Neutral Citation No: [2021] NICA 35 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **HUM11528** *ICOS No:* *Delivered:* **01/06/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

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HOLCHEM LABORATORIES LIMITED

Appellant

-and-

JAMES HENRY

Respondent

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Before: McCloskey LJ, Humphreys J and Rooney J

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Representation

Appellant: Michael Potter instructed by Napiers Solicitors
Respondent: Donal Lunny QC and Sean G Doherty instructed by Donaghy Carey Solicitors

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HUMPHREYS J (delivering the judgment of the court)

Introduction

[1] Holchem Laboratories Limited ("*the appellant*") appeals to this court against the judgment and order of Simpson J ("*the judge*") dismissing its claim against James Henry ("*the respondent*"), a former employee, alleging breach of his employment contract, both prior to and after termination. The respondent's counterclaim was also dismissed and there is no appeal against that decision.

[2] This appeal is confined to the dismissal of the appellant's claim in relation to the pre-termination conduct of the respondent. It is contended that the judge erred in law and in fact in determining that the respondent was not guilty of breach of his contract of employment.

[3] The respondent was formerly employed by the appellant as a Regional Sales Manager for its business which relates to the supply of specialist hygiene chemical products to the agri-food sector. The period of such employment was 3 July 2017 to 25 August 2020, the respondent having tendered his resignation on 28 July 2020.

Relevant Express Contractual Terms

[4] The respondent executed a written Statement of Terms and Conditions of Employment with the appellant on 4 July 2017, his employment having commenced the day before. Insofar as is material to this appeal, these Terms provided as follows:

> *"4. Conflicts of Interest*
>
> *4.1 During the Term the Executive shall not whether alone or jointly with or on behalf of any other person, firm or company and whether as principal, partner, manager, employee, contractor, director, consultant, investor or otherwise (except as a representative or nominee of the Company or any Group Company or otherwise with the prior consent in writing of the Board) be engaged, concerned or interested in any other business which:*
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> *4.1.1 is wholly or partly in competition with any business carried on by the Company or any Group Company; or*
>
> *4.1.2 as regards any goods or services is a supplier to the Company or any Group Company."*

[5] The document makes it clear that the *'Company'* is the appellant and the *'Executive'* is the respondent, whilst the *'Term'* is defined as the period of the respondent's employment.

[6] The appellant also argues that the contract of employment contained an implied term of good faith and fidelity in addition to the express term found at clause 4.

The Appellant's Case

[7] This court has recently had occasion, in *Ulster Metal Refiners Limited v The Commissioners for HMRC* [2017] NICA 26, to emphasise the importance of pleadings in civil litigation. Pleadings serve to define the issues upon which the court at first instance is asked to adjudicate, they inform the process of discovery and provide the basis for the determination of the issue of the relevance of evidence adduced by the parties. As this court readily recognised in *Ulster Metal Refiners*, the nature of a case can change prior to or during the course of a hearing. In such circumstances, it is incumbent on the party seeking to raise or rely upon an issue not previously

referenced in the pleadings to apply to amend the Statement of Claim or Defence as the case may be. It is simply not permissible for a party to rely on a 'new issue' without such an amendment being effected.

[8] In the instant case, the appellant served its Statement of Claim on 12 December 2020. This pleading referred to clause 4 of the Terms and Conditions. The particulars of breach of this clause alleged:

> *"Acting in a conflict of interest while employed contrary to Paragraph 4 of the contract of employment."*

[9] The Statement of Claim also contained an averment that there had been:

> *"Breach of an implied term, the duty of fidelity owed to an employer during and after employment."*

[10] Order 18 rule 7 of the Rules of the Court of Judicature (NI) 1980 imposes a requirement that a pleading must contain a statement of the material facts upon which a party relies for his claim. This was manifestly absent in the Statement of Claim in the subject proceedings.

[11] Given the want of particularity in the pleaded case, the respondent served a Notice for Particulars on 4 January 2021 seeking to elicit, *inter alia*, further information in relation to the conflict of interest and breach of the duty of fidelity alleged. In its Replies, the appellant stated:

> *"Discussions with a client of the Plaintiff's concerning alleged issues with the service provided by the Plaintiff and potential future business relationship in competition with the Plaintiff in breach of the Defendant's contract of employment (including a pre-termination conversation with a client which included a reference to the client's intent to work with the Defendant in the future). The Defendant appears to have breached his express and implied contractual duties, such as loyalty and fidelity and the duty not to act in a conflict of interest, by reason of failing to pass on to the Plaintiff important commercial information obtained from Mr Wright that could have enabled the Plaintiff to engage with Mr Wright and retain JMW Farms Limited as a client."*

[12] As the first instance hearing transcript demonstrates, the case was opened by counsel for the appellant, Mr Potter, by reference to clause 4, which he stated was *"a term that's now at the heart of the case"*, given what had come to light in discovery. Mr Potter explained to the judge that a text message had been disclosed, dated 13 July 2020, sent by the respondent to a Mr Andrew Irwin of JMW Farms:

> *"Hello Andrew, yes thinking of going but not all quite finalised yet…and still in confidential mode. The new company is a specialised water treatment company – Genco. Meeting with Mark and owner of company Mark Gent in Tonnagh on Wednesday. Hopefully you will be around. This is my private number. Regards Jim Henry."*

[13] The case was also opened on the basis that the respondent was *"involved with Genco"* prior to the termination of his employment with the appellant.

[14] The *"first issue"* identified by the appellant in opening was whether the respondent had been guilty of breach of clause 4 and/or the implied terms while he was still employed, and whether this caused the loss of a client and of profits.

[15] Quite properly, in the course of this opening, the judge sought to engage counsel on the definition of the issues to be determined in the litigation and in his judgment, at paragraph 13, he set these out:

> *"Counsel for the parties agreed that the core issues in dispute were:*
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> *(i) Whether there was want of consideration on the defendant's part in relation to the contract dated 3rd July 2017;*
>
> *(ii) Whether the defendant was constructively dismissed, so that the terms of the contract are not binding on him;*
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> *(iii) If the contract of employment is binding, whether the restrictive terms are unreasonable and therefore unlawful;*
>
> *(iv) Whether the defendant solicited any clients;*
>
> *(v) Whether the defendant was in breach of the covenant in relation to confidentiality;*
>
> *(vi) Whether the defendant has been in competition with the plaintiff since the termination of his employment;*
>
> *(vii) Whether, prior to termination of his employment, the defendant breached the duties of loyalty and fidelity owed to the plaintiff by virtue of his employment with the plaintiff."*

Factual Matrix

[16] The factual matrix before this appellate court consists of a combination of formally agreed facts, undisputed facts and facts which this court considers indisputable. The parties' schedule of agreed material facts includes the following:

(i) In or about 10-13 July 2020 the respondent was in contact with Mark Gent of Genco Water Limited, who was a competitor of the appellant, and also Mark Wright and Andrew Irwin of JMW Farms Limited which was a major client of the appellant;

(ii) On 13th July the respondent sent the text message to Andrew Irwin of JMW Farms Limited;

(iii) On the 28th July 2020 the respondent gave notice of his intention to resign;

(iv) An email of 19th August 2020 discloses negotiations between Genco and the respondent in respect of the terms of the respondent's future employment with Genco. By this time the respondent had a Genco laptop and email address;

(v) The resignation took effect on the 25th August 2020;

(vi) Following this termination, the respondent began working as a consultant for Genco Water Limited and since that time has been involved in supplying products to former clients of the appellant, JMW Farms and SM Pigs Limited.

Findings of the Trial Judge

[17] With reference to the text message of 13 July, the judge heard evidence from the respondent and found, as a matter of fact, that the meeting referred to therein never took place. He also found that the text did not prove solicitation but was entirely consistent with the respondent looking around for other job opportunities[1].

[18] The judge held, at paragraph [50] that whilst the respondent was in possession of a Genco laptop and email address prior to the termination of his employment with the appellant, no binding terms were in place and these arrangements were preparatory in nature.

[19] The judge also found, as a matter of fact, that whatever preparation the respondent was making for future employment during the currency of his

[1] Paragraph 47

employment with the appellant *"did not have a material effect"* on the appellant's business[2].

[20] At paragraph [55] the judge determined that the reason former clients of the appellant 'followed' the respondent when he moved to his new employer was because of the long standing and friendly relationship which he enjoyed with key members of staff of these client companies.

[21] At paragraphs [62] to [68] of his judgment, the judge addressed the *'Pre Termination Complaint'* which concerned the appellant's allegation that the respondent had failed to bring service complaints from JMW Farms to the attention of the appellant. The judge found, as a matter of fact, that this did not give rise to any breach of the obligation of loyalty or fidelity nor did it cause any harm to the appellant's business. There is no appeal against these findings.

[22] The judge summarised his findings at para [69]:

(i) that the contract of employment was entered into with consideration on both sides;

(ii) that the defendant was not constructively dismissed;

(iii) that the plaintiff has failed to prove that the defendant was in breach of his duties of loyalty and fidelity to the company;

(iv) that the defendant did not solicit the business of clients (i.e. JMW and SM Pigs) away from the plaintiff;

(v) that the plaintiff has failed to prove that the defendant was in breach of an obligation of confidentially;

(vi) that the defendant did act, on his own admission, in competition with the plaintiff while in a consultancy role with Genco.

[23] Having made the findings rehearsed above, the judge dismissed both the claim and counterclaim.

Appeal to this Court

[24] We consider that the following core issues fall to be determined:

(i) Did the judge err in law or in fact by finding that the respondent had not breached any obligation of loyalty or fidelity under the contract of employment, whether express or implied?

[2] Paragraph 58

(ii) In his judgment, did the judge fail to address the relevant obligations of loyalty or fidelity in the contract of employment?

Appeals to this Court: General Principles

[25] In *Kerr v Jamison* [2019] NICA 48, McCloskey LJ reviewed the well-established principles which underpin the role of the appellate court:

> *"[35] Some basic dogma must be recognised at this juncture. This is not a court of first instance. It is rather an appellate court. The adjectives perverse, irrational and aberrant have a legal grounding, being traceable to a series of principles to be derived from the decided cases. The jurisdiction of the Court of Appeal to review findings of both fact and law is clear. See for example Ulster Chemists v Hemsborough [1957] NI 185 at [186] – [7]. Where invited to review findings of primary fact or inferences the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility: see for example Kitson v Black [1976] 1 NIJB at 5 – 7. The review of the appellate court is more extensive where findings are made at first instance on the basis of documentary and/or real evidence. However, even where the primary facts are disputed the appellate court will not overturn the judge's findings and conclusions merely because it might have decided differently: White v DOE [1988] 5 NIJB 1. The deference of the appellate court will of course be less appropriate where it can be demonstrated that the first instance judge misunderstood or misapplied the facts. See generally Northern Ireland Railways v Tweed [1982] 15 NIJB at [10]–[11].*
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> *[36] There is a valuable exposition of the role of this court in Heaney v McAvoy [2018] NICA 4 at [17]–[19]:*
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> > *'[17] Generally an appeal is by way of rehearing. The rehearing is conducted by way of review of the trial, including any documentary evidence, and the trial testimony is not re-heard. In most appeals the hearing consists entirely of submissions by the parties and questions put to the parties by the judges. New evidence is not generally admissible unless it can be shown that it is relevant and that the evidence could not with reasonable diligence have been brought before the original trial.*

> *[18] The Court of Appeal is entitled to review findings of fact as well as of law but the burden of proof is on the appellant to show that the trial judge's decision of fact is wrong. On a review of findings made by a judge at first instance, the rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The first instance hearing on the merits should be the main event rather than a try-out on the road to an appeal.*
>
> *[19] Even where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and contemporaneous documents without oral testimony, the first instance judgment provides a template and the assessment of the factual issues by an appellate court can be a very different exercise. Impressions formed by a judge approaching the matter for the first time may be more reliable than the concentration on the appellate challenge to factual findings. Reticence on the part of the appellate court, although perhaps not as strong where no oral evidence has been given, remains cogent (see DB v Chief Constable [2017] UKSC 7).'"*

[26] In summary:

> *"reticence on the part of an appellate court will normally be at its strongest in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses."* – per McCloskey LJ at paragraph [37].

The Contractual Duties

[27] In *Imam-Sadeque v Bluebay* [2013] IRLR 344, a case concerning allegations of pre-termination breach, Popplewell J reviewed much of the caselaw and stated:

> *"These authorities provide helpful guidance as to the application of principles in particular cases; but, as has repeatedly been emphasised in this context, the precise scope and content of the duty of fidelity, and whether it has been*

> *breached, is a question of fact which depends on the particular circumstances of each case."*[3]

[28] It is tolerably clear from the authorities to which we were referred that there will be implied into a contract of employment a duty of good faith and fidelity, even where there is an express conflict of interest clause in the contract (see, for example, Popplewell J at paragraphs [118] – [121] of *Imam-Sadeque*).

[29] The nature and extent of the duty of fidelity has been the subject matter of much judicial consideration. In particular, the question has been posed as to where the line is drawn between legitimate preparatory activity in respect of a possible change of employment and illegitimate competitive activity. Findings of breach of duty are more common in cases where the employee owes a fiduciary duty to his employer, such as *QBE v Dymoke* [2012] EWHC 116 (QB). No such duty was alleged to arise in the instant case. Where the employee is free to lawfully compete with his employer post-termination (as the judge held in this case), the courts have been more willing to countenance preparatory steps – see, for example, *Helmet Integrated Systems v Tunnard* per Moses LJ:

> *"This freedom to compete, once an employee has left, unrestrained by any enforceable covenant, carries with it a freedom to prepare for future activities, which the employee plans to undertake, once he has left."*

First Issue: Consideration and Conclusions

[30] It is evident from the judge's consideration of the evidence that he did not consider the respondent's pre-termination contact with JMW Farms to be a breach of any duty of fidelity or loyalty. It was, in the court's view, consistent with the respondent looking for other employment opportunities. This, classically, falls on the side of the line which can be characterised as legitimate preparatory activity. Equally, the contact and relationship which the respondent had established with Genco consisted merely of preparatory activity.

[31] Such findings are paradigm examples of findings of fact, arrived at after hearing and seeing the relevant witnesses, with which an appellate court should be slow to interfere. The advantage enjoyed by the judge at first instance is well illustrated by his comment, at paragraph [11], that the respondent was *"a straightforward witness who was prepared to make significant concessions."*

[32] The burden on the appellant in challenging such a finding is to demonstrate that the first instance judge was wrong. The case advanced by the appellant does not begin to meet that threshold. The judge was perfectly entitled to reach the

[3] Paragraph [132]

findings of fact in light of the evidence adduced. It follows that the first issue is resolved in the respondent's favour.

Second Issue: Consideration and Conclusions

[33] The appellant has emphasised that the judge did not expressly address clause 4 of the Terms and Conditions in the judgment. This is true to the extent that the words of clause 4 do not feature in the judgment but it is important to consider the judgment as a whole. The judge set out the agreed issues at paragraph [13] which included the question of whether any pre-termination breach occurred. The paragraphs [36] to [61] of the judgment address the conduct of the respondent both pre and post-termination and the findings which follow at paragraph [69] must be read in that context.

[34] The failure to specifically mention clause 4 could only be relevant if, as a matter of law, this express term added anything to the implied duty of fidelity. The prohibition in clause 4 relates to being engaged or concerned in any business which competes with that of the appellant. This is simply a mirror image of the duty which is implied by law into a contract of employment. We consider that the judge's conclusion at paragraph 69(iii) that the respondent had not committed any breach of his duties of loyalty and fidelity clearly encompasses both the express and implied contractual duties.

[35] The court would add the following observation. The criticism levelled at the judge should be placed in the context of the appellant's pleaded case in relation to breach of clause 4 and/or the duty of fidelity. The particulars of the respondent's alleged contact with JMW Farms and Genco were never pleaded in the Statement of Claim. Nor was any application to amend made either after the receipt of discovery or during the trial. It ill behoves the appellant to seek to find fault with the judge's reasoning and mode of expression when the case which the appellant sought to prove at trial was not pleaded adequately or at all.

[36] Moreover, there is no appeal by the appellant against the finding of the judge that the pre-termination conduct of the respondent gave rise to no material loss to the appellant. Even if a breach of clause 4 or the duty of fidelity could be established, this would have only entitled the appellant to nominal damages. In such circumstances, we consider that this appeal is of little utility in any event.

Omnibus Conclusion and Order

[37] For the reasons set out herein, the appeal is dismissed and the Order of Simpson J affirmed.