Neutral Citation Number: [2020] EWHC 1208 (QB)

Case No: BM00010A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

High Court Appeal Centre, Birmingham
Remote hearing by Skype for Business

30 April 2020

Before :

MR JUSTICE CAVANAGH

- -

Between :

Duchy Farm Kennels Limited	**Appellant**
- and -	
Graham William Steels	**Respondent**

- -
- -

Alexander Pritchard-Jones (instructed by **Neil Davies and Partners**) for the **Appellant**
Andrea E Pitt (instructed by **Chattertons**) for the **Defendant**

Hearing date: 30 April 2020

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JUDGMENT

Mr Justice Cavanagh:

Introduction

1. This is an appeal from the judgment of Her Honour Judge Wall, sitting at Birmingham Civil Justice Centre, handed down on 17 January 2020. Leave to appeal was granted by Mr Justice Martin Spencer on 3 March 2020.

2. This appeal is concerned with an important issue which, perhaps surprisingly, has never been the subject of an appellate ruling before, so far as counsel and I have been able to discover.

3. The issue arises in the context of contracts for settlement of Employment Tribunal claims which have been reached under the auspices of an ACAS conciliation officer, following conciliation action under sections 18A-18C of the Employment Tribunals Act 1996. If certain conditions are satisfied, these settlements are effective to prevent the claimants from proceeding with their claims in the ET: Employment Rights Act 1996, section 203(2)(e). Such contracts of settlement are normally set out in a document called a COT3 form, and they often contain a number of generic terms. Amongst these generic terms is a confidentiality clause, pursuant to which the parties agree to treat the fact of, and terms of, the settlement as strictly confidential and undertake not to disclose them to anyone else, save as required by law or to professional advisers. The issue that arises in this appeal is what happens if a party, in this case the claimant, breaches such a clause. In particular, does it mean that the other party, normally the former employer, is freed from any obligation to make any further payments of agreed instalments of the settlement sum?

4. The Respondent, Mr Steels, brought a number of claims in the Employment Tribunal against his former employer, the Appellant, including a claim for unfair dismissal. The Appellant is a small business which makes dog kennels and catteries and supplies them to clients throughout the country. Both parties were represented by lawyers. A settlement was negotiated with the assistance of an ACAS conciliation officer and an agreement was reached on 25 January 2019 which was recorded on a COT3 form, and signed by the parties' representatives. I will refer to this as the COT3 Agreement.

5. Under the terms of the COT3 Agreement, the Appellant agreed to pay to the Respondent the sum of £15,500, by means of 47 weekly instalments of £330 each. The Respondent agreed that the payment was in full and final settlement of his Employment Tribunal claims, and agreed that he would not bring any other proceedings, of any nature, relating to his employment with the Appellant, save in respect of the standard exceptions, namely personal injury claims which had not arisen at the time of the agreement, and any claims relating to his pension entitlements. The COT3 agreement also included a confidentiality clause, a warranty that the Respondent had not previously disclosed the facts and terms of the agreement to any other person, and a mutual non-disparagement clause. The Appellant also agreed to provide potential employers of the Respondent with a reference in agreed terms.

6. All of the terms that I have just referred to are more or less commonplace in COT3 agreements, though the amounts to be paid and the form of the reference (if any) vary, of course, from case to case. It is also more common, in my experience, for the settlement sum to be paid by way of a single lump sum

rather than by instalments. The sum was to be paid by instalments in the present case because the Appellant is a small business and the instalments relieved pressure on the Appellant's cash flow.

7. The confidentiality clause, clause 9, was in the following terms:

> "9. The parties will treat the fact of and the terms of this Agreement as strictly confidential and the parties will not disclose them to any other person or entity, save as set out in this clause or as may be required by law or to any regulatory authority or to professional advisers subject to them maintaining the same level of confidentiality."

8. In the event, after paying instalments for a few weeks, the Appellant company ceased to do so, because it asserted that its obligation to do so had fallen away, as the Respondent had breached the confidentiality clause by disclosing the fact of the settlement, and the amount of the settlement, to a third party, Mr Paul Mulliner. The Appellant paid a total of £2,960 in instalments, the last one being paid on 29 March 2019.

9. I will summarise the Judge's findings of fact, which are not challenged in this appeal, a little later in this judgment.

10. Section 19A of the Employment Tribunals Act 1996 permits a party to recover by means of execution in the county court a sum that is payable under a settlement agreement, where an ACAS conciliation officer has taken action, unless, pursuant to s19A(4), the paying party applies for and obtains a declaration that the sum would not be recoverable from him under the general law of contract.

11. The relevant parts of section 19A provide as follows:

"19A **Conciliation: recovery of sums payable under settlements**

(1) Subsections (3) to (6) apply if—

(a) a conciliation officer—

(i) has taken action under any of sections 18A to 18C in a case, and

(ii) issues a certificate in writing stating that a settlement has been reached in the case, and

(b) all of the terms of the settlement are set out—

(i) in a single relevant document, or

(ii) in a combination of two or more relevant documents.

(2) A document is a "relevant document" for the purposes of subsection (1) if—

(a) it is the certificate, or

(b) it is a document that is referred to in the certificate or that is referred to in a document that is within this paragraph.

(3) Any sum payable by a person under the terms of the settlement (a "settlement sum") shall, subject to subsections (4) to (7), be recoverable—

(a) in England and Wales, by execution issued from the county court or otherwise as if the sum were payable under an order of that court;

…..

(4) A settlement sum is not recoverable under subsection (3) if—

(a) the person by whom it is payable applies for a declaration that the sum would not be recoverable from him under the general law of contract, and

(b) that declaration is made.

….

(7) Once an application has been made for a declaration under subsection (4) in relation to a sum, no further reliance may be placed on subsection (3) for the recovery of the sum while the application is pending.

> (8) An application for a declaration under subsection (4) may be made to an employment tribunal, the county court or the sheriff.
>
> ….
>
> (11) Nothing in this section shall be taken to prejudice any rights or remedies that a person has apart from this section.
>
> (12) In this section "settlement" (except in the phrase "settlement sum") means a settlement to avoid proceedings or bring proceedings to an end."

12. After the Appellant stopped paying the instalments, the Respondent issued proceedings for execution in the County Court, under section 19A, in respect of the obligation to pay the sums due under the COT3 Agreement. The Appellant defended the proceedings by seeking a declaration under s19A(4) that, because of the breach of the confidentiality clause, the outstanding sums were no longer recoverable by the Respondent under the general law of contract.

13. The matter came before HHJ Wall in Birmingham Civil Justice Centre on 13 December 2019. She heard evidence and subsequently handed down a reserved judgment on 17 Jan 2020.

14. The Respondent denied that he had disclosed the terms of the COT3 agreement to Mr Mulliner, as alleged by the Appellant, and also argued that, even if he had done so, this was not a breach of a condition or a repudiatory breach of the COT3 Agreement, such as would entitle the Appellant to refuse to make any further payments of outstanding instalments under the COT3 Agreement.

15. Having heard from a number of witnesses, HHJ Wall found that the Respondent had indeed breached the confidentiality clause by disclosing its terms, and in particular the amount of the settlement sum, to Mr Mulliner.

16. However, the Judge held that this amounted to a breach of an intermediate or innominate term of the COT3 Agreement, rather than the breach of a condition, and so that it did not automatically mean that the Appellant was freed from its obligation to continue paying the monetary instalments. She further held that the Respondent's actions did not in all the circumstances amount to a repudiatory breach or a renunciation of the COT3 Agreement. She held that the obligation to pay the instalments therefore continued, notwithstanding the breach.

17. Accordingly, the Judge refused the Appellant's application for declaratory relief to the effect that the settlement monies were not recoverable from it under the general law of contract, pursuant to section 19(A)(4) of the Employment Tribunals Act 1996. This meant that the remaining instalments were still due and owing.

18. The Appellant appeals on the basis that the Judge erred in failing to grant the declaration that the Appellant sought.

19. The Appellant is represented by Mr Pritchard-Jones and the Respondent by Ms Pitt. I am grateful to them both for their helpful submissions.

The judge's ruling

20. Before I come on to deal with the parties' respective arguments and my conclusions on this appeal, it is necessary to set out in a little more detail the findings of fact of HHJ Wall. As I have said, there is no challenge to these findings.

21. The Judge found that the Respondent mentioned the fact that he had entered into a settlement with the Appellant, and the terms of the settlement, including the total sum and the instalments, in a conversation with Mr Mulliner on 3 April 2019. Mr Mulliner had come round to the Respondent's house to give a quote for fencing. There was then a chain of communication (as the Judge put it) when Mr Mulliner passed the information on to his boss and then the information made its way, via three more people who were employees of the Appellant, to the Managing Director, Mr Payne. Mr Mulliner was a former employee of the Appellant who had left on bad terms, and his boss was also a former employee of the Appellant.

22. The Judge found that the Appellant had previously mentioned the settlement terms to his wife and his brother-in-law, but the breach relied upon by the Appellant was the disclosure to Mr Mulliner.

23. HHJ Wall also held that the disclosure of this information did not run any risk of causing commercial harm to the Appellant company, but that the risk was that other disaffected employees might rely on the information as encouragement to bring unmeritorious claims against the Appellant in the hope that they would obtain a settlement. The Judge accepted that it was not possible presently to quantify damages for the breach. However, if an employee had brought an unmeritorious claim in reliance upon the knowledge of the settlement with the Appellant, the Appellant would have been able to bring a claim for damages by reference to the costs incurred in defending the unmeritorious proceedings.

24. The Judge also found that in fact there had been no copy-cat unmeritorious claims, and that the risk of such claims was very low, given that the settlement was not for a high figure and, indeed, there had been surprise amongst those who were informed of it that it had not been higher.

25. The Judge also found that it was no secret that the Respondent had left the Appellant's employment and that there had been chatter about him getting money by way of settlement.

26. The Judge said that the Respondent had known what he was doing when he had spoken to Mr Mulliner. He knew that he was in breach of the confidentiality clause. However, she said that this did not mean that he was evincing an intention no longer to be bound by the settlement, and he had no intention to cause damage to the Appellant.

27. Against that background, the Judge rejected the Appellant's argument that the remaining instalments were no longer payable under the ordinary law of contract. She held that clause 9 was not a condition of the contract, any breach of which would automatically give the other party a right to bring its contractual obligations to an end. She also held that the breach did not go to the root of the contract and so was not a repudiatory breach, entitling the Appellant to treat itself as being discharged from any further obligation to pay instalments. Finally, she held that the breach did not mean that the Respondent had renounced the contract, such that a reasonable observer would think that he no longer regarded himself as being bound by the contract.

The Appellant's submissions

28. On behalf of the Appellant, Mr Pritchard-Jones observed that there is no authority directly in point on the issue that arises in this appeal. In **Peter Brooks v Oyslager OMS (UK) Ltd** (CA, 19 January 1998), the question arose as to whether the breach by an ex-employee of an implied confidentiality term would have relieved the ex-employer of the obligation to pay the settlement sum to him. In the event, the Court of Appeal found that there was no such implied term and so the question of the consequences of breach did not arise.

29. Mr Pritchard-Jones submitted, first, that the judge should have held that the confidentiality clause was a condition of the COT3 Agreement. He submitted that confidentiality was at the core of the COT3 Agreement, as is evident if the normal rules of construction of contracts are applied, as summarised in Chitty on Contracts, 33rd Edition, at paragraph 13-047.

30. In the alternative, Mr Pritchard-Jones submitted that, if clause 9 was not a condition, but, rather, was an intermediate term, the Judge should have found that breach of it committed by the Respondent was such as fundamental breach that the Appellant was absolved from the obligation to make any further payments.

31. In support of both alternative submissions, Mr Pritchard-Jones made the following points:

    (1) Although it is true that the word "condition" is not used expressly in clause 9, the importance of confidentiality to the COT3 Agreement as a whole is made clear by the fact that the Agreement is short, being only 13 clauses long, and three of them are concerned with confidentiality (the warranty, clause 9 itself, and the non-disparagement clause);

(2) Moreover, clause 9 refers to the terms of the COT3 Agreement not just as being confidential, but as being "strictly confidential";

(3) The Agreement was carefully drafted and agreed, by legal professionals;

(4) It makes business sense that the employer would want there to be confidentiality in relation to the COT3 Agreement and its terms, and it makes no business sense that the ex-employee can effectively thumb his nose at the confidentiality obligation, because no sanction will follow if he ignores it;

(5) The fact that no adverse consequences resulted for the Appellant from the Respondent's breach of confidentiality is irrelevant. The status of the relevant term has to be assessed in light of the position at the time when the contract was entered into. Moreover, the breach might have had adverse consequences, in encouraging others to bring claims against the Appellant. Indeed, the very fact that the Respondent denied in court that he had breached the confidentiality clause shows that he was well aware that he would be in serious trouble if he breached the confidentiality obligation;

(6) The Judge was wrong to place weight on her finding that the Respondent had evinced no intention not to be bound by the COT3 Agreement. The status of the term and the seriousness of the breach were to be judged objectively. The Respondent's intention was irrelevant; and

(7) As a matter of public policy, terms like these should enforceable. It is very hard to quantify damages in the event of breach, and so unless there is a

right to withhold the money, there is no practical remedy for the innocent party.

The Respondent's submissions

32. On behalf of the Respondent, Ms Pitt submitted that it is for the court to decide as a matter of law whether a term is a condition, a warranty, or an intermediate or innominate term. The nature of the term will depend on the intention of the parties at the time when the agreement is entered into.

33. She referred me to the judgment of HHJ Klein (sitting as a Deputy High Court Judge) in **C21 London Estates v Maurice Macneill Iona Ltd** 2017 EWHC 998 (Ch). In this case, the Judge held that the terms of a side letter between the master franchisor of an estate agency brand and a franchisee, to the effect that the franchisee would pay outstanding fees due in respect of one franchise, were not conditions of a contract for a second franchise. The Judge's ruling was upheld by the Court of Appeal ([2018] EWCA Civ 1823).

34. At paragraph 68 of his judgment, HHJ Klein said that:

> "68. As Tettenborn et al helpfully explain in Contractual Duties: Performance, Breach, Termination and Remedies (2nd ed), at paragraph 10-036, a contractual term is a condition in the following circumstances:
>
> "A term is a condition (rather than an intermediate or innominate term, or a warranty), in any of the following five situations: (1) statute explicitly classifies the term in this way; (2) there is a binding judicial decision supporting this classification of a particular term as a "condition"; (3) a term is described in the contract as a "condition" and upon construction it has that technical meaning; (4) the parties have explicitly agreed that breach of that term, no matter what the factual consequences, will entitle the innocent party to terminate the contract for breach; or (5) as a matter of general construction of the contract, the clause must be understood as intended to

> operate as a condition. This classification was declared as "neat" by Waller LJ in **The Seaflower** [**BS&N Ltd (BVI) v Micado Shipping (Malta) (No 1)** [2001] 1 LL R 341] who adopted the statement by Chitty on Contracts—although it should be noted that Chitty does not separate items (3) and (4) in this list.""

35. The Appellant's argument in the present case is on the basis that clause 9 is a condition because of (5) in the list above.

36. At paragraph 76 of his judgment, HHJ Klein said:

> "72. In Carter's Breach of Contract, at paragraphs-04, it is suggested that, in determining whether a contractual term is a condition, consideration ought to be given to the following non-exhaustive factors:
>
> (a) the form and structure of the term; whether entry into the contract was motivated by an understanding on the part of [the innocent party] that the term would be strictly complied with;
>
> (b) the relationship between the term in issue and the other terms of the contract;
>
> (c) the likely effects of any breach of the term;
>
> (d) the extent to which the [innocent party] will be adequately compensated by an award of damages for breach of the term;
>
> (e) whether construing the term as a condition will achieve a reasonable result;
>
> (f) the nature of the contract in which the term appears;
>
> (g) the nature of the subject matter of the contract;
>
> (h) the nature of the term and the obligation which it creates"
>
> I believe that all these factors are factors in the process which Lord Ackner approved in **The Naxos [Cie Commerciale Sucres et Denrees v C Czarnikow** [1990] 1 WLR 1337 (HL)]."

37. The Court of Appeal said, at paragraph 14 of its judgment:

> "14. The best way to establish that a contractual term is a condition of a contract is to say so in terms, although even that is not necessarily conclusive (see **L Schuler AG v Wickman**

> **Machine Tools Sale Ltd** [1974] AC 235). However, that has not been done in this case. The side letter says no more than it is to be a "contractual component" of the Chelsea agreement. The question, then, is whether it is a matter of necessary implication that, objectively, the terms of the side letter must have been intended to take effect as a condition of the Chelsea agreement: see **Bunge Corporation v Tradax Export SA** [1981] 1 WLR 711 at 726. I emphasise the word "necessary".

38. Ms Pitt also drew my attention to the following passage from the judgment of Bowen LJ in **Bentsen v Taylor, Sons and Company** [1893] 2 QB 74:

> "There is no way of deciding the question [whether a term is a condition] other than to look at the contract in light of surrounding circumstances and making up one's mind whether the intention of the parties as gathered from the instrument itself will be best carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of liability"

39. Applying these principles to the present case, Ms Pitt submitted that there had been nothing at the time when the COT3 Agreement was entered into to suggest that the Appellant was particularly concerned about confidentiality. The Employment Tribunal proceedings did not give rise to sensitive issues. The Appellant is not like a care home, for example, for which the adverse publicity resulting from Tribunal proceedings might be very damaging.

40. Ms Pitt submitted that the term in the COT3 Agreement relating to confidentiality was a generic one. The fact that lawyers and ACAS were involved in negotiating the Agreement does not affect the status of clause 9.

41. Ms Pitt further submitted that it did not make business sense for the confidentiality term to have the status of a condition. The COT3 Agreement was not primarily intended to purchase confidentiality for the Appellant. Rather, the main consideration that was provided to the Appellant by the COT3

Agreement was that there would be no hearing of the Employment Tribunal claims that the Respondent had brought, without any admission of liability by the Appellant. A breach of the confidentiality agreement would not bring any particular benefit for the Respondent.

42. A further reason why clause 9 was not, on its proper construction, a condition, was because damages would be an adequate remedy if there was a breach which actually caused financial loss to the Appellant. The damages could be quantified by reference to the costs incurred by the Appellant as a result of a future unmeritorious claim, if it could be shown that the claim had been triggered by the claimant's knowledge of the Respondent's settlement.

43. For all of these reasons, Ms Pitt submitted that to treat clause 9 as a condition would lead to an unreasonable result.

44. Ms Pitt further submitted that, if clause 9 was an intermediate term rather than a condition, the circumstances of the breach did not amount to a repudiatory breach. No harm had been done to the Appellant. The likely effect of a breach of the confidentiality clause was limited.

Discussion

45. The starting point is that the only breach of which the Respondent has been guilty is a breach of the confidentiality clause, clause 9. There was no suggestion that he was in breach of clause 8, the warranty to the effect that he had not breached confidentiality before entering into the COT 3 agreement. The judge did mention in passing that he may also have been in breach of the non-

disparagement clause, clause 10, but there was no evidence of this. Disclosure of the fact of the settlement is not the same as disparaging your ex-employer.

46. There are two routes by which the Appellant can potentially establish that the Respondent's breach of the confidentiality clause means that, applying the general law of contract, the Appellant was freed from the obligation to continue to pay the instalments.

47. The first is by establishing that the term was a condition of the contract. It is trite that there are three types of terms in a contract: a condition, any breach of which entitles the innocent party to bring the contract to an end; a warranty, breach of which does not so entitle the innocent party, and for which the only remedy is damages; and an intermediate or innominate term, halfway between the other two, in respect of which a breach may or may not be a repudiatory breach which would allow the innocent party to terminate the contract, depending on the circumstances and the nature of the breach.

48. If, therefore, the Appellant can establish that the term was a condition, the breach by the Respondent will inevitably absolve the Appellant from the duty to pay the further instalments.

49. The second route to the same outcome is if the term is not a condition but an intermediate term, and the nature of the breach is such that it in all the circumstances it was a repudiatory breach.

50. The Judge considered a third issue, namely whether the Respondent had by his actions renounced the contract and evinced an intention not to be bound by it, but in my judgment this is really just another way of describing the second

issue, repudiatory breach. In any event, as the judge observed, the same considerations apply to considering renunciation as to considering repudiatory breach. I should say that I accept the Appellant's submission to the effect that the Respondent's subjective intention when breaching the confidentiality clause cannot be relevant to any of the issues in this case, and that the question whether the term is a condition or not cannot be determined with the benefit of hindsight: it must be considered by reference to the position as at the time when the contract was entered into.

Condition

51. The first question, therefore, is whether clause 9 was a condition of the contract.

52. It is possible for the parties to a contract to state expressly that a term is a condition, such that any breach of it will absolve the innocent party from any further duty to comply with its obligations under the contract. That did not happen here. The question for me, therefore, is whether, by necessary implication, in light of all of the relevant circumstances, clause 9 should be regarded as being a condition. In my judgment, the guidance referred to by HHJ Klein in the **C21 London Estates** case is helpful and should be taken into account when considering this question.

53. Looking at the COT3 Agreement in all of the circumstances, and taking account of the considerations referred to in the **C21 London Estates** case, I have come to the clear conclusion that clause 9 was not a condition in this sense.

54. In my judgment, HHJ Wall was right to describe this term as ancillary to the main part of the contract. Confidentiality was not at the core of the agreement. The most important obligations of the contract, on the Respondent's side, were that he would give up his Employment Tribunal claims, thereby foregoing the opportunity to recover more money through the tribunal claim, and that he would not bring any other claims in relation to his employment or the termination of it. In return, he was guaranteed a sum of money. On the Appellant's side, the most important obligation was to make payments to the Respondent, and the Appellant benefitted from avoiding Employment Tribunal proceedings and the attendant risk, cost, and inconvenience, without having to make admission of liability.

55. There may well be cases in which a confidentiality clause in a COT3 or settlement agreement might be of sufficient importance to achieve the status of a condition. There may be cases where the allegations in question, and/or the identity of the Claimant or Respondent, are so sensitive that the achievement of confidentiality is the very essence of the benefit for the employer from the agreement. In most cases of that nature, however, the agreement will expressly stipulate that the term is a condition.

56. The present case, if I may say so without giving offence, is about a COT 3 Agreement arising in the context of a fairly standard employment dispute, in which neither of the parties is high profile. As the Judge said, the Appellant did not face any significant commercial risk from breach of the confidentiality clause. At most the risk was that it would encourage others to bring copy-cat claims. At the time when the COT3 Agreement was entered into, which is the

time that matters for this purpose, there would be no particular reason why the parties should be significantly concerned about this risk. The settlement was not for a large sum of money. Realistically, the very fact that the parties were in dispute was already well known in the locality and amongst the Appellant's workforce.

57. The fact that there were three terms in the COT3, out of 13, which dealt in one way or another with confidentiality is not a reason to regard clause 9 as a condition. You do not weigh the importance of contract terms by volume.

58. The fact that the word "strictly" is used in front of the word "confidential" in paragraph 9 is not, of itself, sufficient to elevate the term to a condition, in the context of the rest of the circumstances. As Ms Pitt observed, something is either confidential or it is not, so the word "strictly" does not add much.

59. This was a generic clause, such as one sees almost as matter of course in an employment settlement agreement. The fact that there is a confidentiality clause in such an agreement does not indicate that confidentiality is of paramount, or even major, importance to the parties. Nor does the fact lawyers were involved and the document was well put together, or that ACAS was assisting the parties at the time when the contract was entered into. In fact, ACAS does not generally advise about the terms or the merits of an agreement: its role is usually confined to facilitating the agreement and to ensuring that the parties are aware that if they settle they cannot proceed with the Employment Tribunal claim (see **Clarke v Redcar and Cleveland Borough Council** [2006] ICR 897).

60. Moreover, in my judgment to treat this term as a condition would not lead to a reasonable or desirable result. It would mean that any disclosure, however minor, would mean that the Respondent would forfeit the rest of his money. The point was made that he had told his wife about the settlement. Technically this was a breach: there was no "immediate family" exclusion for clause 9 as there was for clause 8, but it would be nonsensical to think that the parties intended that the ex-employee would lose his right to the settlement monies if he told his wife about it. Indeed, it is hard to see how he could avoid her finding out about it. This strongly suggests that it cannot be the case that any breach of clause 9 should entitle the innocent party to bring the contract to an end.

61. Also, as Ms Pitt pointed out, the confidentiality clause was of no particular value to the Respondent, and this militates against it being regarded as a condition. The confidentiality obligation applied both to the Respondent and to the Appellant.

62. I don't think that any conclusions can be drawn from the fact that, in the county court proceedings, the Respondent denied that he had breached the confidentiality obligation. This is not a sign that he understood that it was an obligation of fundamental importance. It is a sign that he did not want to lose the rest of his money.

63. It is true that if this term is not a condition, then it may not in practice be enforceable at all. This issue flags up the general problem of enforceability of confidentiality clauses in employment settlements. In the more usual case, the settlement payment is paid over in one go and the breach of confidentiality

happens after the payment has already been made. It is often impossible to quantify the loss that results in monetary terms. In such circumstances, the innocent ex-employer may in practice be left without a remedy in damages. If it is the ex-employer which breaches confidence, the ex-employee may similarly be without a remedy in damages.

64. In my view, there are two answers to this problem, without recourse to treating any breach of a confidentiality clause as a breach of a condition. The first, and most important one, is that the parties can make specific provision in the contract terms for what should happen if there is a breach of confidentiality. The parties can agree, for example, that in the event of a breach the ex-employee must repay all or a proportion of the money already paid over. The second, and related, answer is that a party can insist that the COT3 Agreement specifies that the relevant term is a condition. Furthermore, if the breach really matters to the innocent party, it can go to court to seek an injunction to prevent any further breach, though this only arises if the breach has not already taken place or if the damage has not already been done.

65. Against that background, and for these reasons, I do not think that the confidentiality clause was a condition. The judge was right to characterise it as an intermediate term, which would be capable of amounting to a repudiatory breach or to a breach sounding only in damages, depending on the circumstances. Parties often overestimate the harm that can be done by a relatively minor breach of a confidentiality clause.

In all the circumstances, was this a repudiatory breach of an intermediate term?

66. The next question is whether, in all the circumstances, the disclosure to Mr Mulliner was so serious a breach of the confidentiality clause as to amount to a repudiatory breach of the COT3 Agreement.

67. The relevant test requires the court to be satisfied that, from the perspective of a reasonable person in the position of the innocent party, the employer has "clearly shown an intention to abandon and altogether refuse to perform the contract": **Eminence Property Developments v. Heaney** [2010] EWCA Civ 1168, per Etherton LJ at paragraph 61, and applied in the employment law sphere, for example in **Tullett Prebon plc v. BGC Brokers** [2011] EWCA Civ 131; [2011] IRLR 420 (CA), at paragraphs 20 and 24.

68. In my judgment, HHJ Wall was right to conclude that the answer was no. The breach was never likely to, and did not, result in any commercial embarrassment or other commercial problems for the respondent. The risk that it would trigger expensive unmeritorious copy-cat claims was very remote, especially as the sum in issue was not very large. I would be very surprised if people who were familiar with the protagonists were unaware that an ET claim had been brought. If the breach had not happened, anyone who was aware of the dispute and who thought about it would probably work out that there had been a settlement, even without a breach of the confidentiality clause.

69. Moreover, if there had been actual financial loss as a result of the breach, an award of damages would have been an adequate remedy.

Conclusion

70. Accordingly, for these reasons, which are mainly the same as were given by the judge below, in her admirably careful and clear judgment, I dismiss this appeal.