IN THE HIGH COURT OF JUSTICE **Claim No: HC14B00097**
CHANCERY DIVISION **Neutral Citation no. [2014] EWHC 615 (Ch)**

BETWEEN:

PROPHET PLC

Claimant

-and-

CHRISTOPHER HUGGETT

Defendant

Before:
David Donaldson Q.C. sitting as a Deputy High Court Judge

11 March 2014

Essential facts and nature of the action

1. The Claimant ("Prophet") is, and has for many years been, engaged in the business of developing, selling, and updating computer software for use in the fresh produce industry. Though it has divisions in South Africa and the USA, I have been concerned in this action solely with its operations in the United Kingdom. Its product, marketed as "Prophet"- in particular Prophet Pr3 and Pr2 (the former being an update of the latter) - offers a suite of integrated software applications covering much of the process functions of businesses supplying fresh produce (which can vary from cut flowers to brassicas, though apparently not including fresh meat), such as accounting, purchase and sales, warehousing, packing, and transport, and may extend from seed to supermarket, assisting a range of actors from growers to retailers and intermediaries. Not all modules will be required or desired by each purchaser, and a sale is preceded by an in-depth investigation and discussion of precise requirements, paid for by the customer. The initial licence is for a period of twelve months and renewable yearly thereafter on payment of an annual fee, which will include routine maintenance (but not updates.) In practice, however, moves by customers to a rival software supplier are rare indeed, perhaps because of inconvenience, though it may be that inertia or cost also play a role. According to the evidence which I heard, Prophet's charging structure is not shared by other suppliers in the UK, of whom there are comparatively few, and who grant a permanent licence against an initial fee with an annual maintenance charge.

2. The Defendant ("Mr Huggett") is not a software engineer or developer. He has however been involved in fresh produce since leaving college in 1993. He then worked for six years dealing with the supply of fresh cut flowers to supermarkets and subsequently onions. After two years working for a pot plant grower, in 2001 he set up and ran Evolution Flowers Limited, of which he was managing director, sourcing and distributing cut flowers. That company was sold as to 85% in 2008, with Mr Huggett retaining the other 15%, though apparently inactive in that business. He then retreated to being a house-husband and assisting his then partner as an unpaid non-executive director with her new retail fashion business. Both the business and the relationship collapsed in 2010. Mr Huggett was then out of employment until the spring of 2012.

3. In 2011 Prophet decided that Mr Michael Hetherington, its sales director and an employee of over 22 years, should go to the new office in the USA and that a new sales manager for the UK should be recruited, with the intention that if and when he had grown successfully into the job he would become sales director. One of the two candidates considered by Prophet was Mr Huggett. Mr Mark Peachey, the Managing Director of Prophet, told me that Mr Huggett appeared to him from his cv and interview to be an individual who would be capable of

winning business in the fresh produce sector, though more from his experience and abilities than through any existing contacts.

4. On 2 February 2012 Prophet made a written offer to Mr Huggett of employment as sales manager at £50,000 p.a. plus commission at ten per cent on sales in which he had been instrumental and a notice period of three months. An outline of his role included:

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- *To develop new business for Prophet plc across the fresh produce industry and within the existing portfolio of customers:*
    - *Identifying and developing new business through networking and follow-up communication*
    - *Marketing and promoting Prophet software products by creating sales literature and through attending industry events*
    - *Attending initial sales meetings – preparing and delivering customer presentations*
    - *Determining high-level business requirements and applying product knowledge to assist in outlining solutions to meet those needs*
- *To work closely with senior staff at Prophet plc to prepare responses to tenders and sales proposals*
- *To coordinate the activity of staff to bring together the necessary elements of a sales campaign*
- *Negotiating and closing business*
- *Account relationship management*."

A contract of employment was signed by both parties on 12 April 2012.

5. Clause 19 of the contract contained a post-termination restriction in the following terms:

> *"The Employee shall not during the continuance of this Agreement, or for a period of 12 months from the determination thereof (for whatever reason and in whatsoever manner), without the consent in writing of the Board of Directors of the Company, either solely or jointly with, or as, a Director, Manager, Agent, Consultant or Employee of any other person, firm or company, directly or indirectly, carry on or be engaged, concerned or interested in any business which is similar to, or competes with, any business of the Company in which the Employee shall have worked whilst employed hereunder (in that they provide computer software systems of whatever kind to any company involved in the fresh produce industry) within the geographical area (namely the United Kingdom), except as a shareholder or debenture holder not having a controlling interest in any Company the shares of which are quoted on a recognised Stock Exchange. Provided that this restriction shall only operate to prevent the Employee from*

being so engaged, employed, concerned or interested in any area and in connection with any products in, or on, which he/she was involved whilst employed hereunder."

That provision is at the heart of the dispute in the present case.

6. Additionally, in Clause 20 the contract contained (1) a covenant not (during or following termination of the contract) to use or disclose confidential information (2) covenants for one year after termination not to solicit or procure orders or deal or accept orders from any person who in the previous 12 months had been a customer of Prophet or in the habit of dealing with Prophet and with whom the Employee had dealt for goods or services the same as (or similar to) those supplied or dealt in by Prophet.

7. In November 2013 Mr Huggett was contacted by a headhunter acting for K3 Business Solutions Limited ("K3"), whose managing director is Mr Gary Vincent. Like Prophet, K3 provides and sells business solutions to its customers, known generically as enterprise resource planning or ERP. Unlike Prophet, however, it does so across a variety of sectors. K3 supplies a Microsoft product called Microsoft Dynamics. Though modular, it is sold as a whole and not a la carte, with the client obliged to pay for excess functionality over what it may actually require. K3 has - partly in conjunction with Microsoft - tailored the Dynamics software to meet the specific needs of the various sectors to which it sells. Over recent years it has done this for the fresh produce sector, and the product, known as Fresh Dynamics, is currently available on the Microsoft Dynamics AX 2012 platform. To date, however, K3 has made only four sales of Fresh Dynamics, but recently decided now to market and promote the product more actively, referred to by Mr Vincent as a "launch" (though slower and more gradual than normally connoted by that word). To this end it wished to recruit a salesperson with particular experience in the fresh produce sector. Mr Huggett's time with Prophet apparently met that bill (though the cv which he provided to K3 seriously and, as Mr Huggett confirmed to me, consciously misstated the extent of his sales success). His earlier activities in the sector, though nothing to do with ERP software, were also seen as a plus by Mr Vincent. The Job Summary prescribed that the candidate would report to the sales manager and be responsible for new business sales of ERP solutions based on Microsoft Dynamics AX software, and that his target market would be the fresh produce sector addressing packhouse, traders and growers with a sales target of £1.6m margin contribution (which I was told would equate to roughly £3.2m in sales orders). His main responsibilities were to be:

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- *Early qualification of leads that are both cold and have been prequalified to a basic set of criteria*
- *Carry out initial meetings to gain an understanding of the business needs*

and be able to structure a plan of approach to address the business requirements

- *Communicate issues and needs to an internal team pre-presentation and coordinate with all parties the approach and content*
- *Prepare and present proposals and ITT responses in conjunction with the bid management team*
- *Carry out board presentations and commercial negotiations*
- *Assist in shaping of the product roadmap to address sector issues and innovation*
- *Meet agreed sales targets*."

I was told that his remuneration was to be £75,000 plus commission, a substantial increase on his existing package at Prophet.

8. On 18 December 2013 Mr Huggett emailed Mr Peachey notification that he was resigning from his position with Prophet. Referring to his understanding that 12 weeks notice was required, he asked whether it would be possible to release him from his employment as soon as possible. Mr Peachey asked in his reply that in order to enable him to consider that request he should told what Mr Huggett's plans were as to future employment. Mr Huggett responded the next day, quite mendaciously, that he had been offered a role *"heading up European marketing in food manufacturing"*. Pressed by Mr Peachey to identify the new employer, Mr Huggett replied tersely *"It's K3"*: Mr Peachey was well aware that K3 was a software supplier operating in part in the fresh produce sector, and not a food manufacturer. A telephone conversation ensued, described by Mr Huggett as abusive on Mr Peachey's part. Whether or not that adjective is accurate, I have little doubt that Mr Peachey would at least have expressed himself with some vigour. Mr Huggett accepts that in the course of that conversation Mr Peachey told him that he would be in breach of his employment contract if he went to work for K3 (an obvious reference to the restriction in Clause 19) and that he, Mr Peachey, would be taking legal advice. Mr Peachey told me that he was advised that he should agree to the early termination (though I was not told the reason behind the advice). A more moderate conversation took place on 20 December 2013, recorded and confirmed in a letter the same day from Mr Peachey to Mr Huggett:

> *"Having considered your request and discussed this with you, I agree that in the circumstances it would probably be better all round for us to release you from your employment as soon as possible. You informed me that you intended to start your new employment week commencing the 6 January 2014. On that basis we agreed that your employment will come to an end on the 3 January 2013.*"

9. On 23 December 2013, the next working day given the intervention of the weekend, solicitors for Prophet wrote a letter before action, referring to Clause 19

and requiring an undertaking by Mr Huggett to refrain from commencing his new employment with K3 until the expiry of the 12 month period in that Clause, in default of which an application for injunctive relief was threatened. In the light of that letter, Mr Huggett's solicitors agreed to defer the commencement of his new employment until 14 January 2014 to permit further discussion, opining that the other covenants in Clause 20 provided sufficient protection without resort to Clause 19. An application for injunctive relief was issued by Prophet against Mr Huggett returnable on 16 January 2014, when Mr Huggett gave an undertaking in terms of Clause 19, save that he was permitted to remain on the payroll of K3 as an employee, pending an expedited trial with a time estimate of two days, which came before me for a hearing starting on 21 February 2014 and in the event lasted most of six days (with significant judicial pre-reading). In order to produce a judgment within a time-frame which reflects the urgency of the matter, I have sought to concentrate on what appear to me to be the main and essential features of the arguments and evidence, and not generally descended into the detail with which they were discussed and analysed before me - I have however considered and reflected upon the totality of the arguments and evidence advanced by the parties.

10. K3 was not, for whatever reason, joined as a co-defendant. It has however made clear that it stands behind Mr Huggett in his opposition to the grant of an injunction. In particular, it has now - as the result of an enquiry on my part - formally intimated that it will, if required, provide undertakings to the Court that (1) until 2 January 2015 it will not permit or encourage the Defendant to act in breach of the Clause 20 covenants against solicitation and dealing and disclosure or use of confidential information (2) it will pay to Prophet any award of damages or costs ordered by the court arising out of this matters, if not previously satisfied by Mr Huggett. Prophet's position is that such undertakings, even if cumulated with similar undertakings from Mr Huggett, are insufficient protection, and it continues to seek an injunction in terms of Clause 19, while properly acknowledging that in its practical effect - though the wording of the clause is narrower - it will preclude Mr Huggett from working for K3 or any other software supplier in the UK fresh produce sector until January 2015.

The broad legal framework

11. The essential law is now conveniently summarised by Cox J in *TFS Derivatives v Morgan* [2005] IRLR 256 at [37] to [39]:

> *"37. Firstly, the court must decide what the covenant means when properly construed. Secondly, the court will consider whether the former employers have shown on the evidence that they have legitimate business interests requiring protection in relation to the employee's employment ...*

38. Thirdly, once the existence of legitimate protectable interests has been established, the covenant must be shown to be no wider than is reasonably necessary for the protection of those interests. Reasonable necessity is to be assessed from the perspective of reasonable persons in the position of the parties as at the date of the contract, having regard to the contractual provisions as a whole and to the factual matrix to which the contract would then realistically have been expected to apply.

39. Even if the covenant is held to be reasonable, the court will then finally decide whether, as a matter of discretion, the injunctive relief sought should in all the circumstances be granted, having regard, amongst other things, to its reasonableness as at the time of trial."

I shall follow a similar road-map.

Construction

12. When the matter came before me, counsel for Prophet, Mr James Laddie Q.C., was seeking an injunction in terms of Clause 19, as he had when seeking the interim injunction. At the same time, however, and somewhat paradoxically, he accepted and indeed actively submitted that the words of Clause 19 read literally would provide him with no protection. This was because no competitor would ever be selling Prophet products, which were the only products in or on which Mr Huggett would realistically ever have been involved whilst employed by Prophet.

13. Counsel for Mr Huggett, Mr Andrew Burns, submitted that there remained nonetheless some field of application for Clause 19. He drew my attention to the existence of 3 or 4 third parties, who with the approval of Prophet provided on-going assistance to some existing customers, and who also might introduce potential customers to Prophet in return for an introductory commission, if accepted. Unhelpfully for him, however, the evidence before me did not establish that the existence and role of the third parties was something which at the time of signing the contract Mr Huggett either knew or could be reasonably expected by Prophet to have known and thus could assist (as part of the "matrix") in construction of the clause. Mr Burns also posited as a possibility that Mr Huggett might, on termination, engage in a business of advising Prophet customers. However, this scenario - and indeed that involving a third-party agent - would fail the test for a competitor included in Clause 19 that the new business should *provide* computer software systems. Moreover, both scenarios were so improbable as to render quite implausible the notion that it was to protect Prophet against them, and solely for that purpose, that the parties agreed

the elaborate and lengthy wording of Clause 19.

14. On this basis, Clause 19 was on its face indeed pointless. That something had gone wrong in the drafting was therefore clear. To revise it by construction would however require it to be clear what correction was necessary, in other words what a reasonable person would have understood the parties to have meant by their use of the language (see e.g. *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [21] to [25]). I asked both counsel how that meaning was to be formulated.

15. In response to that enquiry Mr Laddie eventually came up with wording under which Clause 19 was to be construed as meaning that Mr Huggett was prohibited *"from being directly involved in the provision of business process computer software designed for the fresh produce industry"*. Mr Andrew Burns, counsel for Mr Huggett, was for his part unable to suggest any candidate for alternative wording, if his argument as to primary meaning were, as I have now held, to be rejected.

16. I regard it as very far from clear that Mr Laddie's wholesale reformulation of Clause 19 is what the parties should reasonably be understood as having agreed. Though neither party was prepared to espouse it, I would have found more persuasive a correction in the form of a simple addition at the end of the clause of the words *"or similar thereto"*. This is not for reasons of drafting elegance but because it in my view represents (a) the minimum change necessary to produce a commercially sensible result and (b) the probable formula which parties would employ for this purpose. As regards the latter, my view is reinforced by the fact that these parties included (in parenthesis) the additional word *"similar"* in the non-solicitation and non-dealing covenants in Clause 20(b) and (c).

17. Ultimately, however, what matters is whether the formula by which the enjoined activities are specified in any order falls within any plausible candidate for the true meaning of Clause 19. Addressed in this way, I consider that Mr Laddie's formula passes muster. Not only would it fall plainly within the word *"similar"*, but I am unable to conceive of any other credible candidate for construction which would not prohibit at least the activities described by his formula.

18. In urging me nonetheless to determine the true meaning (even if not corresponding to his formula) Mr Laddie expressed concern about how otherwise the reasonableness of the term could be assessed. That appears to me a false worry, in that the potential reasonableness or otherwise is itself a factor in the process of interpretation. As it was put by Waller LJ in *Turner v Commonwealth & British Minerals Limited* [2000] IRLR 114 at [14]

> *"There is in my view some interconnection between the question of construction*

and the doctrine of restraint of trade. That, as it seems to me, must be so for at least one reason. If a particular construction was to lead to the view that the clause was unenforceable, then an alternative view, which did not lead to the same result if legitimate, ought to be preferred."

If, which I examine below, Clause 19 with the addition of the words *"or similar thereto"* is reasonable, it could realistically only be displaced by another candidate for meaning which also passes that test. It is therefore not necessary for me - without the benefit of adversarial debate - to trawl through and test each possible candidate individually.

Reasonableness

(1) Legitimate interest

19. While a covenant intended to protect against competition by an ex-employee will not be enforced, the court will take a different view if persuaded that a covenant with this content is reasonably necessary to protect trade secrets or confidential information: see e.g. *Littlewoods Organisation Ltd v Harris*[1977] WLR 1472 at 1478. That is to be tested as at the date when the parties entered into the employment contract, and thus on a prospective basis viewed at that time. As stated by Diplock LJ in *Gledhow Autoparts Ltd v Delaney* [1965] 1 WLR 1366 at 1377:

> *"[T]he question of the validity of a covenant in restraint of trade has to be determined at the date at which the agreement was entered into and has to be determined in the light of what may happen under the agreement, although what may happen may cover many possibilities which in the result did not happen. A covenant of this kind is invalid ab initio or valid ab initio. There cannot come a moment at which it passes from the class of invalid into that of valid covenants."*

20. The job outline which I set out earlier in paragraph 4 specified the roles which Mr Huggett would or might be called upon to perform in the course of his employment. Clearly, many (if not all) of them would, or might realistically, result in Mr Huggett becoming privy to considerable quantities of confidential information. Indeed, I did not understand Mr Burns to contend otherwise. His essential argument was rather that Clause 19 went beyond what was necessary for the protection of that information, because that was adequately secured by the more limited and targeted covenants in Clause 20.

21. As regards the non-solicitation and non-dealing covenants, that submission faced the difficulty that they would not protect confidential information relating to *prospective* customers. Such information (and much else) would of course be covered by the covenant relating to confidential information. But the courts'

attitude to such an argument is scepsis born of practical reality. As Lord Denning MR put it in *Littlewoods v Harris* at 1479[1]:

> *"... experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not: and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade."*

That statement, read literally, may be too absolutist. There may be cases, perhaps rare, where the difficulties of which Lord Denning spoke would be unlikely to arise. But that was not in my view in reasonable prospect when the employment contract was signed in the present case. And these difficulties would remain, even if - as Mr Huggett contends but I doubt - the restricted nature of this sector were such that a new order going to a competitor would inevitably become rapidly known through the small community of software suppliers.

(2) The temporal element

22. Mr Burns also submitted that the 12 month period of the restriction was excessive, and hence not reasonably necessary. He pointed out that it was the same as that to which Mr Huggett's seniors at board level, such as Mr Peachey, were subject. But what matters in this regard is rather the nature of the confidential information to which the particular employee will or may realistically become privy during and by virtue of his employment, and how long its non-use or non-disclosure may be expected to remain of significant value to the employer. In the present case, I heard that the contracts were renewed on an annual basis. Knowledge of the renewal date in any particular case could be of assistance to a competitor, and might fall as late as eleven months after any change of employment to that competitor. Nor does it appear to me that knowledge about a potential new customer would necessarily become stale and useless to a competitor before the expiry of 12 months. Overall, in my estimation that is not such a period as would render the covenant unreasonable[2].

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[1] Cf Waller LJ in *Turner v Commonwealth & British Minerals Ltd* [2000] IRLR 114 at [18] and Toulson LJ in *Thomas v Farr* [2007] ICR 912 at [42].

[2] Counsel for Mr Huggett suggested that the notice period of three months had to be added to the twelve months in considering reasonableness. This built on an idea floated by Neill LJ (in *Credit Suisse Asset Management Ltd v Armstrong* [1996] ICR 882 at 894) that a long period of garden leave might be taken into account. Given the sterilising effect of garden leave, there is clear attraction in this view. The same consideration does not apply where as here one is

23. In reaching this conclusion I have assumed for analytic purposes that its true meaning is rendered by the addition of the words *"or similar thereto"*. That conclusion would be no different if I were to assume Mr Laddie's suggested construction.

Discretion

(a) Witness credibility

24. Some of the matters which I am required to consider under the heading of discretion involve oral evidence given by Mr Vincent, Mr Peachey, and Mr Huggett. Both Mr Vincent and Mr Peachey appeared to me entirely honest witnesses, though the latter was on occasion cautiously defensive. That minor stricture is however insignificant compared to my evaluation of Mr Huggett as a witness. He was frequently constrained to accept that a passage in documents, in his witness statements, or even in earlier answers in his oral testimony, were *"errors"* and then further constrained to accept that they had been lies. That these admissions were made often without great resistance was almost disarming, but did little to counter the clear and inevitable conclusion that he was a thoroughly unreliable witness, whose evidence would at the lowest have to be treated most sceptically.

(b) Legal framework as regards discretion

25. Mr Laddie referred me to a passage in the judgment of Colman J in *Insurance Company v Lloyds Syndicate* [1995] 1 Lloyds Rep. 272 at 277 [3] dealing with a duty of confidence arising under an arbitration agreement and in which, having reviewed well-known authorities such as *Doherty v Allman* [1878] 3 App Cas 709 and *Sharpe v Harrison* [1922] 1 Ch 515, which concerned restrictive covenants concerning the use of land, he resumed the position in the following propositions:

> *"(1) Express or implied negative covenants will in general be enforced by injunction without proof of damage by the plaintiff.*
>
> *(2) The principle does not depend on whether the plaintiff is a person or a corporation. The ready availability of the remedy is not the consequence of*

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concerned with a simple notice clause devoid of horticultural overtones.

[3] Adopted and followed in *Dyson Technology Limited v Strutt* ChD 25.11.2005.

equity's regard for the plaintiffs personal feelings, but of equity's perception that it is unconscionable for the defendant to ignore his bargain.

(3) 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."

26. In the case of *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 297 the Court of Appeal considered the proper approach in deciding whether to order damages in lieu of an injunction under Lord Cairns Act. In the course of his judgment on that appeal A.L.Smith LJ formulated a four-fold test of now considerable celebrity (though not in fact endorsed by the other members of the Court):

"(1.) If the injury to the plaintiff's legal rights is small,

(2.) And is one which is capable of being estimated in money,

(3.) And is one which can be adequately compensated by a small money payment,

(4.) And the case is one in which it would be oppressive to the defendant to grant an injunction:-

then damages in substitution for an injunction may be given."

27. Less frequently noted are the introductory words of A.L.Smith LJ in which he described his test as *"as a good working rule"*. Despite this, it has since often, though not invariably, been understood and applied as if it were exhaustive. In *Coventry v Lawrence* [2014] UKSC 13 (handed down in the middle of the hearing before me) members of the Supreme Court disapproved that tendency. Lord Neuberger stated (at [116] to [123]:

"116 It seems to me that there are two problems about the current state of the authorities on this question of the proper approach for a court to adopt on the question whether to award damages instead of an injunction.

117 The first is what at best might be described as a tension, and at worst as an inconsistency, between two sets of judicial dicta since Shelfer. Observations in Slack, Miller, Kennaway, Regan, and Watson appear to support the notion that A L Smith LJ's approach in Shelfer is generally to be adopted and that it requires an exceptional case before damages should be awarded in lieu of an injunction, whereas the approach adopted in Colls, Kine, and Fishenden seems to support a

more open-minded approach, taking into account the conduct of the parties. In Jaggard, the Court of Appeal did not need to address the question, as even on the stricter approach it upheld the trial judge's award of damages in lieu, although Millett LJ seems to have tried to reconcile the two approaches.

...

119 So far as the first problem is concerned, the approach to be adopted by a judge when being asked to award damages instead of an injunction should, in my view, be much more flexible than that suggested in the recent cases of Regan and Watson. It seems to me that (i) an almost mechanical application of A L Smith LJ's four tests, and (ii) an approach which involves damages being awarded only in "very exceptional circumstances", are each simply wrong in principle, and give rise to a serious risk of going wrong in practice. (Quite apart from this, exceptionality may be a questionable guide in any event - see Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2011] 2 AC 104 , para 51).

120 The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested in Regan and Watson . And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good...
...

123 Where does that leave A L Smith LJ's four tests? While the application of any such series of tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in Fishenden 153 LT 128 , 141. First, the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion". Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted."

That critical approach to the mechanical operation of the *Shelfer* tests is echoed in the other judgments (see paragraphs 159, 163, 170-171, 239). In short, I understand that the *Shelfer* formula is to be applied as no more than the working rule which A.L.Smith LJ conceived it to be, albeit satisfaction of the four tests will normally lead to a refusal of an injunction in the absence of other relevant circumstances.

28. *Shelfer* and *Coventry* both concerned claims in nuisance rather than breach of covenant. That means that the negative obligation was imposed by the general law rather than having been voluntarily assumed by the defendant, but the source

of the obligation cannot be critical in this regard, and the observations of the Supreme Court as to preserving flexibility in the operation of Lord Cairn's Act are equally apposite. I consider therefore that the restriction to exceptional circumstances and hardship reflected in the passage I quoted earlier from Colman J is now to be treated as unsound. That is not to say that the factors identified in previous cases are not relevant, only that they are neither exhaustive nor to be applied mechanistically.

(c) Potential damage and risk

29. Earlier cases on restrictive covenants have emphasised that the absence of any loss from the breach, or intended breach, does not of itself require the refusal of an injunction. Having stipulated for a particular right, the covenantee should not be refused its enforcement merely because it has no monetary value. Such is the sense of Lord Cairns' observation in *Doherty v Allman* [1878] 3 AC 709 at 720 that:

> *"It is not then a question of balance of convenience or inconvenience or of the amount of damage or of injury; it is a specific performance by the court of that negative bargain which the parties have made with their eyes open between themselves."*

30. As emphasised by Astbury J in *Sharpe v Harrison* (at page 515), that statement by Lord Cairns was not intended to remove from the court its ultimate discretion nonetheless to refuse the injunction. It does however indicate a factor of substantial importance, and which may in many, perhaps most, situations be decisive. Non-compete restrictions in employment contracts require however closer analysis. Unlike, say, the beneficiary of a covenant not to block a treasured view from his property, a covenant which seeks to protect the employer against competition is unenforceable: that is in the eyes of the law an illicit interest. Its validity is dependent upon the existence of a different interest, the protection of the employer's confidential information against its use to his detriment. While that has to be determined, prospectively, as at the date of the contract in deciding upon reasonableness, the position at the date of its termination is not without possible significance at a later stage in the context of the court's discretion. As Toulson LJ observed in *Thomas v Farr* [2007] ICR 912 at [47]:

> *"...if it had been the case that, as events turned out, Mr Thomas was unable to recall any truly confidential information after leaving Farr, that could afford a reason for the court not granting an injunction in support of the non-competition clause."*

That may even be an understatement. Absent the danger (abuse of confidential information) which provides the sole admissible justification for the clause, there

is no *quia timet* as to invasion of the legitimating interest, and neither need nor warrant for the grant of an injunction. In the nature of things, however, a court is unlikely to be satisfied that the interest which supported the validity of the covenant when agreed had in the event either never eventuated or had subsequently disappeared unless this is supported by cogent evidence.

31. (a) Though he had access to databases containing confidential information as to existing and prospective customers and leads, Mr Huggett claimed to have consulted them little himself. And he strongly downplayed the significance of such documents as weekly sales reports. All this, probed tenaciously in cross-examination of Mr Huggett, I found far from convincing.

(b) A further problem for Mr Huggett was that before returning his laptop (which was company property) to Prophet on 23 December 2013 he had (on 18 December 2013) transferred to an Iomega hard disk drive a very large quantity of company documents of a plainly confidential nature. He explained to me that it was a batch down-load including a large quantity of personal documents, with a simple press of a button. It was however clear that at least one document, a copy of the latest weekly sales report, had been separately downloaded 30 minutes before the batch: Mr Huggett was unable to offer a satisfactory explanation for this. He had, he told me, intended on his return after Christmas to delete the company documents from the Iomega drive, and did so on 3 January 2104. Forensic inspection of the drive at the behest of Prophet revealed that in very large part such deletion had indeed occurred. That was not the case for the sales report. The disk drive, and hence that copy of that report, is however now embargoed in the hands of Mr Huggett's solicitors. Mr Huggett assures me that he made no other copy of any of the company documents, for example by transferring them to his partner's laptop. Though inclined to believe this, I could, given Mr Huggett's track record on truth, have no real confidence in doing so.

(c) In any event, I am wholly unable to exclude as a serious possibility that even without access to documents Mr Huggett will retain a memory of some confidential information which could assist him in his new employment: the most obvious example is the identity of prospective customers or leads identified by Prophet.

(d) Moreover, the difficulty of demonstrating that, or how, the use of such information was responsible for loss of a prospective sale or otherwise damaged Prophet remains an important part of the legitimate interest of Prophet in the enforcement of Clause 19.

32. In short, I am not persuaded that there is no threat to a legitimate interest underpinning Clause 19.

33. In the post-*Coventry* climate of greater flexibility, it appears to me that the court can have regard, not only in binary fashion to the existence or not of such a threat, but also to the level of the risk that the threat will materialise. That may be separated into two principal elements: (a) the chance that confidential information will be used to the detriment of the former employer, and (b) the level of any loss if that occurs.

34. I can deal shortly with the latter, which in the present case would in practice relate to the loss of an order or renewal. On the figures recounted to me in evidence, even at the bottom end of Prophet's clientele the value attached to these is not inconsiderable and may reach substantial levels as one moves upwards - account must also be taken of the value of renewals over potentially some years.

35. Understandably, therefore, Mr Huggett's case, supported by evidence from Mr Vincent, focussed rather on the first element, contending that there was no risk of the confidential information being used to Prophet's detriment, in effect to conclude sales to actual or potential customers of Prophet.

36. Mr Vincent told me that K3 had no interest in the lower part of the market, where most of Prophet's current customers were found. Indeed, he explained to me that K3's costs in effecting the sale and installation (apparently much greater than Prophet's costs) were such that only higher value customers were a viable proposition. But Prophet already has large scale customers, and would no doubt be interested in landing another fish of similar size[4]. While I accept Mr Vincent's evidence that he did not hire Mr Huggett for his contacts book, that does not mean that there could not be an occasion in the coming months when the two companies are, or potentially might be, in competition for the same prospect. I also consider that Mr Vincent would not, particularly in the light of this litigation and even more so if I were to accept the proffered undertakings by K3, knowingly encourage or permit Mr Huggett to breach the confidentiality covenant. But that does not eliminate the possibility that Mr Huggett may, unbidden and unencouraged, use prohibited information to secure a sale, not least where it carries a commission entitlement and may affect the award of an annual bonus.

37. In short, I do not accept that the risk which legitimises enforcement of Clause 19 is now non-existent. But while it is a real, and not fanciful, risk, I do not think that it greatly exceeds that low threshold.

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[4] Mr Vincent told me that because Microsoft dealt directly with the major supermarkets, K3 was contractually unable to recruit them as customers without Microsoft's consent. But I heard nothing to establish that the higher end of the market in which K3 hoped to operate and which Prophet might also be targeting was restricted to these few majors.

(d) Adequacy of damages as a remedy[5]

38. The classic judicial pronouncements on this topic offer in my view no assistance when considering restrictive covenants in employment contracts. In other cases, one is typically concerned with a single continuing breach (which may or may not have already incepted) on which it may - though not always - be possible to place a monetary value of sufficiently reliable accuracy. The position is quite different in a case such as the present one. Any damage would occur non-continuously, differentially, and sporadically, if and as Prophet is deprived of an order or a renewal through misuse of confidential information. Assessment of a figure for damages in lieu of an injunction would in such circumstances be in high degree arbitrary. The argument for Mr Huggett appears moreover to assume that Prophet should be left to sue for damages if and as any loss occurs, forcing on Prophet a potential series of actions, in each of which Prophet would have to prove a breach of the confidentiality requirement, causation, and quantum of damage. That is far from what appears to me to be contemplated by Lord Cairns' Act (now embodied in section 50 of the Senior Court Acts, 1981). And each such claim for damages would have embedded within it difficulties of assessment of a nature which courts regularly regard as making damages an inadequate remedy, or, in the now more often preferred formula, rendering it unjust in all the circumstances to confine a claimant to a remedy in damages[6].

(e)) The circumstances of the termination of employment

39. I set out earlier in paragraph 8 how the employment came to be terminated by agreement with effect from 3 January 2014. In essence, having told Mr Huggett that his proposed employment with K3 would breach his contract with Prophet - an obvious reference to the restriction in Clause 19 - Mr Peachey agreed to the request for early termination on the basis, as his letter of 20 December 2013 expressly stated, that Mr Huggett would be starting work for K3 on 6 January 2014. He did this following advice from Prophet's solicitors, who on 23 December 2013 (the next working day) despatched a letter requiring Mr Huggett to refrain from entering K3's employment for 12 months. An odour of bad faith emerges from this conduct, leading Mr Burns to submit that in seeking an injunction Prophet does not come to the court with clean hands. The force of that submission may be reduced, though it is not eliminated, by the fact that Mr

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[5] In considering this question I work on the basis that (a) K3 would give the intimated undertaking (see paragraph 10 above) to the court to pay any award of damages and (b) K3 will be well able to honour that commitment. Mr Huggett's inability himself to meet any judgment is on this basis effectively irrelevant.

[6] *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349 @ 379H per Sachs LJ.

Huggett's own actions were scarcely a model of honest dealing, resorting to not only concealment but blatant lies about the identity and nature of the new employer until the truth was dragged out of him. While not in my view sufficient to constitute a bar to the relief sought by Prophet, its conduct is a factor to which I should have regard in the exercise of the discretion as to whether to grant it.

40. In this connection, I understand from Mr Vincent that the first four weeks since 6 January 2014 were dealt with by agreement by treating two weeks as annual leave (and hence paid) and the remaining two weeks as unpaid leave[7]. It may be, though I was not told, that Mr Huggett has not been paid since. To that extent, he has suffered a detriment which he would not have had if Prophet had not released him early to join Mr Huggett. At the same time, the twelve month period will expire three months earlier.

(f) Hardship

41. Mr Huggett gave extensive evidence as to the effect which the grant of an injunction would have financially on him and those he has to support. The practical effect of an injunction, as I understand Mr Laddie to accept, will be to exclude him from work in this industry. In addition, he told me that in the two years before joining Prophet he had sought work in the fresh produce industry itself, but without success, and asks me to conclude that he has no prospect of obtaining employment in the next nine months. Nor does he have any financial reserves. It is likely that his partner will have to abandon her course at a teacher training college to earn the family bread.

42. Given my view of Mr Huggett's reliability as a witness, I have to view this evidence with serious caution. I have no real, and certainly no reliable, picture of how long or how intensively he sought work or from what companies, nor is the position clear as to potential employment in other sectors other than fresh produce. Mr Huggett suggested that posts (in, I believe, the fresh produce industry) are available but in locations which would cause problems for familial reasons, and with a significantly lower remuneration.

43. There is, however, a more fundamental consideration. It was in practice an inevitable consequence of the restriction accepted by Mr Huggett that he would be shut out from employment in the fresh produce ERP software industry and obliged to seek employment elsewhere. The availability of such job opportunities might be expected to vary with economic conditions, but that risk was inevitably

[7] One may note however that his salary at K3 was 150% higher than at Prophet, so that the net loss was equal to one week in his old employment.

assumed by Mr Huggett in agreeing to the restriction[8]. It is not in my view the kind of matter contemplated by the reference in earlier cases to hardship, even discarding – in loyalty to the observations in *Corner* - their requirement that the case should be exceptional.

44. If nonetheless I were to regard this a factor which ought to be taken into account, it would be of such small weight as not to affect the outcome of my discretionary evaluation.

(g) Overall assessment

45. As I indicated above, I do not regard the risk of any abuse of confidential information to the detriment of Prophet as more than modest: its case rests on a suggested picture which in the light of the evidence which I have heard is over-alarmist to a considerable degree. Nonetheless, weighing such risk as does exist along with the other considerations, for and against, which I have examined above, I have concluded that in all the circumstances the appropriate order in the exercise of the court's discretion is to enforce the restriction by the grant of an injunction.

Conclusion

46. I will therefore make an order restraining Mr Huggett in terms reflecting the formula proposed on behalf of Prophet.

[8] Nor is it at all clear that the economic climate is less favourable now than would have appeared at the time of the contract two years ago.