

EMPLOYMENT

Restrictive Covenants Case Law Update – Recent decision from the UK Court of Appeal regarding liability in tort for inducing breach of contract

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Issue

The principle issue raised before the UK Court of Appeal in *Allen t/a David Allen Chartered Accountants v Dodd & Co Ltd [2020] EWCA Civ 258* was the question as to what amounts to a sufficient state of mind to make a person liable in tort for inducing a breach of contract.

Background Facts

Mr Pollock was employed by *David Allen* (the Appellant in this appeal), an accountancy firm, as a business service analyst. Mr Pollock commenced employment with David Allen in 2007 and, in 2015, Mr Pollock signed a new contract of employment and a restrictive covenant agreement which contained restrictive covenants. Once Mr Pollock signed the new contract of employment and restrictive covenant agreement he was credited with a back-dated salary increase.

On 23 May 2018 Mr Pollock was offered a job by *Dodd & Co Ltd*, a competitor of David Allen and the Respondent in this appeal. Mr Pollock resigned with effect from 6 July 2018 and joined Dodd & Co Ltd three days later. Before Mr Pollock took up his new job, Dodd & Co Ltd obtained legal advice from its solicitors about whether the restrictive covenants were enforceable. The legal advice obtained by Dodd & Co Ltd at the time of Mr Pollock's recruitment contained the following advices:

".....Given the above, the restrictive covenant hasn't got a lot going for it. You could, therefore, act and allow [Mr Pollock] to act on the basis that it isn't enforceable and contact DA's clients. This is almost certain to provoke a strong reaction. He will probably write to [Mr Pollock] setting out why he believes [Mr Pollock] is in breach."

Based on the advice received, Dodd & Co Ltd took the view that while the matter was not entirely without risk, it was more likely than not that the restrictive covenants were ineffective and unenforceable against Mr Pollock.

High Court Hearing

After a contested hearing and the use of the blue pencil test, the High Court in the UK concluded that the restrictive covenants were in fact enforceable and binding on Mr Pollock. By joining Dodd & Co Ltd, a competitor, Mr Pollock was in breach of those binding restrictions.

The High Court held, however, that Dodd & Co Ltd did not have sufficient knowledge to expose it to liability in tort for procuring a breach of Mr Pollock's contract.

Issue before the UK Court of Appeal

The principle issue before the UK Court of Appeal was whether Dodd & Co Ltd was liable in tort for inducing the breach of contract.

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Counsel for David Allen argued that Dodd & Co Ltd was aware that there was a risk that the restrictive covenants would prove to be enforceable and an awareness that there is a chance that the acts you are inducing could amount to a breach of an enforceable contract, is or should be enough to found liability in tort for inducing a breach of contract. Dodd & Co Ltd took a risk it was aware of and that risk had eventuated. Therefore, it should be held to be liable for inducing the breach.

The UK Court of Appeal disagreed and, in rejecting the appeal, held that to be liable for inducing a breach of contract, you must know that you are inducing a breach of contract and that liability for inducing a breach of contract will only arise if the party intended to persuade the contracting party to breach the contract. The UK Court of Appeal held

that if a defendant honestly believes that the act that he procures will not amount to a breach of contract, he is not liable in tort even if his belief is mistaken in law. The UK Court of Appeal went further to say that it did not matter whether the defendant's erroneous belief is caused by his own ignorance or by the incorrect advice that he receives from his lawyers.

Assessment

While this case is not binding on the Courts in Ireland, it is useful authority in an area of law that is not frequently litigated in Ireland.

It is also a useful reminder that new employers should exercise care when recruiting employees who are working with known competitors. The new employer should request a copy of a potential new hire's contract of

employment (and any other documents which contain provisions which could impact or restrict the move to a competitor) to determine whether the new hire is subject to any post termination restrictions and, if there are any post termination restrictions, the new employer should obtain legal advice as to whether or not they are likely to be enforceable against the new hire.

Where there may be a potential issue, the new hire should be advised to take his/her own independent legal advice.

Finally, we recommend that all contracts of employment include a warranty that the new hire is not restricted from joining the new employer due to obligations owed to a third party which might prevent the employee from starting work on a proposed date or from properly performing the duties of the position.