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Appeal ref: CH-2023-000084

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

ON APPEAL FROM ICC JUDGE MULLEN

Rolls Building
Fetter Lane
London, EC4A 1NL

11 October 2023

Before :

MRS JUSTICE BACON

Between :

CHARLES ANTHONY JOSEPH STEEL

Appellant

- and -

SPENCER ROAD LLP
(trading as The Omerta Group)

Respondent

Thomas Croxford KC and Oliver Hyams (instructed by Lewis Silkin LLP) for the Appellant
Andrew Shaw (instructed by Withers LLP) for the Respondent

Hearing date: 31 July 2023

Approved Judgment

This judgment was handed down remotely at 10 a.m. on 11 October 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

Mrs Justice Bacon:

Introduction

1. This is an appeal from the order of ICC Judge Mullen dated 30 March 2023 in which he dismissed Mr Steel's application to set aside a statutory demand served by the Respondent, which I will refer to as Omerta.
2. Mr Steel was employed by Omerta, a global executive search firm. Under the terms of his employment contract dated 13 July 2015, his remuneration was by way of a basic annual salary plus a discretionary bonus scheme. The bonus was conditional on Mr Steel remaining in the employment of Omerta for three months from the date of payment of any bonus, and not having given or been given notice to terminate his appointment during that period.
3. There was no guarantee that a bonus would be paid in any given year. Mr Steel did, however, receive substantial bonuses under the scheme in every year from 2016 to 2021. In January 2022 he was paid a bonus of £187,500, which was an amount considerably larger than his basic salary at the time of £65,000. Mr Steel then gave notice of termination of his employment in February 2022.
4. Omerta requested repayment of the bonus under the clawback provisions in the employment contract. When Mr Steel refused to do so, Omerta served a statutory demand for the full amount of the bonus, plus £12,623 in legal fees.
5. Mr Steel applied to set aside the statutory demand, contending that the bonus clawback provisions in the contract operated as an unreasonable restraint of trade or were penalty clauses and were therefore unenforceable. His application was dismissed by ICC Judge Mullen. Mr Steel then repaid the bonus to Omerta but brought this appeal. Permission to appeal was given by Trower J on 1 June 2023.

Factual background

6. Clause 2.1 of Mr Steel's employment contract provided:

“The Appointment shall commence on the commencement date and shall continue, subject to the remaining terms of this agreement, until terminated by either party giving the other not less than 12 weeks' prior notice in writing.”
7. Clause 7.4 referred to the discretionary bonus scheme, operated in accordance with Schedule 1 to the contract. Clause 7.5 then provided:

“Subject to the successful achievement of objectives created by the Board, the Company and yourself, you may qualify for a Discretionary Bonus. Whether each objective has been successfully completed, whether to pay Discretionary Bonuses and the amount of any such bonuses are matters within the sole discretion of the Board. The Discretionary Bonus Scheme may be varied from time to time at the discretion of the Company, and the objectives are likely to vary from year to year. The fact that a Discretionary Bonus is paid in one year is no guarantee that such bonuses will be paid in

subsequent years. Discretionary Bonuses shall be paid less tax, national insurance contributions and other deductions required by law. A Discretionary Bonus payment shall not be treated as part of the basic salary for any purpose and shall not be pensionable.”

8. Clause 7.6 provided:

“As the Discretionary Bonus Scheme is intended to incentivise employees to remain in the employment of the Company, payment of any Discretionary Bonus is conditional on the Employee remaining in the employment of the Company for a period of three months from the date of payment of any given Discretionary Bonus (the ‘Payment Date’) and the Employee not having given or been given notice to terminate the Appointment at the Payment Date or during the three month period following the Payment Date.”

9. Clause 7.7 then provided:

“In the event that the Employee serves or receives notice of termination of his contract of employment, the Company shall be entitled to:

- (a) Recover any Discretionary Bonus payments made to the Employee during the three month period preceding the deemed date of service of that notice.”

10. Clause 7.13 provided:

“All sums that the Company seeks to recover from the Employee shall be recoverable as a debt. In the event that the Company seeks to enforce payment of any of the sums repayable under this clause 7, or any outstanding sum, the Employee agrees to indemnify the Company against any costs, fees and charges it may incur in enforcing such a payment.”

11. Schedule 1 to the contract contained similar provisions. In particular, §§6–9 of Schedule 1 provided that:

6. Whether each objective has been successfully completed, whether to pay bonuses, and the amount of any bonuses, under the Discretionary Bonus Scheme are matters which are entirely at the discretion of the Company and its Directors. The Discretionary Bonus Scheme, including the basis for determining eligibility to be considered for a bonus, may be varied from time to time at the absolute discretion of the Company and are likely to be varied from year to year.
7. The fact that a bonus is paid in one year, or in consecutive years, is not guarantee that bonuses will be paid in subsequent years. Bonuses shall be paid less tax, national insurance contributions and other deductions required by law.
8. As the bonus is also intended to incentivise the Employee to remain in the employment of the Company, payment of any bonus is conditional on the Employee remaining in the employment of the Company for a

period of three months from the date of payment of a discretionary bonus (the ‘Payment Date’) and the Employee not having given or been given notice to terminate the Appointment at the Payment Date.

9. The Discretionary Bonus Scheme confers no rights or entitlements on the Employee other than to be considered for a discretionary bonus upon achievement of the Target. If the Employee leaves the Company or gives or receives notice within three months of the Payment Date, the Employee shall repay the total amount of the Discretionary Bonus received on the Payment Date ... to the Company.”
12. I will refer to clauses 7.6 and 7.7 of the contract, and §§8–9 of Schedule 1, as the “bonus clawback provisions”.
13. Bonuses were paid in the January of each year, referable to the achievement of the relevant objectives during the previous year. The bonuses paid by Omerta to Mr Steel fluctuated during the course of his employment. The bonus paid in January 2022 was, however, considerably larger than the bonus paid in any previous year.
14. Mr Steel gave notice of his resignation from Omerta on 22 February 2022, and his last day of work was confirmed as being 17 May 2022. During that period, and thereafter, Omerta maintained that the bonus paid in January was repayable by Mr Steel under the bonus clawback provisions of the contract. Mr Steel disagreed and refused to repay the bonus. On 4 August 2022 Omerta issued the statutory demand that is the subject of this appeal.

The judgment of ICC Judge Mullen

15. Mr Steel contested the statutory demand on the basis that the bonus clawback provisions were unenforceable on the grounds that they were in restraint of trade and/or penalty clauses.
16. The judge found that the weight of the authority was that the bonus clawback provisions were not within the restraint of trade doctrine, since they did not restrict Mr Steel’s ability to work elsewhere. He relied in particular, in that regard, on the judgment of Jack J in *Tullett Prebon v BGC Brokers* [2010] EWHC 484 (QB), and distinguished the later judgment of Mr David Donaldson QC, sitting as a deputy judge of the High Court, in *20:20 London v Riley* [2012] EWHC 1912 (Ch). The judge commented that there might be circumstances where the severity of the consequences were clearly out of all proportion to the benefit received, but considered that this was not arguable in the present case, where the conditions attached to the bonus payments were in his view “very moderate”.
17. The judge also considered that the argument that the provisions operated as a penalty clause had no real prospect of success.

The appeal

18. Mr Steel appeals the judge’s findings on the restraint of trade doctrine on four grounds: (i) that *Tullett Prebon* was wrongly decided, and the judge should instead have followed the approach in *20:20 London v Riley*; (ii) that the judge was wrong to conclude that the

restraint of trade doctrine might only be engaged by bonus clawback provisions that were out of all proportion to the benefit conferred; (iii) that the judge failed to consider other clauses in the contract which operated as a significant disincentive to resign; and (iv) that the judge should not have refused the application to set aside a statutory demand in what is said to be an emerging area of law.

19. There is no appeal against the judge's conclusion that the bonus clawback provisions were not in the nature of penalty clauses.

Relevant law

Setting aside a statutory demand

20. Under Rule 10.5(5)(b) of the Insolvency (England and Wales) Rules 2016, the court may grant an application to set aside a statutory demand if the debt is disputed "on grounds which appear to the court to be substantial".
21. It is common ground that this test is essentially the same as for summary judgment under CPR Pt 24, and that the debtor must therefore show a real prospect of successfully resisting the creditor's claim. As the judge noted at §12 of his judgment, in considering whether there is a substantial dispute, the court will not conduct a mini-trial, but it should be prepared to grapple with points of law where it can properly do so on the basis of the evidence before it.

The restraint of trade doctrine: general principles

22. The doctrine of restraint of trade has been considered in cases going back to the 18th century. It is well-established that it requires a two-stage test. The first is whether a particular contract is a restraint of trade. If it is, then it is enforceable only if it is reasonable with reference to the interests of the parties and the public.
23. The present appeal is concerned only with the first of those questions. If the answer to that question is that the bonus clawback provisions are a restraint of trade, then it is not disputed that the statutory demand will fall to be set aside.
24. The principles governing the identification of whether a contract is a restraint of trade were considered and summarised by Carr LJ in *Quantum Actuarial v Quantum Advisory* [2021] EWCA Civ 227, [2022] 1 All ER (Comm) 473, §§54–61. It is apparent from that summary that:
 - i) The doctrine is not confined to "immutable boundaries or rigid categorisation"; nor is there a "precise and exhaustive test" for determining whether a particular agreement is a restraint of trade. Rather, all of the relevant factors must be assessed cumulatively: *Quantum* §60(i), (ii) and (iv).
 - ii) There are nevertheless some categories of covenants to which the doctrine has been traditionally held to apply, such as employee covenants not to compete with the employer after leaving the employer's service, and covenants whereby the seller of a business agrees not to compete with the purchaser: *Quantum* §60(i).
 - iii) The application of the doctrine is to be assessed by reference to the position as at the time that the contract is made, rather than by reference to subsequent events.

How the contract turns out is relevant only in so far as it provides evidence of the nature of the contract when it was originally made: *Quantum* §60(v).

- iv) The central question is “the practical effect of the restraint in hampering the freedom to trade”, which is a question of substance not form: *Quantum* §60(vi).
25. The summary at §60(ii) of *Quantum* also cites the proposition set out by Lord Wilberforce in *Esso* [1968] AC 269, 331 that the doctrine is “to be applied to factual situations with a broad and flexible rule of reason”. Neither counsel was able to explain what this meant in the context of the first stage of the test, and I do not think that this adds anything to the principles set out above.
26. The requirement for the court to consider all the relevant facts of the particular case led Carr LJ to caution against placing too much emphasis on analogous factual situations, noting that the approach of the courts in analogous cases might be of assistance, but was “unlikely to be determinative because of the fact-sensitive nature of the exercise to be carried out”: *Quantum* §61.
27. For similar reasons, the authorities recognise that the line between the two stages of the test is not entirely clear-cut, and that there may in a given case be a degree of overlap between the two questions: Carr LJ in *Quantum Actuarial v Quantum Advisory* [2021] EWCA Civ 227, [2022] 1 All ER (Comm) 473, §66. Accordingly, in some cases, the matters that might be raised under the second stage might also be relevant to the first question of whether the doctrine of restraint of trade is engaged at all: Arden LJ in *Proactive Sports Management v Rooney* [2011] EWCA Civ 1444, [2012] FSR 16, §59. In the present case it is not, however, suggested that there are matters going to the reasonableness of the provisions which should be taken into account in determining whether the bonus clawback provisions are a restraint of trade. On the contrary, the second ground of appeal objects that the judge wrongly conflated the two stages of the test, which I will address below.

Bonus clawback provisions

28. The central issue raised by the appeal is whether a bonus clawback in the form of clauses 7.6 and 7.7 of Mr Steel’s contract (and Schedule 1 §§8–9), which are conditional on remaining in employment for a certain period of time, but are not otherwise subject to any non-compete requirement, are a restraint of trade.
29. The only case which directly considers whether a loyalty bonus (conditional on remaining in employment, but not subject to any non-compete requirement) engages the doctrine of restraint of trade is the case of *Tullett Prebon*. I was, however, referred to a number of other cases, both preceding and postdating *Tullett Prebon*, which one or other counsel relied on as being relevant.
30. The first case is *Electronic Data Systems v Hubble* (unreported, 20 November 1987). That concerned Mr Hubble’s employment contract with EDS, which provided that he was to receive specialist training, but required him to sign promissory notes obliging him to repay the costs of that training if he resigned or was dismissed within a specified time period. Mr Hubble did resign within that time period and EDS made a demand under the promissory note. When Mr Hubble refused to pay, EDS issued proceedings and applied for summary judgment. It succeeded at first instance.

31. The Court of Appeal allowed the appeal on the basis that it considered that the restraint of trade defence should be allowed to proceed to trial. The important point of context for that decision was that, as Mustill LJ expressly recorded, it was accepted by both parties that the contractual provision in question was capable of being a restraint of trade. The question to be decided was therefore not the first question in the two-stage test set out above, but the second question of whether the restriction imposed was reasonably necessary for the protection of the legitimate interests of the parties to the contract, looking at all of the relevant provisions of the contract. The arguments of Mr Hubble referred to, among other things, the relative bargaining power of the parties, the extent of the payment by comparison with his annual salary, the true cost of the training to EDS and its value to Mr Hubble, and EDS' motive in making this arrangement. Mustill LJ's comment on these arguments was that, after some initial hesitation, he did not regard Mr Hubble's case as so hopeless that he should not be allowed to argue it at the trial.
32. The next case is *Marshall v NM Financial Management* [1997] EWCA Civ 1237, [1997] 1 WLR 1527, which concerned an agency agreement between the claimant, a salesman, and the defendant. Clause 10(g)(i) of the agreement provided that the claimant would after termination of his appointment continue to receive commission in respect of payments by investors he had introduced to the defendant, provided that he did not become an independent intermediary or take up employment with an organisation competing with the defendant within the first year after termination of his appointment.
33. At first instance, Jonathan Sumption QC found that there was no doubt that this proviso was a restraint of trade, given that it was a "financial incentive to the agent not to carry on business in the specified fields" [1995] 1 WLR 1461, p. 1465C. That finding was not challenged on appeal, and Millett LJ commented at p. 1533B–C that:

"It is settled law that there is no difference in this context between a contract by a person that he will not carry on a particular trade (which if valid would be enforceable against him) and a contract that he does not do so he will receive a benefit to which he would not otherwise be entitled (which if valid would not prevent him from carrying on the trade but merely result in the loss of the benefit in question)".
34. A further condition provided the relevant commission would only be payable if at the date of termination of the appointment the claimant had been continuously an agent of the company for a period of not less than five years. That condition was not regarded as a restraint of trade: Jonathan Sumption QC, p. 1468F; Millett LJ, p. 1533G–H.
35. It is clear from this case, as Mr Croxford said, that the law recognises indirect restraints of trade where the restraint derives from the loss of a benefit rather than a direct prohibition on competing trade. It is important to note, however, that *Marshall* does not suggest that any provision which leads to the forfeiture of a benefit if the employee leaves the relevant employment is a restraint of trade. Quite the contrary, the reason why clause 10(g)(i) was a restraint of trade was that it restricted the claimant's freedom to carry on particular forms of trade after the termination of his appointment. The further condition of at least five years employment was, by contrast, not a restraint of trade.
36. These points were made by Rimer J in the EAT in *Sweeney v Peninsula Business Services* [2004] IRLR 49, where the disputed employment contract provided for the payment of commission to Mr Sweeney at the end of every month following receipt of fees from the

client introduced by Mr Sweeney, but only (pursuant to terms set out in section B of the contract) where he was still in employment at the end of the month when commission was payable. There was, however, no restriction on where Mr Sweeney could work after termination of his employment with the defendant.

37. The first instance employment tribunal found that the disputed condition was a restraint of trade, finding that it was designed to provide an economic disincentive or discouragement to the salesmen from leaving their employment and working elsewhere. The tribunal relied on *Marshall*, without explaining what in *Marshall* supported its conclusion. Rimer J in the EAT allowed the appeal, holding at §§39–43 that *Marshall* in fact supported the opposite conclusion, and rejecting the tribunal’s reasoning that the disincentive to leave the company amounted to a restraint of trade. In particular, he noted at that:

“41. The point about [*Marshall*], however, is that it is clear that the only feature of clause 10 which the court regarded as constituting a restraint of trade was the condition in clause 10(g)(i). That is because that is what that condition amounted to, namely a condition restricting the former agent’s liberty to carry on his trade in such manner and with whom he might choose. There is no such condition in the present case. Mr Sweeney was at liberty, on leaving Peninsula, to work for whomever he liked.

42. The tribunal’s point, however, is that because section B had the effect of imposing what they regarded as a penalty on resigning employees, it must have operated as a disincentive on them to resign and, therefore, to go and work for competitors whom they might, but for section B, have wished to work for. We regard the tribunal’s conclusion that those circumstances turned section B into a contract in restraint of trade as wrong. We do not consider it seriously arguable that the commission penalty that Mr Sweeney suffered on resignation arose under a contractual term involving an unlawful restraint of trade. His employment contract did not impose any restraint on him as to whom he might work for, or what he might do, after leaving Peninsula. ...

43. ... the Court of Appeal [in *Marshall*] had no doubt that a condition requiring the agent to serve for five years before he could claim to be entitled to post-leaving commission was valid. The tribunal’s reasoning in the present case would, however, suggest that such a condition was invalid, since it would have operated as a disincentive to a termination of the agency agreement during the first five years.”

38. Rimer J’s conclusion at §44 was that, contrary to the decision of the tribunal, nothing in the disputed condition was an unlawful restraint of trade.
39. Both *Marshall* and *Sweeney* are therefore authority for the proposition that a contractual commission, which is subject to a condition of continuing employment or to employment for a specified period of time, but which does not otherwise restrict the employee’s freedom to take up other employment, is not a restraint of trade.
40. *Hubble*, *Marshall* and *Sweeney* were all cited by Jack J in *Tullett Prebon*, in respect of the question whether certain clauses in contracts between financial products brokers and their employers constituted restraints of trade. The disputed clauses provided for the

repayment of either signing or retention bonuses in the event that (among other things) the brokers resigned or were not actively performing their duties before the end of a specified minimum term.

41. Jack J did not consider that he could derive any assistance from *Hubble*. He did, however, rely on *Marshall* and *Sweeney* for his conclusion at §267 that the disputed bonus provisions were not provisions in restraint of trade: “They do not affect the employees’ ability to work after leaving. They are substantial sums paid to highly paid employees as a reward for loyalty.”
42. The final case referred to by the parties is the *20:20 London* case. This did not concern bonus or commission payments in employment contracts, but rather raised the question of whether a clause requiring the defendant to repay consideration paid to him for the sale of a business in the event that he left the business within three years of the sale was a restraint of trade.
43. The judge relied on *Hubble* for the proposition that an analogous repayment provision was capable of being a restraint of trade. He distinguished *Marshall* and *Sweeney* on the basis that the court in *Marshall* had not been asked to consider the disincentive effect of forfeiting earned but unpaid commissions if the agent left during the first five years. Likewise, he considered that Jack J in *Tullett Prebon* had not addressed any issue of disincentive effect, and appeared to conflate the question of whether there was a restraint with the question of whether the restraint could be justified (§§44–46).
44. The judge concluded at §47 that there was no binding authority which decided that a repayment provision could never “through disincentive or ‘golden handcuff’ effect” amount to a restraint of trade requiring objective justification, and that *EDF* appeared to suggest the contrary. On that basis he allowed the claim to proceed to trial on the restraint of trade defence.
45. The divergence in approach between *20:20 London* and the approach taken in *Marshall*, *Sweeney* and *Tullett Prebon* is the subject of the first ground of appeal, to which I now turn.

Grounds of appeal

Ground 1

46. Mr Steel’s first ground of appeal is that the judge should not have followed *Tullett Prebon* because it was wrongly decided in the light of the earlier authority, in particular *Hubble*. Instead, Mr Croxford contended that the judge should have followed *20:20 London*. Omerta’s response is to say that *Tullett Prebon* was correctly decided and should be followed by this court.
47. Like Jack J in *Tullett Prebon*, I find it difficult to derive any relevant principle from the decision in *Hubble*. Not only was that a case on very different facts, concerning training costs rather than the repayment of a commission or bonus, but (more importantly) it is clear from the judgment of Mustill LJ that counsel for EDF had effectively conceded the first-stage question of whether the doctrine of restraint of trade was engaged by the disputed contractual provisions and promissory note. The issue in this case as to whether

there was a restraint of trade at all (i.e. the first-stage question) therefore simply did not arise for determination as a dispute in *Hubble*.

48. By contrast, the three subsequent cases of *Marshall*, *Sweeney* and *Tullett Prebon* all concerned the repayment of commissions (*Marshall* and *Sweeney*) or bonuses (*Tullett Prebon*) and specifically considered whether the relevant repayment provisions were to be regarded as restraints of trade.
49. Mr Donaldson QC was right to note in *20:20 London* that in *Marshall* the court was not asked to consider the disincentive effect of the provision requiring the agent to have acted for the company for a minimum period of five years. It does not, indeed, appear to have been suggested in *Marshall* that this provision might also be a restraint of trade; instead, both Mr Sumption QC and the Court of Appeal appear to have assumed that this provision was lawful, the focus being on the non-compete aspect of the provisions.
50. In *Sweeney*, however, the question of whether the commission provisions disincentivised employees from resigning was squarely before both the tribunal and the EAT, and Rimer J had no hesitation in rejecting the proposition that this amounted to a restraint of trade. That passage of his analysis (cited above) was, in turn, set out *in extenso* and relied upon by Jack J in *Tullett Prebon*. I therefore agree with ICC Judge Mullen that Jack J had the question of disincentive firmly before him, and it is clear that he followed the reasoning in *Sweeney* on this point.
51. Nor do I consider that the analysis in *Tullett Prebon* conflated the two stages of the restraint of trade test. It is clear that the section of the judgment directed to the restraint of trade issue was addressing the first-stage question of whether the relevant bonus provisions were a restraint of trade. Having decided that in the negative, the judge did not need to (and did not in fact) address the question of whether the provisions were reasonable.
52. With due respect to the comments of Mr Donaldson QC in *20:20 London*, therefore, I do not consider that *Tullett Prebon* can be distinguished on the basis suggested by him. It is (as ICC Judge Mullen correctly observed) an authority directly in point for the present case – and indeed is the only authority cited by the parties which specifically addresses the question of whether a bonus clawback which operates as a disincentive to resign is a restraint of trade. As a matter of judicial comity, the established practice is that I should depart from the reasoning of another judge of the High Court only if I am convinced that it is wrong: *Lornamead Acquisitions v Kaupthing Bank* [2011] EWHC 2611 (Comm) §§53–56.
53. I do not consider the reasoning in *Tullett Prebon* to be wrong. There is no doubt that an employee bonus or commission scheme which is conditional on the employee remaining in employment for a specified period of time operates as a disincentive to that employee resigning. That does not, however, turn such a provision into a restraint of trade. As Rimer J said in *Sweeney*, the disputed employment contract did not impose any restrictions on where Mr Sweeney might work after he left the defendant. The same was true of the disputed clauses in *Tullett Prebon*, and the same is also true of the bonus clawback provisions in the present case.
54. While the restraint of trade defence was permitted to go to trial in *20:20 London*, that was a case concerning a wholly different type of contractual provision, and I am mindful

of the note of caution sounded by Carr LJ in *Quantum* in respect of seeking to place too much emphasis on decisions on different facts. I do not, therefore, consider that the decision in that case undermines the conclusions I have reached above.

55. I therefore reject the first ground of appeal.

Ground 2

56. Having found (correctly in my view) that the provisions of the contract in the present case did not constitute a restraint of trade, the judge went on to make this comment at §26 of his judgment:

“That is not to say that there cannot be circumstances in which the severity of the consequences are clearly out of all proportion to the benefit received but I do not see that that is arguable here. It is not suggested that this incentive scheme was in any way elusory or was intended to be Mr Steel’s actual remuneration dressed up as a discretionary scheme. All that is said is that the clawback provisions are unlawful on the basis of restraint of trade. I have not been directed to any particular feature of the relationship or allegation of disparity of bargaining power between the parties that might need to be determined before the nature of the contract between the parties can be considered. Mr Hyams did take me to a statement in one of the text books, *Employee Competition* (3rd ed.), to the effect that the practical effect of a clause requires careful analysis of the facts but that cannot be put forward in the abstract. There are no primary facts here that are relied upon that could give rise to the conclusion that, despite the terms of this provision, it is in fact a covenant in restraint of trade subject to the requirement of reasonableness. I do not consider that there is a real prospect of successfully arguing that it was. The authorities are clear. This is an incentivisation scheme with a very moderate requirement that the employee remains in post for three months after payment before giving notice and the practical effect of that is nugatory.”

57. Mr Steel’s second ground of appeal objects that the judge in this comment wrongly conflated the first and second stages of the restraint of trade test.

58. That is not a fair criticism of the paragraph set out above. In this passage, as with the earlier part of his judgment, the judge was clearly addressing the first-stage test of whether the disputed provisions amounted to a restraint of trade such that they would then be subject to the requirement of reasonableness. This part of his analysis addressed a submission by Mr Steel that the penalty imposed on him for resigning was so severe and out of proportion to the benefit incurred that the bonus clawback provisions amounted to a restraint of trade. In response to that, the judge correctly acknowledged the fact-sensitive nature of the exercise.

59. As acknowledged in both *Quantum* and *PSM v Rooney* (see §27 above), the first and second stages of the analysis may in some cases overlap, in that some of the facts which fall to be considered under the second stage of the analysis may, in particular cases, also be relevant to the first-stage question of whether the disputed provision amounts to a restraint of trade. In the present case, however, the judge’s conclusion was that there are no specific facts going to the reasonableness of the provisions that should be considered

at the first stage of the analysis, so as to lead to the conclusion that the bonus clawback provisions are restraints of trade.

60. That analysis is unimpeachable and properly reflected the distinction between the two stages of the test. I therefore reject the second ground of appeal.

Ground 3

61. The third ground of appeal is that the judge should have considered the effect of the bonus clawback provisions when combined with other provisions of the contract. In particular, while the bonus clawback provisions disincentivised Mr Steel from resigning within three months of his bonus payment each January, he was also subject to a three month notice period which would mean that he would have to remain an employee for approximately six months after payment of the bonus in order to retain that bonus. In addition, Mr Steel was subject to post-termination restrictive covenants which included a 13-week restriction on working for a competitor.
62. These submissions are misconceived. There is no dispute that the bonus clawback provisions operate as a disincentive to resign, with the effect that (when combined with the three-month notice period) Mr Steel would have had to remain working for Omerta for approximately six months after payment of the bonus in order to retain it. I have already concluded, however, that that disincentive is not a restraint of trade.
63. That analysis is not affected by the fact that there are other contractual provisions which impose different restrictions, such as post-termination restrictive covenants. No challenge has been brought to the other provisions of Mr Steel's employment contract, and it is not suggested that the post-termination restrictive covenants have any bearing on the interpretation of the bonus clawback provisions.
64. I therefore reject the third ground of appeal.

Ground 4

65. The fourth and final ground of appeal is that the judge should have set aside the statutory demand on the basis that the application of restraint of trade principles to bonus clawbacks and similar provisions is not settled and is subject to conflicting authority. The issues raised in this case should instead, it is said, be pursued at trial. Mr Croxford relied in particular, in this regard, on the observation of Evans-Lombe J in *Cale v Assiudoman KPS (Harrow)* [1996] BPIR 245, p. 248, to the effect that the court "might decide to set aside a statutory demand in a case where the facts were not in issue but liability depended on a complicated issue of law requiring substantial argument and which might have a considerable effect outside the ambit of the particular case."
66. It is notable that in *Cale v Assiudoman* Evans-Lombe J went on to decide that the case before him was *not* a case where the issues of law should proceed to trial. On the contrary, he considered it appropriate to decide the points of law raised by the appellant, and on that basis he upheld the statutory demand. In my judgment, the same applies here. While it is right to say that the doctrine of restraint of trade continues to be applied and considered in new contexts, the decision of the judge in the present case was based on a line of authority which, for the reasons set out above, I consider correctly states the principles applicable to the clawback of employee bonus and commission payments

which are conditional on the employee remaining in employment for a specified period of time. This is therefore not a novel case but the application of established precedent.

Conclusion

67. The appeal is dismissed for the reasons given above.