Neutral Citation No: [2021] NIQB 12 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **SIM11404** *ICOS No:* **20/79096** *Delivered:* **03/02/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(COMMERCIAL HUB)

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BETWEEN:

HOLCHEM LABORATORIES LIMITED

Plaintiff:

-and-

JAMES HENRY

Defendant:

_____

Michael Potter, of counsel (instructed by Napier & Sons) for the plaintiff

Sean Doherty, of counsel (instructed by Donaghy Carey) for the defendant

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SIMPSON J

I. Introduction

[1] I heard this case over three days - 20, 21 and 22 January 2021 - in Covid-secure circumstances. Only counsel were physically in court. Solicitors and all the witnesses were in attendance remotely. There were a few short-lived technical glitches, but nothing which added significantly to the duration of the hearing, although they did interrupt the flow of the hearing. With the use of a laptop, I was able to obtain a better view of the witnesses than that provided by the large screen in the various courts in which the case was heard. I was able to see the witnesses as they were being cross examined in a way which enabled me to assess their demeanour, much as I would have been able to do had they given evidence in court. The particular circumstances of this case were such that I did not consider that I was at any disadvantage in this respect, although I would not be sure that in other cases such circumstances would not cause problems.

[2] Some of the witnesses were not in this jurisdiction when they gave evidence. I commend the parties' solicitors for ensuring that wherever the witness was, each had access to the trial bundle, so that there was no difficulty in their being able to refer to any relevant material while giving evidence.

[3] I am grateful to both counsel for their pragmatic approach which allowed the parties, and the court, to concentrate on the core issues and the evidence relevant to those issues. I am also grateful to them for their helpful skeleton arguments and clear submissions.

[4] Setting out in the body of this judgment the various contract terms which the plaintiff particularly relies on would unnecessarily lengthen it, so I have included the relevant portions of the contract in Appendices 1, 2 and 3 to the judgment.

II. The parties, pleadings and issues

[5] The plaintiff company has its registered address in Bury, Lancashire. It is a manufacturer of specialty hygiene products for the food sector, including beverage, food service, retail, dairy processing and agri-sector. Included in its services is the provision of technical onsite support to customers. This case is concerned with its activities in the agri-sector.

[6] The defendant's employment background is in the food technology industry. In his affidavit he describes himself as having "extensive experience in the agri-food sector, with particular expertise in chemical hygiene products that can be used to increase efficiencies, and in respect of the pig and poultry sector, reduce the reliance on antibiotics." From 2010-2015 he was sales director for Kilco (International) Ltd., involved in dairy hygiene sales and biosecurity sales. Between January and September 2016 he was employed by the plaintiff as a Technical Sales Consultant, responsible for dealing with customers in the 9 geographical counties of Ulster. His evidence is that while in that role he dealt with some 30 or 40 customers of the plaintiff. Then from October 2016 to July 2017, on foot of a 'Consultant Agreement' dated 15 October 2016, he provided consultancy services to the plaintiff, working on a dairy hygiene project. At this time he was working in his own business, Boyd and Henry Ltd., he being the 'Henry' in the title, a business which he describes as a contract hygiene management company.

[7] His second period of employment with the plaintiff, and the employment out of which these proceedings arise, commenced on 3 July 2017 and terminated on 25 August 2020. During that period his job title was Regional Sales Manager; the region being the whole of the island of Ireland. In this capacity he dealt with approximately 140 clients, on some 170 sites, and was the line manager for 3 technical sales consultants. His unchallenged affidavit evidence is that he had responsibility for managing and growing the plaintiff's existing food and beverage business and for managing the plaintiff's new dairy hygiene product sales business which the defendant had been helping the plaintiff to develop when in his consultancy role.

[8] During this period of employment Ecolab Ltd. acquired the plaintiff company. This occurred in November 2018. The acquisition was investigated by the Competition and Markets Authority, which directed Ecolab to dispose of the plaintiff company. In May

2020 the plaintiff was acquired by the Kersia Group, a large multinational company which had previously also acquired Kilco (International) Ltd, the company for which the defendant had worked in the period 2010 to 2015.

[9] The plaintiff brings these proceedings against the defendant alleging breach by him of his employment contract. Broadly, the plaintiff alleges that the defendant has been in breach of restrictive covenants contained in the contract. The plaintiff also alleges breach of the defendant's duties of loyalty and fidelity to the company within the period while he was still in the plaintiff's employment. The Writ included a claim in tort for the unlawful interference with the plaintiff's economic interests, but counsel for the plaintiff conceded, correctly in my view, that this added nothing to the plaintiff's claim in contract. The defendant defends the allegations on three bases: that the contract of employment is not binding on him, there being no consideration for his signature on the contract; that the plaintiff repudiated the contract in any event, so that he is not bound by its terms; that the restrictive covenants are unreasonable and therefore unenforceable against him. He also counterclaims against the plaintiff for what he maintains to be unpaid amounts of bonus.

[10] The case originally came before Horner J for the hearing of the plaintiff's claim for injunctive relief. A contested hearing was rendered unnecessary because the defendant was prepared to, and did, enter into a number of undertakings until the trial of this matter.

[11] For the plaintiff the principal witness was Nicholas Edwards, the plaintiff's Sales Director. I also heard evidence from Stuart Collins and Aaron Brownlee, each of whom is employed by the plaintiff as a Technical Sales Consultant. The defendant gave evidence on his own behalf. My impression of the defendant, which I noted during his evidence, was that he was a straightforward witness who was prepared to make significant concessions, even when such concessions were clearly against his interest.

[12] As well as the oral evidence which I heard, I have taken into consideration all the evidence contained in the three affidavits sworn by Mr. Edwards, the affidavits of Mr. Collins and Mr. Brownlee which, with the agreement of counsel, were treated as those two witnesses' evidence in chief, and the affidavit of the defendant. I have also considered the pleadings and the skeleton arguments submitted by each side. There were many factual disputes, some more important than others. While I have borne them all in mind when reaching the conclusions I have reached, I did not find it necessary to resolve all of them.

[13] Counsel for the parties agreed that the core issues in dispute were:

(i) whether there was want of consideration on the defendant's part in relation to the contract dated 3 July 2017;

(ii) whether the defendant was constructively dismissed, so that the terms of the contract are not binding on him;

(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 the 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.

[14] The trial bundle contained a letter addressed "To whom it may concern" authored by a Mr. Matt Ellis ACMA CGMA, described as the Chief Finance Officer, Kersia UK (Holchem). He states that he "was asked to prepare a report on the trading relationship between [the plaintiff] and two of its customers, JMW Farms & SM Pigs." The letter sets out various financial matters germane to those two companies. This is clearly not an expert report, nor was it put forward as one, and it is not independent of the plaintiff. It was agreed by counsel that quantum evidence would await my findings on the liability aspect of the case. I make it clear, however, that in reaching the conclusions to which I have come below, I have read the letter to ensure that nothing contained in it is capable of altering my findings, either on its own or as the basis for further submissions.

III. The status of the contract

[15] It makes logical sense for me to deal first with the issues raised about the status of the contract. The following is common case: that the commencement date for the defendant's second period of employment was 3 July 2017; that the terms of the contract having previously been negotiated, the defendant flew to Liverpool and travelled to the plaintiff's head office in Bury on 3 July; that the defendant was provided with a letter and his contract of employment, the letter stating that he should read the contract carefully and that if he had any queries he should "not hesitate to contact the" administration director of the plaintiff company; that no issues were ever raised by the defendant; that the defendant signed the contract on the following day, 4 July 2017.

[16] The defendant's case is that he is not bound by the contract, because there was no consideration for his signature, all of the terms of the contract having already been agreed between the parties prior to 3 July. He says that prior to his signing the contract on 4 July, there was no discussion about the contents of Schedule 1 or the Secrecy Agreement. He did not read the contract because nothing was going to change if he objected. The matter is pleaded thus in the Defence and Counterclaim:

> "… there was no valuable consideration provided to support the terms of that contract that sought to place post termination restraints upon the Defendant and further asserts there was no valuable consideration provided to support the said secrecy agreement. The Defendant therefore asserts the said restraints, and the said secrecy agreement, are void and/or unenforceable due to a lack of valuable consideration."

[17] The plaintiff says that the defendant's first period of employment is relevant to a consideration of this issue. Again, it is common case that the defendant's contract of employment, and all the terms and conditions, for both his first and second period of employment are identical. The plaintiff says that the defendant, therefore, knew that he would be required to sign a contract with precisely the terms to which he had previously agreed. Asked what would have happened if the defendant had refused to sign the contract, Mr. Edwards said that he would not have been employed by the plaintiff; no-one, he said, is employed without a signed contract of employment.

[18] Whether or not the defendant read the contract is immaterial. I am satisfied that he was well aware, from his first period of employment, of the terms of the contract which he would be expected to sign, and which he signed on 4 July. I am satisfied that by accepting the employment he was accepting those terms in their entirety. I am also satisfied that his continuing in the employment of the plaintiff and his receiving salary and bonus after 4 July is indicative of his acceptance of and agreement to the entirety of the terms of the contract of 3 July, including those he signed on 4 July.

[19] Accordingly, I find that there was appropriate consideration for the contract.

IV. The circumstances of the defendant's leaving his employment

[20] Both parties agree that the plaintiff resigned from his employment. He did so by an email dated 28 July 2020. His final day of employment was 25 August 2020. The defendant says he was constructively dismissed. His reason for resigning is encapsulated in paragraph 30 of his affidavit: "… it was the impact that the transfer would have on my bonus, and the continued non-payment of my full bonus, that were the primary reasons for my resignation."

[21] I start again with what is common case: [1] the dairy hygiene bonus was initially agreed at 8.5% of relevant sales; [2] it was reduced, initially to 8%, then to 7%; [3] reduced payments were made to the defendant and paid, at the request of the defendant, into his pension pot.

[22] Mr. Edwards gave evidence that the figure of 8.5% was arrived at on foot of the defendant's representations that the plaintiff company could expect to enjoy a gross profit margin of 60%. This, he said, did not materialise; the margin was closer to 42%. As a result of this he considered that the bonus should be reduced and, initially, it was reduced to 8% with, he says, the agreement of the defendant. In fact, in 2018 the defendant was erroneously paid at 8.5%.

[23] In November 2018 Mr. Edwards wanted to reduce the bonus further. He sent an email to the defendant on 26 November proposing two options for the calculation of the bonus, the second of which was a "straight commission and bonus payment of 6%." He said there was a discussion about this bonus payment in November 2018, probably at Bristol airport, during which he and the defendant negotiated and settled on "a straight payment of 7%." This figure was paid thereafter.

[24] It is the defendant's case that he never agreed any reduction, either to 8% initially or to 7% thereafter; the bonus was simply unilaterally reduced by Mr. Edwards despite his (the defendant's) protests. When the bonus was paid (for the year 2019) at the rate of 7% it is the defendant's evidence that he said to Mr. Edwards, "That's not eight and a half percent", but that Mr. Edwards said nothing. When asked what he did about that, he said, "I took it no further."

[25] The defendant's case is that this was a unilateral variation of the terms of his contract to which he did not agree. Having seen and heard Mr. Edwards and the defendant giving evidence I am satisfied that the bonus reductions were agreed between the parties, however reluctant the defendant's agreement may have been, hence the change from the initial suggestion of 6% to a payment based on 7%. The defendant accepted the payment at 7% thereafter, without demur.

[26] In the circumstances I find that there was no unilateral variation of the defendant's contract of employment by the plaintiff relating to the payment of bonus.

[27] The other reason put forward in paragraph 30 of the defendant's affidavit arises out of the acquisition of the plaintiff by the Kersia Group. The defendant's case is that he was told that the plaintiff's dairy hygiene products division would be transferred to Kersia Agriculture, under the management of the existing Kersia agriculture manager. At a meeting which took place on 22 and 23 July 2020 a Kersia Group structural diagram was produced. It showed the Dairy Farm Sales Division being under the management of Alan Powell with the defendant having no role in that division. The diagram shows the defendant in the food and beverage division, continuing to report to Mr. Edwards, the "F&B Sales Director." The defendant also says that at that meeting he was told that his dairy sales bonus would continue to be paid for 2020 but that when he asked about 2021 he got no reply.

[28] The diagram, introduced into evidence, does indeed show those divisions as stated by the defendant. However, Mr. Edwards's evidence was that the defendant was reassured that he would still be involved in the dairy business, looking after the dairy hygiene business with Alan Powell and that while the Dairy Direct sales would not fall within the food and beverage division, the defendant would still be involved in the Dairy Direct sales.

[29] I find as a fact that the defendant was never told that his bonus was in jeopardy or would not continue after 2020. If the defendant drew such an inference, I find that it was not based on any action of the plaintiff. I consider that his repeated references in evidence to the fact that nothing was said to reassure him about the future of his bonus is indicative of his state of mind, but not representative of any positive assertion made by the plaintiff.

[30] The defendant's resignation email, addressed to Mr. Edwards, refers to a telephone conversation earlier that day "where we discussed my reasons" for leaving the plaintiff. When I asked the defendant what those reasons were he said that he told Mr. Edwards, in what was "a short enough conversation", that "I didn't believe the Kersia journey was for me." It seems to me that this describes the real reason for the defendant leaving his employment with the plaintiff. I find that he did not leave because his bonus was unilaterally reduced or because his dairy hygiene bonus was being removed beyond 2020; rather I find

that he had become disaffected - perhaps because of the reduction of his bonus and his perceptions as to uncertainty for the future - and was seeking pastures new.

[31] In reaching that conclusion I consider it significant that at no time prior to the occasion of pre-proceedings correspondence did the defendant raise either issue with the plaintiff. He had the opportunity to articulate his concerns at what is described as an "exit meeting" or "exit interview" in Newry on 20 August 2020, but did not do so. After he had left the plaintiff company he was provided with an Exit Questionnaire which he could have completed at a time when he was entirely removed from any influence exercised by the plaintiff company. One question specifically asked "What made you decide to leave the Company?" This was the perfect opportunity for the defendant to make clear his reasons but, again, he did not do so.

[32] I find, therefore, that he was not constructively dismissed.

[33] There is one further matter which needs to be dealt with in this section. On the day of the exit interview, the defendant was handed a letter on Holchem letter heading which contained the following:

> "I, the undersigned, agree that on termination of my employment, I am still bound by the conditions of employment pertaining to maintenance of Company secrets and the conditions laid down in the clauses of my contract of employment with Holchem Laboratories Ltd, headed "Termination of Employment and Secrecy Agreement". A copy of the original contract of employment has been handed to me at the exit interview. I accept this copy as a reconfirmation of my original agreement with the Company."

[34] The document is only signed by the defendant. It is witnessed by Mr. Edwards, but not signed by him as a party. The plaintiff gave no evidence as to what consideration passed relating to this 'agreement', and the defendant was not asked about consideration. I am satisfied that no consideration passed in respect of this document. Insofar as it might be relied upon to add something to the obligations on the defendant's part, I find that it is not contractually binding.

[35] The effect of the above findings is that the defendant's counterclaim must fail.

V. Solicitation, confidential information and competition

[36] At this stage it is necessary to introduce other characters into the narrative.

[37] JMW Farms Ltd. ("JMW") is a company which owns farms at a number of locations in counties Armagh, Tyrone, Fermanagh, Monaghan and Offaly, and one farm in Norfolk. The initials in the name of the company refer to brothers James and Mark Wright. JMW became a customer of the plaintiff in July 2017. The plaintiff's business with JMW related to the supply and monitoring of a drinking water treatment product, Clorious 2-6000.

("Clorious2") The product is described by Mr. Edwards as "a purification process of the water to improve mortality rates and growth rates in swine/pigs."

[38] The defendant says that he had a relationship with JMW prior to his re-joining the plaintiff in 2017, describing Mark Wright as a long-standing customer of his and a personal friend. Prior to re-joining the plaintiff as an employee in July 2017 the defendant was in discussion with JMW about the potential to improve their farm water quality through filtration and dosing and that he is the reason why JMW became a customer of the plaintiff. It is common case that JMW became a customer of the plaintiff after 3 July 2017; the plaintiff says 13 July, the defendant says mid-July. I find that the reason why JMW became a customer of the plaintiff company in the first place was because the defendant was working for the plaintiff and JMW, through Mark Wright, wanted to work with the defendant wherever he was.

[39] JMW purchased a water filtration and dosing system from the plaintiff after the defendant commenced his employment with the plaintiff. That system was actually installed by a third party entity, Irish Fluid Controls Ltd., which would carry out servicing of the equipment after installation on behalf of the plaintiff.

[40] SM Pigs Ltd. carries on business from Strabane in Co. Tyrone. Its managing director is Hugh McReynolds, who had been a customer of the defendant over many years when the defendant worked with Kilco (International) Ltd. The defendant says that he had built a close relationship with Mr. McReynolds, whom he has known for more than 30 years, and whom he considers to be a friend. When in his own business with Boyd and Henry Ltd. the defendant sold a water filtration system and the product Clorious2 to SM Pigs. It is the defendant's case that SM Pigs became a customer of the plaintiff because "they followed me to the plaintiff company." I find that this is the reason.

[41] Genco Water Ltd. ("Genco") is a company based in King's Lynn in Norfolk. It is an engineering company with experience in water filtration. Its managing director is Mark Gent. After his employment with the plaintiff terminated, the defendant began working as a self-employed consultant with Genco.

[42] It is the plaintiff's case that from the date when JMW and SM Pigs became its customers the plaintiff supplied Clorious2 to those companies. After the defendant left the plaintiff company in August 2020 no further orders have been received from those companies for the product. Rather, Clorious2 is now supplied to those companies by Genco, for whom the defendant is working as a consultant.

[43] The defendant denies soliciting those companies' business away from the plaintiff. His evidence is that just as those companies had "followed" him to the plaintiff, so they followed him away from the plaintiff. They did so because of his long-standing relationship and friendship with both Mark Wright and Hugh McReynolds.

[44] In support of its case on solicitation the plaintiff relies on a document entitled "Order Pattern for Clorious 2-6000 1 January 2020 until last order received." The document was prepared for the purposes of this litigation. In cross examination Mr. Edwards conceded that on a proper analysis of the information in the document, it is clear that some of

the orders placed for the supply of Clorious2 were sufficiently large that no repeat order would have been expected in any event, for some weeks or months after the defendant had left the employment of the plaintiff. Having considered the contents of the document, I find that it does not prove solicitation. Its contents are equally consistent with JMW and SM Pigs having decided, without solicitation on the part of the defendant, to move their business from the plaintiff company after the defendant had left.

[45] In addition, the plaintiff relies on the oral and affidavit evidence of Aaron Brownlee and Stuart Collins, to whom I have referred above. Both gave evidence of conversations with employees of JMW in which they were informed, in September 2020, that the defendant would be supplying product to JMW from then on. September 2020 is after the date on which the defendant left the employment of the plaintiff. Their evidence is again equally consistent with the defendant's case. Their evidence does not prove solicitation.

[46] The plaintiff also relies on a text message of 13 July 2020 from the defendant to Andrew Irwin, JMW's general manager. It reads as follows:

> "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 [Wright] and owner of company Mark Gent in Tonnagh on Wednesday.
> Hopefully you will be around. This is my private number.
> Regards Jim Henry"

[47] Mr. Henry denied that the meeting ever took place, and no evidence was called to contradict him. I accept his evidence about this. He said that at this time, as appears from the text, he was thinking of leaving the plaintiff's employment, and that he was looking around for job opportunities for himself. I consider that the text does not prove solicitation. It is entirely consistent with what the defendant says about looking around for job opportunities.

[48] The plaintiff also places reliance on an email passing between the defendant and Mark Gent of Genco and dated 19 August 2020, 6 days before his final leaving date from the plaintiff. It comes from the defendant's email address with Genco. The defendant admitted that he had a laptop provided by Genco at that date. The plaintiff says this is proof of the defendant working for Genco at that date. The defendant denied this. It was put to him that the email shows that he had "actually agreed terms with Genco" at that date. The defendant denied this.

[49] An analysis of the content of the email shows that the defendant and Genco were still negotiating the package which the defendant would receive and the basis of the future relationship between Genco and the defendant. The email made it clear that he was still in discussion with his accountant as to the best option for him, whether PAYE, self-employment or setting up a limited company. In the email the defendant put forward some terms, and the email concluded:

> "If you are in broad agreement with this, then I'll speak to my accountant to determine if it will work and if, when additional costs e.g. accountancy costs, insurance of pick up, depreciation of pick up etc. are included, is it a better deal for me than PAYE."

[50] In my view the email shows that far from agreement having been concluded, terms were still being discussed. Although the defendant was seeking some employment relationship for his future, and making preparatory arrangements for that future, it is clear that no binding terms governing the relationship between the defendant and Genco had been agreed by the date of the email.

[51] The plaintiff relies on a series of emails passing between Mr. Edwards and Mr. Andrew Irwin, General Manager of JMW, between September and November 2020 i.e. after the defendant's employment had terminated. It is stated by Mr. Irwin in an email of 9 November that "an individual within JMW signed a contract with" the defendant. This is denied by the defendant, and he was not challenged about it in cross examination. Later in the email exchange (13 November), the suggestion from Mr. Irwin is that the contract in question was actually between JMW and Genco, not the defendant. No attempt was made to obtain access to the relevant document by way of third party discovery. I am satisfied on the evidence that no such contract exists as between JMW and the defendant. This evidence falls far short of proving solicitation. Indeed, when it was put to Mr. Edwards that the defendant would say that Mark Wright, of his own initiative, decided to change to Genco, Mr. Edwards conceded that he could not dispute that.

[52] As to SM Pigs the only evidence relied on (other than the Order Pattern document) is an assertion that in October 2020 Mr. Brownlee informed Mr. Edwards "that he had contacted Andrew McAuley of SM Pigs Limited to book a service call. When Mr Brownlee spoke to Mr McAuley, he was told that the Defendant was due to visit SM Pigs Limited later that day." I do not consider that that evidence proves the allegation of solicitation. It, too, is equally consistent with the defendant's case as outlined above.

[53] The plaintiff was unable to produce any documentation to show that the defendant solicited JMW's or SM Pigs' business from the plaintiff or to support unequivocally the allegation of solicitation. No attempt was made, so far as I was made aware, to obtain evidence from JMW or SM Pigs, whether by witness evidence or through third party discovery, e.g. by way of Khanna subpoena, to support the allegation of solicitation; certainly no such evidence was produced. Further, I record that there was no evidence of solicitation or attempted solicitation of any other client of the plaintiff, of whom there were approximately 140.

[54] On the other side of the coin, the defendant points to two emails which he sent to the administrative staff of the plaintiff — one before and one after his letter of resignation — placing orders with the plaintiff for Clorious2 to be dispatched to both JMW and SM Pigs. The defendant says that these emails show that he was working appropriately for the plaintiff right up to the end of his employment.

[55] I have examined above individually each of the strands of the plaintiff's evidence as to solicitation and have set out my findings in relation to each. However, since they are clearly relied on by the plaintiff as circumstantial evidence of solicitation, I have separately considered all of the circumstantial evidence in its entirety to see whether the totality of it persuades me on the balance of probabilities that the defendant did solicit those named clients from the plaintiff. Having carefully considered all of the relevant evidence, I am satisfied on the balance of probabilities that the reason why JMW and SM Pigs now place their orders through the defendant with Genco is because Mark Wright and Hugh McReynolds have a long-standing and friendly relationship with the defendant and that their preference is to place their business through him. They did so in the past, when he moved into the employment of the plaintiff, and I am satisfied that they have chosen to do so again.

[56] I am also satisfied that there is nothing in the contemporaneous evidence to prove to the requisite standard that the defendant solicited the custom of either JMW or SM Pigs away from the plaintiff. The evidence to which I have referred above is equally consistent with the fact that Mr. Wright and Mr. McReynolds, having learned that the defendant was leaving the employment of the plaintiff, chose to place their business through him. The inference the plaintiff asks to be drawn from the contemporaneous documentation is that the defendant has solicited those customers away from the plaintiff. I decline to draw that inference, particularly in circumstances where there is another perfectly reasonable inference to be drawn from the same documentation.

[57] In the circumstances I find that the plaintiff has not proved that the defendant solicited those clients from the plaintiff.

[58] In the course of closing submissions my attention was drawn to a passage in the text book *Restrictive Covenants under Common and Competition Law*, by Kamerling and Osman, at paragraph 7.1.3, to the effect that an employee cannot make preparations for future employment during the currency of his employment "if such preparation has a material effect on the employer's business." In light of what I have said above, I find that whatever preparation the defendant was making did not have a material effect on the plaintiff's business.

[59] A further part of the plaintiff's claim related to confidential information. In the first affidavit of Mr. Edwards, at paragraph 45, the following is stated: "*I believe that, in breach of his common law and contractual obligations the Defendant has used the Plaintiff Company's trade secrets and confidential information … (including the Plaintiff Company's lists of customers and information concerning the identity of customers; details of customer pricing policies)".* However, no such lists or details were identified during the hearing; nor was the defendant asked about such information or any use he may have made of it; nor was there evidence of what use, if any, was allegedly being made of any such information.

[60] In the circumstances the plaintiff has failed to satisfy me that there was any inappropriate use of confidential information by the defendant.

[61] The defendant accepted, without prevarication or qualification, in cross examination that since the termination of his employment he has been involved in competition with the plaintiff. I deal with this below beginning at paragraph [70].

VI. Pre-termination complaint

[62] An additional plank in the plaintiff's claim relates to complaints made by JMW Farms Ltd. while a customer of the plaintiff. As part of his affidavit evidence the defendant made the case that one of the reasons why JMW chose to move business from the plaintiff was that there were ongoing problems which had not been resolved. The plaintiff says that if such problems were being experienced by JMW it was part of the defendant's duties of fidelity to ensure that these were properly brought to the attention of the plaintiff so that it could seek to resolve such complaints, and he did not do so.

[63] The genesis of the dispute is found in paragraph 22 of the defendant's affidavit in which he deals with the complaints which JMW had with the water filtration and dosing system. He says:

> "There were many issues with the systems including leaks, filter heads blocking, filters blocking, overdosing of chemical and the chemicals not dosing at all. I understand this led to a degree of frustration on the part of JMW…"

[64] Dealing with the period leading up to his resignation, the defendant says:

> "Mark Wright of JMW Farms was aware that I was leaving the plaintiff. He was still dissatisfied with the service provided by the plaintiff. He considered that the plaintiff had not adequately dealt with the issues set out at paragraph 22…"

[65] It is the plaintiff's case that the only issues brought to its attention relating to JMW were the cost of the product and the cost of callouts. It is Mr. Edwards's evidence that he was not aware of any continuing issues such as those expressed in paragraph 22 of the defendant's affidavit. He refers to the monthly reports which the defendant had to provide, and the absence in those reports of any continuing problems. He points to the monthly report for April 2020, compiled on 11 May 2020, in which the defendant records:

> "Andrew Irwin, G[eneral] M[anager] of JMW challenging price of (a) Clorious2 (b) Service charges, particularly the labour charge ex. Irish Fluid. As agreed we will plan to substitute some of Irish Fluid labour with Ronan. Darren to agree and to get Ronan trained. Clorious2 reduced by £0.10/kg"

[66] The defendant says that he brought the attention of Mr. Edwards to these issues during telephone conversations between the two. He also said that the issues were not resolved; Ronan (who is Ronan Herbert) was not trained.

[67] I find it difficult to draw any conclusion from the evidence which was presented at the hearing. The details of the matters were not investigated in any depth with the witnesses. There was no evidence as to how many times issues were supposed to have arisen, or when, or over what period of time, or whether they were recurring issues. Other than the way in which they were described in the affidavit there was no evidence as to what the precise nature of each of them was. Importantly, there was no evidence to show that if the matters had been drawn to Mr. Edwards's attention, they would have been resolved to JMW's satisfaction, or how, or by when. The only evidence available seemed to suggest that although the matter of service charges was drawn to Mr. Edwards's attention, the problem was not solved. Accordingly, there was not available to me the evidence on which to make any finding to the appropriate standard that the defendant was in breach of any duty of loyalty or fidelity.

[68] Further, even if I had found that the defendant was in breach of the duties, there was no evidence of any adverse effect on the plaintiff arising from any such breach. No evidence was produced which was capable of displacing my finding, set out above, as to the reason why JMW in fact moved its business away from the plaintiff. I record that SM Pigs was not implicated in this aspect of the case.

VII. The findings summarized

[69] At this stage of the judgment it is helpful if I summarise the various findings which I have made before examining relevant legal issues. I have found:

(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.

VIII. The restrictive covenant relating to competition

[70] It is the plaintiff's case that the defendant is bound by, and in breach of, the covenant in his contract which relates to competition with the plaintiff.

[71] Where material, Schedule 1 to the employment contract provides:

> "2. The Executive shall not without the prior written con-

sent of the Board directly or indirectly at any time within the Relevant Period:-

1. …
(b) deal with

any Relevant Customer or Prospective Customer in respect of any Relevant Goods or Services."

Paragraph 3 of Schedule 1 provides that the defendant:

> "shall not without the prior written consent of the Board directly or indirectly at any time within the Relevant Period engage or be concerned or interested in any business within the Relevant Area which (a) competes or (b) will at any time during the Relevant Period compete with the Business …"

[72] The Relevant Period is 12 months from 25 August 2020; the Relevant Area is the UK and Ireland.

[73] 'Business' is defined as "the business or businesses of the Company or any Group Company in or with which the [defendant] has been involved or concerned at any time during the period of twelve months prior to the Termination Date." Relevant Customer, as appears in Appendix 1, is defined as:

> "any person firm or company who at any time during the twelve months prior to the Termination Date was a customer of the Company or any Group Company, with whom or which the Executive dealt other than in a de minimis way or for whom or which the Executive was responsible on behalf of the Company or any Group Company at any time during the said period (or the Term if shorter)"

and Prospective Customer as:

> "any person firm or company who has been engaged in negotiations with which the Executive has been personally involved, or has been identified as, by the Company or any Group Company with a view to purchasing goods and services from the Company or any Group Company in the period of six months prior to the Termination Date"

[74] It is clear that these contractual provisions amount to covenants in restraint of trade. In the current (33rd) edition of *Chitty on Contracts* the following is stated:

> "All covenants in restraint of trade are prima facie unenforceable at common law and are enforceable only if they are reasonable with reference to the interests of the parties concerned and

> of the public. … A covenant in restraint of trade (if unreasonable) is void in the sense that courts will not enforce it…" (paragraph 16-106)

[75] Paragraph 220.02 of Harvey *on Industrial Relations and Employment Law* states:

> "Traditionally harder to enforce than other restrictive covenants and viewed as 'the most powerful weapon in an employer's armoury' … there has nevertheless been a continuing recent trend in favour of enforcing non-competes, particularly for more senior employees, provided they are properly restricted in scope and duration, and provided the legitimate interest cannot be sufficiently protected by a less onerous covenant contained in the contract."

[76] In *Merlin Financial Consultants Ltd. v Coope*r [2014] EWHC 1196 (QB) the court said as follows (in paragraph 62):

> "From the cases [identified in paragraph 61] it is possible to derive a number of principles:
>
> (a) The party seeking to enforce a restrictive covenant must establish that it is reasonable both between the parties and in the public interest.
> (b) The question of whether the restraint is reasonable or not must be assessed as at the date of the agreement. That includes, though, what is in the reasonable future contemplation of the parties at the time.
> (c) The restraint will not be reasonable between the parties if it provides the party in whose favour it is imposed with more protection than is justified in the circumstances.
> (d) The nature of the relationship between the parties is an important factor in deciding whether or not the restraint is reasonable. There is more freedom to negotiate in business sale agreements than between employer and employee.
> (e) Where the parties are of equal bargaining power, the court is slow to intervene to prevent the enforceability of what they have freely agreed, as they are the best judges of what is reasonable as between themselves, but if the restraint goes further than is reasonably necessary to protect a legitimate business interest, it will be held unenforceable."

[77] In *Morris Ltd. v Saxelby* [1916] AC 688 Lord Atkins said (page 700):

> "the onus of establishing to the satisfaction of the judge who tries the case facts and circumstances which show that the restraint is of the reasonable character above mentioned resting upon the person alleging that it is of that character…"

[78] To quote again from *Chitty*: "Reasonableness is a question of law, that is, a question of the application by the court of a legal standard to the facts of the particular case. Therefore … evidence of surrounding circumstances at the time the contract was made, such as the character of the business to be protected by the covenant, is admissible in the consideration of the requirements of that business…". (Paragraph 16-128; emphasis added). In relation specifically to competition, the authors of *Chitty* say: "Whether the restraint sought to be enforced in a particular case affords more than adequate protection to the business of the employer depends to some extent upon the requirements of that business." (Paragraph 16-138) What the requirements of the plaintiff's business were, at the date of signing of the contract, is a matter which requires proof. It is not a matter for speculation by the court.

[79] Other than a number of averments in the affidavits of Mr. Edwards that he believed the restrictions were reasonable the plaintiff called no evidence in support of this aspect of its case. At paragraph 44 of his first affidavit Mr. Edwards said:

> "I believe that the Defendant, by reason of the position and role he occupied in our employment and particularly his role in Ireland, had the potential to substantially damage the Plaintiff Company's trade connections with its customers and, in particular, to use his contacts and relationships with our customers to the detriment of the Plaintiff Company. The Defendant also enjoyed access to confidential and sensitive business information. The 12-month period of restraint as regards soliciting of clients was, and remains, necessary so as to ensure that there is adequate protection for the Plaintiff Company to solidify its relationship with said clients following the departure of the Defendant, particularly given his pivotal role in the Ireland operation."

At paragraph 24 of his third affidavit he said:

> "As outlined at paragraph 16 of my affidavit of 16 November 2020, I believe the contractual restrictions contained in the Defendant's contract of employment are reasonable and represent the minimum restrictions required to protect the Plaintiff Company's legitimate business interests. In particular, I believe that the nature of the restrictions is justified given that the Defendant was our most senior employee in Ireland."

At paragraphs 82 and 83 of the third affidavit:

> "Our Customer contracts are generally either for one year, two years or three years. It is not uncommon for customer contracts

> to lapse for some months before being renewed. As set out at paragraph 18 of my second affidavit of 27 November 2020, the Plaintiff Company has a strong track record of retaining its customers.
> I want to emphasise the specialised nature of the product provided by the Plaintiff Contract – it is a niche product for the food; dairy; beverage and agri markets. And the Defendant given his experience and contacts played a pivotal role in the business, particularly in Ireland in gaining and maintaining customers."

[80] The only oral evidence given by Mr. Edwards was that the industry was very competitive, that the plaintiff had 3 major global competitors and other smaller competitors and was quite price-sensitive. Thus, and to take just a few examples, there was no evidence before me as to [1] why the period of 12 months is reasonable and why a lesser period of 6 months or 3 months would not suffice to protect the plaintiff; [2] why the prohibition extends both to the whole of the UK and Ireland in the particular circumstances of this defendant's employment; [3] why 'Business' should include the entirety of the Kersia Group business, and not just that business with which the plaintiff corporate entity was concerned; [4] why a 'Relevant Customer' should include a hypothetical one who had not been a customer of the plaintiff for, say, 11 months and who had parted company with the plaintiff in acrimonious circumstances where it is highly unlikely that it would ever do business with the plaintiff in the future.

[81] Other than the two former customers, JMW and SM Pigs, there was no evidence about any other customer of the plaintiff or the nature or extent of the defendant's involvement with any such customer or how his working for Genco has affected or might affect the plaintiff's business.

[82] No evidence was produced as to the general practice in this industry in relation to restrictive covenants. If there had been evidence that the plaintiff's terms follow industry norms, that might have suggested that the plaintiff's terms were more likely to be reasonable.

[83] The plaintiff's evidence did show that the defendant's contract of employment contained "similar, if not identical" restrictive covenants, including the geographical areas of the UK and Ireland, when he was previously a Technical Sales Consultant and dealing only with the customers in the geographical province of Ulster. Mr. Edwards, the plaintiff's Sales Director, said that he, too, was subject to the same restrictive covenants. Thus, the evidence would appear to suggest that these were simply the plaintiff's template covenants, applicable to every employee, irrespective of the nature of their employment. I infer from that evidence that no consideration was given to drafting covenants relevant to the particular circumstances of individual employees.

[84] I would have expected the plaintiff to produce evidence of the reasons why the covenants relevant to this employee were considered by the plaintiff to be the minimum necessary to protect its interests, or to paraphrase *Merlin*, why they were no "more protection than is justified in the circumstances." The plaintiff simply seems to have taken the

view that Mr. Edwards's assertions and beliefs would, of themselves, prove the plaintiff's case. That is not so.

[85] A further matter of relevance relates to the circumstances in which the defendant signed the contract. The defendant said that he "was just expected to sign it." As I have recorded above, Mr. Edwards's evidence was that if the defendant had not signed the employment contract, he would not have been employed by the plaintiff and that no-one is employed without a signed contract of employment. From that evidence I draw the clear inference that the contract was presented to the defendant on very much a 'take it or leave it' basis and, in reality, there was no likelihood of his being able to object to the inclusion of the restrictions. Therefore, when it comes to a consideration of the relationship between the parties and its effect on reasonableness, the unequal bargaining positions of the plaintiff and the defendant are material.

[86] Absent any evidence establishing why the restrictions were necessary in the sense explained above, and in light of the bargaining position of the parties when the contract was entered into, I have come to the conclusion that in all the circumstances of this particular case the plaintiff has failed to satisfy me that the restrictive covenant dealing with competition represents the minimum necessary for the protection of the plaintiff.

[87] My attention has been drawn to cases in which courts have said that where a covenant is too wide a court should look to construing it more narrowly so as to be properly enforceable or, in appropriate cases, removing words from the covenant; see e.g. *Haynes v Doman* [1899] 2 Ch. 13; *Plowman & Son Ltd. v Ash* [1964] 1 W.L.R. 568; *Home Counties Dairies Ltd. v Skilton* [1970] 1 W.L.R. 526; *T. Lucas & Co. Ltd. v Mitchell* [1972] 3 All ER 689; *Littlewoods Organisation Ltd. v Harris* [1977] 1 W.L.R. 1472. Having considered such cases, and bearing in mind the particular circumstances of this case and the absence of evidence which I have identified above, I find myself in respectful agreement with the sentiments expressed by Simon Brown LJ (as he then was) in the Court of Appeal decision in *J.A. Mont (UK) Ltd. v Mills* [1993] FSR 577:

> "There is, moreover, this further consideration. If the court here were to construe this covenant as the plaintiffs desire, what possible reason would employers ever have to impose restraints in appropriately limited terms? It would always be said that the covenants were basically "just and honest," and designed solely to protect the employers' legitimate interests in the confidentiality of their trade secrets rather than to prevent competition as such. And it would be no easier to refute that assertion in other cases than it is here. Thus would be perpetuated the long-recognised vice of ex-employees being left subject to apparently excessive restraints and yet quite unable, short of expensive litigation and at peril of substantial damages claims, to determine precisely what their rights may be.
>
> *Mason v. Provident Clothing and Supply Company Ltd.* [1913] A.C. 724 provides, indeed, House of Lords authority to this effect. As Lord Moulton stated at page 745:

> 'It would in my opinion be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master. …'
>
> True, that passage was directed at a covenant deliberately framed too widely, and at an argument that it might properly be whittled down rather than more narrowly construed. Nevertheless, as a matter of policy, it seems to me similarly that 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."

[88] In all the circumstances of this case I find that the covenant relating to competition is unreasonable and therefore void, in the sense that this court will not enforce it.

[89] If I am wrong in this finding, and if the defendant has been in breach of a lawful covenant relating to competition, there was no evidence before me of any actual damage such a breach of contract has caused to the plaintiff. Since I have found that the plaintiff has failed to prove that the defendant solicited JMW's and SM Pigs' custom from the plaintiff, the evidence contained in the Order Pattern document referred to above does not provide proof of any loss relating to those clients for breach of the restriction on competition. There is no evidence of any damage relating to any other client. In such circumstances the plaintiff would have proved merely a technical breach of contract, and I would have considered an award only of nominal damages of £1.

[90] The Writ in this case was issued on 16 November 2020. Judgment is being delivered on 3 February 2021; a period of just over 2½ months. This is an example of the outworking of a fundamental principle of the Commercial Hub, namely to provide commercial litigants with a speedy resolution of disputes. However, in such circumstances it is incumbent on litigants who desire an early hearing to ensure that they have available the evidence necessary to prove their case. The court will facilitate the desire for expedition; the parties need to be ready for it.

IX. Conclusion

[91] Both the claim and the counterclaim are dismissed.

[92] I enter judgment for the defendant against the plaintiff in the claim brought by the plaintiff, and I enter judgment for the plaintiff against the defendant on the counterclaim.

[93] The normal order for costs would be that the defendant is entitled to his costs in the defence of the plaintiff's proceedings; and the plaintiff is entitled to its costs of defending the counterclaim. That is the order I would intend to make, but I will refrain from doing so for 14 days to allow for written submissions from counsel as to why such an order would not be appropriate.

[94] Because of the finding that the defendant has not solicited clients from the plaintiff, I have not found it necessary to make any finding as to the reasonableness of the restrictive covenant in relation to soliciting, although my comments above about lack of evidence apply with equal force. I will ask counsel to include in their written submissions, their observations on the effect of this judgment on the undertakings which were provided by the defendant at the date of listing of the injunction application.

APPENDIX 1

Schedule 1

PROTECTION OF BUSINESS INTERESTS

In this Schedule the following words and expressions shall have the following meanings:-

"Business"	the business or businesses of the Company or any Group Company in or with which the Executive has been involved or concerned at any time during the period of twelve months prior to the Termination Date;
"directly or indirectly"	The Executive acting either alone or jointly with or on behalf of any other person, firm or company, whether as principal, partner, manager, employee, contractor, director, consultant, investor or otherwise;
"Key Personnel"	any person who is at the Termination Date or was at any time during the period of twelve months prior to the Termination Date employed or engaged as a consultant in the Business in an executive or senior managerial or sales capacity and with whom the Executive has had dealings other than in a de minimis way at any time during the said period (or the Term if shorter);
"Prospective Customer"	any person firm or company who has been engaged in negotiations with which the Executive has been personally involved, or has been identified as, by the Company or any Group Company with a view to purchasing goods and services from the Company or any Group Company in the period of six months prior to the Termination Date,
"Relevant Area"	the UK and the Republic of Ireland;

"**Relevant Customer**"	any person firm or company who at any time during the twelve months prior to the Termination Date was a customer of the Company or any Group Company, with whom or which the Executive dealt other than in a *de minimis* way or for whom or which the Executive was responsible on behalf of the Company or any Group Company at any time during the said period (or the Term if shorter);
"Relevant Goods and Services"	any goods and/or services competitive with those supplied by the Company or any Group Company at any time during the twelve months prior to the Termination Date in the supply of which the Executive was directly involved or concerned at any time during the said period;
"Relevant Period"	the period of twelve months from the Termination Date less any period during which the Executive has not been provided with work pursuant to clause 3.4 of this Agreement.
"Relevant Supplier"	any person firm or company who at any time during the twelve months prior to the Termination Date was a supplier of any goods or services (other than utilities and goods or services supplied for administrative purposes) to the Company or any Group Company and with whom or which the Executive had personal dealings other than in a de minimis way at any time during the said period (or the Term if shorter): and
"Termination Date"	the date on which the employment of the Executive under this Agreement shall terminate.

1. The Executive shall not without the prior written consent of the Board directly or indirectly at any time during the Relevant Period:-

(a) solicit away from the Company or any Group Company; or

(b) endeavour to solicit away from the Company or any Group Company; or

(c) employ or engage, or

(d) endeavour to employ or engage,

any Key Personnel.

2. The Executive shall not without the prior written consent of the Board directly or indirectly at any time within the Relevant Period:-

2.1. (a) solicit the custom of; or

(b) deal with

any Relevant Customer or Prospective Customer in respect of any Relevant Goods or Services

2.2. (a) interfere; or

(b) endeavour to interfere,

with the continuance of supplies to the Company and/or any Group Company (or the terms relating to those supplies) by any Relevant Supplier.

2.3. In the event of the Executive breaking the Agreement in Schedule 1 (Protection of Business Interests) the Company shall be entitled to recover any loss of profit occurring from the breaking of the said Agreement.

3. The Executive shall not without the prior written consent of the Board directly or indirectly at any time within the Relevant Period engage or be concerned or interested in any business within the Relevant Area which (a) competes or (b) will at any time during the Relevant Period compete with the Business Provided that the Executive may hold (directly or through nominees) by way of bona fide personal investment any units of any authorised unit trust and up to one per cent of the issued shares, debentures or securities of any class of any company whose shares are listed on a recognised investment exchange within the meaning of the Financial Services Act 1986 or dealt in in the Alternative Investment Market.

4.1 The Executive acknowledges (having taken appropriate legal advice) that the provisions of this Schedule are fair, reasonable and necessary to protect the goodwill and interests of the Company and the Group Companies.

4.2 The Executive acknowledges that the provisions of this Schedule shall constitute severable undertakings given for the benefit of the Company and each Group Company and may be enforced by the Company on behalf of any of them.

4.3 If any of the restrictions or obligations contained in this Schedule is held not to be valid on the basis that it exceeds what is reasonable for the protection of the goodwill and interests of the Company and the Group Companies but would be valid if part of the wording were deleted then such restriction or obligation shall apply with such deletions as may be necessary to make it enforceable.

4.4 The Executive acknowledges and agrees that he shall be obliged to draw the provisions of this Schedule to the attention of any third party who may at any time before or after the termination of the Executive's employment hereunder offer to employ or engage the Executive and for whom or with whom the Executive intends to work within the Relevant Period.

APPENDIX 2

Confidentiality

1. The Executive acknowledges that during the Term he shall in the performance of his duties become aware of trade secrets and other confidential information relating to the Company, the Group Companies, their businesses and its or their current or prospective clients or customers and their businesses.

2. Without prejudice to his general duties at common law in relation to such trade secrets and other confidential information, the Executive shall not during the Term or at any time after the Termination Date disclose or communicate to any person or persons or make use (other than in the proper performance of his duties under this Agreement) and shall use his best endeavours to prevent any disclosure, communication or use by any other person, of any such trade secrets or confidential information, which shall include but not be limited to:-

   (b) Formulations of chemical products;

   (c) Lists of customers and information concerning the identity of customers; and

   (d) details of customer pricing policies;

1. The provisions of this clause shall cease to apply to information or knowledge which comes into the public domain otherwise than by reason of the default of the Executive.

APPENDIX 3

SECRECY AGREEMENT

1) YOU SHALL NOT EITHER DURING YOUR EMPLOYMENT WITH HOLCHEM LABORATORIES LTD, OR AFTER THE TERMINATION OF YOUR EMPLOYMENT DISCLOSE TO ANY PERSON, FIRM OR COMPANY OR USE FOR YOUR OWN BENEFIT OR THE BENEFIT OF ANY PERSON (WHICH WORD SHALL IN THIS AGREEMENT INCLUDE ANY FIRM OR CORPORATION) OTHER THAN THE COMPANY OR USE IN ANY MANNER WHICH IS OR MAY BE TO THE DETRIMENT OF THE COMPANY ANY CONFIDENTIAL INFORMATION WHICH COMES TO YOUR KNOWLEDGE OR POSSESSION IN THE COURSE OF YOUR EMPLOYMENT AND WHICH CONCERNS OR RELATES TO THE BUSINESS OF THE COMPANY OR ANY OF ITS CUSTOMERS; AND ALL RECORDS, MEMORANDA, CUSTOMER LISTS OR OTHER DOCUMENTS CONCERNING OR IN ANY WAY RELATING TO SUCH BUSINESS OR CUSTOMERS WHICH ARE MADE BY YOU OR WHICH MAY HAVE COME INTO YOUR POSSESSION IN THE COURSE OF YOUR EMPLOYMENT SHALL BE THE EXCLUSIVE PROPERTY OF THE COMPANY AND YOU SHALL PROMPTLY DELIVER UP THE SAME ON BEING REQUESTED TO DO SO.

2)

a) 'CUSTOMERS' MEANS THOSE CUSTOMERS OR INDIVIDUALS TO WHICH THE COMPANY HAS ASSIGNED YOU ANY SALES OR SERVICE RESPONSIBILITY IN THE FOOD AND BEVERAGE INDUSTRIES.

   THE 'PRODUCTS' MEANS OF A TYPE OR KIND MARKETED BY THE COMPANY IN THE FOOD AND BEVERAGE INDUSTRIES.

   'RESTRICTION PERIOD' MEANS A PERIOD OF 12 MONTHS AFTER TERMINATION FOR ANY REASON WHATSOEVER OF YOUR EMPLOYMENT HERE UNDER.

b) YOU SHALL NOT DURING THE RESTRICTION PERIOD OR INDIRECTLY ON YOUR BEHALF OR ON BEHALF OF OR IN ASSOCIATION WITH ANY OTHER PERSON SOLICIT ORDERS FOR THE PRODUCTS IN ANY OF THE CIRCUMSTANCES SET OUT BELOW (COVENANTS CONTAINED IN PARAGRAPH (i) AND (ii) BELOW EACH BEING SEPARATE AND INDEPENDENT COVENANTS):

   i. <u>FROM CUSTOMERS</u> WITH WHOM YOU HAD DEALINGS FOR AND ON BEHALF OF THE COMPANY IN THE COURSE OF YOUR EMPLOYMENT DURING THE 12 MONTHS IMMEDIATELY PRECEDING SUCH TERMINATION.

   ii. <u>FROM CUSTOMERS</u>

a) TO WHOM THE COMPANY SUPPLIED ANY SUCH GOODS DURING THE 12 MONTHS IMMEDIATELY PRECEDING SUCH TERMINATION; AND

b) CONCERNING WHOM YOU RECEIVED CONFIDENTIAL INFORMATION IN THE COURSE OF YOUR EMPLOYMENT AND DURING THE SAID 12 MONTHS.

c) YOU SHALL NOT REPRESENT YOURSELF AS BEING IN ANY WAY CONNECTED WITH OR INTERESTED IN ANY OF THE BUSINESSES OF THE COMPANY AFTER THE TERMINATION FOR ANY REASON WHATSOEVER. OF YOUR EMPLOYMENT HEREUNDER.