IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

**[2017] EWHC 638 (QB)**

No. HQ17X00662

Rolls Building
Royal Courts of Justice

Friday, 3rd March 2017

Before:

MRS. JUSTICE O'FARRELL

B E T W E E N :

ICAP MANAGEMENT SERVICES LIMITED — Claimant/Applicant

- and -

(1) DEAN BERRY
(2) BGC SERVICES (HOLDINGS) LLP — Defendants/Respondents

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MR. D. OUDKERK QC and MR. E. BROWN (instructed by Macfarlanes LLP) appeared on behalf of the Claimant/Applicant.

MR. D. READE QC and MR. M. SHERIDAN (instructed by Doyle Clayton Solicitors) appeared on behalf of the First Defendant/Respondent.

MR. P. GOULDING QC (instructed by in-house solicitor for BGC Services (Holdings) LLP) appeared on behalf of the Second Defendant/Respondent.

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# J U D G M E N T

(As approved by the Judge)

MRS. JUSTICE O'FARRELL:

1 This is an application by the claimant, ICAP, for interim injunctive relief:

(i) firstly, against the first defendant, Mr. Berry, to enforce garden leave and a confidentiality obligation in his contract of employment between ICAP and Mr. Berry, and,
(ii) secondly, to restrain inducement of breach of contract (if any) by Mr. Berry of his contract of employment on the part of the second defendant, BGC.

There is also an application for a speedy trial and consequential directions.

2 The application is opposed by the defendants on the grounds that firstly, Mr. Berry's employment under the contract has been terminated and he has commenced employment with BGC this week and, secondly, in any event, Mr. Berry has already been on garden leave for seven months and no further period is necessary to protect the legitimate interests of ICAP.

3 ICAP is part of the TP ICAP Group, a global interdealer broker that operates as a service company and employs the Group's employees, including Mr. Berry. Mr. Berry is employed as a CEO of Global e-Commerce for the ICAP Global Broking Business ('IGBB'). The Global e-Commerce team designs trading platforms for clients.

4 The contract of employment between ICAP and Mr. Berry is dated 10th May 2013, although it appears that Mr. Berry has been working there since about 2011. That contract requires Mr. Berry to give twelve months' notice of any termination of his employment.

5 On 22nd July 2016, Mr. Berry gave written notice to ICAP terminating his employment after twelve months, i.e. by 21st July 2017. On 25th July 2016, BGC, a global brokerage company and competitor of ICAP, issued a public announcement that Mr. Berry would be joining the company as an executive managing director in its global electronic and hybrid execution team, leading all e-commerce brands across the company, subject to his outstanding legal obligations.

6 On 26th July 2016, ICAP gave written notice to Mr. Berry that he was on garden leave with immediate effect and he has not performed any duties as an employee since that date.

7 On 30th December 2016, Tullett Prebon Plc acquired ICAP's Global Hybrid Voice Broking and Information business, including ICAP's associated

technology and broking platforms (the 'IGBB') by way of share transactions. By a letter dated 7th February 2017, Mr. Berry informed ICAP that he considered that his employment was terminated on the grounds that: (a) the acquisition by TP of IGBB resulted in a transfer of undertaking in accordance with the TUPE Regulations, (b) Mr. Berry objected to the transfer of his contract to the merged business, as indicated in correspondence in October 2016, and (c) that such objection operated so as to terminate his employment.

8 By a letter dated 16th February 2017, ICAP's solicitors sought undertakings from Mr. Berry, including an undertaking that he would not take up employment with a third party prior to expiry of his notice period. On 24th February, this application for injunctions was issued, no undertakings having been given.

9 On 27th February 2017 Mr. Berry commenced working for BGC.

10 The test that is applicable on an application for an interim injunction is the test set out in *American Cyanamid v Ethicon* [1975] AC 396, namely,

(i) is there a serious issue to be tried;
(ii) if so, would damages be an adequate remedy for the claimant if no relief granted;
(iii) would damages be an adequate remedy for the defendants if interim remedy were granted, and,
(iv) whether the balance of convenience lies in favour of granting or refusing interim relief.

11 Firstly, it is common ground between the parties that there is a serious issue to be tried. The contract clearly contains a twelve months' notice period which has not expired. If there is a TUPE transfer, Mr. Berry's objection to his transfer terminated his employment. That is a dispute that requires a factual enquiry and can only be determined at trial.

12 Secondly, considering the adequacy of the remedy for the claimant, if the claimant succeeds in its case, damages would not be an adequate remedy. It is very difficult to quantify the losses that it might suffer or prove the loss of business as a result of any breach of his employment obligations by Mr. Berry.

13 Thirdly, if the defendants were to succeed, damages would not be an adequate remedy. In respect of the first defendant, Mr. Berry, he will continue to receive his salary but he will be involuntarily idle and unable to use his skills, and may lose some up-to-date knowledge of the market. In respect of the second defendant, they are in a similar position to the claimant in that it would be very difficult to identify, prove and quantify any loss.

14 However, if it is not possible to hold a trial before the period for which the claimant claims to be entitled to an injunction has expired, or substantially expired, the court must go further and consider whether the claimant would be likely to succeed at trial: *Lansing Linde v Kerr* [1991] ICLR 428 per Lord Justice Staughton at p.435D.

15 In this case the application was issued on 24th February 2017. The injunction that is claimed is until 21st July 2017, which is the expiry of the notice period under the contract, if still subsisting. The claimant seeks an order for a speedy trial to take place in the Easter term, i.e. between the end of April and end of May of this year. There is a risk that the court might not be able to accommodate those dates or that the final conclusion of the case might be at a later time. In any event, even if those dates are obtained and a speedy trial is held, that is likely to be some half to two-thirds into the claimed injunction period. Therefore, in my judgment, the *Lansing* test is engaged.

16 It is not necessary for ICAP to establish on the evidence currently before the court that it will succeed or, indeed, that it is likely to succeed at trial. However, the issue whether it is likely to succeed at trial, on the basis of the evidence currently before the court, is a material factor in the balancing exercise that the court must take into account in considering whether to grant interim relief.

17 With that in mind, I turn to consider the contract of employment. Clause 3 of the contract provides, at clause 3.2, that:

> "The employment of the Employee may be terminated by either party giving to the other not less than twelve months' prior written notice".

18 Clause 10 provides that during any such notice period, or any part or parts thereof, ICAP may place the employee on garden leave.

19 Clause 11 imposes on the employee, both during his employment and after any termination of his employment, obligations of confidentiality in respect of confidential information, including, at 11.2, the following:

> "The Employee shall not, either during his employment or after his employment has terminated for whatever reason, directly or indirectly exploit, use or disclose to any other employee or any third party other than in the proper performance of his duties for the Company or any Group Company or as authorised in writing by the Company, any Confidential information".

"Confidential information" is defined in clause 11.1.1 in very wide terms, but includes:

> "information of a confidential nature and in the nature of a trade secret including but not limited to information concerning the organisation, business, finances, databases or affairs of the Company or other Group Company or any of their respective customers or clients …".

20 Clause 12 contains restrictive covenants placed on the employee during his employment and following termination. Those that are relevant for today's purposes are, firstly, clause 12.1.1, which provides that the employee shall not:

> "for the period of six calendar months following the date his employment terminates, deal with, be employed or engaged by or engage in business with or be in any way interested in or connected with any business which competes with any business carried on by the Company or any Group Company at the date of termination of the [relevant] employment ...".

This is effectively a six months' restriction on working for a rival.

21 Clause 12.1.2 provides that:

> "for the period of nine calendar months following the date of his employment terminates, [the employee shall not] deal with, solicit business from or engage in business with or work on any account or business of any customer or client of the Company or any Group Company for the purpose of providing to that customer or client services which are the same as or similar to those which he has been involved in providing to that customer or client in the 12 months preceding the termination of his employment or discourage such a customer or client from dealing with the Company or any Group Company".

22 Clause 12.1.3 provides for a nine months' restriction on enticing away or poaching other employees.

23 Clause 12.2 provides that:

> "The Employee agrees that the restrictions contained in Clause 12.1 are reasonable and necessary for the protection of the legitimate interests of the Company and the Group Companies and that, having regard to those interests, those restrictions not work unreasonably on him".

24 Clause 12.4 provides:

> "In the event that the Company exercises its right to place the Employee on Garden Leave then each of the periods referred to in Clauses 12.1.1 and 12.1.2 shall be reduced by any period/s spent by the Employee on Garden Leave in the twelve months prior to the date his employment terminates".

So, effectively, there is a set-off in respect of any period of garden leave as against the six months' restriction on working for a rival and the nine months' restriction on soliciting business from clients.

25 It is also, for good measure, set out at clause 12.6 that:

> "The restrictions set out in this Clause 12.1 are without prejudice to other express or implied duties whether fiduciary or otherwise owed by the Employee to the Company or any Group Company".

26 Clause 15 of the contract provides that this is an entire agreement.

27 Thus, there is a clear twelve months' notice period within the contract. The company is entitled to place the employee on garden leave for part or all of that notice period. There are express confidentiality obligations. But as against that, I must take into account that the restrictive covenants are limited to six months' restriction on working for a rival and nine months' restriction on soliciting business from other clients.

28 In considering whether the claimant is likely to succeed, if this matter proceeds to trial, in obtaining the injunctions now sought, I take into account the following line of authorities.

29 Where, as in this case, an employer seeks an injunction to prevent an employee from working for a competitor during a contractual notice period whilst the employee is on enforced garden leave, there are competing public interests. That is set out in the case of *Tullett Prebon Plc v BGC Brokers LP* [2010] EWHC 484, per Mr. Justice Jack at para.222, in which he stated:

> "The court will also have in mind the strong public interest in employees being held to contracts which they have freely entered into for substantial remuneration. That interest pulls in the opposite direction to the public interest in employees being freely able to exercise their skills in work by transferring from one employer to another. It is also a factor that the brokers will take time to get back up to speed once they begin

> work again. … These are all factors which are subsidiary to the main issue as to the time required for the reasonable protection of the employer's protectable interests."

30 Any injunction in these circumstances must be justified on similar grounds to a restrictive covenant. Firstly, the claimant must demonstrate that there is a legitimate interest to protect. Secondly, the claimant must show that the injunction sought extends no further than is reasonably necessary to protect that legitimate interest. Thirdly, the grant of an injunction is discretionary and may be refused if the claimant will suffer no damage or there is delay in seeking a remedy. Fourthly, the court has flexibility to grant an injunction for part only of the notice period, if that is the only extent of the period in respect of which it can be justified. Authority for that is *J M Finn v Holliday* [2013] EWHC 3450, per Mrs. Justice Simler at para.61, *Tullett* (above), per Mr. Justice Jack at paras.224-225; and *Elsevier v Munro* [2014] EWHC 2648, per Mr. Justice Warby at para.57.

31 Protection can be legitimately claimed for confidential information or trade secrets, but it must be sufficiently specific, precise and cogent. Protection cannot be claimed legitimately in respect of the skill or experience of an employee, even if it was acquired during the course of his employment: *FSS Travel & Leisure Systems v Johnson* [1998] IRLR 382, per Lord Justice Mummery at paras.29-34.

32 However, I also bear in mind the case of *Thomas v Farr Plc* [2007] EWCA Civ. 118, and, in particular, Lord Justice Toulson at paras.41 and 42, where he stated:

> "In order to establish that the inclusion of a non-competition clause in an employment contract was reasonably necessary for the protection of the employer's interest in confidential information, the first matter which the employer obviously needs to establish is that at the time of the contract the nature of the proposed employment was such as would expose the employee to information of the kind capable of protection beyond the term of the contract (i.e. trade secrets or other information of equivalent confidentiality). The degree of the particularity of the evidence required to establish that matter must inevitably depend on the facts of the case. To say this is to say nothing new. Aldous LJ stated the principle in *Scully UK Limited v Lee* …
>
> > '"In cases where a restrictive covenant is sought to be enforced, the confidential information must be particularised sufficiently to enable the court to be satisfied that the plaintiff has a legitimate interest to protect. That requires an enquiry as to whether the

plaintiff is in possession of confidential information which it is entitled to protect. … Sufficient detail must be given to enable that to be decided but no more is necessary'.

42. Provided that the employer overcomes that hurdle, it is no argument against a restrictive covenant that it may be very difficult for either the employer or the employee to know where exactly the line may lie between information which remains confidential after the end of the employment and the information which does not. The fact that the distinction can be very hard to draw may support the reasonableness of a non-competition clause. As was observed by Lord Denning MR in *Littlewoods Organisation v Harris* at 1479 and by Waller LJ in *Turner v Commonwealth and British Minerals Limited* [2000] IRLR 114 at para 18, it is because there may be serious difficulties in identifying precisely what is or what is not confidential information that a non-competition clause may be the most satisfactory form of restraint, provided that it is reasonable in time and space."

33 Turning to the evidence of legitimate business interest in this case, this is dealt with in the witness statements of Mr. Vogels and Mr. Berry. I deal with each category that has been identified by the parties in turn.

*Confidential information*

34 Mr. Vogels' evidence is as follows, Mr. Berry is a very senior employee. He sat on the executive committee which took strategic decisions that impacted the whole of the IGBB. He was the CEO of a major division of the business and he was entrusted with highly sensitive and confidential information. He states that he gained detailed knowledge of which product initiatives and platforms were successful in relation to which products and why. Mr. Berry had access to details of the use of the IGBB's core clients made of the e-Commerce solutions provided by the Global e-Commerce business. He was aware of how clients would use those systems, how much revenue they generated and what volumes of activity were driven through the systems. That information is highly sensitive and confidential. None of it is publicly available. Mr. Berry was also aware of particular arrangements and specific deals reached with individual clients in order to incentivise them to do business with the IGBB. Mr. Berry had access to the employment and remuneration details for all of the employees within the Global e-Commerce business, including senior employees. Mr. Berry was, as a member of the executive committee, privy to the IGBB's monthly management accounts and he helped to shape the three-year strategic plan for the IGBB. He had a detailed view of the overall revenue and profitability of the business and full access to the revenue data for the IGBB globally.

35 Mr. Berry's evidence is that any information held by him in relation to the clients' technical needs and/or use of products is by now stale and the same can be said in relation to information relating to sales information, for example, volumes and revenues, specific client deals and product initiatives. There is no evidence that Mr. Berry has retained any such confidential information in hard or soft copy. I pause there to say that certainly there is no evidence before the court that he has retained such information. Insofar as any such information was ever in his head, his case is that it is highly likely to have been forgotten now. In relation to staff salaries, things have moved on significantly in this regard and such information could only be useful to a competitor who wished to poach ICAP staff, but that risk is obviated by Mr. Berry's undertaking to abide by the nine months' restraint against poaching staff in clause 12.1.3 of his contract. Although Mr. Berry had access to the management accounts and helped to shape the three-year strategic plan for the IGBB, the global executive committee that he sat on was second-tier of the strategic management and not top level. The meetings were general in their nature and if ICAP needed to keep Mr. Berry out of the market for twelve months in order to protect its interests, then the post-termination restraints against competition and dealing with clients would surely have been for a twelve month duration.

36 Mr. Berry is a very senior CEO of ICAP. He has been involved in strategy. He has had access to the business workings of the IGBB. He does have access to client information. I reject Mr. Berry's suggestion that the information that he acquired in his position as CEO is stale or has been forgotten. In my judgment, the claimant has demonstrated that it has a legitimate business interest which requires protection in that regard.

*Client connections*

37 Mr. Vogels' evidence is that, as CEO of the Global e-Commerce business, Mr. Berry had close connections with many of the IGBB's core clients. Holding a senior position in the IGBB, he had direct contact with that business's core clients at the most senior levels of decision-making. He also had access to confidential information in respect of those clients.

38 Mr. Berry's evidence is that he was not a broker. He was in charge of designing platforms for clients. He was the CEO of Global e-Commerce. The Global e-Commerce team designed the trading platforms but it is the technology team that then develops the platform. He accepts that he had some client relationships. However, those who have taken over from his role since he was placed on garden leave also had strong relationships with the same clients and they would have been easily able, within a short period of time, to shore up ICAP's relationships with those clients.

39 As a CEO, Mr. Berry was in a particular position to forge significant relationships with those in senior positions of the company's clients. He has had access to detailed knowledge and the ability to form those relationships at a high level over a lengthy period of time. In my judgment, the claimant establishes that it has a clear legitimate interest in protecting those client connections.

*Stability of the workforce*

40 Mr. Vogels' evidence is that many members of the Global e-Commerce business team were recruited initially by Mr. Berry. He was in large part responsible for building and growing the IGBB's e-commerce business. His leaving has a potentially significant disruptive effect on the stability of the workforce within this business area in particular and, because his departure has been announced publicly, if he starts work earlier than otherwise expected, this could embolden other employees to attempt the same tactic.

41 Mr. Berry's answer is that, as regards the risk of him poaching ICAP's staff, it has the benefit of his undertaking to abide by the restraint covenant in clause 12.1.3 of his employment contract, which would not expire until nine months after the termination of his employment. That is in addition to the period of protection already gained by placing Mr. Berry on garden leave. He makes the valid point that, in any event, the horse has rather bolted given that there has already been a very public announcement of his departure. If staff were likely to be persuaded to change horses, as it were, it is likely that they would already have been emboldened to do so.

42 Therefore, I reject the claimant's case that it can establish a need to protect the stability of the workforce further than the current nine months' restraint in clause 12.1.3.

*Period of Protection*

43 If Mr. Berry were entitled to terminate by virtue of his letter of 7th February 2017, i.e. if the TUPE argument is successful, he would still be bound by the restrictive covenants under the contract. However, because of the set-off provision, he would already have served his six months in respect of his garden leave in terms of joining another competitor. That period would have expired. In respect of the nine months' restriction on soliciting clients, that would expire on 25th April 2017, and in respect of the nine months' restriction on enticing away employees, that would expire on 6th November 2017.

44 However, I do have to take into account the fact that, although there is an arguable case in respect of a TUPE transfer, there is no evidence before the court to support that argument. It is simply a potential case that the defendants might be able to run once they have further disclosure from the claimants. If the TUPE point is a bad one, then it is clear, on the express terms of the contract, that Mr. Berry is bound by his twelve months' notice period and must serve out his garden leave. The same points arise in relation to the expiry of the restrictive covenant in relation to clause 12.1.1 and the forthcoming expiry of the nine months' restriction on soliciting clients.

45 However, the gardening leave and notice period are not just to prevent an employee from working for a competitor. They are also to preserve confidential information gleaned by an employee during his term of employment, and to prevent solicitation of existing clients of the company and soliciting business from the company. As stated by Lord Denning, it is very difficult to police those obligations and to prove any breach of them. Therefore, it may well be that the best protection is to prevent an employee from working for a competitor. That is, in order to prevent the employee from soliciting clients and other business, the best way of protecting the company may be by a restriction on working for a competitor.

46 In my judgment, if this matter proceeds to trial, on the evidence currently before the court – and I emphasise that the court clearly does not have all the evidence that will be relevant to the final decision – the claimant is likely to establish an entitlement to an injunction for at least part of the outstanding garden leave.

47 I have to weigh up the difficulty posed by the tight timescales in this case. If there is no trial until June or July then there will be no material garden leave period left to argue about. If there is no interim injunction pending such a trial, the claimant will be prejudiced. However, if interim injunctions are granted until 21st July 2017, the defendants will be prejudiced.

48 I have taken into account the defendants' suggestion that there has been inordinate and excessive delay on the part of the claimant but I reject it. Proceedings were issued when the first defendant made clear that he considered that his employment was terminated and that he would be taking up his employment with a third party, and failed to give the undertakings.

49 The first defendant has already started working for the second defendant, but that has only been from this Monday, and I note that it was after the application was issued. Therefore, it cannot affect the balance or, indeed, what might be considered to be the status quo in this case.

50 Balancing all of those factors, what I propose to do is to grant an interim injunction, the terms of which I will hear from the parties, to 5th May 2017. I am going to order a speedy trial to take place on 26th April 2017 or as soon as possible thereafter. That will comprise one day reading time for the judge on 26th April and then a hearing time of two days to take place on 27th April and 28th April. I note that that is very tight but it is doable. There will be written openings, no oral openings, and the time for evidence and further submissions will either be set out in an agreed timetable by the parties before the case starts or, alternatively, it will be split as between the claimant, who will have one day, and the defendants, who effectively are running the same case, who will have the second day. The time is to be used in whatever way the parties think fit and absent an agreed timetable a chess clock is to be used.