offensive" ([2017] O.U.C.L.J. 301, 313) as regards interpretation (e.g. *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619) and implication (e.g. *Marks & Spencer plc. v BNP Paribas Securities Services Trust Co. (Jersey) Ltd.* [2015] UKSC 72, [2016] A.C. 742). In *FSHC*, the Court of Appeal has taken a similar opportunity to depart from Lord Hoffmann's views on rectification. Where the parties only envisage being bound upon signing a contract, the best evidence of their objective intentions is the formal, written document. For that contract to be rectified for common mistake, both parties must have actually made a mistake.

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FREEDOM OF CONTRACT AND RESTRAINT OF TRADE

EGON Zehnder Ltd. runs a recruitment business and Ms Tillman used to head its financial services practice area. Her employment contract contained various restrictive covenants, including an undertaking not to "directly or indirectly engage or be concerned or interested in" a competing business for 12 months after termination of her employment. In January 2017, Ms Tillman's employment ended. In May 2017, she notified Egon Zehnder that she intended to work for a competitor. She claimed that the non-compete covenant was an unreasonable restraint of trade and therefore unenforceable. Egon Zehnder applied for an injunction. It was granted at first instance but set aside by the Court of Appeal. The Supreme Court restored the injunction. Lord Wilson gave the only judgment: *Egon Zehnder Ltd. v Tillman* [2019] UKSC 32, [2019] 3 W.L.R. 245. The company lost on arguing that the clause was outside the scope of the restraint of trade doctrine, and lost on its narrow construction of the clause, but nevertheless was able to maintain the injunction on the basis that the offending part of the clause could be "severed" from the rest. This note addresses the three points in turn.

It is fundamental to contract law that the courts respect and give effect to parties' agreements. However, the common law balances freedom of contract against freedom after contract. Occasionally the former outweighs the latter such that, as a matter of public policy, certain contractual clauses will not be enforced in the interest of personal autonomy. This is contentious territory. Many consider that the common law should not obstruct freedom of contract and public policy issues should be left to legislation. The most controversial example is the penalties rule but restraint of trade belongs in the same category. It reflects "the central importance to the freedom of all of us to work": *Egon Zehnder* at [22]. Despite being invoked

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much more successfully in practice than the penalties rule, its existence has never been attacked in the same way.

In *Egon Zehnder*, Lord Wilson recognised that an employment contract is a "classic type" of contract to which the restraint of trade doctrine applies (at [30]), the other being contracts for the sale of businesses. But while the core application of the doctrine is well settled, its boundary is not clearly demarcated. In *Egon Zehnder*, the company argued that the restriction on being "interested" in a competitor – such as a shareholding in a rival company – was not a restraint on trade but a restraint of investment. This received short shrift in the Supreme Court, Lord Wilson concluding that it was all "part of the restraint on Ms Tillman's ability to work in the immediate aftermath of her employment" (at [33]).

The uncertainty over the scope of the doctrine arises because all contracts lead to a restraint of trade, to some extent, but the doctrine clearly does not apply to all contracts: *Chitty on Contracts* (33rd ed.), para. 16.108. A neat distinction was offered in *Esso Petroleum Co. Ltd. v Harper's Garage (Stourport) Ltd.* [1968] A.C. 269 (HL), 328, per Lord Pearce: "It was the sterilising of a man's capacity for work and not its absorption that underlay the objection to restraint of trade." In other words, if the restriction reflects an interest by the beneficiary of the covenant to receive, use and pay for the output of the covenantor's trade no public policy issue arises; but if the restriction reflects an interest simply to stop the covenantor applying his trade elsewhere the public policy becomes engaged. However, there remain borderline cases. In *A Schroeder Music Publishing Co. Ltd. v Macaulay* [1974] 1 W.L.R. 1308, the House of Lords held a songwriter contracted exclusively to a music publisher for up to 10 years constituted a restraint of trade. In form that might look like an "absorption" case. But in substance it was a "sterilisation" case. The publisher was under no positive obligation to use any of the songwriter's output and, if it chose not to do so, the songwriter would not be paid anything. The House of Lords was also influenced by the lengthy term of the contract, and the absence of provision for the songwriter to terminate it early, or even to lay claim to the copyright of any of his output which the publisher did not want.

The test for an unreasonable restraint of trade is whether the restrictive covenant goes any wider than reasonably necessary to protect the legitimate interests of the recipient of the covenant. The argument in *Egon Zehnder* again focused on the word "interested" in the non-compete clause. Ms Tillman claimed this went beyond what was reasonably necessary to protect Egon Zehnder's goodwill and client base. The company contended that "interested" ought to be construed so as not to capture shareholdings in competitors on the basis of the validity principle, by which (*Egon Zehnder*, at [38]): "in circumstances in which a clause [is] … capable of having two meanings, one which would result in its being void and the other which would result in its being valid, the latter should be preferred."

The issue in *Egon Zehnder* was the threshold which had to be reached before the validity principle could be engaged. The authorities were confused on this: some cases requiring mere ambiguity in the language; others, that the two meanings be evenly balanced. Lord Wilson struck a pragmatic middle course between these ends of the spectrum (at [42]), requiring any valid construction to be "realistic" given the language of the clause and its context. The company's alternative interpretation of "interested" was not realistic: it both departed from long-standing authority as to what "interested" meant in restrictive covenants and treated the word as "casual surplusage" (at [51]–[53]). The validity principle is a pragmatic limitation on the operation of the restraint of trade doctrine; it is difficult to justify by reference to the parties' objective intentions, although cf *Egon Zehnder* at [38].

The final issue in *Egon Zehnder* was the question of severance. If a restrictive covenant is *prima facie* too wide, the court may be able to "sever" the offending part so that the rest remains enforceable. The courts developed severance to uphold freedom of contract and ensure as much of a restrictive covenant as possible can be enforced. It is a further important limitation on the wider restraint of trade doctrine. Yet it is also seen as an interference with freedom of contract, allowing the court to modify the bargain struck between the parties. It also allows a stronger party to impose a series of obligations in a series of subclauses in a form that might unfairly chill covenantor's behaviour, knowing that if the most restrictive clause is unenforceable, a more reasonable one will still be recognised.

After it was recognised in the early twentieth century, severance was therefore quickly fettered with onerous and often contradictory limitations (surveyed in *Egon Zehnder*, at [57]–[81]): Was the severed restriction in substance a distinct covenant to that to be enforced? Was it no more than "trivial or technical"? Would there be any need to add or modify the wording of the clause? Would the remainder still be supported by adequate consideration? Would severance so change the character of the contract that it becomes "not the sort of contract that the parties entered into at all"? Would severance be consistent with the public policy underpinning restraint of trade?

The Court of Appeal in *Egon Zehnder* [2017] EWCA Civ 1054 refused to sever "or interested" from the rest of the non-compete clause on the basis that it could not be treated as a covenant distinct from that which the company wished to enforce. This was an artificial approach, mandated by some of the older case law, and reflected an underlying misperception about the nature of the rule. Indeed, the doctrine's label – "severance" – is a misnomer. It does not remove terms from the contract. The doctrine is really about partial enforcement or enforcement on terms. Put another way, the court cannot change what the parties can agree, but it can do its best to enforce all parts of the covenant which do not offend public policy.

Once seen in this light, severance is a tool to be used in service of freedom of contract rather than a blight on it.

The Supreme Court rightly jettisoned the older limitations on severance. Usually only two requirements need be met. First, it should be possible to remove the offending words simply by running a "blue pencil" through them (at [85]). Second, severance should not "generate any major change in the overall effect of the restraints" in the contract (at [88]). Both requirements reflect the fact that the common law does not confer power on the courts, even via severance, to modify the parties' bargains. As Lord Wilson noted (at [85]): "Were it ever to be thought appropriate to confer on the court a power to rewrite a restraint so as to make it reasonable, it would surely have to be achieved by legislation."

The Supreme Court also purported to retain the test that the remaining covenant be supported by adequate consideration, while accepting it would not be relevant in cases like *Egon Zehnder* where the covenantee rather than the covenantor secured severance. This is to be regretted. It means that, on the same facts, different results may eventuate simply due to the vagaries of litigation. Further, as a matter of principle, it is misconceived. Consideration goes to the underlying validity of contractual obligations rather than their enforceability. Retaining this requirement runs contrary to Lord Wilson's recognition that severance does not lead to the modification of contracts.

That quibble aside, Lord Wilson's judgment in *Egon Zehnder* is to be welcomed. The cluttered case law on the validity principle and on severance has been cleared away, to be replaced with clarity and certainty about these checks on restraint of trade's incursion into freedom of contract.

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THE ROLE OF KNOWLEDGE IN DISHONEST ASSISTANCE

THE test of dishonesty and the role of knowledge in dishonest assistance has been considered by the Court of Appeal in *Group Seven Ltd. v Notable Services L.L.P.* [2019] EWCA Civ 614, [2019] 3 W.L.R. 1011. Allseas Group S.A. is a Swiss undersea pipe-laying company. Allseas had a brilliant idea: it would build a ship that could sail to an oil rig, lift it out of the water, and repair it. A group of fraudsters informed Allseas of a secret investment scheme with superlative returns supposedly run by the US Federal Reserve. It was only available to special investors with investment projects that were exceptionally beneficial to humankind. Fortunately, Allseas was special: the Federal Reserve wanted to help