

High Court rules employer had to pay settlement even after ex-employee breached confidentiality clause – *Duchy Farm Kennels Ltd v Steels* [2020] EWHC 1208 (QB)

By [Mathew Gullick](#)
3PB Barristers

The Facts

1. In *Duchy Farm Kennels Ltd v Steels* [2020] EWHC 1208 (QB), the High Court addressed the consequences of a party breaching the confidentiality clause in a COT3 settlement, noting that the issue of law arising regarding the status of the clause had not been the subject of a previous appellate ruling.
2. The employer was a small business which manufactured dog kennels. The employee brought claims in the Employment Tribunal, including for unfair dismissal. A settlement was negotiated with the assistance of an ACAS conciliation officer and was recorded on a COT3 form which was signed by both parties' lawyers.
3. The employer agreed to pay the employee the sum of £15,000 in 47 weekly instalments of £330, in full and final settlement of his claims against the employer. The payment of instalments over such a long period was because the employer was a small business and needed to manage its cash flow. There was also a confidentiality clause, which read:

“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.”
4. After paying £2,960 by way of instalments, the employer ceased to make payments. The employer contended that it was entitled to do this because the employee had breached the confidentiality clause. The employer alleged that the employee had disclosed the fact

of the settlement and the amount of the settlement sum to a third party, another ex-employee who had come to his home to give him a quote for some fencing work. That information had then been passed on to others and the breach had come to the attention of the employer's managing director.

5. The employee issued proceedings in the County Court to enforce payment of the sums due under the settlement agreement; he contended that he had not breached the agreement at all. The employer defended the claim on the basis that the sums were no longer recoverable because of the breach of the confidentiality clause.

The County Court

6. At the trial in the County Court, Her Honour Judge Wall found as a fact that the employee had breached the confidentiality clause, as alleged by the employer, and that he had known that disclosing the information was a breach of that clause. However, she went on to hold that this was a breach of an intermediate term of the agreement rather than a breach of condition, so it did not automatically release the employer from the obligation to pay the settlement sum.
7. She also held that the employee's actions did not amount to a repudiatory breach of the agreement. As a result, she found that the obligation to pay the settlement sum continued, notwithstanding the employee's breach.

The High Court

8. On the employer's appeal to the High Court, Mr Justice Cavanagh upheld the County Court's decision. There was no appeal against the factual findings made by the trial judge. Mr Justice Cavanagh noted that it would have been possible for the parties to state, expressly, that the confidentiality clause was a condition and that breach of it would absolve the innocent party from further responsibility, but that had not happened in this case. Nor was the confidentiality clause a condition by necessary implication: confidentiality was not at the core of the agreement; neither of the parties was high-profile and there was no significant commercial risk to the employer from breach of the confidentiality clause. The bare fact of a confidentiality clause being in the agreement did not indicate that confidentiality was of paramount, or even of major, importance to the parties.
9. Mr Justice Cavanagh held that the County Court had been right to treat the confidentiality clause as an intermediate term, breach of which might be repudiatory or might sound only in damages. He upheld the County Court's decision that the breach in

the particular case was not repudiatory; the employee had no intention to cause damage to the employer and was not evincing an intention to be no longer bound by the settlement.

10. The Judge noted that the facts of the case before him were unusual because the payment to the employee was to be made in instalments over a lengthy period of time. More commonly, a settlement payment would be paid in a single lump sum and any breach of a confidentiality clause would occur after full payment had been made. He noted that it was often impossible to quantify the loss, in monetary terms, arising from such a breach by either the employee or the employer with the result being that the clause would be unenforceable in practice.
11. Mr Justice Cavanagh considered that there were two related solutions to this problem. The first, and most important, one would be to make express provision in the agreement for what should happen in the event of a breach of the confidentiality clause (e.g. in the case of breach by the employee, repayment of some or all of the settlement sum).
12. The second would be to specify in the agreement that the confidentiality clause was indeed a condition, and the Judge noted that one of the parties could insist on this being stated in the agreement. Further, the Judge also noted that the injured party could consider seeking an injunction to prevent further breaches of the confidentiality clause, once a breach had come to its attention.

Analysis

13. Parties to settlements would be wise to consider carefully what Mr Justice Cavanagh had to say regarding specifying within the agreement itself both the importance of a confidentiality clause (if one is included) and the consequences of a breach of it.
14. In the event that the parties do not do so then it may not become clear until much further down the line – and at some expense to the losing party given the litigation will be in the courts rather than the tribunals – what the consequences of a breach might be.
15. In this case, the dispute over whether the employer was bound to pay the remainder of the settlement sum, once it had become aware of the breach, lasted more than a year.

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Mathew Gullick

Barrister
3PB

0330 332 2633

mathew.gullick@3pb.co.uk

3pb.co.uk