No: 04/TLQ/0307

Neutral Citation Number: [2004] EWHC 2799 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

St Dunstan's House
133-137 Fetter Lane
London EC4A 1HD

Friday, 30 July 2004

B e f o r e:

MRS JUSTICE GLOSTER

- - - - - -

BRAKE BROTHERS LIMITED

CLAIMANT

- v -

UNGLESS & ANR

DEFENDANT

- - - - - -

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(Official Shorthand Writers to the Court)

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MR STAFFORD QC and MR BACON (Instructed by Messrs Adrian Whitehead) appeared on behalf of the Claimant

MR BLOCH QC (Instructed by Messrs McLaren Brittan) appeared on behalf of the Defendant

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JUDGMENT
(As Approved by the Court)

- - - - - -

Friday, 9 July 2004

J U D G M E N T

MRS JUSTICE GLOSTER:

Introduction

1. This is an action brought by the claimant, Brake Brothers Limited ("Brakes") against the defendants, Darren Ungless ("Mr Ungless") and Timothy Adams ("Mr Adams"), who are former employees of Brakes. Brakes seeks permanent injunctions to restrain the defendants from acting in breach of certain covenants contained in their contracts of employment. In particular, injunctions are sought that the defendants should not work for competitors of Brakes for a period of six months after termination of their respective contracts of employment.

2. The principal business of Brakes is the wholesale supply of frozen, chilled and ambient food products to the catering industry. Brakes carries on its business across the whole of the United Kingdom and employs about 9,000 people. It also carries on business in France. It has a turnover of in excess of £1.5 billion, based on its accounts to the end of the financial year 2003. It does not sell to the public, nor does it sell to supermarkets for resale, save for restaurants, cafes and other catering outlets in supermarkets. Its business is within a specific part of the food industry known as the food service sector. It offers an extensive portfolio of products, both own-brand and supplier-branded in each temperature range. It has a number of divisions which deal with different parts of its business.

3. The defendants were both employed by Brakes as national buyers; that is to say, they had responsibility for negotiating trading agreements and dealing with suppliers of food products which Brakes would, in turn, sell on to the catering industry. The

defendants were both employed in the "Chef's Essentials" team within the Ambient Temperature Division team at Brakes, each dealing with a wide range of ambient products and a large number of different suppliers.

4. Mr Ungless is 32 years old, married with two young children and his earnings comprise the main family income. Mr Ungless was employed by Brakes pursuant to a written contract signed by him on 5 February 2003, although he had been employed by a predecessor business, Watson & Phillips Limited, subsequent acquired by Brakes in 1992 and he had been employed by Brakes since 1999. Indeed, his statutory continuous service appears to have begun in 1989. From 2000 he was employed as a purchasing manager, and as senior purchasing manager from 2002. He was in receipt of a salary of approximately £46,000 at the time he left Brakes. He was therefore, if not a senior employee, certainly one with considerable responsibilities.

5. On 19 December 2003 Mr Ungless gave three months' notice of termination of his contract and, in accordance with the contract, was placed by Brakes on garden leave until the expiry of his notice on 19 March 2004. The post-termination restraints constrained in his contract, if valid, will last for six months following the end of his employment, namely 19 September 2004. He made it clear, either when, or shortly after, giving notice that he had resigned from his employment with Brakes to take up employment as a buyer with a rival company of Brakes called 3663 First Foods Service Limited ("3663"). He was not evasive in any way and no allegation is made that when he left Brakes' employment he took confidential information in hard copy form or in any way downloaded, or improperly took, copies of computer files away with him.

6. Mr Adams is 25 years old. He was employed by Brakes as a purchasing manager pursuant to a written contract signed on 31 May 2002. He was in receipt of a salary of approximately £37,000 at the time he left Brakes. On 11 February 2004 he gave three months' notice of termination of his contract. In accordance with the contract, Mr Adams was placed on garden leave until expiry of his notice period which was 10 May 2004. His contract contains post-termination restraints in similar form to that of Mr Ungless which, if valid, will last for six months following the end of his employment. These covenants will accordingly expire on 10 November 2004. Mr Adams also made it clear at the time, or shortly after, he gave notice, that he proposed to take up employment with 3663 on termination of his employment by Brakes. Likewise, there is no allegation that he was evasive about this in any way, or that he took with him confidential information in written form, or that he had downloaded computer files or anything of that sort.

7. 3663 is the largest competitor of Brakes in the UK. Brakes believes that its sales in the last financial year exceeded £1 billion. 3663 also provides food to the catering industry across the same temperature ranges as Brakes. It is in direct competition with Brakes. In addition, likewise in competition, it runs a contract distribution service on a national scale, supplying name-branded products and own-label brands in a way similar to the way in which Brakes does so.

8. Proceedings were issued by Brakes on 9 March 2004 when it failed to receive what it regarded as satisfactory assurances from the defendants that they would not begin their employment with 3663 prior to the expiry of the six months' period. Also on 9 March 2004, an application notice for interim relief was issued by which Brakes sought interim injunctions against the defendants until trial. After an ineffective

hearing, when Andrew Smith J made an order by consent standing over the application on undertakings, full argument was heard by Treacy J on 22 March 2004, at the conclusion of which the judge granted Brakes interim injunctions in the terms of the restrictive covenants. The judge also gave directions for the matter to proceed to a speedy trial, which began before me at the end of May.

The Restrictive Covenants

9. The relevant provisions of the defendant's contract which contain the constraints and restrictive covenants are in the same terms and are as follows:

> "23. Business Protection
>
> a) **Definitions**
>
> The definitions concerning business protection are set out in Schedule 1.
>
> b) **Acknowledgements**
>
> You acknowledge that:
>
> - each Group Company possesses a valuable body of Confidential Business Information;
> - the Company will give you access to Confidential Business Information in order that you may carry out the duties of your employment;
> - the duties of your employment include, without limitation, a duty of trust and confidence and a duty to act at all times in the best interests of the Group and any Group Company that employs you from time to time;
> - the Group requires a range of managers to accept restrictions which are similar to those set out in this agreement for its and each of their mutual protection;

- your knowledge of Confidential Business Information directly benefits you by enabling you to perform your duties;

- the disclosure (other than as is strictly necessary for legitimate business purposes) of ay Confidential Business Information to any customer, supplier or actual or potential competitor of any Group Company would place that company at a serious competitive disadvantage and would cause immeasurable (financial and other) damage to the Group;

- if, on leaving the employment of the Group, you were to hold any Material Interest in a customer, supplier or any actual or potential competitor or any of the Businesses, it would place the relevant Group Companies at a serious competitive disadvantage and would cause immeasurable (financial and other) damage to the Businesses;

- the success of the Businesses depends, in part, on your successor and/or fellow employees establishing business relationships with the customers of and suppliers to the Businesses which are similar to those established and maintained by you in the course of your employment within the Group.

c) **Confidential Business Information**

You must not disclose to anyone else outside the Group (or to any Group employee who does not have a business need to know) any Confidential Business Information about the Company or any Group Company, which you have acquired during your employment. This duty continues to apply after your employment comes to an end. It is not limited in time but does not apply to information ordered by a court to be disclosed or otherwise required by law to be disclosed.

You must return property of whatever kind whenever requested to do so by the Company or Group Company and which belongs to the Company or Group Company and in any event must do so when you leaves its employment.

…

f) **Conflict of interest**

You shall, during the period of your employment within the Group:

- abide by any Company or relevant Group policy on conflicts of interest and outside business interests produced from time to time;

- not, without the Company's prior written permission, hold any Material Interest in any person, firm or company which:

  (a) is or shall be in competition with any of the Businesses;

  (b) impairs or might reasonably be thought by the Company to impair your ability to act at all times in the best interests of the Group; or

  (c) requires or might reasonably be thought by the Company to require you to disclose any Confidential Business Information in order properly to discharge your duties to or to further your interest in such person, firm or company;

- not directly or indirect receive or obtain, in respect of any goods or services sold or purchases or other business transacted (whether or not by you by or on behalf of any Group Company, any discount, rebate, commission or other inducement (whether in cash or in kind) which is not authorised by any Company or relevant Group rules or guidelines form time to time and, if you or any firm or company in which you may hold a Material Interest shall obtain any such discount, rebate, commission or inducement, you shall immediately account to the Company for the amount so received;

- not, without the prior authority of the Company or in the ordinary course of your duties, remove from Company premises or copy or allow others to copy the contents of any document, computer disk, tape or other tangible item which may contain any Confidential Business Information or may belong to any Group Company;

- return to the Company upon request and, in any event, at the Termination Date all documents, computer disks and tapes and other tangible items in your possess or under your control which may contain or refer to any

Confidential Business Information or may belong to any Group Company;

- if so requested by the Company, delete all Confidential Business Information from any computer disks, tapes or other reusable material in your possession or under your control which may contain or refer to any Confidential Business Information.

g) **Obligations after employment**

Unless you have the prior written authority of the board of the Group you shall not either on your behalf or on behalf of any other person, firm or company, directly or indirectly, for a period of 6 months after the Termination Date:

- try to entice away from the Group any person who has at any time during the 12 months prior to the Termination Date to your knowledge been an Employee of the any Group Company and with whom you have worked to any material extent during any part of the 12 months prior to the Termination Date;

- with a view to competing with any Group Company try to entice away from the Group any customer (or party negotiating with the Group with a view to becoming a customer) with whom you had material dealings (in relation to any of the Businesses) during any part of the 12 months prior to the Termination date:

- with a view to competing with any Group Company try to entice away from the Group any suppliers (or party negotiation with the Group with a view to becoming a supplier) with whom you had material dealings (in relation to any of the Businesses) during any part of the 12 months prior to the Termination Date

- in the United Kingdom be concerned or involved directly or indirectly in any capacity in any business activity which is undertaken in competition with any of the Businesses. However, this restriction shall only apply where the business or activity is carried out by a sole trader partnership, company or any group of the same which, when taken together, had a turnover in such section during their last complete financial year prior to the Termination Date of a minimum of £30 million;

- …

- at any time after the Termination Date, disclose to any person, firm or company or make use of any Confidential Business Information.

h) **Business Protection - General**

Each of the restrictions in this agreement shall be independent and severable from the remaining provisions and enforceable accordingly. If any provisions shall be unenforceable for any reason but would be enforceable if part of their wording were deleted, it shall apply with such deletions as may be necessary to make it enforceable.

Wherever provisions of this agreement potentially benefits other Group Companies you have given them t the Company as trustee for itself and for each Group Company and shall at the request and cost of the Company enter into direct undertakings with any Group Company which correspond to them.

...

SCHEDULE I

DEFINITIONS

In this agreement:

'Business' means all and any trade or other commercial activities of the Group:

a. with which you shall have been concerned or involved to any material extent at any time during the 12 months up to the Termination Date and which any Group Company shall carry on with a view to profit; or

b. which any Group Company shall, at the Termination Date, have determined to carry on with a view t profit in the immediate or foreseeable future and in relation to which you possess at the Termination Date any significant body of Confidential Business Information.

'Confidential Business Information' includes (without limitation) all and any information about business plans, maturing new business opportunities, research and development projects, the contents of management meetings (and minutes taken), product formulae, the working of computer systems,

> processes, inventions, designs, discoveries or know-how, sales statistics, marketing surveys and plans, reports, costs, unpublished information concerning profit and loss, prices and discount structures, the names, addresses and contact details of customers or suppliers and potential suppliers (whether or not recorded in writing or in other electronic form) and any other information of a commercially sensitive nature."

10. The relevant covenants may be summarised as follows. The first relevant restrictive covenant for present purposes is that which I have designated (i) above in sub clause (23)(g); that is a covenant by the defendants not to entice away from Brakes anyone who had been employed by Brakes at any time during the 12 months prior to the termination of the defendant's contract. This promise is limited to those with whom the employee worked to a material extent during any part of the 12 months prior to termination. The claimant contends that this covenant seeks to protect its interest in maintaining staff stability. In their defence, the defendants did not admit the lawfulness of this covenant. However before me they were prepared to give an undertaking in the terms of this restrictive covenant for the relevant period of six months.

11. The second and third covenants were promises not to try to entice away from Brakes any customer or supplier of Brakes. These promises are again limited in a number of ways. They apply only to those customers or suppliers of Brakes with whom the relevant employee had material dealings in the twelve months prior to termination of his employment. They apply to prevent enticement with a view to competing. The claimant contends that these covenants seek to protect Brakes' confidential information and its customer and supply connection and goodwill. The defendants do not admit the lawfulness of this covenant. However, before me they were prepared to give an undertaking in the terms of the restrictive covenant for a period of six months. Likewise, they are prepared to give undertakings in the terms of the restrictive

covenant which I have designated at (v) above; that is to say the confidentiality undertaking which is an undertaking not to disclose to any person or make use of any confidential business information, subject, they contend, to "proper identification of the categories of confidential information".

12. The real issue, however, arises in relation to the covenant which I have designated as (iv) above and which has been referred to before me as the "area" covenant. It is, in effect, a non-competition clause which *prima facie* and on the assumption that it is valid, prevents an employee, who has been a buyer for Brakes from, for example, buying for certain trade rivals, whether as an employee, agent, consultant or director. Brakes contends that this clause addresses its legitimate interests in protecting trade secrets or confidential information akin to trade secrets in circumstances in which, amongst other things, policing the use or disclosure of confidential information is extremely difficult. Brakes contends that this clause is reasonable, both as to its ambit and as to its duration.

13. The defendants, on the other hand, argue that there is no legitimate interest warranting the imposition of such a covenant, that there is no need for protection of this type, that it is too long in duration and that it has been drafted so as to be too wide. They contend that such a restriction is unjustified in order to protect any legitimate business interests of Brakes and it is wholly disproportionate, especially when it is viewed in addition to the serving of a three month period on garden leave. In particular the defendants contend:

    (1) it is simply anti-competitive, preventing the defendants from using their general skill and knowledge;

(2) it is not supported by any legitimate protectable interest; if intended to protect confidential information it is inappropriate since there was no memorable confidential information which needed to be protected in any way; see Herbert Morris v. Saxelby [1916] 1 AC 688. If intended to protect the relationship with suppliers, it is inappropriate for the following reasons:

(i) In the industry the relationship between a buyer and supplier, from whom the employer buys, is not analogous to the customer connection that exists in the relationship between an employee and a customer to whom the employer sells. There is no exclusivity in supply and suppliers deal with some or all of the claimant's principal competitors.

(ii) There is no evidence of any risk that a buyer who leaves the claimant in order to join a competitor would have any influence, or effect, over the way in which the supplier dealt with the claimant in the future.

(iii) Even if (i) and (ii) were not the case, other more finely honed forms of restraint would provide adequate protection to the claimant without having to rely upon such a harsh and anti-competitive restraint.

(iv) The restraint is excessive, in that the other covenants in the contract and the garden leave provision provide

more than adequate protection in respect of any legitimate interest.

(v) It is excessive as to its duration. A period of six months on top of the three months' garden leave is said to be too long given the shelf-life of the confidential information relied upon.

(vi) It is excessive as to its general ambit, in that (a) it is not limited to employment as a buyer but prevents employment in any capacity by 3663; (b) it is not limited to acting as a buyer for the same or similar goods with which the defendants actually dealt; (c) it is not limited to dealing with suppliers with whom they had had connection or very recent connection in respect of which there could be argued to be goodwill connection or confidential information; (d) it prevents the defendants from being employed for a total of nine months by all of the companies that the defendants would be best suited to join in order to continue to exercise their skill and knowledge at the same or a higher level.

14. However, the defendants are prepared to undertake that, for the six months following termination of their employment they will not deal with the products with which those buyers dealt latterly with in their employment at Brakes. In addition, 3663 have, by

the defendant's counsel Mr Bloch QC, said that they are prepared to undertake to the court in the following terms in the event that, as a result of this judgment, they cease to be restricted from employing Mr Ungless and Mr Adams as national buyers. They will undertake that they will at no time during the period, in the case of Mr Ungless, up to 18 September 2004, give him any responsibility for or encourage him in or reward him for the direct or indirect purchase on behalf of 3663 of any products falling within the following product ranges, oils, sugars, fruit, nuts, dried culinary, herbs and spices and sweeteners, being a list of those products which 3663 understands that Mr Ungless was responsible for purchasing on behalf of Brakes at least at some point in the last twelve months of his employment by Brakes. They give a similar undertaking in relation to Mr Adams up until the six month expiry from the termination of his contract, namely 10 November 2004 in relation to the products which he was responsible for purchasing on behalf of Brakes, namely creams/milk, flour and flour based mixes, baker's sundries, essence and colourings, vinegars and cooking wines, oils, pickles, pie fillings and ambient desserts. As I have said, the reference to the specific products were those in which Mr Ungless and Mr Adams respectively traded as buyers during their employment at Brakes.

The Law

15. The law as to the enforceability of restrictive covenants was, in effect, common ground between the parties. The following propositions taken from both the claimant's and the defendants' skeleton arguments may be taken as summarising the law for present purposes.

(1) Covenants in restraint of trade are *prima facie* unlawful and accordingly are "to be treated with suspicion" see per Laddie J in Countrywide Assured Financial Services Limited v. Smart ChD, Laddie J, 7 May 2004.

(2) It is for the covenantee to identify a legitimate business interest that is capable of protection.

(3) It is for the covenantee to show that the covenant extends no further than is reasonably necessary to protect that interest and the court will enforce the covenant only if it goes no further than is reasonably necessary to protect the trade secrets or other legitimate interests of the previous employer: see, for example, Scott LJ (as he then was) in Scully UK Ltd v. Lee [1998] 1 ICCR 259.

(4) The court will scrutinise more carefully covenants in employment contracts, as opposed to ordinary commercial contracts where it will more readily upheld the covenant as being agreed between parties of assumed equal bargaining power.

(5) A covenant should be assessed for its validity at the date upon which the contract was made.

(6) A covenant will be upheld if the employer can show that it has been designed to protect his legitimate interests that, properly construed, the covenant extends no further than is reasonably necessary to protect

those interests: see Mason v. Provident Clothing and Supply Ltd [1913] AC 724; Herbert Morris v. Saxelby [1916] 1 AC 688.

(7) If a covenant can be construed in two ways, one of which leads to its invalidity, then the court should prefer the alternative construction: see Tern v. Commonwealth and British Minerals Ltd [2000] IRLR 114 at paragraph 14.

(8) A covenant should be interpreted in the context of the agreement as a whole so as to give effect to the intention of the parties.

(9) The legitimate interests which justify the imposition of a covenant in restraint of trade are (i) trade connection; (ii) trade secrets or confidential information akin to a trade secret; and (iii) staff stability.

(10) Trade connection is established where it can be shown that, by virtue of his position with the employer, the employee will have recurrent contact with customers or, as in this case, suppliers, such that the employee is likely to acquire knowledge of and influence over the customers or suppliers.

(11) An employee has a legitimate interest in maintaining the stability of his workforce.

(12) In order to determine whether an item of information is a trade secret or confidential information akin to a trade secret, the court should have regard to a number of factors as described the Court of Appeal in

Faccenda Chickens v. Fowler [1987] 1 Ch 117 at pages 137B to 138H, including the nature of the employment and the nature of the information itself. It is clear that this must be a trade secret or information of such a highly confidential nature as to require the same protection. This was explained by Lord Shaw in Herbert Morris v. Saxelby (*supra*) at page 714 as follows:

> "Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge - these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability - all those things which in sound philosophical language are not objective, but subjective - they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and expand his powers is advantageous to every citizen, and may be highly so for the country at large. This distinction, which was also questioned in argument, is just as plain as the other.
>
> An excellent concrete example of the latter point may be found in the present case. The second head of the injunction claimed is "from divulging or communicating … information as to the customers or affairs of the plaintiff company and from otherwise divulging or using such information". This [is] purely objective, and it was with exact correctness made the subject of a separate claim."

A trade secret has also been defined as information used in a business, the disclosure of which to a competitor would be liable to cause real or significant harm to the owner of the information and the dissemination of which has either been limited or not encouraged: see Lansing Linde v. Kerr [1991] 1 WLR 251 at 260B to D per Staughton LJ. Other factors include whether the employer impressed upon the employee the

confidentiality of the information (the attitude of the employer towards the information provides evidence which may assist in determining whether the information can properly be regarded as a trade secret); whether the relevant information can be easily isolated from information which the employee is free to use; and whether it is information, the use of which a man of average intelligence and honesty would regard as improper.

(13) It is clear that an area or non-competition covenant may be justified where the interest to be protected is trade secrets or confidential information akin to a trade secret, notwithstanding that there is an obligation present in the contract not to divulge confidential information post termination. Such a covenant, the authorities show, may be justified because it can be difficult for a former employer to police compliance with an obligation relating to trade secrets or confidential information akin to a trade secret. In addition, such a covenant can be justified by the fact that there are serious difficulties in identifying precisely what is, or what is not, a trade secret, or confidential information akin to a trade secret; see Littlewoods Organisation v Harris [1997] 1 WLR 1472 at pages 1479A-E, where Lord Denning said:

> "But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not: and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to

> take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period."

Likewise in CR Smith Glaziers Limited v Greenan (1993) SLT 1221, the court said at page 1223F:

> "… it is well established that a prohibition against disclosing trade secrets is practically worthless unless it is accompanied by a restriction upon the employee possessed of secrets against entering the employment of competitors."

See also Printers & Finishers Limited v. Holloway [1965] 1 WLR 1 at page 6; Faccenda Chicken Limited v Fowler [1987] 1 Ch 117 at pages 137G-138G; Turner v. Commonwealth & British Minerals Limited [2000] IRLR 114 at paragraph 18; Kall-Kwik Printing v Rush [1996] FSR 114 at page 124. However, the courts will scrutinise their covenants with particular care because of their broad anti (inaudible) effect, 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 than one which bars out competitive employment in the whole of the United Kingdom; see Office Angels Limited v Rainer-Thomas [1991] IRLR 214 paragraphs 45-58 and Countrywide Assured Financial Services Limited v Smart (*supra)*.

In any event, a balance has to be struck between the degree of protection legitimately required by the claimant (which is permissible) and the degree of restriction or legitimate use of skill and knowledge and legitimate competition (which is impermissible); see Office Angels

(*supra*) at paragraph 58. In considering the anti-competitive effect of the area covenant, the court should consider whether the existence of the provision would diminish the defendant's prospects of employment; Stenhouse Australia Limited v Phillips [1974] AC 391 at page 124C-D.

(iii) In cases where a restrictive covenant is sought to be enforced the trade secret (or confidential information akin to a trade secret) must be particularised sufficiently to enable the court to be satisfied that the employer has a legitimate interest to protect, but no more than that; see Scully UK Limited v. Lee (*supra*) [1998] IRLR 259 at paragraph 23.

(iv) The covenant to protect the use or disclosure of trade secrets (or confidential information akin to a trade secret) does not depend upon the employee taking documents or memorising the contents of documents. It can properly apply to trade secrets (or confidential information akin to a trade secret) which the employee may carry away in his head; see, eg, Polly Lina Limited v Finch [1995] FSR 751 at page 757.

Construction of the Restrictive Covenant

16. The first issue is the true construction of the contract. Does it, as the defendants contend, prevent the defendants from being employed in any capacity by 3663, and not merely as a buyer? Or does it, as the claimant contends, merely prevent the defendants from working for 3663 as a buyer, namely from being employed in a

similar commercial activity as that which the defendants were involved in prior to the termination of their employment.

17. In my judgment (and consistently with the view taken by Treacy J on the interim relief application hearing) the definition of the expression "the businesses", as set out in schedule 1 to the agreements, restricts the application of the fourth covenant to restraining the employee from working in any business activity which competes with work of the type which the employee had been carrying on in the previous twelve months. I remind myself that, in accordance with the seventh proposition of law set out above, if a covenant can be construed in two ways, I should prefer a construction that upholds its validity. I do not consider that the restriction goes so wide as to prevent an employee, such as Mr Ungless or Mr Adams, from being employed at all, in any post, by 3663 (for example, in human resources or as a janitor), simply because the latter company is clearly a defined competitor in the relevant area of business. Such a provision might indeed be too wide, but it is not for me to decide this. But here, in my judgment, consistent with the aims set out in the acknowledgement clause (clause 23(b)) and the definition of "businesses" in schedule 1, there is every sensible justification for construing the words "business activity" in section 23(g) as limited to a business activity with which the employee was involved and not to anything wider, here of course being employed as buyers from suppliers. Accordingly, in my judgment, it cannot be said that the restriction is too wide to be unenforceable.

Issues that arise for determination

18. It was therefore common ground that the issues that arise for determination in relation to each of the defendants are as follows.

(1) In relation to each covenant sought to be enforced, what is the legitimate interests which Brakes seeks to protect?

(2) On a proper construction of that covenant, does the covenant in question extend further than is reasonably necessary for the proper protection of the legitimate interests?

(3) Even if the covenants, or any of them are held to be enforceable, ought the court, in the exercise of its undoubted discretion, nonetheless grant an injunction?

19. In my judgment, having read and heard extensive evidence over a number of days as to the manner in which Brakes (and indeed its competitors) carry out their business, and the role played by the defendants in that business, the following conclusions can be reached on the evidence:

(1) Brakes has, and continues to have, a legitimate interest in protecting its connection with its suppliers.

(2) Brakes has, and continues to have, a legitimate interest in protecting its staff's ability.

(3) Breaks has a legitimate interest in protecting its confidential information akin to trade secrets.

20. In order to explain why I have reached this conclusion, it is necessary to describe, in a little more detail, what I find as a fact to be the evidence of the operation of Brakes'

business and the role played by the defendants in it. This description is based on the evidence which I have read and heard.

21. Brakes buys food products using a team of buyers, allocating a buyer to a series of products, which may change from time to time. It has trading agreements with the suppliers relating to specific types of products. Such trading agreements are typically entered into for a period of one year, and usually a calendar year. Some trading agreements may last for more than one year. The trading agreements are subject to express confidentiality clauses, as the defendants accepted they knew. Negotiations of trading agreements and variations of such agreements are confidential and treated as such. A trading agreement will typically include one or more element of discounts and payments by the supplier to Brakes. These discounts are applied to the base price, that is to say the invoice price to Brakes. The elements can include an overrider, rebate, marketing support, advertising allowance, promotional payments and other lump sums. An overrider is often a simple percentage, which often covers every product within a particular range of products, and often remains stable throughout the course of a trading agreement.

22. Some of the discount and payments elements may vary according to the volume of products produced by Brakes. A trading agreement typically identifies (a) the product to which it applies, (b) the discount and payment elements and (c) the nett price of the products (that is to say the base price less any overriders, PLR or guaranteed rebates but excluding the discount and payment elements are which variable). But the nett price of a product (which is the price after all elements have been taken into account, including variable elements such as lump sum and targeted elements dependent upon

level of purchases) may not be capable of calculation until the end of the accounting period, if it varies according to the volumes purchased.

23. Breaks issued three catalogues each year, setting out its prices and its products. The trading agreement between Brakes and the supplier included an express term which affords a supplier an opportunity to seek a price increase before the next catalogue has gone to press. The price agreed between Brakes and a supplier can be varied by agreement. But save in the rare cases of supplier with "muscle" (such as Coca Cola) the supplier cannot force a price increase on Brakes. The prices agreed between Brakes and a supplier can remain stable throughout the course of a trading agreement. It is not uncommon for the prices agreed between Brakes and the supplier to remain stable for the whole of the duration of a trading agreement.

24. Brakes is very concerned to ensure price stability because it does not want to place customers in the position of having to change many prices frequently. In 2003, prices were affected by two unusual events, namely the drought conditions across Europe and the hardening of the Euro against the pound. Brakes enters into strategic partnerships with some of its suppliers, by which the supplier may provide additional resources or special co-operation with a view to increasing the resale of its products by Brakes. Internally Brakes treats the discount and payment elements arising from the trading agreement as the income of the buying side of its business. Internally Brakes measure and motivates its buyers by setting targets to the team of buyers and to each buyer individually. Brakes' buyers receive bonuses or commission depending upon how well they have performed against their targets. In order to keep its sales force motivated to secure the best resale price, Brakes does not ordinarily reveal to its sales force the nett price paid for products. Of a work force of about 9,000, only

about 40 are privileged to details of the terms upon which it purchases products from suppliers. In the current case, of course, that would include, in relation to the products with which they were dealing, the two defendants. In order to improve its sales, Brakes develops, or attempts to develop, innovative strategy such as selling new products, directing its marketing towards particular sectors of the retail market, for only certain types of products, developing its range of its own brand products and package products in new or different ways. Brakes seeks to secure the co-operation and support of its buyers for the activities which it undertakes to improve its sales and otherwise enhance its business. Brakes (presumably like its competitors) recruits buyers who have previously worked as buyers in sectors outside the food industry.

25. As to the business carried on by Brakes' trade rivals, I make the following findings of fact relevant to this case:

(1) Brakes' principal trade rivals are 3663, Woodwards and Danish Bacon Company ("DBC"), each of which has an annual turnover in excess of £30 million and thus these entities are clearly within the ambit of the restrictive covenant.

(2) It has numerous smaller regional trade rivals, who operate businesses with smaller turnovers and thus who do not fall within the ambit of the definition of competitors within the restrictive covenant. These are companies for which either the defendants could, if they chose to do so, go and work. Brakes' trade rivals buy from suppliers who also supply food products to Brakes. Trading agreements, overriders, rebates, marketing allowances and other lump sum payments are common place within the food service sector. Trading

agreements between a trade rival and its suppliers are almost certainly to be on terms which include an express confidentiality clause, similar to that expressed within the Brakes' trading agreements. It may be the case, as Mr Adams and Mr Ungless said in evidence, that 3663 operates the structure of its buying income in a different manner from Brakes, but nonetheless the basic structure, that is to say some sort of discount arrangement, and overriders, is likely to be similar. There was no evidence as to the manner in which Woodwards of DBC operate their buying income. A buyer had left Brakes to work for 3663. Thereafter, 3663 had launched a new range of own-brand cheeses very similar to that which the buyer had been responsible whilst employed by Brakes. I find as a fact that Brakes genuinely believed that in those circumstances, as a result, confidential information was indeed being provided to 3663.

The Role of Mr Ungless and Mr Adams

26. On the evidence before me I find as a fact that buyers employed by Brakes could be required to carry out some or all of the following tasks:

(a) the negotiation of the terms of trading agreements;

(b) the negotiation of variations to trading agreements;

(c) the negotiation of strategic partnership agreements;

(d) the monitoring and reviewing of trading agreements;

(e) the management of relations with those suppliers with whom a buyer deals;

(f) the preparation and approval of financial information reflecting buying activities carried out by an individual buyer or by the buying team;

(g) the provision of information and comment as part of the business planning process undertaken by Brakes;

(h) the receipt of information and comment derived from the business planning process;

(i) the support of business initiative such as new product development, promotions and marketing;

(j) the management of team sales tendered;

(k) the preparation of trading reports;

(l) the co-ordination of bulk deal opportunities;

(m) the co-ordination of group buying opportunities.

I find as a fact that the defendants performed the tasks identified under sub-paragraphs (a) to (i) above; that in addition Mr Ungless also performed the tasks identified under sub-paragraphs (j) and (k); and that Mr Adams also performed the tasks identified under sub-paragraphs (l) and (m).

27. Of these various tasks two are of particular importance. These relate to the preparation and receipt of business planning information as identified in sub-paragraphs (g) and (h) above. The evidence shows that buyers were expected to be

and were indeed involved in the preparation of business planning information and that Mr Ungless and Mr Adams themselves were indeed involving in such preparations. The 2002 category information documents, the Business Planning information documents and the document entitled Chef's Essentials - Food Business Planning 2004 clearly demonstrate the defendants' involvement in such documents. In respect of the 2002 Category Review documents, Mr Ungless accepts that the buyers provided the narrative and that he himself provided the information for the purposes of preparing these documents. Mr Adams accepted in cross-examination that this information represented the information which the buyers needed to know. The nature of the documents does not support Mr Ungless' evidence that this information was purely to help new buyers. Likewise the Business Planning Information documents, are similar in context to the 2002 Category Review documents. Mr Ungless provided information to his superior, Mr Black, and contributed amendments to the narrative as is demonstrated by the unredacted documents. Mr Adams also provided information to Mr Black, as is demonstrated by Mr Black's manuscript notes, and by the unredacted narrative sections which reflect those manuscript notes. Mr Ungless contributed information to the "Chef Essentials - 2004" Business Planning 2004 document. He accepts that he produced the document referred to in evidence as the "Bill Driscoll spreadsheet". He disputes Mr Black's evidence that he was involved in any other way, but I find as a fact that Mr Ungless is incorrect in his recollection in this respect.

28. The evidence demonstrates that buyers can be and are involved in the receipt of business planning information. The defendants have not disputed that the 2002 Category Review documents were presented to the buyers. Although they accepted some very limited involvement, the defendants dispute that they received or presented

with the information comprised in the business planning information document or the Chef's Essential Business Planning document. However, the evidence of Mr Radcliff, Brakes' Commercial Manager, and Mr Black is to the effect that the defendants did indeed receive these documents. Mr Black told the court the process by which these documents were created and explained that together, he and Mr Ungless, presented these documents to their superior Mr Radcliff, and that Mr Radcliff spoke about the plans at a subsequent meeting attended by both of the defendants. Mr Radcliff said that the Business Planning information was presented to the team by him with Mr Ungless and Mr Adams in attendance. I conclude that the evidence of Mr Black and Mr Radcliff on these matters is to be preferred for the following reasons.

(1) Mr Ungless initially gave what turned out to be a limited and inaccurate account of his knowledge of the Business Planning Information document and his role in its creation. His explanation in his supplemental witness statement was not convincing.

(2) Mr Ungless initially gave a somewhat sparse account of his knowledge of the Chef's Essential Business Planning 2004 document and his role in its creation. His assertion that he was unfamiliar with its context was perhaps somewhat surprising in the light of his subsequent concession that he prepared the Bill Driscoll spreadsheet. His supplementary witness statement was not satisfactory in this respect. I had the impression that, at least originally and before he had had the opportunity to remind himself of the contents of documents, he has, perhaps understandably, persuaded himself that his role in the preparation of these documents was less involved than in fact it was. Mr Adams' witness statement stated wrongly, in the event, that he had not any

input into the Business Planning Information document. By contrast to this, the evidence of Mr Black and Mr Radcliff in this respect was convincing. In particular the evidence of Mr Black was corroborated in part by contemporaneous documents, which contradicted the evidence of the defendants.

Supply Connection

29. So far as the submission that Brakes had and continues to have a legitimate interest in protecting its connection with its suppliers, the evidence showed as follows.

30. So far as Brakes' regular dealings with its specific suppliers was concerned, on average Mr Adams and Mr Ungless dealt with each of their suppliers every two weeks, but when negotiating agreements, the contact would be more frequent. Mr Adams and Mr Ungless only dealt with a limited number of suppliers; in the case of Mr Adams, 22 suppliers, whilst, in the case of Mr Ungless, 20 suppliers. The principal purpose of the dealings between a buyer and his supplier is to negotiate agreements and variations to agreements in relation to which they have to get the best deal and resist price increases. This was accepted by both Mr Adams and Mr Ungless. A buyer comes to know which supplier is easy to deal with and which is not; a buyer wants a supplier to find him to be reliable; and a buyer wants a supplier to value the custom which the buyer places with him. On some occasions suppliers may entertain a buyer as was the case when Mr Ungless was entertained by British Sugar at Goodwood Races. Consequently and inevitably, the buyer will have a connection with a supplier which assists the buyer to do his job well. This goodwill is created for the benefit of Brakes. When a buyer leaves the employ of Brakes, that

knowledge/rapport will be lost to Brakes and it will take time for it to be replicated by the person taking over the supplier's products. However, the goodwill which attaches to a buyer can, unless contractually restrained, be diverted to benefit the buyer's new employer.

31. Accordingly, I reject the suggestion there is no protectable interest owned by Brakes because the supplier wants to sell to the buyer and not the other way around. I reject this submission because it is belied by the imposition of non-solicitation and non-dealing covenants within the defendants' contract.

Staff Stabilities

32. The evidence showed that Brakes had, and continues to have, a real and legitimate interest in protecting its staff stabilities. In support of this proposition Brakes, in my view correctly, relies upon the following: Brakes is dependent upon its personnel for carrying out its business. Buyers within Brakes operate a team with team targets and individual targets. In respect of some suppliers, a buyer may be negotiating the principal terms of a trading agreement for another buyer who also purchases from the same supplier. Buyers within Brakes work in an open plan office, socialise with each other by going out to the pub at lunch, or at the end of the day, and have regular contact with each other. The buyer's team provides support and encouragement to each other and have dealings with marketing personnel, commercial managers and product development personnel. As a consequence of these matters, a buyer is likely to know which members of staff are good to work with, and which are not, which are good at their jobs, and which are not. Accordingly, a buyer may come to be in a position of influence with employees such that an employee may be susceptible to the

idea of joining an ex-buyer at his new employer. Accordingly, in my judgment, staff stability is a legitimate interest for Brakes to protect.

Confidential Information

33. In my judgment, the evidence showed the defendants were privy to, and conversant with, confidential information. I reject the submission by Mr Bloch QC that the confidential information was inadequately specified or too vague to attract the protection afforded by the restricted covenant. In summary, the confidential information was of the following types:

(1) Details of the terms within Trading Agreements

This was conceded by the defendants in their Amended Defence to be confidential. Such agreements are expressly stated to be private and confidential, even when promulgated by a supplier. It is clear that base to net pricing sheets form part of this confidential information. Component parts of the trading agreement are confidential information; for example,the overrider percentage, the rebate rate, the market support and other sums payable by the supplier to Brakes. This was accepted by Mr Adams in evidence.

(2) Proposal for Trading Agreements

In their evidence the defendants accepted that they regarded this type of information as confidential.

(3) Negotiation with Suppliers

This was conceded by the defendants in their Amended Defence. The point made by Mr Ungless in his evidence was that many of his trading agreements remained incomplete when he went on garden leave is not, in my judgment, relevant.

Secondly, information relating to prices paid to suppliers, from whom Brakes bought products, is clearly confidential. This was conceded by the defendants in their Amended Defence.

Likewise, financial performance documents, such as the accrual sheets and the draft year end balance sheets, were also clearly confidential. I also regard the Business Planning Information as confidential.

34. The evidence before me illustrated the kind of business planning information to which buyers at Brakes, such as the defendants, were privy. The 2002 Category Review documents, the Business Planning Information documents and the Chef's Essential - Food Business Planning 2004 were, in my judgment, clearly confidential. The types of information contained within these documents included:

(a) details of the relationship between Brakes and the supplier as viewed internally;

(b) details of forthcoming support from suppliers;

(c) details of commercial opportunities identified by Brakes;

(d) details of marketing plans.

(e) details of new product development;

(f) details of profit margins;

(g) details of areas to be targeted;

(h) details of successful and unsuccessful channels for the sale of a particular range of products.

35. All this information is, in my judgment, objectively plainly confidential information. It is all information which a man of average intelligence and honesty would consider improper to disclose to his employer's trade rivals, to use the test articulated by Cross J in Printer & Finishers Limited v. Holloway [1965] 1 WLR 1 at page 6C.

36. Additionally, in my judgment, if a test or criteria were any different, the confidential information which I have identified above is akin to a trade secret. Thus the nature of the defendant's employment was such they were habitually handling confidential information. Brakes had pressed upon its buyers the confidentially of information to which they were privy. For example, the defendants' contracts of employment expressly identified types of information which are regarded by Brakes as confidential. The Trading Agreements with suppliers were marked "Private and Confidential", as were proposals for Trading Agreements, proposals for Strategic Partnerships and year end balances. The financial accrual sheets do not expressly state that the information was confidential, but it is obvious from what is set out on those sheets. They incorporate details derived from the trading agreements, such as the overrider percentage and the amount of various payments. I accept the submission of counsel for Brakes that it was disingenuous of Mr Ungless to complain that Brakes

did not impress upon him that Brakes regarded these sheets as confidential. In cross-examination Mr Adams and Mr Ungless accepted that, for example, neither would feel free to disclose to his new employer the new products which Brakes planned to launch, nor Brakes' plans to promote products or target areas of the market. Likewise the defendants accepted in cross-examination that Brakes itself regarded the information in question as confidential. I also accept the submission by counsel for Brakes that the fact that the circulation of certain information is restricted to a limited number of individuals can indeed throw light on the status of the information and its degree of confidentiality. In the present case this consideration reinforces the impression of confidentiality. Moreover, the sales force did not, save in rare cases, have access to information concerning overriders, rebates and financial support. Only about 40 out of a workforce of about 9,000 had access to the information to which buyers are privy. Access to certain parts of the computer systems was confined to a limited category which included the buyers. The nature of the information is such that it could have been used to the commercial disadvantage of Brakes within the test formulated of a trade secret by Staughton LJ in Lansing Linde v Kerr (*supra*) at page 260B-D.

37. In submission Mr Bloch QC, counsel for the defendants, submitted that only the net net price could be useful and that, since this was unknowable until after the year end there was nothing of value which could be drawn from the terms of the trading agreement. Indeed, in his evidence Mr Ungless accepted that his point was based on the premise that price was the only useful piece of information. For the reasons advanced by Mr Stafford QC in argument, I reject this contention. My reasons are as follows. Whatever a supplier has been prepared to agree is valuable in itself to a trade rival. The individual agreements of a trading agreement are valuable to a trade rival,

seeking to secure the best deal from a supplier in common. The reference to net net prices is, in one sense, irrelevant. The buyers were perfectly able to evaluate and renegotiate their deals with suppliers in ignorance of the net net price. As Mr Stafford QC submitted, the net net price is, in truth, something of an artificial construct, by which certain sums of money are, after the event, sub-divided as between the number of units purchased in order to analyse the effect of volume on price over time. The buyers know and work with the net price, as could a trade rival.

38. For all the above reasons, I have concluded that the information that was available to the defendants was indeed confidential and was indeed adequately specified in the pleadings and in the evidence that was deployed before me.

Memorability

39. The next submission made by Mr Bloch QC, on behalf of the defendants, was that, insofar as there was any confidential information, it was so detailed that it was not information that a buyer could reasonably be expected to recall in the six month period following the three months compulsory garden leave. I reject this contention. Although obviously much of the information and the detail of the prices might be too detailed and complex to retain in one's memory, the evidence showed that, at least in headline terms, a buyer would retain the key information relating to the transactions with which he was involved. As Mr Radcliffe, Brakes' Commercial Manager, said, a buyer would "live and breathe the key deals you do. You live and breathe these numbers every day." The fact that the information was relatively simple here makes it all the more likely to be memorable.

40. In my judgment, in the present case, the information identified above is simple, such as, for example, the fact that Brakes plans to launch a product in 2004, the fact that at supplier had agreed a particular type of payment and the amount of the payment. The relative simplicity of the trading agreements is shown in the document at B483-6 in which Mr Adams sets out the principal elements of the Trading Agreements which he had with these suppliers. I thus reject Mr Bloch's case that the information was all too complicated to be memorable.

41. Likewise, as Mr Stafford submitted, information which a buyer has helped to create is more likely to be memorable to him than information which is simply presented to him. In the present case, the Trading Agreements and the Business Planning narratives, insofar as they relate to a buyer's own products, are the product of that buyer's hard work. Moreover, the Trading Agreements are created as the result of intensive negotiation, thereby making it all the more memorable so far as the buyer is concerned; it is clear that buyers constantly revisit the bargains which they have struck with their suppliers. In the case of renegotiations with suppliers, both Mr Ungless and Mr Adams admitted in evidence that the starting point was the existing agreement. During the course of the year they constantly monitor prices and performance to ensure that they can spot opportunities to improve the terms and prices and can resist attempts to vary the terms and prices adversely affected. As Mr Black observed, this was useful as a reminder of the goals at which the buyers were aiming. Mr Stafford submitted, and I accept that, although it can be quite difficult to recall something in an information vacuum, it is a different position where one is recalling something where there is a reason for applying one's mind to the matter, or there is a trigger to prompt recollection. I accept the submission that a buyer of foods who moves to work for a trade rival as a buyer is not likely to be working in an

information vacuum. Moreover, the suppliers with whom his new employer is dealing, will, or will be likely to, be the same suppliers. The ingredients of the Trading Agreements -- overriders, rebates, marketing support -- are, as the defendants accepted, commonplace within the industry.

Shelf Life

42. Mr Bloch submitted that, by the expiry of the garden leave period, the shelf life or relevance of information that was indeed memorable would have expired. I reject that submission. I accept Mr Stafford's contention that the evidence showed that there was, in effect, an annual business cycle. Targets would be set for the buying team as a whole and for the individual buyers. This would take place in the autumn. The buyers would then open negotiations with their suppliers for a trading agreement, aiming to produce the income that would enable each to contribute his share of the team's income. Before the end of the year, plans would be made for the development of business over the next year. Agreements with suppliers might be made before the year end, but sometimes agreement was not reached until the spring. The financial performance of the team and of its individual members was based on a calendar year. Over the course of the year, new product developments would emerge and be pursued.

43. This suggests that the shelf life of the business planning information is likely to be a calendar year. This is the period of time over which the plans are to be carried out into effect and their success or failure measure.

44. A good example is the terms of the 2004 Trading Agreement. The claimant contends that the shelf life, whilst capable of varying, can undoubtedly last the length of the

Trading Agreement itself, which is typically a year. It is clear that the overrider and discount rate will not ordinarily change, although the price of the product to which they are applied may do so. Prices can change but there is evidence to demonstrate that, prior to 2003, there had been considerable price stability lasting for longer than one year. The documents to which I was referred show as much. I accept the claimant's contention that there is a striking contrast between the state of affairs revealed by the contemporaneous documents and the defendants' first witness statements which sought to pain a picture of ever-changing price changes in a volatile market. Thus, the shelf life of profit margins, for example, is, on the face of it, at least annual. So, if Brakes secured a margin of, say, 25 per cent on a particular range over the past year, that information will be useful to a trade rival which would be aware of the prices on the underlying commodity market.

45. Accordingly, I conclude that Brakes has established a legitimate interest in its supplier connections, staff stability and confidential information.

46. I turn now to consider the next issue, namely whether the covenants go no further than is necessary for the protection of those interests.

Staff stability

47. As I have already said, there was effectively no issue about this covenant. The defendants were prepared to give an undertaking not to entice any employees. In any event, in my judgment, the covenant is reasonable. It is limited to those employees with whom the buyers worked to any material extent. Thus, it covers only those employees whose capabilities and attributes are known to the ex-employee and only those over whom an ex-employee may have developed an influence. Likewise, it is

limited in time to a period of six months. This affords Brakes a reasonable opportunity for unsettled employees to recover their equilibrium.

Supplier Connection

48. Likewise, there is no real issue as to the defendants' obligation under the clause restraining an ex-employee from enticing away suppliers. In my judgment, it is clearly reasonable because it is limited to those suppliers with whom a buyer has had material dealings; the most intensive dealings between a buyer and a supplier will be for the purposes of negotiating a trading agreement; and despite the fact that typical trading agreements is for a period of one year, a period of six months does not necessarily allow the new buyer the chance to negotiate a renewal of the agreement. I accept the submission of Mr Stafford QC on behalf of the claimant that the covenant is reasonable in its duration.

Confidential Information

49. In my judgment, contrary to the submission of Mr Bloch, the area covenant does not go beyond what is reasonable in all the circumstances to protect Brakes' legitimate interest in protecting its confidential information. In my judgment, it is legitimate for Brakes to have done so by a clause which goes beyond a non-dealing clause. I have already referred to the relevant authorities which support the proposition that such a covenant may be reasonable. I should emphasise that it is clear from those authorities that a covenant to protect the use or disclosure of trade secrets (or confidential information akin to a trade secret) does not depend upon the employee taking documents or memorising the contents of documents. It can properly apply to confidential information akin to a trade secret which the employee may carry away in

his head. A good example of this is to be found in the case of Polly Lina Limited v. Finch [1995] FSR 751 in which a defence not dissimilar from that advanced by the current defendants was rejected by the court. The judge concluded that, on an objective test, it was reasonably to be expected that the employee was in a position to give significant information which could be commercially damaging to the ex-employers. The judge there also rejected the employee's offer of limited undertakings to comply with his obligations of confidentiality.

50. I conclude, on the evidence before me, that, viewed objectively, a buyer at Brakes could reasonably be expected to be in a position to give significant information to a trade rival which well could be commercially damaging to Brakes as described in Poly Lina Limited v. Finch (*supra*).

51. I also conclude that the evidence shows why, on the non-dealing clause alone, a mere confidentially clause would be insufficient and why an area covenant is indeed needed. As Mr Stafford submitted, if a buyer from Brakes were to tell his new employers what products Brakes were planning to launch, that would not involve dealing or soliciting with suppliers. If that buyer were to tell his new employer what lines Brakes were planning to promote heavily, that likewise would not involve dealing with suppliers. If a buyer from Brakes were to tell his new employer that a supplier in common had been willing to finance promotional activities that would not be a traceable breach of confidence. The employer might well, in the light of the information, adjust its negotiating stance and secure a more favourable trading agreement. That adjustment need not involve telling the supplier, merely knowledge that the supplier had already given such support in the past. As Mr Ungless himself said in evidence "there's always a tussle about lowering a price. Some [suppliers]

rolled over and you kicked yourself for not pressing them." As he accepted, the point emerging from this evidence was that ordinarily you never actually new how far a supplier would go. He accepted that this applied not only to re-negotiation. In the present example, a trade rival would know how far a supplier was prepared to go and that would be it on the back of a breach of confidence. One can trace this example through to a number of fact scenarios, namely whether a supplier would be prepared to enter a long-term agreement, whether it was wiling to pay a rebate, whether it was willing to pay, and had in the past paid, a lump sum and how much and so forth.

52. Moreover, because the trade rival indeed secured a better trading agreement on the back of a breach of confidence, that trade agreement necessarily would itself be subject to terms as to confidentiality. It was accepted by Mr Adams in evidence that there was no means by which Brakes could ever realistically hope to find out about the breach of its confidential information. Moreover, the risk of detection is reduced still further in an industry in which, as is accepted by the defendants, it is overwhelmingly likely that the supplier is already dealing with both Brakes and its trade rivals.

53. The next point is that, once the defendants have left to joint 3663, they will be required to show their allegiance to their new employer. In some respects, their evidence has been unsatisfactory in these proceedings, which has not led the court to have confidence that their obligations as to confidential information will be preserved. For example, the defendants have each been prepared to make and leave uncorrected wrong statements, in their written evidence. In particular, those have wrongly asserted that they would suffer extreme financial hardship if an injunction were to be granted. As I mentioned below, this is not in fact the position. Likewise, each

defendant gave evidence that sought to minimise or down-play their knowledge and involvement in the preparation of business planning information.

54. Brakes cannot control what tasks are allocated to the defendants by 3663. It will be impossible for Brakes to know what may or may not be occurring behind the scenes at their rivals. Necessarily, it will be impossible for Brakes to know what the defendants are saying or doing and whom they are meeting. The dynamics of working as part of a team with targets as such that a buyer in the new position of the defendants may well be subject to temptations or pressures to reveal what he knows. Yielding to persuasion from a new employer is not unknown, and indeed Mr Adams himself describes the economic vulnerability he felt when asked by Brakes to sign his contract with it. In my judgment, protecting non-compliance with confidentiality or other similar covenants will be almost impossible in the circumstances. It is perhaps of some relevance that Mr Ungless' new contract with 3663 includes an area covenant. It would appear that where a buyer with 3663 is given access to confidential information akin to a trade secret, 3663 does not regard a non-dealing covenant as sufficient protection for its legitimate interests.

55. In my judgment, the six month period of the restraint after the garden leave period is no greater than is reasonably necessary for the proper protection of Brakes' legitimate interest. The shelf life of the material plainly turns upon the annual business cycle and the way in which Brakes' buyers do their work. Even if taken together with the three month period of garden leave, it is clear that the period of restraint is no greater than is reasonably necessary for the purposes of protecting Brakes' legitimate interest.

56. In any event, the company is limited to trade rivals with a turnover of more than £30 million. This means that there are only three companies caught by the covenant. In reality, as the evidence shows, there are numerous other companies in the business and indeed retailers such as supermarkets would be more than willing to employ the defendants given their buying skills in the food industry. Accordingly, in my judgment, the area covenant is reasonable in all the circumstances and certainly is not too long as to its duration. It is worthy of note that both Mr Ungless and Mr Adams were required to provide services during their period of garden leave which involved further exposure to confidential information. Moreover the shelf life of the confidential information to which the defendants were privy is, in any event, at least nine months. Accordingly, in my judgment, the area covenant is a legitimate tool to protect Brakes' legitimate interest in the confidentiality of their confidential information.

Should the Court enforce the covenant?

57. The final issue is whether, notwithstanding the court's conclusion that the covenants are indeed enforceable, the court should, in the exercise of its discretion, grant an injunction in this case. The defendants submit that I should not do so in the exercise of my discretion, taking into account all the circumstances and in particular the undertaking offered by 3663.

58. I was referred to **Snell's Equity** (30th edition at paragraphs 45-15) where the following statement is set out:

> "Although the court has, in general, a discretion whether to grant or withhold an injunction, an order to restrain the breach of a negative covenant may be obtained almost as of right."

The authors then cite a dictum from Lord Cairns L-C in Doherty v Orman [1878] 3 AC 709 at page 720 as follows:

> "If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to say is, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties."

59. It has been suggested by the defendants that it is very unlikely that any damage will in fact be occasioned to Brakes if the injunction were not to be granted. In my judgment on the evidence there is indeed a risk that damage may be caused to Brakes by the deliberate or inadvertent contravention of the defendants' breach of confidentiality obligations. I take into account the fact that the defendants have spent time on garden leave in the exercise of my discretion. However, for the reasons that I have given above, this fact does not seem to me to be a reason as to why I should not grant an injunction. In Credit Suisse v Armstrong [1996] IRLR 450, the Court of Appeal made the following comments:

> "In the case of restrictive covenants it is the practice for the court to consider first whether the covenant, which has to be tested at the date when the contract of employment came into existence, is valid. If it is found to be valid and there is no other reason, such as the adequacy of the remedy in damages, to impede its enforcement it will be enforced according to its terms." (See per Neill LJ at paragraph 39).

And at paragraph 44, Neill LJ said:

> "I would therefore leave open the possibility that in an exceptional case where a long period of garden leave had already elapsed, perhaps substantially in excess of a year, without any curtailment by the court, the court would decline to grant any further protection based on a restrictive covenant. But that is not this case."

I agree with counsel for the claimant's submission that this case is not such a case either.

60. In any event, my discretion is affected by the fact that the proposition (as contended for in their witness statements) that the defendants will suffer hardship if the covenant is enforced is simply not true. From the end of April, or the beginning of May, Mr Adams has had an oral agreement with 3663 which means that he will be paid for the period that he is unable to work for 3663 because of these proceedings. Mr Ungless has a similar agreement, confirmed subsequently in writing. Both their costs will be met by 3663. There are at no risk as to costs themselves because 3663 has promised to pay any order in favour of Brakes. Their jobs, the court was told, would still be available for them after the expiry of the injunctions. As the cost letter shows, 3663 regards this case as important, and as a matter to be funded because it is in its interests to do so. It clearly has an interest in the outcome of this case and to have an interest in testing the validity of its trade rival's covenants. I do not consider that the undertakings which it has offered, which nonetheless involve Mr Adams and Mr Ungless working as buyers in effectively the same capacity as they were for Brakes, as sufficient protection for Brakes' legitimate interests.

61. Accordingly, in all these circumstances, I find for the claimants in these proceedings and propose to grant injunctions in the terms sought. The precise terms of the order will be for discussion.

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