



Neutral Citation Number: [2020] EWHC 1823 (QB)

Case No: QB-2020-001915

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 July 2020

Before :

MR JUSTICE CAVANAGH

Between :

P14 MEDICAL LIMITED
- and -
EDWARD MAHON

Claimant

Defendant

Rebecca Page (instructed by **Willans LLP**) for the **Claimant**
Chris Quinn (instructed by **Harrison Clark Rickerbys**) for the **Defendant**

Hearing date: 6 July 2020

Approved Judgment

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

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Mr Justice Cavanagh:**Introduction**

1. This judgment follows the hearing of an application for an interim injunction, in which the Claimant company seeks orders restraining the Defendant from breaching restrictive covenants which the Claimant contends are contained in his contract of employment, and restraining him from disclosing or using confidential information belonging to the Claimant.
2. The Claimant is a company which carries on business as the supplier of pain-management devices for the relief of chronic pain, including both standard and cooled radiofrequency pain-management systems. The Claimant also provides training to clinicians and patients regarding procedures involving standard radiofrequency devices, peripheral nerve implants for pain management, and on the use of radiation protection garments. The Claimant's customers are primarily NHS Trusts and private hospitals.
3. Until his resignation with immediate effect on 7 May 2020, the Defendant was the Claimant's Sales Director. He was also a registered director of the Claimant and owned (and owns) 40% of the shares in the Claimant's parent company, Pain Medical Limited. He had previously owned the same proportion of shares in the Claimant. The other shareholders in the parent company are the other two directors at the time of the Defendant's resignation, Mr Stephen Dechan, who owns 50% of the shares, and Mrs Kate Dechan, who owns the remaining 10% of the shares.
4. From 1 December 2017 until 24 May 2020, the Claimant had an exclusive distribution agreement ("the Distributor Agreement") for the UK and Ireland with Avanos Limited ("Avanos") for its radiofrequency products for the relief of chronic pain ("IVP products"). Avanos was formerly known as Halyard Health UK Limited. Avanos itself did not sell or supply its IVP products to the end-users. This was done via the Distributor Agreement with the Claimant. On 23 April 2020, Avanos gave written notice of its intention to terminate the Distributor Agreement with effect from 24 May 2020. From that date onwards, Avanos has sold and supplied its IVP products in the UK and Ireland directly to end-users, in direct competition with the Claimant, which continues to supply other pain-management devices for the relief of chronic pain to end-users.
5. The Defendant stated in his evidence that on 23 April 2020, the same day that Avanos gave notice to terminate the Distributor Agreement, a senior employee of Avanos, Ms Arnols, telephoned him to inform him of Avanos's decision to sell directly to end-users and to notify him that Avanos intended to make him an offer of employment. On 27 April 2020, Avanos offered the Defendant a position as its Business Development Manager in the UK and Ireland in respect of its IVP products. In this position, the Defendant's role would involve selling essentially the same products in the same territory as he had previously done for the Claimant. (In the Claimant's evidence, it is contended that Avanos had, in fact, approached the Defendant much earlier, in Autumn 2019, with a proposal that the Defendant join Avanos in order to assist the Company to sell directly to end-users, but is not necessary, for present purposes, for me to resolve this dispute of fact.)

Approved Judgment

6. The Defendant resigned his employment with the Claimant on Thursday 7 May 2020 and commenced employment with Avanos on the next working day, Monday 11 May 2020 (Friday 8 May being a Bank Holiday).
7. The Defendant accepts that the functions that he has been employed by Avanos to perform would involve the solicitation of, and dealing with, clients of the Claimant in competition with the Claimant. However, he denies that this would place him in breach of any express restrictive covenants in his contract of employment with the Claimant. This is because he denies that there were any such express covenants in his contract of employment with the Claimant, and he further contends that, even if there were such express covenants, they are unenforceable as being unlawfully in restraint of trade. Similarly, the Defendant denies that there were any express terms in his contract of employment which prohibited him from using or disclosing confidential information after the termination of his employment, and contends that, even if there were, they were too broad and too vague to be enforceable.
8. In addition to reliance upon alleged express terms, the Claimant claims that, in proposing to make use of trade secrets and/or confidential information, the Defendant will be in breach of his implied contractual duty of fidelity, his equitable duty of confidence, and/or his director's duties. The Defendant denies these allegations also.
9. The Claimant issued its application for injunctive relief on 3 June 2020. The application was listed to be heard on 17 June 2020, but, on 12 June 2020, the parties agreed to a Consent Order pursuant to which, inter alia, the Defendant gave interim undertakings and it was agreed the application would be heard on 6 July 2020.
10. In addition to the applications for injunctive relief, I have been asked to deal with an application to amend the Claimant's Particulars of Claim and to deal with matters arising from a number of procedural applications that have been made by the Defendant in these proceedings, including an application to transfer the proceedings to the Business and Property Courts in Birmingham. I have also been asked to give directions with a view to a speedy trial of this action taking place in September 2020. It was agreed that I would first deal with the application for interim injunctions, and I would then hear submissions and make orders on the remaining issues. This judgment deals only with the application for interim injunctions.
11. The Claimant is represented by Ms Rebecca Page and the Defendant by Mr Chris Quinn. I am grateful to both of them for their helpful submissions, both oral and in writing.
12. The issues that arise in this application can conveniently be dealt with in the following order:
 - (1) What approach should be taken to the merits of the claims in injunction proceedings such as these? The Claimant says that I should apply the standard test for interim injunctions that was laid down by the House of Lords in **American Cyanamid v Ethicon Limited** [1975] AC 396. This involves asking (1) Is there a serious issue to be tried?; (2) If so, would damages be an adequate remedy for the party injured by the Court's grant of, or its failure to grant, an injunction?; and (3) if damages would not be an adequate remedy, where does the balance of convenience lie? (In addition, the Court retains a residual discretion as to the grant

Approved Judgment

of an injunction, which is a discretionary remedy). The Claimant submits, therefore, that, in looking at the merits of the claims, I need only be concerned with whether there is a serious issue to be tried. The Defendant, on the other hand, says that this is one of the exceptional category of case in which, when considering the balance of convenience, the Court should look more closely at the prospects of success, and should take into account whether it is likely, on the basis of the evidence currently before the Court, that the Claimant will succeed at trial;

(2) Did the Defendant's contract of employment contain the express restrictive covenants that are relied upon by the Claimant? It is common ground that the Defendant was employed by the Claimant until the termination of his employment on 7 May 2020. In addition, it is common ground that the Defendant entered into a contract of employment in 2016 which contained the express restrictive covenants that are relied upon by the Claimant. However, it is also common ground that the 2016 contract of employment was entered into between the Defendant and another company, Platform 14 Medical Limited ("Platform 14"). The Claimant contends that the Claimant took over the business of P14 Medical Limited in 2017 and that:

- (a) The Defendant's terms of employment under his employment with Platform 14, including the restrictive covenants, automatically transferred from Platform 14 to the Claimant pursuant to the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE");
- (b) In the alternative, there was an agreement between the Claimant and the Defendant, or a novation of the Defendant's contract of employment, with the effect that the same terms, including the restrictive covenants, as had existed in his contract with Platform 14 carried over into his contract with the Claimant, on the basis that the Defendant consented by conduct to such an agreement or novation;
- (c) In the further alternative, the Claimant is estopped by convention from denying that he was employed by the Claimant on terms that included the restrictive covenants; and/or
- (d) Even if the terms of the Defendant's contract of employment with Platform 14 did not transfer to the Claimant in one of the aforementioned ways, the Defendant signed a new written contract of employment with the Claimant on 12 November 2018 on identical terms to his former contract with Platform 14, including the restrictive covenants;

(3) If, at the time of his resignation from the Claimant, the Defendant's contract of employment contained the express restrictive covenants which were originally contained in the 2016 contract with Platform 14, are the express covenants

Approved Judgment

enforceable? The Claimant relies on non-solicitation, non-competition, and non-supply restrictions. The Defendant says that they are unenforceable because they are unreasonably in restraint of trade;

- (4) Again, if at the time of the Defendant's resignation, the Defendant's contract of employment contained express restrictions, can the Claimant rely upon an express term preventing the Defendant from using or disclosing confidential information belonging to the Claimant? The Defendant says that this term is too wide and too vague, and so is unenforceable;
 - (5) Alternatively to (4), is there sufficient evidence to show that the Defendant is likely to disclose or make use of trade secrets and/or confidential information, in breach of the Defendant's implied contractual duty of fidelity, his equitable duty of confidence owed to the Claimant, and/or his directors' duties?;
 - (6) Will damages be an adequate remedy?; and
 - (7) If damages will not be an adequate remedy, where does the balance of convenience lie?
13. There is one further preliminary point that I should make. This is that, not surprisingly in the circumstances, Mr Dechan and the Defendant have fallen out. I have been told that there may, in the future, be separate shareholder proceedings between them, although I have not been given any details. In the course of their evidence, Mr Dechan and the Defendant were trenchantly critical of each other's conduct. It is not my function at this interim stage to determine general allegations of misconduct or bad behaviour between the main protagonists, except to the extent (if at all) that they are relevant to the injunction issues.
- (1) **What approach should be taken to the merits of the claims, in interim injunction proceedings such as these?**
14. The duration of each of the non-solicitation, non-competition and non-supply restrictions, upon which the Claimant relies, is six months. The Claimant's employment terminated on 7 May 2020. This means that the six-month period will expire on 7 November 2020. The parties have made enquiries about listing for a speedy trial with a time estimate of 3-5 days, and have been told that it is likely that this can be accommodated in September 2020. As Mr Quinn pointed out, after a hearing of this length, with much disputed witness evidence, it is likely that the judge will reserve his or her judgment and that judgment will be handed down, say, 2-3 weeks later. The best estimate that can currently be given of when final judgment in these proceedings will be handed down, therefore, is in about early October 2020. This will mean that, by that time, five of the six months of the restriction period will have expired.
15. Mr Quinn, for the Defendant, submits that this means that the Court should not adopt the standard **American Cyanamid** approach of limiting consideration of the merits of the claims to consideration of whether there is a serious issue to be tried, but should take account of whether it is likely that, on the basis of the current evidence, the Claimant would succeed at trial. Ms Page, for the Claimant, on the other hand, submits that the standard **American Cyanamid** approach should be adopted. She

Approved Judgment

submits that the **American Cyanamid** test is only to be departed from in “extreme circumstances” where a trial would be rendered plainly and obviously otiose (relying on **Allfiled UK Ltd v Eltis** [2015] EWHC 1300 (Ch); [2016] FSR 11, at paragraph 78).

16. In my judgment, Mr Quinn’s submission is correct. It is consistent with the statement of Lord Diplock (who gave, of course, the guidance in **American Cyanamid**) in the later case of **N.W.L. Limited v Woods** [1979] 1 WLR 1294, at 1307:

“Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.”

17. **N.W.L. v Woods** was not a restrictive covenant case. However, this approach has been adopted in post-termination restrictive covenant cases in which final judgment in the action is unlikely to be handed down until the period of the restriction has expired or has substantially expired. So, in **Lawrence David Ltd. v Ashton** [1989] I.C.R. 123 (CA), at 135, Balcombe LJ said:

“It is only if the action cannot be tried before the period of the restraint has expired, or has run a large part of its course, that the grant of the interlocutory injunction will effectively dispose of the action, thus bringing the case within the exception to the rule in **American Cyanamid**, such as was considered by the House of Lords in **N.W.L. Ltd. v. Woods** [1979] I.C.R. 867 (and I refer in particular to Lord Diplock’s speech at p. 880) and also by this court in **Cayne v. Global Natural Resources Plc.** [1984] 1 All E.R. 225 . It is then that the judge may properly go on to consider the prospects of the employers’ succeeding in the action. Another way of reaching the same conclusion is to say that the longer the period of the interlocutory injunction, the more likely it is that the employee may suffer damage (if the injunction is wrongly granted) which is uncompensatable by the employers on their cross-undertaking, and therefore it becomes necessary to consider the relative strength of each party’s case as revealed by the affidavit evidence, under the last stage of the **American Cyanamid** process: see [1975] A.C. 396 , 409, and **N.W.L. Ltd. v. Woods** [1979] I.C.R. 867 , 880.”

18. This is also consistent with the guidance given the Court of Appeal in **Lansing Linde v Kerr** [1991] 1 WLR 251, in which Staughton LJ said, at 258A-D:

Approved Judgment

"If it will not be possible to hold a trial before the period for which the plaintiff claims to be entitled to an injunction has expired, or substantially expired, it seems to me that justice requires some consideration as to whether the plaintiff would be likely to succeed at a trial. In those circumstances it is not enough to decide merely that there is a serious issue to be tried. The assertion of such an issue should not operate as a *lettre de cachet*, by which the defendant is prevented from doing that which, as it later turns out, he has a perfect right to do, for the whole or substantially the whole of the period in question. On a wider view of the balance of convenience it may still be right to impose such a restraint, but not unless there has been some assessment of the plaintiff's prospects of success. I would emphasise 'some assessment,' because the courts constantly seek to discourage prolonged interlocutory battles on affidavit evidence. I do not doubt that Lord Diplock, in enunciating the **American Cyanamid** doctrine, had in mind what its effect would be in that respect. Where an assessment of the prospects of success is required, it is for the judge to control its extent."

19. In **Lansing Linde**, Staughton LJ said that whilst the trial judge had been right to take account of the strength of the claimant's claim, "he would have been wrong to regard this as the sole consideration."
20. I do not think that the two authorities relied upon by the Claimant, **Allfiled**, and **Arbuthnot Fund Managers Ltd v Rawlings** [2003] EWCA Civ 518, cast any doubt on the guidance given in the authorities cited above. **Allfiled** and **Arbuthnot** were not cases in which the Court was giving guidance on the approach to be taken in a case in which the period of restraint would have substantially expired before final judgment could be handed down. That issue did not arise in those cases. The cases did not purport to depart from **Lawrence David** or **Lansing Linde**.
21. The passage in **Lansing Linde**, set out above, emphasises that it is not appropriate, at the interim injunction stage, for the Court to stage a mini-trial. There is no time to do so at interim hearings, which normally last for an hour or two (and in the present case lasted a day), and which ordinarily take place before full disclosure has taken place. In the present case, though the Claimant has given some disclosure, under the terms of the Consent Order, there has not been full disclosure, and the Defendant has not yet given disclosure. Also, as in aspects of the present case, there may be disputes of fact which can only be resolved by a judge after hearing oral evidence. It is clear, therefore, that unlike the trial judge, I am not able to reach a final and concluded view of the prospects of success at this interim stage (not least because there were 14 witness statements in the bundle, and the bundle of documents for the interim hearing was 1258 pages long).
22. Nevertheless, it is clear, in my judgment, that I should form an assessment, based on current evidence, of the likelihood of the Claimant succeeding at trial, and should take it into account when considering the balance of convenience in this case. It is unlikely that a judgment after trial will be handed down until about five-sixths of the restraint period will have expired. The Claimant contends, correctly in my view, that damages would not be an adequate remedy for it, so the injunctive relief is the main

Approved Judgment

form of relief that the Claimant is seeking from these proceedings. (It is true that the confidential information term relied upon by the Claimant, unlike the non-solicitation, non-dealing and non-supply terms, is of indefinite duration, but the key relief sought by the Claimant relates to those latter terms.)

23. The case-law emphasises that consideration of the likelihood of success of the Claimant's claim is relevant to the third stage of the **American Cyanamid** analysis, i.e. the balance of convenience. Strictly, therefore, it is a separate question from the first-stage question of whether there is a serious issue to be tried. However, consideration of likelihood of success at trial plainly covers the same ground as the "serious issue to be tried" test, and it is convenient to deal with it first in a case such as this.
24. In two more recent cases, **CEF Holdings Limited v Munday** [2012] EWHC 1524 (QB); [2012] IRLR 212, at paragraph 204 and **F M Tenon Ltd v Cawley** [2018] EWHC 1972 (QB); [2019] IRLR 435, judges have referred to the likelihood of success as "a new threshold". With respect, I do not think that is quite right. In cases such as this, the likelihood of success does not replace the "serious issue to be tried" threshold at the first stage of the **American Cyanamid** analysis. Rather, as I have said, likelihood of success is a consideration to be taken into account at the balance of convenience stage. In most cases, it will be a very important consideration, but there is no absolute rule that in all cases where the restraint will have substantially expired before final judgment is handed down, injunctions cannot be granted unless the Claimant has clearly shown, on the balance of probabilities, in the light of the available evidence, that s/he is likely to succeed at trial. There may be cases where there are other strong considerations in favour of injunctive relief. As Staughton LJ said in **Lansing Linde**, the likelihood of success is not the sole consideration.
25. In light of the above, I will look at the available evidence with a view to taking into account whether, in light of the current state of the evidence, the Claimant is likely to succeed at trial.

(2) **Did the Defendant's contract of employment contain the express restrictive covenants that are relied upon by the Claimant?**

26. The Defendant does not dispute that he was employed as Sales Director of the Claimant at the time of his resignation on 7 May 2020. However, he contends that his contract of employment did not contain any of the express restrictive covenants which are relied upon by the Claimant. He accepts that these terms existed in his contract of employment with Platform 14, but he said that they did not form any part of his contract of employment with the Claimant, which was unwritten.
27. It is common ground that the Defendant signed a contract of employment with Platform 14 on 11 April 2016 which contained the express restrictive covenants that are relied upon by the Claimant. The Defendant joined Platform 14 as its Sales Director, having previously been employed by a competitor, BVM Limited ("BVM"). BVM brought proceedings against Platform 14 and the Defendant, including a claim for breach of restrictive covenants. This claim was settled in 2018.
28. Both Mr and Mrs Dechan were directors of Platform 14 when the Defendant joined, and the Defendant became a director also.

Approved Judgment

29. On 11 August 2017, the Claimant was incorporated. From the outset, the Directors of Platform 14, Mr and Mrs Dechan and the Defendant, became directors of the Claimant (whose name was, obviously, very similar to that of Platform 14). They were each shareholders of the Claimant.
30. In my judgment, it is clear from the evidence before me that the Claimant took over the business of Platform 14. The Claimant was incorporated for the purpose of acquiring Platform 14's business as a going concern. It appears that the main motivation for the change was concerns about the impact that the litigation with BVM might have upon Platform 14. To all intents and purposes, the Claimant just took over Platform 14's business and carried on with it. The business was essentially unaffected by the change. Everything carried on as before. All members of Platform 14's relatively small workforce transferred over to work for the Claimant. The Claimant took over the goodwill of Platform 14 and took over the relationships with end-user clients and with suppliers that Platform 14 had previously enjoyed. There was a seamless transition.
31. As Ms Page put it in her skeleton argument, the Claimant took over the same assets, employees, premises, trading name, email addresses, and operated under the same management, using the same operational methods and selling the same products to the same customers. Platform 14 headed notepaper was still used to send Purchase Orders on behalf of the Claimant to suppliers, including Avanos. The Claimant paid sums to Platform 14 for assets consisting of office equipment and stock and the Claimant paid further sums to Platform 14 to enable Platform 14 to settle some of its liabilities. The total amount of these further sums was £139,111, which was treated as goodwill in the accounting records of the Claimant.
32. Platform 14 ceased trading when the Claimant started to trade, and the company was dissolved in 2019. It is true that, as Mr Quinn pointed out, the exclusive Distributor Agreement that Avanos entered into on 1 December 2017 was with "Platform 14 Limited" rather than with the Claimant ("P14 Limited") but it is plain, in my judgment, that this was a simple oversight or typing error, and that the Agreement was in reality entered into between Avanos and the Claimant. This is borne out by the fact that there was never any suggestion by the Claimant's directors that the Claimant was not the counterparty to the Distributor Agreement, even when it was terminated in April 2020 by means of a letter sent to Mr Dechan and the Defendant. Also, on 12 May 2020, in an email to various officials working in the NHS supply chain, Ms Sarah Arnolds, Business Manager, EMEA, Interventional Pain, for Avanos (and the Defendant's new boss) said, "I want to inform you that we as Avanos (previously Halyard) decided to terminate our relationship with Platform 14 (P14) for interventional medical products..." This shows Avanos understood that Platform 14 and P14 (the Claimant) were the same going concern.
33. The Defendant must have fully understood what was going on when the Claimant took over from Platform 14. He was one of only three directors in the business, and was the Sales Director. He was a substantial shareholder in the Claimant.
34. The Defendant did not enter into a new or different contract of employment when Platform 14 ceased to trade and the Claimant took over. He continued to draw his basic salary of £75,000 per annum, as before. His salary was thereafter paid by the Claimant. Both before and after the move from Platform 14 to the Claimant, part of

Approved Judgment

the Defendant's salary was paid by way of dividend. On 17 October 2017, Mrs Dechan wrote to him in a letter headed "Novation of Service Agreement" which said, "This letter serves as confirmation that your Service Agreement with Platform 14 Limited is hereby novated to P14 Medical Limited. All terms and conditions within the agreement will remain the same.... Should you have any questions or queries, please do not hesitate to contact me." A similar letter was sent to all other employees. The Defendant was not asked to, and did not, countersign the letter, but there is no suggestion that he responded with any questions or queries. He did not express surprise, let alone disagreement, that all his terms and conditions remained the same as before.

35. In March 2019, Mr and Mrs Dechan and the Claimant exchanged their shares in the Claimant for shares in a new parent company, Pain Medical Limited.
36. In his letter of resignation dated 7 May 2020, the Claimant said that "With immediate effect I am resigning from my role as Sales Director at P14 Medical Limited & Pain Medical Limited."
37. Against this factual background, I move on to consider the first of the several alternative bases upon which the Claimant contends that the express restrictive covenants were part of the Defendant's contract of employment with the Claimant.

TUPE

38. Regulation 3(1) of TUPE provides that
 - “3.—(1) These Regulations apply to—
 - (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;”
39. Regulation 3(2) provides that:
 - “(2) In this regulation “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.”
40. The effect of a TUPE transfer on the terms of employees' contracts of employment is set out in Regulation 4, which states, in relevant part:
 - 4.—(1) a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.
 - (2) ... on the completion of a relevant transfer—

Approved Judgment

(a)all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b)any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

41. The effect of regulations 4(1) and (2) of TUPE is that, upon a TUPE transfer, the contracts of employment of all employees in the part transferred are automatically transferred, by operation of law, from the transferor to the employee, and the terms and conditions remain the same. This operates so as to transfer restrictive covenants as it does to all other terms and conditions, as Mr Quinn accepts: see **Morris Angel & Son Ltd v Hollande** [1993] IRLR 169 (CA).
42. It follows that the only issue is whether there was a TUPE transfer when the Claimant took over from Platform 14. If there was, the restrictions transferred over. There is a plethora of case authority on the question as to whether there is a relevant transfer for TUPE purposes in particular circumstances, but it is not necessary to examine this case law in any detail. In my judgment, on the evidence currently before me, it is plain that this was a TUPE transfer. The entirety of the economic entity that consisted of Platform 14 Limited transferred to the Claimant, and Claimant continued the business as a going concern, thereby retaining its identity. It was the same business, with the same directors, the same employees, the same suppliers, and the same clients. There was a transfer of a stable economic entity whose activity was not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursued a specific objective (see **Cheesman v R Brewer** [2001] IRLR 144 (EAT), at paragraph 20).
43. The fact that the main motive for the transfer of the business from Platform 14 to the Claimant may have been to protect the business from the consequences of the proceedings brought by BVM against Platform 14 does not mean that TUPE did not apply. The motive for the transfer is irrelevant to the TUPE analysis.
44. Mr Quinn points out that there is no documentation at the time of the transfer which states that this was a TUPE transfer, and neither Platform 14 nor the Claimant took any of the formal steps that normally accompany a TUPE transfer, such as employee consultation and notification under regulations 13 or 13A of TUPE. There was no documentation which formally records or refers to the transfer of the business of Platform 14 as a going concern to the Claimant. However, this is completely beside the point. In determining whether a TUPE transfer took place, the Court must look at the substance and not the form of the transfer. Employers cannot deprive their employees of the protection of TUPE by failing to mention or to acknowledge that a TUPE transfer is taking place. There are no specific technicalities that must be complied with in order for a TUPE transfer to take place. Similarly, any failure by the transferor or transferee to comply with consultation and notification requirements does not mean that the TUPE transfer does not take place. Rather, it may mean that affected employees have a remedy in the Employment Tribunal. In any event, in the

Approved Judgment

present case, the core element of TUPE protection was honoured by the Claimant, in that all employees of Platform 14 continued in employment with the Claimant, on the same terms and conditions as before.

45. Mr Quinn also points out that it is the Claimant's case that the Claimant and the Defendant entered into a new contract of employment, on exactly the same terms as the Platform 14 contract, in November 2018, and that this would have been unnecessary if TUPE applied. It is true that such a fresh contract would not have been necessary if there had been a TUPE transfer, but it is potentially explicable as a "belt and braces" expedient to reassure the Claimant's business lender, which was considering whether to make a loan to the Claimant at the relevant time. In any event, whatever did or did not happen in November 2018 (and this is hotly disputed) cannot retrospectively affect whether or not there was a TUPE transfer in or about August 2017.
46. In my judgment, therefore, the Claimant is likely to succeed at trial with an argument, based on TUPE, to the effect that the express restrictive covenants in the Defendant's contract of employment dated 11 August 2016 continued to apply in the contract of employment between the Claimant and the Defendant which was in place until it was terminated on 7 May 2020. Indeed, on the basis of the current evidence, the Claimant is very likely to succeed with this argument.
47. It follows that it is not strictly necessary to consider whether the restrictive covenants became part of the Defendant's contract of employment by some other means, and so I will deal with the alternative submissions that are made by the Claimant in this regard very briefly indeed.

Agreement/novation

48. If it had been necessary to consider the matter, in the absence of a TUPE transfer, I would have taken the view that the Defendant had agreed to be bound by a contract of employment with the Claimant in the same terms as his contract with Platform 14. Even absent TUPE, he would have agreed to do so by his conduct in continuing to function as Sales Director of the Claimant after August 2017, and by continuing to draw his salary in the same way as before, and to enjoy other contractual benefits as specified in the Platform 14 contract, such as the right to a company car. The consideration for this was that the Claimant continued to provide him with his salary and other benefits. To conclude otherwise would be to fly in the face of common sense and practical reality. The Defendant was not a junior employee at the time of the move from Platform 14 to the Claimant. He was a prime mover in the business, and one of the three directors. He knew full well what was going on. Nothing in substance was going to change, apart from a change (and only a minor one at that) to the name of the business and the shedding of some awkward liabilities or potential liabilities. Against that background, the very strong likelihood was that the mutual expectation and intention of the contracting parties was that the Defendant would continue to be employed on the same terms as before. The idea that the web of interlocking obligations that had previously been owed by employer and employee had fallen away without being replaced is absurd.
49. It is true, as Mr Quinn submits, that the Defendant resigned without notice on 7 May 2020, and this was not consistent with the terms of the original Platform 14 contract

Approved Judgment

of employment. But this point goes nowhere. Even if there was a completely new and unwritten contract of employment with the Claimant, there would have been an implied obligation for the Defendant to give some reasonable notice of his resignation. The decision to resign without any notice at all would not have been compatible with the Defendant's obligations, whatever the terms of his contract of employment happened to be.

50. Mr Quinn cited a number of authorities and passages from textbooks which demonstrate the proposition that an employee cannot be made subject to a restrictive covenant simply because the employer serves a draft contract upon him, which the employee does not sign or return. However, in my judgment, these can all be distinguished. None of them is concerned with cases, such as this one, where one company takes over from another company, with the involvement of the employee as a director of both businesses, and the new company then carries on operation as before. Rather, the authorities cited by Mr Quinn fall into three other categories. First, there were cases in which the employer had provided the employee with a draft contract, which the employee had not signed. Second, there were cases in which the employer was contending that the employee was bound by an employee handbook, in circumstances in which the handbook itself said that it was only binding when signed, and the employee had not signed it (such as **SG&R Valuation Service Co v Boudrais and Others** [2008] EWHC 1340(QB) [2008] IRLR 770). The third category consists of cases in which an employer was seeking to rely upon a unilateral variation of the contract of employment, which the employee had not accepted (such as **Jones v Associated Tunnelling Co Ltd** [1981] IRLR 477). The present case does not fall into any of these categories.
51. Mr Quinn also pointed out that, at common law, a contract of employment is personal to the employee and therefore non-transferable: **North West Training and Enterprise Council Ltd (trading as Celtec) v Astley** [2006] UKHL 29, [2006] ICR 992, per Lord Bingham, at paragraph 2, and that an employee cannot be required to consent to the change in the identity of an employer on the transfer of a business from one party to another: **Nokes v Doncaster Amalgamated Collieries Ltd** [1940] AC 104. However, the present case is different, in that it is common ground that (even if there was no TUPE transfer) the Defendant by his conduct consented to being employed by the Claimant, and that there is strong evidence that he did so on the basis that the terms he signed up to with Platform 14 would continue to apply.
52. Accordingly, there is a second, alternative, reason why, at trial, the Claimant is likely to succeed with the argument that the express restrictive covenants formed part of the Defendant's contract of employment.

Estoppel by Convention

53. In light of the views that I have expressed on the first two arguments, this does not arise.

New Service Agreement entered into on 12 November 2018

54. The Claimant contends that the Defendant entered into a new Service Agreement, in identical terms to his agreement with Platform 14, on 12 November 2018. Mr Dechan's evidence is that the Defendant did so at a meeting at the Claimant's offices.

Approved Judgment

He says that the Defendant did so because all of the directors were asked to do so by the Claimant's financial adviser, Mr Lawrence, who told them that it was necessary to enter into new employment contracts with the Claimant in order to reassure a lender, ExWorks Capital, which was being asked to lend money to the Claimant. There is, in the bundle, a copy of such an agreement, which has the Defendant's electronic signature at the end of it.

55. The Defendant denies that he knew anything about this new Service Agreement and denies that he either signed at the end of the Agreement or gave authorisation for his electronic signature to be used. He points out that it would be odd if he had been physically present but had used his electronic signature. He also points out that there is nothing in the contemporaneous documentation, including the documentation about the transaction with ExWorks, which specifies that ExWorks required to see contracts of employment between the Claimant and the directors. (Mr Lawrence's evidence is that it was he who asked for new Service Agreements for the directors, as he anticipated that ExWorks would ask for them, though, in the event, ExWorks did not do so.) Also, the first letter before action that was sent by the Claimant's solicitors in this matter, on 22 May 2020, made no reference to any suggestion that there was a new Service Agreement.
56. There is a very substantial dispute of fact on this issue. It is not the type of matter that readily lends itself to any resolution at this stage, as there is a stark conflict in the witness evidence, and there may yet be disclosure of important relevant documentary evidence, and/or metadata relating to the apparently signed version of the contract (which the Defendant says is a forgery). Fortunately, I do not need to form any view of the competing contentions relating to this matter. For the reasons I have already given, I have taken the view that the Claimant is likely to succeed at trial with the contention that the express restrictive covenants were part of the Defendant's contract of employment with the Claimant, irrespective of whether there was a new, signed, Service Agreement on 12 November 2018.

(3) The restrictive covenants

The relevant legal principles

57. There was no dispute between Ms Page and Mr Quinn about the relevant legal principles. Mr Quinn helpfully summarised five key principles in his skeleton argument as follows:
- i) A restrictive covenant is void as an unlawful restraint of trade unless the employer can show it goes no further than is reasonably necessary to protect his legitimate business interests: **Herbert Morris Ltd v Saxelby** [1916] AC 688, HL. The burden of establishing this rests with the person seeking to enforce the restrictive covenant.
 - ii) The Court is entitled to consider whether a covenant of a narrower nature would have sufficed to protect the employer's position as explained in the following passage of Sir Christopher Slade in **Office Angels v Rainer-Thomas** [1991] IRLR 214 (CA), at paragraph 50:

Approved Judgment

"The Court cannot say that a covenant in one form affords no more than adequate protection to a covenantee's relevant legitimate interests if the evidence shows that a covenant in another form, much less far reaching and less potentially prejudicial to the covenantor, would have afforded adequate protection"

- iii) The reasonableness of a restriction is determined by reference to the circumstances of the parties at the time the contract of employment was concluded: **Gledhow Autoparts Ltd v Delaney** [1965] 1 WLR 1366;
- iv) The court will not uphold a covenant taken by an employer merely to protect himself from competition by a former employee. As Mummery LJ stated in **FSS Travel and Leisure Systems v Johnson** [1998] IRLR 383 at paragraphs 29-34:

"(1) The court will never uphold a covenant taken by an employer merely to protect himself from competition by a former employee.

(2) There must be some subject matter which an employer can legitimately protect by a restrictive covenant. As was said by Lord Wilberforce in **Stenhouse Ltd v Phillips** [1974] AC 391 at p.400E (cited by Slade L.J. in the **Office Angels** case [1991] IRLR 214 supra):

'The employer's 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.'

(3) Protection can be legitimately claimed for identifiable objective knowledge constituting the employer's trade secrets with which the employee has become acquainted during his employment.

(4) Protection cannot be legitimately claimed in respect of the skill, experience, know-how and general knowledge acquired by an employee as part of his job during his employment, even though that will equip him as a competitor, or potential employee of a competitor, of the employer.

(5) The critical question is whether the employer has trade secrets which can be fairly regarded as his property, as distinct from the skill, experience, know-how, and general knowledge which can fairly be regarded as the property of the employee to use without restraint for his own benefit or in the service of a competitor. This distinction necessitates examination of all the evidence relating to the nature of the employment, the character of the information, the restrictions imposed on its dissemination, the extent of use in the public domain and the damage likely to be caused by its use and disclosure in competition to the employer.

(6) As Staughton L.J. recognised in **Lansing Linde** [1991] IRLR 80 ... the problem in making a distinction between general skill and knowledge, which every employee can take with him when he leaves, and secret or confidential information, which he may be restrained from using, is one of definition. It must be possible to identify information used in the relevant business, the use and dissemination of which is likely to harm the employer, and establish that the employer has limited dissemination and not, for example, encouraged or permitted its widespread publication. In each case it is a question of examining closely the detailed evidence relating to the employer's claim for secrecy of information and deciding, as a matter of fact, on which side of the boundary line it falls. Lack of precision in pleading and absence of solid evidence in proof of trade secrets are frequently fatal to enforcement of a restrictive covenant..."

- v) The court may, in an appropriate case, agree to blue-pencil or sever part of a restrictive covenant: *Egon Zehnder v Tillman* [2019] UKSC 32; [2020] AC 154.

58. In **Coppage v Freedom Security Limited** [2013] EWCA Civ 1176, at paragraph 9, the Court of Appeal said:

“(i) Post-termination restraints are enforceable, if reasonable, but covenants in employment contracts are viewed more jealously than in other more commercial contracts, such as those between a seller and a buyer.

(ii) It is for the employer to show that a restraint is reasonable in the interests of the parties and in particular that it is designed for the protection of some proprietary interest of the employer for which the restraint is reasonably necessary.

(iii) Customer lists and other such information about customers fall within such proprietary interests.

(iv) Non-solicitation clauses are therefore more favourably looked upon than non-competition clauses, for an employer is not entitled to protect himself against mere competition on the part of a former employee.

(v) The question of reasonableness has to be asked as of the outset of the contract, looking forwards, as a matter of the covenant's meaning, and not in the light of matters that have subsequently taken place (save to the extent that those throw any general light on what might have been fairly contemplated on a reasonable view of the clause's meaning).

(vi) In that context, the validity of a clause is not to be tested by hypothetical matters which could fall within the clause's meaning as a matter of language, if such matters would be improbable or fall outside the parties' contemplation.

(vii) Because of the difficulties of testing in the case of each customer, past or current, whether such a customer is likely to do

Approved Judgment

business with the employer in the future, a clause which is reasonable in terms of space or time will be likely to be enforced. Moreover, it has been said that it is the customer whose future custom is uncertain that is “the very class of case against which the covenant is designed to give protection...the plaintiff does not need protection against customers who are faithful to him” (**John Michael Design plc v Cooke** [1987] 2 All ER, 332, at 334).”

59. In **TFS Derivatives Ltd v Morgan** [2004] EWHC 3181 (QB); [2005] IRLR 246 at paragraphs 36-38, Cox J gave guidance on the correct approach to the question of assessing reasonableness of covenants:

“...In assessing reasonableness, there is essentially a three-stage process to be undertaken.

[1] Firstly, the court must decide what the covenant means when properly construed.

[2] Secondly, the court will consider whether the former employers have shown on the evidence that they have legitimate business interests requiring protection in relation to the employee's employment. In this case, as will be seen later on, the defendant concedes that TFS have demonstrated on the evidence legitimate business interests to protect in respect of customer connection, confidential information and the integrity or stability of the workforce, although the extent of the confidential information is in dispute in relation to its shelf life and/or the extent to which it is either memorable or portable.¹

[3] Thirdly, once the existence of legitimate protectable interests has been established, the covenant must be shown to be no wider than is reasonably necessary for the protection of those interests. Reasonable necessity is to be assessed from the perspective of reasonable persons in the position of the parties as at the date of the contract, having regard to the contractual provisions as a whole and to the factual matrix to which the contract would then realistically have been expected to apply.”

Will the Defendant act in breach of the restrictions, if not restrained?

60. The Defendant fully and willingly accepts that he intends to act in a way that will be a breach of the express restrictive covenants. The Defendant says that he is perfectly entitled to do so, because the restrictive covenants did not form part of his contract of employment with the Claimant and/or because they are unenforceable as being in restraint of trade. He has been employed by Avanos in a senior sales role in the UK and Ireland specifically so that he can make use of his customer connection with those who are current or prospective customers of the Claimant in relation to the supply of pain-management devices for the relief of chronic pain, and so he can make use of his

¹ The contrast with the present case is stark

Approved Judgment

knowledge of the business. Avanos now wishes to compete directly with the Claimant in this field.

61. It is common ground, therefore, that, unless restrained by an injunction, the Defendant intends to act in a manner that would be inconsistent with the express restrictive covenants.
62. In light of this, it is not necessary for me to examine or refer to the evidence which shows that the Defendant had indeed, prior to giving undertakings, taken steps to compete with, and approach customers of, the Claimant. I will give just one example. On 3 June 2020, the Defendant sent an email to Dr Ron Cooper of North West Independent Hospital and Causeway Hospital, stating that Avanos was no longer using the services of the Claimant, that all product sales, marketing support and enquiries will be through Avanos (and provided contact details) and that:

“I have moved to a role at Avanos as their Business Development Manager for the UK & Ireland and will be responsible for a smooth transition for clinicians, support staff and procurement teams. Our focus is to ensure that you continue to receive the most advanced RF System with a high level of clinical support...”
63. I should add that there is no evidence, and no suggestion, that the Defendant has acted inconsistently with the undertakings not to act in breach of the restrictive covenants, that he gave in the Consent Order of 12 June 2020.
64. I will refer to two other matters at this stage.
65. First, the evidence shows that, even though the Claimant has lost the right to distribute Avanos’s IVP products, the Claimant is still in competition with Avanos. Since 24 May 2020, the Claimant has held unsold Avanos IVP Product stock and the benefit of orders for Avanos IVP Products. In addition, the Claimant has entered into a sub-distribution agreement with Polar Medical in respect of its Diros products, which are IVP products sold in direct competition with Avanos IVP products. Moreover, in the next 12 months the Claimant intends to launch a new Biowave pain relief product across UK, Europe and the Middle East (subject to regulatory approval which is imminent) Avanos have an elite sports product which will be sold in direct competition and targets the same customers (known as “Game Ready”).
66. Second, the Claimant says that, even if he is restrained by an injunction from competing with the Claimant, the Defendant can still retain his position with Avanos and can do productive work for the company. The Claimant carries on business in the field of pain-management devices for the relief of chronic pain. Avanos is involved in this business also, but Avanos is also involved in supplying pain management devices for the relief of acute pain, which the Claimant does not compete with. The Claimant says that the Defendant can be engaged on that part of Avanos’s business, whilst the restrictions are in force, and point out that the Defendant has remained employed by Avanos since he gave his undertakings. In his statement, the Defendant expressed concerns that he might lose his job with Avanos if the injunctions are granted. In any event, the fact remains that the Defendant was employed by Avanos because of his knowledge and expertise in the sale of pain management devices for the relief of chronic pain, and because of his knowledge of,

Approved Judgment

and contact with, the Claimant's customers, and this means that, if injunctions are granted, they will deprive the Defendant of most of his value for his new employer, until the restrictions expire.

Clause 20 of the contract of employment, the definitions and the exclusions

67. The restrictive covenants relied upon by the Claimant (apart from the covenant relating to confidential information) are to be found in clause 20.1 of the written contract of employment.
68. The introductory words to clause 20.1 say that the restrictions are "In order to protect the Confidential Information and business connections of the Company to which has had access as a result of the Appointment..."
69. The restrictive covenants refer to "the Company", a "Restricted Customer" and "Restricted Business".
70. As a result of the operation of TUPE, the reference to "the Company" is a reference to the Claimant.
71. A Restricted Customer is defined in clause 1.1 of the contract of employment to mean:
- "any firm, company or person who, during the 12 months before Termination, was a customer or prospective customer of or was in the habit of dealing with the Company with whom the Employee had contact or about whom he became aware or informed in the course of employment."
72. Restricted Business is defined in clause 1.1 to consist of:
- "Those parts of the business of the Company with which the Employee was involved to a material extent in the 12 months before Termination."
73. Exclusions from the scope of the restrictive covenants are set out in clause 20.2:
- a) holding an investment of not more than 5% in another company (clauses 20.2(a));
 - b) being engaged or concerned in any business concern insofar as his duties or work shall relate solely to geographical areas where the business concern is not in competition with any Restricted Business (clause 20.2(b));
 - c) being engaged or concerned in any business concern, provided that the Defendant's duties or work shall relate solely to services or activities of a kind with which the Defendant was not concerned to a material extent in the 12 months before Termination (clause 20.2(c)).
74. Clause 20.6 states that:
- "Each of the restrictions in this clause is intended to be separate and severable. If any of the restrictions shall be held to be void but would be valid if part of

Approved Judgment

their wording were deleted, such restriction shall apply with such deletion as may be necessary to make it valid or effective.”

75. This clause has probably been rendered otiose by the judgment of the Supreme Court in the **Egon Zehnder** case.

The non-solicitation clause

76. The first restrictive covenant which the Claimant seeks to enforce is the non-solicitation clause in clause 20.1(a) of the Claimant’s contract of employment. This states that the Claimant shall not:

“for 6 months after Termination solicit or endeavour to entice away from the Company the business or custom of a Restricted Customer with a view to providing goods or services to that Restrictive Customer in competition with any Restricted Business”

77. In my judgment, the Claimant is likely to succeed at trial in establishing that this restriction is not unlawful on the basis that it is unreasonably in restraint of trade.
78. The Defendant was the Sales Director of what was (in terms of numbers of employees) a small business, working in a very specialised field. He was a very senior employee. He was personally responsible for winning about 70% of the Claimant’s annual sales of £780,000. He was paid £75,000 per annum plus bonus and had been given a £200,000 “dividend” shortly before his resignation (though I understand that there is now litigation about this payment). The Defendant was one of the key public faces of the Defendant’s business.
79. In these circumstances, in my judgment, it is likely that it will be established at trial that the restriction is justified as being no more than reasonably necessary to protect the Claimant’s stated legitimate interests of protecting confidential information and business connections.
80. In **Norbrook Laboratories (GB) v Adair** [2008] EWHC 978 (QB); [2008] IRLR 878, it was held, in relation to a sales employee, that the identity of customers, relevant contacts, information relating to discounts, net prices, records of sales and marketing strategies were protectable interests (para 63). It is clear, on current evidence, that the Defendant was aware of all of these types of information relating to the Claimant (and, indeed, that this was why he was an attractive hire for Avanos).
81. In **Norbrook**, the judge also held that a “customer connection” built up by a sales person on the employer’s behalf was a protectable interest (paragraphs 70-71). In my judgment, the same applies, all the more so, here, where the Defendant was the Sales Director and the dominant force in sales in the business.
82. The risk to the Claimant’s business from solicitation by an employee of a competitor who had built up the customer connection whilst at the Claimant and who was in possession of this confidential information is obvious.

Approved Judgment

83. The restrictive covenant in clause 20.1(a) does not fall into any of the obvious traps that such covenants may fall into. It is only for six months. This, in my judgment, is a reasonable period. Mr Dechan's witness statement referred to the slow nature of repeat business, where it is not uncommon for 3-6 months to elapse between orders from a customer. In **Coppage**, at paragraph 19, dealing with a non-solicitation clause, the Court of Appeal said that,
- “if the restraint period is as short as six months, this must be a powerful factor in assessing the overall reasonableness of the clause.”
84. The restriction only applies to Restricted Customers as defined, which limits it to customers or prospective customers in the last 12 months before termination of employment and to those in respect of whom the Defendant had some contact or awareness. In other cases, perhaps, the reference to the restriction applying to customers about whom the Defendant was informed or became aware in the last 12 months of his employment might have been problematic. In the present case, however, given the small size of the sales team and the Defendant's pivotal role in the sales operation, I take the view that this does not undermine the reasonableness of the clause. In **Coppage**, the Court of Appeal made clear that a reasonably drafted restriction can impose limitations based on the Defendant's knowledge of clients (see judgment, paragraph 16).
85. The restriction only applies to Restricted Business, that is the parts of the business with which the Defendant had involvement in the last 12 months (though in reality the Defendant was probably involved in all parts of the Claimant's business).
86. The fact that some, or even many, of the customers may have come with the Defendant from BVM does not mean, in my view, that the connections do not “belong” to the Claimant.

The non-competition clause

87. This clause is at clause 20.1(c). It provides that the Defendant shall not:
- “for 6 months after Termination, be involved in any Capacity with any business concern which is (or intends to be) in competition with any Restricted Business”
88. This is obviously a more wide-ranging restriction than the non-solicitation and non-supply clauses. The question therefore arises as to whether it goes further than is reasonably necessary, especially as the Claimant is already protected by the non-solicitation clause in clause 20.1(a) and the non-supply clause in clause 20.1(d).
89. Nevertheless, in my judgment, the Claimant is likely to succeed at trial in establishing that the clause is enforceable. This is primarily because a non-competition clause is more straightforward and easier to police than a non-competition clause or a restriction protecting confidential information. See, **Argus Media v Halim** [2019] EWHC 42 (QB); [2019] IRLR 442, at paragraph 124, per Freedman J.
90. In **Littlewoods Organisation Ltd v Harris** [1977] 1 WLR 1472, Lord Denning stated at page 1479:

Approved Judgment

"It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade but experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period."

91. This approach was reaffirmed by the Court of Appeal in **Thomas v Farr plc** [2007] EWCA Civ 118; [2007] IRLR 419, per Toulson LJ at paras 41-42. A similar restriction to that in clause 20.1(c) was upheld by the Supreme Court in **Egon Zehnder v Tillman**, after the deletion of a restriction relating to shareholding (see judgment, paragraph 8). In so far as there is a restriction on shareholdings above 5% (by reason of the definition of "capacity"), this can be dealt with by means of deletion as it was in **Egon Zehnder**.
92. The six-month period of the restriction is reasonable. The general exclusions in clause 20.2 narrow the potential scope of this restriction. They mean that the Defendant will not be in breach if he holds a small shareholding in a competitor, if he works in a different geographical area, or if he works in a field in which he was not engaged for the last 12 months of his time with the Claimant.
93. This restriction (and the others) does not mean that Avanos cannot compete with the Claimant during the six-month period. Avanos is free to do so, provided that it does not make use of the Defendant to do so.

The non-supply clause

94. This is clause 20.1(d). It provides that the Claimant shall not:

"for 6 months after Termination be involved with the provision of goods or services to (or otherwise have any business dealings with) any Restricted Customer in the course of any business concern which is in competition within any Restricted Business"
95. This is not dissimilar to the non-competition clause, but is somewhat narrower in scope. It prevents competition by means of having dealings with Restricted Customers, in respect of Restricted Business.
96. For the reasons I have already given in relation to other two clauses, I consider that is likely that the Claimant will succeed at trial in establishing that this clause was not unlawfully in restraint of trade. It is only for six months, and it is focused upon Restricted Customers and Restricted Business. It is less onerous than the non-competition clause which I have said is likely to be held to be lawful. It is true that it does not add much, because it overlaps with the restriction in clause 20.1(c), but that is not, of itself, a reason to strike it down.

Conclusion on the restrictive covenants in clauses 20.1(a), 20.1(c) and 20.1(d)

97. For the reasons I have given, I take the view, on the evidence currently before me, that the Claimant is likely to succeed at trial in persuading the judge that these clauses are enforceable.

(4) The express term relating to confidential information

98. It is clear that the Defendant will, unless restrained, disclose and make use, in his work with Avanos, of information which the Claimant would regard as trade secrets or akin to trade secrets belonging to the Claimant.

The relevant legal principles

99. Once again, there was no significant disagreement between counsel as regards the legal principles that apply.
100. An ex-employer may rely upon a restrictive covenant to protect its confidential information, but only if that confidential information is a trade secret or other information of equivalent confidentiality.
101. In **Thomas v Farr plc**, Toulson LJ said, at paragraph 41 (when considering the nature of protectable confidential information which must be present to justify a non-competition clause):

"41. In order to establish that the inclusion of a non-competition clause in an employment contract was reasonably necessary for the protection of the employer's interest in confidential information, the first matter which the employer obviously needs to establish is that at the time of the contract the nature of the proposed employment was such as would expose the employee to information of the kind capable of protection beyond the term of the contract (i.e. trade secrets or other information of equivalent confidentiality). The degree of the particularity of the evidence required to establish that matter must inevitably depend on the facts of the case. To say this is to say nothing new. Aldous LJ stated the principle in **Scully UK Ltd v Lee** [1998] IRLR 263 at 23:

"In cases where a restrictive covenant is sought to be enforced, the confidential information must be particularised sufficiently to enable the court to be satisfied that the plaintiff has a legitimate interest to protect. That requires an enquiry as to whether the plaintiff is in possession of confidential information which it is entitled to protect. (See **Littlewoods Organisation v Harris** [1977] 1 WLR 1472 at 1479F). Sufficient detail must be given to enable that to be decided but no more is necessary."

Approved Judgment

102. In **Lansing Linde Ltd v Kerr**, Staughton LJ considered the confidential information which an employer is entitled to protect by way of restrictive covenant, and said, at page 260B-D:

“It appears to me that the problem is one of definition: what are trade secrets, and how do they differ (if at all) from confidential information? Mr. Poulton suggested that a trade secret is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication.

That is my preferred view of the meaning of trade secret in this context. It can thus include not only secret formulae for the manufacture of products but also, in an appropriate case, the names of customers and the goods which they buy. But some may say that not all such information is a trade secret in ordinary parlance. If that view be adopted, the class of information which can justify a restriction is wider, and extends to some confidential information which would not ordinarily be called a trade secret”.

103. In **Faccenda Chicken v Fowler** [1987] Ch 117, the Court of Appeal contrasted the type of information which could be protected by a post-termination restraint (trade secrets and the like) with information which could not be so protected, which was (i) information which, because of its trivial character or its easy accessibility from public sources of information, cannot be regarded by reasonable persons or by the law as confidential at all; and (ii) information which the servant must treat as confidential, but which once learned necessarily remains in the servant’s head and becomes part of his skill and knowledge. It is notoriously difficult to draw the line between information that has a sufficient degree of confidentiality to be protectable and information which is insufficiently confidential.
104. As Ms Page pointed out in her submissions, two types of information which have been held to be sufficiently confidential to be protectable by a post-termination restraint are:
105. (1) Customer lists and contact details: **FSS Travel and Leisure Systems v Johnson** [1999] FSR 505, 512 citing **Printers & Finishers Ltd v Holloway** [1965] 1 WLR 1 where Cross J gave the example of an ex-employee using or disclosing a list of customers as a “*clear case*” for restraint of an ex-employee; and
- (2) Costs and pricing information: **Thomas Marshall (Exports) Ltd v Guinle** [1979] Ch 227 (CA), 248a: “Costs and prices which are not generally known may well constitute trade secrets or confidential information”

Approved Judgment

106. As stated above, in the **Norbrook** case, the judge, Elizabeth Slade QC, held also that information relating to discounts, records of sales and marketing strategies was protectable confidential information.
107. In **Argus Media v Halim**, at paragraph 142.4, Freedman J said that protectable confidential information was information which would be of considerable advantage to competitors, was capable of causing real harm to the Claimant, and would be recognised as being confidential by a reasonable person.

The confidentiality term in the Defendant's contract of employment

108. The confidentiality term is at clause 14, which states:

“14.1 The Employee acknowledges that in the course of the Appointment he will have access to Confidential Information. The Employee has therefore agreed to accept the restrictions in this clause 14.

14.2. The Employee shall not (except in the proper course of his duties), either during the Appointment or at any time after its termination (however arising), use or disclose to any person company or other organisation whatsoever (and shall use his 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 Board or required by law;
- (b) any information which is already in, or comes into, the public domain other than through the Employee's unauthorised disclosure; or
- (c) any protected disclosure within the meaning of section 43A of the Employment Rights Act 1996.”

109. Confidential Information is defined in clause 1.1 as:

“information... relating to the business, products, affairs and finances of the [Company] for the time being confidential to the Company and trade secrets including, without limitation, technical data and know-how relating to the business of the Company or any of [the Company's] business contacts.”

110. In my view, whilst it is clear that the Defendant had access to trade secrets in his role as Sales Director, this express restriction is too wide. This is because it covers not just “trade secrets” but also confidential information “relating to the business, products, affairs and finances” of the Company, and the restriction purports to run indefinitely. In my judgment, this restriction therefore purports to protect information which is merely confidential, in the sense of classes (i) and (ii) in the **Faccenda** classification, from being used or disclosed after the termination of the Defendant's employment.
111. I have considered whether the protection against the disclosure, post-termination, of trade secrets in clause 14.1 can be “saved” by severing the final part of the definition

Approved Judgment

of “Confidential Information” in clause 1.1, which deals with trade secrets, from the other part, which deals with mere confidential information. I don’t think that this is possible. The recent Supreme Court judgment in **Egon Zehnder** signalled a more permissive approach to severance than hitherto. It is no longer the case that it is impossible to sever parts with a single contractual term. However, at paragraph 87 of his judgment, Lord Wilson said that severance can take place only where the employer can establish that removal of the severed words would not generate any major change in the overall effect of all of the post-employment restraints in the contract. In my judgment, the reduction of the scope of the confidential information term from covering all confidential information to covering only trade secrets would be a major change in the overall effect of the post-employment restraints.

112. Accordingly, at present, I think that it is unlikely that the Claimant will establish at trial that this restriction is lawful, as it is not limited to trade secrets or equivalent.

(5) **Implied obligations, equitable duties and directors’ duties of confidentiality**

113. Even where there is no enforceable express post-termination restraint on disclosure of information, the Court will enforce an implied duty not to use or disclose trade secrets. This is made clear by the judgment of the Court of Appeal in **Faccenda Chicken**. The Court of Appeal said, at page 309:

“(4) The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes a general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae (**Amber Size & Chemical Co. Ltd. v. Menzel** [1913] 2 Ch. 239), or designs or special methods of construction (**Reid & Sigrist Ltd. v. Moss and Mechanism Ltd.** (1932) 49 R.P.C. 461), and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret.

The obligation does not extend, however, to cover all information which is given to or acquired by the employee while in his employment, and in particular may not cover information which is only “confidential” in the sense that an unauthorised disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty of good faith.”

114. In the present case, the draft order prepared by the Claimant’s legal advisers, seeks to restrain the Defendant from using or disclosing, until trial or further order, information in the following categories:
- (1) The Claimant’s customer and prospective customer data (including lists of customers, customer requirements and contact details);
 - (2) The Claimant’s management accounts and details of profit margins;

Approved Judgment

- (3) Details of the Claimant’s pricing strategy and customer contracts; and
- (4) The Claimant’s business strategy.
115. The answer to the question whether information of this nature is equivalent to a trade secret such that it is covered by the implied obligation not to disclose it or make use of it post-termination is not clear-cut. However, in my view it is likely that the Claimant will succeed at trial in establishing that information in these categories amounted to trade secrets, taking account of the guidance given in cases such as **Lansing Linde, FSS Travel and Thomas Marshall (Exports) v Guinle**. The customer data, pricing strategy and customer contracts, in particular, are plainly things that it would be harmful for the Claimant’s business to disclose to third parties. It would have been clear when the Defendant’s contract of employment was entered into that it would harm the Claimant’s business to disclose the information to Avanos, as possession of this information would have meant that Avanos no longer had need of the Claimant’s services as distributor of Avanos IVP products. This was information which, for obvious reasons, the Claimant kept confidential from third parties, in general, and Avanos, in particular. This information went beyond the “skill, experience, know-how and general knowledge inevitably gained” by the Defendant whilst employed by the Claimant, which is not covered by the implied obligation of post-termination confidentiality (see **FSS Travel** at 516).
116. In any event, the issue relating to a restriction, pre-trial, of the use or disclosure of trade secrets may well be academic. If the Claimant will be restrained by injunctions in the forms of the express restrictive covenants, dealt with above, he will not in practice be at liberty to make use of any confidential information or trade secrets that he possesses in relation to the Claimant’s business.
117. In light of the view that I have expressed about the implied contractual term, it is not necessary to go further and consider in detail the position in relation to equitable obligations of confidentiality, or any obligations that may exist in relation to a director’s duties. Suffice it to say that it is likely that the scope of the post-termination equitable obligation is the same as the post-termination obligation derived from the implied contractual term: see **Trailfinders v Travel Counsellors Limited** [2020] EWHC 591 (Ch), at paragraph 43.

(5) Adequacy of damages

118. In my judgment, it is clear that damages would not be an adequate remedy for the Claimant.
119. In **D v P** [2016] EWCA Civ 87; [2016] ICR 688, a post-termination restrictive covenant case, the Court of Appeal said, at paragraph 15:
- “... in cases such as this damages are not what an employer wants. The damages potentially sufferable by a covenantee such as the claimant by breach of the relevant restraint will usually be unquantifiable and will rarely, if ever, provide the covenantee with an adequate substitute for an injunction”.

Approved Judgment

120. Similarly, and contrary to the submission of Ms Page, I think that damages would not be an adequate remedy for the Defendant. At present he is continuing to receive his salary from Avanos, during the period of restriction. However, he is not able to bring the value to his new employer that the new employer hoped and expected him to bring. This may have a concrete but unquantifiable impact upon his bonus prospects, and it may also have an unquantifiable impact on promotion prospects or future career prospects more generally. The Defendant has expressed the concern that he may lose his job with Avanos. In addition, the grant of injunctive relief in this case will have an impact on a third party, Avanos, which will not be compensated in damages, even if it turns out that the injunctive relief should not have been granted.
121. It follows that it is necessary to go on to consider the balance of convenience.

(6) Balance of convenience

122. In my judgment, the balance of convenience favours the grant of injunctive relief, both in relation to the express restrictive covenants and in relation to the implied obligation not to use or disclose trade secrets.
123. The most important, but not the only, consideration that is relevant to the balance of convenience is my assessment that the Claimant is likely to be successful at trial. On the basis of the evidence before me, the Claimant is likely to be successful in establishing that the express restrictive covenants were part of the Defendant's contract of employment with the Claimant, that they were not unlawfully in restraint of trade; that the Claimant, unless restrained, is likely to act in breach of these restrictions. Similarly, the Claimant is likely to be successful in establishing that the proposed activities of the Defendant on behalf of Avanos will be in breach of his implied contractual obligation not to use or disclose trade secrets or the equivalent, after the termination of his employment.
124. In these circumstances, unless there is a strong countervailing reason, the balance of convenience is in favour of granting an injunction. I do not think that there is a strong countervailing reason. Injunctive relief will preserve the status quo and will prevent the risk of harm to the Claimant's business. Assuming that a speedy trial can be fixed for September, and judgment is handed down in early October, the interim restrictions will only apply for about three months. There is a cross-undertaking as to damages, which has been fortified by the payment into court of £25,000. The Defendant and Avanos will only have to wait a further three months or so, until the interim injunctions expire.
125. I should add that Mr Quinn made some submissions to the effect that there were deficiencies in the Particulars of Claim and that this should influence my decision whether or not to grant injunctive relief. In short, however, I do not think that there were any significant defects in the way that the Particulars of Claim have been pleaded, let alone anything of such significance that it should have any impact on whether injunctions should be granted. The parties' respective positions have been clear from the outset.

Conclusion

Approved Judgment

126. For all of the reasons I will grant the injunctive relief that is sought by the Claimant. I will hear submissions from counsel about the terms of the Order.