

Restrictive Covenants and Severance

What lessons can Irish litigants take from the UK Supreme Court's decision in *Tillman v Egon Zehnder Ltd*?

The UK Supreme Court has handed down its eagerly awaited decision in the case of *Tillman v Egon Zehnder Ltd* (“EZ Ltd”). It is the first employee competition case to reach the UK's Supreme Court (and its predecessor, the House of Lords) in over a century. The case turned on the question of whether certain words could be severed from a post-employment non-compete. The Court of Appeal had previously decided that a restrictive covenant under which a senior employee of thirteen years agreed not to “*directly or indirectly engage or... be concerned or interested in*” any competing business for a period of six months following termination of employment was unenforceable as a restraint of trade because the words “*interested in*” meant the restriction was too broad to be enforceable. Although the Supreme Court agreed that the words “*interested in*” were too broad, they held that this unreasonably wide element of the restrictive covenant was severable, leaving the rest of the restriction intact and enforceable.

Although this is a UK decision, the arguments used in this case may be relied upon by litigants in this jurisdiction and the Irish courts could follow suit when looking at severability.

While this looks like a decision which is favourable to employers with loosely drawn restrictive covenants, employers need to continue to be careful when considering, drafting and reviewing post-termination restrictions.

What are the practical implications of the decision?

- The decision might encourage the courts to step in to save some restrictive covenants which would previously have been struck down but the circumstances in which they can do so are limited and, as ever with these cases, will turn to a large degree on their facts. Employers still need to exercise care when drafting post-termination restrictions.
- Solicitors may find it harder to advise clients about whether to sign up to certain restrictions and to what extent they may be enforceable should a dispute arise.
- Ultimately the case opens the door for more severing of unreasonable or broad terms, leaving the narrowed restrictions in place and individuals and companies less certain about where they stand in relation to their existing contracts.
- Perhaps now is the time for Irish employers to review their restrictive covenants, in light of this decision, before incurring the expense of asking the courts to use their own blue pencil.

Background

Ms Tillman was hired by “EZ Ltd” Ltd in 2004 and signed a contract containing the six month non-compete clause. In January 2017 she left “EZ Ltd” Ltd and informed the company that she intended to take up a position with a competitor. Ms Tillman refused to comply with the non-compete clause as she contended that it was an unreasonable restraint of trade and therefore, void. She argued the clause which restricted her from being interested in a competitor had the effect of preventing her from holding even a minority shareholding in any competing business. “EZ Ltd” Ltd were granted an interim injunction in the High Court to

prevent Ms. Tillman breaching the restrictive covenant. The Court of Appeal disagreed with the High Court finding that the words “*interested in*” had the effect of preventing even a minor shareholding. They refused to sever the words “*or interested*” from the clause and therefore held the entire non-compete to be unenforceable.

Legal Argument

Three arguments were raised by “EZ Ltd” Ltd in the Supreme Court, one of which was successful. Irish litigants may find themselves running or responding to similar arguments which are outlined below.

Legal Argument A – a restriction on shareholding falls outside the doctrine of restraint of trade

“EZ Ltd” Ltd argued that a covenant restricting shareholding falls entirely outside of the doctrine of restraint of trade and did not fall to be considered under the usual principles applying to enforceability of such restraints. The Supreme Court disagreed, finding the word “*interested*” purported to restrain Ms Tillman from holding shares in another business which formed part of the restraint on Ms Tillman’s ability to work after her employment ended, and therefore fell within the doctrine.

Legal Argument B – a prohibition on being “interested” in a business does not prohibit holding shares

“EZ Ltd” Ltd argued that, when properly construed, the word “*interested*” in the non-compete did not prohibit holding shares in a business. The Supreme Court rejected this argument and followed long-standing authority holding that it does cover a shareholding. “EZ Ltd” Ltd had failed to provide a realistic alternative construction of the word. The Supreme Court went on to say that unless the word “*interested*” could be severed and removed from the rest of the clause, the clause was void as an unreasonable restraint of trade.

Legal Argument C – the words “or interested” could be severed from the restriction to make it enforceable

On the issue of severance, the Supreme Court overruled previous decisions and held that the words “*or interested*” were capable of being severed from the clause so that it was enforceable. The Court gave new guidance on the circumstances in which courts should allow severance:

- 1 The ‘blue pencil test:’ that the unenforceable provision must be capable of being removed without the necessity of adding to or modifying the wording of what remains;
- 2 The remaining terms continue to be supported by adequate consideration;
- 3 The deletion of the words must not create any major change in the overall effect of the post-employment restraints in the contract.

On this analysis, the Supreme Court restored the original injunction granted by the High Court even though the restraint period had long since expired.

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