Restrictive covenants in practice: Kau Media Group Ltd v Hart

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Kau Media Group Ltd v Hart [2025] EWHC 553 (KB)

Summary

1. In Kau, the High Court provided a rare reported case examining a restrictive covenant at the full trial. The ex-employer was seeking to enforce restrictive covenants against an employee who had moved to work in house with the client with whom he worked when employed by the ex-employer.

2. In examining whether the covenants were enforceable, the main issues considered are:
   a. Whether the marketing agency and client were truly 'in competition'
   b. Whether the terms were too wide (6 months general non-competition and 12 months non-engagement with a client with whom he worked)
   c. Whether the clauses were proportionate to the £38,000 salary and benefits package provided to the employee.

3. The case's main usefulness is that:
   a. The covenants were held not to be enforceable, providing a useful analysis of the above terms in respect of their temporal and geographical range. The importance of accuracy in pleadings and matching evidence to those pleadings is highlighted.
   b. The examination of the specific industry of the "fluid market for digital marketing provision" provides useful analysis for practitioners when considering the enforceability of covenants within that or similar industries.
   c. Whereas the majority of restrictive covenant cases end by settlement before the full trial, *Kau* provides a recent worked example and is a useful read for those working within this area of how the end game can play out.

Summary of Facts

4. The ex-employer, Kau Media Group Limited, is a digital marketing agency.

5. The ex-employee, Mr Hart, was engaged by Kau as an Account Director for MiSmile Network Limited, a UK wide group of dentists and orthodontists that for Kau was "a relatively long-standing client (some six or seven years) of the Claimant generating significant revenue for the Claimant company" [8].

6. The new employer was MiSmile Media Ltd ('MML'); an associated company to MiSmile Network Limited. The two companies will be referred to in this article collectively as "MiSmile". Mr Hart left Kau to work for MiSmile and MiSmile terminated their contract for Kau to provide their marketing services. Essentially, the client MiSmile brought the services of the marketing agency in house by recruiting the agency's employee.

7. Kau sought to enforce the restrictive covenants to prevent Mr Hart taking up his new employment. The High Court held the covenants to be unenforceable.

Analysis

Are the two companies in competition?

8. The legal position was succinctly explained at [55] as:

> "Where it is alleged two businesses are in competition, there are two questions to be considered. The first is whether the products and services provided are sufficiently comparable to mean they are in competition. The second is whether the two businesses are to be regarded as competing in the same area see - *Morris-Garner v One Step (Support) Ltd* [2017] QB 1 at [57] to [61]"

9. On the first issue, the Court held that the services provided by MiSmile were "ostensibly, identical in kind to that formerly provided by a relevant part of [Kau]'s business. Services (albeit at arms' length) i.e. from one company to another are provided 'in house' but they are, on the face of it, of the same kind" [63]. In many cases this might be the end of the discussion on whether the two were competition but here, "that is not the end of the enquiry" [63].

10. On the second issue of whether the two companies were competing in the same area, the Court concluded they were not, holding, "First [MiSmile] has left the marketplace. It has taken a decision to bring its services in house...No third-party digital marketing provider

can compete for it. The landscape has fundamentally changed and had done so before termination. Second, [MiSmile] is focussed on providing digital marketing services to small dental practices as part of the MiSmile Network, by contrast with KMG whose focus is not on small practices" [64].

11. "For completeness" the Court continued by analysing whether there was a legitimate business interest requiring protection from the alleged competition [67]. The Court analysed the pleaded case in detail [34-37] and identified that the primary interest relied on by the Claimant was confidential information. Applying *FSS Travel and Leisure Systems v. Johnson* [1998] IRLR 382, the Court highlighted that it is only "objective" knowledge that can be protected. Given that the work was being brought in house, the Court held that there was no legitimate proprietary interest of the Claimant's here because any objective knowledge was already possessed by the client, MiSmile. There was a disconnect therefore between the pleaded case and the evidence later provided and the words of FSS were repeated that, "Lack of precision in pleading and absence of solid evidence in proof of trade secrets are frequently fatal to enforcement of a restrictive covenant" [68].

The covenants' scope

12. The relevant clause was drafted widely:

> "for a six month period from the termination date, [Mr Hart] must not be engaged or concerned or interested or participate in a business the same as or in competition with [Kau]" [62].

13. The Court noted that this aimed to:

> "prevent the Defendant from working for any digital marketing service provider which operates in any sector in which the Defendant had worked in the Protected Period. This is because KMG works across a wide range of sectors and Mr Hart was Account manager for different businesses in different sectors".

14. There was no restriction based on geographical spread or specific sector, for example. The Court also highlighted a concession from the Claimant that it would only seek to enforce the covenant against the employee if he, "was seeking to work in a small rather than large marketing company, and in relation to the dental sector" [70], thereby indicating the true intentions of the parties and a contrast to the position stated in the written

covenant. The covenant was therefore held to be "so wide as to be unreasonable and unenforceable" [70].

What the employee received in return

15. Further to the points above that made the non-compete covenant unenforceable, the Court looked at a non-solicitation and non-dealing clause against what the employee received in return.

16. The Court held that the non-solicitation and non-dealing restriction of 12 months was unreasonable when compared against the salary and benefits provided to the employee when the contract was signed [76]. His salary was £38,000 + commission and "in what is a fluid market for digital marketing provision" there was inadequate evidence to justify a restriction of 12 months, especially when compared against MiSmile's equivalent restriction of 3 months. The Court did suggest a hypothetical alternative of, "a much shorter period say, 3 or 6 months", suggesting this range may however have been acceptable.

Conclusion

17. *Kau* provides a useful recent analysis of common forms of restrictive covenants. It highlights the importance of making sure there is evidence to back up the apparent justification contained in the often hastily prepared pleadings.

18. The specific analysis of the digital marketing industry and the clauses' length and scope provide useful comparisons against an individual case.

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