest being such an interest held through a nominee. On the other hand it would also, as accepted by Mr Laddie, be capable of catching a shareholding – that would be a form of indirect interest in the business (though a more tenuous one). That lack of complete clarity justifies looking for indicia elsewhere, and … I find that the presence of clause 4.5, which expressly deals with shareholding (so the parties know how to deal with that problem if it arises) and yet permits a limited shareholding, demonstrates that the non-compete clause was not intended to deal with shareholding at all. Otherwise the anomaly identified above would exist. I consider that on normal principles of construction it would be right to favour a construction which does not gives rise to an anomaly, and in addition it would be right to favour a construction which validated rather than invalidated the clause

> … It follows that this construction point does not lead to an invalidation of the clause."

The submissions

10. There is one ground of appeal namely that the judge was wrong to hold that clause 13.2 did not prohibit a shareholding in a competitor after termination. In support of that ground Mr Daniel Oudkerk QC submits:-

    i) the natural meaning of "interested in any business carried on in competition with any of the businesses" of Egon Zehnder includes a shareholding;

    ii) such meaning is consistent with such authorities as there are;

    iii) the clause must be intended to prohibit a substantial shareholding on any view;

    iv) the judge was therefore wrong to find any ambiguity in the clause; and

    v) the judge was also wrong to hold that the clause was concerned only with business in the abstract and not "an entity" which had legal personality.

    It follows that the injunction granted by the judge should be set aside.

11. Mr James Laddie QC supported the construction of the post-termination covenant favoured by the judge. He submitted that the judge was also right to favour a construction which validated rather than invalidated the clause and relied on Turner v Commonwealth and British Minerals Ltd [2000] IRLR 114 in which Waller LJ said:-

> "14. There is in my view some interconnection between the question of construction and the doctrine of restraint of trade. That, as it seems to me, must be so far at least one reason. If a particular construction was to lead to the view that the clause was unenforceable, then an alternative view, which did not lead to the same result if legitimate, ought to be preferred."

Ambiguity was not a pre-condition to the operation of this principle which only required an "alternative … legitimate" construction to be available. If he was wrong on construction and the words "interested in" covered a shareholding in a competitor, he submitted (by way of a respondent's notice), that the words "or interested" in the covenant should be severed from the covenant, leaving a valid covenant which could be duly enforced.

Construction

12. I do not accept that the principle of preference of enforceability to unenforceability can be invoked in favour of any alternative legitimate construction since the ingenuity of business and their lawyers may assert that many a plausible construction is a "legitimate" construction. This principle used to be expressed in the maxim "verba ita sunt intelligenda ut res magis valeat quam pereat" and is now called "Saving the document" (see Chitty 32nd edition para 13-084). But the principle can only go so far since one has to start with the language used by the parties; there must, in my view, be a genuine ambiguity before the principle can be invoked and I respectfully doubt

whether Waller LJ meant, in the paragraph of Turner to which we were referred, to imply that ambiguity was not required. As Lord Hoffmann observed in BCCI v Ali [2002] 1 AC 251 para 39, when referring to the principle that parties are unlikely to have intended to agree to something unlawful or legally ineffective:-

> "But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage."

13. The question is, therefore, what the words "interested in" mean in clause 13.2.3 of the contract interpreted in accordance with conventional usage and I find it impossible to say of a person holding shares in a company that he or she is not "interested in" the business of the company. Conventionally those words have that meaning not merely in common parlance and in dictionaries but also in authority.

14. The words "be concerned or interested in" have a long history in the context of restraints after sales of businesses or termination of employment. In William Cory & Son Ltd v C W Harrison [1906] AC 274 the House of Lords held that they did not include being a creditor of a competitor company who would in a wide sense have an "interest" in the success of that company but if Mr Harrison had actually held shares in the company, the result would surely have been different.

15. In British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch 563, the defendant had sold his (small) business to the claimants who were in a large way of business over the whole of the United Kingdom. He covenanted that he would not "carry on or manage or be concerned or interested in or act as the servant of any person concerned or interested in the business of the manufacture or sale of road reinforcements". Some years later he obtained employment with a firm which later took up the business of road reinforcement. Mr Luxmoore KC for the claimants sought an injunction from Younger LJ and the defendant's counsel pointed out that the covenant was too wide because it would prevent the defendant from entering the employment of a company which happened to hold shares in a road reinforcement company. Mr Luxmoore then changed tack; he admitted that the part of the clause preventing the defendant from acting as servant was too wide but said that it could be severed from the rest of the clause. Younger LJ recorded Mr Luxmoore's concession (which he obviously thought was rightly made) and held that the claimants could not succeed without amending their pleading to make a proper allegation of the covenant as severed. He further held that, in any event, even if the offending part was severed, there would have been no breach and the covenant was still impermissibly wide.

16. The covenant in Scully UK Ltd v Lee [1998] IRLR 261 prevented an employee from being "engaged or otherwise interested in, whether as a shareholder, director … employee" any competing business. Aldous LJ held that to make the clause a valid restriction it would be necessary to delete not only the word "shareholder" but also the words "interested in" because those words would also prevent the defendant becoming a shareholder in a competing company.

17. Silber J in CEF Holdings Ltd v Munday [2012] IRLR 912 has also held that the words "interested in" cover having one share in a publicly quoted company and that a restraint including that phrase was therefore impermissibly wide.

18. The only case which might be said to run counter to this stream of authority is the decision of Foskett J in Traditional Financial Services Ltd v Gamberoni [2017] EWHC 768 (QB) but since the circumstances of that case are arguably different and it is currently on the way to this court, I would prefer to leave that case on one side and defer to the balance of authority referred to above.

19. Mr Laddie submitted, while it was true that ambiguity was necessary before one could use commercial good sense as a guide in relation to competing constructions where neither construction led to invalidity, it was not necessary if one of the competing constructions did lead to invalidity. I do not know of any authority for that proposition unless it can be extracted from the dictum of Waller LJ in Turner. Nor do I think it can be correct because otherwise, provisions which are tolerably clear in their meaning will tend to be interpreted in a tortuous way.

20. It is true that courts will sometimes construe a restraint in a limited way according to the context of the case. Thus the words as a dairyman, as a general medical practitioner and as a solicitor were implied into the covenants in Home Counties Dairies v Skilton [1970] 1 WLR 526, Clarke v Newland [1991] 1 AER 397 and Hollis & Co v Stokes [2000] IRLR 712. But that was only because the context of the contracts was in each case employment in those capacities. That is, with respect, an obviously legitimate exercise of construction. What is not permissible is to construe well-understood words or phrases in a manner contrary to their natural meaning.

21. I do not think therefore that there is any true ambiguity in the clause and the judge's search for other indicia as to its true meaning was, with respect, misplaced.

22. The judge relied on the anomaly, as he perceived it to be, that if the post-termination covenant prohibited the possession or acquisition of a shareholding the post-termination position would be even more restrictive than the position during Ms Tillman's employment when she was allowed a 5% shareholding in a publicly quoted company. But there is an anomaly whichever construction is adopted because it would be just as anomalous for Ms Tillman to be restrained during her employment from taking any shareholding greater than 5%, yet be free to take any size of shareholding she liked once her employment is over. Mr Laddie said that the anomaly on which he relied was "the more striking anomaly" but a comparison of degrees of anomaly, to my mind, leads nowhere.

23. Lord Justice Sales asked Mr Laddie in the course of his argument to spell out the construction of clause 13.2.3 for which he contended. He submitted that the words "engage or be concerned or interested in" should be construed as meaning "actively participate in". Thus a majority shareholding could probably be restrained because there would inevitably be an active participation in the business but a small shareholding would not be depending on the facts of the case.

24. Such a construction is inherently unsatisfactory because debatable matters would have to be considered before it could be determined whether there was any breach (or threatened breach) of the clause and before any injunction should be granted. What sort of participation would constitute "active" participation? The alternative construction (which the judge may have favoured) would allow any shareholding in a competitor however large; but that can scarcely be right and is no doubt why Mr Laddie framed his answer to my Lord's question as carefully as he did.

25. I would, therefore, conclude that clause 13.2.3 does prohibit shareholdings and is impermissibly wide and in restraint of trade unless it can be severed in some way.

Severance

26. Mr Laddie submitted that the words "or interested" could be deleted or severed from clause 13.2.3. The judge dealt with this point shortly by saying that he did not find it appealing. Since he held that on its true construction the clause was not impermissibly wide, he did not need to say anything more.

27. I agree with the judge that the argument is unappealing but, as I have held that the clause is in unreasonable restraint of trade since on its true construction it covers a shareholding, it is necessary to address the argument in more detail than the judge.

28. The reason it is unappealing is first that the clause would still be too wide even if the words "or interested" were omitted. The question would then be whether a shareholding was covered by the words "directly or indirectly engage or be concerned … in any business carried on in competition". To my mind, being a shareholder in a company carrying on a business is being concerned in that business at any rate "indirectly". That seems to have been the view of Mr Jeremy Cousins QC sitting as a Deputy Judge of the Chancery Division in UK Power Reserve Ltd v Read [2014] EWHC (Ch) 66 at paragraph 82 and I agree with him. Admittedly he went on to hold (a) that in that case shareholdings were not covered and (b) that the words "concerned or interested" could, if necessary, together be severed, an argument not made by Mr Laddie in the present case. But merely deleting the words "or interested" will not prevent clause 13.2.3 from covering shareholdings and thus being impermissibly wide.

29. The second reason for not allowing severance is that it is well settled that parts of a single covenant cannot be severed; it is a requirement of severance that it can only take place where there are distinct covenants (as, for example, in 13.2 which enumerates separate covenants) and, perhaps, not even then. Clause 13.2.3 is, however, a single covenant preventing Ms Tillman from engaging or being concerned in a competing business in any one of several capacities, has to be read as a whole and cannot be severed, see Chitty para 16-215.

30. That is the effect of Attwood v Lamont [1920] 3 KB 571 where severance was refused in relation to specified trades, with respect to which the employer had no legitimate reason for preventing his ex-employee from carrying on or being concerned in. Younger LJ said at page 593:-

> "The learned judges of the Divisional Court, I think, took the view that such severance always was permissible when it could be effectively accomplished by the action of a blue pencil. I do not agree. The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only."

This court also relied on Lord Moulton's speech in Mason v Provident [1913] AC 724, 745 in which he said that it was no business of the courts to come to the assistance of an employer who had exacted an unreasonably wide covenant and, by applying their ingenuity and knowledge of the law, to carve out of the void covenant the maximum of what the employer might validly have required. Severance was also refused in the British Reinforced Concrete case for the reasons given in Attwood v Lamont.

31. This requirement that severance can only be applied to separate covenants and not to parts of a single covenant remains the law, since Attwood v Lamont was expressly stated in Beckett Investment Management Group Ltd v Hall [2007] ICR 1539 at paras 38-39 to have been adopted in later decisions.

32. Beckett also approved a threefold test propounded by Mr Peter Crawford QC sitting as a Deputy Judge of the High Court in Sadler v Imperial Life Assurance Company of Canada [1988] IRLR 388 at paras 391-2:-

> "a contract which contains an unenforceable provision nevertheless remains effective after the removal or severance of that provision if the following conditions are satisfied: 1. The unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains. 2. The remaining terms continued to be supported by adequate consideration. 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"."

33. Mr Laddie submitted that this test had replaced the requirement that severance only applied to separate and not single covenants. But Beckett shows that that is not correct. The requirement is reflected in the third of the three tests adopted by Mr Crawford because it must always be doubtful whether parts of a single covenant can be deleted without the contract becoming "not the sort of contract that the parties entered into at all". It is, as Lord Moulton said, no business of the courts to create a valid covenant in order to replace an impermissibly wide covenant which an employer has sought to impose on the employee.

34. For those reasons, I do not think the words "or interested" can be deleted in order to save the covenant.

Conclusion

35. It may be said to be unmeritorious that Ms Tillman can rely on the theoretical width of the post-termination covenant to include a shareholding when she does not intend to acquire any shareholding in any competitor and wants to work for a competitor which she could have been restrained from doing if the clause were more carefully drafted. But the law which avoids contracts in unreasonable restraint of trade is based on the wide public policy of promoting competition and protecting employees from too readily abandoning the exercise of their right reasonably to compete after termination. In those circumstances the merits of individual cases must inevitably take second place.

36. The injunction granted by the judge only has a few more days to run. Sadly, the whole purpose of this appeal seems to be about costs. But, in respectful disagreement with the judge, I would set aside his order and dismiss Egon Zehnder's application.

Lord Justice Patten:

37. I agree.

Lord Justice Sales:

38. I also agree.