Neutral Citation Number: **[2023] EWHC 1708 (KB)**

Case No: KB-2023-002708

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 July 2023

Before :

MR JUSTICE CONSTABLE

- -

Between :

HINE SOLICITORS LIMITED

Claimants

- and -

(1) KATHRYN NATASHA JONES
(2) BLASER MILLS LLP

Defendants

- -
- -

Oliver Lawrence for the Claimants
Lucy Bone (instructed by Blandy & Blandy LLP) for the Defendants

Hearing date: 6 July 2023

- -

Approved Judgment

Mr Justice Constable:

Introduction

1. This is an application for an interim injunction brought by the Claimant, Hine Solicitors Limited ('HSL') against the first defendant, Ms Kathryn Jones.

2. HSL is a firm of solicitors with 14 branches including in Oxford where Ms Jones worked from 2015. Ms James had previously started as a trainee at HSL in 2007, qualifying into the family department. She left in 2012. In March 2015, Ms Jones rejoined as an employee with a standard employment contract including mutual notice periods. Ms James was able to resign on three months' notice. Ms Jones worked at the Oxford branch, dealing with clients in the family department only.

3. Ms Jones provided three months notice of her intended resignation on 2 February 2023. As set out further below, it is disputed by HSL that she was entitled to do so. Ms Jones joined the Second Defendant in its office in Marlow from 5 May 2023.

4. As originally drafted, the application sought to prohibit Ms Jones from taking any employment save at HSL for a period of two years. That application was withdrawn. On 3 July, a further draft order was provided to Ms Jones setting out an order which sought to prevent her from (a) enticing away or attempting to entice away from HSL any client of HSL until 8 May 2025 and (b) doing business with any client of HSL on behalf of another law firm until 8 May 2025. This has been refined further in the application for me in which the relief sought is now limited to an order preventing Ms Jones from enticing away or attempting to entice away any client of HSL until 8 May 2025. Within the draft order, 'Client' is defined to mean any person, firm, company, business entity or other organisation who is a customer of HSL.

5. The basis of the application as contended for by HSL is that the contract of employment entered into by Ms James on 10 February 2022 was a contract which, pursuant to clause 9.1, provided an obligation to work a minimum employment term of three years prior to the ability to give notice. As such, it is said that Ms Jones was not entitled to resign, on three months' notice as she purported to do on 2 February 2023, and that her employment contract remains in existence in circumstances where the alleged act of repudiatory breach by Ms Jones was not accepted by HSL. The injunctive relief sought is said to be required to prevent breach of the common law implied duty of fidelity on the part of the employee.

6. Ms Jones disputes the claimed injunctive relief.

The Law

7. The test to be applied on an application for interim injunctive relief is the well known *American Cyanamid* test. HSL must show that:

   (1) there is a serious issue to be tried

   (2) damages are an inadequate remedy;

(3) the balance of convenience is in favour of granting the injunction.

8. Mr Lawrence contends, on behalf of HSL, that the case is entirely suitable for being dealt with as an expedited trial. He says that the issue of a speedy trial is a matter for the court to consider at this stage as the outcome may have a bearing on how matters proceed. However, as Ms Bone contended, there is no application before the Court for an expedited hearing, with draft directions, and it would be inappropriate in these circumstances for me to approach the issue on the basis that an expedited hearing is either warranted or possible.

9. In these circumstances, Ms Bone relies upon the dicta of Staughton LJ in *Lansing Linde v Kerr* [1991] 1 WLR 251, CA, in which he stated:

> "*If it will not be possible hold a trial before the period for which the plaintiff claims to be entitled to an injunction has expired or substantially expired, it seems to me that justice requires some consideration as to whether the plaintiff would be likely to succeed at trial. In those circumstances it is not enough to decide merely that there is a serious issue to be tried….On a wider view of the balance of convenience it may still be right to impose such a restraint but not unless there has been some assessment of the plaintiff's prospects of success…"*

10. In the present case, the injunction is sought through to May 2025. It is likely that if there were a short trial in 9-12 months' time, given that it will be relatively straight-forward and contained, there would still be a considerable period to run; but it is equally true that a substantial period would have expired. Whilst I do not consider it appropriate to elevate the first limb of the test to considering in detail the prospects of success that HSL's case may enjoy when considering whether there is a serious issue to be tried, I will in due course bear in mind the dicta from *Lansing Linde* in the context of the balance of convenience.

Serious Issue to Be Tried

11. The wording of Clause 9.1 lies at the heart of HSL's contention that Ms Jones remains employed (and that, as such, it is entitled to expect a restraint for a period of time reflecting the minimum term of employment). Clause 9.1 reads:

> "*Your employment on your part is (subject to our right to give you notice as set out below) for an initial term of 36 months from the start of these contract terms and thereafter you can end your employment by giving three months written notice. The period of the said notice by youth must terminate on the third day of a calendar month. For the avoidance of doubt this means that notice cannot be given by you in the first 36 months of this contract of employment and as far as you are concerned you are in a fixed term contract for this period*."

12. In her witness statement and in the relevant correspondence, Ms Jones stated that she considered that she was entitled to leave on three months' notice notwithstanding the minimum period of employment by virtue of clause 9.5. This clause states:

> "*If you leave during the fixed period of employment and all without giving the proper period of notice or leave during your notice. Without permission, in*

> *addition to not being paid for any unworked period of notice, the firm shall also be entitled as a result of your agreement to the terms of this contract to deduct up to a day's pay for each day not work during the notice., provided always that the Firm will not deduct a sum in excess of the actual loss suffered by it as a result of your leaving without notice (for example, to cover the additional cost of recruiting a replacement at short notice) and any sum so deducted will be a payment on account of damages of the firm's claim for your breach of contract. This deduction may be made from any final payment of salary which the Firm may be due to make to you. The amount to be deducted is a genuine attempt by the Firm to assess its loss as a result of your leaving without notice. It is not intended to act as a penalty upon termination*."

13. The argument initially deployed in justifying her departure was that notwithstanding the wording of clause 9.1, clause 9.5 contemplated the ability to leave during the fixed period of employment (see the first line). This is not an argument that was deployed by Ms Bone in the hearing before me. It is an unlikely construction of the employment contract that the clear words of clause 9.1 are, as a matter of construction, overridden somehow by clause 9.5. It seems clear to me that clause 9.5 is putting in place a damages regime of sorts which applies when, in breach of contract, the employee does one of the things referred to at the beginning of the clause. So whilst the clause contemplates that an employee may leave during the fixed term of their employment, this is not inconsistent with such an action being a breach of Clause 9.1 of the employment contract.

14. Ms Bone does, however, argue firstly that clause 9.1 is void because it purports to preclude her from giving lawful notice before the expiry of the fixed term. She relies upon the Employment Rights Act 1996 ('ERA') which provides:

> *"**s.86 Rights of employer and employee to minimum notice***
>
> *...*
>
> *(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.*
>
> ***s. 203 Restrictions on contracting out***
>
> *(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—*
>
> *(a) to exclude or limit the operation of any provision of this Act."*

15. Therefore, it is argued that clause 9.1 is void pursuant to s. 203 ERA, as it purports to limit the operation of s.83 ERA. It deprives Ms Jones of the statutory right to give notice subject to a minimum period.

16. Mr Lawrence contends that the statute in context does no more than provide both employer and employee the right to receive a certain period of notice of termination. Looked at another way, it imposes *an obligation* on the employee to give certain minimum periods of notice to the employer once they have been employed for a

certain period of time, so as to provide some protection to the employer against being left in the lurch. This is not the same as entitling the employee to *the right* to give notice in circumstances where the parties have agreed otherwise.

17. In my judgment, the effect of clause 9.1 as contended for by Ms Bone is that any clause which purports to prevent an employee from working for a minimum term before the right to give notice arises is ineffective. This would have far-reaching effects. No support was provided for the proposition, be it by way of case law or from a leading text. I also note that there was no suggestion in *Sunrise Brokers v Rogers* [2014] EWCA Civ 1373 (the only authority before the Court in relation to just such a term) that the provision of the contract stipulating that the employee was not to give notice to resign prior to the expiry of a certain minimum period was void for incompatibility with ERA.

18. Plainly, for the purposes of this application, it is not necessary for me to conclude the point one way or the other; merely to consider whether there is a serious issue to be tried on the validity of Clause 9.1. In my view it is plainly arguable that Clause 9.1 is a valid and effective clause.

19. The second argument deployed by Ms Bone is that HSL in fact accepted Ms Jones' resignation so that her termination was by mutual agreement or at the very least any breach has been waived. It is said that Ms Jones tendered her resignation orally to her line manager Emma Roberts, who is a Partner of the HSL and, it is said, had ostensible if not actual authority to accept such resignation. This was followed up by email. Ms Bone argues, in reliance on the evidence provided by Ms Jones before the Court, that HSL conducted itself consistently with having accepted her notice of termination:

    (1) Anthony Hine, the Managing Partner of HSL, became aware of the Respondent's resignation on the same day and, while expressing shock, did not contradict Ms Roberts' acceptance nor indicate that he would rely on clause 9.1;

    (2) On 7 February, Ms Roberts emailed the Respondent to inform her that HSL wished to recruit a replacement for her;

    (3) On 9 February, Ms Roberts instructed HSL that she would not be allocated any new clients and was to close her existing files during her notice period;

    (4) On 23 February, Ms Jones attended an exit interview with Ms Roberts;

    (5) HSL recruited Tanya Jamal as solicitor in the Family Department on 17 April. On 24 April, Ms Jones participated in a handover meeting in which she handed over her remaining files to Ms Jamal;

    (6) On 27 April, HSL held a leaving dinner for Ms Jones which was attended by several colleagues and partners;

    (7) On 28 April, HSL presented Ms Jones with presents and a leaving card signed by colleagues including Ms Roberts and David Hicks. A 'Good Luck' banner was placed on the window by Ms Jones' desk.

20. It was not until 16.39 on 27 April, Ms Jones' penultimate day at work, that HSL advised her, via an email from Mr Hines, that it considered clause 9.1 to be engaged and that it disputed the fact of her resignation. It seems likely that even those events which took place after this time (sub-paragraphs (6) and (7) above) would have been in motion in advance of that time.

21. Whilst it is said correctly by Ms Jones that the documents relevant to some of the items above have not been disclosed by HSL, Mr Lawrence submits that it was not obvious to do so until the service of Mr Jones' witness statement and the skeleton argument on 4 July 2023.

22. Any acceptance of repudiatory contract in order to bring a contract at an end has to be clear. It is usually done by communicating the decision expressly but it may be sufficient to lead evidence of an '*unequivocal overt act which is inconsistent with the subsistence of the contract…without any concurrent manifestation of intent directed to the other party*.' See *State Trading Corp of India v M Golodertz Ltd* [1989] 2 Lloyd's Rep. 277, quoted in *Chitty on Contracts, 34th Edn,* at 27-066. When deciding whether or not inconsistent actions amount to an acceptance of a repudiation, the courts apply an objective test (*Enfield London BC v Sivandan [2004] EWHC 672 (QB)*.

23. Again, I remind myself that I need only to consider whether there is a serious issue to be tried. In the context of this argument, in order to determine that there is no serious issue to be tried, I must conclude that I am able summarily to determine that the alleged repudiation was accepted. This is a question of fact. Whilst I may observe that the argument advanced by Ms Bone appears to be, on its face, a powerful one, I do not consider it appropriate to conclude in the context of this application that it is so overwhelming so as to permit me to decide the point summarily against HSL. In these circumstances, there is a serious issue to be tried in relation to whether the employment contract is subsisting.

24. The third argument is that, even if the employment contract remained in place because Ms Jones' resignation was not accepted, there is no evidence of unlawful competitive activity. It is said simply that having taken up new employment, several of her clients have requested to transfer their custom to the Second Defendant. It is argued that no issue arises from this because the restrictive covenants in the employment contract only apply in relation to 'Competing Business'. This is defined as '*any business, within a radius of four miles of any Firm office and or court, and all any other location where you worked, which competes, or proposes to compete, with any business carried on by the Firm in which you were involved (other than on a minimal basis) at any time during the relevant period or about which you had access to Confidential Information.'*

25. Mr Lawrence does not dispute that Ms Jones has not acted in breach of the covenant to which she would have been bound had the contract been lawfully terminated (contained in Appendix 1 to the employment contract).

26. When looking at the question of whether there is a serious issue to be tried on breach and risk of breach, Ms Bone's contention depends upon the proposition that her client is correct as to the limit of any present restraint upon her by reference to Appendix 1

of the employment contract. However, that is not the correct lens through which to consider the position.

27. At this point, it is necessary to focus on HSL's case which rests, now that HSL is not seeking to prevent Ms Jones from working at the Second Defendant, on the implied duty of fidelity. The express terms pleaded are not readily apposite to the injunction sought, and no reliance was placed upon them in oral argument by Mr Lawrence. The implied term of fidelity is pleaded at paragraph 7.1 of the Particulars of Claim. The constituent elements pleaded are:

(1) Not to compete with the Claimant;

(2) Act honestly

(3) Preserve the confidentiality of the Claimant's confidential information.

28. As a matter of construction, the implied term has to be consistent with the express terms of the Contact. In this context, it seems likely that an obligation '*not to compete with the Claimant*' would be looked at through the lens of the definition of '*Competing Business*' which is found within the four corners of the Contract. It is accepted by HSL that Ms Jones has not, in fact, breached this obligation as the Second Defendant is not a Competing Business.

29. There is no suggestion (and if there were, I would reject it on the evidence before me) that Ms Jones has either acted dishonestly.

30. In relation to the third limb, 'confidential information' would include HSL's client base. Thus if Ms Jones used that information in order to 'entice or solicit' the transfer of work away from HSL, that would arguably be a breach of this limb of the implied term *even if* that were in the context of employment at a business which did not fall within the definition of '*Competing Business*' (i.e. if Ms Jones had 'enticed' a client to join the Second Defendant, then that could constitute a breach of the third limb of the implied term as it could only have come about by a use (or misuse) of confidential information.

31. However, the evidence of '*enticement*' on the part of Ms Jones is close to non-existent. True it is that following her departure, there is no dispute that two clients of HSL took their work to the Second Defendant. That was at the start of May, and there is no evidence of any others since, and there is no evidence of any nefarious or improper steps taken by Ms Jones either before or after her departure from HSL in order to 'entice' the clients. It is perfectly natural that a client may wish to move, and the move itself (the only evidence relied upon, in effect) is simply insufficient to establish even a 'serious issue' that this was the result of an active 'enticement' or solicitation. It would not be a breach of the implied term to preserve the confidentiality of HSL's confidential information merely to accept instructions from an HSL client who, without prompting, chose to move its business to the Second Defendant. Nor, to use the language deployed throughout the application but not in fact rooted in the implied term pleaded, would it be any form of 'enticement' to accept such instructions.

32. Therefore, on the evidence before me, I conclude that there is no serious issue to be tried that Ms Jones has undertaken or intends to undertake any activity which has placed or would place her in breach of the pleaded implied term of fidelity (including on the basis that this would prohibit 'enticement').

33. In light of this, it is not necessary for me to consider restraint of trade public policy considerations, the adequacy of damages or the balance of convenience, but in deference to the arguments advanced, I go on to do so.

The Application is Contrary to Public Policy

34. Ms Bone submits that this should be regarded as a 'restraint of trade' case, because the substance of what HSL is just such a restraint following her *de facto* employment at the Second Defendant.

35. Mr Lawrence submits that the doctrine of restraint of trade does not apply directly where what is sought to be enforced is a subsisting contract of employment, although he concedes that restraint of trade principles might be relevant to the court's exercise of its discretion in granting injunctive relief (see Linden J in *Red Bull Technology v Fallows* [2021] EWHC 9502 at [45] and [49]).

36. I accept the contention by Ms Bone that the effect of the application is to seek an aspect of specific performance. It is not requiring Ms Jones to comply with all aspects of her (allegedly) continuing employment, in that it is not (now) seeking to prevent Ms Jones from being employed by the Second Defendant at all. However, it is seeking to impose a restriction which is greater that that which would have applied had the termination been lawful (as Ms Jones contends it was, of course). Indeed, it is greater than the restraint which would be imposed upon an employee fired summarily for gross misconduct. It is broader because (a) the definition of 'Client' in the draft Order is unarguably wider than that used in the restraint requirement in the employment contract and (b) it is applicable notwithstanding the fact that the Second Defendant is not 'a Competing Business' as defined in the contractual restraint requirement.

37. This is an unusual case where HSL is arguing that Ms Jones remains employed by it, yet is no longer seeking to prevent Ms Jones from undertaking other employment at all, or from other employment at the Second Defendant. It is nevertheless relying upon the alleged continuing employment status to impose a broader restriction on her activities than would have been the case if the termination was lawful. In these circumstances, it is incumbent on a Court to consider the purpose of the broader restriction, and in particular whether it is, for some reason, required by HSL as being reasonably necessary to protect its legitimate business interests.

38. The importance of the distinction of whether restraint of trade doctrine applies directly or indirectly lies no doubt in the burden of justification for the restrain which, post-termination, falls upon the employer. By contrast, it is said by Mr Lawrence that in employee competition cases, the employer is *prima facie* entitled to an injunction and that the burden is on the employee to demonstrate that an injunction should not be granted.

39. In the present, somewhat hybrid, case it would seem to me unwise to conclude that either side has a *prima facie* entitlement (either to rely upon the burden upon the employer to prove the legitimate business reason for a restraint, or that which applies in 'employee competition' cases), because the case does not fall fully into either camp. It is truly a case which turns on its own facts, and in this context it is appropriate for me to return to the question of justification of the restriction in the context of the balance of convenience.

Adequacy of Damages

40. Mr Lawrence contends that damages would not be an adequate remedy for HSL in the event that Ms Jones entices away more of its clients and is found to have done so in breach of her contract. It is said that there are obvious difficulties in pinpointing the extent of the loss and the value of the HSL's client connections; that there is always a significant chance that, once successfully enticed, a solicitor's client is lost forever and that an award of damages is unlikely to compensate the HSL for such loss adequately. There is no issue in respect of HSL having offered an undertaking in damages to Ms Jones, and it is understood that this would be extended, if relevant, to the Second Defendant.

41. Mr Lawrence points to the fact that the High Court expressed the general principle in *Adorn Spa Ltd v Amijad* [2017] EWHC 1313 (QB) at [36] that in cases where an employee is alleged to have solicited business away from an employer in breach of contract, the courts have held that damages are seldom an adequate remedy. He also relies upon the dicta of Underhill LJ in *Sunrise Brokers LLP v Rodgers* [2014] EWCA Civ 1373:

> "*In a case of this kind there are evident and grave difficulties in assessing the loss which an employer may suffer from the employee taking work with a competitor: even where it is possible to identify clients who have transferred their business ... there may be real issues about causation and the related question of the length of the period for which the loss of the business could be said to be attributable to the employee's breach. If the sums potentially lost are large they will not be realistically recoverable from the employee in any event ... There may be other intangible but real losses to the employer's reputation.*"

42. Ms Bone contents, by contrast, that damages are plainly adequate in this case. She points to the fact that HSL is able to quantify damages as being up to £120,000 in the Claim Form and in correspondence. This is, it is said, not an amount which engages any material issue as to uncertainty of calculation. Ms Bone also argues that the evidence does not support the claim for loss in any event. She states that the claimed £100,000 is the alleged fee income that would be earned by the Respondent if she continued for two years. However, against this must be off-set her salary of £33,000 pa for two years, and other employment costs. In oral submissions, she stated that the loss might otherwise be measured by the increase in salary required (if any) to secure a replacement.

43. There is some force in the contention by Ms Bone that, on the evidence before the Court at this preliminary stage, this case does not seem likely to be a significant one

financially. However, I have to assume for the purposes of considering this question (1) that (contrary to my conclusion above) Ms Jones has enticed clients away and (2) the injunction sought is seeking to prevent that mischief. In these circumstances, the general approach endorsed in the cases I have referred to above is to be preferred and there is nothing particular about this case to conclude that (on the hypothesis above) damages would not be inadequate for the sort of reasons given in those authorities.

44. Therefore, had it been relevant, I would have concluded that damages would not be an adequate remedy.

Balance of Convenience

45. I return first to the justification for the restriction sought, over and above that which would apply in the context of a lawful termination (subject to any arguments about validity of *those* restrictions, which was not the subject of substantive argument before me).

46. The starting point is that an employer would be taken, in imposing such restraints within a contract, to have appropriately balanced their legitimate business interests which need to be protected when an employee moves on, with the requirement that such restraint cannot be oppressive if the restraint is be enforceable. The question therefore arises: what is it about the fact that there is a dispute about Ms Jones' termination that means that that balance achieved by Appendix 1 of the employment contract does not remain an appropriate one to protect HSL's interests? Mr Lawrence, when asked this directly, sought generally to fall back on the argument that restraint of trade policies do not apply directly and that therefore the parties' agreed restraints within the contract of employment should not be a measure of appropriate restraint. However, he was unable to point to any particular feature of the nature of Ms Jones' departure that has led to the dispute to support the proposition that the restraints which HSL itself have sought to impose within the employment contract when it is lawfully terminated are likely, absent some special feature, to be inadequate where the employee has departed but the lawfulness of the termination is disputed.

47. In my judgment, the fact that the restraint sought imposes greater restrictions than had been contractually agreed upon in circumstances where there is no evidence of a legitimate business interest which needs more onerous protection weighs, in the balance of convenience, against granting the interim injunction. The same point could be put another way: on the evidence before me, I consider that the likelihood of a permanent injunction being granted in wider terms *even if* HSL establish that the resignation was not accepted, is low. Similarly, at this stage I repeat my view that Ms Jones' case that her resignation was accepted appears, on the evidence before me now, a strong one. This is another factor appropriate to weigh in the balance of convenience for the reasons I have set out above, and it weighs against the granting of the injunction.

48. I also accept that there is force in Ms Bone's argument that such a broad definition of 'Client' is likely to be unworkable in practice. It goes far beyond anything in Ms Jones' own knowledge (unlike the definition within the employment contract) and would give rise to considerable uncertainty. The solution proposed by Mr Lawrence, namely that Ms Jones is to rely upon any such client's 'self-reporting' any association

with HSL, is not appropriate in circumstances where, if breached, Ms Jones may be in contempt of court.

49. Mr Bone also points to the fact that HSL delayed in bringing its claim in circumstances where (even if it did not amount to a legal acceptance of repudiatory breach) it is clear the Ms Jones was justifiably under the impression that her line manager and colleagues, and indeed clients, all considered – as did she – that she had in fact resigned lawfully. The unexplained period of delay allowed Ms Jones to change the status quo (to move from employment with HSL to the Second Defendant) in circumstances where she did not know HSL did not accept she was entitled to do so. This weighs, in the balance of convenience, against granting the interim injunction.

50. For all these reasons, the application for an interim injunction is dismissed.