Neutral Citation Number: [2023] EWCA Civ 909

Case No: CA-2023-001179

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
SIMON TINKLER (SITTING AS A DEPUTY HIGH COURT JUDGE)
KB-2023-002306

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2023

Before :

LORD JUSTICE BEAN
LORD JUSTICE SINGH
and
LORD JUSTICE PHILLIPS

- -

Between :

MIMO CONNECT LIMITED	**Appellant**
- and -	
(1) MATTHEW ROBERT BULEY	
(2) GRACE AVALON FEVER	
(3) M/Y CONNECT MARITIME LTD	
(4) KARL MARDELL	**Respondents**

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Mohinderpal Sethi KC and Anson Cheung (instructed by **Moore Barlow LLP**) for the **Appellant (Claimant)**
Stephen Schaw Miller (instructed by **Ingram Winter Green LLP**) for the **First to Third Respondents (Defendants)**
The Fourth Respondent, Karl Mardell, appeared in person

Hearing date: 19 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean (giving the judgment of the court) :

1. This is an appeal from a decision of Simon Tinkler, sitting as a Deputy Judge of the King's Bench Division, on the return date of the Claimant's application for interlocutory injunctions. There had been an earlier hearing before Linden J, whose summary of the facts in his judgment of 26 May 2023 we gratefully adopt:-

> "10. The claimant is a private limited company which was incorporated on 31 December 2018 in England with a registered office in Eastleigh in Hampshire. It provides internet connectivity, primarily to customers in the maritime sector, for example to yachts and similar vessels. It derives its profits through service contracts with this type of customer, and, as part of its business, also sells connectivity hardware.
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> 11. Mr Robertson is a co-founder of the claimant, with his wife, Nikki Robertson, and the first defendant. Initially, the shareholding in the company was split eighty-twenty as between the Robertsons and the first defendant. The first defendant and the second defendant have been married since March 2023 but at all material times they were a couple.
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> 12. From 15 April 2019, the first and second defendant were statutory directors of the claimant, and that remains the position in the case of the first defendant. The second defendant ceased to be a director on 4 April 2023. Both were also employed by the claimant from 15 April 2019 as Sales Directors, although both have recently resigned; the second defendant on 4 April 2023, and the first defendant on 9 May 2032, although his resignation was not accepted. Neither the first nor the second defendant had a written contract of employment.
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> 13. From 13 September 2019, both the first and the second defendant became approximately 20 per cent shareholders of the claimant, pursuant to a shareholders' agreement of that date which contained restrictive covenants. These were intended to protect the goodwill of the claimant's business and therefore the value of the shareholdings to which the agreement applied, including the shareholdings of Mr and Mrs Robertson. In particular, clause 9 contained covenants against various forms of competitive activity, namely being involved in a competing business, dealing with clients, offering employment to the claimant's senior employees and soliciting suppliers away from the claimant. Clause 13 contained terms protecting the confidential information of the company.
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> 14. The first defendant remains a shareholder, but on 29 March 2023 the second defendant transferred her shares to the first defendant. However, the restrictive covenants in clause 9 of the shareholder agreement apply for 12 months after a party to the agreement ceases to be a shareholder.

15. The third defendant is a private limited company which was incorporated by the first defendant and the second defendant on 2 November 2022 and has registered offices in Southampton. Until 30 March 2023, the first defendant and second defendant were each 50 per cent shareholders in the third defendant. However, on 30 March 2023, the first defendant transferred his shares to the second defendant so that she currently owns 100 per cent of the shares in that company.

16. The fourth defendant was employed by the claimant as a Technical Sales Executive from 14 February 2020 to 1 January 2023 and is now employed by the third defendant in the capacity of Operations Director and Account Manager.

17. Mr Robertson's first witness statement explains how, as Sales Directors, the first and second defendants were responsible for generating new sales leads, bringing them to fruition in terms of sales, and cultivating client relationships. They were also responsible for agreeing terms with clients and generating monthly invoices. Considerable expense was incurred in enabling them to do their jobs through business development activity including travel. As senior employees and as directors and shareholders of the company, they were also party to, or at least had access to, virtually all of the confidential information and trade secrets of the business, including through apps which were installed on their laptops and iPhones, which were paid for by the claimant.

18. In or around July 2022, relations between the Robertsons and the first and second defendants began to sour. As a result, talks about the first defendant and the second defendant de-merging from the claimant began, and both sides instructed lawyers to assist with the negotiations. These negotiations were protracted as they could not agree about matters, including how the clients would be split, and they stalled in February 2023.

19. Although the Robertsons were aware of the incorporation of the third defendant, Mr Robertson says that their understanding was that it was not trading and would not do so until such time as agreement on de-merger was reached. In the course of April, however, evidence emerged that the second defendant and the first defendant had been diverting, or attempting to divert, business away from the claimant, for their benefit and the benefit of the third defendant. They had also been dealing with the claimant's suppliers for this purpose and they were making use of the client contacts and confidential information. There was also evidence that the fourth defendant was involved in the new business and that there had been switching of customers to the third defendant by changing the counter-party to the contract from the claimant to the third defendant and representing that this was a purely administrative step.

20. On 4 April 2023, the second defendant resigned with immediate effect, stating that she would finish that week and hand over her clients to the first defendant. She said she would not be returning her laptop or her current phone. By letter dated 6 April 2023, her resignation was accepted, but the claimant's solicitors reminded her of her obligations under the shareholder agreement and of her statutory duties as a director of the company as well as of her duty not to disclose the claimant's confidential information.

21. It may well be that the second defendant's resignation was precipitated by the fact that on 3 April 2023 Mr Robertson had stumbled on evidence that the third defendant was, in fact, trading and that she was engaged in diverting the business of one of the claimant's clients away from the claimant. In short, he had come across an invoice on a contract with a client which was not on the claimant's system, had made enquiries, and this had come to the attention of the first and second defendants.

22. On the day of her resignation, the second defendant emailed the client, notifying it of what she described as "a small administrative change." This was that the client would now be invoiced by the third defendant. She also asked the client to sign and return an updated contract, which was in fact the claimant's standard template agreement with the third defendant as the counter-party.

23. On 5 April 2023, the first defendant then sent an email saying that he had checked this out and in fact the invoice was sent in error; there had been a free trial and there was no contract. On the face of it, this appears to have been untrue.

24. In the light of the resignation of the second defendant, Mr Robertson took steps to ensure that incoming emails to her were diverted to him and to investigate her company email account. It was as a result of this that further evidence emerged that the third defendant was trading and that business was being diverted away from the claimant. The evidence thus far suggests that this was the case in respect of at least four clients, and quite possibly more, and that the defendants one to three were dealing with the claimant's suppliers for this purpose. It was also evident that the fourth defendant has been engaging in transferring business from the claimant to the third defendant and has been using the claimant's standard documentation for the purposes of the third defendant's business, and presenting the transfer as a purely administrative matter.

25. On 21 April 2023, notice was given of a board meeting on the following day to discuss what was happening. The first defendant objected to such a meeting and did not attend. On 22 April 2023, the first defendant was therefore suspended

> pending an investigation. The first defendant responded by WhatsApp, saying "not accepted", "incorrect address" and "noted and reverting." The suspension letter obviously suspended the first defendant and provided that he should stay away from work but it also stated that, in the interim, he should comply with the duties under his contract of employment.
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> 26. On 23 April 2023, letters before action were sent to the first defendant and the second defendant personally, as well as to their solicitors for the purposes of the de-merger talks, and on 25 April 2023 a response was received from the solicitors which denied any wrongdoing and said that the third defendant was not trading and that its email accounts were created in anticipation of de-merger. The letter accepted that the fourth defendant was an employee of the third defendant, but said that this was also in anticipation of the de-merger and the first and second defendants were prepared to give undertakings.
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> 27. These undertakings were duly signed by the first and second defendants on 27 April 2023. In the case of both defendants, they undertook to comply with the shareholders' agreement, in particular clause 9, for a period of 60 days. The first defendant, in addition, undertook, for the same period, to comply with the letter of suspension dated 26 April 2023; that is to say, to stay away from work and to comply with his implied duties as an employee.
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> 28. Very shortly after the undertakings were signed, however, evidence emerged which, Mr Robertson says, shows that the third defendant had in fact been trading and was indeed continuing to do so. Moreover, says Mr Robertson, there is evidence that the first and second defendants have breached the contractual undertakings which they gave.
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> 29. These points were put to the first and second defendants in correspondence and on 6 May 2023 the first defendant was asked to attend an investigatory meeting on 11 May 2023. He did not respond to the invitation and nor did he attend the meeting. Instead, on 9 May 2023, the first defendant purported to resign with immediate effect. On 10 May 2023, that resignation was rejected by the claimant. The claimant maintained, and maintains, that his contract remains in force. Although there is no express term as to notice, the claimant maintains that it was implicit that he was required to give a reasonable period of notice, and that a reasonable period would be six months."

2. Linden J granted interim relief prohibiting the defendants from misusing confidential information, from competing with the Claimant's business and from contacting the Claimant's clients.

3. The principal restrictions which the claimant company sought to enforce were contained in a shareholders' agreement between Mr and Mrs Robertson, the majority shareholders and the first and second defendants, who between them held 48% of the shares. Clause 9.1(a) prohibited the parties to the agreement from carrying on activities which competed with "the Business", that is to say the claimant's highly specialised business of providing internet connectivity to the maritime sector, particularly yachts. Clause 9.1(b) prohibited solicitation of or dealing with the Claimant company's clients, a restriction not limited to the Claimant's specialised business.

4. On the return date there was a full day hearing before Mr Tinkler ("the judge") at the end of which he gave an extempore judgment. He accepted limited undertakings offered by Mr Stephen Schaw Miller on behalf of the first, second and third defendants but declined to impose any wider prohibition on dealing with clients.

> " It is common ground that there is no written employment contract between the claimant and either the first or second defendants. Both defendants gave notice of resignation, purportedly with immediate effect. The claimant says it is an implied term of the employment contract that notice could not be given on that basis. The statutory notice period would be one week. Common law implies a reasonable notice period. I heard some argument as to what a reasonable notice period may be, but, in my judgment, insufficient to form a definitive view as to what the notice period should be. It is also implicit in the witness statements that the behaviour of the claimant may be such that it made the continuing employment of either or both defendants untenable; in essence, constructive dismissal.
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> The first defendant has offered an undertaking that for three months he would only undertake work as an insurance broker to the yachting industry. This is to provide comfort to the claimant that he would not be competing with the company, or in breach of any implied restrictions or implied notice period in his contract. Both the defendants have offered to undertake not to work with the specific list of vessels in the draft schedule, which seem to be all the vessels with whom the company says that had contact whilst working at the Company. It seems to me that, on any assessment of the balance of convenience, those undertakings are sufficient to address the issue of the employment contract. I do not therefore propose to grant any injunction stating that there is an employment notice period that is currently in force, or make any decision regarding the appropriate notice period. If, of course, it turns out at a trial that a longer notice period should have been given and was not, and damage has been caused to the company as a consequence, then the defendants would still be liable for that damage. I am just declining to give an injunction.
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> I will turn now to the question of the main injunction. The test I have to apply is set out in *American Cyanamid Co v*

Ethicon Ltd [1975] AC 396, it has three limbs: firstly there has to be an arguable case, secondly, damages are not an adequate remedy, and thirdly, on the balance of convenience, I should grant an injunction. I will deal with each of those three topics in due course. The fourth aspect I will cover in relation to this area is whether or not I should grant what is called a "springboard injunction". That is effectively an enhanced injunction that prevents people taking unjust advantage of breaches already committed. The guidance I have to apply is set out in *QBE Management Services Ltd v Dymoke & Ors* [2012] EWHC 80 (QB).

I will first of all consider the extent to which there are arguable issues in this case. That is not a difficult decision: there are plainly arguable issues. In fact, there are multiple arguable issues. I will touch briefly on them, as it may assist in future analysis on the case. The first issue is that it is said that confidential information belonging to the claimant was used by the first and second defendants prior to their departure from the business. There is evidence of email correspondence with parties who are or were prospective clients of the claimant, timed prior to the departure from the business. It seems clearly arguable that there has been some misuse of confidential information. Parties who charter yachts or who manage the chartered yachts have also been approached after the departure from the claimant by both defendants, and also by the third defendant and fourth defendant. It is arguable that those approaches used confidential information brought from the claimant. There may be genuine disputes about whether the information belonged to the claimant, or to the defendants, or about whether it is truly confidential, but that is the point; they will be arguable issues.

I turn now to the restrictive covenants. These are set out in a shareholders' agreement. The parties to that shareholders' agreement include the claimant, the first two defendants and the other two shareholders. It is said that the shareholders' agreement may have been supplemented or replaced by the articles of association. That is an arguable point. It is also possible that the shareholders' agreement has been varied by conduct or by subsequent oral agreement, which again is an arguable point. Submissions were made by the defendants that the restrictive covenants themselves may not be binding in their terms.

In considering that question I considered the cases of *Guest Services Worldwide Ltd v Shelmerdine* [2020] EWCA Civ 85, [and] *Quantum Actuarial LLP v Quantum Advisory Ltd* [2021] EWCA Civ 227. In *Shelmerdine* the Court of Appeal held that the period from which a person was a shareholder after

termination may be relevant in considering whether the restrictive covenants are binding. I note that in this case there appears to be no ability for the first defendant, Mr Buley, to sell his shareholding, although he may be required to do so…. That, in theory, means that he could therefore be a shareholder indefinitely. That, in itself, raises an arguable issue as discussed in *Shelmerdine.*

When I turn to the content of the restrictive covenants themselves, there are two covenants that are principally relevant. Covenant 9.1(a) deals with being employed, engaged or interested in any business in a "prohibited territory", which would be in competition with any part of the "business". I heard submissions that the geographical definition of "prohibited territory" was too wide to be reasonable, and thus unenforceable, and that the definition of "business" was too wide to be enforceable. I do not need to make any decision on those points, but those are clearly arguable points as the covenants seem to go significantly beyond any current or recent sphere of operations of the company. It is also notable that 9.1(a) does not purport to limit the restriction to those elements of the business in which the defendants were active during their period with the company.

It was agreed during the course of proceedings today that the words of 9.1(b) seek to prohibit the dealing with or seeking the custom of any person that is or was a client or customer of the claimant, irrespective of whether the dealing or seeking the custom related to a service provided by the business, or even contemplated being provided by the business. That raises further questions of reasonableness and thus enforceability in relation to that subsection. The defendants raised the question as to whether their actions have actually breached any of these restrictive covenants. There are points relating to that that will need to be argued in due course, but there seem to be arguable issues as to whether or not they have breached those covenants, even if they are enforceable.

The final two covenants were said not have been breached, save that the claimant wished to reserve the right to argue that the first and second defendants induced each other to leave the business. Given my findings above about there being arguable breaches, I do not need to express any view on this point.

I have two final points in relation to the restrictive covenants. The first one is that, when seeking enforcement, the claimant and potentially its majority shareholders will need to demonstrate on an equitable basis that the company comes with clean hands. The defendants raised matters in the course of the proceedings regarding the conduct of the claimant and its other shareholders including the demerger not progressing, the

reduction of payments to them and others as employees and the holding of meetings of directors without them present. Those matters raise arguable matters that will need to be considered at trial regarding enforcement of the restrictive covenants.

The final point emerged indirectly during the course of today. It seems the two majority shareholders in the company can waive claims under the shareholders' agreement, or waive the restrictive covenants. That means, effectively, that they could waive any claims by the company against themselves. The other two shareholders do not have this ability. This implies that the restrictive covenants themselves are unequal as between the parties. That will be a relevant question for consideration at trial.

It therefore is clear to me that there are multiple arguable issues to be considered, and the first test for granting an injunction is clearly met.

The second question is the adequacy of damages. It was accepted by both parties that that test was met, and there was no argument before me about the adequacy of damages.

Before I continue to consider the balance of convenience, I wish to address two other points. The first one is in relation to the injunction sought for the non-solicitation of employees and in relation to suppliers. It was accepted that, on the basis of the current understanding of the claimants, neither of those restrictive covenants have currently been breached, and I am, in essence, therefore being asked to provide what in Latin is called a *quia timet* injunction, but in essence a forward-looking injunction, because of something somebody might do. The test that I apply is that set out in *London Borough of Islington v Elliott & Anor* [2012] EWCA Civ 56, which requires there to be two necessary ingredients for that. Firstly, if there is no actual damage, there must be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I am not satisfied that those thresholds are met, and so an injunction in relation to suppliers and employees would not, in my view, be appropriate.

The second point relates to the financial position of the claimant, which is relevant because for an injunction there needs to be a cross-undertaking in damages; in other words, if it turns out that this injunction should not have been granted, and the full facts reveal that there should be no injunction, the claimant agrees to pay the costs and damages to the defendants. There have been doubts raised about the ability of the claimant to meet any liability they would have, particularly in relation to costs. I was directed to statements made by, in particular, the first defendant, Mr Buley, regarding the fact that someone was

made redundant from the company, the fact that payments to suppliers are not being made, and also, going back to November last year, the fact that payments to the directors, other than their relatively low level of employment pay, were suspended. Mr Sethi, for the claimant, says that that was caused in part or in whole by the behaviour of the defendants. There was little evidence before me to show that. The evidence from Mr Buley was that the profit from the six contracts which are being currently undertaken by the third defendant was in the region of just $10,000 per month. The troubles also apparently date back to at least November 2022, significantly before the defendants purported to leave the claimant's employment.

In connection with the financial position, it was suggested by the defendants that it would be appropriate for the other two majority shareholders to participate in the crossundertaking - in other words, to stand behind the company's undertaking. On analysis, what I was being asked to say is that if I was not prepared to accept the covenant of the claimant, I should be prepared to accept a fortification of that covenant by an undertaking from Mr and Mrs Robinson. It was made clear by Mr Sethi that was not a proposal that was currently being made, and therefore was not one that I should be actively considering. It is relevant to an extent, because the covenant that is given in the shareholders' agreement is given to all shareholders, as well as the company, and it would therefore be open to the two majority shareholders to have taken personal steps to enforce the covenant, in the context of a business that is, in reality, a quasi-partnership. They have not done so, and the company which remains 42 per cent owned by the defendants, is providing 100 per cent of the undertaking back to those same defendants.

In analysing the financial position, I note for completeness the submissions made in relation to the cases of *Roger Bullivant Ltd v Ellis* [1987] ICR 464 and *PSM*. My decision is not affected by any potential liquidation of the third defendant or by D3 being unable to fulfil its contractual obligations.

Before I finish on the balance of convenience, I will just touch briefly on the springboard injunction, which is an application where there is a breach of obligation, a start, continued wrongdoing. It is designed to hold the ring, pending final determination. QBE identified that the strength of either side's case is a relevant consideration. I note the undertakings that have been offered in relation to the specific vessels in paragraph 6.2 of the draft order.

I turn to the balance of convenience as to whether or not I should grant an injunction. The test described in *Olint Corporation Ltd v National Commercial Bank Jamaica Ltd*

[2008] 12 JJC 2201 is the decision I make should be the one that causes the "least irremediable prejudice to one party or the other". In other words, if, when the full evidence is before the court, the decision to grant an injunction was incorrect, or the decision not to grant an injunction was incorrect, who suffers the least prejudice? The defendants have offered undertakings. The first defendant has offered that for three months, in connection with employment, he will only undertake work as an insurance broker to the yachting fraternity.

All defendants have offered undertakings in relation to the specific vessels listed in the draft order. Those vessels include six which have been identified as all the current clients of the third defendant. The other vessels are all clients of the claimant where there is no evidence of contact by the defendants, but they are clients of the claimant who the defendants will undertake not to contact form now on. There is no evidence that any attempt has been made to solicit any employee in breach of the restriction in article 9.1(c), or that any suppliers have been induced to stop the provision of supplies in a way that would breach 9.1(d). In submissions it was suggested that the behaviour between the first and second defendants was such to breach the restriction in 9.1(c). Whilst that may be a matter that is possibly arguable at trial, if we were to go to trial, it is not one that would justify imposition of a restriction in the terms sought.

It seems important to me to consider the context of the wider dispute. This is a dispute about, in essence, the ownership of the claimant. There are statements in the skeletons and witness statements implying that steps either are in train or were contemplated to effect a demerger or dissolution of some nature. If the claimant were to be dissolved then the business would be divided in some way, between the first two defendants and between the other two shareholders. If the business is divided, it follows that some business will be allocated to one set of parties, and some will be allocated to the other. If that demerger had been agreed, we would not be here today.

I also note that all parties have said in their evidence that they have pre-existing contacts and relations, they have information relating to the industry generally that resides in their heads and/or is generally known, and/or is widely available, and is not, therefore, confidential information of the claimant. I also note, when considering the balance of convenience, the financial risk in relation to the cross-undertaking from the claimant.

If I grant the injunction in the terms offered by the defendants they agree that they will not deal with the list of

identified vessels. They agree that the first defendant will only undertake work as an insurance broker in the next three months. The risks remaining to the claimant are, in essence, that there is work undertaken by one of the defendants either using confidential information in relation to a vessels the claimant has not identified, or that a defendant breaches a different and enforceable term of the restrictions.

If I grant the injunction in the terms sought by the claimants, the first defendant would not be able to undertake any activities in relation to any client of the claimant for 12 months. The second defendant, the first defendant and the third defendant would be unable to seek new business in competition with the claimants, even if that business was completely new, unrelated to anything currently or historically carried out in the claimant's business activities, and in a part of the world where the claimant has not previously conducted activity. The granting of the injunction would also mean that the claimant would retain 100 per cent of the existing business, notwithstanding the 58 per cent shareholding of the majority shareholders. I note that thus far the universe of identified and quantified claims relates only to approximately six contracts undertaken by the third defendant which may or may not be in breach of restrictions in relation to confidential information or the restrictive covenants.

I recognise that in making the decision and in analysing the balance of convenience there is tension between the doctrine of restraint of trade - in other words, that a restrictive covenant should not be upheld - but also the freedom to contract between independent parties.

Stepping back, it seems to me that the undertakings offered by the defendants provide significant protection to the claimant. The claimant’s suggested injunction terms, on the other hand, could cause significant prejudice to the defendants in a situation where it is not clear that the claimant can compensate them. I also note the degree to which there is dispute about the enforceability of the restrictive covenants, the degree to which there is a dispute around the underlying basis on which the shareholding should be construed, and the basis on which there is a dispute about the behaviours of all parties since July last year. In my view the balance of convenience is in favour of granting an injunction in the terms offered by the defendants, and not in the terms sought by the claimants.

In terms of the fourth defendant, I took from what Mr Mardell said that he was content to give the undertakings sought in relation to the witness statement and the other relevant parts. And, again, I am minded to accept them on the limited basis he offered.

> I turn to ancillary matters. In relation to imaging, I think the position is that there is no order currently sought, as the analysis has not yet been completed.
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> In relation to the speedy trial it seems to me, based on the undertakings that have been given and the likelihood of any trial being in the Michaelmas term in any event, and in order to allow the parties to properly take advantage of the ADR requirements, and to prepare the appropriate legal representation papers, that a speedy trial is not appropriate. In other words, there is no reason for this case to jump the queue, ahead of other cases that are in this court. ….."

5. The Claimant applied for permission to appeal on a number of grounds. Their overall complaint was that the judge was wrong to hold that the balance of convenience favoured the refusal of the interlocutory injunctions they had sought and was wrong to find that the action was not suitable for a speedy trial. The six specific grounds of appeal were as follows:

> "Ground 1: Errors as to Shareholder Covenants relating to non-competition and client non-dealing
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> The learned Judge erred in law and/or perversely held that, in assessing the balance of convenience, D1-D3's listed client undertaking obviated the need to enforce the shareholder non-competition covenant in clause 9.1(a) and the client non-dealing covenant in clause 9.1(b) of the Shareholders' Agreement. The balance of convenience favoured the grant of the shareholder non-competition and client non-dealing injunctions.
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> Ground 2: Errors as to springboard non-competition injunction. The learned Judge erred in law and/or perversely held that, in assessing the balance of convenience, D1-D3's listed client undertaking obviated the need to grant a springboard non-competition injunction. The balance of convenience favoured the grant of the springboard non-competition injunction.
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> Ground 3: Errors as to Dl's notice period undertaking
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> The learned Judge erred in law and/or perversely exercised his discretion to change his decision between delivering oral judgment and sealing of the Return Date Order.
>
> In any event, the Judge's reconsidered decision did not reflect the actual undertaking given to the Court by Dl.
>
> Ground 4: Errors as to notice period injunction
>
> The learned Judge erred in law and/or perversely held that, in assessing the balance of convenience, the Judge's revision of

> Dl's undertaking obviated the need to grant the notice period injunction or order Dl's actual undertaking offered to the Court as set out in the Judgment.
>
> Further, the Judge's revision of Dl's undertaking only lasts until 9 August 2023 (ie, the 3 months reflected in Dl's actual notice period undertaking). It is C's position that D1 was required to give a reasonable period of 6 months' notice.
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> Ground 5: Errors in deciding application on basis not argued
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> The learned Judge erred in law and/or perversely decided to refuse the application for Shareholder Injunctions and/or the springboard non-competition injunction by considering arguments and authorities not argued nor canvassed before him.
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> Ground 6: Errors as to speedy trial
>
> The learned Judge erred in law and/or perversely refused to grant an expedited trial by not taking into account relevant factors."

6. By letter of 6 July 2023 written on an open basis and included in our bundles, the solicitors for the first, second and third defendants offered to compromise the appeal on certain terms. That offer was not accepted on behalf of the claimant and the matter came before us on the morning of 19 July 2023.

7. Later that day we were able to announce that the Claimant's appeal would be allowed and to state briefly our reasons for doing so. Since the only point of general application on this appeal is our view that a speedy trial should plainly have been granted, we shall not give more detailed reasons than those we announced.

8. We are conscious of the difficulties faced by the judge, who was deluged with a mass of material at short notice and gave an extempore judgment. But we differ from him in a number of respects.

Discussion

9. In common with many, if not most cases, to enforce covenants for a limited period by way of injunction, this case cried out for an order for speedy trial. Although the decision is often described as a discretionary one, we are entitled to interfere with it because in our unanimous view it was not reasonably open to the deputy judge to conclude that the case was *not* suitable for a speedy trial. The principal covenants had a 12 month duration. The prospect of there not being a trial until the second half of that period, if not towards the end of it, is potentially seriously unjust to the claimant.

10. We also consider that the judge fell into error as a matter of law, in that we do not accept that this case is properly characterised as a dispute about the ownership of the claimant company, nor that the failed attempts to achieve a de-merger of the two sides' interests are relevant to the order the court should have made. This is a claim by a company for interim relief against its directors/shareholders for breach of their fiduciary and/or contractual duties.

11. We consider that the limited undertakings which were offered to and were accepted by the judge were inadequate to protect the claimant's legitimate interests pending a trial. The balance of risk of doing an injustice should have been taken into account against the background of clear evidence, summarised by Linden J in his judgment from which we have quoted, of misuse of confidential information and attempts to divert customers of the claimant towards the third defendant in breach of the first and second defendants' fiduciary duties. There is no dispute that the first defendant remains a director on the register at Companies House and both he and the second defendant remain parties to the shareholders' agreement. Accordingly the activities which Linden J described, in competition with the claimant's business, were clear breaches of fiduciary duty by the first defendant and of contract by the first and second defendants.

12. The offer letter of 6 July 2023 realistically recognises the weakness of the defendant's position in a number of respects. The letter as drafted offered undertakings in terms of the non-competition covenant for two years or until an earlier trial. In the course of oral argument before us the areas of dispute very significantly narrowed.

13. Mr Schaw Miller accepted that the Defendants whom he represents should be prohibited until trial from dealing with customers of the claimant even outside the specialist area of the business. In some cases the balance of convenience might point away from such an order, but given the history and the defendants' behaviour in the present case the concession was clearly justified.

14. There is an interesting dispute about whether the first defendant was an employee of the claimant (his resignation letter certainly suggests that he was) and what notice period he should have given. But we consider that a combination of the non-competition clause 9.1(a) and a prohibition on dealing with the Claimant's customers, whether in respect of the specialised business or otherwise, gives the claimant sufficient protection without having to enter on the employment issues.

15. Mr Mardell, the fourth defendant, addressed us on his own behalf. There is little if any evidence that he has any continuing involvement with the other defendants' activities. Mr Sethi did not press for the grant of any new interim relief against him.

16. The injunctions in respect of confidential information granted by the deputy judge will remain (against all defendants including Mr Mardell). In announcing our decision we said that the undertakings accepted by the judge would be replaced as against the first, second and third defendants either by injunctions or by undertakings to this court if Mr Schaw Miller had instructions to give them. The form of order agreed by counsel incorporates injunctions rather than undertakings.

17. The claimant company's cross-undertakings in damages must be given whether the order takes the form of an injunction or the acceptance of undertakings. We will not, however, differ from the judge's view that the company's undertakings in damages should be accepted without fortification being required whether by a bank guarantee or by personal undertakings from Mr and Mrs Robertson or either of them.

18. We accept that springboard relief should be granted, although in the light of the statement read to us by the fourth defendant we will not make any order against him.

19. Finally there is the issue of the order for costs made by Linden J. We are told that the deputy judge was asked to vary it by means of a stay or giving extra time to pay but there is nothing in his order dealing with the issue. The deputy judge was entitled to take the view that he should not interfere. It would be open to apply to Linden J for such a variation if good cause could be shown but we would not encourage this. At any rate we will not vary it ourselves.

20. We indicated that we would be prepared to give directions for pleadings and other matters such as disclosure to lead to a speedy trial next term. We had in mind 7 days for the Particulars of Claim and 14 days after that for the Defence. The parties have now agreed a detailed form of order which, as well as implementing our judgment, contains directions for pleadings and for a speedy trial.