

RECENT CASES ON RESTRICTIVE COVENANTS AND GARDEN LEAVE

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1. This paper considers the following recent cases on restrictive covenants and garden leave²:
 - **Construction:** *Prophet Plc v Huggett*.
 - **Enforceability:** *Coppage v Safety Net Security Ltd*.
 - **Remedies:** *One Step Ltd v Morris-Garner*; *CF Partners (UK) LLP v Barclays Bank Plc*
 - **Garden Leave:** *Sunrise Brokers LLP v Rodgers*; *Elsevier Ltd v Munro*.

A CONSTRUCTION

Prophet Plc v Huggett³

2. This case raises two important issues regarding (i) the interpretation of PTRs, and (ii) the exercise of discretion in relation to the grant or refusal of injunctions.
3. Judgment in the case was given in March 2014 following a 6-day speedy trial. The judge (David Donaldson QC sitting as a Deputy High Court judge in the Chancery Division) granted an injunction to enforce a 12-month non-compete PTR. The Court of Appeal (Rimer, Lewison and Christopher Clarke LJ) allowed the employee's appeal in July 2014.

The facts

4. Prophet Plc develops, sells and updates computer software for part of the fresh produce industry (fruit, vegetables, cut flowers and herbs, but not dairy products, fish or meat). One of its products is Pr3, an update of Pr2, which offers a suite of integrated

¹ Blackstone Chambers: www.blackstonechambers.com. Editor of *Employee Competition: Covenants, Confidentiality, and Garden Leave* (OUP, 2nd ed).

² Cases considered in this paper were decided in the period October 2013 to September 2014. Other restrictive covenant cases decided during this period include: *East England Schools CIC (t/a 4myschools) v Palmer* [2013] EWHC 4138 (QB), [2014] IRLR 191 (damages for breach of 6 months' non-solicitation/dealing covenant); *Warm Zones v Thurley* [2014] EWHC 988 (QB), [2014] IRLR 791 (disk imaging and inspection order); *Capgemini India Private Ltd v Krishnan* [2014] EWHC 1092 (QB) (employee entitled to withdraw undertakings and context covenant); *Merlin Financial Consultants Ltd v Cooper* [2014] EWHC 1196 (QB) (damages for breach of 12 months' non-compete in goodwill agreement); *Energy Renewals Ltd v Borg* [2014] EWHC 2166 (Ch), [2014] IRLR 713 (12 months' non-solicitation covenant). unenforceable

³ [2014] EWHC 615 (Ch), [2014] IRLR 618; [2014] EWCA Civ 1013, [2014] IRLR 797.

software applications covering accounting, purchases and sales, warehousing, packing and transport.

5. Mr Huggett was employed by Prophet as UK sales manager in 2012. The non-compete at the heart of the dispute, contained in clause 19 of his contract of employment, provides as follows:

“The Employee shall not during the continuance of this Agreement, or for a period of twelve months from the determination thereof (for whatever reason or in whatsoever manner), without the consent in writing of the Board of Directors of the Company, either solely or jointly with, or as, a Director, Manager, Agent, Consultant or Employee of any other person, firm or company, directly or indirectly, carry on or be engaged, concerned or interested in any business which is similar to, or competes with, any business of the Company in which the Employee shall have worked whilst employed hereunder (in that they provide computer software systems of whatever kind to any company involved in the fresh produce industry) within the geographical area (namely the United Kingdom)...**Provided that this restriction shall only operate to prevent the Employee from being so engaged, employed, concerned or interested in any area and in connection with any products in, or on, which he/she was involved whilst employed hereunder.**”

6. In December 2013, Mr Huggett resigned to join a competitor, K3.

The proceedings

7. In January 2014, Prophet issued proceedings for injunctive relief to enforce the non-compete. Mr Huggett undertook in the terms of the non-compete pending a speedy trial, which took place in February 2014.
8. The judge considered three issues. First, he interpreted the covenant. Secondly, he decided that it was no wider than reasonably necessary to protect Prophet’s legitimate interests in its confidential information. Thirdly, he exercised his discretion by granting an injunction to enforce the covenant.
9. The Court of Appeal allowed the appeal and discharged the injunction. It did so on the basis of the first issue, namely the interpretation of the covenant. As a result it did not need to consider other arguments raised on appeal, and did not do so.
10. The principal importance of the case is in relation to the proper approach to the interpretation or construction of the covenant. The judge’s approach to the exercise of discretion (which was not dealt with by the CA) also merits comment.

The interpretation of the covenant

Interpretation of a restrictive covenant: the general approach

11. In *Clarke v Newland*⁴, Neill LJ summarised the principles applicable in interpreting restrictive covenants as follows:

“From these cases and other cases in the same field it is possible to collect certain rules: (1) that the question of construction should be approached in the first instance without regard to the question of legality or illegality; (2) that the clause should be construed with reference to the object being sought to be obtained; (3) that in a restraint of trade case the object is the protection of one of the partners against rivalry in trade. To these rules can be added a fourth: (4) that the clause should be construed in its context and in the light of the factual matrix at the time when the agreement was made”

12. This passage was cited with approval in the recent covenant case of *One Step v Morris-Garner* at [44], which is discussed below. It remains broadly correct, but should be read alongside more recent authorities on contractual interpretation, especially *Rainy Sky SA v Kookmin Bank*⁵.

The problem

13. The drafting of the covenant posed a problem for the employer which turned out to be insuperable. Both parties agreed that the first sentence of clause 19 would be unenforceable as a restraint of trade, if it stood alone. The point of the proviso to clause 19 was to narrow down the nature of the non-compete so that it was not an unreasonable restraint of trade.
14. The employer accepted at trial that clause 19, read literally, gave it no protection. That is because whilst the first sentence, read alone, would provide Prophet with protection (albeit unenforceable protection), a literal reading of the second sentence served wholly to negate it. Looking at the proviso, the only products on which Mr Huggett was involved whilst employed by Prophet were Prophet’s own products (Pr2 and Pr3) which were not provided by anyone else.
15. It was submitted for Prophet that such an interpretation rendered clause 19 pointless and so could not be its true meaning. Four alternative meanings were advanced for “any products” in the proviso, the preferred being “(c) business process software designed for the fresh produce industry”.

The judge comes to the employer’s aid

16. The judge’s view was that clause 19 was on its face pointless. That something had gone wrong in the drafting was clear to him. To revise it by construction would

⁴ [1999] 1 All ER 397.

⁵ [2011] UKSC 50, [2011] 1 WLR 2900.

however require it to be clear what correction was necessary, in other words what a reasonable person would have understood the parties to have meant by their use of the language (see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [21]-[25]). See [14].

17. The judge was far from convinced that what he described as Prophet's "wholesale reformulation of clause 19" is what the parties should reasonably be understood as having agreed. Though not advanced before him, he would have found more persuasive a correction in the form of a simple addition at the end of the clause of the words "or similar thereto". See [16].
18. Ultimately, however, what matters (according to the judge) is whether the formula by which the enjoined activities are specified in any order falls within any plausible candidate for the true meaning of clause 19. Addressed in this way, meaning (c) advanced by Prophet, passed muster.
19. The judge granted an injunction in the following terms:

"The Defendant is prohibited, until 3 January 2015 and within the United Kingdom only, from being directly involved in the provision of business process computer software designed for the fresh produce industry, save that the prohibition shall not prevent the Defendant from acting...in a business which does not compete with the claimant."

The Court of Appeal disagrees and refuses to correct the drafting

20. The Court of Appeal disagreed with the judge's approach, allowed the appeal and discharged the injunction. Rimer LJ gave the only judgment, with which Lewison and Christopher Clarke LJ agreed.
21. In Rimer LJ's judgment, the natural meaning of the words "any products" in their context in the clause 19 proviso is that they are referring simply to those products with which Mr Huggett was involved whilst employed at Prophet, namely Pr2 and Pr3. See [29].
22. Rimer LJ agreed with the judge that the "literal" interpretation of the proviso results in it having no relevant teeth and as imposing no material restraint upon Mr Huggett. That conclusion lent some force to the submission that the parties are not likely to have intended its language to achieve no practical commercial effect. See [32].
23. Despite this, the Court of Appeal refused to depart from the literal meaning of the covenant. Rimer LJ stated the relevant principle in [33]:

"If faced with a contractual provision that can be seen to be ambiguous in meaning, with one interpretation leading to an apparent absurdity and the other to a commercially sensible solution, the court is likely to favour the latter. Such an approach can, however, only be adopted in a case in which the language of

the provision is truly ambiguous and admits of clear alternatives as to the sense the parties intended to achieve.”

24. In Rimer LJ’s view, however, this was manifestly not such a case. He regarded the drafting as unambiguously clear albeit leaving Prophet with, for all practical purposes, a toothless restrictive covenant. He was not, however, persuaded that it was clear that something had “gone wrong” with the drafting of the proviso. See [35].
25. He regarded the words of the proviso as reflecting exactly what the draftsman intended. Where, he accepted, something probably *did* go wrong is that the draftsman did not think through to what extent his chosen restriction would be likely to achieve any practical benefit to Prophet upon Mr Huggett’s departure to a competitor. In other words, he did not think through the concept underlying his chosen words. Had he done so, and had he realised the potential practical futility of those words, he would have started again. Rimer LJ explained further at [36]:

“As it is, I consider that it is not possible to read the proviso and conclude from it that, although it actually achieved result A, it is clear from its language as a whole, read in its context, that the draftsman really intended to achieve different result B – or, for that matter, C, D or E.”

26. The Court of Appeal could therefore identify no basis upon which the judge was entitled to recast the parties’ bargain in the way he did. Prophet made its clause 19 bed and it must now lie upon it.

The exercise of discretion

27. The judge’s approach at first instance is worthy of note for another reason, which was not considered on appeal. That is, the proper approach of the court to the exercise of discretion, following trial, as to whether or not to grant a permanent injunction to enforce a restrictive covenant. See [24]-[45].
28. Whilst much of the discussion in this part of the judgment relates to the particular facts of this case (albeit a helpful illustration of how the court goes about this task), of general interest is the passage concerning the legal framework as regards discretion. See [25]-[28].
29. In *Dyson Technology Ltd v Strutt*⁶, a case concerning employment restrictive covenants, the court applied the following principles laid down by Colman J in *Insurance Company v Lloyd’s Syndicate*⁷:
- (1) Express or implied negative covenants will in general be enforced by injunction without proof of damage by the plaintiff.

⁶ [2005] EWHC 2814, [2005] All ER (D) 355 (Nov).

⁷ [1995] 1 Lloyd’s Rep 272 at 277.

- (2) The principle does not depend on whether the plaintiff is a person or a corporation. The ready availability of the remedy is not the consequence of equity's regard for the plaintiff's personal feelings, but of equity's perception that it is unconscionable for the defendant to ignore his bargain.
 - (3) Although absence of damage to the plaintiff is not in general a bar to relief there may be exceptional cases where the granting of an injunction would be so prejudicial to a defendant and cause him such hardship that it would be unconscionable for the plaintiff to be given injunctive relief if he could not prove damage. In such cases an injunction will be refused and the plaintiff will be awarded nominal damages.
30. In *Shelfer v City of London Electric Lighting*⁸ the Court of Appeal considered the proper approach in deciding whether to order damages in lieu of an injunction under Lord Cairns Act. AL Smith LJ formulated a four-fold test which has been referred to in many subsequent cases:
- (1) If the injury to the plaintiff's legal rights is small,
 - (2) And is one which is capable of being estimated in money,
 - (3) And is one which can be adequately compensated by a small money payment,
 - (4) And the case is one in which it would be oppressive to the defendant to grant an injunction,
- then damages in substitution for an injunction may be given.
31. *Shelfer* was comprehensively reviewed by the Supreme Court in the recent case of *Coventry v Lawrence*⁹. Lord Neuberger held that an almost mechanical application of AL Smith LJ's four tests, and an approach which involves damages being awarded only in very exceptional circumstances, are each simply wrong in principle. See [119]. He answered the question where this left AL Smith LJ's four tests as follows at [123]:
- "First, the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion". Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted."
32. Having considered *Coventry*, the judge in *Prophet* concluded that the *Shelfer* formula is to be applied as no more than a working rule, albeit satisfaction of the four tests will normally lead to a refusal of an injunction in the absence of other relevant circumstances. He added at [28]:

⁸ [1895] 1 Ch 287.

⁹ [2014] UKSC 13, [2014] 3 WLR 555.

“I consider therefore that the restriction to exceptional circumstances and hardship reflected in the passage I quoted earlier from Colman J is now to be treated as unsound. That is not to say that the factors identified in previous cases are not relevant, only that they are neither exhaustive nor to be applied mechanistically.”

33. This new approach should guide the court when considering whether to grant a permanent injunction to enforce a restrictive covenant.

B ENFORCEABILITY

Coppage v Safety Net Security Ltd¹⁰

34. The principal issue in *Coppage* is the enforceability of a non-solicitation covenant that was neither limited to customers with whom the employee dealt nor to those within a recent temporal period. It also contains a useful summary by the Court of Appeal of the principles relevant to the enforceability of PTRs, and a brief discussion on fiduciary duties and quantum of damages for breach of the non-solicitation covenant.

The facts

35. Mr Coppage was the business development director of Safetynet, a security company. His contract of employment contained the following covenant:

“It is a condition of your employment, that for a period of six months immediately following termination of your employment for any reason whatsoever, you will not, whether directly or indirectly as principal, agent, employee, director, partner or otherwise howsoever approach any individual or organisation who has during your period of employment been a customer of ours, if the purpose of such an approach is to solicit business which could have been undertaken by us.”

36. Mr Coppage described himself in evidence “to be the face of the business” and boasted that at least one fifth of Safetynet’s client base and income was as a result of his “pizzazz”.
37. Coppage resigned and shortly thereafter incorporated a competitor company (Freedom), and approached Safetynet’s customers. Telephone records appear to have been critical in proving Coppage’s liability in the face of his denials.

The proceedings

38. Judge Simon Brown QC, sitting in the Birmingham Mercantile Court, held that (i) Coppage had breached the covenant which was enforceable, (ii) he had also breached his fiduciary duties, and (iii) Safetynet was entitled to damages of £50,000 (Safetynet having limited its claim to this amount).

¹⁰ [2013] EWCA Civ 1176, [2013] IRLR 970.

39. The Court of Appeal dismissed Coppage's appeal on (i) and (iii), it being unnecessary to decide (ii). Sir Bernard Rix gave the main judgment, with which Sir Stanley Burnton and Ryder LJ agreed.

General principles on enforceability of employment covenants

40. A helpful summary of the principles on enforceability of employment covenants, relevant to the non-solicitation covenant in issue, is contained at [9]:
- (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.
 - (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.

The enforceability of the non-solicitation covenant

41. Safetynet submitted on appeal that the non-solicitation covenant was unreasonable because it ought to have been restricted to the non-solicitation of current customers, viz customers 'within 6 or perhaps 12 months of the termination of the contract'. It was submitted that because the clause *could have been* so drafted, therefore it *ought* to be

held to be unreasonable as affording the employer greater protection than was necessary. See [8].

42. The Court of Appeal reviewed a number of cases concerning non-solicitation covenants: *Plowman v Ash*¹¹ (reasonable covenant of 2 years' duration, any customer during the employee's employment); *Gledhow Autoparts v Delaney*¹² (unreasonable covenant of 3 years' duration, anyone within the districts in which the employee operated); *Office Angels Ltd v Rainer-Thomas*¹³ (unreasonable covenant of 6 months' duration, any client of the company during the employee's employment); *Arbuthnot Fund Managers Ltd v Rawlings*¹⁴ (reasonable covenant of 12 months' duration, any person who has done business within 12 months preceding termination, subject to blue-pencilling).
43. The Court held the covenant to be reasonable. Sir Bernard Rix emphasised the following considerations at [19]-[23]:
 - (1) The clause in question is a non-solicitation clause and not a non-competition clause in form.
 - (2) The clause was only six months. This was a fundamental consideration and a powerful factor in assessing overall reasonableness.
 - (3) Coppage was a key employee.
 - (4) The stability of the customer list and the small minority of relevant customers who had ceased to provide business within the last 12 months showed that it was entirely reasonable to draft the clause (in *Plowman v Ash* style) to relate to all customers within the period of Coppage's employment.
 - (5) The proviso (*if the purpose of such an approach is to solicit business which could have been undertaken by us*) emphasises that the purpose of the clause is to counter the diversion, from employer to employee, of realistically available custom of customers who would be known to Coppage through his employment.
 - (6) The argument that the covenant could catch a person who ceased to be a customer early on during the employment and prevent his solicitation many years later, was an example of an argument from merely theoretical or fanciful possibilities which the jurisprudence decries.

¹¹ [1964] 1 WLR 568 (CA).

¹² [1965] 1 WLR 1366 (CA).

¹³ [1991] IRLR 214 (CA).

¹⁴ [2003] EWCA Civ 518, [2003] All ER (D) 181 (Mar). The decision in *Arbuthnot* was described as "a rather difficult case on which to build any lessons (per Sir Bernard Rix at [17]), and best regarded "as confined to the specific contractual provision in question and to the particular facts of that case" (per Sir Stanley Burnton at [38]).

C REMEDIES

One Step (Support) Ltd v Morris-Garner¹⁵

44. This first instance decision considers the important issue of the appropriate financial remedies for breach of a PTR.
45. Judgment was given on 7 July 2014 by Phillips J following the trial of the action. He held that the defendants had breached a non-compete covenant, and that the claimant was not entitled to an account of profits but was entitled to judgment for damages to be assessed on the alternative bases of (i) Wrotham Park damages and (ii) ordinary damages, and to elect as between those two bases.

The facts

46. The first defendant was a director and the owner of one-half of the issued share capital of the claimant, a company in the business of providing “supported living” services to children leaving care and vulnerable adults.
47. The first defendant sold her shareholding in the claimant for over £3m, resigned as a director and entered into a deed with the claimant whereby she agreed not to compete with or solicit clients of the claimant for a period of three years from the date of the Deed. The second defendant, the first defendant’s civil partner, agreed to the termination of her employment by the claimant and entered into a similar restrictive covenant.

The proceedings

48. The claimant sought financial remedies when it discovered that the defendants had set up a competing business (Positive Living) within the restricted period.
49. The judge first interpreted the non-compete covenant at [44]-[51] before deciding that the defendants did compete in breach of the non-compete and non-solicitation covenants at [52]-[86]. He held that the covenants were reasonable.

Remedies

50. Phillips J dealt with remedies at [98]-[108].

Ordinary compensatory damages

51. The claimant argued that this was a case in which ordinary compensatory damages would not do justice between the parties. The reasons relied on were that it is inherently difficult for the claimant to prove that any particular business was lost by reason of competition from the defendants’ business, let alone the ongoing damage that would have been caused. The claimant might possibly be left without any

¹⁵ [2014] EWHC 2213 (QB).

substantial remedy, notwithstanding that it had a legitimate interest in the defendants not carrying on the competing business which they conducted and from which they made huge profits. See [98].

52. Having referred to *Attorney General v Blake*¹⁶, in which Lord Nicholls recognised that damages are not always a sufficient remedy for breach of contract, the judge turned to consider the claimant's claims for an account of profits or Wrotham Park damages. See [99]-[100].

Account of profits

53. The judge noted that whilst the House of Lords in *AG v Blake* declined to set rigid parameters for the availability of an account of profits in breach of contract cases, it was recognised that they would only be awarded in exceptional circumstances. The Court of Appeal refused to order an account of profits on this basis in *Experience Hendrix v PPX Enterprises Inc*¹⁷. See [101]-[102].
54. Phillips J likewise refused to order an account of profits in this case. He explained at [103]:

“Whilst the defendants appear to have planned to start a competing business even before they entered the covenants and thereafter breached them thoroughly and with at least some degree of deliberation (particularly in relation to the first defendant's use of confidential information), the breaches were relatively straightforward and unremarkable. They cannot be regarded as exceptional so as to justify ordering an account of profits.”

Wrotham Park damages

55. Phillips J at [100] described the claimant's claim to Wrotham Park damages as the amount which would notionally have been agreed between the parties, acting reasonably, as the price for releasing the defendants from the restrictions¹⁸.
56. In contrast to the position in relation to an account of profits, it appeared to the judge that it is not necessary that there be exceptional circumstances for there to be an award of Wrotham Park damages, which might be considered to be simply one form of compensatory damages, in the form of the sum the claimant should have received from the defendant for giving consent¹⁹.
57. He concluded as follows at [106]:

¹⁶ [2001] 1 AC 268 at 285B-D.

¹⁷ [2001] All ER (Comm) 830.

¹⁸ The term Wrotham Park damages derives from the case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798.

¹⁹ The judge cited *Experience Hendrix* (above) per Mance LJ at 24-25; *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB); and *WWF World Wide Fund for Nature v World Wrestling Federation Entertainment* [2008] 1 WLR 445.

“In my judgment this is a prime example of a case in which *Wrotham Park* damages should be and are available. The defendants have breached straightforward restrictive covenants in circumstances where it will be difficult for One Step to identify the financial loss it has suffered by reason of the defendants’ wrongful competition, not least because there was a degree of secrecy in the establishment of Positive Living’s business which has not been fully reversed by the disclosure process. In my judgment it would be just for One Step to have the option of recovering damages in the amount which might reasonably have been demanded in 2007 for releasing the defendants from their covenants, not least because the covenants provided that the restraint was subject to consent, not to be unreasonably withheld.”

58. Not all judges have expressed the same enthusiasm for *Wrotham Park* damages²⁰, and it remains to be seen whether Phillips J’s approach will be followed in future covenants cases.

CF Partners (UK) LLP v Barclays Bank Plc²¹

59. *Wrotham Park* or ‘negotiation’ damages were recently awarded for breach of an equitable duty of confidence in *CF Partners v Barclays*. The case contains a useful discussion as to how the court should go about assessing damages on this basis.

The facts

60. This was not an employment case. In short, CFP applied for a loan from Barclays in order to acquire a company, and provided the bank with information relating to the target company. In the event, CFP’s proposed acquisition failed to materialise, but Barclays thereafter acquired and sold the company at a substantial profit.

The proceedings

61. CFP alleged that Barclays had misused CFP’s confidential information relating to the target company and claimed an account of profits or damages.
62. Hildyard J found for CFP on liability. The case contains a helpful summary of the principles relevant to a breach of confidence claim: [119]-[142].

Damages

63. As to remedies, the judge did not think there was sufficient reason for departing from the usual approach for breach of the equitable duty of confidence where there is no fiduciary relationship, which is to restrict the claimant to a claim in damages. Accordingly, he declined to order an account of profits: [1168]-[1181].

²⁰ *BGC v Rees* [2011] EWHC 2009 (QB).

²¹ [2014] EWHC 3049 (Ch).

64. The judge did, however, award approximately €10m by way of Wrotham Park damages. He described the approach as follows at [1196]:

“Under this approach the objective is to establish what sum of money might, in a hypothetical negotiation between them, reasonably have been demanded by the claimant from the defendant as a *quid pro quo* for “the release of the relevant contractual obligation””.

65. The judge acknowledged that the exercise is artificial, and necessarily involves a question of impression. It is to some considerable extent a “broad brush”: [1199].

66. The judge recited as helpful at [1204], the following principles for the assessment of such damages based on the statement of Arnold J in *Force India Formula One Team Ltd v 1 Malaysia Racing Team* at [386]²² at first instance:

- (1) The overriding principle is that the damages are compensatory.
- (2) The primary basis for the assessment is to consider what sum would have been arrived at in negotiations between the parties, had each been making reasonable use of their respective bargaining positions, bearing in mind the information available to the parties and the commercial context at the time that the notional negotiation should have taken place.
- (3) The fact that one or both parties would not in practice have agreed to make a deal is irrelevant.
- (4) As a general rule, the assessment is to be made as at the date of the breach.
- (5) Where there has been nothing like an actual negotiation between the parties, it is reasonable for the court to look at the eventual outcome, and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain.
- (6) The court can take into account other relevant factors, and in particular delay on the part of the claimant in asserting its rights.

67. The assessment is ultimately an objective one, albeit that the hypothetical negotiation may be informed by evidence as to what factors and negotiating arguments the parties say (subjectively) they would have advanced: [1205].

D GARDEN LEAVE

68. There have been two recent garden leave cases, in each of which judgment was handed down at first instance in late July 2014, and in one by the Court of Appeal in October 2014.

²² [2012] EWHC 616 (Ch), [2012] RPC 29.

Sunrise Brokers LLP v Rodgers²³

69. In this case, an injunction was granted enforcing the contract during the notice period without requiring the employer to pay the employee at a time when the employee was refusing to work.

The facts

70. Sunrise is an inter-dealer broker. Rodgers' contract, dated 21 October 2011, was terminable by him only after an initial period of 3 years, and thereafter only by giving a further 12 months' notice.
71. The garden leave clause included the sentence:
- “Any period of Garden Leave shall not normally exceed 6 months.”
72. The period of PTRs was to be reduced by any period spent on garden leave immediately prior to termination.
73. On 5 March 2014, Rodgers signed an employment contract with a competitor, EOX, expressed to begin on 1 January 2015. EOX agreed to pay Rodgers a signing on bonus of US\$50,000.
74. On 27 March 2014, Rodgers told Sunrise that he was leaving “and wanted to leave now” He was asked to go back to work but left Sunrise's offices and, except for the meeting referred to in the next paragraph, did not return.
75. On 9 April, following a pre-arranged holiday, Rodgers met with Sunrise's General Counsel. At that meeting, the GC said the purpose was to find a way of getting Rodgers back to work with a view to agreeing a sensible termination plan if that was what he still wanted. Rodgers said that he would not go back to the office and he did not want to work for Sunrise anymore. Rodgers sent an email to Sunrise on 16 April saying he would agree to remain on garden leave until September 2014.
76. On 22 April, the HR department amended its records to show that Rodgers was on “unauthorised absence” and decided not to pay him his April salary or bonus (which he would otherwise have received on 28 April). On 25 April, Sunrise's solicitors wrote to Rodgers rejecting his request to be placed on garden leave and requiring him to return to work.
77. On 27 April, Rodgers' solicitors replied stating that he had resigned with immediate effect on 27 March and would not be returning to work. On 2 May, Sunrise's solicitors wrote again stating that Sunrise remained ready and willing to fully remunerate Rodgers in return for him attending work, adding that he was not entitled to payment for periods in which he failed to attend work.

²³ [2014] EWHC 2633 (QB), [2014] IRLR 780; [2014] EWCA Civ 1373.

78. On 14 May, Sunrise offered to accept a notice period expiring on 16 October, ie 6 months from the date of Rodgers' email of 16 April.
79. On 16 May, Rodgers' solicitors wrote stating that if, contrary to his primary case, Rodgers had not resigned with immediate effect on 27 March, the non-payment of his salary was a repudiatory breach of contract which was thereby accepted.

The proceedings

80. On 19 May, Sunrise commenced proceedings and applied for an interim injunction. The matter came on for speedy trial in July, Rodgers being enjoined in the meantime from working for any competitor.
81. Judgment was handed down on 29 July 2014. The judge (Richard Salter QC sitting as a deputy High Court judge) made orders:
 - (1) declaring that Rodgers remained employed by Sunrise (subject to intervening events) until the reduced notice period, to which Sunrise had voluntarily agreed, expired on 16 October 2014;
 - (2) enforcing in modified form until that date the restrictions in the contract that operate prior to termination; and
 - (3) enforcing in modified form the specified PTRs in the contract for the period from 16 October 2014 until 26 January 2015.
82. On 23 October 2014, the Court of Appeal dismissed the employee's appeal.

Repudiation

83. The judge had to decide whether Sunrise lost its right to affirm the contract by its decision to cease paying Rodgers while he continued to refuse to come to work. In his judgment, it did not.
84. Work (or rather readiness and willingness to work) and wages are, in general, mutual obligations: *Miles v Wakefield MDC*²⁴: [58]-[59].
85. There was no appeal against this part of the judgment.

Injunction

86. It was common ground that the grant or refusal of an injunction is a matter for the discretion of the court, to be exercised in the light of all the relevant circumstances at the time when the matter comes before the court for decision: [64].
87. The judge accepted that Rodgers was living on his savings which were likely to run out "in the next couple of months" (ie July to September). However, an injunction

²⁴ [1987] 1 AC 539.

requiring Rodgers to obey the terms of his contract until 16 October 2014 – at least to the extent of not working for a competitor and not contacting Sunrise’s clients - would be an appropriate Order. Having regard to the particular facts of the case, and bearing in mind the probable effect of such an injunction on the psychological and material need of Rodgers to maintain the skill or talent, it seemed to the judge that such an injunction would have no relevant compulsive effect (ie would not compel Rodgers to return to work for Sunrise). Nor would such an injunction be oppressive to Rodgers: [69].

88. The judge did not accept the submission that, if he made such an order enforcing the contract during the notice period, he should (by analogy with the garden leave cases) require Sunrise to pay Rodgers. In this case, Sunrise had not put Rodgers on garden leave. Rodgers had simply absented himself from work: [71].
89. The post-termination restrictive covenants of 6 months’ duration were enforceable. The judge considered that 10 months was the maximum period reasonably necessary for the protection of Sunrise’s legitimate interests. He, therefore, enforced the notice period until 16 October 2014 plus a little over 3 months of the 6-month PTRs until 26 January 2015 (being 10 months’ after Rodgers’ last client contact).

The Court of Appeal’s decision

90. The Court of Appeal handed down judgment on 23 October 2014, dismissing the employee’s appeal. Underhill LJ gave the leading judgment, with which Gloster and Longmore LJJ agreed.
91. The first ground of appeal was that the judge was wrong to grant an injunction restraining competition during the notice period in the absence of an undertaking from the employer to pay the employee’s salary. Underhill LJ noted that this was not a case where the employer had exercised its right to put the employee on garden leave. In the majority of such cases, the employee’s right to payment derived from the contractual garden leave clause. Nevertheless, he recognised that it is common practice for an employer to agree to pay an employee when seeking an injunction to prevent the employee working for a competitor during a notice period, irrespective of whether the employee attends work and even where the employer has not put the employee on garden leave (as happened in *Elsevier v Munro*, see below).
92. According to Underhill LJ, the rationale for this practice lies in the rule that the court will not order specific performance of a contract for personal services: [28]. The issue is often expressed, particularly in the older cases, as being whether the effect of the injunction would be to reduce the employee to “idleness and starvation” if he did not return to work. Underhill LJ considered this phrase to be more colourful than helpful. As regards “starvation”, a degree of financial hardship short of actual destitution may suffice to engage the principle. See [32].

93. Having referred to *Warren v Mendy*²⁵, Underhill LJ stated the test in [33] as:
- “whether the pressures on the employee will be such as to compel him to return to work.”
94. Broadly speaking, the court is likely to enforce short-term but not long-term obligations. See [34].
95. As to the judge’s decision to grant an injunction enforcing the post-termination restrictive covenants for only a part of their stated duration, the Court did not consider this to be wrong in principle. Underhill LJ noted that it is accepted that even when a court has held that a restrictive covenant is valid, on the basis that it was reasonable when entered into, it is entitled to refuse relief on the basis that subsequent events have made it unreasonable to enforce it. He could see no reason in principle why the exercise of that discretion must be all-or-nothing: the changed circumstances in question might render it unreasonable to enforce the covenant for its full term but not for part. See [49].

Elsevier Ltd v Munro²⁶

96. *Elsevier v Munro* is, perhaps, less surprising than *Sunrise v Rodgers*. The defendant Munro was CFO of the claimant publisher. In April 2014, he resigned to take up a job with a competitor and proposed starting at the end of May. The employer objected, relying on the 12 months’ notice provision in the contract. The employee left at the end of May, claiming constructive dismissal.
97. A speedy trial was held in July. Warby J held that (i) the employee was not constructively dismissed, (ii) his new employer was a competitor of his current employer, and (iii) there was a real risk that the employee would even subconsciously use confidential information in his new job which had been obtained by him in the course of his employment by the claimant.
98. The real issue was whether the court should grant an injunction to enforce the negative obligations during the notice period. The difference between *Elsevier* and *Sunrise* is that in *Elsevier* the employer agreed to pay the employee whether or not he continued to work for the claimant. However, it was argued for the employee that it was not enough for him to be paid, he had a legitimate concern to work; if he did not work for the claimant and an injunction was granted he could not work for anyone else; he did not wish to work for the claimant and could not be forced to do so; hence, the practical effect of the grant of the injunction would be to compel idleness for the remainder of the notice period: [56].
99. The judge rejected this argument. He stated his conclusion at [81] as follows:

²⁵ [1989] 1 WLR 583.

²⁶ [2014] EWHC 2648 (QB), [2014] IRLR 766.



“The fact that the Defendant is not presently working does not affect the Court’s approach to the exercise of that discretion [whether or not to grant an injunction] as was submitted on his behalf. His idleness is chosen by him not imposed by the Claimant, nor is it caused by any wrongful conduct of the Claimant.”

100. An injunction was granted to prevent the defendant from working for a competitor until the end of his contractual notice period, though not to restrain a breach of the duty of good faith because that wording was too vague and uncertain. See [83].

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