

Confidentiality clauses: employer was liable to make full payment under a COT3 in spite of the ex-employee's breach of the confidentiality clause

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The High Court has held that breach of a confidentiality clause in a COT3 was not breach of a condition or a repudiatory breach of an intermediate term, and the employer was not therefore exempt from the obligation to pay the settlement payment.

THE FACTS

A “condition” is a fundamental provision of a contract that goes to the heart of the agreement between the parties. Breach of a condition entitles the wronged party to terminate the contract and claim damages. If a party breaches an “intermediate” term of a contract, the innocent party is only released from further obligations under the contract if there is a repudiatory breach.

In this case, the claimant, Mr Steels, had been employed by Duchy Farm Kennels Ltd. His employment terminated, and Mr Steels and Duchy Farm Kennels entered into a COT3, under which Mr Steels waived all claims against Duchy Farm Kennels. The COT3 contained a confidentiality clause, effectively restricting both parties from disclosing anything about the COT3 to anyone except as required by law or regulatory authorities, or to professional advisers. There was no mention of the confidentiality clause being a condition of the agreement, neither was there a carve out which allowed Mr Steels to tell his immediate family about the fact or terms of the COT3.

Under the COT3, the £15,500 settlement payment was to be paid in instalments.

An ex-employee visited Mr Steels’ home to give him a quote for fencing. Mr Steels mentioned the COT3 and the settlement sum and, by a roundabout route, the fact that he had done so got back to Duchy Farm Kennels. Duchy Farm Kennels stopped paying any further instalments of the settlement sum, and Mr Steels brought a claim against it in the County Court.

The County Court judge held that the confidentiality clause was not a condition of the COT3, but an intermediate term and that Mr Steel’s breach was not repudiatory. Duchy Farm Kennels was therefore required to pay the remaining instalments of the termination sum.

Duchy Farm Kennels appealed to the High Court, which dismissed the appeal. The judge commented that parties to a contract can state that a term is a condition of the contract. This had not happened here. The judge then considered if, in light of the contract, the confidentiality clause was a condition, and held that it was not. Particularly interesting points in the judge’s considerations include:

- Confidentiality was not at the core of this contract. The key element here was the waiver of claims.
- There are circumstances under which a confidentiality clause in a COT3 could amount to a condition. These include where the allegations, or the identity of the claimant or respondent, are sensitive neither of which were the case here.
- There was no significant commercial risk for Duchy Farm Kennels. The only real risk was of copycat claims, and there was no indication that this was a particular concern at the time of they entered into the COT3.
- There was no exception for discussing the COT3 with a close family member, meaning that even a discussion with his wife would have put Mr Steels in breach.

The judge also held that this was not a repudiatory breach of an intermediate term of the COT3 agreement. The relevant test is whether, 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”. This test was not satisfied.

WHAT DOES THIS MEAN FOR EMPLOYERS?

This case concerned a confidentiality provision in a COT3. Going forwards, it would be advisable to expressly make a confidentiality clause in a COT3 a condition of the agreement. The same issues might arise in relation to settlement agreements, but often payments in settlement agreements are conditional on complying with all the terms of the agreement and there may be repayment provisions which kick in if there is a breach of the confidentiality provisions. Employers for

whom confidentiality clauses are likely to be of particular importance should ensure that the drafting of settlement agreements and COT3s reflects this.

Duchy Farm Kennels Ltd v Steels [2020] EWHC 1208 (QB)

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