



Neutral Citation Number: [2019] EWHC 2829 (Ch)

Case No: BL 2019 MAN 000087

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN MANCHESTER**  
**BUSINESS LIST**

Liverpool Civil and Family Court  
Vernon Street, Liverpool

Date: Thursday 24 October 2019

**Before :**

**MR JUSTICE SNOWDEN**

**Vice-Chancellor of the County Palatine of Lancaster**

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**Between :**

**AFFINITY WORKFORCE SOLUTIONS LIMITED**

**Claimant**

**- and -**

**(1) TCE KATHRYN McCANN**

**Defendants**

**(2) LIZZIE McDONNELL**

**(3) CLARE HIND**

**(4) WENDY ROWELL**

**(5) SUSANNE SOUTHEY**

**(6) TRADEWIND RECRUITMENT LIMITED**

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**William McCormick QC** (instructed by **Hemingways Solicitors Limited**) for the **Claimant**  
**Daniel Tatton Brown QC** (instructed by **TLT Solicitors LLP**) for the **Defendants**

Hearing date: 9 October 2019  
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**Approved Judgment**

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

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MR JUSTICE SNOWDEN

**MR JUSTICE SNOWDEN :**

1. This is an application by the Claimant (“Affinity”) for an injunction to restrain the First to Fifth Defendants (the “Employees”) from taking any part in the business of the Sixth Defendant (“Tradewind”) until after the expiry of certain covenants which are alleged to have been included in their contracts of employment with Affinity, and which restrict their ability to engage in competition with Affinity for six months after termination of their employment. Affinity and Tradewind are competitors in the business of providing recruitment services in the education sector, matching vacancies at employer schools (referred to as “clients” or “customers”) with suitable teachers and other potential employees (referred to as “candidates”).
2. The Employees ceased to be employed by Affinity between 17 May 2019 and 2 July 2019 and have all now been employed by Tradewind. In the claim, Affinity seeks injunctive relief to enforce the relevant covenants and damages for breach of contract against the Employees, and injunctive relief and damages for inducing a breach of contract against Tradewind.
3. If applicable, the relevant periods of post-termination restriction will expire between 17 November 2019 and 2 January 2020. The parties have therefore proceeded on the basis that such periods will expire before any trial of the action can take place.
4. As I shall explain, although the application issued by Affinity sought wider relief so as to enforce a number of covenants, each of the Employees has offered to give undertakings to the Court until after expiry of the relevant six-month period not to solicit or deal with any of the customers or candidates included in an agreed list as applicable to her. Although the lists of identified customers and candidates have been agreed for each of the Employees, Affinity does not accept that this regime is sufficient. In consequence, the debate at the hearing before me concerned the single issue of whether the Employees should, instead of giving the undertakings, be restrained more generally from being employed or engaged by Affinity for the remainder of the applicable six-month periods. In that regard, Affinity indicated that in order to mitigate the potential effect of such an order on the Employees, it would have no objection to their remaining employed and paid by Tradewind, provided that they played no role in its business.

Background

5. As indicated above, each of Affinity and Tradewind operate a recruitment business in the education sector. Whilst a single client school may require many candidates over time, without a sufficient reservoir of suitable candidates, the needs of the school will not be met by the recruitment agency, and its business may be lost. Neither clients nor customers will necessarily deal exclusively with a single recruitment agency, but being the first port of call for either group is an important advantage. That position is hard-won and valuable, and the result of the forging of personal relationships between employees of the recruitment agency and the schools and candidates over time. There was no dispute between the parties that such relationships and the confidential information relating to them concerning, for example, the needs of the schools and the qualifications and aspirations of the candidates, can be the proper subject of protection by suitable covenants in the contracts of employment of employees of an agency.

6. Each of the Employees, together with four others, was employed by Affinity until earlier this year. Some, but not all, had become employees of Affinity following a TUPE transfer of their contracts of employment from other companies whose businesses had been acquired by Affinity, in particular Capita Resourcing Limited (“Capita”) and Monarch Education Limited (“Monarch”). The result is that the Employees do not have identical contracts of employment: that is an issue to which I shall return below.
7. The First Defendant was the North West regional director for Affinity, based in Liverpool and the line manager for the other Employees. She was summarily dismissed by Affinity on 17 May 2019 for alleged gross misconduct which is said to have included the taking of unauthorised paid holidays. It is also said that following her termination, the First Defendant forwarded to her personal email a large amount of confidential information and documents belonging to Affinity that would have been valuable to a competitor but of no proper use to her.
8. The First Defendant has denied the allegations against her. She appealed her dismissal at an internal hearing on 13 June 2019, but her appeal was rejected by Affinity a few days later. The First Defendant has since commenced proceedings claiming that she was wrongly and unfairly dismissed. In these proceedings she relies upon her wrongful dismissal as the basis for contending that Affinity repudiated her contract of employment, with the result that she is not in any event bound by any post-termination restrictions in it.
9. Thereafter, between 18 June and 2 July 2019 eight other employees resigned from their employment at Affinity’s Liverpool branch. After short periods of garden leave, their respective employments with Affinity then terminated.
10. The First Defendant commenced employment with Tradewind on 20 June 2019. Each of the eight other former employees of Affinity also started to work for Tradewind between 29 July and 5 August 2019. Affinity has alleged that the First Defendant induced or encouraged the other employees to leave Affinity and take up employment with Tradewind.
11. By letters sent on 12 and 18 July 2019, Affinity complained that the conduct of each of its ex-employees amounted to a breach of their continuing fiduciary duties and their contractual duties of confidence to Affinity. The letters sought extensive contractual undertakings from each of the ex-employees to the effect that they would not make use of any confidential information of Affinity or solicit the custom of, or deal with, relevant clients or candidates with whom they had dealt whilst at Affinity. Importantly, the undertakings sought did not seek to prohibit the ex-employees from working for Tradewind.
12. Extensive correspondence then ensued between solicitors instructed on behalf of all of the ex-employees and Affinity. In the course of that correspondence, on 12 August 2019 the solicitors for the ex-employees proposed a revised set of undertakings to be given to Affinity based upon the earlier draft suggested by Affinity, and including a list of identified schools for each individual ex-employee. The solicitors also protested that Affinity should follow the relevant CPR Pre-action protocols and not issue proceedings as Affinity had threatened.

13. The correspondence continued, and on 6 September 2019, the current solicitors for Affinity who had recently been instructed, wrote a comprehensive letter outlining its position on the applicable contracts and covenants. That letter referred, for the first time, to covenants in the employment contracts of the ex-employees which were said to prohibit competition with Affinity as well as those which related to use of confidential information. It did not, however, specifically identify any injunctive relief that might be sought.
14. On 13 September 2019, the solicitors for the ex-employees responded at length, protesting (inter alia) that Affinity had known for some time that the ex-employees had joined Tradewind, but had not previously sought to rely upon any non-compete restrictions in the undertakings demanded. The letter repeated the willingness of the ex-employees to give undertakings in the form suggested on 12 August 2019.
15. Thereafter, between 20 and 24 September 2019 the solicitors for the parties negotiated and agreed draft undertakings and lists of the critical schools and candidates for each of the ex-employees. At no stage did Affinity require those draft undertakings to include an undertaking not to compete with Affinity by working for Tradewind.
16. However, and without warning, on 26 September 2019 the solicitors for Affinity emailed the solicitors for the ex-employees indicating that although Affinity was prepared to accept contractual undertakings in the agreed form from four of the ex-employees,

“Having reviewed the evidence, [Affinity] intends to issue proceedings against [the Employees].

The email did not identify what, if any, specific evidence had come to light to cause Affinity to adopt this position.

17. The immediate response from the solicitors for the ex-employees was to express astonishment that Affinity had performed what they described as a “*volte-face*”, to set out that lists had been agreed on the basis of the draft undertakings offered for all of the ex-employees, to challenge Affinity to identify any new evidence which had supposedly necessitated the issue of proceedings rather than the acceptance of undertakings in agreed form from the Employees, and to suggest that if this was a “clumsy attempt” to recover the costs of proceedings that had been prepared but not issued, it would be strongly resisted.
18. When proceedings were issued, a section of the evidence in support identified what it alleged were the breaches of the post-termination restrictions by the Employees known to Affinity. These included the allegations in relation to misuse of confidential information by the First Defendant, and other instances of the Employees contacting schools or candidates on the books of Affinity. All but one of those matters pre-dated 24 September 2019 and there was no attempt in the evidence to explain Affinity’s change of attitude towards the Employees as distinct from the other ex-employees from whom it was willing to accept contractual undertakings.
19. The evidence of the Employees in response to the application was relatively brief and couched in very similar terms. As I shall explain in greater detail, a number of the Employees indicated that they either had no recollection of receiving or signing any

terms of employment containing the non-compete clauses relied on against them, they generally declined to respond to the specific allegations of breach of the post-termination provisions made against them due to an alleged lack of sufficient time to prepare a full response, and they indicated that if they were prevented from working for Tradewind this would have a serious detrimental effect upon their financial and personal circumstances. In addition, the First Defendant raised the issue of her alleged wrongful dismissal and Affinity's repudiation of her contract of employment.

### The Law

20. The parties were in general agreement as to the correct legal approach which I should adopt on this application.
21. It is well established that the Court should not, on an application for interim relief, attempt to resolve disputed issues of fact, or any legal issues that turn on disputed facts. Rather, the approach of the court to an application for an interim injunction is that set out in the decision of the House of Lords in American Cyanamid v Ethicon [1975] AC 396. In summary, the Court should ask the following questions: (1) has the claimant raised a serious issue to be tried; (2) if so, will damages be an adequate remedy for the claimant if it succeeds at trial; (3) if not, will the claimant's cross-undertaking as to damages provide an adequate remedy for the defendant if it succeeds at trial; and (4) if the answer to (2) and (3) is "No" or is doubtful, where does the balance of convenience lie? The assessment of the balance of convenience is sometimes referred to as the assessment of whether there is a greater risk of injustice from the grant or refusal of the injunction. In that regard, the House of Lords also indicated that where the material factors appear to be evenly balanced, the most prudent course may be to preserve the *status quo*.
22. However, in a case in which, as here, an injunction is sought to enforce restrictive covenants, and the covenants are likely to have run most or all of their course before a trial can take place, in considering the risk of injustice, the court should take account, as best it can, the likelihood that the claimant would succeed or fail if there were a trial: see Forse v Secama [2019] EWCA Civ 215 at [28]-[31] referring to Lansing Linde v Kerr [1991] 1 WLR 251 at 258.
23. In that regard, whilst the grant of an injunction to enforce an employee's negative covenant after a trial is a discretionary remedy, the starting point for the court is that the ordinary remedy to enforce such a covenant is to grant an injunction and thereby hold the employee to their contractual bargain. The burden of showing why it would be unjust or inappropriate to grant such an injunction lies on the employee: see Dyson Technology v Pellerey [2016] EWCA Civ 87 ("Dyson") at [74]-[75].
24. The categories of considerations that might lead a court to decline to grant an injunction after a trial are not closed, and the case does not have to qualify as "exceptional" before an injunction might be refused: see Dyson. In some cases it has been said that even if a restrictive covenant has been held to be no wider than is reasonably necessary, judged by reference to the situation at the time of contract, the court nonetheless retains a discretion to refuse an injunction by reference to the reasonableness of enforcement at the time of trial: see e.g. TFS Derivatives v Morgan [2005] IRLR 246 at [38]-[39]. Examples include where the grant of the injunction would cause disproportionate hardship to the defendant, and no damage would be caused to the claimant if an

injunction were not granted (Insurance Company v Lloyds Syndicate [1995] 1 Lloyd's Rep 272); or where the covenant had been imposed to protect confidential information which had entered the public domain (other than via the defendant) by the time of trial (the example given in Dyson at [74]).

Serious issue to be tried

25. As I have indicated, the issue between the parties on this application is essentially whether the Employees should be restrained by an injunction from working for Tradewind for what remains of the six-month period after the termination of their respective employments with Affinity.
26. For the purposes of this application, there was no real dispute that Tradewind is engaged in a competing business with Affinity. As such, if a six-month post-termination non-compete covenant had been validly incorporated into the Employees' contracts of employment with Affinity, it was not seriously disputed that working for Tradewind would be within the wording of the covenant. Moreover, although Mr. Tatton Brown QC indicated that the Employees would at trial contend that the non-compete covenants were in any event unreasonable in their scope and were hence unenforceable, that aspect of the case did not feature highly in the argument before me and I cannot easily assess its merits at this interim stage.
27. Instead, the most significant question which was addressed in argument was whether the relevant contract for each of the Employees included a non-compete covenant at all. The position of the individual Employees differed in this respect.
28. The First Defendant signed a contract with Capita on 25 April 2006 which did not include a non-compete clause. Subsequently she was sent revised terms and conditions of employment by Monarch (the "Second Monarch Terms"). Those terms did include a specific non-compete clause prohibiting her from working for a competitor for six months after termination of her employment. The Second Monarch Terms were sent to the First Defendant under cover of a letter dated 8 November 2017 that confirmed the First Defendant's promotion and a salary increase with retrospective effect, but stated that apart from an increase in salary, "All other terms and conditions remain the same." The First Defendant's evidence is that she has no recollection of receiving the Second Monarch Terms and does not believe that she signed them. Affinity has not produced any copy of the Second Monarch Terms signed by the First Defendant.
29. The Second Defendant also originally signed terms of employment provided by Capita which did not include a specific non-compete clause. However, on 21 May 2007 it would appear that she signed underneath a signature clause in similar (but not identical) terms to the clause which appeared at the end of a letter dated 1 May 2007 which set out new terms of employment which did include a non-compete clause. The Second Defendant's evidence is that she does not recall receiving or signing the letter of 1 May 2007.
30. Thereafter the Second Defendant was sent the Second Monarch Terms under cover of a letter dated 15 January 2018 which referred to a salary increase from the start of that month, and then indicated that, "All other terms and conditions remain the same." The Second Defendant's evidence – expressed in very similar terms to that of the First Defendant – is that she has no recollection of receiving that letter and does not believe

that she signed the Second Monarch Terms: and again, Affinity has not produced any copy of the Second Monarch Terms signed by the Second Defendant.

31. The Third Defendant's original terms and conditions of employment with Capita did not include a non-compete clause. She was also sent the Second Monarch Terms in August 2018, but no signed version has been found, and her evidence is that she has no recollection of receiving that letter and does not believe that she signed the Second Monarch Terms. The letter accompanying the terms dated 3 August 2018 also referred to a promotion and pay rise with retrospective effect and stated that "All other terms and conditions remain the same."
32. The Fourth Defendant did sign the signature page of a contract with Capita on 7 June 2016 which she faxed back to Capita. The evidence is that she had been sent a copy of the full contract and that it contained a post-termination non-compete clause.
33. The Fourth Defendant was subsequently sent the Second Monarch Terms under cover of a letter dated 8 May 2018 which referred to a promotion and pay rise with retrospective effect and stated that "All other terms and conditions remain the same." Although the Fourth Defendant's evidence in this respect is that she has no recollection of having seen the full Second Monarch Terms, and believes that she was only sent the signature page which she signed and returned, a check of the email sent to her apparently reveals that she was sent the whole contract.
34. The Fifth Defendant's employment by Affinity only began in April 2018. Although her evidence is that she has no recollection of signing the Second Monarch Terms and no signed version has been produced, it is not disputed that she was sent a copy of the Second Monarch Terms under cover of a letter of 13 April 2018. That letter made her the offer of employment and was the basis upon which she started work and was paid the agreed salary thereafter.
35. From that short summary it can be appreciated that the strength of the case that the Employees were subject to a post-termination non-compete clause varies from defendant to defendant. By way of illustration, whilst making no concessions, Mr. Tatton Brown was not realistically able to suggest that there was not a serious issue to be tried that the Fifth Defendant was bound by the non-compete covenant in the Second Monarch Terms. Although there was no evidence that she signed those terms, the clear inference is that they must have formed the basis upon which she commenced work.
36. That position can be contrasted with the position of the First and Third Defendants, each of whom had an original contract that did not include a non-compete clause, each of whom was sent the Second Monarch Terms under cover of a letter that wrongly stated that the new terms made no material change to her terms and conditions of employment, each of whom has stated that she has no recollection of signing the Second Monarch Terms, and no signed copy has been found for either of them.
37. Mr. Tatton Brown contended that given the erroneous terms of the covering letters, the First and Third Defendants could not be assumed to have appreciated that they were being asked to enter into the new restrictive covenants in the Second Monarch Terms at all, and hence that their agreement to the new covenants could not be implied from their continuing to work for Affinity. He also referred to Reuse Collections v Sendall [2015] IRLR 226 which he said was authority for the propositions (i) that there had to

be some real monetary or other benefit given by way of consideration for an effective variation of a contract of employment, and (ii) that the fact that a new restrictive covenant was sought to be introduced at the same time as the employee was granted a promotion and salary increase would not be sufficient unless there was evidence that one was understood to be conditional on the other. He submitted that the First and Third Defendants would have a good defence to any claim to enforce the non-compete covenant in the Second Monarch Terms on this ground alone.

38. It seems to me that those points relating to the First and Third Defendants are plainly arguable on the facts. Although I cannot decide such issues, I can take into account that they would present a number of legal and factual hurdles which Affinity would have to surmount to succeed in establishing that it had the benefit of a valid non-compete covenant from the First and Third Defendants. The same consideration applies to the additional defence raised by the First Defendant to the effect that Affinity wrongfully dismissed her, and thereby repudiated her contract of employment, such that it cannot now seek to enforce any restrictive covenants against her at all: see Brown v Neon Management Services [2018] EWHC 2137 (QB).
39. The strength of the case for incorporation of a non-compete clause in the contracts of the Second and Fourth Defendants lies somewhere between these two positions. There is an obvious argument that the Second and Fourth Defendants each signed earlier terms which included a non-compete clause. Although the clarity and breadth (and hence enforceability) of the particular wording of those clauses could be the subject of some debate at trial, the clauses would in principle be applicable if it could not be shown that the Second and Fourth Defendants validly agreed the amended non-compete covenant in the Second Monarch Terms.
40. Notwithstanding these differences in position, in my judgment there is a serious issue to be tried in respect of each of the Employees that their respective contract of employment with Affinity included a relevant non-compete covenant which would be enforceable against them, and which would prevent them working for Tradewind.
41. I do accept, however, that for the purposes of assessing the overall likelihood of Affinity succeeding in enforcing a non-compete covenant at trial in accordance with the approach in Forse v Secama and Lansing Linde v Kerr, the case against the First and Third Defendants is subject to substantial problems, and the case against the Second and Fourth Defendants is not straightforward.

Would damages be an adequate remedy?

42. Neither side seriously contended that damages would be an adequate remedy for the other if an injunction were to be refused or granted (as the case might be).
43. Affinity produced evidence to the effect that quantifying the adverse impact that the Employees working for Tradewind would have on its business would be very difficult: and Tradewind produced evidence suggesting it would be equally damaging and difficult to quantify the effect upon its reputation and business if the Employees were prevented from working for it.
44. The Employees also gave evidence that they could have no guarantee that they would continue to be employed and paid by Tradewind if they were unable to do any work for



it, that a significant amount of their income was based on commission, the loss of which would be difficult to assess; and that they would suffer psychological harm from stress and anxiety if they were to lose their jobs.

45. In the circumstances I do not consider that damages would be an adequate remedy for either side. I therefore move to consider the balance of convenience.

Balance of convenience

46. As explained in FSS Travel and Leisure Systems v Johnson [1999] FSR 505 at 512, the general principle is that an employer cannot take a covenant simply to protect himself against competition by a former employee. The employer's claim for protection must be based upon the identification of some advantage or asset, inherent in the business, which can properly be regarded as the employer's property, which it would be unjust to allow the employee to appropriate for his own purposes, even though the employee may have contributed to its creation. In that regard, protection can legitimately be claimed for identifiable knowledge constituting the employer's trade secrets, but not for the skill, experience, know-how and general knowledge of the employee.

47. Although the primary focus is on protection of the employer's property, the courts have been prepared to enforce clauses which prohibit competition in general terms, rather than simply imposing limitations on the use of specific confidential information, or imposing non-solicitation or non-dealing covenants, where such targeted forms of restriction would be difficult to police, or give rise to disputes as to precisely what was confidential or what was prohibited. This was explained by Toulson LJ in Thomas v Farr plc [2007] ICR 932 at [42],

“...it is no argument against a restrictive covenant that it may be very difficult for either the employer or the employee to know where exactly the line may lie between information which remains confidential after the end of the employment and the information which does not. The fact that the distinction can be very hard to draw may support the reasonableness of a non-competition clause. As was observed by Lord Denning MR in Littlewoods Organisation v Harris [1977] 1 WLR 1472 at 1479, and by Waller LJ in Turner v Commonwealth & British Minerals Limited [2000] IRLR 114, para 18, it is because there may be serious difficulties in identifying precisely what is or what is not confidential information that a non-competition clause may be the most satisfactory form of restraint, provided that it is reasonable in time and space.”

48. Those observations were made in the context of determining whether a non-compete covenant was valid in light of the circumstances at the time that the contract was entered into. However, it seems to me that the same considerations must also be relevant when the court is considering the discretionary question of whether an injunction should be granted to enforce a valid covenant in light of the situation at trial.

49. In the instant case, as I have indicated at the start of the judgment, there was no dispute that the Employee's knowledge of the identity, details and requirements of the customers and candidates who had used Affinity, and the relationships which the

Employees had built up with those customers and candidates during employment with Affinity, amounted to information capable of being protected by a suitable restrictive covenant.

50. Moreover, as indicated in Dyson, if Affinity were to establish at trial that it has the benefit of a binding non-compete covenant, the starting point for the exercise of the court's discretion would be that the appropriate remedy would ordinarily be to grant an injunction to enforce that covenant against the relevant Employee.
51. However, on the particular facts of the instant case, and having regard to the reasoning which underlies the willingness of the courts to uphold non-compete covenants, I consider for the following reasons that there would be a very real prospect of the court being persuaded not to grant an injunction to enforce any such non-compete covenants against the Employees after a trial.
52. In the instant case, for a significant period after it was known that the Employees were working for Tradewind, the remedy which Affinity pursued in correspondence was to obtain undertakings to prevent the Employees soliciting or dealing with particular customers and candidates with whom they had established relationships whilst at Affinity. Affinity did not assert that it was necessary to enforce the broader non-compete covenants alleged to exist in the Employee's contracts until some time after the Employees had started to work for Tradewind.
53. Moreover, until 26 September 2019, Affinity was prepared to agree for each of its ex-employees a list of the customer schools and candidates that the employees should undertake not to solicit or deal with for an initial period whilst at Tradewind. In agreeing those lists, Affinity must have accepted that it was possible to identify, with sufficient precision, the contacts and relationships which it contended amounted to its property for the purposes of protecting its legitimate business interests.
54. Further, in accepting that it was sufficient to protect its interests that some of the employees could give agreed undertakings not to solicit or deal with the specified customers and candidates, Affinity must have accepted that those ex-employees could be relied upon to honour the contractual commitments that they were prepared to give.
55. In my judgment, that agreed regime addressed the underlying purpose of protecting the confidential information or relationships forming part of Affinity's business and property; and it would seem that the parties agreed that it would not to give rise to any uncertainty of definition, or inability effectively to police the regime, which the authorities indicate might justify a wider non-compete covenant.
56. The same regime was negotiated for the Employees, but at the last moment rejected by Affinity. Affinity's explanation for that *volte face* (as I think it was correctly characterised) was that there had been a reassessment of the case against the Employees. But that explanation makes little or no real sense.
57. It was not, for example, suggested that the change resulted from a fundamental difference in the strength of the case against the Employees in respect of the incorporation of the relevant non-compete clauses in their contracts as opposed to those ex-employees from whom Affinity was prepared to accept contractual undertakings.

58. It was suggested in argument that Affinity had reassessed its view as to whether it could trust the Employees to honour contractual undertakings. But that was not borne out by the evidence. There was only one alleged instance of a breach of covenant which became known to Affinity after 24 September 2019 which could conceivably have justified a change of attitude, but that alleged breach was in truth no different to the others that which were known about long before that date. Moreover, in relation to the First Defendant, her alleged improper conduct in misusing confidential information immediately after dismissal, and in allegedly acting as a recruiting sergeant for the other Employees, was already well known and, one would have thought, far more relevant to the issue of her trustworthiness than anything discovered about her work for Tradewind thereafter.
59. It would thus appear that Affinity was prepared to take the view for a significant period that its interests would be adequately protected by contractual undertakings not to solicit or deal with identified customers and candidates, rather than a general prohibition on all of the ex-employees working for Tradewind; and that its reasons for a change of position in relation to the Employees do not bear scrutiny. It is also of some significance that the Employees are now prepared to give undertakings to the Court rather than simply in contract, thereby exposing themselves to the potential sanction of contempt proceedings.
60. These protections offered to Affinity must be set against the very obvious hardship to the Employees of putting their continued employment at Tradewind at risk by the grant of an injunction to enforce the non-compete undertakings after they had initially been permitted to establish a new position and business relationships at Tradewind. Although, as I indicated at the start of the judgment, Affinity indicated that it would be content to permit Tradewind to continue to employ and pay the Employees provided that they did no work, I was given no indication that Tradewind would be prepared to continue to employ the Employees on such a basis. There would also be obvious disruption to the lives of the Employees and the business of Tradewind, together with the obvious practical difficulties of Tradewind having in effect to run a second workforce until the relevant periods of restraint expired.
61. In these circumstances, it seems to me that a trial Court might very well take the view that, even if the non-compete covenants were contractually permissible in scope and validly incorporated into the Employees' contracts, it would nevertheless be unreasonable and unjust for them now to be enforced by a general injunction rather than the more targeted undertakings offered by reference to the agreed lists.
62. Such considerations are obviously all the more powerful at the interim stage when, for the reasons which I outlined under the heading "serious issue to be tried", it is uncertain (to a greater or lesser degree) whether Affinity will succeed in establishing the contractual basis for its claims against the individual Employees at all.
63. It therefore seems to me that to grant an interim injunction in general terms, preventing the Employees working for Affinity for the balance of their non-compete covenants, risks a substantial injustice if it were to turn out that such relief would not be granted at trial; but to refuse to grant such relief on the basis of the non-solicitation and no-dealing undertakings offered to the Court carries far less risk of injustice to Affinity, which will have the targeted protection of its relationships with identified customers and candidates, backed up by contempt sanctions for the remaining period of the covenants.

64. If I were in any doubt about that result, the position would be put beyond doubt by consideration of the relevant *status quo*. As I have indicated, Affinity did not seek for a significant period to prevent the Employees for working for Tradewind, but concentrated on preventing the Employees soliciting and dealing with identified customers and candidates. It thereby permitted the Employees to establish new business relationships at Tradewind, which must, I think, constitute the current *status quo*. I would be reluctant to disturb that new situation except on clear evidence that it was necessary to do so to provide sufficient protection to Affinity for its legitimate interests. There is no such evidence.
65. For these reasons, I conclude that on the basis that the Employees are willing to give the non-solicitation and no-dealing undertakings which have been offered to the Court, and taking into account as best I can the likely outcome at a trial, the balance of convenience is clearly against the grant of the non-compete injunction sought by Affinity.

Disposal

66. I will therefore refuse the injunction sought and accept the undertakings offered by the Employees.