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INJUNCTIVE RELIEF FOR EMPLOYERS

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Introduction

1. This paper analyses some of the key recent cases on injunctive relief, in the context of employers seeking such relief against their employees, and the practical ramifications of the judgments. The cases covered are:
 - a. **Sunrise Brokers LLP v Rodgers** [2014] IRLR 780, HC and [2015] IRLR 57, CA;
 - b. **Elsevier Ltd v Munro** [2014] EWHC 2648 (QB);
 - c. **Prophet Plc v Huggett** [2014] IRLR 618, HC and [2014] IRLR 797, CA;
 - d. **Reuse Collections Ltd v Sendall & May Glass Recycling Ltd** [2014] EWHC 3852 (QB); and
 - e. **Capgemini India Ltd & Another v Krishnan** [2014] EWHC 1092 (QB).
2. The final section of this paper addresses the interesting topic of committal proceedings, which can arise (albeit relatively rarely) in the context of applications for injunctive relief.
3. The issue of theft and/or unauthorised use of confidential information, and the remedies which are available to employers in such cases, is covered in the presentation given by James Laddie QC.

'Keeping the contract alive' – an employer's right to affirm

4. In **Société Générale v Geys** [2013] IRLR 122, the UKSC confirmed (by a 4:1 majority) that the 'orthodox' contractual doctrine that an unaccepted repudiation of a contract is a "thing writ in

water” and does not automatically bring the contract to an end (often referred to as “the elective theory”) also applies to contractual disputes concerning contracts of employment.¹

5. At paragraph 93 of the UKSC’s judgment, Lord Wilson cited and approved the dicta of Templeman LJ in **London Transport Executive v Clarke** [1981] IRLR 166, at p. 170:

“The general rule is that a repudiated contract is not terminated unless and until the repudiation is accepted by the innocent party ... [C]ontracts of employment cannot provide a general exemption to that rule because it would be manifestly unjust to allow a wrongdoer to determine a contract by repudiatory breach if the innocent party wished to affirm the contract for good reason...”

6. As discussed below, the words which appear at the end of this quotation – “*for good reason*” – are important.

7. In **Sunrise Brokers LLP v Rodgers**, Mr Rodgers’ contract of employment could not be terminated before September 2014, and only then on 12 months’ notice. The contract also contained six month post-termination restraints (to be reduced by the duration of any period of garden leave). The central facts of the case may be summarised as follows:

- a. Whilst still employed by Sunrise, Mr Rodgers signed an employment agreement with one of its competitors (EOX), under which he would commence employment in January 2015;
- b. Mr Rodgers did not inform Sunrise of this;
- c. On 27 March 2014, Mr Rodgers informed one of Sunrise’s directors that “he was leaving Sunrise and wanted to leave now”;
- d. Mr Rodgers was told to go back to work until the relevant director was available. However, he left the office (never to return);

¹ See also **Atkinson v. Community Gateway Association** (2014) UKEAT/0457/12/BA, in which the EAT recently held that an employer cannot rely on a *prior undiscovered* repudiatory breach of contract (by an employee) to defeat a claim of constructive unfair dismissal (albeit the breach is likely to be relevant to the assessment of remedy). This decision followed conflicting decisions in **RDF v. Clement** [2008] IRLR 207; **Tullett Prebon v. BGC** [2010] IRLR 648; and **Aberdeen v. McNeill** [2014] IRLR 114.

- e. On 9 April 2014 Mr Rodgers had a meeting with Sunrise’s general counsel, during which he was told that he should come back to work (with a view to agreeing a sensible termination plan if that was still what he wanted);
 - f. Mr Rodgers sent an email to Sunrise (on 16 April 2014), stating: “I can safely assure Sunrise ... that I will not start work anywhere else before September 2014 and ... will agree to remain on garden leave until then”;
 - g. Sunrise wrote to Mr Rodgers (on 25 April 2014) to inform him that it did not accept his purported resignation, that he remained employed by the company (as he had not given notice to terminate in accordance with his contract) and that, as he was not in a period of notice, his “request to be placed on garden leave” was misconceived;
 - h. Mr Rodgers replied (on 29 April 2014) by stating that he had resigned with immediate effect on 27 March, that he would not be returning to work, and that he had accepted an offer of employment from EOX;
 - i. In light of Mr Rodgers’ continuing absence from work, Sunrise decided not to make the monthly payment of salary and bonus that would otherwise have been due to him on 1 May 2014;
 - j. Sunrise’s position remained that the contract of employment had not been terminated. It said, however, that it would not insist on Mr Rodgers remaining in employment until September 2015 and was prepared to treat his e-mail of 16 April 2014 as notice effective to terminate the contract after six months, i.e. on 16 October 2014. Sunrise stated that it required Mr Rodgers to return to work until the end of that reduced notice period and made it clear that it would not put him on garden leave;
 - k. Mr Rodgers did not agree to this proposal and Sunrise issued proceedings for injunctive relief, seeking to prevent him from commencing work with EOX.
8. In support of its submission that there was “good reason” for wishing to affirm the contract, Sunrise submitted as follows:

- a. It genuinely wanted Mr Rodgers to stay, as he was good at his job and made money for the company in an area that it was seeking to develop;
 - b. If it was not possible to persuade Mr Rodgers to remain with the company, Sunrise wanted him to give proper notice, so as to allow time for a proper “termination plan”, which would include a phased handover of clients to his successor (which process, Sunrise believed, would take between two to six months); and
 - c. It did not want Mr Rodgers to go to work for a competitor.
9. In the High Court, Mr Richard Salter QC rejected Sunrise’s evidence that, as at the date of the hearing (in July 2014), it still wanted Mr Rodgers to return to work for the purpose of effecting an orderly handover of his clients to his successor. The notion was described as “wholly unrealistic, and one which no prudent employer would countenance”. The Judge went on to observe (at para. 55) that:

“A prudent employer in Sunrise's position would, given the clear evidence that now exists that Mr Rodgers' loyalties lie elsewhere, keep Mr Rodgers well away from Sunrise's clients and Sunrise's confidential information. In any event, on the evidence, I find as a fact that any such handover would now be wholly unnecessary and counterproductive, since all relevant clients already know of the situation with Mr Rodgers (which will, in any event, become public knowledge with the publication of this judgment), and are unlikely to be influenced by any handover at this juncture, however well stage-managed.”

10. Nevertheless, the High Court concluded that Sunrise did have a good reason for wishing to affirm the contract, at all points between 27 March 2014 (when Mr Rodgers had walked out) and 29 April 2014 (when Mr Rodgers had informed Sunrise that he had accepted employment elsewhere). During, this period:

“Sunrise could legitimately have hoped (and did in fact hope) to persuade Mr Rodgers to return. Mr Gibbs said – and I accept – that in his long experience of dealing with brokers 'they can be hot headed', and that he hoped that Mr Rodgers could be persuaded to change his mind and to come back. If that had happened, according to Mr Gibbs, 'we would smooth it [ie the walk-out] over'.”

11. Further and in any event, the High Court rejected a submission on behalf of Mr Rodgers that Sunrise's desire to keep Mr Rodgers for as long as possible from working for a competitor could not amount to a good reason for continuing to affirm the contract. The Judge held (at para. 57):

“On the contrary, that desire seems to me to be an entirely legitimate and sensible commercial reason (looked at from Sunrise's point of view) for Sunrise's choice to continue to affirm the contract, and to be very far from 'perverse' or 'wholly unreasonable'.”

12. In the circumstances, the High Court accepted that Sunrise did have a good reason for wishing to affirm Mr Rodgers' contract of employment, both in the first instance and on a continuing basis.

13. Whilst the legitimate basis on which an employer wishes to affirm a contract of employment may seem blindingly obvious, in any application for injunctive relief it is important to spell out why there is a “good reason” for doing so; and why the employer does simply not wish to accept the employee's repudiatory breach, terminate the employment relationship and sue for damages. For example, an employer should adduce witness evidence setting out:

- a. The extent to which the employee has an important role to play in the ongoing running, profitability, success of the business etc;
- b. Any active steps that have been taken to persuade the employee to remain with the company;
- c. The practicability of the employee returning to work (including the likely reaction of managers, colleagues and customers);
- d. Established processes and procedures within the business for successful 'handovers' of client accounts / work;
- e. The importance of implementing a successful handover / transitional period;
- f. How long this would be likely to take (having regard to the particular nature of the employee's role and the employer's business);

- g. Why there is a legitimate and sensible commercial reason for seeking to prevent the employee from working for a competitor;
 - h. If the identity of the prospective employer is known, why that particular company is considered to be a competitor / key competitor of the employer;
 - i. The damage which the employer anticipates it would sustain, in the event that the employee were permitted to commence working for a competitor (in breach of contract).
14. Furthermore, when dealing with the issue of “good reason”, careful attention should be paid not only to the legitimate justification for affirming the contract as at the date of the employee’s repudiatory breach, but also why there is said to be a good reason for continuing to affirm the contract, up to the date of the interim relief hearing and beyond.
15. As discussed further below, an employer’s decision to cease paying an employee who refuses to provide his/her services does not, by itself, necessarily amount to an acceptance of the employee’s repudiatory breach of contract. It is, therefore, perfectly possible for an employer to affirm (and continue affirming) a contract of employment, in circumstances where the employee is refusing to attend work and is not receiving any payment from the employer (provided there is good reason for the affirmation).

Mutual trust and confidence: close scrutiny of employees’ constructive dismissal claims

16. In many cases, the principal benefit derived from a successful claim for constructive dismissal is not damages for wrongful dismissal, but rather the release which the employee secures from post-termination contractual restraints on employment (to which they would otherwise have been subject).² Claims for constructive dismissal are frequently founded on an alleged breach by the employer of the implied duty of mutual trust and confidence.
17. In **Tullett Prebon Plc v BGC Brokers LP** [2010] IRLR 648, Jack J emphasised (at para. 86) that ‘convenient’ instances of alleged constructive dismissal will be closely scrutinised by the

² Applying the well-established principle derived from **General Billposting Co Ltd v Atkinson** [1909] AC 118 HL.

Courts, approving an extract from *Brearley & Bloch's Employment Covenants & Confidential Information* (3rd edn, para. 9.68) that:

“The courts will...continue to scrutinise closely the arguments of employees (particularly highly paid individuals and teams moving to a competitor of their employer) who have already secured alternative employment prior to resigning, and who construct arguments of repudiatory breach as a means of avoiding notice periods and irksome covenants. In such cases the argument will fail: (a) often at the first hurdle of whether there has been a repudiatory breach at all; or (b) sometimes, because any such breaches have been waived.”

18. In **Elsevier Ltd v Munro**, Mr Munro (the CFO of Elsevier) was offered employment with a competitor company, and in April 2014 handed in a written notice of resignation, stating as follows:

“...In short, the hopes and expectations I have had...have come to nothing and I have therefore reached the decision to leave. Accordingly, insofar as this is required, please accept this as the required written notice of my resignation.”

19. Mr Munro’s contract of employment included a 12 month notice period. Following his letter of resignation, Mr Munro indicated that he was willing to carry out a handover process throughout April and May 2014, but suggested that he be permitted to join his new employer (a competitor of Elsevier) from 1 June 2014. Elsevier rejected this proposal and sought to hold Mr Munro to his 12 month notice period.

20. In the event, Mr Munro stopped working for Elsevier at the end of May 2014, claiming that:

“...In the circumstances, both in respect of the matters leading to my resignation and our subsequent dealings..., I find myself now in an untenable position in respect of my continued employment with Elsevier...”

21. Elsevier applied to the High Court for an injunction preventing Mr Munro from (*inter alia*) working for a competitor during his contractual period of notice with the company.
22. Part of Mr Munro’s response to the injunction application was that he had been constructively dismissed by Elsevier (relying on a series of alleged incidents between August 2012 and February 2014 – including in relation to a change in duties and an internal reorganisation), and

was therefore free to work for whoever he pleased. The High Court (Warby J) rejected this argument, concluding that:

- a. Mr Munro's complaints about his treatment at work had not been raised until after he had decided to accept this alternative job offer;
- b. On the facts, there had been no repudiatory breach of contract by Elsevier;
- c. Even if there had been a repudiatory breach of contract by Elsevier:
 - i. At no point had Mr Munro treated the (historic) alleged incidents as entitling him to leave Elsevier;
 - ii. Although Mr Munro had at one stage told a colleague that he that he believed he had been constructively dismissed or made redundant, he had affirmed the contract by continuing to work in his CFO role; and
 - iii. The reason for Mr Munro's resignation from Elsevier was that he had "unexpectedly received a job offer from Cengage which he found very attractive, more attractive than continued employment with the Claimant, and for that reason wanted to move" (para. 53); it was not because of Elsevier's (alleged repudiatory) conduct.
- d. Furthermore, in his resignation letter, Mr Munro stated that he was giving "the required written notice of my resignation" (emphasis added) – although, as outlined above, he also proposed a leaving date of 31 May 2014 (which would have been only seven weeks into his 12 month contractual notice period). Applying common law principles³ (and not section 95 (1) (c) of the Employment Rights Act 1996, which provides an express statutory exception to the common law rule), the Court concluded that this too amounted to an affirmation of the contract of employment.

³ Derived from, *inter alia*, **Norwest Holst Group Administration Ltd v Harrison** [1985] IRLR 240, *per* Sir Denis Buckley (at para. 49): "The effect of an acceptance of an anticipatory repudiation must, in my view, be the immediate termination of the contract. By accepting repudiation, the innocent party elects to treat the contract as abrogated at the moment when he exercises his election. He cannot, in my judgment, affirm the contract for a limited time down to some future date and treat it as abrogated only from that future date."

'No work, no pay' – an employer's right to withhold payment

23. In **Sunrise v Rodgers**, following Mr Rodgers' unambiguous statement that he was leaving Sunrise and his failure to return to work (when instructed to do so), Sunrise stopped paying him.
24. Mr Rodgers argued that this action by Sunrise had one of two legal consequences – either:
- a. It constituted an acceptance by Sunrise of his repudiatory breach of contract, thereby bringing the employment relationship to an end; or
 - b. It constituted a repudiatory breach of his contract of employment by Sunrise, which he had accepted, thereby bringing the employment relationship to an end.
25. The High Court disagreed with this analysis, concluding (at para. 59) that:
- “...work (or rather readiness and willingness to work) and wages are, in general, mutual obligations. Like the obligations of payment and delivery under a contract of sale, they are concurrent conditions. The employee must be ready and willing to do the work in exchange for the wages, and the employer must be ready and willing to pay the wages in return for the work. The fact that the non-performance of one obligation excuses performance of the other does not mean that the contract of which those obligations form part automatically ceases to exist if either is not performed. It merely means that the particular obligation is suspended until the other mutual obligation is performed.”
26. On the facts, there was nothing in Mr Rodgers' contract of employment that justified a departure from this general principle, and Sunrise was therefore entitled to withhold pay from him on grounds of non-performance, while continuing to affirm the contract of employment and keep the employment relationship alive.
27. The concept of an employer being entitled to withhold salary from an employee, without automatically terminating the contract of employment, is not a new or novel one. It has arisen, for example, in the context of industrial action – in circumstances where employees have offered to perform only part of their contracted duties during a period of strike action and the employer has demanded full performance.⁴

⁴ See for example **Miles v Metropolitan Borough Council** [1987] IRLR 193.

28. However, what the judgments in Sunrise do provide is a clear, practical example of how this principle can operate in an employer's favour, in the context of an employee(s) seeking to 'jump ship' and join a competitor, in breach of their contractual duties. Employers should be careful, however, to take sensible precautions before refusing to pay an employee's pay and/or other contractual benefits. In particular:
- a. Where there is any ambiguity about the employee's intentions, payments should continue to be made;
 - b. Employers should ensure that instructions to return to work are communicated in writing, and that they are received by the employee;
 - c. Issuing repeat instructions to return to work should serve to eliminate (or minimise) any doubt about the delivery and/or receipt of such instructions;
 - d. The employer's instructions should be unambiguous: the employee should be informed that he is required to return to work forthwith, and that if he does not return by a specified date and time, his salary (and any other benefits which are referable to / conditional upon the employee's performance of his duties) will cease to be paid from that point in time;
 - e. Furthermore, when giving the instructions, the employer should unequivocally state that it wishes to maintain the employment relationship, that it is affirming the contract of employment, and that the employment relationship will still continue in the event that payments do cease (by virtue of the employee's ongoing absence from work);
 - f. Employers may wish to consider expressly reserving their right to sue for damages, in the event that financial loss is sustained in consequence of the employee's refusal to obey a reasonable management instruction (and return to work);
 - g. Employers should be particularly careful regarding the non-payment of bonuses. Eligibility criteria for annual bonuses often include a clause that the employee will not be eligible to receive any payment if they are under notice of termination at the payment date (or similar). That will not be the case if the employer has chosen to affirm the contract of employment, and it is important that any discretion in relation to

an absent employee's bonus is exercised lawfully by the employer (having regard to the fact that most bonus awards will be assessed principally by reference to an employee's performance and/or contribution to the business over the preceding year). Whilst there may be a strong temptation to pay an absent employee a nil bonus, that approach could backfire and provide the employee with a golden opportunity to accept a repudiatory breach of contract by the employer (and terminate the employment relationship).

29. Furthermore, depending on the circumstances, stopping an employee's pay may not necessarily be the best tactical move for an employer. As discussed further below, cutting off an employee's source of income may potentially be a factor that weighs heavily against the employer when the Court comes to consider an application for interim injunctive relief (against the employee).

Would the granting of injunctive relief lead to specific performance by the back door?

30. The common law has long recognised the general principle that specific performance of an employment contract will not be ordered against an employee's wishes.

31. In terms of statutory protection for employees, section 236 of TULR(C)A 1992⁵ provides that:

“No court shall, whether by way of –

(a) an order for specific performance or specific implement of a contract of employment, or

(b) an injunction or interdict restraining a breach or threatened breach of such a contract,

compel an employee to do any work or attend at any place for the doing of any work.”

32. The cases of **Sunrise** and **Elsevier** both involved arguments about whether granting the employer's application for injunctive relief (to prevent the employees commencing work with a competitor company) would, in reality, compel the defendant employees to return to work for their employer – or else be faced with “idleness” and/or “starvation”.

⁵ Which replicated section 16 of the Trade Union and Labour Relations Act 1974

33. In Sunrise, the argument was principally about the employee's lack of income. In Elsevier, the argument was about atrophying of skills – owing to the fact that Mr Munro's salary had not been stopped by his employer (nor was it threatening to do so).

34. In Elsevier, the employee's argument was summarised thus (at para. 56):

“...it is not enough for the Defendant to be paid, he also has a legitimate concern to work; if he does not work for the Claimant and the injunction is granted as sought he cannot work for anybody else; he does not wish to work for the Claimant and cannot 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.”

35. The High Court rejected this argument. It noted that Mr Munro had not been placed on garden leave; quite the opposite: he had been asked to continue working until January 2015 (but had refused to do so). Warby J held (at para. 58):

“The reason the Defendant is not working at the present time is that he has chosen to stop working for the Claimant. It does not lie in the Defendant's mouth to complain of "idleness" which he has chosen, in breach of his contract of employment. I am not sure this is because to do so is to rely on his own wrong, as was submitted on behalf of the Claimant. It seems to me, rather, that the point is that the underlying public policy is not engaged in a case where the employer is not depriving the employee of an opportunity to work. I dare say that the Court should be alive to the risk of an employer merely putting on a show of willingness to have an employee carry on working, but that is not the position in this case. I do not accept the argument advanced on the Defendant's behalf that the Claimant is somehow responsible for this choice, even though it has not repudiated the contract of employment. Indeed, I found the evidence of the Claimant's witnesses convincing when they spoke of their trust in the Defendant. The fact that the Court will not compel the Defendant to work is nothing to the point for this purpose. He is absent by choice and without leave.”

36. Warby J went on to state (at para. 59):

“I accept that the principles developed in the garden leave cases are or would be applicable to this extent: the Claimant's proposal was to place the Defendant on garden leave once the 2014 financials are closed, from about January to April 2015. It could not be said, however, that such a short period of enforced leisure would engage the policy considerations that underlie the garden leave cases. As Taylor LJ observed in *Provident* at 170:

"The defendant's skills as an accountant or financial director are unlikely to atrophy in a period of three months. Nor is he likely to suffer severe withdrawal symptoms for loss of job satisfaction over that period."

37. In all the circumstances, the High Court granted Elsevier's application for an injunction which prohibited Mr Munro working for a competitor, in the form of Cengage, until the end of his contractual notice period on 10 April 2015.

38. In Sunrise, the factual position was materially different, given that Mr Rodgers would have no source of income during the period when he was working neither for Sunrise nor its competitor, EOX. The Court of Appeal described the "essential question" as follows (at para. 32):

"...whether the judge was obliged to find that restraining the appellant from working for EOX, without any undertaking from the respondents to pay him, was liable to compel him to return to work for them."

39. Underhill LJ analysed the relevant authorities and legal principles as follows (at paras. 32 and 33):

"**32.** ...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. That phrase is more colourful than helpful. In *Warren v Mendy*, at p.215, Nourse LJ, giving the judgment of the court, approved Oliver J's observation in *Nichols Advance Vehicle Systems Inc v De Angelis* (21 December 1979, unreported) that:

'It simply does not ... seem to me to be realistic to say that nothing short of idleness and starvation is compulsive, and therefore no injunction which involves anything less than that can be said to infringe the principle that the court will not specifically enforce a contract of personal services.'

Thus, as regards 'starvation', a degree of financial hardship short of actual destitution may suffice to engage the principle. What is required is a realistic evaluation of whether the pressures operating on the employee in the particular case are in truth liable to compel him to return to work for the employer. As Nourse LJ put it in *Warren v Mendy* (at p.216), in a passage expressly cited by the judge:

'... [T]he Court ought not to enforce the performance of the negative obligations if their enforcement will effectively compel the servant to perform his positive obligations under the contract. Compulsion is a question to be decided on the

facts of each case, with a realistic regard for the probable reaction of an injunction on the psychological and material, and sometimes the physical, need of the servant to maintain the skill or talent. The longer the term for which an injunction is sought, the more readily will compulsion be inferred ...'

(The focus in that passage on the need to maintain the employee's skills reflects the particular issues in that case, but the same broad approach will apply to other pressures on which the employee may rely.)

33. However, even with that degree of modification, the test remains whether the pressures on the employee will be such as to compel him to return to work. It is not simply whether the employee will suffer some degree of hardship by being held to the negative obligations in his contract – and certainly not, as Mr Craig at one point submitted, whether he will be prevented from earning his living during the period of the restraint. It is important not to lose sight of the fact that the situation with which we are concerned is one where the employee's contract of employment subsists, and it is only because of his unwillingness to perform his obligations under it that he is not being paid...”

(Underlining added)

40. At first instance, the High Court had rejected the submission that Mr Rodgers’ personal circumstances were such that he would be compelled to return to work, in the event that Sunrise’s application for injunctive relief were granted. The Court of Appeal upheld this finding, stating as follows (at para. 36):
- a. There was “almost no evidence” before the first instance Judge that preventing Mr Rodgers from going to work for EOX, and not paying him during his notice period, would cause him serious financial hardship (albeit the High Court *had* accepted (at para. 67) Mr Rodgers’ evidence that he was “living on his savings, which [were] likely to run out in the next couple of months”);
 - b. Mr Rodgers had stated in oral evidence that EOX remained very keen to employ him, and that he would be paid a signing-on bonus of \$50,000 as soon as he started with EOX, together with a salary of \$12,500 per month and substantial bonus commission expectations;

- c. Mr Rodgers had agreed to the equivalent restraints (on working for a competitor) for six months *following* the termination of his employment with Sunrise, during which no question of his being paid could arise.
41. In all the circumstances, the High Court had decided to grant Sunrise injunctive relief to prevent Mr Rodgers from working for a competitor or contacting his former clients from Sunrise, for a period of ten months beginning with the date of his last client contact (27 March 2014 to 26 January 2015). In doing so, the Judge took into account the following factors:
- a. The contract of employment required a minimum of 12 months' notice from Mr Rodgers;
 - b. Sunrise's evidence (which was accepted by the Court) was that any period of garden leave would not usually exceed six months of that 12;
 - c. In the case of a "good leaver" (i.e. an employee who gave the full contractual period of notice), between two and six months of the first half of the notice period would be spent in a structured handover process, which was designed to help Sunrise retain the departing broker's clients for itself.
42. Accordingly, when assessing what period of restraint was reasonably required by Sunrise in order to protect its legitimate business interests, the High Court added a period of four months (which was in the middle of the two to six month estimate given by Sunrise for the transitional / handover arrangements) to the six month period which was specified in Mr Rodgers' post-termination restrictive covenants. The Court of Appeal declined to interfere with the terms of the injunction ordered by the High Court.
43. Permission has been sought by Mr Rodgers to appeal to the UKSC and a decision on his application is awaited.

Injunctive relief: how should restrictive covenants be construed?

44. In circumstances where a professionally drafted post-termination restraint provides no practical benefit to an employer and is "toothless", can that employer expect the Court to re-

write or interpret the clause in such a way that it *does* provide some measure of effective protection? No, held the Court of Appeal in **Prophet v Huggett**, overturning the decision of the High Court.

45. The key facts of the case may be summarised as follows:

- a. Prophet was engaged in developing, selling and updating computer software for the fresh produce industry;
- b. One of Prophet's products was "Pr3", an update of "Pr2", which offered a suite of integrated software applications for the supply of fresh products;
- c. Mr Huggett worked as a sales manager for Prophet. His contract of employment contract contained a 12 month non-competition post-termination restraint;
- d. The first sentence of clause 19 prohibited Mr Huggett from being engaged "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)." Both parties agreed that if this had been the extent of the restrictive covenant, it would have been unenforceable in restraint of trade;
- e. However, clause 19 went on to state that the restriction in the first sentence would only operate to prevent the employee from being so engaged in "any area and in connection with any products in, or on, which he/she was involved whilst employed hereunder";
- f. In 2013, Mr Huggett was contacted by a head-hunter acting for a company that was a software supplier operating in part in the fresh produce sector. The job summary provided that the successful candidate would be responsible for software sales to the fresh produce sector;
- g. Mr Huggett gave notice that he was resigning from Prophet, and Prophet sought an injunction requiring Mr Huggett to comply with the restrictive covenant in clause 19.

46. The problem for Prophet was that clause 19, read literally, gave it no protection. This was because the proviso sentence in clause 19 essentially limited the definition of ‘restricted business / products’ to those products produced by Prophet (i.e. Pr2 and Pr3); and in this particular industry, the reality was that no competitor company would ever have been selling Prophet products.
47. At first instance, Mr David Donaldson QC concluded that:
- a. “Something had gone wrong” in the drafting of clause 19; and
 - b. The restrictive covenant, as drafted, did not give effect to what the parties had intended to achieve by it.
48. In order to ‘cure’ the perceived drafting error, the Judge added the words “or similar thereto” to the end of the clause, such that it expanded the class of ‘restricted business / products’ to include those products which were similar to Pr2 and Pr3, but produced by companies other than Prophet. Having done so, he granted Prophet an injunction prohibiting Mr Huggett from being “directly involved in the provision of business process computer software designed for the fresh produce industry” until 12 months after his employment with Prophet had ended.
49. Mr Huggett’s appeal to the Court of Appeal was successful. Some of the key points articulated in the judgment are set out below:
- a. It is well established that when faced with an ambiguous contractual provision which has two possible interpretations – one of which leads to an apparent absurdity and the other to a commercially sensible solution – the Court is likely to favour the latter;
 - b. However, such an approach can 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;
 - c. In the present case, there was no such ambiguity: reading the clause in its entirety, it was clear that the ‘restricted business / products’ amounted to the Pr2 and Pr3 products produced by Prophet;

- d. It was necessary to approach the issue of construction on the basis that the restrictive covenant was a carefully drafted clause – which included expressly ‘cutting down’ the wide ambit of the first sentence of clause 19, with the intention of creating a reasonable and enforceable restriction;
 - e. This was not a case in which the Court could have been confident that something had “gone wrong” with the drafting. In the Court of Appeal’s view, the words of the clause reflected exactly what the draftsman had intended;
 - f. Where something probably had gone wrong was not in the drafting itself (i.e. the choice of words and formulation of the clause), but rather the failure of the draftsman to consider to what extent the clause (as drafted) would have been likely to confer any practical benefit upon Prophet, upon Mr Huggett's departure to a competitor.
 - g. Although the restrictive covenant was, to all intents and purposes, “toothless”, there was no proper basis for the Court to recast or remake the parties’ bargain; and
 - h. Prophet had “made its clause 19 bed and it must now lie upon it”.
50. In the circumstances, the injunction was discharged. The words of Rimer LJ (at para. 35) will no doubt resonate with those responsible for drafting clients’ restrictive covenants:
- “I would...approach the proviso on the basis that it was a carefully drawn piece of legal prose in which the draftsman chose his words with deliberate and specific care. That is exactly what one would expect in the drafting of a restrictive covenant...”
51. What the Court of Appeal’s judgment in **Prophet** highlights very clearly is the need to give careful consideration, when drafting a post-termination restraint, to:
- a. Any particular quirks of the business / industry in which the client operates; and
 - b. The practical protection which the client is hoping to secure for its business, through the operation of the restrictive covenant.

Restrictive covenants: the importance of consideration

52. In Reuse Collections v Sendall & May Glass Recycling, the High Court was required to determine whether or not there had been an effective variation of an employee's contract of employment, such that he had become bound to comply with various post-termination restraints which the employer had sought to introduce (many years after the commencement of the employment relationship). The key facts of the case may be summarised as follows:
- a. Mr Sendall had worked for Reuse since 1980. He did not originally have a written contract of employment and was not subject to any restrictive covenants;
 - b. In October 2012 Mr Sendall was presented with a draft new contract of employment by Reuse;
 - c. In February 2013 Mr Sendall signed the new contract of employment. This document contained a number of restrictive covenants, including: (i) six month non-solicitation and non-dealing clauses; and (ii) a 12 month non-competition clause;
 - d. Shortly after signing this new contract, Mr Sendall left Reuse to join a competing business (May Glass); and
 - e. Reuse sought injunctive relief to prevent (*inter alia*) Mr Sendall from working for May Glass.
53. A dispute arose as to whether there had been the necessary consideration for the purported contractual variation (i.e. the introduction of the restrictive covenants). The parties' competing submissions on this issue may be summarised as follows:
- a. Reuse: the new restrictive covenants contained in the new contract of employment were supported by consideration because they were introduced as part of a package under which benefits were conferred upon Mr Sendall, including a pay rise. In the alternative, consideration could be found in Mr Sendall's continued employment with the company in the months after the contract of employment was produced (in October 2012) and signed by him (in February 2013);

- b. Mr Sendall: no consideration was provided in return for the restrictive covenants. Although a pay rise was awarded in January 2013, it had nothing to do with the restrictive covenants (and the pay rise had not been documented in the new contract of employment which he signed). Furthermore, in the circumstances of his case, Mr Sendall's continued employment did not amount to consideration for the purported variation.
54. The High Court agreed with Mr Sendall: there had been no consideration for the purported variation. Judge Stephen Davies concluded that Reuse had failed to produce any satisfactory evidence that:
- a. The salary increase was specific either to Mr Sendall or to the other senior employees who were being asked to enter into a formal contract of employment;
 - b. It had been made clear to Mr Sendall that the salary 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;
 - c. The offer of a new bonus was linked with the signing (by Mr Sendall) of a new contract of employment; or
 - d. The terms in relation to life assurance were introduced in an amended and enhanced form to a limited number of senior employees as part of the process by which the new contract of employment (including new restrictions) was put forward for agreement.
55. In the circumstances, the monetary benefits relied upon by Reuse as constituting valid consideration for the introduction of the restrictive covenants were not sufficient for this purpose.
56. As to whether Mr Sendall's continued employment was sufficient to amount to consideration, the Judge concluded that this was "not sufficient in the context of this case, where a long-serving employee was being asked to accept new, substantial, contractual restrictions", holding (at para. 84):

“...This was not a case where, on the evidence, Reuse was putting forward the draft contract of employment 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 does not appear from the evidence that Reuse was in effect giving Keith Sendall a deadline to sign or refuse to sign, after which consequences might flow. Reuse can scarcely rely on the “deemed acceptance” provision in the draft in circumstances where Keith Sendall was making it clear in the period following October 2012 that he was not willing to sign the contract of employment. It cannot be said, therefore, in my judgment, that Reuse provided consideration merely by continuing to employ him, particularly without seeking to link its continued willingness to employ him with his willingness to sign the contract of employment.”

57. **Reuse** is a cautionary tale for employers. When seeking to introduce new provisions into an employee’s contract of employment (which would be regarded as detrimental to the employee concerned), it is not safe to assume that a signed contract of employment or letter of variation will suffice to make those provisions binding on the employee. The safest course of action is always to provide some tangible financial benefit to the employee, in return for entering into the varied agreement. However, the connection between those two things ought to be expressly and unambiguously stated on the face of the contractual documentation (and made clear to the employee).

Withdrawal of undertakings: an automatic right to injunctive relief?

58. Employers’ applications (or threatened applications) for injunctive relief are frequently met with employees giving written undertakings that they will comply with the post-termination restraints in issue, whether for the stated duration of the restrictive covenants, for some other defined period, or pending a final hearing between the parties. Where this occurs, does an employee retain any right or ability to resile from those undertakings (without the employer’s consent) and/or resist an application by the employer for injunctive relief (to enforce the terms of the agreed undertakings)? The answer to this question is: possibly, depending on the facts.
59. The key facts of **Capgemini v Krishnan** may be summarised as follows:
- a. A number of former Capgemini employees moved to a competitor (Infosys) in November 2013, shortly after Capgemini had lost a significant client contract (with First Data) to Infosys;

- b. In January 2014, Capgemini’s Solicitors wrote to the former employees, reminding them of the post-termination restraints contained in their respective contracts of employment;
 - c. The former employees agreed to provide written undertakings, in which they undertook (in summary) not to: (i) provide any IT consultancy services to First Data, whether via Infosys or otherwise, for a period of six months; or (ii) use or disclose Capgemini’s confidential information relating to First Data;
 - d. In giving the undertakings, the former employees expressly stated that no admissions were made as to the enforceability of the restrictive covenant which formed the basis of the undertakings;
 - e. By 17 February 2014, the situation for the former employees had materially changed. Most significantly, Infosys had confirmed that it was willing to ‘stand behind’ them in litigation with Capgemini and provide financial support. With the benefit of this comfort blanket, the employees sought to withdraw their undertakings;
 - f. Capgemini responded by issuing applications for interim injunctions in the High Court.
60. As part of their defence to the application for injunctive relief, the former employees contended that the underlying restrictive covenant (on which the written undertakings had been based) was unenforceable in restraint of trade. Capgemini argued that it was not open to the former employees to seek to go behind the written undertakings (which had been given freely following receipt of professional legal advice), and that injunctive relief (in the terms of the written undertakings) should be granted as of right.
61. HHJ Owen QC held as follows:
- a. “...agreements to compromise either actual or threatened litigation is to be encouraged by the court and thus, unless for good reason, supported also” (para. 75);

- b. However, it is not the case that the fact of having agreed written undertakings will always automatically act as a bar to raising questions of enforceability;
- c. “...whereas the court is not bound, without more, to reject any arguments as to the reasonableness of the clause the existence of the agreement is a material circumstance and would ordinarily be the starting point when considering whether or not to grant an interim injunction. That said, the judicial guidance to which I have referred clearly shows that there are circumstances in which such an agreement may be set aside or not given effect to before trial, principally, on the grounds of public policy” (para. 74);
- d. The Court’s focus remained whether it was appropriate to grant an injunction on an interim basis, pending trial, which required a consideration of all the relevant circumstances;
- e. The fact that the former employees entered into the undertakings was a powerful factor when considering this issue, but not necessarily determinative;
- f. Here, the principal difficulties faced by the employer were:
 - i. It had lost the First Data contract to Infosys in the ordinary course of its business;
 - ii. There was no suggestion of any wrongdoing by the former employees (or their new employer, Infosys), in relation to this loss of business; and
 - iii. There was no realistic prospect of Capgemini being able to *regain* the First Data contract, in the event that interim injunctions were granted on the terms sought.

62. Having considered the relevant circumstances, HHJ Owen QC concluded as follows (at para. 82):

“I am not satisfied that it is either necessary nor that it would be just to grant an interim injunction in the terms sought in the circumstances of this case. The claimants have no realistic prospect of recovering the lost business in question and an injunction would

serve no real or useful purpose and would be a disproportionate response to the apparent though limited alleged breach of the clause. There is no clear basis to assume, or indeed allege, that the defendants have, beyond taking up their new employment acted in breach of any other obligation under the clause. The asserted loss which the claimants might suffer without the injunction is vague and tenuous. The nature and degree of any harm, which it is said could not be compensated for by an award of damages, is not identified save for a general assertion, which, as submitted by Mr Leiper, appears wholly unconvincing. The clause expires shortly in any event and whilst, for the reasons argued by Mr Cohen the claim would sound in damages also I do not consider that in these circumstances it would be necessary or just to grant an interim injunction.”

Committal Proceedings: when and how to deploy the “nuclear option”

63. In principle, committal proceedings (i.e. an application that an individual(s) be committed to prison for contempt of court) may be appropriate in circumstances where an employer discovers that an employee has (amongst other scenarios):

- a. Breached the terms of agreed undertaking(s);⁶
- b. Provided false evidence in a witness statement or affidavit, in the context of an employer’s application (or threatened application) for injunctive relief; and/or
- c. Breached the terms of a Court order granting injunctive relief.

64. As a general rule, committal applications ought to be used sparingly. In **Danchevsky v Danchevsky** [1974] 3 All ER 934, Lord Denning MR stated that:

“...[w]henver there is a reasonable alternative instead of committal to prison, that alternative must be taken.”

65. In **Crystalmews Limited v Metterick & Others** [2006] EWHC 3087 (Ch), Lawrence Collins J observed (at paras. 8 and 9) that:

“...In contempt cases the object of the penalty is both to punish conduct in defiance of the court’s order as well as serving a coercive function by holding out the threat of

⁶ It should always be made clear that an undertaking(s) is to the Court and not merely an undertaking(s) as between the parties: see **FW Farnsworth Ltd v Lacy** [2013] EWHC 3487 (Ch), *per* Proudman J (at para. 14).

future punishment as a means of securing the protection which the injunction is primarily there to do...

...[a] committal order is appropriate where there is serious contumacious flouting of orders of the court”

66. In **FW Farnsworth Ltd v Lacy** [2013] EWHC 3487 (Ch), Proudman J held (at para. 20):

“A person is guilty of contempt by breach of an order only if all the following factors are proved to the relevant standard: (a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order. The act constituting the breach must be deliberate rather than merely inadvertent, but an intention to commit a breach is not necessary, although intention or lack of intention to flout the court's order is relevant to penalty.”

67. Generally speaking, employers should be particular cautious about proceeding with an application for committal in circumstances where:

- a. There is some ambiguity as to: (i) whether the employee has in fact breached the terms of the Court order / agreed undertakings etc; or (ii) the wording of the penal notice which was included within, or annexed to, the relevant order / undertakings. It must be borne in mind that whilst a contempt application is a civil procedure, it will be conducted to the criminal standard of proof: see **Hammerton v Hammerton** [2007] EWCA Civ 248. The case of **Zimareva-Locke v Cetin** [2012] EWHC 4196 is a good example of the High Court construing the terms of an interim injunction very strictly (i.e. in the individual defendant's favour) and rejecting a committal application;
- b. Any breach or false evidence is not particularly serious or important, appears to have been genuinely inadvertent, and/or may easily be rectified by the offending party.

68. Because of the potential seriousness of a well-founded application for committal (i.e. a loss of individual liberty), the procedural rules which govern such applications are:

- a. Very detailed; and

b. Applied strictly.

69. The procedural requirements appear principally in CPR, r. 81 and the corresponding Practice Direction (although regard must also be had to relevant case law in this area).

70. CPR, r. 81.10 provides as follows:

“(1) A committal application is made by an application notice under Part 23 in the proceedings in which the judgment or order was made or the undertaking was given.

(2) Where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under Part 23.

(3) The application notice must–

(a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and

(b) be supported by one or more affidavits containing all the evidence relied upon.

(4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.

(5) The court may –

(a) dispense with service under paragraph (4) if it considers it just to do so; or

(b) make an order in respect of service by an alternative method or at an alternative place.”

71. Note in particular the requirements for:

a. Comprehensive particulars of the alleged contempt;

b. All relevant evidence to be adduced by reference to an affidavit(s) (as opposed to annexing the evidence to the Part 23 application, or exhibiting it to a signed witness statement); and

- c. Personal service of any evidence relied upon in support of the committal application (unless the Court orders otherwise).
72. In addition, CPR, r. 81.28 provides that the applicant may only rely on the grounds and evidence contained within the committal application itself and the affidavit(s) served with it. Again, this procedural rule is applied strictly by the Courts; and it further highlights the substantial level of preparatory work which is required, in order to assemble a compelling and CPR-compliant application for committal.
73. Annex 3 of CPR, PD 81 set out a form of penal notice to be included in committal applications:

“IMPORTANT NOTICE

The Court has power to send you to prison, to fine you or seize your assets if it finds that any of the allegations made against you are true and amount to a contempt of court. **You must attend court** on the date shown on the front of this form. It is in your own interest to do so. You should bring with you any witnesses and documents which you think will help you put your side of the case. If you consider the allegations are not true you must tell the court why. If it is established that they are true, you must tell the court of any good reason why they do not amount to a contempt of court, or, if they do, why you should not be punished. If you need advice, you should show this document at once to your solicitor or go to a Citizens’ Advice Bureau or similar organisation.”

74. CPR, r. 81.18 is entitled “*Committal application in relation to a false statement of truth or disclosure statement*” and sets out the procedure for obtaining permission to pursue such an application. Significantly, however, this rule does not apply to applications for committal based on the provision of false evidence in a sworn affidavit: see **Hydropool Hot Tubs Ltd v Roberjot & Another** [2011] EWHC 121 (Ch). This means that the serving of a false affidavit (as opposed to a false witness statement or disclosure statement) can ground a committal application without first having to seek and secure the permission of the Court or Attorney-General. That does not mean, however, that applicants may disregard the other detailed procedural safeguards set out in CPR, r. 81; and applicants ought carefully to review and comply with them.

75. As with all steps in litigation, just because something can be done, that does not mean that it should be done. When reflecting on whether or not to make an application for committal, some important considerations for prospective applicants may include the following:
- a. If an application is to be made, it ought to be made promptly;
 - b. Has the individual defendant taken steps to rectify the improper conduct? For example, has a second sworn affidavit been served, in an attempt to 'purge the contempt'? If so, does the employer still have concerns about the truth and/or accuracy of the purported *mea culpa*? Is there any cogent evidence to contradict what has been said in the more recent 'full and frank' account?
 - c. How much time and expense will be incurred in making the application for committal (having regard to the strict procedural requirements)? Is it likely that the individual defendant will be able to pay those costs, in the event that the application is successful?
 - d. Is making an application for committal likely to hinder and/or seriously impede any settlement discussions?
 - e. In circumstances where the applicant understands that the individual defendant is being supported and/or indemnified (whether formally or informally) by his new employer, is a committal application likely to affect that relationship; if so, how?
 - f. Ensure that *inter partes* correspondence, including without prejudice and/or WPSATC correspondence, is very carefully worded. It must not appear that an application (or threatened application) for committal is being used as a tactical ploy to try and coerce the defendant into settling the litigation on particular and/or oppressive terms;
 - g. There is no specific right to withdraw a committal application once it has been made (owing to the public policy considerations associated with such applications). Although in practice a Court may be unlikely to proceed with a committal hearing in circumstances where the applicant has indicated a willingness to 'let matters lie', an applicant may find itself 'stuck' with litigation that it does not really want;

- h. There is an automatic right of appeal against committal orders – i.e. permission to appeal is not required (see CPR, r. 52.3). This makes a second hearing, in the event that a committal application is successful, fairly likely (with a consequent additional impact on time and resources etc);
- i. If the Court concludes that an application has been made inappropriately and/or oppressively, serious costs sanctions may flow as a result.

76. With regard to the issue of sentencing:

- a. Pursuant to section 14 (1) of the Contempt of Court Act 1981, a Superior Court can sentence a contemnor to a fixed period of imprisonment not exceeding two years; an Inferior Court can impose a fixed custodial sentence of up to one month; and/or
- b. Pursuant to section 14 (2) of the Act, an Inferior Court may impose a fine of up to £2,500; there is no statutory maximum on the level of fine which a Superior Court may impose.

77. If an application for committal is well founded, when considering the issue of sentence, the following factors are likely to be relevant:

- a. Whether the applicant is prejudiced by virtue of the contempt and whether the contempt is capable of remedy;
- b. The extent to which the contemnor has acted under pressure;
- c. Whether the breach of the order was deliberate or unintentional;
- d. The degree of culpability;
- e. Whether the contemnor was placed in breach by reason of the contempt;
- f. Whether the contemnor appreciated the seriousness of the breach;

- g. Whether the contemnor has cooperated;
 - h. Whether the contemnor has admitted his contempt and has entered a guilty plea (by analogy with sentencing in criminal cases, the earlier the admission the more credit the contemnor is entitled to be given);
 - i. Whether the contemnor has made a sincere apology for his contempt;
 - j. The contemnor's previous good character and antecedents; and
 - k. Any other personal mitigation advanced on his behalf.
78. Generally, custodial sentences will only be imposed as a last resort; in practice, it is more common for Courts to impose a suspended sentence and/or a fine.

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