

Case No: HC10C02284

Neutral Citation Number: [2012] EWHC 2609 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand,
London WC2A 2LL

Friday, 21 June 2012

BEFORE:

MR JUSTICE UNDERHILL

BETWEEN:

PAT SYSTEMS

Claimant

- and -

GRAEME NEILLY

Defendant

MR M TAYLOR appeared on behalf of the Claimant.

MR D OUDKERK QC appeared on behalf of the Defendant.

Approved Judgment

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165 Fleet Street, 8th Floor, London, EC4A 2DY
Tel No: 020 7421 4046 Fax No: 020 7422 6134
Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com
(Official Shorthand Writers to the Court)

J U D G M E N T

MR JUSTICE UNDERHILL:

Introduction

1. This has been the trial of an action to enforce a restrictive covenant in a contract of employment, together with a related counterclaim. Proceedings were commenced on 20 April 2012. The defendant agreed to give undertakings pending trial. Nicola Davies J ordered a speedy trial. The case has been particularly well argued before me by Mr Michael Taylor of counsel for the claimant and Mr Daniel Oudkerk QC for the defendant. I should also say that it seems to have been handled between solicitors in a sensible and professional manner, focusing the points of dispute only on what really mattered, in accordance with the spirit of the overriding objective.
2. The claimant company sells software that enables remote electronic trading on futures exchanges such as the Chicago Mercantile Exchange and the London Metal Exchange, together with other ancillary software. I will say more about its business in due course. It (or perhaps it and its associated companies) has 160 employees in offices in London, Chicago, New York, Tokyo, Singapore, Hong Kong and Sydney.

The employment agreement

3. The defendant commenced employment with the claimant in June 2000 in London as an account manager, reporting to the head of sales. His salary was £35,000 per annum. He had a notice period of one month each way. He signed a formal employment agreement (“the agreement”).
4. Section 8 in the agreement is headed “Restrictions after employment.” Clause 8.1 (which is the clause with which I am primarily concerned in the present case) reads as follows:

“The Employee shall not save with the prior written consent of the Company for a period of twelve months from the termination of the Employment within the Restricted Area carry on or be concerned or engaged or interested directly or indirectly (whether as principal, shareholder, partner, employee, officer, agent, broker, consultant, investor or otherwise) in any trade or business which competes with any part of the Business or any other trade or business carried on by the Company in which the Employee (or any other employee on his behalf or under his instructions) shall have been actively engaged or involved at any time during the period of twelve months prior to the termination of his Employment.

The term “Restricted Area” is defined in clause 9.1 as follows:

“United Kingdom, Continental Europe & USA Commodities, Financial Futures & Options Trading, Securities Trading & Electronic Order Routing in such areas and information vending.”

“The Business” is defined in the interpretation section of the agreement as follows:

“The Company’s business of developing and marketing computerised financial trading systems for the financial trading industry, including (but not limited to) financial trading rooms of the foreign exchange, currency, commodity and securities trading rooms at the foreign exchange, trading markets and derivatives.”

5. It is convenient to deal at this stage with one point of construction arising from the wording of clause 8.1. Mr Oudkerk submitted that the phrase “in which the Employee...[etc]” should be read as qualifying only the immediately preceding phrase, namely “or any other trade or business carried on by the Company”. I do not agree. In my view, it naturally applies also to the earlier phrase “any part of the Business”. In other words, if one were to insert the commas of which the draftsman wilfully denied himself the benefit the entire phrase would read:

“in any trade or business which competes with any part of the Business, or any other trade or business carried on by the Company, in which the Employee” etc.

6. Clause 8.2 contains provisions restricting, in broad summary, dealings with customers with whom the defendant had dealt in his last 12 months of employment and poaching the claimant’s staff. The agreement also includes restrictions on the use of confidential information both during and following employment, but for reasons which will appear I need not refer to these.

7. Clause 8.4 reads as follows:

“The Employee (who acknowledges that, in the course of the Employment, he is likely to have dealings with the clients, customers, suppliers and other contacts of the Company) agrees that each of the restrictions in Clauses 8.1, 8.2(a), 8.2(b) and 8.3 is separate and distinct, is to be construed separately from the other restrictions, and is reasonable as regards its duration, extent and application for the protection of the legitimate business interests of the Company. However, in the event that any such restriction shall be found to be void or unenforceable but would be valid or enforceable if some part or parts of it were deleted or the period or area of application reduced, the Employee agrees that such restriction shall apply with such modification(s) as may be necessary to make it valid and effective.”

8. The defendant is evidently a very good salesman. Over the years following his engagement he received various promotions or increases in responsibility. In July 2005 he was sent a letter confirming his promotion as “Director – Global Account

Management”. He received a substantial pay increase to £80,000 per annum, exclusive of bonus, plus an increase in the company’s contribution to his pension scheme. (I should perhaps say that that was not a leap direct from £35,000 to £80,000: he had received increases in the meantime.) His notice period was increased to one of 3 months, again both ways. He signed an endorsement to the letter in the following terms:

“I agree to the variation of my terms with Patsystems, which are stated in this letter and I acknowledge and agree that all other terms and conditions outlined in my original documentation remain unchanged.”

9. As at April 2012 the defendant’s responsibilities can be summarised as follows. Despite his title, he was not a statutory director of the claimant or any associated company. He was, however, a member of its executive committee. He had direct client responsibility for a small number of customers designated as “global”. He also had management responsibility for account management and business sales for the EMEA region, though day-to-day responsibility lay with his no 2, Justin Dighton, and below him with three account managers. His base salary was £115,000, together with a commission and pension package. In the tax year 2011/2012 his total remuneration was £191,170.

The termination of the employment

10. On 2 April 2012 the defendant handed to the claimant’s then CEO, David Webber, a letter giving him three months’ notice of resignation. He told him that he had accepted an offer of employment with a business called Trading Technologies (“TT”). TT operates in broadly the same market as the claimant, though, as will appear, there is at least formally an issue before me as to the extent to which it is truly a competitor of the claimant.
11. Later the same day, Mr Webber gave the defendant a formal letter making it clear that if he started employment with TT within 12 months of the termination of his employment with the claimant that would be regarded as a breach of clause 8.1 of the agreement.
12. Mr Webber and the defendant met again twice the following day, but the defendant maintained his intention to leave and to join TT at the expiry of his notice period. He was then away on a pre-booked holiday over the Easter break until the afternoon of 11 April. He went to see Mr Webber at about 4 p.m on that day with a view to discussing working arrangements during his notice period. He found Mr Webber unforthcoming on that question, and he got the impression (I do not doubt correctly) that Mr Webber was picking his words carefully – “according to a script” as the defendant put it. He was annoyed by this and there followed a rather unedifying episode in which both he and Mr Webber lost their tempers (though not, I should say, in any drastic way). Both gave evidence before me – indeed they were the only witnesses from whom I heard – and expressed their regret at how they had behaved. Against that background, I would like to say, without I hope appearing patronising, that I find both to be decent and professional people and

that both were particularly frank and intelligent witnesses. Even when everyone intends to behave well, the tensions which inevitably arise when a senior employee leaves to join a competitor (or perceived competitor) – which are often exacerbated by the formalistic advice of lawyers and HR departments – can make normal behaviour rather difficult.

13. In any event, Mr Webber asked the defendant to see him at 5 p.m on the same day. On that occasion he handed him a letter dismissing him with immediate effect. The main parts of the letter read as follows:

“I refer to my letter of 2 April 2012 and our subsequent conversations in which you confirmed that you intend to accept employment with Trading Technologies International Inc, or an affiliate (‘Trading Technologies’).

Clause 8.1 of your employment agreement with the Company dated 2 June 2000, as amended (the ‘Agreement’) states that you ‘shall not save with the prior written consent of the Company for a period of twelve months from the termination of the Employment within the Restricted Area carry on or be concerned or engaged or interested directly or indirectly (whether as principal, shareholder, partner, employee, officer, agent, broker, consultant, investor or otherwise) in any trade or business which competes with any part of the Business or any other trade or business carried on by the Company in which the Employee (or any other employee on this behalf or under his instructions) shall have been actively engaged or involved at any time during the period of twelve months prior to the termination of his Employment’.

Your declared intention to commence employment with Trading Technologies clearly demonstrates that you have decided not to honour the obligations set out in the Agreement. This constitutes a repudiatory breach of the Agreement.

The Company hereby accepts your repudiation of the Agreement and elects as its remedy to terminate the Agreement and, consequently, your employment by Patsystems with immediate effect.”

It has since transpired, though it is hardly surprising, that the letter had been drafted earlier in the day, before any contact had taken place between Mr Webber and the defendant, though it was Mr Webber’s evidence that he did not finally decide to deliver it until the interval between the two meetings to which I have referred that afternoon, having taken further advice in the meantime.

14. The defendant was escorted from the premises once he had cleared his effects. He started work with TT the following Monday, though that soon afterwards had to be put on hold as a result of the undertakings given to Nicola Davies J.
15. There was some exploration in the cross-examination of both the defendant and Mr

Webber of the extent to which their respective stances on 11 April reflected tactical considerations, or was otherwise unreasonable. It was put to the defendant that he was deliberately trying to engineer a situation in which he was summarily dismissed. A specific motive was not put, but of course the sooner he left the sooner he could start with TT; and he would also, if he were summarily dismissed, have a further weapon against the enforcement of the restrictive covenant by reason of the rule in General Billposting v Atkinson (to which I refer below). In the case of Mr Webber, the suggestion was that he acted unreasonably in not being willing to discuss constructively with the defendant how he should work during the notice period. The situation was bound to be awkward, and the contract of employment did not entitle the claimant (at least expressly) to put him on garden leave. It was put to him that a decision had been made before the defendant came back from holiday to dismiss him whatever happened. It is impossible to reach a fair conclusion on these suggestions without disclosure of the legal advice that each was receiving, and I do not in fact think that it is necessary for me to do so. For what it is worth, however, and consistently with what I have already said about the witnesses, I did not get the impression that either man was party to any sophisticated tactical scheming, though both will have had legal advice which is bound to have influenced their behaviour to some extent.

The pleadings

16. The claim form pleads a straightforward case that the defendant “threatens and intends to work or, as it may be, continue to work for TT in breach of clause 8.1 of his contract of employment”; and it claims an injunction to enforce compliance with the terms of that clause. There is a formal claim for damages, but that is not material.
17. The claim form also seeks an injunction to restrict the disclosure of confidential information; and subsequent to the pleading the claimant learned information which, it initially claimed, reinforced the need for that relief. In bare outline, this information was that the defendant had taken with him when he left a memory stick containing his entire Outlook contacts, which were both business and personal. That episode was not in the end explored in the evidence, but I wish to say that, from what I have heard when this aspect of the case was opened to me, I can see nothing sinister in what happened, and I should point out that it was in fact only because the defendant’s solicitors approached the claimant’s solicitors to ask what should be done with the information in question (insofar as the contacts were business contacts) that the claimant became aware of it. In fact the parties have now sensibly resolved that question to their mutual satisfaction and I need make no findings about it. However, Mr Oudkerk made it clear that the defendant would not oppose the continuation of the undertaking as to non-disclosure of confidential information which he had given to Nicola Davies J. That was explicitly not on the basis that he acknowledged that there was in fact any risk of the defendant breaching his obligations, but because he understood that the claimant might have concerns, however ill-founded, and since he had no intention of breaching those obligations he was content to give the undertaking.
18. The defendant in his defence takes various points, which I will itemise in due

course, about the application and/or enforceability of clause 8.1, and pleads that his summary dismissal was wrongful – that being the subject of the counterclaim.

19. The claimant has pleaded a reply and defence to counterclaim. I need not itemise its contents, save to note that it avers that clause 8.1 was enforceable and, further, that the defendant's declaration of his settled intention to join TT constituted a repudiation of his contract which entitled it to dismiss him summarily.
20. What is before me, pursuant to the order of Nicola Davies J, is the trial of issues of liability only.

The issues

21. Logically, the issues as to liability would seem to arise in the following sequence.
 - (a) As a matter of construction, does clause 8.1 apply so as to prevent the defendant from being employed by TT during the twelve-month period there specified?
 - (b) If so, being a covenant in restraint of trade, is it justifiable? Within that broad issue is an important sub-issue as to the date at which the reasonableness of the covenant falls to be assessed.
 - (c) If so, is the claimant disentitled from relying on it because of its summary dismissal of the defendant?
 - (d) If not, should an injunction be granted?

I will take the issues in that order.

(a) Does clause 8.2 apply to the defendant's proposed employment with TT?

22. This question was not at the forefront of the arguments before me, and Mr Oudkerk's submission that clause 8.1 did not bite was somewhat faint. Nevertheless, it represents, as I have said, the logical starting-point, and it is also a convenient vehicle for me to set out certain factual matters that are a necessary background to the more significant issues.
23. I start by saying a little more about the claimant's business. The systems which it provides fall into three categories: trading systems (which are concerned with the actual trading process); risk systems (which enable trading to be monitored by those responsible for risk assessment); and so-called "matching engines" (which are concerned with the matching, clearing and settlement of trades). The defendant's responsibility covered the sales of all three systems, but I am primarily concerned only with trading systems, since TT does not sell the other two.

24. The core component in a trading system is the order management system, which is made available to the user through a trading screen, also known as a “graphic user interface” (GUI), or, more colloquially, a “front end” (at the risk of spelling out the obvious, this does not refer to the claimant supplying a screen as a piece of hardware, but to what actually appears on the screen). The system provided may incorporate the claimant’s own proprietary screens, of which there are two variants, J-Trader and Pro-Mark, or a third-party front end configured to connect to the claimant’s order management system through a so-called API, or by providing access to trading through a so-called FIX gateway.
25. The claimant’s customers for trading systems are primarily either banks or futures commission merchants (FCMs). It is they who make the systems available to the actual traders who wish to trade through them. Those traders (the end-users) may be proprietary traders within the bank or FCM itself, but they may be working for other institutions such as hedge funds, or may simply be individual traders, in either case trading through the facilities offered to them by the bank or FCM.
26. The claimant’s principal revenue stream derives from charges made to customers for each trading screen supplied by the customer to an end-user, either on a monthly basis or for each trade transacted through the system. It follows, as Mr Webber said in his witness statement, that the claimant’s sales strategy is initially to sell the installation of a trading system to the customer, and thereafter to increase the number of end users accessing that trading system by end user screen, APR or FIX gateway. The defendant was responsible for that strategy in the EMEA region and, as I have said, also for certain customers, actual or potential, whom the claimant classified as global.
27. I turn to the business of TT. It too sells trading systems and it sells them to the same class of customer, i.e. banks and FCMs in, among other markets, the UK, Europe and the USA. It is therefore, on the face of it, plainly a competitor of the claimant, and I have seen numerous contemporary documents, including at least one emanating from the defendant himself, where it is so described. It would seem to follow that, by accepting employment with TT, the defendant would be “engaged...as [an...employee..] in [a...business which competes with [a] part of the Business” in which the defendant had been engaged in the Restricted Area in the previous twelve months.
28. What, however, the defendant says with considerable particularity in his witness statement (see paragraphs 13-30) is that TT’s product differs from the claimant’s in a number of respects which mean that the two products appeal to different kinds of end-user, and also that they use different pricing structures. In bare outline, the claimant’s J-Trader product is designed for, and is mainly used by, so-called retail traders, to whom TT’s product, which has different strengths and weaknesses, has little appeal. The claimant’s “Pro-Trader” product is indeed aimed at the same end-user market as TT’s system, namely the professional user; but for various specific reasons into which I need not go it is, he says, inherently inferior and not in truth “a competitive threat” to TT.
29. I do not accept that argument. Even if it follows, as the defendant puts it, that the

claimant and TT “focus on different spaces in the market”, that is not the same as saying that they do not compete at all. Even if the retail end-users are to be ignored (and I do not in fact think that the evidence goes that far), both the claimant and TT are clearly anxious to, and do, attract use by professional traders; and to say, whether rightly or wrongly, that the claimant’s product is inferior or that its pricing structure is different is not the same as saying that they do not compete.

30. The defendant also takes the point that many traders and FCMs take both the claimant’s and TT’s products so as to be able to offer both to their own clients, the end-users. But again I do not believe that that means that they do not compete. For the reasons that I have indicated, the claimant has an interest not simply in making the initial sale to the customer but in promoting the use of its product by the end users rather than the products of TT or any other competitor in order to maximise its revenue.
31. In my judgment, therefore, the evidence clearly establishes that the defendant’s intended employment with TT would constitute a breach of clause 8.1 if it is enforceable.

(b) Enforceability

32. I should address first the sub-issue which I identified earlier, which is in fact of fundamental importance.
33. Mr Taylor conceded, realistically, that the imposition of a twelve-month non-compete clause could not be justified in the case of an employee with the status and responsibilities enjoyed by the defendant when he was first engaged by the claimant in 2000. Mr Oudkerk submits that that concession is fatal. It is settled law that, as the Court of Appeal put it in Commercial Plastics Ltd v Vincent [1965] 1 QB 623:

“...the time for ascertaining the reasonableness of a restrictive covenant...is the time of the making of the contract”

(See per Pearson LJ at page 644B.) If the covenant is unreasonable at that date, it cannot be saved simply because a subsequent change of circumstances means that it would have been reasonable at the time that it falls to be enforced. As Diplock LJ put it in Gledhow Autoparts Ltd v Delaney [1965] 1 WLR 1366 at 1377D-E:

“A covenant of this kind is invalid ab initio or valid ab initio. There cannot come a moment at which it passes from the class of invalid into that of valid covenants.”

Mr Oudkerk also referred to the statement by Lord Halsbury in Mogul Steamship Co Ltd v McGregor [1892] AC 25 (at 39) that the law treats a covenant which is in

restraint of trade and which cannot be justified as if it had not been made at all.

34. Mr Taylor, however, submits that on the facts of the present case the covenant in question should be treated as having been entered into not in July 2000, when the defendant was first engaged, but in July 2005, when the contract was varied in the way which I have set out above. On that occasion he was given a new job title reflecting enhanced responsibilities, a substantial increase in remuneration (salary and pension), and a longer notice period. The express acknowledgment that his other terms continued to apply was equivalent to their incorporation into the agreement made on that occasion. He should be treated as having at that point entered into the restrictive covenant afresh (or, perhaps, strictly speaking, for the first time, since it was until then a nullity). That was the date at which I should judge its reasonableness.
35. I have not found this point entirely easy. None of the authorities to which I have been referred has considered precisely this question, i.e. when the covenant is to be regarded as having been “made” in a case where there has been a subsequent variation. The case which comes closest is WRN Ltd v Ayris [2008] IRLR 889. There an employee entered into a contract containing a restrictive covenant when first employed in 1999, but at the time of the termination of the employment in 2007 he had acquired greater responsibilities. At paragraph 60 of his judgment (page 900), Judge Seymour QC (sitting as a Deputy High Court Judge) said this:

“It was common ground between Mr. Colton and Miss Chudleigh that the question of the reasonableness of the Relevant Covenants fell to be considered as at the date of the Employment Contract, September 1999. Mr. Colton submitted that it was appropriate, in considering reasonableness as at that date, to have regard to the possibility of the promotion of Mr. Ayris, as happened, in the fullness of time to the position of Head of Sales and Marketing. Miss Chudleigh disputed that contention. She submitted that one should consider reasonableness as at September 1999 simply in the context of the agreement then made for employment in the position to which the contract related. I accept the submission of Miss Chudleigh on that point. Any alteration in the role in which Mr. Ayris was employed of necessity involved some variation to the Employment Contract, and possibly the making of an entirely new contract. A contract varying or superseding the Employment Contract might have contained whatever modifications to restrictive covenants contained in the Schedule which the parties considered to be appropriate to the new situation. It should not be assumed that on any alteration in role the existing restrictive covenants in the Schedule would simply continue. Moreover, it would be a very strange position if restrictive covenants which were unreasonable in the context of the position to which Mr. Ayris was appointed by the Employment Contract, if considered on its own, became reasonable because of the chance that he might be promoted to a role in which the restrictive covenants would be appropriate.”

That passage is, broadly speaking, unhelpful to Mr Taylor’s submission, but as Mr

Oudkerk correctly accepted, it is not directly on the present point, because counsel for the employer did not rely on any subsequent variation as such, but rather on the asserted expectation, judged as at 1999, of promotion at some point in the future. In any event, the decision is not binding on me. I should therefore consider the question as one of principle.

36. I have come to the conclusion that I should reject Mr Taylor's submission. If, which is common ground, the restrictive covenant was void in 2000, it is in my judgment necessary for the claimant to show that a fresh covenant was entered into in July 2005. If that had been done explicitly – that is, if the claimant had said to the defendant in terms “we would like you, as part of the terms of this promotion, to indicate afresh your acceptance of the restrictive covenant in your previous contract, irrespective of whether it has been enforceable up to now” – I could see no reason why that should not be treated as a fresh covenant so that its reasonableness fell to be judged as at that date. Even if it were not as explicit as that – if, for example, the claimant had been asked to sign a fresh agreement containing the same restrictive covenant, but without his attention being particularly drawn to this clause – that would probably also have sufficed, on the conventional basis that if a party signs a contract he must be taken to be accepting its full terms. But I do not think that what occurred in this case can be treated as equivalent to either of those situations. A general acknowledgment, or even “acknowledgment and agreement”, by the defendant that his previous terms “remain unchanged” cannot in my judgment be construed as an agreement to reinstate a term which was in fact (whether or not this was appreciated) a nullity. It simply does not convey an intention to make a fresh start in the relevant respect. If a restrictive covenant is void when initially entered into, it is wrong that it should be, so to speak, revived save where that is unequivocally the contractual intention.
37. That seems to me the right approach in principle, but it also seems right on grounds of policy and practicality. Contracts of employment are very frequently varied over their lifetime, sometimes explicitly, sometimes by conduct, and in a variety of different respects and using a variety of different mechanisms with varying degrees of formality. It would be very undesirable that every such change could in principle have the potential to revive a defunct restrictive covenant. That would conduce to complexity and uncertainty. Employees when they agree to a restrictive covenant are entitled to know their position; indeed in an ideal world they would take legal advice, though I accept that that is not normal or indeed realistically practicable for any but the most senior and well-remunerated. The occasions when such an assessment, with or without advice, is required should be as few and as well-marked as possible. Similarly, in a case where an employee needs to know where he stands – typically because he is contemplating a change – it is undesirable that he or his advisers should have to survey his whole employment history since the date at which he entered into his original contract in order to consider whether an initially unreasonable contract could have changed its character. Again, it ought to be necessary to look only at the most recent date at which such a covenant has been explicitly entered into.
38. If this conclusion means that employers will have to take more care in considering

whether promotion or some other substantial change in an employee's terms or circumstances require an explicit reconsideration of what restrictive covenants are reasonable, that is probably a healthy discipline. I note that this is in any event recommended in both the leading practitioner works in this field – see Brearley and Bloch “Employment Covenants and Confidential Information” at para 12.10, and Goulding “Employee Competition” at para 9.11.

39. Mr Taylor submitted that this approach was wrong because as a matter of principle a restrictive covenant, like any other contractual term, fell to be interpreted in the context of the contract as a whole as it stood at any particular moment, having regard to any amendments to other terms, and that the same approach should be taken to the assessment of its reasonableness. But that assumes that there is a covenant to interpret. For the reasons that I have given, I believe that the right approach is that a covenant which is unenforceable *ab initio* should simply be disregarded unless and until it is subsequently and explicitly re-agreed.
40. I should finally say, for completeness, that I raised with counsel the question whether the issue of the date for assessing reasonableness should not depend on whether the defendant's promotion in 2005 constituted the making of a new contract or whether it was only a variation. There is a fair amount of case law on that question, reviewed in Freedland “The Personal Employment Contract” at pages 261-267, and more recently by Slade J in the Employment Appeal Tribunal in Potter v North Cumbria Acute Hospitals NHS Trust (no 2) [2009] IRLR 900 – see especially paras 59-73 (pages 907-909). But in the end I was persuaded that this was not a useful approach. Quite apart from anything else, the case-law in question does not speak with one voice, and the outcomes in particular cases appear to be very much influenced by the purpose for which the question is asked.
41. In the light of Mr Taylor's concession, that conclusion is decisive of the issue of reasonableness and thus also of the entire case. In deference to the arguments which I have heard (and also, I suppose, in case the case may go further) I will nevertheless give my conclusions on the other issues, but in the circumstances I will do so somewhat more briefly than if they had been determinative.
42. The first such question (still under the conceptual heading of enforceability) is whether if, contrary to my view, the reasonableness of the covenant falls to be considered as at July 2005 the claimant has satisfied me that it goes no further than is reasonably necessary to protect the defendant's legitimate interests. The most authoritative recent statement of the relevant principles is to be found in the judgment of Sir Christopher Slade in Office Angels Ltd v Rainer Thomas [1990] IRLR 214 at paras 21-25, page 217. I need not set them out here. The starting-point is to identify the interests which the covenant is designed to protect. The claimant in the usual way relied on the twin heads of the protection of confidential information and the protection of trade connections. So far as confidential information is concerned, the evidence established that, unsurprisingly, the defendant had access to confidential information about the claimant's pricing, sales prospects and plans for future products, which would be of some interest and perhaps value to competitors, and some at least of which might have the character of a trade secret. As for trade connection, it was of course the essence of the

defendant's role as a salesman and manager of salesmen to maintain and develop good personal relationships with the claimant's customers, and the evidence was that he had indeed done so. I have no doubt that the claimant was entitled to some protection against that connection developed for its benefit being unfairly exploited for the benefit of a competitor before it had had the chance to vest its relationship in different employees.

43. Before I consider whether the protection purportedly afforded by clause 8.1 went further than was reasonably necessary to protect those interests, I should deal with one preliminary point. Mr Oudkerk referred me to the parenthesis in clause 8.4 in which the defendant acknowledges that he is "likely to have dealings with the clients, customers, suppliers and other contacts of the company" and submitted that this was, in effect, a statement of the purpose of the restrictions in, *inter alia*, clause 8.1 and should be treated as an exclusive statement of that purpose. He pointed out that the clause considered by the Court of Appeal in the Office Angels case had had introductory words in essentially similar terms, and that Sir Christopher Slade had said at paragraph 47 of his judgment (page 200) that the employer could not "go behind this stated purpose". Not without some hesitation, I would reject that submission. On balance, I do not think that the words relied on in this case, appearing where they do, can be taken as an explicit agreement that trade connection is the only interest intended to be protected.
44. I turn therefore to the question of the reasonableness of the protection. In my judgment, clause 8.1 does indeed go further than is reasonably necessary to protect the legitimate interests which I have identified. I will, as I have said, give my reasons more summarily than if this had been the decisive point in the case. My essential reason is that I believe that a period of twelve months for a non-competition clause was simply too long. That is a very substantial period of time to keep any employee, even a well-remunerated employee like the defendant, out of the only market in which he has employment experience. I do not say that in an appropriate case such a term may not be justifiable, but in my judgment neither the trade connections which the defendant had undoubtedly developed nor the confidential information of which he was aware seem to me, having regard also to the nature of the market in which the claimant operated, to require protection for that length of time, or in any event protection by the most powerful weapon in an employer's armoury, i.e. by a covenant restricting employment by a competitor – as opposed to, say, a non-dealing covenant. A period of six months during which the defendant was restricted from working for a competitor would in my judgment have been sufficient adequately to mitigate the potentially unfair advantage to a competitor of having access to his trade connections. One relevant factor is that the banks and FCMs to whom the claimant sold would commonly also have bought competitor's products. The advantage that a competitor would gain by employing the defendant was not typically that they would gain access to an entirely new customer: the most that they might get in such a case is the benefit of a closer or more influential relationship with an existing client. As regards confidential information, the evidence before me revealed that this was a fairly transparent market, both as regards pricing and as regards product information. Customers had no particular incentive to conceal the prices that they were paying for the competitor's products (if anything the reverse), and while full details might not be

easily available in every case, there could be no legitimate expectation of such details being treated as a closely guarded secret. No doubt products under development will be kept under wraps in their early stages, but I am not satisfied that more than a six-month restriction was justified to protect the claimant against the risk of information about such products being leaked – in circumstances where that would in principle of course be a breach of covenant by the employee in question.

45. I am reinforced in that conclusion, though it is not at the centre of my reasoning, by the evidence that most of the defendant's colleagues were subject to non-compete covenants with a duration of no more than six months. Most of the colleagues in question were less senior than him, but their access to confidential information and their trade connections would not necessarily be any less than his. (Indeed, there was some evidence that even these covenants were often not enforced; but I am not particularly impressed by that, since the decision whether to take legal action may be influenced by many considerations other than an assessment of the reasonableness of the covenant in question.) I should add that the defendant's new contract with TT itself provides for a non-competition covenant with a duration of only six months.
46. I should mention for completeness a further argument advanced by Mr Oudkerk, namely that the phrase "or information vending" at the end of the definition of "Restricted Area" in clause 9.1 meant the covenant was too broad, since as a matter of construction it was not subject to the territorial limits applying to the rest of the definition. The clause is certainly badly drafted, but although Mr Oudkerk's construction appears grammatically correct, it seems to me that on a fair reading of the clause as a whole the territorial limits would in fact apply to information vending (whatever exactly that is) as well. Even if I were wrong about that, I can see no reason those words should not be severed.

(c) The summary dismissal of the defendant

47. The claimant's pleaded justification for summarily dismissing the defendant was that he had made it clear that he proposed to act in breach of clause 8.1 of his contract. My conclusion that the clause is unenforceable means that that dismissal was wrongful. That in principle means that the defendant has an additional answer to the claimant's claim, namely that it cannot enforce a covenant in a contract which it has itself wrongly terminated, under what is generally referred to as the rule in General Billposting v Atkinson [1909] AC 118. In practice, however, that point adds nothing, since the reason why the dismissal was wrongful is that the clause was unenforceable anyway. More pertinently, it means that the defendant's counterclaim succeeds. The issue of quantum is not before me, and it seems likely that it will be capable of agreement. In case it is not, I will refer it for trial by a Master.
48. Mr Oudkerk took two other points before me.
49. The first was that even if the clause was in fact enforceable the defendant's

assertion to the contrary was a good faith mistake on a genuinely doubtful point of law which was capable of determination by the court before any question of actual breach could arise: he submitted that on that basis it did not amount to a repudiation or anticipatory breach of the contract, so that the rule in General Billposting v Atkinson did not apply. This raises the vexed question of the effect of the decision of the House of Lords in Woodar Investment Development Limited v Wimpey Construction UK Limited [1980] 1 WLR 277, and how, if at all, that decision can be reconciled with the earlier decision in The Nanfri [1979] AC 757. This ground was recently traversed by the Court of Appeal in Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168, but it cannot be said that all difficulties have been resolved. In the employment law field the issue surfaced not long after the decision in Woodar in Financial Techniques Planning Services Ltd v Hughes [1981] IRLR 32, but the judgments of Brandon and Templeman LJ appear to give rather different messages. I was also referred to a short passage in the judgment of Sir John Donaldson MR in Bridgen v Lancashire County Council [1987] IRLR 58 (see para 16 at page 59), but the reasoning there is not fully developed. It is not necessary for me to venture on these choppy waters, and I see no point in my doing so. I will only record (in case the point has to be considered elsewhere) that there was nothing in the evidence before me to justify a finding that the defendant's stance that clause 8.1 was unenforceable was not adopted in good faith.

50. Mr Oudkerk's second point was that, even if the defendant's stance did amount to a repudiatory breach of the contract, the claimant had, by accepting that repudiation, disentitled itself to enforce the clause as opposed to seeking damages. He relied on the trite rule enshrined in many well-known cases – he referred me in particular to the judgments of Lord Esher MR and Bowen LJ in Johnstone v Milling (1886) 16 QB 460, at pp. 467 and 473 – that where there is an anticipatory breach the promisee has an election whether to accept it or not; but that, where he does so, he is disentitled from claiming future performance himself.
51. However, that is not an absolute rule. The question is discussed in general terms at paragraph 24-048 of the current edition of Chitty on Contracts, where it is observed that:

“Ultimately it is a question of construction whether or not the parties intended the contractual obligation in question to survive the termination of the contract.”

Mr Oudkerk acknowledged that the parties to a contract of employment are not likely to have intended that in circumstances where the employer is entitled to dismiss the employee for gross misconduct he can do so only at the cost of losing the benefit of an otherwise enforceable restrictive covenant. But he said that the position was different here, because the repudiation consisted of an anticipatory breach of the very obligation which the employer was seeking to enforce. In such a case, he submitted, the employer should indeed be put to his election. He should be allowed to hold the employee to his obligations under the restrictive covenant only if he himself is prepared to perform his own primary obligation, namely to continue to employ the employee and to pay him during the notice period:

otherwise he would indeed be having his cake and eating it. In the present case the claimant had, he suggested, obtained an additional advantage by its election, in that by dismissing the defendant summarily it avoided the difficulties of managing him during the notice period in circumstances where the contract contained, unusually, no garden leave clause.

52. I am inclined to think that Mr Oudkerk is right about all this; but since the point is not without difficulty and is not necessary to my decision, I again prefer to express no concluded view. This issue also seems to me to be one of pure law, on which no factual findings would be required even if the case were to go further. The question of Mr Webber's motivation in dismissing the defendant when he did would not seem to me to affect the legal analysis; but in case I am wrong about that I should make it clear that I do not regard it as having been proved that Mr Webber acted as he did in order to gain the particular advantages identified by Mr Oudkerk.

(d) Injunction.

53. I should say for the record that if, contrary to all my conclusions expressed above, clause 8.1 had been enforceable, I could see no reason why I should not have granted injunctive relief in the terms of the covenant. It would no doubt have borne quite onerously on the defendant, but if it was a reasonable covenant to impose, there would have to be some special reason why it should not have been enforced, and none was proved before me.

Conclusion

54. For those reasons I dismiss the claim and allow the counterclaim. I refer the assessment of damages under that counterclaim to be tried by a Master if necessary. The order should record the undertaking as regards confidential information, to which I refer at paragraph 17 above.
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