Neutral Citation Number: [2024] EWHC 1192 (KB)

Case No: KB-2024-000778

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 May 2024

Before:

RORY DUNLOP KC
(Sitting as a Deputy High Court Judge)

- -

Between:

MORGAN FIRE PROTECTION LIMITED	**Claimant**
- and -	
(1) ROBERT PETER MOGFORD	**Defendants**
(2) GENERAL FIRE PROTECTION LIMITED	

- -
- -

Aidan Reay (instructed by **Fieldfisher**) for the **Claimant**
Robert Mogford appearing in person for the **First and Second Defendants**

Hearing dates: 30 April 2024, 10 May 2024

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Approved Judgment

This judgment was handed down remotely at 4pm on 17 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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RORY DUNLOP KC

Rory Dunlop KC, sitting as a Deputy High Court Judge:

1. This is an application by the Claimant, Morgan Fire Protection Limited, for interim injunctions against the First and Second Defendants, Mr Robert Peter Mogford and General Fire Protection Limited.

2. There have been two hearings in relation to the application. At each, the Claimant was represented before me by Aidan Reay of counsel. The First Defendant, Mr Mogford, appeared in person. I am grateful to each of them for their courteous, clear and succinct submissions which greatly assisted me.

The Factual Background

3. The Claimant is a company that supplies fire safety goods and services. The Claimant provides its services to its customers through field service engineers who are allocated customers via a personal digital assistant device ("PDA") that they then service.

4. Mr Mogford was (prior to his resignation) one such field service engineer. Mr Mogford had started working for the Claimant on 5 May 2015 and worked for the Claimant until his contract terminated on 27 October 2023 pursuant to a resignation he handed in on 29 September 2023.

5. The Second Defendant is a company incorporated in April 2023. Mr Mogford is the Second Defendant's sole director and shareholder.

6. Mr Mogford's contract of employment dated 6 May 2015 ("the Employment Contract") provided for Mr Mogford to be subject to and remain subject after termination to an express duty of confidentiality contained in clause 25 that provided:

> *"During the course of your employment, you will have access to and be entrusted with information in respect of the business and financing of the Company and its dealings, transactions and affairs and its clients and suppliers and similar information concerning its clients and suppliers all of which information is or may be confidential.*
>
> *You hereby agree that you will not (except in the proper course of your duties) during or at any time after your employment divulge to any person whatever or otherwise make use of any trade secret or any confidential information concerning the business or finances of the Company or its clients or suppliers or any like details relating to its clients or suppliers.*
>
> *The restriction in the paragraph above shall not apply in respect of any information which is or has become in the public domain (otherwise than by a breach by you of this clause) or which you are required to disclose by any court or competent authority or which by virtue of your employment are part of your own skill and knowledge.*
>
> *All documents and relating to the Company's business, whether they be stored on hard copy, electronic, through the Cloud or by any other means, remain the property of the Company. All such documents or contacts that may be in your possession must be returned to the Company upon the termination of your employment."*

7. Appendix 2 of the Employment Contract also provided restrictions on post-termination competition:

> "*1. For the purpose of this clause, the following expressions shall have the following respective meanings:*
>
> *1.1 "Client" means a person, firm or corporate body who placed business with the Company at any time during the last 12 months of the Employment or for the period of the Employment, if shorter, and who has not also placed business with the Competing Business during the said period and was not a client known to the Employee prior to the Employment who he/she introduced to the Company.*
>
> *1.2 "Potential Client" means a person, firm or corporate body who was negotiating with the Company or from whom the Company actively and directly attempted to solicit business at any time during the last 12 months of the Employment or for the period of the Employment, if shorter and who has not also placed business with the Competing Business during the said period and was not a client known to the Employee prior to the Employment who he/she introduced to the Company.*
>
> *1.3 "Competing Business" means any person, firm or corporate body providing services directly or indirectly in competition with the Company.*
>
> *1.4 "Termination Date" means the date upon which the Employment terminates for any reason whether by notice or without notice or in the event that the Company requires the Employee to stay away from work during the period of notice then it shall mean the date on which the Employee last attended work notwithstanding the fact that the Employment continues beyond that date.*
>
> *2. The Employee will not without the prior written consent of the Company (such consent only to be withheld so far as may reasonably be necessary to protect the legitimate business interest of the Company) during the Employment or for a period of 12 months from the Termination date whether alone or jointly with or as shareholder, advisor, principal, partner, agent, director, employee, consultant or otherwise of the Competing business, directly or indirectly:*
>
> *2.1 solicit or canvass, or attempt to solicit or canvass, business from any Client or Potential Client with whom the Employee dealt;*
>
> *2.2 deal with or accept instructions from any Client or Potential Client with whom the employee dealt;*
>
> *2.3 endeavour to entice away from the Company any person who at the Termination Date shall have been an employee of the Company with whom the employee worked at any time during the Employment.*"

<u>Pre-action correspondence</u>

8. In a letter dated 10 November 2023 Fieldfisher, solicitors for the Claimant, wrote to Mr Mogford, alleging that he had breached the Employment Contract. They alleged

that he had conducted a 'campaign' of soliciting the Claimant's customers, particularly those who had upcoming annual service dates. They enclosed photographic evidence of the Claimant's customers' fire extinguishers having the Second Defendant's labels on them. In that letter Fieldfisher asked for clarification of certain matters and a series of detailed undertakings, including that he would abide by the obligations in the contract.

9. In a letter dated 15 November 2023 Perrin Myddelton, who were instructed by Mr Mogford, replied with a holding letter asking the Claimant not to start proceedings while they took instructions. In a further letter dated 23 November 2023 Perrin Myddelton denied that Mr Mogford had unlawfully obtained or retained confidential information and denied he had a list of customers. They said that the restrictive covenants in the Employment Contract were unenforceable. They offered to give undertakings, including an undertaking not to solicit the Claimant's customers. However, the list of undertakings they offered to give was not the full list the Claimant had requested. In addition, they said that Mr Mogford was entitled to work for customers who approached him (as opposed to being solicited by him).

10. In a letter dated 15 December 2023 Fieldfisher replied saying that Mr Mogford had not provided them with accurate instructions. They said that the Claimant's investigation had revealed that Mr Mogford had directly solicited at least 26 of the Claimant's customers. Specific examples were given. At the end of the letter Fieldfisher stated that the Claimant was prepared to give Mr Mogford until 4pm on 20 December 2023 to give the undertakings requested, otherwise they would need to take formal action including seeking injunctive relief. In a letter dated 20 December 2023 Fieldfisher wrote in similar terms to the Second Defendant.

11. In a letter dated 20 December 2023 Perrin Myddelton offered undertakings not to use the Claimant's confidential information, not to associate himself with the Claimant other than as a former employee and not to fix labels on behalf of the Second Defendant which showed a BAFE logo. They did not offer to give all the undertakings requested by the Claimant.

12. In a letter dated 22 December 2023 Fieldfisher wrote alleging further examples of Mr Mogford having used the Claimant's confidential and sensitive customer information. They made a number of detailed requests for signed undertakings and information. No substantive response was made to this letter. On 3 January 2024 Perrin Myddelton emailed Fieldfisher saying they were taking their client's instructions and would revert shortly. However, they never did.

<u>These proceedings</u>

13. On 13 March 2024 the Claimant filed a claim for breach of restrictive covenants and misuse of confidential information.

14. The Claimant filed particulars of claim which set out in detail the allegations of breach of the Employment Contract before and after termination. The Particulars alleged that, prior to the termination of his employment, Mr Mogford provided fire safety services to at least 5 known customers of the Claimant on his own behalf or on behalf of the Second Defendant and that Mr Mogford approached a further unknown customer offering his services.

15. The Particulars further alleged that, subsequent to Mr Mogford's termination of his employment, Mr Mogford provided fire safety services to at least 9 known customers of the Claimant and to 1 unknown customer (see paragraphs 31 to 39 of the Particulars of Claim). It is the Claimant's case that this breached Mr Mogford's duties under Appendix 2 of the Employment Contract and that this could only have been achieved through the use of the Claimant's confidential information in the form of customer details including:

    i) Customer names;

    ii) Customer sites;

    iii) Key individual's details;

    iv) Contact information; and,

    v) Services offered to those customers including dates and pricing information.

16. The Claimant also contended that the Defendants have been passing off as the Claimant.

17. The claim form and Particulars of Claim made clear that the Claimant would seek interim and final injunctive relief. On 15 March 2024, the Claimant applied for an interim injunction to prevent Mr Mogford from breaching the restrictive covenants, breaching his duties of confidentiality, to deliver up the confidential information belonging to the Claimant and to provide affidavit evidence.

18. In a letter dated 18 March 2024 Fieldfisher served the claim form, the Particulars of Claim and three witness statements which supported the account in the Particulars of Claim. Those statements came from Tina Wood, Keith Kingsley and Steven Garry.

19. In a signed witness statement dated 7 April 2024 Mr Mogford responded to the Claimant's witness evidence. In essence, he admitted working for many of the Claimant's former customers but said that they approached him. He denied holding any confidential information relating to the Claimant. He claimed that the Claimant's former customers had given him their contact details and other such information unsolicited. He also made allegations of racist and dangerous practices at the Claimant and alleged that he was not given all the pay he was entitled to.

20. In a defence and counterclaim, dated 15 April 2024 and drafted by Perrin Myddelton, the Defendants neither admitted nor denied the detailed allegations in the Particulars of Claim about Mr Mogford soliciting the Claimant's customers. The Defendants contended that the Claimant was not entitled to relief because:

    i) The clauses relied upon are unenforceable;

    ii) The Claimant had delayed bringing the application; and/or,

    iii) The Claimant had engaged in a repudiatory breach of contract which has released Mr Mogford from his obligations.

21. A notice of change dated 17 April 2024 indicated that Perrin Myddelton had come off the record and Mr Mogford would now be acting in person.

22. On 22 April 2024 the Claimant filed a Reply in which they pointed out that the Defendants should be able to admit or deny the detailed allegations of soliciting former customers as those facts were within Mr Mogford's knowledge.

23. A hearing took place before me on 30 April 2024. Following that hearing, I provided a draft embargoed judgment to the parties. The Claimant submitted that one of the issues in my draft judgment – i.e. observations I made on the form and clarity of the draft order - had not been canvassed at the hearing. I saw the force of that submission and made directions for there to be a further hearing, which took place on 10 May 2024. Further to my directions after the first hearing, Mr Mogford has provided a further statement, to which he has attached some handwritten names and telephone numbers he obtained from clients when he was working for the Claimant. For example, the first entry is the name of a company and a telephone number which appears on the home page of the company if you search for it on Google. That telephone number was listed on that homepage as the company's contact details.

24. At that hearing, Mr Reay made submissions on the confidentiality injunction and the concerns I had expressed in the draft judgment. He took me to some of the caselaw in this area and submitted that an express confidentiality provision does not oust the implied common law duties. If a contract had a definition of confidential information which didn't cover everything that would be covered by the implied duty, the implied duty would still exist unless expressly released.

25. He said that Clause 25 goes beyond customer lists. He said it was, on its face, enforceable. He submitted that it was similar to the obligation in reported cases. He submitted that one cannot say, just because contact details are on a website, therefore they are in the public domain, because the concept of being in the public domain doesn't cover the mere fact that anything could be found if you look for it in a certain way. He said this was recognised in *Roger Bullivant Ltd v Ellis* [1987] ICR 464.

26. He submitted that, in so far as the court wasn't happy with clause 25, the court could make a more limited injunction requiring Mr Mogford to deliver up and not use any list of customer details or any business cards.

27. Mr Mogford objected to Mr Reay's submission about someone stealing property. He said he did not steal anything. The names belonged to the clients themselves. No one controlled that. That was not proprietary information. He said he did not receive any material benefit in the contract being so restrictive and his salary was very low. He expressed concern that Mr Reay was now talking about a springboard restriction, which might continue into his 80s, and now making submissions on fire services, like fire alarms, not just fire alarms. He said the order sought was too broad – it would mean he was not allowed to work within 5 miles of where he last did a job.

28. In response to a submission from Mr Reay that the customers on his list were only valuable if they require a fire service, Mr Mogford pointed out that every company requires a fire service. He said the order was becoming way too broad because he could not contact any single customer. He objected to being accused of being deceptive. He said he had been nothing but open and candid. He was not the one

who had been omitting evidence. When he first told the Claimant about his company he got suspended. He asked how anyone is supposed to know whether someone had worked with the Claimant in the last 12 months. He said they had omitted from their evidence the fact that he resigned. He asked how can they claim any injunction when they have sought to mislead the court. He said there was zero proof that he had been anything other than dishonest. He said they broke clause 23. He said they deliberately docked his pay. They never intended to pay. They broke the law and the DPA. They changed their reasons after the fact. He asked how we know which customers he brought in – e.g. from his own doctor's surgery. He said it was not his fault if the contract was not well written. If it was not written, it shouldn't count. He said restrictive covenants were not standard in the industry. He said Denis Morgan was working for someone else before he started on his own. The only thing that is consistent in the business is people working, leaving and starting own business. He said it already was a free-for-all – that was how every company starts. He said the Claimant had misled court on how much he earns.

29. In reply, Mr Reay said that Mr Mogford had mischaracterized what the Claimant was asking for. I confirmed with him that the order would not prevent Mr Mogford from working for the Claimant's customers, only those Mr Mogford had dealt with in the last 12 months.

30. At the hearing, each party said they could be ready for a trial before 27 October 2024. However, in subsequent email correspondence with the court, Mr Mogford said he did not think he could be ready by then.

Legal Framework

31. The test for injunctive relief is that set out in *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396:

    i) Is there a serious issue to be tried?

    ii) Would damages be an adequate remedy?

    iii) Where does the balance of convenience lie?

The first issue - a serious issue to be tried?

32. Mr Reay submits that this test is not a particularly onerous one for an applicant to establish. He cites *Planon Limited v Gilligan* [2022] EWCA Civ 642, where Nugee LJ said at [102]:

> "*At the first stage of the analysis the question is whether there is a serious issue to be tried. This is not a demanding test, and it really only serves to exclude the case where the claim is frivolous or vexatious, or otherwise demonstrably bad. If a restrictive covenant is clearly wider than is reasonably necessary for the protection of the employer's legitimate interests, then the Court can so hold and refuse an injunction, but prolonged examination of the merits at the interlocutory stage is not appropriate and in many cases of this type, as the*

> *Judge rightly found here, there will be at least a serious issue to be tried.*"

33. In the course of submissions, I directed Mr Reay to the next paragraph of *Planon*, i.e.:

> "*It is also well established however that at the third stage of the analysis, when considering the balance of convenience, the Court may, in cases of this type, undertake some assessment of the merits: Lansing Linde v Kerr [1991] 1 WLR 251 at 258C per Staughton LJ. But I emphasise, as Staughton LJ did, that this is merely "some assessment" or as Bean LJ refers to below, "a preliminary view*".

34. Mr Reay accepted that this was a case of a similar type to *Planon*. It is a case where there may not be a final hearing until after the end of the 12-month period which is covered by Appendix 2. It follows that this is a case where I need, at least at the third stage, to make some assessment of the merits.

35. In my judgment there are serious issues of fact and law to be tried.

36. One serious issue of fact, which could only be resolved at a final hearing, is whether Mr Mogford has solicited the customers he dealt with when he was employed by the Claimant. His case, set out in a witness statement and reiterated in the hearing before me, is that he did not solicit these customers. He admits accepting instructions from former customers of the Claimant known to him as a result of his employment with the Claimant. However, he denies that he solicited them. He says that they all approached him and asked him to work for them and gave him their contact details freely.

37. On the other hand, there is evidence, in the form of witness statements, from Tina Wood, that Mr Mogford has approached the customers he had dealt with when working for the Claimant and solicited work from them. This factual dispute can only be resolved at a substantive hearing. It is clear from Ms Wood's evidence that there is a serious factual issue to be tried in relation to this.

38. One issue of law which can only be finally determined at a final hearing is whether the terms of Appendix 2 of the Employment Contract are enforceable. Even on Mr Mogford's case, he has not complied with the obligations in §2.2 of Appendix 2 of the Employment Contract. He has dealt with and/or accepted instructions from clients of the Claimant, with whom he dealt when he was employed by the Claimant, without obtaining the prior written consent of the Claimant. Mr Mogford's primary defence to this is that the clause is unenforceable because it was an unreasonable restraint on competition.

39. On this issue, Mr Reay pointed in his skeleton argument to limits on the covenants in Appendix 2, i.e.:

    i) They do not prohibit competition; they prohibit the solicitation of the Claimant's business;

ii) Mr Mogford is not prevented from approaching or working for all of the Claimant's clients, he is only restrained from approaching those clients of the Claimant who placed business with the Claimant in the last 12 months of Mr Mogford's employment with the Claimant and, of those clients, he is only restricted from approaching or working for those with whom he had dealt;

iii) The restriction is limited to 12 months; and,

iv) Mr Mogford can also ask for written consent to solicit and deal with such clients and that consent can only be withheld in so far as may be necessary to protect the Claimant's reasonable business interests.

40. As for the clauses in relation to confidentiality, Mr Reay submitted, before the first hearing, that the scope of the provision was no wider than the scope of the provision upheld and enforced in *SBJ Stephenson Ltd v Mandy* [2000] F.S.R. 286.

41. At the second hearing, I heard further submissions on the clauses relating to confidentiality. I expressed concerns about whether Clause 25 went too far to be reasonable, was unenforceable and/or was unclear. I will address those concerns below in more detail below.

42. It is neither necessary nor appropriate for me to make a final ruling on whether the covenants in the Employment Contract relied on by the Claimant are enforceable. That will be for a final hearing, assuming this case reaches such a hearing.

43. However, because a final hearing will likely not take place before 27 October 2024, I do think I should make some assessment of the merits of the arguments in relation to Appendix 2 in particular. I think there is a reasonably strong argument that the terms of Appendix 2 are and were enforceable.

44. I accept the submission that a company working in this field is likely to rely on repeat custom – customers who require regular servicing. I accept also that a company working in this field needs to be able to send out their field engineers to meet customers face to face. They need to be able to trust that those field engineers will not try to solicit those customers to cancel their contracts with the employer and give them the business instead at a lower price. As a result, I think there is a reasonably strong argument that §2.1 of Appendix 2, the clause that prevents an employee for 12 months from soliciting business from customers they have dealt with, is reasonable. Indeed, it is not clear to me that Mr Mogford disagrees: his case was not that it was acceptable for him to solicitor the customers he dealt with but that he did not solicit them – they approached him.

45. §2.2 of Appendix 2 goes further than §2.1 and prevents an employee, without prior written consent, for 12 months, from dealing with or accepting instructions from a client with whom the employee dealt when they were employed by the Claimant. However, I accept that there is a reasonably strong argument that this is reasonable too. As the evidential conflict in this case demonstrates, it is often difficult to establish who approached who to start a new contractual relationship. §2.1 on its own might be difficult to enforce. §2.2 provides a clear rule for a limited length of time. Furthermore, there is an important limit on the extent of §2.2 – the former employee can seek written consent of the Claimant to work with a former client and that consent

can only be withheld so far as reasonably necessary to protect legitimate business interests. That possibility, of obtaining written consent, is a powerful factor in support of the Claimant's argument that §2.2 is reasonable.

46. Mr Mogford's focus was on Appendix 2 rather than the clause 25. His case was simply that he did not take any confidential information. He accepted that he received business cards and contact details from customers when he was employed by the Claimant. However, he did not consider that such information was confidential. However, he accepted this was a legal issue which was difficult for him to comment on.

47. In my judgment, the Claimant's arguments in relation to clause 25 are not as strong as they are in relation to Appendix 2. I think that there is a serious issue to be tried as to whether clause 25 is reasonable. I would go no further than that. I return in the discussion below to some of the uncertainties that arise around the application of clause 25. I did not find the comparison to *SBJ Stephenson v Mandy* helpful as the confidentiality clause in that case was drafted differently and the context was different. There was no uncertainty, for example, about whether contact details which would be available to the public were confidential.

48. If Clause 25 prevents employees from ever (even many years later) calling a former customer on a telephone number which is freely available on the internet, just because that customer gave them that telephone number when they were employed by the Claimant, then that would go much further than Appendix 2 and arguably beyond what is reasonable to protect the Claimant's legitimate interests. In the course of submissions, I used the example of the first telephone number attached to Mr Mogford's latest statement – it was the telephone number of a public company and it appears on that company's home page if you do a Google search. I asked Mr Reay whether that telephone number was confidential within the meaning of clause 25. He did not answer 'Yes' or 'No' to that question but instead said that it would depend on other matters. He said it was very difficult to address hypothetical questions and then began to posit another, different hypothetical scenario. This exchange did not allay the concern I had as to whether clause 25 is reasonable or sufficiently clear. I will return to those concerns later when addressing the scope of the order.

49. In summary, applying the test in *Planon*, Appendix 2 is not *clearly wider than is reasonably necessary for the protection of the employer's legitimate interests.* As for Clause 25 I would also say, with some hesitation, that the relatively low threshold appropriate at the first stage of American Cyanamid is met.

50. The Defendants' allegation that there have been breaches of the Employment Contract and the DPA by the Claimant does not alter my conclusion that there are serious issues to be tried. Whether there have been such breaches and what their consequences are seem to me to be matters which need to be tried in a substantive hearing and cannot be resolved at this stage.

51. In his submissions, Mr Reay accepted that the Claimant owes Mr Mogford £3,084.98 in relation to an unpaid commission. However, he submitted that this commission was only due for payment in November 2023, i.e. after the termination of the Employment Contract. He said it was the Claimant's case that it was entitled to withhold this sum by way of set off. In other words, it was not a breach of the

Employment Contract but something the Claimant was entitled to do. In any event, even if a breach, he submitted that the withholding of such a relatively small sum of money would not entitle Mr Mogford to purport to terminate contract or get out of ongoing liabilities. He also submitted that, in respect of other allegations, there were not sufficient particulars but Mr Mogford had never accepted a repudiatory breach and so the Employment Contract could not have been brought to an end.

52. Mr Mogford said that the Claimant had zero intention of paying him the money they owed him. He said £3,000 was a lot to him. He said the Claimant's intention in taking that money was malicious. He said 'you shouldn't be stealing people's money'.

53. I cannot resolve the issues in the counterclaim at this stage. However, for the reasons given by Mr Reay summarised above, I do think there is a reasonably strong argument that the obligations in the Employment Contract were not and are not extinguished by reason of the breaches alleged by Mr Mogford.

54. In my judgment, the first limb of the American Cyanamid Test is satisfied.

Adequacy of Damages

55. The Claimant submits that damages will not be an adequate remedy.

56. They submit that, if no injunction were granted and the Claimant succeeded at a final hearing, the damage done by the Defendants would likely to be difficult to quantify as breaches result not just in an immediate loss of revenue but also a potential loss of a commercial relationship and therefore a loss of future revenue.

57. Secondly, they submit that there is a real risk that the Defendants may not have the resources or assets so as to be able to pay any damages awarded after a substantive hearing.

58. Thirdly, the submit that Mr Mogford is likely to continue to breach his obligations unless restrained.

59. I understood Mr Mogford to accept that his resources were limited. I do not understand there to be any dispute that he would be unlikely to have the resources to pay the damages and costs that the Claimant might recover if they took this case to trial and won.

60. In my judgment, for that reason alone, it is clear that damages are not an adequate remedy. I turn therefore to the third stage of the *American Cyanamid* test.

Balance of Convenience

61. Mr Reay submitted that the balance of convenience here favours granting the injunctions.

62. First, he submitted that the order sought seeks to enforce the status quo by preventing the Defendants from causing harm to the Claimant's business in the interim pending trial.

63. Secondly, he submitted that if it should turn out that the injunction was wrongly granted, the Defendants will be adequately protected from their losses by the Claimant's cross-undertaking in damages.

64. Thirdly, by contrast, he submitted that, if the injunction is not granted and the Claimant should succeed at trial, it is doubtful whether the Defendants will be able to compensate the Claimant for loss and that loss would be difficult to establish.

65. As for delay, he submitted the Claimant has recognised that this would make the application unsuitable for determination on a without notice basis and has made the application on notice, however, beyond that the delay is not relevant to the disposal of the application. He relied on the correspondence, set out earlier in judgment, and the attempts to obtain suitable undertakings and avoid litigation.

66. He submitted that it is relevant, at this stage, to consider the respective merits of the parties' positions in light of the fact that it may not be possible to have a speedy trial prior to 27 October 2024 (when the restrictions in appendix 2 of the Employment Contract would expire) and, at best, a significant part of the 12-month term of the Appendix 2 restrictions will have elapsed. He submitted that, on the balance of probabilities and in light of the available evidence, the Claimant is likely to succeed in demonstrating that Mr Mogford has acted in breach of the enforceable restraints (Mr Mogford having effectively admitted as much) in Appendix 2 of the Employment Contract.

67. He submitted that, if, as Mr Mogford contends, he has no confidential information to deliver up then nothing will be delivered up and he will not be prejudiced by the making of the order.

68. In oral submissions, Mr Reay developed his case on delay. He submitted that delay does not amount in and of itself amount to a reason why an injunction would be refused. He said there were two circumstances where delay might be a reason to refuse an injunction – where there was insufficient time left to make the injunction a worthwhile exercise and what he described as 'the quasi estoppel point'. He said this case was not in either. An injunction would still be beneficial. The confidential information requirements exist indefinitely and there was still a significant period to elapse before 27 October 2024. He said this had not been 'sprung on' Mr Mogford.

69. I asked Mr Reay which of these two categories *Planon* fell into. In his response, Mr Reay accepted that there were not only two categories where delay might be a reason to refuse an injunction. He accepted the point I put to him that the relevance of delay depends on the impact on the parties and the balance of convenience. He pointed to factual distinctions with *Planon* – in *Planon* the injunction would mean that the employee lost their employment. The injunction sought in this case would not stop Mr Mogford from going to work or even from competing, so long as it was not with clients he had dealt with when employed by the Claimant.

70. I asked him about the delay between the Fieldfisher letter of 22 December 2023 and bringing this claim in early March 2024. He said time was needed to prepare the documentation.

71. I asked him if the damage had already been done. He submitted that there was further damage that could be done. He said the Claimant did not know the full extent of damage that has been done. He said they were only part of the way through the 12-month period and there was still a significant period to run on covenant. He compared the number of known customers with whom Mr Mogford is dealing (9) with the number of customers Mr Mogford had invoiced (442) and pointed to the scope for the damage to worsen.

72. I asked him about the extent of the financial damage to the Claimant caused by Mr Mogford. He pointed to part of Ms Wood's statement which suggested that Mr Mogford brought in around £200,000 a year to the Claimant. He accepted that not all of that business would be lost and he pointed to the fact that the claim form sought between £50,000 to £100,000.

73. Mr Mogford said that it was not true that he could take away anything like £200,000. He was dealing with national customers tied into long term contracts – sites like Fuller's.

74. Mr Mogford said that the delay started in September 2023. The Claimant knew he had a business then. They could have applied for an injunction then and got one. They knew his intentions to start another company. He said they had waited 230 days, which was a long time. He said that the Claimant wanted to cause as much financial harm to him as possible and wanted to 'ramp it up'. He said they had never asked him for a 'sit down'.

75. I asked Mr Mogford what the impact on him would be if I made the order sought. He said it would pretty much put him straight under. He said 90% of his customers were former customers of the Claimant. He said, however, that only 50% of his turnover was work from the Claimant. He explained that the Claimant's former customers liked him and gave him work at different sites, sites where he had never been sent as an employee of the Claimant – in essence, work that the Claimant would never have got.

76. I asked about the impact of the delay. He said that if the Claimant had taken earlier action, he would probably have got a job somewhere else. He said he had sunk around £35,000 of his own cash into the Second Defendant. He was unclear on whether he could get a job somewhere else but even if he could, he said it would mean writing off that £35,000. He was concerned about his prospects of finding a job as he said he was not going to have an enhanced DBS and wouldn't be able to gain a reference.

77. In reply, Mr Reay said that what Mr Mogford had told me, about the financial impact of the injunction, was not in evidence. He said that, in any event, it did not meet the threshold, which he said applied, of exceptional hardship. He pointed to what would happen if the injunction were refused and this case went to a full hearing and Mr Mogford lost. In such a case, he submitted, Mr Mogford would be liable to damages equal to the work done. He said it would do Mr Mogford no favours to allow him to continue to breach his obligations, only then to be faced with a claim for damages that puts him in an even worse position.

78. In my judgment, for the reasons that follow, the balance of convenience does weigh in favour of granting some form of injunction. I will address the terms of the injunction below.

79. First, for the reasons set out above, I do think there is, at the very least, a reasonably strong case that Mr Mogford is currently in breach of enforceable terms in Appendix 2 of the Employment Contract by working for clients he dealt with when he was an employee of the Claimant without the Claimant's prior written consent. It is apparent that, unless I grant the order, Mr Mogford will continue with that work.

80. Secondly, I accept that the Claimant will be significantly prejudiced if no injunction is granted and they win at trial. They will likely have lost, in the meantime, further business that may be difficult to quantify. Furthermore, even in so far as those damages can be quantified, it seems unlikely that they will be able to recover those damages from Mr Mogford after the trial. He has been working for himself for more than 6 months and is low on resources. It is unlikely that he will be in any better financial position at any substantive hearing.

81. Thirdly, the cross-undertaking the Claimant has offered gives Mr Mogford a level of protection if the roles are reversed and he wins at a final hearing. If he were to lose, for example, the £35,000 he invested in the Second Defendant by reason of the injunction, he could recover that loss if he won at trial, by reason of the cross-undertaking.

82. Fourthly, I think there may be more scope for the Second Defendant to survive after an injunction than Mr Mogford has realised. The terms of the injunction (and the terms of the Employment Contract) permit him to seek the prior written consent of the Claimant to work for clients he dealt with when he was employed by the Claimant. The Claimant cannot withhold such consent unless it is reasonably necessary to protect their legitimate business interest. Mr Mogford has told me that much of his work is for former clients of the Claimant at sites which the Claimant did not service. In other words, much of his work is work that the Claimant never had and never would have had. It is open to him to write to the Claimant and seek their written consent to continue that particular strand of his work. I make no ruling on whether the Claimant would need to agree such requests. However, they would need, at the very least, to consider whether it was reasonably necessary to protect their legitimate business interests to refuse that request.

83. Fifthly, given my preliminary view on the merits of the arguments in relation to Appendix 2, there is force in Mr Reay's submission that, in the long run, it may do Mr Mogford no favours to permit him to continue to breach a term of the Employment Contract.

84. I have given careful thought to the impact of the delay in this case. On the Claimant's case, the start of the delay was not September 2023, as Mr Mogford alleged. They say that they did not know, at that stage, that Mr Mogford would be in competition in the same area of the country where he had worked for the Claimant.

85. In any event, whether the clock started in September or October, it seems to me that the Claimant was entitled to try to resolve matters without litigation. The correspondence with Mr Mogford's former solicitors consist, in my judgment, of

reasonable attempts to persuade Mr Mogford to take steps that would have made litigation unnecessary. This correspondence ended around the start of January. There was a holding email from Mr Mogford's former solicitors on 3 January 2024 and nothing of substance after that. The Claimant was entitled to wait for at least a few days for a substantive response.

86. I further accept that it would have taken time, once it was realised that litigation was necessary, to put the evidence and legal submissions together. The two months which the Claimant took to do this does not suggest that they saw the matter as one of great urgency. However, I do not think that taking two months instead of two or three weeks shifted the balance of convenience. I accept the submissions of Mr Reay that *Planon* was a materially different factual position. The injunction sought will not result in Mr Mogford losing a job. He can continue his company. He can either focus on customers who he did not deal with when he worked for the Claimant or seek the written consent of the Claimant to work for customers he had so dealt with, e.g. at different sites. In any event, the position he finds himself in now is not materially different to the position he would have been if this application had been filed 6 weeks earlier.

87. It follows that I accept that an interim order should be granted. The next question is what form that order should take.

The Form of Order

88. The substance of the order sought covers two matters – the provision of confidential information and solicitation/competition.

89. As to confidential information, the Claimant originally sought the following orders:

"*2. Until further order of the court, the Defendants will not:*

a. use or permit the use of any Confidential Information or any copies, notes or memoranda of Confidential Information; or

b. disclose or cause to be disclosed and will use his or its best endeavours to prevent the publication or disclosure of any Confidential Information, save that the Defendants shall be entitled to disclose Confidential Information required to be disclosed by law, regulation or any tax authority and the Defendant shall be entitled to confidentially disclose Confidential Information to professional advisers for the purposes of advising the Defendants.

3. The Defendants will deliver up to the Claimant's solicitors by no later than 4pm on [x] [x] 2024 any copies, notes or memoranda of Confidential Information in their possession or control including any business cards containing Confidential Information.

4. To the extent that the Defendants maintain that they have nothing to deliver up in accordance with paragraph 3 above, the Defendants shall by 4pm on [x] [x] 2024 file and serve an affidavit verifying the same.

5. The Claimant will preserve any material delivered up pursuant to paragraph 3 above until further or order of the court.

90. In the embargoed judgment and at the second hearing, I expressed my concern about the uncertainty of draft clause 2 – e.g. whether it would prevent Mr Mogford from using telephone numbers that were freely available. At the second hearing, Mr Reay suggested that instead of relying on §2 of the draft order as the basis for requiring Mr Mogford to deliver up the customer lists, there might be a separate order for Mr Mogford to deliver up of all the contact details and customer lists that he obtained while employed by the Claimant. He submitted that such an order would be justified because such lists are proprietary and belong to the employer. I accept that submission. That seems a sensible solution, which may give the First Defendant clarity on what he must do. I will make such an order for delivery up.

91. I asked what purpose §3 would serve when Mr Mogford had already made clear in signed witness statements that he did not have any confidential information beyond the telephone numbers and contact details attached to his statements. Mr Reay submitted that, at this stage, I cannot assume that Mr Mogford has told the truth in his witness statements. In my judgment, that must be correct. Mr Mogford gave me the impression of being an honest and candid person but it is not my role at this stage to make findings on credibility. Further and in any event, there is much caselaw on how findings on credibility need to be rooted in analysis of the contemporary documents rather than demeanour.

92. Mr Reay also said that to obtain an affidavit Mr Mogford would have to see a solicitor who could give him advice. I asked Mr Mogford at the first hearing about whether he would approach a solicitor to obtain an affidavit. He seemed reluctant to do so, given the cost. In the light of the directions I made after the last hearing, Mr Mogford has provided a further witness statement attaching all the contact details he obtained during his employed for the Claimant. On reflection, I do see the benefit, to both parties and especially Mr Mogford, of an order requiring him to obtain an affidavit, with the consequential need for him to speak to a professional who can give him independent advice on the consequences of the order I make and on what needs to be contained in the draft affidavit.

93. I had two further concerns about §2 of the draft order.

94. The first was that it may go beyond Clause 25. The Employment Contract contains a definition of confidential, which the draft order repeats, which leaves considerable scope for uncertainty – it seeks to draw a distinction between information which is '*readily accessible*' to a member of the public as opposed to information which '*could in theory be accessed by a member of the public if they were minded to do so*'. It is not clear to me whether, applying that definition, an email address or telephone number for a business which could be found online through research on Google would be confidential or not. I did not find the answer to be much clearer after the second hearing. It was unclear to me how this very broad definition of confidential, which would capture information in the public domain, fitted with another aspect of the wording of clause 25, i.e. the part which states: '*The restriction in the paragraph above shall not apply in respect of any information which is or has become in the public domain (otherwise than by a breach by you of this clause).'* Mr Reay submitted that there was no inconsistency between this part of Clause 25 and the wording of the draft order – he said, in effect, that 'in the public domain' in this context meant the same thing as not 'confidential' applying the definition in the contract. It is not obvious to me that 'in the public domain' means the same things as

'readily accessible'. However, this concern (that the draft order does not match Clause 25) may be alleviated if the order includes the specific 'carve out' wording of clause 25 (i.e. *The restriction in the paragraph above shall not apply in respect of any information which is or has become in the public domain (otherwise than by a breach by you of this clause)*. I so direct.

95. I was also concerned that §2(a) of the draft order would or might prevent Mr Mogford from communicating with the Second Defendant's clients who used to be the Claimant's clients. If their contact details are confidential information, then it might be said that corresponding with those clients, even to cancel work, is 'using' the confidential information. I do not think it would be right for Mr Mogford to be put in a position where he is not sure whether contacting a customer, even to say he cannot work for them because of a court order, is a contempt of court. Mr Reay has submitted that 'use' means 'use to their advantage'. However, that in itself begs questions, as to when use is to someone's advantage. It also seems to envisage me rewriting the draft order in a new way which does not reflect the contract. However, what I am prepared to do is to add wording to the effect that Mr Mogford may not use confidential information 'save to comply with other requirements of this order'. I have seen such wording in some of the cases that Mr Reay took me to.

96. As I said above, if Clause 25 prevents Mr Mogford from ever communicating with the Claimant's former clients, simply because they once provided him with contact details when he was working for the Claimant, even if those contact details could be found on Google, then I think that arguably goes much further than Appendix 2 and too far. As a result, I have hesitated to make an interim order reflecting Clause 25. In the end, I have decided that as there is a triable issue, such an order should be made. Mr Mogford will need to deliver up his existing customers lists, by reason of my order. He can then take advice on whether, when and how he may, consistently with my order, contact any customers who were on that list after 27 October 2024. He mentioned, for example, that some of them were customers he drove past every day. He also spoke of customers he introduced to the Claimant. I make no ruling on whether, when or how he can, after 27 October 2024, contact any former customers of the Claimant whose contact details were provided to him and whose contact details he has delivered up. That is a matter on which Mr Mogford would be well advised to take independent legal advice and/or to discuss with the Claimant.

97. For these reasons I will make an order similar to that set out in §§2-5 of the draft order but with variations.

98. I am prepared to make the order in §6 of the draft order, i.e.:

> *"6. Until 27 October 2024 or further order of the court, the First Defendant shall not without the prior written consent of the Claimant (such consent only to be withheld so far as may reasonably be necessary to protect the legitimate business interest of the Claimant) , whether alone or jointly with others, or as shareholder, advisor, principal, partner, agent, director, employee, consultant or otherwise of a Competing Business, directly or indirectly:*
>
> 1. *solicit or canvass, or attempt to solicit or canvass, business from any Client with whom the First Defendant dealt whilst employed by the Claimant; or,*

2. *deal with or accept instructions from any Client with whom the First Defendant dealt whilst employed by the Claimant."*

99. The order should also include the definition of 'Client" set out in §1 of the draft order, i.e. "*a person, firm or corporate body who placed business with the Company at any time during the period 28 October 2022 to 27 October 2023 inclusive and was not a client known to the First Defendant prior to his employment with the Claimant who he introduced to the Company."* Mr Mogford has expressed concerns that he could not seek to do business with any of the Claimant's former customers. The order does not go that far. It only restricts him from dealing with clients that he had dealings with whilst employed by the Claimant. Further, he has the right to write to the Claimant and ask for their written consent to deal with those clients and that consent can only be withheld if reasonable.

100. I asked if it was possible for the Claimant to provide a list of the clients meeting this definition in order to give Mr Mogford greater clarity. I thought that would mitigate the risk of future disputes about whether the Defendants were in breach of the order. Mr Reay told me, at the start of the hearing, that he had such a list but did not want to provide it to Mr Mogford as it would cause the very damage the Claimant was trying to prevent. The Claimant was concerned that providing Mr Mogford with the list would enable him to breach the contract further. I see the force of that submission and so I will not attempt to particularise 'client' any further than it is particularised in the Employment Contract.

Costs

101. The Claimant relies on the following authorities. In *Lawrence David v Ashton* [1989] IRLR 22, Balcombe LJ said:

> "*A defendant who has entered into a contractual restraint, which is sought to be enforced, should seriously consider, when the matter first comes before the court, offering an appropriate undertaking until the hearing of the action, provided that a speedy hearing of the action can then be fixed and the plaintiff is likely to be able to pay any damages on his cross undertaking. It is only if a speedy trial should not be possible that it would then be necessary to have a contest on the interlocutory application. I do not believe that, in this comparative limited type of case – limited in numbers, that is – the courts of first instance will not be able to arrange for a speedy hearing of the action, and thus avoid time being spent, usually necessarily, on contested interlocutory applications.*"

102. In *Picnic at Ascot v Kalus Derigs* [2001] F.S.R 2 at [12], Neuberger J said:

> "*there may be cases where the balance of convenience is so clear, and the outcome of hearing of the application for the interlocutory injunction should be so plain for the parties, that the court should conclude that an order should be made against the defendant for wasting time and money in fighting the issue (whether or not the defendant eventually concedes)*"

103. The Claimant submits that the current case is just such a case. I do not agree. The Claimant is a large national company. The Second Defendant is a small business. Mr Mogford had a reasonable argument that the balance of convenience weighed in his favour given the delay and the impact an injunction will have on him. The balance of convenience was not so obvious as to justify a departure from the usual outcome of costs reserved. Furthermore, I have not made the order requested in precisely the terms first suggested and hearings were necessary. In my judgment, costs should be reserved.

104. An embargoed draft judgment and a draft order was sent to the parties. The draft order included case management directions, proposed by the Claimant, to progress this case to a hearing. Since then, each of the parties has sent emails to the court. Mr Mogford has said that he may have overstated his readiness for trial. He said he would not be ready by October and thought 12 months would give him enough time to learn the law. Mr Mogford wrote again, saying that I had made errors of law in my judgment. Mr Mogford wrote a third time, saying that his former solicitors had put him on the back foot and it was too much to comply with the order in the time asked for. Mr Mogford wrote a fourth time, saying it was unclear what 'client' meant. He also suggested that the judgment should be set aside as the Claimant has commercial interests inside the court, with regards to carrying out fire protection services, and there was a conflict of interest. Mr Mogford wrote again saying he could send over the contact list but could not comply with the other dates as he did not know what they meant. He also mentioned a health matter. I asked the Claimant for a response and whether the case management directions could be replaced by something else. The Claimant submitted that I should make the case management directions they proposed and that the timetable was not unduly tight. In the alternative, the Claimant submitted that the court could provide for a 2.5 hr CCMC on the first available date after 28 days.

105. It is understandable that Mr Mogford, as a litigant in person, might communicate with the court by email after receipt of an embargoed draft judgment. It is particularly understandable when I was willing to grant a further hearing, at the request of the Claimant, after an earlier embargoed judgment raised concerns that had not been canvassed at the first hearing. However, these communications cannot go on indefinitely. There is a public interest in finality. This is a final judgment and I do not intend to respond to further communications from either party.

106. I reject Mr Mogford's submission that the judgment should be set aside on the grounds of conflict of interest. I have seen no evidence, either way, as to whether the Claimant provides services to the court but, even if they do, that cannot prevent the Claimant from having a right of access to the court.

107. I reject Mr Mogford's submission that I should have refused to grant an injunction on the basis that the Claimant had not come with 'clean hands'. As explained above, I am not in the position to make findings of fact. If and in so far as Mr Mogford's factual allegations against the Claimant are allegations that they have not come with 'clean hands' they will need to be resolved at the final hearing.

108. I interpret Mr Mogford's submission that I made errors of law and that he should have a new hearing as an application for permission to appeal against my decision. I refuse permission to appeal. I do not think there is a realistic prospect of the Defendants'

establishing that I erred in exercising the discretion I have in the way I did. If Mr Mogford wishes to pursue an appeal, he will need to apply to a higher court for permission to appeal.

109. It is not for the court to give legal advice on the meaning of 'client'. However, I would emphasise (or re-emphasise) that paragraph 7 of my order does not prevent Mr Mogford from soliciting business or dealing with all of the Claimant's 'clients', only those he dealt with when employed by the Claimant.

110. I am sympathetic to Mr Mogford's wish to have more time. It is strongly in his interest to instruct a legal representative. Even if he cannot afford the full fees of representation to a final hearing, it is in his interest to instruct a solicitor to help him produce the affidavit required and give him advice on this order and the proposed case management directions. In order to assist him, in that regard, I will not make the case management directions which the Claimant asks me to make. Instead, I will make the alternative order proposed by the Claimant (but with a variation of timing) – i.e. that there be a 2.5 hr CCMC on the first available date after 42 days. That should give Mr Mogford time to obtain legal advice before the CCMC.