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“Employment Law in the High Court”
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GARDEN LEAVE

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Key Issues

1. This talk attempts to engage with three areas of practical significance in relation to garden leave:
 - 1.1. What evidence is needed to obtain a garden leave injunction?
 - 1.2. How long can garden leave last?
 - 1.3. The impact of *TFS Derivatives v Morgan*?

Background

2. "Garden leave" involves a period of enforced absence from the work place, and usually suspension from duties, for an employee subject to notice of termination (whether notice was given by the employer or by the employee).
3. From the employer's point of view, its potential merits are that:
 - 3.1. It prevents an employee joining a competitor;
 - 3.2. It prevents an employee from continuing to come in to work and having access to clients, fellow employees or confidential information; and/or
 - 3.3. It makes available the employee's co-operation / services, if desired, for a limited period of time.
4. Its major drawback is the cost to the employer, since the employer must pay for the privilege by providing the employee with the same salary and benefits¹ as he would have done had the employee remained at work.
5. Garden leave evolved from the difficulty faced by an employer when confronted by an employee who, despite having entered into a contract of employment, refused to work. Worse still, the employee intended to leave without giving proper notice, in order to join a competitor. The employer was told that the courts would not grant an injunction

¹ This will include any bonuses which would be payable during notice period: *Clark v Nomura International plc* [2000] IRLR 766

which had the effect, albeit indirectly, of forcing the employee to work for the employer. (This undesired effect might materialise if the employee was prevented from working elsewhere, resulting in his idleness or starvation that forced him back to work for the current employer.) This left the employer with no effective remedy.

6. A number of exceptions were developed.
 - 6.1. First, if the employee was not compelled to go back to the employer and could realistically go and work elsewhere, albeit not with a competitor, then an injunction could be granted (e.g. *Warner Bros Pictures Inc v Nelson*²).
 - 6.2. Secondly, where the employee was happy to continue working for the employer, and trust and confidence was maintained, the courts were more inclined to grant an injunction to ensure the employee worked out his notice: *Evening Standard v Henderson*³.
7. But a third exception to the traditional answer emerged. The employer agreed to pay the employee's salary and all benefits, would not insist on him coming to work and would not sue for his failure to work. He was put on garden leave.
8. The employer then faced a further problem. On behalf of employees, it was argued that the employer himself was in breach of contract by not allowing the employee to work. If the employer was in breach of contract, then the employee could say "you have broken the contract, I shall accept this breach by ending the contract; I am free to join the competitor". Whether the argument succeeded depended on whether the employer had a right to put an employee on garden leave. The courts began to grapple with this question in *GFI v Eaglestone*⁴ and *Eurobrokers v Rabey*⁵, and considered it squarely in *William Hill Organisation Ltd v Tucker*⁶.
9. The Court of Appeal in *William Hill*, where there was no express garden leave provision, approached the matter in the following way:

² [1937] 1 KB 209

³ [1987] ICR 588

⁴ [1994] IRLR 119

- 9.1. There is no general duty on the employer to provide a skilled employee with work and the opportunity to exercise his skills save where there is an express or implied right not to do so.
- 9.2. The proper approach is to ask: what does the employer agree to do? The answer is based on terms of the contract in the light of all the surrounding circumstances.
- 9.3. Certain situations are recognised by the courts as giving rise to an obligation for the employer to provide work - for example, in the case of actors, who need to exercise their skills, or where publicity is of utmost importance. In contrast, the courts have in the past been reluctant to find an obligation to provide work in cases where an employee is engaged on an indefinite contract with a fixed wage and no remarkable features.
- 9.4. The changed social conditions in which we live must inform the legal approach to be adopted (going back to a comment of Lord Denning in a 1974 case of *Langston v AUEW*⁷, through to Lord Justice Dillon in *Provident Financial Group v Hayward*⁸).
- 9.5. It is not suggested that there is an obligation to find work if there is none to be done or none that can be done with profit to the employer, and the employer is not bound to allocate work to an employee in preference to another if there is not enough for both.
- 9.6. In considering whether there is a right to work, the following factors may tend to indicate that there is:
 - 9.6.1. First, the post is specific and unique;
 - 9.6.2. Secondly, the skills necessary to the proper discharge of the employee's duties require frequent exercise;

⁵ [1995] IRLR 206

⁶ [1998] IRLR 313

9.6.3. Thirdly, the contract provides for the hours and days of work, and imposes on the employee the obligation to work those hours necessary to carry out his duties. In *William Hill* there was also an express right of suspension, which term would be unnecessary if an implied right to place an employee on garden leave existed.

10. As for an employee's obligations whilst on garden leave, two short points should be noted:

10.1. First, perhaps unsurprisingly, the approach of Scott VC in *Symbian Ltd v Christensen*⁹ that the implied duty of good faith does not survive during garden leave does not to date appear to have found any more favour than it found in the Court of Appeal; and

10.2. Secondly, the case of *Fulham Football Club (1987) Ltd v Jean Tigana*¹⁰ makes it clear that the parties can, by agreement, limit the extent of the contractual duties owed by the employee during the period on garden leave.

Evidence To Support A Garden Leave Injunction

11. In order to obtain a garden leave injunction an employer must show real or substantial actual or threatened harm (see e.g. *Provident*, where the absence of such tilted the balance against the grant of an injunction in the exercise of the court's discretion).

12. However, this will not of itself be sufficient. The judgment of the Court of Appeal in *William Hill* makes it clear that even where there is an express garden leave clause, it will not automatically be enforced. The Court, having noted (it appears with some disapproval) the trend towards increasing reliance on garden leave provisions in preference to conventional restrictive covenants, as a result of the more flexible approach adopted by the courts to the former (see *Credit Suisse Asset Management Ltd v*

⁷ [1974] IRLR 15

⁸ [1989] IRLR 84

⁹ [2001] IRLR 77

¹⁰ [2005] EWCA Civ 895, [2004] EWHC 2585 QB

*Armstrong*¹¹), held that if an employer seeks a garden leave injunction then it must be justified on similar grounds to that necessary to the validity of a restrictive covenant (§25). This reflects what had previously been said in the 1996 case of *Cantor Fitzgerald v George*¹², and such approach endorsed by the Court of Appeal in *Symbian v Christensen*¹³.

13. Following *William Hill*, an employer applying for a garden leave injunction would therefore need to put evidence before the court of his legitimate interests meriting protection, that is, evidence as to business secrets, trade connections or goodwill and protection of the workforce.
14. It will generally be necessary to show:
 - 14.1. The nature of the interest, e.g. the confidential quality of the information;
 - 14.2. The longevity of the interest, e.g. the period for which the confidential quality will subsist (being at least the period for which the garden leave is sought to be enforced); and
 - 14.3. That the interest protected would be likely to be of interest / value to the competitor.

Restraint of Trade Grounds

Business secrets

15. This category may include, for example, business forecasts, strategic planning, trading agreements, turnover figures, salary negotiations, assessments of employee's strengths and weaknesses etc..
16. Where the application is based on confidential information, an employer should consider whether a confidentiality regime should be put in place, limiting inspection to a litigant's

¹¹ [1996] IRLR 450, at 454 §39

¹² 17 January 1996, Court of Appeal.

¹³ [2001] IRLR 77

advisers where good reason is shown (see *Warner-Lambert v Glaxo Laboratories*¹⁴), and whether any part of the proceedings should be heard in private (see CPR 39.2(3)(C)).

Trade connections / goodwill

17. Trade connections may be established where it can be shown that an employee, by virtue of his position with the employer, will have had recurrent contact with customers or suppliers such that he is likely to acquire knowledge of or influence over the customers or suppliers.
18. In the context of cases on garden leave, evidence as to expense accounts has figured highly. In *GFI Group Inc v Eaglestone*¹⁵, Mr Eaglestone was a foreign exchange options dealer whose contract provided for 20 weeks' notice by either side. The High Court granted injunctive relief (although not for the full 20 week period – as to which, see below) primarily on the basis that during his employment Mr Eaglestone had had a very generous entertainment expense account, and in the last year that he had worked had spent “no less than £59,616 by way of entertainment expenses; that is, by way of payments aimed at nurturing his relationship with the trader customers – that is – nurturing the customer connection.” See too *Eurobrokers v Rabey*. Evidence as to the frequency of meetings with customers / suppliers (and level of seniority of persons met) is also likely to be relevant.

Stability of the workforce

19. Relevant evidence may go to the employee's knowledge of salary negotiations, staff appraisals and performance, as well as to the more nebulous concept of loyalty (perhaps indicated by other personnel having followed the employee when he joined the employer) or even 'charisma': see *Crystal Palace FC (2000) Ltd v Stephen Bruce*¹⁶.

¹⁴ [1975] RPC 354, per Buckley L.J. at p.356 lines 7 to 33, p.358 lines 9 – 17 and p.360 line 14 to p.361 line 31.

¹⁵ [1994] IRLR 119

¹⁶ 22 November 2001, Burton J.

Quasi-Legitimate Interests

20. Notwithstanding the dicta of Morritt LJ in *William Hill*, requiring an employer to justify the garden leave on similar grounds to that which would be required to justify a restrictive covenant, it is arguable that some lesser interest will suffice.

Preventing an employee helping a rival

21. In *Crystal Palace FC (2000) Ltd v Stephen Bruce* the club argued that a nine month garden leave clause should be upheld on the basis that there was a sufficient legitimate interest simply in stopping an employee helping a competitor during his notice period. The club relied upon *Provident Financial Group plc v Hayward*, in which Dillon LJ, having noted that merely helping a competitor was not an activity that could be restrained after the end of the contract, had suggested that “for an employee to foster the profitability of a rival during the continuation of his employment could well, in appropriate circumstances, be restrained either under a [garden leave clause] or as a breach of the duty of good faith”¹⁷. The club further relied upon the approach of Neill LJ in *Credit Suisse v Armstrong*¹⁸, and submitted that even if the restraint of trade doctrine “was to be applied with its full vigour” in relation to garden leave clauses, contrary to Dillon LJ’s approach, it would still be arguable that in cases where an employer has agreed to pay a substantial salary under a fixed term contract to a senior employee, it should not be regarded as in restraint of trade to prevent that senior employee from going straight off and “snapping his fingers” at his contract to carry out the same work for a competitor.
22. Notwithstanding the dicta of Morritt LJ in *William Hill*, Burton J. held that it was arguable (for the purposes of an interlocutory injunction pending a speedy trial) that this was a sufficient legitimate interest.

“Breathing time”

23. In *Crystal Palace v Bruce*, quite apart from the arguable interest in preventing an employee helping a rival, Burton J. accepted that there was a legitimate interest in

¹⁷ at 169B.

enabling the club to have a “breathing space” between the departure of the employee and his commencement elsewhere. Mr Bruce had given undertakings not to solicit or procure any players from leaving in breach of contract and not to procure any employer of his to employ them. However, there were a number of players whose contracts were due to come up for renegotiation within the following month. Burton J. held that in the light of the likelihood that players would be attracted to join Mr Bruce at another club simply by his presence there, as opposed to any solicitation, there was a legitimate interest in his being prevented from working at another club for the period which straddle the window of contract renegotiations.

24. A similar interest was contended for by Reading Football Club against its then manager, Alan Pardew, who sought an injunction upholding the garden leave provision in his contract, amongst other grounds, in order to give itself time to get its own house in order before Mr Pardew got up and running with one of its direct competitors. The case settled on the basis of undertakings that West Ham would not solicit or employ any of its players or coaching staff for the balance of the season, and Reading was to receive compensation of £380,000, and Mr Pardew agreed to remain on garden leave for a further month, such period presumably reflecting the relevant “breathing space”.

Honouring contractual obligations

25. In *Sendo Holdings plc (in administration) v Brogan*¹⁹ the High Court was concerned with the application by a company in administration to enforce a garden leave provision against its Chief Executive. In accordance with his contract, Mr Brogan was given 6 months’ notice by the administrators and placed on garden leave. On the same day, although Mr Brogan was unaware of it at the time, the company sold some of its assets to a rival company (Motorola), which contract imposed obligations on Sendo in respect of non-competition, and, in particular, imposed an obligation on Sendo to terminate Mr Brogan’s employment and put him on garden leave.

¹⁸ at 892-4

¹⁹ [2005] EWHC 2040 (QB)

26. Mr Brogan argued that Sendo, in administration, had no legitimate interest to protect, as it had no business, customers or employees save for a handful on temporary contracts. However, the High Court accepted Sendo's argument that as a company in administration its interest was to maximise value for creditors, to which end they sought to comply with the obligations under the sale agreement with Motorola which included putting Mr Brogan on garden leave, which it characterised as a proprietary or quasi-proprietary interest capable of protection pursuant to a garden leave provision.

How Long Can Garden Leave Last?

27. The starting point is that the period of restraint should be the minimum necessary for legitimate purposes and not the maximum: *Cantor Fitzgerald International v George*²⁰.
28. Further, the court has a wide discretion both as to the period of the injunction to enforce garden leave and as to its scope: *Credit Suisse Asset Management Ltd v Armstrong*²¹.
29. In exercising that discretion, the Court will be astute to recognise that the practice of long periods of garden leave is obviously capable of abuse: "It is a weapon in the hands of the employers to ensure that an ambitious and able executive will not give notice if he is going to be unable to work at all for anyone for a long period of notice" *Provident Group Plc v Hayward*²². Thus, even in circumstances where the contract contains an express garden leave provision (and the *William Hill* issue as to a right to work does not arise *per se*), in considering the period for which such provision should be upheld the Court will take into account the fact that an "employee has a concern to work and a concern to exercise his skills"²³.
30. Some assistance as to the approach to be adopted is found in *GFI v Eaglestone* in which Holland J. carefully set out his approach to the issue of whether, having concluded that there was a real prospect of the employer sustaining loss which was not readily

²⁰ per Lord Bingham MR at 11H-12A

²¹ [1996] ICR 882 (CA), per Neill LJ at 893G

²² per Dillon LJ at 165E-F

quantifiable in damages, he should sustain the order upholding garden leave for 20 weeks, that being the notice period provided for in the contract, or for some lesser period. He weighed in the balance:

30.1. The factors in favour of 20 weeks, namely, that

30.1.1. 20 weeks was agreed between the parties with equal bargaining power, and there was therefore pressure on the court to sustain that period and not to undermine bargains freely reached by parties before them²⁴;

30.1.2. On the evidence before him, that period was reached as falling between 6 months (the employer's desire) and 3 months (the period the employee was prepared to concede);

30.1.3. Both parties had proceeded on the basis that a significant period was required, which period was required for their mutual benefit.

30.2. On the other hand, the factors against:

30.2.1. There was no real current indication that 20 weeks was in fact the period that was required in order to protect the employer from sustaining the damage identified.

30.2.2. The strong indication in authorities that he should not grant more relief than absolutely necessary.

30.2.3. The fact 2 out of 3 brokers had already left and were then working for the competitor after their 4 week notice period, and the question was therefore that given that two other brokers were then working for the competitor, was it really necessary to protect the employer's interests that Mr Eaglestone should spend another 16 weeks on

²³ per Dillon LJ at 168D

²⁴ Although see on this point Dillon LJ in *Provident v Hayward* at 165D "these clauses are imposed on many senior executives and it may be that such executives are hardly in a position to negotiate over the terms of their contracts of service".

garden leave before being able to join them, or was the reality that the damage had already been done and the employer did not need that extra period of protection?

31. Ultimately, Holland J. substituted for period of 20 weeks a period of 3 months, indicating that were it not for the fact that the other employees had joined the rival earlier then the balance would have been in favour of holding Mr Eaglestone to his agreed term. However, he warned that were that factor to have been otherwise, he would have been strongly motivated to hold Mr Eaglestone to his word in circumstances where although in his business 'his word was his bond', he suggested that the contract did not have the meaning it purported to have.
32. Some indication of the outer limit of garden leave is given in *Credit Suisse v Armstrong and others*. In that case the relevant employees' contracts provided for 3 months, 6 months and, in the case of 6 employees, for 12 months notice, and (arguably) for 6 months' post-termination restrictions. The employees contended that the post-termination covenants were unenforceable, as the employer had already obtained the 6 months' protection it had selected as the period for which it required protection by way of the restrictive covenants. The Court of Appeal upheld the Judge's finding that the garden leave clause should not be enforced any further than the 6 months already served and that the covenants should be upheld.
33. However, in this context, the trial judge had noted that he could "see no reason why in appropriate circumstances a 12-month garden period is not appropriate". In considering the interplay between garden leave and restrictive covenants, Neill LJ appeared to go further, leaving open the possibility that "in an exceptional case where a long period of garden leave ha[s] already elapsed, *perhaps substantially in excess of a year*, without any curtailment by the court, the court would decline to grant any further protection based on a restrictive covenant"²⁵.

²⁵ At 894C

TFS Derivatives Ltd v Morgan

34. *TFS Derivatives v Morgan*²⁶ largely deals with the reasonableness of a 6 month non-compete covenant in the context of an equity derivatives broker. Because of the precise wording of the covenant, it was upheld – with a little “blue pencilling”.
35. However, during the hearing Counsel for the broker in question advanced the proposition that the relevant covenant was in restraint of trade because an alternative clause would have been more appropriate, i.e. a clause providing for six months’ notice entitling the employer to place the broker on garden leave for the whole of that period. He accepted that there was little authority on the interplay between garden leave and restrictive covenants, but he asked the court to take the opportunity “to say something about the reasonableness and greater attraction of garden leave clauses generally” and to strike down the clause in question.
36. Mrs Justice Cox declined the invitation, but she did say that she was not persuaded that garden leave clauses negated the necessity for non-compete clauses, particularly on the facts of the particular case, citing the following reasons:
 - 36.1. Six months’ garden leave could be regarded as more onerous as it prevented the broker from working in any capacity rather than in the particular business area covered by the covenant.
 - 36.2. A garden leave clause would not be sufficient protection if the employee was summarily dismissed or walked away without giving notice.
 - 36.3. Enforced garden leave might be a breach of the implied term of trust and confidence.
 - 36.4. Just because the employer had to pay for garden leave that did not make it more reasonable for the employee.

²⁶ [2004] EWHC 3181 (QB), 15 November 2004, Cox J.

37. Any hopes by employment lawyers that the Court of Appeal might have been more amenable to this invitation were dashed when the case was settled shortly before the appeal was heard in December 2005.