IN THE HIGH COURT OF JUSTICE **2BM40032**
QUEENS BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
MERCANTILE COURT

BETWEEN: -

SAFETYNET SECURITY LIMITED

Claimant

-and-

(1) LEONARD COPPAGE
(2) FREEDOM SECURITY SOLUTIONS LIMITED

Defendants

JUDGMENT

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1. The Claimant is a security company, incorporated on 2nd August 2003, employing about 250 people who are mainly security guards and door supervisors for premises, including clubs, pubs and bars. It is a relatively small business with just 94 customers. Mr Otis Hanley is its sole shareholder and the Chief Executive.

2. The First Defendant joined the Claimant on 9th July 2008 and later became its non-shareholding Business Development Director with a written contract of employment, most recently signed on 5th May 2010.

3. One of the terms of his employment was a restrictive covenant entitled 'COMPETITION AGREEMENT':

"*It is a condition of your employment, that for a period of six months immediately following termination of your employment for any reason whatsoever, you will not, whether directly or indirectly as principal, agent, employee, director, partner or otherwise howsoever approach any individual or organisation who has during your period of employment been a customer of ours, if the purpose of such an approach is to solicit business which could have been undertaken by us*"

4. On Thursday 12th April 2012, Mr Hanley held a redundancy consultation meeting with the First Defendant. The following Monday 16th April 2012 the two met again at a minuted meeting after which the First Defendant resigned by e-mail. The next day, Tuesday 17th April 2012, the Second Defendant was incorporated by Mr Joshua Hadley, a 21 year old trainee electrician and part time door supervisor. The next day, Wednesday 18th April 2012, Mr Hanley received e-mails from two customers, Mr Damien Dixon of Lab 11 and Mr Ryan McGillicuddy of the Prince Albert, immediately terminating their relationship with the Claimants. Mr McGillicuddy stating that the lost relationship with the First Defendant being the reason to look for another service provider. On Saturday 21st April 2012, another customer qclub emailed Mr Hanley also terminating its contract with the Claimant in similar vein as Mr Dixon in citing the Claimants' 'Company restructure' as the reason. On Monday 30th April 2012 two more customers, Fixxion Warehouse and Kent Davis of Rainbow, emailed Mr Hanley terminating their relationship with Mr Davis openly stating that they were moving to the Second Defendant.

5. The Claimant alleges that the First Defendant is the directing mind of the Second Defendant and that he has 'solicited' five of their customers in breach of the restrictive covenant. The Defendant denies these allegations and counterclaims that the Claimant was in repudiatory

breach of contract in exercising a sham redundancy exercise and in any event the non solicitation covenant is unenforceable.

Issues

6. The following issues are required to be decided in relation to the Claim:
    a. Is the restrictive covenant enforceable?
    b. Did Mr Coppage owe the Claimant a fiduciary duty of "no conflict"?
    c. Did solicitation and/or breach of the fiduciary duty occur?
    d. Was Mr Coppage the "controlling mind" of the Second Defendant?
    e. Did, and if so, to what extent, the Claimant suffered loss by reason of breach of the restrictive covenant and/or breach of fiduciary duty?

7. The following issues stand to be decided in relation to the Counterclaim –
    a. Was there an implied term that the Claimant was to provide Mr Coppage with work?
    b. Was there a repudiatory breach –
        i. in that the Claimant was conducting a sham redundancy exercise, thus breaching the implied term of trust and confidence;
        ii. and/or in that Mr Coppage was placed on gardening leave without having been served with a notice of termination, in breach of the terms of the employment contract?
    c. Did Mr Coppage resign from his employment in response to the alleged repudiatory breach by the Claimant?
    d. Did, and to what extent, did Mr Coppage suffer loss by reason of the alleged repudiatory breach by the Claimant?

8. The Clause has appeared consistently as a term of Mr Coppage's employment throughout the various incarnations of the employee handbook and Mr Coppage has regularly and without complaint agreed to be bound by the clause being fully aware of its existence.

9. The usual principles of contractual construction apply, as identified by Lord Hoffmann in Investors' Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896, 912H–913E.

> *'Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*.'

10. The 'objective' of such a clause is critical to its interpretation.

> *'Agreements in restraint of trade, like other agreements, must be construed with reference to the object sought to be attained by them*.' Per Sir Nathaniel Lindley MR in Haynes v Doman [1899] 2 Ch 13, at p.25, quoted with approval by Lord Denning MR in Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472, 1481.

11. Historically, non-solicitation covenants have been viewed as the least form of restraint and therefore readily justifiable. Nonetheless, the guiding principle in evaluation of a restrictive covenant is that of reasonableness. Hence,
    a. First, the Court should consider the construction of the clause for its pure meaning.
    b. Second, the Court should consider the object of the restraint, here, protection of the Claimant's customer base and goodwill established therein.
    c. Finally, the Court must construe the clause in context and have regard to the factual matrix at the date at which the contract was made.

12. Counsel for the Defendants has submitted a number of authorities dealing with the enforceability of various restrictive covenants. However, precedents are of limited assistance: Austin Knight Ltd v. Hinds [1994] FSR 52. In any event, none of the cases cited sit on all fours with the instant case and are easily distinguishable as relating to employees in lesser roles than Mr Coppage and clauses which provide

an entirely different level of protection than the one the Court is tasked with construing in the instant case. Effectively, each case will turn on its own facts.

13. In my judgment, the non-solicitation clause relied upon by the Claimant is reasonable and thus enforceable. The clause is well drafted and unambiguous in its meaning and provides a wholly appropriate protection for the Claimant and its customer base whilst allowing for limits so that Mr Coppage was and is able to continue earning a living. Indeed, Mr Coppage's own evidence is that he and the Second Defendant have not had any problems obtaining work outside of the Claimant's customer base.

14. The Claimant is a relatively small business, with one branch and just 94 customers. It is Mr Coppage's own case that he was instrumental in the success and growth of the Claimant company –

    a. In the Defence, it is alleged that Mr Coppage *"was a key figure in its business operation being the main person who was able to and did bring and retain new business though not all clients were obtained through the first defendants"*

    b. In Mr Bhogal's (his erstwhile solicitor) witness statement, he states that Mr Coppage *"held a high level of responsibility and responsible for the general operation of the Company as a whole" and Mr Coppage "was marketed as the face of the Company"* .

    c. In his witness statement Mr Coppage boasts: *"I was responsible for at least one fifth of the Claimant's client base and income as a result of my pizzazz for business development and expansion"*

    d. In his affidavit Mr Coppage's states: *"Mr Hanley wanted me to be the face of his business"*

    e. Mr Ali, a Defence witness states: Mr Hanley "*had employed Lenny to be the face of the business and develop it as such*'.

15. Against that background the non-solicitation clause is restricted to a period of six months only and relates solely to solicitation of customers who were customers of the Claimant during the period of Mr Coppage's period of employment. Accordingly, both the duration of the restriction and the class of customer with whom Mr Coppage was not to deal have been appropriately confined.

16. It is suggested in the Defendants' Counsel's Skeleton Argument that the non-solicitation clause ought to have been restricted solely to customers with whom Mr Coppage had had dealings with over the last 12 months of his employment. Defence Counsel readily concedes that there is no obligation on the Claimant to limit the clause in this way.

17. In my judgment, on the specific facts of this case, such a limitation would not have provided the Claimant with the necessary protection –
    a. Mr Coppage played a large role in the Claimant and as "the face" of the Claimant he was readily identifiable with the goodwill built up within the Claimant's customer base; and
    b. Mr Coppage admitted in cross examination that he had contact with all of the customers of the Claimant since taking on the role of Operational Director in May 2010.

18. In my judgment the non-solicitation clause is reasonable and wholly enforceable.

Non Solicitation

19. In Sweeney v. Astle [1923] NZLR 1198 (as referred to in Employee Competition (2nd Edition), Stout J. noted that 'solicit' was a common English word, and in its simplified form, meant 'to ask' and that its other meanings included 'to call for', 'to make request', 'to petition', 'to entreat', 'to persuade.

20. In Equico Equipment Finance Ltd v. Enright Employment Relations Authority, Auckland, NZ (17th July 2009), the Member of the Authority

usefully rehearsed Sweeney and English law about the meaning of "solicitation" (and 'enticement away') in this context up to that point:

> '[26] 'MMs Enright's counsel refers the Authority to Black's Law Dictionary definition of a non-solicitation agreement as this:-
> *"A promise in a contract for the sale of a business, a partnership agreement, or an employment contract, to refrain, for a specified time, from either (1) enticing employees to leave the company or (2) trying to lure customers away".*
> [27] It is also submitted that if solicit means to entice, then appropriate synonymous for 'entice' include "tempt", "lure", "persuade", and "inveigle". I accept that solicit should be interpreted similarly.
> [28] In *Sweeney v Astle* Stout J noted that 'solicit' was a common English word, and in its simplified form meant 'to ask' and that its other meanings included 'to call for', 'to make request', 'to petition', 'to entreat', 'to persuade'.
> [29] The Employment Court in *Deloitte & Touche Group-ICS Ltd v Halsall* referred to *Sweeney* and also the Shorter Oxford Dictionary definition "to seek assiduously to obtain", "to ask earnestly or persistently for" and 'request' or 'invite'. More recently,
> the High Court in *TAP (New Zealand) Pty Ltd v Origin Energy Resources NZ Ltd* considered that solicit in its ordinary use "has connotations of impropriety or persistence" and then cited the definition from the Shorter Oxford Dictionary that had also been referred to in *Deloitte*.
> [31] It matters not who initiates the contact. The question of whether solicitation occurs depends upon the substance of what passes between parties once they are in contact with each other. There is solicitation of a client by a former employee if the former employee in substance conveys the message that the former employee is willing to deal with the client and, by whatever means, encourages the client to do so.
> [32] In my view, "canvass" is synonymous with soliciting. Both words involve an approach to customers with a view to appropriating the customer's business or custom. I consider a degree of "influence" is required. There must be an active component and a positive intention'.

21. In my judgment, this is an excellent dissertation on the meaning of the words "canvassing, soliciting and enticing away" in the context of the "non- solicitation clause".

22. As described in Employee Competition (2nd Edition), para. 5.255, questions posed such as these are instructive: *"Does the conduct evidence a specific purpose and intention to obtain orders from*

customers? Where it is his contact initiative with a customer, does he do something more than merely inform the customer of his departure?"

23. Restrictive Covenants under Common and Competition Law (6th edition), paragraph 3.4.1, the customer approach *"must involve some direct or targeted behaviour".*

24. Therefore a general advertisement to the world about availability for custom at a new firm or a specific notification to a client of departure from one firm to another does not cross the borderline; any activity or behaviour beyond would.

Findings of fact and evaluation of the evidence

25. The Claimant alleges solicitation by Mr Coppage of 5 of its customers. Mr Coppage denies it. There is a conflict of evidence in the witness testimony. The guidance given in the extra-judicial writing of the late Lord Bingham of Cornhill approved by the courts is therefore apposite. In "The Judge as Juror: The Judicial Determination of Factual Issues" published in "The Business of Judging", Oxford 2000, reprinted from Current Legal Problems, vol 38, 1985 p 1-27, he wrote:

". . . Faced with a conflict of evidence on an issue substantially effecting the outcome of an action, often knowing that a decision this way or that will have momentous consequences on the parties' lives or fortunes, how can and should the judge set about his task of resolving it ? How is he to resolve which witness is honest and which dishonest, which reliable and which unreliable? . . .

The normal first step in resolving issues of primary fact is, I feel sure, to add to what is common ground between the parties (which the pleadings in the action should have identified, but often do not) such facts as are shown to be incontrovertible. In many cases, letters or minutes written well before there was any breath of dispute between the parties may throw a very clear light on their knowledge and intentions at a particular time. In other cases, evidence of tyre marks, debris or where vehicles ended up may be crucial. To attach importance

to matters such as these, which are independent of human recollection, is so obvious and standard a practice, and in some cases so inevitable, that no prolonged discussion is called for. It is nonetheless worth bearing in mind, when vexatious conflicts of oral testimony arise, that these fall to be judged against the background not only of what the parties agree to have happened but also of what plainly did happen, even though the parties do not agree.

The most compendious statement known to me of the judicial process involved in assessing the credibility of an oral witness is to be found in the dissenting speech of Lord Pearce in the House of Lords in ***Onassis v Vergottis*** *[1968] 2 Lloyds Rep 403 at p 431. In this he touches on so many of the matters which I wish to mention that I may perhaps be forgiven for citing the relevant passage in full:*

''Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

Every judge is familiar with cases in which the conflict between the accounts of different witnesses is so gross as to be inexplicable save on

the basis that one or some of the witnesses are deliberately giving evidence which they know to be untrue . . . . more often dishonest evidence is likely to be prompted by the hope of gain, the desire to avert blame or criticism, or misplaced loyalty to one or other of the parties. The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely form case to case:

> *(1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;*
>
> *(2) the internal consistency of the witness's evidence;*
>
> *(3) consistency with what the witness has said or deposed on other occasions;*
>
> *(4) the credit of the witness in relation to matters not germane to the litigation;*
>
> *(5) the demeanour of the witness.*
>
> *The first three of these tests may in general be regarded as giving a useful pointer to where the truth lies. If a witness's evidence conflicts with what is clearly shown to have occurred, or is internally self-contradictory, or conflicts with what the witness has previously said, it may usually be regarded as suspect. It may only be unreliable, and not dishonest, but the nature of the case may effectively rule out that possibility.*
>
> *The fourth test is perhaps more arguable. . . ."*

26. The following guidance of Lord Goff in Grace Shipping v. Sharp & Co [1987] 1 Lloyd's Law Rep. 207 at 215-6 is also helpful:.

"And it is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial

*importance for the Judge to have regard to the contemporary documents and to the overall probabilities. In this connection, their Lordships wish to endorse a passage from a judgment of one of their number in Armagas Ltd v. Mundogas S.A. (**The Ocean Frost**), [1985] 1 Lloyd's Rep. 1, when he said at p. 57:–*

"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth." [emphases added].

That observation is, in their Lordships' opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence."

In that context he was impressed by a witness described in the following terms.

"Although like the other main witnesses his evidence was a mixture of reconstruction and original recollection, he took considerable trouble to distinguish precisely between the two, to an extent which I found convincing and reliable."

That is so important, and so infrequently done."

27. This approach to fact finding was amplified recently by Lady Justice Arden in the Court of Appeal in Wetton (as Liquidator of Mumtaz Properties) v. Ahmed and others [2011] EWCA Civ. 610, in paragraphs 11, 12 & 14:

11. By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.

12. There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is

an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.

14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.

28. This judgment will follow all this guidance in the relevant fact finding concerning witness testimony relating to the issues in dispute

29. The Claimant's primary witness, its CEO, Mr Hanley, gave his evidence in an open and straightforward manner. During searching cross examination, his answers were direct and consistent and borne out, in so far as it is possible, with the important contemporaneous evidence in this case: the redundancy consultation notes from 12 and 16 April, the memorandum sent to customers on 18 April and the customer termination emails from dated 18 April to 30 April .

30. The Claimant's other witnesses Miss Scott, Mr Pryce and Mr Vassell similarly gave their evidence in an open and helpful manner.

31. On the other hand, Mr Coppage, in giving his evidence was unhelpful and closed in his manner –

    a. He preferred to repeat the unpleaded, irrelevant and unsubstantiated allegations against Mr Hanley to try to damage Mr Hanley's credibility in preference to answering the straightforward questions that he was asked.

    b. His evidence is not borne out with the contemporaneous evidence before the Court. For example, no evidence has been produced in relation to alleged police involvement or Mr Coppage's alleged early attempts to seek legal advice from the Citizens Advice Bureau. The contemporaneous note of the second redundancy meeting on 16 April said to have been made by Mr Coppage a day or two after the meeting, and only produced in disclosure rather than at the time of the injunction application, does not bear out Mr Coppage's pleaded case that on "16 April, Mr Hanley offered to reemploy in the same role at a reduced salary".

    c. Though never raised previously, Mr Coppage questioned the authenticity of his signature on the Claimant's internal Form EE confirming receipt of a written statement of terms and the employee handbook and his own standard disclosure document. He spent a period of time in cross examination considering whether his signature at the bottom of each page of the 12 and 16 April meeting notes was indeed his. This gave the impression that Mr Coppage was unwilling to agree to having signed documents that he perceived as being unhelpful to his case.

    d. Mr Coppage had no explanation as to why the statement of his former solicitor Mr Bhogal asserted that "neither Defendant approached any customers of the Claimant" or why his statement dated 17 July 2012, whilst not specifically asserted, very much gives the impression that there was no contact at all between himself and the customers when in reality there was a

large level of both telephone and text traffic. In the circumstances, where disclosure of Mr Coppage's telephone records was only forthcoming following a formal application at a contested hearing on 27 July 2012, Mr Coppage has sought to deliberately mislead the Court. Mr Coppage's subsequent affidavit, dated 3 August 2012, seeking to suggest that whilst there was contact, such contact was strictly personal in nature, has to be considered in the light of the earlier blanket denial of any contact.

e. Mr Coppage had no explanation as to why his solicitors wrote to the Claimant's legal representatives on 29 June 2012 asserting that "the communication between Mr Coppage and the customers is personal in nature and does not have any relevance to these proceedings" whereas his own evidence was that he checked for messages in the week beginning 28 May 2012, one month earlier, and at that time discovered that the messages no longer existed. The adverse inference to be drawn is that Mr Coppage purposefully deleted his text messages at some time after 29 June 2012.

f. Mr Coppage even lied on his Facebook page: he claimed to be an ex SAS Officer and did not reveal he was an ex police office when asserting his credentials in security.

32. Mr Joshua Hadley's support of the other witnesses relied upon by the Defendants and his assertion that it was possible for him to incorporate a business and obtain his first customer overnight in the absence of a business plan, marketing material, internet presence, a shop front or solicitation, defies belief. He simply does not have the skills, personality or experience to do that: he is a 21 year old trainee electrician and part time door supervisor

33. Mr Thompson's evidence was said to be "relied upon" though he was not called to confirm his evidence or submit to cross examination. No

hearsay notice was served in respect of Mr Thompson's evidence. The Court attaches no weight to Mr Thompson's evidence or in the attempt to discredit Mr Hanley.

34. Mr Ali's evidence is of little relevance to the key issues in dispute between the parties and is only of relevance to any claim between his and the Claimant and there is none. .

35. The customer evidence of Mr Davis (who did not attend court for cross examination), Mr McGillicuddy, Mr Dixon, Mr Chauhan and Mr Harrington initially appeared in affidavit format. Each affidavit is remarkably similar in both tone and wording and denies any contact whatsoever between the customer and either Defendant ahead of the customer's decision to terminate their relationship with the Claimant. The suggestion, in cross examination from Mr McGillicuddy and Mr Chauhan that they wrote their affidavits themselves is astonishing. Following disclosure of Mr Coppage's mobile telephone records, it emerged that there had in fact been 135 calls and 175 texts from Mr Coppage to the five customers between 12 and 30 April 2012. This confirms that the customers and Mr Coppage had an unusually close relationship over this key period of solicitation. In my judgment, all of the above named customers, now customers of the Second Defendant have together sought to mislead the Court. In this respect, it is worthy to note:

    a. The notices of termination of services from each of the customers from 18th April 2012 to 30 April 2012 are similarly worded. There is a repetitive use of the phrases "company restructure" and "after careful consideration".
    b. In the face of a specific direction of the Court that the customer evidence be given consecutively with witnesses only being allowed into Court once they had given their evidence, so as to diminish any collusion, the Defendants, their Counsel and all of the customers who attended court to give evidence defied that court order and attended a pre-hearing conference together.

36. It is common ground that just two days after Mr Coppage resigned from his position and just one day after the Second Defendant was incorporated, two of the Claimant's customers terminated their relationship with the Claimant in favour of the Second Defendant. Within another 12 days, another three customers followed suit.

37. Though Mr Coppage denies that he became an employee of the Second Defendant prior to 30 April 2012, such evidence is contradicted by Mr Dixon and Mr McGillicuddy's affidavits.

38. Similar wording was used by each of the former customers in the emails they sent terminating their business relationship with the Claimant: "careful consideration" and "restructure of company". Interestingly, the only place where the word "restructure" appears is within the redundancy notes made during the meeting between Mr Coppage and Mr Hanley on 12 April 2012. The word was not used within the circular sent to all clients on 18 April 2012. Mr Chauhan of QClub was questioned as to why his termination email is written in Times New Roman font whereas the heading of the email seems to be pre-set to an Arial font. Mr Chauhan's response that sometimes he likes to "draft" emails in Word before copy and pasting into an email is at odds with the various mistakes in the three sentence email.

39. In my judgment, Mr Coppage had a hand in drafting these scripts, namely e-mail termination notices and affidavits at a time when he did not know his phone records would have to be disclosed telling the contemporaneous truth.

40. The Second Defendant is a newly formed company who between the period of incorporation and 30 April 2012, when the last of the named customers defected, Mr Hadley has confirmed, had no internet presence and had not produced any marketing or advertising materials. The Second Defendant therefore had no "shop-front". It is simply impossible for the named customers to have been aware of the existence of the Second Defendant in the absence of being told by Mr

Coppage, directly or indirectly. The Second Defendant's first customer, The Prince Albert, became a customer the day after the Second Defendant was incorporated. The suggestion by Mr McGillicuddy, the Managing Director of the Prince Albert, that he heard about the existence of the Second Defendant "through the industry" overnight is a downright lie.

41. The five named customers have each produced similar affidavits swearing/affirming that there was no contact between them and Mr Coppage ahead of their decisions to terminate their relationships with the Claimant. The recent order for specific disclosure has unveiled that in fact there was a large amount of both telephone and text traffic. There were 135 calls and 175 texts. In his most recent affidavit, Mr Coppage seeks to suggest that the content of the telephone calls and the now deleted text messages to the named customers were purely friendly in nature. The four customers who gave evidence suggested the same. However, against the background of a previous blanket denial of any contact at all, such assertions lack any credibility.

42. Moreover the suggestion that the telephone calls and text messages were purely friendly in nature and did not involve discussion of work matters must be wrong. The text messages produced by Mr Pryce clearly demonstrate that a friendly relationship will often, and very naturally, involve discussion of work matters. In April, one of the biggest events in Mr Coppage's life must have been his resignation from the Claimant. On his own case he was upset about this. It is inherently unlikely that Mr Coppage would not have discussed his work and employment situation with his so-called friends and yet he denies this. Indeed, the customers themselves deny this. Again, such evidence lacks credibility.

43. Contrary to suggestions in their affidavits, there is no documentary evidence that any of the five customers were dissatisfied with the service that the Claimant was providing prior to 16 April 2012. Of the five customers who left, four were relatively new customers, but one,

Rainbow, had been a customer of the Claimant since April 2008. In the face of the wilful inaccuracy of the affidavits, the customers' evidence that their reason for terminating their relationship with the Claimant was not by reason of solicitation is rejected.

Breach of fiduciary duty

44. Mr Coppage was a director of the Claimant. Though it seemed in evidence that Mr Coppage sought to challenge this, the Defence admitted it as a fact.

45. By section 175 of the Companies Act 2006, "*a director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company" and "this applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity)*".

46. By section 170 (2) of the Companies Act 2006, "*a person who ceases to be a director continues to be subject to the duty in section 175 (duty to avoid conflicts of interest) as regards the exploitation of any property, information or opportunity of which he became aware at the time when he was director*".

47. Even if the non-solicitation clause were to be deemed unenforceable, Mr Coppage was subject to an unavoidable duty as a director of the Claimant to avoid situations where his own interests could conflict with the interests of the Claimant in respect of exploitation of opportunities. Solicitation of the Claimant's customers may be considered to fall within the natural meaning of conflict situations.

48. I disbelieve each of the Defendants' witnesses that solicitation did not occur. I find them to be lying and acting under the control of Mr Coppage. But for the solicitation, in my judgment, the customers would

have continued in their working relationship with the Claimant being bound by their contracts until a period of notice had expired as they had no complaints about Safetynet the company, just about Mr Hanland personally.

Controlling Mind

49. The Claimant's pleaded case is that Mr Coppage is the controlling mind/ de facto director of the Second Defendant and accordingly the Second Defendant is liable for inducing a breach of contract. In my judgment, the evidence bears out this contention.

50. Mr Hadley's evidence in this respect is key –

    a. Mr Hadley's primary employment was an apprentice electrician.
    b. Mr Hadley, having spent approximately four years training to become an electrician, one month shy of qualification, decided to start a security company.
    c. Mr Hadley's decision to start a new company coincided with Mr Coppage's resignation from the Claimant. Mr Coppage resigned and approximately one hour later Mr Hadley resigned.
    d. There were 62 calls from Mr Coppage to Mr Hadley between 12 April and 30 April and 84 text messages from Mr Coppage to Mr Hadley in the month of April. Mr Hadley sought to persuade the Court that these conversations were restricted to discussions of Mr Coppage's emotions. There is a 19 year age difference between Mr Coppage, who was born on 28 October 1971 and Mr Hadley, who was born on 9 September 1990.
    e. In terms of security experience, Mr Hadley has only ever worked as a door supervisor. He did not have any managerial experience. He did not have any knowledge of compliance matters within the field of security.
    f. Mr Hadley seemed hesitant in recalling the start-up capital for his first and only company.

g. Beyond having been taught how to issue an invoice during the course of his primary employment as an electrician, Mr Hadley has no knowledge of accounts, payroll or HMRC matters.
h. Mr Hadley seemed unsure of the first customer of his first and only company.
i. Mr Hadley did not have a business plan and admitted that he did not know the nuts and bolts of the security industry (SIA accreditation, vetting and insurance). His hope was that Mr Coppage would assist at some time.
j. Mr Hadley was aware that his own contract contained a non-solicitation clause but did not recollect whether he was aware of the same clause in Mr Coppage's contract.

51. Mr Coppage admitted in cross examination that he had a good working knowledge of how a security business runs. He quantified such knowledge at 80%. Contemporaneous evidence in the form of a text message sent to Mr Pryce on 12 April 2012 would seem to suggest that Mr Coppage was considering whether he should leave the Claimant and "go alone".

52. It is also of note that both Defendants employed the services of the same legal team. Their cases have been dealt with as if they were one and the same. Mr Hadley's evidence in cross examination was that the Second Defendant, a start-up company, is funding the litigation on behalf of Mr Coppage.

53. In my judgment, Mr Coppage is the directing mind of the Second Defendant which is therefore jointly liable with him

The Claimant's loss

54. Each of the five named customers who left the Claimant company in favour of obtaining security services from the Second Defendant was subject to an obligation to provide the Claimant with notice of termination. Mr Hanley sets out the nature of the notice provisions in

his first witness statement and sets out the quantification of the loss of revenue in his second witness statement. These quantifications are supported by the customer activity logs.

55. The Court is invited to find that, but for Mr Hanley's solicitation, each of the five customers would have retained the services of the Claimant and accordingly, the Claimant has suffered a financial loss.

56. Mr Hanley quantifies his loss as gross loss of revenue in the sum of £159,587.31. Of course these figures are gross and do not take into account saved overheads. Accordingly the Claimant limits its claim up to the pleaded value of £50,000 on the Claim Form.

57. I am satisfied that this is the minimum it has lost and am prepared to award this sum in damages.

Implied Term

Duty to Provide Work

58. It is well established that a term will be implied into a contract if it is so obvious that both parties would have regarded it as a term even though they had not expressly stated it as a term or it is necessary to imply the term to give the contract business efficacy. It is submitted that in the instant case, there was no duty on the Claimant to provide Mr Coppage with work. So long as Mr Coppage was fully remunerated, and he makes no allegation that he was not, the Claimant fulfilled its duties under the contract.

59. The instant case does not fall within the "artists' exemption" -
    a. Mr Coppage's earnings did not vary according to the work he carried out. Mr Coppage's allegations in this respect were expressly denied by Mr Hanley and are not borne out by any documentary evidence.
    b. Mr Coppage was not dependant on publicity in the manner an actor or singer is; and

c. There was no risk that Mr Coppage's door security and/or business development skills would atrophy through lack of use. Indeed, the Court is reminded that in the context of the Counterclaim, the allegation of breach of contract by non-provision of work relates to a period of two days from Monday to Wednesday to allow Mr Coppage to reconsider his wish to be made redundant and give him a period of time in which to relax and think clearly.

60. Furthermore there is no need to imply such a term where there existed an express term of Mr Coppage's employment contract in relation to hours of work: "your hours of work are those required to carry out your duties to the satisfaction of the Company and as necessitated by the needs of the business".

61. Accordingly, in my judgment there was no implied term that the Claimant was to provide work.

Repudiatory Breach and Causation

62. Mr Coppage's pleaded case is that a repudiatory breach occurred –
    a. in that the Claimant was conducting a sham redundancy exercise, thus breaching the implied term of trust and confidence; and/or
    b. in that Mr Coppage was placed on gardening leave without having been served with a notice of termination, in breach of the terms of the employment contract.

63. The Counterclaim makes no reference to any other conduct on the part of Mr Hanley which would constitute a breach of contract or even constitute a cause for complaint.

64. In my judgment, the Claimant rightly denies the pleaded allegations of repudiatory breach in their entirety –

a. The redundancy process was not a device to impose a unilateral salary reduction. As is set out in his evidence, in April 2012, Mr Hanley had taken the view that there was no need for the Claimant to employ a Business Development Director and he was looking to take more of this function back to himself. At the onset of the process, notification to Mr Coppage, Mr Hanley was open-minded as to whether Mr Coppage could be retained and the consultation letter provided on 12 April 2012 is consistent with this.

b. As to Mr Coppage being placed on gardening leave on 16 April 2012, the meeting notes make it clear that Mr Hanley was not dismissing Mr Coppage but rather imposing what might have been more accurately described as compassionate leave in the face of being told that Mr Hanley had not eaten or slept all weekend.

c. The email of resignation sent by Mr Coppage to Mr Hanley is friendly and up-beat in tone. There is no suggestion of a fundamental breach by the Claimant or acceptance of the same by Mr Coppage. It is also of note that despite four pre-action letters Mr Coppage first made an allegation of constructive dismissal in response to the issue of these legal proceedings. There is no evidence beyond Mr Coppage's recollection that he sought to pursue the Claimant for an alleged breach of the employment contract prior to the issue of these proceedings. No claim has been made by Mr Coppage to the Employment Tribunal.

d. Moreover, it is specifically denied that Mr Coppage chose to resign from the Claimant by virtue of anything said or done on 16 April 2012. Mr Coppage had already made his decision to leave the Claimant on 15 April 2012 and he confirmed this to Mr

Pryce in a text message sent on that day when he said 'I'm happy knowing I am leaving'. .

e. In any event, Mr Coppage could have seen through the redundancy process before making a rash decision that the process was a subterfuge. Mr Coppage failed to make use of the Claimant's clearly set out grievance procedure or to express any discontent at all. In my judgment, Mr Coppage successfully used the problem of his potential redundancy to create an opportunity to "go alone".

Conclusion

65. Accordingly, I find for the Claimant and grant the relief set out in the Particulars of Claim together with damages of £50,000 and dismiss the Counterclaim.

His Honour Judge Simon Brown QC
Specialist Mercantile Judge
Birmingham Civil Justice Centre

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15 August 2012