Introduction

It is trite that common law policy is against enforcement of restraints of trade. A restraint of trade clause in an employment contract will be void as contrary to public policy and, hence, unenforceable unless the employer can show that the clause is reasonably necessary to protect its legitimate business interest. If the court finds that certain parts of a restrictive covenant are unenforceable but other parts are, the courts may “blue pencil”, that is, to sever the unenforceable parts of the wording so that the remaining wording constitutes an enforceable clause. This is commonly referred to as the “blue pencil” test or principle of severability.

On 3 July 2019, the UK Supreme Court handed down a landmark judgment in Tillman v Egon Zehnder Ltd [2019] UKSC 32, which clarifies the “blue pencil” test or principle of severability regarding restrictive covenants. It is noteworthy that Tillman is the first decision in 100 years that goes beyond the English Court of Appeal, where the UK Supreme Court considered severance of post-employment non-compete restrictive covenants and its ruling shifted the long-accepted interpretation of the principle of severability.

What is “blue pencil” test?

The “blue pencil” test refers to the severance of unenforceable provision of a contract by the court so that the remaining provision constitutes an enforceable provision. Severance can be effected when the part severed can be removed by running a “blue pencil” through it without affecting the remaining part: Attwood v Lamont [1920] 3 KB 571. In determining whether part of a restrictive covenant is severable, the courts apply the “blue pencil” test to determine whether or not the part is unreasonable and can be crossed out by a “blue pencil” and the remainder of the clause is reasonable, readable and able to stand alone: Kao, Lee & Yip (A Firm) v John Richard Edwards [1994] 1 HKLR 232; Susan Buchanan and Janesville Ltd [1981] HKLR 700. It is not the function of the court to re-draft restrictive covenants for the parties. The court will not imply a term in order to save a restrictive covenant. Nor will the court re-write a restrictive covenant, if unenforceable, should be rewritten with such minimum amendment as renders it enforceable: Midland Business Management Ltd & Anor v Lo Man Kui (No 2) [2011] 2 HKLRD 667.
Pre-Tillman position

Attwood v Lamont [1920] 3 KB 571

The English Court of Appeal’s decision in Attwood had been regarded as the leading authority in determining the scope of severance of restrictive covenants before the UK Supreme Court handed down its judgment in Tillman.

In Attwood, the defendant was employed as a tailor and cutter of the plaintiff’s general outfitters. The defendant’s employment contract bound him not to be concerned in the trade of business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher or gentlemen’s, ladies’ or children’s outfitter. The defendant asked the Court to craft out the word “tailor” in such restrictive covenant.

The English Court of Appeal held that the covenant was not severable. Younger LJ set out the following rules in determining whether or not a particular part of a restrictive covenant can be severed:

1. severance of a covenant was available only where it was not a single covenant but was in effect a combination of several distinct covenants; and
2. severance should be confined to the trivial and the technical.

Beckett Investment Management Group Ltd v Hall [2007] EWCA Civ 613

The English Court of Appeal’s decision in Beckett Investment Management Group Ltd v Hall was an important milestone in the principle of severability, where it sets out a substantive approach to deal with the issue of severability of restrictive covenants.

In Beckett, the defendants, who had been employed by the claimant as independent financial advisers, covenanted that for the year immediately following termination of their employment, they would not deal with any of the claimant’s clients with whom they had dealt with in the preceding years, and agents of the clients should been deemed to be its clients for the purpose. The English Court of Appeal held that the deeming of agents as clients was unreasonable.

While the English Court of Appeal declared that Attwood was the appropriate starting point to deal with severance, the severability of the post-employment restraints has been determined by reference to the threefold test identified in Sadler v Imperial Life Assurance Co of Canada Ltd [1988] IRLR 388, a decision of the first instance, instead of the mechanical approach set out in Attwood. The three criteria are:

1. the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains;
2. the remaining terms continue to be supported by adequate consideration; and
3. the removal of the unenforceable provision does not so change the character of the contract that it becomes “not the sort of contract that the parties entered into at all”.

*Beckett* did not expressly reject the applicability of the *Attwood* test. Rather, the English Court of Appeal acknowledged that the *Attwood* test should be the starting point in determining severability. Following *Sadler* and *Beckett*, those three criteria had been applied in many English and Hong Kong cases involving severability of post-employment restrictive covenants without rejecting the *Attwood* test. However, in *Tillman*, the UK Supreme Court decided to abandon the *Attwood* test and revisited the threefold test laid down in *Sadler* and *Beckett*.

**Tillman v Egon Zehnder Ltd [2019] UKSC 32**

In *Tillman*, the UK Supreme Court clarifies the principle of severability relevant to post-termination restrictive covenants.

In 2003, the plaintiff, Ms Tillman, started her employment with Egon Zehnder Ltd (“Egon Zehnder”), an executive search and recruitment company, when she was first employed as a consultant. She was promoted to the joint global practice head in 2012. In her employment contract, Ms Tillman covenanted that she would not “directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of [Egon Zehnder]” limited to a six-month period from the date of termination. When Ms Tillman resigned in January 2017, she intended to work as an employee of a competitive firm. She argued that the word “interested” in the post-employment restrictive covenant meant she could not hold any shares in any competitive firm, which is normal and necessary for an employee in a senior position, if she wished to do so. She contended that it would prevent her proposed employment within the restricted six-month period and is an unreasonable restraint of trade. Egon Zehnder applied to the court for an interim injunction to restrain Ms Tillman from entering into her proposed employment, arguing that the proposed employment would be in breach of the non-compete restriction in her employment contract.

At first instance, it was held that the restrictive covenant had nothing to do with shareholding and the court upheld the restrictive covenant in favour of Egon Zehnder. The English Court of Appeal overturned the decision at first instance, suggesting that, although “interested” could refer to a person holding shares, such word could not be severed since removing the word would change the character of the contract.

**Decision of the UK Supreme Court**

The UK Supreme Court first considered whether or not the word “interested” in the post-employment restrictive covenant amounts to an unreasonable restraint of trade. The
Supreme Court held that such word should include any shareholding in the competing business, no matter a large or small portion of shares. It would be normal and necessary for Ms Tillman to hold certain portion of shares in a company where she was employed due to her being a top executive. The Supreme Court ruled that such restraint on shareholding is part of the restraint on Ms Tillman’s ability to work after her employment with Egon Zehnder and is unreasonable.

The second issue comes to the proper construction of the word “interested”. The Supreme Court held that the natural construction of the word “interested”, consistent with long-standing authority, should cover holding shares.

Last but not least, the UK Supreme Court looked into whether the word “interested” can be severed from the original post-employment restrictive covenant. In determining whether or not the Attwood case should remain authoritative, the Court looked into the applicability of the two-step test in Attwood and held that, first, an inquiry whether the covenant to be severed was indeed one covenant or more than one covenant was an elusive application, and second, the requirement of triviality and technicality was more of a side-line application to the restraint. While the Court prefers the three-step test laid down in Sadler and Beckett, it suggested that the third criterion would be better expressed as being “whether removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract” (emphasis added).

In light of the UK Supreme Court’s decision in Tillman, the three criteria in determining severability of a post-employment restrictive covenant are:

1. the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains;
2. the remaining terms continue to be supported by adequate consideration; and
3. the removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract.

**Conclusion**

Tillman is the first decision in 100 years that goes beyond the English Court of Appeal, where the UK Supreme Court considered severance of post-employment non-compete restrictive covenants. It is a shift of the “blue pencil” test or principle of severability relevant to post-termination restrictive covenants, where the long-accepted Attwood principle is rejected, and the threefold test in Beckett is adopted and modified. The UK Supreme Court has thus confirmed that courts are able to “blue pencil” or sever the unenforceable part of a restrictive covenant, leaving the remaining part enforceable.
Although Hong Kong courts are not bound by English precedents, they are persuasive and Hong Kong courts have often sought guidance from them. It bears noting that the threefold test in the English Court of Appeal’s decision in *Beckett* has been adopted in a long line of cases in Hong Kong. It may be well expected that the UK Supreme Court decision in *Tillman* will be followed and adopted by Hong Kong courts in the near future. It is expected that the new test in *Tillman* will be scrutinised in future litigation and will generate discussions and debates as to what may be considered by the courts as a “major change” under the third criterion of “whether removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract”. Employers, employees or interested parties ought to keep an eye out for any further development in this regard, and we will write further on this topic when there is further development.

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**Important:** The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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