



Neutral Citation Number: [2023] EWCA Civ 373

Case No: CA-2023-000408

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION
HIS HONOUR JUDGE AUERBACH
KB 2023 000177

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2023

Before :

LADY JUSTICE MACUR
LORD JUSTICE BEAN
and
LORD JUSTICE COULSON

Between :

ALAN JAMES BOYDELL **Appellant**
- and -
(1) NZP LIMITED
(2) AI ICE (LUXEMBOURG) MIDCO S.A.R.L. **Respondents**

Paul Nicholls KC and Andrew Edge (instructed by **Hogan Lovells International LLP**) for
the **Appellant (Defendant)**

Judy Stone, Rupert Paines and Raphael Hogarth (instructed by **Kirkland and Ellis**
International LLP) for the **Respondents (Claimants)**

Hearing date: 15 March 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties
or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. Dr Alan Boydell appeals against a decision of His Honour Judge Auerbach, sitting as a Judge of the High Court, to grant interlocutory injunctions against him pending a trial which we are told is listed to be heard between 19 and 29 June 2023. The judge himself granted permission to appeal to this court on certain grounds which raise what I regard as the main point in the case; on other grounds Dr Boydell seeks permission to appeal which the judge refused. By a Respondent's Notice the Claimant companies seek permission to cross-appeal on one aspect of the judgment below.
2. The business of the First Claimant ("NZP") is in a niche area of the pharmaceutical industry described in summary as the development, production and sale of bile acid derivatives for sale to pharmaceutical companies for use by them in their products. It is part of the ICE Pharma Group of companies. Its ultimate holding company is the Second Claimant. Dr Boydell is a former employee of NZP. Following his notice of resignation, given in October 2022, his employment ended on 25 January 2023. At that time he was Head of Commercial - Speciality Products, a position he had held since early 2021 although he had worked for NZP for some years before. He stated his intention to join Zellbios GmbH, which is part of the Aexplora Group, to head their "bile acid business."
3. The claim was issued on 24 January 2023. The Claimants sought to enforce two sets of restrictive covenants. One set, contained in a variation to the Appellant's employment contract, ran for one year from the termination of his employment. The other set, contained in a shareholder's agreement ran for two years. The judge granted an interim injunction enforcing the one year covenants in the employment contract until the trial, with some modifications to which I will come later. He refused to enforce the two year restrictions in the shareholder's agreement; the Claimant companies have not sought to appeal against that aspect of his decision.
4. When proceedings were issued the Defendant gave a written undertaking to abide by the covenants pending determination of the Claimants' application for an interim injunction. The parties sought a hearing on 6 February 2023 but the court was unable to accommodate them. The hearing was listed for and took place on 23 February 2023. The judge gave his decision orally the following day. It was no mean feat to have produced a judgment of such high quality so promptly.
5. The most important clause of the employment contract for present purposes is clause 3.1, which provided as follows:

"3.1 The Employee agrees with the Company, that they will not, for a period of 12 months after the termination of their employment with the Company for whatever reason, be involved directly or indirectly, in any activity, whether as a self-employed person or as an employee, even on an occasional basis or without remuneration as a partner, director, employee, contractor, assistant, or agent, independently of their duties under their new business relationship for the benefit of any-subject, natural or legal person, company or other entity howsoever defined that carries out any business activity that would compete with the business activity as carried out by the Company or any of its

affiliates, including each entity in the Group (together, the “Group Companies”), or that any Group Company was actively considering carrying out as evidenced by board minutes, at the date of termination of the Employee’s employment, including collection of bile or other related animal products, processing of bile or other related animal products, conversion of bile or other related animal products for pharmaceutical use, any activities relating to the supply chain, manufacturing or use of bile from various animals, including but not limited to cattle, chicken, pigs; any business related to cholic acid or any derivatives (including UDCA – ursodeoxycholic acid), and anything that is either related to or is a substitute of [sic] such products; any pharmaceutical business that involves applications for gallstone dissolution, PBC (primary biliary cholangitis), or other liver or GI (gastrointestinal) related conditions. For the purposes of this non-compete covenant, amongst the companies which are to be considered as competitors, are included by way of example, the following (including the relevant parent subsidiaries and/or affiliates): Belling, Pharmazell, Dipharma. Falk/Tiefenbacher, Pro.Med, Riverson, Cheplapharm, Daewoong Mitsubishi Pharma.”

6. Further clauses provided:

“3.2 The Employee covenants and agrees that the Employee will not following the termination of the Employee’s employment (however terminated) for a period of 12 months, without the prior written consent of the Company, do any of the following:

a. directly or indirectly induce or solicit or endeavour to induce or solicit, any person who or entity which was at any time within the 12 month period prior to the termination of the Employee’s employment, was a client or customer of any Group Company and with whom the Employee had direct dealings during the 12 months prior to the termination of the Employee’s employment, to cease doing business with the relevant Group Company or to reduce the amount of business which the person or entity would normally do with the relevant Group Company;

b. directly or indirectly approach, entice away or deal in trade with any person who or entity which, within the 12 month period prior to the termination of the Employee’s employment, was a client or customer of any Group Company and with whom the Employee has direct dealings during the 12 months prior to the termination of the Employee’s employment; and

3.3 The obligations set out under the above covenants will be valid within the territory of the United Kingdom. Considering the current technological resources (including, but not limited to, email and video conferencing), allowing a dissociation between the place in which the activity may be carried out and the place

in which it may be used and, in any event, take effect, the restriction referred to above shall be deemed to relate to both places and shall therefore be binding not just with regard to the place in which the activity is carried out, in any form, but also the place in which such activity is intended to take direct effect, permanently and regularly, irrespective of the physical presence of the Employee in that place.

3.4 In consideration of the obligations set out above, the Company will pay the Employee a gross amount equal to 100% of the last annual gross salary, calculated on the basis of (i) the annual gross base salary applicable at the date of termination of the Employment; (ii) the average of the cash bonuses paid by the Company to the Employee during the 3 years preceding the date of termination of the Employment, and of any potential stock option/stock grants or the like potentially assigned to the Employee; and (i) the value indicated under the relevant payslip of the benefits potentially assigned to the Employee as at the date of termination of the Employment. This amount will be paid by the Company to the Employee after the termination of the Employment, during the period of effectiveness of the non-compete, in quarterly consecutive equal instalments and any of these instalments will be due on the last day of each quarter, on the proviso that the Employee fulfils the non-compete obligations.

3.5 The Employee and the Company agree that the obligations set in this variation are reasonable and that the consideration above is reasonable and that they intend the obligations in this clause to operate to the maximum extent.

3.6 In the event of any conflict between the provisions of this clause 3 and any other arrangement, the provisions of this Agreement shall prevail, unless the relevant clause of the relevant arrangement expressly provides that it shall prevail, thereby referencing the clause of this Agreement over which the applicable schedule is intended to prevail.”

7. I have recited clause 3.5, which is a form of words commonly inserted into covenants of this kind; but Ms Stone rightly did not rely on it. Such clauses are rarely worth the paper they used to be written on, or the digital equivalent. Clause 3.6 was not referred to in argument and does not appear to be relevant.

The facts

8. I gratefully adopt the summary of the material points of the claimants’ evidence given by the judge at paragraphs 19-22 of his judgment:-

“19 ICE Pharma’s key business involves the development, production and sale of bile acid derivatives for the pharmaceutical industry . This involves obtaining animal bile

and use this to manufacture products, most importantly ursodeoxycholic acid (UDCA).

20 Zellbios, as I have noted already, is a company within the Axplora Group formed by a merger, one part of which was formerly known as Pharmazell. Axplora is ICE Pharma's main competitor and Axplora and ICE are the only companies which control their own supply chain directly buy bovine bile to produce UDCA

21 As Head of Commercial Speciality Products from early 2021 the defendant was responsible for the global sales and marketing for the entire group, of all bile-derived products other than UDCA, known as "speciality products", and he managed the worldwide speciality products business, dealing closely with its customers. In his role was entrusted with trade secrets and confidential information relating to the ICE Pharma business. Business plans are made looking forward over a five year period, and so it is said by the claimants that confidential information acquired by the defendant has a shelf life of up to five years. As reflected in correspondence on 25 October 2022, Dr Boydell gave notice of resignation, indicating that he intended in due course to take up an appointment with Zellbios to head their bile acid business.

22 Further points developed by Dr Viney in his witness statement [on behalf of the Claimants] include the following. He submits that in this case it would be impossible to police non-soliciting or non-dealing restrictions alone. He submits there is a legitimate interest in preventing the defendant from carrying out all competing activity, whether or not in relation to speciality products as he argues that the defendant had access to information relating to all parts of the business. He maintains that the first claimant competes centrally with its competitors on pricing, and that pricing information is highly confidential. He identifies, in addition to those that were identified by the defendant himself, a number of other countries in which he says the defendant has dealt with clients around the globe. He says that the claimant had some involvement with, and knowledge of, the activities of all the main operating companies in the group, of which there are five. He says that the claimant attended some important board meetings in which confidential information relating to both parts of the business was shared, and would have been aware of any significant new developments or decisions that were discussed at those board meetings. He says that the claimant was involved in developing a number of strategic initiatives under him."

The order of the judge

9. The main battle in this case was over clause 3.1. The judge granted an injunction after severing some words from the clause. The Appellant's skeleton argument helpfully sets out the clause showing what was severed and what remained. The order was that the defendant, pending trial of the claim, must not:-

“be involved ... in any activity ... for the benefit of [any third party] ... that carries out any business activity that would compete with the business activity as carried out by [New Zealand Pharmaceuticals Limited] ~~or any of its affiliates, including each entity in the Group (together “the Group Companies”), or that any Group Company was actively considering carrying out as evidenced by board minutes~~ at the date of termination of the employee's employment including collection of bile or other related animal products, processing of bile or other related animal products, conversion of bile or other related animal products for pharmaceutical use, ~~any activities relating to the supply chain, [manufacturing or use of] bile from various animals, including but not limited to cattle, chicken, pigs;~~ any business related to cholic acid or any derivatives (including UDCA – ursodeoxycholic acid), and anything that is either related to or is a substitute of such products; any pharmaceutical business that involves applications for gallstone dissolution, PBC (primary biliary cholangitis), or other liver or GI (gastro-intestinal) related conditions. For the purpose of this non-compete covenant, amongst the companies which are to be considered as competitors are included, by way of example, the following (including the relevant parent, subsidiaries and/or affiliates): Belling, Pharmazell, Dipharma, Falk / Tiefenbacher, Pro Med, Riverson, Cheplapharm, Daewoong, Mitsubishi Pharma.”

10. The judge also granted injunctions to enforce the non-solicitation and non-dealing provisions of clause 3.2.
11. The judge was asked to grant Dr Boydell permission to appeal on numerous grounds. He gave permission on four of these:-

“a) The Judge misconstrued clause 3.1 of the Variation Agreement in holding that the clause was limited to preventing an employee being engaged in the particular part of a new employer that competes with the First Claimant. Where a new employer engages in both competitive and non-competitive activity, on its correct construction, the clause prohibits the employee from joining even the non-competitive part. The Judge should so have held, and should have held that such a clause was unenforceable.

b) The Judge erred by failing to hold that clause 3.1 of the Variation Agreement was too wide because it was not limited to

restraining the employee from undertaking a role for a new employer in which role the employee's activity would compete with the old employer.

c) The Judge erred in failing to hold that clause 3.1 of the Variation Agreement was too wide insofar as it restrained: (i) business activities related to the collection of bile or other related animal products and the processing of other related animal products, and (ii) the employee's involvement in any pharmaceutical business that involves liver or GI (gastrointestinal) related conditions. Such restraints were too wide because they were unrelated to the Claimant's business.

d) The Judge erred in his approach to severance in that:

i. he erred in severing from the contract reference to competing with group companies. That was an impermissible exercise in severance;

ii. he erred in severing reference to the supply chain, [manufacture and use of bile products]. That was an illegitimate exercise in severance;

iii. he erred in severing reference to activities which companies were considering for the same reason; and

iv. having made multiple severances, he erred by failing to stand back and consider whether, as was the case, the totality of the severances meant that the Judge has impermissibly re-written the whole contract.”

12. The judge refused permission to appeal on the following further grounds:-

“e) The Judge was wrong to say that delay was relevant only to the balance of convenience.

f) The Judge was wrong to say that a restraint on joining the parents or subsidiaries or affiliates of named competitors was not too wide because the reference to “relevant” parents, subsidiaries or affiliates meant that they had to be competing.

g) The Judge was wrong not to hold that clause 3.2(a) of the Variation Agreement applied to prevent the employee from inducing or soliciting customers for any purpose and not, as the Judge held, only in respect of products related to the Respondent's business. The Judge should have held that, correctly construed, the clause restrained inducement/solicitation of customers for any purpose and, as such, was too wide

h) The Judge was wrong not to hold that clause 3.2(b) applied to prevent approaches to and dealings with customers for any

purpose whatsoever and not, as the Judge held, only for products related to the Respondents' business. The Judge should have held that, correctly construed, the clause restrained approaches to and dealing with customers for any purpose and, as such, was too wide.

i) The Judge was wrong to hold that damages would be an adequate remedy for the Defendant.”

American Cyanamid

13. As commonly happens in this type of case, the Claimants argued before the judge, and argue before us, that all they needed to show on the merits was a serious question to be tried. They rely on observations to that effect by Elisabeth Laing and Nugee LJ in the recent case of *Planon v Gilligan* [2022] IRLR 684, citing what Nugee LJ described as the “seminal decision” in *American Cyanamid v Ethicon* [1975] AC 396.
14. *American Cyanamid v Ethicon* was indeed a seminal decision, but Lord Diplock’s speech is neither a statute nor a biblical text, and should not be read as if it were either. The *Cyanamid* case itself was a large and complex patent claim. The interlocutory injunction which was the subject of appeal to this court (where the hearing lasted eight days) and the House of Lords (where it took a mere three days) had been granted in the High Court on 30 July 1973. The case did not come to trial until the autumn of 1977, and the trial lasted some 100 working days (see [1979] RPC 215). It is one thing to say in a case of such complexity and duration that on an interlocutory injunction application the court should not go beyond asking whether there is a serious question to be tried. But in an employment case of far more limited scope it may be unjust to stop at that: and it should always be remembered that the statutory test for the grant of an injunction is whether it is just and convenient. Hence the decision of this court in *Lansing Linde v Kerr* [1991] 1 WLR 251 that where it will not be possible to hold a trial until the period of the covenant has expired, or substantially expired, it is permissible for the judge to form at least a preliminary view of the claimant’s prospects of success, and to factor that in at the “balance of convenience” stage of the analysis.
15. In *Planon v Gilligan* there was no difficulty about what the covenants meant (unlike those in the present case, they used quite standard wording), nor any issue of severance. A different approach is applicable where the issue is the interpretation of the contract. In *Arbuthnot Fund Managers Ltd v Rawlings* [2003] EWCA Civ 518, Chadwick LJ said:-

“The first task of the court - faced with the contention that post-termination restraints on an employee's ability to engage in future business activity are not enforceable - is to construe the contract under which those restraints are said to be imposed. That, as it seems to me, is a task which the court ought to carry out on an application for interim relief (if there is one) if it can properly do so. Unless the court is satisfied that there are disputed facts which bear on the construction of the relevant contractual terms, and that those facts cannot be resolved without a trial, the court at the interlocutory stage is as well able to construe the relevant contractual terms as a court will be at a trial.

There is no need to put off until trial determination of the question - what do the contractual terms mean? The court can, and should, determine the scope of the restraints which, as a matter of construction, the contractual terms seek to impose.”

16. Indeed, in the present case the judge noted at paragraph 28 of his judgment that:-

“Both counsel agree... that I am equipped to deal now with constructions of the wording of the covenant and it is of course the first task of the court to decide, if it is not plain and undisputed, what the covenant actually means.”

17. The judge went on to sound a note of caution in relation to the matter of construction. He said:-

“Whilst the court may, indeed, be in a position at the interim stage to resolve an issue of construction, construction of employment contracts, and indeed all contracts, is an exercise that must be carried out mindful of the surrounding factual context and matrix, and things that the court can objectively determine would have been known to both parties relevant to that.”

18. At paragraph 18 of his judgment he had said:

“There are some areas of factual dispute to be resolved at trial as necessary, but my starting point for the purposes of the application before me is the facts as asserted in Dr Viney's statements for the claimants, though Ms Stone says that where there are material disputes of fact this may have a bearing on whether I should grant interim relief until such disputes can be resolved as the result of a trial.”

19. I agree with this approach. If the court, even making the assumption that any disputes of fact would be resolved at trial in the Claimants' favour, concludes that on its proper construction (with any permissible severance – see below) the relevant clause is plainly unenforceable, it should say so. In such a case it cannot be said that there is a serious issue to be tried.

20. There is a degree of factual dispute in this case but it is relatively limited. Clearly Dr Boydell had extensive knowledge of NZP's confidential information protectable after the termination of his employment in accordance with the principles set out in *Faccenda Chicken Ltd v Fowler* [1987] Ch 117. It is not contended otherwise, although there is a dispute as to whether he had access to protectable confidential information right across the group of companies headed by the Second Claimant. This case may, therefore, be distinguished from those in which there is a genuine factual dispute as to whether the claimants have any trade secrets or commercially confidential information capable of protection after the defendant has left their employment; or cases where there is a serious issue as to whether the employers have repudiated the contract so as to be precluded from relying on any restrictive covenants (*General Billposting v Atkinson* [1909] AC 118).

21. Mr Nicholls KC accepted that his appeal could only succeed if it is plain and obvious that the covenants are unenforceable. His case before the judge and before us was, he said, in the nature of a strike out application. I agree with him that this is the proper approach in a case of this kind.

Principles of construction

22. The interpretation of contracts is not a question of the exercise of a discretion. I do not think it is necessary to cite the many familiar authorities usefully summarized in Sir Kim Lewison’s magisterial book *The Interpretation of Contracts*. It is well established that the words of a contract should be interpreted in their natural and ordinary sense, in the context of the facts known to both parties at the time the contract was concluded, unless there is good reason to adopt a different meaning. As Lord Carnwath said in *Lambeth LBC v Secretary of State for Local Communities and Government* [2019] UKSC 33; [2019] 1 WLR 4317:-

“In summary, whatever the legal character of the document in question, the starting point, and usually the end point is to find “the natural and ordinary meaning of the words there used viewed in their particular context (statutory or otherwise) and in the light of common sense.”

In the pithy formulation of Lord Hodge JSC in *L Batley Pet Products Ltd v North Lanarkshire Council* [2014] UKSC 27; [2014] 3 All ER 64, “the starting point is the words the parties have chosen to use”.

23. The next point is that it has long been established as a principle of construing restrictive covenants in employment or similar cases that, as Salmon LJ said in *Home Counties Dairies Ltd v Skilton* [1970] 1 WLR 526:-

“If a clause is valid in all ordinary circumstances which can have been contemplated by the parties, it is equally valid, notwithstanding that it might cover circumstances which are so “extravagant”, “fantastical”, “unlikely or improbable” that they must have been entirely outside the contemplation of the parties.”

In the earlier case of *GW Plowman & Son Ltd v Ash* [1964] 1 WLR 568 Harman LJ described one suggested construction of the clause in question as being “a fantastification of which one need not take any account, anyhow on the trial of the motion” [the term then in use for an application for an interlocutory injunction in the Chancery Division].

24. The next point is derived from *Egon Zehnder Ltd v Tillman* [2019] UKSC 32; [2020] AC 154, to which I shall return shortly on the issue of severance. Lord Wilson JSC referred at paragraph 38 to what he described as “the validity principle”:-

“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?"

25. At paragraph 42 he answered this question as follows:-

“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.”

26. He ended paragraph 42 by saying that the test was whether each of the alternative constructions was realistic. So if there are two alternative realistic constructions, the parties are deemed to have meant to enter into a valid agreement rather than an invalid one. But, if there is only one realistic construction, then that must be followed however disastrous the consequences for one of the parties – see for example *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619.

Severance

27. In *Egon Zehnder v Tillman* the Supreme Court resolved the conflict between the decisions of this court in *Goldsoll v Goldman* [1915] 1 Ch 292 and *Atwood v Lamont* [1920] 3 KB 571, which had caused a measure of uncertainty in the law for almost exactly a century. The latter case, in which this court had held that severance of words in a restrictive covenant was only permissible if the part to be severed was of trivial importance or merely technical, was overruled. Lord Wilson JSC said, however, at paragraph 82 that “the courts must continue to adopt a cautious approach to the severance of post-employment restraints”. The “blue pencil” test requiring that the unenforceable provision is capable of being removed without the necessity of adding to or modifying the words of what remains, is still good law. There is a second criterion concerning adequate consideration for the remaining terms which Lord Wilson said can be ignored in the usual situation. The crucial third criterion, set out at paragraph 87 of his judgment, is:-

“...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.”

The construction of clause 3.1 and the issue of severance

28. Although Ms Stone valiantly attempted to persuade us otherwise, it seems to me clear that as originally drafted clause 3.1 prohibits Dr Boydell from being involved in any activity for the benefit of any third party that carries out any business activity that would compete with the business activity carried out by NZP or by any other company in the group. This broad construction is emphasised by the final sentence of the clause, which lists a number of companies “which are to be considered as competitors”.
29. I turn next to the severance carried out by the judge. The deletion of the references to “activities relating to the supply chain” or to “the manufacturing or use of bile from various animals” appears to me, as it did to the judge, to cover a very peripheral part of the covenant: it would, I think, have been severable even in the days of *Attwood v Lamont*. The main point made by Mr Nicholls in his attack on the clause concerns the reference to other companies in the group and can be expressed as follows. NZP may be a highly specialised business, but other companies in the group are less specialized. One of these, for example, produces some general pharmaceutical products such as nasal sprays. On a proper construction of the clause as drafted the Defendant is therefore prohibited for 12 months from working for any company which sells pharmaceutical products including nasal sprays. Mr Nicholls did not name them, but presumably this would include large chains such as Boots or Superdrug. This goes far beyond what is reasonably necessary to protect the Claimants’ legitimate interests: therefore the offending words cannot be severed under the principles laid down in *Egon Zehnder v Tillman*; and thus the whole clause fails.
30. In my view this is a construction of the clause which falls within the principle of *Home Counties Dairies v Skilton*. If at the time of signing the “Variation of Employment Agreement” which introduced the covenants into Dr Boydell’s contract the parties had been asked by the hypothetical officious bystander whether after leaving NZP he would be able to go to work for Boots or Superdrug, I am confident that *both parties* would have said “of course he would”. The whole burden of the clause is directed to the specialist activities of NZP, which it lists at some length. The judge was entitled, at least at the interim injunction stage, to sever the words from the clause and grant an injunction on a more limited basis. There is a serious question to be tried as to whether other group companies have significant areas of business which are wholly distinct from the activities carried out by NZP. I would, however, refuse Ms Stone’s application for permission to cross-appeal against the judge’s decision to sever the relevant words from clause 3.1.

Is the clause too wide even after severance?

31. Mr Nicholls submits that a restraint on being involved in any capacity with any third party which competes with the former employer’s business, whether or not it was in the same field of activity as when the employee was working for the claimants is plainly too wide in principle. He referred to the decision of this court in *Wincanton Ltd v Cranny* [2000] IRLR 716. In that case the claimant company sought to enforce a 12 month covenant which prohibited the defendant from being engaged, concerned or interested “in any business of whatever kind within the United Kingdom which is wholly or partly in competition with any business carried on by the company ...”. Simon Brown LJ said of this clause:-

“17. ... I need say no more than that on its face it plainly falls foul of all the well-known authorities in this field. Mr Duggan himself appears to recognise that it is necessary to read it down for it to become enforceable. He seeks to rely for the purpose upon the well-known trilogy of cases, GW Plowman v Ash [1964] 1 All ER 10, Littlewoods Organisation Ltd v Harris [1978] 1 All ER 1026 and Business Seating (Renovations) Ltd v Broad [1989] ICR 729.

18. In my judgment, however, the approach adopted in those cases cannot apply in a case like the present where, so far from there having been any attempt to formulate the covenant in a way which focuses upon the particular restraint necessary in respect of a particular employee, the clause is in a standard form plainly intended to apply to the widest possible range of situations. This court's judgment in JA Mont (UK) Ltd v Mills [1993] IRLR 172 is in my judgment fatal to the enforceability of a clause drawn as intentionally widely as clause 15(a) in the present case.”

32. I do not think that *Wincanton v Cranny* will bear the weight which Mr Nicholls put on it. Wincanton Ltd was described in the judgment as the second largest haulier in the UK. It was a subsidiary of Unigate plc, a large and well-known public company. Wincanton's business was concerned not merely with distribution but with logistics. Although Mr Cranny held a very senior position at Wincanton, namely as European Operations Manager, it seems to me a very severe restriction that an employee should be excluded from every aspect of haulage or logistics businesses throughout the country for 12 months after leaving.
33. Decisions in this field are highly fact-sensitive. Where the employer is, for example, a large public company covering a variety of fields of business activity it may be very difficult to justify a covenant against competition of the kind we have in clause 3.1 even on the basis of a senior employee's knowledge of the company's commercial secrets. But this is far less obvious where the company, as is the case with NZP, has a highly specialised or niche business. It may be unrealistic, as Ms Stone argues, to think that if Dr Boydell were to move immediately to Zellbios or to one of the direct competitors listed in the clause he could somehow be insulated from activities which compete with those of NZP. The case is a very long way from, for example, *Ashcourt Rowan Financial Planning v Hall* [2013] IRLR 637 where the effect of the restriction was to exclude the defendant altogether from the financial services sector.
34. Another of Mr Nicholls' criticisms of the clause was that the clause extends to involvement with “related animal products”, without limiting those to products in which NZP dealt. But the natural construction of this phrase, in my view, is “animal products related to bile”, which remains prima facie a very specialised field of business activity.
35. I therefore take the view that it is *not* plain and obvious that clause 3.1 was incapable of severance; nor that, as severed by the judge, it was nevertheless too wide to be enforceable.

The non-solicitation and non-dealing clauses

36. Mr Nicholls challenges the enforceability of both the non-soliciting clause and the non-dealing clause. As to the first of these, clause 3.2(a), Mr Nicholls submits that its wording is unusual because it only relates to solicitation of customers to cease or reduce their business with the Claimants rather than positively to give their business to the Defendant's new employer. Like the judge, I cannot see that there is anything wrong with a clause in this form. The other objection to clause 3.2(a) is that it could apply to any business which the solicited customer might want to do even if unconnected with the defendant's former field of activity. I agree with the judge that this objection is in the category of being fanciful in terms of what the parties would have had in contemplation. It is unrealistic to suppose that customers of a business as specialised as NZP might have been concerned with the supply of completely unrelated products.
37. The objection to the non-dealing clause is similar. It is said that it restricts the defendant from approaching customers in relation to products completely unrelated to Dr Boydell's former field of activity. This would indeed, as the judge said, have been "absurdly wide", but it too falls fairly and squarely within the *Skilton* principle. I would therefore refuse permission to appeal against the judge's decision to include both the non-solicitation and non-dealing clauses in the injunction which he granted.

Adequacy of damages

38. This potential ground of appeal did not feature in Mr Nicholls' oral argument and it can be dealt with shortly. In accordance with Clause 3.4 of the contract the Claimants have from the start offered to pay Dr Boydell his full salary during any period prior to trial during which he is restrained by injunction from joining his new employer. There is no evidence that in this situation he would suffer any financial loss. Conversely, the inadequacy of damages to the Claimants, if they are refused an interlocutory injunction but succeed at trial on liability, is entirely obvious.
39. In those circumstances, strictly speaking, one never reaches the "balance of convenience" stage of the *American Cyanamid* analysis; or, putting it another way, the balance of convenience obviously favours the grant of an injunction until trial. Mr Nicholls did not dispute that if his arguments on "no serious question to be tried" were to be rejected, he could not succeed on the balance of convenience.

Delay

40. A further ground on which Dr Boydell sought permission to appeal was that of delay. It was submitted that the Claimants knew in November 2021 that he intended to join Zellbios as soon as his notice period expired but nevertheless delayed until the expiry of that notice period before issuing proceedings.
41. Reliance is placed on observations of mine in *Planon Ltd v Gilligan*. In that case Mr Gilligan, who was alleged to be in possession of trade secrets of his old employer, started with the new employer on 1 September 2021. The claimants discovered this the following day, yet it was not until some seven weeks later that the hearing in the Chancery Division of their application for an injunction took place. Mr Gilligan had been in post with the new employer throughout this period, during which, as I pointed

out, any trade secrets would surely have been lost. By the time the case reached this court that period had become seven months.

42. In the present case, when Dr Boydell first informed the Claimants of his intentions there was a period from 17 November to 14 December 2022 during which the parties were in negotiation to see whether a compromise could be reached. In January there was open correspondence, including a request from Dr Boydell's solicitors for more time in which to respond. Dr Boydell had not started work for the new employer when proceedings were issued, and gave an interim undertaking not to do so for the brief period until a hearing on notice of the injunction application could take place.

43. As the judge put it:-

“... This is not a case where it is suggested that the Claimants have acted in bad faith in their approach to dialogue and correspondence about this matter, nor indeed is it suggested by them that the defendant acted in bad faith by somehow drawing out the discussions to somehow set a trap for them. Rather the picture is a very striking one in which at very stage, given this dispute, both parties have behaved in an exemplary and responsible fashion, such as the court sometime exhorts other parties to do, but without success. There was early dialogue through correspondence in a civilised and business-like fashion before and after the solicitors became involved. Although I know nothing of the details it is clear that there are genuine efforts on both sides to see if without prejudice communications might yield an accommodation. ... even when the correspondence resumed in the New Year, the Defendants solicitors asked for a little more time before responding, entirely reasonably, and that in context where the Defendant was not yet indicating any keenness to start on a given date or in a given timescale with his new employer.”

44. We did not find it necessary to hear from Ms Stone in answer to the application for permission to appeal on the question of delay, and I would refuse such permission.

Conclusion

45. I would dismiss the appeal.

Lord Justice Coulson:

46. I agree.

Lady Justice Macur:

47. I also agree.