Approved Judgment

Neutral Citation Number: [2024] EWHC 966 (Ch)

Claim No: CR-2024-000698

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF MALLET FOOTWEAR LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006
DERIVATIVE CLAIM

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 25 April 2024

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between:

UZOR HOLDING LIMITED **a company incorporated in the British Virgin Islands**	**Claimant/ Applicant**
- and -	
(1) MR TOMMY FORDHAM	**1st Defendant /Respondent**
(2) MALLET. FOOTWEAR LIMITED	**2nd Defendant**

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Thomas Elias (instructed by **Gunnercooke LLP**) appeared for the **Claimant**
James Laddie KC (instructed by **Reynolds Porter Chamberlain LLP**) appeared for the **First Defendant**
The **Second Defendant** did not appear and was not represented

Approved Judgment

Hearing dates: 17-18 April 2024

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Approved Judgment

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 25 April 2024 at 10.30am.

DEPUTY JUDGE ROBIN VOS:

Introduction

1. The Claimant, Uzor Holding Limited ("Uzor") is a company incorporated in the British Virgin Islands. It is wholly owned by Mr Evren Ozkarakasli.

2. In 2015, the First Defendant, Mr Tommy Fordham (also known as Tommy Mallet) and Mr Ozkarakasli/Uzor, went into business together through the Second Defendant, Mallet. Footwear Limited ("MFL"). MFL's main product is a range of premium or luxury trainers which retail for between £160-£220. It has also at various times offered a range of clothing although it currently only sells baseball caps, socks and t-shirts.

3. 3. Each of Uzor and Mr Fordham initially owned 50% of MFL. In 2019, JD Sports Fashion PLC ("JD Sports") purchased 25% of the company. Those shares were sold back in December 2022 so that, at the date of these proceedings, the shares in MFL are held as to 50% by Mr Fordham and 50% by Uzor.

4. At the time of the share purchase by JD Sports, both Mr Ozkarakasli and Mr Fordham were required to enter into formal service agreements which contain post-termination restrictive covenants applying for 12 months after termination of employment. The post-termination restrictions are contained in clause 13 of Mr Fordham's service agreement. These are set out in the appendix to this judgment.

5. On 31 October 2023, Mr Fordham resigned from MFL. He subsequently announced on 1 December 2023 that he would be launching a new brand of trainers with the brand name CTRNE on 1 January 2024 which he did through a company known as MNFSTABNDNCEHOLDINGS Limited (short for Manifest Abundance Holdings Limited – "MAHL").

6. During his employment with MFL, Mr Fordham also developed a relationship with (and is said to have acquired shares in) a sports and leisure clothing company which uses the brand name Condition.

7. Uzor has brought a derivative claim against Mr Fordham seeking various forms of relief including an injunction enforcing the post-termination restrictions in his service

agreement. However, on 14 February 2024, Uzor also applied for an interim injunction restraining Mr Fordham from acting in breach of those restrictions. This judgment follows the hearing of that application.

8. Mr Fordham resists the application. He says that the post-termination restrictions are unenforceable and that, even if they are enforceable, damages would be an adequate remedy for any loss caused to MFL. In any event, he says that neither Condition nor CTRNE competes with MFL.

Further background

9. Mr Fordham is (and was at the time MFL was established) a prominent social media personality, having appeared in the television series, The Only Way Is Essex. The brand is of course named after his celebrity persona, Tommy Mallet.

10. Initially, Mr Fordham and Mr Ozkarakasli were the sole directors of MFL. Mr Fordham was primarily responsible for design and marketing whilst Mr Ozkarakasli looked after the business side of things although, by the time of Mr Fordham's departure from MFL, it had a team of people dealing with day to day matters.

11. MFL sells its products directly through its website and through sales on a wholesale basis to retailers around the world. In relation to the wholesale business, MFL has used various sales agents in Europe, the Middle East and the US. For a relatively short period of time, it had its own store on Carnaby Street in London although this closed in May 2023.

12. When JD Sports acquired 25% of MFL, it had the right to appoint a director. From May 2022, the director nominated by JD Sports was Christopher Stephenson although he ceased to be a director when JD Sports sold their shares back to Mr Fordham and Mr Ozkarakasli/Uzor. He was however reappointed as a director by Mr Fordham to act in his place when he resigned from MFL in October 2023.

13. In June 2023, Mr Fordham applied for a trade mark for "CTRNE". In July 2023, he applied for a patent relating to footwear.

14. In August 2023, Mr Fordham announced on social media that he had acquired 49% of Condition although he denies that he in fact acquired any shares and says that this was

purely for marketing purposes. He accepts however that he promoted the brand on social media.

15. On 19 October 2023, Mr Fordham applied for a word mark relating to "STEPINTOABUNDANCE" and on 31 October 2023 (the day he resigned from MFL) applied for the word mark "CTRNE".

16. Another senior employee of MFL, Mr Ian Gough, left MFL in November 2023. Uzor believes that Mr Gough is working for CTRNE in some capacity. This is not denied by Mr Fordham.

17. As I have already mentioned, CTRNE is a brand of luxury trainers. Mr Fordham says that they are very different from the trainers sold by MFL and are aimed at a different target market. There is a single design (although available in different colours). They sell for £250.

18. CTRNE is a relatively small business. There are five shareholders (including Mr Fordham) who are members of Mr Fordham's family and who all work in the business. It has two other full-time employees and three contractors. Mr Fordham says that he provides MAHL with cash injections to enable it to pay expenses/salaries.

19. As an issue has been raised about the time it has taken for Uzor to apply for the interim injunction, I should say something here about the steps taken by Mr Ozkarakasli/Uzor/MFL after Mr Fordham announced on 1 December 2023 that he was launching the CTRNE brand.

20. No action was taken until 21 December 2023 when Fladgate LLP, purportedly acting for MFL, wrote to Mr Fordham threatening an urgent injunction application if he did not provide undertakings that he would abide by the post-termination restrictions and not launch CTRNE until 31 October 2025 (calculated as being 12 months' notice to terminate employment plus a further 12 months post-termination restriction – although it is now accepted that Mr Fordham's employment came to an end on 31 October 2023 so that the restrictions come to an end on 31 October 2024).

21. Mr Fordham's lawyers, Reynolds Porter Chamberlain LLP ("RPC"), responded on 29 December to say that Mr Fordham was not willing to give the undertakings as the

restrictions were not enforceable and that, in any event, he was not in breach of them. RPC also queried whether Mr Stephenson (as a director of MFL) had approved Fladgate's letter.

22. This prompted Mr Ozkarakasli to instruct another firm, Gunnercooke LLP ("Gunnercooke"), who wrote a letter before claim to Mr Stephenson on 10 January 2024 making allegations of breach of duty against Mr Stephenson. It concluded by asking him either to resign as a director or to support the claim against Mr Fordham. Before any substantive answer was received, Mr Fordham appointed Mr Gough as a director of MFL in place of Mr Stephenson.

23. On 19 January 2024, Gunnercooke wrote on behalf of Uzor to RPC inviting Mr Fordham to give similar undertakings to those which had previously been requested, failing which Uzor would proceed with a derivative claim, including seeking an emergency injunction.

24. As before, this was rejected by RPC on behalf of Mr Fordham (on 24 January 2024) leading to Uzor issuing its claim on 2 February 2024.

25. Mr Justice Trower made an order granting first stage permission for the derivative claim on 13 February 2024 and the proceedings were served the following day together with an application for the interim injunction.

26. There followed correspondence between the parties dealing with the listing of a hearing for the second stage of the permission application and also the hearing of the injunction application. RPC's position was that the hearing of the injunction application should be at least six weeks after the hearing of the permission application although subsequently suggested that the permission application and the injunction application should be heard together.

27. This was however rejected by the Court which noted that the injunction application would be listed in the normal way but that Uzor could make an application for the listing to be expedited. It issued an application for the hearing to be expedited on 6 March 2024. The following day, RPC indicated that Mr Fordham did not in fact oppose the permission application.

28. On 11 March 2024, Mr Justice Adam Johnson granted the application to expedite the injunction which was listed in a window from 15 April 2024. The second stage of the permission application was granted by Trower J on 14 March 2024.

The injunction application - legal principles

29. The approach to be followed by the Court in determining whether to grant an application for an interim injunction is based on the guidance given by the House of Lords in *American Cyanamid Co v Ethicon Limited* [1975] AC 396 and is well known. These principles are not in dispute.

30. The Court must first consider whether there is a serious issue to be tried in respect of the underlying merits. It should then consider whether damages would be an adequate remedy for either party should they suffer loss as a result of the Court deciding to grant, or not to grant, the injunction. This may well determine whether an injunction should be granted or not but the Court must in any event consider whether it is "just and convenient" to grant an injunction, often referred to as the balance of convenience. The objective is to follow the route which carries the lower risk of injustice or irremediable prejudice.

31. Generally speaking, it is not appropriate for the Court to decide difficult questions of law or contested facts. However, both parties agree that, in cases such as the present, where the injunction is, in reality, final as there is unlikely to be a trial before the date on which the post-termination restrictions come to an end (in this case, 31 October 2024), the Court should give some consideration to the merits (*Lansing Linde Limited v Kerr* [1991] 1 WLR 251 at [258]). There should however only be "some assessment" of the claimant's prospects of success given that "prolonged interlocutory battles on affidavit evidence" are discouraged. It is therefore for the Judge to determine the extent of any assessment on the merits.

32. Having referred to *Lansing*, Nugee LJ put it slightly differently in *Planon v Gilligan* [2022] EWCA Civ 642 at [103] suggesting that the Court might come to a "preliminary view" on the merits, particularly if it has serious doubts about the validity of the covenant. He noted however that this "is only one of the factors that goes into the exercise of the discretion whether to grant an interlocutory injunction or not" (i.e. when considering the balance of convenience).

Restraint of trade - legal principles

33. As Mr Laddie observed, the Court of Appeal in *Koza v Koza Alfin Isletmeleri AS* [2021] 1 WLR 170 noted at [77] that "the Court may need to have a high degree of assurance that the threatened conduct is an actionable invasion of the claimant's rights" and that the merits "may be a very important part" of the balancing exercise when it comes to considering the balance of convenience.

34. In looking at the underlying merits, it will therefore be necessary to try and form at least a preliminary view as to whether the post-termination restrictions are enforceable and, if so, whether Mr Fordham has breached them or is likely to breach them.

35. In the context of an employment relationship, it is well established (and the parties agree) that a post-termination restriction is enforceable if it is reasonably necessary to protect some legitimate business interest.

36. Reasonableness is to be tested objectively at the time the contract is made but a restriction will not be invalid as a result of hypothetical matters which could fall within the clause's meaning if such matters would be improbable or fall outside the parties' contemplation (*Coppage v Safetynet Security Limited* [2013] EWCA Civ 1176 at [9]).

37. In addition, if there are two realistic interpretations of a restriction, the Court should uphold the one which makes it valid (sometimes referred to as the validity principle - *Egon Zehnder Limited v Tillman* [2019] UKSC 32 at [42]).

38. The Supreme Court in *Egon Zehnder* also confirmed at [85-88] that an unenforceable provision may be severed if it can be removed without the need to add to or modify the wording of what remains, that what remains continues to be supported by adequate consideration and that the removal of the unenforceable provision does not significantly change the overall effect of the post-termination restrictions.

39. As the House of Lords made clear in *Herbert Morris v Saxelby* [1916] 1 AC 688 at [706-707], the starting point is that the covenant in restraint of trade is contrary to

public policy and therefore void. It is up to the person seeking to rely on the restriction to show the circumstances which justify it.

40. Given that a post-termination restriction will only be enforceable if it goes no further than is reasonably necessary to protect the employer's legitimate business interests, it is necessary to identify "with some care" the interests which the employer seeks to protect (*Office Angels Limited v Rainer-Thomas* [1991] IRLR 214 at [26]). The parties agree that the categories of interest which are generally thought to qualify for protection are confidential information, trade connections (relationships with customers/suppliers etc) and the stability of the employer's workforce.

41. I should mention one further point. Mr Elias submitted on behalf of Uzor that it is relevant that the employment contracts were entered into against the backdrop of the acquisition of shares by JD Sports, for which Mr Fordham (and Mr Ozkarakasli) were paid a significant sum of money, referring to the observations of the Supreme Court in *Egon Zehnder* at [82] in support of this.

42. However, despite noting that high ranking employees may be negotiating on an equal footing (and so might be expected to be able to look after themselves), these comments were made in the context of whether it is possible to sever post-termination restrictions which would otherwise be unenforceable, the conclusion being that "the Courts must continue to adopt a cautious approach to the severance of post-employment restraints". No distinction was made in that conclusion based on equality of bargaining power.

43. I accept Mr Laddie's submission that equality of arms in the negotiation of the relevant provisions is irrelevant to the question as to whether the restrictions are reasonably necessary to protect the legitimate business interests of the employer. As Mr Laddie notes, this was the conclusion reached by Mr Justice Andrew Smith in *Ashcourt Rowan Financial Planning Limited v Hall* [2013] IRLR 637 at [37].

44. This is in my view also consistent with the rejection by the Courts of the relevance of clauses by which the parties agree that the restrictions are reasonable (see for example *Boydell v NZP Limited* [2023] EWCA Civ 37 at [7] and *Ashcourt* at [38]). As Mr Justice Andrew Smith explains in *Ashcourt* at [38], given that the principles relating to restraint of trade are principles of public policy, it is for the Court to determine

whether a particular restriction is justified. The parties cannot override this by agreement.

45. In terms of the approach to be followed by the Court, both parties agree that the guidance given by Mrs Justice Cox in *TFS Derivatives Limited v Morgan* [2005] IRLR 246 at [36-39] should be followed.

46. The first step is to determine what the restriction means when properly construed. The second step is to consider whether the former employer has shown on the evidence that it has legitimate interests which require protection. If so, the Court will need to be satisfied that the restriction is no wider than is reasonably necessary for the protection of those interests. If so, the Court will then exercise its discretion to decide whether to grant the injunction.

47. Whilst I accept that this is a sensible approach, it should be noted that the application in *TFS* did not relate to an interim injunction but was a case where injunctive relief was being considered in the context of a full trial. As I have already explained and, as the parties agree, it is not for the Court to come to a final conclusion as to whether the restrictions are enforceable but merely to have such regard to the merits as is necessary first to determine whether there is a serious issue to be tried and secondly, to the extent the Court considers appropriate, as a factor in determining where the balance of convenience lies when exercising its discretion whether or not to grant an interim injunction.

48. With that background in mind, it is appropriate to consider first the meaning of the relevant restrictions.

Post-termination restrictions

49. The post-termination restrictions are contained in clause 13 of Mr Fordham's service agreement (set out in full in the Appendix to this judgment). Clause 13.1 contains definitions. The main restrictions are in clause 13.2. Clause 13.3 limits these restrictions by providing that the restrictions do not prohibit Mr Fordham from undertaking any activity which is not in direct or indirect competition with any business being carried on by MFL on the date his employment comes to an end (31 October 2023). This significantly cuts down the scope of some of the restrictions.

50. Mr Laddie criticises the use of the word "indirect" in clause 13.3. He submits that it is not clear what would amount to indirect competition. He does however accept that the words "or indirect" could be severed, if necessary, applying principles set out by the Supreme Court in *Egon Zehnder*. Without reaching any definitive view, it seems likely to me that Mr Laddie's criticism is well founded. However, given the ability to sever the offending words, this would not impact on the enforceability of the restrictions.

51. All of the restrictions in clause 13.2 apply for 12 months from the date of termination of employment (so, in this case, until 31 October 2024).

52. Clause 13.2(a) provides that Mr Fordham must not "carry on, or be engaged, concerned or interested in any business within the Restricted Territory which competes with the Restricted Business".

53. The Restricted Territory is defined as countries in which MFL carries on business at the date of termination of employment or has carried on business in the previous 12 months or which Mr Fordham knows MFL intends to carry on business in the following six months. The definition however only includes countries where Mr Fordham has been involved or concerned.

54. Restricted Business is similarly defined as not only the business which MFL was carrying on at the date of termination of employment but also any business carried on in the prior 12 months or which Mr Fordham knows the company intends to carry on in the following six months. The definition is however limited so that it only includes any business with which Mr Fordham is materially concerned or had management responsibility or in respect of which he had confidential information at any time within the 12 months leading up to the termination of his employment.

55. In the case of both these definitions, the effect of clause 13.3, mentioned above, is that, although they refer to matters occurring within the 12 months prior to termination of employment, the restrictions nevertheless only apply to business or territories current at the date the employment came to an end.

56. The interpretation of clause 13.2(a) is relatively straightforward and is not disputed. The only minor issue is that Mr Laddie objects to the words "concerned or interested

in" as he points out that this prevents Mr Fordham from acquiring any shareholding, however small, in a private company (there is an exception in clause 13.4 for small shareholdings in listed companies). This is a point about reasonableness rather than interpretation. However, Mr Laddie accepts that the words "concerned or interested in" could be severed and so this would not, in any event affect the enforceability of this restriction.

57. Clause 13.2(b) is a relatively standard clause relating to the non-solicitation of customers. Customers includes in this context not only purchasers of MFL's products but also the sales agents it engages. It is limited to customers with whom Mr Fordham has had direct dealings or personal contact within the prior 12 months and is limited to goods and services which are similar to, or competitive with, MFL's products and with which Mr Fordham has been directly concerned or of which he has personal knowledge during the prior 12 months.

58. Clause 13.2(c) builds on the restriction against solicitation of customers by preventing Mr Fordham from dealing with any such customers in relation to any such goods or services. Mr Laddie notes that the only justification for such a restriction is the difficulty of policing the non-solicitation restriction but does not raise any issues in relation to its interpretation.

59. Clause 13.2(d) prevents Mr Fordham from soliciting key employees of MFL. This covers employees who are part of the senior management of MFL or who have confidential information or relationships with customers/suppliers which are likely to be of assistance to a competitor. In either case, it only applies to employees with whom Mr Fordham has worked during the prior 12 months. Again, no issue arises in relation to the interpretation of this clause.

60. The final relevant restriction is in clause 13.2(e). This builds on the prohibition on the solicitation of employees by preventing Mr Fordham from employing a "Key Person". Mr Laddie notes that Key Person is designed as someone "who **is** an employee" of MFL and, on this basis, submits that it cannot therefore include anybody who has ceased to be an employee of MFL by the time they become employed by Mr Fordham.

61. This, of course, would severely limit the scope at clause 13.2(e), if not render it completely meaningless. Mr Elias therefore suggests that, on a proper interpretation of the contract, it must be taken to include anybody who has worked for MFL during the previous 12 months. My preliminary view is that Mr Elias is probably right given that there would be very little point in having the clause if it did not prevent Mr Fordham from employing somebody who had been an employee of MFL but who is no longer an employee of MFL at the time the employment with Mr Fordham took effect.

62. However, this debate is somewhat academic as Mr Laddie submits that a restriction on employing somebody who worked for the previous employer is simply not enforceable.

63. In support of this, he refers to the decision of Mr Justice Tugendhat in *White Digital Media Limited v Weaver* [2013] EWHC 1681 (QB) (unreported) who, based on comments by Robert Walker J (as he then was) in *Dawnay, Day & Co. Limited v D'Alphen* [1998] ICR 1068 at [1096G], accepted the submission of the defendant's counsel that such a restriction could not be justified as it would prevent the departing employee from earning a living in the way that they chose even if, for example, they had been wrongfully and unfairly dismissed by the previous employer and had no restrictions in their service agreements which would prevent them from working for a competitor.

64. As a matter of principle, this seems to me to be the correct approach. I would accept therefore that, in this case, there is no basis on which the restriction in clause 13.2(e) could be justified.

The legitimate business interests

65. The next step following the approach in *TFS* is for the party applying for the injunction to show, on the evidence, that they have legitimate business interests requiring protection.

66. In relation to the non-solicitation restrictions relating to customers, agents and employees and the restriction on dealing with customers and sales agents, Mr Laddie accepts, on behalf of Mr Fordham, that there are legitimate business interests (trade

connections and stability of the workforce) which do require protection although, as we will see, he does not accept that the particular restrictions in this case are reasonably necessary to protect those interests.

67. Mr Laddie does not however accept that Uzor has provided any evidence that MFL has legitimate business interests which require the protection of a non-compete covenant. In making this submission, Mr Laddie refers to the comments of Mr Justice Andrew Smith in *Ashcourt Rowan* at [47-50].

68. The Judge in that case acknowledges that a non-compete clause may be justified where other covenants (such as a restriction on the disclosure of confidential information) may be difficult to police in the sense that it may, in practice, be difficult to show that the relevant obligation has been breached.

69. Nonetheless, he notes at [50] that this does not mean that a non-compete clause can always be justified and (referring to the comments of Gloster J in *Brake Bros v Ungless* [2004] EWHC 2799 (QB)) warns that the Courts should scrutinise "with particular care" arguments that seek to justify a non-compete clause on this basis, enquiring whether a lesser form of restriction (for example a non-solicitation clause) might not have given the employer sufficient protection and have been a more proportionate form of embargo.

70. This, he says, "requires an assessment, as at the contract date, of the balance between the restraints that the covenant might impose on the employee even though he is not trespassing upon the legitimate business interests of the previous employer, and the need for such additional restraints in order to police the covenant or to give it practical effect."

71. Mr Laddie observes that the particulars of claim do not specify which legitimate business interests are said to justify the non-compete covenant. He does however accept that it can be inferred from Mr Elias' skeleton argument that it is both the confidential information which it is said Mr Fordham will have obtained during his employment and his trade connections which justify the restriction.

72. As a preliminary point, Mr Laddie noted that much of the concern which emerged from Mr Ozkarakasli's evidence appeared to relate to the question as to whether MFL

could continue as a viable business without the involvement of Mr Fordham given that he was, in effect, the face of the brand (as well as it being named after him).

73. Mr Laddie submits that any damage caused simply as a result of Mr Fordham leaving is irrelevant and cannot justify any post-termination restriction. I have no doubt that this is right (and Mr Elias did not suggest to the contrary). There still however remains the question as to whether MFL has legitimate business interests which require protection.

74. As far as confidential information is concerned, Mr Laddie notes that Mr Ozkarakasli identifies various categories of confidential information which it is said Mr Fordham has had access to including, for example, sales data, cash forecasts, expansion plans, design information, customer budgets (i.e. how much a retailer may be willing to spend in a particular period) etc., but submits that there is no evidence that this information would be helpful to a competitor or could be used to harm MFL.

75. He also stresses that Mr Fordham, in his evidence, has dealt with each category of confidential information and explained why, in his view, it could not be used to advantage by a competitor.

76. Looking at Mr Fordham's evidence, in his preface to his comments, he explains that much of the information would be out of date by now, particularly taking into account that he says he stepped back from active involvement in the business at the end of April 2023.

77. The problem with this argument is that the investigation at this stage is whether the post-termination restrictions were, in principle, reasonably required in order to protect MFL's legitimate business interests at the date the service agreement was entered into in February 2019. Therefore, the question as to what confidential information Mr Fordham actually had when his employment came to an end and how out of date that information might be, is, to a large extent, irrelevant (as Mr Laddie accepted). It may be relevant when considering the balance of convenience, but that is a separate exercise.

78. As Mr Elias submits, as a founder, director and senior executive who was, by his own admission, involved in all aspects of the business, there can be little doubt that Mr

Fordham would be expected to have access to confidential information in relation to MFL's business.

79. I accept that there is no direct evidence of the damage that might be caused but it seems to me that it can easily be inferred that a senior executive who is, in effect, running the company, and therefore privy to all confidential information held by a company, will almost inevitably have information which could be used to the benefit of a competitor and to the detriment of the former employer.

80. As Mr Elias noted, the Supreme Court in *Egon Zehnder* seemed to share the same view observing at [82] that "high-ranking employees can do particular damage to the legitimate interests of their employers following termination of their employment".

81. Mr Laddie did also accept in his submissions that confidential design information could benefit a competitor. My preliminary view therefore is that, at trial, Uzor may well be able to establish that MFL had legitimate business interests relating to confidential information which required protection.

82. The fact that there was likely to be confidential information which, in 2019, it would be reasonable to protect does not, however, on its own, justify a non-competition covenant particularly as there is a specific clause in the service agreement intended to protect confidential information.

83. Mr Laddie notes that the justification often given for needing the protection of a non-compete covenant is the difficulty in policing more specific provisions such as the prohibition on the use of confidential information.

84. In this case, Mr Laddie suggests that the only confidential information which could be used to the detriment of MFL is the design information. In respect of this, he suggests that the difficulties of policing do not exist (i.e. the ability to detect if confidential information is being used) as it will be obvious, if a competitor with which Mr Fordham is involved produces a trainer with a similar design to one in the pipeline at MFL, that the confidential information has been used.

85. However, whilst Mr Laddie is clearly right that such a situation might well show that MFL's confidential information had been misused, it does not follow that it would be

straightforward to police Mr Fordham's confidentiality obligations as it is, for example, perfectly possible that the competitor could come up with another explanation as to how it obtained the design information. It is precisely this sort of difficulty of proving that the information came from the ex-employee that the non-compete covenant is designed to avoid.

86. Mr Elias suggested that there may be other categories of confidential information which could be used by Mr Fordham for the benefit of a competitor and therefore to the detriment of MFL. One example he gave was knowledge of the price at which products could be acquired from MFL's suppliers. However, in the absence of any evidence as to how this would be to the detriment of MFL, it is difficult to speculate whether any lesser restriction than a full non-compete covenant might give MFL adequate protection.

87. Nonetheless, based on the example of designs, it appears to me that the claimant would have a good chance of persuading a Court at trial that the non-compete covenant was reasonably necessary to protect its confidential information.

88. There is also the question as to whether a non-compete covenant is required in order to protect MFL's trade connections. This includes both retailers who purchase stock from MFL and also sales agents engaged by MFL to generate sales to such retailers.

89. Mr Laddie submitted that Mr Fordham's relationships with a sales agent should not be a significant issue given that the sales agents in question do not have an exclusive relationship with MFL and, indeed, also work for close competitors.

90. As far as wholesale customers (i.e. retailers) are concerned, Mr Laddie again suggests that the fact that Mr Fordham may have a relationship with a particular buyer should not be a particular cause for concern given that a retailer will buy stock from a number of different manufacturers. He contrasted the position with a client of a financial adviser or solicitor. Such a person only needs one adviser and so there is more justification for placing restrictions on such an employee's ability to work for a competitor; if the client moved with the adviser to another firm, it would of course no longer need the services of the first employer.

91. Having said all of this, Mr Laddie did however concede that, if Mr Fordham were able to use his trade connections, this could cause some harm to MFL. This must be right. It can clearly be envisaged that, if Mr Fordham has a good relationship with a sales agent or the buyer for a major retailer, he may well be able to persuade them to focus more on the business he is now working for rather than MFL.

92. Mr Laddie however submits that this is still not a reason why a non-compete covenant is justified given the existence of a restriction prohibiting Mr Fordham from soliciting business from customers/sales agents and, perhaps more importantly, a restriction preventing him from having any dealings with such people.

93. Mr Elias notes however that there may still be difficulties policing a no dealing restriction with a sales agent where the retailer which is the end customer is not a retailer used by MFL. Whilst it will, he accepts, be apparent that the new employer had made some sales to the retailer, it will not necessarily be clear that a sales agent used by MFL and with whom Mr Fordham had a relationship has been involved.

94. Again, this seems to me to be right and is another reason why the claimant may well be able to persuade a Court at trial that, as a matter of principle, a non-compete covenant is justified and that some lesser restriction will not adequately protect MFL's legitimate business interests.

Reasonableness of the restrictions

95. That is not however the end of the story. Mr Laddie submits that, even if a non-competition covenant can in principle be justified, the particular restriction is in this case too wide. He gives three reasons for this, of which the key reason is the 12 month duration. I will however deal briefly with the other two points which he raises as, in my view, they have little merit.

96. The first is that, on the face of it, the non-compete covenant prevents Mr Fordham from being involved in any competing business in any capacity. Mr Laddie suggested that this would, for example, prevent Mr Fordham from working as a sales assistant in a shop selling shoes made by a competitor or as a delivery driver for a competitor.

97. However, as Mr Elias submitted, in relation to the interpretation of post-termination restrictions, a clause remains valid if it "is valid in all ordinary circumstances which can have been contemplated by the parties" even if it might also "cover circumstances which are so 'extravagant', 'fantastic' or, 'unlikely or improbable' that they must have been entirely outside the contemplation of the parties." (*Boydell v NZP Limited* [2023] EWCA Civ 37 at [23] quoting Salmon LJ in *Home Counties Dairies Limited v Skilton* [1970] 1 WLR 526).

98. Given Mr Fordham's position within MFL, I accept that the likelihood of Mr Fordham being involved in a competing business in a role such as those suggested by Mr Laddie (or indeed in any role where the confidential information and so called trade connections which he might possess would not be of some assistance to a competitor) is sufficiently unlikely or improbable that it would not have been within the contemplation of MFL and Mr Fordham at the time the employment contract was entered into and does not therefore call into question the validity of the non-competition covenant.

99. The second matter referred to by Mr Laddie is one which I have already mentioned and this relates to the fact that the prohibition from being "concerned or interested in" a competing business would also prevent Mr Fordham from having a shareholding in a competing business, even a shareholding that was so small that it would not give him any influence over the business. Whilst I accept that this is the case, as I have already said, a Court would no doubt be able and willing to sever the offending words so that the non-competition covenant would remain valid.

100. The more substantial objection to the non-competition covenant (and indeed the other post-termination restrictions) is that there was no justification for a restriction which lasts for 12 months.

101. The submissions in relation to this focussed primarily on Mr Fordham's knowledge of MFL's designs as there is some evidence in relation to this. It appears to be common ground that Mr Fordham had information about the designs for the latest range (Autumn/Winter 2024, also referred to as "AW24") in June 2023. These designs were shown at Paris Fashion Week (an event designed to generate interest with retailers which might stock the new range and at which representatives of the fashion media

would also be present) in January 2024. The evidence is that the new range will be in the shops in May 2024.

102. There is a difference of opinion between the parties as to the extent to which the designs become public knowledge as a result of Paris Fashion Week. Mr Laddie submits that, after this, the designs were no longer confidential. He points out that this took place approximately seven months after information about the designs was first available in June 2023 and that, as a result of this, a restriction for 12 months cannot be justified.

103. Mr Laddie also notes that, in his evidence Mr Ozkarakasli suggests the time for getting a product from concept to the shop floor might be in the region of six – nine months, which would again support an argument that a restriction for 12 months is too long.

104. Mr Elias on the other hand relies on the fact that it will have taken almost a year for the AW24 range to get from the design concept to the shop floor which, he says, justifies a restriction of 12 months.

105. Mr Elias also seeks to justify the 12 month restriction by reference to Mr Fordham's knowledge of trade connections. He notes that Mr Fordham's own evidence is that a buyer at Saks in New York (Ms Hernandez) and a sales agent in the Netherlands (Ingmar van der Kooij) are personal friends (a justification for having met with them after the termination of his employment with MFL). He submits that it is therefore clear that there was a close relationship and a strong rapport between Mr Fordham and at least some of MFL's trade connections and that, in the light of this, a 12 month period is not unreasonable to allow somebody else to build a similar relationship with the relevant individuals working for MFL's sales agents and wholesale customers.

106. I cannot (and in any event, should not) reach any definitive conclusion as to the extent to which the designs for the trainers become public knowledge as a result of an event such as Paris Fashion Week. Clearly the event is designed to generate interest in the range but, equally, it seems that the event is primarily aimed at buyers and not competitors, with the windows of the relevant exhibition spaces being mostly blacked out and only those who have been invited allowed in. The evidence does therefore suggest that there is a certain level of confidentiality that is maintained.

107. On the basis that the AW24 range will only become fully public when it starts being stocked in shops in May 2024, 11 months after the initial designs, a 12 month restriction does not seem unreasonable. In reaching this conclusion, I am inferring that, despite Mr Ozkarakasli's comments about the possibility of a competitor getting a design from concept to stores in six – nine months, the 11 month period for MFL's AW24 collection is more typical of the lead time for MFL.

108. It does also seem to me quite likely that a Court would be persuaded that a 12 month period is reasonable to protect MFL's trade connections. Whilst it might be expected that MFL would introduce a new individual to customers and sales agents who would be responsible for the relevant relationship, for those customers and sales agents where Mr Fordham had, until the termination of his employment, been closely involved in the relationship and developed personal friendships with the relevant buyer/sales agent, it is clearly going to take a significant amount of time for somebody else to develop similarly strong relationships, particularly in circumstances, as here, where Mr Fordham (as the evidence shows) has been synonymous with the brand.

109. My preliminary conclusion therefore is that a 12 month non-competition covenant is, in principle, reasonably necessary to protect MFL's legitimate business interests. There is of course a separate question as to whether or not the grant of an interim injunction is appropriate.

110. Turning to the other restrictions, as far as those which relate to trade connections are concerned, Mr Fordham's only objection is to the 12 month duration. For the reasons which I have already explained, my preliminary view is that a 12 month restriction is reasonable in the circumstances.

111. Mr Laddie does however draw attention to the fact that MFL appears to have done very little since Mr Fordham resigned from MFL to cement its relationships with its sales agents and customers. He notes for example that, on 26 February 2024, almost four months after Mr Fordham resigned, Mr Ozkarakasli wrote to its customers and sales agents reassuring them about MFL's position following Mr Fordham's departure as well as asking them not to facilitate any breach by Mr Fordham of his post-

termination restrictions. There was no evidence of what, if any, steps MFL may have taken before or after this.

112. It is also true that, in the section of Mr Ozkarakasli's evidence dealing with the duration of the restrictions, there is a heavy focus on the need to persuade retailers and other contacts that the business remains viable without the involvement of Mr Fordham. This cannot of course justify a post-termination restriction as it has nothing to do with what other activities Mr Fordham may undertake but instead focuses only on the fact that Mr Fordham is no longer involved with MFL. The evidence does however also touch on the need for MFL to develop strong relationships with their customers so that they no longer rely on Mr Fordham.

113. Although it may well be true that MFL has done little since Mr Fordham resigned to cement its relationships with its customers, this is not relevant to the question as to whether it was reasonable in 2019 to include a 12 month restriction in Mr Fordham's employment contract so that MFL would have an opportunity to build new relationships. It will however be relevant to take this into account in deciding whether to grant an injunction.

114. As far as the restriction on the poaching of employees is concerned, Mr Laddie accepts that a period of time is needed to ensure the stability of MFL's workforce. However, he suggests that a period of 12 months is too long in the context of a small company (approximately 20 employees) with two founders given that it can be expected that both of them would have good relations with those employees.

115. It is however clear from the evidence that, whilst Mr Fordham was based in the UK and closely involved in the business, Mr Ozkarakasli was living in Turkey from the time the company was founded in 2015 until 2022 when he moved to Dubai. Indeed, Mr Fordham complains in his evidence about Mr Ozkarakasli's absence and his failure to engage.

116. In these circumstances (which I infer the parties would have been aware of in 2019), it must be expected that Mr Fordham would have the opportunity to build up a much stronger relationship with MFL's key employees (an inference supported by Mr Gough's departure from the company shortly after Mr Fordham and his subsequent appointment by Mr Fordham as a director of MFL in January 2024). Based on this, it

does not strike me as unreasonable to allow a 12 month period for staff to be reassured and for Mr Ozkarakasli to attempt to develop a similarly strong relationship with his employees.

Is Mr Fordham in competition with MFL?

117. In considering the merits, it is also necessary to look at whether Mr Fordham's activities are in fact in competition with MFL. As I have mentioned, these fall into two categories, the first being his involvement with the clothing brand, Condition and the second being his new business, CTRNE.

118. In assessing whether there is competition, both parties refer to the decision of Mr Justice Freedman in *Argus Media Limited v Halim* [2019] IRLR 442. That case was very different, involving the business of operating a price reporting agency in relation to a fertiliser business in Africa. It was also a case of a speedy trial seeking injunctions rather than an application for interim injunctions. However, the comments made at [88-91] in relation to assessing whether two businesses are in competition are helpful.

119. Leaving aside the geographic area (which is not an issue in this case), Mr Justice Freedman considered at [89] that the key question to ask is: "Were the two companies supplying goods or services which are sufficiently comparable to mean that they were in competition?"

120. He also noted at [91] that, whilst interchangeability of products is likely to mean that there is competition, interchangeability of products is not a pre-requisite of finding that two businesses are competitive. It is enough that the products are similar or sufficiently comparable with every case being fact specific and a broad-brush approach being appropriate.

Condition

121. With that background in mind, I look first at the position in relation to Condition. As I have mentioned, Condition supplies a range of clothing which is described by Mr Fordham as "functional and lightweight athletic clothing". Mr Ozkarakasli does not

agree with this description but even he suggests that the clothing sold by Condition is most similar to the range of clothing sold by MFL until June 2023.

122. This would not of course constitute competition for the purposes of the post-termination restrictions as those restrictions only bite to the extent that the new activity is in competition with business being carried on by MFL as at the date Mr Fordham resigned in October 2023.

123. Indeed, there is precious little evidence as to what clothing MFL did in fact sell at the end of October 2023. It is apparent that a new range of clothing was brought in when the original range was discontinued in June 2023 but it is said that this did not sell well and was also discontinued. Mr Fordham's evidence is that, at the date he resigned, the only clothing being sold by MFL was branded baseball caps and socks.

124. Although it is a matter of impression rather than expertise, a visual comparison of the clothing ranges offered by Condition and MFL tends to support Mr Fordham's evidence that they are different types of clothing.

125. In any event, based on the evidence at this stage, it seems more likely that MFL was selling very little in the way of clothing at the date Mr Fordham resigned and that the businesses were therefore in no real sense competitive. Whilst I would not go so far as to say that there was no serious issue to be tried, given the limited evidence I have, I have certainly formed a preliminary view that any claim by Uzor in relation to Mr Fordham's activities in connection with Condition is weak.

CTRNE

126. The position in relation to CTRNE is however rather different given that its only business is supplying a premium or luxury brand of trainers which is of course exactly what constitutes the main part of MFL's business.

127. Nonetheless, Mr Fordham's position is that MFL and CTRNE do not compete as their designs and ethos are different and that they are targeting different markets both in terms of price and customer demographic.

128. Mr Fordham describes MFL as an "urban streetwear" brand aimed at what a market research report commissioned by MFL referred to as the "luxury aspirer". On the

other hand, he says that CTRNE has an ethos and philosophy connected with spirituality which would attract customers who prioritise their physical and mental health with an interest in wellbeing and mindfulness. This, he suggests, is the opposite of urban fashion. In support of this, he refers to a report prepared by a friend of his, Polly King which emphasises the link with wellness and spirituality.

129. Interestingly, Mr Laddie drew attention to the fact that the report contains a chart showing the businesses which are said to be competitors of CTRNE which does not mention MFL as, Mr Fordham explains, it is not seen to be a competitor. However, as Mr Elias points out, one of the closest competitors shown on the chart is a business called Axel Arigato which, in the context of a discussion about sales agents is said by Mr Fordham to be a close competitor of MFL. Based on this, it is hard to escape the conclusion that MFL is not mentioned on the chart because Mr Fordham knows that he is not allowed to compete with MFL.

130. I must however look as best I can, based on the limited evidence available, whether the two businesses do in fact compete. In this context, Mr Fordham has produced witness statements from three witnesses who are involved in the footwear business and who were described at the hearing as trade witnesses. There was some discussion as to whether their evidence is impermissible opinion evidence which, if it is to be given, should only be given by an expert.

131. In relation to this, both parties referred to *Fenty v Arcadia Group Brands Limited* [2013] EWHC 1945 Ch (which concerned a rather different question, being an action for passing off in relation to T-shirts with images of Rihanna). There was however some discussion at [34-39] about the overlap between trade witnesses and expert witnesses.

132. For present purposes, it is enough to note that it was accepted at [39] by Mr Justice Birss (as he then was) that a trade witness may give factual evidence about a trade without that being treated as expert evidence and therefore having to comply with all the requirements which apply to expert witnesses. However, a witness who expresses an opinion on the ultimate question before the Court (in this case whether the businesses are in competition) is expressing an expert opinion and would need to comply with the requirements for expert witnesses.

133. In this case, the evidence given by the trade witnesses is a mixture of factual evidence about the footwear trade (and, in particular, trainers) as well as pure opinion evidence as to whether MFL and CTRNE are competing with each other. I do therefore need to approach the evidence of these three witnesses with caution.

134. The claimant's case that MFL and CTRNE are in competition is based on the fact that both produce luxury/premium trainers, that some of the designs produced by MFL (which produces a number of different designs) are similar to the design of the trainer produced by CTRNE (CTRNE only has one design, although a number of colours) and that the price point, although not exactly the same (Mallet trainers selling for between £160-£220 and CTRNE trainers selling for £250) is sufficiently similar in the context of a market where the evidence shows that prices range from £150 to over £1,000.

135. Mr Fordham's position however is, as set out above, that the trainers are aimed at very different target markets, are not in fact all that similar and that there is a significant difference in price. Mr Laddie for example notes that the most similar design produced by MFL retails for £165, almost £100 less than CTRNE's trainers at £250.

136. Interestingly, one of Mr Fordham's trade witnesses, Dean Walker suggests that price is less of an issue and that what is more important is brand positioning. He suggests that the trainers produced by CTRNE fall within the contemporary segment of the market whilst those produced by MFL align more closely with the casual category; although he then goes on to say that the Mallet brand is recognised for its "contemporary designs". His conclusion is that the two brands would appeal to different types of customers and that he would therefore place them in different parts of his store.

137. Another of the trade witnesses also suggests that price may be less of an issue, noting that brands in the £150-£300 range can co-exist but again differentiating the two by reference to brand ethos and target customers. The third trade witness tells a similar story although appears to suggest that price is a more important factor than the other two trade witnesses.

138. In relation to the target market, Mr Elias submits that it is reasonable to infer that the target market is, to a large extent, those who follow or are influenced by Mr Fordham given his social media presence and that the fact that he is, to a large extent, the brand.

There is some limited support for this in the form of a social media post in relation to CTRNE from an individual who says he "currently only wears Mallet's but can't wait to try" the CTRNE trainers.

139. In my view, it is right to take a broad-brush approach. When considering objectively in the light of the surrounding circumstances at the time the service agreement was entered into (i.e. as a matter of construction) what the parties intended when referring to activities which competed with or were in competition with the business of MFL, it seems unlikely that they intended that this should be construed narrowly or in an overly technical sense.

140. Bearing that in mind, my own preliminary view is that, although the trainers produced by MFL and those produced by CTRNE are not interchangeable, they are similar or sufficiently comparable to mean that MFL and CTRNE are in competition. Looking at the pictures of the different products, there are certainly similarities between the design of CTRNE's trainers and some of the designs produced by MFL.

141. I also do not consider the price point to be significantly different. In the context of a market where the prices range from £150 to over £1,000, a price differential of between £30-£90 is not that great. It is much easier to see, for example, that trainers costing £200 are likely to appeal to a completely different segment of the market to trainers costing say £500.

142. As far as the target market is concerned, this is perhaps the most difficult aspect. Although some views are expressed by the trade witnesses, these are only expressions of opinion and come very close to (if not cross the threshold for) expert opinion. The three witnesses all appear to be closely associated with Mr Fordham. In the circumstances, whilst I have taken into account what they have to say, I do not feel like I can place a great deal of weight on these opinions.

143. Ultimately, I consider there is force in Mr Elias' observation that the market for both brands will be heavily influenced by those who follow Mr Fordham's social media presence and that, if Mr Fordham is actively promoting the CTRNE brand rather than Mallet, this is likely to have an impact on sales. I accept that there is no evidence of the impact of this and that it is simply a matter of impression but there is in my view insufficient evidence to take any other approach at this stage.

144. Based primarily on the similarities in the design and price, my preliminary view would be that CTRNE and MFL do compete within the meaning of the post-termination restrictions.

145. One additional point I should mention in relation to competition is that it was submitted by Mr Laddie that it would be implausible for Mr Fordham to set up a business in competition with MFL given that he continues to own 50% of MFL.

146. Whilst, on a rational basis, this may be true (although he might of course consider that he has more to gain from CTRNE than he has to lose if the new brand damages MFL), this cannot, in my view, change the objective conclusion. Either the businesses do compete or they do not. In addition, as Mr Elias notes, Mr Fordham has given an interview in which he said that he no longer cares about MFL and so it is impossible to say what his motivation may be.

147. Mr Laddie also suggests that it should be inferred that CTRNE is not competing with MFL if MFL cannot point to any loss which it has suffered or any tangible impact on its business. However, given that CTRNE is still in the very early stages of its development and the evidence shows that it has only sold 560 pairs of trainers in its first three months of operation, it seems to me to be fanciful to suggest that any impact on MFL's business could be detected at this stage. The fact that it has not yet had any impact certainly does not indicate that CTRNE is not a competitor.

Actual or potential breach of restrictions

148. As far as actual breach of the post-termination restrictions is concerned, there is no doubt that, if CTRNE is a competitor, Mr Fordham is in breach of the non-competition covenant given his involvement with CTRNE.

149. There is no direct evidence that he is in breach of the non-poaching restriction although, as already noted, Mr Gough left MFL shortly after Mr Fordham and there is some evidence that he may now be working for CTRNE. This has neither been confirmed nor denied by Mr Fordham.

150. In addition, there is clear evidence that Mr Fordham, whilst he was still employed by MFL in the summer of 2023 had discussions with a senior employee of MFL with a

view to that individual going to work for Condition. There is therefore some reason to think that Mr Fordham either has breached, or may breach, the non-poaching restriction.

151. As far as customers (which includes sales agents) are concerned, there is evidence that Mr Fordham has had meetings with a buyer from Saks and MFL's sales agent in the Netherlands. Mr Fordham says that these were just meetings with friends although he accepts that CTRNE was discussed at those meetings. In addition, there is hearsay evidence from Mr Ozkarakasli that Selfridges were close to entering into an arrangement with CTRNE when it became aware of the potential for Mr Fordham to be in breach of his post-termination restrictions and so pulled out of the deal.

152. I am not making findings one way or another in relation to any of these matters (and indeed I would not be expected to do so at this interlocutory stage). However there seems little doubt that there is a real risk either that breaches have taken place or that there may be breaches in the future.

153. In summary, my preliminary assessment of the issues relating to restraint of trade is that:

153.1 the post-termination restrictions at clauses 13.2(a)-(d) are enforceable;

153.2 CTRNE is a competitor to MFL but Condition is not;

153.3 there has been, or there is a risk that there will be, breaches of the restrictions.

The injunctions

154. I return now to the *American Cyanamid* analysis. It will be apparent from what I have already said that there is, in my view, a serious issue to be tried. I therefore need to consider whether damages would be an adequate remedy for either party and, in the light of that to consider, taking into account all other relevant circumstances, where the balance of convenience lies in terms of granting or refusing to grant any of the injunctions.

Damages as an adequate remedy

155. Ultimately both parties effectively conceded that the damage to either party could not easily be quantified should an injunction be granted or refused.

156. I should be clear that, as far as Mr Fordham is concerned, this is based not only on any damage which might be suffered by Mr Fordham himself but also takes into account the impact on CTRNE and the consequential impact on its other shareholders and employees/contractors.

157. Mr Elias suggests however that any damage to CTRNE would be relatively small given that it is in its infancy and has so far only sold 560 pairs of trainers. On the other hand, he suggests that the damage to MFL's business could be significant given that it is a much larger company which has a turnover in the region of £17.5m a year.

158. It does however seem to me that these two statements are inconsistent. If CTRNE is so small that it will not suffer any significant damage if an injunction is granted, it must surely follow that any potential harm to MFL if no injunction is granted would be relatively small as CTRNE is not capable of having a significant impact on its much larger competitor.

159. Mr Elias does note that there is some evidence that CTRNE, which currently only sells online, intends to start selling to retailers. I accept that the evidence shows that there is clear intention to do so. Mr Fordham has however said on several occasions in his evidence that CTRNE has no intention to sell trainers through retail outlets during 2024.

160. Towards the end of the hearing, Mr Laddie confirmed in Open Court that Mr Fordham would be prepared to give an undertaking that CTRNE would not sell any trainers through retail outlets until at least 31st October 2024. After the hearing, on 22 April 2024, Mr Fordham in fact filed an undertaking with the Court "not to sell or take preparatory steps in the sale of CTRNE footwear to the retailers [currently selling MFL's trainers], until after 31 October 2024".

161. This would no doubt limit any impact on MFL although Mr Elias notes that CTRNE may still have something of a head start compared to the position it might be in if the full non-competition covenant is enforced by way of injunction.

162. Perhaps unsurprisingly, Mr Laddie suggests that any damage to CTRNE if an injunction enforcing the non-competition covenant is granted would be much more significant than any damage which might be suffered by MFL if no injunction is granted.

163. In support of this, he has provided some calculations which show that if CTRNE managed to increase its sales to 5,000 pairs of trainers by 31 October 2024 (compared to 560 pairs in its first three months of trading) and if 10% of these (i.e. 500 pairs) might be said to have reduced the sales of MFL, the damage to MFL would be in region of £37,500.

164. There is some force in Mr Elias' objection that this is too simplistic and, for example, takes no account of the fact that, if no injunction is granted, CTRNE's growth is accelerated by six months which could in turn have a much more significant longer-term impact on the business of MFL. However, Uzor has provided no evidence as to what any losses might be and how they might arise.

165. In the absence of any such evidence, it seems more likely to me, given the relatively slow start which CTRNE has made, that it might be expected that any impact on MFL as a result of CTRNE being allowed to continue to operate with the involvement of Mr Fordham until 31 October 2024 would be relatively limited, even taking account of the head start, particularly in the light of Mr Fordham's undertaking, mentioned above.

166. This is, to some extent, supported by MFL's management accounts which anticipate significantly increased sales in the year to 31/1/2025 compared to the previous year. I do however accept Mr Elias' point that there is no evidence as to what factors may have been taken into account in preparing the management accounts and so it is difficult to draw any reliable inferences from them.

167. As far as CTRNE itself is concerned, Mr Fordham's evidence is that if the injunction enforcing the non-competition covenant is granted, CTRNE will, in effect, go out of

business as he is the person who is funding the company and the effect of the injunction will be that he will no longer be able to do so.

168. On the other hand, as Mr Elias points out, there are four other shareholders and there is no evidence as to what their means are or whether they would be able to finance the company themselves for the next six and a half months either out of their own resources or through borrowings. He suggests that CTRNE may well be able to continue in business in a relatively modest way without Mr Fordham for the next six and a half months so that it can then resume its plans once the restrictions have fallen away and Mr Fordham is able to be involved.

169. In terms of the ability of either party to pay any damages suffered by the other depending on whether the injunction is granted or is not granted, I have no real information about Mr Fordham's means. It is clear that he has received significant dividends from MFL over the last few years and so it seems likely that he has assets.

170. Mr Laddie confirmed that Mr Fordham's position was not that he would be unable to manage financially if injunctions are granted despite some evidence in his witness statements which could be read as implying that his financial resources were limited. It is however impossible to be confident that he could meet any award of damages if no injunctions are granted.

171. As far as Uzor is concerned, the evidence is that it owns the shares in MFL, a flat in London which was purchased for £550,000 (with no mortgage) and shares in some other trading companies. As Mr Laddie points out, it therefore appears to have no liquid assets although the fact that it owns a property within the jurisdiction means that there is some prospect of enforcing an order for damages even though the company itself is based in the British Virgin Islands.

172. However, I have no up-to-date value of the property and, if Mr Fordham's prediction that CTRNE will go out of business if an injunction enforcing the non-competition covenant is granted, it may well be insufficient to meet any losses suffered by Mr Fordham/CTRNE if it turns out that injunctions should not have been granted.

173. The result of all of this is that the adequacy of damages for either party does not resolve the question as to whether any injunction should be granted and so I need now to turn to the other factors relevant to the balance of convenience.

The balance of convenience

174. As I have explained, the authorities show that the decision whether or not to grant an injunction should be based on what is likely to result in the least irremediable harm as there will have been no final determination as to whether the claimant's claim is successful or not. The merits of the claim should be taken into account given that, by the time the post-termination restrictions come to an end, it is unlikely that a trial will have taken place and so the injunctive element of the relief claimed will no longer be relevant.

175. Looking first at the non-competition covenant, I have decided that it would not be appropriate to grant an injunction despite the preliminary views I have reached as to the merits. There are a number of reasons for this.

176. First of all, I accept Mr Laddie's submission that the potential impact on CTRNE (and therefore on Mr Fordham and the other shareholders in MAHL) may well be more significant than any impact on MFL and is likely to be much more difficult to remedy. I have no reason to doubt Mr Fordham's evidence that he is the person who is funding CTRNE nor his evidence that CTRNE has debts of £140,000. I accept that there is no evidence as to whether CTRNE could be funded from another source (for example its other shareholders) but the fact that Mr Fordham is currently funding all of the expenses (including the salaries of the employees) strongly suggests that this would not be straightforward.

177. There is therefore a risk that, if an injunction is granted, that would put an end to CTRNE. If Mr Fordham were successful at trial, it would, as accepted by Mr Elias, be very difficult to determine what his losses might be in this situation nor indeed to be confident that Uzor could pay any damages.

178. On the other hand, there is no suggestion that the effect on MFL would be anything like as serious. So far it cannot point to any loss which it has suffered at all, and, given the early stages of CTRNE's business, it seems more likely than not that any

impact would be relatively limited in the light of the undertaking which Mr Fordham has given.

179. It is of course impossible to say what the impact of having an additional six and a half months head start might be but, coupled with an undertaking not to sell through retailers until the restriction period has come to an end and the injunctions which I do propose to grant (as to which see below), there is in my view less likely to be irremediable harm to MFL than would be the case for Mr Fordham/CTRNE if I were to grant an injunction enforcing the non-compete covenant.

180. I do also take account of the delay on the part of Uzor in seeking the injunctions. Five and a half months out of the 12 month period of restriction has already passed. It is clear that, although part of the delay has resulted from Mr Fordham's own actions in appointing Mr Gough as a director of MFL which made it more difficult for MFL to bring these proceedings and so resulted in Uzor having to bring a representative claim, Uzor and Mr Ozkarakasli could have acted more promptly given that it took three weeks from becoming aware that Mr Fordham intended to launch a new brand of trainer before any contact was made with Mr Fordham about this.

181. Having said that, I accept Mr Elias' submission that this is not a situation where it might be expected that any damage which was going to be done has already been done. It is different to the situation where an employee moves to another established business, as was the case in *Planon* where Elizabeth Laing LJ and Bean LJ took different views as to whether the delay in that case would, of itself, justify a refusal to grant an injunction.

182. In this case, CTRNE is a start-up company which clearly has ambitions to sell to retailers but has not yet done so. There is still scope, for example, for Mr Fordham's trade connections to damage MFL. The failure to act expeditiously is therefore a factor that I have taken into account, but it is a relatively minor consideration.

183. In addition, as I have said, perhaps the main justification for an injunction enforcing an all-embracing non-competition covenant is to provide a method of policing compliance with other obligations such as a restriction on the use of confidential information and the protection of trade connections.

184. However, as I have explained, the evidence of MFL taking any real action to protect its trade connections is relatively thin. Whilst this does not affect the question as to whether the restriction is, in principle, reasonable, it is in my view relevant in considering whether it is appropriate to enforce, by way of injunction, a non-competition covenant. In my view, it is not, in circumstances where MFL appears to have taken few steps to protect its position.

185. In any event, it appears to me that the need for policing is, in this case, reduced. The only concrete example of confidential information which could be misused relates to the designs for the AW24 range of trainers. However, these will be in stores in a couple of weeks and so there will no longer be anything to protect even if the designs remained confidential after Paris Fashion Week. As I have said, it is relevant that Uzor has not provided any specific evidence explaining why any other confidential information needs to be protected for a further six and a half months.

186. As far as customers and sales agents are concerned, it will of course be clear if CTRNE has dealings with an existing MFL retailer and, in any event, Mr Fordham has given an undertaking that CTRNE will not take steps to sell through such retailers until after the end of the restriction period.

187. As observed earlier, I accept that there could be scope for problems with policing where a sales agent is involved. However, in reality, this is only a problem if the sales agent places CTRNE's products with a retailer which is not used by MFL. In those circumstances, it might be expected that this will have less impact on MFL as it will not interfere with its relationship with existing retailers.

188. Overall, I am not persuaded that, at this stage, there is a justification for an injunction to enforce the non-competition covenant on the basis of the need to police other obligations.

189. I do however consider that it would be right to grant an injunction in relation to the non-solicitation and non-dealing restrictions in respect of customers (which, as I have said, includes sales agents). Given Mr Fordham's statements that CTRNE does not intend to sell any goods through retailers in 2024 and his undertaking not to do so through MFL's existing retailers until the end of the restriction period, it is difficult to see how this can cause any significant damage to CTRNE. This significantly changes

the balance of convenience compared to the much more draconian step of granting an injunction in relation to the non-compete covenant.

190. It might be thought, in the light of the undertaking which Mr Fordham has given, such an injunction is unnecessary. However, the undertaking is only that CTRNE will not sell goods through existing retailers (or take preparatory steps to do so) until 31 October 2024. On its own, that would not prevent CTRNE from engaging with MFL's sales agents with a view to selling to other potential retail customers in the meantime. Given the evidence of contact between Mr Fordham and at least one sales agent, there is in my view a risk of preparations for retail activity between now and the end of October 2024 if no injunction is granted.

191. Although, as I have said, any damage to MFL if Mr Fordham were to do this might be expected to be less significant, the evidence is that MFL has, since Mr Fordham left, established relationships with two new retailers, and so granting the injunction sought will give a certain measure of protection to MFL in respect of its connections with sales agents.

192. I appreciate that it could be said that this injunction on its own still leaves some problems in relation to policing any contact with sales agents. However, for the reasons I have already given, I do not consider these problems to justify an injunction enforcing the non-competition covenant.

193. In addition, as outlined above, there is little evidence as to what steps MFL has taken to protect its trade connections since Mr Fordham resigned from MFL. Whilst I do not think this tips the balance in favour of refusing an injunction in respect of trade connections it is, as I have said, a factor in refusing to grant the protection of an injunction relating to the non-competition restriction.

194. I also consider it appropriate to grant an injunction in relation to the poaching of MFL's employees. MFL is a relatively small company (approximately 20 employees) and the evidence is that a number of staff have left over recent months. The possibility of staff being enticed away by Mr Fordham therefore poses a risk. On the other hand, the inability for Mr Fordham/CTRNE to poach staff from MFL is not said to give rise to the risk of any particular damage for either of them.

195. In reaching my conclusion, I have not found it necessary to resort to maintaining the status quo. There is in any event some dispute as to whether the status quo is the current position (where CTRNE is up and running and Mr Fordham is working for it) or whether the status quo is a situation where CTRNE is in theory able to continue but without the involvement of Mr Fordham.

196. If pressed, I would say that the status quo in this case is the present position, particularly bearing in mind that there have been some delays on the claimant's part in seeking relief (see the comments of Bean LJ in *Planon*) although I acknowledge that the approach taken by the Court of Appeal in *Forse* v *Secarma Limited* [2019] EWCA Civ 215 at [55] might suggest to the contrary. However, as Mr Laddie noted, those conclusions were reached in the context of a springboard injunction where the considerations may well be different. Given that it is not necessary for me to do so, I prefer to express no concluded view on this point.

197. I would invite the parties to seek to agree the form of the order giving effect of this Judgment. As far as the draft order I have been provided with is concerned, it appears to me that paragraphs 1(c) and (d) remain appropriate. In paragraph 1(e) the words "employ or engage for the provision of work or services" will need to be removed but otherwise it may well be that this paragraph can remain as it stands. Given the potential impact on CTRNE (and not just on Mr Fordham), the cross undertakings as to damages should extend to MAHL.

Appendix

13 Restrictive covenants

13.1 In this clause 13, the following words and phrases shall have the following meanings:

Garden Leave shall mean any period during which the Company exercises its rights under clause 4.3 such that the Executive has not been provided with any work

Key Person means any person who is an employee of or otherwise works for the Company or any Group Company and either:

(a) to the Executive's knowledge is and within the Prior Period had been part of the senior management of the Company or any other Group Company or

(b) by reason of their knowledge of trade secrets or Confidential Information or knowledge or influence over the clients, customers or suppliers of the Company or any Group Company is likely to be able to assist or benefit a business which competes or proposes to compete with the Company or any Group Company

and in either case with whom the Executive worked (other than in non-material way) in the course of the Employment within the Prior Period

Prior Period means the period of 12 months immediately preceding the Termination Date provided that the Prior Period shall not include and shall be extended by any period of Garden Leave

Prospective Customer means any person, firm, company or organisation who or which at any time during the Prior Period is or was to the Executive's knowledge negotiating or having material discussions with the Company or any Group Company for the supply of Relevant Goods and Services and with whom or which the Executive had (other than in a non-material way) direct dealings or personal contact during the Prior Period in the course of the Employment

Prospective Supplier means any person, firm, company or organisation who or which at any time during the Prior Period is or was to the Executive's knowledge negotiating or having material discussions with the Company or any Group Company to be a supplier to the Company or any other Group Company and with whom or which the Executive had (other than in nonmaterial way) direct dealings or personal contact during the Prior Period in the course of the Employment

Relevant Customer means any person, firm, company or organisation who or which at any time during the Prior Period is or was to the Executive's knowledge:

(a) a client, customer or agent of the Company or any Group Company for the sale or supply of Relevant Goods and Services or

(b) in the habit of dealing with the Company or any Group Company for the sale or supply of Relevant Goods and Services

and in each case with whom or which the Executive had (other than in a nonmaterial way) direct dealings or personal contact during the Prior Period in the course of the Employment

Relevant Goods and Services means any goods and services which are of the same kind as or of a materially similar kind to or competitive with any goods or services supplied by the Company or any Group Company within the Prior Period and with which sale or supply the Executive was directly concerned or connected or of which the Executive had personal knowledge during the Prior Period (other than in a non-material way) in the course of their Employment

Restricted Business shall mean the business or any part of the business which in either case:

(a) is carried on by the Company or any Group Company at the Termination Date or

(b) was carried on by the Company or by any Group Company at any time during the Prior Period or

(c) is to the knowledge of the Executive to be carried out by the Company or by any Group Company at any time during the period of 6 months following the Termination Date

and with which the Executive was materially concerned or for which the Executive had management responsibility or in respect of which the Executive had Confidential Information in each case at any time during the Prior Period

Restricted Period means the period of 12 months from the Termination Date provided that such period of restriction shall be reduced by any Garden Leave

Restricted Supplier means any person, firm, company or organisation who or which to the Executive's knowledge is and has been a supplier to the Company or any other Group Company during the Prior Period and with whom the Executive had (other

than in a non-material way) direct dealings or personal contact in the course of the Employment during that period

Restricted Territory shall mean the United Kingdom together with any other country in which the Company or any other Group Company:

(a) carried on any Restricted Business at the Termination Date or

(b) carried on any Restricted Business at any time during the Prior Period or

(c) is to the knowledge of the Executive to carry out any Restricted Business at any time during the period of six months immediately following the Termination Date

and regarding which country at any time during the Prior Period the Executive was (other than in a non-material way) involved or concerned.

13.2 The Executive will not (without the previous consent in writing of the Board) at any time during the Restricted Period whether as principal or agent, and whether alone or jointly with, or as a director, manager, partner, shareholder, employee or consultant of any other person, directly or indirectly:

(a) carry on, or be engaged, concerned or interested in any business within the Restricted Territory which competes with the Restricted Business;

(b) negotiate with, solicit business from or endeavour to entice away from the Company or any Group Company the business of any Relevant Customer in respect of Relevant Goods and Services, so as to harm the goodwill or otherwise damage the business of the Company or of any other Group Company;

(c) in competition with the Company or any Group Company, deal with or accept the custom or business of any Relevant Customer for the sale or supply of Relevant Goods and Services;

(d) interfere with the employment of, solicit or endeavour to entice away from the Company or any Group Company, any Key Person;

(e) employ or engage for the provision of work or services any Key Person;

(f) negotiate with, solicit business from or endeavour to entice away from the Company or any Group Company the business of any Prospective Customer in respect of Relevant Goods and Services, so as to harm

the goodwill or otherwise damage the business of the Company or of any other Group Company;

(g) interfere with the supply of any product or service by any Restricted Supplier or Prospective Supplier to the Company or any Group Company;

13.3 For the avoidance of doubt, none of the restrictions contained in clause 13 shall prohibit any activities by the Executive which are not in direct or indirect competition with any business being carried on by the Company or any Group Company at the Termination Date.

13.4 Nothing in clause 13.2 shall preclude the Executive from holding (directly or through nominees) investments listed on the UK Official List, AIM or any Recognised Investment Exchange as long as the Executive does not hold more than 3 per cent of the issued shares or other securities of any class of any one company.

13.5 At no time after the termination of the Employment shall the Executive make any untrue or misleading oral or written statement concerning the business and affairs of any of the Companies or any Group Company nor directly or indirectly represent himself as being interested in or employed by or in any way connected with any of the Companies or any Group Company, other than as a former employee of the Company.

13.6 The Executive agrees that, having regard to all the circumstances, the restrictions contained in this clause are reasonable and necessary for the protection of the Company or of any Group Company and that they do not bear harshly upon the Executive and the parties agree that:

(a) each restriction shall be read and construed independently of the other restrictions so that if one or more are found to be void or unenforceable as an unreasonable restraint of trade or for any other reason the remaining restrictions shall not be affected; and

(b) if any restriction is found to be void but would be valid and enforceable if some part of it were deleted, that restriction shall apply with such deletion as may be necessary to make it valid and enforceable.

13.7 The Executive shall not, during the Employment, assist or advise or give any information to any person for the purpose of that person doing an act which, if done by the Executive himself, would be in breach of any of the provisions of clause 13.2.