R A Rossborough (Insurance Brokers) Ltd v Gary Boon

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	25 July 2001
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Text

[2001] JRC 157

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, Deputy Bailiff, **and** Jurats Quérée **and** Bullen.

Between
R A Rossborough (Insurance Brokers) Limited
Plaintiff
and
Gary Boon
First Defendant

and

Saiful Luis Aziz

Second Defendant

Advocate M.H. Thompson **for the Plaintiff**.

Advocate N.M. Santos-Costa **for the First and Second Defendants**

Authorities.

Western Excavation Limited v Sharp (1978) 2 QB 761.

Hotel de France (Jersey) Limited v The Chartered Institute of Bankers (21 December 1995) Jersey Unreported.

Bellfield v Aviation and Airport Services Limited (14th March 2001) unreported decision of the Employment Appeal Tribunal.

Air Jamaica Limited v Charlton (1999) 1 WLR 1399.

Malik v BCCI (1997) 3 All ER 1.

Gillies v Richard Daniels & Co. Ltd (1979) IRLR 457.

Jones v F Sirl & Sons (Furnishers) Ltd (1997) IRLR 493.

Alpha Print Limited v Alphagraphics (1989) JLR 152.

American Cyanamid Co v Ethicon Limited (1975) AC 396.

Drysdale & Silverleaf: Passing Off Law & Practice (1986).

Lawrence David Limited v Ashton (1991) 1 All ER 385.

NWL Limited v Woods (1979) 3 All ER 614.

Cayne v Global Natural Resources Plc (1984) 1 All ER 225.

Lansing Linde Limited v Kerr (1991) 1 All ER 418.

Herbert Morris Limited v Saxelby (1916) AC 688 at 709.

Stenhouse Limited v Phillips (1970) 1 All ER 117 at 122.

Wallis v Taylor (1965) JJ 455.

Nicol v Egan (1968) JJ 903.

G.W. Plowman & Son Limited v Ash (1964) 2 All ER 10.

Home Counties Dairies Limited v Skilton (1970) 1 All ER 1227.

John Michael Design Plc v Cooke (1987) 2 All ER 332.

International Consulting Services (UK) Limited v Hart (2000) IRLR 227.

Office Angels Limited v Rainer-Thomas (1991) IRLR 214.

Application by the defendants to discharge or vary interim ex parte injunctions in restraint of trade contained in the employment contracts of the first and second defendants respectively with the plaintiff.

Deputy Bailiff

THE

1 This is an application by the defendants to discharge or vary interim injunctions granted ex parte by me pursuant to an order of justice dated 30 th October 2000. The injunctions relate to covenants in restraint of trade contained in the employment contracts of the first and second defendants respectively with the plaintiff.

Factual background

2 The plaintiff is a firm of insurance brokers carrying on business in Jersey. It has affiliates in other Channel Islands. The first defendant began working for the plaintiff in 1989 and the second defendant in 1990. The first defendant's employment has been continuous but the second defendant's was interrupted for about nine months at one stage when he went travelling. By the time of their departure in October 2000, the first defendant was a director of the plaintiff and the second defendant was one of two account executives of the plaintiff.

3 In April 1995, along with other senior executives, each defendant signed a new contract of employment. The contracts contained the following provisions:-

> *"16. For a period of two years after the determination from any cause whatsoever of his employment hereunder the Employee will not (save as hereinafter permitted) within the Island of Jersey undertake or carry on either alone or in partnership nor be employed or interested directly or indirectly in any capacity whatsoever in that part of an insurance brokers or consultants business which is in any way concerned or connected with insurance against fire accident and motor vehicle risks (commonly known as and hereinafter called 'general branch business') PROVIDED ALWAYS that the Employee may enter into partnership with another person or persons or be employed by any person firm or company carrying on general branch business where such general branch business is conducted on a day to day basis by his partner or partners or other employees of his employer as the case may be to the exclusion (other*

than indirect financial benefit) of any involvement of the Employee.

17. For a period of two years after the termination from any cause whatsoever of his employment hereunder the Employee will not on behalf of himself or any other person firm or company canvass or solicit or endeavour to take away from the Employer the business of any person firm or company who shall at any time during the last two years of the employment of the Employee hereunder have been a client or clients of the Employer.

18. For a period of two years after the termination from any cause whatsoever of his employment hereunder the Employee agrees not to carry on or undertake directly or indirectly and whether alone or in conjunction with or on behalf of others in whatever capacity any kind of insurance broking or consultancy work for and on behalf of any person firm or company who shall at any time during the last two years of the employment of the Employee have been a client or clients of the Employer and the expression 'client or clients' in this context includes in the case of a company its beneficial owners and in the case of a trust the settlor, named beneficiaries and intended beneficiaries".

Applying the terminology which is commonly used in connection with such clauses and taking them in descending order of gravity, clause 16 is a non-competition clause; clause 18 is a non-dealing clause; and clause 17 is a non-solicitation clause. By a letter dated 12 th April, 1995 Mr Wrigglesworth, on behalf of the plaintiff, wrote to each defendant to confirm that clauses 16 and 18 would not apply if it was the plaintiff which gave notice to terminate the defendant's contract provided the relevant defendant had not contrived to influence the plaintiff to give such notice.

4 Each defendant's contract also contained provisions about pension arrangements. However they were not identical. Clause 11 of the first defendant's contract was in the following terms:-

"The Employer will maintain a non-contributory Life Assurance and Pension Scheme for the benefit of the Employee under the terms of the R A Rossborough Limited 1980 Pension Scheme or any Scheme issued in substitution thereof by agreement with the Employee."

Clause 12 of the second defendant's contract was as follows:-

"Consideration will be given to providing permanent health insurance and pension scheme benefits with effect from the 1996 renewal dates of the company's schemes.".

5 Regardless of this difference, at the material time in 2000, both defendants were members of the plaintiff's group pension scheme known as the R A Rossborough Limited 1980 Pension Scheme (" *the Old Scheme*"). Since 1998 the Old Scheme had been a contributory scheme. The Old Scheme was what is known as a "final salary" scheme.

6 On 28 th April, 2000, the plaintiff's finance director, Mr Ian Smith, sent an e-mail to all relevant staff, including the defendants, informing them that the plaintiff's holding company had decided to change the group pension scheme from a final salary scheme to a 'money purchase' scheme (" *the New Scheme*"). He stated that the reason for the change and the benefits of the New Scheme would be explained to staff at a meeting to be held the following month.

7 On 25 th May Mr Smith sent a further e-mail to all relevant employees informing them that the design of the New Scheme had not yet been finalised and that implementation would be deferred until 1 st September, 2000. He went on to say the following:-

On 7 th August, Mr Smith e-mailed the employees suggesting dates for the meetings envisaged in his e-mail of 25 th May.

> (i) All members of the Old Scheme, including the defendants, were to be given a proper opportunity to discuss the effect of the proposed scheme on them with the group pension scheme advisers Peter Daniell and Charlotte Guillaume, although such meetings could not be held until August;
>
> (ii) Accrual of benefits under the Old Scheme would cease at 31 st May 2000;
>
> (iii) With effect from 1 st June 2000, employee contributions of 5% of salary would continue to be deducted for June, July and August. These contributions together with the employer contributions to the New Scheme would be paid into the New Scheme once it was established; and
>
> (iv) The death in service benefits (which were separate from pension arrangements), would remain insured with Norwich Union who managed the Old Scheme.

8 According to the defendants, the second defendant approached Mr Smith on two occasions to voice his concern over the New Scheme and was told on or about 18 th August that the New Scheme would be implemented regardless of his concerns. However this is not accepted by Mr Smith. In any event the defendants composed a joint letter on 21 st August which they handed to Mr Smith. The letter stated that the New Scheme was not in their interests and they were not prepared to accept it. The letter went on to assert that the change could not be instigated unilaterally. Each of the defendants met with Mr Daniell and Mrs Guillaume later that day. They assert that their fears were not allayed, but were exacerbated. They were, they say, also told that the New Scheme would proceed regardless. Mr Daniell and Mrs Guillaume give a somewhat different version of the meetings.

9 On 23 rd August the defendants sent an e-mail to Ian Smith advising that they were still not happy at being transferred to the New Scheme. In reply Mr Smith confirmed that their

concerns would be raised at a meeting of the directors of the plaintiff's holding company to be held on 19 th September. He also requested the defendants to provide details of their misgivings, which they did by memo dated 31 st August.

10 On 6 th September the defendants met with Mr Smith and Mr Wrigglesworth, who was the chairman and managing director of the plaintiff, in order to discuss the issue further. It did not advance matters very far. Following the meeting Mr Smith made a file note as follows:-

> *"Met SA and GB to express our disappointment at the way they had approached the issue of the pension scheme changes.* SJW and IDS explained why the changes were being made and it was left to GB and SA to decide whether they wished to join the new scheme. It was made clear that whatever their decision we would not be maintaining the N.U. Scheme for them.".

11 On 12 th September each of the defendants wrote an identical letter to Mr Wrigglesworth, which contained the following paragraphs:-

> *"It is clear that the proposed change over in pension scheme is, from your perspective, non-negotiable and that Rossborough is not prepared to countenance any compromise in this regard.* As such, having considered this matter very carefully and taken the appropriate independent advice, I believe that this is a fundamental change in my terms of employment and thus regretfully consider myself to have been constructively dismissed from my employment with immediate effect.
>
> *Notwithstanding this, I am, of course, prepared to work my one month's notice in accordance with the terms of my contract of employment and await your instructions in this regard."*

Mr Wrigglesworth replied immediately to the effect that he did not accept there had been any fundamental change to the terms of their contract. On 15 th September, some three days later, he told each of the defendants that the board had had a re-think and was now prepared to offer all the members of the Old Scheme the opportunity to stay in the Old Scheme or join the New Scheme. He asked both defendants to stay in the employment of the plaintiff. However, later the same day, both defendants informed him that they were not willing to reconsider.

12 The reason for reciting the evidence at some length is that it is in issue between the parties as to whether the defendants were constructively dismissed or resigned. If they were constructively dismissed then, in accordance with the letter of 12 th September 1995, clauses 16 and 18 (the non-competition and non-dealing covenants) would not apply.

13 On 16 th October 2000 the defendants entered into a contract of employment with Marsh Financial Services (Jersey) Limited (" *Marsh*") and that employment began on 1 st

November. Marsh is a very large firm of insurance brokers but it has hitherto had little presence in Jersey. The present employees of Marsh in Jersey consist of the two defendants and a secretary. The defendants assert that they were conscious of the non-solicitation clause (clause 17) in their contracts with the plaintiff and, at their insistence, the following clause was inserted in their employment contracts with Marsh:-

> *"You shall not either directly or indirectly for a period of two years after commencement of employment with the Company, induce or seek to induce by any means any existing customer of RA Rossborough Limited to cease dealing with or seek to restrict or vary the terms upon which it deals with RA Rossborough."*

The proceedings

14 On 30 th October 2000 the plaintiff presented an order of justice alleging that each of the defendants had breached the non-solicitation covenant. An ex parte injunction was granted in the following terms:-

> *"A) Until judgment herein or further Order in the meantime the service of this Order of Justice on the First Defendant and the Second Defendant and on each of them:-*
>
> *1. shall operate as an immediate interim order preventing either of them from:*
>
> *1.1 at any time up to and inclusive of 19 October 2002 canvassing or soliciting or endeavouring to take away from the Plaintiff the business of any person firm or company who was at any time between 21 October 1998 and 20 October 2000 a Client of the Plaintiff, and*
>
> *1.2 up to 19 October 2000 carrying on or undertaking directly or indirectly and whether alone or in conjunction with or on behalf of others in whatever capacity any kind of insurance broking or consultancy work for and on behalf of any person firm or company who was at any time during the period 21 October 1998 to 20 October 2000 a Client or Clients of the Plaintiff.*
>
> *2. In relation to the Orders contained in paragraph 1 above it is further ordered that:-*
>
> 2.1 *The expression Client of the Plaintiff in this context in the case of a company shall extend to its beneficial owners and in the case of a Trust shall include named beneficiaries."*

The plaintiff did not seek to enforce clause 16 of the employment contracts (the non-competition clause) and argument has therefore been confined to the non-dealing and non-

solicitation covenants.

15 Although the summons to lift the injunctions was not issued until April 2001, Mr Santos-Costa explained that, until recently, the defendants had only been concerned with setting up the office systems etc. so that there had been no call for them to seek new business for Marsh in Jersey. But that part of their work had now been done and Marsh were expecting them to develop the business. Hence the need at this stage to apply for the injunctions to be discharged or varied. The delay was also explained by the fact that negotiations had taken place between the parties and no summons had been issued until these had broken down in February 2001. We are satisfied that nothing turns on any alleged delay and we have accordingly ignored this when considering the application.

Outline of the arguments

16 Mr Santos-Costa argues that, even though this is an interlocutory hearing with only affidavit evidence, the Court is in a position to make a definitive finding that the defendants were constructively dismissed by the plaintiff. That would mean that the non-dealing covenant (clause 18) was inapplicable. He went on to argue that this was one of those cases where the outcome of the interlocutory hearing was likely to be decisive and that the Court should therefore consider the merits of the respective cases of the parties. He argued that there were strong grounds for concluding that the covenants were unreasonable in that they were far wider than was necessary to protect the plaintiff's legitimate interests. Even if the Court was against him on constructive dismissal, the injunction to enforce the non-dealing covenant should be lifted as the covenant was unreasonable. The non-solicitation clause should be cut down before it could be said to be reasonable.

17 Mr Thompson argued that the Court should apply the *American Cyanamid* test. We should therefore not have regard to the respective merits of the parties cases but should confine ourselves to considering the balance of convenience. The proper application of that test led to the conclusion that the injunctions should be maintained in their present form pending trial. If, contrary to his submission, the Court was minded to consider the merits, he argued that the covenants were reasonable and should be maintained. He also argued that the Court was not in a position at this stage to decide whether or not the defendants had been constructively dismissed.

Constructive dismissal

18 It is convenient to take this issue first. It would be unusual to make a definitive finding at an interlocutory stage. This hearing is not an application for summary judgment on the grounds that there is no real defence; nor is it an application to strike out all or part of the Order of Justice on the grounds that it discloses no reasonable cause of action or is otherwise an abuse of process. Nevertheless Mr Santos-Costa argues that, even on the plaintiff's evidence, it is clear that the defendants were constructively dismissed and we should so

hold.

19 Constructive dismissal is merely an example of a well settled principle of the English Law of contract under the rubric 'discharge by breach'. The requirements were summarised by Lord Denning MR in *Western Excavation Limited v Sharp* (1978) 2 QB 761 at 768:-

> ***"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance.*** If he does so, then he terminates the contract by reason for the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

20 Both parties asserted that this principle forms part of Jersey Law. Mr Thompson had included in his authorities the case of *Hotel de France (Jersey) Limited v The Chartered Institute of Bankers* (21 December 1995) Jersey Unreported but neither side made any reference to the case in oral argument. At page 8 of the judgment in that case the Court said this:-

> ***"Mr Barry Nicholas in his French Law of Contract advances the matter:***
>
> ***'There is obviously a broad similarity of function between the remedy of resolution and the common law remedy of rescission or avoidance for breach, but there are two marked differences.*** (i) Save in certain exceptional cases, the creditor must normally apply to the court for an order resolving the contract; he may not, as in the common law, simply treat the debtor's breach as discharging the contract. (ii) There is no legal criterion for distinguishing those breaches which are sufficiently serious to justify the termination of the contract and those which are not. The matter lies in the pouvoir souverain of the trial judge' .
>
> ***We have no doubt that there was not time to apply to Court.*** This was 'an exceptional case'. Furthermore we are satisfied that the matter was sufficiently serious to justify the termination of the contract."

This extract would suggest that the English doctrine referred to above has no place in modern French law but the Court made no ruling as to whether the law of Jersey was to like effect.

21 To insist that, however serious the breach by the other party, a party to a contract cannot treat the contract as being at an end so that he is relieved of his obligation to continue to perform his side of the bargain, but has to go to Court to seek a discretionary decision as to whether the contract should in fact be ended, would seem to be very undesirable. It would mean that the innocent party would not know where he stood until a decision by the Court some months or even years later. We must emphasise that we have not heard any argument on this matter but our initial reaction is that we would be reluctant to find that the law of Jersey was to such effect unless there were binding precedent to that effect. The Court should develop the law of contract in accordance with the requirements of a modern society insofar as it is open for it to do so. The French approach would appear to leave all the parties in a state of complete uncertainty. Disputes concerning contracts of employment are cases where there is particular need for parties to know where they stand immediately. Be that as it may, both parties were agreed that the Court should consider whether the defendant was constructively dismissed on the basis of the test described by Lord Denning and that is what we have done.

22 We therefore need to consider two issues:-

(i) Did the plaintiff breach the contract of employment?

(ii) If so, was the breach of such significance as to justify the defendants treating the contract as being at an end?

23 The first question in turn raises two separate issues. First what is the term of the contract which the plaintiff is alleged to have breached and secondly did the Plaintiff in fact commit a breach of the term? In relation to the first defendant, Mr Santos-Costa relies upon clause 11 of his contract of employment which, he says, means that the plaintiff agreed to keep the Old Scheme going and to make the payments required by the actuary to fund the scheme. Any change to this could only be made with the first defendant's consent. In relation to the second defendant, he says that, once the second defendant became a member of the Old Scheme, there was an implied term that the plaintiff would, so long as it was carrying on business, fund the scheme as requested by the actuary in order to provide the benefits stipulated under the trust deed. He asserts that that is an implied term in all contracts of employment where an employee is a member of a final salary pension scheme. As to whether there was a breach, Mr Santos-Costa argues that the defendants were entitled to rely upon the assertion of Mr Wrigglesworth at the meeting on 6 th September to the effect that the plaintiff would not be maintaining the Old Scheme for the defendants. They did not act prematurely by not waiting for the board meeting to be held on 19 th September.

24 As to whether the breach by the plaintiff was of sufficient seriousness to justify the defendants treating the contract as repudiated, Mr Santos-Costa asserted that the Court did not need to analyse in detail the advantages and disadvantages of the New Scheme as compared with the old one. The fact is that it was agreed by all parties to be completely different in certain key respects. Under a final salary scheme an employee is entitled to a

fixed percentage of his final salary depending on the number of years worked; in this case one sixtieth for every year worked up to a maximum of two thirds of the final salary. This was an entitlement on the part of the employee which was subject only to the employer funding the scheme to the necessary extent as advised by the actuary. Under such a scheme an employee knew where he stood. The investment risk was on the employer, not on the employee so that, if the investment performance was poor, the employer would have to increase the funding rate for the scheme. Regardless of investment performance, the employee was still entitled to the stated percentage of his final pension. Conversely, with a money purchase scheme, the employee was only entitled to a pension based upon the investment performance of his fund. The investment risk was entirely on him. The employer had no investment risk; he simply had to pay the agreed employer's contribution. If the investment performance was good, the employee might be better off than under a final salary scheme, but if the investment performance was poor, he would be worse off. He simply would not know. Mr Santos-Costa relied upon the affidavit of Mr Daniell, the director of the plaintiff responsible for pension matters, who said as follows:-

> *"… final results would only be known at the date of retirement when actual fund performance, salary inflation and annuity rates were known as fact.* The results of such a scheme would be either similar, greater or lesser than the result of the old final salary scheme. Such was the nature of a defined costs scheme of the type being proposed and implemented."

Mrs Guillaume's affidavit was to like effect. At paragraph 24 she said:-

> *"I consider that the new scheme was of more benefit to the defendants than the old scheme.* It is true to say that the old scheme had some advantages. A member had a known pension amount and there was no investment risk for a member. The advantages of the Rossborough Final Salary Scheme however were in my opinion outweighed by the disadvantages for members in the age group of the defendants …".

After describing these she then went on at paragraph 26:-

> *"… the disadvantages with the new scheme are that there is some investment risk to the member, coupled to this therefore is an unknown pension level."*

Mr Santos-Costa argued that, on any view, there was a very significant difference between the two schemes and that it was reasonable for an employee to take the view that he did not wish this change to be imposed upon him. He was entitled to say that he wished for a known level of pension rather than an unknown one. He did not have to show that the change was disadvantageous to him. Mr Santos-Costa referred us on the aspect to *Bellfield v Aviation and Airport Services Limited* (an unreported decision of the Employment Appeal Tribunal dated 14th March 2001).

25 Mr Thompson argued that it was not possible for the Court to decide this issue on the basis of affidavit evidence without the benefit of oral evidence and cross-examination. He began by referring to *Air Jamaica Limited v Charlton* (1999) 1 WLR 1399, a decision of the Judicial Committee of the Privy Council. In particular he referred to passages in the judgment of

Lord Millett at 1407 to the effect that, under a scheme such as that in question, the employer had no contractual obligation to pay the pension. That obligation lay upon the trustee under the terms of the trust deed. The only obligation on the employer was a contractual one to pay the appropriate contribution, but that was subject to the provision of the trust deed that the employer could unilaterally discontinue the scheme at any time. Mr Thompson pointed out that there was a similar power under clause 11(i) of the Old Scheme for the plaintiff to discontinue its contributions to the scheme at any time. Furthermore, argued Mr Thompson, unlike the scheme in the Air Jamaica case, there was no specific obligation on the employer concerning contributions. The only provision in the trust deed was clause 3(ii) and this did not provide that the plaintiff had to contribute to the funding at any particular level. Accordingly, when properly construed in the context of the Old Scheme, clause 11 of the first defendant's contract was no more than an agreement that the first defendant would be a member of the scheme and that the plaintiff would act in accordance with its obligations under the rules of the scheme. However, because of the express terms of the scheme, there was no obligation on the plaintiff to keep making contributions and accordingly the plaintiff was not in breach of contract by exercising its right under the scheme to discontinue contributions. In the case of the second defendant, there was no contractual obligation on the plaintiff to maintain its contributions and the implied term suggested by Mr Santos-Costa did not exist; otherwise no employer could ever change pension schemes. Furthermore to imply such a contractual term was inconsistent with the principles described in the *Air Jamaica* case. The only implied term which might be relevant was that referred to in *Malik v BCCI* (1997) 3 All ER 1, namely a term that an employer would not conduct his business in a manner likely to directly or seriously damage the relationship of confidence and trust between employer and employee. But, he asserted, there was no evidence before the Court entitling it to find a breach of such term at this stage of the proceedings.

26 Even if, contrary to his submission, there was a contractual obligation on the part of the plaintiff to keep the Old Scheme going and funded for the defendants, the plaintiff had not definitely and irrevocably decided to breach that obligation. It had been made clear that the board of the holding company would consider the defendants' objections on 19 th September. It was only the board of directors which could decide the matter and the defendants actual prematurely in resigning on 12 th September simply on the basis of alleged remarks made by Mr Wrigglesworth at the meeting on 6 th September. Support for this could be drawn from the fact that, within three days, the plaintiff did in fact agree to maintain the Old Scheme for those who wished it.

27 If he was wrong on these points, Mr Thompson argued that any breach of contract on the part of the plaintiff had not been so significant as to justify the defendants in treating the contract of employment as repudiated. There was much expert evidence to be adduced to show that the New Scheme would be much better for the defendants and other employees than the Old Scheme because of factors such as portability i.e. the ability to transfer to other schemes in the event of a change in employment. The fact that the defendants apparently preferred the Old Scheme to the New Scheme was not sufficient. The Court had to be satisfied objectively that the change imposed by the plaintiff was of such significance as to

amount to a repudiatory breach. In order to decide that, the Court had to be made aware of all the advantages and disadvantages of the New Scheme in order to reach a conclusion as to whether the change in the pension scheme was such as to justify the defendants in resigning. A conclusion could not be reached on the one point of difference relied upon by Mr Santos-Costa. In support he referred the Court to *Gillies v Richard Daniels & Co. Ltd* (1979) IRLR 457.

28 Finally Mr Thompson argued that the repudiatory breach had to be the effective cause of the defendants' decision to resign (see *Jones v F Sirl & Sons (Furnishers) Ltd* (1997) IRLR 493. The plaintiff had adduced affidavit evidence which suggested that the defendants had decided to leave in any event and that the problem of the pension was just a convenient cover for their decision to go. The plaintiff wished to obtain discovery and further evidence as to when the defendants were first in touch with Marsh concerning their new employment. The plaintiff was entitled to a conventional trial on this issue including discovery, oral evidence and cross-examination together with the opportunity to bring all the evidence at its disposal. It was not suitable for resolution at an interlocutory hearing.

29 We have concluded that we are not in a position to make a definitive finding on whether the defendants were constructively dismissed. We think that there is much force in Mr Thompson's submissions. The various issues upon which he relies cannot be fully and fairly dealt with on affidavit evidence at an interlocutory hearing. The parties are entitled to have such matters resolved only after they have had full opportunity of putting their case including discovery, the production of expert evidence as necessary, oral evidence and cross-examination. Only then would the Court be in a position to determine exactly what were the relevant terms of the contracts of employment; whether they had been breached; if so whether the breach was so significant as to justify the defendants in treating the contract as repudiated; and whether it was an effective cause of their decision to treat the contract as being at an end. In particular the issue as to the exact obligation of an employer to an employee in relation to a pension scheme such as this is complex. A decision in favour of Mr Santos-Costa that a unilateral change from a final salary scheme to a money purchase scheme would invariably be a repudiatory breach of contract would have wide ramifications. We are not happy to reach such a decision at an interlocutory hearing on disputed affidavit evidence and without the benefit of the fullest argument.

30 We would add that, on the basis of the arguments which we have heard, we do not consider one party's case to be significantly stronger than the other's on the issue of constructive dismissal. We think that the arguments are complex and we simply do not know at this stage whether the defendants will ultimately be held to have been constructively dismissed or not. Accordingly the merits of the respective arguments on this issue have not been weighed in the balance when considering whether to maintain the injunctions.

Interlocutory injunctions – the applicable principles

31 In *Alpha Print Limited v Alphagraphics* (1989) JLR 152, the Court approved the adoption of the principles laid down by the House of Lords in *American Cyanamid Co v Ethicon Limited* (1975) AC 396 in relation to interlocutory injunctions. In particular, the Court approved the following summary of the speech of Lord Diplock as set out in Drysdale & Silverleaf Passing Off Law & Practice (1986).

> ***"1. Has the plaintiff shown on the evidence before the court that there is a serious question to be tried? If not, then no injunction is granted*** .
>
> ***2. If there is a serious question to be tried, then the court considers whether the damages awarded at the trial would be an adequate remedy for the plaintiff. If so, then no injunction is granted*** .
>
> ***3. If damages would not be an adequate remedy for the plaintiff, the court then goes on to consider if damages would be an adequate remedy for the defendant: if so, then normally an injunction will be granted*** .
>
> ***4. If damages would not be an adequate remedy for the defendant, the court goes on to consider the factors affecting the balance of convenience, i.e. which party will suffer more uncompensatable damage from the grant or refusal of the injunction*** .
>
> ***5. If the balance of convenience is fairly even, then it is prudent for the Court to seek to preserve the status quo*** .
>
> ***6. Finally, where there is approximately equal uncompensatable damage to both parties, it is proper to look at the relative strength of the parties' substantive cases. Where one is disproportionately stronger than the other, this may swing the balance"*** .

32 Mr Thompson argued that these principles were equally applicable in cases of covenants in restraint of trade and we therefore should not look at the relevant strength of the parties' substantive cases unless there was approximately equal uncompensatable damage to both parties. After some initial hesitation, the English Courts have decided that restraint of trade cases are not a separate category of case where the *American Cyanamid* principles do not apply. Thus in *Lawrence David Limited v Ashton* (1991) 1 All ER 385 Balcombe LJ said at 393:-

> ***"However, another 13 years have gone by since*** *Fellows & Son v Fisher* (1975) 2 All ER 829 ***and 12 since*** *Office Overload Ltd v Gunn* ***and in my judgment it should now be firmly stated that the principles of the*** *American Cyanamid* ***case apply as well in cases of interlocutory injunctions in restraint of trade as in other cases."***

33 However restraint of trade cases do raise difficulties which are not always present in other cases. One example is the limited duration of the covenants. This led Balcombe LJ to go on to say at 395:-

> ***"It is only if the action cannot be tried before the period of the restraint has expired, or has run a large part of its course, that the grant of the interlocutory injunction will effectively dispose of the action, thus bringing the case within the exception to the rule in American Cyanamid, such as was considered by the House of Lords in*** *NWL Limited v Woods* (1979) 3 All ER 614 ***esp at 625 per Lord Diplock and also by this court in*** *Cayne v Global Natural Resources Plc*. (1984) 1 All ER 225. ***It is then that the judge may properly to go on to consider the prospects of the plaintiff succeeding in the action."***

34 Lack of an early trial date is not the only occasion when it is right to have regard to the strength of the parties' respective cases on the substantive issue. In some cases, it is clear that the outcome of the interlocutory hearing will in practice be decisive of the case. In these circumstances it surely cannot be right to decide the interlocutory hearing merely on the balance of convenience and without regard to the relative strengths of each party's case. To do so would mean that the case was effectively dealt with without either party having the opportunity to argue the strength of its case. Authority for this approach can be found in a number of cases. In *NWL Limited v Woods* (1979) 3 All ER 614, Lord Diplock said at 625 that the American Cyanamid decision:-

> ***"… was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial."***

In *Cayne v Global Natural Resources Plc* (1984) 1 All ER 225, an interlocutory injunction was refused. In the view of Kerr LJ at 236, the action was never likely to be taken to trial if the plaintiffs obtained an injunction. Hence:-

> ***"The overriding consideration for present purposes is that, if an injunction is granted, the effective contest between the parties is likely to have been finally decided summarily in favour of the plaintiffs."***

Finally in *Lansing Linde Limited v Kerr* (1991) 1 All ER 418, Staughton LJ said at 424:-

> ***"Nor do I see why, as part of the practical realities, the judge should not consider how likely it is that a trial will ever take place.*** On the contrary, this seems to have been considered at least to some extent in the NWL Limited case and in Cayne's case."

Having then considered the likelihood of the defendant wishing to bring the matter to trial if an injunction were granted he went on to say:-

> ***"So if an injunction had been granted by the judge, or is now granted, the likely effect would be to decide the dispute against Mr Kerr for good and all.*** In those circumstances justice requires, in my opinion, some assessment of

the merits and more than merely a serious issue to be tried."

35 We will consider the balance of convenience in a moment but Mr Thompson conceded that, if he were successful in maintaining the interim injunctions at this hearing, the defendants would be unlikely to pursue the action to trial. In our view he was being realistic in making that concession. Any claim for damages against the plaintiff on the undertaking in damages would be speculative and for a comparatively modest amount. Accordingly, if decided one way, the decision on this interlocutory hearing will effectively dispose of the whole action. Let us assume for the purposes of argument that the Court were to conclude that the balance of convenience test favoured the continuation of the injunctions. Let us also assume that, although satisfied that there was a serious issue to be tried, the Court was of the view that the covenants were likely to be held to be unreasonably wide. Can it be right to condemn a defendant to obey an injunction, which the Court knows is likely to be decisive of the whole case, without taking into account the fact that the Court believes it to be more likely than not that the covenant which underlies the injunction will be struck down as being unreasonably wide. To do so would be unjust to a defendant.

36 In our judgment, because this is a case where, if we decide the interlocutory hearing in favour of the plaintiff, it is likely effectively to dispose of the whole case, we must take into account the respective strength of the parties' substantive cases. An additional reason for doing so is that both parties were agreed that it was unlikely that a full trial could take place before the end of the year at the earliest. That would mean that about two-thirds of the period of the covenants would have expired. In those circumstances we think that the case also falls within the exception envisaged by Balcombe LJ in the extract cited above from the *Lawrence David* case.

The balance of convenience

37 We turn next to consider the balance of convenience in the manner summarised in the *Alphaprint* case. We are satisfied that there is a serious issue to be tried in respect of the validity of the covenants, whether the defendants were constructively dismissed and whether the defendants have been in breach of the covenants. The case therefore crosses the necessary threshold to consider the balance of convenience.

38 Would damages be an adequate remedy for the plaintiff if it were successful at trial? In our judgement they would not. It would be difficult to assess the plaintiff's loss. Once clients move, it is difficult to persuade them to return. Thus the loss suffered as a result of a client who left the plaintiff because of the breach of the covenant by the defendants might continue indefinitely. The damage to the plaintiff's business would be ongoing. Furthermore the defendants would not be in a position to pay damages of any substantial amount.

39 Would damages be an adequate remedy for the defendants if they were successful at trial? The evidence is that they are employed by Marsh at a fixed salary, in addition to which they

are entitled to an unlimited bonus calculated by reference to the new business brought in. On the face of it, the level of damage suffered by them would be the bonuses which they would otherwise have earned during the two year period, but which they would have been prevented from earning by the injunction. On the evidence, even on the assumption that all the business for which they were responsible at Rossboroughs would have followed them to Marsh, the level of bonus would not be substantial and could clearly be met by the plaintiff. According to Mr Santos-Costa the bonus in those circumstances would be £27,500 for the first defendant and £6,500 for the second defendant. However there would be great difficulties of proof. How would the defendants prove the amount of business which would have transferred to Marsh (thereby affecting their bonus) if the injunctions had not existed? Furthermore, it is suggested by Mr Santos-Costa that if the injunctions are maintained, the defendants may be at risk of losing their employment with Marsh because of the limitations on the business which they can undertake. If they were to lose their jobs, he argued, damages would not necessarily be an adequate remedy. We are not convinced by this latter point as the fixed salary element would clearly be capable of assessment. The problems in assessing the lost bonus would still remain. We conclude that, because of the difficulties in assessment, damages would not be an adequate remedy for the defendants.

40 We therefore turn to consider which party would suffer more uncompensatable damage from the grant or refusal of the injunction. On this aspect, we conclude that the balance of convenience favours the plaintiff. It may suffer substantial long term damage to its business if clients are wrongly (if the plaintiff succeeds at trial) allowed to transfer to the defendants' new employers. Conversely, the defendants are receiving a basic salary in any event. The only uncompensatable loss which they will suffer will be the bonuses which they would otherwise have earned. As we have said these are estimated by Mr Santos-Costa as being £27,500 in the case of the first defendant and £6,500 in the case of the second defendant if all the business for which they were responsible at the plaintiff were to transfer. There may of course be other business of the plaintiff which they might have captured if allowed to do so and the above figures do not therefore represent an absolute maximum loss but, in our judgment, they represent a realistic measure of the maximum loss. It follows that the uncompensatable damage which would be suffered by the defendants would be much less than the uncompensatable damage suffered by the plaintiff.

41 Accordingly, if we were to decide this case solely on the balance of convenience, we would find in favour of the plaintiff. However, for the reasons which we have given above, we think that this could be a potential cause of injustice to the defendants and accordingly we propose to go on to consider each party's case on the merits.

Validity of the covenants General principles

42 We have been referred to a number of cases concerning covenants in restraint of trade. Subject to two points, to which we will refer shortly, we are satisfied that the principles which apply in English Law are equally applicable in Jersey. In the context of employment contracts – the law looks more generously on such covenants in a contract for the sale of a

business – we would summarise the principles as follows:-

(i) A covenant in restraint of trade between an employer and an employee is unenforceable unless it is reasonable as between the parties and reasonable with reference to the public interest.

(ii) A covenant intended merely to protect the employer against competition from his former employee will not be upheld. The Court will be careful to ensure that the law is not used to stifle bona fide competition or to prevent an employee from using his skills and knowledge, even if gained wholly or partly in the employer's service.

(iii) However an employer is entitled to protection against an employee taking unfair advantage of information obtained during his employment. As Lord Parker put it in *Herbert Morris Limited v Saxelby* (1916) AC 688 at 709:-

> ***"Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilise information confidentially obtained."***

Further guidance on the sort of matters which can be the subject of protection by a covenant in restraint of trade was given by Lord Wilberforce in *Stenhouse Limited v Phillips* (1970) 1 All ER 117 at 122:-

> ***"Leaving aside the case of misuse of trade secrets or confidential information … the employer's claim for protection must be based on the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation.*** For while it may be true that an employee is entitled – and is to be encouraged – to build up his own qualities of skill and experience, it is equally his duty to develop and improve his employer's business for the benefit of his employer. These two obligations interlock during his employment: after its termination they diverge and mark the boundary between what the employee may take with him and what he may legitimately be asked to leave behind to his employers" .

The most common example of a matter which falls within Lord Wilberforce's description is goodwill arising from customer connections.

(iv) If a Court is to uphold a covenant which imposes restrictions upon the freedom of

action of the employee after he has left the service of the employer, the restrictions must be no greater than are reasonably necessary for the protection of the employer in his business.

(v) The burden of satisfying the Court that the covenant is no wider than is reasonably necessary lies on the employer.

(vi) Although the Court may, where appropriate, interpret a covenant in a manner which renders it reasonable, and therefore enforceable and may also apply the "blue pencil test" so as to strike out parts which render the covenant too wide but enforce the remainder if reasonable, the Court cannot rewrite the covenant which the parties have entered into. If, despite benevolent interpretation and the deletion of unreasonable parts, the covenant would still be wider than is reasonably necessary, the Court will not enforce it even if it would have enforced a more narrowly drawn covenant to protect an employer's legitimate interest.

43 The first issue on which Jersey Law may be different is the burden of proof. It is clear that, under English Law, the burden of showing that the covenant is no wider than is reasonably necessary lies on the employer. Mr Thompson argued that, under Jersey Law, the burden lies on the employee to show that it is wider than reasonably necessary. He referred to *Wallis v Taylor* (1965) JJ 455 where the Court said at 457:-

> ***"It is an established principle of Jersey Law that 'la convention fait la loi des parties' and the Court will enforce agreements provided that, in the words of Pothier, (Oeuvres de Pothier, Traité des Obligations 1821 edition, at p.91) 'elles ne contiennent rien de contraire aux lois et aux bonnes moeurs, et qu'elles interviennent entre personnes capables de contracter'.*** Where an agreement is freely entered into between responsible persons, good cause must be shown why it should not be enforced, and the matter which we have to determine is whether and the extent to which, in Jersey law, a covenant in restraint of trade can be held to be invalid."

Although the Court went on to say that it would have regard to English precedents in the absence of any local ones, Mr Thompson submits that the fact that 'good cause must be shown why it should not be enforced' means that the burden is on the employee. This, he says, is consistent with the maxim of 'la convention fait la loi des parties', which places great importance on the need to uphold contracts into which parties have freely entered. Furthermore the outcome of the two reported cases could only be explained on the basis that Jersey Law was more inclined to uphold covenants in restraint of trade than English Law. Thus in *Nicol v Egan* (1968) JJ 903 the Court upheld a 10 year non-competition clause preventing an employee from working as a physiotherapist in Jersey. In *Wallis v Taylor* itself the Court upheld a one year clause preventing the employee from working as a driving instructor in Jersey.

44 We see the force of Mr Thompson's argument and, as at present advised, would be inclined to accept it. However we would wish to hear further argument on the exact effect of the maxim before reaching a final conclusion as we have not heard full argument on this

aspect during the course of this interlocutory hearing. For the purposes of this case, we have proceeded on the basis that the burden lies on the plaintiff to show that the covenants are no wider than is reasonably necessary to protect its legitimate interests.

45 The second issue on which Jersey Law may be said to be different relates to the power to substitute a lesser period when the period specified in a covenant is thought to be too long. It is clear that the courts in England cannot do this as it would amount to rewriting the covenant. In *Nicol v Egan* (supra) the Royal Court expressed the obiter opinion that, had it considered the ten year period in that case to have been too long, it would have granted an injunction for a such shorter period as it considered reasonable. It saw no logic in the English rule which applied the doctrine of severance so as to permit the grant of an injunction in respect of part of an area, or part of the prohibited activity or only some of the classes of persons with whom dealings were prohibited, but which did not allow enforcement of part of the duration of a covenant. Although at first sight it may appear tempting to find that such a power exists, rather than be forced to hold the whole covenant unenforceable just because it is too long, it would amount to rewriting the parties' agreement. Furthermore, if employers thought that the Court had such a power and would exercise it freely, there would be a real danger of employers inserting long periods in their employment contracts in the knowledge that, to do so, would not place them at any risk because, if the period were held to be unreasonably long, the Court would simply reduce the period to whatever it thought reasonable. The employer would therefore have nothing to lose by 'trying it on' with a long period. In the case of former employees who did not feel able to take legal proceedings to challenge the covenant, they could find themselves being restricted in their activities for an unreasonably long period. Again, we do not feel that we have had full argument on this aspect and, for reasons which will appear later, we do not think it necessary to reach a final conclusion. But our provisional view is that there is a difference in legal principle between simply striking out certain words in a clause so as not to enforce them and changing a clause by substituting a lesser figure. As at present advised, we would be inclined to follow the English principle rather than the obiter dictum in *Nicol v Egan*.

46 We turn next to consider specific aspects in which it is said that the covenants in this case are unreasonably wide.

(i) Extended definition of "client"

47 Clause 18 prevents dealing with any person firm or company who has been a client within the relevant period and goes on to say:-

> *"And the expression 'client or clients' in this context includes in the case of a company its beneficial owners and in the case of a trust the settlor, or named beneficiaries and intended beneficiaries."*

The injunction is more narrowly drawn and says at paragraph 2.1:-

"The expression Client of the Plaintiff in this context in the case of a company shall extend to its beneficial owners and in the case of a Trust shall included named beneficiaries."

Although no-one mentioned this point in argument, it seems strongly arguable that this extended definition of " *client*" applies only to clause 18 and not to clause 17. But the injunction assumes that the extended definition applies to both clauses.

48 Mr Santos-Costa submitted that this extended definition rendered the covenants too uncertain and too wide. On the basis of the evidence before us at this stage, we are inclined to agree. It is too uncertain because the phrase " *beneficial owner*" is ambiguous. Mr Santos-Costa gave as an example a public company. He asserted that the defendants could not act for any shareholder of that company, no matter how small the shareholding. There must be many thousands of shareholders of some public companies, the vast majority of whom would never have had any connection or dealings with the plaintiff whatsoever; yet the defendants were prevented from acting for them. This was not merely hypothetical because it was accepted by both parties that the plaintiff did indeed act for a number of public companies. Mr Thompson dismissed this argument. He initially contended that a beneficial owner meant a person who could say " *this is my company*", by which he therefore meant the person who owned the whole of the company. On reflection he modified this stance to argue that a person who owned more than 50% of a company would be a beneficial owner for these purposes. But both the covenant and the injunction referred to "beneficial owners" of a company. That suggests that there would be more than one beneficial owner of a company, which is inconsistent with Mr Thompson's submission (save in the case of joint owners). Furthermore, a person who owns, say, one third of the shares of a company is often described as one of the beneficial owners of the company. Where is the line to be drawn? Does there come a time when a shareholder's holding is so small that he is no longer properly described as a beneficial owner? If so, when is that limit reached? In our judgment it is very difficult to know what is meant by the phrase in the context of this covenant and we would not be willing to grant an injunction the effect of which was so uncertain.

49 We also agree with Mr Santos-Costa that the extended definition is unreasonably wide. In relation to companies, it may include shareholders who have no relationship whatsoever with the plaintiff and, depending upon the exact meaning of " *beneficial owner*" it may mean that there are many such shareholders in the case of public companies. In relation to trusts, the covenant itself refers to intended beneficiaries as well as the settlor and named beneficiaries. How can any one know who the former are and how can it be said that they form part of the customer connection of the plaintiff? Wisely, the plaintiff restricted the injunction to named beneficiaries but in our judgment that is likely also to be held to be too wide. The most common form of trust in Jersey is the discretionary trust. There is normally a wide class of beneficiaries such as the issue (both children and more remote) of the settlor and the spouses of such beneficiaries. The legal relationship, in the case of a trust, is between the plaintiff and the trustee. We can envisage that, in some cases, there may be a beneficiary who has become involved in the question of insurance so that he has dealt with the plaintiff, but we think that this would be a minority of cases. In any event, all the other

beneficiaries would have played no part in the insurance and would have no relationship with the plaintiff. Yet the defendants would be prohibited from providing insurance for any of them. For example, the fact that a trust insured, through the plaintiff, a house in which the settlor and his family lived would mean that none of the adult children could insure their cars or their own houses through the defendants. Furthermore the identity of all the beneficiaries would almost certainly be unknown to the plaintiff, let alone to the defendants.

50 In our judgment, on the evidence before us, the extended definition of client renders both covenants wider than is reasonable and we think that the prospects of the plaintiff being able to uphold these extended definitions at trial are low. In saying this, we do not wish to suggest that it can never be reasonable to seek to protect a client connection in respect of a particular beneficial owner of a company or a particular beneficiary of a trust. But the covenant would have to be narrowly drawn so as to make it clear what constituted a beneficial owner and confine the covenant to beneficial owners or beneficiaries who had had dealings with the employer and had played a part in securing the insurance policy entered into by the relevant company or trust. In such cases, there would be a client connection which it would be reasonable for the employer to seek to protect. We should add that our decision on this aspect would have been the same even had we accepted Mr Thompson's arguments in relation to ‘la convention fait la loi des parties’. This provision is too wide even if the burden lies on the defendants and even if Jersey Law looks more sympathetically on covenants in restraint of trade than does English Law.

(ii) Interpretation of “client”

51 There was argument before us as to what was meant by the word “ *client*” (in its unextended form) in the case of a trust. The point is important because of the nature of financial business carried on in Jersey where there are a relatively modest number of trust companies which carry on the business of acting as trustee but where the larger of such trust companies may act as trustee of many many trusts. Certain names were mentioned in the course of argument but we think it preferable to take a hypothetical Jersey trust company called Trustco A. Trustco A is trustee of possibly several thousand trusts. Many of these require insurance and Trustco A uses the plaintiff to insure the assets of some of the trusts of which it is trustee. Mr Thompson argued that the client in such cases is Trustco A. Accordingly, if Trustco A insures a single trust with the plaintiff, the defendants are prohibited by the covenants from soliciting or acting for Trustco A in respect of any of the other trusts of which it is trustee, even though Trustco A may already spread its business between different firms of insurance brokers. Mr Thomspon argued that that is reasonable because the key client connection lies with the officers of Trustco A and the plaintiff is entitled to protect that goodwill.

52 In our judgment that is not the natural construction of clauses 17 and 18. If Trustco A as trustee of Trust X enters into a contract, its own assets are not at risk (save in exceptional circumstances) nor are the assets of Trust Y of which Trustco A is also trustee. The client of the plaintiff in that case is Trustco A in its capacity as trustee of Trust X. Trustco A as trustee

of Trust Y has no legal relationship with the plaintiff. In our judgment, ordinary principles of interpretation would lead us to the view that the client of the plaintiff was Trustco A as trustee of Trust X. That view is reinforced by the wording of the extended definition of clients, namely "… *and the expression 'client or clients' in this context includes … in the case of a trust the settlor …*". This clearly suggests that it is the trust which is the client, not the trustee. A trust is not a legal entity but the wording can only sensibly be taken to refer to the trustee in its capacity as trustee of that particular trust.

53 Accordingly clauses 17 and 18 do not prohibit the defendants from soliciting or dealing with Trustco A in respect of trusts which are not insured through the plaintiff. The covenants do prohibit them from soliciting or dealing with Trustco A in respect of any trusts which are insured through the plaintiff. In respect of any insurance business of its own (i.e. not in its capacity as trustee) Trustco A falls to be dealt with as an ordinary company for the purposes of the covenants.

(iii) Past clients

54 The covenants restrict the defendants from soliciting or dealing with not only those persons who were still clients when the defendants left, but also those who had been clients at any time within the preceding two years. Accordingly it covers the case of a person who had become disillusioned with the plaintiff and moved to another firm of insurance brokers, possibly more than a year before the defendants left; yet the defendants are prohibited from soliciting or dealing with such a person.

55 Although Mr Santos-Costa alluded to this issue in passing, he did not press the point that it was a ground for holding that the covenants in this case were too wide. It is clear from the English cases that there is no objection in principle to such covenants extending to former clients (see *G.W. Plowman & Son Limited v Ash* (1964) 2 All ER 10; *Home Counties Dairies Limited v Skilton* (1970) 1 All ER 1227; *John Michael Design Plc v Cooke* (1987) 2 All ER 332 and *International Consulting Services (UK) Limited v Hart* (2000) IRLR 227. Furthermore a non-competition covenant, where upheld, would of course cover such persons because it prevents the employee from carrying on business at all. The thinking behind allowing such provision in non dealing and non-solicitation covenants has been expressed to be to in order to protect the employer's chance of such former clients returning to the fold (see Harman LJ in *Plowman* at 13). We agree that, in principle, extension to former clients may be reasonable but great care has to be taken in deciding how far back it is reasonable to go. There comes a point at which it really cannot be said that the employer has any continuing customer connection interest. We would not wish it to be thought that it will invariably be the case that a back period of two years will be permissible. However, given that insurance policies are renewed only on an annual basis, we can see the arguments for recognizing a two year period in this case and do not consider that aspect of the covenants to be too wide.

(iv) The number of clients – personal contact with clients

56 Mr Santos-Costa's main point was that it was unreasonable for the covenants (particularly clause 18) to extend to all the clients of the plaintiff. The plaintiff's own publicity material referred to some 40,000 policy holders. This was initially thought to mean that the plaintiff had 40,000 individual clients. However, during the course of the hearing, Mr Wrigglesworth swore a further affidavit in which he asserted that the figure of 40,000 included the business of the plaintiff's associated companies in the other Channel Islands and also referred to policy holders rather than clients. One client could hold several policies. He said that it was not possible to give precise figures because of computer changes but his best estimate of the total number of clients of the plaintiff was between 12,000 and 15,000. We do not have any evidence as to the number of clients who had personal contact with the defendants but we accept for present purposes that it could only have been a small proportion of this total.

57 Mr Santos-Costa argued that the covenants should be restricted to clients with whom the defendants had dealt personally. He referred to a number of cases where the restriction had been in this form. In *Home Counties Dairies Limited* (supra) there was a one year non-solicitation and non-dealing covenant in respect of a milkman but it only covered customers that he had served himself. In *Stenhouse* (supra) there was a five year non-solicitation clause for an insurance broker but it was confined to clients or potential clients with whom the employee had had dealings or negotiations. Lord Wilberforce emphasized this aspect in his judgment. In *International Consulting Services (UK) Limited* (supra) the one year non-solicitation and non-dealing covenants only applied to clients with whom the employee (or any of his subordinates) had had contact. He placed particular reliance on the case of *Office Angels Limited v Rainer-Thomas* (1991) IRLR 214. That case concerned an employment agency. At the relevant time it had 34 branches situated mainly in London and the south and west of England with an aggregate of some 6,000 to 7,000 clients. One of the defendants had been the manager of one of the branches and the other defendant was an employee in that same branch. There was a non-solicitation and non-dealing covenant which applied to any person who had been a client of the employer during the period of the defendant's employment. The judge held that the provisions of this clause were too wide because it applied to all 6,000 to 7,000 clients of the plaintiff and to all the branches, when the defendants had had contact with no more than one hundred clients, all in their own branch.

58 Mr Thompson sought to distinguish these cases. *Skilton* applied to a milkman where clearly personal contact would be the key factor. In *Stenhouse* the covenant had been for a period of five years which could be said to be on the long side. In the circumstances, the fact that the covenant was restricted to clients with whom the employee had dealt made it easier for the court to uphold the five year period. In this case we were only concerned with a two year term. In *International Consulting Services*, he referred to the observation of the judge at page 7 that:-

> ***"In considering these points, it is necessary to bear in mind that the burden on the employer in establishing the reasonableness of the covenant does not extend to showing that it is only capable of operating in circumstances in which the employee will have actual sway or influence***

> ***over the particular customer.*** That that is so is demonstrated by the Court's willingness, in appropriate cases, to uphold a provision preventing the employee from carrying on a business similar to that of the employer's in which he was previously engaged for a reasonable time and in the relevant geographical area. Such restraints often mean that the employee is prevented from dealing with some customers with whom he has had no previous contact whatsoever. Further, in cases involving non-solicitation type covenants, it has been held that it is no objection to such a covenant that it covers customers with whom the employee has never dealt …."

In relation to the *Office Supplies* case, he said that that decision was not surprising on its facts where there were 34 branches but the defendants had only had dealings with a few of the customers in one of the branches. There could therefore be no legitimate protection required concerning clients of all the other branches. That was a very different situation to the present where the defendants were senior and key employees who had a general knowledge of the plaintiff's business.

59 Mr Thompson, in turn, relied on two cases. In *GW Plowman & Son Limited v Ash* (supra) the employee was a salesman for a firm of agricultural merchants. The covenant in question was a non-solicitation clause in respect of any farmer or market gardener who had at any time during the employee's employment been a customer of the employer. It was argued that it was unreasonable for the employee to be restricted from soliciting clients with whom he had had no dealings whilst in his former employment. It was said that he might inadvertently breach an injunction by soliciting a person who, unknown to him, was or had been a customer of the employer. The Court of Appeal upheld the covenant as being reasonable and said that the employee's remedy was, before he solicited any person, to ask that person if they had been a customer of the employer during the relevant period.

60 Secondly, Mr Thompson relied on the case of *John Michael Design Plc v Cooke* (supra). The employees in that case were an assistant director and a senior designer who left to set up their own business. There was a non-solicitation and non-dealing covenant in respect of any person who had been a client of the employer during the four years prior to the termination of the employment. At a hearing concerning an interim injunction, the Court of Appeal granted an injunction and gave the opinion that the covenant was prima facie valid. In relation to non-dealing (as opposed to non-solicitation) covenants Nicholls LJ said at 335:-

> ***"The mere fact that a particular customer no longer wishes to remain a customer of the plaintiff but wishes in future to deal with the defendant is not per se a sound reason for excluding that customer from the scope of the injunction.*** With a non-dealing covenant, in practice the plaintiff will often only need protection when a customer of his has decided to change horses and go with the defendant. To regard that change of allegiance by a customer as per se a sufficient reason for refusing an injunction would be tantamount to refusing the court's assistance in giving a plaintiff protection in precisely the circumstances where that assistance is needed and for which the covenant was

designed."

61 Mr Santos-Costa further argued that, because of the large number of clients of the plaintiff and the fact that most of them were not known to the defendants, the covenants effectively prevented the defendants from earning a living because they could not safely act for anyone in case he or she turned out to be a client of the plaintiff. However, in their affidavits, both defendants asserted that they intended to abide by the non-solicitation covenant. Thus both of them said this on oath in anticipation of the hearing:-

> *"Finally, I can confirm my absolute intention to abide by the non-solicitation clause in my contract and I have communicated this both verbally on a number of occasions and in writing to the plaintiff …."*

In his submissions, Mr Santos-Costa initially argued that his clients would have no objection to the non-solicitation covenant if the extended definition of client were removed and if it were reduced to one year's duration. However, at the very end of his submissions, made in reply to those of Mr Thompson, he asserted, in response to a question from the Court, that even if this were done, the covenant would still be too wide because of the number of clients. It should therefore be confined to clients with whom the defendants had dealt.

(v) Summary of the merits

62 As can be seen, we have been referred to a number of cases. This was very useful in order to give some idea of the sort of covenants which have been upheld and those which have not in varying circumstances. But it is important to remember that these cases are not precedents in the strict sense. They are merely examples of the application of well known principles to specific facts. The facts have varied considerably. Furthermore in some cases the terms of a covenant meant that a particular point was not argued. Our task is to consider whether, on the facts of this case, the covenants are likely to be held to be reasonable or not.

63 Although we have considered a number of individual aspects, we ultimately have to consider the covenants in the round. We have come to the clear conclusion that, if the extended definition of client is maintained, these covenants are unreasonably wide because they apply to so many persons in respect of whom the plaintiff does not in truth have any goodwill through customer connection. However, if the extended definition of client is deleted, and having regard to the interpretation which we have given to the word "*client*" in relation to trust companies, we are of the view that both the non-dealing and non-solicitation covenants are likely to be held to be no wider than is reasonably necessary at trial. Our reasons can be summarized briefly as follows:-

(i) Both defendants were senior employees. The first defendant was a director and the second defendant was one of only two account executives, being the level of

employee immediately below board level. The first defendant was therefore privy to all matters which were considered at board level. He opened the post on a daily basis and would have significant knowledge of all the key clients of the plaintiff even if he did not deal with them personally. To take an example given by Mr Thompson, if the plaintiff were having difficulties with a major client, this was the sort of matter which would be discussed at senior level and of which the first defendant would become aware. Even if he had had no dealings with that client himself, he would know that the relationship of the client and the plaintiff was perhaps vulnerable and could therefore target it after he left. The second defendant also took part in broker's meetings and had knowledge of the key client relationships of the plaintiff.

(ii) In the case of junior or middle-ranking employees it will often be unreasonable to restrain them from dealing with clients with whom they have had no contact during their employment. But, as the authorities show, the same is not necessarily true in the case of more senior employees. In such cases, in order to provide effective protection of the employer's customer connections, it may be reasonable to prevent the employee from soliciting or dealing with any clients of the employer, even if the employee had no contact with those clients. We are satisfied that, in view of the nature of the plaintiff's business, the level of seniority of the defendant and the nature of their duties during their employment, it is reasonable for the covenants to apply to all clients of the plaintiff rather than just those for whom the defendants acted personally.

(iii) Both defendants have accepted that a non-solicitation covenant is reasonable in principle although their stance has altered as to how much, if any, it has to be cut down before it is reasonable in practice. Is a non-dealing covenant also required? It is clear from the authorities that a non-dealing covenant is often considered to be necessary in addition to a non-solicitation covenant and we think that, on the facts of this case, a non-dealing covenant is likely to be held to be reasonable. In a place such as Jersey, which is small geographically and has a comparatively small business community, we think that it will often be the case that a non-solicitation clause on its own will not be sufficient to protect the employer's legitimate interests. In such circumstances it is too easy for an employee to take advantage of the customer connections he has established whilst working for his employer without overtly soliciting clients. The fact that he has moved to a new employer or has set up business on his own is almost certain to become known to clients without the need for any active solicitation from him. Even in cases where he has solicited, it will be extremely difficult to prove it as the fact of solicitation will be known only to the employee and the client who has transferred.

(iv) We think that, on the facts of this case, a two year period is likely to be upheld. Insurance policies are, in general, renewed annually and we think that a two year period is reasonable in order to give the employer the opportunity to prove that he has adequately replaced the former employee and is therefore worthy of retaining the client's business.

(v) We do not agree that the effect of the covenants will be to prevent the defendants from working or doing business. The fact is that the injunction has been in force for

eight months and they have been employed throughout that time. Presumably Marsh was aware of the covenants when it decided to employ them. It would be surprising if the defendants were now to be dismissed by Marsh simply because the injunctions have not been lifted. Even if they were to be dismissed, we have little doubt that, bearing in mind Jersey's very tight labour market and its position as a successful finance centre, two insurance brokers with the skills and experience of the defendants would have no difficulty in finding new employment.

(vi) Nor do we agree that, because of the number of clients of the plaintiff, it will in practice be impossible for the defendants to solicit or deal with anyone in case they turn out to be clients of the plaintiff. As was made clear in *Plowman*, the remedy is to ask in each case before so acting. If the person turns out to be someone for whom the defendants cannot act, they simply inform the client of this by referring to the fact that there is an injunction which has a further period to run. If the person lies and states that he is not a client when in fact he is, then, assuming the defendants do not know otherwise, they will not be in contempt of Court because they will not have the necessary knowledge or intent.

64 In summary, when considering the strength of the parties respective substantive cases, we consider that the plaintiff's case on the extended definition of client is weak and would not be likely to be successful at trial but we consider that, if that provision is deleted and having regard to our interpretation of client in relation to trust companies, the remainder of the two covenants are prima facie reasonable and the plaintiff is likely to succeed at trial

Conclusions

65 So how does our view of the merits affect the balance of convenience? Given our view on the unreasonableness of the extended definition of client, we would not think it right to grant an injunction in terms which included that definition just because a strict application of the balance of convenience test suggests that we should. We think that to do so would be to cause a grave injustice to the defendants in a case where, as we have said earlier, this hearing may well be decisive of the whole matter. We would therefore be preventing the defendants from undertaking activities which we think are likely to be held to be lawful.

66 However it is clear that the Court can apply the blue pencil test so as to delete passages in a covenant in restraint of trade which are too wide. We therefore propose to delete that provision. The remaining provisions are, for the reasons which we have stated, likely to be held to be reasonable and therefore enforceable. Accordingly our view of the merits of the case supports the provisional conclusion which we had reached by application of the balance of convenience test.

67 The upshot is that we maintain the interim injunctions as set out in paragraphs A 1.1 and 1.2 of the prayer of the Order of Justice but we delete paragraph A 2.1.

68 Finally we would like to express our gratitude to both counsel for the clarity and thoroughness of their submissions. In particular we would like to emphasise that our reference to not having had full argument in relation to the two points on which Jersey law may differ from English Law on covenants in restraint of trade implies no criticism whatsoever. This was an interlocutory hearing and there were limits to what it was reasonable to investigate at such a hearing.