Neutral Citation: [2019] EWHC 824 (Comm) Case No: LM-2019-000044

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Rolls House
7 Rolls Buildings
London EC4A 1NL

Friday, 15 March 2019

BEFORE:

HIS HONOUR JUDGE MARK PELLING QC
(Sitting as a Judge of the High Court)

BETWEEN:

PRICEWATERHOUSECOOPERS LLP

Claimant

- and -

NICHOLAS CARMICHAEL

Defendant

MR R HOWE QC appeared on behalf of the Claimant
MR C CIUMEI QC appeared on behalf of the Defendant

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

HH Judge Pelling QC:

1. This is the hearing of an application by the claimant (“PwC”) for an order restraining the defendant (“NC”) from breaching clause 13.10 of the PwC LLP members' agreement dated 31 December 2002 as amended thereafter by various members' resolutions ("MA").The application as issued originally sought injunctions restraining breach of various other post-termination restraints within part 13 of the MA, but those elements of the application have been compromised.

2. The MA contains a comprehensive disputes' resolution provision within part 17, which culminates in clause 17.2.1(iii), which it is common ground constitutes an arbitration agreement between the parties to this dispute. The parties have, or shortly will refer the dispute concerning the enforceability of the post-termination restraints to arbitration. There is currently a hiatus caused by a connection between the proposed arbitrator and NC's solicitor. However, it is anticipated this will be resolved within a few days. This application is brought pursuant to section 44(3) of the Arbitration Act 1996. The circumstances leading to this application are not seriously in dispute, at any rate for the purposes of this application.

3. PwC is a well-known professional services firm. It currently has some 926 partners, each of whom are members whose relationship is governed by the MA. NC joined PwC in 2011 and became a partner and member on 1 July 2013. NC was a member of PwC's refinancing and restructuring group (“RRG”).

4. PwC's case is that NC has had access to significant confidential information while he was a partner. PwC’s evidence in support of its application is contained in a statement from Mr Perkins. He states at paragraphs 21 and 22 of his statement as follows:

> "As a partner in the BRS business and as part of the projects and transactions referred to above, Mr Carmichael had access to the most confidential information and trade secrets of PwC an its clients. This includes pricing structure, strategies and significant information about sensitive and high-value projects with such information being 'live' and highly confidential today.
>
> As an example, the R&R team runs a watchlist of stressed and distressed situations, and of restructurings across the market that are

> very specific to PwC. All market intelligence from the PwC partners and staff is stored into a secure IT library called the Opportunities Unit. Mr Carmichael had access to this information on a daily basis and up until the period on which he went on garden leave, and no doubt retains some of it in his mind today.
>
> I understand that many of the names and cases on the watchlist remain live and current for the reason that they would be developed by the team over a number of months and years. As I have stated above, I understand that some of the projects and transactions on which Mr Carmichael performed material work are also still ongoing. For example, Mr Carmichael worked on phase 1 of a project for an energy company which commenced in 2016, and the project is currently in phase 3. Mr Carmichael also worked on phase 1 and the first part of the second phase of a project for a steel product manufacturer.
>
> The information obtained during work on these projects is highly confidential and commercially sensitive, and would be of incalculable value to a competitor such as FTI as it seeks to develop and strengthen its capabilities and business in this area."

Mr Perkins added at paragraph 25(e) as follows:

> "As to clause 13.10 which prevents a retiring member from joining a competitor for a period of six months after his termination date, I believe that this is similarly plainly reasonable in order to protect PwC's legitimate business interests as a member of PwC such as Mr Carmichael will inevitably obtain detailed knowledge of highly confidential and commercial matters in the course of his duties.
>
> Although clause 13 contains an expressed confidentiality clause, these types of clauses are broad and difficult to police in practice. The only effective way to ensure that a retiring member does not unfairly compete by making use of such information is to have a short post-termination non-competition covenant in clause 13.10."

5. At the end of 2016, PwC was approached by FTI Consulting ("FTI") concerning a proposed acquisition by FTI of PwC's RRG. That culminated in an offer from FTI in May 2017 that was rejected. PwC alleges that thereafter FTI attempted to recruit some or all of the partners in PwC's RRG. Three partners in the RRG retired from PwC in or around the end of January 2018. NC was one of those partners. He gave notice to retire on 25 January 2018. PwC's case is that each intended to join FTI. NC does not dispute

that was his intention. Indeed, his case is that he intends to join FTI with immediate effect unless restrained by court order.

6. On 28 March 2018, PwC wrote to NC informing him that his retirement had been approved with a period of 12 months' notice and requiring him to take garden leave from 1 April 2018 until 24 January 2019 when his retirement was to take effect. This was a period of just over nine months. The letter informing NC of these arrangements stated amongst other things:

> "All the provisions of the members' agreement will continue to apply to you. Clause 12 sets out the restrictions and obligations relating to partners on required leave, and all these restrictions and obligations will apply to you. In particular, save as provided for in this letter, you are prohibited from having any communication with any clients of the LLP or any members or employees and/or receive, have access to or copy any confidential information such as agreed otherwise in writing with Marissa Thomas.
>
> Please note that certain activities on social media, such as updating your LinkedIn profile by stating that you will be leaving, on garden leave or have left, or by providing information about a new role with a competitor, will amount to solicitation and will be considered a breach of clause 12 of the members' agreement. A copy of clause 12 and a summary of the information which applies to you for the period of your garden leave is enclosed."

The letter added at the end:

> "Consequence of ceasing to be a partner.
>
> I would take this opportunity to remind you that one of the clauses of the members' agreement, clause 13.10, prohibits you from joining a competitor of PwC LLP as a member or partner for a period of six months from the date of your retirement from the LLP. Deciding whether a business is in competition with the LLP is at the discretion of the management board, but this would clearly include FTI Consulting.
>
> Clause 13 of the members' agreement sets out the consequences of ceasing to be a partner. A copy is enclosed for your information together with clause 15 to which clause 13 refers. I also enclose the guidance notes on the clause 13 restrictive covenants for your reference.

> Please note that as the membership of the LLP is inter-conditional with being a partner in the partnership, the equivalent clauses of the partnership agreement, clauses 11, 12 and 13.10(a) will also apply. We would also like to refer you to clause 13.17 of the members' agreement, in the event that we have become aware of behaviour amounting to specified conduct as defined in the members' agreement at any stage prior to or after your retirement we will have no hesitation in invoking the full range of sanctions contained within that clause."

7. On 17 December 2018, PwC wrote to NC again, again drawing attention to the post-retirement restrictions contained in the MA. Insofar as is relevant, that letter stated:

> "Whilst all of the post-termination restrictions set out in the two agreements will apply to you, I wish to bring two key clauses of PwC LLP's members' agreement to your attention.
>
> 1. Clause 13.10 prohibits you from joining a competitor of PwC LLP or any PwC network firm as a member or a partner for a period of six months from the retirement date. Deciding whether a business is in competition with PwC LLP or any PwC network is at the discretion of the management board. But for the avoidance of doubt, this will include FTI Consulting. Consequently, this clause will prohibit you from joining FTI Consulting until 24 July 2019 at the earliest… In addition, in the event that PwC becomes aware that you do not intend to abide by your post-termination restrictions including the above two restrictions, PwC reserves its legal rights fully to take any such action as it deems necessary including but not limited to seeking injunctive relief against you personally to the full extent permissible under law in order to protect its legitimate business interests…"

The letter concluded by again identifying 24 July 2019 as the date after which the claimant was free to join a competitor business.

8. Shortly thereafter, NC retained solicitors and on 25 February 2019, those solicitors wrote to PwC informing PwC that NC would be starting work with FTI, "*this coming Wednesday*", that is 27 February 2019. PwC responded by requiring undertakings from NC including that he would abide by clause 13.10 of the MA. NC's solicitors offered

the undertakings sought by letter of the same date but subject to conditions in the following terms:

> "Our client is prepared to provide the requested undertakings on the following conditions:
>
> 1. that such undertakings will be provided until the end of the hearing of your application to the Commercial Court for an interim injunction;
>
> 2. your application must be on notice and issued in the Commercial Court by no later than 4 pm this Friday, 1 March 2019 on the basis that it is listed urgently for a return date hearing;
>
> 3. the LLP will provide a cross-undertaking in damages to our client in relation to the significant losses he will incur in relation to any further period of restraint supported by the LLP's most recent filed accounts or appropriate management accounts;
>
> 4. your acceptance that the offer of such undertakings is entirely without prejudice to our client's position that the restrictions are unenforceable and that you will not rely on these undertakings in support of your claim to enforce them on an interim or final basis…"

9. Following further correspondence concerning what NC's solicitors considered was an unwarranted delay in fixing the hearing of the injunction application, on 11 March 2019, NC's solicitors served his evidence opposing the application for an injunction and at the same time informed PwC that NC planned to start work at FTI that day, alleging that the failure to list the application was a breach of the conditions under which NC had offered his contractual undertakings to comply with, amongst other things, clause 13.10 of the MA. It was that which caused PwC to move its present application.

10. At the start of the hearing NC applied for an order that the substantive application be heard in public. I dismissed that application for the detailed reasons I gave at the time, applying the rules and principles set out in CPR 62.10 and the authorities relating to the

confidentiality of the arbitral process. It remains an issue as to whether or not this judgment will be published.[1]

11. Turning now to the substantive application, there is no dispute between the parties that I have jurisdiction to make the orders sought applying section 44 of the 1996 Act. The claimant's case is that I should approach this application applying the principles set out in American Cyanamid v Ethicon [1975] AC 396, following the decision of the Court of Appeal in Lawrence David v Ashton [1989] ICR 123. NC submits this is wrong and in the circumstances I should take into account PwC's prospects of success at trial applying the principles set out in Lansing Linde v Kerr [1991] 1 WLR 251. The basis for this submission is NC's contention that it will not be possible to hold an arbitral hearing before the date when the claimant accepts any injunction will expire, that is 24 July 2019.

12. Mr Ciumei QC on behalf of NC submits there is little or no prospect of the parties obtaining a hearing before mid-May 2019, and the publication of the Award will take further time, and in the result it is unlikely or perhaps even highly unlikely that the dispute concerning the enforceability of clause 13.10 will be resolved before 24 July 2019. Mr Ciumei submits, therefore, that in practice the effect of granting an injunction at this stage will be determinative of the dispute concerning the enforceability of clause 13.10. That is not quite right, because if NC succeeds in the arbitration, he will become entitled to claim under PwC's cross-undertaking in damages.

13. Mr Howe QC on behalf of PwC submits that Mr Ciumei's submission is mistaken essentially for two reasons. First, he maintains that it is likely that the arbitration hearing to resolve the issue concerning the enforceability of clause 13.10 will take place and the award resolving that dispute is likely to be published much sooner than 24 July 2019, and secondly, because it is contemplated that the arbitrator will be able to consider the question of interim relief at a directions' hearing which is planned to take place subject to the appointment of an arbitrator in the next two to three weeks. Mr Ciumei submitted that this last point was without substance because the arbitrator would be in the same

[1] **Post judgment Note**: Following delivery of this judgment the parties agreed that this judgment could be published as if it had been delivered in public.

position as me. I reject that last point simply because the arbitrator will have a much clearer idea than I do as to when a final arbitral hearing can take place.

14. I have come to the conclusion that it is likely that an arbitration hearing confined to the enforceability of clause 13.10 of the MA and the publication of an Award limited to that issue can take place well before 24 July 2019. We are now at 15 March 2019. Given the limited factual issues that will arise and that most of the time needed will be taken up with legal submissions, I do not see that a final hearing would last longer than two days, and the award will not be lengthy. It is realistic to suppose that the process can be completed by mid-May at the latest. That being so, it will be possible to hold a final arbitral hearing relating to the enforceability of clause 13.10 before the expiry of the period for which PwC claims an injunction. In those circumstances, I accept Mr Howe's submission that I should determine the application applying American Cyanamid principles.

15. The American Cyanamid principles are well known. The first issue that arises is whether the claimant has a real prospect of succeeding in this claim at trial. This is not a high-threshold standard. As Diplock LJ emphasised in American Cyanamid (ibid. at 407 to 408) the court must be satisfied merely that the claim is not frivolous or vexatious. NC's main submission is that clause 13.10 is so obviously unenforceable that the threshold test has not been passed.

16. Clause 13.10 provides as follows:

> "A retiring member shall not for a period of six months from his termination date become a member or partner in or provide services to or on behalf of any business which is or is about to be in the reasonable opinion of the management board in competition with the business of the LLP or any related firm or overseas firm."

Mr Ciumei submits that the relevant test for enforceability is that identified in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company* [1894] AC 535, namely:

> "The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing

> more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities."

Mr Ciumei submits that no one is entitled to protection against competition, and that to be reasonable in the interests of the parties a covenant must afford no more than adequate protection to the party in whose favour it has been granted - see Herbert Morris v Saxelby [1916] 1 AC 688 *per* Parker LJ at 707. He maintains that viewed in this way, clause 13.10 plainly does not satisfy the test.

17. As is well known, there is a materially different approach to restrictive covenants contained in contracts of employment from that adopted to covenants contained in contracts for the sale of businesses. It is also clear that there is a different approach adopted in relation to covenants contained in partnership deeds. The leading authority on this point remains Bridge v Deacons [1984] 1 AC 705.

> "The agreement in the present case, being one between partners, does not conform exactly to either of the types to which reference has just been made, although it had some resemblance to both. Their Lordships are of opinion that a decision on whether the restrictions in this agreement are enforceable or not cannot be reached by attempting to place the agreement in any particular category, or by seeking for the category to which it is most closely analogous. The proper approach is that adopted by Lord Reid in the *Esso Petroleum* case [1968] AC 269, where he said, at p.301:
> 'I think it better to ascertain what were the legitimate interests of the appellants which they were entitled to protect and then to see whether these restraints were more than adequate for that purpose.'
> What were the respondent's legitimate interests will depend largely on the nature of their business, and on the position of the appellant in the firm..."

The issue in that case was whether the firm was entitled to protection against the defendant in those proceedings acting for clients for whom he had not worked while a partner. The approach that was adopted by the Privy Council was that set out by Lord Fraser at page 716, where he said:

> "… it is necessary to recall that the partners in the respondent firm as constituted from time to time are the owners of the firm's whole assets including its most valuable asset, goodwill. The appellant had owned a share of the assets while he was a partner, but he transferred his share to the continuing partners when he ceased to be a partner. Thereafter, the continuing partners owned the whole of the assets… The question is whether it is reasonable as between the parties for the respondent to obtain protection against appropriation by the appellant of any part of the goodwill, notwithstanding the 'departmentalisation' of the practice. Their Lordships considered that it was reasonable provided… that the protection did not extend beyond the respondent's practice…
>
> On the question, the mutuality of the contract is the most important consideration. The contract applied equally to all of the partners. None of them could tell whether he might find himself in a position of being a retiring partner subject to the restriction in clause 28 or of a continuing partner with an interest to enforce the restriction. It was at least as favourable to the appellant as to the more senior partners. By clause 22 of the agreement, every partner is obliged to retire on 31 December immediately following his 60th birthday. The probability, therefore, was rather that the restriction would apply first against the more senior partners than the more junior ones. Moreover, if any(?) of the senior partners at different times and on a variety of different matters. Moreover, it might well have been able to take any more of the firm's clients with him than could the appellant…"

18. Mr Ciumei submits that clause 13.10 is one of the widest import that it is possible to contemplate, because it restrains NC from working for any business which is in competition with PwC or any related firm or overseas firm as defined within the agreement. He says that this is a very large category when the definitions contained in the MA are considered, and is too wide when the more limited scope of the other covenants contained in part 13 of the MA are considered. The concept of services referred to in clause 13.10 is not that which is defined in the MA, and so could conceivably prevent NC from undertaking any type of work in a competitor firm even if wholly unconnected with his previous role at PwC or with the mainline business of the competitor firm.

19. Mr Howe submits that clause 13.10 is designed to protect the value of PwC's confidential information, business and goodwill. It applies to all partners and does not exceed the scope of the firm's business. He submits that to assert that the services concept has the

effect contended for by Mr Ciumei is precisely what the court should guard against, that is, denying enforcement of a covenant by construing it so as to apply to counterfactuals that are either unlikely, improbable or possibly even impossible - see in this regard Home Counties Dairies Limited v Skilton [1970] 1 WLR 526 *per* Salmon LJ at 536 C to E, summarising the effect of a number of earlier authorities.

20. In my judgment, PwC has demonstrated a sufficiently arguable case to satisfy the threshold requirement in American Cyanamid (ibid.) As Mr Ciumei acknowledged in paragraph 21 of his written submissions, and as I have noted already, it is only if a claim is frivolous or vexatious that a claim will fail to pass the test. I do not consider that the claimant's claim is either frivolous or vexatious, either by reference to any of the points deployed on behalf of NC individually or when considering all of them in the round together. On the contrary, I consider it is plain that there is a serious issue to be tried. My reasons for reaching these conclusions are as follows.

21. PwC justifies enforcing clause 13.10 by reference to the facts and matters referred to in paragraphs 21, 22 and 28(e) of Mr Perkins's witness statement that I set out earlier in this judgment. In my judgment, it is plainly arguable that PwC is entitled to protect its confidential information, business and goodwill by a non-compete clause -see in this regard Littlewoods v Harris [1977] 1 WLR 1472 *per* Lord Denning MR at 4178 F – G. It is arguable that a non-compete clause is the appropriate method for protection for the reasons given by Lord Denning in his judgment in the Littlewoods case at 1479, where he said:

> "Experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period. This appears in the judgment of Cross J in *Printers and Finishers v Holloway* [1965] 1 WLR 1 at 6…"

In my judgment, it is all the more arguable that clause 13.10 will be upheld for the reasons set out in Bridge v Deacons ibid, the relevant parts of which I have set out earlier in this judgment.

22. It was submitted on behalf of NC that the combination of gardening leave, in this case nine months, and the six-month period fixed by clause 13.10 made the six-month period contained within clause 13.10 too long or even far too long to make the clause even arguably enforceable. I do not accept that the arguability of PwC's case is necessarily or inevitably defeated by the length of time that the restraint applies. That may be correct on the basis of evidence adduced at the final arbitral hearing but it does not justify the conclusion that PwC does not have a sufficiently arguable case at this stage. It may be, for example, that there will be evidence concerning the fixing of the length of garden leave by reference to what access NC had to what types of confidential information. It may be that the evidence that emerges in the course of the trial will provide further detail in relation to the evidence that currently exists concerning the long-tail characteristics of the confidential information to which NC had access. The implication of the evidence available is that he had extensive access to highly confidential information that is of long-term value.

23. I do not accept that the inclusion within clause 13.10 of the words, "*in the reasonable opinion of the management board*" makes the clause more unacceptable than would otherwise be the case. The difficulty with a business such as PwC's business is that the extent of its subsidiary and associated businesses will change over time. The mechanism adopted a practical means by which all relevant subsidiaries can be brought within the scope of the covenant. It was submitted that the inclusion within the clause of the reference to the reasonable opinion of the board introduced impermissible vagueness. I do not accept that point makes PwC's case unarguable. It is at least arguable that the inclusion of the word "r*easonable*" introduced the possibility of challenge using the agreed dispute resolution procedure contained in the MA. It is open to an ex-partner to seek clearance from PwC before commencing any new role. If there is a disagreement, it can be resolved ultimately by arbitration. I accept that arbitration may not be as convenient or as affordable as litigation. However, it was the choice of the parties to adopt arbitration as their preferred means of dispute resolution. Although it was submitted that NC did not have a choice about this or indeed about agreeing to the

covenants contained in part 13 of the MA, that does not assist for present purposes. NC is a senior and experienced practitioner in his chosen field. He chose to become a partner on the terms on offer. It is at least arguable that is a sufficient answer to his claim to a lack of equality of bargaining power.

24. In summary, for these reasons there is a serious issue to be tried as to whether clause 13.10 confers more than adequate protection particularly having regard to the principles set out in Bridge v Deacons and Littlewoods v Harris, bearing in mind the approach to construction in relation to such clauses referred to in Skilton.

25. It is now necessary to consider the following stages of the American Cyananid test. Although it is submitted on behalf of NC that PwC overstates the extent to which damages would not be an adequate remedy by exaggerating his access to and retention of confidential information, that is not an issue that can be resolved at this stage. On PwC's case, damages would not be an adequate remedy. Not merely would a breach be difficult to prove, but loss would be difficult to prove as well, and there is no evidence from which it can be inferred that NC has the means to meet such a claim for damages should one be commenced.

26. It was submitted on behalf of NC that the availability of the cross-undertaking in damages was not a satisfactory remedy for NC. The basis of this submission was that the hardship caused by not being able to work for the period identified in clause 13.10 was being suffered now and during the period when the non-compete clause applies. Any claim under the cross-undertaking will come many months after the injunction would have expired if granted. In my judgment, this point does not assist NC. It is a problem that faces all respondents to injunction applications. The only issue identified by Lord Diplock in *American Cyanamid* is whether the respondent will be adequately compensated under the cross-undertaking. NC will be. The problem that NC identifies is the necessary consequence of adopting the cross-undertaking as a mechanism for protecting a respondent against whom an injunction is made, as opposed to some other and more flexible mechanism. However, there is no authority that justifies attempting to alter the scope or effect of the cross-undertaking offered by PwC.

27. In those circumstances, the final stage of the American Cyananid test, the balance of convenience, does not really arise. However, NC claims that the effects of the order will be draconian so far as he is concerned and, therefore, the balance of convenience lies in not granting the injunction sought. In paragraph 38 of his witness statement, NC states:

> "…PwC's insistence upon enforcing its restrictive covenants and in particular its non-competition obligation have deprived me of the ability to earn a living, and I have been forced to take out an overdraft and re-mortgage my family home as a consequence. My inability to work since 25 January 2019 has resulted in a permanent loss of income in the region of £25,000 at the date of this statement, such loss increasing by £550 a day for each day I am prevented from working. These figures ignore related liquidity issues and other costs I am facing. If I was permitted to join FTI, this would help considerably to alleviate these financial concerns, and almost as importantly would allow me to re-join the working world after almost a year either on garden leave or being restrained. There is much that I could do in terms of planning, preparation and strategy development, induction and professional development, and knowing that I am being held back from even these tasks is challenging at a personal level."

NC maintains that these difficulties have been made worse by PwC's conduct as described in paragraph 37 of NC's witness statement. It is not necessary that I set out that paragraph. The points are lengthy to describe, but in the aggregate come to this, that NC alleges that PwC has treated him unfairly and possibly unlawfully in relation to the way his benefits under the MA have been calculated and/or managed.

28. I do not consider these factors would justify me in refusing the injunction sought. NC was paid a substantial sum of money while on garden leave at a time when he knew from the correspondence referred to earlier that PwC were seeking to enforce the post-termination covenants contained in the MA against him. He has not disclosed the nature of his arrangements with his new employer. If and to the extent that PwC has acted unlawfully in taking the steps referred to by NC in paragraph 37 of his witness statement, then those issues can be resolved in the arbitration if they are referred.

29. In the result, I am satisfied that PwC should be granted the injunction sought, and I will hear counsel further as to the drafting, in particular as to the drafting necessary to ensure there is a speedy hearing before the arbitrator once appointed and with liberty to apply to the court pending the appointment of the arbitrator.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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