

Case note on *Prophet plc v Huggett* [2014] EWCA Civ 1013 - *Restrictive Covenants: they mean what they say*

1. The Court of Appeal gave judgment on 21 July 2014 in *Prophet plc v Huggett* [2014] EWCA Civ 1013; an eagerly awaited decision concerning interpretation of restrictive covenants in employment contracts. It has confirmed that a strict interpretation must be given to restrictive covenants as they are regarded as clauses drafted with particular care. A court may not easily find that something has gone wrong with the language and thus restrictive covenants are not readily amenable to judicial reinterpretation. The conclusion of the Chancery Division judge (*Prophet plc v Huggett* [2014] IRLR 618) that the words “or similar thereto” should be added to the clause in order to give it commercial effect was overturned and the injunction against the employee discharged.
2. The dispute concerned a limiting proviso in a 12 month non-competition covenant. The covenant prevented “the Employee from being so engaged, employed, concerned or interested in any area and in connection with any products in, or on, which he/she was involved whilst employed hereunder”. After an expedited 6 day trial, the Judge granted an injunction restraining Mr Huggett from working for his new employer until 3 January 2015 on the basis that it sold products that were similar to Prophet’s Pr3 product in which he was involved.
3. It was common ground that the court’s task was to decide what the clause would have been understood to mean by a reasonable person having all the background knowledge available to the parties (*ICSL v West Bromwich* [1998] 1 WLR 896). The Court of Appeal accepted that the employee was only ‘involved’ at Prophet with a specific product – ‘Pr3’ and not with its other products: ProPack or Prophet QX.
4. The Court noted the submission that there may in certain cases be a justification for applying a ‘blue pencil’ to a covenant so as to delete provisions which cause it to offend against public policy and to reflect the parties’ intention to impose a narrower restriction, but it will only be so appropriate if it is not also necessary to add to or modify what then remains. A court should not strive to interpret a covenant that is on its face too wide as if it contained an implicit limitation which could justify its imposition: *J.A. Mont (UK) Ltd v Mills* [1993] IRLR 172. It was also submitted for the Appellant that a court should not strive to widen a clause that looks too narrow so as to provide what the court regards as effective protection. If the parties’ chosen words resulted in a restriction of no effect, the explanation may be that the employer had simply made a bad bargain. It was said that the court should be wary about mending such a bargain so as to improve it.
5. The Court of Appeal noted that *Chartbrook v Persimmon Homes* [2009] 1 AC 1101 held that the courts do not ‘easily accept that people have made linguistic mistakes, particularly in formal documents’, and that it ‘clearly requires a strong case to persuade the court that something must have gone wrong with the language....’ Further, not only must there be such a strong case, it must further also ‘be clear what correction ought to be made to cure the mistake’ (*East v Pantiles (Plant Hire) Ltd* (1981) 263 EG 61).

6. The Court of Appeal held that the natural meaning of the words ‘any products’ in their context was that they referred simply to those products with which Mr Huggett was involved whilst employed at Prophet, namely Pr3. This ‘literal’ interpretation of the proviso resulted in its having no relevant teeth. It imposed no material restraint upon the employee. Where a clause gives rise to an apparent absurdity, a court can favour a construction that achieves a commercially common sense result (*Rainy Sky v Kookmin Bank* [2011] 1 WLR 2900), but that only applies where the language of the provision is truly ambiguous and admits of clear alternatives as to the sense the parties intended to achieve. In this case it did not.
7. It was impermissible to adopt Prophet’s suggested re-writings of the proviso on the basis that something has ‘gone wrong’ with its drafting. A court could not re-cast the parties’ chosen language with a view to giving effect to what is said to have been their likely commercial intention.
8. The Court of Appeal held that a vital part of the context was that the restrictive covenant was drafted by someone who had tried to draw it tightly to avoid it being void for unreasonable restraint of trade. A carefully drawn piece of legal prose in which the draftsman chose his words with deliberate and specific care is not a case in which the court can be confident that something has ‘gone wrong’ with the drafting.
9. Where something probably did go wrong is that the employer did not think through the practical benefit. The Court held that it is not for a judge to re-make the parties’ bargain where an employer has poorly drafted its restrictive covenant. Rimer LJ (with whom Lewison and Christopher Clarke LJJ agreed) commented that “Prophet made its clause 19 bed and it must now lie upon it”. He went on to say that it is not possible to read a restrictive covenant and conclude from it that, although it actually achieved result A, it is clear from its language as a whole, read in its context, that the draftsman really intended to achieve different result B – or, for that matter, C, D or E.
10. This re-establishes the orthodoxy that was undermined by the judge’s willingness to add the words “or similar thereto” to the restrictive covenant in order to widen it and give it commercial teeth. The warning for employers is clear. A restrictive covenant must be drafted with the utmost care. If it is badly drafted so that it does not meet the employer’s objective, the court will not step in to rescue it.

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