Neutral Citation Number: [2024] EWHC 2026 (KB)

Case No.: KB-2024-002341

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
THE ROYAL COURTS OF JUSTICE

Date: 31st July 2024

Before:
MR JUSTICE RITCHIE

- -

BETWEEN

LITERACY CAPITAL PLC

Claimant

- and –

VANESSA JANE WEBB

Defendant

John Mehrzad KC (instructed by **Addleshaw Goddard LLP**, solicitors) for the **Claimant**.
Paul Nicholls KC (instructed by **Osborne Clarke LLP**, solicitors) for the **Defendant**.

Hearing date: 26th July 2024

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APPROVED JUDGMENT

This judgment was handed down remotely at 15.00pm on Wednesday 31st July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Ritchie:

The Parties

1. The Claimant is an investment company which holds controlling shareholdings in other companies which purchased Mountain Healthcare Limited (Mountain).

2. The Defendant is a qualified nurse, doctor and business-woman who, with a business partner, ran and grew Mountain, a company providing medical services to sexual assault referral centres (SARCs).

Bundles

3. For the hearing I was provided with two hearing bundles, two authorities bundles, two skeleton arguments and a late served witness statement from the Defendant.

Summary

4. This judgment deals with an application by the Claimant for an interim injunction to restrain the Defendant from trading in competition with a group of subsidiary companies owned by the Claimant including Mountain due to restraint of trade covenants nationwide with a 10 year duration.

The Issues

5. There is only one issue to be determined. That is whether the restrictive covenants on which the Claimant relies are unenforceable under the common law. Within that issue are the following sub-issues:
   - 5.1 What is the scope and duration of the restrictive covenants?
   - 5.2 Arguably, does that scope attract the common law provisions governing the validity of restraint of trade covenants?
   - 5.3 If so, are these restrictive covenants unarguably void due to their wide scope and long duration?
   - 5.4 Should an interlocutory injunction be granted to restrain the Defendant?

Pleadings and chronology of the action

6. In the Claim Form, which was dated the 19th of July 2024 but has not been issued, the Claimant sought a declaration that various restrictive covenants had been breached, an injunction prohibiting breaches and costs. The Claim Form stated that the cause of action was for breach of "restrictive covenants". There are no Particulars of Claim. By a notice of application issued on the 19th of July the Claimant sought an interim injunction to restrain the Defendant from breaching non-compete and non-deal restrictions in a written investment agreement dated 27th October 2021. The application was listed for 1 hour and took 2.5 hours.

The lay witness evidence

7. I have read evidence from the following witnesses:

7.1 Mr Rajbir Singh Phagura (statement sworn on 19.7.2024);
7.2 The Defendant, (statement sworn on 25.7.2024).

Findings of facts

8. I summarise the evidence put before me on this inter partes urgent application below. I am not making settled findings of fact because at this stage it is not the task of this court to resolve factual issues.

9. The Defendant, who is qualified as a nurse and a doctor is a forensic physician and a board member of the UK Association of Forensic Nurses. This is the steering group for SARC experts. She and a business partner bought Mountain in 2014 and converted it to a SARC provider to the Police services in England. She held a 25% shareholding. Mountain must have been successful because four years later she sold her shares to the Claimant via various subsidiary companies for around £4.7 million, which was paid in cash as to £215,000 and as to the rest by way of a deferred loan by the Defendant to the Claimant, to be repaid by a long stop date or before then if Mountain was sold on. She signed an Investment Agreement and Loan Agreement in 2018. She stayed on as a director of Mountain. 75% of the outstanding loan was described as "manager loans" and 25% as "vendor loans".

10. On the 27th of October 2021 she decided to resign from Mountain and all other directorships connected with the Claimant and she renegotiated the sale of her shares to the Claimant or its subsidiaries which were valued at approximately £7 million at that time. She entered two written agreements, an Investment Agreement dated 27.10.2021 and a Loan Note Agreement of the same date (the 2021 Agreements). These agreements replaced the 2018 agreements. The Investment Agreement and Loan Notes Agreement had restrictive covenants in them preventing her from competing. I shall set them out in more detail later in this judgment.

11. In December 2021 the Defendant and her business partner formed a company called Nurture Health and Care Limited (Nurture) in which she holds a 28% shareholding and is the medical director. Originally, Nurture traded in fields unconnected with the Claimant's the businesses but, after the end of the 12 month ex-employee non-compete, Nurture started to assemble SARC services and tendered in April 2024 to provide those services to the South Wales Police. On the 6th of July 2024 Nurture announced they had won the contract with South Wales Police to provide SARC services starting in September 2024. The Claimant became aware of this and two days later Mr Phagura held two phone calls with the Defendant about what he asserted were breaches of the restrictive covenants in the 2021 Agreements. Thereafter the Claimant issued the application. Various negotiations have taken place in the intervening period involving draft undertakings which do not impinge on this judgment.

12. The Defendant gave evidence that the Claimant's subsidiary companies within what is called the RCI Group included Benchmark Management Consultancy; Community Court (which provides intermediaries to HMCTS); Prometheus (which provides secure patient transfers in the mental health sector); Elisian Software (which offers software solutions for businesses) and Venture People (a provider of mental health services assisting the regaining of independence after mental illness).

The Investment Agreement 2021

13. The Investment Agreement was made between the Claimant, the managers listed in Schedule One and many subsidiary companies owned by the Claimant. The following clauses are relevant to my judgment:

> "**Whereas**
> (D) The:
> 1) Lead Investor has agreed to exchange its A Ordinary Shares in Topco for A Shares in the Company;
> 2) the Managers have agreed to exchange their B Shares, C Shares, D Shares and E Shares in Topco for B Shares in the Company, and in the case of Vanessa Webb B Shares in Topco for B Loan Notes in the Company; and
> 3) various Managers will subscribe for C Shares in the Company, as set out at Schedule 2, in each on the terms set out in this Agreement.
> (E) Vanessa Webb is a party to this Agreement as a holder of B Loan Notes.
> (F) The parties to this Agreement agree that the arrangements between themselves in relation to the affairs of the Group will be on the terms and conditions set out in this Agreement."

> **"PART B - COMPLETION**
> **2. Completion**
> 2.1 Each of the Managers and the Newcos will use his or its respective reasonable endeavours to ensure that the matters in Schedule 3 (Obligations of the parties in respect of Completion) are satisfied on Completion."

> "3(b) the obligations expressed to be assumed by it under this Agreement and each such other agreement are legal, valid and binding and enforceable against it in accordance with their terms;"

> "**9.2 Managers' Covenants**
> **(a)** Each of the Managers severally covenants with the Investors that:
> (i) he will use all powers and votes lawfully available to him in his capacities director or shareholder or a loan note holder of any Group Company or otherwise to procure to the extent he is able that the Newcos comply with the Corporate Covenants; and

(ii) will comply with the provisions set out in in 2 of schedule 7 (Positive Managers' Covenants);
(iii) will comply with (where applicable) the restrictive covenants in part 3 of Schedule 7 (Positive Managers' Covenants)."

"16.5 The Board, with Investor Consent, may give notice to a holder of Vendor Loan Notes and/or B Loan Notes that such Manager has breached his restrictive covenants set out in this Agreement and/or his contract of employment/ engagement with a Group Company and/or has committed fraud in respect of a Group Company and, with effect from the date of such notice, the Vendor Loan notes and/or B Loan Notes (as the case may be) held by such Manager shall cease to accrue interest. The Manager shall have 5 Business Days to give notice to the Board that he disagrees with the Board's findings in respect of any such breach or fraud, in which case the Board shall appoint an independent barrister to opine on the matter. The barrister shall act as expert not as arbitrator and the barrister's decision will be final and binding on the relevant parties to this Agreement in the absence of manifest error. The costs of the barrister will be borne by the relevant Manager, in the event the barrister agrees the Manager has committed a breach of his restrictive covenants and/or fraud, or by the Company if the barrister finds there has been no such breach and/or fraud."

"**Schedule 3**
1.2 The Company has executed the B Loan Notes Instrument and upon Completion the Company shall issue the B Loan Notes to Vanessa Webb in the amounts set out in Part 2 of Schedule 2 of this Agreement."

"**Schedule 7**
Part 3 - Restrictive Covenants
1 Outside Interests
Save in respect of any Permitted Activity, whilst such Manager remains a director or employee of any Group Company, he will not without Investor Consent:

(a) whether on his own account or otherwise in whatever capacity, directly or indirectly for or on behalf of any other person carry on or be engaged concerned or interested in any business or investment whether or not such business is similar to any business carried on by any Group Company; or
(b) deal with any Customers, Suppliers or Prospective Customers otherwise than in relation to the Business; and
(c) hold any office or appointment (whether or not remunerated) outside any Group Company (including any civic or public office or appointment).

2. Giving of restrictive covenants
2.1 If any Manager (i) **ceases (for any reason) to be a director or employee of any Group Company without becoming or remaining a director or employee**

of that or any other Group Company, and/or (ii) holds (or ceases to hold) B Loan Notes, he will not, within the Restricted Period whether alone or jointly, and whether as principal or agent, with or for or on behalf of any other person and whether directly or indirectly:

(a) **in the Restricted Area carry on, or be engaged, employed or interested in, any business which is of the same or a similar type to any Restricted Business and which is in competition with any Restricted Business;**

(b) **in competition with any Restricted Business, deal or seek to deal with any person who at any time during the year prior to the Commencement Date is or was a Customer;**

(c) **In competition with any Restricted Business, deal or seek to deal with any Prospective Customer;**

(d) deal or seek to deal with any person who at any time during the year prior to the Commencement Date is or was a Supplier if such dealing causes or is reasonably likely to cause such supplier to cease supplying, or reduce its supply of goods or services to any Group Company, or to vary adversely the terms upon which it conducts business with any Group Company; and

(e) employ or engage, or seek to employ or engage, any Restricted Employee, whether or not that person would breach any contract with any member of the Group by leaving its service."

"**8 Definitions**

In this Part 3:

Commencement Date means in respect of a Manager, the date upon which a Leaver Event (as defined in the Articles) occurs in respect of such Manager and/or the date upon which the individual becomes a holder of B Loan Notes

Customer means a customer of any Group Company at the Commencement Date or within the 12 month period up to and including the Commencement Date

Prospective Customer means a person who is or was (to the Manager's knowledge) **in material discussions and/or negotiations with any Group Company with a view to becoming a customer or client of any Group Company and with whom the Manager had direct dealings or personal contact at any time during the 12 month period up to and including the Commencement Date**

Restricted Area means the **UK and Channel Islands**

Restricted means the **business of any Group Company** carried on at any time during the 12 month period up to and including the Commencement Date

Restricted Employee means any person who at the Commencement Date is, or was at any time within the 12 month period up to and including the Commencement Date, a director of a Group Company and/or an employee of the Company or any other Group Company whose gross annual salary is not less than £50,000 per annum

Restricted Period means:

(a) in respect of a Leaver Event, the period of **12 calendar months** immediately following the Commencement Date and/or

(b) in respect of a holder of B Loan Notes, **the period commencing on the Commencement Date and ending 12 calendar months after the date on which they cease to hold any B Loan Notes**

Supplier means a supplier of any Group Company at the Commencement Date or within the 12 month period up to and including the Commencement Date" (Other than headings, all the emboldening is mine).

The Loan Note Instrument

14. This was dated 27.10.2021 and contained the following terms:

"Seven per cent" … "£7,008,023"

"Schedule 2 The Conditions

1 Interest

1.1 Until the Loan Notes are repaid or redeemed in accordance with these Conditions, interest on the Loan Notes will accrue from day to day;

(a)

(i) at the Interest Rate; or

(ii) in circumstances where a Noteholder commits a Restrictive Covenant Breach, from (and including) the earlier of:

(A) date on which such Noteholder commits such Restrictive Covenant Breach;

(B) the date on which the Company becomes aware of such Restrictive Covenant Breach by the Noteholder; and

(C) the date on which the Noteholder becomes aware of such Restrictive Covenant Breach by the Noteholder,

at the Reduced Interest Rate; and

(b) be paid in cash in accordance with Conditions 1.2 - 1.6 (inclusive) below."

"2 Repayment and redemption

2.1 Unless previously repaid or redeemed or purchased by the Company and cancelled, the Loan Notes will be redeemed in full at par together with all accrued interest on the Redemption Date."

"**Redemption Date means the earlier of:**

(a) 27 October 2028 (or, if such day is not a Business Day, the next succeeding Business Day) and

(b) the date on which any Sale or Listing is completed"

(Other than headings, all the emboldening is mine).

15. In the application the Claimant relies on paragraphs 9.2(a)(iii) of the Investment Agreement 2021 and paragraph 2.1(a)-(c) of the Loan Note Agreement 2021. It is apparent that in 2018 the Claimant bought into Mountain when it was run by the Defendant for a substantial sum paid partly upfront and partly in arrears with a long tail set out in the Loan Note. Then, in 2021, the Defendant resigned and, the Claimant re-purchased all of her shareholding for around £7 million, subsumed the 2018

contract into the 2021 contract and issued a further Loan Note under which the loan was not to be repaid until the back end of 2028 or earlier sale of Mountain. Part of the deal was for the Claimant to pay the Defendant nearly £500,000 per annum in interest on the loan. There was a clause permitting the Claimant to cease paying interest if the Defendant breached the restrictive covenants. There were restrictive covenants limited to one year governing all of the staff who were paid out and ceased employment. A similar covenant governed the Defendant. The earlier ceasing employment covenant, from the 2018 Agreement, had a two year duration. However, the relevant restrictive covenant was a non compete covering all of the listed subsidiary companies' businesses, for 7 years from 2021 plus a year after the loan was to be repaid at the long stop date, so 8 years in total. It was UK wide. The parties agree that the long stop redemption date was extended to 2030 at a time unknown to me.

Submissions

16. The Claimant submitted that it was entitled to an interim injunction pending a return date or full trial, which they asked to be expedited and listed for five days commencing on the 2nd of November 2024. The Claimant submitted the Investment Agreement and Loan Note Agreement were both arms-length commercial agreements by parties of equal bargaining power. Counsel for the Claimant, in his skeleton, described the covenants binding the Defendant as "restrictive covenants" and asserted the Defendant had never disputed the validity of them. The Claimant proposed a draft interlocutory injunction which did not prevent the Defendant from continuing with her SARC contract in South Wales through Nurture but prevented any further competitive activities. The Claimant set out the substantial inter partes correspondence relating to proposed undertakings, all negotiated subject to the Defendant's challenge to the validity of the restrictive covenants. I raised at the hearing whether I needed to be taken through any of the correspondence and invited counsel to do so. The Claimant's counsel did not refer to or rely on any of it.

17. The Claimant submitted that, pursuant to *American Cyanamid Co v Ethicon Limited* [1975] AC 396, there were four steps for the Court to take: firstly, to determine whether there is a serious issue to be tried. Relying on the judgement of Lord Justice Nugee at paragraph 102 in *Planon v Gilligan* [2022] EWCA Civ. 642 [*Planon*], the Claimant submitted this was not a demanding test and was designed to exclude frivolous or vexatious claims. Secondly, to determine whether the balance of convenience favoured the grant or refusal of an injunction. Thirdly, when considering the balance of convenience it was submitted the Court should consider whether damages would be an adequate remedy for the Claimant if the injunction was refused, and fourthly, the Court should seek to take steps which would be the least likely to cause harm if the decision later turned out to be wrong.

18. Focusing on the restrictive covenants in the Investment Agreement, the Claimant submitted, relying on *Credico Marketing v Lambert* [2021] EWHC 1504 [*Credico*], and the judgment of Cavanagh J at para 230, that employment law restrictive

covenants were not a guide in a commercial case such as this. Further, the restrictive covenants applied during the duration of the Investment Agreement and were not post termination of employment covenants. Finally, the Claimant relied on the judgment of Carr LJ in *Quantum Advisory v Quantum Actuarial* [2021] EWCA Civ. 227 [*Quantum*] at paras. 54 and 60-61, submitting that the doctrine of restraint of trade "may" not apply in commercial cases. In the alternative the Claimant submitted, relying on *QBE Management v Dymoke* [2012] IRLR 458, at para 210 in the judgment of Haddon-Cave J that the Court had to determine whether the Claimant/employer had shown any evidence that it had a genuine interest which required protection and if so the Claimant had to show that the covenant was no wider than reasonably necessary. Then, the Court would decide if the covenant was reasonable and whether, as a matter of discretion, injunctive relief should be granted, having regard to all the circumstances. The Claimant accepted that the burden is on the applicant to show the restraint covenants are no greater than reasonably necessary for the proper protection of its protectable interests. Reasonable necessity is assessed objectively by persons in the positions of the parties at the time the contract was entered into. Relying on para. 215 of the judgement of Haddon-Cave J, it was submitted that it would only be if the Court found that the restrictive covenant which was actually necessary was far less far reaching than the restrictive covenant actually imposed, when the Court would hold it to be unreasonable. Thus, the Claimant submitted, there was a serious question to be tried and the assessment of the validity of the restrictive covenants should not take place at the interim hearing. The Claimant submitted that the Defendant had not disputed the meaning of the covenant in the past. The Claimant sought to protect its investment in the goodwill of Mountain (see paragraph 38.2 (ii) of the skeleton argument). In relation to the balance of convenience, the Claimant submitted that it favoured granting the injunction because, without it, the Claimant's entire investment in Mountain would be at risk of "unquantifiable damage".

19. In verbal submissions the Claimant went further than the skeleton. They submitted that the relevant goodwill was all of the business of all of the companies within the subsidiaries set out in the evidence. The Claimant submitted that there was no restraint of trade issue within their application. Whilst accepting in oral submissions that all of the circumstances were relevant when determining whether the common law on restraint of trade applied to the restrictive covenants in the 2021 Investment Agreement the Claimant submitted that employment was irrelevant to it and the selling of a trade or business was irrelevant. Instead, this was a pure commercial agreement, unrelated to the established law or public policy governing the validity of restraint of trade covenants in employment and the sale of business agreements. The Claimant accepted that no clause 16.5 (Investment Agreement 2021) barrister evaluation had been triggered by the Claimant's assertion that the Defendant had breached the restricted covenant. When I opened up the issues of whether the evaluation clause was equivalent to an Arbitration Act clause providing exclusive jurisdiction both parties submitted that, because the application was not concerning

any issue of breach, but was only concerning the issue of validity of the restrictive covenants, this Court should not concern itself with that question.

20. In summary the Claimant asserted that (1) there was a serious question to be tried: namely whether the public policy elements of restraint of trade law applied at all to the restrictive covenants; (2) that enforceability was a question for trial not for the interim injunction application; (3) that, as to duration and the question of whether there was a protectable interest, the case was nuanced and those matters should be dealt with at trial; (4) in relation to the question of whether damages would be a sufficient remedy and specifically in answer to the Court's question about the Claimant saving £500,000 per annum by refusing to pay interest on the outstanding loan because of the alleged breach of the restrictive covenant, the Claimant relied on the bald assertion in the witness statement of Mr Phagura, that the damages were inestimable.

21. The Defendant's case was restricted to raising one single issue. The Defendant asserted there was no serious issue to be tried because the restrictive covenants are void and no realistic argument to the contrary has been or could be raised. This was so because the covenants' duration was far too long to protect any legitimate interest: eight years in total (in fact this had been extended, so I was informed during the hearing, to 10 years), which is manifestly too long in the context of any vendors selling any businesses to purchasers. Further, it was manifestly too long when compared with the restraint of trade covenant for managers, which was only 12 months in the 2021 Investment Agreement. Secondly, the Defendant submitted that the scope of the restrictive covenants was far too wide. Mountain only provided services for SARC assessment centres and yet the restrictive covenants covered all of the subsidiary group activities of the Claimant which went way beyond the activities of Mountain. These covered, for instance, management consultancy, software consultancy, the provision of staff to the HM Court Service and many other fields. Relying on the common law and in particular *Herbert Morris v Saxelby* [1916] AC 688; *Wincanton v Cranny* [2000] IRLR 716*;* and *Allied Dunbar v Weisinger* [1988] IRLR 60, the Defendant asserted there were no arguable prospects that these restrictive covenants would be upheld at trial.

22. In verbal submissions the Defendant eschewed relying upon the balance of convenience test to defend the application and stuck to the case set out in the written skeleton. It was submitted that there is no precedent for restrictive covenants lasting 10 years. This would prevent the Defendant from trading and exercising her skills within a field which was exceptionally needy of her skills. It was submitted that the Defendant's skills were needed in the public interest. The restriction was for a period so long that it would ban her using her skills until her retirement age of 65. As to whether the common law in relation to restraint of trade applies, it was submitted that the context of this case is not pure commerciality but is instead employment and the sale of a business by the guiding mind of the business. Both contexts were well

established within the common law of restraint of trade. The rationale for restricting directors who leave businesses is based on confidential information in relation to processes, products and customers. There is no precedent for restrictive trade covenants on employees lasting more than one or two years and certainly not 8 to 10 years. As for vendors, who are integral to businesses, who sell such businesses, the restraint of trade covenants necessary to protect the purchaser's interest are again a well established field of restraint of trade common law. They are allowed to protect the goodwill tied partly to the name of the vendor which is purchased by the purchaser and to prevent competition for a necessary period in the same field. Likewise, there is no precedent in the case law for such restraint of trades upon vendors lasting longer than a year or two. The Defendant submitted the protection sought in the 10-year restrictive covenants was far wider and longer than was necessary to protect the purchaser's goodwill in Mountain. The Defendant submitted that her case was equivalent to a summary judgment application on the restrictive covenants. She argued that the Claimant has no arguable prospect of proving the validity of the restrictive covenants. In relation to the underlying public policy rationale, it was submitted that there is a high public policy need for good SARC practitioners urgently to assess victims of rape and sexual violence and that excluding a senior practitioner from the market would be contrary to public policy. The Defendant submitted that the 2021 Agreements were equivalent to hybrid contracts, mixing employment and sale of business elements, both of which attracted restraint of trade analysis of the validity the restrictive covenants.

The Law

23. The doctrine relating to covenants in restraint of trade is summarised in *Chitty on Contracts* volume one 35th edition at paragraphs 19-203 to 19-219. The starting point for a covenant which restrains trade is that at common law such covenants are unenforceable because the public interest favours liberation of trade in a free capitalist society. It is only if the party relying on the restrictive covenant, which carries the burden of proof, can establish that the restraint is reasonable that the starting point is displaced. The concept of reasonableness is based upon various factors. The core factor was described in 1894 by Lord Macnaghten in *Nordenfelt v Maxim* [1894] AC 535 at page 565 thus:

> "it is a sufficient justification and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in relation to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

24. When determining what is reasonable the Courts consider inter alia whether or not a covenant of a narrower nature would have sufficed. The extent or scope of the

restrictive covenant is considered in relation to the areas of trade or service restricted; the geographical area covered and the duration of the restriction.

25. In *Office Angels* v *Rainer-Thomas* [1991] IRLR 214, at p 217, Sir Christopher Slade summarised the principles in relation to ex-employee restrictive covenants thus:

> "(1) If the court is to uphold the validity of any covenant in restraint of trade, the covenantee must show that the covenant is both reasonable in the interests of the contracting parties and reasonable in the interests of the public (see for example *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 707 per Lord Parker of Waddington) . . .
> (3) In the case of contracts between master and servant, covenants against competition are never as such upheld by the court . . .
> (4) The subject matter in respect of which an employer may legitimately claim protection from an employee by covenant in restraint of trade was further identified by Lord Wilberforce in *Stenhouse Australia Ltd v Phillips* [1974] AC 391, 400 as follows:
>
> > "The employers" claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation."
>
> (5) If, however, the court is to uphold restrictions which a covenant imposes upon the freedom of action of the servant after he has left the service of the master, the master must satisfy the court that the restrictions are no greater than are reasonably necessary for the protection of the master in his business (see *Mason v Providence Clothing and Supply Co Ltd* [1913] AC724, 742 per Lord Moulton) . . ."

26. In *Beckett v Hall* [2007] ICR 1539, the Court of Appeal considered a 12 month restrictive covenant post termination banning approaching any client. Maurice Kay LJ ruled thus:

> "25. The first thing to notice about this is that it accepts in principle the reasonableness of a covenant against dealing in the circumstances of this case, notwithstanding the existence of the non-solicitation covenant in clause 17.2. I agree with the judge about that. In the course of submissions I put to Mr Oldham a proposition gleaned from Bowers, A Practical Approach to Employment Law, 7th ed (2005), para 6.51, which is in these terms:
>
> > "The courts will, in most cases, carefully consider the nature of the market in which the employee was engaged. The narrower and more specialist the market, thus the more likely it is that a non-dealing

> covenant will be upheld, given that clients will in those circumstances naturally gravitate to the ex-employee who opens a new, competing company in such a case."
>
> "29. … For these reasons I consider that the confinement of reasonableness to a period of three months was wrong. Whilst I do not consider that a period in excess of months would have been reasonable in respect of either Mr Hall or Mr Yadev, I am prepared to hold that months was a reasonable period in both cases. In reaching this conclusion I have specific regard to their seniority and importance, to the evidence about business patterns, to the logistics of replacing them, and to the uncontradicted evidence of an industry standard of months. In my judgment, a non-dealing clause for months was reasonable between the parties and reasonable in the interests of the public."

27. I glean from this judgment that the type of work which the Defendant was doing is directly relevant when assessing the scope of the restriction which the Claimant seeks to show is necessary to protect its interests.

28. In *Wincanton v Cranny* [2020] IRLR 716, the Court of Appeal considered an ex-employee 12 month non solicitation clause. The judgment was reported (in a short report) to have been as follows:

> "11. In essence the judge began by considering clause 15 and this he struck out essentially on the basis that the prohibition against competing in any capacity 'with any business carried on' by Wincanton was plainly too wide. As he rightly pointed out, Wincanton's business has a number of facets. It is apparently concerned not merely with distribution, but also for example with what is called logistics, and the use of the standard restraint clauses was obviously designed to extend their restrictive effect on ex-employees beyond the particular field of activity (in Mr Cranny's case the European transport operation) in which personally they had been engaged. The further objectionable words in clause 15 'or with any of Unigate's subsidiary or associated companies' the judge felt able to sever. So far, so good. The judge however then proceeded to clause 16 and, having quoted only the opening words, he said this:
>
> 'Again, I repeat that the words "any business carried on by the company" extends to matters outside the scope of the transport business with which the contract of employment was originally concerned."
>
> "17. First, however, as to clause 15. I need say no more than that on its face it plainly falls foul of all the well-known authorities in this field. Mr Duggan himself appears to recognise that it is necessary to read it down for it to become enforceable. He seeks to rely for the purpose upon the well-known trilogy of cases, *G W Plowman v Ash* [1964] 1 All ER 10,

> *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026 and *Business Seating (Renovations) Ltd v Broad* [1989] ICR 729.
> 18 In my judgment, however, the approach adopted in those cases cannot apply in a case like the present where, so far from there having been any attempt to formulate the covenant in a way which focuses upon the particular restraint necessary in respect of a particular employee, the clause is in a standard form plainly intended to apply to the widest possible range of situations. This court's judgment in *J A Mont (UK) Ltd v Mills* [1993] IRLR 172 is in my judgment fatal to the enforceability of a clause drawn as intentionally widely as clause 15(a) in the present case."

29. I take from this authority that an intentionally wide scope for the restricted work can be fatal to the asserted reasonableness of the restrictive covenant.

30. When considering which contracts attract restraint of trade law key guidance was given in *Quantum Advisory Ltd v Quantum Actuarial LLP* [2021] EWCA Civ 227, in which Carr LJ considered these issues at paras. 54, 60-68 and ruled thus:

> "54. The definition of a covenant in restraint of trade presents "peculiar conceptual difficulty": *Chitty* comments that all contracts are to some extent in restraint of trade by at least preventing the parties to the contract from trading with others. However, there has been no suggestion that all contracts are or should be subject to the doctrine, which is rather "to be applied to factual situations with a broad and flexible rule of reason" (see *Esso* (at 331G per Lord Wilberforce)). The courts have made no apologies for refraining from any attempt to identify the dividing line between contracts which are and are not in restraint of trade. It has been described as "uncertain and porous" (see *Proactive Sports Management Ltd v Rooney* [2012] FSR 16 ("PSM") (at [55] per Arden LJ). The courts have emphasised repeatedly that the categories of restraint of trade are not closed (see for example *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146 (at 169 per Lord Denning MR)) ("Petrofina").
> ….
> 60. I draw together the relevant legal principles from the authorities (including most recently *Peninsula)* as follows:
> (i) The doctrine is not confined to immutable boundaries or rigid categorisation, but there are certain categories of covenants to which the doctrine traditionally applies, in particular those by which an employee undertakes not to compete with his employer after leaving the employer's service and those by which a trader who has sold his business agrees not thereafter to compete with the purchaser of the business. The doctrine has been held to apply to franchise agreements, share-purchase agreements and the assignment of a patent;

(ii) There are no clear limits on the scope of the doctrine and no precise or exhaustive test can be stated. The doctrine is to be applied to factual situations with a broad and flexible rule of reason (see *Esso* (at 331G per Lord Wilberforce)). The question is whether or not in all the circumstances the contract should be excluded from the application of the doctrine or, as Lord Wilberforce put it in *Esso* (at 332G), whether it is appropriate to dispense the contract "from the necessity of justification under a public policy test of reasonableness";

(iii) Contractual restraining provisions which are of a sort which have become part of the accepted machinery of a type of transaction which have generally been found acceptable and necessary – reflecting the accepted and normal currency of commercial or contractual conveyancing relations - will generally fall outside the scope of the doctrine (following the "trading society" test discussed above and approved in *Peninsula Securities*);

(v) Determining whether contractual restraints fall outside the range of a normal commercial contract imposing restrictions on a contracting party's ability to carry on a business activity is a question of evaluating all the relevant factors to be assessed cumulatively...;

(vi) The assessment of application of the doctrine is to be carried out by reference to the position as at the time that the contract is made (not by reference to subsequent performance and events). How the contract turns out may be relevant only in so far as it furnishes evidence of the nature of the contract in question when made…;

(vii) The application depends less on legal niceties or theoretical possibilities than on the practical effect of the restraint in hampering the freedom to trade…. It is a question of substance not form…;

(viii) The doctrine can apply to restraints operating during the currency of the contract, as well as post-contractually. However, the distinction between pre-and post-termination restraints is not without relevance. The fact that a restraint is limited to the period of the contract may be a factor in favour of excluding the doctrine (or a factor to be brought into account on the side of justification)…

(ix) As already set out above, where the doctrine applies, the contractual restraints are prima facie unenforceable but all, whether partial or total, are enforceable if reasonable.

61. The approach of the courts to analogous factual situations may be of assistance in determining the correct approach to be taken but is unlikely to be determinative because of the fact-sensitive nature of the exercise to be carried out."

31. I glean from this ruling that when approaching the question of whether the Agreements attract restraint of trade law this Court must look at the evidence and all the circumstances at the time of the contracts. There are certain categories of restrictive covenants to which the doctrine traditionally applies, in particular those by which an ex-employee undertakes not to compete with his ex-employer and those by which a business person, who has sold his business, agrees not thereafter to compete with the purchaser of the business, to protect the goodwill he sold to the purchaser. The doctrine has been held to apply to share-purchase agreements. Carr LJ continued the guidance thus:

> **Reasonableness**
> 62. On the question of reasonableness, it is common ground that the test identified by Lord Macnaghten in *Nordenfelt (*at 565) is to be applied:
>
> > "reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is no way injurious to the public."
>
> 63. Whilst in some of the authorities the courts have conflated the two (private and public interest) aspects of the test (see for example *Attorney-General of the Commonwealth of Australia v Adelaide SS Co [*1913] AC 781 (at 795 per Lord Parker) and Esso (at 324D per Lord Pearce)), the broad view appears to be that Lord Macnaghten's dichotomy is to be preferred. Where businesses have dealt at arm's length with each other, they can usually be regarded as adequate guardians of their own interests. However, the possible impact of the bargain upon third parties, or the public more generally, may call for careful judicial scrutiny. Clarity of analysis is more likely to be facilitated by preservation of both limbs of the exposition.

The Claimant relies on this paragraph to support its assertion that this was an arms length contract so no issue of restraint of trade applies. However, Carr LJ continued thus

> "64. A court will be slow to substitute its (objective) view as to the interests of the contracting parties for the (subjective) views of the contracting parties themselves. The law recognises that if business contracts are fairly made by parties who are on equal terms such parties should know their business best (see in particular *Esso* (at 300C-D per Lord Reid; at 305B-D per Lord Morris and at 323B-E per Lord Pearce)). That consideration will carry less or no weight if the parties were negotiating on other than equal terms (see *Panayiotou* (at 332 per Jonathan Parker J)). The absence of independent legal advice for the weaker party may also be relevant (see *PSM* (at [100] per Arden LJ)).

65. Beyond this, and again drawing the relevant threads together by way of summary:

i) The onus of establishing that a covenant is no more than is reasonable in the interests of the parties is on the person who seeks to rely on it (see

in particular *Attwood v Lamont* [1920] 3 KB 571 (at 587-588 per Younger LJ). If he/she establishes that it is no more than reasonable in the interests of the parties, the onus of proving that it is contrary to the public interest lies on the party attacking it (see in particular *Saxelby* (at 716 per Lord Shaw));

ii) The time for considering reasonableness is again the time of the making of the contract (see in particular *Gledhow Autoparts Ltd v Delaney* [1965] 1 WLR 1366 (at 1377 per Diplock LJ); *Shell v Lostock Garage Ltd* [1976] 1 WLR 1187 (at 1197-1198 per Lord Denning MR) and *Schroeder* (at 1309H per Lord Reid));

iii) It is no answer on the question of reasonableness to say that there have been substantial financial rewards on all sides. The question of reasonableness has to be considered by reference to the terms of the contract (see in particular *PSM* (at [104] per Arden LJ));

iv) For a restraint to be reasonable between the parties it must be no more than what was reasonably required by the party in whose favour it was imposed to protect his legitimate interests (see in particular *Saxelby* (at 701 per Lord Atkinson) and *Schroeder* (at 1310B per Lord Reid and 1315H per Lord Diplock));

v) The court is entitled to consider whether or not a covenant of a narrower nature would have sufficed for the covenantee's protection (see in particular *Office Angels Ltd v Rainer Thomas and O'Connor* [1991] IRLR 214 (at 220 per Sir Christopher Slade));

vi) What is reasonable may alter with the changing nature of commerce and society (see in particular *Nordenfelt* (at 547 per Lord Herschell));

vii) Factors to be considered when assessing reasonableness between the parties include the character of the business (see in particular *Nordenfelt* (at 550 per Lord Herschell)) and also:

a) The relevance of the consideration for the restraint;
b) Inequality of bargaining power;
c) Standard forms of contract;
d) Whether the restraints operate during or post-contract;
e) The surrounding circumstances, including the factual and contractual background;

(see in particular *Panayiotou* (at 329-336 per Jonathan Parker J));

viii) The duration of an agreement in restraint of trade is a factor of great importance in determining whether the restrictions in an agreement can be justified (see in particular *Schroeder* (at 1312F-G per Lord Reid));

> ix) The level of compensation may be relevant to the question of reasonableness (see *Esso* (at 300B-C per Lord Reid) and (at 329-330 per Jonathan Parker J));" …
> "68(ii) The question is whether or not (as a matter of public policy) it is appropriate to dispense the contract from the necessity of justification under a public policy test of reasonableness" …
> "79…..Public policy, which sets a high threshold, remains the foundation of the doctrine. As the authorities make clear, there is no bright line to be drawn (and it would be wrong to attempt to define one).
> But what does have to be decided is on which side of the line the facts of any given case fall. This involves an assessment of public policy to be carried out by reference to the facts as they stood at the time that the contract was entered into, balancing the competing considerations of holding parties to freely negotiated contracts whilst not permitting them to be restricted unduly in their ability to trade. The freedom to contract is itself in the public interest (see Esso (at 304F-306C per Lord Morris)).
> The doctrine is not there to rescue business men and women from having
> entered into agreements which they may later regret."

32. In *Credico v Lambert and ors* [2021] EWHC 1504, Cavanagh J was dealing with restrictions in a trading agreement between C, a client supplier and D, an independent marketing company set up and contracted to C to supply independent face to face marketing staff for the introduced clients. It was terminable on 14 days' notice and contained a restrictive covenant whilst current and post termination for 6 months, covering a 10 mile radius. He held that the restriction did attract restraint of trade law. In relation to the factors relevant to restraint of trade he ruled thus:

> "230. The level of scrutiny that is applied depends upon whether the restriction was imposed in the context of an employment relationship, or something that is akin to an employment relationship, on the one hand, or in the context of a commercial relationship, on the other. The task of showing that the restrictions go no further than is reasonably necessary to protect the Claimant's legitimate business interest is much more onerous in an employment relationship case than in other types of case. The standards of scrutiny are not binary, however, and, in a non-employment case, the extent of the scrutiny depends on all of the circumstances of the case: there is no one size-fits-all standard." …

Later Cavanagh J considered the types of contract which would attract restraint of trade thus:

> "252. In practice, in my view, it will often be the case that where a restriction is on the cusp of falling into a category in which the doctrine of the restraint of trade does not apply at all, it will be clear that, even if the doctrine does apply, the restriction is enforceable on the basis that it is no greater than reasonably necessary for the proper protection of protectable interests. In such cases, the outcome will be the same whether the restriction is regarded as one which is outside the doctrine of restraint of trade altogether, or as one which is within the scope of the doctrine but which is enforceable in accordance with the doctrine."

33. In *Planon Ltd v Gilligan* [2022] EWCA Civ. 642, the Court of Appeal were considering a 12 month, ex-employee, restrictive covenant by a software company. D started work with a competitor in the period. The Judge held the covenant unenforceable at the interlocutory injunction stage. On appeal the decision was upheld on different grounds: the balance of convenience. Elizabeth Laing LJ recited a run of exemplar cases in paras. 56-67 which I take into account and Nugee LJ ruled thus:

> "102. It is not in those circumstances necessary for me to add anything, but I would just like to draw attention to two points that emerge from their judgments. First, an application for an interlocutory injunction is not the appropriate occasion to expect the Court to give any definitive answer to the question whether a covenant is enforceable or not. Ever since the seminal decision in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, it has been established law that the Court should not usually seek to resolve the substantive issues on such an application. At the first stage of the analysis the question is whether there is a serious issue to be tried. This is not a demanding test, and it really only serves to exclude the case where the claim is frivolous or vexatious, or otherwise demonstrably bad. If a restrictive covenant is clearly wider than is reasonably necessary for the protection of the employer's legitimate interests, then the Court can so hold and refuse an injunction, but prolonged examination of the merits at the interlocutory stage is not appropriate and in many cases of this type, as the judge rightly found here, there will be at least a serious issue to be tried."

34. Bean LJ ruled as follows:

> "109. There are two ways of dealing with injunction applications of this kind. One is to order a very speedy trial (that is to say one taking place within weeks rather than months) and to make an interim order which will hold the ring for the short period pending that trial. But trials are very expensive, and the costs may be beyond the resources of one or even both parties. Sometimes the judge on the interlocutory application is in as good a position as a trial judge would be to assess the validity of the covenant.

> In a high proportion of cases, including this one, following the judge's decision on the interlocutory injunction application, time for service of pleadings is extended by agreement and the claim at first instance proceeds no further."
>
> "111. In this case it is not disputed that there is a serious question to be tried as to the validity or otherwise of the covenant against competition."

35. I take from this ruling that the interlocutory injunction stage is not generally the correct jurisdiction for an analysis of whether the scope of a restrictive covenant is reasonable or not. The rationale for this is plain. The full evidence is not before the court. So, for instance, in the application before me there are only two short witness statements. I know very little about the size or scope of the business run by Mountain or any of the other subsidiary companies owned by the Claimant. I have seen no standards from the relevant industries. No evidence has been put in as to whether the customer or prospective customer lists of Mountain included South Wales Police.

Applying the law to the facts

36. **What is the scope of the restrictive covenants in this case?** There is no dispute as to the scope of the restrictive covenants in this case. They lasted for a total of 10 years post agreement including one year after the loan is paid back to the Defendant on the long stop date. As to the businesses which they cover, they go far wider than just the services which Mountain delivered when the Defendant worked for them. They include management consultancy, supplying HM Courts with administrative staff and mental health services. As to the geographical scope, they cover all of the UK and the Channel Islands.

37. **Do they unarguably attract the common law restraint of trade provisions?** I have carefully considered the clear rule that such matters are best considered at trial not at the interlocutory injunction stage. In my judgment it could only be in very clear cases that this Court should take on the task of holding that restraint of trade law applies where there is a real issue about it. I must ask, is it at least arguable that the Investment and Loan Agreements are purely commercial agreements, unrelated to any matter which would likely attract restraint of trade?

38. The Defendant submitted that the restriction arose because of the Defendant's special expertise having set up, grown and succeeded with SARC services at Mountain. In my judgment there was no other essence to the Agreements or the covenants than that. Nor was any put forwards. The Claimant bought the product of the Defendant's labours in setting up SARC services through Mountain. The method of payment was a matter for the parties to agree but it did not stand aside from and unconnected to the services offered by Mountain or the profits made or the value of the shares which the Defendant held as a result of her growth of those services. The purchase price must have been premised on the value of the turnover of Mountain and the net profit and

various projections. As Carr LJ stated in *Quantum* share purchase agreements attract the law of restraint of trade in the appropriate circumstances.

39. The circumstances in this case are clear. The Claimant bound the Defendant as an employee to restrictive covenants whilst she worked for Mountain and after she left. The leaving restrictions were for 12 months and were imposed when she left in 2021. They arose as a result of her status as founding director and it is not disputed that a 12 months, non-compete with Mountain restriction would have been reasonable by way of duration and business scope. But the covenants also sought to restrict the Defendant as vendor of the business of Mountain. These restrictions were set at a duration of 8 and then 10 years. No evidence has been put before the Court to justify the necessity for that duration. In attempting to discharge the burden of proof the Claimant has failed to provide any evidence of necessity for a 10 year covenant. As to the geographical scope, the only evidence of Mountain's business was a reference to a contract with Norfolk and Suffolk Police in 2020-2021. The evidence was wholly silent as to any other Mountain contracts. The covenants were wide, nationwide. The Claimant has provided no evidence to justify a nationwide covenant other than the assertion that they had nationwide ambition. Evidence of Mountain's SARC contracts around the country would have been easy to add in two lines to the witness statement of Mr Phagura if they existed. Evidence of Mountain's customer lists for SARC centres around the UK in 2021 would have been simple enough to add to the evidence. None were provided. Evidence of the Police forces to whom Mountain had tendered would have been simple enough to have been provided. None were provided.

40. I turn then to consider the sale of the shares in the business by the Defendant to the Claimant. A long tail payout lasting 8-10 years was agreed. An interest rate of 7% was agreed in 2021 when interest rates were low. The market has moved in the Claimant's favour but that is of no consequence, the time for consideration of the Agreements is the time they were made. I have no evidence of what the parties were negotiating or aiming to achieve when reaching that agreement. All that was submitted by the Claimant was that the restrictive covenants were needed to protect the goodwill of Mountain and all of the Claimant's subsidiaries' businesses for the £500,000 of interest to be funded each year. Protecting Mountain makes sense (albeit for not so long), but protecting the other, different, businesses makes no legitimate sense because the Defendant did not have expertise in any or most of those fields. So, the core of the legitimate protectable interest was only Mountain's business. In my judgment, taking this and the directorship into account, it is beyond argument that the restrictive covenants arose from the Defendant's status as an employee of the Claimant and as a founder and grower of the business and as vendor of the Mountain business to the Claimant and so attracted restraint of trade law. The facts of this case fall squarely within the jurisdiction of restraint of trade and I can see no arguable case for the Claimant to escape that conclusion.

41. **If so, are these restrictive covenants unarguably void due to their wide scope and long duration?** I have again carefully considered the clear rule that such matters are best considered at trial not at the interlocutory injunction stage. The scope of the restrictive covenants goes far beyond the core of Mountain's services and so reaches far beyond any legitimate protectable interest. The covenants cover businesses which are wholly unrelated to Mountain. The duration of the restrictive covenants is far past the duration allowed in ex-employee cases and in sale of business cases. The Claimant could produce no exemplar case approaching anywhere near 8-10 years. The geographical scope, being Nationwide, was not justified by the Claimant providing any evidence of the geographical scope of Mountain's contracts beyond Norfolk and Suffolk.

42. I have considered whether the restrictive covenants are severable, but I cannot see how they can be properly severed in a simple and clean way. The only suggestion made by the Claimant was to sever the 1 year "carry over" restriction after the loan is fully repaid but that does not resolve the 9 year duration before then or the width of the businesses banned or the geographical scope.

43. In my judgment this is a clear case of restrictive covenants being drafted so widely and of such long duration that they are plainly unenforceable at common law for breaching the public policy against restraint of trade. They seek to ban the Defendant from working in her chosen field of expertise, and many other fields, for a huge duration until her retirement age of 65. They seek to go far beyond protecting the Claimant's legitimate interests in buying Mountain and protecting the goodwill received in that business.

44. I conclude, exceptionally, that it is appropriate at this stage to rule that on the facts of this case there is no arguable issue about the lack of validity of these restrictive covenants. They are void and unenforceable and the Claimant has not and will not at trial be able to raise any arguable case that they are either: (1) unaffected by restraint of trade law or (2) reasonable in scope and duration.

Conclusions

45. I dismiss the application for an interlocutory injunction on the grounds that the restrictive covenants relied upon by the Claimant in their Claim Form and application are void and unenforceable. There is no argument to the contrary which has any realistic prospect of success.

46. Had the full *American Cyanamid* test been addressed by the Defendant in argument I would have dealt with it in this judgment but the Defendant did not rely on the balance of convenience test and eschewed dealing with it.

47. A consequentials hearing should be listed early next term if the parties cannot agree the order. The time for permission to appeal is extended until 14 days after the order is issued.

END