Neutral Citation Number: [2019] EWHC 638 (Ch)

Case No: IL-2018-000206

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
INTELLECTUAL PROPERTY LIST (CHANCERY DIVISION)

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 March 2019

Before :

MR JUSTICE ARNOLD

- -

Between :

FRESHASIA FOODS LIMITED	**Claimant**
- and -	
JING LU	**Defendant**

- -
- -

Douglas Campbell QC (instructed by **Myerson LLP**) for the **Claimant**
Stephanie Thompson (instructed by **Virtuoso Legal**) for the **Defendant**

Hearing dates: 7-8, 11 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ARNOLD

MR JUSTICE ARNOLD:

Contents

Introduction

1. This is an ex-employee dispute. The Claimant ("Freshasia") manufactures and supplies Asian foods, particularly frozen Chinese dumplings and sliced meats, to customers in the UK and a number of other European countries. The Defendant ("Mr Jing") was employed by Freshasia from 12 January 2015, initially as a Marketing Assistant and from 26 January 2015 as Marketing Advertising Manager, until 28 September 2018. Since 1 October 2018 Mr Jing has been employed by a competitor to Freshasia, Oriental Food Express Ltd trading as Kung Fu ("Kung Fu"), as its Business Development Manager. Freshasia alleges that Mr Jing is in breach of certain restrictive covenants in his contract of employment ("the Restrictive Covenants") and that he has misused confidential information contained in, and has infringed the copyright or database right in, 59 documents copies of which are contained in Annex 8 to Freshasia's Particulars of Claim ("the Protected Documents").

The Restrictive Covenants

2. As explained in more detail below, the Restrictive Covenants relied on by Freshasia are contained in clauses B, C and D of the "Safeguards" section of Freshasia's Employee Handbook.

3. Clauses B(1)(a) and (b) provide as follows:

> "a. You must not, whether during your employment with Company or after the end of it, whether you resign or are dismissed by the Company, unless expressly authorised in writing by your Manager, disclose to any unauthorised person or use any confidential information relating to the business affairs or trade secrets of the Company. This includes any detail about the Company's products, technical data, any matter relating to the company or its business, customers and employees, actual potential or past and all details relating to information on the Company's data base.
>
> b. For this reason you hereby agree that you will not during your employment with the Company or any associated or subsidiary companies, or for a period of six months (for non-senior employees) or twelve months (for senior employees) (hereinafter referred to as 'the leaving period'), in respect of any aspect of the business which the Company undertakes, solicit or attempt to solicit the custom of, or sell, or deliver to or accept work for private gain and/or for any third party, from any private individual, firm or company or otherwise deal with any person who at the date of termination of your contract is a customer or potential customer of the Company to whom you have personally sold and/or delivered the Company's products on

behalf of the Company, or whom you had introduced to the Company, or approached on behalf of the Company, or with whom you had any business dealings or knowledge in the leaving period immediately prior to the date of termination of your contract."

4. Clause B(1)(c) is a more detailed covenant against misuse of confidential information, but for the purposes of this case it adds nothing to clause B(1)(a).

5. Clauses B(2)(a) and (b) provide as follows:

"a. One of the most valuable assets of the Company is the contact that you will have and the relationship that you will be encouraged to build up with the Company's Customers. You acknowledge that this contact and the relationship is capable of being misused unfairly against the Company if after you have left the Company's employment it is exploited for your own benefit or that of another person in competition against the Company.

b. For this reason you hereby agree that you will not during your employment with the Company or any associated or subsidiary companies, or for a period of six months (for non-senior employees) or twelve months (for senior employees) (hereinafter referred to as 'the leaving period'), in respect of any aspect of the business which the Company undertakes, solicit or attempt to solicit the custom of, or sell, or deliver to or accept work for private gain and/or for any third party, from any private individual, firm or company or otherwise deal with any person who at the date of termination of your contract is a customer or potential customer of the Company to whom you have personally sold and/or delivered the Company's products on behalf of the Company, or whom you had introduced to the Company, or approached on behalf of the Company, or with whom you had any business dealings or knowledge in the leaving period immediately prior to the date of termination of your contract."

6. Clauses C(a) and (b) provide as follows:

"a) You agree not to:

(a) Directly or indirectly compete with the business of the Company and its associated companies during the period of employment and for the leaving period and notwithstanding the cause or reason for termination.

(b) For the leaving period; directly or indirectly compete with the business of the Company on your own behalf or in conjunction with any person, company, business entity or other organisation whatsoever, solicit, assist in soliciting, accept or facilitate the

> acceptance of, or deal with, in competition with the Company, the custom or business of any Customer or Prospective Customer with whom you had substantial person contact or dealing on behalf of the Company during the period of employment.
>
> b) This non-compete agreement shall extend for a location in UK and European countries. The term 'not compete' as used herein shall mean that you shall not own, manage, operate, consult or be employed in a business substantially similar to or competitive with, the present business of the Company or such other business activity in which the Company may substantially engaged during the term of employment."

7. Clause D provides:

> "All written material, whether held on paper, electronically or magnetically which was made or acquired by you during the course of your employment with us, is our property and our copyright. At the time of termination of your employment with us, or at any other time upon demand, you shall return to us any such material in your possession."

8. The Employee Handbook also contains certain other restrictive covenants which are not relied upon by Freshasia, such as a covenant against soliciting employees of Freshasia to leave that employment.

Procedural history

9. The procedural history is relevant to some of the substantive issues, and it is therefore necessary for me to set it out. Before doing so, I should first explain that Mr Jing is a Chinese national whose ability to work in the United Kingdom is (subject to the point discussed below) dependent on him having a Tier 2 visa which is in turn dependent on him being employed at a salary of at least £30,000 per annum by a sponsoring employer recognised by the Home Office.

10. Freshasia discovered that Mr Jing was working for Kung Fu on 12 October 2018. On 16 October 2018 Freshasia instructed solicitors. On 23 October 2018 Freshasia's solicitors sent a letter before claim to Mr Jing, in which they referred to restrictive covenants contained in the contract of employment Mr Jing signed on 12 January 2015. No reference was made in the letter to the Employee Handbook. Freshasia's solicitors alleged that Mr Jing was in breach of covenants against competition, soliciting customers and soliciting employees. For reasons that will appear, it is important to note that, although this was not mentioned in the letter, those restrictive covenants were expressed to last for 10 years following the termination of Mr Jing's employment by Freshasia. Freshasia's solicitors demanded that Mr Jing immediately resign from his position with Kung Fu and give various undertakings. They also made the following demand:

> "Despite [the obligations contained in the 12 January 2015 contract], it is our client's understanding that you continue to

> possess a range of correspondence, documentation and sales and marketing information belonging to our client, in hard copy and/or stored on your personal laptop. This all must be returned immediately."

11. Mr Jing did not reply to this letter. His explanation was that he could not afford to pay for legal advice, and was deeply concerned at the prospect of having to resign from Kung Fu and potentially losing his Tier 2 visa. He accepted that, in hindsight, he should have provided Freshasia with copies of any Freshasia documents that he had in electronic form and then deleted them, but he was focussed on Freshasia's demand that he resign.

12. There was no further correspondence between the parties prior to the commencement of proceedings. On 21 November 2018 Freshasia issued its claim form in these proceedings and an application for an interim injunction ("the Interim Application") with a hearing date of 29 November 2018. In its Particulars of Claim Freshasia relied for the first time upon Mr Jing's contract of employment dated 26 January 2015 and upon the Restrictive Covenants contained in the Employee Handbook, contending that they had been incorporated into Mr Jing's contract of employment on 25 July 2016 (as explained in more detail below).

13. After being served with the Interim Application on Saturday 24 November 2018, Mr Jing attended the first available appointment at the Hackney Law Centre to get advice, and then attended the hearing on Thursday 29 November 2018 at which he was represented by counsel acting *pro bono* through the CLIPS scheme.

14. The Interim Application who heard by Snowden J, who declined to enforce the Restrictive Covenants pending the hearing of an application by order, but decided that it was appropriate to grant an order with respect to Freshasia's documents in Mr Jing's possession or control. Freshasia had sought relief in respect of 30 documents listed in Schedule B to its draft order. In respect of items 21, 28 and 29 in Schedule B, counsel then appearing for Freshasia explained that Freshasia was relying purely on copyright and not on confidence, and so no relief was granted by Snowden J in respect of those items. Snowden J also made an order for an expedited trial.

15. Mr Jing having indicated that he was willing to give appropriate undertakings, Snowden J accepted undertakings from Mr Jing (1) not to use or disclose any of the information recorded in the documents listed in Schedule A to the order dated 29 November 2018 ("Listed Documents"), (2) to deliver up any hard copies of any Listed Documents in his possession or control, (3) to make two copies on electronic storage media of any Listed Documents stored on his Apple laptop or Google Drive and supply them to Freshasia's solicitors, (4) then to delete all electronic copies of Listed Documents accessible by him and (5) to make and serve a witness statement confirming compliance with undertakings (2)-(4). Schedule A to the order refers to "The Claimant's documents entitled…". Item 3 is "2018 marketing sales target and analysis". Item 24 is "Marketing Event – retailers participation". It is important to note that, at the time of giving these undertakings, Mr Jing was not permitted by Freshasia to have access to the copies of the Listed Documents and other Protected Documents annexed to the Particulars of Claim.

16. On 10 December 2018 Mr Jing made his first witness statement saying that (1) no hard copies of Listed Documents were in his possession or control, (2) he had made copies on two USB sticks of Listed Documents which were on his laptop or Google Drive as listed in his exhibit JL01 and had supplied the USB sticks to Freshasia's solicitors and (3) he had deleted all electronic copies of Listed Documents accessible to him. Exhibit JL01 states that 17 Listed Documents, including items 3 and 24, were deleted, while the remainder were not found. It is convenient to note at this point that Freshasia has not adduced any evidence as to which documents were included on the USB sticks which were supplied to it by Mr Jing, and the extent to which they are Protected Documents.

17. On Friday 14 December 2018 Freshasia's solicitors requested for the first time that Mr Jing consent to inspection of his laptop. On Monday 17 December 2018 Mr Jing stated that he was willing to agree to the inspection, but that it would need to be at Freshasia's cost, and invited Freshasia to propose a draft order. That same day, instead of proposing a draft order, Freshasia filed an application to inspect Freshasia's laptop for the purpose of (i) identifying whether any of Freshasia's confidential information remained on the laptop and (ii) whether such information had been copied or transferred from the laptop ("the Inspection Application").

18. The further hearing of the Interim Application and the hearing of the Inspection Application took place before Daniel Alexander QC sitting as a Deputy High Court Judge on 18 December 2018.

19. On 19 December 2018 Mr Alexander QC made an order for the reasons given in a reserved judgment handed down on 4 January 2019 ([2018] EWHC 3644 (Ch)) in which he:

    i) refused to grant interim enforcement of the non-compete clause, on the basis that "Freshasia's case on this clause is likely to fail and it would be unlikely to be entitled to an injunction enforcing it at trial"; and

    ii) severed aspects of the non-solicitation clause and granted an interim injunction enforcing the pared-down version of that clause until trial. The deputy judge considered that without such severance "the scope of prohibited activities is greater than reasonably necessary to protect Freshasia's legitimate interest".

20. Mr Alexander QC adjourned the Inspection Application to a date to be fixed on the basis that inadequate notice had been given by Freshasia. Prior to the adjournment, however, Mr Jing had filed submissions stating that he was willing for the inspection to occur, but that (i) Freshasia should bear the costs of this in the first instance, and (ii) Freshasia should not have access to the laptop during the inspection, as Mr Jing used it for his work at Kung Fu.

21. After 19 December 2018 Freshasia failed to pursue the Inspection Application.

22. Although the trial was estimated at two days, in the event it took three days, both sides having considerably underestimated the time it would take to cross-examine the other's witness(es).

23. During cross-examination, counsel for Freshasia asked Mr Jing whether he was prepared for his laptop, which was present in Court, to be inspected. Mr Jing's answer was yes, as long as Freshasia could not see it (but he said that he was willing for Freshasia's legal representatives to do so). Freshasia made no attempt to follow through on this request, however.

Application to amend the Defence

24. As noted above, Freshasia relied in its Particulars of Claim on the Restrictive Covenants, which are contained in the Employee Handbook. Freshasia alleged that the provisions of the Employee Handbook had been incorporated into Mr Jing's contract of employment by virtue of an acknowledgement signed by Mr Jing on 25 July 2016 stating that he had read and understood the Employee Handbook and that it formed part of his contract of employment. In the alternative, Freshasia relied upon clauses 18 and 19 of the contract Mr Jing signed on 26 January 2015.

25. In his Defence served on 14 December 2018 Mr Jing admitted that the provisions in the Employee Handbook had been incorporated into his contract of employment as alleged by Freshasia. The argument before Mr Alexander QC proceeded on that basis. Likewise, counsel for Mr Jing proceeded on that basis in her skeleton argument for trial dated 1 March 2019.

26. By an application sent by email at 11:10 on 5 March 2019, just under 48 hours before the trial commenced, Mr Jing applied for permission to amend his Defence to withdraw the admission that the provisions of the Employee Handbook had been incorporated into his contract of employment. I heard argument on this application at the start of the trial. At the conclusion of the argument, I announced that the application was refused for reasons to be given later. My reasons for refusing this application were as follows.

27. Paragraph 7.2 of Practice Direction 14 – Admissions provides as follows:

> "In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including –
>
> (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
>
> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
>
> (c) the prejudice that may be caused to any person if the admission is withdrawn;
>
> (d) the prejudice that may be caused to any person if the application is refused;

> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
>
> (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and
>
> (g) the interests of the administration of justice."

28. So far as (a) is concerned, the ground upon which the application was made was that Mr Jing wished to contend that the terms contained in the Employee Handbook had not been incorporated into his contract of employment because there was no consideration from Freshasia to support a variation of the contract in July 2016. Counsel for Mr Jing candidly explained that the reason for the application was that Mr Jing's legal team had not previously spotted this point.

29. As to (b), there is no suggestion that Mr Jing was led to make the admission by any conduct of Freshasia. Counsel for Mr Jing did point out, however, that Freshasia had not fully pleaded its case that Mr Jing's contract of employment had been varied on 25 July 2016, and in particular had not pleaded how the variation was supported by consideration. I do not consider that this is of any significance. Mr Jing could have made a Part 18 request directed to this point before making any admission, but instead he simply admitted incorporation of the Employee Handbook.

30. Turning to (c), counsel for Mr Jing accepted that, if Mr Jing was given permission to withdraw the admission, Freshasia would have to be given the opportunity to adduce further evidence in relation to the consideration issue. She suggested that Freshasia would not be prejudiced, or at least not significantly prejudiced, because it would be able to lead oral evidence on the point from its witness Mr Lan (as to whom, see below). Furthermore, she pointed out that Freshasia's solicitors had referred in a witness statement made in opposition to the application to taking urgent instructions from Mr Lan on this point. As counsel for Freshasia pointed out, however, it remained the case that Freshasia had been deprived of the opportunity of dealing with the question in a witness statement. Moreover, there was no realistic possibility of Freshasia searching for and giving any further disclosure that might be relevant prior to Mr Lan giving evidence. Finally, Freshasia would be required to deal with a new and not straightforward legal point at very short notice in an expedited trial which already involved the parties being under considerable pressure. (He made it clear, however, that Freshasia did not contend that it had had the power unilaterally to incorporate the Employee Handbook into Mr Jing's contract of employment.)

31. As for (d), counsel for Freshasia submitted that there was no significant prejudice to Mr Jing for three reasons. First, Mr Jing had been content to proceed on the basis that the Employee Handbook was incorporated into his contract of employment, and had plenty of arguments predicated on that premise. Secondly, if Freshasia could not rely upon the Employee Handbook, that was not the end of its case because it would rely in the alternative upon the restrictive covenants in Mr Jing's 26 January 2015 contract. Thirdly, Mr Jing had a potential remedy against his lawyers.

32. So far as (e) is concerned, counsel for Freshasia submitted that the application was made extremely late, on the eve of trial. Although Mr Jing was not suggesting that the trial be adjourned, the absence of an adjournment was what led to the prejudice to Freshasia discussed above. If Mr Jing had suggested an adjournment, that would have been prejudicial to Freshasia since it was trying to enforce time-limited restrictive covenants and a speedy trial had been ordered by Snowden J for that reason.

33. As to (f), counsel for Freshasia did not dispute that the point on consideration had a real prospect of success (although he submitted that Freshasia would have a good answer to it).

34. No additional point was raised by either side under (g). Taking all the factors into consideration, it seemed to me that the key factors were the lateness of the application and the consequent prejudice to Freshasia if Mr Jing was permitted to withdraw his admission, and accordingly permission should be refused.

The witnesses

35. It should be noted that all of the people involved in this case followed the Western practice of putting their given name before their family name (rather than the other way around, as is normal in Chinese culture). Freshasia's principal witness was Jian Lan, also known as Calvin Lan. Mr Lan is the owner and director of Freshasia. Mr Jing's only witness was himself (as he explained, his family name is Lu, but he prefers to be called Mr Jing because Lu is a more common name). Both counsel attacked the credibility of the other's witness. It is convenient before considering them separately to note certain points they had in common.

36. First, although the mother tongue of both witnesses was Mandarin and both spoke imperfect English, both witnesses signed witness statements drafted by their respective solicitors expressed in perfect English which nowhere mentioned their lack of complete proficiency in English. There is no reason to think, however, that the witness statements of either witness suffered from lack of comprehension on the part of the witness of what was in their statements. It was clear that both witnesses could read English better than they spoke it.

37. Secondly, both witnesses gave evidence partly in Mandarin through an interpreter and partly in English with assistance from the interpreter as and when required. Despite the best efforts of the interpreter, both witnesses struggled some of the time with language issues, both in terms of comprehension of the questions asked in cross-examination and in terms of articulating their answers. For this reason, their oral evidence needs to be considered with some caution.

38. Thirdly, both witnesses made multiple witness statements: five in the case of Mr Lan and no less than seven in the case of Mr Jing. Both witnesses were criticised for mentioning something in a later statement or in oral evidence which was not mentioned in an earlier statement or in some cases at all. The force of this point varies according to the circumstances in which the statement was prepared: for example, Mr Lan had plenty of time in which, and resources with which, to prepare his first statement, whereas Mr Jing's first two statements were prepared under considerable time and resource pressure. Moreover, the importance of certain points increased as the case

developed. In general, therefore, it seems to me that caution should be exercised before reaching adverse conclusions as to either witness' credibility on this ground.

39. Counsel for Mr Jing submitted that Mr Lan had repeatedly given evidence which was false, misleading or exaggerated. She highlighted five examples of this in her closing submissions. Four of these related to statements made by Mr Lan in his first witness statement. I agree that these reflect adversely on Mr Lan's credibility. It is sufficient at this stage to refer to two of these examples. Others are discussed below.

40. The first is Mr Lan's statement in his first statement that Mr Jing "would contact retailers every day" in order to "build up very good relationships with customers". In his third statement, however, Mr Lan said that this was only the case for the first 18 months of Mr Jing's employment, although he maintained that Mr Jing "would still be in contact with customers" after that. Furthermore, in cross-examination, Mr Lan admitted that, during the latter period, Mr Jing did not need to contact customers directly because other people were designated to that job (namely, Freshasia's account managers). Yet further, Mr Lan asserted in his second statement that "it was vital that the Defendant had a good relationship with all of our customers", but he admitted in cross-examination that it would be impossible for Mr Jing to have a good relationship with all 500 of Freshasia's customers. Finally, Mr Lan asserted in his third statement that "[e]ver since the Defendant joined Freshasia …, he would conduct comprehensive interviews with our customers", but in cross-examination, he admitted that, after the first 18 months, other people conducted the interviews apart from with "one or two very important customers". Despite this, Mr Lan claimed to have "more than [a] thousand" letters from clients proving that Mr Jing had conducted interviews with them; but no such letters had been disclosed by Freshasia.

41. The second is Mr Lan's allegation in his first statement regarding the Double Eleven discount. I shall deal with this context below. At this stage, it is sufficient to note that Mr Lan withdrew the allegation in his third witness statement after it had been disproved by disclosure documents, but maintained that he had believed it to be true when he made his first statement. His acceptance in cross-examination that he knew that Freshasia was offering a 12% discount at the time he decided to stop the campaign shows, however, that he cannot honestly have believed it to be true.

42. I would add that the shifting nature of Mr Lan's evidence on some of the key issues means that, even if I was persuaded that he was doing his best to tell the truth at times, I would conclude that he was not a reliable witness.

43. Turning to Mr Jing, the starting point is that, as discussed below, he admitted that he had lied to Freshasia's representatives as to what he intended to do after leaving Freshasia. He gave an explanation for this, which I accept. It does not follow that his evidence was untruthful. Counsel for Freshasia submitted that Mr Jing had repeatedly given false evidence. Most of the examples he gave I find unconvincing. The one point which has concerned me was Mr Jing's evidence in cross-examination that Mr Lan had told him that he was a junior employee. As explained, below, I have concluded that Mr Jing was confused and that what he really meant was that Mr Lan had told him that he was too junior for promotions he was asking for. In any event, this does not in my assessment detract from the credibility of the remainder of Mr Jing's evidence. In general, therefore, I am disposed to prefer the evidence of Mr Jing to that of Mr Lan

where they are in conflict. It remains necessary, however, to consider the totality of the evidence on each issue.

44. The only other witness was Jinwan Sun (known as Tina), who was called by Freshasia. I will consider her evidence in context later. As counsel for Mr Jing noted, Freshasia did not call any of its other employees or former employees or customers as witnesses. Counsel for Mr Jing did not go so far as to invite me to draw an adverse inference from Freshasia's failure to do so, but did point out that this meant that Freshasia had no evidence to support Mr Lan's evidence on certain points.

The facts

Freshasia's business

45. Freshasia has approximately 500 customers in the UK and (at least in 2017) nine other European countries: Belgium, France, Germany, Ireland, Italy, Luxemburg, the Netherlands, Sweden and Switzerland. Most of its customers are retail shops, but a few are Chinese restaurants. Its target consumers are students. In order to promote its products, it conducts several cooking demonstrations in Chinese supermarkets every week.

46. In his first statement Mr Lan said that Freshasia has about 100 employees, whereas in his second statement he said that it has nearly 200 employees. In his oral evidence he said that the current correct figure was 191. For reasons that will appear, I think that figure must include part-time staff.

47. It is common ground that Freshasia has two offices north of Bexley, in one of which there is a server. Mr Jing's unchallenged evidence was that he mainly worked at the other office.

48. Mr Lan's evidence was that that it takes 12 months to build a relationship with a customer; that there are only 10 companies in UK and in the rest of the EU which produce Chinese dumplings and sliced meats; and that there are only nine Chinese trading companies in the UK and EU which sell Chinese products, of which only two sell frozen goods. Mr Jing did not dispute this evidence.

Mr Jing's employment by Freshasia

49. Mr Jing graduated from Hull University Business School with an Msc in Marketing in 2014. He joined Freshasia as a Marketing Assistant on 12 January 2015, and was promoted to Marketing Advertising Manager on 26 January 2015. He started the latter role on an annual salary of £20,956.60 gross. His duties were set out in Appendix 1 to the contract as being working with the director and "senior marketing manager" to discuss the products and services to be marketed, conceiving advertising campaigns, reviewing and revising campaigns, and arranging marketing events such as conferences and exhibitions.

50. Consistently with this job description, Mr Jing's evidence was that his main tasks were to design and plan promotions, to promote Freshasia on social media, to plan cookery demonstrations and to monitor the effects of those promotions and demonstrations on sales. I accept that evidence.

Was Mr Jing Freshasia's Head of Marketing?

51. An important issue between the parties is whether Mr Jing was a "senior" employee within the meaning of the Restrictive Covenants as at 25 July 2016. I shall consider that issue below. At this stage it is necessary for me to make a number of findings of fact as to various sub-issues which relate to that issue. One of these is whether Mr Jing was Freshasia's Head of Marketing. Another is whether he managed a team of other employees. It is convenient to consider these together.

52. The starting point here is that it is no part of Freshasia's pleaded case that Mr Jing was its Head of Marketing. Moreover, in Freshasia's skeleton argument for trial, counsel for Freshasia submitted that it was "not disputed that D's job title was, from 26 January 2015, always Marketing Advertising Manager". Counsel went on to say that "Mr Lan draws attention to business cards which D designed for himself on 16 June 2016 … where D described himself as Head of Marketing". By contrast, in his closing submissions, counsel for Freshasia submitted that "C's case is that D was <u>always</u> C's Head of Marketing".

53. In Mr Lan's first statement, there was no mention of Mr Jing being Head of Marketing. What Mr Lan said was:

> "When the Defendant became Marketing Advertising Manager, he was the only employee working in Freshasia's marketing department, However, by the time the Defendant left, there was another employee working in the marketing department – a marketing support officer called Xiao Ming Liu."

54. In his second statement Mr Lan quoted Mr Jing's duties from an updated job description dated 23 March 2018. Mr Lan exhibited this updated job description to his third statement. A point which Mr Lan did not mention in either statement, which was not put to Mr Jing in cross-examination and which was not drawn to my attention by counsel in submissions, but which I noticed when preparing this judgment, is that this document sets out Mr Jing's "new JD" as "Head of marketing". I will return to this below.

55. In Mr Lan's third statement, he said:

> "9. … by [17 July 2018], the Defendant was my Marketing Manager and was one of 9 managers who reported directly to me. Prior to this, even as at 25 July 2016 … the Defendant reported directly to me and was one of 3 key managers to do so …
>
> 10. In the last two years of the Defendant working for Freshasia, he had a team of 10 people reporting to him. The Defendant had two staff members working with him within the marketing team – a marketing assistant and a social media coordinator. There were also 8 staff members who were part of the sales team but who reported to the Defendant in regards to marketing efforts. …

> 11. I have also noted that in the business cards the Defendant designed for himself …., he described himself as Head of Marketing. These business cards were approved by my General Manager [i.e. Jessica Guo, Mr Lan's wife] and I believe confirm that the Defendant saw and described himself as Head of Marketing …"

56. In Mr Lan's fourth statement, he said:

> "4.4 Between August 2016 and September 2017, the Defendant formed a Sales and Marketing Department with the Sales Manager. …
>
> 4.5 Between September 2017 and September 2018, a marketing team of 3 people was created with the Defendant as the Marketing Manager, Kary Poon as a Social Media and Marketing Coordinator and Xiaoming Liu as a Marketing Coordinator. …
>
> 5.1 … Jing Ruan was not Jing's line manager. Jing Ruan was Freshasia's Marketing Manager before the Defendant joined my company. When the Defendant joined Freshasia, Jing Ruan was transferred to the EU sales team. Jing Ruan resigned in January 2016.
>
> …
>
> 5.3 Chen Tsai and Shaojie Bao were paid less than the Defendant. Shaojie was in charge of the EU marketing project … "

57. In cross-examination, Mr Lan continued to deny that Mr Ruan was Mr Jing's line manager prior to January 2016; but this was somewhat undermined by his acceptance that, after Mr Ruan left, he (Mr Lan) was "the only person" to whom Mr Jing reported.

58. Returning to the new job description referred to above, Mr Jing said in his third statement that Mr Lan had agreed on 23 March 2018 that he (Mr Jing) could begin planning a new job description. Mr Jing finished this document in May 2018, and took it to his annual review in June 2018. He said that he was not prepared to take on new responsibilities without an increase in salary, which Mr Lan declined. This issue remained unresolved when Mr Jing handed in his notice, and was one of the reasons he resigned. He was not challenged on this evidence in cross-examination.

59. Mr Jing said in his fourth statement:

> "At my time in employment with the Claimant, the marketing department consisted of [Jin] Bao (as European Marketing Project Manager), Kary [Poon] (as Social Media Marketing Manager) and myself (as Marketing Advertising manager – prior to 26 January 2015 my job role was of Marketing Assistant). While all of us had the word 'Manager' in our titles, we all functioned as part of the same marketing team, that eventually

> was supervised and by, and answered to, Jian Lan. I assume we were given the title 'Manager' as it gave the [right] impression to any external individuals we may come into contact with from time to time. Until June 2016 Mr Ruan was the head of the marketing team, and we were supervised by him, but Jian Lian did not find a replacement for him upon his departure and required instead that we answer directly to him."

60. In his oral evidence, Mr Jing accepted that Mr Ruan had resigned in early 2016. Mr Jing maintained that, when he started, Mr Ruan was the senior marketing manager and was Mr Jing's line manager. This evidence is supported by the description of Mr Jing's duties in Appendix 1 to his contract dated 26 January 2015. Mr Jing said that, when Mr Ruan left, Mr Lan did not promote Mr Jing to Mr Ruan's position, but told Mr Jing that he was too junior for such responsibility and that Mr Lan would fulfil Mr Ruan's role. Mr Jing maintained that, as he had said in his third statement and repeated in his fourth statement, while he had the power to create marketing plans and materials, they had to be approved by Mr Lan.

61. So far as Mr Bao is concerned, my understanding is that the person referred to by Mr Lan as "Shaojie Bao" and the person referred to by Mr Jing as "Jin Bao" are one and the same. As can be seen, there was no dispute between Mr Lan and Mr Jing that Mr Bao was in charge of European marketing. Mr Jing accepted that Mr Bao had joined Freshasia after him. Mr Jing thought this was between April and July 2015, although he was not sure and accepted that it could have been in October 2015. Having regard to the salary records discussed below, I consider that the latter date is more accurate. Mr Jing maintained that Mr Bao was on the same level as him. I shall return to this point below.

62. As to Kary Poon, Mr Jing accepted that, as shown by the salary records discussed below, she joined Freshasia a few months after the beginning of the 2017/18 tax year. According to Mr Lan, she left in July 2018. It is common ground that Mr Jing carried out Ms Poon's appraisal on 8 February 2018. Mr Jing's explanation for this was that this was because she wanted to come off probation and Mr Lan did not have time to do it. He maintained that Ms Poon reported to Mr Lan and not to him. He also said Mr Lan told him that he was too junior to manage Ms Poon. I shall return to the latter point below.

63. As for Xiao Ming Liu, it is common ground that he was a student who worked part-time for Freshasia in 2018. I will return to him below.

64. It was put to Mr Jing that eight account managers reported to him from July 2016, but he denied this.

65. Turning to the question of the business cards, it is common ground that, on 13 June 2016 and 13 September 2016 respectively, Mr Jing created two business cards for himself, one with the title "Head of Marketing" and one with the title "Aera [sic] Sales Manager". It is also common ground that Mr Jing was not an Area Sales Manager. Mr Jing's explanation for creating these business cards was that they were intended to impress Freshasia's business partners with whom he had contact. He said that he had sent the design of the first card to Mr Lan, Mrs Guo and Angela Zhao and had explained

the purpose of using it to Mr Lan and Mrs Guo. Counsel for Freshasia submitted that this explanation was untrue, but I have no difficulty in accepting it.

66. Considering the evidence as a whole, I find that, from the date Mr Jing joined Freshasia until January 2016, Mr Ruan was the senior marketing manager and Mr Jing reported to him. After Mr Ruan left, the marketing team initially consisted of just Mr Jing and Mr Bao, but later they were joined by Ms Poon, and they all reported to Mr Lan. Later still, they were joined by Mr Liu part-time. It was Mr Jing who was primarily responsible for planning and reviewing Freshasia's marketing, particularly in the UK. To that extent, Mr Jing was Freshasia's head of marketing; but Head of Marketing was neither his job title, nor does it accurately convey the limited degree of his authority. Mr Jing asked to be appointed as Head of Marketing with a consequential pay rise in June 2018, but Mr Lan declined to agree to this.

Salaries

67. A related sub-issue concerns the salaries which Freshasia paid its employees. There is no dispute that Mr Jing was paid a gross salary of £21,229.56 in the tax year 2015/16, £24,346.12 in the tax year 2016/17 and £30,269.24 in the tax year 2017/18.

68. Mr Lan exhibited documents produced from Freshasia's Sage accounting software which listed the actual amounts paid to various employees in the tax years 2015/16, 2016/17 and 2017/18. These show that, in terms of actual amounts paid, he was the sixth, fourth and fourth highest-paid employee respectively in those tax years.

69. Freshasia did not, however, adduce any evidence as to its other employees' contractual annual salaries. Thus, although the exhibit shows that Mr Ruan was paid less than Mr Jing in the tax year 2015/16, it does not enable a comparison to be made between their respective annual salaries. Given that it is now common ground that Mr Ruan left in January 2016, the exhibit does not contradict Mr Jing's evidence that he believed that Mr Ruan was paid more than him. In my view it is probable that, as the more senior employee, Mr Ruan was paid more than Mr Jing.

70. Similarly, Mr Lan accepted that, whereas the exhibit shows that Ms Zhao was paid £15,6014.16 in 2016/17, she was only employed for six months in that year; and that, whereas the exhibit shows that Ms Poon was paid £7,457.42 in 2017/18, she only worked for a short period in that year and her annual salary was around £22,000.

71. Furthermore, it appears that the fourth highest-paid employee in 2015/16, C. Tan, left early in 2016/17, since he or she received a much lower sum in that tax year; while the third highest-paid employee in 2015/16, Y. Li, left towards the end of 2016/17, since he or she received around £3,400 less in that tax year.

72. As for Mr Bao, the exhibit shows that he was the next highest paid employee in 2016/17 (£22,568.04) and the ninth highest in 2017/18 (£23,175.64). Mr Jing was sceptical about the accuracy of these figures, and in particular the latter one; but it is common ground that Mr Jing did not actually know what other employees were paid when he was at Freshasia.

73. In conclusion, I find that Mr Jing was in fact amongst Freshasia's highest paid employees in each of the three tax years. As at 25 July 2016, I conclude that Mr Jing

was probably the fifth or sixth most highly paid ranked by annual salary. As I have said, however, Mr Jing was not aware what other employees were paid.

Was Mr Jing told that he was a senior employee?

74. Another related sub-issue is that, by the time of closing submissions, it was Freshasia's case that Mr Lan had told Mr Jing that he was a senior employee, while it appeared to be Mr Jing's evidence that Mr Lan had told him that he was a junior employee. This was not either side's case at earlier stages of the case, however. Indeed, it is not part of either side's pleaded case even now.

75. There was no suggestion in any of Mr Lan's first three statements that he had told Mr Jing that he was a senior employee. This is despite the fact that Mr Lan asserted in his third statement that there was "no doubt in my mind that the Defendant was a senior employee". Only in his fourth statement did Mr Lan claim that he told Mr Jing that Mr Jing was "a senior manager". Even then, he did not specify when he said this or in what context. In cross-examination, Mr Lan had no explanation as to why he had not mentioned this before. When asked when this was, he said it was when Mr Jing was promoted to Marketing Advertising Manager. Mr Lan admitted, however, that he had not told Mr Jing that Mr Jing was a "senior employee" for the purposes of the Restrictive Covenants.

76. Turning to Mr Jing, in his fourth statement (made prior to Mr Lan's fourth statement), he said that Mr Lan had never communicated to him that he was considered to be a "senior employee". In none of his statements did he claim that Mr Lan had told him that he was a junior employee. He first made this claim in cross-examination, and he was unable to explain why he not said it in any of his witness statements. His evidence on this topic was quite confused, however. To begin with, he appeared to be eliding the concept of being told by Mr Lan that he was "too junior" for something and the concept of being told by Mr Lan that he was "junior". After I intervened to explain the difference, he appeared to understand and said that Mr Jing had told him he was a junior employee twice, once when Mr Ruan left in early 2016 and once in the beginning of 2018 in connection with his annual review. I am not convinced, however, that Mr Jing (who at this point in his cross-examination was giving evidence in English) really did appreciate the distinction that I explained. As noted above, Mr Jing's evidence during a different passage in his cross-examination was that, when Mr Ruan left, Mr Lan refused to promote Mr Jing to Mr Ruan's position because he was too junior. As for the discussion in 2018, Mr Jing clarified in re-examination that this took place at the same time as the discussion over the new job description considered above (i.e. in June 2018). That context makes it more likely that the thrust of what Mr Lan said was that Mr Jing was too junior for the promotion Mr Jing was then asking for.

77. In conclusion, I find that Mr Lan did not tell Mr Jing that he was a senior employee. Nor did he tell Mr Jing that he was a junior employee, although he did twice tell Mr Jing that he was "too junior" for promotions that Mr Jing was asking for.

Credit card

78. It is common ground that Mr Jing was given a Freshasia credit card in November 2016. Mr Jing's evidence was that he asked for this because of the large sums he had been

spending on promotional materials, which he had had to claim re-imbursement for. I accept that evidence.

Customer contact

79. A key area of dispute between the parties is as to the degree of contact which Mr Jing had with Freshasia's customers as at 25 July 2016.

80. I have already noted the unsatisfactory and changing nature of Mr Lan's evidence on this topic. By contrast, Mr Jing was consistent in his evidence that he was not in regular contact with customers directly; that almost all customer contact was carried out by Freshasia's account managers, whose responsibility it was; that feedback from customers was relayed by the account managers to Mr Jing; and that (except for one customer who was a personal friend of Mr Jing and his wife) Mr Jing did not have a personal relationship with customers and most of them did not even know his name. This evidence is supported by Mr Jing's contact list discussed below. It is also supported by what Mr Lan himself said in one passage in his third statement:

> "During [the last two years of his employment], the Defendant will have only really dealt with strategic marketing matters and the Defendant would have prepared formal reports and strategy documents based on the feedback he was getting from other employees within Freshasia."

81. The matter does not end there, however, because what is even more telling is Freshasia's disclosure on this topic. As counsel for Mr Jing pointed out in her skeleton argument for trial, if Mr Jing had been in regular contact with customers over the nearly four years of his employment with Freshasia, one would expect thousands of emails, text messages and/or phone records to this effect (as well as evidence from other Freshasia employees and customers). Freshasia has disclosed only nine emails to or from Mr Jing. Of those, three are emails concerning recruitment of part-time student staff or sponsoring of student events, and only six (all of which, save one, are from 2015–2016) are emails to customers. Even those six are related to promotions and demonstrations. Mr Jing went through each of the emails in his fourth statement explaining the limited nature of his involvement, and his evidence on this was not challenged.

82. Mr Lan gave two answers to this point in cross-examination. The first was to claim for the first time that Freshasia had lots of other emails, which had not been disclosed (i.e. in breach of Freshasia's disclosure obligations). Absent such disclosure, I do not accept this.

83. The second answer was to claim for the first time that Mr Jing had normally communicated with customers via his personal WeChat account (WeChat is a Mandarin-language messaging service similar to WhatsApp) and that Freshasia could not disclose such communications. Freshasia had made no request for disclosure of WeChat messages by Mr Jing, however. It is no answer to the latter point that, when cross-examined about his WeChat account, Mr Jing accepted that he had had communications with 10 customers via WeChat during his first 18 months at Freshasia, but said he had deleted the contact details and communications of those customers when he left Freshasia. Mr Jing explained that the reason why he had used his personal

WeChat account on the rare occasions he communicated with customers was that Freshasia did not have a corporate WeChat account and said that Freshasia's account managers had also used their personal WeChat accounts to communicate with customers. Mr Jing also explained that he had deleted the WeChat details of the customers because he had no intention to contact them any more. I accept that evidence.

84. Nor are there any other documents which assist Freshasia. On the contrary, item 24 of the Listed Documents (document 53 of the Protected Documents), which Mr Lan claimed in his first statement showed that Mr Jing had contacted 60% of Freshasia's main customers, in fact supports Mr Jing's case. The document is an Excel spreadsheet with a number of tabs which appears to list all Freshasia customers which participate in its marketing promotions. At page 58 and following, one can see "updates" by two of Freshasia's account managers, Mr Lien and Ms Wang, who have clearly called the retailers. Mr Jing's name does not appear anywhere in this document. As Mr Lan accepted in cross-examination, this document does not show that Mr Jing contacted the customers listed in the document.

85. Furthermore, as discussed below, the documents from the handover meetings do not record any request to Mr Jing to hand over details of customer contacts. (When this was put to Mr Lan, he answered "It's not his job".) Instead, during the meeting on 18 September 2018, Mr Jing was asked to produce "Handover list 1 Vendor list (existing & potential Vendor) 2 Social Media: all social account link, login name and PW 3 management tools and file link". Mr Jing produced this document the same day. It mainly lists the requested account information for Google Drive, Facebook, Instagram and so on. It includes contact details for just 10 companies, most of which were not customers. I will return to this below.

86. Finally, it is common ground that on one occasion Mr Jing attended a cookery demonstration at a customer called Loon Fung in Stratford. Mr Jing explained that he did so because, although students were hired part-time to do such demonstrations, on that occasion no student was available. One of the email chains disclosed by Freshasia relates to this event. The chain of emails shows that all the detailed information about it was sent to Loon Fung by Mr Lan. It also shows that Loon Fung had dealt with Freshasia's account manager. Accordingly, I accept Mr Jing's explanation.

87. In conclusion, I find that, as at 25 July 2016, the extent of Mr Jing's contact with Freshasia's customers was minimal. I also accept Mr Jing's evidence that he only ever had any contact with one customer outside the UK.

The Apple laptop and Google Drives

88. It is common ground that Mr Lan agreed to Mr Jing using his personal Apple laptop for his work while at Freshasia, and therefore Mr Jing had electronic copies of Freshasia documents stored on his laptop during the course of his employment.

89. It is also common ground that, at Mr Lan's request, Mr Jing created a Freshasia gmail account and associated Google Drive to enable Freshasia to store documents in the cloud in about September 2017.

90. Mr Jing explained that, prior to that, he had needed a way to upload to Freshasia's server large files such as promotional posters which he had created when working from

Freshasia's other office or from home. He did this by saving the files to his personal Google Drive (which was associated with his personal gmail account) and then emailing them to his work email address using a service called "WeTransfer" which enables large documents to be transferred by email. This explanation was not challenged in cross-examination. Moreover, it is corroborated by (i) Mr Lan's acceptance that Freshasia's server could not be accessed remotely, and (ii) emails showing files being sent by WeTransfer from Mr Jing's personal email address to his work email. There are no emails showing transfers in the other direction.

91. Mr Jing also explained that, after he created Freshasia's Google Drive, he did not deliberately use his personal Google Drive for work purposes, but nevertheless Freshasia's documents would sometimes be saved to his personal Google Drive. If he was logged into his personal Google account in the background (for example, if he had been checking his personal email, or getting something off his personal Google Drive), and while working he downloaded one of Freshasia's documents from his work email or WeChat, that document would automatically save to his personal Google Drive. I accept Mr Jing's evidence on this point.

92. Mr Lan claimed in his first statement that he had only discovered on about 24 October 2018 that Mr Jing had a personal Google Drive and had shared Freshasia's documents from Freshasia's Google Drive with his own Google Drive. Mr Lan exhibited a screenshot of Freshasia's Google Drive after a search had been made on 9 November 2018 for all documents in that account which were "owned" by Mr Jing's personal gmail address. It is apparent from a cursory look at that screenshot that Mr Jing's personal account was the owner of many documents, and the same would have been apparent to anyone logging into Freshasia's Google Drive. Thus it is clear that Mr Jing did not conceal his use of his personal Google Drive.

93. Mr Jing's evidence was that Mr Lan was always aware of his personal Google Drive use. Having regard to the foregoing, I accept that evidence.

94. Accordingly, I find that Mr Jing stored electronic copies of Freshasia documents on (i) his laptop, (ii) his personal Google Drive and (iii) Freshasia's Google Drive with Freshasia's consent. I do not understand it to be in dispute that it is implicit that, in the case of (i) and (ii), such consent came to an end after Mr Jing's departure from Freshasia.

Alleged bullying culture at Freshasia

95. In his fourth statement Mr Jing alleged for the first time that there was a culture of bullying at Freshasia, particularly by Mr Lan. Wisely, these allegations were barely mentioned by either side at trial. It is not necessary for me to make any findings with respect to them, and I shall not do so. It is pertinent to note, however, that Mr Jing said in this context that there was a high turnover of staff at Freshasia. Whatever the reason, this appears to be correct.

Mr Jing's resignation

96. On 11 September 2018, Mr Jing gave written notice of his resignation to Freshasia. His last day with Freshasia was Friday 28 September 2018. Freshasia complains that Mr

Jing did not give as much notice as he was required to do, but it has not made any claim on that ground.

97. Mr Jing has never disputed that he told Mr Lan that he was leaving to work in Hong Kong and that he told Wan-Chen Tsai (known as Sasha), Freshasia's Area Sales Manager, that he was leaving to work for an IT company in the UK. Nor has he disputed that those statements were untrue.

98. Mr Jing's explanation for making these statements is that, during the meeting on 28 September 2018 referred to below, Mr Lan told him that he was not permitted to work for a competitor for at least the next 10 years. Mr Lan did not deny this in the three witness statements he made after Mr Jing first said this, but denied it in cross-examination. Mr Jing's evidence is supported by the fact that, as noted above, Freshasia's solicitors relied in their letter dated 23 October 2018 upon Mr Jing's contract of employment dated 15 January 2015 which had a 10 year non-compete clause in it. I therefore accept Mr Jing's evidence on this point.

The handover meetings

99. It is common ground that there were four handover meetings attended by Mr Lan, Mr Jing and four other employees on 17, 18, 19, 26 September 2018 and one attended by Mr Lan, Mr Jing and two others on 28 September 2018. Mr Lan exhibited notes of the first four of these meetings.

100. Prior to the first meeting, on 14 September 2018, Mr Lan sent Mr Jing a document in Mandarin entitled "Handover arrangements for the marketing department". This listed various documents or classes of documents and activities that Mr Lan requested Mr Jing to hand over to one or more other employees. In many cases Mr Jing was requested to handover the documents or activity to "Calvin Lan (Leader)". As noted above, the list of items did not include any customer contact details. Nor is any request to hand over customer contact details recorded in any of the notes of any of the meetings.

101. It is common ground that, during the meeting on 17 September 2018, Mr Jing handed over two documents which Mr Lan had requested. On 20 September 2018, Mr Lan asked Mr Jing to provide more documents and to produce a list of documents in his possession. Mr Jing said that he was unable to do so since he did not have an orderly collection of them, and that Mr Lan would be able to find everything he needed on Freshasia's Google Drive.

102. One of the 10 contacts listed in the document which Mr Jing produced following the meeting on 18 September 2018 was "Tina" at Hungry Panda, i.e. Ms Sun, whose work telephone number is given. Mr Jing accepted that (as explained below) he had had Ms Sun's WeChat ID since January 2018, and that he had not included it in the document. When it was put to him that he had deliberately – and, it was implied, wrongly – omitted this information, Mr Jing explained that he had not included it for the good reason that it was personal information.

103. On 28 September 2018 Mr Lan asked Mr Jing to let him check that he did not have any work documents on his laptop. Mr Jing refused because it was his personal laptop, but agreed to delete work documents when he got home. Mr Jing admitted that he failed to do so. His explanation was that he asked Mr Lan for a list of documents which should

be deleted, and Mr Lan agreed to provide one, but failed to do so. Mr Lan could not remember Mr Jing asking for a list, but accepted that Mr Jing might have done. Mr Lan denied agreeing to provide a list, saying that he did not know what documents Mr Jing had copies of. Mr Jing's explanation was that he was concerned that he might have copies of a large number of documents either on his laptop or on his personal Google Drive, and therefore he asked for a list of the ones Mr Lan regarded as sensitive. One of the attendees of this meeting was Mr Lan's personal assistant, who took notes. Mr Jing requested disclosure of those notes, but they were not disclosed. In the absence of the notes, I accept Mr Jing's evidence on this point. I do not accept Freshasia's contention that Mr Jing deliberately kept the documents for future use.

Kung Fu's business

104. Kung Fu is a smaller competitor to Freshasia. Mr Lan gave unchallenged evidence that Kung Fu had about 30 employees and that he estimated that around 60-70% of Freshasia's customers were also customers of Kung Fu. Mr Lan also explained that one of the directors of, and shareholders in, Kung Fu, Zhinqiang Wang, was Mr Lan's business partner in Freshasia between 2007 and 2011. In 2011 there was a dispute between them which led to litigation which was resolved by Mr Lan buying Mr Wang's shares in Freshasia. Mr Wang had then set up Kung Fu with two other former employees of Freshasia and a fourth person.

Mr Jing's employment by Kung Fu

105. Mr Jing explained in cross-examination that he had engaged a firm of headhunters to try to find him alternative employment in around February or March 2018. They introduced him to two companies with whom he had interviews, but neither led to the offer of a job. Then the headhunters had put Kung Fu in contact with him in about July 2018. Mr Jing attended an interview and was offered the job of Business Development Manager. Mr Jing's evidence was somewhat confused as to the salary he was offered by Kung Fu. As I understood it, what Mr Jing was trying to say was that he was initially offered £30,000, but persuaded Kung Fu to increase their offer to £40,000. As noted above, he started on 1 October 2018. His job is not identical to that he performed at Freshasia, but it is similar.

Other Freshasia employees employed by Kung Fu

106. As discussed above, it is common ground that Mr Liu worked with Mr Jing in Freshasia's marketing team prior to Mr Jing's departure. It is also common ground that Mr Jing recommended Mr Liu for a permanent position at Freshasia and that Mr Liu attended Mr Jing's handover meetings with a view to taking over some of Mr Jing's responsibilities. On 8 October 2018 Mr Liu left Freshasia. Subsequently he joined Kung Fu as a Marketing Data Analyst, although Mr Jing's evidence was that in reality Mr Liu was mainly posting promotional materials to retailers.

107. It is also common ground that another former employee of Freshasia called Shuyu Dong (known as Jennifer) has also joined Kung Fu since Mr Jing did. According to Mr Lan, Ms Dong was a sales and marketing coordinator whose line manager was Ms Tsai, but who was also managed by Mr Jing. According to Mr Jing, Ms Dong was an account manager and he did not manage her. More importantly, Mr Jing gave unchallenged

evidence that Ms Dong only joined Freshasia on 17 September 2018 and he barely knew her at that time.

108. Even though it is no part of Freshasia's pleaded case that Mr Jing is breach of any restrictive covenant against soliciting employees, it was put to Mr Jing that Mr Jing had encouraged Mr Liu and Ms Dong to work for Kung Fu. In the case of Mr Liu, Mr Jing denied that he had any communication with Mr Liu on the subject. In the case of Ms Dong, he said that, after leaving Freshasia, Ms Dong had sent him a message asking if he knew of any work opportunities. He suggested she ask Kung Fu, but without mentioning that that was where he was now working. I accept Mr Jing's evidence on these points.

109. Mr Jing pointed out that, as is common ground, both Freshasia and Kung Fu operated in a very specialised market in which there were only a few employers. He said that Kung Fu was an attractive choice for employees because it paid higher salaries than Freshasia. Again, I accept that evidence. Equally, as counsel for Mr Jing pointed out, Kung Fu had an obvious interest in headhunting employees of Freshasia.

Double Eleven discount

110. Mr Lan claimed in his statement that Freshasia had planned to announce a 12% discount referred to as the "Double Eleven" discount available during November 2018 on 1 November 2018, that Kung Fu had announced a 12% discount on 30 October 2018 and that Freshasia had therefore cancelled its 12% discount campaign. This was relied upon Freshasia in its Particulars of Claim as an instance of misuse of Freshasia's confidential information by Mr Jing. In his third witness statement, however, Mr Lan accepted that the disclosure documents showed that Freshasia's 12% discount campaign had actually been launched on 18 September 2018. As he noted above, he nevertheless maintained that he had believed that his first statement was true when he made it. In cross-examination, however, he admitted that he had been the one to decide to stop Freshasia's 12% discount campaign when Kung Fu announced its own campaign, and that he had known at the time that he made that decision that Freshasia was already running a 12% campaign. This allegation of misuse of confidential information is not pursued by Freshasia.

Kung Fu cookery demonstrations

111. On 6 October 2018 Kung Fu gave a cookery demonstration at Seewoo, a Chinese supermarket). Mr Lan claimed in his first statement that "Kung Fu did not do any cookery demonstrations before the Defendant joined them" in support of his contention that Mr Jing must have assisted Kung Fu with organising the demonstration before he left Freshasia's employment. Upon being confronted with evidence disclosed by Mr Jing that Kung Fu had held cookery demonstrations before this, Mr Lan accepted that this was the case. This is yet another instance of his initial evidence being wrong, although in this case it is not suggested that he knew it was wrong as opposed to being phrased in unduly categorical terms.

Allegations of customer contact

112. In his second statement Mr Lan said that he had been told by Ms Tsai that Mr Jing had contacted three of Freshasia's customers since joining Kung Fu and had told two of

them that Freshasia was going bankrupt. Mr Jing responded that he had never contacted those two customers either at Freshasia or at Kung Fu (and did not even know where they were located or their contact details), while the third customer was the friend of Mr Jing and his wife mentioned above. Freshasia did not call either Ms Tsai or the customers as witnesses at trial, and Mr Jing's evidence on this point was not challenged in cross-examination. Freshasia did not pursue this allegation.

113. Instead, Freshasia called evidence from Ms Sun. She is the HR Manager of Hungry Panda, a company which delivers food to individual consumers. Ms Sun said in her statement that Hungry Panda was a customer of Freshasia. In cross-examination, however, she accepted that Hungry Panda had only made one purchase from Freshasia, of some moon cakes, although she also said that they were "cooperating" with Freshasia "for wholesale". Mr Jing's evidence was that he did not think Hungry Panda was or had ever been a customer of Freshasia, as Freshasia sells to retail stores or restaurants, not end consumers. He disputed that there had been a sale of moon cakes to Hungry Panda, and said that he did not understand what Ms Sun meant by "cooperating for wholesale" (nor did I).

114. Ms Sun said in her statement that she had met Mr Jing in January 2018 and that they had got to know each other on a personal basis and had socialised together. As a result, they had each other's WeChat IDs. On 28 December 2018 she had been contacted by Jennifer from Kung Fu on WeChat "asking if there is any possibility of cooperation". This was the first time she had ever had any communication from anyone at Kung Fu. Ms Sun said that she did not know how Jennifer had obtained her WeChat ID, although Ms Sun was clearly implying that Jennifer had obtained it from Mr Jing. Only part of Ms Sun's chat with Jennifer was exhibited to her witness statement.

115. In response, Mr Jing exhibited the second part of that chat. It had come into his possession because Jennifer had informed Ms Sun that Mr Jing had given Jennifer Ms Sun's contact details. Ms Sun had contacted Mr Jing asking him not to give out her WeChat details without telling her first and had sent him a screenshot of her chat with Jennifer. Mr Jing apologised and promised not to do it again. The second part of the chat makes it clear that Kung Fu was simply requesting that Hungry Panda advertise Kung Fu's products by enclosing a Kung Fu leaflet when Hungry Panda delivered food to consumers (a request which Ms Sun declined); Kung Fu was not soliciting Hungry Panda as a customer. Ms Sun accepted this.

Deletion of documents by Mr Jing

116. Mr Jing's evidence was that, when he deleted documents from his laptop in compliance with his undertaking to Snowden J, the approach he took in order ensure compliance was to delete from his laptop and personal Google Drive all documents dated from 2015 to the end of the September 2018 except for personal ones.

117. Although Mr Jing had appeared to accept in his exhibit JL01 that he had deleted copies of 17 Listed Documents, including items 3 and 24, in cross-examination Mr Jing was reluctant to accept this. His reason was that he could not now be certain what he had deleted given that (a) he had deleted everything except personal documents, (b) the documents had been stored on his laptop and Google Drive under Mandarin names (rather than the English titles in Schedule A to the order dated 29 November 2018 and in exhibit JL01) and (c) he could not now remember what was on the two USB sticks

(and Freshasia had adduced no evidence of this). Despite Freshasia's failure to prove this elementary aspect of its case, I conclude on the balance of probabilities that Mr Jing did delete at least 17 Listed Documents bearing the titles in question. In the case of item 3, it can be seen that many of the Protected Documents bear this title. I consider that it is probable that Mr Jing deleted a number of such documents.

Copying the Form

118. On 16 February 2017 Mr Jing created a Demo Promotion Confirmation and Record Form ("the Form") which was used to record the number of dumplings sold following demonstrations. Only shortly before trial, Freshasia produced evidence that Kung Fu was using a very similar form, which in particular included 143 words of copied text. This was despite the fact that the Kung Fu form was disclosed and described as a copy in Freshasia's disclosure list on 14 January 2019. Mr Jing's evidence was that, when he joined Kung Fu, he found that it was already collecting similar information. In October 2018 he adapted the Form and sent it to Kung Fu's account managers. He did not think there was anything wrong in doing so, since the Form was just a template which was not confidential since it was given to Freshasia's customers and which he believed he could have re-created from memory. He deleted the Kung Fu copy from his laptop on 30 November 2018 even though his understanding was that it was not included among the Listed Documents. After he saw Freshasia's disclosure list, he told all the staff at Kung Fu to stop using the copy form on about 23 January 2019. There was no challenge to this evidence in cross-examination.

119. Even though it would appear to be an infringement of copyright, Freshasia does not complain of this act of copying *per se*, since the Form is not a Protected Document. Rather, Freshasia contends that this episode demonstrates a propensity on part of Mr Jing to use Freshasia documents for the benefit of Kung Fu. Having regard to the nature of the Form and Mr Jing's explanation for copying it, however, I do not consider that it does establish any such propensity. Certainly, it does not establish any propensity to misuse Freshasia's confidential information.

Alleged loss of sales

120. Freshasia alleges that it has lost sales to Kung Fu since Mr Jing joined Kung Fu as a result of Mr Jing using Freshasia's confidential information to benefit Kung Fu. Mr Lan's evidence in support of this allegation was very unsatisfactory, however.

121. In his first statement Mr Lan described confidential exhibit JL11 as "sales figures of our dumplings in October 2017 as compared to October 2018 showing loss of sales", and said that he believed that this was due to Mr Jing's misuse of confidential information. This gave the plain impression that he was comparing total dumpling sales in October 2017 with total dumpling sales in October 2018. As Mr Jing spotted, however, the sales total for October 2017 recorded in document 19 of the Protected Documents was much higher than the total set out in JL11. This led Mr Lan to say in his fourth statement that JL11 only recorded sales to "selected stores who started dealing with Kung Fu after the Defendant joined Kung Fu". He did not explain how Freshasia could know this, and he was not directly challenged on this point in cross-examination. When I queried it subsequently, counsel for Freshasia told me on instructions that Freshasia's account managers had made notes of which stores stocked Kung Fu products when they visited them; but that pre-supposes that the stores had not

previously been selling Kung Fu products when, as noted above, it was Mr Lan's own evidence that there was a 60-70% overlap in customers. In any event, Mr Lan admitted in cross-examination that JL11 only included sales to stores which had purchased less from Freshasia in October 2018 than in October 2017. Mr Lan also agreed that he had not produced any evidence which would allow the Court to compare sales to all stores in October 2017 and October 2018. For all the Court knows, total sales may have increased. As Mr Jing pointed out, because Freshasia's customers compete against each other in an area, naturally some customers will purchase more in a month and some less, as they perform better or worse.

122. In his second statement Mr Lan claimed that "[m]y company was always able to meet its sales targets while the defendant worked for Freshasia", yet exhibit JL31 to which he referred showed that Freshasia had failed to reach its targets in August and September 2018. It was put to Mr Jing in cross-examination that this was because Mr Jing had stopped working hard for Freshasia after receiving the job offer from Kung Fu, an allegation that had not been made by Mr Lan in any of his statements. Mr Jing denied this, and I accept his denial.

123. Mr Lan went on in his second statement to describe exhibit JL32 as "a spreadsheet showing the sales figures of our dumplings in November 2017 compared to 2018. This … shows the **total** number of cases sold in November 2017 was 1,862, compared to just 882 in November 2018 [emphasis added]." Again, he said in his fourth statement that it only showed sales to "selected stores who started dealing with Kung Fu after the Defendant joined Kung Fu", and again he admitted in cross-examination it only included sales to stores which had purchased less from Freshasia in November 2018 than in November 2017. Moreover, he accepted that it was definitely possible that there had been other stores which purchased more Freshasia products in November 2018 than in November 2017. When asked what the total dumpling sales were in November 2017 and November 2018, Mr Lan could not remember. It follows that Mr Lan's evidence on this point in his second statement was seriously misleading.

124. Mr Lan also claimed in his second statement that, if the Court did not uphold the non-compete clause in the Employee Handbook, he expected that Freshasia would suffer a total loss of sales of at least £2 million. No attempt was made by Freshasia to substantiate this claim at trial.

125. The only comparison of total sales before and after Mr Jing's departure produced by Freshasia is a disclosure document which compares sales of FA dumplings in December 2017 and December 2018. This data is still problematic: it only covers a short time period (one month); it does not include all dumpling sales; and it does not include sales of other products. In any event, it only shows a 2% decline in sales.

126. In these circumstances I do not accept Mr Lan's evidence in his second statement that Freshasia had "lost 55 customers" by December 2018 or his oral evidence that similar numbers of customers had been "lost" in subsequent months. Even if it is correct that some customers are not currently purchasing from Freshasia, it may well be the case that other customers are purchasing more and/or that Freshasia has attracted new customers to replace those it has "lost".

127. Even if the 2% figure is representative, there may well be reasons other than Mr Jing's abuse of customer goodwill or misuse of confidential information which explain this

decline in sales. First, it is common ground that Freshasia switched from handmade to machine-made dumplings in September 2018, which slowed production. Mr Lan could not remember whether he had asked his sales manager to limit sales as a consequence (as Mr Jing said he did), but accepted that this was a "common procedure".

128. Secondly, as a result of the departures of Ms Poon, Mr Jing and Mr Liu in July-October 2018, Freshasia had to recruit an entirely new UK marketing team. Mr Lan's own evidence was that he hired a replacement for Mr Jing on 29 October 2018 who proved unsatisfactory and therefore was dismissed on 7 November 2018, and that it took him several months to find a satisfactory replacement.

129. In conclusion, Freshasia has not established that it has suffered any overall loss in sales since Mr Jing left. Still less has it established that any loss which it may have suffered is likely to be attributable to misuse of customer goodwill or confidential information by Mr Jing. It is worth reiterating that Freshasia has not established that Mr Jing has solicited a single Freshasia customer on behalf of Kung Fu. Nor has it shown that Kung Fu has taken business from it by use of any confidential information, for example concerning prices or margins.

Interpretation and validity of the non-compete and non-solicitation Restrictive Covenants

130. There are three issues of interpretation of the Restrictive Covenants, and one related issue of validity (as distinct from enforceability).

The non-compete clause

131. The leaving period is defined in clause B(1)(b) as "a period of six months (for non-senior employees) or twelve months (for senior employees)". It extends "for a location in UK and European countries".

132. *Senior/non-senior*. There is no definition of either "senior" or "non-senior" in the Employee Handbook, and therefore no criterion is supplied by the contract for distinguishing between them. It is common ground that, if Mr Jing was told that he was a senior employee, then that would suffice for this purpose. I have found, however, that he was not told. Counsel for Mr Jing submitted that, in that event, the clause was void for uncertainty. In his skeleton argument and written closing submissions, counsel for Freshasia submitted that the clause simply required a factual assessment of whether, as at 25 July 2016, Mr Jing was a senior or a non-senior employee, and relied upon various indicia as showing, that, as a matter of fact, Mr Jing was a senior employee of Freshasia. In his oral submissions, however, counsel for Freshasia conceded that, if another employee had not been told whether or not he or she was "senior", the clause would be void for uncertainty. It must follow that the clause is void in Mr Jing's case.

133. I would reach the same conclusion in any event because of the absence of any criterion for determining whether an employee is "senior" or "non-senior" for this purpose. Seniority is a relative concept, and the answer is likely to depend on the reason why the question is being asked. For example, in some contexts, it could refer to the length of time an employee has been employed. It is not clear what the relevant yardstick is here. In my view it is no answer to say that the Court can make a factual assessment. As my findings of fact show, in Mr Jing's case there are factors which point in different directions. Thus he was in fact one of Freshasia's five or six best-paid employees, but

he had no way of knowing that. He also had a job title which included the word "Manager", but so did other employees, and in reality he had little or no management responsibility.

134. *European*. There is no definition of "European" in the Employee Handbook. Counsel for Freshasia submitted in his skeleton argument that this meant "mainland Europe", but in his oral closing submissions submitted that it meant "European Union" i.e. the 27 Member States other than the UK as at 25 July 2016. Counsel for Mr Jing submitted that it meant "European continent", which she said included 52 countries (she did not identify the source of that figure). The problem with Freshasia's interpretation is that it has one or more customers in Switzerland, which is outside the EU (and indeed outside the European Economic Area). In those circumstances I consider that "European" should be interpreted as meaning European continent. It would not make any difference to the outcome if I accepted Freshasia's interpretation, however.

The non-solicitation clauses

135. *Senior/non-senior*. Since all the non-solicitation clause are expressed to last for the leaving period, the same point arises and my conclusion is the same.

136. *In the leaving period*. The non-solicitation clauses end with the words "in the leaving period immediately prior to the date of termination of your employment". There is a dispute as to which preceding parts of the clauses these words qualify. Counsel for Mr Jing submitted that they only qualified the immediately preceding part of the clauses i.e. "with whom you had any business dealings or knowledge". Counsel for Freshasia submitted that they qualified all of the preceding parts. As a matter of syntax, it seems to me that counsel for Mr Jing is correct. I see no reason to interpret the clause in any other manner.

Enforceability of the non-compete and non-solicitation Restrictive Covenants

137. Mr Jing contends that the non-compete and non-solicitation Restrictive Covenants are unenforceable on the ground that they are in unreasonable restraint of trade. I shall consider the enforceability of the non-compete clause on the assumptions that (a) it is not void for uncertainty and (b) Mr Jing was a senior employee, and thus the applicable duration was 12 months.

The law

138. There is no dispute as to the relevant legal principles. They were conveniently summarised by Sir Bernard Rix in *Safetynet Security Ltd v Coppage* [2013] EWCA Civ 1176, [2013] IRLR 970 at [9]:

> "(i) Post-termination restraints are enforceable, if reasonable, but covenants in employment contracts are viewed more jealously than in other more commercial contracts, such as those between a seller and a buyer. (ii) It is for the employer to show that a restraint is reasonable in the interests of the parties and in particular that it is designed for the protection of some proprietary interest of the employer for which the restraint is reasonably necessary. (iii) Customer lists and other such

> information about customers fall within such proprietary interests. (iv) Non-solicitation clauses are therefore more favourably looked upon than non-competition clauses, for an employer is not entitled to protect himself against mere competition on the part of a former employee. (v) The question of reasonableness has to be asked as of the outset of the contract, looking forwards, as a matter of the covenant's meaning, and not in the light of matters that have subsequently taken place (save to the extent that those throw any general light on what might have been fairly contemplated on a reasonable view of the clause's meaning). (vi) In that context, the validity of a clause is not to be tested by hypothetical matters which could fall within the clause's meaning as a matter of language, if such matters would be improbable or fall outside the parties' contemplation. (vii) Because of the difficulties of testing in the case of each customer, past or current, whether such a customer is likely to do business with the employer in the future, a clause which is reasonable in terms of space or time will be likely to be enforced. Moreover, it has been said that it is the customer whose future custom is uncertain that is 'the very class of case against which the covenant is designed to give protection…the plaintiff does not need protection against customers who are faithful to him' (*John Michael Design Plc v. Cooke* [1987] 2 All ER 332, 334). (viii) On the whole, cases in this area turn so much on their own facts that the citation of precedent is not of assistance."

Assessment

139. *The non-compete clause*. The first question is whether Freshasia had legitimate business interests requiring protection. In my judgment, it did not. So far as customer goodwill is concerned, I have found that Mr Jing's contact with customers was minimal. Even if Mr Jing had had more contact with customers in the first 18 months of his employment, that would not justify imposition of the non-compete clause on 25 July 2016, particularly given that Mr Jing might be (and was in fact) employed for over two years after that.

140. As for Freshasia's confidential information, this was protected by separate covenants and no covenant was required anyway because confidential information akin to a trade secret would be protected by an equitable obligation of confidence. Furthermore, the information contained in the Protected Documents is very detailed information which it would be very difficult for Mr Jing to remember in enough detail for it to be useful, and thus the key remedy would be to ensure deletion of electronic copies of the Protected Documents.

141. Even if Freshasia had legitimate business interests requiring protection, the clause is wider than reasonably necessary to protect those interests in terms of its geographic scope. It extended to the whole of the European continent, whereas Freshasia only had customers in nine European countries. The answer would be the same if "European" was interpreted to mean "EU".

142. Furthermore, in my view the clause is also too wide in that it would stop Mr Jing from being employed by a competitor to Freshasia in a non-marketing role. Counsel for Mr Jing gave as examples working as a dumpling maker or recipe tester. Counsel for Freshasia submitted that those examples were fanciful. I am inclined to agree with that, but a different example which is not fanciful would be working as a production manager for a competitor. Mr Jing is a native Mandarin speaker, has reasonable English, has IT skills and has experience in the food industry (as well as Freshasia, he worked for Nestlé China in the past), and would therefore be suited to a role as a production manager.

143. Furthermore, on the assumption that the applicable period was 12 months, I consider that it is too long. The only factor relied on by Freshasia as supporting this period was the evidence that it takes 12 months to build a relationship with a customer. It does not follow that Freshasia needed protection for a period of 12 months following Mr Jing's departure. 12 months' protection would only be required in respect of a customer who had only just become a customer at the end of Mr Jing's employment, but it is inevitable that Mr Jing would have little connection with such a customer. So far as the evidence goes, it appears that most of Freshasia's 500 customers have been customers for some time.

144. *The non-solicitation clauses*. Again, I am not satisfied that Freshasia had legitimate business interests requiring protection.

145. Counsel for Mr Jing submitted that, even if Freshasia had legitimate business interests requiring protection, clauses B(1)(b) and B(2)(b) were wider than reasonably necessary to protect those interests for the following reasons:

i) they prohibit Mr Jing from accepting work from customers, e.g. if a supermarket customer decided to start manufacturing own-brand dumplings;

ii) they prohibit Mr Jing from soliciting, and therefore from designing a promotional poster which someone else at Kung Fu used to solicit custom;

iii) they prohibit Mr Jing from soliciting customers whom he approached once or twice at the start of his employment, but not for the remaining years (and with whom he therefore had no goodwill);

iv) they prohibit Mr Jing from soliciting entities which were "potential customers" as at the termination date; and

v) they prohibit Mr Jing from soliciting customers whom he knew of while at Freshasia, but whom he had not sold to, delivered to, introduced or approached (and with whom he therefore had no goodwill).

146. Counsel for Freshasia submitted that some of these examples, and in particular the first two, were either fanciful or would not be a breach of the clauses, and that any objectionable aspects could be dealt with by severance. In relation to (i), I agree that the example postulated is fanciful; but the clauses would also prevent Mr Jing from working for a supermarket which sold Freshasia's dumplings, which is not fanciful. As for (ii), I agree with counsel for Mr Jing that designing a poster for Kung Fu for the purpose of trying to get orders from Freshasia's customers (e.g. a comparative advertisement comparing Freshasia's and Kung Fu's prices) would contravene the

clause, and this is far from fanciful. Accordingly, I conclude that the clauses are too wide in each of these five respects.

147. As for clause C(a)(b), I did not understand counsel for Freshasia to argue that Freshasia could prevail on this if it failed on the other two clauses.

Severance

148. There was a lively debate between counsel both before Mr Alexander QC and me as to whether the non-solicitation clauses could be severed if some parts of them were found to be objectionable, but other parts would be reasonable. This debate centred on the difficulty of reconciling a series of decisions of the Court of Appeal on this topic, and in particular the decisions in *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613, [2007] ICR 1539 and *Egon Zehnder Ltd v Tillman* [2017] EWCA Civ 1054, [2018] ICR 574. Having regard to my earlier conclusions, it is not necessary for me to enter into this debate. Nor is it desirable that I should do so given that an appeal against the decision in *Egon Zehnder* was argued before the Supreme Court in January 2019 and judgment is presently awaited.

Should an injunction be granted to enforce the non-compete Restrictive Covenant?

149. Counsel for Mr Jing submitted that, even if the non-compete Restrictive Covenant was valid and enforceable, no injunction should be granted to enforce it. Having regard to my previous conclusions, this issue does not arise. For completeness, however, I would add two points. First, if the applicable period was six months, I would decline to grant an injunction on the simple ground that the period is about to expire. Secondly, if the applicable period was 12 months, the Court would be faced with a difficult decision. A factor favouring the refusal of an injunction to enforce the non-compete clause would be its potential effect on Mr Jing's immigration status. Mr Jing's evidence was that he believed that it would be difficult for him to find a job with a recognised sponsoring employer outside the Asian food industry that paid at least £30,000 per annum. While it was theoretically possible for Mr Jing to apply for a dependant's visa relying on his wife's Tier 2 visa, he was understandably reluctant to be dependent on her employment.

Retention of Protected Documents

150. Freshasia contends that Clause D of the Restrictive Covenants on its true construction required Mr Jing to deliver up any electronic copies of any Protected Documents he had in his control and then to delete them. I accept this subject to the qualification that in my judgment Mr Jing was only required to deliver up copies of documents that Freshasia did not already have.

151. Freshasia contends that Mr Jing acted in breach of this obligation by failing to hand over, and retaining on his laptop and personal Google Drive, copies of Protected Documents from 28 September 2018 until (at least) 30 November 2018. Since Freshasia already had copies of all of the Protected Documents, the first part of this allegation falls away. As for the second part of the allegation, I conclude that Mr Jing did breach clause D by failing to delete at least 17 Protected Documents until 30 November 2018. I am not persuaded that he retained any Protected Documents after 30 November 2018. Freshasia could have instructed a suitable expert to inspect Mr Jing's laptop for

evidence of such retention, but it did not do so. Mr Jing's willingness to permit this indicates that he had nothing to hide.

The claim for misuse of confidential information

152. It is common ground that Freshasia can only succeed in its claim for misuse of confidential information, whether by enforcing clauses B(1)(a) and (c) or by enforcing an equitable obligation of confidence, if Mr Jing has misused information which is akin to a trade secret. There are two aspects to Freshasia's claim for misuse of confidential information. The first concerns Mr Jing's retention of Protected Documents on his laptop and personal Google Drive between 28 September 2018 and (at least) 30 November 2018. The second concerns Mr Jing's alleged misuse of information contained in Protected Documents both during that period and subsequently.

153. *Retention of the documents*. In my judgment Mr Jing's retention of copies of Protected Documents did not amount to use, or therefore misuse, of the confidential information contained therein. At most it amounted to a threat to do so.

154. *Misuse of the information*. There is no direct evidence that Mr Jing has misused any confidential information contained in any of Protected Documents since his departure from Freshasia, let alone that he threatens or intends to do so in the future. Freshasia contends that this should be inferred from various factors. Having regard to my findings of fact, I consider that there is no basis for any such inference.

The claim for copyright/database right infringement

155. Freshasia contends that Mr Jing infringed its copyright in the Protected Documents by accessing them on his personal Google Drive, and thereby copying them, between 28 September 2018 and (at least) 30 November 2018. If copyright does not subsist in any of the Protected Documents because it qualifies as a database, Freshasia relies in the alternative on database right. Mr Jing does not dispute that the Protected Documents are protected by one right or the other, but he denies infringement. There is no evidence that Mr Jing accessed copies of Protected Documents on his personal Google Drive, between 28 September 2018 and 30 November 2018, nor is this to be inferred. He did so on 30 November 2018 for the purpose of copying files onto the USB sticks, but that was done with Freshasia's consent. There is no evidence that Mr Jing has accessed copies of Protected Documents on his personal Google Drive since 30 November 2018, nor is this to be inferred. Accordingly, this claim is dismissed.

Result

156. Freshasia's claims are all dismissed except for its claim that Mr Jing breached clause D by retaining copies of Protected Documents on his laptop and/or personal Google Drive from 28 September 2018 to 30 November 2018, which succeeds.