Neutral Citation Number: [2023] EWHC 2493 (Ch)

Case No.: BL-2023-000582

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 October 2023

Before:

HIS HONOUR JUDGE BAUMGARTNER
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

WLADIMIR PATRICOT

Claimant

- and -

ADRIAN LEE & PARTNERS

Defendant

- -
- -

Thomas Westwell (instructed by **Watling & Co**) for the **Claimant**
Morwenna Macro (instructed by **Birketts LLP**) for the **Defendant**

Hearing date: 3 October 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand down is deemed to be 10.30am on 5 October 2023.

HIS HONOUR JUDGE BAUMGARTNER:

Introduction

1. This is an application (the **"Application"**) by the Claimant, Wladimir Patricot, for an expedited trial of a claim brought against his former employer, Adrian Lee & Partners. He seeks a trial by no later than the end of October 2023. The Claim Form was issued on 17 April 2023, and the Application on 18 September 2023, some five months later.

2. The Claimant's claim is for a declaration that a non-compete clause in his employment contract with the Defendant (**"Clause 6"**) is unenforceable. This is denied by the Defendant, who says that Clause 6 is a permissible restraint upon the Claimant's employment as legitimately protecting its proprietary and confidential systems and processes, and enforceable for the reasons set out in its Defence.

3. The Claimant is now employed in Switzerland, but says that he wishes to return to the United Kingdom to work. Clause 6 expires on 2 February 2024, such that the practical utility of the claim has a short lifespan. The Claimant relies primarily upon these two factors in seeking expedition, alongside a claim for ongoing losses.

4. After reading the papers (which included three witness statements from the Claimant's solicitor, Henry Page, a witness statement from the Defendant's solicitor, Ceri Rogers, and a bundle of documents relevant to the Application) and hearing from the parties, I dismissed the Application, giving short reasons and reserving judgment. This is my reserved judgment.

Background

5. Clause 6 of the Claimant's employment contract (or "Fidelity Undertaking", as it is called by the parties) says:

> "I agree that for a period of twelve (12) months after the termination of my employment (howsoever caused) I shall not directly or indirectly carry on or be engaged or interested (whether on my own account or as advisor, consultant, partner, shareholder or employee) in a business in Ireland, the United Kingdom and the United States of America which competes with the business of the Company".

6. The Claimant's case is that the clause is in restraint of trade and unenforceable because, for the reasons set out in paragraph 5 of his Particulars of Claim and paragraphs 17-19 of his Reply, it goes further than is reasonably necessary to protect the Defendant's legitimate interests.

7. The Claimant gave notice of his resignation to the Defendant on 3 November 2022. By letter dated 9 November 2022 an investment management firm called T Rowe Price International Limited (**"TRP"**) offered the Claimant a role. On 19 December 2022, the Claimant wrote to the Defendant seeking a waiver of Clause 6. In January 2023 the Defendant wrote to TRP threatening to commence legal proceedings against it if the Claimant took up the role. Thereafter, various correspondence passed between the Defendant, TRP and the Claimant; throughout, the Defendant refused to waive Clause 6 and continued to assert its enforceability.

8. The Claimant's last day of employment with the Defendant was 3 February 2023. He was due to start with TRP on 20 February 2023, but on 16 February 2023 TRP withdrew its offer, stating that it was "*not prepared to face potential litigation from* [the Defendant] *and, regretfully, this means we cannot move forward with your hire*".

9. Thereafter the Claimant made a number of job applications between February and April 2023, one of which (on 6 April 2023) resulted in a job offer in Switzerland which he promptly accepted. He commenced employment in Switzerland on 8 May 2023.

10. As I mentioned, this claim issued on 17 April 2023. The Claim Form was not served upon the Defendant until 28 April 2023. There was, it seems, some attempt by the parties to resolve matters between themselves but it was clear by early July that no out-of-court resolution was possible. This Application issued on 18 September 2023, some five months after the claim issued. It was originally listed for hearing on 26 September 2023, but was relisted to 3 October for the convenience of the Claimant's counsel.

Legal framework

11. In their respective and helpful skeleton arguments, Thomas Westwell (for the Claimant) and Morwenna Macro (for the Defendant) set out the applicable legal principles in applications of this nature. While the relevant legal principles are agreed between them, they placed different emphasis on certain aspects.

12. The Chancery Guide 2022 (June 2023 revision) provides that:

> "*3.19 The court may expedite the trial of a claim in cases of sufficient urgency and importance.*
>
> *3.20 A party seeking an expedited trial should make an application on notice to all parties at the earliest possible opportunity. This will normally be on the hearing of an early interim application on notice or after issue and service of the claim form and particulars of claim but before service of a defence (see Chapter 15). ...*"

13. In *Wembley National Stadium Limited v Wembley (London) Limited* [2000] 11 WLUK 1006, Jonathan Parker LJ said (at [54]) that it is "a matter essentially for the discretion of the judge" whether to grant expedition, and, if so, how much, and on what terms. But, as Vos LJ (as he then was) said in *Petter v EMC Europe Limited* [2015] EWCA Civ 480, the court exercises its discretion to expedite proceedings against the backdrop that the courts are busy and that expediting one case will often slow the progress of others. For that reason, the overriding objective requires that there should be a good reason for expedition.

14. In deciding whether to exercise its discretion, the court must consider the following four factors identified by Lord Neuberger in *WL Gore & Associates GmbH v Geox SpA* [2008] EWCA Civ 622, at [25]:

    (1) whether the applicant has shown good reason for expedition;

    (2) whether expedition would interfere with the good administration of justice;

    (3) whether expedition would cause prejudice to the other party; and

(4) any other special factors, including the applicant's conduct.

15. In *Petter*, Vos LJ held (at [17]) the overriding factor to be that "expedition will only be justified on the basis of real, objectively viewed, urgency", and said that the four factors in *Gore* are to be viewed in that light. Earlier, at [11], Vos LJ approved a statement from an earlier authority that the court must be "convinced … that there are pressing reasons justifying such course."

16. Any delay in bringing the application falls to be taken into account as a "special factor", but it is not determinative: see *Gore* at [37]. Instead, "it all depends … on why the application is made at a later, rather than an earlier, stage": see *Daltel Europe Ltd v Makki* [2004] EWHC 1631, per Lloyd J at [19].

17. Even a significant period of delay does not in itself prevent an order for expedition. In *Verition Advisors (UK Partners) LLP v Jump Trading International Ltd* [2023] IRLR 787, the claimant employer brought a claim to restrain its former employee from taking up a new job nine months after having been informed that the claimant had accepted the new employer's (Verition) job offer. At first instance, Michael Ford KC (sitting as a Deputy High Court Judge) refused the claimant an interim injunction on the grounds of delay but ordered an expedited trial. Verition appealed against the expedition order, but the Court of Appeal upheld it and dismissed the appeal. Simler LJ (with whom Elisabeth Laing LJ agreed) held that the delay by the claimant in pursuing the claim did not undermine the conclusion that there was objectively viewed urgency. She observed (at [35]):

> "Restraint of trade litigation in the employment context frequently gives rise to real urgency, where enforcement of the restrictive covenant is necessary to avoid uncompensatable damage being suffered. Such cases are common examples of cases in which orders for expedition are made because in almost all such cases, the period of restriction will have expired or substantially expired before trial unless an order for expedition is made. Accordingly, regardless of whether interim injunctive relief has been ordered, there is almost always real urgency in such cases justifying an order for a speedy trial: see for example *Lawrence David Ltd v Ashton* [1989] IRLR 22 (at pp 27, 28), [1989] ICR 123 (at pp 134G and 135G). This case is no different: the mere fact that the non-compete clause is time-limited and will expire within a relatively short time, is a reason to conclude that there was objectively viewed urgency."

Submissions and analysis

18. Against that framework, Mr Westwell's submissions on behalf the Claimant can be put broadly as follows. He submits Clause 6 has forced the Claimant to leave his home in London and to take up employment in Switzerland, and that, without an expedited trial, the Claimant is unable to return to London to take up employment. In addition, he submits that, because the term of the clause expires in February 2024, judgment on an ordinary timetable would be of limited practical value to the Claimant and, as the claim concerns the enforceability of a single clause, a trial is likely to take no more than two days, so there is likely to be limited interference with the administration of justice or prejudice to the Defendant. Despite the Claimant's delay in bringing the application, Mr Westwell submits there are good reasons why the application is being made now and this factor should not prevent the granting of the application.

19. The Defendant opposes an expedited trial. Ms Macro's overarching submissions can be briefly put as follows. She submits the Claimant has not made out his case for expedition in all the circumstances, especially the threshold test of real, objectively viewed, urgency. She submits that the factors relied upon by the Claimant for an expedited trial have been present since issue of the claim, yet there has been a very lengthy delay in seeking expedition, depriving such factors of their potency and casting doubt on any genuine urgency. That, submits Ms Macro, is something of the Claimant's own making. As the Claimant is seeking trial in no more than four weeks' time, she submits such a short timescale to prepare for trial is prejudicial to the Defendant and is not justified in the circumstances.

20. I shall look at these submissions in greater detail. I take, as my starting point, Vos LJ's overriding factor of "real, objectively viewed, urgency", and consider the four *Gore* factors in that light.

Real, objectively viewed, urgency

21. Mr Westwell's submission on this factor was shortly put: there is real urgency given the fact that the clause expires in February 2024, the Claimant's desire to return to London as soon as possible, and the ongoing impact of the clause upon him. Mr Westwell submits on that basis that the order for expedition should be made, and relies on *Verition* as authority to reject the Defendant's position that the Claimant's delay in pursuing his claim undermines the conclusion that there is real, objectively viewed, urgency.

22. In reply, Ms Macro submits the Claimant has not demonstrated the kind of exceptional, pressing, urgency which would justify expedition. She relies upon, in particular:

    (a) the lack of any, or any proper, explanation for what she says is the Claimant's "*egregious and unjustified*" delay in making the Application, which points against genuine, pressing, urgency;

    (b) that, while the value of obtaining a declaration has a finite lifespan:

        (i) the Claimant is in employment (and not in breach of Clause 6);

        (ii) the Claimant's own delay in seeking expedition has already eaten into most of the timescale covered by Clause 6 (with eight months out of the 12 having now passed);

        (iii) that any ongoing loss that may be proven for the remaining short period of restriction (if any) will be minimal, and the curtailment of such (by no more than three months) is unlikely to be a genuine reason given the substantial delay;

        (iv) the Claimant's real remedy is in damages;

    (c) the Claimant's desire to return to the United Kingdom is not something of sufficient, objective, pressing urgency to warrant expedition, especially considering that:

(i) the Claimant has only now chosen to make the Application, six months after accepting the job offer in Switzerland;

(ii) the Clause 6 restriction only applies for a further four months (indeed only three months from the trial date sought);

(iii) the Claimant is obliged to give three months' notice for his current position;

(iv) there is no current, actual, job offer in the United Kingdom;

(d) even if the Claimant was granted a trial by the end of October, such would provide no real benefit or utility as his three-month notice period means that he could give notice from 3 November 2023 in the event he wished to return to the United Kingdom at the first opportunity post-restriction; and

(e) the Claimant did absolutely nothing to seek expedition or indeed progress the claim between issuing the claim in April, and putting in a Reply and making this Application five months later in September.

23. Those are, in my view, powerful submissions on this overarching point. This is not a case of someone in the invidious position of not being able to obtain employment, or like, in *Petter*, potentially in breach and facing potential liability for unquantifiable damages.

24. And, unlike this case, *Verition* concerned a claim by the former employer to enforce the covenant until its expiry, on the basis that any breach of the covenant was likely to cause immeasurable and/or undiscoverable damage to the former employer by misuse of its confidential information. Verition delayed issuing its claim until just before the employee was due to start a month after his garden leave/employment ended, and only then sought relief to enforce the non-compete covenant until its stated expiry date about 11 months later. There was, importantly, a significant amount of time left to run under the non-compete covenant, and within which a trial could be accommodated by the court.

25. One can fully understand why an order for expedition ought to be made on the facts set out in *Verition*; but, for the very clear reasons set out by Ms Macro, I do not consider there is real urgency here. The time left remaining under Clause 6 expires in February next year, and with the three-month notice period that the Claimant has to give to his current employer, I do not think it likely the Claimant would be put in any better position if an expediated trial was granted. Although Mr Page says at [30] of his first witness statement that "[the Claimant] *requires a judgment as soon as possible to enable him to take up employment with TRP in London*", there is no evidence from TRP to suggest such a job offer has been made or remains open (the 16 February 2023 letter withdrew the offer of employment), nor is there any evidence that the court could accommodate even a relatively short a trial in October (or even November). Moreover, I do not consider the Claimant is suffering any uncompensatable damage.

26. For all those reasons I reject the Claimant's position that there is real, objectively viewed, urgency in this case. Having made that finding, I turn to consider the four *Gore* factors.

Good reason for expedition

27. Mr Westwell points to three reasons for the trial to be expedited.

28. First, the Claimant wishes to return to London as soon as possible and has compelling reasons for this: he had lived in London for around 10 years before leaving for Switzerland in May 2023, he owns property here, and his partner and many of his friends live here. Mr Westwell submits the Claimant's financial position is worse in Switzerland than it would be in London, relying upon the facts and matters set out in Mr Page's third witness statement.

29. Secondly, if the application were granted and the Claimant were to obtain judgment in his favour by the end of October (or shortly thereafter), he expects to be able to obtain work in London promptly (as Mr Page sets out in his first witness statement). In particular:

    (a) Clause 6 has prevented the Claimant from obtaining employment: TRP withdrew the offer expressly because of the clause; and in March 2023 even a potential employer outside the geographical scope of the clause referred to it as its reason for not considering the Claimant's application;

    (b) if the clause were declared unenforceable, the Claimant would likely be able to obtain a role back in London promptly. TRP's letter of 16 February 2023 expressly stated that it would "*gladly consider* [the Claimant] *for any future opportunities, when the time period of the restrictions has passed*";

    (c) while the Claimant has a three-month notice period under his current employment contract, he expects to be able to agree a reduction to this. The Claimant's employer has recently agreed to a reduction with another employee. In addition, the Claimant has informed his employer of the situation with respect to TRP, which suggests that his employer would not be surprised by any such request.

30. Thirdly, Clause 6 expires in February 2024: unless judgment is obtained on an expedited basis, it would be of limited practical value to the Claimant. This makes resolution of the claim a matter of real urgency.

31. Having carefully considered those submissions, I cannot see any good reason for expedition. The Claimant is in employment, any ongoing loss is limited, and little of the restriction period is left to run. If he is right that Clause 6 is unenforceable, any damage which he has suffered is likely to be compensatable. In my judgment, his desire to return to work in the United Kingdom in itself is insufficient to be a good reason in the premises, including the delay and the fact that he may return uninhibited in four months' time, and is obliged to give three months' notice. There is, in addition, no firm job offer on the table from TRP (or anyone else). While Mr Page, in his first witness statement, makes reference (at [30]) to the short passage quoted above and relied upon by Mr Westwell, that is not a firm offer or anything of the kind; it is contingent upon there being "*future opportunities*" available "*when the time period of the restrictions has passed*", and there is no direct evidence from TRP that any such opportunity is in the offering. Indeed, Mr Page goes on to say that:

> "[the Claimant] *has informed me of his belief that, even if TRP were no longer willing to employ him, he would have a good chance of obtaining another role in London promptly without the impediment of* [Clause 6]",

but no reasons are given by Mr Page or the Claimant for the basis of that belief.

32. Even if expedited, and expedited on the extremely short timetable sought by the Claimant, in my view a favourable judgment would have little practical value as only three months of the restriction would remain, which is the same term of the Claimant's contractual notice period. The Claimant would be able to give notice regardless of any declaration. Any case the Claimant may have had based upon the practical value of a favourable judgment has been overridden by his own delay.

33. In taking all those matters into account, including the reasons I have given against any real urgency, I would have refused to exercise the court's discretion on this factor alone, and dismissed the Application on that basis. Nonetheless, I will go on to consider if there is any merit in the three remaining *Gore* factors.

Interference with good administration of justice

34. Having considered all the facts and matters set out in Mr Page's first witness statement on this factor, it seems to me that the singular omission there is the lack of any approach to the Clerk of the List as to when a trial – whatever its length or complexity – could be accommodated by the court. I shall return to this point shortly.

35. As set out by Lord Neuberger in *Gore* (where trial within six months was sought), this factor:

> "includes having a sensible timetable leading up to the hearing, and it also includes the interests of parties to other cases, which weighed quite rightly with Lewison J" (at [30]).

36. At this juncture, I do not consider it possible to have a sensible timetable leading up to a trial in the timescale proposed; indeed, the Claimant's own draft directions are impossible to fulfil, providing for disclosure four weeks before trial, and for bundles three weeks before trial, even before witness statements are exchanged two weeks before trial; yet on the Claimant's case a trial must take place before the end of October (or, as Mr Westwell conceded, possibly early November), which is in four weeks' time.

37. As to the length and complexity of the trial, to decide this point I consider the court would need to determine the meaning of the Clause 6 and then decide whether it goes no further than reasonably necessary to protect the Defendant's legitimate business interest. That will, necessarily, involve some consideration of the nature of the Defendant's business and of the Claimant's role when he was employed there. I cannot see that happening in less than two days. It remains unclear whether the court could easily accommodate such a trial within the next three to four weeks.

38. For those reasons, I am not satisfied that an expedited trial would not interfere with the good administration of justice.

Prejudice to other party

39. Mr Westwell submits that any prejudice to the Defendant from ordering an expedited trial is likely to be limited. He relies particularly upon the narrowness of the issue and the amount of disclosure and witness evidence involved.

40. Ms Macro, however, submits otherwise:

    (a) the case raises numerous factual issues in addition to legal ones, and has some complexity; given the nature of some of these issues and the fact that some factual matters are quite historic, and bearing in mind that the Defendant is very small in size, it has had very limited notice of the expedited trial and has few personnel who could devote time alongside their other duties to the onerous task of preparing for trial;

    (b) disclosure will need to be appropriate and with a sensible timetable;

    (c) the Defendant anticipates calling four to five witnesses, and will need time to prepare their evidence, properly, and (as Ms Rogers sets out in her witness statement) there are real issues in terms of availability if the timetable is too truncated;

    (d) the declaration sought is important to the Defendant to protect its proprietary and confidential information, and may have wider ramifications; the Defendant is entitled to have appropriate time to properly prepare its case, and a trial should not be "*shoehorned*" in at the last minute to the Defendant's manifest disadvantage, when the Claimant's delay has caused the situation.

41. Mr Westwell questioned why the Defendant believed that evidence would be required in relation to TRP or any services it might have provided the Defendant in the past. He relied upon the issue at trial being whether Clause 6 is enforceable as a general matter, not whether TRP falls within the scope of the clause. I cannot, however, accept this submission. I do not seek to bind the hands of the trial judge (who will have to agree the issues for trial), but, within the context of this Application the issues identified by Ms Macro in the appendix to her skeleton argument appear to me to be matters which may well fall for determination in considering whether Clause 6 is enforceable, including whether TRP is a competitor of the Defendant's. There are, in addition, the issues identified by Ms Rogers in her witness statement regarding the availability of key personnel during any expedited period. All these matters suggest to me that the Defendant would be prejudiced by any trial expedited on the basis sought by the Claimant.

42. In any event, I am not persuaded that the declaration sought by the Claimant would be dispositive of the issues now arising between him and the Defendant. Those issues are confined to whether Clause 6 bites insofar as the Claimant's proposed employment with TRP is concerned: if the clause is not unenforceable in and of itself as an unlawful restraint of trade, there are a number of residual matters that will be required to be determined in relation to any proposed employment of the Claimant (as Ms Macro identifies in her draft list of issues).

43. I would refuse an expedited trial having considered this factor too.

Any other special factors

44. The fourth factor requires the court to consider any other special factors, including the Claimant's conduct. I have already considered the Claimant's delay in making the Application and I need not rehearse that here again, suffice to say that no good reason has been provided for the delay. While I acknowledge that delay is not determinative, the reasons for expedition relied upon by the Claimant all existed as at the issue date of his Claim Form; this is not a case of matters emerging since, which might have justified a late application for expedition. I do not consider there is any justification for the five month delay.

45. Besides, the Claimant can exercise his contractual right to terminate his present contract of employment very shortly after the expedited trial timetable sought. Although he says (through Mr Page) that he considers his current employer would likely be willing to negotiate a shorter notice period with him were he to resign (see Mr Page's second witness statement, at [7]), as I have already mentioned there is no direct evidence from the Claimant's current employer about this. I am not persuaded that the position would be so simple if the Claimant's skills were in such demand and/or in short supply.

46. Again, I would refuse an expedited trial having considered this factor too.

Disposal

47. Accordingly, the Application was dismissed.