



Trinity Term

[2019] UKSC 32

On appeal from: [2017] EWCA Civ 1054

JUDGMENT

Tillman (Respondent) v Egon Zehnder Ltd (Appellant)

before

Lady Hale, President

Lord Kerr

Lord Wilson

Lord Briggs

Lady Arden

JUDGMENT GIVEN ON

3 July 2019

Heard on 21 and 22 January 2019

Appellant

James Laddie QC

Adam Solomon QC

**(Instructed by Reynolds Porter Chamberlain LLP
(London))**

Respondent

Daniel Oudkerk QC

Amy Rogers

**(Instructed by Simmons & Simmons
LLP)**

LORD WILSON: (with whom Lady Hale, Lord Kerr, Lord Briggs and Lady Arden agree)

Introduction

1.

A company employs a business executive pursuant to a written agreement. Following the termination of her employment she wishes to become employed by a firm whose business is in competition with that of the company. The company contends that her proposed employment would breach a covenant in the agreement. She answers that the covenant is void at common law because part of it is in unreasonable restraint of trade. Before this court the company replies with three contentions, each of which she disputes.

2.

Each of the company's contentions raises an issue with a different hypothesis, as follows:

(A) The hypothesis in Issue (A) is that the employee's construction of the part of the covenant alleged to be in unreasonable restraint of trade is correct. Here the company contends that the impugned part falls outside the doctrine against restraint of trade ("the doctrine") and that it is therefore irrelevant that, had it fallen within the doctrine, it would have been in unreasonable restraint of it.

(B) The hypothesis in Issue (B) is that the employee's construction of the impugned part is incorrect. Here the company contends that, upon a correct construction of it, it is not in unreasonable restraint of trade.

(C) The hypothesis in Issue (C) is that, as in Issue (A), the employee's construction of the impugned part is correct; but that, contrary to the company's contention in Issue (A), it does fall within the doctrine. Here the company contends that, although it is in unreasonable restraint of trade, the impugned part should be severed and removed from the remainder of the covenant, which would therefore survive so as to prohibit the employee's entry into the proposed employment.

One can argue that Issue (B) is logically anterior to Issue (A). But, since Issue (A) purports to test the very boundaries of the doctrine, a balance of convenience favours consideration of it first.

3.

I will explain why in my opinion the most difficult and important issue raised in the appeal is Issue (C): when part of a post-employment covenant is in unreasonable restraint of trade, in what circumstances should the court sever and remove it so as to leave the employee bound by the remainder of it?

The Facts

4.

Egon Zehnder Ltd ("the company"), the appellant, is the UK subsidiary of a Swiss company and part of a worldwide group which is in the business of specialist executive search and recruitment. The group has nine practice areas into one of which it will place each of its recruiting customers.

5.

Ms Tillman, the respondent, had previously been employed by J P Morgan as European Managing Director. The company considered that she would be ideally placed in the financial services practice area of its business. It employed her as a consultant, with effect from 5 January 2004, pursuant to the terms of an employment agreement dated 10 December 2003. It agreed to pay her a salary of £120,000 pa and, at the end of the first year, a bonus of £100,000 provided that she then remained in its employment. Mann J, at first instance, observed that the company regarded Ms Tillman as "a bit special" and that it expected to promote her. It duly promoted her to be a principal in 2006 and to be a partner in 2009. A condition of her becoming a partner was that she should hold shares in the Swiss holding company; and she began to do so. In 2012 she became joint global head of the company's financial services practice area. The agreement made in 2003 was never replaced in order to reflect her promotions although no doubt a few of its terms, in particular relating to her remuneration, then changed. In any event, however, resolution of the issues raised by the appeal requires the court to address the terms of the original agreement.

6.

Clause 13 of the agreement was entitled "COVENANTS" and it provided for five restraints upon the activities of Ms Tillman following the end of her employment, all limited to the six months which

would immediately follow it. By the first, in clause 13.1, she covenanted not to endeavour to entice away from the company any of its employees in specified senior positions.

7.

The other four restraints were included in clause 13.2. Its introductory words, arguably relevant to Issue (B), are as follows:

“You [Ms Tillman] shall not without the prior written consent of the company directly or indirectly, either alone or jointly with or on behalf of any third party and whether as principal, manager, employee, contractor, consultant, agent or otherwise howsoever ...”

By the first of the other four restraints, set out in clause 13.2.1, Ms Tillman covenanted not to solicit the custom of, nor to deal with, specified suppliers of services to the company. By the second, set out in clause 13.2.2, she covenanted not to seek to interfere with supplies to the company. By the fourth, set out in clause 13.2.4, she covenanted not to use any name likely to be confused with any name recently used by the company.

8.

The third of the restraints in clause 13.2, set out in clause 13.2.3, is central to all the issues in the appeal. There Ms Tillman covenanted that she would not

“directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of the Company or any Group Company which were carried on at the Termination Date or during the period of 12 months prior to that date and with which you were materially concerned during such period.”

I will refer to this as “the non-competition covenant”.

9.

By clause 13.3, Ms Tillman acknowledged that the provisions of clause 13 were fair, reasonable and necessary to protect the goodwill and interests of the company. Clause 13.4 provided:

“If any of the restrictions or obligations contained in this clause 13 is held not to be valid as going beyond what is reasonable for the protection of the goodwill and interest of the Company ... but would be valid if part of the wording were deleted, then such restriction or obligation shall apply with such modifications as may be necessary to make it enforceable.”

10.

As I will explain, the question raised in Issue (B) relates to whether the word “interested” in clause 13.2.3 purports to prohibit Ms Tillman from holding any shares in a company conducting business in competition with such businesses there specified as were conducted within the company’s group. To that question an earlier clause of the agreement, casting a restraint upon her during the period of her employment, is arguably relevant:

“4.5. You shall not, during the course of your employment, directly or indirectly, hold or have any interest in, any shares or other securities in any company whose business is carried on in competition with any business of the Company ..., except that you may hold or have an interest in, for investment only, shares or other securities in a publicly quoted company of up to a maximum of 5% of the total equity in issue of that company.”

11.

On 30 January 2017 Ms Tillman's employment by the company came to an end. Shortly thereafter she informed it that she intended to start work, on (as she later added) 1 May 2017, as an employee of a firm which was in competition with the company. She made clear that she intended fully to comply with all her covenants in the agreement apart from that in clause 13.2.3. She conceded that, by its terms, this last clause prevented her entry into the proposed employment but alleged that it was in unreasonable restraint of trade and therefore void.

12.

On 10 April 2017 the company issued proceedings in which it applied for an interim injunction to restrain Ms Tillman's entry into the proposed employment. On the undertaking of the company to compensate her in damages if the court were later to hold it not to be entitled to the injunction, she undertook not to enter into the proposed employment until the court had determined the application.

13.

The lower courts were impressively accommodating to the fact that the issue related to a covenant which on any view had no effect beyond 30 July 2017. On 15 and 16 May 2017 Mann J heard the company's application and on 23 May he delivered a substantial judgment in which he granted the injunction: [\[2017\] EWHC 1278 \(Ch\)](#), [\[2017\] IRLR 828](#). On 11 July the Court of Appeal heard Ms Tillman's expedited appeal and on 21 July, by a judgment delivered by Longmore LJ with which Patten and Sales LJ agreed, it upheld it, set aside the injunction and dismissed the company's claim: [\[2017\] EWCA Civ 1054](#), [\[2018\] ICR 574](#). It is against the Court of Appeal's order that the company brings the present appeal.

14.

The temporal limitation of the dispute and therefore the reality that determination of the company's application would dispose of the whole claim also led the parties to agree, and Mann J to accept, that the grant of the injunction should depend on a closer inquiry into the merits of the company's claim than whether it merely raised "a serious question" apt to the conventional determination of an application for an interim injunction: *NWL Ltd v Woods* [1979] 1 WLR 1294.

15.

By her Defence, Ms Tillman alleged that the non-competition covenant exceeded the company's need to protect its legitimate interests, and was therefore void, for no less than five different reasons. But, by the time of the hearing before Mann J, the substantial focus was on one argument alone. It was that the effect of the part of the non-competition covenant not to be "interested" in any of the competing businesses there specified was unreasonably to prohibit her from holding even a minority shareholding in such a business. She did not allege that she aspired to hold any shares in the business which proposed to employ her or in any other of the competing businesses there specified; but such was agreed to be irrelevant. The company's response to her argument was

(a) to dispute that, on its proper construction, the covenant prohibited her from holding even a minority shareholding in any of the competing businesses there specified; and

(b) to concede that, if, contrary to (a), the covenant did prohibit her from doing so, the whole of it was in unreasonable restraint of trade but to contend that a word or words (which the judge took to be the words "or interested") should be severed and removed from the remainder of the clause, with the result that she would remain prohibited from entering into the proposed employment.

16.

Mann J upheld the company's response at (a) above. He so construed the word "interested" in the non-competition covenant as not to prohibit Ms Tillman from holding shares in any of the competing businesses there specified. He therefore had no need to address what he took to be the company's alternative contention that, together of course with the word "or", the word should be severed and removed from the remainder of the clause; he added however that, although it had not been developed at any length, he did not find that contention appealing.

17.

In upholding Ms Tillman's appeal, the Court of Appeal rejected the construction placed by Mann J upon the word "interested" in the non-competition covenant. It held that its effect would be to prohibit Ms Tillman from holding even a minority shareholding in any of the competing businesses there specified and that, as such, the covenant was in unreasonable restraint of trade; and it refused to sever the word from the remainder of the clause so as to save the remainder of the prohibition.

Issue (A): The Doctrine

18.

The hypothesis here is that Ms Tillman is correct to construe the word "interested" in the non-competition covenant as purporting to prohibit her from holding any shares, however small a proportion of those issued, in a company conducting business in competition with such of the businesses of the group as are there specified. On that hypothesis the company concedes that, if the doctrine applied to it, the prohibition reflected in that word, in particular by excluding the sort of minor shareholding which was permitted to Ms Tillman during her employment, would exceed any necessary protection of its interests; that it would therefore be in unreasonable restraint of trade; and that the word would accordingly need to be severed and removed from the remainder in order to justify the injunction sought. But the company contends that the doctrine does not apply at all to a prohibition against holding shares. Not every post-employment restriction agreed in a contract of employment will, says the company, restrain trade. It seeks to make its point by reference to an extreme example: what if (it asks) Ms Tillman had there agreed not to play mah-jong for six months following the end of her employment?

19.

The company did not raise Issue (A) in either of the courts below. Wrongly, as I will suggest, it considered that the doctrine of precedent would have obliged both of them to reject its contention which the issue reflects. The company seems to have had in mind in particular the decision of the Court of Appeal in *Scully UK Ltd v Lee* [1998] IRLR 259. An employee had covenanted that throughout the year following termination he would not engage in or be "otherwise interested in, whether as a shareholder ... employee or ... in any other capacity" any business, which was defined in terms not limited to the employer's competitors. The trial judge held that the prohibition against shareholding on the part of the employee was too wide because it would catch even a small holding but that it should be severed and removed and that the remainder should be enforced against him. The Court of Appeal took no issue with the judge's objection to the prohibition against shareholding but upheld the employee's appeal on the basis that there were other unreasonable features of the covenant incapable of severance.

20.

It seems clear therefore that in the *Scully UK* case both courts were making an assumption, rather than reaching a focussed determination, that the word "interested" not only represented a prohibition against holding shares but also fell within the doctrine. The same can be said of the decision in *Geo*

Hill and Co v Hill (1886) 55 LT 769. The claimant company acquired the meat export business of the defendant, who covenanted not to "be in any way concerned or interested in any similar business" within ten miles of the Royal Exchange. He became an employee of a similar business within that radius. The judge held that it was unnecessary to decide whether he was "interested in" the business, which, the judge added, meant in commercial language "entitled to profits", because on any view he was "concerned" in it; and that the covenant should be enforced against him.

21.

When a court makes an assumption about the law, instead of reaching a focussed determination in relation to it, the decision based upon it does not carry binding authority under the doctrine of precedent: *National Enterprises Ltd v Racal Communications Ltd* [1975] Ch 397, 406 to 408. But, notwithstanding the absence of a decision on Issue (A) which could have been sought in the courts below, this court has granted permission to the company to raise it and it must therefore receive a focussed determination.

22.

The doctrine is one of the earliest products of the common law. It epitomises the nation which developed it: a nation which has ascribed central importance to the freedom of all of us to work - in the interests both of the self-sufficiency of ourselves and our families and of our common prosperity.

23.

In *Dyer's case*, 2 Hen 5, f 5, pl 26, 1414, John Dyer, a dyer, was sued in the Court of Common Pleas for breach of a condition in an indenture that he would not work as a dyer for six months. He contended that he had not broken the condition but Justice Hull observed that he should have taken a wider point, namely that the obligation was void. "By God," added the judge, "if the plaintiff was here, he would go to prison until he paid a fine to the King." Two hundred years later the invalidity of restraints of trade remained unqualified. In *Colgate v Bacher* (1601) Cro Eliz 872, the defendant agreed that, if for three years his son worked as a haberdasher in Canterbury or Rochester, he would pay the plaintiff £20. The court held the agreement to be void irrespective of its limitations of time and place because it was against the benefit of the commonwealth and because the defendant's son ought not to have been abridged of his trade and living.

24.

But in the 17th century the absolute nature of the right of the ex-employee or vendor of a business to work or trade elsewhere irrespective of his covenant began to be tempered. For paradoxically the doctrine against restraint of trade was positively inhibiting trade. In *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, 564, Lord Macnaghten explained:

"... it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed."

The law came to recognise that the employer or the purchaser of a business had legitimate interests which might justify his placing limited restrictions on his employee or vendor.

25.

In 1711 Chief Justice Parker, later Lord Macclesfield, gave the seminal judgment of the Court of Queen's Bench in *Mitchel v Reynolds*. The immaculate report of it is at (1711) 1 P Wms 181 and any study of the contribution made by law reporters to the development of our law would do well to

include it. The defendant had assigned to a purchaser the lease of a bakery in Holborn for five years and had entered into a bond with him not to trade as a baker elsewhere in Holborn for that period. Lord Macclesfield held

(a) at p 192 that all restraints of trade were presumed to be bad but that the presumption was rebuttable;

(b) at p 193 that Judge Hull's vehemence towards them had been excusable but not his manner of expressing it;

(c) at p 191 that a restraint of trade throughout England would always be bad ("for what does it signify to a tradesman in London what another does at Newcastle?"); but

(d) at p 197 that this baker's bond, limited to Holborn and to the five years of the assignment, was reasonable and should be enforced.

Thus was the concept of reasonableness authoritatively grafted on to the doctrine by way of modification of it.

26.

Based as it is on public policy, the doctrine has regularly had to adjust to social change. The need for adjustment is well exemplified by the decision of the appellate committee of the House of Lords in the Nordenfellt case cited in para 24 above. The appellant, who had been a manufacturer of guns and ammunition, had covenanted with the respondent, which had taken over his business, not to engage in manufacture of them anywhere in the world for 25 years. The committee held that, notwithstanding its width, the covenant was reasonable and so enforceable against him. Lord Herschell, the Lord Chancellor, explained at p 547 that changed conditions of commerce and of the means of communication meant that Lord Macclesfield's reference to the irrelevance to a London trader of similar trade in Newcastle was out of date; and that what would once have been "merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee". Lord Watson observed at p 555 that there had been a protracted struggle between the principle of freedom of contract and the doctrine and that the latter had had the worse of the encounter, particularly in courts of equity. Lord Macnaghten held at p 565 that there was a general rule that restraints of trade were void but that there was an exception to the rule where the restriction was reasonable by reference to the interests of both parties and of the public. You cannot, so he observed at p 572 in relation to a vendor's covenant, sell the cow and sup the milk.

27.

In *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 the members of the appellate committee all stressed that different considerations applied to restraints on a vendor of a business from those which applied to restraints on an ex-employee; that, as Lord Atkinson said at p 701, the purchaser of a business had paid for its goodwill, including for the vendor's covenant which protected and enhanced it; that, as Lord Shaw of Dunfermline said at p 714, an employer was entitled to reasonable protection against dissemination of his trade secrets or solicitation of his customers, in other words against misuse of his property, but not directly against the employee's use of his skill and his manual or mental ability, which were the employee's own property; and that, as Lord Shaw added at p 716, a delicate balance was always required between freedom of trade and freedom of contract.

28.

During the last century questions arose about the width of the doctrine, in particular whether it extended beyond contracts of employment and for sale of a business. Did it apply to a contract in which I agree to buy specified goods only from you? Or to sell specified goods only to you? Or to sell to others specified goods bought only from you? An early example was *Servais Bouchard v The Prince's-Hall Restaurant (Ltd)* (1904) 20 TLR 574. A restaurant in Piccadilly had contracted with a supplier of burgundy not to sell burgundy to its customers other than such as it had purchased from the supplier. The restaurant broke the contract and the Court of Appeal held that the supplier was entitled to enforce it. Sir Richard Henn Collins, the Master of the Rolls, held that the contract fell outside the doctrine; the other members of the court apparently held instead that, albeit within the doctrine, the restraint was reasonable. Later decisions demonstrated a similar slide into a verdict in relation to reasonableness in preference to an attempt to discern the boundaries of the doctrine: *Dickson v Pharmaceutical Society of Great Britain* [1970] AC 403, 431.

29.

The outer reaches of the doctrine were, however, more fully explored, albeit with obvious difficulty, by the appellate committee in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269. The garage company had entered into "solus" agreements with Esso to sell petrol bought only from Esso at two of its filling-stations and to do so at one of them for in effect five years and at the other for 21 years. The committee held that, on balance, both contracts fell within the doctrine and that, while the agreement for the shorter period was reasonable and enforceable against the garage, the other was unreasonable and unenforceable. Lord Reid noted at p 294 that a contract under which a person agreed to work exclusively for another fell outside the doctrine although it detracted from his freedom to work as he pleased; and at p 298 that a restrictive covenant upon land which prohibited its use for trading fell outside the doctrine because the purchaser of the land who became subject to it was not surrendering any freedom to trade there which he had previously enjoyed. Lord Pearce observed at p 325 that, for the same reason, a contract under which a publican took a lease from a brewer of a tied public house fell outside the doctrine; but that the garage company, by contrast, already ran the filling-stations when it accepted Esso's restrictions. He added at p 328 that it was "the sterilising of a man's capacity for work and not its absorption that underlay the objection to restraint of trade"; and he cited *Warner Brothers Pictures, Inc v Nelson* [1937] 1 KB 209, in which the contract by which Miss Bette Davis had agreed not to work otherwise than for the claimant for one year was enforced against her. Lord Wilberforce, at pp 333 to 335, favoured a pragmatic analysis under which restrictive covenants on land and tied public houses, having long been accepted to fall outside the doctrine, must for that reason be taken to have satisfied the demands of public policy on which the doctrine rested.

30.

In my view the resolution of Issue (A) does not require any closer study of the boundaries of the doctrine. For the contract in the present case is of the classic type between employer and employee and, as is agreed, it does provide for a restraint of trade which falls within the doctrine and which is therefore void unless reasonable. The only question under Issue (A) is whether an assumed prohibition against holding shares forms part of the restraint. In this regard assistance is to be derived from the decision of the Court of Appeal in *Proactive Sports Management Ltd v Rooney* [2011] EWCA Civ 1444, [2012] IRLR 241. Wayne Rooney set up a company to which he assigned his image rights, in other words his rights to exploit his image by, for example, his indorsement of sports products and by other forms of promotion and sponsorship. His company contracted with the claimant to act as its agent in negotiating contracts for the exploitation of his image. His company breached the contract and, when sued by the claimant, it contended that the contract fell within the doctrine. The claimant disputed that it did so but accepted the trial judge's conclusion that, if it did so, its terms

were in unreasonable restraint of trade and unenforceable, albeit that it was entitled to a restitutionary remedy. At para 67 my lady, then Arden LJ, recorded the claimant's submission that Wayne Rooney's "trade" was as a footballer and that exploitation of his image rights formed no part of it. She held however at paras 92 and 93 that, although his business of exploiting his image rights was ancillary to, and indeed dependent on, his primary occupation of playing football, it fell within the doctrine. The other members of the court agreed. Gross LJ added at para 153 that Wayne Rooney's activities on-field and, in exploiting his image rights, off-field were both part of a single trade; and at para 155 that the court should adopt a "broad, practical, rule of reason approach" to determining the applicability of the doctrine. It is an approach which this court should also adopt.

31.

In Issue (A) the company contends that the word "interested" in the non-competition covenant falls outside the doctrine but concedes that the remainder of the covenant falls within it. It is a curious proposition, namely that the restraints provided in the rest of the covenant are valid only if reasonable but that the restraint provided by that word is valid although unreasonable. The company cites no authority in which a particular word in a covenant which substantially falls within the doctrine has been held to fall outside it. The covenant was cast in terms which, no doubt on advice, the company considered that it could justify as reasonable for the purposes of the doctrine; and among these terms was one which, for the purposes of Issue (A), we are to construe as prohibiting Ms Tillman from holding any shares in the specified businesses.

32.

By clause 13.3 Ms Tillman acknowledged "that the provisions of this clause 13 are fair and reasonable". The acknowledgement is hard to explain unless the law required them - all of them - to be fair and reasonable. A similar conclusion is to be derived, even more clearly, from clause 13.4, set out in para 9 above. It provided that, were any restriction in clause 13 to be held invalid as exceeding what was reasonable for the protection of the company's interest, it should be severed and the balance of the restriction should remain enforceable. Subclause (4) represents a clear acknowledgement that all the restraints in subclauses (1) and (2) fall within the doctrine.

33.

Nor is it in any way surprising that, in seeking to protect itself against competing activity on the part of Ms Tillman in the immediate aftermath of her employment, the company should have aspired to prohibit her from holding shares in the potentially competitive businesses specified in the non-competition covenant. Any controlling shareholding on her part would, by definition, enable her to direct the competitor's operations. But even a minority shareholding, say a 25% shareholding in a company started up with three others, would enable her to influence its operations. And, even more obviously, the employment of a top executive such as Ms Tillman is frequently subject to conditions that she should hold shares in her employer or be remunerated partly in its shares or in options to purchase them. Indeed, as explained in para 5 above, it was a condition of her becoming a partner in the company in 2009 that she should hold shares in the holding company. In substance as well as in form the restraint on shareholding is part of the restraint on Ms Tillman's ability to work in the immediate aftermath of her employment.

34.

The proper determination of Issue (A) is that, on the assumption that the word "interested" purports to restrain Ms Tillman from holding shares in the specified businesses, it falls within the doctrine.

Issue (B): Construction

35.

The company's argument here is that, when properly construed, the word "interested" in the non-competition covenant does not prohibit Ms Tillman from holding shares in the businesses there specified; and that accordingly in this respect Mann J was right and the Court of Appeal was wrong.

36.

The company concedes that in some contexts a person holding shares in a company will properly be described as being "interested" in it. But it contends, uncontroversially, that the meaning of the word is informed by its context in the agreement as a whole: *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, para 10. It argues that the word "interested", when considered in the context of its agreement with Ms Tillman as a whole, does not cover a shareholding; and that in particular it fails to cover a shareholding once the validity principle, as explained below, has been applied so as to identify its meaning.

37.

One might expect the company to have aspired, and reasonably to have aspired, to prohibit Ms Tillman from, for example, having a controlling interest as a shareholder in a competing company even if she was not working in it. But, in relation to this issue, the company cannot have it both ways: it cannot sensibly argue that the word "interested" covers a large shareholding but not a small shareholding. It is all or nothing. The company contends for nothing.

38.

Better considered without reference to its original formulation in Latin, which nowadays few people understand, the validity principle proceeds on the premise that the parties to a contract or other instrument will have intended it to be valid. It therefore provides that, in circumstances in which a clause in their contract is (at this stage to use a word intended only in a general sense) capable of having two meanings, one which would result in its being void and the other which would result in its being valid, the latter should be preferred. In the present appeal, however, the parties are at odds about the specific circumstances in which the principle is engaged. Is it engaged only when the two meanings are equally plausible or is it also engaged even when the meaning which would result in validity is to some extent less plausible?

39.

In *In re Baden's Deed Trusts* [1969] 2 Ch 388 the Court of Appeal, by a majority, determined the meaning of a deed of settlement by reference to the validity principle. Harman LJ said at p 400:

"... the court is at liberty, if the considerations on both sides seem evenly balanced, to lean towards that which may effectuate rather than frustrate the settlor's intentions ... I by no means hold that the court may take this course by flying in the teeth of the provisions of the deed, so that the weaker view may prevail because it is likely to have an effectual result, but where the terms of the deed produced a balance so even as the present I am of opinion that the doctrine may be called in aid." (italics supplied)

40.

To say that rival meanings are evenly balanced is to say that they are equally plausible. Thus, in *The Interpretation of Contracts*, 6th ed, 2015, Sir Kim Lewison offers the following proposition at the head of chapter 7, section 16:

“Where two interpretations of an instrument are equally plausible, upon one of which the instrument is valid, and upon the other of which it is invalid, the court should lean towards that interpretation which validates the instrument.” (italics supplied)

41.

Others, however, have taken a wider view of the circumstances in which the principle is engaged. In the text of section 16 Sir Kim quotes an observation made by my Lady, then Arden LJ, in *Anglo Continental Educational Group (GB) Ltd v Capital Homes (Southern) Ltd* [2009] EWCA Civ 218, [2009] CP Rep 30, para 13, that “if the agreement is susceptible of an interpretation which will make it enforceable and effective, the court will prefer that interpretation to any interpretation which would result in its being void” (italics supplied). And in *TFS Derivatives Ltd v Morgan* [2004] EWHC 3181 (QB), [2005] IRLR 246, Cox J suggested at para 43 that the principle applied if there was an element of ambiguity about the meaning of a covenant. It was her approach which, in the present case, Mann J adopted at paras 32 and 43.

42.

In my view the point at which the validity principle is engaged lies between these various descriptions of it. To require a measure of equal plausibility of the rival meanings is to make unnecessary demands on the court and to set access to the principle too narrowly; but, on the other hand, to apply it whenever an element of ambiguity exists is to countenance too great a departure from the otherwise probable meaning. In *Inland Revenue Comrs v Williams* [1969] 1 WLR 1197, which related to the meaning of a clause in a deed of appointment, Megarry J adverted at p 1201 to the reference by Harman LJ in the *Baden’s Deed Trusts* case to the need for an even balance and added:

“It is possible that the same approach might be adopted where the scales are tilted only slightly to one side or the other; but plainly it cannot apply where, apart from the effect of the rule against perpetuities or some other sources of invalidity, the court reaches the conclusion that one construction is clearly preferable to the other ... the right view may well be that, before the doctrine can apply, the court must be left in a state of real and persistent uncertainty of mind.”

In *Great Estates Group Ltd v Digby* [2011] EWCA Civ 1120, [2012] 2 All ER (Comm) 361, Toulson LJ explained that, if the contract was “capable” of being read in two ways, the meaning which would result in validity might be upheld “even if it is the less natural construction”. And in *Tindall Cobham 1 Ltd v Adda Hotels* [2014] EWCA Civ 1215, [2015] 1 P & CR 5, Patten LJ, with whom the other members of the court agreed, observed at para 32 that the search was for a “realistic” alternative construction which might engage the principle. In my view Megarry J, Toulson LJ and Patten LJ were identifying the point at which the principle is engaged in much the same place. Let us work with Patten LJ’s adjective: let us require the alternative construction to be realistic.

43.

In its need to set up a realistic construction of the word “interested”, alternative to a construction which relates it to a shareholding, the company adverts to three features of the context of the word in the agreement as a whole.

44.

The first is the content of clause 4.5, set out in para 10 above. For the duration of her employment, it expressly prohibited Ms Tillman from holding shares in specified businesses except for a holding of up to 5% of issued shares in a publicly quoted company. So the company argues that, when in their agreement it and Ms Tillman wanted to address her holding of shares, they did so expressly; and that it would be anomalous that, having acknowledged her freedom to hold a limited number and type of

shares in specified businesses during her employment, they should have agreed that she should be prohibited from doing so in the immediate aftermath of her employment by their use of the word “interested”, which of course stands unqualified in the non-competition covenant. This argument found favour with Mann J, who held that it would be right to adopt a construction which did not give rise to this anomaly.

45.

The second feature relates to the introductory words of clause 13.2, set out in para 7 above. There the company and Ms Tillman set out the different types of status in which she was to be subject to the restraints which followed, namely “as principal, manager, employee, contractor, consultant, agent or otherwise howsoever”. Notwithstanding (says the company) the catch-all words at the end, the significance of the list is that it could so easily have included the word “shareholder” if the restraint in the non-competition covenant had been intended to prohibit Ms Tillman from holding shares.

46.

The third feature relates to the direct link in the non-competition covenant between the word “interested” and the words “in any business”. Interest in a business, submits the company, connotes active interest in it and is to be contrasted with the passive interest of a shareholder in a company.

47.

In relation to the first and third features the company claims to derive valuable support from the decision of Foskett J in *Tradition Financial Services Ltd v Gamberoni* [2017] EWHC 768 (QB), [2017] IRLR 698. There the post-employment restrictions on the employee were in somewhat similar terms to those in the present case and included a covenant on his part not for six months to “undertake, carry on or be employed, engaged or interested in any capacity in ... any business activity” of a specified character. Among the employee’s various contentions that the restrictions were in unreasonable restraint of trade was a contention, identical to that reflected in Issue (B), that the word “interested” disabled him from holding even a small quantity of shares in companies of the specified character.

48.

In response the employer in the *Tradition Financial Services* case adverted to two features of the contract, identical to the first and third features to which the company adverts in the present case. Thus, as Foskett J explained in para 127 of his judgment, the employer relied on an earlier clause of the contract under which during his employment the employee had been permitted to hold small amounts of shares, even apparently in competing companies. This was the foundation of the employer’s primary argument, which the judge described as follows and which he accepted:

“it cannot sensibly have been intended that [the employee] should be subject to a more onerous restriction as to shareholdings after his employment had terminated than whilst still an employee, particularly if it is suggested that the more onerous obligation is created by a clause that makes no express reference to shareholdings at all. In other words, whatever ‘interested in any capacity ... in any business activity’ means, it cannot be a reference to a shareholding.”

Indeed, as Foskett J explained in para 128, the employer also relied on the fact that the covenant prohibited the employee from being interested in a “business activity” and it argued that passive investment by way of a minority shareholding was not a “business activity”. The judge explained that he gave less weight to this argument but that, when added to the employer’s primary argument, it supported his conclusion that the word “interested” did not cover a shareholding.

49.

The trouble is that, without expressly acknowledging it, Foskett J, whose opinion is on any view entitled to considerable respect, was there departing from the obvious natural meaning of the word “interested”, such as had been recognised in our law for more than a century without dissent.

50.

In *Smith v Hancock* [1894] 2 Ch 377 the defendant sold his grocery business near Stoke-on-Trent to the claimant and agreed not for the following ten years to carry on or be “in any wise interested” in any similar business operating within five miles of it. The defendant’s wife set up a grocery within those parameters. In the Court of Appeal Lindley LJ held at p 386 that the word “interested” meant a proprietary or pecuniary interest and that it did not extend to the “indirect interest which every man has in the happiness and welfare of his wife”. He and A L Smith LJ both reluctantly held that, on the judge’s findings, the defendant was not “interested” in his wife’s business. In *Gophir Diamond Co v Wood* [1902] 1 Ch 950 the ex-employee of a jewellery shop in Regent Street had become a salaried employee of a rival shop in the same street. Swinfen Eady J noted at p 952 that his covenant had only been not to be “interested” in a similar business; and the judge added, intriguingly for present purposes, that in that regard the covenant had materially departed from the common form in the then current edition of *Palmer’s Company Precedents* that the covenantor should not be “engaged or concerned or interested” in a similar business. He held that, since his remuneration had in no way depended on the profits of the rival shop, the ex-employee was not in breach of his covenant.

51.

It does seem that the phrase “engaged or concerned or interested”, adopted in the non-competition covenant in the present case, has been included in standard precedents for the drafting of non-competition covenants throughout the last century. It has popped up frequently in the reported cases, including in *CEF Holdings Ltd v Munday* [2012] EWHC 1524 (QB), [2012] IRLR 912. Silber J there held that for various reasons the non-competition covenant was in unreasonable restraint of trade. One of his reasons, set out in para 65(i), was that “[i]ts width is so great that it prevents any employees from having ‘any interest’ in [a competing] company, such as even owning one share in a publicly-quoted company”.

52.

The company’s alternative construction of the word “interested” needs to be realistic. What is its proposed construction? At the hearing Lady Hale inquired about it. Even Mr Laddie QC on behalf of the company struggled to find an answer. He suggested that the word might be casual surplusage. Is that good enough? What was the construction placed on the word by Foskett J in the *Tradition Financial Services* case? As set out in para 48 above, he did no more than to adopt the employer’s submission that, whatever it meant, it did not refer to shareholding. Was that good enough?

53.

The proper determination of Issue (B) is that the natural construction of the word “interested”, consistent with long-standing authority, is that it covers a shareholding; that the three features of the present agreement on which the company relies are insufficient to require a different construction to be placed on the word, when found in clause 13.2.3; that the company fails to establish even a realistic alternative construction of it which would engage the validation principle; that the word “interested” in the non-competition covenant in the present case therefore covers a shareholding, whether large or small, and on that basis is, as is conceded, in unreasonable restraint of trade; and that, unless it can be severed and removed from the rest of the clause, the Court of Appeal was right to set aside the injunction granted against Ms Tillman.

Issue (C): Severance

54.

Where part of a contract is unenforceable, the enforceability of the remainder represents an issue which arises far more widely than in contracts of employment. In *Carney v Herbert* [1985] AC 301 the problem was that the security for payment of the price, for which a contract for the sale of shares had provided, was not only a guarantee but also mortgages which were statutorily illegal. The Privy Council indorsed a decision of the Supreme Court of New South Wales that the provision for mortgages could be severed and removed from the contract, with the result that the guarantee should be enforced. Lord Brightman, who delivered the judgment of the Board, observed at p 309 that tests for determining severability in certain types of case were not always applied satisfactorily in others. But then, with hesitation, he suggested at p 317

“that, as a general rule, where parties enter into a lawful contract ... and there is an ancillary provision which is illegal but exists for the exclusive benefit of the plaintiff, the court may and probably will, if the justice of the case so requires, and there is no public policy objection, permit the plaintiff ... to enforce the contract without the illegal provision.”

55.

It is clear that considerations of public policy drove the evolution of the doctrine under common law that post-employment restraints of trade were, unless reasonable, void: see paras 23 to 25 above. It is less clear that, until the early years of the last century, considerations of public policy also drove a more restrictive approach to severance in post-employment restraints of trade than was adopted in other areas. Take, for example, *Chesman v Nainby* (1726) 2 Ld Raym 1456. Miss Nainby traded as a draper from her home in Drury Lane. Prior to her marriage Mrs Chesman became apprenticed to Miss Nainby. Mrs Chesman entered into a bond that, after leaving Miss Nainby's service, she would not trade as a draper, nor assist anyone else to do so, within half a mile of Miss Nainby's home in Drury Lane or of “any other house that [Miss Nainby] shall think proper to remove to” and that, in the event of breach, she would pay Miss Nainby £100. After leaving Miss Nainby's service Mrs Chesman assisted her husband to trade as a draper elsewhere up Drury Lane. It was held in the Court of Common Pleas, and upheld on appeal first by the Court of King's Bench and then by the House of Lords itself in accordance with the opinion of its judicial members, that Mrs Chesman owed Miss Nainby £100. Applying the recent decision in *Mitchel v Reynolds* addressed in para 25 above, the court accepted that it was unreasonable to seek to restrict Mrs Chesman from trading, or continuing to trade, within half a mile of any other house to which Miss Nainby might at any stage move, even “in the remotest part of the kingdom”. Nevertheless at p 1459 it upheld Miss Nainby's submission

“that if a bond is given, with condition to do several things, and some are agreeable to law, and some against the common law; the bond shall be good as to the doing the things agreeable to law, and only void as to those that are against the law.”

56.

Early in the last century, however, a much more restrictive view was suddenly taken of the availability of severance in post-employment covenants. The reasons of public policy which drove a conclusion that, unless reasonable, they were void were adopted and expanded to suggest a further conclusion that, where parts of them were unreasonable, not even the reasonable parts should usually be enforced.

57.

This further conclusion was most vividly expressed in unlikely circumstances. In *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 the employee had covenanted not to work for any of the employer's competitors "within 25 miles of London". The appellate committee held that the employer had failed to establish that the extension of the restraint to the area thus specified was reasonably necessary for its protection and concluded that it was therefore void. It is hard to see how on any view the offending words could have been severed; and, although the employer apparently argued in the alternative for severance, it must have done so briefly for there is no mention of it in the report of its counsel's argument. At all events, at the end of his speech, with which no other member of the committee expressed agreement, Lord Moulton, at p 745, added the following:

"It was suggested in the argument that even if the covenant was, as a whole, too wide, the court might enforce restrictions which it might consider reasonable (even though they were not expressed in the covenant), provided they were within its ambit. My Lords, I do not doubt that the court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would in my opinion be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master."

58.

These passing observations of Lord Moulton were to have an electric effect on the law.

59.

Within six months of their publication Sargant J was seeking to explain part of them away. In *SV Nevanas & Co v Walker and Foreman* [1914] 1 Ch 413 an employer admitted that the second part of a post-employment covenant was void but contended that the first part was valid and, following severance, should be enforced. Sargant J held that the first part was also void and so dismissed the claim. He was however at pains to say that, had the first part been valid, the second part could have been severed and removed from it. He said at p 422 that he wished to

"clear the ground at once from a suggestion that, in view of certain remarks of Lord Moulton in the recent case of [Mason], this part of the covenant is invalidated, because the succeeding part of the covenant ... is, admittedly, too wide. I do not think that those remarks were intended to be applicable to cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants. No question of the kind was involved in the case before the House of Lords, and I think that Lord Moulton was not intending to deal with the numerous cases of high authority in which the good part of such a covenant was held to be enforceable, notwithstanding its collocation with a bad part ..."

60.

Several months later, however, Lord Moulton's observations attracted outspoken support from Neville J in *Goldsoll v Goldman* [1914] 2 Ch 608. In the event the judge applied the principle of severance to a non-competition agreement made between two jewellers in Bond Street; and, later to be substantially upheld by the Court of Appeal [1915] 1 Ch 292, he enforced the valid part of it by injunction. At the

outset of his judgment, however, at pp 611-612, he had railed against the long-standing modification of the doctrine against restraint of trade which rescued a restraint to the extent that it was reasonable; indeed he called it a blot on the jurisprudence. Then at p 613 he had added:

“Again I think that the application of the doctrine of severability of the terms of a contract in restraint of trade has proved mischievous. It seems to me to be in accordance both with principle and justice that if a man seeks to restrain another from exercising his lawful calling to an extent which the law, even as it now stands, deems unreasonable, the contract by which he does so, whether grammatically severable or not, should be held to be void in toto. To hold otherwise seems to me to expose the covenantor to the almost inevitable risk of litigation which in nine cases out of ten he is very ill able to afford ...”

61.

Thus was the stage set for the decisions in *Attwood v Lamont*, first of the Divisional Court of the King’s Bench Division, [1920] 2 KB 146, and then of the Court of Appeal, [1920] 3 KB 571. The claimant, who carried on business in Kidderminster as a draper, tailor and general outfitter, employed the defendant as a cutter in the tailoring department. The defendant covenanted not at any time thereafter to trade as “a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen’s, ladies’ or children’s outfitter” within ten miles of Kidderminster. The defendant left the claimant’s employment and set up business as a tailor; and, although he based it more than ten miles away, he returned to Kidderminster to obtain and execute tailoring orders there, including from the claimant’s former customers.

62.

The Divisional Court, on appeal from the county court, agreed that the list of prohibited trades was too wide but held that the covenant should be severed so as to enable the reference to all trades other than that of a tailor to be removed and that the defendant should be enjoined from trading as a tailor within ten miles of the town. *Bailhache J* at p 156 held that the covenant was clearly severable. He noted that in the *Mason* case, in which on any view the covenant had not been severable, Lord Moulton had added that, even if clearly severable, a covenant should not be severed unless the excess was trivial or technical. But he, *Bailhache J*, expressed himself satisfied that Lord Moulton’s addition was contrary to authority. *Sankey J* at pp 158-159 made similar remarks.

63.

The Court of Appeal, reversing the order of the Divisional Court, held that the covenant was not severable. But, although its conclusion was unanimous, the route taken to it was different. Lord Sterndale MR gave the first judgment; but the binding authority of the decision attached to the judgment of Younger LJ because it was with his judgment that, without adding anything, *Atkin LJ* agreed.

64.

Lord Sterndale observed at p 577 that the tendency of recent decisions had been to limit severability more than previously but that in his view it remained the law that severance was available if the parts proposed to be severed were independent and if it did not affect the meaning of what was proposed to remain. At p 578 he quoted with approval what *Sargant J* had said in the *SV Nevanas* case, set out in para 59 above; and he suggested that, if severance of one part were to leave the remainder of the covenant with a meaning different in kind and not only in extent from its previous meaning, the parts of the covenant could not be said to be “substantially equivalent” to separate covenants. At p 580 he

concluded, however, that severance of the list of trades would entirely alter the scope and intention of the agreement and so failed Sargant J's test.

65.

Younger LJ

(a) stated at p 581 that recent decisions of the House of Lords had wrought a fundamental change in the approach of the law to post-employment restrictions, which were peculiarly susceptible to current views of public policy;

(b) observed there that the principle of freedom of contract still remained operative in contracts between the vendor and purchaser of a business;

(c) suggested at p 593 that severance of a covenant was available only where it was "not really a single covenant but [was] in effect a combination of several distinct covenants";

(d) held there that the list of prohibited trades was in effect contained in one covenant because (so he reasoned) the claimant himself had only one trade and not several trades;

(e) noted there that, even if he was wrong to regard the list of trades as contained in one covenant, the court should nevertheless decline to sever it;

(f) quoted with approval at pp 594-595 the observations first of Lord Moulton that severance should be confined to the trivial and the technical and then of Neville J in the Goldsoll case that a partly unreasonable restraint should make it entirely void, even if grammatically severable; and

(g) concluded at p 595 that severance should not generally be allowed.

66.

Although, as I will suggest in para 82 below, there were, and remain, good reasons of public policy for the law to take a cautious approach to the severance of a post-employment restraint, the decision of the majority in the Attwood case, founded, as it was, upon the passing observations of Lord Moulton and on the hostile approach of Neville J to the whole concept, suddenly made the common law fiercely restrictive of it. How easy would it be for courts to apply the first requirement, that the covenant should in effect be a combination of different covenants? And what would they make of the second requirement, that the part proposed to be removed should be no more than trivial or technical?

67.

In *Putsman v Taylor* [1927] 1 KB 637 the claimant employed the defendant as manager of his tailoring business at 49 Snow Hill in Birmingham. The defendant covenanted that, following the end of his employment, he would not be employed by a tailor (a) anywhere else on Snow Hill nor (b) within half a mile of Aston Cross nor (c) within half a mile of the Bristol Road. He became employed by a tailor at 73 Snow Hill. The Divisional Court of the King's Bench Division severed the covenant, removed (b) and (c) as too wide and enforced (a) against the defendant by way of injunction. Salter J suggested at pp 640-641 that in the Attwood case it had been Lord Sterndale who had articulated a definite test, namely whether severance would render the covenant different in kind and not only in extent; and he held that removal of (b) and (c) affected only the extent of the covenant. Talbot J observed at p 643 that the law relating to the severability of illegal contracts was as fully applicable to those in restraint of trade as to those illegal in any other respect; and at p 645 that Lord Moulton's observations in the Mason case referred to the inability of the court to substitute terms which had not been expressed for

terms which were unreasonably wide. Neither judge addressed the second requirement identified in the Attwood case.

68.

In *Scorer v Seymour Jones* [1966] 1 WLR 1419 the Court of Appeal took a similar approach to that taken by the Divisional Court in the *Putsman* case. The claimant, an estate agent in Dartmouth, opened a branch in Kingsbridge and employed the defendant to manage it. The defendant's post-employment covenant was not to set up as an estate agent within five miles either of Kingsbridge or of Dartmouth. He set up as an estate agent within five miles of Kingsbridge. The court severed the covenant, removed the reference to Dartmouth as too wide and enforced the remainder. Although the *Attwood* case was cited to them, none of the judges expressly referred to either of its requirements.

69.

In *T Lucas & Co Ltd v Mitchell* [1974] 1 Ch 129 the claimant, which manufactured foodstuffs, employed the defendant as a salesman in Manchester. His post-employment covenant was not to deal in goods similar to those manufactured by the claimant nor to solicit orders from, nor to supply, any of its recent customers. Following termination of his employment, he solicited orders from a number of its recent customers. The Court of Appeal held that the claimant's legitimate interests justified the covenants against solicitation and supply but that the covenant against dealing was unreasonable. It held, however, that the latter should be removed following severance and the former enforced. By a judgment delivered on its behalf by Russell LJ, it held at p 135 that the latter could be removed "without altering the nature of the contract" and that its removal would not confer on the former "a meaning and effect different in kind and extent". Then, at p 136, the court addressed the further "step" apparently required by the *Attwood* case; and, although it did so in slightly ambiguous terms, a careful reading of the report impels the conclusion that it was referring to what I have described as the second requirement in the *Attwood* case, namely that the part proposed to be removed should be no more than trivial or technical. The court declared that it looked askance at this requirement, which, it added, "much strains our loyalty to precedent" and with which a decision of equal stature, namely that of the Court of Appeal in the *Scorer* case, was wholly inconsistent.

70.

The post-employment covenant in *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388 arose in circumstances significantly different from those addressed above. The defendant employed the claimant as an insurance agent on commission, to be calculated by reference to premiums paid to the defendant for the first ten years under any policy which he had procured. A clause of the contract stated that, if in certain circumstances he left the defendant's employment, it would, subject to a proviso, continue to pay him commission in respect of premiums thereafter paid to it for the first ten years under any policy which he had procured. The proviso was that this post-employment commission would cease if he began to work for another insurance company. The claimant left the defendant's employment and began to work for another insurance company. The defendant refused to pay him further commission. In his claim for payment of it he contended that the proviso was in unreasonable restraint of trade and thus void and that it should be severed and removed from the remainder of the clause, which should continue to entitle him to the commission. Mr Peter Crawford QC, sitting as a deputy judge of the Queen's Bench Division, upheld his claim. He rejected the defendant's contention that if, which it had denied, the doctrine against restraint of trade applied at all, the whole clause, including for the payment of further commission, was void. Following a survey of the authorities, the deputy judge concluded at para 19 that the proviso could be removed from the remainder of the clause since (1) there was no need to add to or modify the wording of the remainder,

(2) the remainder continued to be supported by adequate consideration and (3) the removal did not “so change the character of the contract that it becomes ‘not the sort of contract that the parties entered into at all’”.

71.

Save for one complicating feature, the circumstances in *Marshall v NM Financial Management Ltd* [1995] 1 WLR 1461 were similar to those in the *Sadler* case. The claimant’s remuneration from the company was again linked to premiums paid over many years under policies issued by the company which he had procured. Again the contract included a clause that in specified circumstances such remuneration should continue to be paid notwithstanding termination of his agency; but in this case payment was subject to two provisos. The first was that in the immediately following year he should not work for a competitor. Within that year the claimant, then aged 40, did work for a competitor. Mr Jonathan Sumption QC, sitting as a deputy judge of the Chancery Division, chose to apply the three criteria for severance which had been identified in the *Sadler* case; but he suggested a fourth, namely that severance should be consistent with the public policy underlying avoidance of the offending part. He said at p 1466 that application of the third criterion, which called for inquiry into change in the character of the contract, was

“altogether more satisfactory than the more traditional and question-begging statement of the test: whether there is one obligation or more than one.”

The complicating feature was the second proviso, which identified an alternative route to entitlement to post-employment commission, namely that on termination the agent should have attained the age of 65. This second proviso was not even arguably in restraint of trade but, if the first proviso were alone to be removed, the second would survive to preclude payment of the commission to the claimant. In the event the deputy judge regarded both provisos as linked and removed them both.

72.

In the *Marshall* case the Court of Appeal, [1997] 1 WLR 1527, dismissed the company’s appeal against the deputy judge’s decision. Millett LJ observed at p 1531:

“Although the question is described as one of severance it is important to bear in mind that we are not concerned to decide how much of an offending restriction should be struck down. In such a case the question is to what extent can the party who imposed the restriction enforce those parts of it which are not in unreasonable restraint of trade. We are concerned with a very different question, namely, whether the party who has been freed from an invalid restraint of trade can enforce the remainder of the contract without it.”

As Millett LJ observed, it was the employee (or agent) who was seeking severance in the *Sadler* and *Marshall* cases; and therefore there was no relevance in the public policy reasons for restricting severance when sought by overbearing employers who had required their employees to subscribe to extravagant restraints.

73.

In *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613, [2007] ICR 1539, the defendants, who had been employed by the claimant as independent financial advisers, covenanted that, for the year immediately following termination of their employment, they would not deal with any of the claimant’s clients with whom they had dealt in the preceding year; and that, if they had then dealt with agents of its clients, the agents should be deemed to be its clients for this purpose. The Court of Appeal held that the deeming of agents as clients was unreasonable; that the covenant

should be severed and the deeming provision removed; and that the remainder of the restraint should be enforced against the defendants. In a judgment with which Sir Anthony Clarke MR and Carnwath LJ agreed, Maurice Kay LJ

(a) observed at para 34 that “[a]t one stage” there had been an assumption in the authorities, such as the Mason case, that courts should be reluctant to sever a covenant in restraint of trade in favour of an employer;

(b) declared at paras 35-37 that the appropriate starting-point was what Lord Sterndale and Younger LJ had said in the Attwood case;

(c) noted at para 38 that in the T Lucas case, cited in para 69 above, the court had authoritatively rejected the second prerequisite of severance which Younger LJ had identified;

(d) addressed at para 40 the three criteria identified in the Sadler case and noted that it had been applied both in the Marshall case and in the TFS Derivatives case cited in para 41 above;

(e) rejected at paras 41 and 42 the suggestion that those three criteria applied only to claims by employees to post-employment commission and likened the third criterion to the reference in the T Lucas case to the availability of severance if achievable “without altering the nature of the contract”;

(f) suggested at para 43 that “the threefold test ... is a useful way of approaching these cases and should be adopted”; and

(g) concluded at para 44 that application of those three criteria rendered the deeming provision removable.

74.

Following the decision in 2007 in the Beckett case, there have been a number of decisions at first instance in which issues of severability of post-employment restraints have been determined by reference to those three criteria, sometimes with the addition of the fourth criterion suggested in the Marshall case.

75.

For example, in *East England Schools CIC v Palmer* [2013] EWHC 4138 (QB), [2014] IRLR 191, the claimant’s business was that of an agency which sought to find teachers for schools with teaching vacancies. Among the post-employment restraints included in the first defendant’s contract with the claimant was a provision that, whether as shareholder or otherwise, she should not be “concerned with the supply ... of Services” to any school or teacher with whom she had had recent dealings. Mr Richard Salter QC, sitting as a deputy judge of the Queen’s Bench Division held at para 77 that this provision, which specifically extended to her status as a shareholder, was unreasonably wide because it would even prevent her from having a minority shareholding in a competing company which supplied such services. But, by reference to the three criteria and the additional criterion, he proceeded to declare that the provision should be severed and removed from the remainder of the restraints, which were enforceable. He had therefore asked himself at para 86 whether severance would change the underlying character of the contract. He had not asked himself whether the unreasonable provision in effect formed a separate covenant.

76.

In *UK Power Reserve Ltd v Read* [2014] EWHC 66 (Ch) there was focus, yet again, on whether the effect of the words “concerned or interested” in a post-employment restraint was to preclude the ex-

employee from having no more than a passive minority shareholding in a competitor, because, if so, they were unreasonably wide. Mr Jeremy Cousins QC, sitting as a deputy judge of the Chancery Division, held that, in the light of a proviso, such was not the effect of the words. But in paras 87 to 93 he observed in passing that, had such been their effect, he would have severed the covenant and removed them from the remainder in accordance with the four criteria first identified in the Sadler and Marshall cases. He referred in para 87 to the strong body of recent authority which suggested that the law had developed so as to require them to be applied.

77.

In *Freshasia Foods Ltd v Lu* [\[2018\] EWHC 3644 \(Ch\)](#) Mr Daniel Alexander QC, sitting as a deputy judge of the Chancery Division, recently granted an interlocutory injunction by way of enforcement of parts of an employee's non-solicitation post-employment covenant. Treating the inquiry as purely interlocutory, he made only provisional determinations. These were that three aspects of the covenant were unreasonably wide but that, following severance, they should be removed from the remainder. Prompted in part, so it would seem, by the Court of Appeal's decision against which this present appeal is brought, he conducted a wide-ranging survey of the law of severance of post-employment restraints in which he made a number of valuable observations.

78.

Even more recently, following a full hearing, Arnold J delivered a judgment in the *Freshasia Foods* case, [\[2019\] EWHC 638 \(Ch\)](#), in which he ruled at para 144 that the employer had failed to establish legitimate interests which required the protection of the covenant. He therefore declined to continue the injunction; and, apart from adverting to the difficulty of reconciling the decision in the *Beckett* case with the decision under present appeal, he explained at para 148 that he had no need to address the issues relating to severance. This final disposal of the application does not however detract from the value of the deputy judge's observations. In particular he

(a) observed that the deeming provision in the *Beckett* case could not be regarded as a separate covenant but had nevertheless been severed (para 37);

(b) inferred from the *Beckett* case that the historical reluctance to sever, exemplified in the *Mason* and *Attwood* cases, was something of a relic (para 41);

(c) recognised on the one hand that an employer had legitimate interests worthy of protection in the public interest; that they might easily be prejudiced when an important employee left; and that they should not be frustrated by too narrow an approach to severability (para 48);

(d) recognised on the other hand that Lord Moulton's concerns in the *Mason* case remained valid; and that the law should not allow an employer first to extract an unreasonably wide restraining covenant, inhibiting the employee from leaving to work elsewhere and even from threatening to do so in order to obtain fairer terms from him, and then, if challenged in court, too easily to secure its removal and the enforcement of the remainder (paras 49 and 50);

(e) questioned whether Lord Moulton's concerns were best addressed by a rule which denies severance of a term within a single covenant, even if insignificant (paras 51 and 52); and

(f) concluded that it might be preferable to address substance rather than form and thus to permit the removal of relatively minor terms if it would not materially change the nature of the contract (para 53).

79.

A survey of the development in England and Wales of the severance principle, when applied to post-employment restraints of trade, would be deficient if it failed to note the current standing of the principle in other common law jurisdictions. In *Shafron v KRG Insurance Brokers (Western) Inc* [2009] 1 RCS 157 the Supreme Court of Canada, by a judgment delivered by Rothstein J, firmly adhered at para 36 to the historical approach directed by the *Attwood* case from the foot of the observations of Lord Moulton; and it even rejected the move in the *T Lucas* case to shed the second requirement of triviality or technicality. By contrast, in *Lee Gwee Noi v Humming Flowers and Gifts Pte Ltd* [2014] SGHC 64, a magisterial survey of the standing of the principle in Singapore, albeit conducted at first instance, concluded that its application there was subject to the three criteria approved in the *Beckett* case: paras 155 and 172. In New Zealand the legislature has relieved the courts altogether from the shackles of the severance principle by conferring on them a discretion actively to rewrite an unreasonable covenant in restraint of trade: see section 83(1)(b) of the Contract and Commercial Law Act 2017.

80.

Now, at last, it becomes appropriate to address the reasoning of the Court of Appeal in refusing to sever the words “or interested” from the remainder of Ms Tillman’s non-competition covenant. In paras 29 and 30 Longmore LJ cited the *Attwood* case for the proposition that parts of a single covenant could not be severed; and he observed that, in that it prevented Ms Tillman from engaging or being concerned or interested in a competing business in any one of several capacities, the non-competition covenant had to be read as a whole and could not be severed. In para 33 he rejected the company’s submission that the three criteria approved in the *Beckett* case had replaced the requirement for separate covenants. He explained that:

“The requirement is reflected in the third of the three tests ... because it must always be doubtful whether parts of a single covenant can be deleted without the contract becoming ‘not the sort of contract that the parties entered into at all’.”

81.

We in this court have had the benefit of fuller argument and greater opportunity for reflection than had the Court of Appeal. At all events it is clear that, even were the *Attwood* case still to be regarded as authoritative, that court took a narrow view of its effect in appearing to discern a single covenant by reference to nothing other than the form of its words. More importantly, however, the time has come to determine whether the *Attwood* case should remain authoritative.

82.

High-ranking employees can do particular damage to the legitimate interests of their employers following termination of their employment; and it may be that, when they enter into their post-employment covenants, they are able to negotiate with their employers on nearly an equal footing. As Denning LJ said in *M & S Drapers v Reynolds* [1957] 1 WLR 9, 19, “A managing director can look after himself”; and so, arguably, could Ms Tillman. But then he added: “A traveller is not so well placed to do so. The law must protect him”. It is clearly common practice for an employer to present a prospective employee with a substantial written contract, many terms of which, including those imposing post-employment restraints, are derived from books of precedent. It is as valid in 2019 as it was in 1913 to infer that most prospective employees will not be able, even if minded, to decline to accept such terms, still less, following the end of their employment, to defend a claim that they are in breach of them. The courts must continue to adopt a cautious approach to the severance of post-employment restraints.

83.

Nevertheless both of the requirements which were shoe-horned into the law by the Attwood case were, as we have seen, to prove both instantly controversial and ultimately unsatisfactory. An inquiry whether the covenant proposed to be severed was indeed one covenant or whether in effect it was more than one covenant proved to be of elusive application, largely dependent on the eye of the beholder. Why was the list of prohibited trades in the Attwood case one covenant but the list of prohibited areas in each of the Putsman and Scorer cases in effect more than one covenant? And, being a question noted in para 78(e) above, why should an unreasonable restraint of insignificant proportions fail to qualify for severance just because of its place in a single covenant? The second requirement - of triviality or technicality - reflected an attempt to sideline application of the entire severance principle to post-employment restraints. It is far from clear that, even in 1913 and 1920, public policy demanded it; and in 1972 in the T Lucas case, it was rightly criticised in the strongest possible terms, following which it fell away.

84.

It therefore becomes appropriate to analyse the effect of each of the three criteria indorsed in the Beckett case.

85.

The first is that "the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains". This is the so-called "blue pencil" test. Unfortunately it can work capriciously and, if the aspiration of our judgments today had been to discern in the common law a principle which can always be applied so as to produce a sensible outcome, we would have laboured in vain. In his judgment in the Divisional Court in the Attwood case, cited in para 61 above, Bailhache J said at p 155:

"... the courts will sever in a proper case where the severance can be performed by a blue pencil but not otherwise. To give an illustration, a covenant 'not to carry on business in Birmingham or within 100 miles' may be severed so as to reduce the area to Birmingham, but a covenant 'not to carry on business within 100 miles of Birmingham' will not be severed so as to read 'will not carry on business in Birmingham'. The distinction seems artificial, but is I think settled."

The distinction is indeed settled. It is inherent in the word "severance" itself, which means cutting things up and does not extend to adding things in. The "blue pencil" criterion is a significant brake on application of the principle; and, although it can work arbitrarily, it is in my view an appropriate brake on the ability of employers to secure severance of an unreasonable restraint customarily devised by themselves. Were it ever to be thought appropriate to confer on the court a power to rewrite a restraint so as to make it reasonable, it would surely have to be achieved by legislation along the lines of that in New Zealand which has been noticed in para 79 above.

86.

The second criterion is that "the remaining terms continue to be supported by adequate consideration". It goes without saying that an employer who sues on a covenant made otherwise than under seal must show that he provided consideration for it. But why is it said to be a prerequisite of his ability to sever? The answer is surely to be found in the unusual circumstances of the Sadler and Marshall cases, which generated the criteria adopted in the Beckett case. In those two cases it was the claimant employee who secured severance of unreasonable obligations cast by the contract upon himself. In that situation the court needed to satisfy itself (and in each case it did so) that, were his unreasonable obligation to be removed, there would nevertheless remain consideration passing from

him under the contract such as would support the obligation which he was seeking to enforce. In the usual post-employment situation, however, the need to do so does not arise. A claimant employer who asks the court to sever and remove part of a covenant made by the defendant employee is in no way proposing to diminish the consideration passing from himself under the contract such as is necessary to support the obligation which he seeks to enforce. In the usual situation the second requirement can be ignored.

87.

The third criterion is that “the removal of the unenforceable provision does not so change the character of the contract that it becomes ‘not the sort of contract that the parties entered into at all’”. This is the crucial criterion and I find it impossible to equate it with the Attwood requirement, as suggested by the Court of Appeal. In my view this third criterion was rightly imported into the general jurisprudence by the Beckett case and has rightly been applied by our courts ever since then, otherwise than in the decision under appeal. But I suggest, with respect, that the criterion would better be expressed as being whether removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract. It is for the employer to establish that its removal would not do so. The focus is on the legal effect of the restraints, which will remain constant, not on their perhaps changing significance for the parties and in particular for the employee.

88.

Application of the severance principle to Ms Tillman’s restraint covenants now becomes straightforward. First, the words “or interested” are capable of being removed from the non-competition covenant without the need to add to or modify the wording of the remainder. And, second, removal of the prohibition against her being “interested” would not generate any major change in the overall effect of the restraints. So those words should be severed and removed.

89.

Another of the Court of Appeal’s objections to removing the words “or interested” from Ms Tillman’s non-competition covenant was that removal would be idle in that the remainder would continue unlawfully to oblige her not to hold any shares in companies of the character there specified. For the covenant would then become that she would not “directly or indirectly engage or be concerned ... in any business”; and, so the Court of Appeal considered, any holding of shares in a company would mean that she was “indirectly ... concerned” in it.

90.

The company expressly accepts, at any rate in this court, that, if necessary, it would be content for the words “or be concerned” also to be removed from Ms Tillman’s covenant; and my view is that, had the Court of Appeal’s construction of the word “concerned” been correct, it would, by reference to the criteria identified above, have been appropriate also to remove them. But are you, as no more than a shareholder in a company, “concerned” in it? In *Ashcourt Rowan Financial Planning Ltd v Hall* [2013] EWHC 1185 (QB), [2013] IRLR 637, the defendant’s non-competition covenant prohibited him from being “engaged or concerned in any business”. It did not include the words “or interested”. Andrew Smith J concluded at para 39, that the word “concerned” denoted working for the business or having some other active involvement in it and so did not extend to a proprietary interest, such as a shareholding, in it. But a conclusion which there was clearly borderline becomes stronger in the present case. For Ms Tillman covenanted that she would not “engage or be concerned or interested ...”; and there was no specific reference to her doing so as a shareholder, as there was in the *East England Schools* case. Conventional principles of construction require value to be attributed, if

possible, to each word of an agreement. But, were the word “concerned” to be construed so as to cover passive interest in a business such as that enjoyed by a shareholder, what value would be left to be attributed to the word “interested”? Nor is such an exercise in construing the word “concerned” undermined by the fact that the words “or interested” are to be severed and removed. The meaning which the words of an agreement carry at its inception is not changed by later events. In *British Reinforced Concrete Engineering Co Ltd v Schelfff* [1921] 2 Ch 563, 573, Younger LJ (no less) said:

“Now the effect of severing by striking out with a blue pencil the obnoxious part of a covenant is not to alter or affect the construction of what is left. That must be construed as if the portion struck out still remained ...”

Conclusion

91.

I therefore propose that the court should set aside the Court of Appeal’s order and should overrule the decision in the *Attwood* case; and that, although the contractual period of the restraints has expired long ago, it should formally restore the injunction granted by Mann J, subject only to the removal of the words “or interested”.

92.

The court should also invite submissions on the proper orders in respect of the costs incurred in each of the three courts. In para 104 of his judgment on the interim inquiry into the *Freshasia Foods* case the deputy judge described as “legal litter” the unreasonable parts of post-employment restrictions to which employers extract the agreement of prospective employees; and he added that they “cast an unfair burden on others to clear them up”. It is a neat metaphor. In my view the company should win ... but there might be a sting in the tail.