

# Post-termination Restrictive Covenants & Constructive Dismissal - Square Global Limited v Leonard [2020] EWHC 1008 (QB)

---

By [Daniel Brown](#)

3PB Barristers

[ ] Judgment paragraph number

## Introduction

1. Mr Leonard was recruited as a Broker by Square Global Limited (**'Square'**) in February 2015. He resigned summarily on 11 November 2019. For around seven months prior to his resignation, Mr Leonard had been in discussions with a rival financial services business, Market Securities, about leaving Square and joining them instead [2].
2. Square sought to hold Mr Leonard to his contractual, six-month, notice period as well as an order preventing him from undertaking any competitive work for a third party during that period, along with, inter alia, injunctive relief in accordance with a number of contractual post-termination restrictive covenants (**'PTRs'**) and damages [3].
3. Mr Leonard's Defence was that his immediate resignation was not wrongful: he had been constructively dismissed and was therefore free from any PTRs, which he argued were unenforceable in any event [8].
4. An expedited trial was heard by Jon Turner QC (sitting as a Deputy Judge of the High Court) over three days. Square relied on five witnesses, three of whom were called for cross-examination [12]. Mr Leonard relied on three witnesses (including himself) [13].
5. This case summary focuses on the Court's judgment in respect of the PTRs, rather than on the constructive dismissal question. The evidence relied on by Mr Leonard in support of his constructive dismissal argument is, however, discussed in detail in the judgment [36-130].

## Issues

6. The issues for determination are set out in the judgment as follows [15]:
  - i. Was the Defendant constructively dismissed on 11 November 2019?
    - a. Did the Claimant repudiate the contract of employment?
    - b. If so, did the Defendant affirm the contract prior to resignation?
    - c. If not, did the Defendant resign in response (or partly in response) to the repudiation?
  - ii. If the Defendant was not constructively dismissed:
    - a. Did the Claimant affirm the contract and if so, should the Court enforce the contract for the remainder of the Defendant's notice period until 11 May 2020?
    - b. Should the PTRs be enforced? In this regard:
      - a. Does the Claimant have legitimate business interests capable of requiring protection via PTRs?
      - b. If so, do these PTRs go no further than is reasonably necessary to protect the legitimate business interests?
      - c. If so, should the Court exercise its discretion to enforce the PTRs and, if so, to what extent?
  - iii. Did the Defendant breach a clause in the employment contract requiring him to notify the Claimant of the acceptance of a new job?

## Relevant contractual terms

7. In addition to a six-month notice period, Mr Leonard's contract contained the following relevant provisions [35]:

Fidelity (clause 3.2): various obligations were imposed requiring Mr. Leonard to provide exclusive and loyal service to Square, including at clause 3.2(a) a duty to devote the whole of his time, attention, and abilities to the business of the employer unless prevented from doing so by incapacity.

Garden leave (clause 15): after notice to terminate was given by either Mr Leonard or Square, Square had the discretion to require him not to perform any services (or to perform only certain services).

Job notification (clause 17.4): whilst still employed by Square, and for the duration of the PTRs, Mr. Leonard was required to provide a copy of clause 17 to any person making him an offer to be involved in a business competitive to Square; if Mr. Leonard were to accept an offer from any person to be involved in a business competitive to Square, he was also required to notify Square of the identity of the person making that offer.

## **Constructive Dismissal**

8. In a nutshell, Mr Leonard's case in respect of constructive dismissal was comprised of three broad categories behaviour (i) bullying/an aggressive environment, (ii) unfairness in relation to the allocation of remuneration and (iii) a failure or refusal to deal with complaints and grievances [6].
9. Mr Leonard relied on the implied term of trust and confidence and the Court applied the well-known principles in *Malik v BCCI* [1997] ICR 606 (UKHL) and, in respect of the final straw doctrine, *Omilaju v Waltham Forest LBC* [2005] ICR 481 (CA).
10. The Court held that there was no repudiatory breach of contract by Square, whether in respect of any individual act relied on or by way of a course of conduct over time [152 & 167].
11. Because Mr Leonard had not been constructively dismissed, his summary resignation was in breach of contract; Square was entitled to affirm the contract and, as a minimum, require Mr Leonard not to work for a third party until the expiry of his contractual notice period (11 May 2020) [168].

## **Breach of the job notification clause**

12. Square contended that Mr Leonard had breached the following clause of his contract [169]:

“If the Employee receives an offer to be involved in a business concern in any Capacity during the Appointment, or prior to the expiry of the last of the covenants in this clause 17, the Employee shall give the person making the offer a copy of this clause 17 and shall tell the Employer the identity of that person as soon as possible after accepting the offer.”

13. Clause 17 imposes two distinct requirements. First, it places Mr Leonard under an obligation to give any person making him an offer to be involved in a business concern, during the currency of his contract with Square, with a copy of clause 17. Secondly, it requires Mr Leonard to inform Square as soon as possible after accepting such an offer [170]. The question of whether Mr Leonard provided Market Securities with a copy of clause 17 was not explored at trial; Square focussed on the second requirement [171].
14. Square argued that Mr Leonard had reached an agreement with Market Services in relation to all of the essential elements of the contract in/around March 2019, long before his resignation [172]. Square's case was that although successive drafts of a contract were exchanged between Mr Leonard and Market Securities after March 2019, they contained only relatively minor amendments and that the process of negotiations was designed to obscure the fact that in reality, all of the major terms had been agreed.
15. The Court rejected the argument that Mr Leonard was in breach of clause 17; although it is probable that, from March 2019, both Mr Leonard and Market Securities had a high degree of confidence that a contract would in due course be agreed, it was a bridge too far to find that a contract had in fact been struck in March 2019 [173-174].

## The PTRs

16. The relevant PTRs were as follows [35]:

(clause 17):

- a. for six months after the termination of his employment, Mr Leonard was prevented from being involved in any business concern which is (or intends to be) in competition with Square (clause 17.1(c)) (the "**Non-Compete**");
  - b. for six months after the termination of his employment, Mr Leonard was prevented from: (i) soliciting the business of; (ii) endeavouring to entice away from Square; or (iii) having any business dealings with, certain of Square's customers or clients (clause 17.1(a) and (d)) (the "**Non-Deal**").
17. The Court noted that clause 17(1)(c), the Non-Compete clause, was the critical one in this case; the later Non-Deal clause effectively served as a fall-back position, in the event of the Non-Compete clause being found to be unenforceable [175].

18. Mr Leonard argued that both the Non-Compete and Non-Deal clauses were unenforceable and that the Court should refuse to grant injunctive relief in any event [177].

### ***PTRs: the relevant law***

19. The Court adopted the principles set out by Cox J in *TFS Derivatives Ltd v Morgan* [2005] IRLR 246. The principles were summarised as follows:

First, the Court must decide what the covenant means when properly construed. Secondly, the Court will consider whether the employers have shown on the evidence that they have legitimate business interests requiring protection in relation to the employee's employment. Third, once the existence of legitimate protectable interests is shown, the covenant must be shown to be no wider than is reasonably necessary for the protection of those interests. Finally, even if the covenant is held to be reasonable, the court will then finally decide whether, as a matter of discretion, the injunctive relief sought should in all the circumstances be granted, having regard among other matters to its reasonableness judged at the time of the trial [178].

In her judgment, Cox J observed that it was common ground that the employer had three types of protectable interest: customer connections; confidential information; and the integrity or stability of the workforce. In the case of confidential information, the extent to which to which it was memorable or portable was relevant [179].

20. The Court also referred to *TFS Ltd v Gamberoni* [2017] IRLR 698, in which Foskett J held that the necessity for non-compete provisions may arise where non-solicitation and non-dealing covenants and confidential information restrictions are difficult to police, or where there are disputes as to what information is confidential [180].

21. In *TFS v Morgan* (above), Cox J had observed that in this industry, non-solicitation clauses are almost impossible to police. In *Gamberoni*, Foskett J recognised that while each case is fact specific, such that previous decisions about what is said to be industry practice are not determinative, a non-compete clause that keeps a broker out of the market for between 6 and 12 months is not excessive by current standards of the industry [181].

22. The Court also noted *Credit Suisse Asset Management v Armstrong* [1996] ICR 882.

Neill LJ in the Court of Appeal held that the existence of a garden leave clause can be taken into account in determining the validity of a restrictive covenant as at the date of the contract. Moreover, in an exceptional case, where a long period of garden leave had already elapsed, perhaps substantially in excess of a year, there was the possibility that the Court would as a matter of discretion decline to grant any further protection based on a restrictive covenant [182].

## Analysis

23. The Court was satisfied that Square had legitimate protectable interests: Mr Leonard's job at Square involved building up and exploiting customer connections, indeed, he was able to spend 3% of net production on client entertainment in order to build relationships [184].

24. The Court found that the relevant market (trading exotics) is illiquid and opaque [185].

25. Mr Leonard had in fact retained a copy of a document containing highly confidential information about Square's clients and trades on his personal Hotmail account; although it was not established that Mr Leonard had done so deliberately, he explained that his device may innocently have selected his personal account as the relevant account from which to send the document, this only served to illustrate the portability of Square's confidential information [186].

26. For the avoidance of doubt, the Court found that 'Square had a legitimate interest in protecting its valuable confidential information from commercial use against itself; to vindicate this interest is the stuff of normal healthy competitive activity in a well-functioning market economy and is not anti-competitive' [187].

27. The Court was further satisfied that the six-month Non-Compete clause in Mr Leonard's contract was reasonable and went no further than necessary to protect Square's legitimate business interests [188].

28. Mr Leonard argued that if the Non-Compete clause was valid, the Court should refuse to grant injunctive relief because: (i) Square's evidence was that it would not have put Mr Leonard on Garden Leave had he given proper notice to terminate his employment; (ii) that accordingly, Square had conceded that the maximum protection it needs is six

months from the date that Mr Leonard leaves the market; and (iii) Mr Leonard had in fact been off the market for over fourth months already [190]. The Court rejected this argument.

29. Where an employer utilises a Garden Leave clause on the ground that it has concerns about how an employee would conduct himself during his notice period, the employee would be 'off the market' for the period of Garden Leave and it would not be unreasonable for the employer to, thereafter, enforce the full period of the PTRs. The Court considered that Mr Leonard's position was analogous; the fact that he had been off the market since his summary resignation was not a proper basis for declining to enforce the six-month Non-Compete clause [191].

30. Accordingly, the Court decided to exercise its discretion to enforce the Non-Compete clause [192].

## **Conclusions**

31. In light of the above, the Court held as follows [193]:

- i. Mr Leonard continues to be an employee under his contract of employment with Square, and he will remain so until the end of his notice period on 11 May 2020. Square is entitled to declaratory relief to this effect.
- ii. Mr Leonard was not entitled to resign summarily on 11 November 2019. In taking this action, and in failing to give six months' written notice of termination, he was in breach of his contract of employment. I dismiss his counterclaim for wrongful dismissal.
- iii. It was not proven that Mr Leonard was in breach of clause 17.4 of the contract of employment (the job notification clause).
- iv. Square was entitled to an order prohibiting Mr Leonard from engaging in employment with a third party while he remains an employee of Square.
- v. Square was entitled to an order enforcing the Non-Compete clause, by prohibiting Mr Leonard from involvement in a business concern in competition against Square until 11 November 2020.

32. The Court invited further submissions in relation to the form of the Order and consequential matters. In addition, the Court was willing to accept submissions in respect of whether the Court should make a further determination and order relating to the forensic examination of Mr Leonard's electronic devices and his private email

account, in order to confirm that no confidential information had been retained, together with an order for delivery up of any such information. Finally, submissions were also invited in relation to directions in respect of the outstanding issue of damages [194].

2<sup>nd</sup> June 2020



**Daniel Brown**

*Barrister*

3PB

0330 332 2633

[daniel.brown@3pb.co.uk](mailto:daniel.brown@3pb.co.uk)

[3pb.co.uk](http://3pb.co.uk)