



EMPLOYMENT, PENSIONS AND EMPLOYEE BENEFITS

Analysis of UK case on restrictive covenants suggests regular reviews needed

by **Aoife Bradley**

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A recent judgment in English High Court - *Bartholomews Agri Food Limited –v- Michael Andrew Thornton* - brought restrictive covenants into focus once again.

In this article, we suggest that as these covenants are governed by common law, this case would have persuasive authority in Irish courts.

The judgment in the English High Court in the case of *Bartholomews Agri Food Limited –v- Michael Andrew Thornton* was delivered in respect of an application by the applicant employer seeking an interim injunction to enforce the terms of a restrictive covenant contained in the Respondent employee's contract of employment.

The employer is an agricultural merchant and supplies a full range of products and services to the agricultural sector, including the provision of agricultural advice to the various players within the sector. The company's business is based in West and East Sussex, Kent, Hampshire, Wiltshire and Dorset and it is part of a larger group of companies (in respect of which the holding company is Bartholomews (Holdings) Ltd).

The employee is a qualified agronomist (specialised in the areas of plant and soil) and joined the employer in September 1997 as a trainee agronomist.

The employee tendered his resignation on 21 December 2015 and intended to take up a new position with Pro Cam UK Ltd, a retailer supplying its customers with seed from various different seed producers throughout the UK, on 22 March 2016 on the expiry of his notice period. The employee was purportedly placed on garden leave by the employer on 6 January 2016.

The Respondent's Contract of Employment & Clause 10.2

Shortly after commencing his employment in November 1997, the employee signed the employer's contract of employment. Although issues arose in relation to the confidentiality clause also, the restriction which became the main focus of this injunction application was contained in clause 10.2 of the Respondent's contract of employment as follows:

"10.2 Protection of Knowledge Acquired Due to the Company's Specialised Business

Employees shall not, for a period of six months immediately following the termination of their employment be engaged on work, supplying goods or services of a similar nature which compete with the Company to the Company's customers, with a trade competitor within the Company's trading area, (which is West and East Sussex, Kent, Hampshire, Wiltshire and Dorset) or on their own (sic) account without prior approval from the Company. In this unlikely event, the employee's full benefits will be paid during this period."

The Application

The court applied the Campus Oil principles and sought to determine whether there was a serious question to be tried in relation to the enforceability of Clause 10.2 of the contract of employment. In this regard, the court required the employer to demonstrate that it had a legitimate business interest requiring protection and that the restriction was no wider than reasonably necessary to protect those interests.

The employer alleged that the employee was a trusted advisor to many of its customers who were small, geographically isolated, family run businesses, and gave evidence to the pivotal and central role that the employee played in the business and in maintaining relationships with its customers.

The employee alleged that the restrictive covenant on which the employer was seeking to rely was unreasonable and unenforceable and constituted a restraint of trade.

Decision

The court held that despite the fact that it was limited in duration and geographical scope, Clause 10.2 was in restraint of trade and unenforceable.

The court placed emphasis on the appropriateness of the restriction at the time of agreement was made between the employer and the employee. In this regard, the court was critical of the fact that the restriction was imposed in 1997 when the employee was a trainee agronomist and held that it was wholly inappropriate to impose such a restriction on such a junior employee. In this regard, the court endorsed the decision in *Pat Systems v Nelly* [2012] IRLR 979 which held that a restrictive covenant that was unenforceable at the time of agreement given the employee's status and role at the time of agreement remained unenforceable, even in circumstances where the employee was subsequently promoted to a more senior role in respect of which the restriction may have been deemed reasonable.

The court also held that Clause 10.2 was wider than reasonably necessary to protect the employer's legitimate business interests. In particular, the court criticised the employer's attempt to impose the restriction in respect of all of its customers and its associated companies, irrespective of whether the employee had knowledge of or involvement with these customers. The percentage of turnover generated by the employee was examined and found to be just over 1%. In the circumstances, the court held that such a wide ranging restriction was inappropriate.

It is instructive to note that the court held that a more appropriate restriction would have provided that the employee could not deal with or solicit customers with whom he had dealings with for a period of time before the termination of his employment for a period of six months.

Interestingly, the court found that the provision in Clause 10.2 whereby the employer would continue to pay the employee for the duration of the restriction as long as he complied with the terms of the provision was contrary to public policy as it effectively sought to purchase a restraint of trade.

In all the circumstances, the court refused the Applicant's application for injunctive relief.

Conclusion

Restrictive covenants drafted at the outset of the employment relationship should be reviewed and may need to be renegotiated as the employee's role and the nature of the employer's business evolve over time. Therefore, it is advisable for employers to carry out regular reviews of employment contracts and restrictive covenants in place for key personnel to ensure that they are fit for purpose. Legal advice should be sought in relation to the specific circumstances of any employment relationship where employees are offered promotion or job specifications have been changed as the employee's restrictive covenants should correspond to the seniority and specifications of the particular role if they have any chance of being enforceable.

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