Neutral Citation Number: [2021] EWCA Civ 227

Case No: A4/2020/1104

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
CIRCUIT COMMERCIAL COURT (QBD)
His Honour Judge Keyser QC (sitting as a Judge of the High Court)
[2020] EWHC 1072 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2021

Before:

LORD JUSTICE MOYLAN
LADY JUSTICE CARR DBE
and
LORD JUSTICE STUART-SMITH

- -

Between:

QUANTUM ACTUARIAL LLP	**Appellant**
- and -	
QUANTUM ADVISORY LIMITED	**Respondent**

- -
- -

Andrew Butler QC (instructed by **Acuity Law Limited**) for the **Appellant**
Mr Guy Adams (instructed by **Stuart Brothers Solicitors**) for the **Respondent**

Hearing dates: Tuesday 9 & Wednesday 10 February 2021

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00am 24 February 2021."

LADY JUSTICE CARR DBE:

Introduction

1. This appeal concerns the application of the doctrine of restraint of trade ("the doctrine") in the context of a bespoke services agreement entered into by commercial parties in the context of a corporate re-structuring. The doctrine was considered very recently by the Supreme Court in *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36 ("*Peninsula Securities*").

2. The Appellant, Quantum Actuarial LLP ("LLP"), is an entity formed in 2007 as part of a re-organisation of three businesses providing pension fund related services: Quantum Advisory Limited ("Old Quad"), Renaissance Pension Services Limited ("RPS") and Quantum Financial Consulting Limited ("QFC") (together described as "the legacy companies"). The agreement in question, dated 1 November 2007, was executed between LLP and Old Quad ("the Services Agreement"). Shortly after execution, the Services Agreement was novated from Old Quad to the Respondent, formerly named Pascal Company Solutions Ltd ("PCS") but by then re-named Quantum Advisory Limited ("New Quad").

3. As set out more particularly below, the Services Agreement contained provisions preventing LLP from soliciting or enticing away any of Old Quad's clients in connection with defined services; from obtaining instructions from or undertaking those services for any of those clients; and from undertaking any services in relation to what was described as "pipeline" business or in relation to new business introduced before 31 March 2008 ("the Covenants"). The Covenants were to apply throughout the 99-year duration of the Services Agreement (and a further 12 months beyond).

4. In a careful and detailed judgment dated 5 May 2020 ([2020] EWHC 1072 (Comm)), following a full hearing in February 2020, HHJ Keyser QC (sitting as a High Court Judge) ("the Judge") held, amongst other things, that the doctrine did not apply to the Covenants and that, even if it did, the Covenants were reasonable ("the Judgment"). LLP appeals against the Judgment and resulting order on the basis that the Judge was wrong on both counts.

5. New Quad resists the appeal in full, maintaining that the Judge reached the right conclusions for the reasons that he gave. It also seeks to uphold the Judgment on a further basis if necessary, by reference to arguments of agency, including that the Covenants were reasonable in that they reflected the fiduciary obligations owed to New Quad by LLP (as agent).

Background facts

6. Old Quad was incorporated in 2000 by a group of former colleagues at PricewaterhouseCoopers LLP: Martin Coombes, Peter Baldwin, Andrew Reid-Jones and David Deidun. Old Quad carried on business as a provider of administrative, actuarial and related services, primarily for defined benefit pension schemes. Mr Coombes was its single largest shareholder and managing director.

7. In the same year QFC was set up for the purpose of undertaking regulated financial services work associated with Old Quad's pensions consultancy and administration

work. Mr Coombes was its majority shareholder for regulatory reasons; it was understood that he held his share on trust for Old Quad.

8. In 2004 Old Quad entered into a joint venture with a team led by former colleagues at Bacon & Woodrow (now Hewitt), including Robert Davies and Mark Vincent. The venture involved the creation of RPS, of which Old Quad and Mr Davies were the principal shareholders. RPS was to carry on a similar business to that of Old Quad with a view, following a three year period of business development, to merging with Old Quad. During this period, engagements with RPS' clients were entered into by Old Quad which then accounted to RPS for an agreed proportion of the fee income.

9. By 2007 the interests and ambitions of those involved in the legacy companies had begun to diverge. Mr Coombes wanted to diversify (by developing a pensions and tax based consultancy), whilst his colleagues did not. It was agreed that there would be a re-organisation of the business. A buy-out of Mr Coombes' interest in Old Quad was financially impossible (given its value) and/or undesirable for other practical and commercial reasons. A different re-organisation model was instead agreed.

10. In summary, and as set out in the Judgment, the business of the legacy companies would be continued by a new entity, which would seek to develop and expand it. However, the goodwill of the existing legacy business would be ringfenced: the clients of the legacy companies ("the legacy clients") would remain the clients of the legacy companies (or their assigns), but they would be serviced on behalf of the legacy companies by the new entity, which would then receive a fee representing the cost to it of providing the services to the legacy clients. Thus the new entity would not receive any profit element for servicing the legacy clients. Instead, the benefit to the new entity was that it would receive a turnkey business: it would take over all of the staff of the legacy companies and have the full use of their premises and equipment and the Quantum brand, as well as having an established client base on which to build new business. Thus it would be enabled to develop its own business without the usual costs and risks associated with starting a business from scratch.

11. LLP was incorporated on 12 March 2007 as the new entity in question. The model was implemented in two stages, dealing first with the (unregulated) business of Old Quad and RPS and then the (regulated) business of QFC.

12. The arrangement for the unregulated business was put into effect in April 2007 but only formalised by the Services Agreement (in November 2007). As set out more particularly below, the work relating to the pensions consulting, actuarial, administrative and investment services that Old Quad had provided to the legacy clients would be carried out by LLP. Old Quad would pay LLP 57% of the fee income received from those clients.[1] LLP was given the right to use the Quantum brand, and the premises, personnel and equipment of the existing business.

13. The negotiations for the Services Agreement, which were conducted mainly by Mr Coombes, Mr Baldwin and Mr Reid-Jones, proceeded originally on the basis of a ten

[1] The 57% payable to LLP was designed to cover the cost of providing the services to clients, with the 43% being retained by Old Quad to represent the profit element. As set out further below, the Judge found that the parties believed that apportionment to be fair and reasonable at the time and that the evidence as a whole at trial had not shown that view to have been mistaken.

year term.[2] Eight drafts on this basis were produced between December 2006 and August 2007. However, concern was expressed (by Mr Reid-Jones for LLP) at the impact on LLP of the termination of the Services Agreement (when LLP would lose a major part of its business and income) at the end of a ten year period, and whether LLP would by then be sustainable without it. Thus, towards the end of the negotiations at a meeting on 15 August 2007 (attended by Mr Coombes, Mr Reid-Jones and Mr Baldwin[3]), Mr Coombes proposed extending the term to 99 years. The proposal for a 99 year term was agreed and incorporated in the express terms of the SA. A further draft, now based on a term of 99 years, was produced on 23 August 2007 with the final version settled on 18 September and signed on 1 November 2007.

14. The Services Agreement was drafted by SRB legal LLP, Old Quad's solicitors. LLP did not retain its own solicitors. As at the date of execution, the members of LLP were:

i) Mr Reid-Jones, who was also a director of and 15% shareholder and non-voting shareholder in Old Quad and director of and 15 % shareholder in New Quad. His wife was a 3% shareholder in Old Quad and New Quad (and a non-voting shareholder in Old Quad and New Quad);

ii) Mr Vincent, who was also a non-voting shareholder in New Quad;

iii) Mr Rhidian Williams;

iv) Mr Davies, who was also a director of and non-voting shareholder in New Quad;

v) Mr Deidun, who was also a director of and 20% shareholder and non-voting shareholder in Old Quad and a director and 20% shareholder and non-voting shareholder in New Quad;

vi) Karen Kendall.

15. In an email dated 11 October 2007, and so between production of the final draft and execution, Mr Reid-Jones emailed Mr Vincent and Ms Kendall, copied to Mr Davies, in the following terms:

> "In putting the outsource deal together, part of the thinking behind was that it should, in broad terms, be fair….Now if we want to go back to legacy and renegotiate, we are always free to do so. However, we should be aware that legacy may decide that there has been enough give on its part and decide that it might like to renegotiate on certain areas that it feels hard done by on….Taken in the entirety, I think the deal is reasonable.

[2] The Judgment refers to an email from Mr Coombes to Mr Reid-Jones and others dated 19 March 2007 in which he pointed to the "real fear" that "in ten years' time the blood, sweat and tears involved in establishing and growing Quantum will be forgotten. The then partners of llp may regard the old owners as undeserving parasites. Accordingly they will feel no compunction in offering say a 10% profit margin rather than whatever is then the fair equivalent of 43%. This can only be resolved if there is a reasonable balance of negotiating power at CRD."

[3] And possibly Mr Brothers of SRB legal LLP.

> There will always be elements of it we can point to as unfair, but that is available to both parties."[4]

16. Further, between 31 December 2007 and 2 January 2008 PCS, a company wholly owned by Mr Coombes, bought the entire issued share capital of Old Quad and RPS. The business and assets of Old Quad and RPS were transferred to PCS, subject to outstanding liabilities. At that stage PCS changed its name to Quantum Advisory Ltd (ie New Quad) and Old Quad changed its name to Pascal Company Solutions Ltd. At the same time, on or about 2 January 2008, the Services Agreement was novated from Old Quad to New Quad.[5] Old Quad was dissolved in May 2011.

17. The regulated business of QFC was managed in essentially the same manner, though there was a delay due to the need to obtain authorisation from the Financial Services Authority. It was necessary for LLP to be acting for clients on its own account. Thus, in February 2009 LLP and QFC entered an "Introducer's Appointed Representative Agreement" ("the IARA") under which LLP was obliged to pay QFC 43% of the net commission or other fee income it received in respect of the provision of investment advice and insurance mediation services to the legacy clients who had been introduced to LLP. The IARA was novated from QFC to New Quad by a deed of novation dated 31 March 2011. Thus LLP provided regulated services to the legacy clients, accounting to New Quad for the profit element of the fee income.

The Services Agreement

18. The Services Agreement referred to Old Quad as "Quad" and expressly included "any other party to which this Agreement is novated in its place". References to "Quad" elsewhere in this judgment refer to "Old" or "New" Quad as relevant.

19. The Recital, which according to Clause 1.8 formed an operative part of the agreement, stated:

> "Quad has resolved to appoint the LLP to carry out certain responsibilities for and on behalf of Quad in relation to its business, and the LLP agrees to carry out such responsibilities (the Services, as defined below) in consideration for the payment by Quad of the Administration Fees and any other payments due to Quad pursuant to this Agreement."

20. Clause 2 .1 provided:

> "2.1 With effect from the Effective Date [defined to mean 6 April 2007], Quad confirms the appointment of the LLP to be (subject to the provisions of clause 2.8 below) solely responsible for the provision to Quad of the services set out in Schedule 7 to this Agreement to the extent that they:- (a) relate

[4] Mr Butler QC for LLP submitted at one stage that this email demonstrated the lack of focus or understanding of the impact of the extended term of the SA from LLP's perspective – by reference to the statement that LLP could always go back and renegotiate. However, he fairly accepted that, on a proper reading, the reference to renegotiation was a reference to renegotiation before finalisation of the SA (as executed a few weeks later) and not to some renegotiation at the end of a ten year term.

[5] This was a contentious issue at trial but there is no appeal against the Judge's finding to this effect.

> to any engagements of Quad by the Clients, or (b) are referred to Quad or the LLP by any of the Introducers during the Extended Period [defined to mean the period from 6 April 2007 until 31 March 2008] (save where any Introducer receives a bona fide substantive financial reward from the LLP), or (c) relate to the Pipeline Business, together with such other services as the parties may agree from time to time in writing that the LLP is to perform for Quad (the 'Services'). Quad confers upon and grants to the LLP such power and authority as is necessary or desirable for providing the Services. The LLP hereby accepts the appointment to provide the Services to Quad, subject to the terms and conditions set out in this Agreement."

21. By Clause 2.10:

> "2.10 For the purposes of this Agreement, the provisions of clause 2.1 shall not apply to work undertaken for any Clients where Quad acknowledges in writing to the LLP that both of the following conditions are satisfied:
>
> 2.10.1 the LLP employs or directly engages one or more individuals who previously acted as a scheme consultant or scheme actuary to a Client to the extent that any such employment or engagement does not relate to any person employed or directly engaged by Quad prior to the Effective Date; and
>
> 2.10.2 the sole reason for any additional work emanating from any such Client is the engagement by the LLP of the individual referred to in 2.10.1.
>
> In such circumstances such discrete items of work shall be carried out by the LLP and invoiced by the LLP without any payment being due to Quad. For the avoidance of doubt, it is agreed that clause 2.10.1 shall not include circumstances where the LLP engages one or more individuals pursuant to an agreement or arrangement between the LLP and a third party for the provision of services to or on behalf of the LLP."

22. Clauses 2.2 to 2.8 are central for present purposes. They provided as follows:

> "2.2 The LLP shall not, during the course of this Agreement and for a period of 12 months after its expiration or termination for whatever reason, directly or indirectly:-
>
> 2.2.1 solicit or entice away (or attempt to solicit or entice away) any Client in connection with any Services; or
>
> 2.2.2 obtain instructions for any Services from any of the Clients or undertake any Services for any of the Clients; or

2.2.3 undertake any Services in relation to either the Pipeline Business or any work introduced by any of the Introducers during the Extended Period without first having referred such matters to Quad other than pursuant to the provisions of this Agreement;

It is acknowledged that the LLP shall not be in breach of these provisions to the extent that Quad has been given the opportunity to undertake any such Services and has declined the opportunity to do so in writing.

2.3 If the LLP commits any breach of clause 2.2 above then it agrees to pay to Quad on demand an introduction fee equal to 2.15 x the Actual Revenue [defined to mean the highest revenue, net of VAT, received by any "Relevant Company", namely Old Quad, New Quad, the LLP and QFC].

2.4 It is acknowledged that the damages payable pursuant to clause 2.3 above does not preclude Quad from applying to Court for an injunction to restrain a breach of clause 2.1 (sic: presumably a reference to clause 2.2)….

2.5 Each party acknowledges that the provisions of clauses 2.2 & 2.9 are no more extensive than is reasonable to protect the interests of Quad and that the level of liquidated damages set out in clause 2.3 represents a genuine preestimate of the anticipated loss which would be incurred by Quad in the event of such breach.

2.6 The restrictions contained in clause 2.2 & 2.9 (each of which is a separate obligation) are considered reasonable by the parties (each of the parties having taken, if required, separate legal advice) in all the circumstances as necessary to protect the legitimate interests of the other party; but if any such restriction shall be judged by a competent court to be void but would be valid and enforceable if certain words were deleted or the period reduced or any other amendment made, such restriction shall apply with such modification to make it valid and effective. …

2.9 In addition to the restraints on the part of the LLP contained in this clause 2.2 above, the LLP shall not during the period from the date of this Agreement to and including the expiration of the Extended Period directly or indirectly solicit or endeavour to solicit or obtain instructions for Services from any of the Prospects [i.e. those identified by Old Quad as potential new clients in the twelve-month period before the making of the Services Agreement] other than for the benefit of Quad pursuant to the provisions of this Agreement save that this provision shall not apply to P&O."

23. Schedule 7 defined the "Services" as "Provision of pensions consulting, actuarial, administrative and investment services". It contained a long list of examples of what fell within the definition. Clause 1 defined "Clients" to mean:

> "the clients and schemes to which Quad has provided any Services prior to 1st April 2007 together with such clients as are attributable to the Pipeline Business and any parties introduced either to Quad or the LLP by any of the Introducers during the Extended Period including (without limitation) those clients and schemes as are set out in Part 1 of Schedule 2 to this Agreement which expression shall include (where appropriate) any companies within the same group of companies as the relevant Client from time to time and any pension schemes sponsored by any Clients and any new entrants to such schemes".

The "Pipeline Business" was defined to mean "any engagements by Quad entered into with any of the Clients or Prospects or which are referred to Quad by any of the Introducers in connection with the provision of Services during the Extended Period". "Introducers" was defined to include all Clients, all those identified in Schedule 4 to the Services Agreement, and everyone else with whom Old Quad had had face to face contact for the purposes of engendering a commercial relationship in the twelve months immediately prior to 1 April 2007.

24. Clause 5 and Schedule 8 provided for the TUPE transfer of Quad's employees to LLP. Schedule 8, which recorded that the agreement "envisage[d] that subsequent to the commencement of this agreement, the identity of the provider of the Services (or any part of the Services) may change (whether as a result of termination of this agreement, or part, or otherwise) resulting in a transfer of the Services in whole or in part" (paragraph 3.1) also contained detailed provisions dealing with employment upon such a Service Transfer.

25. Provisions relating to the supply of the Services were contained in clause 7, including the following:

> "7.1 The LLP shall provide the Services to Quad subject to the terms and conditions set out in this Agreement.
>
> 7.2 Quad shall at its own expense from time to time supply the LLP with all necessary information, data, documentation and other records and materials relating to the Services (the 'Input Documentation') within sufficient time to enable Quad [presumably this should read 'the LLP'] to provide the Services in accordance with this Agreement. The parties hereby acknowledge and confirm that as at the date hereof Quad has provided to the LLP all such Input Documentation as may be necessary for the LLP to commence provision of the Services to Quad. In addition, Quad shall make available the Assets to the LLP in order to enable it to perform the Services PROVIDED HOWEVER THAT such consent to use the Assets

> shall be terminated immediately upon the termination or expiration of this Agreement.
>
> 7.3 The LLP shall provide the Services in a professional, competent, diligent and efficient fashion in accordance with Best Industry Practice and shall devote such time and efforts as it deems reasonably necessary for the efficient operation of Quad's business.
>
> 7.4 The LLP shall in providing the Services comply with any statutory, regulatory or professional requirements as well as any other reasonable requirements made known to it from time to time by Quad which shall include (but not be limited to) the implementation of any actions arising from any reviews of service standards by Quad with any Clients or Introducers. The LLP shall consider in good faith any recommendations made by Quad in the LLP's performance of the Services and the LLP shall be deemed to accept any such recommendation unless the LLP promptly notifies Quad in writing of the LLP's rejection of any such recommendation and provides reasonably detailed reasons for such rejection.
>
> 7.5 Without prejudice to the generality of the LLP's obligations contained in this Agreement, the Services shall be performed to a standard no less favourable than that provided by the LLP from time to time for other clients in respect of services the same as or similar to the Services."

Clause 1 and Schedule 1 defined "Assets" as "All assets owned or leased by Quad to the extent that they are used on or prior to the date of this Agreement for the provision of the Services to the Clients or for any reason relating to the business of Quad".

26. Clause 9 contained provisions relating to finance. Clause 9.1 provided for LLP's remuneration:

> "In consideration of the provision of the Services by the LLP to Quad, the LLP shall on the last working day of each month invoice Quad in the sum of 57% of the aggregate of the amounts Quad has invoiced to the Clients and received payment for during each respective month for the Services … together with any Commissions received by Quad for that month to the extent that the Services were carried out on or after 1st April 2007 ('the Administration Fees'). For the avoidance of doubt the amounts referred to above shall include payments and Commissions received in respect of QFC matters. …"

27. Clause 15 contained extensive provisions regarding the term and termination of the Services Agreement:

i) Clause 15.1 provided that either party might terminate the agreement by written notice in certain specified events, which concerned the insolvency of the other party;

ii) Clause 15.2 provided that Old Quad might terminate the agreement if LLP committed a material breach of the agreement (and, if the breach were remediable, failed to remedy it within 30 days);

iii) Clause 15.3 gave to each party the right to terminate the agreement on three months' written notice; however, clause 15.4 provided that no such notice could be effective to terminate the agreement before the expiry of 99 years from the Effective Date: that is, before 6 April 2106;

iv) Clause 15.5 gave to Old Quad the right to terminate the agreement by three months' notice in two specified circumstances, which concerned respectively the cessation of involvement of certain key personnel in LLP and the fall of Old Quad's income under the agreement below specified levels.

28. The effect of clause 15 as a whole was that LLP could only bring the agreement to an end on the occurrence of one of the events indicating Old Quad's insolvency, though the Services Agreement did not purport to derogate from LLP's rights under the general law to terminate for a repudiatory breach of contract by Old Quad.

29. Finally, clauses 17, 18 and 20 provided as follows:

> "17.1 This Agreement and the documents referred to in it constitute the entire agreement between the parties and supersedes all prior arrangements, written or oral with respect thereto. All other terms and conditions, expressed or implied by statute or otherwise, are excluded to the fullest extent permitted by law….
>
> 17.3 If any of the provisions of this Agreement are held by any competent authority to be invalid or unenforceable in whole or in part, the validity of the other provisions of this Agreement and the rem[a]inder of the provisions in question shall not be affected…
>
> 18. The LLP and Quad are not partners with each other and neither the terms of this Agreement nor the fact that Quad and the LLP or anybody affiliated to the LLP may have joint interests in any one or more investments shall be construed so as to make them partners of each other or impose any liability as such on either of them…
>
> 20.1 The LLP may not assign, sub-contract, novate or otherwise dispose of any or all of its rights and obligations under this Agreement without the prior written consent of Quad other than in accordance with this Agreement.

> 20.2 Quad may assign, novate or otherwise dispose of any or all of its rights and obligations under this Agreement to any third party of its choice without consent."

The dispute

30. It appears that the parties operated under the Services Agreement and the IARA without material difficulty for a number of years. However, as the Judge put it, as the years passed the advantages for LLP arising out of the provision of a turnkey business "featured less prominently in the thoughts of the members of LLP than did the fact that LLP was carrying on a significant part of its business activities on a basis that provided profit to New Quad but none to itself". There may also have been dissatisfaction with the 57%/43% apportionment arrangement.

31. By letter dated 11 June 2018 to New Quad, LLP indicated (amongst other things) that, having taken legal advice, it intended, as from 1 September 2018, to proceed on the basis that the Covenants were in unreasonable restraint of trade and that Clause 2.2 of the Services Agreement was unenforceable. The term of the Services Agreement would be treated as amended to a period of time "deemed reasonable, a period between 5 to 10 years". This meant that LLP was "free to contract with whoever it wishes without any restraint."

32. That letter led New Quad, in July 2018, to commence the present proceedings seeking, amongst other things, declaratory relief to establish that the Services Agreement was fully enforceable between the parties. LLP counterclaimed seeking, amongst other things, declaratory relief to the effect that the Covenants were in unreasonable restraint of trade. New Quad sought and obtained interim injunctive relief, which the Judge granted (by consent) on 22 August 2018.

The hearing and the Judgment

33. The hearing took place over four days, during which the following witnesses gave evidence:

    i) For New Quad: Mr Coombes, Mr Baldwin and Mr Russell Powis (a non-executive director of Old Quad);

    ii) For LLP: Mr Reid-Jones, Mr Vincent and Mr Williams.

34. The Judge had to address a number of issues that are not the subject of this appeal and so do not arise for our consideration. However, he described the question of whether the Covenants were an unreasonable restraint of trade as "the central issue in the case".

35. On that issue, he summarised LLP's case and then considered the law. Applying the law to the facts he concluded first that the doctrine did not apply to the restraints in the Covenants, reasoning, in summary, as follows:

    i) The Services Agreement had to be considered on its own terms and in its own circumstances; attempting to pigeon-hole it would not assist. It was a bespoke agreement;

ii) Equally, addressing the question of whether or not the effect of the Services Agreement was to make LLP an agent of Old/New Quad would not assist. The existence of an agency relationship was neither necessary nor sufficient for the application of the doctrine;

iii) A group of related considerations weighed "especially strongly" against the application of the doctrine:

a) LLP was brought into existence for the purpose of the restructuring effected via the Services Agreement. It had no prior business. LLP's complaint as to restraint of trade lacked the kind of traction normally found where the doctrine applies;

b) The Services Agreement was the sine qua non of LLP's ability to trade at all. The Services Agreement was not, in any relevant sense, a restraint of trade, but rather a means of providing the opportunity to trade;

c) There was a degree of incoherence in attempting to place the Covenants within the scope of the doctrine:

- The context of the agreement was critical. The legacy business itself - the goodwill and its profits - remained that of Quad. It was to revert to Quad upon termination;

- LLP did not complain of the duration of the Services Agreement itself, or the nature of the Covenants themselves (which were unexceptional in principle);

- LLP's complaint as to the duration of the restraints in the Covenants divorced the restraints from the wider agreement and thus mistook their nature. Their purpose was to recognise the legacy/LLP client ownership boundaries, as Mr Coombes had said in evidence;

- The evidence showed that it was always intended that the Covenants should last for the full term of the agreement and one year thereafter. LLP agreed to an extended term of 99 years. The consequences for LLP and Quad respectively endured so long as the agreement subsisted. The Covenants gave effect to the ownership boundaries, reflecting the fact that, whilst LLP was given the benefit of servicing the legacy business for the lengthy period it agreed to, it had not acquired that business for itself and was not entitled to use its favourable position under the Services Agreement to help it to take a business for which it had not bargained.

36. The Judge further took into account his considerations on reasonableness. As to that, the Judge concluded that the Covenants were reasonable in any event, reasoning in summary as follows:

i) The Services Agreement and the restraints in the Covenants were a matter of free agreement between experienced, intelligent, articulate and highly competent business people, who were properly able to look after their own interests and who expressly agreed that the restraints were reasonable as being necessary to protect the parties' interests;

ii) There was no "true substance" in LLP's submission that there was an inequality of bargaining power between the parties (given that there was no formalised negotiation process and no one clearly representing the interests of LLP). This was not a case of one naïve and inexperienced party facing a commercially sophisticated counterparty. The negotiations were carried out in a spirit of seeking an outcome that was fair and reasonable for all concerned, largely as a matter of the "inherent decency" of the individuals involved, and because it would be in no-one's interests to inflict damage on the other (counterparty);

iii) The absence of independent legal advice to LLP was not a reason to view the parties' free agreement with caution. LLP was perfectly capable of obtaining its own legal advice. Clause 2.6 of the Services Agreement recorded that each party had taken separate legal advice "if required". He accepted the evidence of Mr Baldwin that the members of LLP were comfortable with the agreement; they never turned their minds to the question of independent legal advice;

iv) LLP's complaint that the principal commercial consideration under the Services Agreement, namely the fee division in clause 9, was inadequate and unfair did not indicate unreasonableness in the Covenants. The figures were a matter of mutual discussion and agreement; at the time of agreement the split was considered to be fair and reasonable, and the totality of the evidence fell far short of establishing that that view was mistaken. The absence of tapering provision did not alter this: it was clear from the Services Agreement that the apportionment would apply throughout the duration of the agreement and the parties knew that there was no contractual provision for renegotiation. Tapering might - or might not - have been advantageous for LLP. Nor was there any force in the submission that New Quad had received many times more by way of fees from the legacy clients than the value placed on the legacy business in 2007. In any event, the actual benefits received over time were not themselves relevant to the assessment of reasonableness. The question was not whether the apportionment was favourable to one side or the other, but whether the Covenants were reasonable. The adequacy of consideration may be relevant, but it was a distinct question. He rejected the contention that the totality of the consideration provided to LLP was sufficiently inadequate such as to amount to evidence of unreasonableness (by reference to Mr Reid-Jones' email of 11 October 2007 (referred to above));

v) If necessary, the 100-year duration of the Covenants was adjudged to be reasonable. They only applied during the subsistence of the Services Agreement (plus a year). It was entirely justified for New Quad, which upon termination had the right to seek to retender the outsourcing of the legacy business or to seek to insource it, to protect that business from LLP which bargained to use that business for its own advantage but never to acquire it. The term was not imposed by New Quad but suggested and accepted as a

method of addressing a concern by LLP. The term was not arbitrarily long when viewed in its proper context (with clients including pension funds and other organisations which might themselves subsist for more than a century). The positive obligation on LLP to service the legacy clients did not stifle, but rather facilitated the trading of LLP on its own account;

vi) The Judge considered the hypothetical example of a client, 15 years into the Services Agreement, deciding to run a tendering exercise for the future provision of services, following which the business was lost to Quantum and given to a third party. He did not consider that the fact that Clause 2.2.2 would prevent LLP from providing services to that client at any future time within the remaining 85 years indicated that the Covenants were unreasonable. The concern was hypothetical only; the extent of the ability to bid in the future for work could not be assessed at the time of making the Services Agreement; the Covenants provided certainty without introducing arbitrary distinctions; the contractual acknowledgment of reasonableness was not to be ignored;

vii) LLP had not persuaded the Judge that the Covenants were unreasonable on account of any consideration of public policy (either by reference to the fact that LLP was the only business of its kind (based) in Wales or to the contention that, if freed from the obligation to account (in effect) for 43% of the fee income from legacy clients, LLP would be able to offer services at more competitive rates).

Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd **[2020] UKSC 36**

37. Subsequent to the Judgment, on 19 August 2020, the Supreme Court handed down judgment in *Peninsula Securities*. There the court considered the application of the doctrine to covenants restraining the use of land for trading.

38. Applying the facility inherited under *Practice Statement (HL:Judicial Precedent)* [1966] 1 WLR 1234, the Supreme Court departed from the previous well-known decision of the House of Lords in *Esso Petroleum Ltd v Harper's Garage Southport* [1968] AC 269 ("*Esso*") in overruling the "pre-existing freedom" test there propounded by Lord Reid. Instead it unanimously approved what it described as "the trading society test" propounded by Lord Wilberforce.

39. In *Esso* the majority of the House of Lords favoured the "pre-existing freedom" test as follows:

> "Restraint of trade appears to me to imply that a man contracts to give up some freedom which otherwise he would have had. A person buying or leasing land had no previous right to be there at all, let alone to trade there, and when he takes possession of that land subject to a negative restrictive covenant he gives up no right or freedom which he previously had."

(per Lord Reid at 298B-D). This view enjoyed the support of Lord Morris (at 309E) and of Lord Hodson (at 316G-317A).

40. Lord Pearce (at 328D) favoured a further test of "sterilisation of capacity":

> "The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract, viewed as a whole, is directed towards the absorption of the parties' services and not their sterilisation."

41. As indicated, Lord Wilberforce did not subscribe to the pre-existing freedom test. In a dissenting opinion, he adopted the "trading society" test. He stated (at 332G-333C):

> "…the development of the law does seem to show that judges have been able to dispense from the necessity of justification under a public policy test of reasonableness such contracts or provisions of contracts as, under contemporary conditions, may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations. That such contracts have done so may be taken to show with at least strong prima facie force that, moulded under the pressures of negotiation, competition and public opinion, they have assumed a form which satisfies the test of public policy as understood by the courts at the time, or, regarding the matter from the point of view of the trade, that the trade in question has assumed such a form that for its health or expansion it requires a degree of regulation. Absolute exemption for restriction or regulation is never obtained: circumstances, social or economic, may have altered since they obtained acceptance, in such a way as to call for a fresh examination: there may be some exorbitance or special feature in the individual contract which takes it out of the accepted category: but the court must be persuaded of this before it calls upon the relevant party to justify a contract of this kind…."

42. He went on (at 335C-D):

> "I think one can only truly explain [the exemption of certain transactions from the doctrine] by saying that they have become part of the accepted machinery of a type of transaction which is generally found acceptable and necessary, so that instead of being regarded as restrictive they are accepted as part of the structure of a trading society. If in any individual case one finds a deviation from accepted standards, some greater restriction of an individual's right to "trade," or some artificial use of an accepted legal technique, it is right that this should be examined in the light of public policy".

43. He went on (at 335E-336A) to consider the "well-known type of case where a man sells his business and its goodwill and accepts a limitation on his right to compete":

> "….So the rule has become accepted that, in the interest of trade itself, restrictions may be imposed on the vendor of goodwill provided that they are fairly and properly ancillary to the sale: if they exceed this limit, the "doctrine" may be applied…"

44. The Supreme Court acknowledged that the "pre-existing freedom" test had come under heavy scrutiny, both academically and in later jurisprudence, most notably in Australia where the test has been emphatically rejected. It held that the test did not deserve its place in the doctrine, there being no public policy reason why a restraint should engage the doctrine if the covenantor enjoyed a pre-existing freedom, but why an identical restraint should not engage it if he did not do so (see in particular [44] of the judgment of Lord Wilson).

45. By contrast, the "trading society" test was consonant with the doctrine, since it reflected the importance attached to freedom to trade, which generated the doctrine, and the importance attached to the enforceability of contracts in the interests of trade, which kept the doctrine within bounds (see [45] to [47] of the judgment of Lord Wilson[6]). Thus a covenant relating to the use of land was not subject to the doctrine if it was of a sort which had become part of the accepted machinery of a type of transaction which had generally been found acceptable and necessary, so that instead of being regarded as restrictive, such covenants were accepted as part of the structure of a trading society. In that case, involving the grant of a long lease in part of a shopping centre, the inclusion of a restrictive covenant binding the lessor in relation to the use of other parts of the centre had long been accepted. It followed that, by reference to the trading society test, the doctrine was not engaged.

46. Lord Carnwath, in a short separate judgment, agreed with the result favoured by Lord Wilson, Lord Lloyd-Jones, Lady Arden and Lord Kitchin. He described the formulation of the "trading society" "approach" as "no more than an imprecise guide" (at [60]). When considering its application to the facts of any case, he commented (at [61]):

> "…Less important than history is whether, in the light of established practice, there is in the relevant context any public policy reason for interfering in the process of negotiation between the parties, or seeking to redress the balance of interests between them. The doctrine is an exception to the ordinary principles of freedom of contract, and should not be extended without good justification beyond those categories already established by the case law, or indistinguishable in principle from them…."

47. Lord Carnwath concluded (at [67]) that on the facts of *Peninsula Securities:*

> "..No feature of public policy requires that if he freely contracted he should be excused from honouring his contract."

48. It has been acknowledged that the approach of the (majority in the) Supreme Court raises, amongst other things, the question as to how private parties are to prove whether a contractual restriction is or is not "acceptable and necessary" "as part of the structure of a trading society" (see for example the commentary of Aidan Robertson QC: "*The common law doctrine of restraint of trade – will it rise up again unshackled by Brexit and reformed by the Supreme Court?"* ECLR 2021 at 42(2), 62-64). It was recognised by the Supreme Court in *Peninsula Securities* itself as being an inherently difficult standard to define or apply (see [45] to [47] per Lord Wilson).

The grounds of challenge

Ground 1

49. In his written submissions for LLP Mr Butler QC contended that, whilst the application of the doctrine was something for which there was no single, exhaustive test, it was clear that the court is or should be concerned with the covenant's practical

[6] Lord Wilson emphasised (at [46]) that the "proper rooting" of the test in public policy generated a need to qualify it: public policy is not a constant. A change in society might precipitate a change in public policy.

effect. The Judge had failed to consider the practical effect of the Covenants at all, and focussed almost exclusively on the circumstances in which the Services Agreement was entered. Those circumstances might well be highly relevant to the second question (of reasonableness) but are of no relevance to the first question (of engagement). One particular danger of focussing on factors other than the practical effect of the Covenants was said to be well-illustrated by this case: it leads to undue weight being placed on the circumstances at inception of the contract, and insufficient weight on the totality of its course. LLP is now a relatively substantial organisation with a turnover in excess of £8 million per annum, and the overlap in personnel between it and New Quad is very much less than it was. It is now a sizeable and independent entity. If proper regard is paid to the practical effect of the Covenants, there can be no question that they are restrictive in nature. Even if a client were to have terminated Old Quad's retainer on the day after the Services Agreement LLP could not deal with that client for a century. This is relevant not only to reasonableness but also highlights the restrictive nature of the Covenants and why the doctrine of restraint of trade is engaged. The breadth of the Covenants, their duration, the fact that LLP is forced to provide services under the SA with no facility to alter the levels or commission, no meaningful ability to terminate or any ability to assign the SA, are all factors which point toward the doctrine being engaged (and the Covenants being "plainly unreasonable").

50. In the light of *Peninsula Securities*, however, Mr Butler adopted a bolder primary position in his oral submissions, contending that the "trading society" test is now the single test to be applied in all cases and by reference to the categories identified by Lord Wilberforce in *Esso*[7]. Since the Covenants do not "come close" to any of the established categories of cases accepted as falling outwith the doctrine, the doctrine therefore falls to be applied. In the alternative, relying on the reasoning of Lord Wilberforce (at 333C), this was a case with "exorbitant[t]" or "special feature[s]", words with particular resonance in the present case where the restrictive covenants are to endure for 99 years (plus 12 months) in the absence of any meaningful right on the part of LLP to terminate. These were factors taking the Covenants out of the accepted category of normal commercial relations.

51. In summary, seen through the prism of *Peninsula Securities*, the Judge's conclusion on the threshold issue the subject of Ground 1 is said to be clearly wrong.

Ground 2

52. Mr Butler accepts that the Judge correctly recognised that the starting point in assessing reasonableness is the *Nordenfelt* test. However, he submits that the Judge:

    i) Failed at any stage to identify what legitimate interest of Old Quad/New Quad the Covenants seek to protect, or to answer the fundamental question of whether the Covenants were no more than was adequate to protect it. Even if it is assumed that the Judge had in mind the desire of Old Quad to protect the legacy business, it is far from clear that it can be described as legitimate to seek to protect the interest in trade connections for a period of 100 years. The evidence as to the change in the duration of the Services Agreement was highly material: no one involved in the negotiation process "gave a second

[7] Although Mr Butler accepted that the categories were not necessarily exhaustive as opposed to illustrative.

thought to the effect" of the extension to the length of the Services Agreement on the Covenant;

ii) Misunderstood and mishandled the important question of inequality of bargaining power. Amongst other things, LLP had not been properly represented in the negotiations. There was no one looking exclusively at the position of LLP, which has to be treated as a separate entity in itself, divorced from the individuals behind it. No one was "squarely and unconditionally" focussing on the consequences of a 99 year term from LLP's perspective. That term would long outlive the individuals in question; the members of LLP are now different;

iii) Failed to undertake the fundamental exercise of considering the reasonableness of the Covenants in the round. Although the Judge rejected the individual matters relied upon by LLP with "considerable care", he overlooked the real thrust of the LLP's case which was that it was those factors in combination which rendered the Covenants unreasonable. LLP is locked into the SA to provide services to Old Quad's clients for a term of 99 years, whilst prohibited from any direct dealing with any of those clients on its own account. LLP had only limited termination rights.

The Law

53. It is easy to refer to "the doctrine of restraint of trade" without first reminding oneself precisely what is meant by it. It can be encapsulated as follows:

> "All covenants in restraint of trade are prima facie unenforceable at common law and are enforceable only if they are reasonable with reference to the interest of the parties concerned and of the public. Unless the unreasonable part can be severed by the removal of either part or the whole of the covenant in question, its including renders the covenant or the entire contract unenforceable."
>
> (see *Chitty on Contracts* (33rd ed.) ("*Chitty*") at 16-106)

Application of the doctrine

54. The definition of a covenant in restraint of trade presents "peculiar conceptual difficulty"[8]: *Chitty* comments that all contracts are to some extent in restraint of trade by at least preventing the parties to the contract from trading with others[9]. However, there has been no suggestion that all contracts are or should be subject to the doctrine, which is rather "to be applied to factual situations with a broad and flexible rule of reason" (see *Esso* (at 331G per Lord Wilberforce)). The courts have made no apologies for refraining from any attempt to identify the dividing line between contracts which are and are not in restraint of trade. It has been described as "uncertain and porous" (see *Proactive Sports Management Ltd v Rooney* [2012] FSR 16 ("*PSM*") (at [55] per Arden LJ). The courts have emphasised repeatedly that the categories of restraint of trade are not closed (see for example *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146 (at 169 per Lord Denning MR)) ("*Petrofina"*).

[8] See *Chitty* at 16-108.
[9] See *Chitty* again at 16-108.

55. The doctrine is "of ancient origin" (see *Esso* (at 293D per Lord Reid)) and, as such, is one of the oldest applications of the doctrine of public policy. As early as 1711 it was held in *Mitchel v Reynolds* [1711] 1 P Wms 181 (*"Mitchel"*) that a bond to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good, though if it be upon no reasonable consideration or to restrain a man from trading at all, it is void. Lord Macclesfield's distinction was one between contracts made upon good consideration and those which were merely oppressive (see *Mitchel* at 348).

56. *Mitchel* has been described recently as a "seminal judgment" (see *Egon Zehnder Ltd v Tillman* [2019] UKSC 32; [2020] AC 154 (at [25] per Lord Wilson)) and remains authoritative. The roots of oppression see their modern expression in subsequent recent formulations of the doctrine (see for example *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 ("*Schroeder"*) (at 1314H per Lord Reid and at 1315F-H per Lord Diplock); *Esso* (at 323D per Lord Pearce); *PSM* (at [105] per Arden LJ and at [150] per Gross LJ).

57. At the heart of the doctrine lies the tension between two freedoms, on the one hand freedom of contract, and on the other freedom of trade: see *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 (*"Saxelby"*) (at 716 per Lord Shaw). How these freedoms are reconciled may depend on the type of contract in question. By way of example, between employer and employee, the court more jealously guards the freedom of an employee to earn a livelihood elsewhere; in other cases, more weight is given to the "policy of the law that contracts freely entered into should, prima facie, be enforced" (see *Whitehill v Bradford* [1952] Ch 236 (at 246 per Lord Evershed MR)).

58. Following *Mitchel* and up to and including *Esso,* the principles were developed in five decisions of the House of Lords: *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535 ("*Nordenfelt*"); *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724; *Saxelby; Fitch v Dewes* [1921] 2 AC 158; and *Esso*[10].

59. Since *Esso,* the scope of the doctrine and its application have been further explored over the years in a number of authorities. The Judge was taken to (and considered) the following: *Panayiotou v Sony Music Entertainment* [1994] EMLR 229 ("*Panayiotou*"); *PSM*; *One Money Mail Ltd v RIA Financial Services* [2015] EWCA Civ 1084 ("*One Money Mail*"); *CJ Motorsport v Bird* [2019] EWHC 2330; [2019] IRLR 1080 ("*CJ Motorsport*"). On appeal further authorities have been referred to, including *Stenhouse Australia Ltd v Marshall William Davidson Phillips* [1974] AC 391 ("*Stenhouse"*); *Schroeder* and, of course, *Peninsula Securities,* as set out above.

60. I draw together the relevant legal principles from the authorities (including most recently *Peninsula*) as follows:

    i) The doctrine is not confined to immutable boundaries or rigid categorisation, but there are certain categories of covenants to which the doctrine traditionally applies, in particular those by which an employee undertakes not to compete with his employer after leaving the employer's service and those by which a trader who has sold his business agrees not thereafter to compete with the

[10] Preceded closely by *Petrofina*.

purchaser of the business. The doctrine has been held to apply to franchise agreements, share-purchase agreements and the assignment of a patent;

ii) There are no clear limits on the scope of the doctrine and no precise or exhaustive test can be stated. The doctrine is to be applied to factual situations with a broad and flexible rule of reason (see *Esso* (at 331G per Lord Wilberforce)). The question is whether or not in all the circumstances the contract should be excluded from the application of the doctrine or, as Lord Wilberforce put it in *Esso* (at 332G), whether it is appropriate to dispense the contract "from the necessity of justification under a public policy test of reasonableness";

iii) Contractual restraining provisions which are of a sort which have become part of the accepted machinery of a type of transaction which have generally been found acceptable and necessary – reflecting the accepted and normal currency of commercial or contractual conveyancing relations - will generally fall outside the scope of the doctrine (following the "trading society" test discussed above and approved in *Peninsula Securities*);

iv) Determining whether contractual restraints fall outside the range of a normal commercial contract imposing restrictions on a contracting party's ability to carry on a business activity is a question of evaluating all the relevant factors to be assessed cumulatively (see in particular *PSM* (at [99] per Arden LJ))**;**

v) The assessment of application of the doctrine is to be carried out by reference to the position as at the time that the contract is made (not by reference to subsequent performance and events). How the contract turns out may be relevant only in so far as it furnishes evidence of the nature of the contract in question when made (see in particular *Schroeder* (at 1309 per Lord Reid); *PSM* (at [104] per Arden LJ and at [149] per Gross LJ));

vi) The application depends less on legal niceties or theoretical possibilities than on the practical effect of the restraint in hampering the freedom to trade (see in particular *Esso* (at 298A-B per Lord Reid)). It is a question of substance not form (see in particular *Stenhouse* (at 402G-H per Lord Wilberforce));

vii) The doctrine can apply to restraints operating during the currency of the contract, as well as post-contractually. However, the distinction between pre- and post-termination restraints is not without relevance. The fact that a restraint is limited to the period of the contract may be a factor in favour of excluding the doctrine (or a factor to be brought into account on the side of justification) (see in particular *Esso* (at 238 per Lord Pearce; *Panayiotou* (at 335 per Jonathan Parker J) and *One Money Mail* (at [5] per Longmore LJ));

viii) As already set out above, where the doctrine applies, the contractual restraints are prima facie unenforceable but all, whether partial or total, are enforceable if reasonable.

61. The approach of the courts to analogous factual situations may be of assistance in determining the correct approach to be taken but is unlikely to be determinative because of the fact-sensitive nature of the exercise to be carried out.

Reasonableness

62. On the question of reasonableness, it is common ground that the test identified by Lord Macnaghten in *Nordenfelt* (at 565) is to be applied:

> "reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is no way injurious to the public."

63. Whilst in some of the authorities the courts have conflated the two (private and public interest) aspects of the test (see for example *Attorney-General of the Commonwealth of Australia v Adelaide SS Co* [1913] AC 781 (at 795 per Lord Parker) and *Esso* (at 324D per Lord Pearce)), the broad view appears to be that Lord Macnaghten's dichotomy is to be preferred[11]. Where businesses have dealt at arm's length with each other, they can usually be regarded as adequate guardians of their own interests. However, the possible impact of the bargain upon third parties, or the public more generally, may call for careful judicial scrutiny. Clarity of analysis is more likely to be facilitated by preservation of both limbs of the exposition.

64. A court will be slow to substitute its (objective) view as to the interests of the contracting parties for the (subjective) views of the contracting parties themselves. The law recognises that if business contracts are fairly made by parties who are on equal terms such parties should know their business best (see in particular *Esso* (at 300C-D per Lord Reid; at 305B-D per Lord Morris and at 323B-E per Lord Pearce)). That consideration will carry less or no weight if the parties were negotiating on other than equal terms (see *Panayiotou* (at 332 per Jonathan Parker J)). The absence of independent legal advice for the weaker party may also be relevant (see *PSM* (at [100] per Arden LJ)).

65. Beyond this, and again drawing the relevant threads together by way of summary:

i) The onus of establishing that a covenant is no more than is reasonable in the interests of the parties is on the person who seeks to rely on it (see in particular *Attwood v Lamont* [1920] 3 KB 571 (at 587-588 per Younger LJ). If he/she establishes that it is no more than reasonable in the interests of the parties, the onus of proving that it is contrary to the public interest lies on the party attacking it (see in particular *Saxelby* (at 716 per Lord Shaw));

ii) The time for considering reasonableness is again the time of the making of the contract (see in particular *Gledhow Autoparts Ltd v Delaney* [1965] 1 WLR 1366 (at 1377 per Diplock LJ); *Shell v Lostock Garage Ltd* [1976] 1 WLR 1187 (at 1197-1198 per Lord Denning MR) and *Schroeder* (at 1309H per Lord Reid));

iii) It is no answer on the question of reasonableness to say that there have been substantial financial rewards on all sides. The question of reasonableness has

[11] See for example *Illegality and Public Policy* (5th edn) by Professor Richard A. Buckley at 12-11.

to be considered by reference to the terms of the contract (see in particular *PSM* (at [104] per Arden LJ));

iv) For a restraint to be reasonable between the parties it must be no more than what was reasonably required by the party in whose favour it was imposed to protect his legitimate interests (see in particular *Saxelby* (at 701 per Lord Atkinson) and *Schroeder* (at 1310B per Lord Reid and 1315H per Lord Diplock));

v) The court is entitled to consider whether or not a covenant of a narrower nature would have sufficed for the covenantee's protection (see in particular *Office Angels Ltd v Rainer Thomas and O'Connor* [1991] IRLR 214 (at 220 per Sir Christopher Slade));

vi) What is reasonable may alter with the changing nature of commerce and society (see in particular *Nordenfelt* (at 547 per Lord Herschell));

vii) Factors to be considered when assessing reasonableness between the parties include the character of the business (see in particular *Nordenfelt* (at 550 per Lord Herschell)) and also:

a) The relevance of the consideration for the restraint;

b) Inequality of bargaining power;

c) Standard forms of contract;

d) Whether the restraints operate during or post-contract;

e) The surrounding circumstances, including the factual and contractual background;

(see in particular *Panayiotou* (at 329-336 per Jonathan Parker J));

viii) The duration of an agreement in restraint of trade is a factor of great importance in determining whether the restrictions in an agreement can be justified (see in particular *Schroeder* (at 1312F-G per Lord Reid));

ix) The level of compensation may be relevant to the question of reasonableness (see *Esso* (at 300B-C per Lord Reid) and *Panayiotou* (at 329-330 per Jonathan Parker J));

x) The motives of the party challenging the contract are immaterial to the question of whether the terms of the contract are reasonable as between the parties (see in particular *Schroeder* (at 1309H per Lord Reid) and *Panayiotou* (at 336 per Jonathan Parker J)).

Interplay between application of the doctrine and reasonableness

66. There is a degree of overlap between the two stages to be considered (namely whether the doctrine applies at all and, if it does, whether the restraints are reasonable): see *PSM* at [59] where Arden LJ observed:

> "….the line between the two stages…is not clear cut, and the analysis has to be an iterative one between them…."

and where Gross LJ went on (at [147]) to state:

> "…these questions, though analytically separate, cannot be viewed as existing in wholly watertight compartments."

Discussion

67. In order to succeed on this appeal, LLP needs to overturn both the Judge's finding as to engagement of the doctrine of restraint of trade in principle and as to reasonableness of the Covenants. As indicated above, the two questions are not to be treated as entirely discrete. On the facts of this case, there is a very significant degree of overlap. It is however convenient to consider the threshold test first, whilst acknowledging this interplay.

68. There are three steps to consider:

    i) Whether or not, in practical terms, the restraints in the covenant amount to a restraint of trade;

    ii) If so, whether or not the covenant should be excluded from the application of the doctrine. The question is whether or not (as a matter of public policy) it is appropriate to dispense the contract from the necessity of justification under a public policy test of reasonableness;

    iii) If the doctrine is engaged, whether or not the covenant is reasonable by reference to the private interests of the parties and to the public interest.

69. It is common ground that the restraints in the Covenants constitute a practical restraint of trade (in a literal sense) so as to satisfy the first question. They prevent, amongst other things, the solicitation of any of Quad's clients (as identified) and performance of any Services for them (outside the SA) throughout the 99 year currency of the SA (plus a year). I would add, however, that the acknowledgement at the end of Clause 2.2 should not be overlooked; on any view, it tempered the effect of the restraints, allowing for the possibility for LLP to provide services to Quad's clients on its own account with written permission. Mr Butler submitted that the acknowledgment added nothing to what would in any event be contractually possible and so nothing of any materiality. I disagree: at the very least it gave LLP the comfort of certainty in the event that New Quad was given the opportunity to undertake the Services itself and declined it in writing. It also demonstrates the goodwill between the parties at the time of contracting, and the mutual desire for the arrangements to be in everyone's best interests: Quad had in contemplation the possibility of giving away "something for nothing" to LLP, as it was put in argument.

Ground 1

70. It is necessary first to consider the correct approach in law to be taken to the question of whether or not the threshold to engagement of the doctrine is crossed.

71. Whilst it is clear that the Supreme Court in *Peninsula Securities* rejected the "pre-existing freedom" test in the context of the doctrine as a whole[12], overruling *Esso* in this regard, I reject the submission that at the same time it laid down the "trading society" test (which Lord Carnwath preferred to describe as an "approach") as the single test of universal application in determining whether or not the doctrine is engaged.

72. The "trading society" test fitted neatly with the facts in *Peninsula Securities*, a case involving the grant of a long lease of part of a supermarket (and covenants affecting the use of land). However, there was no suggestion that it is now to be seen as "the" test for all purposes, and no suggestion of interference with the long-established view on the authorities that there is no single test to be applied (as set out above). Indeed, Lord Wilson (at [26]) endorsed Lord Wilberforce's speech in *Esso* (at 331):

> "…the common law had often thrived on ambiguity; that, even if it were possible, it would be mistaken to try to crystallise the rules of the doctrine into neat propositions; and that the doctrine had to be applied to factual situations with a broad and flexible rule of reason….."

73. Any other approach would lead to the result that every contract that did not satisfy the "trading society" test, for example because it was entirely novel, would automatically fall within the doctrine; that would be a most surprising result. If the test were to be elevated as suggested, it would have to be so widely interpreted as to lose any meaningful value.

74. Here, the Services Agreement is a private bespoke agreement created in very specific circumstances arising out of a complex corporate restructure. It was fashioned to address the competing needs and interests of a group of professional people and, in particular, the practical issues involved in permitting one part of the group to enjoy the benefits of the established Quantum brand and business when that cohort was unable to afford a buyout of the interests of the other group.

75. It is thus not a type of contract which falls naturally into a category susceptible to considerations of "accepted and normal currency" of commercial or contractual dealings. Rather, it falls to be considered, as the Judge said, "very much on its own terms and in its own circumstances".

76. However, if it were necessary to consider the application of the "trading society" test to the Covenants, it can be noted that the character of the Covenants falls well within the ambit of a type envisaged by Lord Wilberforce in *Esso* as being exempt from the doctrine on the application of that test. At 335F-336A he said:

> "Then there is the well-known type of case where a man sells his business and its goodwill and accepts a limitation on his right to compete…That, on the sale of the goodwill of a business, a promise might validly be given not to carry on the relevant trade was established…..So the rule has become accepted that, in the interest of trade itself, restrictions may be imposed on the vendor of goodwill

[12] This does not, however, and as seen below, mean that the pre-existing circumstances of the parties can never be relevant.

provided that they are fairly and properly ancillary to the sale: if the exceed this limit the "doctrine" may be applied."

77. What the Covenants do, in the converse situation (where the business and goodwill in question are not being sold), is the mirror reverse: they conventionally (and unobjectionably in principle) impose restrictions to protect the value of that business and goodwill.

78. On this premise, and recognising that any exemption will never be absolute, the question becomes whether or not there was "some exorbitance or special feature in the individual contract which takes it out of the accepted category" (see Lord Wilberforce in *Esso* (at 333C)), or whether the restrictions imposed were "fairly and properly ancillary" to the agreement (see Lord Wilberforce in *Esso* (at 335F-336A)).

79. I would adopt a similar approach by reference to an iterative application of the general principles identified above (and independently of the "trading society" test) and as adopted, for example, in *Rooney*. Public policy, which sets a high threshold, remains the foundation of the doctrine. As the authorities make clear, there is no bright line to be drawn (and it would be wrong to attempt to define one). But what does have to be decided is on which side of the line the facts of any given case fall. This involves an assessment of public policy to be carried out by reference to the facts as they stood at the time that the contract was entered into, balancing the competing considerations of holding parties to freely negotiated contracts whilst not permitting them to be restricted unduly in their ability to trade. The freedom to contract is itself in the public interest (see *Esso* (at 304F-306C per Lord Morris)). The doctrine is not there to rescue business men and women from having entered into agreements which they may later regret.

80. The search is for one or more features of the Services Agreement which, in all the circumstances, can be said to be such a cause for concern (or apparently oppressive) as to justify (as a matter of public policy) requiring the covenantee to prove reasonableness. As indicated, LLP contends that there are, including the duration of the Covenants and the one-sided nature of the termination provisions.

81. For the reasons set out below, however, I do not consider that there is any basis on which to interfere with the Judge's careful evaluative assessment to the effect that there was no cause for concern as to require such justification.

82. LLP's suggestion that the Judge failed to take due account of the practical effects of the Covenants is misplaced. The restrictive effect in practice of the Covenants was (of necessity) an omnipresent consideration in the Judge's analysis. It was effectively a "given"; there was no material dispute as to the scope and effect of the Covenants. The Judge acknowledged at the outset of his discussion (at [87]) the existence of "restraints" in the Services Agreement and again at [92]. At [99], [104] and [105] he identified (and addressed in detail) the duration of the restrictions and also LLP's limited ability to terminate the Services Agreement. At [101] he identified (and addressed in detail) the lack of provision to alter the fee split and the lack of any provision for tapering. Perhaps the most obvious example of his in depth consideration of the practical effect of the Covenants is to be found at [106] of the Judgment (in the context of Clause 2.2.2). Whilst these later paragraphs are contained in the Judgment under the section targeted at reasonableness, the Judge stated in terms

(at [94]) that he (legitimately) took those matters also into account on the threshold question. He was thus fully aware of (and took into account) the practical implications of the Covenants when reaching his conclusion that the doctrine was not engaged.

83. Further, I do not accept LLP's submission that the circumstances surrounding the parties' entry into the Services Agreement (and the individual characteristics of the covenantor) are irrelevant to the threshold question (and only relevant to the question of reasonableness). They directly inform the overall assessment as to whether the doctrine is properly to be engaged (as cases such as *PSM* demonstrate). Equally, LLP is wrong as a matter of law to seek to rely on post-contractual events (such as the fact that LLP is now a "relatively substantial organisation with a turnover in excess of £8 million per annum"). As set out above, the assessment of the application of the doctrine is to be carried out by reference to the position as at the time that the contract is made.

84. Turning then to the matters relied upon by the Judge, first and compellingly, the Services Agreement was a bespoke agreement entered into by sophisticated professional parties who (as the Judge found) were of equal bargaining power[13]. It was a specific solution identified by the parties to meet their desire to go in different business directions in circumstances where a buy-out of Mr Coombes' interest in Old Quad was not to take place.

85. A central plank of LLP's challenge on appeal is to criticise the Judge's finding on equality of bargaining power. Mr Butler described this as a "very important part" of LLP's case, and one can understand why. Where parties deal on an equal footing, with the benefit of legal advice (or the means and opportunity to obtain it), and negotiate the terms in question, "the strong initial presumption must be that the parties themselves are the best judges of what is legitimate", at least so far as their private interests are concerned: see *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67; [2016] AC 1172 at [35] per Lords Neuberger and Sumption; and also *Esso* (at 300C-G per Lord Reid, at 320A-B per Lord Hodson, at 305B per Lord Morris and at 323B-E per Lord Pearce). Unusual circumstances will be required before the court will call on one party to justify the restrictions (see for example *Esso* (at 294B-D per Lord Reid and at 328C-329A per Lord Pearce). Absent an inequality of bargaining power, on the facts of this case, it is very difficult to see on what basis public policy would justify engagement of the doctrine.

86. The Judge considered LLP's submission on bargaining power with conspicuous care. He held that there was "no true substance" in the suggestion of an inequality of bargaining power. He found that "all of the relevant individuals were well able to look after their own affairs and interests". To view the discussions and negotiations in 2007 as adversarial would be to mischaracterise them. The negotiations were carried out in a spirit of not seeking a special advantage for one side or the other but rather an outcome that was fair and reasonable as among all those involved – largely as a matter of the "inherent decency" of those involved. He accepted the evidence of Mr Baldwin as to the approach at the time:

[13] The facts are very far removed indeed from those, for example, in *Schroeder* and *Rooney*.

> "…it was in the interests of everyone that the LLP, which had no money or assets of its own, should succeed, because it was to be the vehicle by which Quad would receive income from the legacy business."

87. The Judge expressly accepted the evidence of Mr Coombes and Mr Baldwin that for certain purposes various individuals wore "different hats". Mr Reid-Jones, who had a less than 20% interest in the legacy business, led for LLP. It is wholly artificial in the circumstances of the parties' arrangements to seek to treat LLP as somehow separate and divorced from the individuals behind it. The Judge found that Mr Reid-Jones "did not feel the least bit compromised". It is clear that Mr Reid-Jones assessed the merits of the overall deal from LLP's separate perspective, as his email of 11 October 2007 (set out above) demonstrates. The Judge did not make any finding that any of the members of LLP misunderstood (or overlooked) the effect of the Covenants, which were always going to endure for the currency of the Services Agreement which everyone clearly understood (from mid-August 2007 onwards) to be 99 years. In terms of independent legal advice, LLP was perfectly capable of taking its own advice, had it needed to (as reflected in Clause 2.6). LLP did not feel it necessary. The Judge accepted Mr Baldwin's evidence that the members of LLP were comfortable with the Services Agreement, together with the remark: "None of us are stupid".

88. Mr Butler sought to pray in aid the harmony between the parties as a factor militating in LLP's favour, in the sense that it emphasised the lack of independent scrutiny brought to bear from LLP's perspective. As set out above, the Judge did not find that there was any such lack of independent scrutiny. There could be no suggestion that Mr Reid-Jones was unlawfully conflicted in any way. He was quite capable of wearing "different hats". Further, contrary to the thrust of LLP's submissions, the Judge did not find that no one within LLP had ever addressed the effect of the extended length of the Services Agreement on the Covenants from LLP's vantage point. It is to be noted that the Covenants (which were expressed in clear and simple terms) were front and centre of the main operative provision in the Services Agreement (ie Clause 2). The terms of the Services Agreement were being considered and evaluated in terms of reasonableness for LLP well after it had been agreed that the term of the Services Agreement would be extended.

89. Nor do the timing and circumstances of the introduction of the 99 year term give rise to any cause for legitimate concern. On the contrary, the origin of the increase in term lay in LLP's concern that a ten year period would not be long enough for it to have found its feet sufficiently to withstand the loss of a major part of its business. The extended term was on any view a very significant alteration. But it was a clear and obvious one, reflected in a fresh draft produced almost immediately after the amendment was agreed in mid-August 2007, several months before the Services Agreement was finally agreed. There was no rush, let alone any pressure on the parties at any stage.

90. Against this background and on the Judge's findings of fact, it seems to me, as it did to the Judge, wholly unreal to suggest that there was any substantive inequality of bargaining power such as to justify engagement of the doctrine (either alone or as part of an overall consideration of the circumstances), or anything in the position of LLP overall such as to cause concern from a public policy perspective.

91. Secondly, the Judge was entitled to take into account the commercial background to and rationale for LLP's creation and the Services Agreement. LLP and the Services Agreement were the vehicles by which the parties achieved their desired ends; the arrangement was what the parties thought best met their interests and objectives. The Services Agreement was there to enable LLP to use the legacy business, its infrastructure and the Quantum brand to build up a business of its own, whilst at the same time leaving the legacy business with Quad. As the Judge said, in this sense, the Services Agreement was the *sine qua non* of LLP's ability to carry on business at all; to speak of it nevertheless operating as some form of restraint of trade is counter-intuitive. It was reasonable for the Judge to describe the creation of LLP and the Services Agreement as a means of providing an opportunity to trade that would not otherwise have been available. To take this factor into account does not offend the abolition of the "pre-existing freedom" test post *Peninsula Securities*. No such test is being applied; rather the relevant circumstances surrounding the operation of the LLP and the Services Agreement are being identified. This was not a situation where LLP could ever have come into free-standing competition with Quad; this was never a situation as would prevail between two independent competitors constrained only by the rules of the market.

92. Thirdly, the Covenants can be described as "fairly and properly ancillary" to the Services Agreement (as reflected, amongst other things, by their positioning immediately after the main operative provision at Clause 2.1). The Judge accepted Mr Coombes' evidence that the Covenants were there to recognise the legacy/LLP client ownership boundaries. It would have been unacceptable for the legacy business to entrust LLP with the servicing of legacy clients and assets without such protection. This also leads to a further conundrum for LLP, given that LLP did (and could) not complain of the duration of the Services Agreement itself. If the Covenants (which are unobjectionable in themselves) were part and parcel of the overall agreement as to how the legacy business was to be distributed, it is difficult to see how they could be divorced (in terms of length) from the duration of the Services Agreement (by which LLP is on any view bound). The Judge found that the evidence demonstrated that it "was always intended that the restraints now found in Clause 2.2 should last for the full term of the agreement and one year thereafter".

93. Fourthly, there are a number of further pointers in support of the conclusion that the doctrine does not apply, including the contractual acknowledgement of reasonableness in Clause 2.5 and Clause 2.6 of the Services Agreement and the fact that there is no sensible suggestion that the practical effect of the Covenants has any adverse impact on the public interest. Reliance can also be placed on the further considerations of reasonableness addressed below in the context of Ground 2.

94. For all these reasons, I do not consider that the Judge was wrong to conclude that there was no basis on which to require New Quad to justify the Covenants as reasonable and that the doctrine was not engaged. The Covenants were not oppressive, but rather fairly and properly ancillary to the appointment of LLP to provide the Services as set out in Clause 2.1 of the Services Agreement. There was no special feature of the Services Agreement (either because of the duration of the Covenants or otherwise), set in its proper context, such as to justify requiring the covenantee to establish that the Covenants were reasonable. The public interest in

holding the parties to a freely negotiated contract outweighs the effect of restricting LLP in its ability to trade.

Ground 2

95. The Judge considered further the question of reasonableness in a separate section. But as he expressly recognised, and as reflected in the analysis above, such considerations can inform both stages of the exercise. Again, I can see no basis for interfering with his conclusion that, in any event and even if the doctrine were to be applicable, the Covenants were reasonable.

96. He repeated the matters relied upon in the context of the threshold question and went on to consider the matters relied upon by LLP. He considered the reasonableness of the fee division in a lengthy analysis which has not been the subject of criticism on appeal (with the possible exception of his comments on the lack of any tapering provision). He rejected any suggestion by Mr Vincent that it was thought that the division would be subject to periodic revision, finding that the parties knew that there was no contractual provision for renegotiation. So much was clear from the Services Agreement. It was hardly axiomatic that the absence of a tapering provision would be disadvantageous to one party or the other; much would depend on the success of LLP's business.

97. The Judge further addressed the question of adequacy of consideration (in a passage that has not been criticised) and (at length) the reasonableness of the duration of the restraints in the Covenants. As set out above, in summary he reasoned:

    i) The Covenants only applied during the subsistence of the Services Agreement (plus a year);

    ii) It was entirely justified for New Quad, which upon termination had the right to seek to retender the outsourcing of the legacy business or to seek to insource it, to protect that business from LLP which bargained to use that business for its own advantage but never to acquire it;

    iii) The term was not imposed by New Quad but suggested and accepted as a method of addressing a concern by LLP;

    iv) The term was not arbitrarily long when viewed in its proper context (with clients including (largely blue-chip) pension funds and other organisations which might themselves subsist for more than a century);

    v) The positive obligation on LLP to service the legacy clients did not stifle, but rather facilitated the trading of LLP on its own account. (The Judge also noted and accepted Mr Coombes' evidence that the legacy business was expected - at the time that the Services Agreement was entered into - to be a wasting asset, anticipating a loss of half of its clients every 15 years. LLP was not therefore bound to maintain the legacy business unchanged for 99 years).

98. The Judge considered the restraint in Clause 2.2.2 of the Services Agreement in particular detail at [106]. Mr Butler again emphasised Clause 2.2.2 on this appeal, submitting that it was "particularly extreme". I do not agree. Clause 2.1 appoints

LLP to provide the Services (as defined) to the Clients (as defined) on behalf of Quad. This reflects the fact that the legacy business was not to pass to LLP. Clause 2.2.1 is equally clear: LLP may not on its own account solicit (or attempt to solicit) any of the Clients for the provision of any of the Services. Clause 2.2.2 is a modified version of Clause 2.2.1, covering activity falling short of soliciting Clients away from Quad altogether and covering actions by LLP that would nevertheless involve LLP on its own account diverting the provision of Services away from the legacy business. Thus Clauses 2.2.1 and 2.2.2 serve the same or a similar (and legitimate) ancillary function: existing clients are the legacy business that is to be retained by Quad and not diverted to LLP. Without Clause 2.2.2, LLP would be able to obtain instructions to provide the Services to Clients on its own account (in the absence of any soliciting away on its part). It prevents LLP from cutting Quad out of a 43% share of the income of the legacy business which Quad is to retain.

99. Finally, the Judge also dismissed any suggestion that the restraints in the Covenants were unreasonable on account of any consideration of public policy (again in a passage that has not been criticised).

100. Turning to the three specific criticisms made in relation to the Judge's findings on reasonableness:

i) I reject LLP's submission that the Judge failed to identify Quad's legitimate interests and what was necessary to protect them: he identified those interests (in particular at [93(3)] of the Judgment), namely to protect the legacy/LLP client ownership boundaries. He also addressed the question of whether or not there was any legitimate interest in such protection over a period of 100 years (most obviously in the context of his consideration of the reasonableness of the duration of the Covenants) (at [105] of the Judgment). Having acknowledged (at [104]) LLP's submission that the restraints in the Covenants were unjustified by any "legitimate interest" of New Quad, he went on as follows:

> "In the circumstances of this case, it seems to me to be entirely justified that New Quad, which upon termination of the agreement has the right to seek to retender the outsourcing of the legacy business or to seek to insource it, should protect that business from the LLP that bargained to use that business for its own advantage but never to acquire it.";

ii) I also reject the criticisms of the Judge's approach and findings as to equality of bargaining power, for the reasons already set out under Ground 1 above;

iii) I am unpersuaded that there is any merit in the suggestion that the Judge failed to consider the reasonableness of the Covenants in combination and in the round. Having dismissed the individual suggestions of unreasonableness, it is difficult to see how a failure to consider such matters cumulatively could advance matters. But in any event, it is clear that the Judge did consider the position overall by reference to "the full range of considerations relevant" to both the threshold question and that of reasonableness (see [87] of the Judgment).

Respondent's Notice: additional ground for upholding

101. In these circumstances, it is not necessary to consider New Quad's further submissions by reference to the suggestion that LLP was its agent and so owed it fiduciary duties. New Quad contends that the existence of any agency is relevant both to the threshold question and also to the question of reasonableness: the restraints in the Covenants were reasonable for the further reason that they simply reflected the fiduciary duty of loyalty owed by LLP as agent.

102. The Judge did not consider that it was necessary (or helpful) for him to resolve this issue, and so made no relevant findings. I would have found the question very difficult to resolve, certainly without more detailed argument and a fuller understanding of the facts and evidence.

103. Whether or not LLP's relationship with New Quad could properly be described as one of agency is by no means clear. There was no express relationship of agency. The Services Agreement provides expressly (at Clause 8.1.1) that LLP "shall have no power or authority whatsoever to bind or commit Quad other than pursuant to a power of attorney or other written authority..." The Services Agreement states (at Clauses 2.1, 7.1 and 7.2) that LLP is providing services to Quad, not on Quad's behalf to third parties. LLP can also point to the "entire agreement" clause in the Services Agreement. It would also and in any event not follow necessarily that duties of loyalty (either at all or the extent contained in the Covenants) would arise as a matter of fiduciary duty on the facts of this case.

Conclusion

104. For these reasons, and despite the able submissions of Mr Butler, I would dismiss the appeal on both Grounds 1 and 2.

Lord Justice Stuart-Smith:

105. I agree.

Lord Justice Moylan:

106. I also agree.