Peter Grant-Hutchison

The First Half

In a moment we will consider together two recent English cases which examine the duties of senior employees to their employer in a situation where the relationship is drawing to an end. Neither case involves the enforcement of what we would normally consider as being restrictive covenants. Before we do so I suppose I must answer the obvious question: Why consider English cases when there is a substantial body of Scottish law on when it is appropriate to grant an interdict?

In employment law in general and in its interface with competition law most disputes regarding alleged improper competition are decided at the stage when an interim interdict is sought and accordingly are not usually reported. The Scottish Courts over time have been greatly assisted by English authorities. A good example of this is *Xyrex Limited v Patrick McTurk and Cyrus Energy Limited v Alan Stewart 2009 CSOH 53*. Mr Stewart and Mr McTurk were senior employees in sister companies. Their contracts contained almost identical restrictive covenants. They both resigned within a day of each other. Some three months after the respective companies obtained interim interdicts in terms of the restrictive covenants without appearance on behalf of the Defenders. Shortly thereafter a motion for recall was lodged and Lord Woolman decided the case after a 3 day hearing in which three substantial volumes of productions and an affidavit had been lodged by the Pursuers. It is clear from his analysis that he was greatly assisted by English judgements. I do not seek to suggest that Scottish Courts will necessarily follow the two cases we are about to discuss but I suggest that in the current difficult economic times be more persuasive than hitherto and of course the public policy considerations in relation to competition are the same in both jurisdictions.

The Recent English Cases

QBE Management Services (UK) Limited v Dymoke & Others
2012 IRLR p458

The Facts

Mr Dymoke and two other senior employees agreed to set up a business venture together which was to compete with their current employer. Their employer was a specialist marine insurer. They serially approached numerous current employees seeking their agreement to become involved in the competing business and requiring them to keep silent about the new venture. They approached some of their employer's brokers. They attracted and negotiated investment and insurance backing for the new venture using a business plan which contained information and materials confidential to their employers. They aimed to have their new venture up and running by 20th February 2012 which was a time when 70% of renewals were to take place. They were to join the fourth defendant in the new venture. In April 2011 they resigned. Their resignations were followed by that of a further eight employees who they had approached.

The ex-employers sought relief and raised proceedings. They argued that the defendants had obtained a major "springboard advantage for their new venture". They sought a final injunctive springboard relief against the defendants.

What did the Court do?

The Court granted a springboard relief by way of a final injunction. The Court stated in terms -

> *"An employee owes his employer a contractual duty of 'fidelity' - how far it extends will depend on the facts of each case. The more senior the staff the greater the degree of loyalty, fidelity and diligence required. It is a breach of the duty of fidelity for an employee to recruit or solicit another employee to act in competition … … … … … … … … … … … … … … … … …*

The mere fact that activities are described by an employee as 'preparatory' to competition does not mean that they are legitimate".

and in relation to a springboard injunction the Court stated -

"The appropriate measure for the length of a springboard injunction is the length of time that it would have taken the wrongdoer to achieve lawfully what he in fact achieved unlawfully, relative to the victim."

Ranson (Appellant) v Customer Systems plc (Respondent) [2012] IRLR p769

The Facts

The Respondent was a holding company of a group providing a specialist information technology consultancy. Mr Ranson's duties were primarily in sales. The only restrictive covenant in his contract was that he should not work for certain important customers for a year after he left his employment. Before and during his notice period he made preparations for the establishment of a competing business. He had conversations with representatives of his employer's existing and potential clients. During these discussions he became aware of opportunities for work for his employers. Two days before he left his employers he took an order to undertake work that would begin after he left said employment.

What did the Courts decide?

The High Court held that although Mr Ranson had been entitled to plan a competing business, he had breached fiduciary duties and his contractual duty of loyalty when he did not inform his employers of the opportunities and work he had obtained while working with them.

On appeal, it was held that Mr Ranson did not owe his employer any relevant fiduciary duty and had not breached any contractual obligation of fidelity, duty of mutual trust and confidence or duty to report. The Court opined -

"An employee has a contractual obligation of fidelity towards his employer. If the obligation is not express, it will invariably be implied. Both the content of the contractual obligation of fidelity and also the existence and content of any fiduciary duty are determined in the first instance, by the terms of the employees' contract of employment. In the employment context, the duty of loyalty is one where each party must have regard to the interests of the other - that contrasts with the single minded duty of loyalty that is the hallmark of a fiduciary duty. The contractual obligation is no more than an obligation loyally to carry out the job that the employee agreed to do."

<u>What did their Lordships says about *Dymoke*?</u>

"Mr Dymoke's contract contained obligations to use his best endeavours to promote and protect the interests of his employer and a further obligation that he would "fully and properly disclose to the Board all of the affairs of the Group which he is aware". These obligations meant that Mr Dymoke had a duty to disclose his own activities in soliciting fellow employees to defect en masse, his misuse of confidential material and solicitation of his employer's customers while he was still employed."

What can we take from these cases? When we came to advise employees who are not directors as to what is proper for them to do towards the end of an employment relationship or when advising employers on what action to take in relation to competition by ex-employees the starting point remains an analysis of the contract itself. There remains considerable life in our old friend ***Restrictive Covenants*** yet!

The Second Half

Plus CA Change

The sizes of the perceived problem or the opportunity to uphold employees rights

From 1st April 2011 to 31st March 2012 Employment Tribunals received 186,300 claims. 110,000 Tribunal claims were disposed of in that year. However only 21% of unfair dismissal claims were upheld at a hearing with a medium award of £4,560 and in only 2% of these cases was the amount awarded over £50,000 and so potentially subject to the current cap of £72,300. 2170 appeals were received by the Employment Appeal Tribunal.

This government looking at these statistics has come to the view that this represents a problematic situation for British Industry. The Business Secretary Vince Cable has been quoted in Employers Law as saying the following -

> *"We have been looking across the range of employment law with a view to making it easier for firms to have staff while protecting basic labour rights. Our starting point is that Britain already has flexible labour markets. But we acknowledge that more can be done to help small companies by reducing the burden of employment tribunals, which we are reforming and moving to less confrontational dispute resolutions through settlement agreements."*

The Suggested Solution to the Perceived Problem

The Enterprise and Regulatory Reform Bill started in the Commons and had its first reading in the Lords on 18th October 2012. Its summary states that it is to make provision for a UK Green Investment Bank; to make provision about employment law, to establish and make provision about the competition and markets authority and to abolish the Competition Commission and the Office of Fair Trading to amend the Competition Act 1998 and the Enterprise Act 2002; to make provision for the reduction of legislative burdens; to make provision about payments to company directors and for connected purposes.

Part 2

Section 7 of the Bill makes it a requirement to contact ACAS before a claim to a Tribunal can be lodged although there are certain exemptions.

Section 10 of the Bill makes provision for an increased number of matters to be decided by a "legal officer" rather than a full tribunal and Section 11 has the effect of making it the norm that an Employment Appeal Tribunal should be constituted by a Judge sitting alone.

Section 12 Confidentiality of Negotiations before termination of Employment states *inter alia* -

> *"(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under Section 111. This is subject to subsection (3) to (5)."*

Anyone who has ever had any interaction with an employer/employee relationship can easily envisage the potential unfairness to an employee caused by this clause, however in fairness to the government they also realised this potential and they seek to ameliorate this in the exceptions to the primary provision. One way they seek to do this is in subsection 4 where they stated -

> *"In relation to anything said or done which in the Tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the Tribunal considers just."*

One might be forgiven for thinking that this provision alone will endlessly complicate Tribunal proceedings which is ironic for a Bill that is intended to simplify the practice of employment law.

Section 13 makes provision for changing the maximum compensatory sum that can be awarded by reference to "median annual earnings" rather than by reference to the Retail Price Index as is the current situation. The new cap is likely to be 12 months pay or a fixed sum whichever is the lower. The fixed sum could be as low as £26,000. Effectively this would remove or at least seriously dilute the employment protection currently afforded to senior management and professionally qualified employees.

Section 14 makes provision for payment of a financial penalty by an employer who has breached a worker's rights where "aggravating features" exist. The statute does not define what constitutes aggravating features and yet again we may expect many a legal argument and appeals before a body of case law is established to give clear content to this section. Any penalty will be at least £100 and no more than £5,000.

Section 15 amends the Employment Rights Act to ensure that "whistleblowing cases" can only be pursued if the whistleblower made the disclosure "in the public interest" and finally Section 16 empowers the Tribunal to order a deposit to be paid of up to £1,000 if a party wishes to pursue certain allegations or a line of argument.

I started the second half of my talk by quoting from Vince Cable. With the greatest of respect to that individual, I would like to finish with a quote from an individual with considerably greater experience of how employment law is actually applied in the Tribunal system. Ms Doris Littlejohn. She was the first woman to be appointed as an industrial tribunal chairman and is a former President of Scotland Tribunals. In the Scotsman on 13th August 2012 she wrote -

> *"I fear the inevitable outcome of proposals under the Enterprise and Regulatory Reform Bill will be an increased focus on technical, legal arguments. … … … … … … With every additional rule or regulation, another hurdle is created for the employer or employee to overcome and another opportunity for the lawyers to argue about the interpretation and application of that particular rule or regulation making tribunals more legalistic than they already are."*

I share her concerns. I regard this Bill as being not only inamicable to the proper exercise of employment rights but also likely to increase the complexity and cost of Tribunal procedures. Modern Employment Rights are essential creatures of statute and any reform of the statutory basis should be given the utmost consideration. I remind myself that before Parliament breathed life into employment rights, for many decades the leading Scottish textbook on the subject was *Frasers, "Master and Servant"*.