Neutral Citation Number: [2023] EWHC 2158 (KB)

Case No: QB-2021-002807

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Friday, 25 August 2023

Before :

JASON BEER KC
(Sitting as a Deputy Judge of the High Court)

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Between :

CELEBRITY SPEAKERS LIMITED	**Claimant**
- and –	
(1) DAVID DANIEL **(2) ANDREW LEIGHTON-POPE** **(3) D&A ASSOCIATES LIMITED**	**Defendants**

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Mark Stephens (instructed by **McBride Wilson & Co**) for the **Claimant**
Frances Hoar (instructed by **Fitz Solicitors**) for the **Defendants**

Hearing dates: 20th April 2023, with further written submissions on 27th and 28th April 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 25th August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archive.

Jason Beer KC (Sitting as a Deputy Judge of the High Court):

A. Introduction

1. Having breached a raft of Orders of the Court, the Defendants' statement of case was struck out, judgment was entered for the Claimant on liability, and a series of directions were made giving the Defendants limited participatory rights in the remedies hearing which was listed before me.

2. This judgment accordingly concerns the remedies which the Claimant, Celebrity Speakers Limited ("CSL"), should be granted in its claim against the Defendants - David Daniel, a former director of CSL, who with Andrew Leighton-Pope, set up D & A Associates ("D&A") in competition with CSL as a speaker bureau.

B. The Facts

The relevant people and organisations, and the duties that they owed

CSL

5. CSL was incorporated in 1983 and has operated since then as a speaker bureau. A speaker bureau is an organization which facilitates the searching and booking of professional speakers for corporate events and conferences for clients requiring motivational or keynote speakers, celebrity appearances, or conference facilitators.

6. A speaker bureau will typically create and maintain a database of personalities from diverse fields such as politics, sports, business, television, education, and comedy. The staff at the speaker bureau often initiate an introduction between speakers and clients and support both parties thereafter. A speaker bureau helps both the client and the speaker negotiate a fee.

7. CSL itself built up and maintained a confidential database of information concerning both its clients and its speakers ("*the Confidential Database*"). More particularly, it contained information concerning:
    a. All of CSL's clients, including their principal contact names, e-mail addresses and mobile telephone numbers, alongside details of all of their past and proposed bookings, their budgets and the prices charged and to be charged to them by CSL;
    b. All of CSL's speakers, including information about past and future bookings (and the amounts charged on each occasion), together with information about their fee expectations.

8. CSL's Managing Director was at all relevant times Sandra Krywald.

Mr Daniel

9. Mr Daniel was recruited by CSL in 1996 and, as will be seen, came to be employed by CSL for some 25 years. He was habitually the best performing Sales Consultant for CSL, developing close working relationships with clients and speakers. He was appointed as the dedicated manager for one of CSL's most important speakers, Bruce Dickinson - a singer, and best known as the lead vocalist of the band *Iron Maiden*.

10. In 2015 Mr Daniel was appointed as a statutory director of CSL and at the same time promoted to Director of UK Sales Strategy under the terms of a Service Agreement dated 16th April 2015 ("*the Service Agreement*"). Reflecting the seniority of his position within CSL, his importance to the business, and his appointment as a statutory director of CSL, the Service Agreement contained a number of covenants that sought to protect CSL's business and its confidential information.

11. Pursuant to Clause 13.1 of the Service Agreement, Mr Daniel was prohibited, without the prior written approval of CSL from:

> "…[being] directly or indirectly engaged, concerned or [having] any financial interest in any capacity in any other business, trade profession or occupation (or the setting up of any business, trade, profession or occupation)."

12. Pursuant to Clause 13.2 of the Service Agreement (and notwithstanding Clause 13.1), Mr Daniel was permitted to:

> "…hold an investment by way of shares or other securities of not more than 5% of the total issued shared capital of any company…where such company does not carry on a business similar to or competitive with any business for the time being carried on by [CSL]…"

13. By Clause 14 of the Service Agreement Mr Daniel owed a series of additional obligations to protect and not to misuse CSL's confidential information, including client lists, prices charged to clients by CSL, fees charged by speakers and any private or ex-directory telephone number of any speaker or client – all of which were contained in the Confidential Database. Thus:
    a. Pursuant to Clause 14.1 of the Service Agreement Mr Daniel was prohibited as follows:
       "…[Mr Daniel] shall not…either during the Appointment or at any time after termination of the Appointment (howsoever arising):
       (a) Use any confidential information; or
       (b) Make or use any Copies; or
       (c) Disclose any Confidential Information to any person, company or other organisation whatsoever."
    b. Pursuant to Clause 14.2 of the Service Agreement Mr Daniel was:
       "…responsible for protecting the confidentiality of the Confidential Information and shall:
       i. Use his best endeavours to prevent the use or communication of any Confidential Information by any person, company or organisation except in the proper course of his duties, as required by law or as authorised by [CSL]; and
       ii. Inform [CSL] immediately upon becoming aware, or suspecting, that any such person, company or organisation knows or had used any Confidential Information."
    c. Pursuant to Clause 14.3 of the Service Agreement:

> "All Confidential Information and Copies shall be the property of [CSL] and on termination of the Appointment, or at the request of [CSL], at any time during the appointment, [Mr Daniel] shall:
> (a) Hand over all Confidential Information or Copies to the Managing Director…
>
> (c) Provide a signed statement that he has complied with his obligations under this Clause 14."

14. Mr Daniel additionally agreed that he would not, for a period of 9 months after the termination of his employment:

> "(a) Solicit or endeavour to entice away from [CSL]…the business or custom of a Restricted Client with a view to providing goods or services to that Restricted Client in competition with any Restricted Business, nor
> (b) Be involved in any Capacity with any business concern which is (or intends to be) in competition with any Restricted Business"

15. A "Restricted Business" was defined in the Service Agreement as "…the provision or engagement or supply of or the making of any arrangement for or the recruitment and management or any individual or group/s of individuals to speak or to perform (by whatsoever means) at any meeting or event or the provision of any advice with respect to the foregoing."

16. A "Restricted Client" was defined in the Service Agreement as "…any firm, company or person who, during the 12 months before termination, was a Client or prospective Client of or was in the habit of dealing with [CSL]…with whom [Mr Daniel] had contact or about whom he became aware or informed in the course of his employment."

17. Mr Daniel was issued by CSL with a user name and password that enabled him to have access to the Confidential Database for the purpose of undertaking his duties for CSL.

Mr Leighton-Pope

18. Mr Leighton-Pope is a longstanding friend of Mr Daniel. Mr Daniel introduced Mr Leighton-Pope to work for CSL as a sub-agent in May 2018. His main role was to contact promoters for Mr Dickinson's spoken-word events, and assist Mr Daniel – as required – in relation to these bookings. He received 5% of the commission earned by CSL in respect of each booking.

19. Mr Leighton-Pope was not given a username or password to access the Confidential Database, nor was he ever permitted to access the Confidential Database by CSL. CSL pleads, and therefore it is established for the purposes of this judgment (as to this: see paragraph 38 *et seq.* below) that Mr Leighton-Pope (and D&A) have gained access to the Confidential Database using Mr Daniel's username and password.

20. No written contract existed between Mr Leighton Pope and CSL – there was, for example, no equivalent to the Service Agreement. However, CSL pleads, and it is therefore established for the purposes of this judgment, that:
    a. There existed a commercial relationship between them, which relationship required a high degree of communication and co-operation with an expectation of loyalty in which the parties owed a duty to conduct themselves in good faith and fairly with one another;
    b. There existed a relational contract under which Mr Leighton-Pope was obliged to refrain from conduct which, in the relevant context, would be regarded as commercially unacceptable by reasonable and honest people.
    c. Mr Leighton-Pope was obliged, whether under an implied tern, in equity or in tort, not to use, exploit or disclose to any third-party confidential information belonging to CSL that came into his control during his engagement with CSL.

D&A

21. D&A was incorporated on 26th November 2020 (the name "D&A" is seemingly a reference to the first letters of the forenames of Mr Daniel (namely David) and Mr Leighton-Pope (namely Andrew)). It is also a speaker bureau.

22. Companies House records list Mr Leighton-Pope as its sole director. CSL pleads, and therefore it is established for the purposes of this judgment, that Mr Daniel is in fact a shadow director of D&A (i.e., a person who has significant influence over the company's affairs without being formally appointed as a director) and that Mr Daniel (whilst still employed by CSL) and Mr Leighton-Pope (whilst still engaged by CSL as a sub-agent) were actively engaged in the establishment of D&A and have continued to assist D&A to trade in competition with CSL using goodwill and confidential information misappropriated from CSL.

The COVID-19 Pandemic, furlough, garden leave and termination of employment

23. The onset of the COVID-19 Pandemic in early 2020 led to a sudden and significant contraction in the market for live events, with a consequent effect on CSL's business. CSL took remedial action, including by:
    a. Placing Mr Daniel on full furlough between 15th May and 31st August 2020;
    b. Placing Mr Daniel on partial furlough between 1st and 30th September 2020;
    c. Placing Mr Daniel on full furlough between 1st October and 30th November 2020.

24. In readiness for Mr Daniel's anticipated return to full-time work, in late October 2020 CSL provided him with a computer to enable remote access to the Confidential Database so as to undertake his duties from home. In the event, as the timeline in paragraph 23 above narrates, Mr Daniel did not return to full-time work until 1st December 2020. At that time, there were 11 events for speakers in which Mr Daniel previously had an active role in managing which were waiting to be re-scheduled.

25. On 30th December Mr Daniel informed Mrs Krywald that he intended to resign from CSL and from 8th January 2021 he was placed on 6 months' garden leave. At that time, he did not explain to CSL the existence of D&A, nor that he intended to run that business with Mr Leighton-Pope.

26. Mr Daniel's employment with CSL terminated on 8th July 2021 – he was, of course, bound by the post-termination restrictive covenants in the Service Agreement (see paragraphs 14, 15 and 16 above) for a period of 9 months – i.e., until 8th April 2022.

Activities of Messrs Daniel and Leighton-Pope and D&A

27. CSL pleads, and therefore for the purposes of this judgment it is established that, for a date that is not in fact known, but which is likely to be before D&A's incorporation on 26th November 2020, Messrs Daniel and Leighton-Pope entered into an agreement and / or reached a common understanding that (in breach of the duties that I have mentioned above, and with an intent to injure, or cause loss to, CSL by unlawful means) they would divert clients, speakers and business opportunities away from CSL, for their own benefit and / or to benefit CSL.

28. Upon his return to work in December 2020, Mr Daniel contacted numerous speakers and clients (including Mr Dickinson) – but, notably, he made no bookings whatsoever.

29. Subsequent inspection of CSL's Confidential Database revealed that:
    a. Between 18th November 2020 and 30th December 2020 – i.e., in the period immediately before, and for some time after, the incorporation of D&A - Mr Daniel (and possibly someone else using his username and password) spent more than 27 hours examining the details of 757 speakers – by looking at their notes, contact details and fees pages. This examination was undertaken systematically and alphabetically – and went far beyond access for the purposes of re-scheduling the 11 events in which Mr Daniel had a legitimate interest.
    b. Between 8th January 2021 and 8th July 2021 – i.e., when Mr Daniel was on garden leave – he and / or Mr Pope continued to access the confidential database without CSL's permission, again making systematic and alphabetical searches of CSL's clients and speakers.

30. Close examination of the records of such systematic searching also reveals that that Mr Daniel (or someone using his user details) was plainly taking screenshots (or a photograph, or some other electronic record) of the data they were accessing – the time spent on each page was typically only a few seconds: not long enough to read the information on the page, but long enough to screenshot etc. it, and move on.

C. The Claim

31. The claim was issued on 16th July 2021 and, on the same day, an application was made for interim relief by way of injunctions seeking to: restrain the Defendants from further infringements of CSL's rights in its Confidential

Database; requiring the Defendants to deliver up all information confidential to CSL that was within their control and / or which derives from data extracted from its Confidential Database; restraining Mr Daniel from breaching post-termination covenants set out in the Service Agreement; and restraining Mr Leighton-Pope and D&A from inducing or procuring Mr Daniel to breach those covenants.

32. The application for injunctions came before Martin Spencer J on 30th July 2021. Mr Daniel and Mr Leighton-Pope served witness statements for the purposes of that hearing in which they denied accessing or using information on the Confidential Database and refuting the conclusions and inferences which CSL sought to draw from analysis of Mr Daniel's work computer (in particular that the Confidential Database had been accessed on numerous occasions whilst Mr Daniel was on gardening leave, and that Mr Daniel's login details had been used by more than one person, and at an IP address connected to Mr Leighton-Pope).

33. Martin Spencer J declined to grant the injunctions sought, holding: "I am not satisfied that the evidence which is before me is sufficient to conclude that the database has been used by David Daniel, particularly in the light of his denials to that effect and his explanations set out in his witness statement, that I am able to make the assumptions I am asked to, and grant interim relief in relation to the database matter."

34. Directions were given to bring the claim to trial. However, on the Claimant's application and following a series of failures by the Defendants to comply with the Court's directions (including those relating to disclosure and the instruction of an expert witness), on 3rd February 2023 Michael Ford KC, sitting as a Deputy Judge of the High Court made the following Order:

> "1. The Defendants' statement of case is struck out under CPR 3.4(2)(c).
> 2. There be judgment for the Claimant on liability….
> 5. Pursuant to CPR 3.1(m) the Court grants permission to the Defendants to participate in the Remedies Hearing to the extent set out in paragraph 6(b), (d) and (e) below.
> 6. The following directions are made for the Remedies Hearing:
> (a) The Claimant shall file…a paginated bundle comprising the documentary and witness evidence upon which it intends to rely at the Remedies Hearing.
> (b) The Defendants are entitled to receive an electronic copy of the bundle…
> (e) The Defendants may participate in the Remedies Hearing to the following extent only:
> (i) They shall serve on the Claimant…a skeleton argument limited to the issues of what remedies, if any, the Court should grant to the Claimant, and the appropriate order for costs.
> (ii) If the Defendants serve a skeleton argument in accordance with paragraph (i) above they may also make closing submissions orally upon the issues in paragraph (i) at the Remedies Hearing."

35. The Deputy Judge also made orders for costs adverse to the Defendants, which orders had not been complied with by the time that the matter came before me.

36. By the time of the exchange of submissions after the Remedies Hearing, CSL sought the following relief:
    a. Injunctions against Mr Daniel restraining him from copying, disclosing or using any of the Confidential Information, and requiring him to deliver up all electronic and hard copies of the Confidential Information in his custody or control.
    b. Injunctions against all three Defendants restraining them from copying, disclosing, or using CSL's Database or any information extracted from it, and requiring them to deliver up all electronic and hard copies of CSL's Database and any information extracted from it in their custody or control (along with an affidavit verifying such compliance).
    c. Damages:
        i. In tort, of £160,383, representing lost commission and caused by the conspiracy, in breach of Mr Daniel's restrictive covenants, to divert a series of tours and talks undertaken by Mr Dickinson which were being managed by CSL to D&A (by "re-booking" them);
        ii. In tort, of not less than £50,000, representing lost commission and caused by the conspiracy, in breach of Mr Daniel's restrictive covenants, to divert a series of tours and talks undertaken by people *other* than Mr Dickinson which were being managed by CSL to D&A (by "re-booking" them); and
        iii. Negotiating damages, of not less than £50,000, in respect of the Defendants' interference with CSL's Confidential Database.
    d. Interest.

D. The Issues

37. The issues that arise for determination are as follows:
    a. First, on what factual basis should the Court determine the remedies that should be granted to the Claimant, in the light of the fact that the Defendants' statement of case was struck out and judgment was entered for CSL?
    b. Second, is the Claimant limited to recovering the "amount claimed" – in this case £120,000 – on the Claim Form?
    c. Third, did Mr Daniel have contact with or become aware of Mr Dickinson in the 12 months before termination "in the course of his employment"?
    d. Fourth, has CSL established that breaches of contract/duty by the Defendants caused it to suffer the loss of bookings with Mr Dickinson as a speaker?
    e. Fifth, what loss has CSL established as a result of the breach of contract/duty by the Defendants in relation to the bookings of Mr Dickinson?
    f. Sixth, what sum, if any, should be awarded in relation to any other business lost by CSL by reason of the Defendants' breaches?

g. Seventh, should an award of negotiating damages be made (and, if so, in what sum) to represent the Defendants' interference with CSL's Confidential Database?
h. Eighth, should the Court grant injunctions and, if so, in what terms?
i. Ninth, what award of interest, if any, should be made?

E. Analysis and decision

First Issue: on what factual basis should the Court determine the remedies that should be granted to the Claimant, in the light of the fact that the Defendants' statement of case was struck out and judgment was entered for CSL?

38. The general approach is that set out by Carr J, as she then was, in *New Century Media v Makhlay* [2013] EWHC 3566 (QB) at [30] – the matters pleaded in the Particulars of Claim stand as a proxy for a judgment that would otherwise set out the basis of the liability of the Defendants; it is not open to the Defendants to go behind the pleas in the Particulars of Claim that established liability; however, damages still have to be proved, and the Defendants can raise any issue which is not inconsistent with those matters set out in the Particulars of Claim that established the liability of the Defendants to pay some damages.

39. The general position requires development in circumstances where the Defendants argue (namely under "Issue 4") that CSL has not established that the Defendants caused CSL loss or damage and CSL argues that the Particulars of Claim have necessarily established that Defendants have caused CSL loss and damage.

40. The question of the extent to which a default judgment (or similar) establishes the causation of some loss and damage has been addressed many times in the past:
    a. In *John Turner v P.E Toleman* (1999), unrep., 15th January the late Simon Brown LJ, admittedly in a judgment refusing permission to appeal to the Court of Appeal on a renewed oral application for permission, had cause to consider the effect of obtaining summary judgment – with damages to be assessed - in a claim for damages for personal injuries in circumstances where the claimant argued that the judgment determined not just liability issue, but also causation, including the question of the attributability of the claimant's injury to the accident. Simon Brown LJ profoundly disagreed, holding "No doubt defendants must acknowledge some injury to a plaintiff before judgment could properly be entered against them, otherwise the cause of action is not complete…That is a far cry from saying that they are liable for each and every aspect of loss and injury which the plaintiff in his pleaded claim asserts he suffered…That has everything to do with quantification and nothing to do with basic liability.
    b. In *Lunnun v Singh* (1999), unrep., 1st July the Court of Appeal (Clarke LJ, Peter Gibson LJ and Jonathan Parker J) approved *Turner* in circumstances where judgment in default, with damages to be assessed, had been entered on a claim alleging a water and sewage leak which had caused damage to a neighbouring property. The defendant subsequently sought to argue that issue was taken not merely with the quantum of the damage claimed, but also with causation – namely the allegation that

there was a causal link between the damage and the leak. The Court of Appeal agreed, Jonathan Parker J holding "…it is…inherent in the default judgment that the defendants must be liable for some damage…but that, in my judgment, it the full extent of the issues which were concluded or settled by the default judgment…al questions going to quantification, including the question of causation in relation to the particular heads of loss of loss claimed by the claimant, remain open to the defendants at the damages hearing…" Clarke LJ agreed: "The defendant cannot…contend that his acts or omissions were not causative of *any* loss to the plaintiff. But he may still be able to argue, in the assessment, that they were not causative of any particular items of alleged loss…Moreover he may do so even if the statement of claim alleges a particular item was caused by the tort."

c. *Turner* and *Lunnun* have been consistently followed since they were decided – see e.g. *Pugh v Cantor Fitzgerald International* [2001] CP Rep 74, *Enron (Thrace) Exploration and Production BV v Clapp* [2005] EWHC 401 (Comm), *Strachan v The Gleaner Co Ltd* [2005] 1 WLR 3204, and *Symes v St George's Healthcare NHS Trust* [2014] EWHC 2505 (QB).

41. It follows from these authorities that it <u>is</u> open to the Defendants to argue issues of causation of any alleged heads of loss pursued by CSL – causation of the heads of loss set out in the Particulars of Claim was <u>not</u> settled by the judgment on liability.

Second Issue: Is the Claimant limited to recovering the "amount claimed" – in this case £120,000 – as set out on the Claim Form?

42. The Defendants observe that the "amount claimed" set out on the Claim Form is limited to £120,000 and the Court fee was calculated and paid on that basis – as no application to amend has been made in the many months that have passed since then, they submit that any damages that I award should be capped to £120,000.

43. CSL responds by pointing out that, although the "amount claimed" box on the Claim Form does state £120,000, the body of the Clain Form pleads, under the heading "value" that "[CSL expects to recover damages exceeding £100,000. The value of the claim is <u>presently</u> limited to £120,000" (emphasis added) and that the Particulars of Claim plead "The true extent of the loss and damage sustained to date is not presently ascertainable by reason of the Defendants' efforts to conceal and / or frustrate its quantification."

44. I pointed out in argument, to both parties, the terms of CPR 16.3(7) ("The statement of value in the claim form does not limit the power of the court to give judgment for the amount which it finds the claimant is entitled to") and decisions of the court which make it clear that a court is not restrained in determining the appropriate judgment sum by the value on the Claim Form, especially if the value pleaded was an estimate before the extent of harm or damage was known (see e.g. *Harrath v Stand for Peace Ltd* [2017] EWHC at [22]).

45. In light of this, CSL gave an undertaking to pay such fee as the Court shall determine in the light of my judgment on the damages to which CSL is entitled.

46. Accordingly (as the Defendants essentially accepted by the end of oral argument), there is no substance in this point and it falls away: there is no cap on the quantum of damage that I may award by reason of the statement of value in the Claim Form.

Third Issue: Did Mr Daniel have contact with or become aware of Mr Dickinson in the 12 months before termination "in the course of his employment" if the same was undertaken whilst he was furloughed?

47. It will be recalled that the Service Agreement prohibited Mr Daniel, for a period of 9 months after the termination of his employment, from soliciting or endeavouring to entice away from CSL the business or custom of a Restricted Client with a view to providing goods or services to that Restricted Client in competition with any Restricted Business, and that a Restricted Client was defined in the Service Agreement as "…any firm, company or person who, during the 12 months before termination, was a Client or prospective Client of or was in the habit of dealing with [CSL]…with whom [Mr Daniel] had contact or about whom he became aware or informed <u>in the course of his employment</u>" (emphasis added).

48. Although the definitional clause is not happily drafted, I agree with the Defendants that it means that a Restricted Client is:
    a. Any firm, company or person who, during the 12 months before termination, was a Client or prospective Client of or was in the habit of dealing with CSL; <u>and</u>
    b. With whom, in that 12-month period and in in the course of his employment, Mr Daniel had contact; <u>or</u>
    c. Who, in that 12-month period and in the course of his employment, Mr Daniel *first* became aware of, or *first* informed about.

49. This approach gives business sense to the definition – otherwise, the clause would be operative in respect of *all* CSL clients of which Mr Daniel was ever aware or informed about. This, as it seems to me, would run contrary to the plain purpose of this definitional clause, which is to act as an important limitation on the operation of the parent clause which it serves. In that way, the parent clause is enforceable as a reasonable restraint of trade because it bites *only* in respect of clients with whom Mr Daniel had contact or was first informed about/became aware of proximately to his departure – i.e., in the 12 months before termination of his employment. So that addresses the definition.

50. In terms of application, there is no difficulty in respect of limb (a) above: Mr Dickinson was plainly a longstanding client of CSL, and was such a client in the 12 months before the termination of Mr Daniel's employment on 8th July 2021.

51. However, the Defendants sought to argue that limbs (b) and (c) above were not satisfied because:

a. Mr Daniel was prohibited from undertaking any work for CSL throughout the periods of his full furlough – this was as a consequence the terms of the Coronavirus Job Retention Scheme ("the Scheme"), made in exercise of powers under ss71 and 76 of the Coronavirus Act 2020, which necessarily involved an instruction by the employer to cease all work in relation to their employment. To the extent that Mr Daniel worked in breach of the prohibitions in the Scheme, the Defendants say that it would be contrary to public policy for the Court to grant a remedy to CSL: *ex turpi causa non oritur damnum.*
b. Although Mr Daniel was, in law, entitled to undertake some work for CSL whilst he was flexibly furloughed, the facts and matters pleaded and relied on by CSL do not, in fact, establish that Mr Daniel was permitted to work when he was flexibly furloughed.
c. Mr Daniel was not permitted to work for CSL for the duration of his 'garden leave'.

52. It follows, say the Defendants, that Mr Damiel could not (lawfully) have worked with Mr Dickinson (nor indeed any of CSL's other clients), 'during the course of his employment', within the period of one year before the termination of his contract of employment on 8th July 2021.

53. The short answer to this interesting argument – and one which means that it is necessary to consider neither the terms and effect of the Scheme or the application of the *ex turpi causa* doctrine – is that CSL pleads in paragraph 30 of the Particulars of Claim that "[Mr Daniel's return [to work] was delayed until December 2020. Upon returning to his duties he contacted numerous clients and speakers (including Mr Dickinson), but did not book any new events." It follows that the Defendants are for the purposes of this judgment bound by, and cannot go behind, the facts asserted in that paragraph. Accordingly, it is established that Mr Daniel "had contact with" Mr Dickinson "in the course of his employment" in the 12 months before the termination of his employment. Mr Dickinson was, therefore, a 'Restricted Client' for the purposes of the Service Agreement meaning that Mr Daniel was prohibited from soliciting or endeavouring to entice away from CSL the business or custom of Mr Dickinson with a view to providing goods or services to Mr Dickinson.

(4) Fourth Issue: Has CSL established that breaches of contract/duty by the Defendants caused it to suffer the loss of bookings with Mr Dickinson as a speaker?

54. The Defendants submit that the evidence does not establish that, even if Mr Dickinson was a Restricted Client, any breaches of duty or contract by the Defendants caused CSL to suffer any loss in respect his bookings, because:
    a. It is not pleaded that Mr Leighton-Pope owed a duty not to compete with CSL, nor that Mr Leighton-Pope knew Mr Dickinson through his work with CSL as a sub-agent.
    b. It is clear from the documents placed before the Court by CSL that Mr Leighton-Pope runs another organisation (called "The Leighton Pope Organisation") – the invoices to CSL rendered by Mr Leighton-Pope in relation to his sub-agent's commission between January and November 2019 establish that. It is accordingly submitted that I can infer that Mr

Leighton-Pope's undertaking sometimes deals with CSL, and sometimes does not, and that the undertaking is clearly more than a sub-agency.

c. An email dated 5th July 2021 from Mrs Krywald to Mr Daniel in which she records that Mr Dickinson liked Mr Leighton-Pope and that his acquaintance Andy Taylor knew Mr Dickinson's father, Carl. It is accordingly submitted that I can infer that there was an existing relationship between Mr Leighton-Pope and Mr Dickinson – one which pre-dated Mr Leighton-Pope's sub-agency work with and for CSL.

55. In my view the starting point – in determining whether these submissions have merit – is to examine what the Particulars of Claim, which stands as a proxy for a judgment on liability, *do* establish in relation to Mr Leighton-Pope. They establish the following:

a. First, that he owed CSL a duty of good faith (Particulars of Claim, paragraph 25);
b. Second, that he owed CSL a duty to refrain from conduct which would be regarded as commercially unacceptable by reasonable and honest people (Particulars of Claim, paragraph 26);
c. Third, that he owed CSL a duty not to use or to exploit any confidential information that came into his control during his engagement with CSL (Particulars of Claim, paragraph 27);
d. Fourth, that he, together with Mr Daniel entered into an agreement to divert business opportunities away from CSL for their own benefit and / or to benefit D&A (Particulars of Claim, paragraph 35);
e. Fifth, that before during and after the period of Mr Daniel's garden leave, he and Mr Daniel diverted goodwill and business opportunities from CSL (Particulars of Claim, paragraph 36(b)); and
f. Sixth, that he and Mr Daniel extracted or copied information from the Confidential Database (Particulars of Claim, paragraph 36(c)).
g. Seventh, that Mr Leighton-Pope was instrumental in the plan to "re-book" Mr Dickinson's tour dates (Particulars of Claim, paragraph 43(a)).

56. In the light of these facts and matters, whilst it is correct to state that there was no express contractual duty imposed on Mr Leighton-Pope not to compete with CSL, that is really nothing to the point. The duties mentioned in paragraphs 55(a), (b) and (c) above are the relevant duties upon which the claim against Mr Leighton-Pope is not only founded, but they are the relevant duties upon which his liability to CSL was established.

57. As for the invoices in the name of the "Leighton Pope Organisation", all that I can take from those is that such an organisation existed between January and November 2019. Aside from the existence of that organisation as a trading name, I cannot take anything more from the documents.

58. I decline to draw the inferences from Mrs Krywald's email of 5th July 2021 sought by the Defendants. The language used in the email is not a proper foundation upon which to do so. In any event, such an inference – or, more properly, the

implications which the Defendants seek to draw by building on that inference (namely that it was such prior familiarity with Mr Leighton-Pope that was the cause of the "re-booking" of Mr Dickinson's tours to D&A) are inconsistent with the basis upon which liability was established. Further, I regard it as significant that one of the Defendants' defaults which led to judgment being entered against them was a failure by them to co-operate in the instruction of an expert witness who would have (i) investigated the searches made by Mr Daniel of CSL's Confidential Database and (ii) reported on what was deleted by Mr Daniel from his electronic devices. More particularly, the Court gave directions for the instruction of a single joint expert in the field of Forensic Computer Analysis and Geolocation of Mobile Telephones – it was intended that they would report upon when Mr Daniel's username was used to access the Confidential Database between 30th October 2020 and 8th July 2021, as which device or devices were used to access the Confidential Database, the location from where such access was obtained, the extent of the information searched for and the identity of material which had been deleted. Against this background, if any inferences are to be drawn, they are adverse inferences against the Defendants. As it happens, there *does* exist good evidence of Mr Leighton-Pope actively enticing Mr Dickinson's bookings away from CSL and over to D&A – thus, in an email of 19th May 2021 from Mr Leighton-Pope to a concert organiser, Mr Leighton-Pope said "In order to move on we need to get the deposit refunded to you. Then with the new post Covid company we will 'rebook' the dates. Please…ask for the flight refund from [CSL] before we announce the new dates" (emphasis added). By 5th July 2021 Mr Leighton-Pope was open in an email to CSL that "In case you aren't aware, I have taken over as [Mr Dickinson's] exclusive agent. Could you send me a link to all authorised photos and videos that you hold on file for [him] and direct any future enquiries to me" and by 3rd November 2021 was declaring the following in an email to CSL "The good news is - for me anyway – that I am back working solely with [Mr Dickinson] again."

59. For all of these reasons I can comfortably conclude, as I do, that the evidence establishes that CSL's loss of Mr Dickinson's business was caused by breaches of contract by Mr Daniel and Mr Leighton-Pope and by breaches of duty by all three Defendants.

(5) Fifth Issue: What loss has CSL established as a result of the breach of contract/duty by the Defendants in relation to the bookings of Mr Dickinson?

Introduction

60. Mrs Krywald identifies three heads of substantial loss relating to specific business opportunities for Mr Dickinson that were identified before Mr Daniel's employment with CSL ended, and which opportunities were lost to CSL as a result of the breaches of contract/duty by the Defendants: (i) Mr Dickinson's US and Canada speaking tour between January and March 2021, (ii) Mr Dickinson's Summer 2021 tour, arranged through Live Nation, and (iii) Mr Dickinson's Fortinet Master Talks in Autumn 2021.

(i) US and Canada Speaking Tour

61. The US and Canada speaking tour was proposed by CSL in early 2019, was being arranged by CSL (through Mr Daniel and Mr Leighton-Pope) in in April and May 2020 (with 29 US dates provisionally scheduled for 29th January 2021

– 28th February 2021 and additional dates being proposed for Canada between 1st and 31st March 2021), and then re-arranged for January - March 2022 – it in fact took place within these latter months, having been advertised from November 2021 (CSL makes the reasonable point, which I accept, that arranging a 42-venue tour across two countries takes many months to organise and that what has occurred is the diversion of the tour of January – March 2021 previously arranged by CSL to new dates in January – March 2022).

62. Using both fee income for Mr Dickinson generated by CSL on previous occasions, and past arrangements with Mr Dickinson as to CSL's rate of commission (which varied as between book events, and other events), Mrs Krywald has carefully calculated both Mr Dickinson's estimated fee for each of the events which took place on the US and Canada Tour between 17th January 2022 and 30th April 2022, and calculated what CSL's commission would have been in respect of that tour and has calculated that the commission received by CSL would have been £184,800.

(ii) Summer 2021 'Live Nation' Tour

63. Live Nation - a multinational entertainment company which promotes, operates, and manages ticket sales for live entertainment in the United States and internationally – has been a client of CSL since 2014. Between 2018 and 2021 CSL received many requests from Live Nation for Mr Dickinson to speak at events throughout Europe. Mrs Krywald provides detailed evidence of arrangements for an event entitled *An Evening with Bruce Dickinson* at venues across the UK in August 2021; how those events happened but that CSL was cut out from them by Mr Daniel, Mr Leighton-Pope and D&A and explains why the loss of commission to CSL was £19,200.

(iii) Fortinet Master Talks in Autumn 2021

64. Fortinet is a cybersecurity company which develops and sells security solutions like firewalls, endpoint security and intrusion detection systems – it also arranges a series of online "Master Talks" by well known individuals. In August 2021 CSL provided a booking proposal to Fortinet for Mr Dickinson to speak in an online event to be recorded between 27th and 30th September 2021 and then broadcast on 14th October 2021. CSL was subsequently falsely told that the event had been cancelled – this was untrue, as the event was in fact broadcast on 25th November 2021. I accept the evidence of Mrs Krywald that CSL's loss of commission was not les than £4,000 in relation to this event.

Calculation of losses

65. Mrs Krywald explains in her evidence that, from the total commission of £207,400 from the three species of events set out above (£184,800 + £19,200 + £4,000 = £208,000) must be deducted the commission that would have been paid personally to Mr Daniel and the sub-agent's commission that would have been paid personally to Mr Leighton-Pope (along with a bonus of £2,000 that was payable to Mr Daniel), resulting in a loss of £160,383. I accept that evidence.

66. The Defendants submit that CSL is entitled to claim loss of *profits*, not loss of *turnover* and that this loss of £160,383 essentially represents loss of turnover.

They submit that it was for CSL to formulate its case, that it has had many months to prepare it (some 20 months at the time of the Remedies Hearing had passed since the end of the relevant events), and that it could have called a range of evidence – including expert forensic accountancy evidence – showing the loss of profits that it had sustained (if any): this could have included (i) evidence of the difference between predicted profits and actual profits in the relevant year(s), (ii) evidence of its profit margins in the recent past and a claim for that percentage of its loss of turnover, (iii) evidence of the speaker agency industry profit margins (and the Defendants bravely - in the light of the directions as to their limited participatory rights in the Remedies Hearing - sought to give some sketchy evidence about that by way of the inclusion of hyperlinks to sources in their Opening Skeleton Argument) , or (iv) some other type insofar as the loss related to Mr Dickinson.

67. I should make clear that the way in which CSL has advanced its case on loss is in my view unaffected by the reprehensible and calculated way in which the Defendants have defended these proceedings – that is because the evidence of loss comes principally from CSL itself. No blame, in *this* respect, attaches to the Defendants.

68. However, I accept the evidence given by Mrs Krywald in her witness statement that the losses that she has set out in that witness statement *do* represent the lost profit to CSL, because (i) she has already deducted the commission and bonus payments that would have been made to Messrs Daniel and Leighton-Pope, (ii) the work had already been substantially done by CSL in arranging these bookings and (iii) no other business expenses fall to be deducted (because, for example, CSL did not incur travel or accommodation expenses when Mr Dickinson undertook speaking engagements – these were all picked up by the corporate client or the promoter).

69. I therefore award CSL the sum – under this head of loss – of £160,383.

(6) Sixth Issue: What sum, if any, should be awarded in relation to any other business lost by CSL by reason of the Defendants' breaches?

70. CSL seeks a further sum of £50,000 representing commissions charged at 33% on an estimated loss of £150,000 bookings *other* than those related to Mr Dickinson (which I have addressed above).

71. CSL invites me to infer that - having regard to evidence that suggests that (i) Messrs Daniel and Leighton-Pope were making preparations before setting up D&A to compete with CSL, (ii) Mr Daniel had deleted emails exchanges with some 41 clients, and (iii) Mr Daniel and / or Mr Leighton-Pope had systematically captured a substantial volume of information from CSL's Confidential Database – the Defendants diverted *other* clients away from CSL in breach of contract or the duties that they owed.

72. I am quite prepared to draw that inference, having regard to the evidence before me concerning the Defendants' behaviour. However, the evidence as to the loss that such a diversion caused is very thin indeed. It amounts to two sentences in

Mrs Krywald's witness statement: "…I would estimate that CSL has lost at least another £150,000 of bookings for other business opportunities diverted during that period, CSL's usual rate of commission is 33% (Mr Dickinson was an exception) which would indicate a further loss of £50,000." Even allowing for the fact that CSL doubtless wished to secure disclosure from the Defendants of evidence that showed – in clear terms – the value of the diverted business away from CSL, I am not satisfied that the evidence that Mrs Krywald gives in *this* respect is a sufficiently firm foundation upon which to award damages (especially in circumstances where I could reasonably expect there to be at least some evidence of the extent of losses attributable to bookings with other clients being mysteriously cancelled or at least the events themselves taking place having been lost to CSL). I therefore decline to make any award under this head of loss.

(7) Seventh Issue: Should an award of negotiating damages be made (and, if so, in what sum) to represent the Defendants' interference with CSL's Confidential Database?

73. CSL seeks negotiating damages (or *'Wrotham Park'* damages, as they used to be known) of £50,000 in respect of the Defendants' interference with the Confidential Database.

74. In *Morris-Garner v One Step (Support) Ltd* [2019] AC 649, Lord Sumption observed at [105] that "The ordinary measure of damages for breach of a non-compete covenant is the value of the business profits which the claimant would otherwise have made but which it has lost as a result of the defendant's unlawful competition, discounted in the case of future profits for accelerated receipt."

75. However, when a court is faced with difficulties in quantifying loss (including where this is caused by the defendant preventing the claimant from having access to relevant evidence), the court must do the best that it can rather than declining to award any damages: see, e.g., *One Step* at [37] and [38], where the Supreme Court cited a statement in *Chitty on Contracts* that: "Where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence" and noted that assessing the effect of a breach on a business's profits or value often involves what Lord Shaw in *Watson, Laidlaw & Co v Pott, Cassels & Williamson* [1914] Supreme Court (HL) 18, 29-30 described as "the exercise of a sound imagination and the practice of the broad axe".

76. In *One Step* the Supreme Court held that negotiating damages are a remedy awarded to compensate a claimant where the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset – i.e., an award, calculated on a hypothetical basis, to reflect the sum which a defendant would have been prepared to pay in order to secure a release from its obligations to a claimant before, for example, breaching a contract.

77. The facts of *One-Step* are of no particular relevance. The task in each particular case is to apply established legal principles to the facts of that case. However, it is of interest to note Lord Reed's remarks at [98]:

> "This is a case brought by a commercial entity whose only interest in the defendants' performance of their obligations under the covenants was commercial. Indeed, a restrictive covenant which went beyond what was necessary for the reasonable protection of the claimant's commercial interests would have been unenforceable. The substance of the claimant's case is that it suffered financial loss as a result of the defendants' breach of contract. The effect of the breach of contract was to expose the claimant's business to competition which would otherwise have been avoided. The natural result of that competition was a loss of profits and possibly of goodwill. The loss is difficult to quantify, and some elements of it may be inherently incapable of precise measurement. Nevertheless, it is a familiar type of loss, for which damages are frequently awarded. It is possible to quantify it in a conventional manner, as is demonstrated by Mr Hine's [the claimant's expert's] report."

78. Damages assessed by reference to the value of the use wrongfully made of property are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass): the rationale of such awards is that the person who makes wrongful use of property, where its use is commercially valuable, prevents the owner from exercising a valuable right to control its use, and should therefore compensate him for the loss of the value of the exercise of that right. He takes something for nothing, for which the owner was entitled to require payment.

79. It is common ground that, if it is appropriate to make such an award, I have to consider what sum would have been arrived at in hypothetical negotiations between the parties bearing in mind such matters as the commercial context and the negotiation is between the actual parties with their respective strengths and weaknesses, at least up to a point, and in the circumstances at the time of the hypothetical negotiation.

80. Here, CSL was set up in 1983 – it had gradually built up a bank of information about both speakers and clients, held no doubt initially in hard copy and subsequently the Confidential Database. I have set out in paragraph 7 above a summary of the information held in the Confidential Database. That bank of information was a very valuable asset to CSL, perhaps the most important asset that it owned (it would certainly be the most important part of the goodwill of the business in the event of a sale of CSL).

81. The parties agree that the relevant measure in the circumstances of this claim is the hypothetical fee that CSL would have charged the Defendants to *share* the Confidential Database between CSL and the Defendants (as opposed to a fee representing, for example, the purchase of the Confidential Database) – that is

because although the value of the Confidential Database to CSL will have substantially diminished in the light of the Defendants' wrongful use of the information on it, it still represents a valuable and useable asset to CLS that remains in its possession: CSL can *still* use it to contact speakers and clients, set fees, conduct negotiations etc.

82. Mrs Krywald states that "The value of the database is very difficult for me to quantify, and I would never dream of granting a licence to a competitor. However, I would expect a competitor to pay at least £50,000 for it." Whilst this evidence is also slender, having regard to the different and difficult nature of the exercise being undertaken, having regard to my finding that the Confidential Database was perhaps the most asset owned by CSL, and having regard to the very modest value that such a sum would represent by reference to each individual on the Confidential Database (£66 a head), it seems to me that if anything the sum sought is an undervalue: I am quite prepared to award CSL £50,000 in relation to the Defendants' interference in its rights in the Confidential Database.

(8) Eighth Issue: Should the Court grant injunctions and, if so, in what terms?

83. The Defendants argue that, in the light of the award of damages, the Court should not additionally grant any injunctive relief. They submit that injunctive relief preventing them from using the information in the Confidential Database would doubly compensate CSL where it has, *ex hypothesi*, also received the value of an agreement that would authorise the Defendants to use the Confidential Database – it would, it is said, be squarely inconsistent with the premise of such damages. In the alternative, it is submitted that the Court should refrain from exercising its discretion to grant an injunction in circumstances where it would risk imposing an unreasonable restraint of trade.

84. I reject these submissions, for the following reasons:

a. It is just and proper for each of the Defendants to be restrained from using or disclosing to any third party the information obtained from the Confidential Database – including the identities, addresses and trading histories between CSL and its speakers or from otherwise misusing CSL's Confidential Information.
b. The award of damages for lost business opportunities that I have made does not arise or flow from only the Defendants' interference with CSL's Confidential Database: there is no double compensation by granting an injunction and awarding such damages. The negotiating damages that I have awarded *do* represent compensation for the unauthorised use of the Confidential Database. However, I agree with CSL that compensation for interference with that proprietary right is conceptually distinct from losses which will follow if the Defendants *continue* to misuse the data that they extracted.
c. It is one thing to award negotiating damages for the infringements of CSL's rights to date; it would be quite another for the Court to effectively sanction, by declining to restrain further use of the data extracted from the Confidential Database, the indefinite continuation of the Defendants' wrongs.

d. Grant of the injunctions sought would not act in unreasonable restraint of trade. All that the injunctions do is prevent the Defendants from continuing to infringe CSL's rights, or from further benefiting from past infringements of such rights. The injunctions do not prevent the Defendants from building their own database, or conducting their own business, creating their own contacts.

85. In relation to the terms of the injunction sought, these seem to me to be appropriate, save for the following. CSL sought an injunction requiring the Defendants to make and serve on CSL an affidavit identifying all persons / and / or companies named within the Confidential Database with whom they have had dealings (other than on behalf of CSL) since 26th November 2020 – i.e., the date of incorporation of D&A. In my view a requirement of this sought would be appropriate if CSL pursued the remedy of seeking an enquiry as to the damage caused by the Defendants' breaches of duties and an account of profits made by them by the Defendants, as opposed to pursuing a claim for damages to be assessed. Although such a remedy was pleaded in the Prayer in the Particulars of Claim (at (VI)), and was floated as a possibility in CSL's Opening Skeleton Argument, in the event – when put to its election – CSL stated clearly in its oral opening submissions, and in reply, that it did not pursue such an enquiry and account (principally because, in the light of the Defendants' conduct to date, it seems unlikely that the Defendants would provide full and frank disclosure of their activities). In these circumstances, there seems to be no utility – and certainly no justification – for an order requiring the Defendants to give disclosure by affidavit of information whose principal use would be within an enquiry as to damages and an account of profits which is not pursued. I have therefore removed this element from the draft Order provided by CSL.

(9) Issue 9: What, if any, award of interest should be made?

86. In this case I think it appropriate to adopt a rate of 1% over base rate (cf *Carrasco v Johnson* [2018] EWCA Civ 87) because: (i) this rate will more adequately compensate CSL for the fact that it has been kept out of money to which it is entitled, (ii) it reflects the rate at which CSL might have borrowed the sums awarded), and (iii) harm was caused to CSL following the refusal of interim injunctions, a refusal which was in substantial measure based on evidence filed by the Defendants which has now been shown to be inaccurate.

87. Accordingly, I shall award the following sums by way of interest:
    a. £3,147.95 in relation to the negotiating damages of £50,000 (being 766 days of interest – from 8th July 2021 (the last day of Mr Daniel's employment) until the day of this judgment)
    b. £6,894.27 in relation to damages the damages for lost commission of £160,383 (being 523 days of interest – from 30th March 2022 (the relevant last date of Mr Dickinson's tours) until the date of this judgment.

F. Outcome

88. I shall therefore grant injunctions in the terms sought, save as is set out above. I award damages as follows: damages in tort of £160,383 (paragraphs 60 – 69

above) plus negotiating damages of £50,000 (paragraphs 73 – 82 above), totalling £210,383, plus interest of £10,042.22 (paragraphs 86 - 87 above) - totalling **£220,453.22**.

89. Damages in those sums (and, indeed, the damages sought by CSL at trial) would have required a court fee of £10,000 to have been paid by CSL on issue. I shall therefore incorporate provision in the order for CSL to pay an additional court fee of £4,000 (CSL having already paid £6,000 on issue).

90. I will set a timetable for the provision of written submissions as to costs, if agreement cannot be reached as to the payment of costs.