

GARDEN LEAVE & POST TERMINATION RESTRAINTS

THEIR INTERACTION AND THE LEGAL PROBLEMS GENERATED

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1. The origins of the garden leave injunction are to be found in the judgment of Lord St Leonards VC in Lumley v Wagner given on 26th May 1852 (see *l de GM&G* 604 42 ER 687). Its modern form requiring undertakings from the claimant employer to continue to pay wages and provide other contractual benefits during garden leave and not to sue the employee to recover the same if he or she refused to attend for work emerged in 1986 in Evening Standard Co Ltd v Henderson [1987 ICR 589]. A clear and comprehensive analysis of the legal principles underpinning the grant or refusal of modern garden leave injunctions was provided by the Court of Appeal in Provident Financial Group v Hayward [1989] ICR 160, two years later. It might be thought that with the passage of some twenty years the courts would by now have assimilated and understood these principles and, in particular, the crucial differences between the approach courts must take in garden leave injunctions and the approach they must take in applying the doctrine of restraint of trade to post termination covenants. It might be thought, too, that by now the courts would have worked out a coherent and consistent approach to the interaction between garden leave and post termination restraint so as to ensure that an employer cannot subvert the restraint of trade doctrine by piling the former onto the latter and obtaining more protection against competition than his legitimate interests could possibly justify.
2. The thrust of this Paper's argument is that it is clear that judicial confusion continues both as to the approach to be adopted to garden leave injunctions and post termination restraint injunctions, and that no coherence or consistency marks the courts' understanding of the impact on post termination restraints of garden leave provisions.

3. To illustrate the argument, I need refer only to the recent decision in *Tullett Prebon Plc & Ors v BGC Brokers LP & Ors* [2010] EWHC 484 QB (Jack J). As part of the relief claimed, the claimant sought in the case of a number of individual brokers poached by the corporate defendants an injunction restraining them from joining these defendants and an injunction restraining these defendants from employing them for a period of eighteen months from April 2009 when the action had been commenced. The basis for this relief was the enforcement of garden leave and in two cases, where the brokers' contracts of employment, would have terminated earlier than that eighteen month period, a combination of garden leave and six month post termination restraints, one of which was a blanket non-compete. In the event the judge refused to enforce garden leave clauses for an eighteen month period and substituted lesser periods for the injunctions (in the majority of cases, twelve months and in one case, eight months). However, in the two cases above mentioned even the lesser period of twelve months took those two brokers beyond the end of their respective contracts of employment with the claimant and the judge made up "the shortfall" by enforcing by injunction also their post termination restraints "for such period as will provide a total of 12 months taken with their time on garden leave, but not thereafter" (paragraph 241, my emphasis), i.e. the judge granted an injunction which included the enforcement of post termination restraints but for a period less than the contractual covenants stipulated. This was not only a fundamental error of principle but an approach that the parties, in an agreed note, had urged the judge not to take. Rather, they argued, he should enforce the full length of the post termination restraints but shorten the period of the garden leave element of the injunctions.

4. Further the judge compounded this error of principle by rejecting the defendants' contentions that the post termination restraints took insufficient account of periods spent in garden leave and ought therefore to be held unreasonable restraints. Despite lengthy periods of notice during which the employees could be put on garden leave, the

contracts of employment did not provide for a full set off of garden leave periods from the post termination restraint periods. The relevant provision was as follows:

“12.2 If you are required by the company not to attend for work under [the garden leave clause] up to six weeks of the period of such exclusion should be set against the period of post termination restriction under clause 12.1(a).” [The blanket non compete provision]. (There was no set off at all in respect of the non-solicit not dealing with clients and non solicitation of employment of fellow employees’ covenants.)

The judge held (paragraph 237):

“In my view, where a clause takes no account of the possibility of garden leave it is not thereby made unreasonable. For, as I have set out, in deciding whether to give effect to the covenant and the extent to which it should be given effect, the court will take account of garden leave. Any necessary adjustment is, as it were, built in by the law. Where a clause takes some account of the possibility of garden leave, but inadequate account, that should not put the clause in a worse position than a clause which takes no account.”

5. Not only was the judge’s summary of the law incorrect, he failed to apply it. In paragraph 239 of his judgment he ruled of the restrictive covenant in question: “I am satisfied that a six month period is no more than is reasonable in this business where broker/trader relationships have the importance which I have described”. Had the judge been following his own exposition of the law and taken account of garden leave, he would have to have been satisfied that an eighteen month period (less six weeks) or twelve months (less six weeks) being the respective notice periods of the two brokers when they could have been put on garden leave, plus the six months post termination restraint period less the partial set-off, were reasonable in that business.
6. Neither did the judge explain why if, as he had earlier decided, the set-off clause took inadequate account of the possibility of garden leave, he was able to uphold the period of the restraints as reasonable. On his own reasoning, it could not have been.
7. It is necessary to review some authorities on garden leave injunctions and on the doctrine of restraint of trade to uncover the essential principles at play and how these two areas of law differ.

Garden leave injunctions

8. It is vital at the outset to observe that a garden leave injunction is not an injunction “to enforce notice periods” as it is sometimes described. The garden leave injunction is aimed at enforcing either express or implied exclusivity of service provisions (see Evening Standard v Henderson supra) or the implied negative obligation not to assist or take employment with a competitor of the employer during the currency of the contract of employment. This implied negative obligation is an incident of the implied terms of good faith and fidelity (see Hivac v Park Royal Scientific Instruments Ltd [1946] Ch 169 and Thomas Marshall (Exports) Ltd v Guinle [1978] ICR 905).

9. It follows that garden leave injunctions are not only obtainable during a period of notice given by employer or employee or only where the employer has invoked a garden leave provision in the contract of employment (see Guinle supra).

10. It follows also that, because the “garden leave” injunction is aimed at enforcing negative obligations of an employee that it escapes the equitable (now statutory – see Section 236 TULRCA 1992) principle that a court cannot specifically enforce a contract for personal services. The courts recognise, however, the danger of enforcing too wide a negative prohibition prohibiting an employee from working for any one else at all if the effect of that would be to compel the employer to continue or resume working for the employer because otherwise he would starve or suffer enforced idleness (Chapman v Westerby [1913] WN 277). This would be indirectly to specifically enforce a contract for personal service. This objection to a garden leave injunction drops away (at least so far as starvation is concerned) with the development in the Evening Standard case of the requirement that the employer must undertake to pay the employee against whom the garden leave injunction is sought his wages or provide other contractual benefits and the further undertaking that these will not be “clawed back” from the employee by action as damages for his breach of contract in refusing to attend for work. What remains is an objection to such an injunction that it forces a person to remain idle rather than being able to deploy their skills and that those skills may atrophy:

“The practice of long periods of ‘garden leave’ is obviously capable of abuse. It is a weapon in the hands of the employers to ensure that an ambitious and able executive will not give notice if he is going to be unable to work at all for anyone for a long period of notice. Any executive who gives notice and leaves his employment is very likely to take fresh employment with someone in the same line of business not through any desire to act unfairly or to cheat the former employer but to get the best advantage of his own personal expertise.” (Provident Group (supra) per Dillon LJ at p 165).

“It is not enough just that the employee has contracted in certain terms and will not starve if the terms are enforced against him while the employer continues to pay him in full. The employee has a concern to work and a concern to exercise his skills. That has been recognised in some circumstances with artists and singers who depend on publicity, but it applies equally, I apprehend, to skilled workmen and even to chartered accountants.” (Provident Group (supra) per Dillon LJ at p 168).

11. What may be called “considerations” of restraint of trade do, therefore, arise in garden leave injunction cases because the substantive effect of a garden leave injunction (and indeed of a garden leave clause if operated by the employer) is to “sterilise” not to absorb the skills of the employee in question in the same way that a post termination restraint does. But it does not follow that the doctrine of restraint of trade can be employed in the same way in garden leave cases as it is in relation to post termination restraints. Again, this was made clear in the Provident case:

“[Counsel for the defendant] persists that the negative term that is actually enforced must be expressed in the agreement; it is not possible to have a wide term in the agreement which the court will whittle down so as to enforce as much of it as the court thinks right. Of course that is correct where you have in the service agreement a contract restraining the employee after termination of his agreement from operating in a particular line of activity within the specified geographical area or over a prohibited period of restriction. If it is held that the area that has been chosen by the employer or the period of restriction are too wide or too long, the court will reject the whole clause as void and will not enforce whatever maximum shorter or smaller field of restriction the court thinks would have been permissible if the parties had made such an agreement.”

“But that, as I see it, is not this case. The negative clause here not to work for anyone else during the term of the contract of service is a common form of clause which has often been held to be valid. The question is whether it should be enforced in particular circumstances by injunction. The lesser form of relief suggested not to work during the continuance of the service agreement for specified rivals or rivals generally if there were no express contract not to do so in the service agreement, could still be restrained as a breach of the employees’ obligations of good faith ...” (per Dillon LJ supra at p 167).

12. Accordingly, unlike post termination restraints the court is not in garden leave injunction cases obliged either to enforce an express (or implied) negative covenant in strict

accordance with its terms or refuse the injunction altogether. The court can whittle the exclusive services provision down or invoke implied duties of good faith and impose injunctions of a narrower ambit or of a shorter period than the actual notice period of the contract:

“It becomes, therefore, as it seems to me, a question of considering what detriment the plaintiff will suffer if this [exclusive services clause] is not enforced by injunction... Those are matters to be considered as I see it not as questions of principle but as questions of discretion as to whether or not an injunction should be granted.” (Provident Group (supra) per Dillon LJ at p 168 and p 169)

“In my view the court has power to grant an injunction and, if necessary, to narrow the scope of the contractual embargo. It would be undesirable to hedge the courts’ power in this field by imposing the highly technical drafting requirements contended for by [Counsel for the Defendant].” (Provident Group (supra) per Taylor LL at p 170)

13. Thus, in garden leave injunction cases are to be found instances where injunctions restraining working for a competitor have been granted for the entire duration of a notice period (Euro Brokers Ltd v Rabey [1995] IRLR 206) for a lesser period than the notice period (GFI Group Inc v Eaglestone [1994] IRLR 119) or refused altogether where the court perceived no substantive risk of detriment to the employer (Provident Group (supra)).

The doctrine of restraint of trade / post termination restraints

14. This flexible discretionary approach to garden leave injunctions is not the approach adopted by the courts where the “doctrine” as distinct from “considerations” of restraint of trade is being applied. Here, certain immutable principles apply. Amongst those principles is the cardinal principle that a court cannot (subject only to a limited power of severance by blue pencilling) uphold a covenant in restraint of trade by redeeming its ambit or duration to what the court considers reasonable. The court will not impose a new bargain on the parties (see Provident Group (supra) & JA Mont (UK) Ltd v Mills [1993] IRLR 172). This holds true even if the parties include in the covenants a “reading down” provision (see Living Design (Home Improvements) Ltd v Davidson [1994] IRLR 69).

15. In this respect the decision in Mont v Mills (supra) is of crucial importance. In that case a post termination blanket worldwide non-compete provision was included in a settlement agreement terminating an employee's employment. The employee breached the provision and the employer sought an injunction to enforce the covenant. The judge at first instance (Lans J as he then was) decided the covenant was too wide as framed to be a reasonable restraint but held that the Provident Group case (supra) heralded a new and more flexible approach by the courts to covenants in restraint of trade permitting him to enforce the covenant in a form that was reduced as to geographical scope and as to ambit. He directed counsel to draw up an injunction in the form of the "new" covenant. On appeal by the employee, the Court of Appeal held very firmly that the judge had misinterpreted the Provident Group decision. Far from permitting a judge to approach post termination restraints in the same flexible way as garden leave injunctions, it emphasised the distinction between them. That distinction is that during the currency of an employment contract, there is in existence an implied duty of fidelity on the employee that can be enforced by injunction restraining him working for rivals irrespective of the existence of any express contractual term to that effect. Once the contract comes to an end, however, that duty of fidelity or good faith disappears. Any post termination restraint must then satisfy the doctrine of restraint of trade as drawn and properly construed. The fact that under the settlement agreement the employee was to be paid the equivalent of his prior annual emoluments made no difference. Covenants in restraint of trade cannot be "purchased" as a matter of public policy.

16. Actually this only explains in part the different approaches to be taken to garden leave injunctions and injunctions enforcing post termination restraints. Another cardinal principle of the doctrine of restraint of trade is that the validity of the covenant in question must be determined as at the date it was entered into, not at the date the alleged breach or threatened breach occurs. If an exclusive service provision is viewed at the time the employment contract is entered into, it is difficult to see that it could, unless the contract of employment was of an extreme duration, ever be held to be an unreasonable restraint. There is nothing unreasonable about an employer insisting that his employees

focus upon their work for him and are not distracted by other employment. Equally there is nothing unreasonable in an employer seeking by an express term to prohibit his employees from working during the currency of their employment also for a competitor; after all the law implies a term to that effect in any event. This fundamental problem in applying the doctrine of restraint of trade to exclusive service provision was pointed out by the Court of Appeal in Symbian Ltd v Christensen [2001] IRLR 77.

17. By parity of reasoning, a similar problem arises in relation to garden leave provisions. If judged at the outset of the contract the court cannot at that stage determine whether the provision will be implemented by the employer or not. The garden leave provisions I have seen are not mandatory but permissive. The employer is not obliged to take the employee away from his duties if he gives notice and in many cases may well choose to keep the employee at work. It is only at the stage where the employer implements the provision that he is sterilising rather than absorbing the employee's skills in the employment and therefore only at that stage that the provision begins to satisfy the test of being a contract in restraint of trade.

18. Whatever flexibility therefore applies in relation to garden leave injunctions as to the ambit or duration of the restraint, the same flexibility does not apply and cannot, under the principles of the doctrine of restraint of trade, apply to post termination covenants. In choosing to injunct employees for the entire duration of their notice periods on a garden leave basis, the judge in Tullett could not having held the post termination restraints valid under the restraint of trade doctrine then, as a matter of discretion, enforce them by injunction for part only of their duration. That was to impose a different bargain on the parties and falling into the same trap as the judge in Mont v Mills supra.

The impact of garden leave on post termination restraints

19. According to the judge in Tullett, the court will take account of "the possibility of garden leave" by making any "necessary adjustment". If by that he meant any adjustment to the

length of any injunction to enforce a post termination restraint then that, as I hope I have demonstrated, is fundamentally wrong.

20. There remains, however, the vexed question of whether the possibility of garden leave should have any impact on post termination restraints and if so, what. The point first arose for decision in the case of Credit Suisse Asset Management Ltd v Armstrong [1996] ICR 882. A number of investment managers gave notice to terminate their employment with the claimant to join a competitor. They were put on garden leave and six months later the claimant moved to obtain injunctive relief to enforce post termination restraints essentially prohibiting the departees from soliciting or dealing with their employer's clients for a period of six months following termination of their respective employment contracts. The judge at first instance granted injunctions to enforce the post termination restraint notwithstanding the fact that they had already been on garden leave for six months. His decision was upheld by the Court of Appeal which concluded that there was no basis for a "set-off" of the period covered by a restrictive covenant against a period of garden leave. If a restrictive covenant is valid, the employer is entitled to have it enforced.

21. Apart from determining that a court can exercise its discretion in deciding the permissible length of garden leave injunction but cannot re-write a restrictive covenant so as to enforce it for a lesser period than that which the parties agreed which is surely right (see above), the rest of the Court of Appeal's decision is less than satisfactory. The Court of Appeal seemed to concern itself with arguments other than the central argument raised on behalf of the defendant which was simple and in my view entirely right:

"It is argued on behalf of the defendant that, as the post termination restrictive covenants are stated to last for a period of six months, this period must be treated as the period which [the claimant] has itself chosen as the length of time during which it needs protection from the activities of former employees and during which it requires an opportunity to rebuild a team of investment managers. In this case, it is argued [the claimant] has already had the complete protection afforded by the six months of garden leave and the effect of the judge's order is to double the period of time which [the claimant has itself selected]" (per Neill LJ paragraph 15).

In short, counsel for the defendants was not arguing for an implied “set-off” of garden leave against post termination restraint period. He was arguing that if a covenantee selects a period of post termination protection at six months, that must mark the period considered reasonable for the protection of his legitimate interests. The effect of garden leave for six months is to provide him with that protection. To apply a further six months by way of post termination restraint means that the employer has achieved twice the period of protection he legislated for. Hence the covenant must be invalid if piled onto garden leave.

22. The Court of Appeal failed to grapple with this point except somewhat feebly. Neil LJ merely stated: “It is clear from the judge’s judgment that he concluded that some protection for 12 months was appropriate ...”. He then cited from the judge’s judgment dealing with an argument that had been raised at first instance that in the case of some of the defendants (who had twelve month notice periods), a continuation of garden leave injunctions should be granted rather than the enforcement of post termination restraints. Part of the judgment quoted said this:

“But here, trying to form some view of the likely outcome at trial, I was impressed by the argument that the plaintiffs have a long way to go to establish that another six months’ garden leave is the minimum time reasonably necessary to protect their interests. My doubts as to the need for a further 6 months free from all competition by the defendants is reinforced by the terms of the restrictive covenants.”

Here the judge was clearly saying that a blanket non-compete by virtue of a garden leave injunction was not necessary because there were post termination restraints which could provide adequate protection. However nowhere did the first instance judge or the Court of Appeal explain why having chosen six months as the period of protection from the solicitation or dealing with its clients in the post termination restraints, the claimant should enjoy twelve months protection from that form of competition by virtue of a combination of garden leave and post termination restraint.

23. To add to the problems generated by the Court of Appeal’s evasion of the crucial point raised by the defendants’ counsel is a concession that:

“Moreover, it is to be remembered that the existence of a garden leave clause may be a factor to be taken into account in determining the validity of a restrictive covenant as at the date of the contract.” (per Neill LJ par 43) (my emphasis)

Sadly Neil LJ failed to explain how precisely (or at all) a garden leave clause may be such a factor and moreover added an equally Delphic “caveat”:

“Terms which operate in the restraint of trade raise questions of public policy. The opportunity for an individual to maintain or exercise his skills is a matter of general concern. I would therefore leave open the possibility that in an exceptional case where a long period of garden leave had already elapsed, perhaps substantially in excess of a year, without any curtailment by the court, the court would decline to grant any further protection based on a restrictive covenant. But that is not this case.”

Again no explanation was proffered as to why substantially in excess of twelve months’ garden leave should trigger a refusal to enforce a restrictive covenant rather than say substantially in excess of two months. The decision is unreasoned and unprincipled, and has the appearance of being totally arbitrary.

24. The Armstrong case was then followed by Credit Suisse First Boston (Europe) Ltd v Padiachy & Ors [1998] IRLR 504. The defendants were two research analysts and a trader who worked in the UK equities division of Barclays de Zoete Wedd Services Ltd. Their contracts of employment contained a provision for three months’ notice and a twelve month restriction on soliciting client and employees operative post termination. In May 1998 the business transferred to Credit Suisse. Prior to the transfer, the defendants entered into new contracts of employment with Credit Suisse which contained a three month non-compete covenant and a non solicitation of employees covenant for the same period post termination. Again, prior to the business transfer the defendants resigned to join a competitor. They were put on garden leave for three months of their notice period. Credit Suisse then sought an injunction to enforce the non compete provision. The judge (Longmore J as he then was) held that the non compete covenant could not be enforced following the Daddy’s Dance Hall decision but also decided that the non compete provision was in any event unenforceable as an unreasonable restraint of trade.

25. The judge said (supra paragraph 27):

“The question is whether it is justifiable ... to require an anti competition covenant for 3 months after ... garden leave has come to an end as well as an anti solicitation covenant ...”

He answered the question as follows (paragraph 28):

“[Counsel for Credit Suisse] relied on [Armstrong supra] for the proposition that one cannot set periods of garden leave off against periods of restraint on employment by a competitor. However it must still to my mind be legitimate to look at the position as it was when the contract was made and ask whether, granted that there was a garden leave provision and an anti solicitation covenant, it was legitimate to impose on top of that, as part of the new arrangements, an anti competition clause even for the relatively short period of three months. I doubt if a court at trial would come to any such conclusion.”

Accordingly, the injunction to enforce the non compete term was refused.

26. This case therefore suggests that a court can take account of garden leave in determining the validity of a covenant operating post termination. However it is submitted that this is an illegitimate approach given the strict principle of the doctrine of restraint of trade. Of course a judge is entitled, when considering the validity of a covenant as he must do as at the date when it is entered into, to have regard to the factual matrix to determine what was in the reasonable contemplation of the parties (for a striking recent example of this see Allan James LLP v Balraj Joka [2006] EWHC 286 (Ch)). The judge, too, can look at other terms in the contract in question to judge the validity of a restrictive covenant. The problem however is that the mere existence of a garden leave provision does not enable the court to judge as at the date of entry into the contract whether that provision will at a future date be operated by the employer. All that the court can do is to find that there is a possibility that garden leave may be imposed but equally there is a possibility that it will not be. What the court cannot do in applying the doctrine of restraint of trade is to take into account what actually happens after the contract is entered into to determine the validity of a restrictive covenant (see Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366). It is obvious that a post termination

restraint may be perfectly reasonable as to duration if garden leave is not imposed on an employee but, as argued in Armstrong and found in Padiachy, be unreasonable if garden leave is imposed, but how can regard be had to that at the date of the contract?

27. It is submitted that the only solution to this problem is either to change the principle of the doctrine of restraint of trade to permit the court to take into account what actually happens after the contract is entered into (i.e. whether garden leave is in fact imposed or not), or to take refuge in the fundamental principle that injunctive relief is always discretionary and for the court to withhold an injunction in cases where post termination restraints are sought to be enforced following periods of garden leave. Both of these solutions are problematic but one thing is, it is submitted, clear: a court cannot do what the judge in Tullett did and, as a matter of discretion, enforce a post termination restraint for only part of its expressed duration following a period of garden leave.

May 2011