Neutral Citation Number: [2024] EWCA Civ 175

Case No: CA-2023-002335

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mr Justice Bourne
[2023] EWHC 2788 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2024

Before:

LORD JUSTICE BEAN
LORD JUSTICE MALES
and
LORD JUSTICE LEWIS

- -

Between:

1) DERMA MED LIMITED	**Appellants/**
2) PEAL ATHENA LIMITED	**Claimants**
- and -	
1) DR ZACK ALLY	**Respondents/**
2) ZACKALLY LIMITED	**Defendants**
3) DR SANAH QASEMZAHI	

- -
- -

Thomas Grant KC & James Kinman (instructed by **Locke Lord LLP**) for the **Appellants**
Adam Solomon KC & Stuart Sanders (instructed by **DWF Law LLP**) for the **Respondents**

Hearing date: 30th January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Males:

1. The first defendant, Dr Zack Ally, is described as a leading and high profile aesthetics practitioner, treating people with Botox and other cosmetic fillers. He and his wife, Dr Sanah Qasemzahi, the third defendant, built up a successful business, Derma Med Ltd ('Derma Med', the first claimant), treating patients and running courses to teach others how to do so, which on 24th March 2022 they sold to the second claimant, Peal Athena Ltd ('Athena').

2. The sale agreement provided for Dr Ally and Dr Qasemzahi to receive total consideration worth up to £15,550,000 together with 20% of the share capital of Athena, on terms that (among other things) they would not compete with Derma Med for a period of two years (i.e. until 24th March 2024), including by dealing with any client of Derma Med, enticing away any supplier, or using any of Derma Med's intellectual property, and would keep confidential Derma Med's confidential information, including information relating to its business, clients, suppliers, intentions, market opportunities and know-how. It was agreed also that Dr Ally would remain a director of Derma Med (as well as becoming a director of Athena) and would continue to work for Derma Med. In view of his reputation as a leading practitioner, this was obviously a matter of considerable importance.

3. However, the claimants came to suspect that Dr Ally was dishonestly diverting business from Derma Med to himself, and was using Derma Med's confidential information in order to do so. This led to him being suspended on 31st May 2023, as a result of which Dr Ally resigned as a director and employee, asserting that he had been constructively dismissed. On 22nd June 2023 the claimants applied without notice for an injunction in order (among other things) to enforce Dr Ally's non-compete and confidentiality obligations. The injunction was granted by Mr Justice Constable ([2023] EWHC 1555 (KB)), who was satisfied that there was a strong *prima facie* case that Dr Ally was breaching these obligations, that the balance of convenience favoured the grant of an injunction pending a return date, and that it was appropriate to grant the injunction without notice in view of a strong inference that Dr Ally would take steps to cover his tracks if warned in advance.

4. However, on the return date hearing, which took place on 17th October 2023, Mr Justice Bourne ('the judge') discharged the injunction on the ground that there had been significant failures of full and frank disclosure by the claimants at the without notice hearing, and refused to grant a fresh injunction because damages would be an adequate remedy for the claimants if they succeeded in their claim.

5. The claimants now appeal to this court, contending that the judge was wrong to discharge the injunction granted without notice and that in any event he ought to have granted a fresh injunction. At the conclusion of the hearing we announced that the appeal would be allowed, that an injunction against competition would be granted until 24th March 2024, and that an interim injunction to protect the claimants' confidential information would be granted on terms to be decided if the parties were unable to agree, although in the event they were able to do so. This judgment sets out my reasons for joining in that decision.

Background

6. For the purpose of this appeal, the facts can be summarised as follows, although some of them may be in dispute when this claim reaches trial.

7. Derma Med, established by Dr Ally and his wife in 2017, is a supplier of aesthetic services. It provides courses training practitioners to undertake Botox and other dermal filler procedures, and provides treatments to its own clients. On 24th March 2022 Dr Ally and his wife sold their shareholding in Derma Med to Athena. In consideration of the sale, they received (1) £5 million in cash; (2) the forgiveness of a further £5 million of debts owed by them to Derma Med; (3) shares in Athena, such that they held a 20% shareholding in the company; (4) rights to up to a further £2 million by way of a 'Holdback Amount', the precise amount depending on how a draft completion statement compared to certain benchmarks; and (5) rights to up to a further £3,550,000 by way of 'Earn-Out Payments', payable in three instalments, dependent on the future performance of Derma Med. All of these payments have been made, save for part of the 'Holdback Amount', as to which there is a dispute, the second and third 'Earn-Out Payments' which it is agreed had not fallen due, and the final instalment of the first 'Earn-Out Payment' amounting to £633,333.33.

8. The agreement contained restrictive covenants whereby Dr Ally and his wife undertook not to compete with Derma Med at any time before 24th March 2024 and to keep certain information confidential.

9. On the same date Dr Ally entered into a service agreement with Derma Med whereby he remained an employee of the company, and (together with Dr Qasemzahi) a shareholders agreement relating to Athena. The intention was that Dr Ally, who was associated in the mind of the relevant public with Derma Med, would continue to work for Derma Med and would remain a director of the company. His reputation was viewed as important for bringing in business and his Instagram account ('the ZA account') was an important driver of business into Derma Med's clinics. The ZA account was the subject of specific provision in the sale and purchase agreement, which conferred upon Derma Med the right to control the account and obliged Dr Ally to refer any enquiries received through the account to a named individual (Mr James Woods, an employee of Athena).

10. The claimants' evidence indicates that from the outset Dr Ally acted in breach of his obligations under the sale and purchase agreement in a number of respects, diverting business to himself and away from Derma Med, and taking considerable trouble to conceal his activities from the claimants. This concealment included deleting messages from the ZA account so that the claimants would not see what was happening, changing the email address on the account so that emails went to him directly and not to Derma Med, taking payments from clients in cash without accounting to Derma Med in the pretence that Derma Med's card payment system was not working properly, and obtaining a duplicate card machine linked to the second defendant's bank account so that card payments were made to his company instead of to Derma Med.

11. In September and October 2022 the claimants complained to Dr Ally that he was treating patients for his own account, contrary to what had been agreed, and an agreement was reached that henceforth he would only treat family members and (Dr Ally says) friends outside of Derma Med's business, and then only with prior permission. This agreement was referred to in evidence as 'the October Re-Set'.

However, the claimants' case is that Dr Ally continued to divert business to himself and away from Derma Med.

12. Dr Ally has admitted doing these things, including after the October Re-Set, although he says that he did them in retaliation for the claimants' delays in paying him what he was owed under the sale and purchase agreement. But that purported justification must be viewed in the light of the fact that he set up the separate card payment system shortly before the sale and purchase agreement was concluded, which suggests that his diversion of cash and business away from Derma Med was premeditated.

13. The claimants say that the evidence which they have obtained, which at this stage is largely unchallenged and is to some extent admitted, represents strong *prima facie* evidence of dishonesty on the part of Dr Ally, and that although his partial success in covering his tracks means that it is impossible to be precise about the figure, the evidence indicates that he has in effect stolen money from them which runs into at least a six-figure sum. Although it would be premature to reach any firm conclusion, on the material presently available that submission appears to be well founded.

14. By 31st May 2023, following a report that Dr Ally had approached two employees to work with him in a separate business, Derma Med decided to suspend him as an employee while an investigation took place. The suspension letter of that date stated:

> 'There are grounds to consider that you may have potentially seriously breached a number of provisions of the Executive Service Agreement and/or your fiduciary duties as a director of [Derma Med].
>
> The allegations the subject of the investigation are that:
>
> - You have taken cash payments for treatments provided to clients and/or encouraged or permitted other employees to accept cash payments.
>
> - You have failed to properly respond to sales leads and/or to pass them on to [Derma Med].
>
> - That you have failed to properly keep clinical records of treatments and ignored a client complaint.
>
> - You have been disloyal in suggesting to senior employees that they should leave the company to work with you at a competing business.'

15. On 8th June 2023 Dr Ally resigned from his employment with Derma Med and as a director, asserting that he had been constructively dismissed. The context for this resignation was not only his suspension, but also a dispute as to non-payment of the final instalment of the first 'Earn-Out Payments' due under the sale and purchase agreement. The position here is that the claimants had accepted, in their solicitors' letter dated 13th April 2023, that 'the conditions in respect of the Earn Out have been met', but had given two reasons for not making the payment. The first, given in an email dated 4th April 2023, was that the claimants intended to set off all or part of this payment

against a claim which they intended to make against Dr Ally. The second, in the solicitors' letter dated 13th April 2023, was that Derma Med was 'in urgent need of a short-term cash injection (including, but not limited to, a VAT payment of c.£248k which the Company should (but failed) to make prior to completion on 24 March 2022)', which was now coming to light as a result of the finalisation of the Completion Accounts. They said that they would 'be amenable to a constructive dialogue in respect of the mutual liabilities owed between the parties' after this problem had been addressed.

16. By a letter dated 13th June 2023 the claimants' solicitors challenged the allegation that Dr Ally had been constructively dismissed and called upon him to cease and desist from (among other things) divulging confidential information of the claimants and enticing suppliers (including trainers) and employees away from Derma Med. Dr Ally's response, by his solicitors' letter dated 16th June 2023, declined to give any undertakings, denied that Dr Ally was in the process of setting up a competing business, and described the claimants' concerns as being 'motivated by paranoia rather than any supporting evidence'.

The application to Mr Justice Constable

17. It was in these circumstances that the claimants made their without notice application to Mr Justice Constable on 22nd June 2023. They sought an order which, until a return date on 24th July 2023, did six things: (1) it restrained Dr Ally from competing with Derma Med; (2) it ordered him not to use or disclose 'Confidential Information'; (3) it ordered him to preserve any 'Device' containing any Confidential Information; (4) it ordered him not to delete any 'Electronic Account' or information stored therein containing any Confidential Information; (5) it ordered him not to alter or edit any login details or passwords for access to any Device or Electronic Account containing Confidential Information; and (6) it ordered him to make available to an independent expert all Devices on which Confidential Information was stored for the purpose of obtaining forensic images of each of his Devices and Electronic Accounts. 'Confidential Information', 'Device' and 'Electronic Account' were all terms defined in the order.

18. Mr Justice Constable was satisfied that the claimants had made a strong case for such an order. As he put it:

> '12. On the evidence placed before the Court, I am persuaded that the inference from the investigation so far carried out is that Dr Ally has both pre and post the sale of the business conducted significant "off books" treatments, the latter at least being in breach of the SPA. These have been facilitated by conduct through DM and email. In doing so, there is a strong *prima facie* case that he would have been using Confidential Information for his own end, in breach of the SPA. The constant deletion of DM messages within the ZA Account is itself evidence that the nature of the communications was such that Dr Ally did not wish that content to be exposed as it would evidence that conduct. There is also a strong *prima facie* case that Dr Ally has been paid for such treatments either in cash or through a Zettle card account linked to what was effectively a personal bank account (in the

> name of the Second Defendant) rather than to the proper Derma Med account. On the face of it, any such funds should belong to Derma Med. …'

19. He was satisfied also that damages would not be an adequate remedy for the claimants, that 'in light of the strong *prima facie* evidence before the Court of serious wrongdoing on the part of Dr Ally, the balance of convenience lies fully in favour of granting the interim injunctions sought *ex parte*, to be reconsidered in the short term on the Return Date should the maintenance of the injunctions be opposed', and that there was a substantial risk that without an order to ensure the preservation of evidence, such evidence would be destroyed or removed.

The Return Date hearing

20. On 12th July 2023 Dr Ally's solicitors maintained that Athena was in repudiatory breach of the sale and purchase agreement as a result of its failure to pay the full amount of the Earn-Out Payment, which Dr Ally and Dr Qasemzahi now accepted as terminating the agreement. As a result, they said, the defendants were no longer bound by the non-competition clause in the agreement.

21. On 18th July 2023 the defendants issued an application to set aside the orders relating to non-competition and the use of confidential information, but not the orders relating to Dr Ally's Electronic Accounts and Devices, on the grounds that there had been 'material non-disclosure'. The application was supported by a witness statement from Dr Ally which made important admissions of treating patients 'off the books', of taking payments in cash and of deleting messages coming into the ZA account.

22. In the event the return date hearing did not take place on 24th July 2023 as the parties agreed to mediation with a view to resolving the dispute. Unfortunately the mediation was unsuccessful. The defendants' application to set aside parts of the order made by Mr Justice Constable, together with the claimants' application to continue that order, came before Mr Justice Bourne on 17th October 2023. The judge decided to give an *extempore* judgment with a view to allowing the parties to know where they stood without delay.

23. In his judgment Mr Justice Bourne concluded that there were four 'significant failures' by the claimants to draw matters to the attention of Mr Justice Constable. I shall consider these below. There were other allegations of non-disclosure made by the defendants, but the judge did not reach any firm conclusion on these. Overall, his conclusion was as follows:

> '23. Without reaching a firm conclusion on the other matters complained of by Mr Solomon, I conclude that overall there was a serious failure to make full and frank disclosure of relevant matters. I am not in a position to conclude that it was deliberate, but it can certainly be described as culpable. …'

24. The judge continued that, in view of this 'overall serious failure', the order made by Mr Justice Constable should be discharged. In fact, however, the order which he then made did not discharge Mr Justice Constable's order in its entirety, but left in place the provision for forensic imaging of Dr Ally's devices by an independent expert, which

by then had been complied with, and left for future decision what should happen to the images thus obtained.

25. The judge considered next whether there should be any new injunctive relief to restrain competition or to prevent misuse of confidential information. Although he accepted that there was a serious issue to be tried on the merits, including whether Dr Ally was entitled to treat the sale and purchase agreement as repudiated, he concluded that no new injunction should be granted. The judgment deals with this question only briefly, but gives two reasons for this decision. The first was that Dr Ally had 'gone on record' as saying that he would not compete with Derma Med or use its confidential information. The second was that damages would provide an adequate remedy to the claimants if they win their claim because 'Dr Ally is a person of means who has received millions of pounds from the sale of the business' and would therefore be in a position to meet any award of damages.

The appeal

26. The claimants appeal on four grounds:

(1) the judge was wrong to find them guilty of any, or any serious and culpable, breach of their duty of full and frank disclosure;

(2) the judge was wrong to set aside the orders made by Mr Justice Constable;

(3) the judge ought to have continued the non-competition and confidential information orders; and

(4) the judge's order as to costs was wrong in principle; as the appeal has succeeded on the previous grounds, this ground need not be further considered.

27. The defendants supported the judge's reasoning and conclusion, save that they contended by a Respondents' Notice that the judge ought to have held, for the future, that there was no serious issue to be tried because Dr Ally and his wife were released from their obligations under the sale and purchase agreement as a result of their acceptance of the claimants' repudiatory breach of that agreement.

The approach on appeal

28. This is, in large part, an appeal against evaluative or discretionary decisions made by the judge and accordingly, as the claimants accept, they face a high hurdle. This court will in general only interfere with such decisions where the judge has taken into account immaterial factors, failed to take account of material factors, erred in principle or come to a conclusion which was not reasonably open to him. I shall apply that approach in what follows but, even so, I have concluded that the judge's decision cannot be supported.

Failures of full and frank disclosure

29. The importance of full and frank disclosure by a claimant when applying for an order without notice to the defendant has been emphasised many times. The leading statements of principle remain those set out in the well-known case of *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, although there are many other more recent summaries

of the applicable principles to be found in the cases. One very full such summary was by Mrs Justice Carr in *Tugushev v Orlov* [2019] EWHC 2031 (Comm) at [7]:

> 'i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
>
> ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;
>
> iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;
>
> iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;
>
> v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;
>
> vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been

improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;

xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;

xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;

> xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure.'

30. Although this was said in the context of an application for a freezing order, the principles are of general application. I would draw particular attention, as relevant in the present case, to the fact that the overriding consideration when deciding whether to continue an injunction or grant a fresh injunction despite a failure of disclosure is the interests of justice; and to the need to maintain a due sense of proportion in complex cases. This latter point was made by Mr Justice Toulson in *Crown Resources AG v Vinogradsky* (15 June 2001) and was adopted by the Court of Appeal in *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381, [2014] 1 CLC 451 at [36]:

> '… where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion. …
>
> I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees. …
>
> In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion.'

31. A further point which merits emphasis is that even when there has been a failure of full and frank disclosure, the interests of justice may sometimes require that a without notice order be continued and that a failure of disclosure be marked in some other way, for example by a suitable costs order. A court needs to consider the range of options available to it in such an event.

32. In the light of these principles, I consider next each of the failures of disclosure found by the judge.

Failure to disclose that there was no good reason for applying without notice for the non-competition and confidential information orders

The judgment

33. The first failure found by the judge concerned the making of the application without notice. The judge put it this way:

> '18. … First, although it was logical to seek orders for preservation of devices and imaging orders without notice on the basis that notice of the application might prompt Dr Ally to

> destroy the evidence before it could be secured, the same logic did not apply to the orders restraining him from competing with Derma Med or from misusing confidential information. To date, in my judgment, no good reason has been identified for seeking those orders without notice. In my judgment, there was a duty to ensure that the judge was aware of that difference between the rationale for the different parts of the order and the fact that making the non-compete and confidentiality orders without notice was unusual to say the least.'

34. The judge referred to a passage in the textbook by *Bloch & Brearley*, *Employment Covenants and Confidential Information* (4th Ed) at para 14.34:

> 'Occasionally, the applicant will decide to seek some of the proposed relief without notice and the balance of the relief on notice, eg a confidentiality injunction and injunction restraining destruction of confidential or proprietary documents without notice followed up by a with notice application for delivery up of confidential or proprietary documents and interim enforcement of restrictive covenants … Making only certain elements of an application on a without notice basis is often a more proportionate and reasonable way to proceed than to seek the entirety of the relief without notice.' (Underlining added).

35. Although the claimants' skeleton argument before Mr Justice Constable had referred to this paragraph, it did not refer specifically to the words which I have underlined, which the judge considered would have alerted Mr Justice Constable to the lack of any reason to order enforcement of the restrictive covenants without notice to the defendants.

Submissions

36. For the claimants, Mr Thomas Grant KC (who did not appear below) submitted that it was obvious to Mr Justice Constable that the application to him was being made without notice and that the claimants had drawn his attention to the cases making clear that this is an exceptional course for which good reason is required. He submitted that the claimants had given an explanation for seeking the injunction to restrain competition and to prevent a misuse of confidential information without notice, namely that Dr Ally should be held to his agreement not to compete at the earliest opportunity and before further damage was inflicted on Derma Med's business. Accordingly, Mr Grant submitted that this should not be regarded as a failure of disclosure at all: the claimants had identified the test which they had to meet in order to obtain an injunction without notice, and the basis on which they said that they satisfied that test. Alternatively, if it was a failure, the judge was wrong to regard it as culpable and serious in circumstances where Dr Ally had not advanced any reason at the return date hearing why such an order should not be made against him.

37. For the defendants, Mr Adam Solomon KC emphasised the exceptional nature of a without notice application and the need for a clear justification for making such an application, confining the relief sought to that which can be justified as an exception to the basic principle of justice that an order should not be made against a party without

giving him an opportunity to be heard. He cited the explanation given by Mr Justice Hoffmann in *Re First Express Ltd* [1992] BCLC 824, 828:

> 'It is a basic principle of justice that an order should not be made against a party without giving him an opportunity to be heard. The only exception is when two conditions are satisfied. First, that giving him such an opportunity appears likely to cause injustice to the applicant, by reason either of the delay involved or the action that it appears likely which the respondent or others would take before the order can be made. Secondly, when the court is satisfied that any damage which the respondent may suffer through having to comply with the order is compensatable under the cross-undertaking or that the risk of uncompensatable loss is clearly outweighed by the risk of injustice to the applicant if the order is not made.'

38. Mr Solomon submitted, in effect, that the claimants ought to have told Mr Justice Constable that there was no justification for seeking without notice relief so far as the non-compete injunction was concerned and that their failure to draw the words which I have underlined from paragraph 14.34 of *Bloch & Brearley* to Mr Justice Constable's attention was 'extraordinary', 'culpable', 'significant' and 'cavalier'.

Decision

39. It is obvious that the claimants made a conscientious effort to comply with their duty of full and frank disclosure. As Mr Solomon accepted, they drew Mr Justice Constable's attention to the requirement that a without notice application should not be made without a very good reason, citing a passage from the judgment of this court in *Moat Housing Group-South Ltd v Harris* [2005] EWCA Civ 287, [2006] QB 606 at [63]:

> 'As a matter of principle no order should be made in civil or family proceedings without notice to the other side unless there is a very good reason for departing from the general rule that notice must be given. Needless to say, the more intrusive the order, the stronger must be the reasons for the departure. It is one thing to restrain a defendant from what would in any event be anti-social behaviour for a short time until a hearing can be arranged at which both sides can be heard. It is quite another thing to make a "without notice" order directing defendants to leave their home immediately and banning them from re-entering a large part of the area where they live.'

40. Having identified the test, the claimants then made a submission that they satisfied that test. The submission was, in effect, twofold: (1) that a without notice application was not only justified but necessary so far as the orders relating to Dr Ally's devices and electronic accounts were concerned because of the real danger that, if given notice, he would take steps to destroy evidence; and (2) that a non-compete injunction without notice was justified for a short period until the return date because Dr Ally's breaches of his obligation not to compete were already causing damage to Derma Med's business which ought to be stopped without further delay. The first part of that submission was

not challenged by the defendants. In my view the second part of the submission was a matter for Mr Justice Constable to evaluate. Some judges might have taken the view that notice of the application for the non-compete order ought to have been given, so that the application had to be made in two stages. Other judges could reasonably have considered that the delay inherent in requiring notice to be given when a without notice application was clearly justified in relation to the devices and electronic accounts, and when there would be a return date within a relatively short period in any event, would cause injustice to the claimants which could not be compensated by an award of damages – i.e. that this was the situation contemplated by Mr Justice Hoffmann in *Re First Express Ltd* in which an application without notice would be justified. It is evident that Mr Justice Constable took the latter view. He gave a careful judgment in which he set out in detail the principles applicable to the making of without notice orders, including the citation from *Moat Housing* which I have set out above, and was clearly alive to the need for such orders to be justified. He expressly took account of the fact that the restrictions would only apply for a short period until the return date, at which the defendants could be represented, and contemplated that the enforceability of the restraints, if challenged, could be finally decided in short order at a speedy trial. He recognised the evidential difficulties which the claimants would face in seeking to recover damages. I shall return to this point.

41. In these circumstances it seems to me that the defendants' complaint is not so much that there was a failure of full and frank disclosure by the claimants, but that Mr Justice Constable was wrong to take the view which he did. The complaint of non-disclosure essentially comes down to the fact that the claimants did not tell Mr Justice Constable that according to a leading textbook it was often more proportionate and reasonable to seek to enforce a restrictive covenant by making an application in two stages than to seek the entirety of the relief in a single without notice application. In my judgment, however, there is nothing in this complaint. It is clear that Mr Justice Constable was aware of the need for a without notice application to be justified and took the view that it was. The fact that a textbook suggests that a different course will 'occasionally' or even 'often' be appropriate carries relatively little weight.

42. In my judgment, therefore, Mr Justice Bourne was wrong to characterise this as a failure of full and frank disclosure by the claimants, let alone a significant or culpable failure.

Failure to disclose the suspension letter

The judgment

43. The second failure identified by the judge concerned the letter dated 31st May 2023 suspending Dr Ally pending an investigation, which I have set out at [14] above. The judge said:

> '20. I also consider that the judge should have been shown the letter dated 31 May 2023, telling Dr Ally that the claimants wished to investigate allegations that he had taken cash payments, not properly responded to sales leads, failed to keep proper clinical records and ignored a client complaint and been disloyal by soliciting other senior employees to leave the business. That too would have led the judge to ask why it was thought necessary to restrain competition without notice.'

Submissions

44. Mr Grant pointed out that although Mr Justice Constable had not been shown the suspension letter, he had been shown other correspondence, such as the claimants' solicitors' letter dated 13th June 2023 referred to at [16] above, in which the claimants had expressed concerns that Dr Ally was divulging confidential information and enticing suppliers and employees away from Derma Med, together with the defendants' solicitors' reply dated 16th June 2023 in which the claimants' concerns had been characterised as paranoia (see also at [16] above). The claimants' skeleton argument on the without notice application expressly drew attention to the point that the existence of correspondence between represented parties 'is normally an indication that a "without notice" application is not justified' (the claimants' underlining), while going on to submit that this was not an important factor in the present case. In these circumstances, Mr Grant submitted that the suspension letter would have added little or nothing to the material to which Mr Justice Constable was referred.

45. Mr Solomon submitted that what was said in the suspension letter was critically different from the material which Mr Justice Constable was shown. That was because the suspension letter included allegations that Dr Ally had taken cash payments for treatments provided to clients and had failed to pass sales leads to Derma Med. Thus the claimants had made Dr Ally aware of the allegations against him and therefore had no justification for seeking without notice relief on the basis that to give notice would enable him to destroy evidence.

Decision

46. It is true that the suspension letter was somewhat more explicit than the letter dated 13th June 2023 which was shown to Mr Justice Constable, in that it referred to Dr Ally having taken cash payments from patients. However, the letter dated 13th June 2023 did identify a number of serious complaints against Dr Ally and expressly reserved the right to seek 'urgent injunctive relief' if the requested undertakings were not forthcoming. Accordingly it was expressly drawn to the attention of Mr Justice Constable that there had been correspondence between the parties in which Dr Ally was notified of complaints against him, including that he was engaged in setting up a competing business using Derma Med's confidential information, and that an urgent application to the court for an injunction was a real possibility; the claimants also identified to Mr Justice Constable that this might be a reason not to proceed without notice. In these circumstances I accept the submission by Mr Grant that the suspension letter added little or nothing of substance and that there was no failure of full and frank disclosure by the claimants in this respect.

47. In any event I consider that the defendants' submission misses the real point. An important justification for making the application without notice was the relatively recent discovery by the claimants that, despite the October Re-Set, Dr Ally had been systematically deleting direct messages (or 'DMs') sent to the ZA account, had changed the email address associated with the account so that emails from clients and potential clients went directly to him, had set up a separate 'Zettle' card machine account to enable him to take payments from clients, and had falsely told clients that Derma Med's Zettle reader was not working as a pretext to have them pay in cash. These matters fully justified the application without notice for orders to preserve evidence. As I have already explained, it was then a matter for Mr Justice Constable to decide, applying the

principles set out in authorities such as the *Moat Housing* case, whether it was appropriate to make the further orders without notice to the defendants. The limited further information in the suspension letter was not material to that decision.

48. Again, therefore, I consider that Mr Justice Bourne was wrong to characterise the failure to draw the attention of Mr Justice Constable to the terms of the suspension letter as a failure of full and frank disclosure, let alone a serious or culpable one.

Failure to disclose that the definition of 'Confidential Information' was too wide

The judgment

49. The order which the claimants obtained from Mr Justice Constable required the defendants to 'keep confidential all Confidential Information (as defined in Schedule B) and not use it either for their own benefit or for the benefit of third parties'. Schedule B defined 'Confidential Information' as follows:

> 'all confidential or proprietary information (however recorded, preserved or disclosed) including but not limited to:
>
> (i) any information that would reasonably be regarded as confidential relating to the Business, affairs, customers, clients, suppliers, plans, intentions, or market opportunities of the Company or of the Second Applicant or the Second Applicant's Group, all the operations, processes, product information, know-how, designs, trade secrets or software of the Business, the Company or of the Second Applicant or the Second Applicant's Group; or
>
> (ii) any information or analysis derived from Confidential Information.' (Underlining added.)

50. There was then an exception for information to which the definition did not apply.

51. The definition in Schedule B, including the words which I have underlined, tracked the definition of 'Confidential Information' in the sale and purchase agreement. However, the defendants submitted that the inclusion of the underlined words rendered the order uncertain and too wide. The judge said this:

> '21. A further failure has been accepted by Mr Siddall KC today. He appeared for the claimants below. He represents them again today, leading Tim Matthewson. The definition of confidential information, which was used in all of the operative provisions of the injunction other than the non-compete injunction, was hopelessly wide. It used the phrase 'including but not limited to', which was disapproved in *Caterpillar Logistics Services (UK) v de Crean* [2012] EWCA Civ 156, [2012] IRLR 410 at paragraph 68. It depended on a judgment being made as to what was reasonably regarded as confidential. And it extended far too widely to any information relating to the business affairs and customers of Derma Med or the Athena Group. There was a

> failure to draw the judge's attention to the unsuitability of that provision or the authorities which were relevant to it. Mr Siddle has today accepted that he fell into error in that regard.'

Submissions

52. Mr Grant accepted that the terms of the injunction were too broad and ill-defined. He submitted, however, that seeking an injunction in these terms did not amount to a failure of full and frank disclosure in circumstances where the definition of 'Confidential Information' in the order was taken from the parties' agreement and sought to do no more than enforce by injunction the contractual promises which Dr Ally had made; and where Mr Justice Constable had been taken through the language of the injunction and was satisfied that it was appropriate. Indeed, he had commented in his judgment that 'the restraint against misuse of Confidential Information appears narrowly drawn'. Mr Grant pointed out also that the width of the injunction appeared to have caused Dr Ally no prejudice, and that the complaint had only emerged with any clarity in the defendants' skeleton argument for the return date hearing.

53. Mr Solomon submitted that it had been conceded by the claimants before Mr Justice Bourne that there had been a failure of full and frank disclosure in this respect and that the claimants should not be permitted to resile from this concession. In any event, the concession was correct and the injunction sought was indeed 'hopelessly wide', as explained by Lord Justice Stanley Burnton in the *Caterpillar* case:

> '68. I add that the form of interim relief sought by CLS is hopelessly wide and vague. It does not specify the confidential information to be the subject of restriction with any certainty, but simply describes it as "all or any confidential information acquired by the respondent during her employment with [CLS] in whatever form". Paragraph 10 of CLS's Particulars of Claim does attempt to identify some of the confidential information it seeks to protect. I say some, because the allegation is that the respondent had access to the identified information "in particular, but not limited to" the listed information. …'

Decision

54. I would accept that, whatever the terms of the parties' agreement, an injunction should not have been sought in terms which left uncertain the scope of the information which it was sought to protect. In particular, the words 'including but not limited to' are indeed too wide as they do not enable the defendant to understand the full scope of the information which he is restrained from using or divulging, while the words 'that would reasonably be regarded as confidential' require an exercise of judgment on which views may well differ, leaving the defendant at risk of contempt proceedings if he gets the judgment wrong.

55. As Mr Nicholas Siddall KC, counsel then appearing for the claimants, expressly accepted that there had been a want of full and frank disclosure in failing to draw the attention of Mr Justice Constable to the problems inherent in the use of these words, together with the consistent requirement in the authorities that 'any injunction must be capable of being framed with sufficient precision so as to enable a person injuncted to

know what it is he is to be prevented from doing' (*Lawrence David Ltd v Ashton* [1989] IRLR 22 at [34]), I would not permit the claimants to resile from that concession. I need not decide whether it was correct. However, I regard Mr Siddall's frank acceptance of the point once it was clearly raised as a point in the claimants' favour rather than the reverse.

56. There is, moreover, considerable force in Mr Grant's point that once the problem was clearly explained, it was accepted by the claimants, and that the width of the injunction had caused no prejudice to the defendants in the meanwhile. Although Mr Solomon submitted that the width of the definition of 'Confidential Information' had infected other provisions of the order made by Mr Justice Constable because of the way that those other provisions referred to Confidential Information, that was a matter which, if it had caused any real as distinct from theoretical problem, could easily have been sorted out. The fact that it was only raised so late, in the defendants' skeleton argument for the return date hearing, suggests that it was something of an afterthought. Indeed, Dr Ally had indicated that he was prepared to offer suitable undertakings as to confidentiality, although he had never specified the terms in which he was prepared to do so and in the event no such undertakings were given.

57. Accordingly, while I would hold that this was a failure of full and frank disclosure, it was clearly not deliberate and was of relatively limited significance. A sense of proportion was needed.

Failure to disclose non-payment of the final instalment of the first Earn-Out Payment

The judgment

58. The final criticism of the claimants' disclosure upheld by the judge concerned the withholding of the final instalment of the first Earn-Out Payment. The judge said this:

> '22. I also consider that the judge's attention should have been drawn to the fact that the first claimant had failed to pay a large sum due to Dr Ally under the SPA and was not suggesting that it had any defence to liability other than a possible set-off, which on the face of it was barred by a term of the contract. Whether or not the claimants should at that point have anticipated that the defendant would purport to repudiate the SPA, causing restrictive covenants potentially to fall away, and should have drawn that possibility to the judge's attention is more debatable. But where discretionary remedies were being sought, and in a case where a picture was being painted of unlawful conduct by Dr Ally, I consider fairness demanded that the court be told about that non-payment.'

Submissions

59. Mr Grant submitted that the claimants did draw to Mr Justice Constable's attention the fact that Dr Ally's position was that Athena owed him substantial sums of money under the sale and purchase agreement, so that Mr Justice Bourne's real criticism was that the claimants did not explain that their only defence to the defendants' demands for the balance of the Earn-Out Payments was a set-off defence which was barred by the terms

of the sale and purchase agreement. As to this, Mr Grant submitted that this was an invalid criticism in two respects. The first was that the claimants had other defences as a result of Dr Ally's own breaches of the sale and purchase agreement. The second was that, on its true construction, the 'no set-off' clause in the sale and purchase agreement did not apply. The important point, therefore, was that the claimants did bring to Mr Justice Constable's attention the fact that the defendants' case was that Athena was in default under the sale and purchase agreement, but they were not obliged to concede that point when (at least arguably) they did have a defence.

60. Mr Solomon submitted that the claimants had never explained that they had failed to pay the Earn-Out instalment despite admitting, in their letter dated 13th April 2023 that 'the conditions in respect of the Earn Out have been met' and that the only reasons given for not making the payment were a defence of set-off and the need for a short-term cash injection (see at [15] above).

Decision

61. In my judgment the claimants failed to disclose to Mr Justice Constable, and Mr Grant was unable to suggest otherwise, any of the following matters: (1) that they had accepted in correspondence that the conditions entitling the defendants to the Earn Out payment had been satisfied; (2) that the sale and purchase agreement contained a 'no set-off' clause which, at least arguably, precluded any defence of set-off; and (3) that the claimants had so far indicated no other defence to a claim for the final instalment of the Earn Out payment. Those matters ought to have been disclosed, as on the face of things, the claimants were withholding some £633,000 which was due to the defendants. It would then have been open to the claimants to advance whatever arguments they saw fit to explain why, on a true analysis and contrary to what they appeared to have accepted, the payment was not in fact due, or they were entitled to set it off against their claim against the defendants despite the 'no set-off' clause in the sale and purchase agreement.

62. I consider, therefore, that the judge was entitled to regard this as a culpable, albeit not deliberate, failure of disclosure by the claimants.

Other alleged failures

63. Mr Solomon submitted that there were other failures of disclosure by the claimants, but as I read the judgment (see at [23] above), Mr Justice Bourne expressly declined to reach any conclusion about these and there is no Respondents' Notice in this regard. I therefore propose to say nothing further about these other allegations.

Was the judge wrong to set aside the orders made by Mr Justice Constable?

64. So far, I have held that (1) the judge's conclusions that there were significant and culpable failures of disclosure in the first two respects which he identified were not reasonably open to him, but (2) that he was entitled to conclude that the claimants failed to some extent in their duty of full and frank disclosure in the remaining two respects. As his decision that the injunction granted by Mr Justice Constable had to be set aside was based upon what he described as the claimants' 'overall serious failure', consisting of all four of the failures which he found established, it is necessary to consider the matter afresh.

65. Applying the principles which I have set out at [29] to [31] above, I have no doubt that the injunction should not have been set aside. The following points appear to me to be particularly significant.

66. First, as Mr Justice Constable rightly held, there was on the evidence before him a strong *prima facie* case that Dr Ally had committed significant breaches of his obligations under the sale and purchase agreement, and had taken extensive steps to conceal his wrongdoing. That view was confirmed, rather than dispelled, by Dr Ally's evidence at the return date hearing, which included material admissions. In view of the position of Dr Ally, whose reputation represented a significant element of the value of the Derma Med business for which he and his wife had been paid over £10 million, the restraint on competition for a period of two years was an important aspect of the parties' contractual bargain. The defendants have not suggested that this restraint was unreasonably wide or otherwise unenforceable.

67. Second, although the defendants made various criticisms of the claimants' disclosure to Mr Justice Constable, nothing they said suggested that the grant of an injunction was wrong in principle. On the contrary, leaving aside the failures of disclosure, an injunction was clearly appropriate. As to those failures, the width of the definition of 'Confidential Information' could and should have been dealt with by a tighter definition (as indeed the parties have now agreed at our request following the announcement of our decision at the conclusion of the appeal hearing), while the failure to disclose in respect of the Earn Out payment was not such, in my view, as to cast doubt on the appropriateness of an injunction.

68. Third, although the starting point is likely to be that an injunction should be set aside and not renewed when a failure of disclosure is substantial or deliberate, that is only the starting point. Here, the failures of disclosure were not deliberate, as the judge accepted in relation to all four of the failures which he found established, and in my view they were relatively insubstantial when the case is viewed in the round. As the authorities make clear, it is necessary to keep a sense of proportion and to consider also whether some measure short of setting aside an injunction which is otherwise well justified can appropriately be used to mark a failure of disclosure which is not deliberate. The judge did not consider this question.

69. For these reasons I would hold that the injunction granted by Mr Justice Constable should not have been discharged. I would invite brief written submissions on whether and how the limited failures of disclosure which I have found to be established should be reflected in an order for costs.

Was the judge wrong not to grant a fresh injunction?

The judgment

70. Although I have considered the complaints of non-disclosure which the judge found to be established, in a sense they are of only limited relevance, bearing in mind that the injunction granted by Mr Justice Constable was due to expire in any event at the return date hearing. That hearing was the occasion for the court to consider whether any relief was appropriate going forward, and this question fell to be considered in any event, regardless of whether any failures of disclosure were established. In some cases a failure of disclosure at the without notice stage will itself mean that an injunction should

be set aside and no fresh injunction should be granted for the future. But that was not the judge's approach in this case. Although he considered, mistakenly in my view, that the injunction granted by Mr Justice Constable should be set aside, he did not consider that the claimants' disclosure failings meant in themselves that no fresh injunction should be granted. Instead he considered that question on its merits.

71. As I have already explained (see at [25] above), the two reasons why he declined to grant a fresh injunction were that Dr Ally had 'gone on record' as saying that he would not compete with Derma Med or use its confidential information, and that damages would be an adequate remedy for the claimants. Accordingly it is this reasoning which must now be considered.

Submissions

72. Mr Grant submitted that the reasons given by the judge were wrong in principle. First, Dr Ally had not 'gone on record' as saying that he would not compete with Derma Med or use its confidential information, any such statement being somewhat elusive. But in any event, such a statement would carry little or no weight. Second, although the judge had given as a reason for concluding that damages would be an adequate remedy the fact that Dr Ally would be good for the money, he had failed to have in mind the principal reason why damages are in general not an adequate remedy for breach of a promise not to compete, namely the evidential difficulties to which such a claim gives rise.

73. Mr Solomon submitted that the judge's decision was within the scope of his discretion and that there is no proposition of law that damages can never be an adequate remedy in such cases.

Decision

74. I would accept Mr Grant's submissions summarised above that the judge's decision was wrong in principle.

75. In the light of the strong *prima facie* evidence of Dr Ally's dishonesty, including the facts that he had given a similar assurance at the time of the October Re-set which had proved to be valueless and that he had dismissed the claimants' legitimate concerns as mere 'paranoia', any statement that he had no intention or desire to compete with Derma Med would be of very doubtful value. On the contrary, now that his connection with Derma Med was severed, and he was asserting that he was no longer bound by the covenant not to compete, there was a very real risk that, unless restrained, he would continue to do so. In such circumstances, the claimants would face considerable difficulties in proving their case, as Mr Justice Constable had recognised in his judgment when granting the without notice injunction:

> '27. The Claimant points to the following factors which demonstrate that damages would not be adequate. First, it is likely to be problematic to identify and quantify the loss to the Claimant which is attributable to D1's wrongdoing. Whilst this may be less likely in respect of the use of the Zettle machine (although this might depend if it was being used for some legitimate purpose as well), this point clearly has force where, as

> here, the evidence suggests that cash has been taken. Second, the Claimants would face a number of evidential problems, including how to prove that the loss of a client was due to Dr Ally's misuse of Confidential Information or rather than for other reasons; and how to prove that the departure of a client was due to the Defendants' actions (and not something else). Knock-on consequential losses because even further difficulty. …'

76. Although it is not a rule of law that damages can never be an adequate remedy for breach of a covenant not to compete, the cases have recognised that the factors identified by Mr Justice Constable will generally mean that they are not. As Lord Justice Underhill explained in *Sunrise Brokers LLP v Rodgers* [2014] EWCA Civ 1373, [2015] IRLR 57:

> '53. … In a case of this kind there are evident and grave difficulties in assessing the loss which an employer may suffer from the employee taking work with a competitor; even where it is possible to identify clients who have transferred their business (which will not always be straightforward, particularly where the new employer is outside the jurisdiction) there may be real issues about causation and the related question of the length of the period for which the loss of the business could be said to be attributable to the employee's breach. … There may be other intangible but real losses to the employer's reputation. I do not say that there may not be particular cases in which relief should be refused on the basis that damages are adequate remedy – Mr Craig referred us to *Phoenix Partners Group LLP v Asoyag* [2010] EWHC 846 (QB), [2010] IRLR 594 -- but unless a specific case to that effect was explicitly advanced, the judge was in my view fully entitled to proceed on the assumption that injunctive relief was the appropriate remedy.'

77. Even more fundamentally, an injunction will generally be the appropriate remedy to enforce a lawful negative covenant on the straightforward basis that this is what the parties have bargained for. As it was put in *D v P* [2016] EWCA Civ 87, [2016] ICR 688:

> '15. The substantive effect of the defendant's opposition to the claim for injunctive relief was to ask the court to release him from this contractual restraint so that he could be free to take up immediate employment with the very type of competitor in respect of whom the restraint was intended to apply. Had the claimant made an alternative claim for damages for breach of the restriction (which it did not), it might be said that he was not substantively seeking a total release from the restraint since he would or might still be exposed to a claim for damages for its breach. But in cases such as this damages are not what an employer wants. The damage potentially sufferable by a covenantee such as the claimant by a breach of the relevant restraint will usually be unquantifiable and will rarely, if ever, provide the covenantee with an adequate substitute for an

> injunction. That is what the judge said about a remedy in damages in this case.
>
> 16. Why, therefore, in circumstances such as these, should the court's approach to the claimant's claim be other than one reflecting a firm recognition that the remedy to which it ought *prima facie* to be entitled is an injunction? As Lord Cairns LC said in his well-known dictum in *Doherty v Allman* (1878) 3 App Cas 709, at 720:
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> > "If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such a case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."
>
> 17. That statement is bottomed in the recognition of a basic principle of which sight should not readily be lost, namely that contracting parties should ordinarily be held to their bargain, which is all that the claimant was asking for by claiming the injunction that it did.
>
> 18. That said, I do not lose sight of the also basic principle that an injunction, like all equitable remedies, is a discretionary remedy which will not be granted as a matter of course. In his review of the authorities in *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272, 276-277 (under the heading "The availability of a permanent injunction") Colman J correctly recognised this in his conclusion that negative covenants will generally be enforced without proof of damage but that:
>
> > "Although absence of damage to the plaintiff is not in general a bar to relief, there may be exceptional cases where the granting of an injunction would be so prejudicial to a defendant and cause him such hardship that it would be unconscionable for the plaintiff to be given injunctive relief if he could not prove damage. In such cases an injunction will be refused and the plaintiff will be awarded nominal damages".'

78. Although *D v P* was a case of a final injunction after a trial, and the adequacy of damages is a relevant consideration at the interim pre-trial stage when a court is considering the balance of convenience, it nevertheless remains the case that what an employer, or in the present case the purchaser of a business, has bargained for is not an

uncertain and evidentially difficult remedy in damages, but the opportunity to develop its business free of competition from the defendant during the currency of the non-compete obligation. That factor has all the greater weight when a significant element of the value of the business is attributable to the reputation of the vendor himself, here Dr Ally.

79. The judge did not consider these matters at all and his decision is therefore flawed. Once they are considered, it is in my judgment clear that an injunction and not damages was the appropriate remedy.

The Respondent's Notice

80. Finally, Mr Solomon challenged the judge's conclusion that there was a serious issue to be tried on the merits. He submitted that we should decide now, in the defendants' favour, that the claimants' withholding of the final instalment of the first Earn Out payments was a repudiatory breach of the sale and purchase agreement, which the defendants had been entitled to accept as terminating the agreement, with the consequence that they were released from any further obligation not to compete with the claimants.

81. However, I would accept the submission by Mr James Kinman, junior counsel for the claimants, that this is not an issue suitable for summary determination. The judge was right to find that the question of repudiation raises a triable issue.

Conclusion

82. It was for these reasons that I joined in the decision to allow the appeal, to grant an injunction against competition until 24th March 2024, and to restrain use of the claimants' confidential information until trial.

Lord Justice Lewis:

83. I agree that the appeal should be allowed, and an interim injunction granted restraining Dr Ally from competing and using the claimants' confidential information, for the reasons given by Lord Justice Males.

Lord Justice Bean:

84. I also agree that the appeal should be allowed for the reasons given by Lord Justice Males.