

RECENT EMPLOYEE COMPETITION CASES

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1. This paper considers five issues which arise from recent cases involving post-termination restraints (“PTRs”):
 - The need for consideration.
 - The *American Cyanamid* test for interim relief.
 - The reasonableness of client non-dealing covenants.
 - When a speedy trial will be ordered.
 - Jurisdiction: where an employee can sue and be sued.

A THE NEED FOR CONSIDERATION

Reuse Collections Ltd v Sendall²

2. This case raises an important issue regarding the need for consideration when introducing restrictive covenants during employment.
3. Judgment was given in November 2014 following a trial. The judge (HH Judge Stephen Davies) held that:
 - (1) while the first defendant employee (Sendall) had owed implied duties of fidelity, good faith and confidentiality to the claimant employer (Reuse), he had not owed a fiduciary duty;
 - (2) Sendall’s PTRs were unenforceable for lack of consideration;
 - (3) Sendall had acted in breach of his implied duty of fidelity and good faith, but not any duty of confidentiality, in assisting a competitor during his employment;
 - (4) the second defendant competitor was liable for the tort of unlawful means conspiracy, but not that of inducing or procuring breaches of contract; and
 - (5) Reuse was entitled to damages of approximately £52,000 against both defendants.
4. The second of these issues – the unenforceability of the PTRs for lack of consideration – is considered below.

¹ Blackstone Chambers, Editor of *Employee Competition: Covenants, Confidentiality, and Garden Leave* (OUP, 3rd ed, 2016). For updates on employee competition cases, see Blackstone Chambers’ *Employee Competition Bulletin*, which is available at www.blackstonechambers.com. If you would like to receive the Bulletin by email, please contact matswallow@blackstonechambers.com.

² [2014] EWHC 3852 (QB), [2015] IRLR 226.

Facts

5. Reuse Collections Ltd was a glass recycling business. The Sendall family had set up and owned the business until it was sold to Reuse in the 1990s. Keith Sendall ceased to be a director following the sale and instead became an employee of its Dagenham depot, but had no contract of employment. His two sons were employed as drivers at the depot.
6. In October 2012, Reuse gave Sendall a draft contract of employment which contained post-termination restrictive covenants. He was reluctant to sign this but eventually did so. He received a pay rise around the same time.
7. In 2011, Sendall started thinking about setting up his own business to compete with Reuse. In late 2012, he set up a new company May Glass Recycling Ltd and became, with his sons, a director of the company. He was involved in arranging bank finance for the new business, and contacted Reuse's suppliers and at least one customer to solicit their business for May Glass.
8. In March 2013, Sendall gave 3 months' notice of resignation followed, a month later, by his son's resigning. Reuse found out about May Glass, suspended Sendall pending the outcome of disciplinary proceedings. Sendall resigned with immediate effect, claiming constructive dismissal.
9. Reuse brought proceedings against Sendall and May Glass. An interim injunction was granted (which appears to have been of a springboard nature). At trial, Reuse sought to enforce the PTRs in Sendall's contract of employment (which included 6-month client non-solicitation and non-dealing covenants) and claimed damages for breach of contract, inducement of breach of contract and unlawful means conspiracy.

The unenforceability of the PTRs for lack of consideration

10. It was common ground that the PTRs required consideration to be enforceable, since they were introduced after the inception of the employment relationship and thus amounted to a variation of an existing contractual relationship: [70].
11. It was argued for Sendall (and not disputed by Reuse) that in a case like the present, where an employer seeks to impose substantial new obligations on an existing employee, the consideration must comprise some real monetary or other benefit (promotion for example) conferred on the employee for the purpose of causing the employee to agree the restrictive covenant, and that it must be substantial and not nominal: [70]-[71].
12. Reuse's case was that the covenants contained in the contract of employment were supported by consideration, because they were introduced as part of a package under which benefits were conferred upon Sendall, including a pay rise. Alternatively, it was

said that consideration could be found in his continued employment in the months after the contract of employment was produced: [72].

13. The judge rejected both arguments.
14. First, as to the salary increase, Reuse failed to produce any satisfactory evidence that the salary increase was specific either to Sendall or to the other senior employees who were being asked to enter into a formal contract of employment, or that it was made clear to him that the increase was conditional upon his accepting the contract of employment, or even that in some more general sense it was linked with the introduction of the new contract of employment. In the circumstances, it did not seem to the judge that this could be said to amount to consideration for the PTRs: [81].
15. Second, as to the continued employment, this was not sufficient in the context of this case, where a long-serving employee was being asked to accept new, substantial, contractual restrictions. This was not a case where, on the evidence, Reuse was putting forward the draft contract on the basis, expressly or implicitly, that a refusal to sign it would, or might lead to dismissal or indeed any other lesser sanction. It could not be said, therefore, that Reuse provided consideration merely by continuing to employ Sendall: [84].
16. The lesson for employers is clear. Any introduction of, or variation to, restrictive covenants should be specifically linked either to an improved package of terms and conditions for the employee or to sanctions for non-acceptance, in order to provide the consideration necessary for their enforceability. Any such introduction or variation will need to be carefully managed, with appropriate consultation.

B THE AMERICAN CYANAMID TEST FOR INTERIM RELIEF

Le Puy Ltd v Potter³

17. *Le Puy Ltd v Potter* considers when the *American Cyanamid* test applies for the grant of interim relief⁴.

Facts

18. The claimant, Le Puy Ltd, is a recruitment agency trading as Harpur. The first defendant, Christopher Potter, was an employee, director and shareholder. He was “the face” of Harpur, visiting its customers on a regular basis.
19. Potter set up a competitor business, Abstract Recruitment Ltd and informed Harpur that he was resigning with immediate effect, implying that he was unwell due to pressure of work.

³ [2015] EWHC 193 (QB), [2015] IRLR 554.

⁴ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

20. Harpur commenced proceedings to enforce 12-month non-solicitation and non-dealing client PTRs.

The decision

21. The judge decided that the threshold test for the grant of an interim injunction laid down in *American Cyanamid* – whether there was a serious issue to be tried – was applicable in this case.
22. The employee argued that the *American Cyanamid* test did not apply. That test requires a claimant to satisfy a court only that there is “a serious issue to be tried” that the covenant is enforceable, in which case the court decides whether the balance of convenience favours the grant or refusal of interim relief until trial.
23. Here, the employee contended that the judge should dismiss the application unless satisfied that “it is more likely than not” that the claimant would succeed at trial.
24. The judge pointed out at [20] that, as Lord Diplock observed in *NWL v Woods*⁵, the *Cyanamid* approach:

“was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful on the application, because there would be nothing left on which it was in the unsuccessful party’s interest to proceed to trial.”

25. As Staughton LJ explained in *Lansing Linde v Kerr*⁶:

“If it will not be possible to hold the trial before the period for which the plaintiff claims to be entitled to an injunction has expired, or substantially expired...justice requires some consideration as to whether the plaintiff would be likely to succeed at trial. In those circumstances it is not enough to decide merely that there is a serious issue to be tried.”

26. The relevant chronology in the present case was as follows:

16 Nov 2014	Potter informed Harpur that he was resigning with immediate effect. There followed a period of correspondence between the parties.
22 Dec 2014	Proceedings were commenced and an application notice for interim relief was issued.
2 Feb 2015	The judge granted an interim injunction.
April 2015	Likely date of speedy trial.

⁵ [1979] ICR 867, [1979] IRLR 478.

⁶ [1991] ICR 428, [1991] IRLR 80. See, also, *Lawrence David Ltd v Ashton* [1989] ICR 123, [1989] IRLR 22; *CEF Holdings Ltd v Munday* [2012] EWHC 1524 (QB), [2012] IRLR 912.

27. It can be seen from this brief chronology that the decision on the application was made a little under 3 months into the period of a 12-month restrictive covenant. Judgment following a speedy trial would be likely at a time when approximately 5-6 months of the 12-month covenant was still to run.
28. The judge concluded at [22]:
- “In my judgment, that sort of timetable does not make the *Cyanamid* approach inapplicable. My decision on this application will not ‘in effect dispose of the action finally’. Nor will the relevant covenants, by the time of judgment after trial, have ‘substantially expired’. The preliminary question that I must ask myself therefore remains whether there is a serious question to be tried.”
29. In light of this decision, it is reasonable to assume that where a speedy trial can be heard before more than 50% of the period of the covenant has run its course, then the *American Cyanamid* test of ‘serious issue to be tried’ will apply, rather than the higher threshold of considering whether the claimant ‘would be likely to succeed at trial’. This will be more difficult to achieve where the covenant sought to be enforced only lasts for 6 months rather than 12. Ironically, this suggests that a stricter test will be applied (‘likely to succeed’ rather than ‘serious issue’) to attempts to enforce a more reasonable covenant (6 rather than 12 months).

C THE REASONABLENESS OF NON-DEALING COVENANTS

30. A second point addressed in *Le Puy v Potter* is the reasonableness of the covenant that provided that the employee would not ‘deal with’ defined customers.
31. The employee argued that this was unnecessarily wide because it effectively stopped customers from making even an unsolicited choice to deal with Potter, the employee – an agent that they like and have dealt with for a number of years – rather than with Harpur. The expression ‘deal with’ was in any event too vague and wide to be enforceable, it was argued: [36].
32. The judge reviewed the general principles applicable to the enforceability of restrictive covenants. For this purpose, at [29] he cited with approval the principles stated by Sir Bernard Rix in *Coppage v Safety Net Security Ltd*⁷, which may be summarised as follows:
- (1) PTRs are enforceable, if reasonable, but covenants in employment contracts are viewed more jealously than in other more commercial contracts, such as those between a seller and a buyer.
 - (2) It is for the employer to show that a restraint is reasonable in the interests of the parties and in particular that it is designed for the protection of some proprietary interest of the employer for which the restraint is reasonably necessary.

⁷ [2013] EWCA Civ 1176, [2013] IRLR 970 at [9].

- (3) Customer lists and other such information about customers fall within such proprietary interests.
 - (4) Non-solicitation clauses are therefore more favourably looked upon than non-competition clauses, for an employer is not entitled to protect himself against mere competition on the part of a former employee.
 - (5) The question of reasonableness has to be asked as of the outset of the contract, looking forwards, as a matter of the covenant's meaning, and not in the light of matters that have subsequently taken place (save to the extent that they throw any general light on what might have been fairly contemplated on a reasonable view of the clause's meaning).
 - (6) In that context, the validity of a clause is not to be tested by hypothetical matters which could fall within the clause's meaning as a matter of language, if such matters would be improbable or fall outside the parties' contemplation.
 - (7) Because of the difficulties of testing in the case of each customer, past or current, whether such a customer is likely to do business with the employer in the future, a clause which is reasonable in terms of space or time will be likely to be enforced.
 - (8) On the whole, cases in this area turn so much on their own facts that the citation of precedent is not of assistance.
33. The judge did not need to, and did not attempt to, finally decide the employee's argument as to the unreasonableness of the non-dealing covenant. It was sufficient to conclude that there was a serious issue to be tried. He said at [37]:

"The expression 'deal with' appears in the restrictive covenants considered in a large number of reported cases, and I am not aware of any previous suggestion that it, of itself, produces too wide a restriction, if the class of persons with whom such dealing is prohibited is properly limited. After all, it is the customer whose future custom is uncertain that is the very class of customer against which the covenant is designed to give protection."

D WHEN A SPEEDY TRIAL WILL BE ORDERED

Petter v EMC Europe Ltd⁸

34. *Petter v EMC Europe Ltd & EMC Corporation* concerns ongoing litigation which, thus far, has seen two first instance and two Court of Appeal decisions. This section deals with the decision to order a speedy trial of Petter's claim for declarations that his PTRs are unenforceable.

⁸ [2015] EWCA Civ 480.

Facts

35. Petter was employed by EMC Europe Ltd. He is domiciled in the UK and worked for EMC in the UK. Part of his remuneration package involved the award of restricted stock units (“RSUs”) under a stock plan run by EMC Corporation, the ultimate parent company of his employer, EMC Europe. The RSUs vested over a vesting period and unvested RSUs were liable to forfeiture in certain circumstances. The stock plan contained a Massachusetts law and exclusive jurisdiction clause.
36. Petter obtained employment with a competitor of EMC, Pure Storage Ltd, and resigned from EMC on one month’s notice as required by his contract. EMC Corporation forfeited Petter’s unvested RSUs, and also claimed repayment of previously vested RSUs on grounds that Petter had joined Pure Storage in breach of a 12-month non-compete covenant contained in his employment contract.
37. EMC Corporation commenced proceedings against Petter in the Massachusetts courts (“the US proceedings”). Petter then commenced proceedings against EMC Europe and EMC Corporation in the English courts. He sought declarations that the restrictive covenants in his employment contract are unenforceable, that the forfeiture of his RSUs is unlawful, and an anti-suit injunction to restrain the pursuit of the US proceedings.

The decision

38. The judge ordered a speedy trial of Petter’s claim against EMC Europe for declarations as to the enforceability of the restrictive covenants. EMC Europe appealed the order for a speedy trial.
39. EMC Europe argued on appeal that the judge had been wrong to order a speedy trial when EMC Europe had neither sought nor obtained an interim injunction to restrain Petter from breaching the covenants, and Petter’s only legitimate concern was that he might be sued for damages in the future: [5].
40. Vos LJ (with whom Bean LJ agreed) referred to the relevant principles to the grant of a speedy trial. In *Daltel Europe Ltd (In Liquidation) v Makki*⁹, Lloyd J at [13] said that expedition was not “a question of choosing a slightly faster over a slightly slower method” of proceeding to trial, but could “only be justified on the basis of real, objectively viewed, urgency in the case” which justified giving preference over other cases in the court’s list.

⁹ [2004] EWHC 1631 (Ch).

41. The applicable principles were then succinctly summarised by Neuberger LJ in *WL Gore and Associates GmbH v Geox Spa*¹⁰ where he alluded to four factors to be taken into account as follows:
- (1) whether the applicants have shown good reason for expedition;
 - (2) whether expedition would interfere with the good administration of justice;
 - (3) whether expedition would cause prejudice to the party; and
 - (4) whether there are any other special factors.
42. The Court of Appeal began by noting that this was an appeal from a case management decision made by a judge at first instance: [15]. It is very well established that the Court of Appeal will only interfere with a judge's exercise of a discretion on a case management issue in very limited circumstances where the judge has "not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which reasonable disagreement is possible" (see Lord Fraser in *G v G (Minors; Custody Appeal)*¹¹, Brooke LJ in *Tanfern Ltd v Cameron MacDonald*¹², and Potter LJ in *Powell v Palaces of Hereford Ltd*¹³).
43. As for the correct principles, the overriding objective requires that there should be a good reason for expedition. But the categories of case in which expedition is appropriate are not closed. There may be many and varying situations in which expedition will be held to be just and appropriate, taking into account all aspects of the overriding objective and the court's resources, and the interests of other court users in particular. See [16].
44. The judge had not failed to apply the correct principles. He thought that Petter reasonably wanted to know whether or not he could be lawfully employed by Pure Storage, and that EMC Europe's refusal to undertake not to sue him was an indication that he required that certainty. Neither did the judge exercise his discretion in a way that exceeded the generous ambit within which reasonable disagreement was possible.
45. Vos LJ added at [22]:
- "Mr Petter wants certainty because he does not wish to risk doing a job for Pure that may result in damages being awarded against him some time in the future. He might well wish to take avoiding action if it turns out that the clauses in question are enforceable. When an ex-employee faces the might of a large corporation, one may think that these circumstances would present an

¹⁰ [2008] EWCA Civ 622.

¹¹ [1985] 1 WLR 647 at page 652.

¹² [2000] 1 WLR 1311 at [32].

¹³ [2002] EWCA Civ 959 at [11].

objectively justifiable reason for expedition; albeit that they may not always be enough by themselves.”

46. Subsequently, prior to the speedy trial, a consent order was made declaring that the covenants were unenforceable.

E JURISDICTION: WHERE AN EMPLOYEE CAN SUE AND BE SUED

Petter v EMC Corporation¹⁴

47. The second Court of Appeal hearing in this case concerned the issue of jurisdiction. EMC Corporation applied to dismiss the proceedings on the ground that the English court did not have jurisdiction over Petter’s claim against it. Petter applied for an anti-suit injunction to restrain EMC Corporation from suing him in Massachusetts. Both applications turned to a considerable degree on the effect of Section 5 of Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“Brussels I Recast”), as interpreted and applied by the Court of Appeal in *Samengo-Turner v Marsh and McLennan (Services) Ltd*¹⁵.

The Brussels I Recast Regulation

48. The relevant provisions of the Brussels I Recast Regulation are as follows:

Article 20

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section

Article 21

1. An employer domiciled in a Member State may be sued:

...

- (b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so...

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.

Article 22

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

¹⁴ [2015] EWHC 1498 (QB); [2015] EWCA Civ 828, [2015] IRLR 847.

¹⁵ [2007] EWCA Civ 723, [2008] ICR 18.

Article 23

The provisions of this Section may be departed from only by an agreement:

- (1) which is entered into after the dispute has arisen.

The decision

49. A detailed treatment of this part of the case is beyond the scope of this paper. However, in brief, the Court of Appeal held:

- (1) The dispute between Petter on the one hand and EMC Corporation and EMC Europe on the other was one that “relates to his contract of employment” within the meaning of Article 20(1) of Brussels I Recast and that both EMC Corporation and EMC Europe were to be regarded as his employers for the purposes of the Regulation: [20].
- (2) The terms of the Regulation and the existing case law of the CJEU (limited though it is) combine to make it clear that the Regulation applies in a case of this kind. The matter is *acte clair* and there was no need to refer the matter to the CJEU for a preliminary ruling: [22].
- (3) Petter had much the better of the argument that Section 5 applied in this case and that the court was bound to disregard the Massachusetts exclusive jurisdiction clause and assume jurisdiction over EMC Corporation in relation to the issues raised by the claim: [23].
- (4) The *Samengo-Turner* case is authority for the principle that in a case falling within Section 5 of the Regulation an anti-suit injunction should ordinarily be granted to restrain an employer from bringing proceedings outside the Member States in order to protect the employee’s rights: [31].
- (5) An anti-suit injunction was granted to restrain EMC Corporation from pursuing the US proceedings against Petter.

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