

UPDATE

The enforcement of non-competition covenants by employers

Update prepared by Mathew Cook (Counsel, Jersey)

This judgment is one of the very few Jersey cases that looks at the issue facing an employer looking to enforce a non-competition clause against a former employee.

A recent interlocutory judgment of the Royal Court of Jersey has highlighted the issues facing an employer who wishes to enforce a non-competition clause against a former employee.

The employer had commenced proceedings against two former employees who, it said, had left and taken up employment with a rival in breach of a non-competition covenant in their contracts of employment. The recent judgment directly concerned only whether the employer was entitled to an interim injunction, preventing the former employees from working for the rival pending trial. Nevertheless, in the course of the judgment, the court made a number of instructive observations on the more substantive legal issues involved.

The availability of an ex parte injunction

The employer had already obtained an urgent injunction ex parte from a judge in chambers, that is to say, without notice to the employees. The court held that the employer should not have proceeded in this way. This was not one of the exceptional types of case where it is permissible to seek an interim court order without the other side having an opportunity to be heard. A hearing could have been arranged at relatively short notice. The original injunctions were therefore set aside. With both parties now present, however, the court was willing to consider whether the interim injunctions should, after hearing argument, immediately be re-imposed.

On the facts, the court said that, applying ordinary principles governing interim injunctions, it would normally have been minded to impose the injunctions.

But there was a further problem. As can often happen in such cases, the hearing of the substantive action was unlikely to take place before the restrictive period set out in the contracts of employment had largely or even entirely expired. The court considered it would be unjust to the defendants for the interim injunctions to be re-imposed if, as it happened, the court thought that the non-competition covenants were unlikely to be enforceable in any event. For that reason the court also reviewed the merits of each party's case.

The enforceability of restrictive covenants in restraint of trade - fundamental principles

The court reiterated that the fundamental principles on the enforceability of non-competition clauses in employment contracts are the same as under English common law.

- A covenant in restraint of trade between an employer and an employee is unenforceable unless it is reasonable as between the parties and reasonable with reference to the public interest.
- A covenant intended merely to protect the employer against competition from his former employee will not be upheld. The court will be careful to ensure that the law is not used to stifle bona fide competition or to prevent an employee from using his skills and knowledge, even if gained wholly or partly in the employer's service.

- However, an employer is entitled to protection against an employee taking unfair advantage of information obtained during his employment.
- If a court is to uphold a covenant which imposes restrictions upon the freedom of action of the employee after he has left the service of the employer, the restrictions must be no greater than are reasonably necessary for the protection of the employer in his business.
- Although the court may, where appropriate, interpret a covenant in a manner which renders it reasonable, and therefore enforceable, and may also apply the 'blue pencil test' so as to strike out parts which render the covenant too wide but enforce the remainder if reasonable, the court cannot rewrite the covenant which the parties have entered into. If, despite benevolent interpretation and the deletion of unreasonable parts, the covenant would still be wider than is reasonably necessary, the court will not enforce it even if it would have enforced a more narrowly drawn covenant to protect an employer's legitimate interest.
- The reasonableness of the non-compete covenants is to be determined at the date the contracts were formed.

Burden of proof

One area where it has been suggested in past cases that Jersey law may be different from English common law is the incidence of the burden of proof.

In English law, the burden of proof to show that a non-competition clause in an employment contract goes no wider than reasonably necessary, lies on the employer. Under Jersey law, there is a strong general presumption in favour of upholding contracts; this is taken to be a consequence of the maxim of customary law that *la convention fait la loi des parties* (the parties' agreement makes the law between them). A point which had been argued in previous cases, but not yet decided, was that the importance of this principle in Jersey meant that the burden in such cases falls, unlike under English law, on the employee, to show that the clause goes wider than reasonably necessary.

The judge in the present case pointed out that the public interest is engaged in questions of the enforceability of covenants in restraint of trade. The starting point is therefore that such covenants are void. It is thus apposite, he said, that the burden of proof falls, as under English law, on the employer to show that the covenant is reasonable. It was not, however, necessary to decide this particular question in the context of the present interlocutory proceedings; on the facts, the same result, the judge said, would be reached wherever the burden lay. Although the point has not, therefore, been definitively determined, it is anticipated that the judge's remarks will carry considerable weight if it becomes a live issue in a future case. Despite the earlier indication that Jersey law may differ, the burden may in fact lie on the employer as under English law.

Period of restriction

The non-competition covenant provided for a restrictive period of 12 months from the date of termination of employment. The court commented that a period of 12 months was consistent with many of the English and Jersey cases cited before it, and it was unlikely that the court at trial would regard 12 months as an unreasonable period.

Whilst each case will depend on its own facts, the court's general statement that 12 months is not an unreasonable period, is instructive. It should be noted, however, that the court did not say how much longer than 12 months the period could be before it was likely to be considered unreasonable.

Protecting confidential information

The contracts in question also included clauses preventing the disclosure of confidential information at any time, either during or after termination of employment.

The court noted, however, that protecting confidential information can be difficult. The misuse of confidential information is often insidious and hard to prove and the difficulties of establishing causation are considerable (*Elsevier Limited v Munro* [2014] EWHC 2648). It is often not satisfactory simply to have a covenant against disclosing information – it is too difficult to draw the line between information which is confidential and information which is not; and it is also difficult to prove a breach when the information is such that an employee can carry it away in his head. A covenant preventing an employee from working for

a competitor at all is often the only practical way in which to provide effective protection for an employer's right to safeguard confidential information (*Littlewoods Organization Limited v Harris* [1987] 1 WLR 1472).

The non-competition clauses in the present case could be seen as an attempt to protect the employer's trade secrets. But what sort of information can an employer legitimately protect? The critical question, the court said, was whether the employer has trade secrets which can be fairly regarded as his property, as distinct from the skill, experience, know-how and general knowledge which can fairly be regarded as the property of the employee to use without restraint for his own benefit or in the service of a competitor, following the English case of *FSS Travel and Leisure Services Limited v Johnston and another* [1999] FSR 505).

The court set out the following further principles drawn from *FSS Travel*.

- The court would never uphold a covenant taken by an employer merely to protect himself from competition by a former employee.
- There must be some subject matter which an employer could legitimately protect by a restrictive covenant.
- Protection could be legitimately claimed for identifiable objective knowledge constituting the employer's trade secrets with which the employee has become acquainted during his employment.
- Protection could not be legitimately claimed in respect of the skill, experience, know-how and general knowledge acquired by the employee as part of his job during his course of employment, even though it might equip him as a competitor of his employer.
- The critical question was to distinguish the trade secrets that the employer could claim as his property from the skill, experience, know-how and general knowledge that the employee could regard as his property, for only the former could be subject to such a restraint.
- This question could only be answered by examining all the evidence relating to the nature of the employment, the character of the information which the employer sought to protect, the restrictions sought, the extent of use of the information in the public domain, and the likely damage that would be suffered by the employer if the information were disclosed.
- It was a question of fact on which side of the line any piece of information would fall between employer's and employee's property, but lack of precision in pleadings and absence of solid evidence in proof of trade secrets were frequently fatal to enforcement of a restrictive covenant.

In the present case, the court said that the key issue was whether the employer was likely to be able to establish at trial that there was identifiable objective knowledge constituting its trade secrets which it could legitimately claim as its property as distinguished from the skill, experience, know-how and general knowledge that the defendants could regard as their property.

In the case of one of the employees, the court held, on the particular facts, that her role had been a 'back office function' and the employer would be unlikely to establish at trial any confidential information or trade secret that could fairly be regarded as its property as distinct from those qualities which could fairly be regarded as her property to use for her own benefit or in the service of a competitor. In the light of that, it was unjust to re-impose the interim injunctions pending the outcome of the trial.

The arguments were more evenly balanced in the case of the other employee as he had more detailed knowledge and involvement in the employer's core business and it was somewhat difficult to distinguish between his intellectual property and that of the business. Noting, however, that the courts view covenants in employment contracts more jealously than in other commercial contracts (*Coppage v Safety Net Security Ltd* [2013] EWCA Civ 1176) and taking into account all the circumstances, including the short period that the covenant now had to run, the court also declined to re-impose the interim injunctions against him.

The court made these determinations in just a half-day hearing and without full consideration of the merits and testing of all the evidence. The court was making a determination as to whether the covenants were likely to be enforced in due course. Given the short time frames involved in such cases, quick action and court determination will generally be required in such cases, and may well be determinative of the entire proceedings.

It is vital for employers to give very careful thought to the reasons for the drafting of restrictive covenants; they should be tailored to the business and the role and should be regularly reviewed. If you would like to

discuss any of the issues arising from this case or the enforceability or drafting of restrictive covenants, please contact Helen Ruelle or any member of your local Mourant Ozannes employment team.

Contacts



Mathew Cook

Counsel,

Jersey

+44 1534 676 371

mathew.cook@mourant.com

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED