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Case No: KB-2024-003739

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 December 2024

Before : HHJ KAREN WALDEN-SMITH, Sitting as a Judge of the High Court

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Between :

(1) AMBERSIDE ENERGY (DEVELOPMENT) LIMITED
(2) AMBERSIDE ENERGY LIMITED
(3) AMBERSIDE POWER 2 LIMITED

Claimants

- and -

(1) HAMZA AHMED
(2) BLAKE CLOUGH CONSULTING LIMITED

Defendants

- -
- -

NICHOLAS GOODFELLOW (instructed by **EDMONDS MARSHALL MCMAHON**) for the **Claimants**
DAVID LASCELLES (instructed by **PCB BYRNE LLP**) for the **Defendants**

Hearing date: 21 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ KAREN WALDEN-SMITH :

Introduction

1. The claimants seek interim injunctive relief arising from what is alleged by the claimants to be the retention and misuse of confidential information by the first defendant who had formerly been employed by the first claimant and who subsequently started work with the second defendant. The first defendant worked for the first claimant for approximately three months until 25 July 2024.

2. The application for interim relief was made on 12 November 2024 and served on 14 November 2024. The claimants invited the defendants to agree to undertakings to the court in the form of the draft order. The matter came before the court on 21 November 2024, the claimants contending that the undertakings proposed by the defendants were unduly restrictive and narrow and were not undertakings to the court.

3. The allegation of retention and misuse of confidential information is that prior to the first defendant's contract of employment coming to an end, and while he was working out a very short notice period, he sent to his own personal email account a document which the claimants say included confidential methodology used by the claimant in their business. In addition, it is alleged that the first defendant sent to himself a number of confidential notes relating to the work that he had been carrying out whilst in the employment of the first claimant.

4. At the hearing, the claimants provided a statement from Mr John Day, partner at the claimants' solicitors firm, dated 21 November 2024. That statement exhibited 5 emails sent by the first defendant, Mr Hamza Ahmed, to his personal gmail account that had been disclosed by the defendants' solicitors the day before. It appears from the submissions before me that the claimants had been aware of these emails before the disclosure by the defendants on 20 November 2024 but that it was only then that the claimants were aware of the significance of the emails, as they perceived it. A consequence of the late reference to those emails is that the defendants have not filed a statement in rebuttal. What has been represented to the court, on instructions, is that four of the emails are nothing other than test emails to ensure that Mr Ahmed's signature was displaying as he wanted. The email dated 27 April 2024, which is said to contain confidential material, is said by Mr Ahmed to have been emailed to his personal email address in order to be able to construct a power point presentation for 29 April 2024. That email was sent shortly into Mr Ahmed's employment (approximately 3 weeks) and 3 months before the end of his employment with the claimants.

The Hearing

5. I am grateful for the helpful and comprehensive written and oral submissions of both Mr Goodfellow for the claimants and Mr Lascelles for the defendants, which submissions explored all aspects of the dispute and the order that the claimants are seeking.

6. It was agreed between the parties that in determining whether an interim injunction should be granted the court will be considering it on the basis of the principles set out in *American Cyanimid v Ethicon* [1975] UKSC 1. Those principles are whether there

is a sufficiently serious or substantial issue to be tried by the court; whether damages are an adequate remedy for the claimant if an injunction were not granted, and whether the claimant is able to give a cross undertaking in damages; if damages are not an adequate remedy where the balance of convenience lies and, if the matters are finely balanced, that the court should consider maintaining the status quo.

7. Currently, there are no particulars of claim. The claimants seek, as part of the order that they asking the court to make, a direction for an extension of time for the filing and service of the particulars of claim so that the deadline takes place after the delivery up and affidavit evidence that they seek from the defendants. I will determine that application with the entirety of the application for an order of this court.

8. I had the benefit of statements provided by Mr Scrambler, the CEO and director of both the first and second claimants (Amberside Energy (Development) Limited), and a director of the third claimant; and from Mr Hamzah Ahmed, the first defendant, and Mr Anthony Donoghue, the managing director of the second defendant, Blake Clough Consulting Limited and three separate bundles, together with the authorities bundle: the hearing bundle, the supplemental bundle and the confidential hearing bundle. The confidential hearing bundle was compiled to enable the court to see documentation that the claimants are concerned should not be in the public domain for fear it had the potential of damaging the claimants' business interests.

9. The hearing was in public, and the claimant had not sought a hearing in private, but the claimant was seeking an order that a non-party not be entitled to see copies of documents in the confidential bundle which he would otherwise be entitled to see. The defendant took a neutral stance on the application, but did submit to the court that the confidential hearing bundle (in addition to the main hearing bundle) contained major areas of redaction which protected the commercial interests of the claimant and that already meant that it would be difficult for a member of the public to understand what was happening. Additionally, the defendants pointed out that they were already bound by CPR 31.22 so that a disclosed document could only be used for the purpose of the proceedings in which it was disclosed, unless read out or referred to at a hearing which has been held in public.

10. It is a fundamental principle of the civil justice system that matters are dealt with in public (CPR 39.2) and that there is open justice. The essential purpose of the open justice principle being to *"enable the public to understand and scrutinise the justice system of which the courts are the administrators"* (per Toulson LJ in *R (Guardian News & Media Ltd) v Westminster Magistrates' Court* [2012] EWCA Civ 420). The principles are derived both from the common law and are guaranteed by Article 6 of the ECHR. Article 10 of the ECHR, freedom of expression, may cut across that principle of open justice where, as in this case, an injunction is being sought for the purpose of restraining the use of what is said to be confidential information. In *G v Wikimedia Foundation Inc.* [2009] EWHC 3148, Tugendhat J made it clear that the principle of open justice should only be derogated from when it is necessary and proportionate to do so.

11. In this case, the claimants are extremely concerned about the details of their automated prediction system, developed for the purpose of estimating capacity for circuits and substations and predicting network capacity for the benefit of those supplying renewable energy to the National Grid, being out in the public domain as that is the

basis of their entire business. The details of the claimants' business will be referred to in greater detail below but, for the purposes of this application, it is sufficient to note that the information that the claimants are seeking to protect by way of this interim injunction, in particular the Ambleside Capacity Estimation System (known as "ACES"), could be compromised if various exhibits were open to access by the public.

12. Consequently, while it is a derogation from the principle of open justice, it is in my judgment necessary and proportionate in the circumstances of this case to protect the documentation contained in the confidential hearing bundle in order to ensure that the claimants, by bringing this application, have not exposed themselves to what they would consider to be further risk of their confidential information being revealed to the public.

13. It is a necessary, and proportionate order to make and consequently, pursuant to the provisions of CPR 5.4C(4), I made an order at the commencement of the hearing that the documents contained in the confidential hearing bundle:

(1) Be treated as not having been read or referred to in open court, and shall not be provided to third parties, without permission of the Court (with any such application to be made on 21 days' written notice to the parties);

(2) Only be used for the purpose of these proceedings pursuant to the provisions of CPR 31.22 with the exception in CPR 31.22(a) not applying to the Confidential Bundle; and

(3) Be marked as confidential on the court file.

The Factual Background

The system of electricity transmission and distribution in England and Wales

14. The three claimant companies are referred to collectively as Amberside. The business of Amberside is in the renewable energy sector specialising in (i) developing new, "utility scale" energy products, such as solar and battery farms which connect to the National Electricity Grid Networks ("the National Grid"); and (ii) managing pre-existing (developed) renewable assets and portfolios. It is the claimants' case that renewable energy is a very lucrative market and that Amberside are therefore operating in a very competitive area.

15. Amberside operate within three main areas:

(i) Land – which is the identification of suitable sites and the negotiation of exclusivity arrangements with local landowners;

(ii) Grid – which is the process of applying to the local grid company for permission to connect a solar farm or other renewable source of energy into the local distribution network;

(iii) Planning – which is the application for planning permission from the relevant local authority to build out the asset.

16. In order to develop new energy projects and managing pre-existing assets and portfolios, Amberside are involved in predicting network capacity as there is no purpose in developing a source of renewable energy if it is not possible to "feed" that electricity into the grid.

17. Mr Scrambler provides details in his first statement where he explains that the electricity infrastructure is split into two main categories: transmission, where equipment operates at very high voltages (400-274 kV); and distribution, with equipment operating between 132kV and 230V in a domestic home. The transmission network is operated by the National Grid Electricity Transmission and the balance of supply and demand is the responsibility of the National Energy System Opeator (NESO). At the distribution level, there are different Distribution Network Operators (DNOs) such as Northern Power Grid and UK Power Networks and then Independent DNOs (IDNOs) who own smaller parts of the grid network such as Eclipse Power Networks.

18. The electricity transmitted at high voltage levels through cables held up by pylons is reduced down to a manageable level for the distribution network at electricity substations and where the transmission network meets the distribution network, Grid Supply Points (GSPs) containing transformers which convert power from one voltage level to another.

19. The importance of this for Amberside's submission is that it is necessary to know which circuits are connected to which transformers in order to know how much power is flowing through them in order not to exceed the equipment operational limits in an attempt to maintain a balanced supply network. For this purpose, information and plans are shared between transmission and distribution operators and much of the information is made public. There must be sufficient capacity at any connection point for the electricity generated and as each piece of equipment has a finite capacity, the party developing a site or a source for electrical generation, needs to be sure that the electricity can be received. As Mr Scambler puts it: *"There is no point in spending millions on developing a site if the substation can only receive electricity for, say, 50% of the time…"*

20. Time is also of the essence as the transmission and distribution operators operate on what is described by Mr Scambler as a *"first ready, first connected"* basis so that developers of new projects need to get to the front of the queue.

21. It is for these reasons that Amberside contend that the process of predicting capacity is absolutely critical to the success of any development project.

<u>The ACES System</u>

22. It is the claimants' case that over the past 7 years they have developed an automated capacity-prediction system known as the Amberside Capacity Estimation System (ACES). There are two live versions of ACES, v3 and v4, and the claimants say that this is the "crown jewels" (to use Mr Scambler's phrase) of their business and that it is

highly confidential to them and a closely guarded secret, not shared with their customers. The claimants' concern is that if ACES were to be in the hands of their competitors then it would be very damaging to their business and very valuable to a competitor.

23. The ACES v3 estimates capacity for circuits and substations that are connected at lower voltages down the distribution line from GSPs, whereas ACES v4 deals with capacity at transmission level.

24. The claimants set out that while the source data upon which ACES is developed is within the public domain, the data sets are "vast, incoherent, incomplete and uncorrelated" and the ACES system works because of the significant amount of time and resources invested in analysing a significant volume and variety of publicly available data sets, relying on an algorithm that the claimant has developed. The calculations made within ACES are based on its own methodology which the claimants say have been honed over years and that the ACES calculator is not simply relying on public data but on data that has been manipulated by the claimants based upon the claimants' own knowledge and experience, analysis and research. It is that algorithm and methodology that the claimants say it is seeking to protect.

25. The statement of Mr Scambler sets out that ACES is owned by the second claimant.

The First Defendant's Employment with the First Claimant

26. Mr Ahmed was employed by the first claimant as national infrastructure lead on 8 April 2024. He sets out in his statement that he had spent 7 years at National Grid in Power Systems Engineer roles which involved him, amongst other things, carrying out critical capacity assessments at grid supply points. He says that he carried out a project on a forecasting tool in this area for which he won an award. After National Grid, he worked at Energy Systems Catapult as a Senior Power System Engineer and then at a specialist energy consultancy group, TNEI Group, as a principal consultant in Networks and Innovation. Mr Ahmed says that he was employed by the first claimant because of his knowledge in relation to the electricity grid and capacity calculations.

27. The contract of employment was dated 16 January 2024 and which included restrictions on the first claimant's "Confidential Information" and obligations on termination for the delivery up and deletion of information relating to the claimants' business from his electronic devices and that he provide a signed statement confirming that he had complied with those obligations.

28. Clause 12 of the contract of employment provides as follows:

> "12.1 You acknowledge that you shall in the performance of your duties become aware of trade secrets and other confidential information relating to the Company, the Group Companies, their businesses and its or their clients or customers. You have therefore agreed to accept the restrictions in this clause 12.
>
> 12.2 Subject to clause 12.3 you shall not, except in the proper performance of your duties, either during your employment or at any time after the termination of your employment (howsoever

arising), without the prior written approval of the Company, use or disclose to any person, company or other organisation whatsoever (and shall use your best endeavours to prevent the publication or disclosure of) any Confidential information.

This shall not apply to:

(a) Any use or disclosure authorised by the Company or required by law;

(b) Any information which is already in, or comes into, the public domain other than through your unauthorised disclosure; or

(c) Any protected disclosure within the meaning of section 43A of the Employment Rights Act 1996

12.3 …

12.4 Confidential information shall include (but shall not be limited to) the following:

(a) Details of customers of the business of the Company or any Group Company in relation to and/or in the course of the business dealings of the Company and any such customers (including financial model, and legal documentation);

(b) Technology, software, customisations or implementations of software (such as macros, spreadsheets, databases or web models, templates or applications) and system design material relating to the Company or any subsidiary or customer (save to the extent that such information is included in accounts filed with Companies House);

(c) The Company's marketing strategies and business plans of the Company or any Group Company;

(d) Any information relating to a proposed reorganisation, expansion or contraction of the Company's activities (or that of any Group Company) including any such proposal which also involves the activities of any other corporation or organisation;

(e) Financial information relating to the Company or any Group Company (save to the extent that such information is included in accounts filed with Companies House);

(f) Details of the employees of the Company or any Group Company, the remuneration and other benefits paid to them;

(g) Any information relating to the Company or any Group Company which is marked confidential or which is, by its nature, confidential;

(h) Trade secrets including, without limitation, technical data and know-how relating to the Company's or any Group Company's business; and

(i) Any information which has been given to the Company or any Group Company in confidence by any person, company or organisation which is marked confidential or, which by its nature, confidential."

29. Clause 13 provides that the employee agrees *"to promptly disclose to the Company all Work and all Intellectual Property arising from any Work provided by you"* and a lengthy definition of what is meant by Intellectual Property is provided in that clause.

30. Clause 16 sets out the obligations on termination, which provides:

"16.1 On termination of your employment (however arising) or, if earlier, at the start of a period of Garden leave, you shall:

(a) … immediately deliver to the Company all documents, books, materials, records, correspondence, papers and information (on whatever media or wherever located) relating to the Company's business or affairs or relating to the Company's business contacts, any keys credit card and any other company property which is in in your possession or under your control;

(b) Or you shall allow the Company to, irretrievably delete any information relating to the Company's or Group Company's business stored on any personal mobile telephone which has been used by you in the course of your employment;

(c) Or you shall allow the Company to, irretrievably delete any information relating to the Company's or Group

Company's business stored on any magnetic or optical disk or memory and all matter derived from such sources which is in your possession or under your control outside the Company's premises; and

(d) Provide a signed statement that you have complied fully with your obligations under this clause 16.1 together with such reasonable evidence of compliance as the company may request.

16.2 …

16.3 …"

31. Mr Ahmed was recruited for his earlier experience and he was introduced to ACES. Mr Scambler said that he made it clear to Mr Ahmed that the data, methodology and commercial know-how on which it was based was extremely confidential. Mr Ahmed is said to have been one of the few who was given unfettered access to ACES with personal training from Mr Scambler. He had to be given such access in order to be able to carry out his role.

32. Mr Ahmed sets out in his statement that he was introduced to the mapping system that the claimants used, which mapping system he considered to be sophisticated as it included details of landowners, flood zones and electricity grids all on one map. He did not consider ACES, which was an input to that mapping system, to be very sophisticated and he considered that there were various faults with it.

33. Mr Ahmed's opinion is that the methodology used is *"straightforward, follows common engineering principles using publicly available data and does not require the use of any confidential or proprietary information"* but he was concerned that there was erroneous data being used and that by May 2024 and working *"with almost complete autonomy"* he had created and developed a new version of ACES relying on his own knowledge and data in the public domain. He says that he had carried out similar grid capacity calculation projects when working at the National Grid.

<u>Termination of employment</u>

34. Mr Ahmed decided he did not wish to remain working at the claimants and on 18 July 2024 he handed in his resignation to Mr Scambler who, according to Mr Ahmed, had said that he saw it coming. Mr Ahmed had apparently been looking at other potential employers, including the second defendant, Blake Clough Consulting Limited (BCC). Mr Ahmed did not have employment with BCC when he resigned, although he did indicate at the exit interview that he planned to work in the innovation space as an independent consultant.

35. On his last day, 25 July 2024, he sent an email to say *"I will be going away to spend some time with my family and possibly play "guess the voltage" when looking at random pylons."*

36. By a letter dated 1 August 2024, Mr Ahmed was reminded by the claimants' chief financial officer that the last date of employment was 25 July 2024 and of his

contractual obligations with respect to confidential information and intellectual property. He was told that: *"the Amberside Capacity Estimation ("ACES") methodology is the intellectual property of Amberside and cannot be utilised elsewhere without a breach of your employment deed occurring"*. A further letter was sent on 18 September 2024 to BCC setting out the restrictions and obligations owed by Mr Ahmed to the claimants and, in particular, the restrictions contained in paragraph 12 and 13 of Mr Ahmed's contract of employment.

The Basis of Amberside's Concerns

37. On 1 October 2024, the second defendant posted on LinkedIn the following announcement:

> "*Exciting Announcement!*
>
> *After working with numerous developers and clients in the generation and storage space, Blake Clough Consulting is pleased to announce the deployment of an in-house Grid Capacity screening methodology that is able to screen the electricity networks throughout Great Britain to find grid capacity for Data Centres.*
>
> *The methodology uses thousands of data points and multiple datasets combined with power system simulations and is constantly re-learning based on new information published by the network operators. We have an extensive track record of working with developers conducting grid applications, feasibility studies, curtailment assessments, site finding for generation and BESS and much more.*"

38. A former employee brought the notice to the attention of Mr Scambler with a screen shot of the LinkedIn post, shared by Mr Ahmed, and the words *"didn't this guy work for you? Talking about new grid data tool (sic)…hope you checked his pockets before he left!"*. As a consequence of this, Mr Scambler entered into WhatsApp correspondence with Mr Ahmed. I am not going to refer to that correspondence in any detail, given that it falls within the Confidential File. However, it is fair to say that Mr Scambler was taking the position that he was concerned that Mr Ahmed had acted in breach of the restrictive covenants in his contract of employment, whereas Mr Ahmed was saying that the product being launched by the second defendant, BCC, was an entirely different product but that he and BCC were open to finding out more about the claimants' concerns. Although Mr Scambler suggests in his witness statement that Mr Ahmed does not deny that ACES methodology was being used, Mr Ahmed in fact said that it was not working in the same way as ACES. What he says in his witness statement is that the BCC tool does not contain any of the scripts, codes or algorithms derived from ACES but was *"based on scripts, codes, formulae/algorithms either developed before I joined or developed from scratch after I joined [by] BCC consultants."*. The fact that Mr Ahmed acknowledges that he had quite a lot of input with the second defendant's power systems model, does not mean that he had used ACES methodology in the development of BCC's own grid capacity tool or that changes had been made to BCC's underlying methodology. That is a matter of dispute between the parties.

39. Mr Donoghue's statement refers to BCC as a *"grid connections and power systems consultancy"* that had been operating since September 2021 with 45 employees, including many highly qualified and skilled from the power systems industry. He says that the services of BCC are broad and diverse but underpinned by a detailed technical understanding of the electricity network and principles of how it is designed and developed so that companies such as the claimants, Ambleside, are customers rather than competitors.

40. The second defendant's position is that the industry regulator, Ofgem, requires the data identifying areas of the electricity network that may have available capacity to be made public so all businesses can freely identify network capacity but, because of the delay in connections, the data can only be seen as an indication and not a guarantee. The second defendant says that the methodology used with assessments carried out by them pre-dates any interaction with the claimant and has no need to any scripts or codes associated with ACES. Mr Donoghue says that *"tools of this nature can be easily developed by any company with the necessary engineering skills and expertise, which BCC have possessed since inception."*

41. The first point of dispute, therefore, is whether or not the claimants would be able to establish that the *"in-house Grid Capacity screening methodology"* advertised by the second defendant is in some way relying on or copying the ACES methodology. The defendants both say, forcefully, that it does not as there was no need for any reliance on ACES given the knowledge already possessed by the second defendant.

42. The second point of dispute it whether the first defendant, Mr Ahmed, has discussed the ACES tool with the second defendant or any of its directors and employees. The first and second defendants both say, again forcefully, that he has not. Mr Donoghue says in terms that Mr Ahmed *"did not tell us that he had sent himself any emails or attachments from Amberside, he has never offered them or any of Amberside's information to us and as far as I and my co-directors are aware, we have never been provided with any information extracted from the emails or attachments."* Similarly, Mr Ahmed denies extracting any information from emails that he sent to himself and that he did not provide copies of those emails to BCC.

43. The suspicion that Mr Ahmed has used information that he gained whilst in the employment of the claimants, and which is confidential to the claimants, is that he resigned from the claimants and then, having said he was going to *"spend more time with his family"* he was employed by the second defendant within about 5 weeks of the termination of his employment with the claimants. As is clear from the statements, there was in fact a meeting between Mr Ahmed and BCC while he was working out his notice period even though he did not start working for them until 2 September 2024. Once the LinkedIn announcement was made on 1 October 2024, and the WhatsApp conversation had taken place, the claimants identified that the first defendant had sent two emails from his business account to his personal gmail account on 23 and 25 July 2024 – that is, during the period of working out his notice. The claimants have linked the departure of Mr Ahmed, his employment with BCC, and the announcement on LinkedIn that BCC were launching an in-house grid analysis system, as meaning that Mr Ahmed must have used confidential information taken from the claimants to enable BCC to develop this system. Both Mr Ahmed and BCC deny this forcefully. There does not appear to be any evidence to support BCC having poached Mr Ahmed – it was Mr Ahmed who made the approach to BCC.

44. The first email on 23 July 2024 is said by the first defendant to be a mistake. It contains the ACES spreadsheet and was being sent primarily to his colleague who was taking over the account. He says that he put @hamzah in the body of the email in order to note that he had responsibility for this item. He says that the consequence of that was to copy his email address into the recipient box automatically. I do not know if that is what happens, no doubt that can be checked. What gives some credence to what he says is that the person who was taking over from him, and who therefore knew both about what the claimants say is the sensitivity of this information, and that the first defendant was leaving the company, was the first recipient of the information. It would be foolish in the extreme for someone endeavouring to make off with confidential information to reveal that to the person who was taking over from him. In addition, he also sent the email to the AEL Grid. I am told that is an inbox to which all employees undertaking grid work, and the directors, would have access. While it cannot be suggested that Mr Scambler and the other directors would be expected to go to that inbox, it was obviously a possibility. Again, it would be unnecessarily foolish for someone to include such a mailing list if he was making off with confidential information. Of course, in cases such as this, foolishness can play a part. However, there is at least some credibility in what Mr Ahmed is saying.

45. The other email is the one sent on 25 July 2024 to his personal gmail account which included Mr Ahmed's own One Note File work notes, and which Mr Ahmed says do not contain anything innovative or ground breaking. Mr Scambler believes that Mr Ahmed emailed himself in order to retain access to the claimants' ACES methodology, know how and future development plans so that he could use it for his own personal use after his employment terminated. Mr Ahmed has acknowledged that he should not have sent this email and that he has subsequently unsuccessfully endeavoured to delete both this and the 23 July 2024 emails but found that deleted emails are retained by Google.

46. I have dealt above with the further emails attached to the statement of Mr Day.

47. Two lengthy and detailed letters were sent by the claimants' solicitor to both Mr Ahmed and BCC on 24 October 2024 setting out in detail the basis upon which it was alleged that there had been misappropriation of trade secrets, market know-how and other confidential information following Mr Ahmed's leaving the employ of the first claimant. The letter set out parts of the contract of employment relied upon by the claimants and the allegations with respect to the two emails sent on 23 and 25 July 2024, and stated that the conduct of Mr Ahmed "*amounts to nothing short of the theft of our client's confidential information and intellectual property"*. Mr Ahmed and BCC were both asked to execute a Deed of Undertakings, in much the same form as the injunction being sought from the court.

48. The response from the solicitors then acting for both defendants, My Inhouse Lawyer Limited, denied the allegations – it was denied by Mr Ahmed that there was any breach of any express or implied terms in his contract or any other legal duty, and BCC denied using any proprietary or confidential information allegedly belonging to the claimants or any allegation of inducement or conspiracy.

49. In particular it was denied that ACES was highly confidential and market sensitive and that, if it were, then it should have been explicitly referred to in the contractual definition of confidential information. It was further denied that the development of

BCC's new capacity grid tool had anything to do with ACES: *"There is, quite simply, no question of either of Our Clients using ACES or your client's alleged confidential or proprietary information for any gain"* and, on that basis, no undertakings were offered.

50. These proceedings were issued on 12 November 2024, and further requests were made for undertakings to be given. These undertakings were not offered but on 19 November 2024 the defendants did offer undertakings but, as set out above, these were only contractual ones and not to the extent that the claimants are seeking.

The Legal Analysis

51. The first issue pursuant to the provisions of *American* Cyanamid is whether there has been a triable issue.

52. The defendants accept, at least for the purposes of this interim injunction determination, that there is a triable issue with respect to whether Mr Ahmed has made use of confidential information covered by the contract and whether BCC have been using confidential information having induced Mr Ahmed to work for them in competition with Ambleside.

53. The defendants do, however, reserve the right to make an application to strike out the claim against them once they have had the opportunity to see how the claimants put their case in a properly pleaded Particulars of Claim. The defendants oppose the application by the claimants that they should not be obliged to file a Particulars of Claim until such time as there has been further evidence from the defendants in the form of affidavits and disclosure. The defendants say that at the moment, without a pleaded claim against them, they are discerning that case from the witness statements.

54. I do not consider that is so burdensome, given the detail contained in the witness statements, and the detail that has already been contained in the detailed letter before action. However, I do consider that the claimants ought to be pleading their case as soon as possible in order that the defendants can be in no doubt as to what is being alleged and the basis of those allegations and to consider, if appropriate, whether they should be applying to strike out:

> "…it is in the interests of justice and the efficient and fair conduct of proceedings that the claimant's case be defined and pleaded as soon as possible, so that the defendant knows precisely what is the case against her, and so does the judge." Per Stanley Burnton LJ in *Caterpillar Logistics Services (UK) Limited v Paula Huesca de Crean* [2011] EWHC 3154

The claimants have not set out in their evidence that there is any basis for believing that there is any further information to which the first defendant had access, and there is therefore no good reason for delaying the drafting and service of the Particulars of Claim.

55. The claimants' concern was that further information may be revealed by further disclosure but, if that were to happen, then the claimants can always apply to amend.

Where the costs of such an amendment would fall depends upon the reason for the need for an amendment.

56. Damages would not be adequate remedy and the issue is where the balance of convenience lies. As Lord Diplock said in *American Cyanmid* :

> "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."

and, in *National Commercial Bank Jamaica v Olint Corpn* [2009] UKPC 16, Lord Hoffman said that among the matters which the court may take into account are *"the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."*

57. The claimants contend that there is a very strong inferential case against both the first and second defendants, relying on the emails from July 2024; the timing of the launch of the BCC product; the failure of the defendants to deal with the letter before action by the giving of undertakings at that time and now, it is said by the claimants, obfuscating. The defendants deny those allegations forcefully and do not accept that there should be relief in the form set out in the draft order on the basis that the key definitions provided in the original draft are *"unworkable, being of an extraordinary breadth as well as being imprecise, non-exhaustive and circular"* and it is contended by the defendants that the relief sought does not target the alleged wrongdoing and is disproportionate to any reasonably perceived threats to the claimants' rights.

58. Having heard detailed argument from both counsel for the claimants and the defendants, I agree that the order as initially drafted is not sufficiently tightly worded and that it would have, no doubt unintended, consequences of restricting the defendants' legitimate work and business to deal with the issues complained about, the claimants are entitled to protection which goes beyond the limited contractual undertakings offered on 19 November 2024.

59. An employer cannot prohibit an employee from using, in subsequent employment, confidential information which has become part of their general skill, experience and knowledge:

> "…a clear distinction could be drawn between the skill and general knowledge of a trade or business which an employee might acquire in the course of his employment and he was entitled to use in subsequent employment, and the special knowledge of a former employer's business which the employee could not use thereafter" per Neill LJ, p. 135(f)

60. Where an injunction is sought to protect confidential information, it is necessary for it to be absolutely clear what the injunction is seeking to protect (see Tugendhat J in

Caterpillar Logistics Services (UK) Limited v Paula Huesca de Crean [2011] EWHC 3154). In the Court of Appeal in *Caterpillar*, Stanley Burnton LJ referred to the interim relief being sought as being "hopeless wide and vague." In *Derma Med Limited & Peal Athena Limited v Ally & Ors* [2023] EWHC 2788, Males LJ made it clear that:

> "…an injunction should not have been sought in terms which left uncertain the scope of the information which it was sought to protect. In particular, the words 'including but not limited to' are indeed too wide as they do not enable the defendant to understand the full scope of the information which he is restrained from using or divulging, while the words 'that would reasonably be regarded as confidential' require an exercise of judgment on which views may well differ, leaving the defendant at risk of contempt proceedings if he gets the judgment wrong."

Words such as "would reasonably be regarded as confidential" or including but not limited to" should not be used because of their vagueness and potentially wide applicability, even if those words reflect the terms of the contract.

61. As was set out by Silber J in *CEF Holdings v Mundey* [2012] EWHC 1524, it is a *"fatal objection"* to the grant of an injunction that "*the person subject to it does not know what he can and what he cannot do"*, and any injunction must be framed with sufficient precision so as to enable a person injuncted to know what it is he is to be prevented from doing:

> ""I have always understood it to be a cardinal rule that an injunction must be capable of being framed with sufficient precision so as to enable a person enjoined to know what it is he is to be prevented from doing. After all, he is at risk of being committed for contempt if he breaks an order of the court. The inability of the plaintiffs to define, with any degree of precision, what they sought to call confidential information or trade secrets militates against an injunction of this nature. That is indeed a long recognised practice." Per Balcombe LJ in *Lawrence David v Ashton* [2989] ICR 123.

62. Even if specific confidential information has been taken by an employee and the applicant has clear evidence that has happened, the court must still act proportionately and a taking of confidential information does not mean that same individual will fail to disobey an order of the court to deliver up that information: *"Not everyone who is misusing confidential information will destroy documents in the face of a court order requiring him to preserve them"* per Hoffman J in *Lock plc v Beswick* [1989] 1268.

<u>The Order</u>

63. The wording of the Order, even with the proposed amendments to that Order, is too wide with non-exhaustive and circular definitions which go beyond that which can properly be protected and would interfere with both the business of BCC and the ability of Mr Ahmed to work, and is not targeted at the alleged wrongdoing.

64. In my judgment, the evidence provided by the claimants is not sufficient to establish that the balance of convenience lies in favour of the claimants obtaining an injunction in the form sought against the second defendant, BCC. The undertakings offered in the letter from the defendants' current solicitors, PCB Byrne LLP dated 19 November 2024 are sufficient to protect the claimants' interests but those undertakings need to be made to the court. I understand that BCC are willing to give those undertaking to the court. If they are not so willing then an injunction will be made in terms of the contractual undertaking offered.

65. The contractual undertaking given by the first defendant, Mr Ahmed, is not in my judgment sufficient. Mr Ahmed may be willing to give undertakings to the court in the same form as I suggest to be in injunctive form. In my judgment, while the amended form of words deals with many of the criticisms made with respect to the injunction being too widely worded, there are further limitations that should be made. First the injunction is only to be against the first defendant. The alternative definitions should be amended so that:

Confidential Information should be limited to "Documents that contain the second claimant's grid capacity estimation system (ACES), the methodology and formulas used in ACES, future business plans and strategy for the development of ACES"

Specified Items: the following categories of documents

(i) In respect of the First Defendant only all records, correspondence and papers (on whatever media and wherever located)) including details of the Claimants' business or business contacts that were acquired, received or retained by the First Defendant during the course of his employment with the First Claimant;

(ii) All documents containing Confidential Information;

(iii) All Specified Documents.

Specified Documents The documents identified in schedule 3 to this Order

66. There should be delivery up as set out in paragraph 1(i) of Schedule 1, namely

> "deliver up to the Claimants' solicitors all Specified Items (whether held in electronic or hard copy format) that are in his possession, power, custody or control by (a) returning all hard copies of such documents providing the Claimants' solicitors with copies of these documents"

67. The provision of a list by Mr Ahmed as set out in 1(ii) is appropriate.

68. Paragraph 2 can properly be dealt with by a witness statement confirming all the matters contained in 2(i) to (iii).

69. Paragraph 3 is justified and both reasonable and proportionate.

70. Paragraph 4 is not necessary and is neither reasonable nor proportionate given the fact that Mr Ahmed has already been advised of his disclosure obligations.

71. I have already made an order in the form of paragraphs 5 and 6.

72. Paragraph 7, for the filing and service of the Particulars of Claim, should include the date 9 December 2024.

73. Paragraphs 8 and 9, as drafted, are appropriate.

74. Costs should be reserved and the claimants must give a cross undertaking.

75. Schedule 2 definitions, should include the additional words to the definition of Confidential Information "all insofar as the same are not in the public domain other than by reason of any default by the First Defendant." I invited the parties to make further submissions on the precise wording and there is therefore no difficulty with further words (or "carve out") being added at this time. The employment contract expressly provided that the restriction on confidential information did not apply to any information which had entered the public domain other than through the first defendant's unauthorised use. Not to include these additional words would widen the provisions of the employment contract. There would, consequently, be a potential interference with the ability of the first defendant to work and the ability of the second defendant to carry out its business.

76. Schedule 2 definitions does not require the commas proposed by the defendants. I do agree with the defendants' submissions with respect to the "public domain carve out" and that the wording ("other than those that relate to the terms of the First Defendants' employment or which are in the public domain other than by reason of any default by the First Defendant)" should be included in the wording to (i) of "Specified Items" so that there is no inclusion of the employment contract or pay slips and that it does not include information that has entered into the public domain, other than by the First Defendant's default.

77. With respect to the addition of item 5 to Schedule 4 of Specified Documents, I agree with the claimants that the "*Email dated 27 April 2024 (timed at 16.59) sent to [first defendant's email] together with the PNG file attached to that email entitled "image037441.png"* should be included.

78. I would be grateful if the draft document that has circulated between the claimants, defendants and the court can be finalised. The defendants have made it clear that they are willing to give undertakings in the amended form and that is acceptable to the court, the significance and consequences of giving such an undertaking to the court having been explained by the defendants solicitors.

79. I am willing to hear further submissions in writing on the precise wording of the order, if that cannot be agreed between the parties now having my directions as to what should, and should not, be included.

80. In order to avoid any delay in this matter moving forward, I intend to hand down formally on Monday afternoon.