Neutral Citation Number: [2020] EWHC 3294 (QB)

Case No: QB-2019-004423

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 04/12/2020

Before :

THE HONOURABLE MR JUSTICE CALVER

- -

Between :

QUILTER PRIVATE CLIENT ADVISERS LIMITED — **Claimant**

- and -

(1) EMMA FALCONER
(2) CONTINUUM (FINANCIAL SERVICES) LLP — **Defendants**

- -
- -

Mohinderpal Sethi QC (instructed by **Womble Bond Dickinson**) for the **Claimant**
Emma Falconer – The First Defendant as a Litigant in Person
Daniel Tatton Brown QC (instructed by **Ashfords LLP**) for the **Second Defendant**

Hearing dates: 16 October, 19-23 October,
and 29 October 2020

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Approved Judgment

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 4 December 2020 at 10:30 am

Mr Justice Calver:

INTRODUCTION

1. This case concerns the extent to which the court should restrain an FCA regulated financial services adviser from using client information acquired during her employment by company A after she has left to work for company B; whether she can be prevented from dealing with or soliciting clients of A for 12 months after the termination of her employment with A; and whether she can be prevented from working for a competitor for 9 months after leaving A. It also concerns whether Company B should be held liable for allegedly inducing the adviser to breach her contract of employment with company A.

2. On 17 December 2019 Anthony Metzer QC (sitting as a Deputy Judge of the High Court) ordered an expedited trial of the Claimant's claim limited to the issues of liability and injunctive relief only, with a 5 day trial to be set down on the first open date from Monday 30 March 2020. The Defendants gave undertakings in the interim in particular not to use or disclose confidential information belonging to the Claimant and not to solicit or deal with customers of the Claimant in alleged breach of her restrictive covenants (in the case of the First Defendant) or induce her to breach her undertakings (in the case of the Second Defendant). The restrictive covenants were of 12 months duration and they therefore expired on or about 19 July 2020.

3. By the time the trial was heard by this court in November 2020, the restrictive covenants had long since expired and I was told that the Claimant's monetary claim amounted to a mere £39,000. Despite this, the trial remained expedited and the time estimate had become 7 days. This was a significant under-estimate for a trial of this complexity involving as it did three parties, two represented by Leading Counsel and the third, Ms Falconer, being a litigant in person. It was only by the accommodation of long court sitting days that the trial was completed in 7 ½ days. When I asked Mr. Sethi QC, counsel for the Claimant, why, in view of the fact that the covenants had expired and the claim for damages was extremely modest, the parties had continued to a full trial on an expedited basis, he candidly admitted that the dispute was in truth now largely a dispute about who should pay the costs of the action. I was told that the costs of the Claimant alone were close to an eye-watering £500,000, in circumstances where Ms Falconer, the First Defendant, had to represent herself because of a lack of funds. In view of these facts, it is highly regrettable, and to nobody's credit, that the parties failed to settle this case at a mediation in January 2020 and instead chose to occupy the court's time fighting a full-blown trial.

THE PARTIES

4. The Claimant ("Quilter") is a financial advisory business which assists clients with their financial planning needs, including investments, estate planning and preparing for retirement. It employs a large team of financial advisers. It has 6 offices, including one in Exeter, Devon but it also has offices far removed from there, in particular in Carlisle and Leeds.

5. The First Defendant, Emma Falconer ("EF") is a chartered financial planner who has been working in financial services for some 16 years, specialising in high net worth individuals and business owners. Before she joined Quilter she was employed as a financial adviser by Tilney Financial Planning ("Tilney") between July 2016 and January 2019. Her contract of employment with Tilney contained restrictive covenants, in particular a 12-month non-solicitation and a 12-month non-dealing covenant in respect of clients and prospective clients of the business, but it did not contain a non-competition covenant. EF said in evidence that she was aware of these restrictions when she was employed by Tilney. At Tilney she occupied an approved person Control Function 30 ("CF30") which was a client facing function and subject to FCA regulation, which therefore entailed, in particular, a duty to act with integrity, and with due skill, care and diligence. She has remained in CF30 adviser roles since 19th May 2010.

6. EF gave notice of resignation from her employment at Tilney on 5 December 2018, with her employment ending on 4 January 2019. She had been on maternity leave

since May 2018. She was then employed by Quilter on 7 January 2019, but after a very unhappy time just 6 months later (and within her probation period) she gave notice of her resignation to Quilter on 4 July 2019. She was then put on gardening leave for two weeks and her employment with Quilter ended on 19 July 2019. She was engaged by Continuum very shortly thereafter on 24 July 2019.

7. Continuum is also a financial advisory business. It has its Head Office in Plymouth, and at the date with which these events are concerned, it had a small staff of just 10 employees, although it engaged 49 independent financial advisers providing national coverage. Martin Brown, the managing partner of Continuum, gave evidence that whilst Continuum might compete with Quilter in certain respects and whilst they both offer the same broad service (financial advice), the two main differences between the two companies are that Continuum does not employ its advisers (they are independent) and Continuum offers, through its independent financial advisers, a "full market" service (i.e. they can offer the product of any financial provider), whereas Quilter advisers are employed and they are restricted in the range of products that they can offer to their clients, at least in the first instance (this was called the "restricted plus" service). In particular, in the first instance Quilter advisers must consider whether any of their own group's offerings (Old Mutual Wealth, Quilter Investors or Quilter Cheviot) or other Quilter-approved providers are suitable for their client's needs (i.e. those listed on the Quilter "matrix"). It is only if they are not, that the advisers can then go to the market.

8. Nonetheless, there is no doubt that Quilter and Continuum were in competition for the same type of clients in the same type of market, which is broadly financial advisory services. Indeed, it is precisely because of EF's experience and connections in that market that Mr. Brown of Continuum had been seeking to persuade her to join its business since 2016. Mr. Brown agreed in cross examination that there was competition in the market-place to recruit advisers such as EF, because there was a shortage of experienced advisers such as her.

FACTUAL BACKGROUND

Circumstances in which EF came to be employed by Quilter

9. EF was hired by Quilter in order to take over and service the clients of Ms Carrie Payne ("CP"), who was shortly to retire. That consisted of a valuable bank of 181 clients which generated ongoing fees of £255,000. I accept EF's evidence that by the time she left Quilter's employment she had met some 40 of these clients and that 120 of the 181 had been transferred over to her.

10. It is clear from the text message exchanges in November 2018 between Mr. Burden (Quilter's Regional Planning Director and Head of its Exeter Office) and EF at the outset of her employment by Quilter that Mr. Burden was keen for EF, in taking over Ms Payne's bank of clients, to move more of those clients onto Quilter-approved products (what Quilter termed its "Core Investment Proposition (CIP)") and that she would be paid an additional bonus for doing so at 0.065% of value moved. Mr. Burden offered EF a basic salary of £60,000 with a £35,000 underpin (guarantee) for

year one, and based upon the CIP bonus, he estimated year two earnings of "£100,000+". He considered that EF would be a "super addition to the team".

11. EF gave evidence that Mr. Burden told her that she could give whole of market advice to her clients. She said that she was not told that she would be tied to recommending Quilter-approved products to her clients. This, she said, was one of the main reasons why she left Tilney, where she was so restricted. Specifically, she said that she was not told that she had first to see whether the product which she wished to recommend to the client was on the Quilter matrix and to offer that before going to market (i.e. the "restricted plus" offering). She said that she only discovered this when she carried out her Quilter induction course in February 2019. She then asked Mr. Burden why he had not told her this when she first applied for the position and she says he told her, falsely, that she *could* go to the whole of the market.

12. Although this was her evidence, in an email before the court sent by EF apparently to Tozers, a Devonian firm of solicitors, shortly after her employment with Quilter commenced, EF stated:

> *"Happy new year to you, I hope you're having a great new year so far.*
>
> *I decided to resign from Tilney and join a new advice network!... I have joined Quilter Private Client Advisers, who have been advising clients for over 250 years. Quilter approached me and asked me to join their south west team based out of Exeter office. This was unexpected but I was absolutely thrilled about the opportunity. I did my homework before accepting the role, it was important to me that I can continue to do all the important/specialist things my clients and professional connections need of me, that I was able to do at Tilney. I am able to do even more which helped to firm up my decision to move on.*
>
> *On top of what I can already do for clients, which you are fully up to speed on:*
>
> 1. *I am not tied to recommending an in-house Discretionary Fund Manager (DFM) like at Tilney. I can recommend from a well-researched panel of DFMs to choose the most suitable, currently on our approved list who have passed our criteria is Charles Stanley, Rathbones, Vestra and Quilter Cheviot (In-house DFM). Each DFM has its own strengths and I would select the most suitable for a given client. When I do a bi-annual review, performance will be an important factor I review independently to the DFM and I am able to recommend switching if a DFM begins to lag its peer group in terms of performance.*
>
> 2. *I can access Quilter Cheviot, our in house DFM, as discounted rates and work on a dual expert basis. What is unique about Quilter Cheviot is they can offer single stock or fund portfolios, unlike Tilney who prefer funds, they have in-house researchers on both single stock and funds. This is unique. Quilter Cheviot have extremely strong past performance when compared to their peers so I am thrilled that I am able to access their expertise for my clients;*
>
> 3. *I can review any DFM mandate for ongoing suitability and performance, such as the investments we've already set up, at no extra cost to the client. I can simply take over the financial planning mandate and the Financial Planning*

fees are then transferred on to me. Billie wanted an independent review of trust performance against the peer group which I can continue to do independently without moving funds or any extra cost to the clients. Note that I cannot contact any clients for 12 months, they have to contact me if they'd prefer I carry on looking after them.

…I am committed to continue to support Tozers and building a long standing relationship with you. You are hugely important to me.

I'd really like the opportunity to meet up to go through all of this in more detail if you have the time face to face?..."

13. This contemporaneous email is important because it demonstrates the following:

(1) EF knew that she was expected by Quilter to choose products offered by a Quilter-approved list of DFMs, including Quilter Cheviot, its in-house DFM. The ability to offer Quilter Cheviot was seen by her as a positive development, because they could offer single stock or fund portfolios with in-house research on both.

(2) EF says in her witness statement that the reference to her not being tied to recommending an in-house DFM as she had been at Tilney was something that she was told by Mr. Burden but it was false. In fact, it appears from this letter that she *was* told that Quilter had a matrix of approved DFMs including Quilter Cheviot and that was true. There was no mention by EF in this email of the ability or need to go to market, outside the approved list of DFMs;

(3) EF knew that she had a 12 month non-solicitation clause in her Tilney contract and so she was telling Tozers that the client would have to contact her if they wanted her to continue looking after them. This was an invitation to Tozers to get around the restrictive covenant, but of course, this could still amount to solicitation if as a result of this invitation Tozers encouraged clients to contact EF.

(4) EF would be carrying out bi-annual reviews at Quilter. This is important for the reasons discussed below.

14. EF was told by Quilter that she would be working 4 days a week in a compressed working week, with her working 9 hours on Monday; 9 on Tuesday; 8 on Wednesday; and 9 on Thursday and no hours on Friday, a total of 35 hours. That can be seen from her offer of employment form on which an annotation has been made to that effect. The same form also refers to the fact that she would be a homeworker. Confirmation that EF would work that number of hours in a compressed working week is also provided by an email in November 2018 from Laurence Ashworth to the Quilter HR centre which states: "Another email has been sent to amend working hour to the below: 9,9,8,9 and no Friday." To take effect, on 28 November 2018 Mr. Burden sent an email to Joanna Startin in the HR department of Quilter and Mr. Moore, the Head and a director of Quilter, in which he confirmed that EF was a homeworker and that her draft contract should be amended to reflect that fact.

The conclusion of EF's employment contract

15. The final form of EF's contract reflects these discussions. In particular, it provides as follows:

> "**The Role**
>
> You will devote the whole time, attention and abilities to the duties of your employment with us during the normal working hours of the Company and during such additional hours as shall be reasonably necessary for the proper performance of those duties.
>
> **Probationary period**
>
> The first 6 months of your employment will be on a probationary basis during which time the Company will assess your performance, conduct, attendance, suitability and achieving Regulatory Approval.
>
> …
>
> During the probationary period or any extension of the probationary period, the notice period given by either party to the other is 2 weeks.
>
> **Place of Work**
>
> Your normal place of work will be [EF's home address]. You will be required to travel extensively in the execution of your job role.
>
> **Working Hours and Breaks**
>
> You will normally work a compressed 35 hour working week. Monday, Tuesday, and Thursday 9 hours per day, Wednesday 8 hours per day, Friday non working day.
>
> From time to time it may be necessary to work extra hours in order to meet the needs of the business.
>
> …
>
> **Obligation to provide work**
>
> There shall be no obligation on the Company to provide work for you:
>
> After service of notice to terminate your employment, whether the notice is given by the Company or by you…
>
> If the Company does not provide you with any work in accordance with this provision:
>
> …
>
> You accept that you are not permitted to contact any persons or companies connected to or who conducts business with the Company, whether in a professional or personal capacity, without the Company's prior written permission.

Confidentiality

Confidential information means information in whatever form relating to our business, clients, customers, products, affairs and finances which we consider to be confidential (which includes but is not limited to business development plans, pricing structures, research and analysis) and trade secrets including technical data and know-how relating to our business or any of our suppliers, clients, customers, agents … whether or not such information is marked confidential.

You will in the course of your employment have access to Confidential Information. You agree that you will not, except for the proper performance of your duties either during your employment or any time after its termination use or disclose to any person, company or other organisation 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 …

Restrictions after termination

Section 1: In order to protect the Confidential information and business connections of the Company to which they have access as a result of the Appointment, the Employee covenants (for itself and as trustee for Intrinsic) that they shall not for the following periods (less any period or periods spent on Garden leave immediately prior to Termination) after Termination howsoever arising save with the prior written consent of the Company (which shall not be unreasonably withheld or refused) directly or indirectly, either alone or jointly with or on behalf of any third party and whether on their own account or as principal, shareholder, director, employee, consultant:

a. for nine months following termination and in competition with the Company be employed or engaged in, assist or be interested in any undertaking which provides Services; ["*the non-competition covenant*"]

b. for twelve months following Termination, and in competition with the Company, solicit or otherwise endeavour to entice away from the Company … the business or custom of any Customer in relation to the supply of Services; ["*the non-solicitation covenant*"]

c. for twelve months following Termination, and in competition with the Company be concerned with the supply of Services to any customer; ["*the no dealing covenant*"]

Section 2: Each of the obligations in this clause is an entire, separate and independent restriction on the Employee, despite the fact that they may be contained in the same

phrase and if any part is found to be invalid or unenforceable the remainder will remain valid and enforceable.

Section 3: None of the restrictions in clause Section 1 shall prevent the Employee from

…

b. being engaged or concerned in any business concern insofar as the Employee's duties or work shall relate solely to geographical areas where the business concern is not in competition with Services; or

c. being engaged or concerned in any business concern, provided that the Employee's duties or work shall relate solely to services or activities of a kind with which the Employee was not concerned to a material extent in the 12 months before termination.

Section 4: While the restrictions are considered by the parties to be fair and reasonable in the circumstances, it is agreed that if any of them should be judged to be void or ineffective for any reason, but would be treated as valid and effective if part of the wording was deleted or the period or area was reduced in scope, they shall apply with such modifications as necessary to make them valid and effective.

…

Section 7: If the Employee is offered employment or a consultancy arrangement with a third party at any time during the Appointment or in the six months following Termination (howsoever arising), he will supply that third party with a full copy of this agreement and shall tell the Company the identity of that person as soon as possible after accepting the offer.

For the purposes of this clause:

"**Customer**" means any person, firm, company or entity in respect of which terms and conditions of business for the provision of financial advisory services have been in place between that person, firm, company or entity and the Company … during the 18 month period prior to Termination and in respect of which the Employee was materially concerned or had material personal contact at any time during such 18 month period prior to Termination;

"**Services**" means those parts of the business of the Company and/or Intrinsic with which the Employee was materially concerned at any time during the 12 months prior to Termination and, in particular, but not limited to, its business of the provision of Life, Pension and Investment services and Financial Advisory and Planning Services;

"**Termination**" means the termination of the Employee's Appointment with the Company howsoever caused.

…

Conflict of Business Interest

"During your employment, whether during or outside working hours, you shall not carry on, engage in or otherwise be interested in any other business where this is, or is

likely to be, in conflict with the interests of the Company Group or where this may adversely affect the efficient performance of your duties. However, this will not prevent you from holding, for investment purposes only, up to 5% of any shares or other class of securities in any public company which is quoted on a recognised stock exchange.

Intellectual Property rights

All documents and other work prepared by you during the course of your employment will belong to the Company… "Company Property" means all ideas, correspondence, documents and information stored on any medium, whether or not produced by you and without limitation to any other documents belonging to the Company…

Appendix to the terms and conditions of employment

Incentive scheme

You will be eligible to receive a guaranteed bonus of £35,000 which will be payable monthly for the first 12 months completed service

… if you cease to be employed by the Old Mutual group in any circumstances not mentioned above, or have given notice of resignation before the payment date of any incentive or guaranteed award , the award and any future award will be forfeited immediately…

Grievance Procedure

"Full details can be found in the HR Policies & Processes."

16. Before she gave notice of her resignation at Tilney, EF received her offer of employment at Quilter on 22 November 2018 (it will be seen that a similar course was adopted when she came to be engaged by Continuum as one of its advisers). The proposed written terms of a contract were made available to her online by Quilter in their "Offer Zone" which was password protected. However, the link to the contract was not working and EF was unable initially to access it. After several attempts to access it, on 3 December 2018 at 07.45am EF emailed Mr. Burden and stated:

> *"I have managed to get into the system, so no need to set up a new offer account. However my start date is still wrong. It should be the 7th of January. I have accepted the offer to avoid any further issues getting in, subject to the start date being the 7th January. Thank you and I can't wait to get started." (emphasis added)*

17. In her evidence, EF stated that whilst she read what she could see and focussed on what she thought was important at the time such as her start date, she did not notice the post termination restrictions "*before the system crashed and threw me out.*" However, she said in her witness statement that "*some of the clauses did cause me concern*" and she said that she raised her concerns directly with Mr. Burden. Indeed it seems likely that she did consider the terms of her contract in some detail because it is apparent from her WhatsApp exchange with Mr. Burden five days earlier on 28/29

November that there was a discussion between them about the probation and notice period (page 2 of the final contract); place of work (page 2 of the final contract); the incentive scheme and bonus payments (page 5 of the final contract).

18. On the same date that EF said she accepted the offer (3 December 2018), Quilter's HR department emailed EF to inform her that they had updated the written contract for her (on the on-line Offer Zone), with the correct start date.

19. Also on the same date, 3 December 2018, Quilter (then named Old Mutual Wealth Private Client Advisors Limited) sent a letter to EF at her home address, making a formal offer of employment for the position of Financial Planner, including the terms and conditions of that employment. The letter referred to EF being given commercially sensitive information in advance of her start date once she accepted the offer. EF gave evidence that she did not receive this, despite it correctly stating her home address at Cider Cottage, Swimbridge Exeter. In the letter Quilter correctly referred to her start date being 7 January 2019. It also asked EF to ensure that she read the terms and conditions "which you can accept or decline via the online portal". Mr. Rhodes, Quilter's Senior HR Business Partner, confirmed in his witness statement on behalf of Quilter that this acknowledgement and acceptance could be given (or declined) by EF in Quilter's Offer Zone via the on-line portal.

20. The court was shown a print out of the Offer Zone for EF, which refers to EF's job application as "*submitted*" and under the heading "Acceptance" it states "*Offer accepted*" which Mr. Rhodes explained shows that EF accessed her contract and accepted it. Her acceptance on the system is accordingly her acceptance of the offer. Had she not accepted it, he said that the Offer Zone would have shown "under offer" or "candidate declined".

21. Since: (i) EF said in her email of 3 December at 07.45am that she had "*accepted the offer*" of employment with an amended start date of 7 January "*so no need to set up a new offer account*", and the print out of the on-line portal records her acceptance; (ii) Quilter's HR Department amended the contract in the Offer Zone to change the start date to 7 January at 08.45 that same day, 3 December, as is recorded in its email to EF; (iii) On the same day Quilter then sent out to EF its letter of 3 December 2018, having made the change to the start date of 7 January, and recording the terms of the contract which Quilter had offered to EF (including the restrictive covenants) and which she had accepted via the on-line portal (with the one agreed change to the start date); (iv) EF did not suggest that any of the terms recorded in the letter of 3 December, assuming she did receive it, had not been agreed by her; (v) EF did indeed commence work with Quilter on 7 January 2019 and there were no further communications between them about the terms of her contract; and (vi) although she said in cross-examination that it was a mistake, in her Defence EF admits that she was employed under a written contract dated 3 December 2018 which she accepted on the same date, I find as a fact that she did accept the offered terms and conditions of her employment which were posted on the online portal (with one variation, to which Quilter agreed, to make her start date 7 January) and that the terms and conditions of her employment which she accepted are those recorded in the letter of 3 December 2018.

22. In any event, I also consider it likely that EF *did* receive the letter of 3 December 2018 (which was correctly addressed to her home address); that she would have seen

the terms of her contract contained within it and would have been likely to have at least noticed the restrictive covenants (the letter only consisting of 6 pages), even if she was unlikely to have studied them. This conclusion is reinforced by the fact that when she was later provided with a link to her contract on 14 May 2019 by Quilter's HR department, which I find as a fact she was able to access (see further below), she did not express any surprise at the terms thereof, in particular the inclusion of the restrictive covenants. Having received the contract by post, EF did not at any stage dissent from its terms and, having commenced employment thereafter with Quilter, I find that she accepted those terms (even if she had not done so via the Offer Zone).

23. Moreover, as Mr. Rhodes says in paragraph 14 of his witness statement, it is reasonable to assume that EF would have wanted to review her contract and not just have accepted it (whether via the on-line portal or by receiving a hard copy of the same). As he says, she is a qualified Financial Planner with 10 years' experience, and the contract of employment is a key document which includes, amongst other matters, details of her remuneration, working pattern and homeworker status.

24. I consider it implausible that, as she was compelled to suggest in her evidence, EF (i) did not take note of the terms and conditions of her contract of employment on-line, including her restrictive covenants; and (ii) did not receive the letter of 3 December 2018 containing its terms; and (iii) could not access the link to her contract of employment which Quilter provided to her on 14 May 2019, such that she was unaware at all times of the terms of her contract.

25. In his impressive closing submissions, Mr. Tatton-Brown QC for Continuum submitted that on the balance of probabilities the contract which EF accepted on 3 December 2018 would have been in the same terms as the first draft dated 22 November 2018. That expressly required to be accepted within 5 working days. But if that were so, he argued, that offer had lapsed, as by 3 December 2018 more than 5 working days had passed since 22 November 2018 and so there was no offer for EF to accept on 3 December 2018. However, since I have found that the letter of 3 December 2018 contains the terms of the contract which were offered to EF via the on-line portal and she did accept them within 5 days of the date of that letter, namely on 3 December 2018 itself, this point cannot be sustained.

26. Furthermore, my factual finding corresponds with the reality of the situation. EF knew that she was being employed on certain terms and conditions; she knew that they were available on-line and I find that she was sent them on 3 December 2018 and implicitly accepted them. She began her employment in the knowledge of those terms and conditions and therefore accepted them by her conduct. That is confirmed by the fact that when she was provided with a link to the terms and conditions of her contract on 14 May 2019 at her request, I find that she must have read them and yet she did not express any surprise at all at the terms, nor did she object to them.

27. EF then began her employment at Quilter on 7 January 2019, and she and Ms Payne drove by car in January "however millions of miles around the country" calling on clients of Quilter during the handover process of Ms Payne's book of high net worth clients, as Ms Payne records in her email to EF dated 31 January 2019.

Mr. Brown gets back in touch with EF

28. Just two days later, on 9 January 2019, EF received a LinkedIn message from Martin Brown of Continuum asking when it would be suitable for him to call her to "catch up". This message may well have unsettled EF, and it followed on from similar messages which he had sent her in September and November 2018. As late as 20 January 2019 they continued to exchange LinkedIn messages but it was only on 25 January 2019 that EF finally told Mr. Brown that she had "*decided to move to Quilter in an employee role. Totally unexpected… An adviser is retiring and I'm inheriting a very interesting book of clients",* but she added that *"I'm still keen for the future to consider going independent and self employed it just isn't the right time for me yet.*" She told him that that week she had been with an adviser who was retiring (Ms Payne) "*so I haven't been alone!*" By that she presumably meant that her delay in telling Mr. Brown of her move to Quilter was because it would have been awkward to call him, as he was at a competitor firm and Ms Payne would think it very odd for her to be calling a competitor just after arriving at Quilter.

29. EF said in evidence that she and Mr. Brown then spoke to each other on 25 January 2019 but she did not discuss her new client bank with him. Whilst I am willing to accept that evidence, these exchanges might be thought to have been rather ill-judged on EF's part as they gave rise to the risk, at least, that Mr. Brown might take the reference to EF inheriting a "*very interesting book of clients*", followed by a stated keenness to become independent and self-employed in the future, as being encouragement to him to keep in touch with a view to her eventual engagement by Continuum as a self-employed adviser with a very interesting and ready-made book of clients to bring with her.

EF's swift dissatisfaction with her job at Quilter

30. It is EF's case that soon after she started her employment at Quilter it became apparent to her that the job was not what it was promised to be. She says that she was promised by Mr. Burden the same level of administrative support at Quilter that she had received at Tilney. But contrary to what she was promised, there was no cashflow modelling; no or insufficient support from paraplanners; and she was tied to recommending in-house Quilter products, having been told that she would not be tied. She also says that she was told she would be inheriting clients based locally in the South West, so that she could work from home, servicing a local client bank, and yet during the course of the handover of clients to her by Ms Payne she travelled to places as far afield as South Wales, Gloucester, Essex and London. She says that the travelling was exhausting and she was still breastfeeding with a young baby.

31. Furthermore, EF says that in early February 2019 Mr. Burden presented her with her 2019 performance objectives which were entirely different from the role as portrayed to her. She says that he told her that she needed to increase the average fees of the portfolio significantly to 0.88% and turn the clients' portfolios "green", which meant to move as many of the clients' whole of market investments into Quilter in-house solutions, whether that was to the benefit of the client or not.

32. Aside from her enquiry of Mr. Burden in early February 2019 as to whether there was an XTools expertise in paraplanning in the country because Quilter did not have any, there is no written record of any discontent on EF's part with her role at Quilter until

the end of April 2019. Around that time, however, EF's feelings of discontent appear to have led her to renew her LinkedIn contact with Mr. Brown on Monday 29 April 2019 with the following message, in which she returned to her desire, expressed to him earlier, of becoming an independent financial adviser:

> *"Hi Martin, hope you're well?*
>
> *I caught up with Simon last month, I was keen to understand a bit more about how he's doing.*
>
> *Things aren't as promised at Quilter and it's made me realise how much I want to be an independent FA in order to build a business I'm proud of. Could we meet up in the next few weeks to go through things in more detail?"*

33. "Simon" was a reference to Simon Phillips who worked as a financial adviser at Continuum, so it appears that EF was already thinking about her next move as early as March 2019. Although EF said in cross-examination that they didn't discuss her moving to Continuum and that she just told Mr. Phillips about Quilter because they were friends, I find that evidence difficult to accept. In her message to Mr. Brown she said "*I was keen to understand a bit more about how he's doing*". Since this is a message to Mr. Brown and not to Mr. Phillips, which concludes with her asking Mr. Brown to meet to go through things in more detail, it can only sensibly mean that she was keen to understand how Mr. Phillips was doing *at Continuum*, with the implication that she was interested in what Continuum had to offer her.

The pivotal meeting at the Holiday Inn, Exeter between EF and Mr. Brown

34. Mr. Brown responded that same morning and he told the court that they then met that same week at the Holiday Inn in Exeter, or at least sometime within 7 days of 29 April. Mr. Brown was not sure of the precise date because, and I accept, he had innocently destroyed his paper diary (which he held then) in transferring to an electronic diary. He said in cross examination that he did not take notes of this meeting because his notebook that he carried around with him was full. He said that EF was distraught. She was not happy at Quilter; she felt let down; she had no support there. She wanted to know about Continuum. Mr Brown said that they did not talk about her present role at Quilter because she was too upset to talk about it. He said that they therefore did not discuss her existing client base at Quilter. Instead they talked about EF's Tilney clients and she disclosed the fact that she had restrictive covenants at Tilney. They did not talk about her restrictive covenants at Quilter. He said that they were looking forwards rather than back. They did not discuss her pay at Quilter because they had already done that back in January, when EF told him that she was working 4 days a week, that her salary was £80,000 or £90,000, that she would have full administrative support and was inheriting a client bank. Mr. Brown concluded the conversation by saying that he didn't know whether Quilter offered full market advice but if it did he wished her good luck.

35. Mr. Brown said that the meeting lasted 1-2 hours and it was a meeting just to discuss the "potential" for EF to join Continuum. He said that they then had a number of phone conversations following this meeting and by the Monday EF told Mr. Brown she was excited to pursue the opportunity to join Continuum and he told her that in

that case she needed to complete an application pack, which Mr. Reeve sent to her on 7 May 2019.

36. EF in her evidence also said that they did not discuss her role or work at Quilter; nor did they discuss her client book there.

37. I reject Mr. Brown's and EF's evidence as to what they discussed, or rather as to what they did not discuss, at this meeting. I consider it to be implausible. I do not doubt that EF was genuinely upset at how she perceived she was being treated at Quilter (to which I return below) but I find it impossible to believe that they did not discuss EF's position at Quilter in the light of their earlier exchanges in September 2018 and January 2019. The idea that they would discuss her clients at her previous employer, Tilney, in a lengthy meeting of 1-2 hours but avoid any discussion about EF's *current* book of clients at her *current* employer is unrealistic, particularly since Mr. Brown knew that EF had, as she told him, "*inherited a very interesting book of clients*". Indeed, inconsistently with his oral evidence, in his witness statement at paragraph 22, Mr. Brown says that he would have discussed with EF her current role and her "*existing client base*", as "*we do seek to understand what an advisor's existing book looks like*" although he firmly denied encouraging her to solicit or bring clients over to any future business which she might set up as a Continuum adviser.

38. I consider the likelihood to be that they indeed met, in particular, to discuss EF's engagement at Continuum and, particularly in light of what subsequently transpired, that they must have discussed, even if only in general terms, the book of business that EF was currently running at Quilter.

39. In short, I consider that this was the pivotal meeting at which point EF and Mr. Brown agreed that EF would join Continuum. I consider it likely that they would have discussed, again even if only in broad terms, what post-termination restrictions EF might be under at Quilter should she join Continuum as a competitor, since it would potentially affect what, if anything, she could do at Continuum and what she could do with her existing book of business. And it is likely that it was this discussion which prompted EF to ask for a copy of her contract a few days later on 7 May (see below), so that she could look at the *precise* nature of those restrictions (although there is no evidence that EF ever told Mr. Brown what they were). The fact that she was prompted to do this suggests that Mr. Brown did not simply encourage her to bring her clients to Continuum regardless of the terms of her contract.

EF begins recording her dissatisfaction at Quilter

40. The fact that EF had decided to move to Continuum around this time is reinforced by the fact that immediately after this meeting (or around the same time as the meeting) with Mr. Brown matters progressed quickly and for the first time EF recorded in writing her disaffection at Quilter. On Wednesday 1st May 2019, EF emailed Mr. Burden with the subject "*unhappy*". In this email, she stated as follows:

> *"I have raised how unhappy I am a few times. I don't think things are working and I am concerned about this deeply. I am very unhappy with how things are going. The admin and ownership for things that I don't feel I should be bogged down with just keeps coming back to me, loaded on me, my issue. I do*

> *not agree that it is my responsibility to request all the meeting pack info, once CS are prepping a pack.*
>
> *As for your comment about being organised clearly you don't believe I am...*
>
> *I left Tilney with the assurance the support would be similar and I would be able to do the same role as I was doing, if not more. This isn't the case.*
>
> *I am sorry I stood up and talked across the office, I am really frustrated and I try so hard to not let it show.*
>
> *Emma."*

41. Once again, the complaint centres upon the lack of administrative support that EF felt she was getting at Quilter. EF says in her witness statement that this email followed an encounter in the office that day when she came in to collect a client meeting pack but it was not ready. EF says that Jo Green started shouting across the office at her in an aggressive manner and Mr. Burden witnessed this but did nothing about it. Mr. Burden denied this account.

42. EF says in her witness statement that she had a meeting scheduled with Jo Green for the following day, 2 May, to discuss the level of administrative support that she was, or rather was not, getting at Quilter. She decided to cancel it and instead talk to Mr. Burden which they did on the telephone on 2 May. EF says that Mr. Burden began shouting at her about her having cancelled the meeting, telling her that she should not have done so. She says that during this phone call she told Mr. Burden that she was deeply unhappy in her role, and that she could no longer tolerate the culture and environment of the Exeter office with Jo Green. She also said that he had entirely misled her about the level of support she would receive. Instead of offering to help, he shouted at her and told her she was disorganised and a disappointment and he told her just to get onboard with the process and get the job done. EF believes that Mr. Burden sided with Ms Green because by this stage he accepted that he was in a relationship with Ms Green (and had been since March 2019).

43. In his witness statement Mr. Burden denies that he bullied EF and denied shouting at her over the telephone. He does not, however, deny that this conversation took place. Indeed it seems clear that it did, as on 2 May 2019 EF texted two ex-Tilney colleagues, warning them not to consider joining Quilter. EF stated "*If I'm honest, over the last month… things have fallen apart at Quilter for me. I'm writing a lot of business, 30+ big cases on the go, but my CS and PP support isn't working. I think I mentioned to you that I key my own factfinds to xplan and do most paperwork myself. It's such a bind and wasn't what I was promised*" and "*I have to be honest with you I'm hating it here. Please don't say anything to Jon. But this morning he told me I'm a disappointment, disorganised and he needs to help me get back on track. However he told me I'd get support similar to what we do at Tilney, which hasn't been the case. I'm so unhappy that I may just quit!!*"

44. Again, the complaint centres upon the lack of administrative support that EF felt she was getting at Quilter; and EF records the fact that whilst he considered her to be

disorganised, Mr. Burden was offering to help her to get back on track. The 30+ big cases were, presumably, the clients that had by this stage been transferred over to EF by Ms Payne.

45. EF's discussion with Ms Waring, Quilter's Client and Proposition Director, which Ms Waring recorded in her email to herself dated 4 June 2019 (discussed below), also supports EF's evidence that she complained on more than one occasion about the lack of administrative support.

The scanning of Quilter documentation onto EF's personal laptop

46. In cross-examination EF said that it was around this time, 2 May 2019 (at the time of the row with Ms Green and Mr. Burden), that she began scanning onto her personal laptop large quantities of Quilter client documentation (some 279 documents in respect of 103 individual clients), including the Quilter Client Service Agreements, Valuation Reports and Xplan Fact Finds for those clients. She had a work laptop, but she chose to scan this documentation onto her personal laptop; she did not have any convincing explanation as to why she did that.

47. There is no evidence to suggest that Mr. Brown of Continuum knew at the time that EF was doing this. This documentation was only delivered up to Quilter on 20 December 2019 pursuant to the Order of Anthony Metzer QC dated 17 December 2019 (and before this Court was contained in a series of bundles entitled Trial Bundle 3). When she delivered up these documents, as ordered by the Court, EF also served a witness statement confirming compliance with the delivery up order and explaining what use had been made of the Claimant's relevant documents. In that statement at paragraph 4 she stated as follows:

> *"When I save these files originally, there were several reasons I did so at the time. I was extremely stressed and worried about the people I was helping during my time employed by the Claimant. If such clients came to me for help I wanted to be able to help them and have a record of what we had discussed. I felt that the Claimant didn't care about its clients. Furthermore I had very real concerns about the Claimant's behaviour towards me and towards its own clients. I didn't trust them because of how I was being treated at the time and I held on to records in case I needed to access them and to defend myself…"*

48. In contrast, in cross-examination EF said that that she did not think about the soft copies of documents or data that she scanned onto her personal laptop; she only thought about the hard copy documents. She had forgotten about the soft data on her laptop. She said she accepted that she should have deleted this soft data when she left Quilter's employment.

49. EF then advanced a different explanation which had not previously been foreshadowed in any of her evidence. She said that she was working in Exeter but her home was in North Devon, 2 hours away. She had been handed these hard copy Quilter documents by Ms Payne when they were driving around together visiting clients and she kept them in the boot of her car, which she considered to be unsafe.

She said she therefore decided to scan these documents onto her personal laptop so that she could work on them at home at night in order to service the backlog of client cases. She was asked in cross-examination why if that were so, she had denied taking Quilter property or retaining Quilter information/data in her witness statement and Defence. Her answer was that she had forgotten about the soft data on her laptop, and not that she did this to protect herself and her clients. Moreover, Mr. Burden had clearly stated in his first witness statement at paragraph 4.5 that EF had obtained soft and hard copies of Quilter's confidential information, and yet EF had denied this in her witness statement.

50. Both the timing of this substantial scanning of Quilter's client documentation onto her *personal* laptop (namely at precisely the same time that she met Mr. Brown at the Holiday Inn) and her inconsistent evidence as to why she chose to do this, lead me to the conclusion that this was likely a deliberate act on the part of EF to take away with her Quilter's client information so that she could continue to deal with those clients at Continuum with the benefit of that information. I emphasise however, that there is, no evidence to suggest that Mr. Brown of Continuum knew or encouraged her to do this.

EF finalises her engagement by Continuum and tells Quilter she wants to check the terms of her contract

51. A few days later, on 7 May 2019, EF either met or telephoned Simon Reeve as he emailed her on that date and stated as follows under the subject heading "Continuum Application Pack":

> *"Dear Emma*
>
> *Thanks for your time earlier.*
>
> *Following on our call, please find attached the relevant documentation in relation to our Advisor Application Process.*
>
> *As agreed, should you require any assistance with this, then please do not hesitate to contact me and we can discuss."*

He attached to his email amongst other documents the Continuum Adviser Application Form and the FCA Long Form A.

52. It is notable that also on 7 May EF emailed Quilter's HR department and stated:

> *"Please can you email me a copy of my contract. I need to check some things on it?"*

53. Quilter's HR department replied by email of 8 May and asked what the query on her contract was, because they could help with it. In responding the next day, EF was careful not to say what her query was, instead stating "*I want to read through my contract in detail so a copy of it is fine, thank you.*" There is no explanation as to why EF would suddenly in May want to read through her contract *in detail*. In her witness statement she says merely that it was "due to the incidents with Jo Green and Jonathan Burden". I consider that the likelihood is that she wanted to make sure she had a copy of her up to date contract (it was now 6 months since she had initially

received/read it) to check it carefully because she had made up her mind to leave Quilter and join Continuum, and so she wanted to consider the precise terms of any contractual restrictions on her after leaving, including her post-termination restrictive covenants. If that were so, she would of course not wish to articulate that reason in her email response because it would immediately alert Quilter to the fact that she might be leaving (and considering taking its clients with her).

54. EF had difficulty in accessing the contract on-line as the password did not seem to work but on 14 May 2019 Quilter's HR department emailed her and stated:

> *"Please see your contract on the link attached. Please let us know if you have any queries."*

55. In cross-examination EF said that she did not in fact get to look at her contract because this link did not work and she gave up. I do not accept that evidence. I consider if that were so she would have responded by email to say as much in view of the fact that she was obviously very keen to consider the terms of her contract as she was on the point of leaving Quilter. I do not consider she would have just let the matter drop. I consider it much more likely that the reason that there is no email from her saying that she could not access the contract via the link is because she *was* able to access her contract, and she did look at it by clicking on the attached link in the email of 14 May from Quilter's HR department.

56. It follows I find that it is likely to have been the case that one of the reasons, if not the reason, why EF wanted to read through her contract in detail was because she wanted to look at/remind herself of the precise nature of the employment restrictions to which she would be subject upon joining Continuum, and that she did indeed do so. She said in cross-examination that she assumed she was subject to a non-solicitation restriction and she knew that she could not take confidential documents away with her. It is likely that she wished to remind herself of or fully ascertain the precise terms of those restrictions, not least because she had started scanning large quantities of Quilter documentation onto her personal laptop. There is, as I have said however, no evidence that having done so, she informed Mr. Brown of the terms of those restrictions.

57. EF completed the Continuum Adviser Application Form 10 days later on 17 May 2019, as well as the FCA Long Form A, whilst still employed by Quilter. She stated in the Continuum Adviser Application Form that her target date for her authorisation at Continuum was 18th July 2019 and that her projected production for the next 12 months was £100,000. EF said in evidence that she essentially just plucked this figure out of the air; but that figure, of course, corresponded with the figure that Mr. Burden had given her as her likely earnings in year 2 when she was about to start work at Quilter, where she would inherit Ms Payne's client bank. EF also stated that Continuum could approach Quilter for a reference but only from 3 July 2019, and that her notice period was 2 weeks and so her anticipated release date from Quilter was 17 July 2019. It is clear, therefore, that by 17 May she had formed the settled intention to resign from Quilter on 3 July and to be released from their employment on 17 July 2019 so as to begin at Continuum on 18 July.

58. I do not accept EF's evidence in cross-examination that she had not yet made her mind up whether to leave Quilter, and that putting down the date of 3 July gave her enough time to go on an induction course at Continuum purely in order to make her

mind up whether or not to leave. Furthermore, her reference to the notice period being 2 weeks suggests, as was put to her in cross examination, that she had indeed been able to look at her contract by this stage, having been sent a link to it on 14 May 2019.

59. EF also completed the FCA Long Form A on the same date, 17 May. She ticked the box which stated that she would be providing the CF 30 Customer Function and she stated that her employment with Quilter was "Jan 19 to Present".

60. On 22 May 2019 EF and Mr. Brown had another conversation, and Mr. Brown followed up on that with his email of 23 May in which he stated:

> *"Good Morning Emma*
>
> *It was great to speak with you yesterday and delighted to hear the excitement in your voice. We are very much looking forward to bringing you into the business and working with you moving forward.*
>
> *As promised I have attached a draft sample contract for your initial review.*
>
> *Please note the cash flow amount I have included on page 35 is purely to demonstrate an example. I will amend that figure accordingly, once you have had a chance to be clear on your requirements."*

61. The detailed Partner Agreement attached – which was akin to a consultancy arrangement (the definition of Business expressly included fee-based consultation work of the Adviser) did indeed include in Schedule 2 at page 35 a financial underpin (i.e. guarantee) of *"£4000/month (TBA) for a period not exceeding (TBA) months"*, "*in order to assist with your transition into Continuum*". The schedule further stated "*We will agree a business plan at the outset for review on a monthly basis for the period of the underpin."* As Mr. Brown said, the schedule makes clear that this is an advance payment (not a loan) to the adviser of customer fees in the first year or so of their engagement in order to assist with their cashflow. The schedule also made clear that EF would be paid 75% of the value of business introduced by her personally and 50% for Continuum introduced business. There was therefore an incentive for EF to earn her fees from clients introduced into the business by her, rather than Continuum.

62. EF said in evidence that she did not believe that Mr. Brown asked her whether she was under any restrictions which would affect her working at Continuum, and that she did not tell him of any. Nor did she tell him that she had started scanning on to her laptop Quilter client documents. Mr. Brown gave evidence that he would nonetheless expect advisers coming from an employed background to have restrictive covenants in their employment contracts (although not non-competition clauses) and confidentiality agreements with their employers and that quite a high level of confidentiality would be attached to them in a heavily regulated environment.

63. After receiving her Partner Agreement on 23 May, on 25 May EF emailed Mr. Brown, cc Darrell Stone. She said that the agreement looked good and she was "*heading off to buy my laptop today*!" She said that she would discuss with James the

underpin level but that she could not see "*the fee changing to 90% when fees are in excess of £100,000*". She was optimistic that she could bring in fees in excess of £100,000.

64. It should be borne in mind that EF was still employed by Quilter at this stage. Indeed, just 5/6 days later, on 28 and 29 May 2019, EF was emailing Quilter staff members, copying in Mr. Burden, in which she was asking which service providers she was obliged to use for a particular client (JB), and was told by Mr. Burden that she should go to Vestra and Rathbones in the first instance because they were on the Quilter panel or matrix (which EF knew – see her email to Tozers referred to in paragraph 12 above) and only if they could not accept the relevant power of attorney in that case should she then go "off matrix" to Brewin Dolphin but that then she would not get the matrix bonus (the 0.065% of value). Of course, it was important for EF to continue to afford a good service to Ms Payne's transferred book of clients if she wished to retain their goodwill so as to continue to deal with them at Continuum when she left Quilter; although I also accept that EF was a dedicated client adviser who wanted to provide these clients with a service which she perceived to be in their best interests.

65. One day later, on 30 May, it is apparent that EF had complained once again (in addition to her complaint to Mr. Burden a month earlier) to Sarah Waring of Quilter (her line manager) about her perceived lack of administrative support at Quilter, because Ms Waring emailed EF on that date and stated in a conciliatory tone:

> *"Hi Emma. Sorry I had to shoot today. If you would like to have a chat around what parts of the process you feel could be done by others, then let me know and we can pop something into the diary."*

66. Mr. Burden responded to Ms Waring by email on 31 May (but not to EF, no doubt appreciating that to include her in his response would inflame the situation) in which, consistently with what he had told EF herself on 2 May, he referred to the fact that EF was "*now finding her feet and getting business in which I am pleased about however her admin skills/organisation needs to improve.*" He explained that EF was used to an environment in which she did virtually no admin and case work and effectively saw herself as a salesperson, but that the business was implementing something called vanilla on its Xplan system and so "*I am keen to continue to ensure we stick to one process*." Ms Waring responded by email to Mr. Burden on 3 June, and said that she would be speaking with EF on 4 June and she would bear this in mind. This appears to have been a reasonable response on the part of Mr. Burden, and it can be seen from EF's mileage expense claim form that she indeed received vanilla training at her home on 24 April 2019.

67. It is apparent that Ms Waring did indeed meet EF on 4 June because in an email sent to herself on that date, she recorded the content of their discussion in bullet points as follows under the subject-heading "Emma Falconer":

> *"Lost all trust in JB as manager*
>
> - *People are scared to help in case they get told off (it has happened)*
> - *Nobody owns a case*

- *She is struggling with mental health due to the pressures and workload (has cried to JB and LW), she is obviously very stressed*
- *JB has told her she is a disappointment and disorganised – really hurt her*
- *thinking about leaving – going back to Tilney*
- *4 hours to put business on Xplan*
- *No training, doesn't know the processes and gets told off for doing things wrong …*
- *Feels completely unsupported and like nobody has got her back*
- *She does not believe that JB cares about her…*
- *Believes that JB is under a lot of pressure to deliver Green solutions, and that he is letting the business down, micro-managing everything*

  …

- *The culture in Devon is awful, people unhappy and wanting to leave."*

68. Whilst these notes of Ms Waring are consistent with EF's account of her unhappiness which she relayed to both Mr. Burden and subsequently to Mr. Moore, the reference to her thinking about leaving and going back to Tilney suggests that she was keeping secret from Quilter her advanced discussions with Continuum and the fact that by this stage, as I have found, she had made up her mind to move to Continuum (and not back to Tilney). There is no suggestion in any of the documents that she was thinking of moving back to Tilney; on the contrary she was taking active steps to move to Continuum. It appears therefore that she was not being truthful with Ms Waring about this, presumably because moving to Continuum rather than simply returning to Tilney would look more calculating on the part of EF; and because Quilter would view her engagement by Continuum with alarm as a result of her having been handed the book of clients of Ms Payne just a few months earlier.

69. It is fair to say that EF's complaints about the intimidating atmosphere in the office at Quilter were echoed by Nigel Heald, Quilter's paraplanning team leader, in his 4 page "Time Line of Events" document which he sent to Quilter's HR Department in December 2019 before his departure from the Exeter Office.

70. On 13 June 2019 Mr. Reeve of Continuum sent EF an email, cc Darrell Stone, in which he stated:

> *"Dear Emma*
>
> *Thank you for joining Continuum (Financial Services) LLP.*
>
> *I am delighted to invite you to attend the induction course from 24th June 26th June 2019 (inclusive) at our Cirencester office…*

> *You will need to bring your laptop along with you for the systems training…"*

71. Certainly by this stage, it is clear that EF had decided to join Continuum; indeed Mr. Reeve's email assumes as much. As I have already said, I reject EF's evidence that she went on this induction course just to "take a view" on whether Continuum was for her or not. The induction course was over 3 days and it can be seen from Mr. Reeve's email that it covered wide-ranging and confidential aspects of Continuum's business, including its investment strategy. It also seems likely that the reason why EF went to buy a new laptop on 25 May was because she was told that she would need it for the induction course. I do not accept Mr. Sethi QC's suggestion that EF bought a new laptop purely for the purpose of downloading Quilter's confidential information onto it.

72. EF accepted that whilst she was on this course she was still being paid by Quilter, but she said she had booked the time off as holiday. Quilter's records do not show this time as booked as holiday but there are reasons to think that those records were not entirely reliable. In any event, the important feature is that EF was still employed by Quilter at this time, whether she was on holiday or not.

73. Continuum then sought a reference from Tilney for EF which was received by Tilney on 20 June. Tilney responded on 24 June, enclosing its restrictive covenants for Continuum's information. Meanwhile, at the same time (20 June) EF continued to service her Quilter clients, as is apparent in an exchange with Mr. Burden on 20/21 June concerning client RSS.

74. Indeed, EF continued servicing 8 out of 18 Quilter clients whom it is alleged she solicited right up to 1 July 2019, and an illustration of this is provided in EF's email of that date to Heather Rice (cc Jo Green) concerning clients SB and RB. At the very same time as she was doing this, on 1 July 2019, EF was confirming her business card information to Continuum. It is also apparent from her mileage expense claims that on 1 July 2019 she visited Quilter client JB, as well as visiting a number of other clients throughout June, namely AK on 3 June; SP on 4 June; CSB & RB on 17 June; and RSS on 19 June.

75. And then, on 4 July, one day later than she had originally planned, EF gave her notice of resignation to Quilter, stating in an email to Mr. Burden and Quilter HR advisers "*Please accept my notice of resignation. This is my 2 weeks' notice period. Thank you for the opportunity*." She did not give any reasons for resigning. That meant that EF's employment with Quilter would end on 19 July 2019.

76. Despite the fact that EF was still employed by Quilter until that date, she also carried out her Continuum Competency Assessment on 9 July 2019. At some point prior to 19 July EF also liaised with Continuum about the text of an advertisement to be published in a magazine with a circulation which was local to EF's place of residence, referring to the fact that she had now joined Continuum and extolling her virtues as a financial adviser.

77. Continuum also asked Quilter for a reference for EF on 5 July and they received one back on 9 July in which Quilter referred to the fact that EF's employment was

"current". Unlike Tilney, Quilter failed however to take the sensible precaution of notifying Continuum of the restrictive covenants in EF's employment contract.

Quilter's letter to EF dated 12 July 2019

78. Quilter then sent EF an important letter on 12 July 2019. In it, it acknowledged EF's email resignation, stated that she had been placed on gardening leave until 19 July and that her last day of employment was 19 July. The letter stated:

> "Whilst on garden leave you will remain our employee and bound by the Terms and Conditions of Employment.
>
> - You will continue to receive your usual remuneration
> - You agree to comply with any reasonable conditions we may request at this time
> - You accept that you are not permitted to contact any persons or companies connected to or who conducts business with us whether in a professional or personal capacity, without our prior written permission
> - You will keep us informed about your whereabouts so that you can be called upon to perform any appropriate duties.
>
> We would like to remind you of your obligations under your contract of employment in respect to the restrictive covenants.
>
> …
>
> **Please ensure that you read the contents of this letter and further information sheet thoroughly**…"

79. EF did not respond to this letter by asking "What are my restrictive covenants?" The reason she did not do so, I find, is because she knew by this stage what they were, having asked for a copy of her contract on 7 May, with which she was provided on 14 May.

80. In cross examination EF said for the first time that she also did not receive this letter. This letter was relied upon by Quilter in paragraph 13.6 of its Particulars of Claim and she had never previously suggested that she had not received it; indeed, she admitted paragraph 13 of the Particulars of Claim in her Defence at paragraph 26. EF said (once again) that her barrister had drafted the Defence and he should not have admitted this. But nor did she say in her witness statement that she did not receive this letter. I reject her evidence on this topic; there is no reason to suppose that she did not receive this letter.

81. The attached Information Sheet again asked EF to "familiarise yourself with some terms and conditions that apply after you have left the Company" as well as stating that "You are required to return all company property in your possession by your last working day…". She was also asked to return all company property, documentation, security pass, PIN and passwords by Quilter's HR department in their email to EF

dated 4 July. In compliance with this letter, EF did so by leaving her company phone, ipad and laptop on Mr. Burden's desk.

Discussions between EF and Mr. Burden and Mr. Moore prior to her leaving Quilter

82. On 4 July Mr. Burden sent a text to EF and asked her to spare him and Andrew Moore "*ten minutes tomorrow on a call so we can explain some of our changes and also hear more from you on your decision*." They then had a three-way conversation by telephone the next day. Mr. Burden states in paragraph 3.1 of his witness statement that his recollection is that "*When I asked [EF] where she was going and what she would be doing, she said that she had not decided what she was going to do but she would not be joining a competitor and if she did remain in the industry, which she was not sure if she wanted to, she would probably set up on her own*." EF denies that she told Mr. Burden this and states in her witness statement that she described the poor working environment at Quilter, how that had affected her mentally and the lack of support. I am willing to accept EF's evidence on this, as it is consistent with Andrew Moore's text to her on 8 July in which he states "*Following our conversation if you are able to confirm venue for our catch up tomorrow at 11am that would be great. I'm keen to capture and document details around your decision (XPLAN, support issues, office culture etc)*…". It is also consistent with her complaints to Mr. Burden on 1 May and her complaint to Ms Waring on 30 May about the lack of administrative support for her role and what she perceived to be a hostile working environment.

83. Despite EF's detailed complaint to Ms Waring about the working conditions in the Exeter office on 4 June, it appears that nothing was done about it until after EF had resigned which then led to Mr. Moore's involvement. Nobody told EF that she could pursue her complaint through Quilter's grievance procedure (although that procedure was alluded to in her contract of employment) and it does not appear that Ms Waring did anything about her complaint, despite its nature. In his evidence, Mr. Moore said that he "could not confirm" whether the complaint was elevated to Ms Waring's superior. It seems very likely that it was not as there is no documentary record of it being addressed. Mr. Moore said in his evidence that Mr. Burden had not made him aware of EF's complaint. Mr. Burden said that he did not know what action Ms Waring took. Mr. Rhodes said that he does not believe that EF's complaint was ever addressed by Quilter's HR department: "*I would expect it to have been addressed. It wasn't*". This reflects very badly upon Quilter's office culture, which is precisely what EF was complaining about.

84. Mr. Moore then met EF on 9 July at the Imperial Hotel, Barnstaple. At the same time he met other disgruntled employees, namely Nigel Heald and Clare, Mia, Helen and David who were also in the office. He recorded his meeting in an email to David Rhodes and Sally Rose the following day, 10 July. It is strongly supportive of EF's complaints that the administration at Quilter was seriously inadequate; that there was a lack of training; and that the office was an unhappy place under Jo Green. The Quilter Exeter office employees told Mr. Moore that they were concerned with feeding back to him their views openly in that they had done so in the past only to be met with a negative response. Mr. Moore said that he was clear with them that there would not be any backlash on them should they do so. He then captured their feedback in his email. He set out EF's complaints under the heading "Emma". Her complaints are recorded by Mr. Moore as follows:

(1) XPLAN roll out was poor and that made it very difficult to deal with. EF's offer to feed in her opinions and support was not taken up.

(2) EF took on responsibility for Ms Payne's clients and she spent the first month meeting the clients. It had been very busy;

(3) Vanilla was rolled out without adviser consideration; this had resulted in a significant increase in admin (spending most evenings till 10pm doing basic admin) restricting EF from doing her job; admin and paraplanning teams were not aligned as they had been at Tilney;

(4) Vanilla hasn't worked; it has been rushed and littered with issues;

(5) Paraplanners are doing too much client support work (such as Claire in paraplanning);

(6) XPLAN data is poor, resulting in review work being pointless;

(7) Because the XPLAN data is poor, EF wanted to have a valuation and then a re-fact find with the clients to enable client data to be updated properly. The collected data was poor;

(8) EF shared her feedback on the other staff in the office. The Client Support Team as a whole lacked knowledge as they were new to financial services and needed training. The overall resource in the office was insufficient;

(9) EF had issues with Jo Green. She had been disrespectful to EF in open forums. The Client Support Team did not feel valued by her. There was a lack of team spirit as a result;

(10) EF had lost trust in Mr. Burden. He could have supported her more and taken more time to understand her frustrations. He had failed to address concerns about Jo Green. She could not work for a line manager who did not value her nor appear to care about her.

Mr. Moore concluded by stating that he thought Quilter needed to review its "people engagement" because "there does appear to be some common threads that will erase what is overall a strong culture".

85. EF states in her witness statement that she told Mr. Moore that she was to become an IFA for Continuum, and that he had no objections; indeed, he wished her the best. Mr. Moore's evidence was that EF told him that she was thinking of setting up as a self-employed adviser and he wished her luck; but she did not tell him that she was going to work for Continuum. I accept EF's evidence on this. Neither Mr. Moore nor Mr. Burden appear to have been particularly troubled by EF working for Continuum (provided she did not solicit Quilter's clients) – see paragraph 90 below.

86. Nigel Heald's complaints were very similar to EF's, as were the complaints/comments of the rest of the Client Support Team. Indeed, Mr. Moore recognised this in concluding his email as follows:

> *"As you can see there was a lot of consistency across three separate discussions. I have assured them that there will be no negative comeback on the team for sharing points, everyone had the opportunity to speak and it was very evident that there was lots of passion and willingness but they were feeling very undervalued as a whole…*
>
> *My overall observations here is that we have a team that want to do well for the clients and each other, are prepared to and are working hard and want to be here in the future with Exeter being successful, however resource, inexperience, lack of training and a feeling of not being supported, listened to but worst of all feeling vulnerable in their jobs is creating a very unhealthy atmosphere which we need to sort."*

87. On 12th July, as described above, Quilter sent EF a leaver acknowledgment letter in which it reminded her of her obligations under her contract of employment in respect of her restrictive covenants.

88. It appears that sometime around 17 July Mr. Moore and Ms Waring had a discussion about EF because on that day Ms Waring forwarded to Mr. Moore her email of her discussion with EF which she had sent to herself on 4 June 2019. In her covering email to Mr. Moore, Ms Waring stated "These were my notes, but think you're aware of most of it." Mr. Moore responded by email on the same date and stated "*Thanks Sarah, useful note and aligns with much of the feedback received but things in here that I was not aware of, following my call with JB this morning I will be picking up with him further face to face at mid year review*."

Events after EF begins work at Continuum

89. EF's employment with Quilter then came to an end on 19 July 2019 and she began working at Continuum on 24 July, signing the Continuum Partnership Agreement and she had her FCA application approved on the same day.

90. By late July or early August 2019 Mr. Burden knew that EF had commenced work at Continuum. He said that he informed Mr. Moore of this fact but Mr. Moore did not say much about it and they had no discussion about EF breaching her non-competition covenant. It is striking, as Mr. Tatton-Brown QC stated, that neither did anything in response to this knowledge. Quilter did not seek injunctive relief until some 4 ½ months later. In particular, it did not write to EF or Continuum objecting to EF working for Continuum. That may have been because neither Mr. Burden nor Mr Moore considered the non-competition covenant to be enforceable, as it was Mr. Moore's view (expressed in his internal email of 6 November 2019) that the covenant was open to challenge; or it may have been because they were not particularly troubled by EF working for a competitor (as opposed to protecting their business interests in preventing the dealing with/solicitation of their clients). Mr. Moore himself said that he would have been content to permit EF to continue to work at Continuum following their chance meeting on 6 November 2019 (referred to below) had she ceased to deal with Continuum's clients. Mr. Burden gave evidence that EF's non-competition covenant was not of "grave concern" to him in isolation and if EF had asked him if she could join Continuum, he "*wouldn't at that point have been*

unduly concerned and would have said yes." This suggests that both Mr. Moore and Mr. Burden considered EF's non-solicitation and non-dealing covenants were sufficient to protect Quilter's business interests, and that the addition of a non-competition covenant went further than was necessary.

91. On 10 September 2019 Lauren White, who was Continuum's Training and Competency manager, completed an annual competency assessment in respect of EF. Of course, by this stage EF had only been at Continuum for approximately 6 weeks. The period reviewed was from 01.08.2019 to 10.09.2019. The assessment was stated to include "a review of business written to date". Ms White openly states in her report next to the sub-heading "Source of Business": "*Emma is working from her existing client bank - clients transferred with her from Quilter. She also receives a number of leads from Unbiased.*" It is clear that she was not aware that there might be an issue with EF working from her existing client bank.

92. Indeed, Lauren White concluded her report as follows:

> *"…Emma has been focusing on her existing clients and moving them out of older style contracts that are either more expensive or have underperformed … In addition all of Emma's cases are pre-approved and the majority have been graded as suitable first time, showing that the advice is sound. No further action is needed at this stage"*

Quilter sends Letters Before Action

93. On 21 October 2019 Quilter sent separate letters before action to EF and Continuum. In the letter to EF, Quilter set out EF's contractual obligation of confidentiality as well as her post-termination restrictions. It then stated as follows:

> *"Breach of obligations*
>
> *Your position with [Continuum] is in breach your restrictive covenants [sic] as set out above. You have not been released and will not be released from the terms of this clause.*
>
> *We are also aware that you have disclosed confidential information by removing [Quilter] client data and have attempted to contact and solicit business from [Quilter] clients a number of whom have transferred their servicing rights to your new firm. These actions represent a breach of confidentiality and of your restrictive covenants as set out above.*
>
> ***Contractual undertakings***
>
> *[Quilter] therefore requires you to give a written undertaking [by 28 October] that you will respect the confidentiality and post termination restriction clauses in your employment contract.*

> *Relevant documents*
>
> *You are reminded of your contractual obligation of confidentiality and are requested to return to [Quilter] all [Quilter] confidential information which includes client and customer lists. Please return all [Quilter] client and customer information by return."*

94. In the letter to Continuum, Quilter stated that:

> *"[EF]'s employment with [Quilter] ended on 18th July 2019. We enclose a copy of the letter and enclosures we have today sent to [EF]. Your employment of [EF] is in breach of the ongoing restrictions set out in her Contract. Her contact with clients of [Quilter] offering them financial advisory services and arranging meetings is in breach of the ongoing restrictions set out in her Contract…*
>
> *"[Quilter] therefore requires you to give undertakings [by 28 October] that you will not facilitate [EF] in any action which results in a breach of the post termination obligations owed to [Quilter] and of which you are now put on notice… We require all contact lists for [Quilter] clients and customers which have been taken in breach of confidentiality owed to [Quilter] to be returned to [Quilter] by return."*

95. Continuum replied by letter dated 25 October in which it asked to be sent the enclosures to the Quilter letter which had been omitted (In particular her employment contract). However, Quilter surprisingly failed to respond at all to this letter and failed to take any urgent action as it had threatened to do.

96. Similarly, Wollens, solicitors, replied on behalf of EF and stated that "*we have taken instructions on the content of your letter. However the contract that you have sent is unsigned. Please can you send a copy that is duly signed by our client before we can generally advise our client on the validity of the covenants*." Wollens did not suggest that EF had never concluded such a contract with Quilter; nor did it suggest that she was surprised to see for the first time the restrictive covenants. But once again, Quilter simply failed to respond to this letter.

97. In his first witness statement at paragraph 2.5, Mr. Burden stated that *"[Quilter] did not respond to those letters, as [EF] had given oral undertakings to Andrew Moore at their meeting on 6 November 2019…which [Quilter] hoped and believed she would comply with*." This is a reference to oral undertakings which Quilter allege that EF gave to Mr. Moore in a chance meeting on 6 November 2019 at the Aztec Hotel in Bristol.

98. However, in paragraph 14.6 of his very lengthy second witness statement, Mr. Burden gave a different account. In that paragraph, he stated that "*As soon as the Claimant realised that [EF] was acting dishonestly and was breaching that oral undertaking and could not be trusted, the Claimant took the view that there was no point in responding to [EF and Continuum's] responses to the letters before action, as [EF]*

had only recently given an express oral undertaking to comply with her restrictive covenants but had shown that she had no intention whatsoever of doing so, as she was continuing to act in flagrant breach of them."

99. In his oral evidence, Mr. Burden simply stated that he did not know why there was no response to these letters. He did not refer to either of the explanations in his two different witness statements.

100. This highlights a very unsatisfactory feature of Mr. Burden's evidence. His second witness statement is excessively and oppressively long (running to no fewer than 166 pages). It is also not in a form in which a witness statement should be, contrary to CPR PD32. In particular it fails to comply with the following aspects of the Practice Direction:

(1) **18.1:** The witness statement must, if practicable, be in the intended witness's own words and must in any event be drafted in their own language;

(2) **18.2:** A witness statement must indicate:

(1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and

(2) the source for any matters of information or belief.

101. In short, it is not simply a statement of the *factual evidence* which he can give. It impermissibly regurgitates large chunks of Quilter's pleaded case (with headings such as "Equitable Obligation of Confidence" – Implied duty of confidentiality during employment"), together with Mr. Burden's stated "understanding" as a result of matters which he has apparently been told by his solicitors. It recites large amounts of correspondence between the parties (much of which does not concern Mr. Burden at all), with a running commentary upon those exchanges, as well as containing a laborious and unhelpful list within its last 100 pages of the disclosure which was given after the delivery up order. Moreover, it was apparent from his cross-examination that the statement was in large part not based upon Mr. Burden's own account of events; rather as Mr. Tatton-Brown QC said in closing it is more in the nature of "lawyer drafted submission". In short, it is everything which a witness statement should not be and is a most unhelpful document, not least because Mr. Burden's evidence should be some of the central evidence in this action. The significance of this becomes apparent when one comes to a consideration of the reasonableness of the restrictive covenants in EF's employment contract.

102. Turning to the meeting at the Aztec Hotel in Bristol on 6 November 2019, Mr. Moore made a contemporaneous record of that meeting in an email to David Rhodes, copied in to Mr. Burden, on the day that it happened. Mr. Moore stated as follows:

> *"By shear [sic] coincidence this morning before meeting JB and advisers at hotel in Bristol who should I bump into by [EF]. FYI I engaged with her and reminding her of her obligations that she cannot break her restricted [sic] covenant and that she should immediately cease any engagement and solicitation with our clients. She stated that she had not but I*

> *reminded her that two sets of clients have confirmed otherwise and that she must not continue as we will have no alternative but to continue with legal action. She stated that she was aware that she could not solicit but clients have contacted her, intimating that she could speak/engage with them. She now knows her obligations but for the avoidance of doubt I explained that in such instance she should refer the client back to Quilter PCA office in Exeter. She referred to the clause relating to her being unable to work for 9 months, I think we all know that this [is] open to challenge but again I reminded her of her obligations to adhere to her restricted [sic] covenant. She said that this is stressing her out and that she can't afford to get into a legal dispute and did not want to. We finished the conversation with me stating if she stops now and does not break her obligations then there should be no reason why it needs to be taken further but she must stop now.*
>
> *Cheers*
>
> *Andy"*

103. In his witness statement Mr. Moore suggested that at this meeting EF "*made it clear that she would stop breaching her restrictive covenants. I was therefore content that no further action was required.*" In cross-examination Mr. Moore suggested that EF gave oral undertakings not to compete, solicit and deal with clients, despite the fact that his email makes no reference to this. Mr. Burden also said in cross-examination that EF confirmed in this conversation that she would not contact or solicit any further clients of Quilter. He said he was at the hotel when this conversation took place between Mr. Moore and EF. However, Mr. Burden then agreed that Mr. Moore did not say any more to him than he set out in his note, although he suggested that it was clear when Mr. Moore came back into the hotel that EF had given an undertaking not to solicit or deal with any of Quilter's clients. However, he accepted that Quilter did not write to EF to say that it was relying upon any such oral undertaking.

104. I reject any suggestion that EF gave oral undertakings in this chance encounter not to compete, solicit or deal with Quilter clients. Had she done so Mr. Moore would no doubt have said so in his email. He says in terms in his email that: "*We finished the conversation with me stating if she stops now and does not break her obligations then there should be no reason why it needs to be taken further but she must stop now."* He does not say that EF then gave an undertaking not to breach her restrictive covenants, which she denies doing. Indeed, he seems uncertain as to the nature of her restrictive covenants, referring to a "restricted [sic] covenant" in the singular.

105. On 12 November in an email to Darren Sharkey of Quilter, Mr. Moore referred to this chance meeting but once again made no mention of EF giving any oral undertaking:

> *"I literally bumped into Emma outside a hotel in Bristol last week and made it very clear to her that she must not break her restricted [sic] covenant. She has clearly broken this as far as we aware of three clients that she engaged one of which we have turned back around."*

106. It was only on 10 December 2019 that Quilter issued its Claim Form and applied against the Defendants for an interim injunction, delivery up of documents and a speedy trial. As mentioned at the outset of this Judgment, on 17 December 2019 Anthony Metzer QC (sitting as a Deputy High Court Judge) granted an expedited trial of the claim limited to the issues of liability and injunctive relief only, against certain undertakings provided by EF and Continuum, including an undertaking by EF in clause 3.1 of Schedule 4 to deliver up to Quilter's solicitors by Friday 20th December 2019 any property belonging to Quilter which remained in her possession. That led to the delivery up by EF of the numerous Quilter client documents in Trial Bundle 3, together with her second witness statement in which she gave her explanation as to how she came to have these documents on her personal laptop. In particular, both Defendants undertook until trial or further order not to use or disclose any of Quilter's Confidential Information (as defined); and EF undertook not to solicit or deal with Quilter clients until trial or further order.

107. On 20 January 2020 Continuum also delivered up Quilter documents comprising 54 pages relating to 11 clients which were contained in Trial Bundle 4 and which had been put on its IO system by EF.

THE CLAIM AS FORMULATED AND THE CLAIM NOW ADVANCED

108. Quilter served its Particulars of Claim ("PoC") on 27 January 2020. It is a somewhat diffuse Statement of Case but it essentially alleges as follows (paragraph numbers refer to the paragraph numbers of the PoC):

Against EF:

(1) EF solicited or dealt with 8 of Quilter's customers (16.3);

(2) EF solicited clients by the text of a press article on Continuum's website (16.5, 16.6);

(3) 30 Quilter customers have disengaged from Quilter and moved to Continuum, set out in confidential schedule 3 (16.7);

(4) Quilter is concerned that 52 other Quilter customers have also been wrongfully solicited/enticed away as set out in confidential schedule 4 (16.8);

(5) Whilst employed by Quilter and following termination of her employment, EF deliberately copied and retained hard and soft copy confidential information relating to Quilter's customers as set out in Confidential Schedule 5, including Fact Finds, Valuation Reports, Portfolio Reports and Investment Product details; extracts from Quilter's customer relationship management database (XPLAN) etc (16.10(1));

(6) In breach of her express and implied terms of her employment, *whilst employed by Quilter*, EF engaged in a competitive activity in competition with Quilter, assisted a competitor, diverted business away from Quilter, misused Quilter's confidential information for her own advantage and concealed her own wrongdoing, misleading Quilter about her future employment plans (16.11 and 16.12);

(7) EF acted in breach of her fiduciary duties (16.13);

(8) In breach of the express terms of her contract *following termination* she has misused Quilter's confidential information; engaged in competitive activity against Quilter; engaged in soliciting or enticing away Quilter's customers; engaged in dealing with Quilter's customers (16.14).

(9) In breach of her equitable obligation of confidence, EF has misappropriated, misused and disclosed trade secrets and confidential information belonging to Quilter (16.15);

(10) In breach of her oral undertaking given on 6 November, EF continued to act in breach of contract, confidence and fiduciary duties by further competing with Quilter, soliciting and dealing with Quilter's customers and misusing and disclosing the confidential information (16.17).

Against Continuum

(1) Continuum induced EF to act in breach of the express and implied terms of her employment contract. Continuum was aware or turned a blind eye to the existence of the express and/or implied terms of EF's employment contract and intended to procure a breach of the employment contract or was indifferent as to whether the conduct it induced would breach the same (17.1);

(2) Continuum facilitated the misuse of Quilter's confidential information by EF by enabling her to upload confidential information onto its systems;

(3) Continuum is fully aware that EF is engaged by it, misusing Quilter's confidential information and soliciting/dealing with its clients (17.5);

(4) On 20 January 2020 Continuum delivered up to Quilter confidential information relating to 11 of its customers (16.10(2)).

Against EF and Continuum

(1) An unlawful means conspiracy.

109. At the start of the trial, I asked Mr. Sethi QC, counsel for Quilter, to state which of the reliefs in paragraph 21.1 of the Particulars of Claim he was still seeking. He told me that he was no longer seeking relief for breach of fiduciary duty or conspiracy as against EF; and that he was no longer seeking relief for conspiracy against Continuum. In addition, the injunctive relief in respect of post-termination restrictions is no longer sought in view of the fact that those time limited covenants are now spent.

110. By the time of the written closing submissions, Quilter had limited its case to the following:

"CASE SUMMARY

\ …[*EF*]

2.2. During employment, in breach of her express, implied and equitable duties to C:

(1) D1 **took and retained C's confidential documents** in order to use them pre- and post-employment to transfer client services to D2 (where D1 would act as adviser).

(2) D1 also sought to **divert the business services which C provided to its clients** to herself and D2 by encouraging clients to move with her.

2.3. In breach of her **equitable obligation of confidence, D1 planned to misuse and did in fact misuse C's proprietary and confidential documents** in dealing with Clients. She also misused the confidential documents in order to register C's clients onto D2's system (and in so misusing disclosed C's confidential documents to D2). In compliance with the interim relief order of Anthony Metzer QC, on 20.12.19 D1 delivered up 2,730 pages comprising 231 of C's confidential documents relating to 103 individual Quilter clients. The documents delivered up include all the information necessary to seamlessly continue conducting business with the transferred Clients.

2.4. In breach of its equitable obligation of confidence, **D2 knowingly received C's confidential documents and misused them and/or permitted D1 to misuse them.** On 20.12.19 D2 disclosed 54 pages comprising 11 of C's confidential documents relating to 11 individual Quilter clients – all of which had been used on its system.

In breach of her **9-month non-competition covenant**, D1 was engaged by D2 from 24.7.19.

2.6. In breach of her **12-month Customer non-solicitation and non-dealing covenants** and **oral undertaking**, D1 solicited and/or dealt with 23 individual C Clients.

2.7. In breach of the **Incentive Scheme**, D1 has failed to repay the guaranteed bonus which she received in the sum of £17,500 gross and which C was entitled to claw back under the terms of the scheme.

[*Continuum*]

2.8. D2 has **induced D1 to act in breach of her contractual obligations to C** and is in **breach of confidence**."

111. It follows that the case which remains is essentially as follows:

(1) A breach of confidence case against EF and Continuum separately (retaining and misusing confidential documents);

(2) A diversion of Quilter's business by EF and encouragement to clients to move with her;

(3) A breach of covenant case against EF, in respect of each of her non-competition, non-solicitation and non-dealing covenants, as well as a breach of her oral undertaking (in respect of 23 individual clients);

(4) Continuum's alleged inducement of EF to breach her contractual obligations to Quilter.

CONSTRUCTIVE DISMISSAL?

The Law

112. The starting point in the analysis of the relevant events discussed above is to determine whether or not EF was constructively dismissed from her post. If that is so, then the Claimant's claims for breach of the express or implied terms of her contract of employment must fail. That is because if an employer commits a repudiatory breach of contract which the employee accepts, then the orthodox view is that the employee will be discharged forthwith from any duties under the contract, including the terms of any restrictive covenant, no matter how reasonable it may be: *General Billposting v Atkinson* [1909] AC 118. The relevant term with which the court is concerned in this case is the implied obligation of mutual trust and confidence.

113. The implied obligation of mutual trust and confidence in employment contracts requires that the employer shall not, "without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee": see *Malik v BCCI* [1998] AC 20 per Lord Steyn at 45, adopting the formulation in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666 (EAT) and *Lewis* v *Motorworld Garages Ltd* [1986] ICR 157; and *Imperial Group Pension Trust v Imperial Tobacco Ltd* [1991] ICR 524.

114. The implied obligation as formulated is apt to cover a great diversity of situations in which a balance has to be struck between an employer's interests in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited. It is a mutual obligation.

115. In assessing whether there has been a breach, it seems clear that what is significant is the impact of the employer's behaviour on the employee rather than what the employer intended. The impact is assessed *objectively*: per Lord Steyn *(ibid.* at 47B). Thus, it is sufficient for the employee to show conduct by the employer which, *objectively considered*, is likely to seriously undermine the necessary trust and confidence in the employment relationship.

116. Lord Denning MR succinctly summarised the relevant legal test in *Western Excavating v. Sharp* [1978] QB 761 at 769 A-C:

> *"if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of*

which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

117. So far as the latter point is concerned, when confronted by a repudiatory breach the innocent party must elect whether to accept the repudiation or affirm the contract. An employee will not be taken to have affirmed the contract until: (a) he/she has knowledge of the facts constituting the breach and (b) knowledge of the legal right to choose between the alternative courses of action open to him/her.

118. In *Cook v MSHK* [2009] EWCA Civ 624 Rimer LJ stated:

"Affirmation in the employment context – 'essentially the legal embodiment of the everyday concept of "letting bygones be bygones"' (Cantor Fitzgerald v. Bird [2002] IRLR 867, paragraph 129, per McCombe J) - should, it is said, be something that the court should not be too ready to find having regard to the onerous statutory regime providing protection against employees from unfair dismissal and which in turn imposes burdens on employers not to act precipitately. Good employer/employee relations demand that employers instead act sensitively, with a view to maintaining the employment relationship. They have a statutory duty to follow proper procedures before dismissing an employee, in default of which the dismissal will be automatically unfair. They should make proper investigations before instigating disciplinary procedures."

119. In *Cockram v Air Products Plc* [2014] ICR 1065, Simler J (as she then was) stated at paragraph 13 as follows:

"This approach represents the common law contractual approach: a party cannot affirm the contract for a limited period of time and then abrogate it on the expiry of that period of time at common law. At common law therefore, an employee wishing to resign and successfully claim constructive dismissal would have to resign without notice. To do otherwise would be to affirm that part of the contract covered by the period of notice, whilst disaffirming the rest in the sense of accepting the employer's repudiatory conduct as entitling the employee to bring the contract to an immediate end."

120. However, in paragraph 15 of the same case, Simler J also stated that:

"It is undoubtedly the case that an employee faced with an employer's repudiatory breach is in a very difficult position, as the courts have repeatedly recognised. Most recently, Jacob LJ described the difficulties in these circumstances in Bournemouth University Corporation v Buckland [2011] QB 323 *at para. 54 as follows:*

"..there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it

will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."

121. It is undoubtedly the case that if the employee decides to accept the repudiatory breach, he must do so unambiguously and with sufficient dispatch. If his purported acceptance is delayed, he runs the risk of a court finding that his action has not been sufficient to discharge the contract. However, in my judgment it is what happens during the delay which is the critical feature: provided the employee makes unambiguously clear his objection to what has been done by the employer, he is not necessarily to be taken to have affirmed the contract by giving a short period of notice, and continuing to work and draw pay for a limited period of time. To this extent, I would respectfully disagree with the observation of Simler J that at common law an employee wishing to resign and successfully claim constructive dismissal would necessarily have to resign without notice. It all depends upon the facts of the particular case whether the employee has nonetheless unambiguously accepted the repudiation of the employer and with sufficient dispatch. The length and circumstances of the delay require to be examined in each case.

Application of the law to the facts of this case

122. In my judgment EF was not constructively dismissed. I reach that conclusion for the following reasons.

123. I accept that EF was unhappy with the level of administrative support that she was receiving at Quilter, coupled with her workload, from a relatively early stage after she joined. However, I do not consider that the matters of which EF complained at that time, fairly analysed, could be said to amount to conduct by Quilter which, *objectively considered*, was likely to seriously undermine the necessary trust and confidence in the employment relationship. There were clearly teething troubles in implementing Vanilla on the XPLAN system and it is clear that EF expected better paraplanner support than she was getting in the early stages of her employment, but she had only been employed for around 4-5 months and she was having to get used to new administrative systems and procedures. So far as the long hours are concerned, EF's employment contract did expressly provide that "*from time to time it may be necessary to work extra hours in order to meet the needs of the business*" and the long hours which EF was required to work at the start of her employment was a consequence of the handover of a large client bank from Carrie Payne to EF and therefore likely to be temporary.

124. In any event, it appears from her exchanges with Mr. Brown of Continuum that from the outset EF had doubts about the wisdom of her having accepted her employed role with Quilter and that she continued to harbour a desire one day to become an independent and self-employed financial adviser. Those doubts grew rapidly as Mr. Brown continued to liaise with her during her employment at Quilter, and his continued contact appears to have unsettled her.

125. By 29 April when she asked to meet Mr. Brown to discuss her possible move to Continuum she was unhappy that "*things [weren't] as promised at Quilter*" but in my judgment it could not be said at that stage that the conduct of Quilter, objectively considered, was likely to seriously undermine the necessary trust and confidence in the employment relationship. EF certainly did not tell Quilter at that stage that she

could no longer work for it as a result. At that stage, the focus of EF's complaint was the lack of administrative support at Quilter which was not as she had anticipated it would be.

126. Moreover, it was only after the pivotal meeting between EF and Mr. Brown at the end of April/beginning of May when EF decided to join Continuum, and after she then began scanning Quilter client documentation onto her personal laptop that her complaints became more pronounced. But by then she had already decided that she would rather work for Continuum, which drove her departure from Quilter.

127. I certainly accept that Quilter handled very badly the complaint that EF made to Ms Waring on 4 June. Ms Waring ought to have elevated the complaint to senior management and EF should have been reminded of Quilter's grievance procedure (to which it had adverted in EF's contract of employment). By the time Mr. Moore became involved in investigating her complaint (and the complaints of others) it was too late, as EF had already resigned. But I do not consider that EF's complaints about administrative support and the office culture at Quilter, or Quilter's restrictive plus model caused her to resign, in whole or in part. I find that she had already decided to do so because, whilst she was undoubtedly unhappy at Quilter, she was attracted by the prospect of acting as an independent adviser at Continuum and by the prospect of continuing to service at Continuum, rather than at Quilter, as many of the clients from Carrie Payne's client bank as she could.

128. I do not therefore consider that this is a "last straw" case, such as was described in *Lewis v Motorworld Garages* [1986] ICR 157, where a cumulative series of acts by the employer taken together amount to a repudiatory breach of the implied term of trust and confidence. Rather, the situation here is closer to that described in Brealey & Bloch's Employment Covenants & Confidential Information, 3rd edn, paragraph 9.68, as cited in *Tullett Prebon v BGC* [2010] IRLR 648 at [86]:

> *"The courts will, however, continue to scrutinise closely the arguments of employees (particularly highly paid individuals and teams moving to a competitor of their employer) who have already secured alternative employment prior to resigning, and who construct arguments of repudiatory breach as a means of avoiding notice periods and irksome covenants. In such cases the argument will fail: (a) often at the first hurdle of whether there has been a repudiatory breach at all; or (b) sometimes, because any such breaches have been waived."*

129. Whilst I do not consider that Quilter's conduct was sufficient to amount to a repudiatory breach of contract, had it so amounted I would not have found that EF had nonetheless affirmed her employment contract. Had there been a repudiatory breach of contract by Quilter, there would certainly have been a strong case for arguing that EF delayed in accepting it, despite having knowledge of the *facts* giving rise to it.

130. EF's evidence was that she informed Mr. Burden of her grievances on 1 May but when he spoke to her about them on 2nd May he belittled them, shouting at her and calling her disorganised. (Mr. Burden denied shouting at her). After that, a month passed and she then articulated more detailed complaints to Ms Waring on 4 June. After doing that, she waited a further month before resigning and in the meantime she

continued to service clients up to 1 July, including those whom she took with her to Continuum. Even then she gave two weeks' notice in accordance with the terms of her contract and did not mention any of her complaints as the reason for resigning. This delay amounts to more than that of "a wronged employee who stays on for a bit whilst he or she considered their position." In my judgment EF would have failed to accept Quilter's repudiatory breach (had there been one) unambiguously and with sufficient dispatch in these circumstances.

131. However, it was not put to EF that she had knowledge of her *legal right to chose* between treating herself as discharged under the contract or treating the contract as continuing and it appears that she did not know that she had this choice. As a result, I would have held that she had not affirmed the contract by delaying her departure from Quilter in this way.

RELEVANT TERMS OF EF'S CONTRACT

132. I turn next to whether EF is in breach of the express and/or implied terms of her contract.

Express terms of EF's employment contract

133. The relevant express terms of EF's employment contract are set out in paragraph 15 above. In paragraph 16.11 of its Particulars of Claim, Quilter alleges that EF is in breach of the express terms of her employment contract as follows:

(1) EF failed to devote her whole time, attention and abilities to her duties of her employment with Quilter during the normal working hours of the Company, contrary to the term of her contract headed "*The Role*";

(2) In breach of section 7 of her employment contract, EF failed to supply Continuum with a full copy of her employment contract upon being offered her consultancy arrangement with Continuum;

(3) In breach of section 7 of her employment contract, EF failed to disclose to Quilter the identity of Continuum as soon as possible after accepting its offer of employment or a consultancy arrangement;

(4) During her garden leave, in breach of the *obligation to provide work* clause in her employment contract, EF contacted customers who conduct business with Quilter, whether in a professional or personal capacity, without Quilter's prior written permission;

(5) In breach of the *conflict of business interest clause*, EF has during her employment carried on, been engaged in or otherwise interested in other business where this is, or is likely to be, in conflict with Quilter's interests.

134. As to whether these breaches of EF's employment contract are proved by Quilter, I find as follows:

(1) EF is in breach of this clause in failing to devote her whole time, attention and abilities to her duties of her employment with Quilter during the normal working hours of the Company, in that during her employment with Quilter and in normal

working hours she attended an induction course with a competitor, Continuum, between 24-26 June 2019; she undertook a competency assessment with a competitor, Continuum, with a view to joining them; she also met or had telephone discussions with Continuum employees with a view to making preparations and agreeing terms of employment to commence work there.

(2) EF is in breach of this clause. She failed to supply Continuum with a full copy of her Quilter contract of employment upon being offered her consultancy arrangement with Continuum. She was offered a role as an independent adviser at Continuum, which I consider was in the nature of a consultancy arrangement, during her employment with Quilter on 23 May when Mr. Brown sent her the Continuum Partner Agreement; and she was certainly offered such a role in the six months following Termination of her Employment at Quilter as she signed the Partnership Agreement on 24 July 2019.

(3) EF is not in breach of this clause (alleged failure to disclose to Quilter the identity of Continuum as soon as possible after accepting its offer of employment or a consultancy arrangement). EF accepted Continuum's offer of employment or a consultancy arrangement on 24 July 2019. Whilst it is true that on 4th June she misled Ms Waring into believing that she was thinking of going back to work for Tilney, I have found that she told Mr. Moore the identity of Continuum at their meeting on 9th July and that she was going to work as an IFA for it;

(4) EF is in breach of this clause which concerns her garden leave, covering the period 4-19 July 2019. Quilter reminded EF of this specific obligation which she had undertaken in her employment contract in the Leaver Acknowledgment letter that it sent to EF on 12 July 2019. However, during the relevant period (4-19 July) I find that EF *did* contact customers who conduct business with Quilter, whether in a professional or personal capacity, without Quilter's prior written permission, namely client 10 AK (on 6 July); Client 14 SP (on 18 July); Client 12 RN (on 10 July).

(5) EF is in breach of this clause. EF has during her employment carried on, been engaged in or otherwise interested in other business where this is, or is likely to be, in conflict with Quilter's interests. The same points apply as under sub-paragraph (1) above.

Implied terms: good faith and fidelity and trust and confidence

135. Quilter also alleges (and maintains in its closing) that EF's contract of employment contained the following two implied terms, namely (1) an implied duty of good faith and fidelity and (2) an implied duty of trust and confidence.

Existence of implied terms

136. It is not disputed in this case that an employee has an obligation of fidelity towards his employer. This duty is based upon what a person of ordinary honesty would consider honest or dishonest respectively: *Robb v Green* [1895] 2 QB 315. In *Attorney General v Blake* [1998] 2 WLR 805, Lord Woolf summarised it as follows:

> *"The employee must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third party without the informed consent of his employer."*

137. In the light of the terms of EF's employment contract and job description (which is the starting point in the analysis: per Moses LJ in *Helmet Integrated Systems v Tunnard* [2007] IRLR 126 at [32]), EF and Continuum admit in their Defences that the scope of the obligation of fidelity resting upon EF in this case encompasses:

(1) A duty not to compete with Quilter. The admission is well founded:

(a)\The duty of fidelity gives rise to a duty not to compete with the employer during working hours for the custom of customers, *including making preparations to compete*: *Thomas Marshall v Guinle* [1978] 3 WLR 116; *Helmet Integrated Systems v. Tunnard* [2007] IRLR 126 at paragraph [28] per Moses LJ. In *Robb v Green* [1895] 2 QB 315 the defendant surreptitiously copied from the Claimant's order book a list of names and addresses of customers with the intention of soliciting them after he had left employment and had set up a similar business on his own. Subsequently he did leave and used the list. The Court of Appeal found for the Claimant and affirmed the existence of an implied duty not to prepare to compete;

(b) \Indeed, even outside of working hours, an employee may not be entitled to compete with his employer where those activities are liable to inflict real harm on the employer: *Hivac v Park Royal Scientific Instruments* [1946] 1 Ch 169 at 174 (per Lord Greene MR);

(c)\Nor may the employee solicit the custom of the employer's customers whilst employed by it, and it is irrelevant that the solicitation takes place only shortly before the employment ends and that the employee is only seeking custom from a time after the employment has ended: *Wessex Dairies v Smith* [1935] 2 KB 80.

(2) A duty not to assist a competitor of Quilter. This admission is well founded: in *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 the obligation of fidelity was held, prima facie, to apply to workers carrying out in their own spare time skilled work for a competitor of their employer which would damage their employer's business.

(3) A duty not to divert a business opportunity away from Quilter. This admission is also well founded. A common way in which this duty is breached is for the employee to mention to customers that he is leaving and either directly or indirectly suggest to them that he is available to meet their needs once he/she has left. Indeed, this duty prevents an employee from taking advantage of any approach which is initiated by a customer or supplier even though the employee did not seek or even encourage it: *Sanders v Parry* [1967] 2 All ER 803 per Havers J.

(4) A duty not to use any of Quilter's confidential information for her own purposes or disclose it to third parties. This admission is also well founded: *Faccenda*

Chicken Ltd v Fowler [1987] Ch 117. The earliest cases on this topic involve what might properly be described as misuse by an employee of his employer's trade secrets or other property: e.g. *Yovatt v Winyard* (1820) 1 J & W 394 (surreptitious copying of recipes for medicines); *Robb v Green* [1895] 2 QB 315 (surreptitious copying of customer list). *Wessex Dairies* itself was a case of a milkman soliciting his employer's customers while actually on his rounds. Thus in *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, 135-6 Neill LJ said:

> *"While the employee remains in the employment of the employer the obligations are included in the implied term which imposes a duty of good faith or fidelity on the employee. For the purposes of the present appeal it is not necessary to consider the precise limits of this implied term, but it may be noted: (a) that the extent of the duty of good faith will vary according to the nature of the contract (see Vokes Ltd v Heather, 62 RPC 135); (b) that the duty of good faith will be broken if an employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately memorises such a list, even though, except in special circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer: see Robb v Green [1895] 2 QB 315 and Wessex Dairies Ltd v Smith [1935] 2 KB 80."*

138. The Defendants respectively deny and do not admit that the duty of fidelity encompasses a duty not to conceal EF's own wrongdoing and not to mislead Quilter about her future employment plans.

139. However, I consider that the duty of fidelity does indeed encompass both a duty not to conceal the employee's own wrongdoing and a duty not to mislead an employer about the employee's future employment plans, not least because the duty of fidelity includes a duty of honesty: see *Kynixa v Hynes* [2008] EWHC 1495; *Imam-Sadeque v Bluebay Asset Management (Services) Ltd* [2013] IRLR 344 and *Fulham Football Club v Tigana* [2004] EWHC 2585 at [99].

140. As to (2) (implied duty of trust and confidence), it is also correctly admitted by the Defendants that the contract contained an implied term that EF would not act without reasonable and proper cause so as to destroy or seriously damage the Claimant's trust and confidence in her.

BREACH OF IMPLIED TERMS?

141. EF would have been aware, as a result of the terms of her contract of employment and job description and her long experience as a financial adviser in this marketplace, of the importance of the retention by Quilter of the high-value clients with whom she had been entrusted from the outset of her employment (the Carrie Payne client bank) and of developing the relationship with those clients for the benefit of Quilter; of not diverting the business of those clients away from Quilter; contacting those clients without Quilter's permission during any period of gardening leave; of the importance of keeping confidential the data held by Quilter concerning those clients on whatever medium that data might be stored; and of the importance of her not engaging in any

other business during her employment where that might interfere with her duties owed to Quilter. She would also have known that documents prepared by her in the course of her employment would belong to Quilter.

142. These features of her contract and job description make it appropriate to imply a term of good faith and fidelity into EF's contract of employment of the type described above. Quilter alleges that EF breached the implied terms of her employment contract in the ways set out in paragraph 16.12 of its Particulars of Claim as follows:

(1) Engaging in competitive activity against Quilter;

(2) Assisting a competitor of Quilter;

(3) Diverting business opportunities away from Quilter;

(4) Misappropriating Quilter's property for her own benefit and/or that of Continuum;

(5) Misusing Quilter's confidential information for her own advantage and/or disclosing it to Continuum;

(6) Concealing her own wrongdoing;

(7) Failing to disclose her own wrongdoing to Quilter;

(8) Misleading Quilter about her future employment plans on 4 July 2019.

143. My findings are as follows.

144. Whilst there was some debate about it at trial, I am in no doubt that the Quilter client documentation in the form of Fact Finds, Valuation Reports, Portfolio Reports and Investment Product Details; as well as extracts from Quilter's customer relationship management database (XPLAN) amounted to confidential information belonging to Quilter.

145. Three elements are required for a case of breach of confidence to succeed. First, the information must have the necessary quality of confidence. Second, it must have been imparted in circumstances requiring an obligation of confidence. Third, there must be an unauthorised use of that information to the detriment of the party communicating it: *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.

146. Mr. Burden gave evidence that Quilter's documentary records about their clients are confidential. Gathered over a long period of time, they record the ongoing suitability of investments for the particular client; his/her attitude to risk; his/her identity checks for money laundering purposes; and their client service agreements. It enables an adviser to see how the client's portfolio has been built up; over what period of time, and the reasons why the client has built up that portfolio. Mr. Burden explained how this cannot all be carried in the adviser's head and if one were starting from scratch it would take a considerable period of time to build up this profile.

147. It seems to me that this type of information does have the necessary quality of confidence and I accept this evidence. The client's portfolio has been put together for

him/her as a result of the skill and advice of the Quilter adviser and substantial work has been required to collate the information into a compendious report (as in the case of Quilter's Valuation Reports, which EF scanned onto to her personal laptop in many cases), which has frequently been carried out over a number of visits to the client. The information will have been imparted by the client to the adviser and by the adviser to the client in circumstances requiring an obligation of confidence.

148. Indeed, in paragraph 9b of her Defence, EF admits that the following items of information were indeed capable of constituting the Claimant's confidential information:

(1) Quilter's customer and supplier database;

(2) Products, services, marketing and business development plans;

(3) Pricing information (including any special arrangements with customers and suppliers);

(4) Details of research and analysis; and

(5) Financial and management information.

149. Moreover, in cross-examination EF accepted that she knew that she could not take away Quilter's confidential documents with her. This was *Quilter's* confidential information about *its* client base.

150. Continuum likewise admits in its Defence at paragraph 21 that the information set out in paragraph 11.5 of the PoC is not generally publicly available or easy to memorise and so "much of it will be confidential". Paragraph 11.5 of the PoC refers to customers' names, addresses, telephone numbers, portfolios of assets, fees charged, risk appetites, income, expenditure, personal and family circumstances and health situations.

151. It was suggested by both EF and Continuum however, that the information which appears in the Quilter client Fact Finds or Valuation Reports is information (a) belonging to the client and so the client was entitled to disclose it to EF and (b) which EF carries in her head in any event. I do not accept either of these arguments.

152. In *Towry EJ v Bennett* [2012] EWHC 224, in considering the efficacy of an express confidentiality covenant covering such details and the general law of confidence, Cox J found that the body of clients (or customers) and the details relating to them are the 'lifeblood' of any business involved in the provision of financial advice, and that those details constitute the type of information which such a business needs to protect. She rejected a submission that, to the extent that individual defendants would have retained such details in their head, they amounted to stock in trade or skill and knowledge: "*The fact that a financial advisor may retain such information in his head, without any deliberate effort to do so, does not ... render it any less confidential. If it were otherwise, an employee who left his employment would then be entirely free to use such client information in any way he chose, and the employer would be unable to rely upon contractual, post-termination clauses preventing the misuse of such information.*"

See also: *Spafax Ltd v Harrison* [1980] IRLR 442 at p. 447 (where the court regarded as confidential such matters as names and addresses of customers, names of buying agents, recent selling history and computer print-outs containing details regarding customers and price lists).

153. I consider that the same analysis applies to the facts of this case.

154. The fact that EF chose to scan these documents onto her personal laptop also lends considerable weight to this conclusion, as she clearly felt that she needed to do that precisely because she could not carry this information around in her head. It is not part of her skill and knowledge and her actions were a clear breach of her implied terms of fidelity and trust and confidence.

155. I should add that by so acting EF was also in breach of the equitable obligation of confidence that she owed to Quilter, in misusing Quilter's confidential information (which obligation is denied by EF in paragraph 6 of her Defence but admitted by Continuum in paragraph 13 of its Defence).

156. I have found as a fact that the substantial scanning of Quilter's client documentation onto her *personal* laptop by EF was a deliberate act on her part to take away with her Quilter's client information so that she could continue to deal with these clients at Continuum with the benefit of that information. It enabled EF to utilise the information contained in those Quilter documents to populate the Continuum IO System (including Continuum client Fact Find documents) with Quilter client data.

157. That was a breach of her duty of fidelity as well as a breach of the duty of trust and confidence owed to Quilter; as was her use of this confidential information for her own purposes; as was the fact that by doing this she was making preparations to divert business opportunities away from Quilter and to compete with Quilter (indeed, as can be seen from some of the individual client cases below); as was EF's concealment of her own wrongdoing by scanning these documents onto her personal laptop without informing Quilter that that was what she had done during the course of her employment with it.

158. Last, for completeness I should state again (since it is raised by Quilter as an alleged breach of an implied term) that I do not consider that EF misled Quilter about her future employment plans on 4 July 2019. I have addressed that issue in paragraph 134(3) above.

ARE THE RESTRICTIVE COVENANTS VALID?

159. EF's contract of employment contained three restrictive covenants which apply as from the date of termination of her employment contract, namely a non-competition, a non-solicitation and a non-dealing covenant, as set out above.

160. Quilter relies upon all three covenants to restrain EF from working at its competitor, Continuum; from soliciting its clients; and from dealing with its clients. The Defendants argue that the covenants are wider than is reasonably necessary for the protection of the interests of the Claimant and were and are invalid and unenforceable because their length and scope extend beyond that which is reasonable to protect the Claimant's legitimate business interests.

161. In the case of each covenant there are three questions to be answered, per Cox J in *TFS Derivatives Ltd v Morgan* [2005] IRLR 246 at [36]-[38] and *Office Angels Ltd v Rainer Thomas & O'Connor* [1991] IRLR 214 at paragraphs [21]-[25] per Sir Christopher Slade.

162. Those questions are as follows:

(1) Have the former employers (Quilter) shown on the evidence that they have legitimate business interests requiring protection in relation to the employee's employment?
(2) What does the covenant mean when properly construed?
(3) The covenant must be shown by the employer to be no wider than is reasonably necessary for the protection of his legitimate business interests. Reasonable necessity is to be assumed 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. The covenantee must show that the covenant is both reasonable in the interests of the contracting parties and reasonable in the interests of the public. As Lord Parker stressed in *Herbert Morris Ltd v Saxelby* (supra) at p.707, for any covenant in restraint of trade to be treated as reasonable in the interests of the parties "it must afford *no more than* adequate protection to the benefit of the party in whose favour it is imposed."

163. Even if the covenant is held to be reasonable, the court will then decide whether, as a matter of discretion, the injunctive relief sought should in all the circumstances be granted, having regard, amongst other things, to its reasonableness as at the time of trial.

164. If a restrictive covenant applying after employment has terminated is held to be unreasonable, then it is void and unenforceable. The court cannot read down such a clause in an effort to render it reasonable and enforceable. (In certain circumstances, however, if only a discrete phrase within a particular covenant is held to be unreasonable, individual words or phrases may be "blue-pencilled" or severed, provided that what is left makes independent sense without the need to modify the wording and that the sense of the contract is not changed. But none of the parties have contended for such an approach in the present case).

(1) Legitimate business interests requiring protection?

165. The subject-matter in respect of which an employer may legitimately claim protection from an employee by a covenant in restraint of trade was further identified by Lord Wilberforce in *Stenhouse Ltd v Phillips* (at p.400) as follows: [1974] AC 391:

> *"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."*

166. There is no doubt in my judgment that Quilter had legitimate business interests which required protection in relation to EF's employment in this case, which consisted of what are sometimes called special trade connections (here, its customers and potential customers) as well as its business secrets (here, its confidential information in the form of Client Valuation Reports, Fact Finds and Client Service Agreements). The issue for determination is therefore whether Quilter has demonstrated on the evidence that the covenant is no wider than is reasonably necessary for the protection of those interests and it is that issue that I shall turn to next, after first construing the covenants.

(2) Proper construction of the covenants

167. Having identified the legitimate business interests which require protection, the next stage is to construe the contract in accordance with the ordinary principles of contractual construction and, materially to the present case, the contract should be construed in a sensible, rational way: *Arbuthnot Fund Managers v Rawlings* [2003] EWCA Civ 518, citing *Haynes v Doman* [1899] 2 Ch 13, 25 per Sir Nathaniel Linley MR:

> *"Agreements in restraint of trade, like other agreements, must be construed with reference to the object sought to be attained by them. In cases such as the one before us, the object is the protection of one of the parties against rivalry in trade. Such agreements cannot properly be held to apply to cases which, although covered by the words of the agreement, cannot be reasonably supposed ever to have been contemplated by the parties, and which on a rational view of the agreement are excluded from its operation by falling, in truth, outside, and not within, its real scope."*

168. That stated, as Chadwick LJ stated in Arbuthnot at [23-24]:

> *"…it is not the function of the court to strive to give to the clause a meaning which enables it to have effect within the constraints of public policy if that is not the meaning which, as a matter of construction, the parties are to be taken to have intended that it should have. As Lord Justice Simon Brown put it in J A Mont (UK) Ltd v Mills [1993] IRLR 172 at paragraph 28 on page 176:*
>
> > *' ..... the court should not too urgently strive to find within restrictive covenants ex facie too wide, implicit limitations such as alone could justify their imposition.'*
>
> *The court must steer a course between giving to the clause a meaning which is extravagantly wide; and giving to the clause a meaning which is artificially limited. The task of the court, in construing the contractual term is simply to ask itself: "what did these parties intend by the bargain which they made in the circumstances in which they made it?"*

169. See also the Supreme Court in Tillman v Egon Zehnder Ltd [2019] UKSC 32 at [38]-[42]; and *Turner & Others v Commonwealth & British Minerals Limited* [2000] IRLR 114, in which Waller LJ stated at [14]:

> *"There is in my view some interconnection between the question of construction and the doctrine of restraint of trade. That, as it seems to me, must be so for a least one reason. If a particular construction was to lead to the view that the clause was unenforceable, then an alternative view, which did not lead to the same result if legitimate, ought to be preferred."*

170. In summary, if, having examined the restrictive covenant in the context of the relevant factual matrix, the court concludes that there is an element of ambiguity and that there are two possible constructions of the restrictive covenant in issue, one of which would lead to a conclusion that it was an unreasonable restraint of trade and unlawful, but the other would lead to the opposite result, then the court should uphold the covenant on the basis that the parties are to be deemed to have intended their bargain to be lawful and not to offend against the public interest.

Non-competition covenant

171. The non-competition covenant in this case provides as follows (having inserted the Termination date and the definition of Services):

> *"In order to protect the Confidential Information and business connections of the Company to which they have access as a result of the Appointment, the Employee covenants … that they shall not for the following periods (less any period or periods spent on Garden leave immediately prior to Termination) after Termination howsoever arising save with the prior written consent of the Company (which shall not be unreasonably withheld or refused) directly or indirectly, either alone or jointly with or on behalf of any third party and whether on their own account or as principal, partner, shareholder, director, employee, consultant:*
>
> > *a. for nine months following 19.7.19 and in competition with the Company be employed or engaged in, assist or be interested in any undertaking which provides those parts of the business of the Company and/or Instrinsic with which [EF] was materially concerned at any time during the 12 months prior to Termination and, in particular, but not limited to, its business of the provision of Life, Pension and Investment services and Financial Advisory and Planning services*
>
> *Section 3: None of the restrictions in clause Section 1 shall prevent the Employee from*
>
> > *…b. being engaged or concerned in any business concern insofar as the Employee's duties or work shall relate solely*

> *to geographical areas where the business concern is not in competition with those parts of the business of the Company and/or Instrinsic with which [EF] was materially concerned at any time during the 12 months prior to Termination…; or*
>
> *c. being engaged or concerned in any business concern, provided that the Employee's duties or work shall relate solely to services or activities of a kind with which the Employee was not concerned to a material extent in the 12 months before Termination."*

172. I agree with Mr. Sethi QC's submission in closing that the meaning of this clause is, sensibly construed, to prevent EF from being engaged in any other undertaking providing the kinds of services she provided whilst employed by Quilter, including Life, Pension and Investment services and Financial Advisory and Planning services (save for the carve-outs, which, for example, allows EF to be engaged in geographical areas where Quilter does not operate; or in providing services with which she was not involved in her last 12 months with Quilter). These are, of course, the very services that EF would be providing at Continuum.

173. I also agree, as I have said earlier in this judgment, that Continuum was undoubtedly a competitor of Quilter and that EF was competing with Quilter whilst engaged by Continuum.

174. It follows that the central issue between the parties is this: has the covenant been shown on the evidence by Quilter to be no wider than is reasonably necessary for the protection of its legitimate business interests?

175. In my judgment it has not and this is not a case of the type discussed in paragraphs 169-170 above. I reach that conclusion for a number of reasons as follows:

(1) Quilter adduced very little evidence indeed to demonstrate that the non-competition covenant is no wider than is reasonably necessary for the protection of its legitimate business interests. Mr. Burden deals with it in passing in one paragraph at the end of a 166 page statement (paragraph 15.2). All that he says, in a wholly generalised way, is that "the non-compete restriction is necessary because post-termination confidentiality obligations are very difficult to police in practice."

(2) The length of the period of notice can be an indication of the unreasonableness regarding the duration of the restraint. Here, the restrictions apply irrespective of the length of time that EF had in fact been employed by Quilter. She was subject to a period of probation during which Quilter could terminate her employment with a mere 2 weeks' notice. (After she passed her probation she was required to give 3 months' notice, and entitled to receive 2 months' notice). It is unreasonable for her to be prevented from being employed by a competitor for 9 months when she might be in employment with Quilter for just 2 weeks, see *Mason v Provident Clothing* [1913] AC 724 at 732 and 741 (employment could be terminated on 2 weeks notice and a 3 year non-competition clause within 25 miles of London, where the former

employer was based). In *Gledhow Autoparts v Delaney* [1965] 1 WLR 1366 at 1377 Diplock LJ (as he was) said this:

> *"The defendant was in fact employed for over six years by the plaintiffs and no doubt became a valuable servant and acquired considerable knowledge of and personal relation with the plaintiffs' customers. It is natural in those circumstances to tend to look at what in fact happened under the agreement. But the question of the validity of a covenant in restraint of trade has to be determined at the date at which the agreement was entered into and has to be determined in the light of what may happen under the agreement, although what may happen may cover many possibilities which in the result did not happen. A covenant of this kind is invalid ab initio or valid ab initio. There cannot come a moment at which it passes from the class of invalid into that of valid covenants.*
>
> *If this covenant is examined as at the date at which the contract was entered into, it is to be observed that the covenant is expressed to restrain the defendant for a period of three years from seeking to obtain orders within the districts in which he has operated during the course of this agreement or during any period of employment with the plaintiffs.*
>
> *Clause 5 makes the agreement terminable on one week's notice. It therefore follows that if the defendant had proved perhaps an unsatisfactory traveller and his employment had been determined, as it could have been, within two weeks of having entered into the agreement, he would nevertheless have been restrained from seeking any orders in similar goods in any district in which he had operated, despite the fact that in those circumstances it is obvious that he could have called upon only very few of the potential customers in that district."*

(3) Furthermore, the fact that EF's employment is subject to a 6 month period of probation made it foreseeable that her employment might be terminated during the probation period after having been employed for only a short period of time and yet she would still be subject to a 9 month non-competition restriction, despite the fact that she would only have had time to build a very short-term relationship with any clients in that period. Indeed, Mr. Rhodes, Quilter's Senior HR Business Partner, accepted in cross-examination that the 6 month probation period gave EF "little time to build a relationship" with clients.

(4) Moreover. the shorter the period of notice the less important to the company the employee's services would appear to be and the more lowly his or her position is likely to be. It follows that the perceived need for protection is diminished: see *Restrictive Covenants under Common and Competition law* (6th edn), Kamerling and Goodwill, para 8.5.5.3.

(5) It is true that it was envisaged at the outset that EF would assume Carrie Payne's book of clients which Quilter had built up over a significant period of time. It might therefore be said (as Mr. Sethi QC submitted) that a 9 month non-competition clause was reasonably considered to be necessary even if EF left Quilter's employment after a matter of weeks. However, it is the establishing of the relationship between the client and the adviser which, as Mr. Burden put it in his evidence, is the "jewel in the crown" of a company such as Quilter. Those relationships take time to build: indeed, Mr. Burden's evidence was that it takes 12 months or more to become a trusted adviser of a client, and to build that personal relationship with a customer. In those circumstances, the mere fact that Ms Payne's book of clients was to be gradually transferred over to EF, or that EF had access to the documentation relating to those clients, cannot of itself justify the imposition of a 9 month non-competition clause. The threat of a departing employee requires less protection if she has had less of an opportunity to build such a relationship with the clients. Having access to client-related documentation does not of itself build a strong client relationship.

(6) Indeed, since it was Quilter's case that it typically takes 12 months or more to establish enduring personal relationships with clients, it needs to provide a justification for requiring 9 months protection against an employee who may have been in post only for a matter of weeks before his/her employment is terminated.

(7) I asked Mr. Sethi QC in closing why it is said to be reasonably necessary to prevent EF for 9 months from having dealings with non-Quilter clients. He suggested that one of Quilter's legitimate business interests was "in [EF] not assisting a competitor". But as against EF, it has no such legitimate business interest. The evidence showed that EF only had access to client-related confidential information at Quilter. Whilst it was legitimate for Quilter to seek to protect its customers and its confidential customer information, it was not legitimate for it to seek to prevent competition from its former customer advisers *per se*.

(8) Indeed, in the case of employment contracts, covenants against competition *per se* are never as such upheld by the court. As Lord Parker put it in *Herbert Morris Ltd v Saxelby* (supra) at p 709:

> *"I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained."*

(9) It is of some relevance that Mr. Moore, who was Head of Quilter and who had access to far more confidential information about the business than EF, was himself subject to much less onerous covenants than EF. His non-competition, non-solicitation and non-dealing covenants last for 6 months, compared to EF's 9 month and 12 month restrictions. Whilst it is true that Mr. Moore did not himself deal with clients in the same way as an adviser does, he would obviously have access to the same confidential client information that an adviser would (indeed, he had access to much more). This again demonstrates that Quilter needs to adduce evidence to justify imposing longer periods of restraint on a much more junior employee who would not have access to the same degree of confidential information. This point is reinforced by the fact that Mr. Burden had the same restrictive covenants as EF in his contract of employment and yet he accepted in cross-examination that, as Quilter's Regional Financial Planning Director and Head of the Exeter Office, he had access to a much wider range of confidential information (including strategic and managerial information) than did EF. As Mr. Tatton-Brown QC submitted in opening, EF's contract of employment "appears to be an old "one size fits all" contract used for more senior employees than her, and nobody appears to have given any thought to the suitability of the restrictive covenants for an employee of her status."

(10) The legitimate business interests of Quilter could be protected by an appropriately worded non-dealing covenant relating to its customers; whereas the non-competition covenant prevents EF from doing business with new clients who have nothing to do with Quilter. A covenant cannot be said to afford no more than adequate protection for the covenantee's legitimate interests if the evidence shows that another form, *much* less far reaching and less potentially prejudicial to the covenantor, would have afforded adequate protection: *Office Angels v Rainer-Thomas* [1991] IRLR 214 at [50], cited in *QBE Management Services v Dymoke* [2012] EWHC 80 at [214].

(11) As to this, Mr. Sethi QC submits that "client non-solicit/deal covenants are difficult if not impossible to police and that in itself is one powerful reason to impose a non-compete for a limited period of time". This is the point which Mr. Burden asserted in his witness statement. But there was no substantive evidence to support this submission other than Mr. Burden's assertion; and indeed, the fact that the parties knew that EF was to be presented with an identifiable book of clients by Ms Payne undermines any such suggestion: the fact is that the parties know precisely with which clients EF dealt during her employment with Quilter.

(12) Because Quilter is a nation-wide business, as Mr. Tatton-Brown QC pointed out, the geographical carve out to the non-competition clause is of little practical effect. If EF left to join a small firm offering financial advice to high net worth individuals in Carlisle, that would compete with Quilter's Carlisle office which offers a similar service. However, Quilter has no legitimate interest in preventing her doing so as during her employment with Quilter, EF had nothing to do with Carlisle-based clients. It would be a pure covenant against competition (Continuum referred to this as the "Carlisle problem"). Mr. Sethi QC had no answer to this point. He submitted that this

point was "hopeless" because Continuum is also a national advice firm, just like Quilter. But that misses the point: what matters is that EF was prevented by the non-competition covenant from joining a small firm in other parts of the country precisely because of the geographical reach of Quilter's offices.

(13) The evidence suggested that non-competition covenants for employees such as EF were not industry standard. They were unusual and not reasonably necessary. Neither Tilney nor Continuum itself have such covenants in their adviser contracts.

(14) Significantly, Mr. Moore himself said that he would have been content to permit EF to continue to work at Continuum following their chance meeting on 6 November 2019 had she ceased to deal with Continuum's clients. Mr. Burden also gave evidence that EF's non-competition covenant was not of "grave concern" to him in isolation and if EF had asked him if she could join Continuum, he "*wouldn't at that point have been unduly concerned and would have said yes*." This suggests, which accords with my judgment, that both Mr. Moore and Mr. Burden considered EF's non-solicitation and non-dealing covenants were sufficient to protect Quilter's business interests, and that the addition of a non-competition covenant went further than was necessary. Indeed, the fact that, as described above, when Quilter learned of EF's engagement by Continuum by early August 2019 it did not seek injunctive relief for some 4 ½ months also suggests that a non-competition covenant is not necessary to protect Quilter's legitimate business interests. It is worth noting in passing that in his internal Quilter email of 6 November 2019 recording his discussion with EF when he bumped into her in Bristol, Mr. Moore himself stated: "*She referred to the clause relating to her being unable to work for 9 months, I think we all know that this [is] open to challenge but again I reminded her of her obligations to adhere to her restricted [sic] covenant".*

176. Last, I add that in respect of this covenant as well as the non-solicitation and non-dealing covenants (addressed below), like Plowman J in *Technograph Printed Circuits v Chalwyn* [1967] FSR 307 at 311, I do not consider that the validity of the covenants can be saved by reason of the fact they contain a proviso which states that the restrictions apply *unless the employee has the prior written consent of the employer, which shall not be unreasonably withheld or refused*. In particular, if it were the case that they can be saved in this way, prima facie unenforceable covenants would routinely be rendered enforceable by such a device, which is unreasonable: see *Chafer Ltd v Lilley* (1947) LJR 231 176 LT 22. Moreover, if in such a case the employer withholds his consent, it is unfair to place upon the employee the difficult burden of establishing that the withholding of that consent was unreasonable.

177. Indeed, the very fact that Quilter saw the need to insert this device might suggest that it had little faith in a Court regarding the restrictions as being reasonable, as if the clause is reasonable anyway, the consent proviso is irrelevant.

178. In one paragraph of his opening submissions, Mr. Tatton-Brown QC suggested that it is to be doubted that a non-competition or non-dealing covenant is appropriate at all in the context of the industry in which Quilter operates. A covenant in restraint of trade, to be enforceable, has not only to be reasonable as between the parties, but also

reasonable in the interests of the public : see *Herbert Morris Ltd v Saxelby [1916] 1 A.C. 688* at 707. Here, he submitted, Quilter has a regulatory obligation to act in the best interests of the client. Non-competition and non-dealing clauses act as a fetter on clients' ability to instruct the adviser of their choice: that is not in their best interests, and hence a breach of the client best interests' rule. If a client would like to continue to instruct a departing adviser, it is not in the public interest to prevent them from doing so through the enforcement of a non-competition or non-dealing covenant. To the extent that there is a conflict between a firm seeking to enforce a covenant and the interests of a client, that conflict must be resolved in favour of the client.

179. Quilter did not address this argument in its submissions and whilst I can see the force of the argument, I am not entirely persuaded by it. It seems to me that it is necessary to balance the public interest in the protection of the goodwill (in terms of customer connections) and the trade secrets of businesses of this type against the public policy that financial services advisers should be free to act in the best interests of the client by in particular, being able to join a competitor who offers the client a market wide offering of financial products rather than being forced to remain at a current employer who only offers those clients a restricted "in house" offering of financial products. But if the restrictions are found to be reasonable as between the parties by reference to the first of these considerations, then it is likely in my judgment that it will outweigh the latter consideration: after all, the client can always choose to engage a different financial services provider who does offer a full market service, regardless of the position of the individual financial adviser. However, in the absence of full argument on the point, and since it is unnecessary for me to decide the point for the purposes of this judgment, I prefer to leave the point open.

180. In the circumstances I find that the non-competition covenant is an unlawful restraint of trade and void.

The non-solicitation and non-dealing covenants

181. It is necessary next to consider whether the non-solicitation and non-dealing covenants have been shown by Quilter to be no wider than is reasonably necessary for the protection of its legitimate business interests.

182. The **non-dealing** covenant reads as follows (with the insertion of the definition of "Customer" and "Services" into the clause):

> *"…for twelve months following Termination, and in competition with the Company be concerned with the supply of [those parts of the business of the Company and/or Intrinsic with which the Employee was materially concerned at any time during the 12 months prior to Termination and, in particular, but not limited to, its business of the provision of Life, Pension and Investment services and Financial Advisory and Planning Services] to any [person, firm, company or entity in respect of which terms and conditions of business for the provision of financial advisory services have been in place between that person, firm, company or entity and the Company … during the 18 month period prior to Termination and in respect of which the Employee was materially concerned or had material*

> *personal contact at any time during such 18 month period prior to Termination];"*

183. In other words, for 12 months following termination of her employment, EF is prevented from supplying financial advisory services (and the like) with which she was materially concerned at any time in the 12 months prior to termination to any customer who has been a client of Quilter during the 18 months prior to termination of her employment and in respect of whom EF was materially concerned or had material personal contact during that 18 month period.

184. The **non-solicitation** covenant reads as follows (with the insertion of the definition of "Customer" and "Services" into the clause):

> *"for twelve months following Termination, and in competition with the Company, solicit or otherwise endeavour to entice away from the Company … the business or custom of any [person, firm, company or entity in respect of which terms and conditions of business for the provision of financial advisory services have been in place between that person, firm, company or entity and the Company … during the 18 month period prior to Termination and in respect of which the Employee was materially concerned or had material personal contact at any time during such 18 month period prior to Termination] in relation to the supply of [those parts of the business of the Company and/or Intrinsic with which the Employee was materially concerned at any time during the 12 months prior to Termination and, in particular, but not limited to, its business of the provision of Life, Pension and Investment services and Financial Advisory and Planning Services]."*

185. In other words, for 12 months following termination of her employment, EF is prevented from soliciting the business of a customer who (i) has been a client of Quilter during the 18 months prior to termination of her employment; (ii) in respect of whom EF was materially concerned or had material personal contact during that 18 month period in relation to the supply of financial advisory services (and the like): and (iii) with which she was materially concerned at any time during the 12 months prior to termination.

186. Thus, the question again arises: has each of these covenants been shown by Quilter to be no wider than is reasonably necessary for the protection of its legitimate business interests?

187. Mr. Tatton-Brown QC for Continuum submits that these restrictions are likewise invalid. He says that the restriction applies for 12 months even if EF was employed only for a month. Whilst normally the impact of that feature of the covenant might be mitigated by the fact that the proscribed class of clients would be smaller (because the shorter period of employment would result in less client contact), he says that is not so in this case, because the way that the covenant is structured means that it captures clients of EF's former employer Tilney. That is because, he says, the proscribed clients are those who have had terms and conditions of business with Quilter in the 18 months prior to termination, which in EF's case includes about one year before she

started her employment with Quilter. The material contact does not need to be during her employment with Quilter.

188. I remind myself of the required approach to these covenants which I have set out in paragraphs 168-170 above.

189. In my judgment, contrary to Mr. Tatton-Brown QC's submission, neither of the clauses is, objectively construed, intended to capture clients of EF's former employer, Tilney, and to be artificially limited in that way. Whilst it is fair to say, as Mr. Tatton-Brown QC points out, that the clause does not refer to those with whom the employee was "… materially concerned or had material personal contact during his appointment", the definition of "Services" which is to be read into each covenant, nonetheless makes this point clear by its wording: "*in relation to the supply of those parts of the business of the Company and/or Intrinsic with which the Employee was materially concerned at any time during the 12 months prior to Termination."* In other words, the material contact must be contact whilst EF is employed by Quilter (not Tilney). It should be added that in any event the parties knew that for most of her last year of employment at Tilney, EF had in any event been on maternity leave (and had therefore had no client contact).

190. Mr. Sethi QC submitted that "The fact that [EF] was only employed for 6 months and so the clause captures clients who were clients of [Quilter] in the 12 months before [EF] commenced employment clearly serves to capture the pre-existing book of clients she was given at the start of her employment". But that is not a permissible way of construing the clause. In construing the clause one does not look at what in fact happened; rather, the task of the court is to put itself in the shoes of the parties at the time *when the contract was concluded*. At that time, whilst she had a 6 month probation period, it was not envisaged that EF would only be employed for 6 months.

191. The central issue, so far as the non-solicitation and non-dealing covenants are concerned is whether Quilter can justify the 18 month "backstop" (as the parties called it) on the evidence. The clause in each case requires that terms and conditions of business "*have been in place during the 18 month period prior to termination*". I emphasise that none of the parties argued for a construction of these clauses that would require the terms and conditions of business between the customer and Quilter to have been in place *throughout* (i.e. for the duration of) the 18 month period referred to in the clause; rather they were all content to proceed on the basis that the clause was triggered by terms and conditions of business having been in place at any time during that 18 month period and accordingly, having heard no argument to the contrary, I proceed on that basis.

192. It follows from this that the clause in each case requires justification by Quilter, because it would even prevent EF from soliciting a customer with whom terms and conditions had been in place with Quilter some 17 months and 364 days prior to the termination of EF's employment (such that he/she was no longer a customer), and with whom she had had personal contact on just one occasion during that period (obviously there are less extreme examples that can be imagined).

193. EF would also be prevented from soliciting or dealing with her family and friends as clients, and yet Mr. Burden accepted in cross-examination that Quilter had no legitimate interest in preventing EF dealing with those clients. And she would also be

prevented from dealing with those clients within Ms Payne's book of clients whom EF had not even met but who had been allocated to her, because she would be "materially concerned" with them.

194. In my judgment, the restrictions on EF can only be validly justified if they protect Quilter's customer base and associated customer confidential information; whereas since the restrictions extend so as to prevent EF from dealing with the categories of clients that I have referred to, and in seeking to protect information which may have lost its confidentiality or become stale after 18 months, they appear to go much further than is necessary, absent explanation from Quilter as to why this protection is required.

195. However, at trial Quilter adduced virtually no evidence to justify the alleged reasonableness of these clauses and in particular the 18 month backstop.

196. Mr. Burden's evidence on this topic was essentially contained in section 15 of his very lengthy second witness statement, and in particular in just two paragraphs at 15.3 and 15.4. That evidence was lacking in detail and was unsatisfactory. It consists of a series of generalised statements and does not descend into any detail as to why the scope of these restrictions is necessary or justifiable.

197. In paragraph 15.3 of his statement he referred to the fact that "*the restrictions have carve-outs at Section 3C on page X [sic] which make them limited, reasonable and narrow in scope*." He also addresses other carve out provisions in paragraph 15.4 of the same statement. However, when he was cross examined about this, it was clear that he had no idea what the carve-outs consisted of: indeed, he said he was not even aware of them.

198. The only other witness for Quilter who gave anything approaching *evidence* concerning the alleged reasonableness of the covenants was Mr. Rhodes, who addressed this topic in only a short passage in his witness statement, at paragraphs 17-22. He asserted in paragraph 18 of his statement that *"[t]he Claimant periodically reviews its restrictive covenants based on standard industry practice*." However, in cross examination he admitted that he had no idea when these covenants had last been reviewed by Quilter and he had not reviewed them himself. Indeed, since the contract is in the Claimant's former name it is plain that this contract has not been recently reviewed nor was it tailored to EF's personal circumstances. The same points as are set out in paragraph 175(6) above in respect of the non-competition covenant apply to the non-solicitation and non-dealing covenants.

199. Paragraphs 20-22 of Mr. Rhodes' statement consist of submission and do not advance matters at all. It is only in paragraph 19 of his witness statement that he addresses the reasonableness of the covenants and then only in respect of their length: but even then he only does so in very general terms which come nowhere near affording any justification for the terms of the covenants in issue. Indeed, in cross-examination he accepted that he could not say how the length of the covenants was decided upon in the case of these three restrictive covenants, stating: "*I can't comment on these covenants*".

200. Recognising this evidential difficulty with Quilter's case, in closing Mr. Sethi QC merely asserted that the clauses were reasonable because "a long time can pass

between client reviews and an 18 month backstop reference period is hardly surprising". But as a matter of fact, the evidence was that client reviews at Quilter took place semi-annually, and not every 18 months. An 18 month period would have been atypical (see paragraph 203 below).

201. Mr. Sethi QC also asserted in closing that 18 month backstops were commonplace, being common in the insurance industry, notwithstanding the fact that policies are renewed annually. But there was no *evidence* to support this assertion and no *evidence* as to whether there were any common features of the financial services industry and the insurance industry which made it appropriate in any event to compare the two. I therefore disregard it.

202. There is a further problem with Quilter's case in respect of these two covenants, which is this. The documentary evidence before the court demonstrated that Quilter clients benefited from semi-annual reviews of their portfolios. That is clear from the fact that on 6 December 2018 Mr. Burden emailed one of EF's potential clients (EE) at EF's request to introduce her to them and to offer initial financial planning advice from her once she was employed by Quilter (but before she was employed by them on 7 January 2019) for the sum of £6,000 "*to include a cash flow forecast, recommending a suitable investment/investments, level of risk needed to achieve your long term goals and suitable tax wrappers to utilise (considering pension/ISA/investment bond etc*." He added that "*our clients enjoy semi-annual reviews to ensure that our recommendations remain suitable*." This is consistent with the email before the court sent by EF apparently to Tozers, a Devonian firm of solicitors, shortly after her employment with Quilter commenced, in which she also referred to the fact that:

> "*When I do a bi-annual review*, performance will be an important factor. I review independently to the DFM and I am able to recommend switching if a DFM begins to lag its peer group in terms of performance."

203. In evidence, Mr. Burden said that clients of Quilter are subject to "annual or semi-annual reviews." He said that the frequency of review is driven by the level of the client: a level 1 client is subject to semi-annual reviews; a level 2 client is subject to annual reviews. Mr. Rhodes said that reviews were only "annual", which is demonstrably not the case. I find as a fact that so far as *EF's clients* are concerned, the reviews were always intended to be semi-annual, whether or not some of Quilter's clients were subject only to annual reviews.

204. If clients were intended to be serviced semi-annually by EF, then as Mr. Tatton-Brown QC submitted, a backstop of 6 months, or possibly 12 months, might be shown on the evidence to be reasonable. But a backstop of 18 months, coupled with a lengthy period of restraint of 12 months, is excessive for a junior employee such as EF and designed to capture those who may long since have transferred their portfolios to the prospective future employer.

205. However, none of these issues were addressed, even less answered, in Quilter's evidence.

206. In the circumstances, in my judgment on the evidence, Quilter has failed to show each of these covenants to be no wider than is reasonably necessary for the protection of its legitimate business interests and I find that each of these covenants is an unlawful restraint of trade and void.

207. I should add that Quilter did not suggest that if the covenants were in any respect void, that they could be saved in some way by means of "blue pencilling" any offending sentence or clause to leave standing a valid covenant.

Post-termination restraint on use of Confidential Information

208. Quilter argued at trial for an equitable obligation of confidence during and after EF's employment not to misappropriate, misuse or divulge to any third party trade or business secrets of Quilter, or confidential information of Quilter warranting protection and akin to that afforded to trade or business secretes which EF knew or ought reasonably to have known was confidential to Quilter (paragraph 4.14 of Quilter's Opening Submissions).

209. Quilter did not, however, argue that the Confidentiality clause in EF's contract amounted to an enforceable post-termination restriction which it could enforce against her, but Continuum did address this argument in paragraph 54 of its Closing Submissions and so I shall deal with it briefly at this stage.

210. The Confidentiality clause provides as follows:

> "**Confidentiality**
>
> Confidential information means information in whatever form relating to our business, clients, customers, products, affairs and finances which we consider to be confidential (which includes but is not limited to business development plans, pricing structures, research and analysis) and trade secrets including technical data and know-how relating to our business or any of our suppliers, clients, customers, agents … whether or not such information is marked confidential.
>
> You will in the course of your employment have access to Confidential Information. You agree that you will not, except for the proper performance of your duties either during your employment or any time after its termination use or disclose to any person, company or other organisation any Confidential Information."

211. Mr. Tatton-Brown QC submits that the definition of Confidential Information [1/940] is hopelessly vague and subjective: it is in essence "information … which [the C] consider[s] to be confidential". He argues that the prohibition on using or disclosing such information to any person or company in perpetuity post-employment is unenforceable because it ignores the fact that EF is fully entitled to use her skill and knowledge, which may involve using such information. He refers in support of this submission to the analysis of Leggatt J (as he then was) in *Marathon Asset Management LLP v Seddon* [2017] ICR 791 at paras. 113-114 where the court held that a similar express provision was an unreasonable restriction on the right to work and contrary to public policy to enforce it.

212. I agree with Mr. Tatton-Brown QC that this clause is similarly an unreasonable restraint of trade and unenforceable so far as it applies post-termination. In fact, the Quilter clause is even more objectionable, containing as it does the subjective provision that the Confidential Information is information which Quilter itself considers to be confidential, which is potentially without limit. It is no doubt for this reason that Mr. Sethi QC sensibly did not argue for the application of this clause in closing.

SOLICITATION AND DEALING ON THE FACTS

213. It follows in the light of my finding that the restrictive covenants are unenforceable, that whether or not EF dealt with or solicited particular clients on the facts does not arise. However, since this was also argued before me I set out below my conclusions on these matters. I do so relatively briefly in view of the length of this judgment.

Dealing

214. So far as dealing is concerned, EF has never denied dealing with the clients relied upon by Quilter. She fully accepted in cross-examination that she dealt with Quilter clients up until the injunction that was granted against her. She said she didn't realise that she couldn't deal with them but accepted that she did do so.

Soliciting

The Law

215. In *Towry EJ v Bennett* [2012] EWHC 224, Cox J provided a helpful summary of the authorities as to what amounts to "solicitation", which I gratefully adopt, as follows:

> *"435. The textbook "Employee Competition" (second edition), edited by Paul Goulding QC, contains the shrewd observation that "The concept of 'solicitation' is not easy to define." A practical approach is suggested, based on the New Zealand case of Sweeney v Astle [1923] NZLR 1198, the question being whether the conduct of the employee evidences a specific purpose and intention to obtain orders from the customers? Where it is the employee who initiates contact with a customer,and does something more than merely inform the customer of his departure from the former employment, the employee may be regarded as soliciting the customer. The author continues by stating that "Care should be taken, however, not to confuse a non-solicitation clause with a non-dealing clause. Where the customer initiates contact, the employee may be entitled to respond, as in Austin Knight (UK) Ltd v Hinds [1994] FSR 42."*
>
> *436. The use of the word "may" in these passages indicates, as the parties in this case agree, that each case will turn on its own facts and that the fact that the client is the first to initiate contact, whilst clearly a relevant aspect, does not mean that there can be no solicitation. Mr Tolley submits that, in the*

context of the type of relationship in question in this case, between a financial adviser and his client, in circumstances where the adviser was encouraged to form close relationships with those clients, the question of who made the first contact is of marginal, if any, relevance. In my view that is putting it too high, but that is not to elevate initial contact to such a level that it is determinative, or even highly indicative of an absence of solicitation. Who made the first contact is clearly relevant but the court will need to look at all the circumstances surrounding that contact in order to form a view of its importance in the particular context.

437. In the textbook "Employment Covenants and Confidential Information: Law, Practice and Technique" (Third edition), the authors Kate Brearley and Selwyn Bloch QC state that it is often assumed that there is no solicitation where it is the customer who first contacted the ex-employee, but point out that "This is not necessarily the case."

438. The authors continue with the following, helpful examples:

> *"…where the customer telephones the ex-employee asking what the ex-employee will be doing after employment, it is questionable whether it would amount to solicitation if the ex-employee informs the customer that he will, for instance, be trading from a particular address in the same line of business as the ex-employer. However, if his response is, for instance, immediately to offer to make a sales presentation, it might be difficult to say that there has been no solicitation. Each case will turn on its own precise facts. If the gist of what the ex-employee says is responsive to the customer's enquiries, there will be no solicitation. If there is significant use of persuasion by the ex-employee, this is likely to be seen as soliciting. It is often difficult to draw the line."*

After referring to the particular facts in some cases to illustrate this difficulty, the authors add this advice for employers:

> *"In order to avoid the difficulties of proving customer solicitation by the ex-employee, it is advisable for the employer to seek a non-dealing covenant from the employee."*

439. The key feature of solicitation, which can occur face to face or by letter, telephone or email, is that, as the authors express it, "An element of persuasion is required." It is that need to establish the existence of persuasion that distinguishes non-solicitation from non-dealing clauses. In Taylor Stuart & Co v Croft (7 May 1987 unreported) Stanley Burnton QC, sitting as a Deputy High Court Judge, held that "It is of the essence of solicitation and of canvassing…that the client should

> *be requested to transfer his custom." Further, in a very recent case decided by HHJ Simon Brown QC in the QBD Mercantile Court, Baldwins (Ashby) Ltd v Maidstone (9 June 2011, unreported) the judge held that, "There is solicitation of a client by a former employee if the former employee in substance conveys the message that the former employee is willing to deal with the client and, by whatever means, encourages the client to do so."*
>
> *440. In my judgment a contractual, non-solicitation clause of the kind in this case means that ex-employees must not directly or indirectly request, persuade or encourage clients of their former employer to transfer their business to their new employer. Employers are entitled to prevent ex-employees from exerting influence of this kind over their clients. The question in this case is therefore whether Towry has demonstrated to the civil standard on all the evidence that an individual Defendant's communications with Towry's clients, as they became, contained a material element of persuasion, with a view to gaining the business of those clients. Whether there has been persuasion or encouragement will depend, in each case, on all the circumstances. Determination of this issue is clearly fact specific."*

216. The burden rests upon Quilter to prove that EF solicited its clients. At the start of the trial, Mr. Sethi QC suggested that Quilter might call some of its clients or ex-clients to confirm that they had been solicited by EF, having obtained permission to cross-examine them. However, ultimately Quilter failed to do so (the parties agreed that they could refer to the witness statements of various former clients of Quilter which were before me, despite none of those clients attending for cross-examination). Nor, as Mr. Tatton-Brown QC pointed out, did Quilter produce a single letter or other document from a client complaining that he/she had been solicited by EF. Whilst admitting that she dealt with them, EF denies that she has solicited any of the clients of Quilter. She says that they came to her, unsolicited.

217. It is Quilter's case that EF has solicited 23 individual clients (18 if spouses are combined), listed in a schedule headed "*Claimant's Confidential Code of Clients*" which was handed to the Court and the parties by Mr. Sethi during the hearing. Mr. Burden said that Mr. O'Dowd of Quilter met some of these clients and he was told that EF had solicited them. However, Mr. O'Dowd kept no notes of these alleged meetings, and it is noteworthy that Quilter did not call Mr. O'Dowd to give evidence. Mr. Burden said that he attended two meetings of clients with Mr. O' Dowd but he too had not kept any notes of these alleged meetings. In view of the failure to call Mr. O' Dowd and the lack of any meeting notes, it is necessary to look carefully at the contemporaneous documentation and contemporaneous correspondence passing between EF and these clients in order to determine whether or not EF solicited them, whilst always bearing in mind that the burden of proving these claims rests firmly upon Quilter.

The Facts: individual clients

218. In closing, Quilter submitted a detailed document headed "*Client Summary*" part of which it relies upon in support of its solicitation case. I have read that summary in full. This document was submitted as part of Quilter's written closing; however it should be treated with caution as a number of the points made in it were not made at any other stage of the trial and in particular were not put to EF in cross-examination. Both EF and Continuum complained about this. In those circumstances I cannot make adverse factual findings against EF as I have not heard what EF's explanation is in respect of those points. I highlight below the salient features of the documents and the evidence which *were* put to EF in cross-examination in respect of the clients which Quilter alleges EF solicited, before setting out my factual findings in respect of each of those clients.

Client 3 RB

219. RB had been a client of Quilter since 6 November 2018. EF said that she did not solicit him but she did deal with him.

220. On 28 May 2019 EF asked for up to date details of RB's investments, whilst still employed by Quilter. She said she continued to service the clients whom she had been given at Quilter because it was in the clients' best interests that she should do so. EF's mileage expense claim form shows that she then visited him on 17 June 2019. EF said she didn't believe that she told him that she was leaving Quilter. She denied providing him with her personal contact details. The Continuum database extract shows that a client file was created by EF for RB on 6 August 2019, which is 18 days after her employment at Quilter was terminated.

221. EF uploaded onto the Continuum IO (Intelligent Office) system the Quilter Valuation Report dated 17 June 2019 for RB. She then used this information because the figures in the Valuation Report were transferred by her onto the Continuum Fact Find document for RB. She said that was a mistake. I have already found that I do not accept from her evidence that this was a mistake; I consider that she deliberately scanned this onto her personal laptop (together with 8 other documents relevant to RB) and then uploaded it to the Quilter IO system whilst still employed by Quilter.

222. On 19 June 2019 there was a text exchange between EF and RB as follows:

> *"Dear RB, thank you for your voicemail. I am speaking directly with all the bond providers to get a clear steer on the best way forward and I will phone you Friday morning if that's okay? Best wishes, Emma."*

223. Then on 1 July 2019 EF emailed Heather Rice of Quilter asking her to get the paperwork in respect of numerous financial products put into RB's name and sent to him. This was 3 days before she tendered her resignation to Quilter. She repeated this request in an email dated 2 July 2019.

224. I was shown a file note of what was said to be EF's note of her meeting with RB which refers to the different bonds which were to be transferred into RB's name, upon which she has written "*24 July, 11am*". EF said in evidence that RB "*found me again*

through Carrie Payne… He called me." That was consistent with what she says in her witness statement.

225. It is clear that consistently with her earlier manuscript note, there was then a meeting on 24 July 2019 between EF and RB when EF filled out a Continuum Fact Find document. On the same date, Continuum's Transfer of Service records show that 8 transfer of service authorisations are signed by RB so that Continuum can become the new service provider in respect of RB's financial products, previously serviced at Quilter. This was the very first day of EF's engagement by Continuum. The typed meeting note of that meeting states "*existing client from previous role. Found me again through Carrie Payne. Didn't want to remain with [Quilter]*."

226. EF gave evidence that when she wrote "24 July, 11am" whilst she was at Quilter there was nothing sinister in that. It was just her arranging the next appointment with that particular client. When that client subsequently found her and telephoned her, he wished to keep the same appointment date and so she attended on that date, but she did not solicit the client.

227. In all the circumstances I find that whilst EF clearly dealt with RB, there is insufficient evidence that she solicited the business of RB.

Client 1 JB

228. JB had been a Quilter client since 24 July 2017.

229. JB's step-son provided a witness statement to which the parties referred. In paragraphs 5-6 of his witness statement, he said that at a meeting on 1 July 2019:

> *"Emma informed us that she had decided to resign from Quilter, as she felt she was being prevented from acting in her client's best interests, and that any recommendation she made had to be limited to a choice of in-house products, even if there was clear evidence that an outside product performed better, and was better suited to her client's needs. She informed us that if we wanted to, she could recommend another adviser working for Quilter. We stated that we wanted to remain with her, to which she responded by saying that it was an important decision and wanted us to discuss the matter without her being present before coming to a firm conclusion. After that discussion, I contacted Emma by phone and confirmed that we wanted to continue to work with her as our adviser, and we arranged to meet at my house, and at some point I sent her a text message with details of how to find the house. At that meeting, on 8 August, we began the process of enrolling as clients with Continuum. Subsequently she emailed us on 26 August and we met at Hilary's house on 16 September."*

230. EF said that she had been pressed at the meeting to explain why she was struggling to get a draft report finalised. She told JB that she had decided to resign and she simply told the truth.

231. On 2 July, after she had decided to resign, EF emailed Heather Rice and Nigel Heald and asked them to post to JB's home two copies of the final agreed report along with transfer forms for Vestre (a product provider) as soon as the report had been approved.

232. Once again EF scanned the Quilter Valuation Report onto her laptop, uploaded it onto Continuum's IO system and then, she said she destroyed the hard copy of the document in her confidential waste. She again said that uploading the Quilter Valuation Report onto the Continuum IO system was a mistake.

233. I find that EF's contact with the client in this case fell on the wrong side of the line and that there was a sufficient element of persuasion or encouragement of the client to transfer her business to EF at Continuum. Her disparaging remarks about Quilter's business made it very likely that the client's response would be that she wanted to stay with her when EF moved, and to leave Quilter. Accordingly, had I found that the non-solicitation clause was valid, I would in the case of this client have found that EF was in breach of it.

Client 10 AK

234. AK had been a client of Quilter since 23 August 2017.

235. EF's mileage expense claim form shows that she met AK on 3 June 2019.

236. EF gave evidence that she bumped into AK in a grocery store in Exeter on Friday 19 July 2019 (when her employment with Quilter ended). She dealt with this in paragraph 5 of her composite witness statement. She said that she told them she had left Quilter. She continued: "*they were naturally disappointed that I was leaving and they told me they wanted a meeting with me at their home on 24 July 2019 to discuss their options and they made it clear that they preferred an independent financial adviser like what they had with Carrie Payne originally. I went to their house and they had all of their relevant and confidential information ready for my review*."

237. It was put to EF that she met AK on 23 July 2019 when she was no longer authorised by the FCA to give financial advice because she had left Quilter (19 July) but had not yet begun working at Continuum (24 July) and that was why she had subsequently written the date of 24 July 2019 over the date of 23 July 2019 on the AK Continuum privacy policy document. She denied this and said that she had simply corrected a slip of the pen. In cross-examination of EF, Mr. Sethi QC put a *Summary of Financial Planning Review Meeting* document to EF. On it, EF had written "Continue with Emma." She had then crossed out 22 July and had written 23 July 11.00am. When she was shown this, she said "That is a typo. I met them on 24 July 2019." Whilst this seems suspicious, it is not possible at this remove for the court to reject EF's evidence on this and find that it is untruthful. It is at least possible that she made a mistake in this respect as she noted the date at various times, inconsistently, to be 22, 23 and 24 July and it is apparent from the mis-dating of JE's client agreement (below) that EF would make mistakes with dates from time to time. Accordingly I am not prepared to reject her evidence in this respect.

238. AK disengaged as a client of Quilter on 31 July 2019. Continuum's Transfer of Service records show that transfer of service authorisations were subsequently signed

by AK so that Continuum could become the new service provider in respect of AK's financial products, previously serviced at Quilter. EF was assisted in this task by Lisa McConnell, Continuum's Senior Administrator who worked with Lynne Brown, Martin Brown's wife, who is Head of Accounts and Services at Continuum.

239. So far as AK is concerned, I find that there is insufficient evidence that EF solicited his business.

Client 8 TH

240. TH had been a client of Quilter's since 2016.

241. She provided a witness statement for the trial. In it she said:

> "3. *I had concerns about what I was hearing regarding Quilter … in relation to the Mutual Wealth offering and the size of the firm since they were taken over by a bigger firm. I preferred to be involved with a smaller company.*
>
> *4. I had a good working relationship with [EF] which I believe is important when dealing with financial affairs.*
>
> *5. I contacted [EF] on 9th August stating "I see you've left Quilter! Do give me a ring for a chat when you can."*
>
> 6. *I met with [EF] on 14th August in London. My office sent a meeting request to [EF] at her Continuum work email address."*

242. The 9th August message was a text. It came from TH, not from EF. When EF was asked in cross-examination by Mr. Sethi QC about how TH could have known this, she said that she thought that Quilter had written to its clients about her leaving around 26 July. Quilter had not at that stage disclosed any document to this effect. As a result of that evidence, I asked Quilter to see if they could find any such document. It turned out that EF was correct: Mr. Burden of Quilter had indeed written such a letter to its clients (including the clients who are the subject of the solicitation claim) on 29 July and 31 July 2019 respectively. In the letters, Quilter stated:

> *"As a valued client of [Quilter], I am writing to let you know that for personal reasons Emma Falconer has left the business. To ensure our service to you remains unchanged, I have appointed Ian O'Dowd as a financial Planner in the Exeter Office … In the meantime your clint support contact continues to be Heather Rice…"*

243. In the context of the case against EF that she solicited Quilter's clients, I consider this to be an extremely important document as it demonstrates that the way in which the clients found out about EF's departure from the business was from Quilter itself. It is for Quilter to prove that they learned of it earlier from EF, if that be the case. In the case of TH, Quilter failed so to prove.

244. I find in the case of TH that EF did not solicit her business.

Client 5 JE

245. JE had been a Quilter client since 9 October 2017.

246. JE made a witness statement for this trial. EF accepted in cross-examination that she would have met JE on 21 March 2019 and again around June time.

247. In her witness statement JE stated:

> *"4. When Emma said to me that she was leaving Quilter, she did tell me that she was leaving because she was not happy working with them and that they would not enable her to choose from the whole of the market (Emma had been told that she must refer Quilter products).*
>
> *5. Regardless of what she says at the time, yes I did rely on and trust Emma, I wanted her to continue being my financial adviser and had no interest in staying with Quilter. I therefore resolved to continue using her as my financial adviser if I was able to do so.*
>
> *6. I was contacted by Quilter who tried to retain my business but I informed them that I did not wish them to continue providing me with financial advice…*
>
> *7. I did arrange to meet Emma on the 8th January 2020. I had not seen her since I left Quilter [sic]. I cannot remember whether I contacted her or she contacted me although I had understood that if she was leaving somewhere then there might need to be clear water between her leaving Quilter and engaging me as a client."*

248. In fact, EF accepted in cross examination that they had met on 22 August 2019, because that is apparent from disclosed text messages. A Continuum client agreement dated 21 August 2019 was signed by JE (although this must in fact have been signed on 22 August).

249. On 3 September 2019 EF emailed JE to tell her that she had "*onboarded [her] as a client of Continuum*". JE replied by email dated 7 November 2019 in which she said that she had had a call from Ian [O'Dowd] of Quilter seeking to make an appointment with her. She said "*I just wanted to ask you how to proceed i.e. where we are in the handover process as I'm afraid I forgot to make a note of when it all goes "live" and so much has happened lately that I can't remember what I am supposed to do about an approach from Quilter."*

250. There was then an exchange of emails between JE and EF on 21 November 2019 (the day after JE disengaged Quilter) from which it is apparent that JE drafted a letter to send to Ian O'Dowd at Quilter which she and EF discussed over the phone. She then sent that to EF for her to consider. EF said that the letter was perfect.

251. It was put to EF in cross examination that this showed that she solicited JE: that she persuaded her to move to Continuum but EF denied that that was so. She said: "*she wanted to stay with me. She ran everything past me."*

252. It was also suggested that the mistake in paragraph 7 of JE's witness statement (*I did arrange to meet Emma on the 8th January 2020. I had not seen her since I left Quilter)* was because EF had written the statement for her. EF denied that that was so.

253. In all the circumstances, I find that EF's contact with the client in this case fell on the wrong side of the line and that there was a sufficient element of persuasion or encouragement of the client to transfer her business to EF at Continuum. Her disparaging remarks about Quilter's business made it very likely that the client's response would be that she wanted to stay with her when EF moved, and to leave Quilter. Moreover it is plain that EF actively assisted JE in moving her business to Continuum. Accordingly, had I found that the non-solicitation clause was valid, I would in the case of this client have found that EF was in breach of it.

Client 13 MO

254. MO, a barrister, had been a client of Quilter since 21 March 2017.

255. He provided a witness statement for this trial. In particular, he stated as follows:

> *"3. At some point in the summer of 2019 Emma explained that she was leaving Quilter and was unable to speak to us about business affairs for a period of time…. I recollect that I said at the time that I wished her to get in touch when she was legally or contractually allowed to do so… After Emma had left Quilter we would not have remained with Quilter and initially waited for the time when she could advise us again…*
>
> *5. We received no contact from Quilter that we can recall following Emma's departure and we do not remember being told of her departure by them or that she could not act for us. That was something we learned from Emma. In particular, Quilter did not tell us that we could ask for their consent to our continuing to receive advice from Emma; if they had done so, we would unhesitatingly have sought it."*

256. In cross examination EF said that she just told MO she was leaving. She did not discuss her restrictive covenants. She assured him she would not be able to solicit his business and that she could not get in touch with him. She was asked why on the Quilter Fact Find document for MO she had written "*Call in July*" but she said she did not know when she wrote this note.

257. I should mention at this point that there are other Quilter documents in File 3 which have EF's note "*Call in July*" concerning a particular client. Mr. Sethi QC invited me to draw the general inference that this was because EF was lining up these clients to continue to service them in July after she had joined Continuum. However, since it is unknown when and in what circumstances these annotations were made by EF, I am not willing to draw such an inference as (a) this point was only raised by Quilter for

the first time in Mr. Sethi's cross-examination and (b) the note could equally have been made because this was the customary date for the next semi-annual review for that client or, indeed, just simply the next agreed review date for him or her depending upon that client's circumstances, with nothing sinister about the selection of the date at all.

258. On 24 July MO texted EF to ask if she had a new email address and she replied that she did, and gave him her Continuum email address which she said "*goes live tomorrow*." She also gave him her personal email address.

259. It is apparent from an email exchange on 27 August 2019 that EF and MO met for lunch in London on 28 August. On 2 September EF emailed him to say "*I will await your signed paperwork to onboard you and MO as clients.*" This suggests that she took the paperwork to her meeting with MO on 28 August.

260. On 16 October 2019 MO was entered as a client onto the Continuum IO system and thereafter fee income began to be received. He disengaged from Quilter on 21 November 2019.

261. By 5 December EF was still dealing with MO and by that date she informed him by email that she had completed her preliminary analysis of his Quilter Cirilium funds within his pensions.

262. I find that EF did not solicit the business of MO. There is no evidence that she did anything more than inform MO that she was leaving Quilter's employment. In any event, he plainly made his own mind up to follow her.

Client 17 BDS

263. BDS became clients of Quilter on 13 September 2018.

264. EF states in her witness statement that she met BDS on 30 July 2019. Indeed, it can be seen that she had scanned onto her personal laptop a Quilter Fact Find for BDS on which she wrote "*Booked: 11am – 30th July*".

265. In paragraph 22 of her 2nd witness statement, EF stated that that came about because BDS got in touch with her when she did not turn up for a planned review with the Claimant after she had left Quilter's employment on 19 July, and she then went to see them on 30 July. They told her that they did not like big companies and wanted an IFA.

266. I am not satisfied that Quilter has proved its case that EF solicited this client.

Client 9 RH & JH

267. RH provided a witness statement. In it, he says (in paragraphs 4-5) that he received Quilter's letter dated 29 July 2019 informing him that EF was leaving the business and that he should contact Mr. O'Dowd. He was unhappy about that, and as a result he wrote to Mr. Burden on 5 August to say that he no longer wanted Quilter to deal with his investments. Quilter wrote back to him "*acknowledging his decision to cease providing instructions to their firm*". RH states in paragraph 6 that "*I confirm that I*

thereafter contacted [EF] to see whether she would continue to deal with my investments. At no point did she solicit my business."

268. In cross-examination EF was asked about a Quilter financial summary document for RH and JH on which she had written in manuscript "*Thursday 1st Aug 11.30am*." She did indeed meet them on this date and it was put to her that this was her lining up these clients to meet after she left Quilter. EF said that that was not so; she gave evidence that they found out that she had left and they got in touch with her and wanted her to come on the same date, 1st August, as she had arranged when she was at Quilter. That is consistent with RH's witness statement.

269. I find that there is insufficient evidence that EF solicited the business of RH and JH.

Client 14 SP

270. SP had been a client of Quilter's since 22 November 2016.

271. EF's mileage expense claim form shows that she met SP on 4 June 2019 at a time when she was still employed by Quilter.

272. An entry was created on Continuum's IO system for SP on 18 July 2019, whilst EF was on gardening leave and still employed by Quilter. EF gave evidence that she did this because SP's wife telephoned her on 18 July, having found out that EF had left Quilter and wanting a new adviser, and so she added SP onto the system. She said this is not a Fact Find, contrary to what was put to her in cross-examination; it is simply what is generated on the IO system.

273. I find that there is insufficient evidence that EF solicited the business of SP.

Client 2 CSB

274. CSB had been a client of Quilter since 9 November 2017.

275. There was an exchange of emails between CSB and Quilter in mid-November 2019 which led to exchanges between CSB and EF. In particular, on 12 November 2019 CSB wrote to Heather Rice at Quilter and stated "*We are very disappointed with the level of support that we are receiving from [Quilter] since [EF's] resignation earlier this year. As a result we have decided that we will find a new financial adviser…*"

276. CSB then forwarded this email on to EF and stated "*Our conversation yesterday morning refers. Please see below the email that we have just sent to Quilters. Over to you!!*".

277. In cross examination EF said that CSB "*came to me and wanted me to look after him. It was his choice. I did not solicit their business*."

278. I find that there is insufficient evidence that EF solicited the business of CSB.

Client 11 AL

279. AL had been a client of Quilter since 7 January 2017.

280. EF gave evidence that AL got in touch with her and asked EF to meet her in London. They had a coffee together in Pret a Manger on 28 November 2019.

281. I find that there is insufficient evidence that EF solicited the business of AL.

Client 7 LED

282. LED had been a client of Quilter since 11 July 2017.

283. EF's mileage expense report shows that she met LED on 14 May 2019 whilst employed by Quilter.

284. LED made a witness statement for the trial. She states:

> *"2. The last meeting I had with Emma before she left Quilter she told me that she was leaving and I volunteered and requested to stay with her. I told Emma I wanted to remain with her and had no objection to her retaining information on me that had been provided to her for the purposes of her continuing to advise me in the future.*
>
> *3. It was my idea to remain a client of Emma's, I instigated this."*

285. When asked about this in cross-examination, EF said she did not know whether the meeting on 14 May was the last meeting or not. She said she may have had a subsequent meeting. If it was the last meeting, it would mean that she was telling LED as early as that date that she was leaving Quilter.

286. Whatever the true position, I find that there is insufficient evidence that EF solicited the business of LED. There is no evidence that she did anything more than inform LED that she was leaving Quilter's employment.

Client 18 PS

287. PS had been a client of Quilter since 22 March 2017.

288. He made 2 witness statements for the trial. In his first statement he stated as follows:

> *"3. … About June it appeared to me that Emma was not her normal self, and she explained that she was disillusioned by constraints placed upon her by [Quilter] and was thinking of becoming independent. She did not want to work with their limited product portfolio and wanted to give full market advice. She did not solicit my business at this time or indeed at any other time. She explained that she would be likely to give her notice to [Quilter] soon, and that a new adviser from [Quilter] would be appointed to replace her.*
>
> *4. After Emma had left [Quilter] I attended a presentation by that firm in November 2019. There was a presentation by the senior executive present, called Andy Moore. His presentation*

> *was aggressive in style and very self-assertive. It did not convey much concern to put the client first.*
>
> *5. The tone of the presentation was such that I concluded that his style was antipathetic to my way of doing things and it triggered a preference for re-engaging with Emma as my IFA…*
>
> *7. Sometime after the presentation I made direct contact with Emma to ask her generally what was going on. She informed me that she was now working with an organisation called Continuum and I informed her that I wished to re-engage her as my IFA and that I would like her to carry out the work personally if at all possible."*

289. In fact, it is apparent that PS and EF met before the presentation, on 19 September 2019, when PS signed Continuum's client consent form and a creation date entry was produced on Continuum's IO system. It follows that PS's witness statement cannot be correct.

290. Despite this inconsistency, I am unable to find, on balance of probability, that EF solicited PS's business. She undoubtedly dealt with him; but there is insufficient evidence that she solicited his business.

Client 6 HELC & NC

291. HELC & NC had been a client of Quilter since 15 November 2016.

292. In her composite witness statement, EF states so far as these clients are concerned:

> *"I did not solicit the business of HELC/NC. [They] live next door to RH & JH and flagged me down on the day I was seeing [them] on the 1 August 2019."*

293. HELC made a witness statement for the trial. She stated:

> *"2. When Mrs Falconer resigned, Quilter wrote to say that she had left, and outlined the alternative arrangements for future advice which they had put in place. There was no mention of any option to seek consent from Quilter to continue to deal with Mrs Falconer. I (in a joint letter with my husband, who was also a client) replied on 11 August 2019, asking them to turn off our financial advice charges, and said that we were considering our options for future advice.*
>
> *3. I was hopeful at that time of being able to continue using Mrs Falconer's services and, when I became aware that she was joining Continuum… requested that she accept me as a client, which she did in November 2019…"*

294. In the circumstances I find that there is insufficient evidence that EF solicited the business of HELC and NC.

Client 4 CC and TC

295. CC and TC had been a client of Quilter since 8 June 2018.

296. EF met CC and TC on 9 September 2019 when they signed a client form with Continuum.

297. I find that there is insufficient evidence that EF solicited the business of CC and TC.

Client 12 RN

298. RN had been a client of Quilter since 14 December 2016.

299. Quilter relies upon a text dated 10 July 2019 (9 days before her employment at Quilter ended) for its case that EF solicited this client. The second half of this text was only disclosed by EF on the last day of the trial. It appears that EF sent a text in response to a text from RN herself as follows:

> *"HI RN, lovely to hear from you. Thank you for getting in touch and for the update. Is there a good time to phone you next week to chat through things? I'm having a wisdom tooth out today! I hope everything is well with you both. Best wishes Emma."*

300. RN then responded 6 days later to set up a phone call at 9.30am that Thursday. EF said in her witness statement that "*sometime following this text we spoke and she invited me to her home on the 15 August 2019*." It was at that meeting that RN signed Continuum's client agreement and privacy form.

301. Whilst she clearly dealt with her, I find that there is insufficient evidence that EF solicited the business of RN.

Clients 4 CC & TC; 15 CS; 16 RSS

302. In respect of each of these clients, Quilter adduced no evidence to support any argument of solicitation as opposed to one of dealing.

303. Last, I should mention for completeness that Quilter did not seek to argue that EF's liaising with Continuum about the text of an advertisement to be published in a magazine upon her commencing work at Continuum, which had a circulation which was local to EF, and referring to the fact that she had now joined Continuum was itself an act of solicitation. In particular, Quilter did not seek to prove that any particular client had been encouraged to join Continuum by reason of this advertisement, and so I do not find that this was a separate act of solicitation.

FAILURE TO REPAY THE GUARANTEED BONUS?

304. Under the terms of an incentive scheme contained in an appendix to the Employment Contract:

a) EF was "*eligible to receive a guaranteed bonus of £35,000 which will be payable monthly for the first 12 months completed service"*. Quilter alleges that EF was paid £17,500 for her six months of service.

b) However, under the terms of the Incentive Scheme, it was provided that:

> *"You will be required to repay the net amount if you voluntarily leave the Group within 12 months of any guaranteed bonus payment outlined above or in the case of fraud, negligence, intentional or gross misconduct … or failure to disclose any material fact concerning the performance of your duties within 12 months of the payment being made the business retains the right to claw back any amount paid."*

305. Quilter alleged in paragraphs 2.7 and 11 of its Written Closing that (i) in accordance with the Incentive Scheme in the Contract in the event of EF handing in her notice within 12 months, the bonus award and any future award shall be forfeited and repayment of the net amount is required; and (ii) in breach of the Incentive Scheme, EF has failed to repay the guaranteed bonus which she received in the sum of £17,500 gross (for 6 months of service) and which Quilter is entitled to claw back under the terms of the scheme.

306. EF contended that Mr. Burden represented to her that this was a guaranteed bonus and he said nothing about it having to be repaid in certain circumstances. I accept that evidence, although the contract which I have found EF concluded with Quilter subsequent to that representation *does* provide that the bonus has to be repaid in certain circumstances as set out above and EF is (I have found) bound by those terms.

307. However, at trial Quilter said very little about this aspect of its case and in closing Mr. Sethi QC said nothing about it (other than to assert the breach referred to above). In Mr. Burden's lengthy witness statement, he deals with it in two short paragraphs right at the end, namely paragraphs 17.16.1 and 17.16.2. In 17.16.1 he claims the repayment of £11,022.96 net as a sum paid in respect of the bonus; in 17.6.2 he claims £2,387.36 net in respect of EF's "final month's salary" (although in Mr. Sethi QC's Claims For Trial document dated 19 October 2020, this second head of claim is not pursued and nothing was said about it at trial). Once again, these two paragraphs of Mr. Burden's statement are merely repetitive of Quilter's pleaded case in respect of these sums. He does not explain the precise basis upon which he says that these sums are owing (i.e. which part of the Appendix he is referring to and relying upon – it is notable that Quilter's letter to EF of 21 October 2019 does not even mention the bonus claim); he provides no evidence that these sums have been paid to EF; nor that repayment has been demanded and wrongly refused by her (nor as to how *he* knows that they have been paid to her but not repaid by her). EF denies liability for these (and other) sums in paragraph 50 of her Defence. There is one reference in the trial bundle (at 1/2418) to a "guaranteed bonus" payment of £2,456.14 on 31 January 2019 which may be the same thing, but again, nothing was said about that at trial and it was disclosed incidentally as part of the disclosure concerning the cost of Voyant training for EF.

308. In the light of Quilter's evidential failure to address this part of its case, its failure properly to address it in submissions, and the unsatisfactory nature of Mr. Burden's witness statement, and since Quilter seeks a precise monetary sum which it has not proved, I am not willing to find that this element of Quilter's case is proved against EF and I accordingly dismiss it.

LIABILITY OF CONTINUUM?

309. Finally, I deal with Quilter's case against Continuum. In its Written Opening and Closing Submissions, Quilter states that its case is as follows:

(1) Continuum has induced EF to act in breach of her contractual obligations to Quilter;

(2) In breach of its own equitable obligation of confidence, Continuum knowingly received Quilter's confidential documents and misused them and/or permitted EF to misuse them. On 20.12.19 Continuum disclosed 54 pages comprising 11 of C's confidential documents relating to 11 individual Quilter clients– all of which had been used on its system.

310. In advancing this case, Quilter made no attempt to identify whose knowledge was the relevant knowledge for the purposes of attributing such knowledge to Continuum.

311. When dealing with a company the Court needs to determine which individual's knowledge/intention is to be attributed to the company. Thus, the Supreme Court held in *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1 (per Lord Mance at [41], with whom Lords Neuberger, Clarke and Carnwath JJSC agreed in this regard at [9]) that:

> *"As Lord Hoffmann made clear in Meridian Global, the key to any question of attribution is ultimately always to be found in considerations of context and purpose. The question is: whose act or knowledge or state of mind is for the purpose of the relevant rule to count as the act, knowledge or state of mind of the company?"*

312. Further, Lord Sumption stated at [67]:

> *"The directing organ of the company may expressly or implicitly have delegated the entire conduct of its business to the relevant agent, who is actually although not constitutionally its 'directing mind and will' for all purposes. This was the situation in the case where the expression 'directing mind and will' was first coined, Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705. Such a person in practice stands in the same position as the board. The special insight of Lord Hoffmann, echoing the language of Lord Reid in Tesco Supermarkets Ltd v Nattrass [1972] AC 153, 170, was to perceive that the attribution of the state of mind of an agent to a corporate principal may also be appropriate where the agent is the directing mind and will of the company for the purpose of performing the particular function in question, without necessarily being its directing mind and will for other purposes."*

313. In the light of the evidence, in my judgment the only person whose knowledge can be attributed to Continuum is Mr. Brown, as he was the person who apparently had management and control of Continuum during the period relevant to this claim. I do

not consider the same can be said of Christopher Lloyd (Head of Compliance), whose status was scarcely explored at trial (even less can it be said of Lynne Brown about whom very little was said at trial).

314. Mr. Brown agreed that by reason of the fact that 85% of EF's clients amounted to replacement business (as a result of her working from her "existing client bank"), this would have raised a "red flag" which would have been referred to Mr. Lloyd. But, as Continuum submitted in closing, it is unclear what knowledge it is suggested ought to be attributed to him, as there was no evidence that he was aware of EF's employment contract; or of her covenants; or that he did anything to induce a breach of them. He played no part in EF's recruitment. It follows that there was no evidence that Mr. Lloyd would have known or had any reason to suspect that in consequence EF was in breach of her contract with Quilter in any respect.

315. The only other employee of Continuum whom Quilter suggested might be relevant for this purpose was Lauren White, the Training and Competency manager. But she was insufficiently senior for her knowledge to be attributed to the Company, and I did not understand Quilter to contend otherwise.

316. Accordingly, I analyse the issues below in the context of the knowledge of Mr. Brown.

Did Continuum induce EF's breaches of contract?

317. Quilter alleges that Continuum induced the breaches of contract by EF.

318. It is a tort for a third party to knowingly and intentionally procure a breach of contract by another: *OBG Ltd v Allan* [2007] IRLR 608 HL.

319. As is explained in *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 Ch, [163] and *Alesco Risk Management Services Ltd v Bishopsgate Insurance Brokers Ltd* [2019] EWHC 2839 QB, the ingredients of the tort are:

a) There must be a contract;

b) There must be a breach of contract: *OBG* [44] per Lord Hoffman, [172] per Lord Nicholls;

c) The conduct of the defendant must have been such as to procure or induce that breach:

i) A person who procures another's wrongful act by 'inducement, incitement or persuasion' will be liable, but not if he merely facilitates the act: *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013; *Fish & Fish Ltd v Sea Shepherd UK* [2015] 2 WLR 694 SC.

ii) Calculated inaction can, in appropriate circumstances, amount to inducement: *Premier Model Management Ltd v Bruce* [2012] EWHC 3509 QB. As a matter of law, silence could in certain circumstances be persuasive in encouraging a breach of contract and be intended to do so: *Lonmar Global Risks Ltd v West*

> [2010] EWHC 2878. On the facts in *Lonmar*, it was held that the second defendant's silent receipt of the claimant's confidential information forwarded to him by the first defendant, in the circumstances of their close relationship, the volume of such information sent over time and the steps being taken by the second defendant to set up a business in competition with the claimant, was intended to be an encouragement of the first defendant's breach of his contract with the claimant.

320. But as the Court of Appeal recently emphasised in *Allen v Pollock* [2020] EWCA Civ 258, applying *OBG Ltd v Allan*, in order to be liable for the tort of inducing a breach of contract a defendant had to know that he was inducing a breach of the contract in question. A conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact (what is sometimes called "blind eye knowledge"). That conscious decision is not the same as negligence, or even gross negligence. Therefore, if the defendant honestly believed that the act he was procuring would not amount to a breach of contract, even if caused by his own ignorance, he was not liable in tort. Further, there was no principled distinction between (i) a case in which the defendant did not know that there was a contract, and (ii) a case in which the defendant knew that there was a contract but did not know that the act that he induced would be a breach of contract.

321. As Lord Hoffmann stated in *OBG* at [39]:

> *"This proposition is most strikingly illustrated by the decision of this House in British Industrial Plastics Ltd v Ferguson [1940] 1 All ER 479, in which the plaintiff's former employee offered the defendant information about one of the plaintiff's secret processes which he, as an employee, had invented. The defendant knew that the employee had a contractual obligation not to reveal trade secrets but held the eccentric opinion that if the process was patentable, it would be the exclusive property of the employee. He took the information in the honest belief that the employee would not be in breach of contract. In the Court of Appeal [1938] 4 All ER 504, 513, MacKinnon LJ observed tartly that in accepting this evidence the judge had "vindicated his honesty ... at the expense of his intelligence" but he and the House of Lords agreed that he could not be held liable for inducing a breach of contract."*

322. It is not easy to discern in which respects it is alleged by Quilter that Continuum induced breaches of contract by EF. In its Particulars of Claim, paragraph 17, Quilter appears to concentrate on EF's alleged breach of confidence and her breach of her restrictive covenants, although it does have a generalised allegation in 17.1 that Continuum induced EF to act in breach of her contractual duties to Quilter.

323. However, in closing, Quilter alleged that:

(1) "EF attended the induction course in breach of the implied duty of fidelity and trust and confidence owed to Quilter. Continuum induced this breach as it

was aware EF was employed by Quilter but encouraged her to attend a three day induction course. Both EF and Continuum benefited from EF attending the course whilst still employed by Quilter as it meant that EF could start meeting and advising clients from day one at Continuum.

(2) In arranging and confirming business cards EF was in breach of the implied duty of fidelity and trust and confidence she owed to Quilter as an employee. Continuum, through procuring the information and business cards, in the knowledge that EF was still employed by Quilter induced EF to breach the implied duty of fidelity and trust and confidence she owed to Quilter.

(3) EF completed a [Continuum Training and Competency] assessment in breach of the implied duty of fidelity and trust and confidence owed to Quilter. Continuum, in the knowledge that EF was still employed by Quilter, induced the breach by requesting that EF complete the assessment and providing the resource to do so. This assessment is the first part of the Continuum's training and competency scheme and was recorded by Ms White in EF's competency assessment.

(4) Whilst EF worked to solicit Quilter's clients to move with her to Continuum, Continuum implemented the transfer of the clients services. From 26 July 2019 to 27 November 2019, Continuum received a large number of Letters of Authority at its Head Office in Plymouth, sent such Letters of Authority to policy providers and confirmed and completed 44 transfers of service in respect of 11 of Quilter's clients (AK, AL, CS, LED, RH & JH, MO, RN, RSS, RB, RH and TH) through Ms Rusike. All of this was done with a view to enable EF to deal with Quilter's clients whilst working for Continuum in order for EF and Continuum to generate fees in respect of these clients. Continuum induced EF to breach her non deal restrictive covenant by providing this service which amounts to Continuum procuring and encouraging EF to deal with Quilter's clients.

(5) Mr Brown took active steps to suggest that EF use Continuum employees and processes to assist her with transferring Quilter's clients. Mr Brown also confirmed in cross examination that he may have discussed the Letter Before Action with Mrs [Lyn] Brown, his wife and colleague. We invite the Court to infer that Mrs Brown also has knowledge of the restrictive covenants and actively procured resource for EF in order to transfer Quilter's clients to Continuum. This demonstrates that EF continued to deal with clients in breach of her restrictive covenants and Continuum intentionally induced the breach by encouraging EF to transfer Quilter's clients.

(6) We invite the Court to reasonably infer that EF was acting in breach of the implied and express terms of her Contract and at best, Continuum was executing calculated inaction in order to induced EF to breach the terms of her contract and allow Quilter's considerable client bank to be transferred to it from EF."

324. So far as the first three of these allegations are concerned (i.e. (1)-(3)), namely breach of the implied duty of fidelity and trust and confidence, presumably Quilter relies upon these implied terms because it knows that it cannot realistically contend that

Continuum knew of the express terms of EF's contract, much less that it knew that EF was in breach of those terms.

325. However, even in the case of the implied terms, the evidence does not support Quilter's allegations. Quilter's case in closing was as follows:

> *"[EF] attended the induction course in breach of the implied duty of fidelity and trust and confidence owed to Quilter. Continuum induced this breach as it was aware [EF] was employed by Quilter but encouraged her to attend a three day induction course."*

326. I agree with the submission of Continuum that knowledge that EF was employed when she attended the June 2019 induction course is not the same as knowledge that her doing so would involve a breach of contract. It was not put to Mr. Brown in cross-examination that *he knew* that this would amount to a breach of her contract; nor was it put to him that *he knew* that procuring information for a business card nor that EF completing the competency assessment would amount to a breach of her contract. This is a case, therefore, in which the defendant accused of inducing a breach of contract knew that there was a contract but did not know that the act that it procured would amount to a breach of contract. If, as I find here, the Defendant honestly believed that the act he was procuring would not amount to a breach of contract, he is not liable in tort even if his belief is mistaken in law.

327. Indeed, so far as the induction course is concerned, it is apparent from paragraphs 43-48 of his witness statement that Mr. Brown did not understand that EF's attendance on the induction course might amount to a breach of contract on her part and I am satisfied on the evidence that he did not know that it did.

328. Furthermore, so far as business cards are concerned, Mr. Brown said in any event that "*we never go to print on any stationery until the day the person is appointed*", and so he clearly did not believe that there was anything wrong in obtaining information from EF for use in those business cards. So far as the competency assessment is concerned, Mr. Brown explained that he did not know that this took place on a working day for EF with Quilter and there was no evidence that he knew it to be a breach of her contract.

329. So far as the remainder of these allegations is concerned (i.e. (4)-(6)), this is an allegation that Continuum procured EF to breach her restrictive covenants. So far as that is concerned, the first question is whether the covenants are valid and enforceable, as in order for there to be a breach of these restrictive covenants, or for Continuum to be liable for having allegedly induced a breach, it is necessary for the covenants to be enforceable: *Allen v Pollock* [2020] EWCA Civ 258 at para 25:

> *"It seems to me to be clear that in order for a person to be liable in tort for inducing a breach of contract, the contract in question must be a binding and enforceable contract. If it were not, then the inducement cannot have caused any loss, which is part of the essence of the tort. Put another way, since liability in tort for inducing a breach of contract is an accessory liability to that of the contract breaker, if the party to the*

contract is not liable (because the relevant term of the contract is unenforceable) the accessory cannot be liable either."

330. Since I have found that the covenants are not enforceable, Continuum cannot have induced any breach of contract.

331. Had the covenants been enforceable, I would have found in any event that on the evidence Mr. Brown, and Continuum, did not procure EF to breach her restrictive covenants.

332. Mr. Brown denied inducing EF to solicit Quilter's clients and I find on the evidence that Quilter has not shown that he did so. I find that (i) Mr Brown knew that EF had a very interesting book of clients at Quilter; and (ii) that he and EF would have discussed, at least in broad terms, that book at their meeting at the end of April/beginning of May 2019, at which meeting it was agreed that EF would join Continuum; but (iii) Mr. Brown did not know that EF had scanned onto her personal laptop large quantities of Quilter documentation concerning clients who had been transferred to her; and (iv) Mr. Brown did not induce EF to act in breach of her non-competition covenant (of which he was unaware), her non-solicitation covenant (which he assumed would be contained in her contract of employment but the precise terms of which he was unaware) or her non-dealing covenant (of which he was unaware).

333. In particular, Quilter's primary complaint is that Continuum allowed EF to download onto its IO System the Quilter documents in respect of 8 different clients and which are contained in Trial Bundle 4. However, Mr. Brown explained that he *did not know* that EF had done that and there was no evidence before the court that Continuum, through Mr. Brown or anyone else induced or persuaded EF to do that.

334. It is important to appreciate in this context that Continuum does not employ advisers. Mr. Brown explained in largely unchallenged evidence, and I accept, that advisers are, as in the case of EF, appointed as Registered Individuals under a Partner's Agreement and are granted licences to use the Continuum name and Continuum makes available services for the adviser to use, such as administrative and technical support and compliance services. All advisers use their own hardware, but are provided with access to Continuum's chosen operating platform, the IO system, as well as access to resources to enable them to research appropriate and suitable products for clients.

335. The IO system is a business management system used to store electronic client files containing data including contact details, client agreements, documents, reports and advice in relation to each client. Advisers such as EF were given access to this system to ensure that they were storing data securely and in compliance with FCA requirements. The IO system therefore provides a record of the advice that is given to the clients. Crucially, each adviser has his/her own area on the IO system and can see only their own client files. Continuum would not monitor what EF entered into the system or what documents she was uploading or when she did that. The only time when Continuum would look at individual files would be when an adviser submitted a business case for a pre-sales check under the training and competency scheme. Accordingly, as Mr. Brown states:

> *"In effect, Intelligent Office provides Ms Falconer with a "back office" for the storage of documents for her own use in her independent business. Any documentation uploaded is not uploaded for Continuum's use or benefit, other than to the extent that the documentation is retained on the system as a record in support of the advice that had been given".*

336. Only a limited number of administrative staff at Continuum have access to an adviser's client files and Mr. Brown explained that "*I would not ordinarily access any adviser's client files… nor would I review the names or any details of the clients added to the system… The first time that Quilter provided a list of clients they alleged had originated from Quilter and may have moved to Continuum was 3 January 2020, when they provided an amended version of the additional undertakings that they had requested on 31 December 2019. Until this time I would not have known by looking at Ms Falconer's list of clients whether any of the clients listed had or could have originated from Quilter."*

337. Moreover, as Mr. Brown explained and I accept, anyone looking at the client documents stored by EF on Continuum's IO system would assume that they had been stored with the client's consent – in other words that these Quilter documents had been supplied to Continuum by the client. I accept Mr. Brown's evidence that:

> *"It is now apparent to me that Ms Falconer did use Continuum's IT systems to service clients which had originated from Quilter and that, in doing so, Ms Falconer inputted client data and documentation to Continuum's [IO] system. At the time that this was being carried out I was not aware that this was the case."*

338. As Mr. Brown explained in his witness statement, EF was not employed by Continuum and did not report to Mr. Brown or anyone at Continuum. Continuum did not monitor, other than from a compliance perspective, who the clients were or where they came from. Instead, each adviser's business was monitored and checked by Bankhall Business Monitoring Unit (BBMU), an external company. However, even BBMU does not examine how clients become clients of the adviser. Continuum also monitors advisers in accordance with FCA requirements through its training and competency scheme. The purpose of this internal supervision is, as with BBMU, to check whether appropriate advice has been provided. It does not involve a consideration of how a client came to be a client of the adviser at Continuum.

339. In closing, Quilter contended that access was granted [to Continuum's IO system] even though a contract was not in place between [EF] and Continuum at that time and [EF] was employed by a competitor. However, it is again apparent from the cross-examination of Mr. Brown (cited in closing by Quilter itself) that he did not know that this had occurred:

> MSQC: *"The induction is in June 2019. You are giving employees of competitive firms access to your IO system and enabling them to upload information?"*

> Mr Brown*: "I cannot answer that question. The individuals are given access for training purposes. It appears that access continues after the course. The advisers are under no illusion that they should not upload information prior to their start date."*

340. Consistently with a lack of knowledge on Continuum's part that it was inducing a breach of EF's contract, on 5 July 2019, Lisa McConnell, a Senior Administrator at Continuum, openly requested a reference from Quilter for EF (whilst EF was still employed at Quilter), which included a request for information about EF which Quilter felt was relevant to making a judgment about her suitability for a responsible position with a firm regulated by the FCA. Quilter's HR department responded on 9 July 2019 and it said nothing about EF's restrictive covenants in her contract of employment; nor did it complain that Continuum was guilty of any inducement of a breach of EF's contract.

341. Accordingly I do not consider that this is a case of silent receipt of the claimant's confidential information by Continuum, which was intended to be an encouragement of EF's breach of her contract with Quilter. Putting Quilter's case at its highest, this was a case where Continuum unwittingly *facilitated* EF's breach of confidence, which is not sufficient to establish its liability for procuring a breach of contract: *CBS Songs Ltd v Amstrad* (supra) and *Fish & Fish Ltd v Sea Shepherd* (supra).

Is Continuum in breach of an equitable duty of confidence owed to Quilter?

342. Quilter also advances a direct claim for breach of confidence by Continuum.

343. During (and after) her employment with Quilter, EF owed it an equitable obligation of confidence not to misappropriate, misuse or divulge to any third party Quilter's confidential information or its trade or business secrets.

344. Continuum admits that the same obligation of confidence as EF owed to Quilter was owed by Continuum to Quilter in respect of any confidential information belonging to Quilter that came into the possession of Continuum which it knew or ought reasonably to have known was confidential to the Claimant.

345. It can immediately be seen in the light of the foregoing that the difficulty with this part of Quilter's case is that Continuum did not know that EF had uploaded confidential documents belonging to Quilter onto its IO system when she did. It did not know that EF was using confidential information from Quilter documents to populate Continuum Fact Finds. Mr. Brown did not know that Continuum had retained any of Quilter's documentation post-termination of EF's employment until he saw her second witness statement which she made on 20 December 2019. As soon as he discovered this fact and became aware of the documents in Trial Bundle 4, Mr. Brown made sure that Continuum did not use the information in any way; indeed, he volunteered to deliver up the documentation and did so once Quilter gave him permission to do so. As a result, after receipt of Quilter's letter before action of 21 October 2019 no new clients that had originated from Quilter were created on Continuum's IO system.

346. Aside from knowledge, to sustain a claim for breach of the equitable duty of confidence, actual misuse, adverse to the Claimant, of information which still retains the quality of confidentiality must be established or inferred: *CF Partners (UK) LLP v Barclays Bank PLC* [2014] EWHC 3049 per Hildyard at [138]. Quilter have failed to establish on the evidence that there was any such misuse of confidential information by Continuum in this case.

347. It follows that whilst EF may have been guilty of a breach of confidence, the allegation that Continuum is itself in breach of an equitable duty of confidence owed to Quilter must fail.

CONCLUSION

348. It follows that I find as follows.

349. EF is in breach of the clause in her contract headed "*The Role*", in failing to devote her whole time, attention and abilities to the duties of her employment with Quilter during the normal working hours of the Company, in that during her employment with Quilter and in normal working hours she attended an induction course with a competitor, Continuum, between 24-26 June 2019; she undertook a competency assessment with a competitor, Continuum, with a view to joining them; she also met or had telephone discussions with Continuum employees with a view to making preparations and agreeing terms of engagement to commence work there.

350. EF is in breach of section 7 of her employment contract in that she failed to supply Continuum with a full copy of her Quilter contract of employment upon being offered her consultancy arrangement with Continuum. However, she is not in breach of this clause in allegedly failing to disclose to Quilter the identity of Continuum as soon as possible after accepting its offer of employment or a consultancy arrangement.

351. EF is in breach of the "*obligation to provide work*" clause, which concerns her garden leave, covering the period 4-19 July 2019. During that period I find that EF did contact customers who conduct business with Quilter, whether in a professional or personal capacity, without Quilter's prior written permission, namely client 10 AK (on 6 July); Client 14 SP (on 18 July); Client 12 RN (on 10 July).

352. EF is in breach of the "*conflict of business interest*" clause. EF has during her employment carried on, been engaged in or otherwise interested in other business where this is, or is likely to be, in conflict with Quilter's interests.

353. EF is in breach of her duty of fidelity as well as the duty of trust and confidence which she owed to Quilter in scanning Quilter's client documentation onto her personal laptop.

354. The use of this confidential information for her own purposes was also a breach of the same duties; as was the fact that by doing this she was making preparations to divert business opportunities away from Quilter and to compete with Quilter; as was her concealment of her own wrongdoing by scanning these documents onto her personal laptop without informing Quilter that that was what she had done during her employment with it.

355. EF also acted in breach of an equitable obligation of confidence that she owed to Quilter in misusing Quilter's confidential information in this way.

356. EF did not mislead Quilter about her future employment plans on 4 July 2019.

357. EF did not give any oral undertaking to Andrew Moore on 6 November 2019, nor therefore did she breach any such undertaking.

358. Each of the non-competition clause, the non-solicitation clause and the non-dealing clause in EF's contract of employment is an invalid restraint of trade and unenforceable as a result. The claim against EF that she is in breach of these restrictive covenants in her contract of employment is accordingly dismissed.

359. Had the non-compete restriction been valid, I would have found that Continuum was undoubtedly a competitor of Quilter and that EF was competing with Quilter whilst engaged by Continuum.

360. Had the non-solicitation covenant been valid, I would have found that EF solicited, in breach of the covenant, clients 1JB and 5 JE but none of the other clients.

361. Had the non-dealing covenant been valid, EF would have been in breach of it, as she has always accepted to be the case.

362. The claim against Continuum is dismissed.