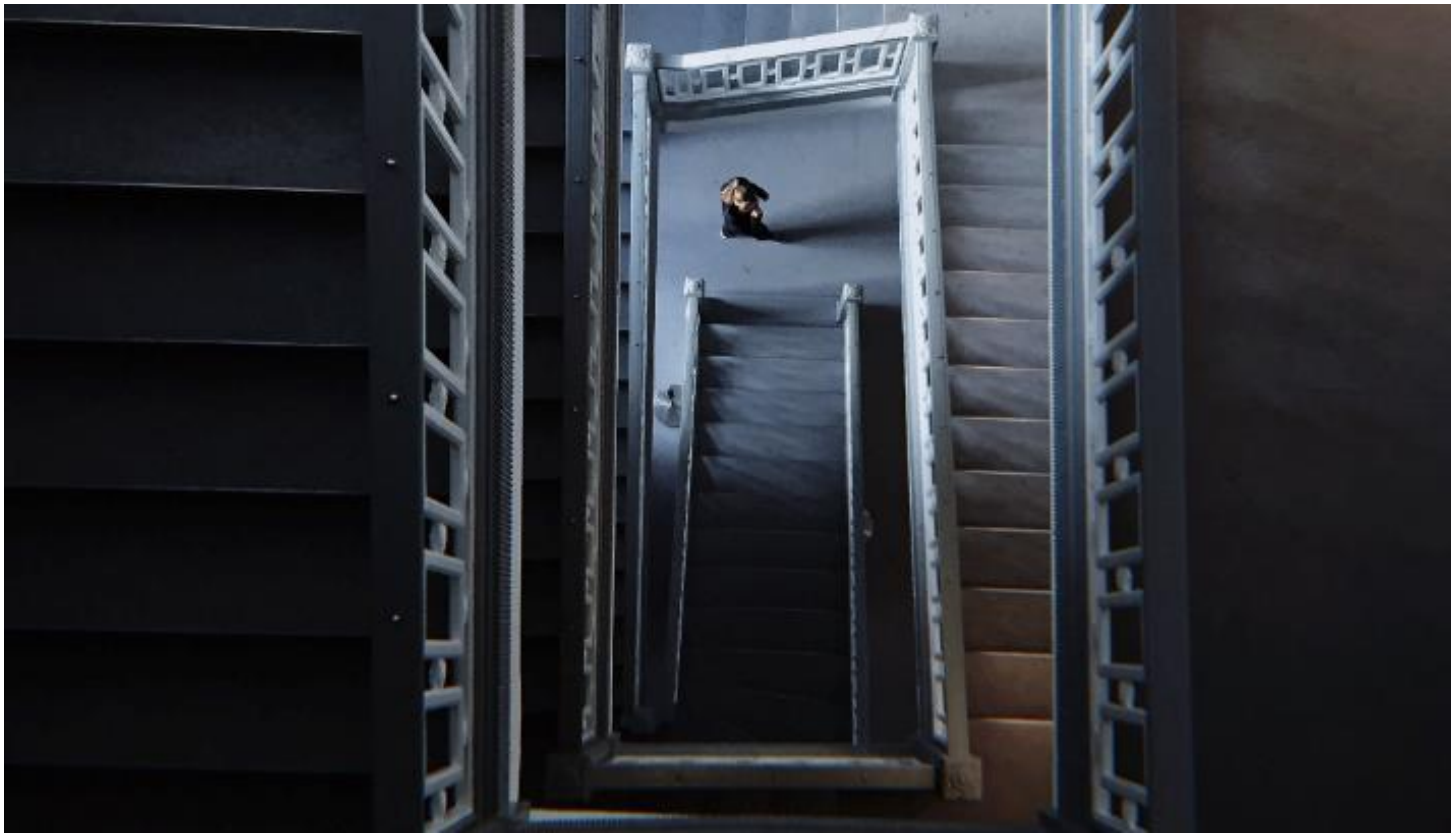
Moalem Weitemeyer

Moalem Weitemeyer
Advokatpartnerselskab
Amaliegade 3
DK-1256 Copenhagen

Tel. +45 7070 1505
moalemweitemeyer.com

CVR 3162 7885



DANISH SUPREME COURT CONFIRMS DECISION ON NON-COMPETE RESTRICTION FALLING OUTSIDE THE SCOPE OF THE ACT ON RESTRICTIVE EMPLOYMENT CLAUSES

9 April 2021

Introduction

The Danish Supreme Court has confirmed that a non-compete restriction agreed between shareholders falls outside the scope of the Act on Restrictive Employment Clauses despite the shareholder being employed with the company. This ruling confirms a decision originally made by the City Court of Helsingør, where a ban had been imposed against the competitive actions of a shareholder and employee, referring to the non-compete restriction originally agreed on in the shareholders' agreement.

The Facts

In 2017, Parties A and B established a joint company as equal shareholders (hereinafter the "Company"). Later in 2017, the Company established a subsidiary ("Company 2"). Party A entered into an employment contract with Company 2.

Following a disagreement among Parties A and B, the Parties entered into a settlement agreement in mid-2019, whereby Party A transferred his entire shareholding to Party B. According to the settlement agreement, Party A was subject to a two-year non-compete restriction as described in the original shareholders' agreement between the Parties.

Later, and despite the transfer of the shareholding, Party A was offered to continue to be employed with Company 2 on new terms. In September 2019, however, Party A was terminated from Company 2 due to collaboration difficulties.

Immediately after being terminated from the position in September 2019, Party A updated his LinkedIn profile so as to reflect that he had now established his own company, offering services within the same area of business as the Company and Company 2.

After having seen the LinkedIn updates by Party A, Party B and the Company filed for an injunction against Party A.

The City Court of Helsingør found that Party A was bound by a non-compete restriction during a two-year period as set out in the settlement agreement. Accordingly, it was concluded that Party A acted against the non-compete restriction, and the ban was imposed on Party A.

Party A argued that Section 11 of the Act on Restrictive Employment Clauses applies to all non-compete restrictions, including restrictions agreed upon between professionals. According to Section 11, a non-compete restriction becomes void if the restricted person is terminated without cause. Based on this, Party A claimed that Section 11 applied and that Party A had been terminated without cause, and that consequently the non-compete restriction was unenforceable.

Party B and the Company maintained that the Act on Restrictive Employment Clauses was without relevance to this matter, arguing that the Act on Restrictive Employment Clauses only applies to the extent that there is an element of employment. Party B and the Company argued that the settlement agreement was entered into between shareholders and with no element of employment. Further, it was argued that Party A was terminated with cause.

Decision from the Supreme Court

The Supreme Court concluded that the non-compete restriction was founded in the settlement agreement, whereby Party A transferred his shareholding to Party B. The settlement agreement finalized the ownership of the Company by Party A. Accordingly, the non-compete restriction was agreed between the Parties in their capacity of owners of the Company. Party A had not taken on this obligation as a part of any employment.

The Supreme court explicitly stated that the fact that Party A has also been an employee did not lead to any other conclusion as the shareholding was the primary element of the relation.

With reference to Section 11 of the Act on Restrictive Employment Clauses, the Supreme Court stated that Section 11 appears to apply more broadly than merely to employees. On the other hand, the Supreme Court referred to the preparatory work which does not indicate any extended field of application compared to the previous Section 38(2) of the Act on Agreements. Section 38(2) only applied to employments. Accordingly, it was concluded that Section 11 of the Act on Restrictive Employment Clauses – like the previous Section 38(2) of the Act on Agreements - only applies to restrictions agreed as a part of employment.

As for this concrete matter, the Supreme Court concluded that the non-compete clause was valid and that there were no grounds on which to disregard it. Accordingly, the ban imposed was confirmed by the Supreme Court.

Perspectives

Firstly, the Supreme Court confirms that Section 11 of the Act on Restrictive Employment Clauses is not applicable beyond employments. Accordingly, the field of application of Section 11 remains to lie between employer and an employee.

As for the assessment of the relationship between Party A, Party B and the Company, the decision follows existing case law, according to which it is crucial to make the assessment of whether the person dealt with is actually a shareholder or an employee.

When assessing the shareholding against the employment, it is relevant to consider how the relations was originally established, e.g. is it a case of an employee being granted some kind of shareholding or is it a shareholder subsequently taking on working responsibilities for the company. Also of relevance are the size of the shareholding and the actual leverage.

The parties may only deviate from mandatory employment regulation in cases where after completion of the assessment above, the shareholding is found to be the main element of the relation.

Moalem Weitemeyer

Any matters related to agreements, breaches and enforcement of non-compete restrictions should always be assessed on an individual basis while taking the specific circumstances into due consideration.

Our team is experienced in assisting in any matters related to the assessment and enforcement of restrictive covenants. For further information please do not hesitate to reach out to us:

Pernille Nørkær
Partner
pernille.noerkaer@moalemweitemeyer.com

Jep Becher Jensen
Senior Associate
jep.jensen@moalemweitemeyer.com