

CASE STUDY

The facts

In August 2004, Mr Small, an Englishman, was recruited by Cleansinks ("**Cleansinks**"), as Head of International Sales. Cleansinks, which is incorporated and has its head office in New York, is a manufacturer and distributor of household cleaning products.

The recruitment of Mr Small took place in London and was conducted by Mr Big, a member of Cleansinks' senior management team. The contract was concluded at the offices of Cleansinks Services Limited ("**Services**"), an English subsidiary of Cleansinks. Services' function is to employ personnel for the purposes of Cleansinks' business worldwide and Services was the employing entity for the purposes of Mr Small's contract of employment. The contract of employment was expressed to be governed by New York law and subject to the exclusive jurisdiction of the courts of New York.

The understanding between Mr Small and Cleansinks was that Mr Small would remain living in London in the short to medium term, travelling regularly between London and New York (and to other international cities) as necessary. In the medium to long term, however, it was envisaged that Mr Small would relocate to New York with his family.

As part of his benefits package, Mr Small entered into a loyalty bonus agreement with Cleansinks (the "**Bonus Scheme**"). Under the terms of the Bonus Scheme, senior management employees were credited with a cash award every 6 months for the duration of their employment and for a period of 12 months post termination provided that:

- (i) no post-termination credits would be payable where the employee breached the post-termination non-competition covenant (the "**Non-Compete Clause**"). The Non-Compete Clause imposes an obligation on Mr Small not to work for a competing business anywhere in the world for a period of 2 years post termination; and
- (ii) in the event of a breach of the Non-Compete Clause by Mr Small, Cleansinks would be entitled to call for repayment of any payments already made under the Bonus Scheme during the post-termination period and during the 12 month period prior to termination.

The Bonus Scheme is also expressed to be governed by New York law and subject to the exclusive jurisdiction of the courts of New York.

Some four years later, in early September 2008, Mr Small was still International Head of Sales. He had not (to the annoyance of Cleansinks' senior management) relocated to New York as was originally envisaged and still lives in London with his wife and children. He had continued to travel between New York and London and was often posted for periods of time in major European cities on particular projects.

During the period January to September 2008, in preparation for the launch of a new product into the French market, Mr Small spent part of his working week in London and part (at least 2 days and nights per week) in Paris.

On 20 September 2008, whilst working in Paris, Mr Small received a telephone call from Mr Big telling him that certain "serious allegations" of misconduct had been made against him by a junior employee in his team. Mr Big was vague about the particulars of the allegations but made clear that it would be "best for all concerned" if Mr Small resigned. Following a series of similar phone calls received over the next 24 hours during which pressure was exerted upon him to resign, a stressed and confused Mr Small resigned his employment whilst still in Paris.

Four months later, Mr Small took up a post as Sales Director of Evencleanersinks Limited, an English company. Upon learning of Mr Small's new employment, Cleansinks refused to make post-termination payments to him under the Bonus Scheme.

Points for discussion

1. Mr Small wishes to make a claim in the Employment Tribunal against Services for unfair constructive dismissal. Can he do so?
2. Cleansinks wishes to sue Mr Small in New York to enforce the Bonus Scheme (and the Non-Compete clause therein) and to recover awards made pursuant to the Bonus Scheme during the 12 month period pre-termination. Can it do so?
3. If Cleansinks decides to bring proceedings against Mr Small in England, will it be permitted to enforce the terms of the Bonus Scheme here?
4. Mr Small wishes to bring proceedings against Cleansinks in England to recover the post-termination payments it has withheld. Can he do so?

