Neutral Citation Number: [2018] EWHC 3326 (Comm)

Case No: CL-2018-000735

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL
Date: Thursday, 22nd November 2018

Before:
SIR ROSS CRANSTON
(Sitting as a Judge of the High Court)

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Between:

(1) IDEAL STANDARD INTERNATIONAL S.A **(2) IDEAL STANDARD INTERNATIONAL HOLDING SARL**	**Applicants**
- and -	
MR. ANTHONY HERBERT	**Respondent**

- -

MR. DANIEL OUDKERK QC and **MR. JEREMY BRIER** (instructed by **Taylor Wessing LLP**) for the **Applicants**
MR. JONATHAN COHEN QC (instructed by **CM Murray LLP**) for the **Respondent**

Approved Judgment

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SIR ROSS CRANSTON:

1. This is an application for an interim injunction to restrain breach of the non-compete clause in a shareholders' agreement. The application was first issued in the Queen's Bench Division under section 37 of the Senior Courts Act 1981 but was transferred to this court to be heard together with an application for identical relief under section 44 of the Arbitration Act 1996. It has been granted an expeditious hearing.

2. The well-known principles contained in *American Cyanamid v Ethicon Ltd. (No. 1)* [1975] AC 396 apply, i.e. whether there is a serious issue to be tried and whether the balance of convenience favours relief. Also to be borne in mind is that a matter of construction can, in some circumstances, be finally determined on an application for interim relief. See for example the discussion of Jacob LJ in *Khatri v Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A* [2010] EWCA Civ. 397, paragraphs 4 to 5.

3. The background to the applications is this. The Ideal Standard International Group manufactures bathroom ceramics and fittings. It is based in Brussels. For convenience I will refer to it the group and its members as "Ideal Standard" unless the context demands otherwise. The group has an extensive corporate structure but the applicants, in effect, are the owners of the operating companies. A Bulgarian subsidiary owns a hotel. Apparently the origin is that when a factory was built in Bulgaria, there was no suitable accommodation for the group's employees in the vicinity. The hotel is now open for commercial use as well.

4. Mr. Herbert, the respondent, worked for Ideal Standard for about twenty years. He was employed in the main operating company of the group, Ideal Standard International BVBA, under a Business Manager Agreement dated 7th May 2013. (Ideal Standard International BVBA subsequently became Ideal Standard International NV.) That, what I shall call "the Employment Agreement", is subject to Belgian law. It does not contain any post termination restrictions but there are confidentiality provisions which survive termination.

5. From February 2017 Mr. Herbert was Vice President of Products and Innovation. As a senior employee Mr. Herbert was a member of the Executive Management Team. In that capacity he became a party to a Subscription and Securityholders' Deed dated 4th March 2017, what I call "the Share Agreement". That is a deed between five members of the Ideal Standard group based in Luxembourg and so-called “participants”, defined to include executive participants. Mr. Herbert was an executive participant. As a result he became a shareholder to the extent of 35,147 shares in Ideal Standard MIP SARL.

6. The agreement provides that the proceeds from the shares crystallise on an exit event such as an IPO or qualifying sale under clauses 10 and 12. Clause 15 is headed “Executive Undertakings”. Under clause 15(a)(i)(A), until the date a party to the agreement ceases employment, he shall not be interested in any other profession, trade or business, except as a passive investor in not more than 5% of any class of securities quoted on a public securities market.

7. The agreement also contains what in the judgment is described as the non-compete clause, clause 15(a)(ii)(E). Under it, for the duration of the applicable undertaking period, an executive participant like Mr. Herbert must not:

> "... carry on or be engaged in or concerned or interested in any business within the jurisdictions in which the Group carries on business … as at the Cessation Date ... that is in competition with Business as carried on at the Cessation Date."

8. "Undertaking Period" is defined in clause 1 for those like Mr. Herbert as 18 months from his cessation date, i.e. 18th May 2018. "Business" is defined as the business activities of the Group or any Group Company from time to time. Clause 23 provides that any waiver of any term or breach of the agreement must be in writing and signed by the party granting it. Under clauses 25 and 27 parties may appoint attorneys to act on their behalf in relation to the agreement.

9. The share agreement is governed by English law. It also provides for arbitration under London Court of International Arbitration rules in clause 36. The right to seek injunctive relief from the Court pending commencement of an arbitration is preserved by that clause.

10. In his first witness statement Mr. Schiller, who is the head of Human Relations and Communications for the operating company in the Ideal Standard Group states that the Share Agreement was intended to incentivise executive participates like Mr. Herbert on a long-term basis.

11. On 29th March 2016 Mr. Herbert entered a memorandum of understanding with Ideal Standard International NV whereby he received a retention payment of £484,000, with a consequent reduction of his entitlement under the Share Agreement. Mr. Herbert was dismissed on 18th May 2018. The termination letter reminded Mr. Herbert of his confidentiality obligations under Article 11 of the Employment Agreement and of the non-compete obligation in clause 15 of the Share Agreement.

12. On 2nd October 2018 Mr. Herbert and Ideal Standard International NV entered into a Settlement Agreement to compromise claims related to the termination of his employment, what I will call "the Settlement Agreement"

in the judgment. Mr. Torsten Turling signed it for and on behalf of Ideal Standard International NV. The recitals state, amongst other things, that it is intended to settle outstanding differences which exist with Ideal Standard International NV "and/or any other company belonging to the Ideal Standard International group of companies".

13. Clause 2.6 provides that the parts of the employment agreement which aim to remain applicable after its termination remain in full force and effect.

14. Article 3 has the heading "Warranties and Waiver". Under clause 3.1 the parties warrant that they are unaware of information which is disclosed which would affect their entry into the agreement. Clause 3.2 reads, in part:

> "With exception of what is provided in the Agreement the Parties declare expressly that none of them will have any obligations vis-à-vis the other Party".

15. By clause 3.3 Mr. Herbert acknowledges that having had time to consider and obtain advice on the Settlement Agreement he "explicitly waives the right to invoke any error or ignorance as to the facts or the law regarding the existence and scope of his right".

16. Clause 3.4 states:

> "Ideal Standard International ensures that the waiver also applies to other companies and entities of the Group."

17. The Settlement Agreement was subject to Belgian law and jurisdiction as a result of clause 4.3. Neither party has sought to rely on Belgian law so under well-known principles I proceed as if English law applies.

18. On about 10th October 2018 Ideal Standard's Chief Executive Officer discovered that Mr. Herbert had become engaged by Kohler Mira Limited, what I will call "Kohler" in the judgment. Mr. Herbert had apparently updated his LinkedIn account. Kohler is a competitor of Ideal Standard. Ideal Standard's lawyers wrote to Mr. Herbert and Kohler shortly afterwards and then on a number of occasions. Eventually Kohler's lawyers responded on 1st November 2018. Proceedings were commenced the following day in the Queen's Bench Division but, after Mr. Herbert's solicitors raised the arbitration point, on 7th November proceedings were transferred here. Yesterday was the first date the matter could be heard in this court.

19. In his witness statements Mr. Schiller explains that in his role with Ideal Standard Mr. Herbert acquired and, in many cases, developed himself highly confidential and sensitive information. He also states that the key purposes of the non-complete obligation is to protect the goodwill of the business, maximise its value on sale, protect the confidential information and ensure the stability of the workforce against other defections. In his senior role, he

continues, Mr. Herbert had extensive access to confidential information which has a considerable shelf life.

20. Against this background Ideal Standard seeks the interim injunction until the position is determined in arbitration.

21. Logically perhaps the place to start is the argument of Mr. Cohen QC, acting for Mr. Herbert, that the application relates to an agreement from which Mr. Herbert has been discharged. The argument is that, properly interpreted, the Settlement Agreement released Mr. Herbert not only from his obligations under the Employment Agreement but as well from the Share Agreement.

22. Clause 3.2, which I quoted earlier, provides, in his submission, for a clean break, and clause 3.4 extends that effect to obligations between Mr. Herbert and the other members of the group as well as the operating company with which Mr. Herbert had his employment contract. As quoted earlier clause 3.4 provided for a waiver applying to other companies and entities of the group. In Mr. Cohen's submission the signature of Mr. Turling can be interpreted as being by someone with the implied authority to act on behalf of the whole group.

23. In my view the clause does not have the effect which Mr. Cohen suggests. The settlement agreement is subject to Belgian law. It is not an easy document to construe. Admittedly the recitals refer to the resolution of differences not only with Ideal Standard International NV but with other members of the group. There is also the reference to those other members of the group in article 3.4, although that article uses what is the peculiar language of waiver rather than the more familiar language for an English lawyer of article 3.2.

24. Apart from the heading, the only previous reference in clause 3 to waiver is in article 3.3 which I quoted, namely a waiver by Mr. Herbert. At one point in his submissions Mr. Cohen urged me to adopt the approach to interpretation laid down at *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 with Lord Neuberger's emphasis on giving effect to the words the parties have used. That approach undercuts Mr. Cohen's submissions in that regard, although I take into account a point Lord Millett made in *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2014] 1 AC 715 at paragraph 716, namely that although the signature and the capacity in which a person signs a document can be described as a process of construction, it is part of the factual evidence of a party and it turns on factual evidence on the identity of a party.

25. In this case we have Mr. Turling's signature of the Settlement Agreement and the express statement that it is for and on behalf of Ideal Standard International NV, not anyone else in the Ideal Standard Group. Second, more importantly in my view, clause 23 of the Share Agreement states that any

waiver or election not to enforce any right must be in writing and signed by or on behalf of the person granting the waiver.

26. There is also no reference in the settlement agreement to the Share Agreement and nothing in writing making it clear that the applicants and the three other members of the group, who are parties to that Share Agreement, have waived their rights under clause 15(a)(ii)(E) of the latter. Given all that it seems to me that Mr. Herbert's obligations in that clause have not been waived and there is no need for evidence from the Ideal Standard Group about the capacity in which the settlement agreement was signed.

27. I turn, then, to the non-compete clause, clause 15(a)(ii)(E). For the applicants Mr. Oudkerk QC began by quoting passages in a standard work edited by Paul Goulding QC, *Employee Competition*, 3rd ed, 2016. He then took me through a line of authority to underline the point made in that work, that this type of non-compete clause is more strictly enforced in shareholder agreements than in the ordinary employee context. For example, non-compete clause held to be *prima facie* valid on an application for interim relief by the Court of Appeal in *Ronbar Enterprises Ltd. v. Green* [1954] 2 All E.R. 266 provided that the partner whose share was purchased should not for five years from such date directly or indirectly carry on or be engaged or interested in any business similar to or competing with the business of the partnership. *Kynixa Limited v. Hynes* [2008] EWHC 1495 QB and *Invideous Ltd and others v Thorogood* [2013] EWHC 3015 (Ch) are more recent decisions along similar lines. The judgment of Robert Walker LJ for the Court of Appeal in *Dawnay Day & Company Limited v. d'Alphen* [1998] ICR 1068 is perhaps the most helpful of these cases.

28. My reading of these authorities is that it is not simply a matter of categorization, non-compete clauses in employment agreements on the one hand, non-compete clauses in shareholder agreements on the other. Non-compete clauses for the vendor of a partnership share or the shares in a business will generally be enforced as reasonable and enforceable. Apart from anything else, such clauses are negotiated in a commercial context and have the legitimate aim of preventing vendors from attacking the goodwill of the partnership or business which they have just transferred. Towards the other end of the spectrum are ordinary employees who have a small shareholding in their employer-company as part of a share participation scheme.

29. Thus I accept Mr. Cohen's submission that the approach of Mr. Peter Whitmore QC in *TSC Europe UK Ltd. v. Massey* [1999] IRLR 22 is correct. The fact that Mr. Herbert's benefits were shares does not change the test. Enforcement of a restrictive covenant, like the non-compete clause in this case, is to be judged according to the principles applicable to other employees.

30. Mr. Cohen then contended that there was no way that Ideal Standard would be able to show that the non-compete clause here was reasonable and in the legitimate interest of Ideal Standard when Mr. Herbert's shareholding was small compared to the value of the Ideal Standard Group.

31. The issue is, first, whether Ideal Standard had a legitimate interest to protect. In this case Mr. Herbert was a senior executive in Ideal Standard. The shareholding, if not huge, was not insubstantial, worth potentially €1.2 million, reduced later by the retention payment of £484,000. In other words, he was not towards the end of the spectrum as I described it of the ordinary employee with a small shareholding in his employer.

32. It seems to me that there is a serious issue to be decided in the arbitration of the legitimate interests of the Ideal Standard Group. In his position Mr. Herbert would be important to the business' relationship with customers and clients; he had confidential information with a significant shelf life; and he had years of working closely with other employees.

33. The second issue is whether the restrictions in the non-compete clause are no more extensive than are required to give adequate protection. Mr. Cohen pointed first to the restriction on having an "interest", including an indirect interest in a competitor of Ideal Standard. That was too wide, he submitted, because the Court of Appeal has held that the prevention of a person from being "interested" in a business includes an interest by way of a passive shareholding.

34. He cited two cases to that effect, *Scully UK Limited v. Lee* [1998] IRLR 259 and, in particular, *Egon Zehnder Ltd. v. Tillman* [2017] EWCA Civ. 1054, [2018] ICR 574. Mr. Cohen emphasised that although permission to appeal had been granted by the Supreme Court in *Egon Zehnder*, nevertheless it was binding on me and I should apply it. He cited a number of cases in support of that proposition to which I need not refer.

35. In his submissions Mr. Cohen also highlighted the carve out in clause 15(a)(i)(A) for a shareholding during employment. That clause did not operate after termination, he said, with the implication that there was no carve out for post-employment. There was no evidence, Mr. Cohen submitted, of any legitimate commercial interest in a prohibition on having a passive shareholding after Mr. Herbert's employment was terminated. Ideal Standard, Mr. Cohen continued, couldn't be assumed to have one. In that regard he cited *CEF Holdings Ltd v Mundey* [2012] EWHC 1524 QB, per Silver J.

36. The application of *Egon Zehnder* is, in my view, not as straightforward as the Mr Cohen's submission suggests. In that case the employer conceded in the Court of Appeal that if "interested" covers acquisition of a shareholding, however minor, the clause would be an unreasonable restraint of trade because it would be wider than would be necessary for the protection of the

company's interest after termination. That concession has been withdrawn for the purposes of the Supreme Court appeal.

37. Next *Egon Zehnder* was not a shareholder case. Rather it was concerned with a covenant in an employment contract. As I have said, I do not see these cases as divided into two immutable categories, but none the less where there is a shareholding interest that is going to be a weighty factor in the balance. Further, I cannot ignore that the Supreme Court has given permission to appeal. Obviously the issue of this type of restraint is not a closed book. Finally, in this application, my role is not to determine the issue but to decide on whether there is a serious issue to be determined in the arbitration

38. Mr. Cohen then pointed, secondly, to what he submitted what the excessive ambit of the non-compete clause. He contended that there was no attempt in the applicant's evidence to justify why the whole of the Ideal Standard group needed protection. Rather, the focus was on the misuse of Mr. Herbert's knowledge of Ideal Standard's research development, product plans and the like. However, he continued, the group is not simply engaged in the manufacture of bathroom equipment. It was in that regard that he highlighted the Bulgarian hotel. The width of the non-compete clause, in his submission, would prevent Mr. Herbert, if he wished, from opening a small hotel in the 18-month period of its operation. There could be no possible justification for that, submitted Mr. Cohen, also adding what he suggested was an excessive period of 18-months and an unjustifiable territorial ambit.

39. In my view the hotel example is fanciful. There is no evidence from Mr. Herbert, but en passant I observe that his employment trajectory gives no indication that he has ambitions to become a hotelier. In terms of the legal analysis, however, the non-compete clause must be construed in light of the factual background available to the parties at the time the contract was made: see Lord Hodge for the Supreme Court in *Wood v. Capita Insurance Services Limited* [2017] UKSC 24, [2017] AC 1173, paragraphs 10 to 14.

40. Given Ideal Standard's evidence, to which I referred earlier, and authorities like *Dawnay Day & Company Limited v. d'Alphen* [1998] ICR 1068, I cannot conclude at this stage that Ideal Standard does not have any prospect of succeeding in its claim in the arbitration. There is a serious issue to be determined. On its face the 18-month period after 18th May 2018 is not unreasonable to protect the applicants' legitimate business interests.

41. Thus I turn to consider whether the balance of convenience lies in favour of granting interim relief. Mr. Cohen referred to the dismissal having occurred in May; to the small value of Mr Herbert's shareholding; to the fact that Mr. Herbert had already started with Kohler; that to deny Mr Herbert employment at this point may deny him employment in the future as well; and to what he characterised as foot dragging by the applicants since they discovered his new employment in October.

42. In my view, however, the balance of convenience is in favour of the interim injunction. Damages are unlikely to be an adequate remedy for the Ideal Standard Group given Mr. Herbert's knowledge of confidential information, its business plan strategy, product development and so on. By contrast, damages are likely to be an adequate remedy for Mr. Herbert, albeit that they may not be confined to his immediate loss of salary.

43. In my view the lowest risk of injustice in my decision is wrong, as Hoffman J put it in *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670 at 680 is to grant the interim injunction. I do not regard the delay in this case as defeating the applicants; in fact a great deal of delay lies at the feet of the respondent. I grant the interim injunction.

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This transcript has been approved by the judge.