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THE HIGH COURT
DUBLIN

2002 7884P

EAMON FINNEGAN

PLAINTIFF

AND
J & E DAVY

DEFENDANT

Judgment of Mr. Justice T.C. Smyth delivered the 26th day of January 2007

1. The Plaintiff who qualified as an accountant, decided on the completion of his articles not to remain in professional practice. He came to be employed with the Defendants after an interview with a Mr. Robbie Kelleher. He was employed initially for what was in effect a probationary period of one year and in this regard he was given in writing a document dated 13th September 1990 incorporating the terms of his engagement.

2. There is a conflict in the evidence on the recollection of the parties to the interview. Mr Kelleher candidly said he did not remember the details of the conversation and that his remembrance of employing the Plaintiff was vague. The Plaintiff on the other hand was firm that he asked about the bonus situation, by which expression I understood to be, in the nature of a general enquiry that an intending employee to a business might make - in short an exploratory enquiry as to the future financial prospects he might have with his prospective employer. While I accept that there are many aspects to the business of stockbroking, it is a business very largely concerned with the buying and selling of stocks and shares for customers or clients.

3. From such trading are profits made and I think it most probable that a young, qualified accountant would, on interview, have an eye to future prospects and be conscious that commission is charged on deals and be concerned that if he generated some multiples of his salary his services might be recompensed in some way, by way of increase in salary, some percentage of the commissions earned directly or indirectly, or some perquisite(s) which might flow from his successful endeavours or that of the firm as a whole. The said he was informed at the interview that there was a year-end bonus scheme which would depend on how the business did and how successful he was if he took up employment. Mr. Kelleher said he did not believe that he could have given the Plaintiff any such indication, as his recollection was that there was no bonus scheme in operation until 1991. I believe some form of incentive was given to the prospective employee. Mr. Kelleher opines it might have been a salary or general performance review, as in the case of a Mr. Conway who was employed with the Defendants.

4. While undoubtedly the Plaintiff may have had an interest in conveying his recollection of the interview - he was the person immediately concerned about his future prospects and Mr. Kelleher's recollection, he fairly states as "vague". Even if bonuses only first became payable by the Defendants in 1991 - this could have been put beyond yea or nay at the end of the Plaintiff's case when both the Plaintiff and Mr. Conway had given evidence, by the production of documentary evidence by the Defendants (the subject of some cogent criticism by Mr. Hugh O'Neill SC for the Plaintiff) - rather than relying on a recollection, which as to its details referable to the Plaintiff, was vague. Even if Mr. Kelleher's recollection as to the beginning of the payment of bonuses beginning in 1991 is correct such would be referable to the previous year's performance. While I accept his evidence that a person merely 'in the door' could not expect to participate in the bonus scheme (however structured), nevertheless a person who had given satisfactory service during a probationary or first fixed year contract and thereafter, continuing to be employed, could reasonably expect some improvements in his rewards. Furthermore if bonuses were first paid in 1991 and it was determined in late 1991 or early 1992 its applicability I consider as a probability was held out to the anticipated beneficiaries in either January 1990 or January 1991, whichever is the applicable 'starting date' and it is in my opinion probable that it was discussed with the potential staff ahead of either date i.e. in or about the time of the interview and engagement of the Plaintiff in August/September 1991. While not making adverse findings on the evidence of the Defendant's witnesses I think it more probable than not that the incentive of the payment of a bonus in the future was discussed at the interview and that the component basis described by the Plaintiff is credible. Whether bonuses would be an important element of the Plaintiff's remuneration is a relative expression, however the fact of the possibility of bonus payments was a relevant matter. I am satisfied that salary, bonus, holidays and conditions of employment was the totality of what would be held out to a person going to work - a view confirmed by Mr. McLaughlin in his evidence. (T2 p98 Q348/9) In the events the Plaintiff was engaged as an equity research analyst and at the end of the fixed term contract, and it contains no reference to bonus, he was kept in the employment by the Defendants. The Plaintiff began his employment in late October/early November 1990 and on the expiry of the fixed term contract he carried on as a research analyst until 1995; and, towards the end of that year he moved to the equity desk. At the end of the calendar year or perhaps January 1992 the Plaintiff avers that he had a meeting with Mr. Kelleher and was told that his bonus for the year was £3,000 and also he received an increase in salary. (T1 p17 Q12) Thereafter bonus payments accrued over the years in the amount set out in the document referred to as 'salary and bonus data for the period 1991 - 2000', the accuracy of the information therein was not seriously contested nor was the fact that the Plaintiff's claim was to an entitlement of £65,000 in respect of bonus payments due from the year ended 31st December 1998 and £140,000 in respect of the year ended 31st December 1999 measured in the statement of claim as €260,296.31. Prior to the transfer to the equity desk of which the Plaintiff's immediate superior was one Ronan Godfrey, the Plaintiff said he spoke with the overall head of the Equities Division, Mr. Kyran McLaughlin, and that when he sought an increase in salary he was informed by Mr. McLaughlin that he would revert to him on the issue at the bonus time. The Plaintiff said on enquiry, as to the source of the bonus, that he was told it would come from the equity desk and not to be concerned about the bonus issue.

5. In late 1995, early 1996 the Plaintiff met with Mr. McLaughlin and was given an increase in salary to £40,000 and a bonus of £35,000. The following year the lot of the Plaintiff improved when his salary increased to £45,000 and his bonus to £40,000. The calendar year 1997 was the first full year of the Plaintiff on the equity desk, which he considered had been quite successful as a result of his efforts and he had estimated in his own mind that his bonus would be of the order of £90,000 to £110,000. His basis for the estimation was on his own performance and the performance of the company - which he averred was the basis indicted to him by Mr. Kelleher.

6. When the time came to discuss the amount of the bonus to be paid to the Plaintiff he met with Mr. McLaughlin who informed him that the bonus for the calendar year 1997 was going to be £50,000. The Plaintiff considered this unreasonable.

7. Mr. McLaughlin contacted the Plaintiff the following morning and told him his bonus for the year would be double what he had offered the previous day, i.e. £100,000. The Plaintiff was told that £60,000 of the figure would be paid as normal in the new year but that £40,000 of it would be deferred for one year, but if he left the employment of Davys he (the Plaintiff) would not receive the £40,000. Queried further by the Plaintiff on this Mr. McLaughlin informed him that if he joined a competitor of Davys he definitely would not receive the money, but if he left to pursue some other career he probably would receive the money. Therefore, such funds/moneys were not available for the purposes of helping to finance the recruitment of new employees to be replace those that resigned (one of the grounds of justification for the deferral or retained elements of the bonuses). I do not, therefore, accept that

the imposed condition was necessary to protect some proprietary interest of the Defendant.

8. Mr. McLaughlin said in evidence that there was no need to discuss the question of retention or deferment of elements of the bonus with the Plaintiff prior to 1997 because the Plaintiff's bonus would not have exceeded 100% of his salary, and that the need to inform the Plaintiff did not arise "until it actually arose for him". (T2 p55 Q201).

9. In the course of his submissions Mr. O'Neill, with some justification, described this attitude as somewhat Dickensian for not only had Mr. Finnegan, like Oliver Twist in effect to say "Please, Sir, may I have some more?"; he also had to make a case as to why he should get more, but unlike Bob Cratchit Mr. Finnegan could not and would not be patronised. The Plaintiff's case, though not related in amount to the year 1997, has its origin in what he says was an attempted retrospective unilateral amendment of his terms of employment and the deferral in the bonus scheme of which he was given no notice was therefore ineffective. The Plaintiff enquired if the amount of £40,000 could be reduced and received no for an answer, but that it would earn interest on his behalf until paid. The Plaintiff considered that as he had earned the bonus he should be paid it as it was his money and he said he could not accept this mode of operation which he considered was totally wrong. Mr. McLaughlin informed the Plaintiff that this scheme of things had been introduced and insisted upon by the Bank of Ireland who had acquired 90% of Davys in 1991. The matter was unresolved at the time and the Plaintiff was, as is clear from his evidence, sceptical of this policy being imposed by the Bank, whom he believed owned 91% of the equity in Davys but only 49% of the voting rights, so that the bank did not have operational control of Davys. It is unnecessary for me in this case to decide the veracity of either point of view in this particular.

10. The Plaintiff said he could not "walk away" from £40,000, he and his wife had a young baby and he had just moved house. In short while he objected to what was imposed upon him he could not in economic terms do anything about it and furthermore having worked for seven years with Davys was getting close to the senior bonus pool within the firm. In addition to the foregoing his appreciation of his position then was that at the age of 32/33 he had ahead of him a maximum of 10-15 years as a dealer, and that there were limited opportunities in Dublin - but there were no opportunities then available. When he did leave Davys in 2000 it was because a "gap" in the market arose and he took his opportunity.

11. In 1998 the Plaintiff's bonus was £200,000 but on this occasion the Plaintiff was informed that he was going to have imposed upon him a one-third split. The Plaintiff I am satisfied objected to the split, protesting that he was being in effect required to work for an additional two years before he could actually receive and have possession of money he had already earned. Equally I am satisfied that he said he was not accepting the imposition which he considered unreasonable. It is common case that retained or deferred monies attracted interest which was paid to the Plaintiff, but he did not have the use of his own money which he had earned. Whenever he may have wished to invest at his own absolute discretion or to make such purchases as he may have wished or to repay such debts as he may have had, in short he had no control over money which he reasonably believed he had earned, it being retained over a period of time to ensure in effect that he would not leave the firm and go to work for a competitor of Davys.

12. I find as a fact that in 1997, 1998 and 1999 the Plaintiff felt that he had to tolerate the position, but he certainly did not accept it. I do not accept that the Plaintiff did in any meaningful way acquiesce in the arrangement. In my judgment the cases of *O'Reilly -v- Irish Press* [1937] ILTR 194, decided before the last World War, and *Cowey v Liberian Operations Ltd.* [1996] 2 Lloyd's Rep. 45 are not applicable in the light of my findings of fact in the instant case.

13. Mr. McLaughlin accepted that the deferral was a material factor in the scheme. While he accepted that the bonus was in relation to work done; he said that the purpose of the deferred elements in the bonus "was to incentivise him [the Plaintiff] going forward as apart from remuneration for past services. It was also to incentivise him for "future years". (T2 p99 Q355) He explained the manner in which the system worked in this way; senior management (specifically this included Mr. McLaughlin) sought the permission from the Bank of Ireland, the major shareholder at the relevant time in Davys, to permit some of the profits of Davys to be applied to and distributed to staff at a certain level and number in the stockbroking firm. The Bank agreed to this (and later enlarged the amount) on condition that no individual employee could get more than 100% of his salary in the first year and if the bonus in total was greater than 300% of his salary one third of the bonus would be paid in each year over a three year period. (While such a deferred bonus scheme apparently operated in Bank of Ireland Asset Management and is common in the stockbroking business in London there was no such custom in the business or trade or profession in the Irish context). The purpose, as was deposed by Mr. McLaughlin, for spreading the payment of the earned bonus:

> "to try and generate loyalty...and in addition it guaranteed a situation that whereby if...there was a poor year the following year, at least the employees had an incentive to work for the full amount knowing there was a payment at the end of that year or the following year."
>
> (T2 p55 Q203)

14. If, as I understand the notion of an incentive, is something that incites to action, then I have great difficulty in understanding how following one's own 1 money in order to recover it and to ensure it is not forfeit or lost falls within the concept. I can well understand a bonus earned and paid in full would be an incentive to future performance.

15. I found the analogy of Mr. McLaughlin between a share option scheme - a right conferred dependent on or which would only vest upon a future event (a known condition subsequent to the conferring of the option) and a bonus already earned declared and set aside in a specific account as a result of past endeavours which had vested and notwithstanding that vesting became conditional upon future commitment to other endeavours in the future, quite unconvincing.

16. Mr. McLaughlin's evidence was that -

> "It was critical from our point of view to try and incentivise people going forward and to generate loyalty to try and keep key employees."
>
> (T2 p57 Q204 L1-3)

17. Further that only three people knew how the bonus scheme worked (and that did not include the Plaintiff) and that one of the factors in determining the amount of the bonus for any particular person (and that did not include the Plaintiff) was -

> "Whether we thought they were likely to move or not to move, how competitive we had to be to hold them and so on."
>
> (T2 p57 Q206 L19-26)

18. The foregoing bears out the submissions of Mr. O'Neill for the Plaintiff that the real purpose (which I find as a fact) of the deferral or retention of the elements of the bonus was to create a financial and practical restriction on employees who wished to continue to act as stockbrokers going to another firm of stockbrokers.

19. Furthermore the fact that such employees as left the employment of Davys when outstanding elements of bonuses had not been paid, but did not go into competition, were paid such outstanding monies gives point to the notion and submission that if in effect the provision was as part of a contract it was a contract in restraint of trade. The evidence, I am satisfied, bears out the contention that the Defendant paid all outstanding bonus entitlements to persons (other than the Plaintiff) who left the employment of he Defendant between the period 1996 and 2001 who did not go into another stockbroking firm.

20. The question as to whether a bonus was discretionary or otherwise was agitated by the parties. I find as a fact that over a period of years the Plaintiff could have had a legitimate and reasonable expectation that if the firm thrived and his efforts were fruitful a bonus would come to him as it did to a number of other employees. It was certainly discretionary as to amount because each year's trading would differ and there had to be an assessment of his success or otherwise in each year, but I am satisfied that the Plaintiff could reasonably expect as a matter of principle built up from a number of years of consistent conduct in the payment of bonuses and the matter of discretion never having been mentioned to him at any stage that some bonus would be payable - the amount only dependent on the trading activities of the firm and his own performance.

21. In *Clark -v- Nomura* [2000] IRLR 766 it was held that in assessing individual performance the employer was not entitled to take into account factors such as the need to retain and motivate the employee and thus to refuse a bonus on the basis that the employee was leaving.

22. This approach was approved by the Court of Appeal in *Cantor Fitzgerald v Horkulak* [2004] EWCA Civ. 1287 and in *Mallone -v- BPB Industries* [2002] IRLR 452. In *Mallone* share options vested in Mr. Mallone were cancelled on his dismissal by the directors of the defendant pursuant to "absolute discretion" in the scheme rules. Rix LJ said:

> "There is no valid reason for treating the whole scheme as a sort of mirage: whereby the executive is welcomed as a participant, encouraged to perform well in turn for a award, granted options in recognition of his good performance, led on to further acts of good performance and loyalty, only to learn at the end of his possibly many years of employment when perhaps the tide has turned and his powers were waning, that his options, matured and vested as they may have become, are removed from him without explanation."

23. Mr. O'Neill submitted that in a context where bonus payments are calculated by reference to profitability of the Defendant in a calendar year and the individual performance of the Plaintiff during that year, it was arbitrary and irrational for the Defendant to seek to make the payment of that bonus already quantified conditional upon the Plaintiff remaining in the employment of the Defendant for the following two years.

24. To impose such a condition changed the criteria from one of profitability and performance to one of loyalty in the future. The bonus payment comprised a very substantial part of the Plaintiff's remuneration package which had been earned, evidenced by the fact that the same when payable carried interest. The unilateral imposition of the condition recognised by the Court as a provision in restraint of trade can hardly constitute the proper exercise of a discretion as to the level of bonus to which the Plaintiff was entitled and his entitlement to receive it when ascertained and declared.

25. I accept this submission as warranted by the authorities in the light of the facts as I find them.

26. Mr. Shipsey submitted for the Defendant, and very ably, that the case law demonstrates clearly that the margin of appreciation to be afforded to an employer in exercising its discretion under a discretionary bonus scheme is extremely wide. More particularly, it is open to the employer to decide the criteria to be employed in assessing whether to award any bonus and if so in what amount. In this regard he relied on the authority of *Horkulak -V- Cantor Fitzgerald Internationa*l [2005] 1CR 402. In *Horkulak* the particular bonus scheme had a number of features that may be common in some respects to the Defendant's bonus scheme. In particular, the Cantor Fitzgerald scheme (as did the Defendant's) contained a proviso that the employee continued to be employed at the payment date of the bonus, which was deferred for a period after its determination. In my judgment this is clearly distinguishable from the instant case because Horkulak's contract was (a) in writing and (b) the term was known to him and it was known to him from the outset.

27. In the events in the instant case the Plaintiff went to NCB stockbrokers in September 2000 and when he requested the monies retained from already earned bonuses he was refused payment by the Defendant. The terms of the Plaintiff's engagement with NCB are nihil ad rem to the issues I have to determine. If he received a form of premium to entice him to join NCB that in some measure made up for the fact that even though he had worked some part of the year of 2000 for the Defendants he could not and did not expect any bonus until the end of the year and he was not completing a calendar year and therefore would have to forego whatever the previous 8/9 months of the year would otherwise have yielded. Such is not either a matter of surprise or an issue requiring determination. Also irrelevant in my judgment is how, having cut the painter with the Defendant, he may have given a dusty answer, he had decided that he was not going to stay with Davys under a deferral system - and quoted figures so high to Mr. McLaughlin to close the latter's enquiries. Even if in negotiation with NCB the Plaintiff negotiated with them to offer him a premium equivalent to the total sum of the unpaid deferred elements of bonus for 1998 and 1999 in Davys and I am satisfied and find as a fact that such were not involved or calculated (T2 p46 Q164) and that a sum that he might have anticipated he might on a quantum merit basis have attracted for the 8/9 months of 2000 that was a price he put on his value to NCB, that he was entitled to do so in negotiation with NCB. Even If they paid him a premium to secure his future services that was a commercial decision on their part; that in my view has nothing to do with the monies earned by way of bonus in the past with the Defendants.

28. I am satisfied that in each of the years 1997, 1998 and 1999 the Plaintiff did not consent to the unilateral imposition of a term of his employment referable to the bonus. If he did, or could be said to have acquiesced at all, it was because he had a Hobson's choice of either leaving Davys and discontinuing his career as a stockbroker and receiving the money or proceeding to sue Davys which was a completely unrealistic prospect for him if he wished to continue to have employment before finding another position, or take up, when the occasion would present itself, a position in another stockbroking firm and forfeit such elements of deferral as were in the bonuses which he had earned in Davys and which were retained from him. The attempted amendment of the terms of employment and bonus scheme were in my judgment as a matter of fact unilateral and while effective in practice as a matter of fact, in that they were withheld, were ineffective as a matter of law, not only because they were not consensual (even if perforce the Plaintiff had to abide or tolerate them) they were made without notice much less notice in writing and if not overtly stated to be a contract in restraint of trade was in effect such. In my judgment the words of Jonathan Sumption QC sitting as a High Court Judge in the Chancery Division in *Marshall -v- NM Financial Management Limited* [1995] 4 All ER785 at 791 are apposite :-

> "I do not think there can be any doubt that proviso 1 is a restraint of trade. It has been well established since the decision of the Court of Appeal in *Wyatt -v- Kreglinger & Fernau* [1993] 1 KB793, that there is no relevant difference between a contract that a person will not carry out a particular trade and a contract that if he does not do so he will receive some benefit to which he would not otherwise be entitled...it is, therefore, unlawful unless it is justified as being reasonable in the interests of the parties and in that of the public."

29. In my judgment on Mr. O'Neill's analysis of the first instance and the Court of Appeal decisions in Marshall's case is correct. I accept his submission that the fact that the Plaintiff has left the employment of the Defendant and now works for a competitor is immaterial. It does not impact on the question as to whether or not the clause operates as restricting trading.

30. See also to the like effect *Sadler -v- Imperial Life Assurance Co*. [1988] IRLR 388 and *Bull -v- Pitney-Bowes* [1966] 3 All ER384.

31. In *Sadler's* case the Plaintiff's contract provided that his entitlements as an insurance agent to commission would immediately cease if he entered into a contract of service or for services directly or indirectly with any limited company, mutual society, partnership or brokerage operation involved with the selling of insurance or would be in breach of any part of clause 9(a) thereof and were the contract still subsisting.

32. It was held that:

> "The proviso in the insurance agent's contract of employment which purported to remove his entitlement to post-termination commission if he continued to work in the insurance industry after he left the Defendant's employment constituted an unlawful restraint of trade. A financial incentive to limit a former employee's activities in accordance with the decision in *Wyatt -v- Kreglinger and Fernau and Pitney-Bowes* amounted to a restraint of trade.

33. In my judgment the question in the instant case is as to whether the deferral or retention provision is so tainted as to be determined by its substance and effect not merely by its form.

34. Mr. Shipsey for the Defendant submitted that the structuring of the Defendant's bonus scheme does not offend against the common law restraint of trade doctrine for the simple reason that it places no restraint on the Plaintiff's trade, and as such is apparent from the Plaintiff's subsequent employment history the Plaintiff was free at all times to leave the Defendant's employment and to enter a contractual relationship with any other employer, that at most the bonus scheme provided an economic disincentive or discouragement from leaving, or put positively, providing an economic incentive to stay with the Defendant company. It did not, however, restrain the Plaintiff's employment or trading options in any way. I am unable to accept this submission.

35. In my judgment there was, on the evidence, no genuine proprietary interest of Davys that required the imposition of the provision imposed upon the Plaintiff. Costelloe J. (as he then was) said in *John Orr Ltd. -v- Orr* [1987] ILRM702 as follows:-

> "All restraints of trade in the absence of special justifying circumstances are contrary to public policy and are therefore void. A restraint may be justified if it is reasonable in the interests of the contracting parties and in the interests of the public. The onus of showing that a restraint is reasonable between the parties rests on the person alleging that it is so. Greater freedom of contract is allowable in a covenant entered into between a seller and a buyer of a business than in the case of one entered into between an employer and an employee. A covenant against competition entered into by the seller of a business which is reasonably necessary to protect the business sold is valid and enforceable. A covenant by an employee not to compete may also be valid and enforceable if it is reasonably necessary to protect some proprietary interest of the covenantee such as may exist in a trade connection or trade secrets. The Court may in certain circumstances enforce a covenant in restraint of trade even though taken as a whole the covenant exceeds what was reasonable while the severance of the void parts from the valid parts."

36. In the instant case it was at most a matter of weeks or, perhaps even imperceptibly and not pursued in cross-examination, months that there was any such reason to protect the information had by the Plaintiff while in the employment of Davys. It is clear from the correspondence the restraint to trade sought to be imposed is an absolute bar to employment of any nature in any location in the business of stockbroking. It is difficult to see how such a restraint is in any way necessary to protect any proprietary interest of the defendant much less the public and even a fortiori the Plaintiff. Furthermore there was no term of employment that a condition would be imposed to effectively secure future loyalty.

37. While considerable emphasis was placed by Mr. McLaughlin, and Mr. Shipsey in his submissions, that the quantum of bonus payment had a loyalty factor built into it, this was not borne out by his own evidence (T2 p79 Q269) when he agrees that the total of bonus payments to all employees is the maximum the Bank of Ireland would allow Davys to make. The quantum of the bonus payments, the global quantum, has nothing to do with loyalty. The loyalty issue in effect is a non-compete issue that only came into the reckoning having decided on the quantum of the bonus payment and then a comparison is made to or with the salary. Indeed in 1997 when the bonus offer increased from £5,000 to £100,000 within 24 hours that was done on the basis that the Plaintiff had made out a good case for the £100,000. It was a mathematical sum and had nothing to do with future loyalty. In my judgment future loyalty was never mentioned in 1991 or until very many years later.

38. To enforce a condition it must be fairly and reasonably brought to the other party's attention. This is especially so when in a contract the condition was particularly onerous or unusual (as I find as a fact the deferral and retention of appreciable percentages of bonuses were) and was not known at all to the Plaintiff until 1997 and the real and full impact only known to him or impacting upon him until 1998.

39. In my judgment the deferral or retention clause operated as a form of forfeit if the Plaintiff sought to go to work for a competitor and not having been timeously, i.e. on first taking up his employment or at latest at the end of his probationary period or if either differed from the first year in which the bonuses were being paid then at such date in my judgment *Interfoto Pictures Library Ltd. -v- Stilleto Visual Programmes Ltd.* [1988] 1 All Eng 348 is applicable.

40. In this case the Defendant sought to unilaterally retrospectively alter the Plaintiff's terms of employment with (however the Defendants may have understood as to encourage loyalty, i.e. to hold on to staff in the future) a provision that was onerous and even if not expressly designed to be a restraint was so in effect. The Plaintiff had committed himself to some six years at least to the Defendants before he was informed even partially of the onerous condition and in my judgment this was unreasonable.

41. Section 3 of the Terms of Employment (Information) Act 1994 has no retrospective effect, since its applicability to the Plaintiff's employment was unfulfilled. Whatever social cachet may have attached to his avocation, whatever good refute for sophisticated skills

he may have had on the Exchange or in the world of high finance, the Plaintiff's terms of engagement were, in my judgment, on the facts, grievously marked by a form of engagement redolent of the indentured employment of another age.

42. The Plaintiff succeeds.