BREAKFAST BITES CARDIFF

Business Protection – what's new?

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Agenda

1. **Introduction**
2. ***Tillman v Egon Zehnder Ltd (Sup Ct)***
3. ***Brown* and *Halim* – where do they take us?**
4. **Q & A**

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Tillman v Egon Zehnder Ltd [2019] IRLR 838

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The issues

- Did a non-competition covenant (6 months duration) requiring that the employee would not "*directly or indirectly engage or be concerned or interested in*" competing businesses, prohibit taking a minority shareholding?

- If so, was that in unreasonable restraint of trade?

- If so, could the words "*or interested*" be severed?

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Facts

- Senior executive. Promotions since 2004, but no updated written terms
- 2012: Joint global head of financial services
- 2017: Resigned, intending to start with competitor in 4 months. Considered non-compete covenant was unreasonable

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Progress through the courts

- T gave undertakings to the court not to take up new employment until High Court judgment
- High Court granted interim injunction, but looked at merits
- Court of Appeal set injunction aside
- EZL appealed to Supreme Court

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The arguments

Tillman's position

- Words "*or interested in*" were unreasonable in that they prevented her from taking minority shareholding

- Covenant was therefore void and she was free to start new employment

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The arguments

EZL's position

- "*interested in*" didn't cover minority shareholding, so clause not void
- "Validity principle" favoured construing ambiguous provision so as to uphold it
- Even if "*interested in*" prevented minority shareholding, that part could be severed

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Supreme Court judgment

Restraint of trade doctrine

- Was agreed that there was a restraint of trade within the doctrine
- Issue was whether assumed prohibition on minority shareholding was part of restraint
- SC had little trouble concluding that it did

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Supreme Court judgment

Construction

- Did "*interested in*" include minority shareholding?
- Yes: natural construction of the words included a shareholding
- EZL was not able to offer any realistic alternative construction: "validity principle" didn't arise

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Supreme Court judgment

Severance

- The most interesting bit!
- Key previous authority was *Attwood v Lamont [1920]* (CA)
- CA in *Attwood* fiercely resistant to severance
- But based on passing observations of Lord Moulton in *Mason v Provident Clothing & Supply Co Ltd [1913]* (HL)

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Supreme Court judgment

Severance (cont.)

- *Attwood/Mason*: severance could only happen if relevant parts were independent and it did not affect meaning of what is left

- AND, part to be removed should be no more than trivial or technical (this second element fell away in 1972: *Lucas v Mitchell* (CA))

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Supreme Court judgment

Severance (cont.)

- *Attwood* should remain authoritative? No
- “Cautious approach” still required
- SC endorsed *Beckett Investment Management Ltd v Hall* (CA)
- 3 criteria adopted …

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Supreme Court judgment

Severance (cont.)

(1) Unenforceable provision is capable of being removed without needing to add to/modify remaining words

(2) Remaining terms continue to be supported by adequate consideration

(3) Removal does not generate major change in overall effect of covenants

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Supreme Court judgment

Severance (cont.)

- In *Tillman: "or interested"* could be removed
- So, remainder was reasonable and could be enforced
- Likely to be costs consequences for EZL however
- Ms Tillman may also reflect on whether she should just have waited 2 months

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Brown and *Halim* - where do they take us?

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Brown & others v Neon Management Services Ltd & another [2018] IRLR 30.

- 3 Claimants – disputes over discretionary bonus scheme, attempts to introduce more onerous Ts and Cs (and other conduct) lead to *resignations on notice for alleged repudiatory conduct (6/12 months)*

- *Immediate resignations then given during notice period* based on further alleged repudiatory conduct.

- HC Claims for unpaid bonuses/wages, wrongful dismissal.

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Key Points (1)

- Resigning on notice for such long periods was an affirmation of the breach.

- Later immediate resignation by 2 Claimants was, however, effective and non-affirmatory.

- Court was entitled to take into account conduct prior to the affirmation in deciding if there a subsequent fundamental breach (*"adding to the scales already weighed down"* by the earlier conduct).

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Key points (2)

- Repudiatory breach by the employer did cause the PTRs to automatically fall away. *"General Billposting"* Rule upheld.

- Attempts to re-visit the rule in the light of obiter comments in *Croesus Financial Services v Bradshaw [2013] EWHC 3685;* and *Geys v Socieitie Geineirale [2013] IRLR 122,* failed.

- There is no basis for altering the accepted position, especially where it is the wrongdoer who is seeking to rely on the PTRs. The obiter comments were addressing the opposite position, which was not the case here.

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Key points (3)

- Based on the contractual drafting, employer was entitled to make granting of future enhanced rights (eg. pay rises) conditional on acceptance of more onerous PTRs.

- However, it was not entitled to withhold pay rises, bonuses etc. unless the new PTRs were accepted.

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What does this mean for your clients?

- For claimants, be very careful about resigning on notice (para 141).
- For employers, be careful about post-resignation conduct if wanting to argue the original, on-notice resignation amounted to an affirmation.
- Significance of a contractual provision expressly stating that the PTRs are *preserved* in the event of repudiatory conduct (paras 173-174).
- Importance of very careful contractual drafting.

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Argus Media Ltd v Halim [2019] IRLR 442

- D was business development manager of a fertiliser business. Provides global reports for the market.
- 9 month PTRs (non-solicit, non-deal, non-compete).
- “Restricted business” not limited to those with whom he had dealings.
- Express duty of confidence (during and post-employment). Plus express term of fidelity.

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- D proposes weekly regional “Africa” report. C declines to go ahead.
- C sets up a new company “Afriqom”. Suspicious conduct thereafter, he then resigns.
- Afriqom offers a weekly Africa report.
- Argus seeks injunctions (including a springboard injunction / damages.

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Key issues (1)

- Applicability of the PTRs and other express/implied duties – was his business “in competition” with C`s?
- Breach / Enforceability of the PTRs
- Was the non-compete necessary at all in light of the other PTRs?
- Did C`s conduct discharge D from the PTRs?

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Key points (1)

- Interchangeability of products is not a pre-requisite to being “in competition”. It suffices if the products are “similar” or “sufficiently comparable”.
- Every case will be fact-specific, and a broad-brush approach is required.
- “Solicitation” requires a direct and specific appeal, not a mere “general” approach.
- The non-deal / non-solicit were not sufficient of themselves to protect C`s legitimate interests – the non-complete was a reasonable additional restriction.

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Key Points (2)

- Reasonable not to limit “restricted business” to those with whom D had previous dealings.

- But no springboard injunction granted *on the facts of this case*. Insufficient evidence to justify.

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Significance for your clients?

- HC gives guidance as to the types of behaviour and factors a court will consider when finding an employee to be in breach of the various express and implied duties. Useful in the modern era.

- HC took a broad approach to defining the scope of D`s new business, also looking at services it intended to provide at an unspecified future time.

"The scope of the business… is not limited to what it was doing at a snapshot of time….."

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