[2019] IEHC 907

THE HIGH COURT

[2019 No. 6239 P]

BETWEEN

RYANAIR DAC

PLAINTIFF

AND

PETER BELLEW

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 23rd day of December, 2019

Introduction

1. This is an action to compel compliance by the defendant with a covenant that he would not for a period of twelve months following the termination of his employment with the plaintiff go to work for a competitor.

2. The defendant admits that he freely signed the covenant and that at the time he signed it he understood its meaning and purpose but makes the case that he is not bound by it.

3. The action is defended on a number of grounds. There is some overlap in the grounds of defence and there was some inconsistency in the case sought to be made on behalf of the defendant at the trial, but in broad terms the defence is (1) that the covenant was not binding, (2) that the covenant is void and unenforceable because the restraint is excessive, and (3) that the circumstances in which the defendant's employment came to be terminated are such that even if the covenant is binding and enforceable, the court in the exercise of its discretion ought not to enforce it.

4. The defendant has signed a contract to commence working for another airline on 1st January, 2020. The action was commenced on 6th August, 2019 and was tried over eight days in the first two weeks of December, 2019. It was hard fought on both sides. The outcome is important for the parties and, if it was possible, the parties needed to know before Christmas what that was. If I had had more time for consideration, I might have been able to refine and polish my analysis and reasoning, but I am satisfied that I have had sufficient time to weigh the evidence and arguments and to make my decision.

Overview

5. In October, 2017 Mr. Peter Bellew was recruited as chief operations officer ("*COO*") of Ryanair Limited, as it then was. He had previously worked for the company from 2006 to 2015, most recently in pilot rostering, recruitment and training.

6. In the autumn of 2017, owing in part to a change in the regulations in relation to pilots' leave and in part to competition for pilots from other airlines, Ryanair found itself dealing with a pilot rostering crisis. Besides, there was increasing pressure on the company to recognise the pilots' unions - something which it had steadfastly refused to do since the time of its establishment in about 1985.

7. One day in mid-September Mr. Michael O'Leary, Ryanair's chief executive officer, happened upon Mr. Bellew in the Ryanair canteen. In the time of his previous employment with Ryanair, Mr. Bellew had been responsible for pilot training and recruitment, reporting to then COO, Mr. Michael Hickey. Mr. O'Leary suggested that Mr. Bellew might return to Ryanair in his previous role but Mr. Bellew was not interested. He had left Ryanair in 2015 to take up the position of COO with Malaysia Airlines, were he had later been promoted to chief executive officer. Soon after the initial approach, Mr. Hickey left Ryanair. His departure left open the role of COO and Mr. O'Leary offered that role to Mr. Bellew. The position of COO was one of the most senior executive roles in Ryanair, one of about eight roles designated as "*Z*". The responsibilities of the COO included pilot rostering, training and recruitment but extended to the maintenance and development of Ryanair's base structure, engineering and safety, and ground operations and customer handling.

8. On or shortly before 4th October, 2017 Mr. O'Leary and Mr. Bellew agreed outline terms which were confirmed in an e-mail of that date sent by Mr. O'Leary's personal assistant to a private e-mail address which Mr. Bellew had provided. The outline terms included a job description and set out that Mr. Bellew would have a basic salary of €550,000 per annum, a bonus of a maximum of €500,000, a pension contribution, various other benefits, and share options.

9. For many years prior to 2017 Ryanair had offered share options to senior executives. In 2013 Ryanair plc had adopted a share option scheme called the Ryanair plc Share Option Plan 2013 under which senior executives were offered share options from time to time in grants approved by the remuneration committee. The Ryanair plc Share Option Plan 2013 was not put into evidence but broadly the scheme was that the executives would be offered the option, at future specified dates, to purchase shares in the Ryanair plc at the price at which they stood at the date of the grant, called the strike price. The scheme was devised to incentivise and retain senior staff. The allotted number of options would vest in tranches over five years, subject to the company achieving specified profit after tax targets and would become exercisable at the end of the five years, subject to the employee remaining in employment.

10. In 2014 during his previous employment with Ryanair, Mr. Bellew had been granted 250,000 share options over a five-year period. The first tranche of 50,000 of these had vested before he left in 2015 but had lapsed when he left.

11. By the autumn of 2017 the shares in Ryanair were trading at a substantially higher price than the 2014 strike price and Mr. O'Leary proposed that if Mr. Bellew would return to Ryanair he would be put in the position he would have been if he had never left. Neither Mr. O'Leary nor Mr. Bellew knew the precise details of the Ryanair plc Share Option Plan and so the means by which what was to be done were not then tied down, but the commercial agreement was that all of Mr. Bellew's 2014 options would be restored. If that was not possible under the rules of the scheme, Mr. Bellew would have the money equivalent of the difference between the strike price and the market price when he had

made up the balance of the five years' service required for the options to become exercisable, which had been interrupted by his time with Malaysia Airlines.

12. The outline terms specified that Mr. Bellew's contract would be subject to "*6 months' notice with 12 months non-compete post termination*".

13. In and after 2015 Ryanair had made the grant of share options conditional on the agreement of the executive not to compete with the company for twelve months after the termination of his or her employment and the agreement between Mr. O'Leary and Mr. Bellew was that any future grant of share options to Mr. Bellew would be subject to such a condition. However, the 2014 grant had not been subject to such a condition and the agreement for the restoration of the balance of 2014 options was not subject to that condition.

14. The e-mail of 4th October, 2017 was followed up by an e-mail of 5th October, 2017 to which was attached proposed terms and conditions of employment and, separately, a form of "*amendment to employment contract*" which set out post termination restrictions. On 10th October, 2017 Mr. Bellew was sent a "*cleaned up final version*" of the proposed terms and conditions of employment and a letter confirming what had been agreed in relation to the 2014 share options. The terms and conditions of employment (but not the addendum) were signed on the following day.

15. It had been agreed that Mr. Bellew would take up his employment as COO on 1st December, 2017, and so he did. On the same day, Mr. Bellew was given a letter formally confirming the means by which what had been agreed in relation to his 2014 share options would be implemented and a letter of offer of 2017 share options.

16. The simple restoration of Mr. Bellew's share options would have required that he remain in employment with Ryanair until 2019, after which they would have become exercisable, but if he had left before then they would have lapsed. The implementation of the commercial agreement made in October was done by a mix of restored share options and cash. By the remuneration committee deeming Mr. Bellew to have been a "*good leaver"* and to be a "*good returner*", his share options for 2014, 2018 and 2019 could be restored. The 100,000 share options that he would have qualified for in 2016 and 2017 could not be restored because he had not been in service. To bridge this gap he was promised a cash bonus calculated by reference to the mark-to-market value of that number of shares as at 30th November, 2017. The difference between the strike price of €6.25 and the then market price of €17.55 was €11.30. Mr. Bellew was promised a cash bonus of €1,130,000, payable in June, 2019.

17. I pause to observe that in the course of the hearing Mr. Bellew complained that his entitlements had not been resolved until after he had returned to work. While the mechanics had not been worked out until then, there was never any doubt or issue as to his entitlement or Ryanair's commitment to deliver what had been promised.

18. The letter of offer of 2017 share options was an offer of 100,000 options at the strike price of €17.55, and Mr. Bellew took this up.

19. On 23rd March, 2018 Mr. Bellew had his first performance review with Mr. O'Leary, which was positive. Mr. Bellew was awarded 90% of his maximum bonus, pro-rated for the four months of his service. He was also told that the remuneration committee had "*awarded*" him a total of 500,000 share options at a strike price of €14.40, subject to the terms and conditions which would be confirmed in writing to him in April.

20. By letter dated 27th April, 2018, signed by the company secretary, Mr. Bellew was invited by the board of directors of Ryanair plc to participate in an offer of share options for 2018. What was offered to Mr. Bellew was the option to subscribe for up to 500,000 ordinary shares in the company at €14.40 per share, subject to the conditions set out in the Ryanair plc Share Option Plan 2013. The options would vest in equal tranches over five years, subject to the achievement of specified profit after tax targets for the company in each year. If in any year the target was met, the options not only for that year but for any previous year in which the target might not have been reached would vest. In other words, there was provision for the vesting to catch up. In the further alternative, it was provided that the options would vest in their entirety if on 1st April, 2023 the market price for the company's shares equalled or exceeded a specified price. As had been the case with the 2014 round, the options whether vested or not would lapse should Mr. Bellew cease to be employed within five years – that is before 31st March, 2023.

21. The letter of 27th April, 2018 set out that the consideration for the grant of the options – if Mr. Bellew wished to accept it – was €0.10 and a non-compete clause "*… under which you may not work for any airline that competes with Ryanair, in any market, for a minimum of twelve months after the date of your departure from Ryanair*". Attached to the letter of offer was a form of acceptance addressed to the company secretary which added "*I understand that Ryanair's Human Resources Department will provide me with the appropriate documentation for execution*". Mr. Bellew signed and returned the form of acceptance on 11th May, 2018.

22. On 15th June, 2018 Mr. Bellew was provided with a form of "amendment to employment contract" which was in the same terms as the draft which had been attached to the e-mail of 5th October, 2017 and which he signed and returned on 20th June, 2018. This document provided:-

> "*AMENDMENT TO EMPLOYMENT CONTRACT*
>
> *I, Peter Bellew, hereby confirm my understanding and acceptance of the following amendments to my contract of employment. The consideration for these amendments is my agreed participation in the Ryanair share option scheme in accordance with [the company's secretary's] letter of 27th April, 2018.*
>
> *1. POST TERMINATION RESTRICTIONS*

1.1 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;

a. be employed, engaged, concerned or interested in any capacity in any business wholly or partly in competition with the Company for air passenger services in any market;

b. solicit or entice or endeavour to solicit or entice away from the Company any person who was employed within in (sic.) a senior executive, managerial, or technical capacity by the Company.

1.2 If you receive an offer of employment or engagement during your employment with the Company, or before the expiry of the restriction period set out in this clause, you shall give the person or entity making the offer a copy of this clause.

1.3 You hereby acknowledge and agree that the provisions of this clause are separate and severable and that the restrictions therein contained are fair and reasonable in all the circumstances. In the event, however, that any of the restrictions contained in this clause are adjudged by a court of competent jurisdiction to go beyond what is reasonable, in all the circumstances, for the protection of the legitimate interests of the Company and/or any associated company but would be adjudged reasonable if any particular restriction or restrictions, or part thereof, were deleted in any manner, then the restrictions in question shall apply with such deletions as may be decided by a court of competent jurisdiction without affecting the remaining provisions thereof.

1.4 No variation of this agreement shall be valid unless it is in writing and signed by both you and the Chief Executive Officer.

1.5 This Agreement shall be governed by and construed in accordance with the law of Ireland and the courts of Ireland shall have exclusive jurisdiction to deal with all disputes arising from or touching upon this Agreement.

1.6 This Agreement contains the whole agreement between the parties hereto relating to the matters provided for in this Agreement and supersedes all previous agreements (if any) between such parties in respect of such matters and each of the parties to this Agreement acknowledges that in agreeing to enter into this Agreement it has not relied on any representations or warranties except for those contained in this agreement.

I, Peter Bellew, confirm my understanding and acceptance of the above conditions in full. I acknowledge that my contract of employment is now amended to include the above terms and that all other terms and conditions of my employment remain unchanged."

23. It was common case 2018 was a very difficult year for Ryanair. This had two consequences of relevance to the dispute now before the court. Firstly, there was more than usual pressure on the executives, including, if not in particular, Mr. Bellew, to manage a variety of significant problems. I will deal later as briefly as I can with the impact of those difficulties on Mr. Bellew's position. Secondly, there was a sharp drop in the share price which meant that there was a lot of catching up to do before the share options which had been awarded on 27th April, 2018 would be valuable again. The commercial object of the share option scheme was to retain staff and for so long as the market price might remain below the strike price, the 2018 options were less attractive. Moreover, there was a significant decline in profits in 2018, which made the profit targets set earlier that year for the following five years (which by design had been ambitious) at least very difficult to achieve.

24. The management structure in Ryanair DAC, the operating company, is hierarchical. At the pinnacle is the chief executive officer. The next most senior executives, each of whom have responsibility for particular broad areas of operation, are called "*Z's*". In 2018 the incumbent CEO took a close interest in all aspects of the business. He asked those who immediately reported to him to submit a short written report each Friday. Those reports were circulated on the Friday to all the other Z's. Early every Monday morning there was a meeting of the senior managers, which the witnesses called the Z meeting. The weekly reports, and the CEO's observations on them, were discussed at the Monday meetings. The report of each of the Z's was returned to him or her: marked with the CEO's comments in manuscript. At the conclusion of the Z meeting, each of the Z's met with those who immediately reported to him or her to update their teams as to the performance of the company over the previous week and the objectives for the future.

25. The chairman of the Monday morning Z meetings – although he was not formally so described – was the CEO. His management style was robust. He was inclined, from time to time, to use language which - to borrow a *dictum* from Moriarty J. some years ago - would not be heard at a vicarage tea party. Similarly, the manuscript comments marked up on the weekly reports tended very much more to clarity than to politeness. While there was, as I shall come to, a good deal said as to the CEO's engagement with the defendant, it was not suggested that the defendant was in general treated any differently to any of the other Z's.

26. At the Z meeting on Monday 5th November, 2018 Mr. O'Leary was particularly critical of Mr. Bellew's written report of the previous Friday and of his performance on a number of issues over the previous weeks. On the same day Mr. O'Leary took the unusual step of sending Mr. Bellew a written memorandum setting out those criticisms and asserting that his performance was in a number of respects unacceptable. The memo identified a number of areas in which improvement was said to be required. I will need to return to the detail on the criticisms then made of Mr. Bellew but it is sufficient for the moment to recall generally what happened, and when.

27. On 22nd March, 2019 Mr. Bellew had his second formal performance review. There was a meeting between Mr. O'Leary and Mr. Bellew followed by a written memorandum. The memo noted that the past year had been one of the most challenging in Ryanair's history, and listed a number of difficulties and successes. It suggested that Mr. Bellew's performance as COO had been disappointing and listed a number of areas in which he had been successful and a number of areas in which, it was said, work needed to be done.

28. The annual review was the time at which employees' bonuses were to be awarded. Under his terms and conditions of employment, Mr. Bellew was entitled to a maximum bonus of €500,000. The award of half of the bonus was measured by reference to the profit after tax earned by the company and the other half by reference to his individual performance. Mr. Bellew was awarded €163,000 based on profit after tax and €200,000 (80% of the maximum under this criterion) based on his personal performance. Mr. Bellew was given a non-exhaustive list of eight objectives for the following year. He was told that given the profit decline that year, there would be no change in his salary or bonus for the following year.

29. Much of the dispute was said to have originated in the last paragraph of the memorandum of 22nd March, 2019 and I will set it out in full:-

> *"In light of your performance this year, I expect to see a dramatically improved and sustained output from you each week over the next 12 months. We will continue to honour your existing share option/bonus agreement, which falls due for payment in June 2019. However, if you do not deliver a significantly improved performance on cost and efficiency within the operations function over the next 6 months, then at that date, we will have to consider your continuing suitability for the position of COO after March 2020. I am not at this time awarding you any replacement share options under the 2019 share options scheme, but would encourage you to significantly improve your performance, and if you deliver significant cost and efficiency objectives over the next 12 months, then I may be willing to recommend to the RemCo that you be included in the 2019 share option scheme to replace your 2018 share options. This is a challenge and incentive to you, and I look forward to working closely with you over the next 12 months to help you achieve this (sic.) objectives."*

30. On 20th June, 2019 Mr. Bellew was paid the deferred cash bonus of €1,130,000 which had been identified in Ryanair's letter of 1st December, 2017 as the best way of implementing part of what he had been promised on 4th October, 2017. At the same time, the last tranche of the restored share options vested and became exercisable. At the time of the trial Mr. Bellew had not exercised those options but the mark-to-market value of them was said to be €1.2 million, or thereabouts.

31. On 8th July, 2019 Mr. Bellew handed Mr. O'Leary a short letter of resignation as COO with effect from 8th January, 2020. There was a brief conversation, to which I will return. That afternoon Mr. O'Leary wrote to Mr. Bellew accepting his resignation, with regret; thanking him for all his hard work over the previous 18 months in what had been a

difficult period for the airline; acknowledging his substantial and significant contribution to the management of, and recovery from, a number of challenges; looking forward to working with him over the coming six months, not least in identifying a suitable successor; and extending best wishes to him and his family. Mr. O'Leary suggested that for mutual convenience they might agree a finish date of 31st December, 2019.

32. On 11th July, 2019 Mr. O'Leary circulated a complimentary and friendly announcement of Mr. Bellew's resignation to the management team.

33. At about twenty past four on the afternoon of 17th July, 2019 Mr. O'Leary had a telephone call from Mr. Bellew, who was working in Vienna. Mr. Bellew told Mr. O'Leary that he had a new job. Having congratulated Mr. Bellew, Mr. O'Leary asked where the new job was, to which the answer was easyJet. Mr. O'Leary was not happy. He reminded Mr. Bellew of the twelve months non-compete period to which he had agreed, and of the €1,130,000 which he had been paid in the previous month, to which Mr. Bellew responded by saying that his share options were under water. Mr. O'Leary asked Mr. Bellew to consider his position carefully and warned him that if he continued on the course he was on Ryanair would have to consider an injunction.

34. On the following morning, 18th July, easyJet published its quarterly results. At the same time easyJet made an announcement that Mr. Bellew would be joining it as COO on 1st January, 2020.

35. There were a number of meetings and an exchange of correspondence over the following days and weeks, on the detail of which it is not useful to dwell.

The proceedings

36. By plenary summons issued on 6th August, 2019 the plaintiff commenced these proceedings claiming:-

    1. *An order for specific performance of the defendant's contract of employment, as amended, with the plaintiff and in particular the post termination restrictions therein as set out in the amendment to employment contract dated 15 June 2018.*

    2. *An injunction, if necessary an interlocutory injunction, prohibiting the defendant from acting contrary to the post termination restrictions set out in the amendment to employment contract dated 15 June 2018 and, in particular, prohibiting the defendant from commencing employment with easyJet for a period of 12 months post termination of his employment with the plaintiff."*

37. The statement of claim pleads the employment of the defendant from 1st December, 2017; the amendment to his employment contract dated 15th June, 2018; his resignation on 8th July, 2019; and the threat and apprehension that the defendant, unless enjoined, would commence employment with easyJet. It alleges that the defendant as a senior executive is privy to confidential material and sensitive commercial and operational information in relation to the past and future business of the plaintiff and that the plaintiff

will be exposed to irremediable and unquantifiable loss and damage should the defendant commence employment with easyJet. The statement of claim complains, besides, that the defendant failed to inform easyJet of his post termination restrictions or, as he was expressly required to do, to provide easyJet with a copy of those restrictions.

38. The defence admits that the defendant executed the addendum to his contract of employment dated 15th June, 2018 but pleads that the consideration for it has wholly failed as inter alia the conditions precedent for the offer of share options and the exercise of the options as set out in the letter of 27th April, 2018 were not met and/or the plaintiff withdrew the said share options offer as comprised in the said letter and/or allowed same to lapse.

39. The defence does not deny that the defendant is privy to confidential and sensitive commercial and operational information. Rather, it pleads that the defendant is fully aware of his obligations of confidentiality during and after his employment and intends to honour those obligations, and that there is no evidence that the plaintiff has breached, or will breach, those obligations. It pleads that the restraint which the plaintiff seeks to impose on the defendant is wholly unnecessary, unreasonable and unwarranted for the purpose of ensuring the plaintiff's obligations of confidentiality or for the protection of the plaintiff's legitimate interests.

40. Further and alternatively, the defendant pleads that the conduct of the plaintiff, and in particular its chief executive officer, was such that it disclosed a wish that the defendant should resign and that the plaintiff so unreasonably treated the defendant vis-à-vis his share options in an entirely different manner to all of the other executives that it was entirely appropriate that he should have resigned; and that in circumstances in which his resignation had been caused in whole or in part by the plaintiff it would be unjust and inequitable to impose on the defendant an entirely unreasonable restraint of trade. There is some ambiguity in this last plea and it was clarified by counsel in the course of the trial. The defendant's case was not that the plaintiff was guilty of a repudiatory breach of contract such as entitled him to treat the contract in its entirety as discharged, but rather that the plaintiff's conduct was such as should engage the discretion of the court to refuse equitable relief to which the plaintiff otherwise might have been found to be entitled. In other words, even if the defendant's covenant was supported by consideration (which it was said it was not), and even if it was not an unreasonable restraint of trade (which it was said it was), nevertheless the defendant was so badly treated by the plaintiff that there ought not to be an injunction.

The defendant's case in relation to share options

41. The case pleaded by the defendant in relation to his share options is clear enough. The offer of 27th April, 2018 was said to have been subject to conditions precedent which had not been fulfilled and/or that offer had been withdrawn and/or had lapsed and/or that the 2018 grant had been replaced in its entirety by the 2019 grant, which had not been extended to the defendant.

42. In the course of the trial the defendant sought to make not only the case pleaded but another case, which not only had not been pleaded (and was not the subject of any application for leave to amend) but was inconsistent with the pleaded case. The pleaded case was that the defendant was not bound by his promise not to compete because he had gotten nothing for it. The alternative case he sought to make was that he was, after all, entitled to the 2019 share options which Mr. O'Leary had said at his performance review on 22nd March, 2019 he was not to have.

43. The defence, as I have said, complained that Mr. Bellew, uniquely, had not been awarded share options in a round which had been extended to all the other executives, but the complaint was that this was unfair and unreasonable, rather than that anyone had withheld share options to which he was entitled, or failed to tell him of an entitlement which he had. What was suggested in the course of the evidence was that from the documents which had been discovered by Ryanair, Mr. Bellew came to know that he had been granted share options by the remuneration committee, but that Mr. O'Leary had concealed that grant from him.

44. Precisely where this alternative proposition might go was not made clear. Absent an application to amend the defence to add a counterclaim, there could be no question of a declaration as to Mr. Bellew's entitlement to share options. There was no indication as to how the proposition that Mr. Bellew was entitled to the 2019 share options fitted in with his argument that there had been a total failure of consideration for the non-compete covenant. In any event, if the 2019 share options had been, as they had been, and as Mr. Bellew at all times knew they had been, granted on terms that the executive should remain in employment for five years from the date of grant, any options which might then have been granted would automatically lapse on the cessation of Mr. Bellew's employment.

45. While Mr. Bellew sought to make the case that Mr. O'Leary had withheld share options to which he was entitled, he did not say that if he had been granted those share options (or that if he had known that he had been granted those share options) he would not have resigned. Part of Mr. Bellew's case was that by reason of Mr. O'Leary's conduct towards him it was "*entirely appropriate*" that he should have resigned. But logically, anything done or not done of which he was unaware before he decided to resign could not have contributed to his decision to resign.

46. Before dealing with the several alternative issues in relation to share options it in necessary to look at the discovered documents now relied on by Mr. Bellew - all of which were put to and acknowledged by Mr. O'Leary in evidence.

47. On 8th February, 2019 Mr. O'Leary sought approval from the remuneration committee for another round of share options at the strike price of the trading price on that day of €11.40, subject to new profit targets for the following five years and a new five year target share price. The document submitted to the remuneration committee set out a list of the names of the executives qualified to participate in the scheme, the allocation of shares under the 2018 round, and the proposed allocation under the proposed 2019

round. Mr. Bellew's name was on the list with a previous allocation of 500,000 options at €14.40 and a proposed allocation of 500,000, without a price. On 15th February, 2019 Mr. O'Leary sought approval for a slightly revised list at the slightly revised price of €11.12. Attached to the proposal was a list of "*Feb 2019 share option grants to replace 2018 share options*", on which Mr. Bellew was shown to have a 2018 allocation of 500,000 at €14.40 and a 2019 allocation of 500,000 at €11.12.

48. Mr. O'Leary's memo of 15th February, 2019 asked that a letter be prepared to go to each of the individuals on the list advising them that in order to qualify for the 2019 round they would need to surrender their 2018 share options and serve one more year. Those who were not willing to do that had the right to decline the 2019 offer and stay on their 2018 share options.

49. Such a letter had already been prepared. It followed broadly the form of the 2018 letters of grant but spelled out:-

> *"Surrender of 2018 Options*
>
> *By signing the attached Form of Acceptance, you agree to surrender the 2018 Options. The 2018 Options (none of which have vested) will be cancelled, will never vest and you will have no rights to exercise them in any circumstances. If you prefer to keep the options granted to you under the 2018 Options Grant, please do not sign the attached Form of Acceptance. However, this will mean that you will not receive (or have any entitlement in respect of) and will not be able to exercise the Options under the 2019 Grant as communicated in this letter."*

50. At some time shortly before 1st March, 2019 the chief financial officer sent to Mr. O'Leary, under cover of a note of that date, a batch of offer letters for signature by him and distribution to the Z's. It was said that the remaining option letters were going to the company secretary for signature by him and would be sent to the Z's for distribution by them to their teams. In due course Mr. Bellew had to swallow his disappointment at not having been made an offer and to distribute the letters to those of his team as had been.

51. Included in the plaintiff's discovery, attached to the copy memo of 1st March, 2019, was a form of letter dated 8th February, 2019 addressed to Mr. Bellew which would have offered him 500,000 share options at €11.12 in exchange for his 2018 options. That letter, in common with all of the other letters to all of the other staff who got them, spelled out that the 2019 options were offered in substitution for the 2018 options. In evidence Mr. Bellew confirmed that he was aware at the time of the terms of the 2019 offers.

52. All of the share options in this case were granted under the terms of the Ryanair Holdings plc Share Option Plan 2013. Unsurprisingly, having regard to the case pleaded, that plan was not discovered, and it was referred to in evidence only in passing. Mr. Bellew's case that Mr. O'Leary had withheld from him share options which had been granted to him by the remuneration committee was not made by reference to the terms of the plan, but to

the memoranda sent by Mr. O'Leary to the remuneration committee and the form of letter on the file which was never signed and was never sent to Mr. Bellew. Two memoranda of 15th February, 2019 referred variously to an *"attached list of the revised allocations as approved by the Rem Co" and "the final allocations"*. The draft letter dated 8th February, 2019, if signed and sent, would have conveyed an offer by the remuneration committee of share options pursuant to the terms and conditions of the Ryanair Holdings plc Share Option Plan 2013. There were a number of references in the memoranda sent by Mr. O'Leary to the remuneration committee and in the letter of 8th February, 2019 to a "grant" but nothing that I can see to justify Mr. Bellew's position that he had been granted the share options by the remuneration committee. In my view, any case that the share options had been granted could not sensibly have been made without reference to the terms of the Share Option Plan, which presumably sets out the respective roles of the remuneration committee, the board and the chief executive. By reference to the plain terms of the letter of 8th February, 2019, the height of what Mr. Bellew might have had was the option to swap his 2018 options for the 2019 options and not, as he contended, a grant of the 2019 options. Mr. Bellew was mistaken in his impression that he was the only executive who was not given the opportunity to participate in the 2019 round of share options. Incidentally, the disclosure included a memorandum of 10th April, 2018 from Mr. O'Leary to Mr. Bellew setting out a "*revised allocation to the people in your area based on your feedback to my original proposals*", which conveys executive involvement on the part of Mr. Bellew in the final award to his team of the share options in the 2018 round, the allocation of which had previously been approved by the remuneration committee.

53. Mr. Bellew's first line of defence is that he is not bound by the post termination restraint which he signed because, as he repeatedly asserted in the course of his evidence, the 2018 grant is "*obsolete and worthless".* He pointed out that by contrast with the grants in 2014, 2017 and 2019 there was no reference in the Ryanair annual reports to the 2018 grants. The absence of any such reference showed, said Mr. Bellew, that the 2018 grant to him was obsolete and worthless and had ceased to exist. When it was pointed out to him that there was no reference in the annual reports to the 2018 grant, Mr. O'Leary recalled that the auditors had taken the view that they were immaterial.

54. Mr. Rogers submits that there was a total failure of consideration for Mr. Bellew's covenant. The time at which that is to be assessed is the time at which the covenant was given: that is the date on which the offer of share options was accepted. The profit and share price targets for the 2018 grant were fixed in early 2018 and were ambitious. The paperwork generated by Ryanair at the time was very clear. The performance targets and the terms upon which the share options would vest and become exercisable, and would lapse, were spelled out. Mr. Bellew acknowledged in evidence that he was in no doubt as to what was asked of him in return. In the event 2018 turned out to be a particularly difficult year. By early 2019 the 2018 share options were decidedly unattractive, but I am quite satisfied that at the date of the grant they were thought – on both sides - to be valuable.

55. The proposition that the 2018 share options lapsed is irreconcilable with the terms of the 2018 grant and with the terms of the 2019 grant. I accept that the prospects that the profit and share price targets by reference to which the 2018 options might vest rapidly receded over the course of 2018. I accept that all appearances now are that the profit targets set in early 2018 for the financial years ending 31st March, 2020 to 2023 and the target share price for 1st April, 2023 will not be achieved: but I am not prepared to say that it is impossible. Even if it was, it would not, in law, mean that the consideration for Mr. Bellew's covenant had wholly failed.

56. The profit and share price targets are not conditions precedent to the effectiveness of the agreement recorded in the letter of 27th April, 2018. They are agreed conditions for the vesting of the options.

57. The options granted by the letter of 27th April, 2018 have not lapsed. Neither have they been withdrawn. Neither have Mr. Bellew's 2018 options been replaced by the grants made to the majority of the Ryanair executives in 2019. Neither have the 2018 options of any of the other executives who did not agree to surrender them been replaced by the 2019 grants.

58. Mr. Bellew's 2018 options will lapse on 31st December, 2019 by reason of Mr. Bellew's leaving Ryanair's employment before 31st March, 2023.

59. The absence of any reference to the 2018 grant in Ryanair's annual reports is nihil ad rem. The proposition that Mr. Bellew's rights might have been abrogated by a failure to refer to them in the reports is unstateable. By the way, Mr. Bellew's opinion as to the value of his options appears to match the opinion of the auditors that they were not material.

60. Mr. Bellew's first line of defence fails.

The circumstances leading to the defendant's resignation

61. Logically, perhaps, I should address the legal issue as to the enforceability of the restraint before dealing with the evidence and argument directed to the exercise by the court of its discretion, but so much of the trial was occupied with the hotly contested issues of the engagement between Mr. Bellew and Mr. O'Leary that I propose to deal with those issues first.

62. It is common case that in the autumn of 2017 Mr. O'Leary went to some trouble to recruit Mr. Bellew as COO. It is common case that the role was very well paid. It is common case that the role was demanding. It is common case that Mr. O'Leary accepted Mr. Bellew's resignation with regret. It is common case that the reasons given by Mr. Bellew for his resignation were that he could not cope with the pressure of his work, was stressed and having difficulty sleeping, and that his family life was being affected.

63. Mr. O'Leary's immediate reaction to the news that Mr. Bellew had lined up a job with easyJet as COO which he proposed to take up immediately on the termination of his

employment with Ryanair was predictable, if not inevitable. He did not take it well. I am uncertain whether before he resigned, Mr. Bellew foresaw that Ryanair would bring him to court but, as I will come to, he correctly saw it as a distinct possibility.

64. The chronology is of some significance. If, as Mr. Bellew said on 8th July, 2019, he was having difficulty managing his work, Mr O'Leary was content to let him go. Mr. O'Leary gave evidence that he was surprised by Mr. Bellew's resignation and asked him to sit down. Mr. O'Leary asked Mr. Bellew why he wanted to resign. He said that things were improving and that Mr. Bellew could still qualify for the 2019 share options. Mr. O'Leary reminded Mr. Bellew that he had just paid him €1.13 million. Mr. O'Leary said that he wanted to think about it but that if Mr. Bellew really felt that he was under that much stress and pressure and could not cope with it, he would accept his resignation, but with regret. None of this was challenged. Mr. Bellew agreed that he had told Mr. O'Leary that he was resigning because he could not cope with the pressure. The only difference in the evidence was whether Mr. Bellew had said that he wanted to travel. Nothing turns on that.

65. By the time Mr. Bellew told Mr. O'Leary that he intended to go immediately to easyJet he was committed to easyJet and the announcement by easyJet was imminent. Mr. Bellew had left it so late that Mr. O'Leary had no opportunity to try to manage the situation.

66. The defence, delivered on 23rd August, 2019, pleaded that the chief executive officer of the plaintiff sought to compel or encourage the defendant to resign by (a) unreasonably treating him in an entirely different manner vis-à-vis share options to all the other executives, and (b) acting in a wholly unreasonable manner towards him. In reply to a request for particulars of the conduct of the plaintiff and its CEO relied upon, Mr. Bellew revived the memorandum of 5th November, 2018, to which I have earlier referred. That memorandum was said to have followed a telephone call in which Mr. O'Leary raised an issue in relation to Mr. Bellew's attendance at a dinner and event in the European Parliament. In the course of that call, Mr. O'Leary was said to have been screaming obscenities at Mr. Bellew. Between the time of the memorandum and May, 2019 Mr. O'Leary was said to have criticised Mr. Bellew at the weekly management meetings, notwithstanding that Mr. Bellew had completed all of his required tasks. The criticism was said to have ended on the week after Mr. Bellew's annual review when he had been put on "*six months performance notice*". It was said that Mr. Bellew could clearly see from the behaviour, the weekly criticism, and finally the "removal" of the share option scheme and annual review with a six-month performance review that the plaintiff and the CEO wanted him to resign.

67. The statement of claim was in the main forensic, but it did allege that Mr. Bellew's engagement with easyJet during the currency of his employment with Ryanair was duplicitous and surreptitious. The claim of unreasonable treatment arose from the defence, but on the run of the case it fell to the plaintiff to lead whatever evidence it had which it was thought would show that Mr. Bellew had not been treated unreasonably. In the way of things, I suppose, the evidence on both sides was as much directed to trying

to persuade the court of the rights and wrongs of a series of business engagements and disagreements, rather than the reasonableness of the way in which Mr. Bellew was treated.

68. Mr. O'Leary in evidence acknowledged that Mr. Bellew's performance in some areas had been good but said that in other areas it had been poor. Mr. Bellew was adamant that in all respects his performance had been excellent.

69. When it was put to him that he was seeking to get Mr. Bellew to leave Ryanair, Mr. O'Leary said that if he had wanted Mr. Bellew to be gone, he would have been gone. Mr. Bellew did not contest this. His position was that Mr. O'Leary "*would pull the trigger in the autumn after the AGM".* Mr. Bellew did not explain why he thought that Mr. O'Leary would wait until then, but it seems to me that the explanation as to why Mr. Bellew thought that he had not been dismissed was at least an implicit acknowledgement that if Mr. O'Leary had wanted him gone, he would have been gone.

70. Mr. O'Leary was cross examined in great detail and at great length in relation to detailed operational issues in Ryanair, the resolution of those issues, and the extent to which Mr. Bellew had contributed to the resolution. Mr. Rogers referred the court to a folder of Mr. Bellew's weekly operational reports, with Mr. O'Leary's manuscript notes, and suggested that by reading these the court could be satisfied that Mr. Bellew had achieved all of the goals set for him. This, with the greatest respect, is to misunderstand the role – never mind the capacity – of the court.

71. There were issues surrounding pilot absenteeism; increasing passenger numbers; decreasing fares; baggage handling procedures; the relative merits, cost and feasibility of aircraft maintenance by airlines and contractors, and so on and so forth.

72. The impossibility of what the court was asked to embark on can be illustrated by examining a couple of those issues.

73. From the time it started operating in Spain (whenever that was) Ryanair used the services of a third party baggage handler. As Ryanair's business there grew, there were increasing difficulties with baggage handling which affected punctuality and turnaround times for the aircraft. Mr. Adrian Dunne, director of ground operations, devised a plan to address the problem. Mr. Dunne reported to Mr. Bellew. Mr. Dunne proposed that Ryanair would do its own baggage handling in Spain. Ryanair would need to decide what equipment it needed and to identify a supplier. It would be necessary to engage with the Spanish airport authority and the Spanish civil aviation authority. The 28 airports served by Ryanair in Spain would need to be equipped with the baggage handling equipment and IT equipment. To do what he wanted to do, Mr. Dunne needed approval for a capital expenditure of €50 million. The project was described by Mr. Dunne as a massive project, probably the largest change of ground handler in airline history. It was, in Mr. Dunne's words, a massive decision to move it forward. There was a certain amount of pressure in the fact that the contract for ground handling services was due for renewal, or not, on 31st March, 2019.

74. Mr. Dunne formulated his plan and sent it up the line to Mr. Bellew. In the same sentence, Mr. Dunne explained that he knew the enormity of the project and needed to get approval very quickly to do it. But, said Mr. Dunne, his request for approval "*dragged on*" for four weeks. Mr. Dunne was peppering to get his project underway and was frustrated by what he characterised as the absence of a decision, but what he really meant was the absence of approval. Mr. Bellew reported back to Mr. Dunne that he didn't think that Mr. O'Leary wanted to proceed at that time. Mr. Dunne brought his proposal directly to Mr. O'Leary and had approval within ten minutes. Mr. Bellew's evidence was that the change in ground handling in Spain was his idea but that Mr. O'Leary, as well as a number of the other Z's, was against it at the start. Without suggesting that there was any Damascene moment for Mr. O'Leary, Mr. Bellew said that the project was eventually approved by the board and was successful.

75. Nobody got into the detail of the matters which needed to be taken into consideration before a decision was made on the biggest proposal for ground handling in airline history, but it stands to reason that the relative cost of contracting out or bringing the task in house was just the starting point. As far as I can see, the problem was probably less to do with baggage handling and more to do with scheduling. If the court had been provided with all of the proposals and arguments – which, incidentally, it was not – it would not have been in a position to second guess the commercial judgment of the airline executives, still less to say whether the project should have been approved sooner than it was.

76. Mr. Dunne and his colleague Mr. Neal McMahon, director of flight operations, gave evidence of alleged failure or delay on the part of Mr. Bellew to approve extraordinary pay increases for which there was, in their opinion, a compelling commercial case. Again, I think that in truth their complaint was that their proposals were not approved, rather than that there was a delay in making a decision or that no decision was made. Having failed to get approval from Mr. Bellew, Messrs. Dunne and McMahon appealed to Mr. O'Leary, from whom they got it. They each agreed in cross examination that the pay increases for which they needed sanction could not have been approved by Mr. Bellew but needed the approval of Mr. O'Leary.

77. These, and the many other issues discussed in the course of the trial, were business and operational matters. It is not the business of the High Court to review the reasonableness of commercial assessments of the wisdom of business plans or proposals, still less to review the reasonableness of the time taken to make commercial decisions which will inevitably have knock-on consequences. It is not the business of the High Court to decide after the event whether such and such an employee should or should not have been awarded a pay increase of so and so much, or whether a senior manager should or should not have done more to promote or secure approval for the recommendation of one of the managers reporting to him.

78. Indecisiveness can be costly in business. So too can rash decisions. The time at which a decision should be made and the level of information upon which a decision should be

based, are matters of business judgment. It is clear that the approaches of each of Mr. O'Leary and Mr. Bellew are different. Mr. O'Leary, I think it is fair to say, is decisive. Mr. Bellew, perhaps, is more circumspect. It is not for me to say which is the better approach, but Mr. O'Leary is the boss and I think that he is entitled to set the pace which he expects from those immediately reporting to him and who are paid in the order of €1 million per annum, before whatever they may earn from share options.

79. It seems to me that part, at least, of the difficulty in the relationship between Mr. O'Leary and Mr. Bellew is that Mr. O'Leary first identified Mr. Bellew as someone who had previously shown himself to be eminently suitable to deal with a particular problem which Ryanair was dealing with in the autumn on 2017, which was a shortage of pilots. A regulatory change in the pilots' leave year from the fiscal year ending 31st March to the calendar year, coupled with competition from other airlines, notably Norwegian, for pilots had given rise to a rostering failure and the cancellation of thousands of flights. In the time of his previous employment with Ryanair, Mr. Bellew had been, for a time, in charge of pilot training and recruitment. He had been the friendly face of Ryanair to the pilots, and well-liked by them. In September, 2017 Ryanair was, as it had been from the time of its foundation, vigorously non-union and had organised its collective bargaining in an employee representative council model, in which Mr. Bellew had an established record of success. Specifically, Mr. O'Leary hoped that Mr. Bellew would be able to see off the growing pressure for unionisation. Mr. Bellew was not interested in that limited role and came to be employed in a more senior role than he had previously occupied in Ryanair. The role of COO at the time of his recruitment included engineering, safety, ground operations and customer handling as well as pilot rostering, training and recruitment and the maintenance and development of the employee representative council structure. Within a couple of weeks of Mr. Bellew taking up his new role, Ryanair decided to recognise the pilots' unions. With the benefit of hindsight, the particular skill for which Mr. Bellew had been recruited was redundant. Mr. Bellew now had full responsibility for the operations of the largest airline in Europe. He had experience as COO of Malaysia Airlines, but that was a different airline to Ryanair.

80. A great deal of time was spent discussing Mr. Bellew's involvement with the pilots' unions after Ryanair decided to recognise them. Mr. O'Leary's recollection was that Mr. Bellew went to the first meeting with the German union in Frankfurt and largely agreed with everything the unions requested and was removed from further negotiations with any of the unions. That recollection was shown to be incorrect. A table was made up by Mr. Darrell Hughes, who is the people director at Ryanair, showing a list of meetings between Ryanair and the German pilots' union between December, 2017 and 25th September, 2018. This showed that all of those meetings were attended by Mr. Bellew. Mr. Bellew had a record of a further meeting on 9th October, 2018 at the Carlton hotel in Dublin. There was however a meeting in September, 2018, lead by Mr. Bellew, at which the German unions said that they wanted mediation and time off work to attend union meetings. There was a strike looming which Mr. Bellew hoped to see off. Whether Mr. Bellew did or not do so, Mr. Eddie Wilson, then chief people officer, apprehended that Mr. Bellew might have given the German union to believe that Ryanair would agree to the

proposals and a letter was written on the following day, which Mr. Bellew signed, making it clear that Ryanair was not agreeable to the union's proposals. Whatever may or may not have happened at the meeting with the German unions was not of sufficient significance at the time to find its way into the litany of criticisms in Mr. O'Leary's memorandum of 5th November, 2018. It seems to me that it was a workaday issue that arose in the course of complex industrial relations negotiations and I frankly do not understand why the parties spent so much time on it.

81. I find that the case that Mr. Bellew was unreasonably slow or poor in his decision making has not been made out.

82. Mr. Bellew's case that Mr. O'Leary wanted him to resign and that Mr. O'Leary's treatment of Mr. Bellew was such that it was entirely appropriate to resign is not altogether easy to follow.

83. The case particularised, as I have said, is that in early November, 2018 Mr. O'Leary had screamed obscenities when taking issue with Mr. Bellew's attendance at a dinner and event in the European Parliament. Between the time of the memorandum and May, 2019 Mr. O'Leary was said to have criticised Mr. Bellew at the weekly management meetings, notwithstanding that Mr. Bellew had completed all of his required tasks. The criticism was said to have ended on the week after Mr. Bellew's annual review when he had been put on "*six months performance notice*". By reference to the contemporary records, Mr. Bellew's performance review took place on 22nd March, 2019. If the criticism ended about a week after that, it ended by the end of March, rather than in May. On the case pleaded, there was nothing that happened after that which was relied upon as unreasonable treatment or wholly unreasonable behaviour, or which might have compelled or encouraged Mr. Bellew to resign.

84. Mr. Bellew in his evidence in chief dealt in exquisite detail with the circumstances in which he had had been re-employed by Ryanair; the resolution of a deficiency in the records of aircraft maintenance, for which he took credit; a difficulty with cabin crew which arose one weekend on which Mr. O'Leary was duty executive, which led to a meeting at the Irish Aviation Authority at which Mr. Bellew said that he saved the day; and an initiative taken by Mr. O'Leary to deal with a perceived problem of absenteeism by pilots. In the course of the trial I could not see how any of these matters went to the issue as to whether Mr. Bellew's post termination restraint should be enforced and, on reflection, I still do not.

85. Mr. Bellew in evidence (as he had in a memorandum of 9th November, 2018) gave a point by point explanation of the several criticisms made in Mr. O'Leary's memorandum of 5th November, 2018 and went through a number of his weekly reports between then and the summer of 2019 before coming back to his performance review on 22nd March, 2019. He did not give evidence that Mr. O'Leary had screamed obscenities at him at the weekly meetings.

86. Mr. Bellew said that he was devastated by his performance review, specifically by the news that he was not to be offered the opportunity to participate in the 2019 round of share options and the warning that his suitability for his role would be considered over the following six months. Far from being the culmination of weekly abuse at the Monday management meetings, as had been pleaded, Mr. Bellew's evidence was that there had been no criticism of him at any time. The progression in the business, he said, was obvious for everyone to see.

87. Mr. Bellew's evidence was that Mr. O'Leary's warning (and Mr. O'Leary agreed that it was a warning) that in the absence of improved performance his continuing suitability would be reviewed conveyed to him that he was a dead man walking.

88. Having then dealt with the documents discovered by the plaintiff in relation to the 2019 share option grants, Mr. Bellew returned to the meeting of 22nd March, 2019: this time saying, in response to a question as to whether anything had happened to repair the shock, that the shouting and roaring at the Monday meetings decreased appreciably after the review. Mr. Bellew gave evidence that through April and May it became obvious to everybody that the operations had dramatically improved and that everything was going better than it had for some years

89. In about the middle of April, 2019 Mr. Bellew had a telephone conversation with a Mr. Thierry Lindenau. Mr. Lindenau is a recruitment consultant and was known to Mr. Bellew personally as well as professionally. Mr. Bellew's evidence was that it was Mr. Lindenau who first approached him. Mr. Lindenau asked whether Mr. Bellew was interested in a job with easyJet. In the following months Mr. Bellew engaged with Mr. Lindenau and later the executives of easyJet and was eventually offered a job, which he accepted. Mr. Bellew's case was that although he was working steadily towards an offer of employment with easyJet, he did not decide to leave Ryanair until 7th July, 2019: that is the day before he tendered his resignation. His decision to resign, he said, had been precipitated by two events in that week.

90. The detail of Mr. Bellew's engagement with Mr. Lindenau and easyJet is of some importance and I will deal with it presently. Before doing so I will look at the two events which are said to have prompted the decision to resign.

91. The first event was an alleged outburst by Mr. O'Leary at a meeting on 2nd July, 2019 at which Mr. Bellew was not present. What was put to Mr. O'Leary was that Mr. O'Leary had excoriated one of Mr. Bellew's colleagues, Mr. Hutchinson, had ended up nose to nose with him, just short of violence, and had said to him, Mr. Hutchinson, that he, Mr. Hutchinson, was f****** useless. Mr. O'Leary denied this account of what had happened, but he did acknowledge that from time to time he used bad language, and that he could have said what he was alleged to have said. He was adamant that there was no squaring up.

92. Mr. Bellew, not having been present at the meeting, was not in a position to say what had happened in fact, but I ruled that he was entitled to give evidence of what was said to

him, as evidence of what was said to him, and not as evidence of the fact of what had happened. Mr. Bellew's evidence of what had been said to him did not quite match what had been put to Mr. O'Leary. What Mr. Bellew said had been recounted to him was that Mr. O'Leary had approached Mr. Hutchinson's desk in an open plan office and had started shouting at him about a letter to one of the regulators that deals with refunds to passengers. What Mr. Bellew said had been said to him was that Mr. O'Leary said to Mr. Hutchinson that the letter was f****** useless, that nobody was able to write a letter, and that everybody was f****** hopeless, f****** useless. To my mind there is a difference between the condemnation of a piece of work and the condemnation of a person, and between the condemnation of an individual and the condemnation of the entire management team.

93. I had the evidence of Mr. Eddie Wilson, then the chief people officer and now CEO, which I accept, that Mr. Hutchinson was distressed and annoyed by the encounter to the point that, although in the last week of his employment, he threatened to leave immediately and had to be talked out of it. I am satisfied that Mr. Hutchinson was annoyed, and that his annoyance was perfectly justified: but he got over it.

94. I am not satisfied that the incident happened in the way in which it was put to Mr. O'Leary. No witness was called to substantiate what was put or to contradict Mr. O'Leary. The account of the incident that was put to Mr. O'Leary ought not to have been put unless it was to be backed up by evidence.

95. I accept that Mr. O'Leary is prone to outbursts, but it seems to me that the real reason why his outburst on 2nd July, 2019 was examined in such detail was that it was something that happened in the week in which Mr. Bellew signed for easyJet which was a hook on which he sought to hang his decision that he would not honour his non-compete covenant.

96. Mr. Hayden, in cross examination, took Mr. Bellew to the note of his performance review on 22nd March, 2019 and suggested that the criticism then recorded had been presaged by previous criticism of his work. In reply, Mr. Bellew said that Mr. O'Leary was inclined to shout and scream at lots of people and that he regularly screamed loudly and angrily at him, Mr. Bellew, that he, Mr. Bellew, was f****** useless. That was not put to Mr. O'Leary. Mr. Bellew shouted into the microphone and appeared to me to be playing to the gallery.

97. Counsel, when cross examining a witness, will put to the witness any issue on which there is disagreement and the substance of any evidence that will be led to contradict what the witness has said. This allows the witness the opportunity to comment on the evidence that it to be led, which ensures fairness and assists the court in identifying and resolving contested issues of fact. Counsel will properly use discretion as to the detail that is put. It is not necessary in every case to put word for word the contradictory evidence that is to be led but the substance must be put.

98. In this case Mr. Rogers put to Mr. O'Leary in detail the case that Mr. Bellew would make as to the encounter between him and Mr. Hutchinson. He did put to Mr. O'Leary, generally, that he had used abusive language to Mr. Bellew but he did not put it to Mr. O'Leary that Mr. O'Leary had not only said the same thing to Mr. Bellew as he was said to have said to Mr. Hutchinson but had done so repeatedly. Given the emphasis that was put on the encounter with Mr. Hutchinson, I think that if Mr. O'Leary had repeatedly used the same words directly to Mr. Bellew, Mr. Bellew would have so instructed his solicitors and it would have been put to Mr. O'Leary, in terms, that he had done so. I am entitled to infer from the fact that this was not put, that Mr. Bellew did not so instruct his solicitors, and I am entitled to infer from the fact that Mr. Bellew did not so instruct his solicitors, that it did not happen.

99. I have spent some time on this issue because it (and more so another issue, to which I will come) goes beyond the particular issue to the reliability of Mr. Bellew's evidence.

100. I accept that what happened in the last week of Mr. Hutchinson's employment was extremely unpleasant for Mr. Hutchinson and might very well have justified Mr. Hutchinson putting on his coat and going home: but I am not satisfied that it was a precipitating factor in Mr. Bellew's decision to resign.

101. The second event relied upon by Mr. Bellew as having triggered his resignation was something that allegedly happened on Friday 5th July, 2019. At that stage, he said, everything was running more smoothly that he could have hoped. Mr. O'Leary, he said, said that he wanted him to go to Austria for six months or maybe more or maybe less to run the operation in Lauda Air. Mr. Bellew, in evidence, said that he did not want to leave his family and friends to go to Vienna - which he characterised as the Siberian front - but he did not suggest that he had then said to Mr. O'Leary that he did not want to go to Vienna. Neither was this alleged request – relied upon at the trial as the last straw – part of the case pleaded. When it was put to Mr. O'Leary that he had told Mr. Bellew to go to Vienna and live there for three or four days a week, Mr. O'Leary denied this. He said that he had asked Mr. Bellew to spend three days every other week in Vienna, alternating with Mr. Neal McMahon. The fact is that Mr. Bellew is primarily based in Dublin while his family are in Kerry. If he takes up the job he has been offered by easyJet, he will be based in London, which is a flight away from Dublin. I will come back to this.

102. In his evidence in chief, Mr. Bellew moved directly from his telephone call with Mr. Lindenau in the middle of April, 2019 to the week before he tendered his resignation. Mr. Hayden explored with him what happened in the interim.

103. Mr. Bellew had discovered the text messages and e-mails he had exchanged with Mr. Lindenau and easyJet and they were given to him in the witness box. There was not a great deal of material and much of it dealt with arrangements for meetings and so forth but there were a handful of documents – communications between Mr. Bellew and easyJet - that Mr. Bellew must have known would call for explanation.

104. The texts and e-mails showed that a meeting was arranged for 14th May, 2019 at the offices of Clifford Chance in London, which was to be attended by Mr. Bellew and the chief executive officer and the group people director of easyJet. That meeting went well, and further meetings were arranged for 31st May, 2019 with the chief financial officer and the chairman. Those meetings also went well, and easyJet asked Mr. Bellew to meet a psychologist, which he did.

105. Mr. Hayden brought Mr. Bellew back to 17th April, 2019 and asked him to confirm that his position was that as of that date he would not be getting the 2019 share options. Whatever about what was written in the memorandum of 22nd March, 2019 and whatever Mr O'Leary might then have said, Mr. Bellew's declared position in his evidence in chief was that he held out no hope that he would be given the options. He was, he said, a dead man walking. When the issue was revisited, however, Mr. Bellew said that in view of his performance he thought that *"there would be some chance that [he] might get them", "some possibility", "some faint hope"*. He appeared to me to be trying to anticipate what he knew was coming, in the hope that he could take some of the sting out of it.

106. On 10th June, 2019 Mr. Bellew sent to Mr. Lindenau a statement of his benefits and pay at Ryanair. He acknowledged that the information was required by easyJet so that it would know what package he had with Ryanair and that his letter to Mr. Lindenau would be passed on.

107. Mr. Bellew wrote that he had 26 days annual leave, plus bank holidays. That was not true. He had twenty. In evidence Mr. Bellew said that Mr. O'Leary had said in February and March that he would increase all of the Z's leave entitlement in 2020 to 25 or 26 days. Whether Mr. O'Leary had or not said that, Mr. Bellew was not entitled to 26 days when he told easyJet that he was.

108. Mr. Bellew wrote that he was entitled to work from home for a minimum of two days a month. That was not true. In evidence, Mr. Bellew said that he was negotiating. That did not make his assertion that he was entitled to work from home for a minimum of two days a month true.

109. Mr. Bellew wrote that he had been offered 500,000 share options at €11.14 (nil payment required), with a requirement to accept by 30th June, 2019. That was not true. Mr. Bellew's position moved from dead man walking on 22nd March, 2019, to some faint hope on 17th April, 2019, to a confident belief on 10th June, 2019, based on his performance, that he would be awarded the share options. The proposition that Mr. Bellew believed on 10th June, 2019 that he would be awarded the 2019 share options is utterly inconsistent with the case pleaded and run. Whatever Mr. Bellew thought his prospects might have been of being awarded the share options, the statement that he had been offered them was simply untrue.

110. Mr. Bellew wrote that he expected a bonus of €350,000 from a maximum of €500,000 for the year ending 31st March, 2010 which he would lose if he left before then. If he

thought that, he must have thought that he would survive any assessment of his suitability in the following September.

111. Having reprised his litany of areas in which he said his performance had been so good, Mr. Bellew asserted that he still felt like a dead man walking.

112. On 16th June, 2019 Mr. Lindenau sent Mr. Bellew indicative terms for the position of COO with easyJet. On the same day Mr. Bellew rejected the terms as too low. He took a very strong position on the initial offer, which in the event turned out to be successful, but which it seems to me was not the position of a man who thought that his days at Ryanair were numbered.

113. By the way, in a comment on a proposal that his bonus in easyJet might be weighted 60% to the profitability of the company, Mr. Bellew said that a core part of the role he saw for himself at easyJet would be to find cost savings, staff efficiencies and leadership for the operations team and he suggested that bonus criteria relating to those challenges would be more appropriate.

114. On 17th June, 2019 easyJet offered revised terms, and in an e-mail of 27th June, 2019 Ms. Ella Bennett, the group people director of easyJet, conveyed to Mr. Bellew her delight that he would be jointing easyJet and attached a draft letter of offer and a printed form of contract. She wrote, "*As I mentioned to Thierry [Lindenau] if you would like our lawyers to review your current contract to understand any restrictive covenants we would be happy to do so.*"

115. On 1st July, 2019 Mr. Bellew sent to Ms. Bennett what he described as a copy of his current contract with Ryanair. What was attached was a copy of the letter of 10th October, 2017, only. He wrote that, "*My Irish solicitor has reviewed all correspondence, share agreements etc., in relation to employment restrictions.*" That was true, but at best ambiguous. On the same day Ms. Bennett replied that there appeared to be no restrictive covenants in his contract but "*Could I just double check there are no additional side letters or correspondence that sets out any employment restrictions*?" On 3rd July, 2019 Mr. Bellew replied that he had "*… taken extensive legal advice in Ireland which says that there is no impediment to my joining or a non-compete other than a six months' notice period.*" At least with the benefit of hindsight, this reply was not really an answer to the question, but Ms. Bennett appears to have thought it was, for she replied on 4th July, 2019 "*Thank you for your confirmation that you are not aware of any restrictive covenants that would apply to you*."

116. By way of an aside, the easyJet standard form of contract of employment for its senior executives included a six months post termination restraint, which Mr. Bellew sought to have reduced to three. For the stated reason of the level of insight and involvement that Mr. Bellew would have into key business strategies, decisions and relationships, easyJet would not reduce the duration of the covenant.

117. At 10:24 on 5th July, 2019 Ms. Bennett sent Mr. Bellew a contract of employment signed by the chairman, Mr. Lundgren, which she invited him to sign and return. Mr. Bellew signed the contract on the afternoon of 7th July, 2019 and e-mailed a photograph of the signed signature page to Ms. Bennett at 17:28.

118. The amendment to contract of employment dated 15th June, 2018 which had been signed and returned by Mr. Bellew on 20th June, 2018 required that he should give a copy of the clause to any person or entity who might make an offer of employment to him. Mr. Bellew did not do so because, he said, what he called the 2018 scheme was obsolete and worthless. For the reasons already given, I have found that the 2018 share options were not obsolete. If there was an issue as to whether the status or value of the 2018 share options was relevant to the validity or enforceability of the post termination restraint, it seems to me that this was something on which easyJet was entitled to be in a position to form its own view.

119. Mr. Bellew was asked a simple question by Ms. Bennett, which was whether there was any side letter or correspondence that set out any employment restrictions. There was. Mr. Bellew did not tell Ms. Bennett that there was but sought to evade the question by referring to legal advice that there was no impediment to joining or a non-compete other than a six months' notice period. In my view, Mr. Bellew's letter to Ms. Bennett of 3rd July, 2019 was not only misleading but was untrue. If there was an issue as to the validity or enforceability of the restraint, it was a matter on which easyJet was entitled to form its own view. I find that the statement that there was no non-compete, in reply to a question as to whether there was any side letter or other correspondence that set out any employment restriction, was false.

120. One of the issues canvassed in the course of Mr. Bellew's cross examination was when and how he had come to the view that he was not bound by his post termination restraint. The context was a text message of 25th June, 2019 from Mr. Bellew to Mr. Lindenau in which Mr. Bellew referred to an appointment which he had made with his solicitor. It was said that Mr. Bellew's solicitor wanted to be prepared "*… as O'Leary will likely be odd about it.*" Mr. Rogers objected that this was trespassing into privilege. There was an exchange between counsel as to the difference between legal advice privilege and litigation privilege in which Mr. Bellew intervened to say that he anticipated litigation. By then Mr. Bellew had his indicative terms and revised terms from easyJet which showed an assumed start date of 1st January, 2020. That start date could only be met if Mr. Bellew could get out of his covenant and Mr. Bellew quite correctly anticipated that he would not be allowed to go quietly. I have great difficulty believing that Mr. Bellew's failure to provide easyJet with a copy of the addendum to his contract and indeed his suppression of its existence was rooted in a firm belief that he was not bound.

121. My findings as to the engagement between Mr. Bellew and easyJet go not only to the issue as to the general equitable jurisdiction of the court not to make an order for the enforcement of the restraint to which Mr. Bellew agreed but to the reliability of Mr. Bellew's evidence, generally.

122. When Mr. Bellew agreed in October, 2017 to re-join Ryanair he knew more or less what he was letting himself in for. I say more or less because Mr. Bellew was re-joining the organisation at a higher level and one particular element of the job for which he had been recruited was almost immediately overtaken by the decision to recognise the unions. Mr. Bellew was aware before re-joining of Mr. O'Leary's inimitable management style. I find that Mr. O'Leary did not treat Mr. Bellew any differently to any of his other most senior managers. Mr. O'Leary is unapologetically demanding of his managers. If he can be abrasive and rude from time to time – which he accepts – that goes with the €1 million plus remuneration package.

123. It is not the business of the court to assess whether Mr. O'Leary's criticisms of Mr. Bellew's performance were warranted or unwarranted. The performance standards in Ryanair are set by Mr. O'Leary and within reason the assessment of performance of the Z executives is a matter for Mr. O'Leary. With the exception of the time at which Mr. Bellew ceased to be involved in the negotiations with the pilots' unions, where there was divergence between the evidence of Mr. Bellew and Mr. O'Leary, I prefer the evidence of Mr. O'Leary.

124. As to the allegation that Mr. Bellew's decision to sign for easyJet was precipitated by Mr. O'Leary telling him on the afternoon of 5th July, 2019 that he had to go permanently to Vienna, the fact is that from about 20th June, 2009 Mr. Bellew did go to Vienna for one day every other week, alternating with Mr. Neal McMahon. There was a memorandum to that effect and Mr. Bellew acknowledged that that was what had been happening until he submitted his resignation. It is also the fact that after his resignation and before the announcement that he was to go to easyJet, Mr. O'Leary had said that he expected that Mr. Bellew would work normally as COO during his notice period. In a memo of 11th July, 2019 Mr. O'Leary confirmed that Mr. Bellew would continue to represent Ryanair on the European Union Aviation Safety Agency board and suggested that he do Tuesday and Wednesday of the following week in Vienna. The first reference in the paperwork to Mr. Bellew being based in Vienna is in the notes taken by Mr. Wilson of a meeting on 19th July, 2019 – after the genie was out of the bottle - which records a suggestion by Mr. Bellew that he would go to Vienna if Mr. O'Leary wanted him to.

125. I find on the evidence that there was a discussion on the afternoon of 5th July, 2019 in relation to Mr. Bellew's attendance in Vienna. It was not, as Mr. Bellew said, a requirement that he would go to live there but, as Mr. O'Leary said, a proposal that Mr. Bellew would go to Vienna for three days every other week, alternating as he had been with Mr. McMahon.

126. The proposition that Mr. O'Leary ordered Mr. Bellew to move to Vienna was not part of the case pleaded and particularised. It is not consistent with the contemporary records and correspondence and I reject Mr. Bellew's evidence that it happened.

127. I am not satisfied that Mr. O'Leary's decision on 22nd March, 2019 that Mr. Bellew should not at that stage be given the opportunity to participate in the 2019 round of share options, or that his performance might be reviewed in six months' time, or that Mr.

O'Leary's treatment of Mr. Bellew then, or before, or thereafter was unfair or unwarranted. I am not satisfied that either of the events of the week ending 5th July, 2019 relied on had anything to do with Mr. Bellew's decision to resign from Ryanair.

128. In my judgment Mr. Bellew got a better offer from easyJet. In deciding whether to take that offer or not I am sure that Mr. Bellew took into account the comparative demands which would likely be made of him and the management style of those he would be working with in easyJet, as well as the financial terms and conditions, but that is far short of the case he advanced that it would have been unreasonable to have expected that he would continue to work for Ryanair.

129. If Mr. Bellew had made out his case that he was badly or unreasonably treated – short of constructive dismissal – an interesting legal issue might have arisen as to the extent to which the court might properly have regard to such conduct in the exercise of its discretion to enforce a post termination restraint to which the employee had agreed but the ground has not been laid in fact, so the legal issue does not arise.

The enforceability of the restraint - legal principles

130. And so I come, at last, to the issue as to the enforceability of the restraint.

131. When I sat to hear this case I thought that the law was settled. Mr. Rogers and Mr. Mallon submit that it is. Mr. Hayden and Mr. Aylward, however, submit that there has been a significant recent development in England, which ought to be followed here. Specifically, the submission is that there is authority in England for the proposition that an employer has a legitimate interest in maintaining the stability of his workforce, and that this is a factor that the court should take into account in this case. I will look at the English authorities which are relied on, but the starting point is the Irish authorities.

132. In *Macken v. O'Reilly* [1979] I.L.R.M. 79 O'Higgins C.J. said, at p.90:-

> *"All interference with an individual's freedom of action in trading is per se contrary to public policy and, therefore, void. The general prohibition is subject to the exception that certain restraints may be justified. Restraints, restrictions or interferences are permitted if they are, in the circumstances obtaining, fair and reasonable. Whether what is complained of can be justified on this basis involves a careful examination of all the circumstances – the need for restraint, the object sought to be attained, the interests sought to be protected and the general interest of the public. What is done or sought to be done must be established as being reasonable and necessary and on balance to serve the public interest."*

133. More recently, there is a judgment of Clarke J. (as he then was) on the subject. It is the case of *Murgitroyd & Company Ltd. v. Purdy* [2005] IEHC 159,

[2005] 3 I.R. 12. As usual, if I may say so, Clarke J. expounds the law clearly and succinctly. At paras. 15 to 17 he said:-

"A restraint on a person working or being engaged in one or more lines of business is by definition a restraint of trade. It is well settled that such a term will not be enforced by the courts unless it meets a two fold test:-

a. it is reasonable as between the parties; and

b. it is consistent with the interests of the public.

see *McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society* [1919] A.C. 548 at p. 562.

In relation to the first test i.e. reasonableness inter partes, in the leading case of Stenhouse Ltd .v. Phillips [1974] A.C. 391, Lord Wilberforce said at p. 400:-

> *'The accepted proposition that an employer is not entitled to protection from mere competition by a former employee means that the employee is entitled to use to the full any personal skill or experience even if this has been acquired in the service of his employer: it is this freedom to use to the full a man's improving ability and talents which lies at the root of the policy of the law regarding this type of restraint. Leaving aside the case of misuse of trade secrets or confidential information … the employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation.'*

The test seems to be, therefore, as to whether in all the circumstances of the case both the nature of the restriction and its extent is reasonable to protect the goodwill of the employer. Clearly certain clauses which preclude solicitation come within that definition provided that they are not excessively wide. In certain other cases clauses have been upheld which have prohibited employees setting up a similar business within a specified distance of an employer's establishment: see for example Marion White Ltd. v. Francis [1972] 1 W.L.R. 1423. But it is clear that the duration of the prohibition and the geographical scope of same are important matters to be considered having regard to the nature of the work in question and the structure of the business."

134. *Murgitroyd* was a case in which the purpose of the restraint was to protect the employer's customer base, but it seems to me (and it was not argued otherwise) that the same principles apply where the object of the restraint is to protect trade secrets or confidential commercial information akin to trade secrets.

135. Covenants in restraint of competition are found in contracts for the sale and purchase of businesses as well as contracts of employment. It is settled that the courts will take a less restrictive view of a covenant in a contract for the sale of a business – the clear commercial purpose of which is to protect the goodwill of the business which the

covenantee has bought and which the covenantor has been paid for – than they will of restraints in employment contracts.

136. In *Murgitroyd* Clarke J. said, at para. 21:-

> *"However, it is also clear that a more restrictive view is taken of covenants by employees than is taken of covenants given on sale of a business. Covenants against competition by former employees are never reasonable as such. They may be upheld only where the employee might obtain such personal knowledge of, and influence over, the customers of his employer as would enable him, if competition were allowed, to take advantage of his employer's trade connection."*

137. The prohibition in that case was against the defendant, a patent attorney, working on his own account in competition with the plaintiff anywhere in Ireland for a period of twelve months. Having regard to the nature of the plaintiff's business, Clarke J. found that the restraint was reasonable in duration and geographic scope, but he went on to find that a prohibition of competition by the defendant for the business of persons who were not existing clients of the plaintiff was excessive. He held that the plaintiff's trade connections could have been adequately protected by a prohibition on the defendant dealing with existing customers.

138. *Murgitroyd & Company Ltd. v. Purdy* was followed by Dunne J. in *Net Affinity Ltd. v. Conaghan* [2011] IEHC 160, [2012] 3 I.R. 67.

139. That was a case in which the defendant employee had agreed that she would not, for a period of twelve months following the termination of her employment, work for any individual or company that provided services similar to those provided by the plaintiff. The plaintiff's business was a hotel marketing agency, specialising in reservation and booking engine systems for hotels in Ireland. The action, in which the former employee and her proposed new employer were named as defendants, was to restrain the employee from taking up employment with the plaintiff's main competitor in the market.

140. Besides the judgment of Clarke J. in *Murgitroyd & Company Ltd. v. Purdy,* Dunne J. was referred to a number of English authorities, including a decision of the High Court of England in *TFS Derivatives Ltd. v. Morgan* [2004] EWHC 3181 (QB), [2005] I.R.L.R. 246 on which counsel for the plaintiff in that case, and this, sought to place particular emphasis. Besides going to work for a direct competitor of Net Affinity Limited, Ms. Conaghan had made off with a box of documents and a memory stick onto which she had copied files on the evening before she left, and injunctions were sought to restrain apprehended breaches of confidentiality as well as working for a competitor.

141. I pause here to observe that in the case before me Ryanair sought to canvass an issue as to whether in the days immediately before the trial Mr. Bellew had attempted to remove from the office a confidential document which, through absolutely no fault on his part, had become mixed up on a shared printer with material which he had been legitimately printing, and an issue as to the nature and extent of Mr. Bellew's use of certain

programmes on his work devices. *Net Affinity* is authority for the proposition that, apart altogether from any covenant not to compete, there may be cases in which it may be appropriate to make an order preventing an employee from working for a competitor for a period of time so as to prevent a breach of confidentiality. In this case, however, the plaintiff's case was pleaded solely by reference to the defendant's agreement not to work for a competitor and I ruled that the issues which had arisen on the eve of the trial were not relevant to the case before the court.

142. The decision in *Net Affinity* turned on the breadth of the clause. It did not have a geographical limit and, as the business of the plaintiff was confined to Ireland, it was far too wide to protect the legitimate interests of the plaintiff. By prohibiting all competition by the employee in the area of services provided by the plaintiff, the clause would have prevented the first defendant from working for a company based outside Ireland providing hotel booking services for hotels in (Dunne J. took the example of) the United States of America, or for a company based in Ireland but whose business was limited to booking engine services for hotels in France. The clause was too wide to protect the legitimate requirements of the plaintiff and Dunne J. found it to be void and unenforceable.

143. Starting at para. 48 of the judgment Dunne J. said:-

> *"[48] It does seem to me that there is a difference of emphasis discernible between the judgments of Clarke J. in Murgitroyd & Co. Ltd. v. Purdy [2005] IEHC 159, [2005] 3 I.R. 12 and the judgment of Cox J. in TFS Derivatives Ltd. v. Morgan [2004] EWHC 3181, [2005] I.R.L.R. 246. The judgment of Clarke J. has clearly set out the applicable law in this jurisdiction and I see no reason for preferring the judgment of Cox J. in TFS Derivatives Ltd. over the judgment of Clarke J. in Murgitroyd. Accordingly, I propose to consider the clause in this case in the light of the judgment in Murgitroyd.*
>
> *[49] The non-compete clause in this case is not limited at all in its scope geographically. There is a temporal limitation for a period of 12 months after termination of contract. The extent to which a temporal limitation may or may not be reasonable depends on the facts of any given case. In this case I would have no issue with the period of 12 months.*
>
> *[50] There are two aspects of the clause that cause me concern. The first of these is that there is no geographical limit contained in the clause. One could imagine a situation where Ms. Conaghan might seek employment outside this country in a similar business to that which is run by the plaintiff. Assuming for the sake of argument that such a business operated only booking engines for hotels in the United States, having regard to the terms in which the non-compete clause is phrased, she would be precluded from taking up such employment even though that employment would not be competing in any sense with that of the plaintiff's business. If Ms Conaghan was to take up employment in this country with a company which operated a business similar to that of the plaintiff, but which, for example, operated booking engines for hotels in France, likewise Ms. Conaghan*

would be precluded by virtue of the non-compete clause from taking up such employment. She is completely precluded by the clause from working 'for any individual or company that provides or plans to provide services similar to that which is provided by the plaintiff.' To my mind, the clause at issue in this case is far too wide to protect the legitimate requirements of the plaintiff. It is a clause which does in fact prohibit all competition by Ms. Conaghan in the area of services provided by the Plaintiff. As has been made clear in the judgment of Clarke J. in Murgitroyd & Co. Ltd. v. Purdy [2005] IEHC 159, [2005] 3 I.R. 12, such a clause is too wide. In those circumstances I have come to the conclusion that the non-compete clause is void and unenforceable."

144. *Hernandez v. Vodafone Ireland Ltd*. [2013] IEHC 70 is an interesting case in which a former employee who had secured employment with a rival company sought an interlocutory inunction restraining his former employer from interfering with his new contract of employment. The former employer did not put up evidence that would have allowed the court (as it had in *Murgitroyd* and *Net Affinity*) to come to any conclusion as to whether the restraint was justified. Laffoy J. referred to both *Murgitroyd* and *Net Affinity* but decided the motion by applying the *Campus Oil* principles.

145. Having looked at the Irish cases, I turn to the English cases relied upon on behalf of the plaintiff.

146. The most recent of these was the judgment of the United Kingdom Supreme Court in *Tillman v. Egon Zehnder Ltd*. [2019] UKSC 32. It is a wonderful exposition of the law in relation to the severability of post-employment restraints but is not directly relevant to this case. The dispute between Ryanair and Mr. Bellew calls for the construction of the relevant clause and an assessment as to whether the restraint has been justified, and if it has, whether it has been shown not to be excessive in geographical scope or temporal limitation. There was no argument that the restraint in this case, if it were found to be excessive on its face, might be limited and thereby saved by the use of a blue pencil.

147. What is interesting about *Tillman* in the present context is that the U.K. Supreme Court heard two days of argument in January, 2019 on issues that had been distilled in the judgments of Mann J. and the Court of Appeal, and took a little over five months before Lord Wilson delivered a judgment tracing the evolution of the law from *Dyer's* case in 1414, 2 Hen 5, f 5, pl 26, with which all the other members of the court were able to unreservedly agree. Such luxury is not available to trial court judges who must decide in short order whether a former employee is entitled to take up a job which he might otherwise lose, or an employer is to be exposed to a risk of irremediable damage if the former employee is allowed to go to work for a competitor. It is against that backdrop that I come to the cases relied on.

148. Mr. Hayden refers the court to a decision of the High Court of England in *Kynixa Ltd. v. Hynes* [2008] EWHC 1495 in which Wyn Williams J., at para. 130 of his judgment, gratefully adopted what he described as the exposition of the law by Gloster J. in *Brake Brothers Limited v. Ungless* [2004] EWHC 2799. *Kynixa Ltd*. is an 83 page judgment

delivered about a fortnight after the conclusion of a three week trail which raised issues of breach of fiduciary duty, removal of confidential information, deletion of business e-mails, post-termination competition and, significantly, as I will come to, enticing away. Wyn Williams J. put aside "*a comprehensive volume of relevant authorities*" and applied the law as Gloster J. was said to have expounded it.

149. *Brake Brothers Limited v.* Ungless [2004] EWHC 2799 was also a case in which, up to the last minute, there were issues of trade secrets or confidential information akin to trade secrets, the reasonableness and enforceability of post-termination restraints, and enticing away. On reading the judgment of Gloster J. it becomes apparent that what Wyn Williams J. referred to as his exposition of the law is in fact a summary taken from counsels' skeleton arguments. The issue as to the lawfulness of the covenant on the part of the defendants not to entice away the plaintiff's staff strictly speaking evaporated when, at the trial, the defendants gave undertakings in the terms of the covenants to which they had agreed but it appears to have been a live issue when the skeleton arguments were written. The judgment of Gloster J. shows, at para. 10, that the claimant's case was that that covenant sought to protect its interest in maintaining staff stability. At para. 47, under the heading "*Staff Stability*" Gloster J. noted the undertaking not to entice away the employees and said that, in any event, the covenant was, in his judgment, reasonable.

150. The thirteen point summary of the law approved by Gloster J. in *Blake Brothers Limited* and adopted by Wyn Williams J. *Kynixa Ltd.* is a useful, and, in my view, in the context of the cases in which it was applied, an accurate summary of the law. I will not set out the entire summary, but the ninth point is that: "*The legitimate interests which justify the imposition of a covenant in restraint of trade are (i) trade connection; (ii) trade secrets or confidential information akin to a trade secret; and (iii) staff stability*. The eleventh point is that: "*An employer has a legitimate interest in maintaining the stability of its workforce*." I quite agree. But the legitimate interest is the employer's interest in keeping his employees other than those who have left, and not preventing or impeding those who might wish to leave from leaving.

151. In *Tillman v. Egon Zehnder Ltd*. [2019] UKSC 32, as I have said, Lord Wilson traced the evolution of the doctrine of restraint of trade back to *Dyer's* case in 1414. At para. 23 of his judgment Lord Wilson recalled that:-

> *"In Dyer's case, 2 Hen 5, f 5, pl 26, 1414, John Dyer, a dyer, was sued in the Court of Common Pleas for breach of a condition in an indenture that he would not work as a dyer for six months. He contended that he had not broken the condition but Justice Hull observed that he should have taken a wider point, namely that the obligation was void. 'By God', added the judge, 'if the plaintiff was here, he would go to prison until he paid a fine to the King.'"*

152. The important distinction between the English cases relied on on behalf of the plaintiff and the present case is the purpose of the restraint. As Lord Shaw put it in *Herbert Morris Ltd. v. Saxelby* [1916] 1 A.C. 688, an employer is entitled to reasonable protection

against the dissemination of his trade secrets or solicitation of his customers, in other words against the misuse of his property, but not directly against the employee's use of his skill and manual or mental ability, which are the employee's own property.

153. While there is a covenant in Mr. Bellew's contract against enticing away, there is no allegation that he threatens or intends to do that. The plaintiff's legitimate interest in preserving the stability of its workforce is not a factor to be taken into consideration in determining the reasonableness of the restraint on Mr. Bellew joining a rival.

154. In the written submission filed on behalf of the plaintiff it was suggested that, in general, post termination restraints are valid if the terms thereof are fair and reasonable in the circumstances. In argument, Mr. Hayden agreed that the law is more nuanced. The presumption is that post termination restraints are void and unenforceable, but they may in certain circumstances be justified if the purpose of the restraint is legitimate and if the restraint goes no further than is necessary to protect a legitimate interest and is, in all the circumstances, fair and reasonable. It was accepted that the onus is on the plaintiff to establish the legitimate purpose and to show that the restraint goes no further than is necessary.

155. It was agreed at the bar, but it is important to emphasise, that the time at which the court is to assess the justification for, and the reasonableness of, a restraint is the date of the contract. See for example *John Orr Ltd. and Vestcom Ltd. v. John Orr* [1987] I.L.R.M. 702, 706. So, for example, an employer with a nationwide chain of supermarkets might seek to enforce against a senior executive a covenant not to work in the supermarket business in Ireland within, say, 12 months of the cessation of his employment. If the executive had been employed as such at a time when the chain was established, the restraint might be justifiable. But if the executive had been employed as, say, a trainee manager, at a time when the employer had a single shop, it would not. In the example, it could not at the time of the contract have been anticipated that the employee in the course of his employment would come to be in possession of sensitive commercial information, so as to engage the clause. Similarly, the confidential information in relation to a chain of supermarkets would be of a different character to that of a single shop. Similarly, the owner of a single shop might very well have a legitimate interest in protecting his business within, say, ten or 20 miles of his shop, but not the whole country.

156. It is important also to set out that the enforceability of the restraint is to be judged by reference to what the employee agreed not to do, rather than what he or she proposes to do after the cessation of employment. *Net Affinity v. Conaghan* is a good example. The covenant in that case was that the employee would not for a period of 12 months after termination be employed in any business providing services similar to those provided by the employer. The employer's business was the provision of reservation, booking, and marketing services for hotels in Ireland. The employee, having resigned, proposed to go to work for a direct competitor providing the same services in Ireland but Dunne J. focussed on the terms of the covenant rather than the new employer's business.

Because there was no geographical limitation on the restraint, it would, if enforced, prevent the employee from taking up employment with an employer providing similar services for hotels in France or the United States who would not be in competition with the plaintiff. Dunne J. found that the clause was too wide and so void and unenforceable. Inferentially, at least, if the covenant had been limited to Ireland, Dunne J. would have enforced it.

The enforceability of the restraint

157. I turn now to the enforceability of the clause in this case.

158. It was agreed at the bar that in construing a restraint, the court, in case of ambiguity, should lean towards an interpretation that would result in finding that the clause is enforceable.

159. If necessary, I would apply that principle to reject the proposition put to Mr. O'Leary in cross examination (but which was not in the written submission) that European railways and ferries are in competition with Ryanair for air passenger services.

160. It was submitted that this is not a case of a simple employer and employee relationship. It was said that the fact that Mr. Bellew is a senior executive and that the non-compete clause was executed in return for the offer by Ryanair to allow Mr. Bellew to participate in the share option plan (or, more correctly, to participate in the 2018 round of options) should have the effect that the clause should not be subjected to the more restrictive view that is taken of covenants by employees than is taken of covenants given on the sale of a business. I am uncertain whether the proposition was that the test should be that applicable to a covenant on the sale of a business, or somewhere between that and a contract of employment. Whichever it was, I cannot agree. It seems to me that the share options given to Mr. Bellew were part of his remuneration as an employee, albeit as a senior executive. The evidence does not establish that the share option scheme is limited to senior executives. The justification for the more liberal view of covenants given on the sale of businesses is that they support and preserve the value of what has been sold. This is not such a case.

161. The first step is to assess whether Ryanair has established that the imposition of the restraint was justifiable, in principle, to protect its business rather than to hobble Mr. Bellew in the legitimate pursuit of his career.

162. Mr. O'Leary outlined the nature of the information to which Mr. Bellew would have been privy as COO and by reason of his attendance at the weekly management meetings. His role meant that he had intimate knowledge of the markets in which Ryanair was interested, the incentives sought and obtained from the airports which it served, and its knowledge of the strengths and weaknesses of its competitors. Ryanair regularly buys large numbers of airplanes to replace aircraft that have come to the end of their useful life and to expand its routes and services. While the strategic plans are constantly evolving, all of the executives at the management meetings are privy to the plans and

priorities and to where and perhaps when adjustments might be made. As a Z, Mr. Bellew was provided with detailed monthly management accounts, which would give enormous insight into all aspects of the company's business. As COO Mr. Bellew had an intimate knowledge of Ryanair's plans and strategies in the area of pilot training and recruitment and so on. All of this information was confidential and commercially sensitive. The disclosure and use of the information would be of great value to Ryanair's competitors and could be damaging to Ryanair.

163. The nature and extent of the confidential information available to those attending the Z meetings was expanded upon by Mr. David O'Brien, chief financial officer, who characterised the Monday morning meetings as the centre of gravity of Ryanair's business. Mr. O'Brien was cross examined about suggested differences between the business models of Ryanair and easyJet, ranging from the airports they each served, the number of bases they operated, the size of their fleets, and so on and so forth. The focus of the cross examination was, perhaps, promoted by the framing of the relief sought.

164. Further detail of the type of information that would come to Mr. Bellew's knowledge as COO and as a Z was given by Messrs. Wilson, Dunne and McMahon and Dr. Karsten Muehlenfeld. Much of the information was secret. The value of some of it was that it was distilled from mountains of publicly available information. It was explained that the useful or valuable life of the information varied from about 12 months in the case of pilot planning, to up to five years in the case of the plans for fleet development and deployment and incentive agreements.

165. There was some cavilling about the extent of Mr. Bellew's knowledge in relation to particular areas and the value of the knowledge which he did have to competitors in general and easyJet in particular, but there no real issue that Mr. Bellew's attendance at the weekly Z meetings gave him oversight over all of the operational, organisational and financial aspects of Ryanair's business. In an exchange with counsel in relation to his agreement to the non-compete clause which he had agreed to give to easyJet, Mr. Bellew accepted that his role as COO of Ryanair had given him (as his role in easyJet would give him) insight and involvement into key business strategies, decisions and relationships. Elsewhere, he agreed that as a matter of principle he had sensitive protectable information that he acquired as COO of Ryanair. Given the extent of the evidence led on behalf of Ryanair this was no great concession.

166. In the defence which he delivered and in evidence Mr. Bellew acknowledged his obligations of confidentiality during and after his employment and declared his intention to honour those obligations. In the light of Mr. Bellew's disregard of his covenant because he thought that his 2018 share options had become obsolete and worthless, and on the view I have taken of Mr. Bellew's correspondence with easyJet in relation to the existence of a non-compete clause, I have to say that I have some sympathy for Mr. O'Leary's scepticism of the value of Mr. Bellew's pledge. That apart, there are good reasons why a confidentiality clause is no substitute for a non-compete clause.

167. The first of these is the difficulty, in practice, of enforcing a confidentiality clause. In *Littlewoods Organisation Limited v. Harris* [1978] 1 All E.R. 1026, Lord Denning M.R. said at p.1033:-

> *"It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period."*

168. The other good reason why sensitive and valuable commercial information cannot be adequately protected by a confidentiality clause is illustrated by *Brake Brothers Ltd. v. Ungless* [2004] EWHC 2799 (QB). Brake was in the business of supplying food products to the catering industry. Two young men who had been employed by Brake Brothers as purchasing managers left their employment with the intention of joining one of Brake's largest competitors. In the course of their employment the men had been engaged in negotiating trading and partnership agreements with suppliers and managing Brake's business relationship with those suppliers. Among the issues debated was the interaction between various confidentiality and non-compete covenants. Gloster J., at para. 51, considered the interaction between confidentiality and non-competition.

> *"I also conclude that the evidence shows why, on the non-dealing clause alone, a mere confidentiality clause would be insufficient and why an area covenant is indeed needed. As [counsel for the plaintiff] submitted, if a buyer from Brakes were to tell his new employers what products Brakes were planning to launch, that would not involve dealing or soliciting with suppliers. If that buyer were to tell his new employer what lines Brakes were planning to promote heavily, that likewise would not involve dealing with suppliers. If a buyer from Brakes were to tell his new employer that a supplier in common had been willing to finance promotional activities, that would not be a traceable breach of confidence. The employer might well, in the light of the information, adjust its negotiating stance and secure a more favourable trading agreement. That adjustment need not involve telling the supplier, merely knowledge that the supplier had already given such support in the past. As Mr. Ungless himself said in evidence 'there's always a tussle about lowering a price. Some [suppliers] rolled over and you kicked yourself for not pressing them.' As he accepted, the point emerging from this evidence was that ordinarily you never actually knew how far a supplier would go. He accepted that this applied not only to re-negotiation, In the present example, a trade rival would know how far a supplier was prepared to go and that would be it on the back of a breach of confidence. One can trace this example through to a number of fact*

scenarios, namely whether a supplier would be prepared to enter a long-term agreement, whether it was willing to pay a rebate, whether it was willing to pay, and had in the past paid, a lump sum and how much and so forth."

169. It seems to me that sensitive commercial information obtained by an employee in the course of his previous employment can be can be valuable to a competitor, and can be deployed, without necessarily disclosing it. An executive's knowledge what agreements a counterparty had previously made would allow him to adopt, or direct, or advise a negotiating position without expressly disclosing the fact or terms of a previous agreement made by his former employer. The basis of the negotiating position might rapidly become fairly obvious to the new employer, but technically there would have been no disclosure.

170. The recognition of the distinction between breach of confidence and competition also disposes, I think, of the argument that there is any significance to be attached to the fact that there was not in this case (on the pleadings, at least) any allegation of retention or copying of confidential information.

171. While much of the evidence was directed to the type and usefulness of the information which Mr. Bellew had in fact gathered in the course of his employment, I am satisfied that I can properly infer that it was all information of the kind that it could properly have anticipated that he would acquire. Moreover, Mr. Bellew, in the time of his previous employment with Ryanair, at one level lower, reporting to the then COO, was required from time to time to substitute for the COO at Z meetings and he acknowledged that he was well aware of the nature and breadth of the information shared at those meetings.

172. I am satisfied that the nature and extent of the confidential information that would inevitably come to the knowledge of Mr. Bellew in the course of his employment was such as to justify a post termination restraint.

173. What has vexed me most in this case is whether the restraint goes further than is necessary for the legitimate protection of Ryanair's interests.

174. The covenant is that Mr. Bellew will not for a period of 12 months after the termination of his employment, directly or indirectly in any capacity either on his 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 passenger services in any market.

175. 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.

176. Before the action was commenced, there was some discussion about modifying the time during which the restraint would apply. I do not take this as an acknowledgement that the stipulated twelve months was unreasonable.

177. Mr. Rogers submitted that in assessing the reasonableness of the time constraint, the court ought to take account of the fact that Mr. O'Leary has not been attending Z meetings since shortly after he gave his notice. I cannot accept that. The evidence is that until he discovered that Mr. Bellew intended to go immediately to easyJet, Mr. O'Leary expected Mr. Bellew to continue to perform his ordinary duties during his notice period. When Mr. Bellew eventually disclosed his intentions, Mr. O'Leary had no choice but to reassign him away from the Z meetings. In my view the reasonableness of the 12 months is to be judged on the premise that Mr. Bellew would, during the period of his notice, continue to discharge all of the duties of COO: for which, after all, he has continued to be paid. The passage from the judgment of Neill L.J. in *Credit Suisse Asset Management Ltd. Armstrong* [1996] I.R.L.R. 450 referred to in the defendant's written submissions which refers to a long period of garden leave appears to me to go to the discretion of the court to make an order enforcing a covenant found to have been otherwise reasonable, as opposed to the reasonableness of the covenant.

178. Ryanair's apprehension is that Mr. Bellew will commence employment in January, 2020 with easyJet and the order sought is an order restraining Mr. Bellew from commencing employment with easyJet. The focus of the evidence was very much on the usefulness of the information which Mr. Bellew has for easyJet and the damage that might be done to Ryanair if that information is disclosed to, or used for the benefit of, easyJet.

179. The written submissions filed on behalf of the plaintiff introduce Ryanair as a well known airline, synonymous with providing low fare passenger services across a number of defined routes throughout the E.U. and beyond. It is submitted that the non-compete clause does not prevent Mr. Bellew being employed by "*other forms of airlines, e.g. high cost legacy airlines" or "long haul airlines*".

180. Ryanair's case is that:-

> *"The plain and ordinary meaning of the words used in the non-compete clause limits the scope of the same to airlines that compete with Ryanair, i.e. low fares airlines operating on the same, or interchangeable, routes as Ryanair. That is a defined and limited group of airlines in respect of which Mr. Bellew is prevented from taking up employment for a period of 12 months post termination of his employment with Ryanair."*

181. The evidence tended to focus on the differences and similarities between the businesses of Ryanair and easyJet but there was evidence in relation to competition in the airline and European airline industry generally.

182. In the course of his cross examination of Mr. O'Leary, Mr. Rogers appeared to be trying to get Mr. O'Leary to agree that easyJet was not a competitor of Ryanair. There was quite a long discussion about routes and destinations and cities and airports, and even about the relative passenger capacity of the Boeing 737 airplanes flown by Ryanair and the Airbus airplanes flown by easyJet. Mr. Bellew, in his evidence in chief, spent ten minutes listing the differences between the two airlines before saying that Ryanair was in competition

with every other airline in Europe. That was what Mr. O'Leary had said. In the course of his evidence, however, Mr. O'Leary identified a "*low fare space*" in which Ryanair competed with Wizz, easyJet and Norwegian.

183. There was some discussion as to the difference between low cost airlines and the so-called legacy airlines and the extent or keenness of the competition between the two. The half year results for Ryanair for the first half of 2019 were put into evidence. This document shows Ryanair offering "*More choice. Lower fares. Great care*." Ryanair's first proud boast is that it is the lowest fare / lowest cost airline group in Europe. It shows Ryanair's average fare on that period at €37, Wizz at €47, easyJet at €61, Norwegian at €91, and then Lufthansa at €176, IAG at €191 and Air France/KLM at €210. On a page captioned "*Europe's lowest cost wins*" there is a table of comparative costs for Ryanair, Wizz, easyJet, Norwegian and Eurowings, ranging from €29 in the case of Ryanair to €114 in the case of Eurowings.

184. There was also a discussion of the easyJet results presentation for 2018 which showed the market share on easyJet routes, divided between easyJet, legacy/other and low cost carriers.

185. Mr. O'Leary in his evidence clearly distinguished between low cost carriers (or, he said, those other than Ryanair who claim to be low cost carriers) on the one hand - he mentioned Wizz, easyJet and Norwegian - and legacy high cost airlines, on the other - he mentioned Lufthansa, IAG and Air France/KLM. Mr. Rogers seemed at one stage to be trying to get Mr. O'Leary to agree that Ryanair was not in competition in the low cost space with Wizz, easyJet and Norwegian: but Mr. O'Leary would not.

186. Mr. Andrew Simpson, who is head of airline research at Goodbody, was called on behalf of Ryanair. Mr. Simpson distinguished between "*flag*" carriers, who operate short haul flights between key hubs and long haul flights, on the one hand, and low cost carriers, who operate flights on a point to point basis, on the other. Mr. Simpson listed as low cost carriers Ryanair, Wizz, Norwegian and easyJet. He identified easyJet as Ryanair's largest competitor, and as a direct competitor: suggesting that there was little product differentiation between them but that their cost structures were significantly different.

187. The substance of Mr. Simpson's evidence is that while there is competition between all of the airlines operating in Europe, the main competition faced by the low cost carriers generally, and by Ryanair in particular, is from the other low cost carriers.

188. It is common case, then, that Ryanair is in competition with all of the other airlines in Europe, in the sense that potential passengers wishing to get to particular destinations have a choice of airline. What is also clear from the evidence, however, is that there are two "*spaces*" in the market: the low cost space and the legacy or flag space, in which the fares are considerably higher. In the first half of 2019 Norwegian's average European fare was nearly two and a half times that of Ryanair, but Norwegian's average fare, the highest fare of the low cost carriers, was nearly half that of Lufthansa, the lowest of the legacy carriers.

189. On the evidence which I have heard, Ryanair sees its key competitive edge over its rivals as cost and efficiency. It is the confidential commercial information in relation to those issues which Mr. Bellew will take away that is the focus of its concern. While it sees itself in competition with the legacy carriers, the gap in fares is very large. In the first half of 2019 the average Lufthansa fare was pushing 5 times the average Ryanair fare.

190. On the afternoon of the second day of the trial, Mr. O'Leary was cross examined as to the scope of the restraint. In answer to a question whether Lufthansa was an employer to which Mr. Bellew could not go, he said "*Actually, not true".* Pointing to the provision in the clause that allows for a prior written consent, he said that if Mr. Bellew was joining a legacy airline in Europe Ryanair would have "*certainly have taken a different view."* When it was put to him that he was talking about concessions on the clause rather than the meaning of it he said:-

> *"I get you, but I mean, does the clause mean you – airlines that are in competition with Ryanair? Yes. In Europe? Yes, it does. Are we in competition with Lufthansa? Yes, we are. If he wanted to join SAS, would we be injuncting him to stop him going there? I very much doubt it."*

191. The law requires that in construing the clause I must put from my mind the fact that Mr. Bellew proposes to join Ryanair's most immediate rival and having construed the clause, determine whether the restraint is limited to the interest.

192. It is well established that in a case where a particular provision of a restraint is found to be excessive and the unenforceable provision can be removed without adding to or changing the wording of what remains, and where the removal of the unenforceable provision does not change the character of the contract, the court may sever the offending provision. This is sometimes called the blue pencil rule. It is spelled out more or less in clause 1.3 of Mr. Bellew's covenant but would have applied anyway as a matter of law. There was no argument in this case, as there was in others in the books, that the prohibition on Mr. Bellew being "*interested or concerned in*" any business might have been a restraint on his being a shareholder in any other airline: or, as there was in other cases in the books, on the severability of that, or indeed, of any other provision. It is also well established that there is no jurisdiction to amend or rewrite such a clause.

193. The covenant in this case applies to any business wholly or partly in competition with Ryanair for air services. In is common case that Ryanair is in competition with all of the European airlines, and conversely, they are in competition with it. Ryanair has clearly demonstrated its interest in protecting its confidential information from disclosure to, or use by or on behalf of, its competitors in the low cost market, or the low cost sector of the market, but I cannot find that it has demonstrated the same interest in relation to the legacy or flag or high cost airlines. In its plain terms, the restraint applies to all European airlines, including the legacy airlines. On Ryanair's case, if Mr. Bellew had wanted to join a legacy airline, he would have been allowed to. But to have joined any such legacy airline he would have required the prior consent in writing of Ryanair, rather than have been entitled to do so as of right. It seems to me to follow that the

commercial information that Mr. Bellew has is not sufficient justification for preventing him from taking up employment with a legacy airline and that the restraint is too wide.

194. With considerable reluctance, but without misgivings as to the applicable law, or my application of the law, I am driven to the conclusion that the clause is void and unenforceable as an unjustified restraint of trade.

195. The other provision of the restraint in this case which troubled me was the prohibition on employment in any business in competition with Ryanair "*in any capacity*". It appeared to me that literally construed it would restrain Mr. Bellew from taking up employment with another airline as a pilot or air steward.

196. Mr. Hayden submitted that the clause must be construed in the factual matrix in which it was made; that it was futile to contemplate whether the clause might bear that meaning because there was never any question of his being employed other than as a senior executive; and that any ambiguity should be resolved in favour of a construction that made it enforceable. He referred to a paragraph in the judgment of O'Donnell J. in *Law Society of Ireland v. Motor Insurers' Bureau of Ireland* [2017] IESC 31 which describes a contract as a form of communication intended to convey the meaning agreed upon by the parties. The Supreme Court in that case was dealing with an agreement negotiated between successive Ministers for Transport and the companies in the business of underwriting motor insurance in Ireland. I confess that I struggle to see this standard form clause which was prepared by one of the big firms of solicitors with little if any input from Ryanair and none at all from Mr. Bellew as a communication, but I do *"… endeavour to understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider that they had agreed*." As I understand the law, the role of the reasonable person in the interpretation of a contract is limited. As I understand people, the view of a reasonable person would be coloured by an expectation that other people would be unlikely to make unreasonable agreements. In this case, the issue is whether an agreement which at the time it was made - or at least subscribed to - was considered by both parties to be reasonable, was in fact, or in law, unreasonable.

197. It is submitted that in view of the seniority of Mr. Bellew's position and the salary he commanded, the covenant, or perhaps the parties, could not possibly have contemplated employment with a rival airline as a pilot or air steward, but this, it seems to me, is to contemplate the likely common subjective intention of the parties, or of reasonable persons, as to what they should agree, or should have agreed, rather than what they did agree. I quite accept that having regard to Mr. Bellew's seniority and salary, to which I would add his age and the fact that he is not trained either as a pilot or an air steward, the parties did not intend to make provision for an eventuality that would never arise. But that, I think, is a distraction from the task of construing the contract.

198. Mr. Hayden relied on the decision of the Court of Appeal in England in *Marion White Ltd. v. Francis* [1972] 1 W.L.R. 1423.

199. *Marion White Ltd*. was a case in which a company which operated a hairdressing business sought to restrain a former employee from working in a rival salon 150 yards away from that at which she had been employed. The employee's covenant was that she would not within 12 months of the end of her employment carry on or assist in the carrying on whether as principal or manager agent or servant or assistant or in any other capacity whatsoever be engaged in the business of a ladies' hairdresser within one half mile of the premises at which she had worked. I cannot help wondering whether Buckley L.J.'s analysis of the clause was coloured by the view he expressed that the conduct of the employee, ethically, was really quite inexcusable. The County Court judge had found the covenant to be too wide because it would have prevented the defendant from obtaining employment as a receptionist in a hairdressing salon. In the Court of Appeal the argument turned to whether it would have prevented her taking up employment as a bookkeeper or cleaner. Buckley L.J. expressed the view that the employment of the defendant as a receptionist in a rival hairdresser would be just as damaging as employment in the actual process of attending to people's hair, but by taking the view that the clause was "*aimed at active participation in a way that is directly connected with the hairdressing aspects of the business*" he said that it would not extend to employment as a bookkeeper or hairdresser. Stephenson and Davies L.JJ. agreed but I have to say that I am not convinced by the reasoning. To my mind, the conclusion of the Court of Appeal was that the restraint would bite where it needed to, rather than where it did.

200. *Brake Brothers Ltd. v. Ungless* [2004] EWHS 2799 (QB), to which I have already referred, is another case in which the restraint extended to employment *"in any capacity*". The defendants had agreed that they would not "*be concerned or involved directly or indirectly in any capacity in any business activity which is undertaken in competition with any of the Businesses*" of their employer. Gloster J. quickly disposed of the defendants' argument that the restraint extended to employment by a competitor extended to employment in any capacity by pointing to the fact that the employer's Businesses (with a capital B) were defined in the contract as activities with which the employee should have been concerned or involved to any material extent in the 12 months prior to the end of his employment. By reference to the definition, the restraint did not extend to employment in human resources or as a janitor.

201. The "*amendment to employment contract*" in this case is a standard form agreement. The evidence is that it applies to at least the senior executives who report to the Z's, as well as the Z's themselves. It is introduced, in every case, as an amendment to a standard form of terms and conditions of employment which in the case of Mr. Bellew, and presumably in every case, identifies the position in which the employee is to be employed. In every case the factual matrix will be that the employee has been employed for a particular position. The contract of employment, as so amended, read as a whole, will specify the position in which the employee is employed. It seems to me that to confine the meaning of the restraint to the position for which the employee was employed would be to modify or ignore the words of the contract. However unlikely it might be thought to be that a Ryanair Z might contemplate employment with a rival airline as a pilot or air steward or janitor, it seems to me that it is by no means beyond

the bounds of possibility that he or she might decide to take a step back, or two steps back, to go to a less challenging and, perhaps, more civilised, position. The legitimate interest of Ryanair might very well extend to restraining alternative employment at a rank immediately below the highest executive rank but not, perhaps, the rank below that. It seems to me that to attempt to so construe the clause that it will be confined to employment in any capacity in which the employee is likely to contemplate employment with a rival would be (as some of the English cases put it) to read down the clause: which is something the court is not permitted to do.

202. In construing a contract it is not permissible to take into account the prospect that it would be enforced. In this case, the possibility or probability or inevitability that consent of the employer to a proposal to take up a particular position with a competitor would be forthcoming is not only no answer to the problem but rather highlights it.

203. I think that the problem is compounded by clause 1.1.b which limits the obligation not to entice away to persons employed in a senior executive, managerial or technical capacity. It seems to me that if the restraint on enticement is limited to particular capacities, the restraint on the employee taking up alternative employment in any capacity must go beyond the specified capacities.

204. I find myself again driven to the conclusion that the restraint in this respect is too wide and that it is, for this reason also, void and unenforceable as an unjustified restraint of trade.

Summary and conclusions

205. For the reasons given, I find that there was not a total failure of consideration for the post termination restrictions which the defendant clearly understood and to which he freely agreed. The covenant is binding.

206. For the reasons given, I find that the defendant was not unfairly or unreasonably treated: whether by reason of Mr. O'Leary's decision on 22nd March, 2019 that he should not at that time be afforded the opportunity of participating in the 2019 round of share options, or otherwise. If the covenants which the plaintiff seeks to enforce are valid in law, there is no basis on which the court should exercise its discretion against the making of the orders sought.

207. The commercial morality of the defendant's behaviour is not material to the construction of the clause or the application of the law.

208. I find that the plaintiff has discharged the onus of proving that it had a legitimate interest in exacting a covenant from the defendant to protect the valuable sensitive and confidential commercial, operational and financial information that would come to the defendant's knowledge in the course of his employment. For the reasons given, I find that that interest has not been shown to extend beyond those airlines in competition with

the plaintiff in the low cost or low fare sector, to those airlines operating in the legacy or flag or high cost sector.

209. I find that the covenant in this case, properly construed, would prevent the defendant from taking up employment with any European airline, including the legacy carriers, and so goes beyond what the plaintiff has shown to be justified.

210. The legitimate interest of the plaintiff in restraining the defendant from taking up alternative employment is limited to roles which would risk the disclosure or use of its protectable information. I find that the restraint on employment in any capacity goes beyond that interest and has not been shown to be justifiable.

211. For the reasons given, I find that the covenant to which the defendant, for valuable consideration, freely agreed is, as a matter of law, void and unenforceable as an unjustified restraint of trade.

212. The action must be dismissed.