# Bonus clawback provisions and the doctrine of restraint of trade

By Alex Leonhardt
3PB Barristers

The High Court considered the extent to which bonus clawback provisions which disincentivise an employee from leaving their employment might engage the doctrine of restraint of trade in ***Steel v Spencer Road LLP***, and firmly concluded that in the ordinary case it does not.

Mr Steel's contract of employment provided that Spencer Road LLP could recover any discretionary bonus made within a three-month period preceding the notice of termination of his employment. Mr Steel had received a bonus of £187,500 in January 2022 and given notice to terminate his employment in February 2022.

The dispute arose in bankruptcy proceedings, Spencer Road LLP having issued a statutory demand on the basis (at least in part) of the money it said Mr Steel owed by virtue of the bonus clawback provision. Mr Steel's application to set aside that demand on the basis that the term was unenforceable because it was a restraint in trade was refused, and this was the appeal of that refusal. The threshold for the initial decision was therefore the low one of whether the debt is disputed "on grounds which appear to the court to be substantial", which is essentially the same as the test for summary judgment.

For a term to be unenforceable by virtue of it being a restraint on trade there is a two-stage test: the term must engage the doctrine, and if it does it is enforceable only if it is reasonable, with reference to the interests of the parties and the public. The appeal concerned the first question only.

Mr Steel sought to rely upon ***20:20 London v Riley [2012] EWHC 1912 (Ch)***, and argue that perhaps the most directly relevant authority of ***Tullet Prebon v BGC Brokers [2010] EWHC 484 (QB)*** was wrongly decided in light of earlier authority, including a case referred to in the *20:20 London* judgment.

The *20:20 London* case was a summary judgment application in which the judge did not consider there was any binding authority that a repayment provision can never amount to a restraint of trade, requiring justification by the second stage of the test referred to above. He

noted that the judgment in *Tullet Prebon* did not explicitly consider the disincentive effect of such repayment terms, and that an earlier case of ***Electronic Data Systems v Hubble*** (unreported) suggested that repayment provisions was capable of being a restraint of trade.

Mrs Justice Bacon did not consider that the *Tullet Prebon* case was wrongly decided, and doubted comments in the *20:20 London* judgment. She noted that the *Hubble* case was one where both sides accepted the applicability of the restraint of trade doctrine (the first stage of the two-part tests).

She also rejected a contention that the applicability of restraint or trade to bonus clawbacks was not settled, subject to conflicting authority, and should therefore be decided at trial (and therefore the statutory demand set aside): the decision of the ICC judge was based upon "a line of authority which […] correctly states the principles applicable to the clawback of employee bonus and commission payments which are conditional on the employee remaining in employment for a specified period of time".

Two other grounds of appeal, more specific to the facts of this case, were also rejected.

## Conclusions

The fact that much of the above case law emanates from summary judgments demonstrates the firmness with which the courts (subject to any extraordinary circumstances) are likely to regard bonus clawbacks based upon remaining employed as not engaging the principles of restraint of trade.

As summarised by Mrs Justice Bacon in her judgment, "there is no doubt that an employee bonus or commission scheme which is conditional on the employee remaining in employment for a specified period of time operates as a disincentive to that employee resigning. That does not, however, turn such a provision into a restraint of trade".

13 November 2023

**This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you seek further information, please contact the 3PB clerking team.**

**Alex Leonhardt**

*Barrister*
*3PB Barristers*

020 7853 8055
Alex.leonhardt@3pb.co.uk

3pb.co.uk