Concentrate Questions and Answers Contract Law: Law Q&A Revision and Study Guide (3rd edn)

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9. Illegality and Restraint of Trade

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Abstract

The *Concentrate Questions and Answers* series offers the best preparation for tackling exam questions. Each book includes typical questions, answer plans and suggested answers, author commentary, and other features. This chapter looks at illegality and restraint of trade.

Illegality is one of the most confusing areas within the law of contract, particularly as regards the consequences of a finding of illegality. This chapter considers recent developments in this general area of law as well as contracts in restraint of trade. It explores two key debates: the extent to which when faced with illegality the courts should grant relief to ensure justice, and 'although many contracts will, to some extent, restrain future activity, the circumstances when a contract will be subject to the restraint of trade doctrine'.

Keywords: Contracts, Illegality, public policy, illegal as performed, illegal at inception, restraint of trade

Are you ready?

In order to attempt the questions in this chapter you must have covered the following areas in your revision:

- The meaning and classification of illegality in contract law, including contracts contrary to law and contracts contrary to public policy;

- Illegality in the formation of contract and illegality in the performance of contract;
- The effects of illegality, including on the recovery of property and money;
- The doctrine of restraint of trade, the meaning of a protectable interest, and the reasonableness of a restraint clause in the interests of the parties and the public interest;
- Severance.

Key debates

Debate: when faced with illegality to what extent should the courts grant relief to ensure justice?

Should the approach be based upon a strict approach to the principle, expressed in the words of Lord Mansfield, that 'No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act', even if the effect leads to unfair consequences? Or should the courts adopt a more discretionary approach to the effect of illegality? This was recently considered by the Supreme Court in ***Patel v Mirza* [2016] UKSC 42**.

Debate: many contracts will, to some extent, restrain future activity but, it seems, not all such restraints will be subject to the restraint of trade doctrine.

When will the doctrine of restraint of trade apply?

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Question 1

In the Law of England and Wales only the innocent have rights under an illegal contract.

Discuss.

Caution!

■ Avoid simply summarizing the law. Marks will be earned for a coherent structure, evaluation, and analysis of existing precedent and, in particular, an ability to concentrate on those aspects of illegality relevant to the question.

■ Your answer should focus on three issues. First, in dealing with a contract illegal at its inception, when will the innocence of either party be relevant to the determination of their rights under that contract? Secondly, is there a difference if the contract is only illegal as performed? Thirdly, in which circumstances, if any, will a guilty party possess rights under an illegal contract? Remember that this area has undergone a landmark change in ***Patel v Mirza* [2016] UKSC 42**.

Diagram answer plan

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Suggested answer

The traditional approach of the courts to illegal contracts could be broadly summarized by the maxim *ex turpi causa non oritur actio* (no right of action arises from a disgusting cause).[1] Thus neither party would acquire enforceable rights under an illegal contract; nor, generally, would they be entitled to

sue for the return of any money or property transferred. Various justifications were advanced for such an approach (indeed in ***Patel v Mirza* [2016] UKSC 42** Lord Toulson identified at least six justifications), including the deterrence of wrongdoing and protecting the integrity of the civil justice system. Yet sometimes such an approach might be viewed as disproportionate. Moreover these, and other, policy considerations sometimes pointed in different directions and so the *ex turpi* rule is subject to exceptions.[2] Unfortunately the application of the rules which developed in this area was not always straightforward or predictable due, in large part, to the unarticulated judicial balancing of competing policy aims. Indeed, the transparent balancing of competing policy aims was something which was encouraged by the Law Commission (see, for example, the Law Commission, *The Illegality Defence* ((2010) Law Com No. 320) at 1.11). Subsequently, in four Supreme Court cases—***Allen v Hounga* [2014] UKSC 47**, ***Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55**, ***Bilta (UK) Ltd (in Liquidation) v Nazir* [2015] UKSC 23**, and ***Patel v Mirza* [2016] UKSC 42**—there was disagreement between the Justices as to the future approach to the illegality defence. Some essentially argued for a retention of a rule-based approach to the illegality defence whereas others argued for a more flexible, underlying policy approach where all relevant policy aims and considerations are balanced. Ultimately in ***Patel v Mirza* [2016] UKSC 42** the latter, more flexible approach was selected. Some will argue that this brings more uncertainty to the law. Yet, arguably, it more accurately and transparently reflects the reality of what the courts were already doing (and, as such, may not radically alter the outcome of cases—compare ***Gujra v Roath* [2018] EWHC 854**). Thus, in ***Okedina v Chilake* [2019] IRLR 905 at [62]**, Underhill LJ stated that not all previous case law will need to be re-examined in the light of ***Patel v Mirza***.

[1] The traditional approach of the courts to illegality is succinctly explained.

[2] There were exceptions to the traditional approach and the answer will explore these traditional exceptions. See also ***Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43**.

Contracts Illegal at Inception

In keeping with the traditional approach just outlined, traditionally an agreement to do something which was expressly or impliedly prohibited by the law was unenforceable and property or money transferred under the contract could not be recovered:[3] *in pari delicto potior est conditio defendentis* (where both parties are equally at fault the position of the possessor is better). In such circumstances, generally neither party could assert that they had no intention of breaking the law, nor would any allowance be made for either party's ignorance of the law.

[3] Such a rule sometimes conflicts with a competing policy aim, the desire to avoid unjust enrichment.

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↵ Nevertheless, the courts would sometimes, for example, permit the recovery of property or money transferred under the contract where the *comparative innocence* of one party was established.[4] Thus, if the parties were not *in pari delicto*, a court may have allowed the less blameworthy to recover money or property transferred under the contract. Precedent suggested that this might have been the case where there was some evidence of oppression or misrepresentation by the defendant, or the statute which prohibits the contract was aimed at protecting one of the parties. For example, in ***Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 KB 482** the plaintiff was allowed to recover premiums paid under an illegal life insurance policy as he was induced to enter into the contract by the defendant's fraudulent misrepresentation that the policy was valid. However, a claimant's innocence may have been insufficient without evidence that the defendant acted in some unconscionable manner. Thus, in ***Edler v Auerbach* [1950] 1 KB 359** the plaintiff lessee could not recover premiums, paid under an illegal lease, from the defendant lessor as there was no evidence that the latter had been fraudulent. Regarding class-protecting statutes, in ***Kiriri Cotton Co. Ltd v Dewani* [1960] AC 192** the landlord charged the tenant an illegal premium which the tenant then sought to recover. It was held that as the relevant statute placed the obligation firmly on the landlord, the tenant could recover the rent on the grounds that he was not *in pari delicto*.

[4] Restitution may have been allowed in certain circumstances; it is important to explain the circumstances clearly.

One further example of 'comparative innocence' was provided by the principle of repentance.[5] Specifically, the recovery of property and money would be permitted if the claimant repents by discontinuing his illegal activities before the contract has been substantially performed (see ***Kearley v Thomson* (1890) 24 QBD 742**). Some cases suggested that the repentance must have been voluntary, the defendant thereby demonstrating that he has seen 'the error of his ways' (although compare ***Patel v Mirza* [2014] EWCA Civ 1947**). For example, in ***Bigos v Bousted* [1951] 1 All ER 92**[6] the plaintiff agreed to purchase Italian lire from the defendant, paying in sterling, which contravened existing exchange-control regulations. When the lire were not delivered, the plaintiff claimed back his money, arguing that he had repented. The claim failed as there was no evidence that the claimant would have withdrawn from the contract if the defendant had supplied the lire.

[5] The paragraph uses PEA, by identifying a point, explaining relevant case law, and undertaking some analysis.

[6] If you decide to explain the facts of a case, you must do so concisely.

As noted earlier, in ***Patel v Mirza*** **[2016] UKSC 42** the Supreme Court adopted a more flexible, underlying policy approach to the illegality doctrine. Moreover, in that case the Supreme Court reversed the traditional general rule that money paid or property transferred under a legal contract could not be recovered with Lord Toulson stating that a claimant 'who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason *only* of the fact that the money which he seeks to recover was ↵ paid for an unlawful purpose' (**[121]** emphasis added). Presumably issues of comparative innocence and the like are not irrelevant to the underlying policy approach to the illegality doctrine.

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Contracts Illegal as Performed

In this area, traditionally, an innocent party *might* have been able to exercise all of the normal contractual/restitutionary remedies available, for example recovery of property and/or damages for breach of contract (see ***Marles v Philip Trant & Sons Ltd*** **[1954] 1 QB 29**). By contrast the plaintiff's claim in ***Ashmore, Benson, Pease & Co. Ltd v AV Dawson Ltd*** **[1973] 1 WLR 828** failed. In that case the contract involved the transportation of a load in excess of the legal limit for the lorries used and the court held that the plaintiff had participated in the illegal performance of the contract. The argument by the *plaintiff*'s transport manager, who had actually supervised the loading of the lorries, that he had not noticed the error, was rejected by the court. Thus if the claimant's 'innocence' was compromised then he/she may have forfeited his/her rights, for example perhaps the innocent party ought to have recognized that the contract could only be performed in an illegal manner, though this seems less important if the statute is there to protect him/her in the first place (see ***Shaw v Groom*** **[1970] 2 QB 504**). A similar approach was also applied, in a different context, to a collateral contract which stipulated that the defendant would obtain the required statutory licence before commencing work. The defendant failed to do so. Nevertheless, the 'innocence' of the plaintiff persuaded the court to afford him an independent cause of action based on the collateral contract (see ***Strongman (1945) Ltd v Sincock*** **[1955] 2 QB 525**).[7]

[7] While the main contract was illegal, ie to do building work without a licence, the claimant's remedy was based on an alternative ground, a collateral contract.

Some of the fine distinctions previously drawn in this area was one of the drivers for the Supreme Court to move to a more flexible, underlying policy approach in ***Patel v Mirza*** **[2016] UKSC 42** and this, arguably, is a more honest approach to the case law in this area (see also ***Robinson v HRH Al Qasimi*** **[2021] EWCA Civ 862**).

So, we have seen that innocent parties may possess remedies under an illegal contract but what about a non-innocent or 'guilty' party?

Rights of a Guilty Party

The general traditional rule that no rights emerge from a contract illegal at inception has often been successfully utilized by the defendant as a defence against a claimant who seeks enforcement, damages, or recovery of property (see ***Re Mahmoud and Ispahani*** **[1921] 2 KB 716**). For example, in ***Pearce v Brooks*** **(1866) LR 1 Ex 213**, although the prostitute used the carriage, she could successfully rely on the illegality of the contract when the plaintiff sued for the hire charge.

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On the other hand, under traditional principles a guilty party could seek recovery of property under an illegal contract provided disclosure ↵ of the illegality is not essential to his/her cause of action. For example, in ***Amar Singh v Kulubya*** **[1964] AC 142** the plaintiff was the owner of land leased unlawfully to the defendant. It was held that he could recover his land on the basis of his untainted, independent title of freehold ownership. However, if the illegality was apparent from the evidence brought before the court, it was questionable whether the guilty party would be entitled to recover his property (see ***Snell v Unity Finance Co. Ltd*** **[1964] 2 QB 203**), although in ***Tinsley v Milligan***, the House of Lords allowed the defendant's counterclaim on the ground that evidence of illegality only emerged in cross-examination rather than in her original pleadings (and a presumption of a resulting trust arose).

However, as evidenced by these four recent Supreme Court decisions in this area, there followed a period of uncertainty on the overall approach that a court would adopt in this context. There had been a growing body of case law suggesting, for example, that where a party is only guilty of a minor breach of law in performing the contract, a court may look more sympathetically on any attempt to enforce an existing contract. Initially, this approach was founded on whether enforcement of a contract would be an affront to public conscience but this was decisively rejected by the House of Lords in ***Tinsley v Milligan*** on the grounds that it would introduce a form of unbridled judicial discretion contrary to 200 years of precedent.[8] However, the absence of any discretion simply begs the question: why should a minor technical offence deprive one party of any contractual rights whilst preserving those rights for the other party? Surely the resultant windfall for the innocent party borders on a form of unjust enrichment?[9] Consequently, in ***Les Laboratoires Servier v Apotex Inc.*** **[2012] EWCA Civ 593** and **[2014] UKSC 55**, Etherton LJ called for a 'just and proportionate response to the illegality' by which a trivial or inadvertent breach of the law might not deprive the 'guilty' party of all of the normal rights under an existing contract. However, the majority in the Supreme Court, led by Lord Sumption, rejected this approach, favouring the approach in ***Tinsley***. In an earlier Supreme Court case, ***Hounga v Allen*** **[2014] UKSC 47,** Lord Wilson said that the approach to adopt was to ask,

'What is the aspect of public policy which founds the defence?' and, then, to ask 'But is there another aspect of public policy to which application of the defence would run counter?' Lord Hughes, while not going as far as this, explained that the approach to illegality had to be case-sensitive and to consider the gravity of the illegality of which the claimant is guilty, the claimant's knowledge or intention in relation to the illegality, the purpose of the law infringed, and the extent to which to allow a civil claim nevertheless to proceed would be inconsistent with that purpose and other factors which may arise in individual cases. In ***Jetivia SA v Bilta (UK) Ltd*** **[2015] UKSC 23**, there was disagreement once more with Lord Sumption maintaining his previously stated ↵ position, but with Lords Toulson and Hodge approving of the approach of Etherton LJ in ***Les Laboratoires*** and relying on the judgment of Lord Wilson in ***Hounga v Allen***.[10]

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[8] The need for certainty and the view of some that this is achieved by a rules-based approach to illegality is discussed.

[9] The counter-policy to certainty is the need for justice.

[10] Should there be divergent judicial views, explanations of such views are essential to a comprehensive answer.

Ultimately in ***Patel v Mirza*** **[2016] UKSC 42** the law was settled in favour of the more flexible, underlying policy approach. In so doing ***Tinsley v Milligan*** was overruled. Moreover, in that case the Supreme Court reversed the traditional general rule that money paid or property transferred under a legal contract could not be recovered with Lord Toulson stating that a claimant 'who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason *only* of the fact that the money which he seeks to recover was paid for an unlawful purpose' ([121] emphasis added). Subsequently in ***Stoffel & Co v Grondona*** **[2020] UKSC 42 at [43]** Lord Lloyd-Jones (with whom Lord Reed, Lord Hodge, Lady Black and Lady Arden agreed) stated that the issue of reliance is not totally irrelevant and may have an impact on the centrality of the illegality.

As has been seen, where illegality is involved, the law provides some remedies to innocent parties but also to parties where some guilt attaches. The difficulty has been that the law was unclear as to the circumstances in which the law will give a remedy. This reflected a conflict in underlying policies—the need for certainty as against the desire to do justice between the parties. ***Patel v Mirza*** **[2016] UKSC 42** arguably paves the way for a much more transparent balancing of competing policy aims.

Looking for extra marks?

■ While a clear statement of the rules in this area is needed, looking at the policies underpinning the rules will demonstrate a deeper understanding of this area of law.

■ Pointing to inconsistencies in the case law and disagreements amongst the judges will impress an examiner. See, particularly, the differing views expressed in four recent Supreme Court cases: ***Hounga v Allen*** **[2014] UKSC 47**; ***Les Laboratoires Servier v Apotex Inc.*** **[2014] UKSC 55**; ***Jetivia SA v Bilta (UK) Ltd*** **[2015] UKSC 23**; and ***Patel v Mirza*** **[2016] UKSC 42**. How will the approach in ***Patel v Mirza*** **[2016] UKSC 42** develop over time?

Question 2

Sam is employed as Deputy Accountant by Albright Ltd, a firm of financial analysts located in Cardiff, Wales. Most of Sam's work involves sitting in front of a computer predicting the future profit expectations of Albright's clients located in Wales. His work has always greatly impressed these clients. Recently, Sam resigned from his job and joined a similar firm located in Swansea. ↵ A number of Albright's clients heard about this move and transferred their allegiance to the Swansea firm. Albright Ltd has now written to Sam pointing out that there was a clause in his original contract which stated that on termination of employment he must not 'for a period of two years solicit custom from, or deal with, any Albright client with whom the employee has had contact in the year prior to termination of the contract, or join any firm of financial analysts located in Wales'.

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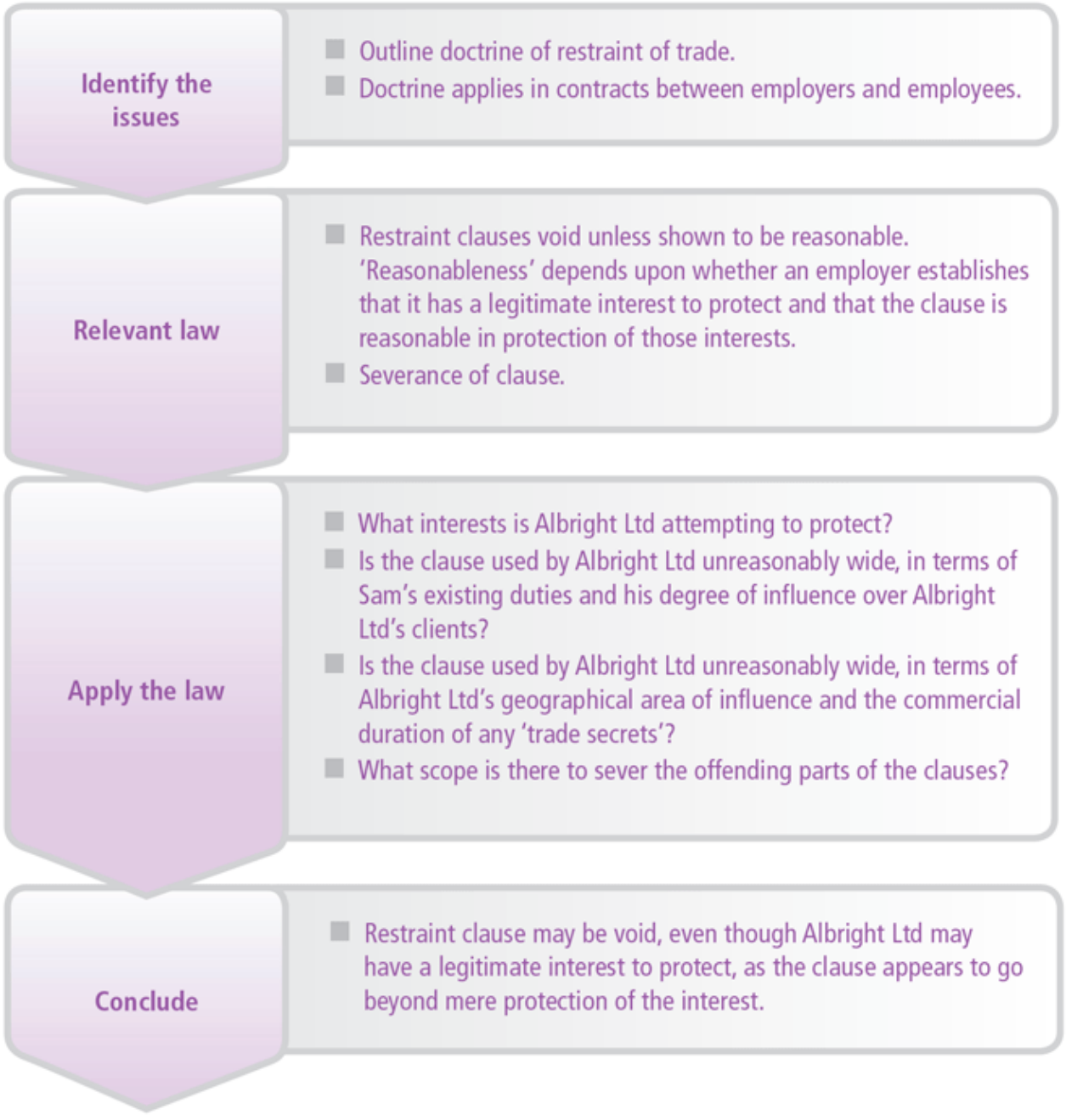
Discuss.

Caution!

■ The basic issue in this question will be resolved by posing the following questions: Does Albright Ltd have a legitimate protectable interest? Is the clause unduly wide in protecting that interest? Can any offending portions be severed whilst allowing the remainder to remain enforceable? The law has a clear structure in this area, follow it closely.

Diagram answer plan



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Suggested answer

The question concerns the doctrine of restraint of trade. For present purposes a contract or contract term in restraint of trade is one which seeks to restrict a person's future freedom to carry on their trade, business, or profession as that person may choose. The doctrine states that such a clause is prima facie void and will be unenforceable unless reasonable as between the parties and reasonable in the public interest: ***Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co.* [1894] AC 535**.[1] The doctrine of restraint of trade may not apply to all contracts that seek to restrain in this manner (see ***Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36** and ***Quantum Actuarial LLP v Quantum Advisory Ltd* [2021] EWCA Civ 227**) but it has been established that the doctrine does apply to covenants in restraint of trade in contracts of employment: ***Herbert Morris v Saxelby* [1916] 1 AC 688**.

[1] It is important to set out the basic doctrine and the key case of ***Nordenfelt*** at the outset of your answer. In ***Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32** the Supreme Court were of the opinion that the it was not necessary to import the ***Patel v Mirza*** into this related area of law.

As Sam had a contract of employment with Albright Ltd the doctrine of restraint of trade applies and the simple issue is whether the restraint clause in that contract is enforceable by Albright Ltd. The presumption with all such restraint clauses is that they are void unless shown to be reasonable. 'Reasonableness' depends, in the first instance, upon whether Albright Ltd can establish that it has a legitimate interest to protect and that the clause is not drafted in unreasonably wide terms for the protection of those interests.[2]

[2] Reasonableness is introduced and then may be used to structure the next section of the answer. Note ***Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32** where the Supreme Court held that a 'legitimate interest' was not limited to contractual obligations.

An employer may not merely protect against competition from a former employee. The employer may only restrain an employee in circumstances where there is a legitimate interest to protect. The law recognizes trade secrets and trade connection (ie customers) as legitimate interests: ***Herbert Morris v Saxelby***.[3] In order to establish a trade connection the employee must have influence over the customers (***Fitch v Dewes* [1921] 2 AC 158**); merely having dealings with customers is insufficient. Does Albright Ltd possess such legitimate interests?[4] This is debatable as regards the protection of trade connections because Sam seems to have little personal contact with Albright's clients. In ***Strange (SW) Ltd v Mann* [1965] 1 WLR 629** where an employee had no face-to-face dealings with customers,

merely speaking on a telephone, it was held that this did not amount to a protectable interest. However, if Sam does have the opportunity to exert personal influence over the clients, or possibly if his reputation is such that clients might move their accounts when he leaves Albright Ltd, such an interest might exist. After all, Albright Ltd is attempting to prevent departing employees from poaching their existing clients: an important asset within any firm (see ***Plowman (GW) and Son Ltd v Ash* [1964] 1 WLR 568**). Moreover, Sam may have had access to a ↵ considerable amount of confidential information which could be used unfairly in this context and may, therefore, constitute a relevant interest (see ***Roger Bullivant Ltd v Ellis* [1987] ICR 464**). However, it is worth remembering that Albright Ltd will need to *prove* that Sam had actively solicited ex-clients to transfer their business to his new employer. In ***Towry EJ Ltd v Bennett* [2012] EWHC 224 (QB), [2012] All ER (D) 148**, clients decided to transfer their business in this way but the court refused to accept that the claimant had proven that these clients had been 'persuaded' to do so by the relevant employee. However, an anti-*dealing* clause is wider and may prevent Sam from dealing with customers who approach him.

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[3] It is essential to identify a legitimate interest of the employer that needs to be protected; without such an interest a restraint clause will be void.

[4] The remainder of the paragraph is an example of IRAC, with a statement of the law and its application to the facts of the problem.

Should a protectable interest be established, is the clause unreasonably wide in terms of the *type* of activities which it restricts? This requires consideration of what is reasonably necessary to protect the interest.[5] As Albright Ltd will want to enforce the clause it will be for it to establish the reasonableness of the restraint clause as between the parties; should the clause be reasonable then it is for Sam to show the clause to be against the public interest: ***Herbert Morris v Saxelby***. Insofar as the clause prevents the solicitation of clients, this is likely to be reasonable if, for example, the two-year period accurately reflects how long it would take the employer to reinstate *influence* over the clients; and should receive a more sympathetic hearing from a court because it is limited in the scope and range of clients affected (see ***Plowman (GW) & Son Ltd v Ash***). However, the clause also prevents Sam from joining a competing firm. This is much more difficult to defend. Reasonableness here will depend upon: (a) Sam's duties and his degree of influence over Albright Ltd's clients; and (b) the area and time limits imposed within the clause.

[5] Having established a protectable interest, the reasonableness of the restraint clause must be tested in terms, for example, of area of operation and duration.

First, it may be that Sam was employed as a backroom expert with little personal contact with clients. This would suggest that the clause is unreasonable (see ***Strange (SW) Ltd v Mann***) because the clause does not reflect the employee's job. However, it seems that Sam did occupy a senior position within the firm and his work impressed the clients for whom he worked. This may represent an effective substitute for personal contact as clients are often more interested in ability and results, rather than general personality traits. As these positive factors induce reliance and some degree of attachment, a properly drawn restraint might be considered reasonable (see ***Marley Tile Co. Ltd v Johnson*** **[1982] IRLR 75**). The actual wording of the clause imposes a blanket prohibition on working for another firm of 'financial analysts'. There is no mention in what capacity Sam would seek employment, for example as a clerk, an auditor, or an accountant. As such, the clause may appear too widely drawn insofar as it prevents Sam from diversifying into other types of employment.[6] The question notes that the clients have moved their business. It is irrelevant ↵ here whether they would or would not wish to continue dealing with Albright Ltd in any event.

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[6] This point relates to the scope of the clause in terms of employment area. The clause must be relevant to the interest to be protected.

On the second point, there must be a functional correspondence between the area circumscribed by the clause (ie not to work in Wales) and the area particularly associated with the employee's place of work[7] (see ***Spencer v Marchington*** **[1988] IRLR 392**). The guiding principle is that the wider the geographical area of restraint, the more likely that it is unreasonable, although density of population should be taken into account. In ***Mason v Provident Clothing and Supply Co. Ltd*** **[1913] AC 724** an employee worked as a canvasser in Islington in London. A restraint clause prevented the employee from seeking similar employment within 25 miles of London. The clause was said to be unreasonable as it covered an area much greater than was needed to protect the interest. In Sam's position we do not know whether his clients are located throughout Wales or within a narrower area. If the clients are widely dispersed, the clause seems more reasonable, whereas if they are all situated within a few miles of Cardiff, a court might reach a different conclusion.

[7] Again the area of the restraint clause must be related to the interest to be protected.

Regarding the time constraint,[8] this period must not be longer than the projected useful life of any trade secrets which Albright Ltd is attempting to protect (see ***Faccenda Chicken v Fowler* [1986] ICR 297**). Nor must any restraint regarding trade connections usually be longer than it would take Albright to recruit a replacement and for that employee to gain the same status and contacts as Sam possessed. Both these points are questions of fact, although current precedent suggests that one year is often a generally accepted norm for protecting trade connections.

[8] The final element of the reasonableness of the clause, duration, is explored in relation to each of the interests, ie trade secrets and customers.

If the clause is reasonable in the interests of the parties, it still could be held to be unreasonable in the public interest: ***Wyatt v Kreglinger and Fernau* [1933] 1 KB 793**. However, if a clause is reasonable in the interests of the parties, it is unlikely to be held to be unreasonable in the public interest.[9]

[9] Only a brief reference need be made to the requirement that the clause must be in the public interest.

Finally, should the clause be unreasonable as between the parties could any reasonable portions of the clause be enforced? The principle of severance does not countenance the rewriting of contracts by the courts.[10] The 'blue pencil' test, as far as employee-focused restraint of trade clauses are concerned, ensures that an objectionable part of a clause can only be severed if it leaves the remainder in a grammatically correct and understandable form and does not '…generate any major change in the overall effect of all the post-employment restraints in the contract' (***Tillman v Egon Zehnder Ltd* [2019] UKSC 32** at **[87]**). On our facts, it would be possible to delete the words 'or join any firm of financial analysts located in Wales', leaving the non-solicitation clause intact. However, it would not be possible to substitute a different length of time for the restraint, so if the existing ↵ period was unreasonable the clause would fail in its entirety. It should also be noted that at one time if a court decided that the clause was not a combination of two undertakings but, rather, an indivisible covenant, the clause would again fail completely (see ***Attwood v Lamont* [1920] 3 KB 571**) but that no longer represents the law (see ***Tillman v Egon Zehnder Ltd* [2019] UKSC 32** at **[83]**).

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[10] Severance must be carefully explained and applied to the facts of the problem. See ***Tillman v Egon Zehnder Ltd* [2019] UKSC 32 at [87]**.

In conclusion, it may be argued that the restraint of trade clause in Sam's contract is void. The key issues are whether Albright Ltd has a protectable interest and whether the clause protects that interest or goes much further than is needed. Sam's ability to influence Albright Ltd's customers seems limited although it may be argued that Sam has access to confidential information in the nature of a trade secret. The clause does appear to go further than is needed in seeking to prevent Sam from working for 'any firm of financial analysts located in Wales' in any capacity. The length of the restraint is also problematic. Severance may be possible, but if the length of time is excessive the clause will be void as severance does not allow the clause to be rewritten.

Looking for extra marks?

■ A restraint of trade clause is an express term in a contract. You could mention that implied terms in employment contracts also offer protection of particular interests, for example an employee cannot use or reveal an employer's trade secrets before or after terminating employment: ***Printers and Finishers v Holloway* [1965] 1 WLR 1**.

■ Consider further the way in which the restraint clause is drafted, contrasting the operation of an area clause with that of a solicitation clause.

Taking things further

■ Buckley, R.A., 'Illegality in the Supreme Court' (2015) 131 LQR 341.

Reviews (before ***Patel v Mirza* [2016] UKSC 42**) ***Hounga v Allen* [2014] UKSC 47** *and highlights the judicial differences of opinion as to how to resolve illegality cases; that is, is resolution based upon application of rules of law or upon a consideration of policy issues?*

■ Davies, P., 'The Illegality Defence: Two Steps Forward, One Step Back' [2009] Conv 182.

Considers the Law Commission's **The Illegality Defence: A Consultative Report**. *Davies concludes that more extensive legislative intervention is needed than the report suggested.*

■ Lim, E., 'Ex Turpi Causa: reformation not revolution' (2017) 80 MLR 927.

Discusses the recent case of ***Patel v Mirza* [2016] UKSC 42**.

■ Smith, S., 'Reconstructing Restraint of Trade' (1995) 15 OJLS 565.

Reviews four issues: (a) which contracts should be excluded from the ambit of the doctrine; (b) defining legitimate interests; (c) the significance in assessing procedural and substantive fairness in assessing restraints; and (d) the importance of the 'public interest' requirement.

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