MINUTES OF MEETING

CITY OF LONDON LAW SOCIETY

EMPLOYMENT LAW COMMITTEE

Meeting held at Dechert LLP, 160 Queen Victoria Street, London EC4V 4QQ at 12:45 pm on Wednesday 10 September 2014

Attendees:

Gary Freer, Chairman	Bryan Cave
Helena Derbyshire, Secretary	Skadden, Arps
Paul Griffin	Norton Rose Fullbright
Mark Greenburgh	Wragge Lawrence Graham
Charles Wynn-Evans	Dechert
Mark Mansell	Allen & Overy
Kate Brearley	Stephenson Harwood
Michael Leftley	Addleshaw Goddard
Anthony Fincham	CMS Cameron McKenna LLP

Absent:

Anna Rentoul	Simmons & Simmons
Alan Julyan	Speechly Bircham
Sian Keall	Travers Smith
Oliver Brettle	White & Case
John Evason	Baker & McKenzie
Jane Mann	Fox Williams
Nick Robertson	Mayer Brown
Laurence Rees	Reed Smith
Ian Hunter	Bird & Bird

1. Apologies were received from those listed as absent.

2. The Minutes of the last meeting were approved.

   It was noted that from the matters arising that *Clyde & Co v Bates van Winklehof* had settled (on confidential terms). The Chairman also noted that the talk to The Law Society by Sir David Latham, the future of employment disputes, was now available through a link on the Employment Tribunal Service website.

3. The Chairman noted that Chuka Umunna had delivered a speech to the TUC on Labour party policy with regard to the tribunal service. The speech had not been very detailed

but he had said that a labour government would review (as opposed to abolish) tribunal fees.

4. Case law.

In *Prophet v Huggett [2014] EWCA Civ 1013*, the Court of Appeal had now considered whether the High Court should have enforced the 12 month non-compete restriction which, on its face, offered the employer no protection. In the Committee's previous meeting we had considered the High Court's unusual decision to enforce the covenant. The Court of Appeal had confirmed the Committee's view and that this was not only unusual but also impermissible. It was felt that this was the right outcome of the case. The Court of Appeal had drawn a distinction between (a) clauses that were just ambiguous, in which case the Court should prefer the construction of the clause that would make it enforceable and (b) provisions that were just so unclear that they did not make sense and would not work. In the decision the Court had not referred to *Arbuthnot* line of cases covering commercially agreed terms. The Committee was unaware of any further appeal of this decision.

One Step Support Limited v Morris-Gardner [2014] EWCA 2213 (QB). The case applied to restrictive covenants on the sale of a business. The First Defendant was a director and owner of the Claimant and the Second Defendant was her civil partner and an employee. Both had entered into agreements not to compete with or solicit clients or customers of the Claimant for a three year period. There had been a blatant breach of the covenants by the two defendants. Philips J had said, without referring to much case law, that this was a classic case for *Wrotham Park* damages: the damage was difficult to quantify but the Claimant had clearly suffered loss. The Judge found that it would be just for the Claimant to have the option of recovering damages in the amount which might reasonably have been demanded for releasing the defendants from their covenants ("Wrotham Park" damages). This contrasted with the decision in *BGC v Rees*, part of the BGC, Tullett Prebon saga. In that employment case Wrotham Park damages had been refused where the Claimant had tried and failed to establish any loss. It was noted that the facts had been different in each case but each had apparently gone with the merits. The Committee considered whether awarding Wrotham Park damages might become a trend but it was felt that this would be the case in only the most exceptional circumstances. It was thought that the BGC view would be more likely to be followed in the employment context. The One Step case was more like a failure of consideration (in the context of the sale of a business) but the merits were a huge factor in the outcome. It was difficult to see how Wrotham Park damages could be claimed if the conduct was not sufficiently exceptional to enable an account of profits. It was noted that the One Step case is being appealed and has been listed between January and May 2015. The Committee was referred to a blog by Simon Devonshire on the 11 KBW website for a review of the law relating to Wrotham Park damages.

Brogden and Reid v Investec Bank PLC [2014] EWHC 2785. This case addressed whether a bank was required to act rationally in calculating the bonus pool available for distribution to its employees. The bank's argument was that they had agreed a broad formula for bonus by reference to economic value added ("EVA"). Leggatt J had found

that there was still an element of discretion with regard to the distribution of that bonus pool which had to be exercised rationally. It would have been surprising if the decision had gone the other way and it was consistent with the *Commerzbank v Keen* line of cases.

Horizon Security Services v Ndeze and another UKEAT/ 0071/14. In this case the EAT had considered whether (a) there had been a service provision change for the purposes of TUPE where there was a change in the underlying client and (b) the exemption for activities "in connection with a single specific event or task of a short term duration" applied. Unsurprisingly the EAT followed the Court of Appeal's decision in *Hunter v McCarrick*, to find that a service provision change requires the services carried out before and after the change to be on behalf of the same client. (In this case the security services in question had been provided to a contractor that had managed a business centre on behalf of the local authority when the local authority took on the management itself). Of more interest, however, was the question of when a task of short term duration should be determined. This would be a finding of fact but the EAT had noted, obiter, that the tribunal had failed to have regard to the intention of the client (namely to provide security services for a period of 8 to 9 months pending the demolition of the business centre), it should have looked at the client's intention at the date of the purported service provision change and should have focused on the task to be carried out (guarding the site pending its demolition).

5. Any other business.

The Committee discussed queries that had been received regarding the potential devolution of Scotland (the referendum being due in a matter of days) and broader implications regarding potential departure from the European Union. There was little to be said regarding Scottish devolution given the absence of any firm commitment by any party to a particular employment policy. However, it was felt that if the UK was to leave the European Union Directors would presumably no longer be applicable and would potentially be stripped back, for example relating to TUPE, trade union recognition and redundancy consultation. There would also be interesting issues regarding UK legislation which had been construed purposively to comply with those Directives.

The next meeting would be on 10 December 2014, at Baker & McKenzie.