



Neutral Citation Number: [2022] EWHC 1410 (QB)

Case No: QB-2022-001226

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/06/2022
Handed down: 08/06/22

Before:

HHJ COE QC
(Sitting as a Judge of the High Court)

Between:

AMOB MACHINERY LIMITED
- and -
(1) ANDREW SMITH-HUGHES
(2) LUIS MANUEL MARGUES DE OLIVIERA
BARROS
(3) VLB GROUP UK LIMITED

Claimant

Defendants

Mr P Gilroy QC (instructed by **Chamberlain Hamnett**) for the **Claimant**
Mr S Pourghadiri (instructed by **Clarke Wilmott**) for the **Defendants**

Hearing dates: 12th May 2022

APPROVED JUDGMENT

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

IHHJ Coe QC :

The Application

1. By application dated 12 April 2021, the claimant company, AMOB Machinery Ltd (“AMOB”) seeks interim injunctive relief against three defendants: the first defendant is Mr Andrew Smith-Hughes, their former employee; the second defendant is Luis Barros, a director of the claimant; and the third defendant is VLB Group UK Ltd (“VLB UK”), the limited company for whom the first defendant now works and of whom he is a director.
2. The relief sought is identified in some 27 paragraphs set out in Schedule 1 to the claimant's particulars of claim (which I annexe to this judgment). The relief sought is summarised in the claimant's skeleton argument at para. 5 as: springboard relief against all three defendants; the provision of statements by all three defendants; an order that all three defendants submit to an investigation by a forensic IT expert in relation to specific documents which C maintains were copied and/or removed by the first defendant during the course of his employment with the claimant; and in the case of the third defendant the delivery up of hardcopy documents belonging to the claimant or containing information derived from the claimant's confidential information.
3. The claimant submits that the injunctive relief should last for one year from the date of the order of the court.
4. I was informed by counsel at the end of the hearing that there would be scope for a speedy five-day trial to be heard in the Queen's Bench Division of the High Court at the end of July 2022, or a longer speedy trial in October 2022.

Background

5. The claimant company is based in Coventry and is concerned in the sale and marketing of highly specialist machinery known as mandrel benders and section bending machines. It sells machinery manufactured by AMOB Portugal; a Portuguese company identified by the claimant as the world's leading manufacturer of metalworking technologies. The claimant is effectively the UK sales function of AMOB Portugal, but the companies are different entities. The claimant has three directors: Tom Wood; the second defendant; and Miss Kay Waite, the company's finance director.
6. The first defendant was employed by the claimant as a key account manager from 15 February 2021 until 30 April 2021. He left and became employed by a company called Bemaco Steel. He then joined the third defendant as UK key group director in late May 2021. He was appointed as a director of the third defendant on 9 June 2021, which was when the third defendant was incorporated. The second defendant was a shareholder in AMOB Portugal with his brother, Manuel, but following a dispute with Manuel, he disposed of his shares in AMOB Portugal. It is the claimant's case that the second defendant set up VLB Portugal, the third defendant's parent company and is the “controlling mind” of the third defendant. The second defendant denies that he has any operational or financial interests in the third defendant or VLB Portugal. The directors of VLB UK are Mr Smith-Hughes and the second defendant's son, Vasco. The second defendant is a director of another company in the same industry in Portugal called Maqfort.

Maqfort is not involved in this litigation.

7. It is the claimant's case that by reason of his employment with it, the first defendant had access to the claimant's QuickBooks package (an online cloud-based accounting system), which included the customer list, the product list, supplier list, quotes list, the orders list, the invoices list and the financial transactions. He also had access to the claimant's key email enquiries database and in the course of his employment created a spreadsheet, "the customer spreadsheet". AMOB says that the first defendant used this to record the quotations he had sent customers together with notes of conversations with potential customers and for follow-up.
8. When he left AMOB, the first defendant returned the laptop to it and it is the claimant's case that it intended to reformat the laptop for a new employee. It is the claimant's case when the laptop was opened, the desktop screen displayed the logo and graphics of the third defendant. It is the claimant's case that the first defendant had uploaded "copious confidential information" belonging to the claimant onto his personal OneDrive.
9. The claimant opened the laptop and saw the details upon which it relies at the beginning of July 2021.
10. It is the claimant's case that the first, second and third defendants have a common design to divert business away from and cause damage to the claimant's business. The claimant says that through the first defendant, the defendants have obtained "a head start" as a result of the commission of unlawful acts, and so injunctive relief should be granted to deprive the defendants of the fruits of their unlawful acts, that is, the claimant claims "springboard" relief.
11. For the purposes of this interim application, I only need to set out in summary, the matters upon which the claimant relies. AMOB contends that the first defendant uploaded confidential information (not amounting to trade secrets) and that, acting for the third defendant, he has used and continues to use the claimant's confidential information to secure orders for the third defendant. AMOB has identified 11 such approaches/transactions with customers. Thus, the claimant claims in light of the alleged breach of the duty of confidence, it is entitled to the relief claimed to protect its confidential information.
12. By its particulars of claim the claimant contends that the first defendant owed and in part continues to owe a number of obligations to the claimant set out in the various express terms in his contract and the claimant's employee handbook. The particulars of claim also relies upon an equitable duty of confidence owed by the first defendant to the claimant concerning its "trade secrets". In the course of the hearing in front of me, the claimant did not contend that the first defendant is in possession of and/or has used trade secrets, but has accessed confidential information and used it to secure orders for the third defendant, and develop customer connections on its behalf.
13. The claimant contends that the customer and lead data stored in the claimant's database

comprises a “database” for the purposes of section 3A (1) of the Copyright, Designs and Patents Act 1988 and is a database in which the database right subsists for the purposes of regulation 13 of the Copyright and Rights in Databases Regulations 1996

14. As indicated, it is the claimant's case that the first defendant had uploaded confidential information onto his personal OneDrive which amounts to unlawful conduct and that the claimant uncovered evidence of the first defendant’s substantial and ongoing breaches of his obligations to the claimant following a review of its IT systems, and “discussions with certain customer connections”.
15. In terms of the breach of the duty of fidelity, the claimant contends that the first defendant accessed the claimant's records prior to the termination of his employment in order to mark two “live” opportunities as “closed” when they were open, thus misusing its property and disrupting its business. It is further alleged that the first defendant did not record on the claimant's database details of at least one sales opportunity, but instead recorded it on a spreadsheet which he subsequently accessed after he had taken up his role with the third defendant.
16. The claimant contends that the defendants have infringed its database right by extracting a substantial part of the contents of the claimant's database without the claimant's consent, in particular, by way of the permanent or temporary transfer of data from the claimant's database. The claimant alleges repeated and systematic acts of extraction by the first defendant. The claimant contends that the extraction of the contents of the database were in each case carried out pursuant to a "common design between the defendants and each of them in respect of which the defendants are jointly and severally liable".
17. The 11 specific instances relied on by AMOB are detailed in the next paragraph.
18. The claimant contends that:
 - on 1 July 2021, the first defendant submitted a quote to Equi-Trek;
 - the first defendant submitted a quote on 14 May 2021 and further quotes on 14 June 2021 and 26 July 2021, to Duright Engineering and, in November 2021, the first defendant posted on LinkedIn announcing the installation of a tube bending machine on behalf of the third defendant at Duright’s premises;
 - following contact with Ricor Ltd, on 9 June 2021, the first defendant submitted a quote to them;
 - the claimant says that on 7 July 2021, it discovered that the first defendant had chased up an enquiry for a machine on 25 June 2021 with Sterling Thermal Technology Ltd;
 - on 7 July 2021, the claimant discovered a note relating to a quote written in the week commencing 5 July 2021 submitted to PSV Wipers;
 - on the same date, 7 July 2021, the claimant discovered that there was evidence that the first defendant had sent a quote on behalf the third defendant to Shelter IT;
 - the claimant discovered on 7 August 2021, evidence (a note made on 5 July 2021) that the first defendant had provided a quote to Rototherm and arranged a site visit. (The claimant went on to win this order);
 - the claimant attended a site visit with Cardinal Steels, who were then contacted by the

first defendant, who submitted a quote to that customer on behalf of the third defendant on 21 October 2021. The claimant contends that following its own quote to the same customer, the first defendant contacted the customer, again making malicious and untrue statements. (The claimant won the order);

-on 21 June 2021 the first defendant on behalf of the third defendant submitted a quote to T and T Tubecraft;

-on 2 February 2022, the first defendant posted an announcement on LinkedIn, regarding the recent installation by the third defendant of a machine at JSC group, Ireland;

-9 August 2021, the first defendant contacted the director of BUSA Engineering via LinkedIn representing the third defendant.

19. Thus, the claimant alleges that the defendants have been concerned in a conspiracy to injure the claimant and that the claimant has suffered loss or damage as a result. The claimant also alleges that the second and third defendants have induced the first defendant to breach his contract.
20. The claimant relies on a report from Ankura Consulting (Europe) Ltd who undertook a review of the metadata of three Microsoft Office Excel files which the first defendant had stored on his personal OneDrive. It is the claimant's case that the report demonstrates that a copy of the spreadsheet had been created by the first defendant on 10 March 2021 and was subsequently modified by him on 5 July 2021 and again on 12 July 2021.
21. In summary, therefore, the claimant says that the first defendant has acted in breach of contract and by his misuse and/or disclosure of the confidential information and/or know-how of the claimant has breached the equitable duty of confidence. Further, that the second defendant has acted in breach of fiduciary duty and/or has induced the first defendant to act in breach of contract and that the third defendant has induced the first defendant to act in breach of contract. Further, that the defendants are each liable for the tort of unlawful means conspiracy and/or interference by unlawful means and for breach of the database right.

Witness statements

22. The claimant relies on the evidence of Mr Tom Wood, the claimant's managing director. In light of the chronology of this application (of which more below), I refused to allow the claimants to rely on the second statement of Mr Tom Wood. There is also a third statement which deals in rebuttal with some of the matters raised on behalf of the first defendant.
23. The defendants rely on the statement of Mr Andrew Smith-Hughes, the first defendant, and of Mr Peter Brewer, the solicitor with conduct of the matter on behalf of all of the defendants.
24. In his first witness statement, Mr Smith-Hughes exhibits the letter from his solicitors dated 17 December 2021. Any breaches of contract or implied obligations to the claimant are denied. Reference is made to the fact that his period of employment with the claimant was short, with two weeks working from home, a week of contractual notice and a week

engaged in installing a machine which work was invoiced through another of Mr Wood's companies.

25. It is pointed out that Mr Smith-Hughes then went to work for Bemaco Steel.
26. It is contended on behalf of the first defendant that he reported to Mr Wood and was invited to attend sales meetings at the instigation of and with Mr Wood. It is set out that it was one of the first defendant's roles to try and leverage the contacts that he had built up in 11 years in the tube bending industry and so lots of activity was around him targeting his existing contacts, rather than the established customers of the claimant.
27. It is alleged that if the first defendant marked a sales lead as "closed", he only did so on the instruction and with the express knowledge of Mr Wood.
28. The nature of the employment relationship between Mr Wood and Mr Smith-Hughes is said by Mr Smith-Hughes to have been an unpleasant one. It is pointed out on behalf of the first defendant that he had a well-established reputation in the marketplace and the tube bending market is a very small one where lots of customers and suppliers know each other well. Indeed, it is said that the principal officers of some companies have become the first defendant's personal friends with whom he has a social relationship outside of work. Thus, it is argued that customers would approach the first defendant and the contact did not depend on breach of any confidential information obligations.
29. Moreover, the first defendant relies on his industry knowledge in terms of his ability to provide quotes rather than depending on any specific reference to the claimant's pricing structure and, for example, Duright Engineering was a long-standing customer of the first defendant. Indeed, the first defendant introduced Duright to the claimant. It is contended that Duright bought a machine which the claimant does not produce. Similarly, it is said that T and T Tubecraft was a customer of the first defendant going back over many years.
30. On behalf of the first defendant in respect of documents, it is said that the claimant could not provide the first defendant with a reliable laptop and so the first defendant accessed the claimant's Dropbox account containing the claimant's information and the first defendant's work email account. Access was via the Internet. His access to the Dropbox account was withdrawn on termination of his employment. After he was denied access to the Dropbox account, he could not access the claimant's documents or his own historic email account, He did not access the Dropbox account or extract anything from it because he had no access after termination of his employment. The first defendant acknowledges that he did retain a pricing list on his personal computer which he had forgotten about and then deleted. Any hardcopy documents he had were left in the claimant's office and he does not now have possession of any confidential information.
31. In his first statement, dated 22 December 2021, the first defendant sets out that he has spent 14 years in the tube bending industry. He confirmed the details in the solicitor's letter.
32. He repeats his denials of breach of the duty of fidelity and confidence as set out in the

solicitor's letter. He states that QuickBooks is primarily an accounting and invoicing tool and he was told not to overload it, but to record initial enquiries on a separate spreadsheet, called "email enquiries" which he did. He was told this by Mr Wood. Again, he emphasises that any lead would only be closed on Mr Wood's instruction and with his express knowledge. He says that he did not have full administrator rights within QuickBooks.

33. His second witness statement is dated 11 May 2022. Mr Smith-Hughes sets out the niche nature of the tube bending industry and also his employment history and his work with the claimant. He describes being closely supervised by Mr Wood and reporting directly to him. He says he was exposed to only a small number of the claimant's existing clients. He corrects the information given previously, to say that he did have in his possession when he was working for the claimant, two Excel spreadsheets, known as "Excel enquiries" and "quotation status". He says that they were only ever held online and he accessed them through his OneDrive account. They were never physically in his possession and are no longer within his possession. He became aware that his OneDrive account had been accessed in July 2021, and therefore made the decision to delete everything on that account which would have included the two spreadsheets. (This was the access by the claimant).
34. Given the difficulties with the laptop, which did not have an MS Office operating system, Mr Smith-Hughes says that he suggested to Mr Wood that he used his own Microsoft login via his OneDrive account to access the claimant's documents. He says that Mr Wood agreed to this and he was able to remotely access the claimant's computer systems. After the laptop malfunctioned, he used his own Apple laptop accessing documentation via OneDrive and saving documentation into the claimant's Dropbox.
35. When he returned the laptop, Mr Smith-Hughes says he performed a factory reset because it was linked to his own OneDrive account which contained a number of personal documents. He says that he cannot understand how the third defendant's logo would have been displayed on that laptop's desktop screen after the factory reset, unless the claimant had obtained unlawful access to his personal OneDrive account. The logo would have been on his then current OneDrive account which would be the same across all his devices because by July 2021, he was working for/a director of the third defendant, and it updated his desktop background. He says his suspicion is confirmed by the claimant's forensic accountants' report by Ankura stating that the claimant downloaded documentation from the first defendant's personal OneDrive.
36. He says that he was approached by Bemaco Steel Ltd and began talking about him joining that company as an employee. Given his unhappiness with the working relationship with Mr Wood, he accepted an offer from them. He was then approached by the third defendant and recruited to that business. He joined the third defendant in late May 2021
37. The first defendant sets out that is aware that the second defendant has been in litigation with the owners of the claimant and that the second defendant is in dispute with the claimant now. The second defendant is a director and shareholder of the claimant and has raised allegations relating to the conduct of the affairs of the claimant. The first defendant's concern is that he has been drawn into these proceedings as a result of that dispute.

38. Mr Smith-Hughes sets out details in relation to the 11 contacts/transactions with customers. He refers to his use of “lead forensics” in respect of how he came to contact Equi-Trek. He says that Ross Taylor of Duright Engineering is a personal friend and has been a professional contact for 12 years. He says that the approach from Ricor came directly to him via LinkedIn. He got the contact details for Sterling Thermal, PSV Wipers, Shelter IT and Rototherm through Google. He contacted Cardinal Steels having seen a post on LinkedIn, but having quoted them, the claimant quoted competitively and won the order. He says he had a long-standing commercial relationship with Mr Turner of T and T Tubecraft. He says that JFC had a relationship with VLB Portugal. BUSA Engineering advertised on LinkedIn, where the first defendant says both he and the third defendant are very active and his own LinkedIn profile has been set up for a number of years. The other contact with JFC came in via a director of the third defendant's parent company.
39. In summary, Mr Smith-Hughes says that he has more experience in the industry than Mr Wood.
40. He says that he has built up a substantial client base and has his own reputation within the tube bending industry, which he believes to be one of the very reasons he was hired by the claimant and then by the third defendant. Thus, he denies in particular and generally that he has been concerned either himself or with the second and third defendants, in any conspiracy to injure the claimant.
41. In terms of the relief sought he confirms again that he has no documentation to deliver up. He has provided the claimant with a signed witness statement and an undertaking to the same effect. He says that the "prohibited customers" list at Schedule 3 of the particulars of claim represents about 1/3 of the total market for tube bending machines and being denied access to that market completely would have a substantial impact on the third defendant's business even if the restriction was only for a very short period of time. Again, he points out that he developed his own client base within the industry long before the claimant was established. To prohibit contact with those customers would give AMOB an advantage and the first defendant says it has nothing to do with any breaches alleged against him. Moreover, despite the access to his OneDrive there was, and is, no suggestion that he saved, or retained a copy of the full “prohibited customer” list referred to.
42. Given that the claimant already had access to his OneDrive account and was able to obtain and view documents on that system having on three occasions looked through the electronic documents and having obtained the Ankura report any further investigation by an IT expert would be oppressive and an invasion of privacy. Any overlap between the third defendant's customer database and the claimant's 450 customer list, given the size of the market and the first defendant’s experience in it, would not be surprising and would not indicate any breach of confidentiality.
43. Both the first defendant and the claimant rely on the fact that the turnaround time for an average sale of a tube bending machine is long and can range from months to up to 2 years. The claimant says that this gives rise to the need for a long period of injunctive protection.

The first defendant says it supports his contention that there is no ongoing use of confidential information as alleged, because any quotes/orders would significantly pre-date the installation of machines.

44. In his statement Mr Brewer sets out that the second defendant does not speak English and so he takes his instructions via a Mr Xavier through a power of attorney.
45. By way of background Mr Brewer was first retained by Mr Barros in respect of the dispute relating to his shareholding and his position as a director of the claimant company. In the exhibited letter before action, Mr Barros alleges that his interests as a minority shareholder were being unfairly prejudiced as a result of Mr Wood's decisions and that Mr Barros had been excluded from the management of the company. In particular, he has not been privy to the usual information one would expect. Mr Brewer states that AMOB is now the subject of pre-action correspondence relating to a section 994 petition.
46. Mr Barros's position as far as these proceedings are concerned is as set out in detail in a letter dated 15 March 2022, exhibited to Mr Brewer's statement. Mr Barros has no legal interest in either the defendant or its parent company. His son wholly owns the parent company and is its sole director. The first defendant, and Mr Barros's son are the directors of the third defendant. Mr Barros says he has no commercial involvement or financial interest in the third defendant.
47. Mr Barros does have a financial interest in the claimant but says he has not been informed of any of the decisions in respect of the current proceedings.
48. In correspondence, Mr Barros has indicated that he would be willing to give a limited undertaking in these proceedings. The offer was not accepted. On behalf of Mr Barros, Mr Brewer repeats that he would be prepared not to contact the "prohibited" customers insofar as they are based in the United Kingdom; confirms that he has not been in contact with them to the extent that they are based in the United Kingdom; would not do anything to encourage or support the first and/or third defendant in the promotion of the third defendant's business; and confirms that he has none of the claimant's confidential information. He would object to a forensic computer analyst having access to his computers, which, he says, would be entirely disproportionate and unjustified in the circumstances.
49. It is the claimant's case, through Mr Wood, that the second defendant is the controlling mind of the third defendant. Mr Wood relies, in particular, on a photograph of the second defendant at the front of the staff team at the VLB Portugal factory and the social media post of him welcoming the first defendant to "the VLB Group family". There is, of course, in addition the background, which is that the Barros family have for very many years been extensively involved in the tube bending industry in Portugal.
50. In his third witness statement, Mr Wood disputes Mr Smith-Hughes' experience and reputation in the marketplace and relies on the fact that he worked as a service engineer for BLM Group for 10 years and not in a sales role.

51. He also denies that the first defendant performed a factory reset on the claimant's laptop before handing it back because had he done so, it would have removed access to his OneDrive account and when the claimant opened the laptop, it was still linked to that account.
52. In Mr Wood's first witness statement, he sets out that the claimant company has five employees and a turnover of 3.2 million.
53. He confirms the background that the second defendant was previously a shareholder in AMOB Portugal and Maqfort Portugal, businesses which were principally owned by him and his brother, Manuel. Following a dispute between the brothers, Mr Barros disposed of his shares in AMOB Portugal entirely and, according to Mr Wood set up a competitor business operation in Portugal, namely VLB Portugal. In turn, Manuel disposed of his shares in Maqfort Portugal and therefore VLB Portugal and Maqfort Portugal now compete with AMOB Portugal.
54. He says that he and the second defendant are in dispute regarding their shareholding in the claimant which started in 2020, when he made it clear to Mr Barros that he wished to buy back his shares because Mr Barros had disposed of his stake in AMOB Portugal and was the owner of VLB Portugal, a competitor to the claimant's main supplier.
55. Mr Wood sets out his reasons for believing that the second defendant is heavily involved and a direct competitor via the third defendant. He says that the second defendant has very deep roots and multiple interests in the industry and is very well known. The claimant's name, AMOB, is derived from Mr Barros family name and his father's initial. He contends that VLB comes from the initials of his son, Vasco, together with Luis Barros.
56. Mr Wood says he believes that Mr Barros owns the third defendant VLB Group UK Ltd "through a smokescreen of his son with the intention of diverting the claimant's business to the third defendant."
57. At paragraph 14 of his statement, Mr Wood deals with the timing of this application. He says that initially the extent of the defendants' wrongdoing was unclear and "we simply thought that Mr Smith-Hughes had used his own IT storage account to work from – we did not know he had copied and potentially misused the claimant's confidential information." He says that the extent of the wrongdoing became clear over time, starting with the first discovery of some of the claimant's confidential information being stored on the first defendant's OneDrive in July 2021.
58. He refers to the shareholder dispute which "took priority" and says he was hoping it would be possible to resolve "all issues." He also says it was hoped that matters could be resolved on undertakings. Solicitors were instructed in November 2021. He also relies on the defendants' denial of wrongdoing and the fact that by February 2022, he says it became clear that the defendants were continuing to misuse the claimant's confidential information to build on the unlawful head start they had obtained. He contends that the defendants

continue to enjoy, and unless restrained will further enjoy, an unlawful advantage over the claimant's business.

59. He states that he started the business in April 2017. He refers to the lifecycle of the customer relationship which can take anything from a few months to 2 years to develop what starts off as an opportunity into an order. The machines are a large cost for the customer and the customer will only buy one or two machines every few years, possibly once every 10 years. Reputation and pricing information are, therefore, he says of critical importance. He says at paragraph 22 that he believes that the defendants have jeopardised about £1.4 million worth of business for the claimant through their unlawful conduct. This is not particularised. He says that the claimant will need at least 12 months' protection from the date of the hearing of this application.
60. He refers to the first defendant being trusted with full access to all of the claimant's confidential information, including that which could be described as its "crown jewels" to a competitor including customer lists, sales opportunities, information and pricing and margin information.
61. Mr Wood sets out how the first defendant's company laptop was opened, showing VLB UK's logo and he says, "this prompted a more detailed review". He says, "over time it became apparent that Mr Smith-Hughes had uploaded copious confidential information." He says that AMOB undertook an investigation and instructed the independent forensic IT team whose findings are set out in the letter before claim dated 23 February 2022
62. At the end of this statement, Mr Wood said that it is possible that the claimant's entire business could be lost to VLB UK in the absence of the injunctive relief sought, and it is impossible to put a precise monetary value on the damage which it may suffer. He says that the claimant is capable of giving a cross-undertaking in damages and of meeting any claim which may follow from the defendants if it were found that they should not have obtained injunctive relief. Mr Wood's statement is dated 5 May 2022.

The Law and Analysis

63. In terms of general principles. I remind myself that an interim injunction, like any injunction, is a discretionary remedy to be granted where it appears to the court be just and convenient to do so. In case of an interim injunction, the court's discretion is to be exercised in accordance with the guidelines laid down in *American Cyanamid Company v Ethicon Ltd* [1975] AC 396, The elements of the general test for the grant of an interim injunction are:
 - (1) Is there a serious issue to be tried?
 - (2) Would damages be an adequate remedy for the claimant if it were to succeed at trial, but an interim injunction had not been granted?
 - (3) Would a cross-undertaking be an adequate remedy for the defendants if they were to establish at trial that they had not acted in breach?
 - (4) If there is doubt about the adequacy of damages, where does the balance of convenience lie?

64. To expand on these points a little in my consideration of this case, I additionally set out from the speech of Lord Diplock:

“The court ... must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”

And:

“It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case. Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.”

65. Where it will not be possible to hold a trial before the period for which the claimant claims to be entitled to an injunction has expired or substantially expired the test in *Lansing Linde Ltd v Kerr* [1991]1 WLR 251 is appropriate. That test involves some consideration at the interlocutory stage as to whether or not the claimant would be likely to succeed at trial, given that granting the interim injunction will effectively be determinative of the matter.

66. In this case the claimant seeks an injunction of 12 months from the date of the hearing. From the information I received and which I have set out above, it is apparent that this matter can come to trial before the expiry of 12 months, and the American Cyanamid test is therefore the correct one for me to apply. It is, in any event, the claimant's case that whichever test is applied, it is met here and that injunctive relief would be appropriate. In my view, I am concerned with American Cyanamid principles.

67. As far as the first question for me is concerned, which is, “Is there a serious issue to be tried here?”, it is conceded on behalf of the defendants that there is, albeit only in relation to 6 of the 11 contacts/transactions with existing customers identified by the claimant. As I understand it, this is because these occurred via Google searches, according to the first defendant. The first defendant, as set out denies misusing any confidential information, but accepts that those allegations and his explanations of those matters do give rise to an issue to be tried.

68. Clearly, the claimant casts its net much wider, referring to the “copious” confidential information and, for example, that the second defendant has “thoroughly abused” his access to the claimant's confidential information by exploiting its use for himself and/or the third defendant in direct competition with the claimant. It is not for me at this stage to reach any

conclusions about this, but the evidence seems to me to be thin on these issues. The forensic report refers to 3 Excel spreadsheets. There is no evidence referred to in support of the unlawful possession of, let alone the use of the list of 450 customers. There is the first defendant's admission about having a copy of the price list on his hard drive which he says he deleted, but the evidence of its use is speculative at the moment. As noted above, the claimant in fact won two of the identified contacts/transactions. Clearly, the claimant will need to establish removal and use of the confidential information rather than mere possession of the same.

69. The claimant emphasises what it sees as the gravity of the breaches, but I must be concerned with the extent of any illegitimate advantage gained.
70. I remind myself that the remedy is a financial one. The law does not restrain lawful competition. I have to do what is best to preserve the status quo.
71. I also remind myself that it is for the claimant to identify the precise period and nature of the competitive advantage.
72. Importantly, in my view, the 11 instances of contact/engagement with customers all relate to the period between 14 May 2021 and 9 August 2021 save for the announcement of an installation of a machine at the premises of Duright in November 2021, a visit to Ricor Ltd in October 2021, a quote submitted to Cardinal Steels on 21 October 2021 (with the contract being won by the claimant) and an announcement on the 2 February 2022 on LinkedIn, regarding the installation by the third defendant of a machine at JFC Manufacturing Ltd.
73. Given the information which is agreed between the parties about the length of time it takes from an order to installation as being months at a minimum, it does not seem to me that the information that machines were installed in November 2021 and February 2022, is likely, without more, to establish any ongoing use of confidential information after July/August 2021. Further, rather than relying on the misuse of any confidential information, the claimant suggests that the first defendant may have “tracked” his vehicle in October 2021 and submitted the quote to Cardinal in consequence of his awareness of the claimant’s visit. That is not an activity which the relief sought seeks to prevent.
74. As I said, is not for me to make any findings of fact which will be dealt with at trial, but these are matters which in my view, go to the issue of the delay in making this application for interim relief. Delay is an important factor in my consideration of whether or not an interim injunction should be granted. Firstly, of course, the claimant needs to establish that there is ongoing use of confidential information which is continuing to create an illegitimate gain for the defendants.
75. Secondly, the claimant has to show that the defendants or any of them are still gaining the necessary “head start.” The issue of delay is also important when I consider the balance of convenience and the preservation of the status quo.

76. I have set out the reasons given by Mr Wood for the delay. At para.22 of the claimant's skeleton it is set out that "some time has passed between the claimant having entertained suspicions of the defendant's wrongdoing and the hearing of this application". First of all, it is clear from the evidence of Mr Wood that having accessed the first defendant's OneDrive he knew on 5th/7th July, according to his interpretation of matters, that the first defendant had retained confidential information belonging to the claimant. He refers to the "copious" quantities of confidential information and lists them in the particulars of claim. It is the claimant's case that on opening the laptop, the third defendant's logo appeared. They knew then, on their own case, that the first defendant had the confidential information they allege and was clearly associated with the third defendant, a direct competitor. Mr Wood relies on the photograph, at page 314 in the exhibits to his statement, showing that Mr Smith-Hughes was being welcomed by the second defendant to the VLB group "family". If the claimant's case is right then as set out in its own particulars of claim, it knew from as early as 7 July 2021 that the first defendant had retained documents described as the business's "crown jewels" without its consent, had joined a competitor and was misusing the information by contacting its customers and quoting for work on behalf of the competitor.
77. However, the claimant took no steps at all to prevent the defendants' alleged activities until the claim was first intimated on 10 December 2021. In the context of a claim of this kind and in particular an application for springboard relief, this delay is, in my view, inordinate.
78. The claimant's explanations at paragraph 14 of his witness statement do not, in my view, come close to explaining the delay adequately. First of all, he says that the extent of the defendant's wrongdoing was unclear. I have set out the claimant's case about what it knew in early July 2021. The submission that it would wait to see the extent of the wrongdoing before protecting the business-critical risk/head start it now identifies is neither logical nor persuasive. It knew its customers were being approached. Solicitors were not instructed until November 2021. An awareness, upon which the claimant seems to rely, that the defendants were continuing to misuse the information is not helpful to the submission at all in my view. Such awareness would be all the more reason to take urgent action.
79. The claimant's application is an application for springboard relief, amongst other things. Such an injunction is designed to remove or limit the advantage or head start that an employee has gained through unlawful activities. It is designed to restore a level playing field between the parties. The seminal case of QBE Management Services (UK) Ltd v Dymoke and others EWHC [2012] 80 (QB) sets out the principles in relation to springboard relief. I set them out as per Haddon-Cave J (as he then was): -

"The principles behind 'springboard' relief are now well-established and, in my view, can be summarised as follows.

First, where a person has obtained a 'head start' as a result of unlawful acts, the Court has the power to grant an injunction which restrains the wrongdoer, so as to deprive him of the fruits of his unlawful acts. This is often known as 'springboard' relief.

Second, the purpose of a 'springboard' order as Nourse L.J. explained in *Roger Bullivant v Ellis* [1987] ICR 464 is "to prevent the defendants from taking unfair advantage of the springboard which [the Judge] considered they must have built up by their misuse of the information in the card index" (at page 476G). May L.J. added that an injunction could be granted depriving defendants of the springboard "which ex hypothesi they had unlawfully acquired for themselves by the use of the plaintiffs' customers' names in breach of the duty of fidelity" (at 478E-G). The Court of Appeal upheld Falconer J.'s decision restraining an employee who had taken away a customer card index from entering into any contracts made with customers.

Third, 'springboard' relief is not confined to cases of breach of confidence. It can be granted in relation to breaches of contractual and fiduciary duties (see *Midas IT Services v Opus Portfolio Ltd.*, unreported Ch.D, Blackburne J. 21/12/99, pp. 18-19), and flows from a wider principle that the court may grant an injunction to deprive a wrongdoer of the unlawful advantage derived from his wrongdoing. As Openshaw J. explained in *UBS v Vestra Wealth* (supra) at paragraphs [3] and [4]:

“There is some discussion in the authorities as to whether springboard relief is limited to cases where there is a misuse of confidential information. Such a limitation was expressly rejected in *Midas IT Services v Opus Portfolio Ltd*, an unreported decision of Blackburne J made on 21 December 1999, although it seems to have been accepted by Scott J in *Balston Ltd v Headline Filters Ltd* [1987] FSR 330 at 340. In the 20 years which have passed since that case, it seems to me that the law has developed; and I see no reason in principle by which it should be so limited.

In my judgment, springboard relief is not confined to cases where former employees threaten to abuse confidential information acquired during the currency of their employment. It is available to prevent any future or further economic loss to a previous employer caused by former staff members taking an unfair advantage, and 'unfair start', of any serious breaches of their contract of employment (or if they are acting in concert with others, of any breach by any of those others). That unfair advantage must still exist at the time that the injunction is sought, and it must be shown that it would continue unless restrained. I accept that injunctions are to protect against and to prevent future and further losses and must not be used merely to punish breaches of contract.”

Fourth, 'springboard' relief must, however, be sought and obtained at a time when any unlawful advantage is still being enjoyed by the

wrongdoer: *Universal Thermosensors v. Hibben* [1992] 1 WLR 840 Nicholls V-C; see also *Sun Valley Foods Ltd v. Vincent* [2000] FSR 825 esp at 834.

Fifth, 'springboard' relief should have the aim "simply of restoring the parties to the competitive position they each set out to occupy and would have occupied but for the defendant's misconduct" (per Sir David Nicholls VC *Universal Thermosensors v. Hibben* [1992] 1 WLR 840 at [855A]). It is not fair and just if it has a much more far-reaching effect than this, such as driving the defendant out of business [855A],

Sixth, 'springboard' relief will not be granted where a monetary award would have provided an adequate remedy to the Claimant for the wrong done to it (*Universal Thermosensors v. Hibben* [1992] 1 WLR 840 at [855B]).

Seventh, 'springboard' relief is not intended to punish the Defendant for wrongdoing. It is merely to provide fair and just protection for unlawful harm on an interim basis. What is fair and just in any particular circumstances will be measured by (i) the effect of the unlawful acts upon the Claimant; and (ii) the extent to which the Defendant has gained an illegitimate competitive advantage (see *Sectrack NV. v. (1) Satamatics Ltd (2) Jan Leemans* [2007] EWHC 3003 Flaux J.). The seriousness or egregiousness of the particular breach has no bearing on the period for which the injunction should be granted. In this regard, it is worth bearing in mind what Flaux J, said at paragraph [68]:

“[68] I agree with Mr Lowenstein that logically, the seriousness of the breach and the egregiousness of the Defendants' conduct cannot have any bearing on the period for which the injunction should be granted - what matters is the effect of the breach of confidence upon the Claimant in the sense of the extent to which the First Defendant has gained an illegitimate competitive advantage. In my judgment, Mr Cohen's submissions seriously underestimate the unfair competitive advantage gained by the Defendants from access to the Claimant's "customer list" and ignore, in any event, the impact (if the injunction were lifted) of actual or potential misuse of other confidential information such as volume of business or pricing information. It is important in that context to have in mind that the Claimant maintains in its evidence that all the information said to be confidential remains confidential.” (emphasis added).

Eighth, the burden is on the Claimant to spell out the precise nature and period of the competitive advantage. An 'ephemeral' and 'short

term' advantage will not be sufficient (per Jonathan Parker J. in *Sun Valley Foods Ltd v. Vincent* [2000] FSR 825 esp at 834).”

80. In this case it is my view that principles 4, 5, 7 and 8 are of particular relevance. Importantly, the advantage alleged to have been obtained by the unlawful behaviour must still exist at the date when the springboard injunction is sought and it must also be established that it will continue to have effect unless relief is granted.
81. In the case of *Sun Valley Foods Ltd v. Vincent* [2000] FSR 825, springboard relief was declined because by the time the application was heard any unfair competitive advantage gained by copying a confidential customer database had been extinguished. I remind myself that springboard relief is intended to prevent the unlawful obtaining of a head start. The “head start effect” only has a limited timeframe. Again, the law permits lawful competition, seeking to protect those that are harmed, but not punish those who have behaved unlawfully. An injunction will not continue beyond the point where there is no longer any advantage, and the appropriate length of the springboard injunction (see again *Dymoke*) is the length of time it would have taken the wrongdoer to achieve lawfully what he in fact achieved, unlawfully relative to the victim.
82. The first defendant left the employment of the claimant at the end of April 2021. He joined the third defendant in May 2021, and it was incorporated in June 2021. The discovery of the material and its alleged misuse occurred in July 2021. Had an interim injunction been sought as soon as possible, even at that point, given the nature of the claimant's business, the effect of the head start would have been extinguished, as I find, in a matter of months. This is particularly so given the experience of the first defendant, the second defendant and the third defendant in the industry itself, their many years in the industry and their reputation and knowledge of the industry.
83. Therefore, in the particular circumstances of this market, I find that even if it had been sought in July 2021, springboard relief would not have been granted for as long as a year.
84. On this point, the 12-month period of springboard relief granted in *Dymoke* and in *Fisher-Karpark Industries Ltd v Nicholls* [1982] FSR 351 is not a benchmark and these injunctions are often and indeed usually granted for shorter periods of time. The effective two-year period sought by the claimant here would be excessive. In any event, in this case I am not satisfied that the claimant has established a precise period of, nor the precise nature of the competitive advantage.
85. The parties have agreed that in terms of the substantive relief sought no points will be taken about delay after 4 April 2022. As I have referred to above, I excluded the second statement of Mr Wood because having issued this application on 12 April 2022 and the matter having been listed to be heard on 12 May 2022 Mr Wood's evidence in support was only served on 5 May 2022 and his second witness statement was dated 11 May 2022
86. In terms of substantive issues, however, despite instructing solicitors in November 2021 and a letter before action (still only) being sent on 10 December 2021, the application was

not issued until 12 April 2022. In the context of an application for interim injunctive relief, and in particular springboard relief, the delay until the issue of this application is again in my view, inordinate and improperly explained.

87. It is established that a former employee who is not subject to any contractual restrictive/non-compete covenants can use the information they carry in their head on moving to a competitor, but it is also acknowledged "having made deliberate and unlawful use of the plaintiff's property he cannot complain if he finds that the eye of the law is unable to distinguish between those whom he could, had he chosen, have contacted lawfully and those whom he could not" (*Roger Bullivant v Ellis*). However, in my view even where it is not appropriate to make a distinction between information the defendants had in any event and information they acquired through misuse of confidential information and/or the advantage they gained thereby such lack of distinction cannot persist beyond the duration of the unlawful advantage and certainly not forever.
88. The first defendant was not subject to any contractual term here and I should say that I do not consider that the handbook terms amount to any enforceable contract terms which would go beyond the duties which the first defendant owed to the claimant in any event.
89. Although it is accepted that there is a serious issue to be tried in relation to six of the alleged instances of allegedly wrongful customer contacts, even up until February of this year there are only two instances of machines being installed and indeed the claimant won two of the contracts. I do not find that there is any evidence in relation to the 450+ prohibited customer list either having been obtained or retained or used by any of the defendants.
90. The information I have about the loss which the claimant may be caused if this injunction is not granted is very limited indeed. As I say, only two machines appear to have been identified as having been installed by the third defendant at the premises of those who may be or have been an existing customer of the claimant since May 2021. Of the 11 impugned transactions/contacts identified, the claimant won two orders. By reference to the passage of time, again, it seems to me that in light of the likelihood of a trial within the next five months, damages would be an adequate remedy for the claimant if it were to succeed at trial. On the other hand, if I were to grant the relief sought in respect of the 450 prohibited customers list (about 1/3 of the available market), it is clear that a cross undertaking may not be an adequate remedy for the third defendant.
91. In light of the passage of time, I find that maintaining the status quo now (June 2022) weighs heavily in favour of not granting injunctive relief. In terms of the balance of convenience again given the passage of time in particular, but also the very limited number of transactions which have been identified and the very limited nature of confidential information which has in fact been referred to even following the forensic report, given the impact there would be on either party, again, I find that the balance falls heavily in favour of not granting injunctive relief.
92. Since I heard this case, the Court of Appeal has handed down judgement in the case of *Planon Ltd v Gilligan* [2022] EWCA Civ 642. It was an appeal against the refusal of an

application for an order to enforce a non-compete covenant in a contract of employment. Even though the court considered that the judge's approach had been wrong, by the date of the hearing of the appeal, the employee had been in his new post for seven months and the non-compete covenant only had about four months to run, so the court felt that it was not appropriate to grant an injunction to enforce it. In particular, at para.113, Lord Justice Bean stated that he would be "the last person" to encourage hasty and aggressive correspondence/litigation. However, he set out the timetable whereby the employee joined the rival firm on 1 September 2021 which came to the applicant's attention the next day. The letter before action "was not sent until 20 September." Proceedings were not issued until 21 October. By the time of the hearing before the judge on the 5 November 2021, the employee had been working for the competitor for over two months and by the time of the hearing in the Court of Appeal that had become seven months. Lord Justice Bean concluded that:

“if Mr Gilligan's new job posed as severe a threat to Planon's protectable trade secrets or customer connection as the Claimants sought to argue, the damage would surely have been done in the first few days, and certainly well before the lapse of two months. It is important, too, to bear in mind the observation of Lord Diplock in Cyanamid... that "where other facts appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo". The judge would have been put in my view have been justified in refusing an interlocutory injunction on this additional ground.”

93. I find that the delay here is extreme in comparison with the delay in Planon. The need for an interim injunction is not made out.
94. If there is any confidential information currently still in the possession of any defendant, its delivery up now would seem to me to be pointless one year later. Further, I accept the defendants' submissions with regard to the proposed order in relation to an IT expert being a gross invasion of privacy, expensive and pointless at this stage. I also agree that given my dismissal of this application, the provision of any statements by the defendants prior to the substantive trial would similarly be pointless.

Conclusion

95. In the circumstances, the application is dismissed.