MAPLES GROUP

UPDATE

The 'Ryanair' Decision: How Reliable Are Non-Compete Clauses In Irish Employment Contracts?

Summary

A recent Irish High Court decision confirms that 12-month non-compete restrictions for departing employees are enforceable. However, in the case of *Ryanair DAC V Bellew (High Court 23 December, 2019)* the Court also reinforced the well-established principles that:

- the non-compete clause must be fair, reasonable, necessary and proportionate;
- it must protect an identifiable business interest from unjust attack by a departing employee;
- the employer's business interest must be identifiable (such as a tailored definition of 'restricted business');
- the non-compete must be limited in geographic scope (e.g. to specific markets);
- the duration must be reasonable (12 months was accepted as a reasonable duration);
- the reasonableness of the non-compete clause will be assessed based on what was agreed at the date of execution and not a later date;
- the Court will not re-write the clause to render it reasonable; and
- the key learning point for employers is that non-compete clauses must be carefully drafted, bespoke to the employee's role and reviewed regularly for fitness for purpose as the employee changes roles or responsibilities in a business or as that business pivots in a different strategic direction.

Relevant Background

Ryanair appointed Mr. Bellew as COO on 1 December 2017. His basic salary was €550,000 and his target bonus was €500,000. Mr. Bellew was offered a potential cash bonus of €1.3m in respect of share options that had lapsed related to a previous period of service with Ryanair. Further, he was offered a new share option grant of 500,000 ordinary shares which would vest in equal tranches over five years to 2023. This was potentially a multi-million euro grant if performance targets were reached. Mr. Bellew accepted the grant subject to the terms of an agreement dated 27 April 2018 which included a non-compete clause as follows:

"…for a period of 12 months after the termination of your employment you shall not, without the prior written consent of the Company, directly or indirectly in any capacity either on your own behalf or in conjunction with or on behalf of any other person be employed, engaged, concerned or interested in any capacity in any business wholly or partly in competition with Ryanair for air passengers services in any market."

So far so good?

Mr. Bellew resigned in July 2019 to take up the role of COO with another low cost European airline, easyJet. Ryanair, on learning of his plans to join what they viewed as a direct competitor, issued High Court proceedings to enforce the terms of the contract of employment including the non-compete clause and to restrain Mr. Bellew from taking up employment with the new employer in January 2020.

So what happened?

- The High Court found that the 12-month non-compete was reasonable and necessary in the circumstances having regard to the sensitive commercial information to which Mr. Bellew had access as COO and as one of the few so called 'Z' members of the senior management team of the airline;

- The Court also decided that the duration of the restriction - 12 months - was reasonable;

- But, there was a fatal flaw in the non-compete. The scope of the non-compete was unreasonably wide. It had the effect in practice of preventing Mr. Bellew from working for any airline (not just competitors) and from working in any capacity (not just as a senior manager). As such, it went further than was necessary to protect Ryanair's business interests and constituted an unlawful restraint of trade.

What did we learn from the decision?

(a) *12 months is a reasonable period of restriction.*

The Court approved a 12 month restriction. The Court heard extensive evidence about the seniority and remuneration of Mr. Bellew. The Court also heard evidence that Mr. Bellew, by virtue of his 'Z' status within Ryanair was part of the strategic, operational and executive 'control centre' of Ryanair. Mr. Bellew had access to highly sensitive and confidential information. It was accepted that this information in the hands of a competitor could cause significant damage to Ryanair. It was also accepted that the shelf life of the confidential information was between one and five years. The Irish courts have previously supported the enforceability of 12-month non-compete clauses, so this is not new. In the Ryanair case the Judge observed:

"I have no difficulty with the time constraint. I find that the period of 12 months was abundantly justified by the likely useful life of the confidential commercial information that would come to Mr. Bellew's knowledge."

The Court also commented that it was prepared to accept a 12 month restriction on the basis that Mr. Bellew was required to work out his six month notice period. The Court may have taken a different view had Mr. Bellew been placed on garden leave for part or all of the notice period. In such a situation, it is always helpful to have clarity in the contract of employment as to the effect of garden leave on the post termination restrictions.

(b) *The geographic scope must be narrow – global restrictions are difficult to enforce.*

The Court did not expressly rule on the issue of the geographic scope of the non-compete. However it approved the established principle that the geographic scope must be tailored to the business. A domestic business, operating in a domestic market will not be able to justify an international geographic scope. The non-compete must be confined to the markets in which the employer operates, the employee operates and in which there is a legitimate business interest to protect. A global restriction will be challenging to enforce.

(c) *Consideration for the non-compete must be adequate at the time of agreement.*

Usually non-compete clauses are expressly set out in the contract of employment. The contract is either executed as a deed or the consideration passing for the restrictions is expressly referred to in the agreement. In the Ryanair case the non-compete was contained in the amendment letter setting out the terms of the share option plan. Mr. Bellew argued that that consideration had failed for the non-compete because the share options were 'under water' at the time of enforcement. The Court rejected this argument. The time at which the consideration has to be assessed is the date on which the share options were granted and accepted. The profit targets and share price were fixed at that date. They were ambitious targets but the performance targets, the terms of the vesting, exercise and lapse of the share options were clear and accepted by the parties. The Court found that it was not impossible that there would be value in the

share options. Further, the court found that even if the targets were impossible to achieve it would not mean, as a matter of law, that the covenant failed for lack of consideration.

(d) *The desire to protect sensitive confidential information is a legitimate interest which can justify the use of a non-compete restraint.*

As noted above, Mr. Bellew as a Ryanair 'Z' had access to highly sensitive and confidential information relating to the strategy of Ryanair. As COO he had exceptional insight into Ryanair's finances, plans, strategies and employee issues. It was accepted by the Court that such information, in the hands of a competitor, could do significant damage if wrongly used. The Court heard extensive evidence about whether the new employer was a direct competitor or not to Ryanair and it found that it was a direct competitor.

The Court observed that a confidentiality clause is not a substitute for a non-compete clause. It is difficult to police and enforce confidentiality clauses. The Court acknowledged that an employer faces a significant challenge to prove that an employee has breached a confidentiality obligation where the information is carried in the employee's head. Mr. Bellew indicated at all times that he intended to be bound by his confidentiality restrictions and that he would not breach them. Despite this, the Court indicated it was prepared to enforce the non-compete to shore up the protection of sensitive confidential information.

(e) *The non-compete must be limited to a role equivalent in seniority and capacity.*

One of the reasons Ryanair failed in its bid to enforce the non-compete was because it restrained Mr. Bellew from competing “in any capacity” with a competitor business. As the Court pointed out, this also went too far and was unreasonable in that it prevented him from taking up any role, even a role such as cabin crew or pilot with the new employer. Ryanair's argument that he was not qualified to take up either role and that the clause should be interpreted such that the restriction applied to any senior or commensurate role, was rejected by the Court and it was declared invalid on this ground. This risk can usually be managed by including wording in the non-compete to confine it to roles which the employee has held in the past 12 months or referring to specific roles.

(f) *The non-compete is assessed by reference to what the parties agreed at the date of execution and not based on what the employee now plans to do.*

Ryanair gave evidence that it would not enforce the covenant had Mr. Bellew moved to the employment of a high cost or 'legacy' airline. Ryanair indicated that it only intended to enforce the non-compete where Mr. Bellew departed for a low cost competitor such as the new employer, in a senior role. The Court pointed out that the covenant in fact went much further than that because on a plain reading it applied to all European airlines including the legacy airlines. If Ryanair intended the non-compete to have a narrower application then the restriction should expressly reflect that.

What next?

Ryanair indicated that it plans to appeal the decision and it is not clear at the date of writing if that is the case. In the meantime, employers should consider the following:

- Non-compete clauses are still regarded as an unlawful restraint of trade which is contrary to public policy. An employee is entitled to use their personal skills and experience with a new employer even where those skills and experience have been gained with the former employer;
- That said, a non-compete restriction will be enforced against departing employees provided that the restriction goes no further than is clearly necessary on the facts to protect an identified legitimate business interest;
- Similar principles apply to clauses governing non-solicitation of customers, non-dealing and non-solicitation of employees;

- Employers should schedule regular 'audits' of the restrictive covenants on which it relies to protect its business and ask the following questions by reference to each employee:
    - What damage could the departure of this employee do to our business?
    - Where could that employee do most damage – what competitors do we have in mind?
    - In what market?
    - For how long?
    - In what capacity?
    - Has our business otherwise changed strategically or geographically since the restrictions were first drafted?
    - Is there a garden leave clause and, if so, is it connected to the restrictive covenants?
    - Is the definition of confidential information and the restrictions on its use and disclosure adequate?
- If an employee changes role or responsibility, check the restrictive covenants to make sure they are fit for purpose.

Further Information

If you would like further information, please liaise with your usual Maples Group contact or:

Karen Killalea
+353 1 619 2037
karen.killalea@maples.com

James Scanlon
+353 1 619 2061
james.scanlon@maples.com

Ciara Ni Longaigh
+353 1 619 2740
ciara.nilongaigh@maples.com

January 2020

.