IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2021] EWHC 3830 (KB)

No. QB-2021-002807

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 30 July 2021

Before:

MR JUSTICE MARTIN SPENCER

B E T W E E N :

CELEBRITY SPEAKERS LIMITED — Claimant/Applicant

- and -

(1) DAVID DANIEL
(2) ANDREW LEIGHTON-POPE
(3) D&A ASSOCIATES LIMITED — Defendants/Respondents

MR M STEPHENS appeared on behalf of the Claimant/Applicant.

MR F HOAR appeared on behalf of the Defendants/Respondents.

J U D G M E N T

MR JUSTICE MARTIN SPENCER:

1 This is an application on the part of the claimant, Celebrity Speakers Limited, for injunctive relief against its former employee, Mr David Daniel, and two further bodies, Mr Andrew Leighton-Pope and a company set up in November 2020 called D&A Associates Limited.

2 The background is set out in a witness statement of Ms Sandra Krywald dated 16 July 2021 who explains that the claimant company was incorporated in August 1983 and is a speaker bureau selling the services of celebrities and high achievers to the corporate market for live events worldwide. It is part of a network of other offices selling the services of speakers under the CSA brand.

3 The first defendant, Mr Daniel, was an employee of the claimant for twenty-five years having been recruited in 1996 and then trained as a speaker consultant. He eventually progressed to the position of head of entertainment and sports. He became a statutory director of the claimant in April 2015 when he was promoted to the post of director of UK Sales Strategy under the terms of a service agreement. Ms Krywald indicates that Mr Daniel was the company's highest performing sales consultant. He developed close working relationships with various clients and speakers, and was the dedicated manager for one of the company's key speakers, Mr Bruce Dickinson of the rock group Iron Maiden.

4 It would appear that in about November 2020, or before that, Mr Daniel started planning for his departure from the claimant company because, in November 2020, a company called D&A Associates Limited, which is the third defendant, was incorporated. There is a witness statement from the second defendant, Andrew Leighton-Pope, who says that in approximately October/November 2020, Mr Daniel contacted him to discuss the pandemic and the effect it was having on the entertainment industry, and explained that he had been thinking about retirement and slowing down anyway but did not want to leave the entertainment business completely. He told Mr Leighton-Pope that he thought it unlikely the business would completely recover for some time as he thought there would be a reluctance for people to want to attend large events where there were lots of people gathered.

5 Mr Leighton-Pope is a childhood friend of Mr Daniel and Mr Leighton-Pope's father was a close personal friend of Bruce Dickinson who was the lead singer of a popular 1980s group called Samson. It was in consequence of that conversation that Mr Leighton-Pope set up the company D&A Associates Limited although he says he did not inform Mr Daniel at the time that he did so and certainly Mr Daniel is not a director as such. He did not tell Mr Daniel he had done that until January 2021.

6 In the meantime, Mr Daniel had had discussions with the managing director of the claimant, Ms Sandra Krywald. He explained that he wanted to resign, that he was nervous about the viability of the business moving forward, wanted to take a step back and look at an easier working life, and that wanted to become the agent of Bruce Dickinson as his sole engagement in working life. He says he explained to Ms Krywald that he did not think this affected the claimant's business and would not amount to competition because he would be acting for Mr Dickinson on a variety of matters. However, he offered the claimant a 20 per cent commission of all commissions he would have received over the nine-month covenant period.

7 This is a reference to the contract to which I have referred which contained a number of clauses, included restrictive covenants. The contract is dated 16 April 2015 and provides in clause 2.1 for a notice period to be given of six months for termination after 31 March 2016,

which is the initial expiry date of the one-year contract initially entered into. By paragraph 19 of the contract, it is provided that there may be a period of garden leave so that paragraph 19.1 states:

> "Following service of notice to terminate the appointment by either party, or if the executive purports to terminate the appointment in breach of contract, may by written notice place the executive on garden leave for the whole or part of the remainder of the appointment."

8 Clause 19 then sets out the conditions of garden leave whereby the company is under no obligation to provide any work to the executive but may ask him to carry out alternative duties, or specific duties. The executive continues to receive his basic salary and contractual benefits and remains an executive of the company bound by the terms of the agreement, including the implied duties of good faith and fidelity. That, in fact, occurred when the first defendant gave his notice in January 2021 and he was on garden leave until expiry of the notice and the termination of his employment on 10 July 2021.

9 Paragraph 21 of the contract contains post-termination restrictions with restrictive covenants for a period of nine months after termination. Thus, it states:

> "21.1 In order to protect the confidential information, trade secrets, and business connections of the company and the CSA group to which he has access as a result of the appointment, the executive covenants with the company that he shall not:
>
> (a) For nine months after Termination solicit or endeavour to entice away from the company or the CSA group the business or customer of a restricted client with a view to providing goods or services to that restricted client in competition with any restricted business; or
>
> (b) For nine months after Termination and in the course of any business concern which is in competition with any restricted business offer to employ, or engage, or otherwise endeavour to entice away from the company or the CSA group any restricted person; or
>
> (c) For nine months after Termination in the course of any business concern which is in competition with any restricted business, employ, or engage, or otherwise facilitate the employment or engagement of any restricted person whether or not such person would be in breach of contract as a result of such employment or engagement; or
>
> (d) For nine months after Termination be involved in any capacity with any business concern which is or intends to be in competition with any restricted business; or
>
> (e) For nine months after Termination be involved with the provision of goods or services to or otherwise have any business dealings with any restricted client in the course of any business concern which is in competition with any restricted business; or
>
> (f) At any time after termination represent himself as connected with the company or the CSA group in any capacity."

10 Paragraph 21.2 then provides:

> "None of the restrictions in clause 21.1 shall prevent the executive from:
>
> ...
>
> (a) Being engaged or concerned in any business concern provided that the duties of the executive or work shall relate solely to services of activities of the kind with which the executive was not concerned with to a material extent in the twelve months before termination."

The slightly unhappy wording is that in the clause.

11 Thus, paragraph 21.2 provides a restriction to the restricted covenant confining the restrictive covenant to services or activities of a kind with which the executive was concerned in the twelve months before termination.

12 For the defendants, Mr Hoar makes the point that the claimant had been on furlough as a result of the COVID-19 pandemic from May 2020, effectively, until the start of the garden leave in January 2021 and therefore, by definition, had not been engaged in any services or activities of the company during that period because for him to have done so would have been unlawful. When one combines that period with the period of the garden leave when, again, no services or activities were carried out by the first defendant, he submits that the twelve-month period before termination cannot have involved any services or activities. Therefore, by virtue of clause 21.2(b), the restrictive covenant cannot apply after the date of termination because any activities or services of Mr Daniel in which he is engaged or concerned in any business concern would not relate to services or activities in the twelve-month period before termination with the company.

13 Returning to the evidence of Ms Krywald, she refers to a meeting on 8 January after which she said she would consider whether the claimant might agree to grant exceptions to the covenant to allow certain permitted activity but she did not do so and in an email of 21 February, reminded Mr Daniel:

> "You remain employed by the company and all your duties of good faith, fidelity, and confidence continue to apply, and that includes not in any way undermining the company."

14 In this witness statement, which is dated 16 July 2021, she states at paragraph 25:

> "Unfortunately, I have identified evidence over the past few weeks that clearly shows Mr Daniel was breaching his duty of fidelity during his garden leave and after his employment terminated last week, he is also breaching his post-termination restrictions."

15 She refers particularly to what she calls unauthorised access to CSL's database. She says that Mr Daniel had no legitimate reason to be accessing the database whilst on garden leave but when his personal computer, which was collected on or about 30 April from him, was

examined, the browser history showed that he had accessed the database on numerous occasions during the garden leave.

16 Furthermore, it revealed various discrepancies to the extent to which the computer had been used after February 2021. She asked one of CFL's IT experts Mr Peter Stefanek to check whether Mr Daniel's login details had been used more recently. She refers to part of the exhibit to her statement which appears to confirm that Mr Daniel's password had been used to grant remote access to the database on numerous occasions in the previous month by at least two people. She refers to the database being accessed from IP addresses in different places on the same date: on 8 June, London at 14.43 and Burnham at 15.21, or on 10 June, Wakefield at 10.27 and Burnham at 12.01. She says:

> "I deduce from the above that Mr Daniel has shared his password with at least one other person and that he and that other person or persons have been accessing the CSL database to extract speaker and client details and other sensitive commercial information of CSL's with the intention of building a database to help them to compete with CSL."

17 She says she does not know anyone connected to Mr Daniel that lives in Wakefield. She does know that Mr Daniel lives in Burnham and the second defendant Mr Leighton-Pope lives in Slough. That is relevant because on 7 June at 12.30, the database was accessed from an IP address in Slough.

18 Yesterday, that is the day before the hearing, the defendant served evidence, including the witness statements of Mr Daniel and Mr Leighton-Pope to which I have referred, and also a witness statement from a Petros Damilos who is a network engineer. He explains that the fact that a database is accessed from a device using an IP address at a certain place does not necessarily indicate that the person is in that place. An example would appear to be the device locating in Wakefield and the evidence or submissions I heard appear to suggest that where the database is accessed from a smart phone using Telefónica O2 service provider, that will show as registering in Wakefield wherever the smart phone is cell siting. So that, for example, in relation to the second of the Wakefield occasions, Mr Daniel says he was actually in Devon on 14 June and nowhere near Wakefield when he accessed the database using his smart phone.

19 Furthermore, Mr Damilos says that the geolocation of devices by using the IP addresses is notoriously unreliable and that whilst it might reliably tell you the country from which the IP address originates, the accuracy rate falls very quickly the more precisely you attempt to locate a particular location. He says:

> "It is my view that using geolocation to identify a particular town is not reliable at all."

20 It seems to me that there may be a triable issue in relation to those matters, but the main concern I have relates to the conclusions which Ms Krywald seeks to derive from the locations which she sets out in her witness statement. She makes a number of deductions: firstly, that the locations show that Mr Daniel shared his password with at least one other person; secondly, that the purpose was to extract speaker and client details from the database; thirdly, that the intention was to build a database using the commercial information to help the defendants to compete with CSL.

21 I am not satisfied that the evidence which is before me is sufficient to conclude that the database has been so used by the first defendant, particularly in the light of his denials to that effect and his explanations as set out in his witness statement such that I should be prepared to make the assumption I am invited to make and such as to grant interim relief at this stage in relation to the database matter.

22 I turn then to the restrictive covenant and the injunctions that are sought in that regard. The interrelation between paragraph 21.1 and paragraph 21.2(b) is Mr Hoar's principal submission because he says there is no scope for the restrictive covenant to take effect given the restriction on that restrictive covenant provided by 21.2(b) in the light of the lack of activity by Mr Daniel required by law when he was furloughed, together with the lack of activity during the period of notice.

23 Mr Stephens has two points he makes in answer to that. Firstly, that the defendant returned on a flexible furlough and, secondly, that it undermines Mr Daniel's point on the reason why he was checking the database. So I need to look at both of those matters.

24 Firstly, so far as the flexible furlough point is concerned, I return to the evidence of Ms Krywald who says at paragraph 21:

> "Mr Daniel was furloughed from 15 May 2020. In October, it was agreed he would return to work in November. About ten days before he recommenced work, a PC was set up at his home so that he could work remotely with access to CSL's database. His return to work was, in fact, delayed until early December. After a few days, Mr Daniel confirmed he should be returned to furlough because he claimed none of his clients were looking to book any speakers. On 30 December 2020, Mr Daniel telephoned me to advise that he had decided to resign and asked to meet with me in the New Year. On 8 January, he handed me his resignation letter and commenced six months' notice on garden leave."

25 From that, it would appear that the potential for Mr Daniel to carry out the activities of the company were restricted to only a few days, in the words of Ms Krywald, and, in any event, Mr Daniel was saying that he had effectively not been able to do any work during those two days because none of his clients were looking to book any speakers. That certainly appears to me to have a significant plausibility given the state of the pandemic and the second lockdown which had occurred in November 2020. I therefore do not consider that Mr Stephens's first point in fact provides an answer at all to what Mr Hoar describes as his knockout point.

26 So far as the second point is concerned, that is that it undermines the defendants' point about checking on the database, this involves a consideration of what Mr Daniel says in his witness statement about that. Firstly, it must be recognised that he says the allegations made against him in relation to unauthorised access to the CSL database are completely false and without merit. He says:

> "Ms Krywald has suggested that I had no reason to access the CSL database during the period of my garden leave. This, however, is not true. Notwithstanding the fact that CSL were doing very little business during the pandemic, there were still a few bookings coming in and being made albeit as virtual conferences. Under clause 9 of my service agreement, I was entitled to receive commissions. However,

> during my meeting with Ms Krywald, she had stated that I would not be paid for commissions that were due to be received after I left CSL even though these commissions had been booked during the currency of my employment. I felt aggrieved by this and decided I needed to take legal advice in connection with this. I had therefore been actively accessing the CSL database up to the penultimate day of my employment to determine what bookings had come in and to be able to calculate what commissions I might be entitled to receive on bookings I had already made, or bookings that I had had an active role in. I had been told by the solicitor I had spoken to that I needed to keep a record of these commissions in the event that I decided to take legal action against CSL for recovery of these sums."

27 On the face of it, this does appear to imply that Mr Daniel had been doing some work during the relevant period which he considered entitled him to commission and that was the legitimate reason for his accessing in the database. It is difficult to marry that up with an argument that, by law, he had been doing no work during the relevant period because of the furlough rules.

28 It seems to me that there is a serious issue to be tried in relation to that matter and therefore whether the restrictive covenant at 21.1 can apply to Mr Daniel's activities in the period and, in particular, the fifteen months or so period prior to the termination of his employment. However, I do accept the point that given the effect of the pandemic on the business of CSL as acknowledged by Ms Krywald, the activities of Mr Daniel, if any, during the period would have been very limited. Therefore, the scope for the restrictive covenant to apply will be in its self very limited given the restriction to it provided by paragraph 21.2(b). If the company feels that it wishes to pursue Mr Daniel in that regard, I consider that in those circumstances, damages are likely to amount to an adequate remedy for them and those damages are likely to be relatively small.

29 Whether to grant an injunction is a matter for the court's discretion and involves consideration of the balance of convenience. Although Mr Stephens makes the point that the restrictive covenant does not prevent Mr Daniel from working at all, nor even from working in the entertainment industry as long as there is no crossover with what he did for the claimant, I consider that the potential damage to Mr Daniel from being subjected to the injunction outweighs the potential damage to the claimant which would need to be protected by an injunction.

30 Stepping back and looking at this issue in this case in the round at this stage, I am not satisfied that this is a case in which it would be appropriate to grant the injunctive relief which is sought. I take into account the fact that Mr Daniel was a loyal employee and servant of this company for twenty-five years and the company gained from his work and his experience over those years and will continue to reap the benefit of that by reference to its client base.

31 I am not satisfied that Mr Daniel is seeking effectively to steal the database and set himself up in business as a rival to the claimant company. At this stage, I am impressed by what he says in his statement as to his intentions at his stage in life and in the light of not only his work for CSL but also the effects of the pandemic and the reappraisal of his working life which he has carried out wholly understandably.

32 In those circumstances, the relief sought by the claimant is refused.

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