Neutral Citation Number: [2018] EWHC 1972 (QB)

Case No: HQ18X02082

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Wednesday 25th July 2018

Before :

His Honour Judge Neil Bidder QC
Sitting as a High Court Judge

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Between :

Tenon FM Limited	**Claimant**
- and -	
Susan Cawley,	**Defendants**
B38 Support Services Limited	
& Ors	

- -
- -

Diya Sen Gupta (instructed by **Gowling WLG**) for the **Claimant**
Chris Quinn (instructed by **Wright Hassall LLP)** for the **1st Defendant**
John Boumphrey (instructed by **Chadwick Lawrence LLP**
for the **2nd, 3rd & 4th Defendants**

Hearing dates: 25th July 2018

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APPROVED JUDGMENT

His Honour Judge Neil Bidder QC Wednesday, 25th July 2018

Ruling by HIS HONOUR JUDGE NEIL BIDDER QC

1. This is my ruling after an on notice adjourned hearing of the claimant company's application against the first defendant for interim injunctive relief enforcing post-termination restrictive covenants (which the claimant contends were part of the first defendant's contract of employment with them) and against the second, third and fourth defendants for an interim injunction prohibiting them, until after the date when the first defendant (Miss Cawley) is allegedly prohibited by her restrictive covenants from working for them, their being a competitor of the claimant company, from inducing her to work for them in relation to services specified in the relevant restrictive covenant.
2. The matter came urgently before Sweeney J on 18 June of this year when undertakings were given to the court by all defendants. I shall refer in this judgment to the first defendant as "Miss Cawley"; to the claimant as "Tenon"; and to the second, third and fourth defendants, who are represented by one team of lawyers, as "B38".
3. The undertakings last until the last day of the three-month notice period given by Miss Cawley when she resigned from Tenon. Sweeney J gave directions for the further hearing of Tenon's applications and there was no objection to my varying one of his directions extending the time for the claimant to serve evidence in response, giving relief from sanctions and allowing reliance on that evidence.
4. There was opposition to an amendment of the particulars of claim, the substantive part of which was to alter the date of the contract of employment relied upon by the claimant. I have given ex tempore reasons for allowing the amendment in the draft attached to the application with a minor typographical error also being allowed because, in brief, it was in the interests of justice

that I should do so and I considered that there was no prejudice to any of the defendants to allow it.

5. One of the directions also sought by the claimant consequent upon my determination of the injunctive relief was to order an expedited trial. If I were to grant the injunctive relief it would obviously be desirable in the circumstances of this case to order an expedited trial. I canvassed the views of all three counsel about the length of that trial, initially estimated by the claimant to be three days including a reading day. There is, as well as evidence relating to the contract of employment and the actions of Miss Cawley, a live issue as to whether the contract was terminated by the acceptance by Miss Cawley of constructive dismissal, based on the allegation that Tenon had exposed her to, and to some extent necessarily involved her in, a possible fraud that was avoidance of the payment of tax and/or National Insurance payments by the payment to Polish cleaners of direct cash payments.

6. In answer to that allegation Mr King, Tenon's CEO, has reported that fraud or potential fraud to HMRC and on one reading of his letter - on one reading of his letter - implicated Miss Cawley in it. Evidence of the fraud, who was involved in it, whether Miss Cawley was involved would necessarily involve witnesses who have not yet made statements and would undoubtedly lengthen the hearing time.

7. I am satisfied, having heard the submissions of counsel, that the trial of this matter would in all probability take six days including a reading day. Queen's Bench listing has told me and the parties that they would try to list an expedited trial between October and December of this year, and I accept Mr Quinn's submissions that before a trial could take place there would need to be a cost budgeting hearing and that is unlikely to take place before early September. Thus my conclusion is, realistically, that even an expedited hearing would not take place before November of this year and could be as late as December.

8. The restrictive covenants said to apply to Miss Cawley under her employment contract differ in the length of application. Some, in what is called the first period of restriction, last for three months after the termination of her employment and the others for six months, that is the second period of termination. If this is a case of termination by notice, the first period of restriction ends on 3 November 2018 and the second on 3 February 2019. It is unnecessary, I consider, for me to consider the date of any constructive dismissal to fix the dates for the expiry of the two periods, because in the event of a constructive dismissal being established the restrictive covenants would fail anyway.

9. The effects of the inevitable delay in even an expedited hearing taking place affects the approach I should take to the grant of an interlocutory injunction. The basic principles of grant are, of course, contained in *American Cyanamid Co v Ethicon Ltd [1975] AC 396*. That is, in summary, the claimant must establish that there is a serious question or issue to be tried, that damages would not be an adequate remedy and that the balance of convenience favours the grant of an injunction. There may be special factors in individual cases, and the grant of what is, of course, an equitable remedy remains discretionary.

10. Those principles were to a limited extent modified in *Lansing Linde v Kerr [1991] 1 WLR 251*. Staughton LJ's judgment at 258A to D states:

"*For my part I readily accept the last of Mr. Brodie's contentions; but I reject the others. If it will not be possible to hold a trial before the period for which the plaintiff claims to be entitled to an injunction has expired, or substantially expired, it seems to me that justice requires some consideration as to whether the plaintiff would be likely to succeed at a trial. In those circumstances it is not enough to decide merely that there is a serious issue to be tried. The assertion of such an issue should not operate as a lettre de cachet, by which the defendant is prevented from doing that which, as it later turns out, he has a perfect right to do, for the whole or substantially the whole of the period in question. On a wider view of the balance of*

convenience it may still be right to impose such a restraint, but not unless there has been some assessment of the plaintiff's prospects of success. I would emphasise 'some assessment,' because the courts constantly seek to discourage prolonged interlocutory battles on affidavit evidence. I do not doubt that Lord Diplock, in enunciating the American Cyanamid doctrine, had in mind what its effect would be in that respect. Where an assessment of the prospects of success is required, it is for the judge to control its extent."

11. Later, when considering the approach of the first instance judge, his Lordship said:

"*The judge was therefore right in my judgment to take into account the strength of the plaintiff's claim. He would have been wrong to regard that as the sole consideration.*"

12. Beldam LJ made a similar point at 267A in the report and stressed that at the interlocutory stage, of course, the evidence was incomplete. And finally, Lady Justice Butler-Sloss on page 269 adopted a passage to much the same effect in Balcombe LJ's judgment in Lawrence David Limited v Ashton [1989] ICR 123, the extract from his judgment being at 135.

13. This is a case in which the first period of restraint is likely to have expired before trial and where a large part of the second period - effectively half or more - will have done so. Thus I consider I must not only apply American Cyanamid principles but I may also take into account the strength of the claimant's claim, recognising as I do that the evidence to date is incomplete.

14. The facts are amply set out in the quite admirable skeleton argument of Miss Gupta for the claimant and need only be summarised by me in the briefest of detail. The claimant is a large cleaning company or rather more accurately, as Mr Colin King, the Chief Executive Officer of that company, sets out in his first statement, it is a facilities management company working at some 1500 customer sites in various locations throughout the United Kingdom.

15. On any version of the parties - who disagree about most things - but on any version of their evidence Miss Cawley was prior to her resignation a senior employee at that company. She was the Operations Director. Tenon allege that Miss Cawley, having resigned on 3 May of this year

giving three months' written notice, has then breached restrictive covenants governing her during and post her employment cessation and has in fact, in effect, become employed by a rival company, probably D2 though D3 and D4, the third and fourth defendants, are also joined and may also be implicated. It is further alleged by the claimant that B38, for short, has induced her to breach her contractual terms and her duty of fidelity by (a) herself coming to work for them, and (b) attempting to persuade another employee of the claimant, Miss Freitas, to come to work for B38. The first defendant effectively agrees that she did try to persuade another employee - that is Miss Freitas - to come to work for B38, although in somewhat different circumstances to that portrayed by the claimants.

16. There is a great danger here that this application (which I must decide on the papers) may become a mini-trial, so detailed are the factual issues raised by the parties in their respective evidence.

17. Miss Cawley began work with the claimant company on 1 May 2008 and in December 2011 she was promoted to be the Regional Operations Director. The contract which the claimant company say first governed her employment was one whose effective date is stated on it to be 1 May 2008. That is at page 229 of the hearings bundle. It is unsigned by Miss Cawley and Tenon's researches have been unable to locate a signed copy. Her starting salary was £45,000. Either party was, under the contract, permitted to terminate the contract on three months' notice in writing.

18. At page 232 of the bundle clause 18 sets out limited restrictive covenants prohibiting the first defendant for six months after the end of her employment with the claimant from enticing away customers or business of the claimant company or competing with the company in relation to a customer with whom the first defendant had had personal contact or dealings in the 12 months prior to the termination of the contract, or soliciting or enticing away any member of the

management team of the claimant with whom she had material contact in the 12 months before termination.

19. In December 2011 the claimant company contends that there was a variation of that contract, or rather effectively a substitution by a new written contract known in the proceedings as the "2011 Contract", which was the contract that was relied upon by the claimant company in the original particulars of claim and indeed before their application before Sweeney J. That contract is at page 234 and following pages of the hearing bundle. It too is unsigned, and no signed contract has been found by the claimant company.

20. The restrictive covenants are set out at page 240 onwards. They are more detailed, more extensive and more onerous than those contained in the written contract of 2008. I need not at this stage read them into my judgment. Some apply during what is termed the first period of restriction, as I have referred to earlier, later defined as three months following the termination of the first defendant's employment. The others apply during the second period of restriction, six months following the termination. There is, again, a three-month period of notice for either side to terminate the contract in writing. There are provisions for sickness and sick pay. The date on the contract is 7 December 2011 and the first paragraph specifies that it supersedes all other agreements and is effective from the date of signature, a clause which is absent from the 2008 contract.

21. After the hearing before Sweeney J and after the first defendant had filed and served her witness evidence, the claimant company found another written contract of employment, what has been called the "2012 Contract". That can be found at page 698 in the second hearing bundle. The restrictive covenants are the same. The only significant difference is that a clause which gave the claimant the right to terminate the contract if Miss Cawley could not perform her duties for eight consecutive weeks as a result of ill health or accident, or aggregate periods of 12 weeks in

a 52-week period (which can be seen at page 239 in the 2011 Contract) that had been removed from the 2012 Contract.

22. Again, this contract, which the claimants contend was substituted by agreement for the 2011 Contract, is said to be effective from signature. It bears the date 4 December 2012. It is an attachment to an email of 5 December 2012 from Joanne Henderson, the then HR Manager of the claimant company to the first defendant, which reads:
"*You need to sign your contract! Attached is a new one. Please print off two copies and sign both*".

23. No response to that has been, apparently, found. The contract was attached. It was not on Miss Cawley's personnel file, unlike, I infer, the other contracts. Neither party has obtained a statement from Joanne Henderson, who has now left the claimant company. She left last year. She appears to have been an experienced HR manager. Presumably she must have gained some pension rights with the claimant company. It is, I have to say, a matter of surprise that with the substantial resources available to the claimant company and the large solicitors firm instructed by them that I have had no explanation of why she has not been traced, if it is the case that she has not been traced, or indeed what efforts have been made to trace her.

24. On 5 May 2016 Miss Cawley was promoted to National Operations Director. On 21 April 2017 the claimant company changed its name to "Tenon FM Limited", and on 15 August 2017 it entered into a service contract with the second defendants. Effectively the second defendant subcontract its cleaning services to Tenon in order to fulfil its contract with the menswear brand Hackett. It should be said that B38 is also a facilities management provider but its concentrates on what Mr King calls - and this is obviously the usage in the industry - "hard services", that is services relating to the physical fabric of buildings such as lift maintenance, plumbing and air-conditioning maintenance. "Soft services" in contrast are things like cleaning and mailroom servicing.

25. I should also add that both the 2011 and 2012 contracts impose express duties on the claimant to use her best endeavours to promote, develop and extend the claimant's business, to be honest and ethical in the performance of her duties, to conform to the reasonable directions of the management and not to take up without obtaining prior consent any other employment while employed by the claimant company. There is also a provision protecting confidential information.

26. Pleaded by recent amendment to the particulars of claim is a term entitling the company to impose garden leave on employees during their notice period. The claimant also pleads that the first defendant, Miss Cawley, owed an implied duty of good faith and fidelity to the defendant company, that is admitted. It is also pleaded that the first defendant owed fiduciary duties to the company. That is denied on the grounds that Miss Cawley was not a statutory director and because her independence of role was much contained by Mr King. Mr King joined as CEO on 6 March 2018. It is further pleaded then that Miss Cawley owed an implied duty of confidence; that is admitted.

27. The first defendant, Miss Cawley, is admittedly a member of the claimant's senior leadership team. She reports directly to the CEO. Her salary was at the time of her resignation £90,000 per annum. There is no further evidence as to when and in what circumstances her salary increased to that level.

28. The claimant pleads that Miss Cawley had unrestricted access to, and use of, significant quantities of highly confidential information. The first defendant does not accept that that was the case, contending that many staff had access to for example the company's computer database which is specified in the pleadings. Mr King in his first statement goes into detail about the type of confidential, essential and sensitive information which the claimant had access to from paragraphs 53 to 55 of his first statement; I need not repeat those. It is generic rather than specific. It is contended that the confidential information to which the claimant has had access

will remain confidential beyond the expiry of the claimant's notice period and that the injunctive relief based on the restrictive covenants is no more than reasonably necessary to protect the claimant in respect of the information.

29. The claimant contends that when Miss Cawley resigned she did not disclose that she was intending to work for B38. Miss Cawley gives as her reason for resigning that having met Mr King she found him arrogant and dictatorial and knew that she could not work with him and needed to find other employment. She agrees she spoke to potential employers including B38, and she pleads that she hoped to start work with them in October 2018. That is what she says in her statement but that is contradicted by a statement in response from Miss Freitas, who says that the claimant told her that she hoped to start with B38 in August of 2018.

30. The resignation letter given to Mr King on 3 May 2018 - it is dated 2 May - contained the sentence:

"*As per the terms of my contract of employment I will continue to work for the company for the next three months, completing my employment on Friday 3 August 2018.*"

31. The company contend that that was a reference to the 2012, alternatively the 2011 Contract. The claimant says she gave three months' notice because she believed it was standard in the industry. She had, of course, seen the 2008 and 2011 Contracts and, on the basis that she had received the email from Miss Henderson, had seen the 2012 Contract. She also contends that she had been given yet another contract in 2015 which contained no restrictive covenants. The first defendant, Miss Cawley, has not produced a copy of that contract, which she says she did not sign. The defendants have not, according to Mr King, been able to find any evidence of a new draft contract of employment in 2015.

32. Miss Cawley's husband, Mr Trott, also works for the claimant but at a less senior level - though at quite a senior level - and the first defendant says that the 2015 contract was similar to his contract, and that is exhibited at least in part to Mr King's first statement and is dated 6 February

2015. My copy does not have a signature page. It does not apparently contain restrictive covenants.

33. On her resignation the first defendant, Miss Cawley, was not placed on garden leave because, Mr King says, he trusted the first defendant and had no knowledge that she was intending to go to work very shortly, as he alleges, for the claimant's competitors, the second defendant. On 10 May 2018 B38 gave the claimants three months' notice to terminate the Hackett contract. The claimant says the first defendant's resignation and the termination of the Hackett contract were almost certainly linked.

34. Tenon's case is that it became aware on about 1 June 2018 that Miss Cawley may have been in breach of her obligations to them in that that they believed she was already providing services to B38 as "Operational Director, Soft Services" while still employed by Tenon, that she had solicited a senior employee (Miss Freitas) to join B38, and that she had disclosed what is contended to be confidential information from a senior leadership team meeting in order to persuade Miss Freitas to work for B38 and that she had a B38 email address from whence comes the description of her job title and had sent emails from it while employed by the claimant. The claimant contends it had no alternative but to issue proceedings and seek urgent injunctive relief.

35. The defendants, as a whole, submit that the claimant rushed to court before considering the possibility of obtaining undertakings, either contractual or to the court, and showing no willingness to compromise. Moreover, Mr Quinn on behalf of Miss Cawley supported by Mr Boumphrey for B38 submits that the large expenditure of costs by the claimant's solicitors is meant to intimate and bully the defendants (and particularly the first defendant) into submission.

36. I have already indicated that I consider I must approach whether to grant injunctive relief, that is, relief going beyond in time 3 August 2018 (the date to which the undertakings were given and accepted) on *American Cyanamid* principles glossed, if I can put it in that way, by the compliance in *Lansing Linde* and I should add that that was the approach followed by Mr Justice

Silber in the case of *CEF Holdings Limited v Mundey [2012] EWHC 1524*. Indeed his Lordship makes it clear at paragraph 205 that that test, to which he refers as the "*NWL v Woods*" test, a higher threshold of "*whether the plaintiff would be likely to succeed at a trial*", applied where, as in that case, the restrictive covenants would have expired before trial. *CEF Holdings* has another important similarity to this case to which I will return.

37. Again, on first principles I accept that I start from the position that all covenants in restraint of trade are prima facie unenforceable at common law, being enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public. For that, see *Chitty On Contracts, 32nd edition* at paragraph 16-085. Sir Bernard Ricks in *Coppage v Safety Net Security Ltd [2013] IRLR 970* at paragraph 9, gave general guidance on that rule and points out that the question of reasonableness must be asked as of the outset of the contract looking forward. As Mr Quinn, learned counsel for the first claimant, points out, the claimant has the difficulty when dealing with that hurdle that as of the date of the amendment of the particulars of claim they were contending for the 2011 rather than 2012 Contract.
38. Having summarised the evidence I now turn to the issues before me. First, has the claimant established that there is a serious question to be tried and that it will be likely to establish at trial that the restrictive covenants actually applied to the first defendant, to Miss Cawley? If it has not then the application for further injunctive relief against all defendants fails because the case against D2 to 4 is parasitic on the establishment of restrictive covenants binding D1.
39. In my judgment, the claimant fails on this fundamental issue as a result of a combination of factors, namely the absence of a signed contract and the absence of **any** evidence - that there was any valuable consideration, let alone adequate consideration, given for Miss Cawley entering into either the 2011 or 2012 Contracts containing more onerous restrictive covenants than were present even in the 2008 Contract.

40. It is, in my judgment, quite remarkable that a substantial undertaking such as the claimant company, with an HR department and an experienced HR manager in Joanne Henderson with personnel files are unable to locate even one signed copy of the employment contract with Miss Cawley, who started at a salary of £45,000 and ended with a salary of £90,000. The very obvious conclusion, namely that she refused to sign contracts containing onerous and adverse terms, is her positive evidence in her statement of 28 June 2018 at paragraphs 11(a) and (b), 16, 18, 19 and 20. I accept, of course, that she now may have a lively interest in making those statements, and in her careful and accurate submissions to me Miss Gupta, (learned counsel for the claimant) rightly points out that there are reasons to doubt, at least in part, Miss Cawley's credibility.

41. For example, it is unlikely, as Miss Cawley says in her witness statement, that when she handed her resignation letter to Mr King (the CEO) that she had told him that her reason for leaving was because of his arrogant attitude and approach. First, that simply does not chime with the tone of the letter. Second, it seems to me to be inconceivable that Mr King would not have put her on garden leave then instead of, as he says, believing that she would amicably work through her notice period and also would have asked her to attend SLT meetings.

42. Second, Miss Gupta suggests that Miss Cawley's email response at page 351 to Miss Freitas informing her that she was not taking up a job offer with B38 -- in which Miss Freitas informs her that she was not taking up a job offer with B38 is inconsistent with her evidence that she had had a phone call with Miss Freitas in which Miss Freitas had told her that she had sent her an email which Miss Cawley said that she had not received, to be informed by Miss Freitas that she had sent it to the B38 email address. Miss Cawley's evidence was that it was only after this that she asked Mr Phillips of B38 to activate the email address. Her email response is clearly to the email she said she had not got because the account had not been the activated. Again, arguably as Miss Gupta properly submits, this affects her credibility.

43. However, even bearing those caveats in mind, her positive evidence that she had refused to sign the contracts containing restrictive covenants is only met by inference from various items of evidence, none of which I consider is remotely likely to persuade a court that she was content to work on the basis of the 2011 or 2012 Contracts despite not signing them nor that the claimant company, if it really insisted on having the protection of the restrictive covenants would not have explicitly warned her that if she did not sign there would be sanctions. I do not consider it is a persuasive inference that she had agreed to the 2012 Contract, complete with restrictive covenants, merely because she asked Joanne Henderson to remove from it a clause allowing the claimant to terminate her contract for eight consecutive weeks of sick absence. She did not sign the amended contract. Neither do I consider her request for a copy of her contract from the head of payroll on or about 19 March 2018 to bear the heavy inference that Miss Gupta invites me to infer that it bears and which undoubtedly she would invite a trial judge to find as well.

44. There are certainly emails from Joanne Henderson asking her to sign her contract. What is absent in the trawl of emails conducted by the claimant is any significant response by Miss Cawley. It is in that context that it is particularly odd that there is not from the claimant either a statement of rebuttal from Miss Henderson or any memo or aide memoire from her from the first defendant's personnel file contradicting the first defendant's account, or at the very least some explanation of why it has not proved possible to contact her. If anyone has contact details for her it will surely be the claimant company. I do not draw any strong inference from the absence of a statement - that would be speculating - but merely note the weakness of the claimant's case on the contractual incorporation of the restrictive covenants by means of a signed contract as opposed to the very definite evidence of Miss Cawley.

45. It is of course correct, as Miss Gupta submits, that acceptance of an employer's offer to contract on specific terms need not be by signature of a contract and may be inferred from conduct. However, the two authorities that Miss Gupta relies on in this context, namely *Wess v The*

Science Museum Group [2014] UKEAT 120 and *Credit Suisse Asset Management v Armstrong,* do not on close consideration really assist her. In *Wess* the EAT upheld the Tribunal's finding that where an employee had appealed one term in her newly presented contract yet did not object to a new notice period which had potentially an immediate impact on her, her conduct in continuing to work represented in those circumstances an acceptance of the terms of the new contract. Here there was no such immediacy of the effects of the restrictive covenants which come into effect, if at all, post-termination.

46. In the Credit Suisse case changes in terms were contained in a staff handbook and the employers gave specific notice of a month to employees to object to any terms. As opposed to those cases which are essentially, as I read them, decisions on their own facts, helpful guidance is given at paragraph 2.2 and 9.108 of the third edition of *Goulding, Employee Competition*, quoted in Mr Quinn's skeleton, indeed quoted with some relish in Mr Quinn's skeleton. In particular the learned editors state that an unsigned contract may be the best evidence of the terms agreed between employer and employer where there is no evidence to the contrary. However, they add: "*An exception to this is in relation to restrictive covenants where an unsigned contract may mean the restrictive covenants will not be enforced by the court.*"

47. That statement of the law, or it may be of the practice known by the editors, might in principle be justified by the common law's attitude to covenants in restraint of trade. But Mr Quinn also relies on other authorities, cited at paragraphs 28 and 29 of his skeleton, where on the facts the courts have been unprepared to uphold unsigned contracts. *SG & R Valuation Service Company v Boudrais [2008] EWHC 1340*, a decision of Cranston J, paragraph 16 of that judgment encapsulates his Lordship's ruling on this issue and the circumstances of the case are in my judgment close to this case, where the 2011 and 2012 Contracts expressly say that they are effective from signature.

48. While ultimately whether the employee has accepted the terms of a written contract preferred by the employer when that written contract is unsigned is probably a question of fact, in my judgment the inferential evidence of the claimant set against the positive contrary evidence by the first defendant, the "coming into effect" clause in the 2011 and 2012 Contract, coupled with the absence of rebuttal or explanatory evidence from either the claimant's HR team or the personnel file, mean that the claimant has not satisfied me that there is a serious question to be tried or, using the terminology in *Arbuthnot Fund Managers Ltd v Rawlings [2003] EWCA Civ 518,* it is plain and obvious to me that the claimant will fail on this issue at trial. If I consider the prospects of the claimant succeeding on this issue at trial, applying the Lansing Linde test, I conclude at this stage that they will fail. That is not the sole consideration for me but it is of substantial importance in my judgment.

49. On the second issue between parties, namely whether there is a serious issue to be tried as to whether the claimant can establish that there was consideration for the variations of 2011 and 2012 of the employment contract, which variations purported to induce far more onerous restrictive covenants, the position in my assessment is even more clear. The contention of Mr Quinn is that there is no evidence of consideration which can be related to the variation. In argument I put to Miss Gupta that that appeared to be the case, and with candour she accepted that. Of course the evidence is not yet complete. However, this cannot be an issue to which the claimant, advised by very experienced lawyers, can have been ignorant of. Had there been such evidence I would have expected to see it flagged up at this on notice stage. Lack of consideration is pleaded in the first defendant's defence of 6 July. There is a reply from the claimant and it does not make a positive averment in relation to consideration.

50. Again the general proposition, which is after all fundamental contract law, is stated in *Goulding,* third edition, at paragraph 6-22:

"*Any variation of contract may be agreed between the parties. Consideration (normally some benefit to the employee) must be given in return for the covenant.*"

51. There is nothing in the claimant's evidence which addresses this requirement. Even in the case of *Re-Use Collections Limited and Sendall [2014] EWHC 3852* where the employers could point to a pay rise and bonus, they could not on the facts establish that that contended-for consideration related to the variation. Miss Gupta contended in her skeleton that an employee continuing to work, and the employer by continuing to employ, can constitute consideration for a consensual variation of contract. But there is no authority for that proposition and the passage cited by Mr Quinn from *Goulding*, third edition, at 6.26 to 27 suggests to the contrary.

52. That position is supported in the judgment of HHJ Stephen Davies, sitting as a Deputy, at paragraphs 70 to 71 of *Re-Use*, but it is most clearly established in the judgment of Elias J (as he then was) sitting in the EAT in *Solectron Scotland Ltd v Roper [2004] IRLR 4* at paragraph 30, where the alleged variation does not require any response from the employee at all the employee cannot be taken to have accepted the variation by conduct. In other words, continuing to work and from the employer continuing to allow the employee to work, cannot without more be referable as consideration to the variation, particularly if it is an onerous term such as more severe terms in restraint of trade.

53. In my judgment where there is no evidence of referable consideration in the evidence of the claimant and no expectation of there being any this issue is simply fatal to their case. If I consider their prospects of successfully arguing at trial that the first defendant is bound contractually by the restrictive covenants in the 2012 Contract I conclude they have no realistic prospects of doing so. Even if I consider whether there is a serious question to be tried at trial on this point I unhesitatingly conclude there is not. While that is decisive of the application for injunction relief in relation to all defendants for the, as I have said, the continued injunctive relief against D2, 3 and 4 is dependent upon an argument that they are liable to induce her,

unless enjoined to breach her restrictive covenants, I should deal briefly with the other issues between the parties.

54. The first defendant, Miss Cawley, pleads in her counterclaim that she has been constructively dismissed for breach by the claimant of the implied term of trust and confidence, in that the claimant exposed the first defendant to a practice of paying cash payments to casual workers. It is not contentious that if that is established by Miss Cawley then the effect of acceptance of the repudiation of the contract by the employer is to release the employee from the restrictive covenants (*General Billposting Company Ltd v Atkinson [1909] AC 118,HL*).

55. However, Miss Gupta rightly submits that the courts will scrutinise closely the arguments of employees who have already secured alternative employment prior to resigning and who construct arguments of repudiatory breach as a means of avoiding covenants, and she cites *Elsevier v Monro [2014] IRLR 766*. There is in my judgment a serious issue to be tried at trial as to whether the first defendant's behaviour after leaving the employers, including her purporting to terminate her contract for notice, could amount to a waiver of any repudiatory breach. The claimant has in my judgment a realistic prospect of defending that issue successfully at trial. As to enforceability of the covenants and the four-stage test in *TFS Derivatives Ltd v Morgan [2005] IRLR 246* at 37 to 38, there is no difficulty in my judgment in construing the covenants as they stand. They are clear enough. Mr King's evidence at 77 and 78 in his first statement does in my judgment establish legitimate business interests to be protected by the covenants, and I accept the submissions of Miss Gupta at paragraphs 44 and 45 of her skeleton, though it does her scant justice for me simply to refer to them.

56. There is on the first two stages of the enquiry either a serious issue to be tried or a realistic prospect of the claimant establishing the issues successfully. However, there is in my judgment considerable uncertainty about the claimant's prospects of success in relation to the issue, "Is the

covenant no wider than is reasonably necessary for the protection of that interest assessed at the date of the contract?"

57. The duration of the restrictive covenants is, I judge, at least arguably reasonable. However, it is now clear and has been confirmed - and I should say with obviously considerable difficulty faced by those acting for the first defendant - by the claimant company that at least two of the senior leadership team of which the first defendant was also a member did not have restrictive covenants in their contracts. Neither did the first defendant's husband nor Miss Freitas, both of whom were senior employees -- not as senior as the first defendant, but senior employees with access to client contacts and the allegedly confidential information to which the first defendant had access, for example, to the computer database.

58. Mr King makes great play of the danger that could be caused by the first defendant disclosing the confidential information to B38, a competitor. The absence of such covenants in the contracts of senior employees, in contrast to their presence in those of junior employees, was one of the reasons why Silber J refused to uphold restrictive covenants in the *CEF Holdings Ltd* case. He was also considering whether to grant interlocutory injunctions on an on notice hearing. He gave his reasons at paragraph 54 and stressed that factor:

"... in the absence of some cogent and rational explanation for this apparent inconsistent treatment undermines the contention that CEF actually had a legitimate interest to protect."

59. There has been no explanation for the inconsistency here. However, that was a factor in Silber J's judgment. Here there is evidence from the claimant's CEO to establish that the covenants were reasonably necessary. This seems to me to be an issue on which the claimant's case is weak but that there is a serious issue to be tried. On the *Lansing Linde* test I take into account the weakness and inconsistency of the claimant's case.

60. The final factor is whether injunctive relief should be granted. It is, of course, discretionary. Mr Boumphrey in his skeleton submits that there is little evidence of how the claimant establishes

liability against one or other of the three joined companies. However, there is some evidence to establish that Mr Phillips, a director of all three companies, participated in an inducement to the first defendant to work for B38, and there is certainly, in my judgment, some evidence that if the 2012 Contract applied there was conduct of Mr Phillips so as to procure or induce a breach by the first defendant, and that at the very least he turned a blind eye to the existence of restrictive covenants and that there would be a breach. However, there is, in my judgment, much force in the joined contentions of all four defendants that the conduct of the claimant in relation to the claim was unreasonable or even vexatious. Given that Miss Freitas had decided not to leave and that the first defendant had been placed on garden leave, it is difficult to see the necessity of service of proceedings for injunctive relief on the eve of Miss Cawley's father's funeral and when Mr Phillips was abroad. There was faulty service of D2 to 4 and a wholly inadequate opportunity to any of the defendants to obtain legal advice and marshal their position in advance of the hearing before Sweeney J. A reasonable request for extension of time was refused and while there was some urgency, it was not in my judgment so urgent that the general pre-action protocol should have been substantially ignored. Moreover the costs already incurred by the claimant appear to me, without detailed argument on the point, to be completely disproportionate. The claimant's conduct is a further factor which I take into account in refusing injunctive relief after the expiry of the undertakings given by the four defendants.

61. The primary reasons for my refusal are, however, the issues of the inability of the claimant to establish the contractual applicability to the first defendant of the 2012 restrictive covenants, and first and foremost in the absence of any evidence that consideration was given referable to the variation of the employment contract either in 2011 or 2012 and the incorporation into that contract of onerous restrictive covenants.

62. I therefore dismiss the claimant's applications for interim injunctive relief against all four defendants. I note that the claimant has come to terms with the second, third and fourth

defendants and I should indicate that I approve the terms of the Tomlin order and will initial it in due course.