Neutral Citation Number: [2020] EWHC 1933 (QB)

Case No: QB 2020 002046

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2020

Before :

MR JUSTICE MORRIS

- -

Between :

Create Financial Management LLP **Claimant**

- and –

(1) Roger Lee
and
(2) Karen Scott

Defendants

- -
- -

John Mehrzad QC (instructed by **Addleshaw Goddard**) for the **Claimant**
Gideon Roseman (instructed by **Flint Bishop**) for the **Defendants**

Hearing dates: 10 and 13 July 2020

- -

Approved Judgment

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

.....

MR JUSTICE MORRIS

Mr Justice Morris:

Introduction

1. This is an application for an interim injunction brought by Create Financial Management LLP ("the Claimant" or "CFM") against Mr Roger Lee ("Mr Lee") and Ms Karen Scott ("Ms Scott") (together "the Defendants") for an interim "springboard" injunction restraining the Defendants from soliciting, until an expedited trial, named clients and former clients of the Claimant. On 18 June 2020 the parties consented to an interim injunction ("the Consent Order") in order to hold the position until a further inter partes hearing. That hearing took place before me, concluding on Monday this week.

2. The Claimant seeks an order that until trial the Defendants "shall not directly or indirectly solicit clients that they should have handed over thoroughly to the [Claimant] by 30 April 2020 and/or they have not deleted those clients' contact details from personal social or professional networking accounts on 30 April 2020 including, but not limited to, those clients listed at Schedule 3".

3. Schedule 3 identifies 244 named clients. In the course of the hearing, the Claimant provided a colour-coded Schedule 3, identifying four categories into which those clients fall: clients not handed over; clients connected on social media after 30 April 2020; clients both not handed over and remaining connected on social media; and clients whose contacts were synced to Ms Scott's LinkedIn account on 6 March 2020. It is not clear whether it is alleged that clients in the last category remain connected on LinkedIn.

4. It is common ground that a trial can and will take place in early September and directions to that end will be made. On that basis, it can be anticipated that final judgment will be available by early October.

5. There is a substantial amount of material before the court, running to over 1000 pages. There are two witness statements from Mr Mark Thomas, the Claimant's managing director, a substantial witness statement from Ms Scott and a brief witness statement from Mr Lee. I have received over 45 pages of written submission from Mr Mehrzad QC and over 30 pages from Mr Roseman and heard vigorously contested oral submissions over two days.

Factual background

6. The Claimant is a firm of independent financial advisers, providing independent financial advice through 17 independent financial advisers ("IFAs") to private and corporate entity clients. Mark Thomas has been the Claimant's managing director since May 2018.

7. The Defendants are the former owners of the Claimant. They disposed of their interest in the Claimant pursuant to a transfer agreement dated 18 December 2017 ("the Transfer Agreement"). Thereafter, between December 2017 and 30 April this year, they were consultants to the Claimant pursuant initially to consultancy agreements dated 18 December 2017 ("the Consultancy Agreements") and, subsequently, to a settlement agreement dated 18 November 2019 ("the Settlement Agreement").

8. Under the terms of the Consultancy Agreements and then the Settlement Agreement, the Defendants were required to "hand over" to the Claimant the clients they had serviced when they had owned and operated the Claimant and at the end of the period to delete from their devices the Claimant's confidential information.

9. On 1 May 2020 the Defendants commenced a separate business under the name ScottLee Financial Planning ("ScottLee") and have sought to solicit the business of the clients of the Claimant. The Claimant contends that, in so doing, the Defendants are in breach of their obligation to hand over clients and delete contact details, that the Defendants have gained, and are gaining, an unlawful competitive advantage, or "head start", of at least 18 months. The Claimant seeks a final "springboard" injunction preventing the Defendants from soliciting these clients for period of at least 18 months from 1 May 2020. By this application, the Claimant seeks an interim springboard injunction in similar terms pending the expedited trial in September.

The Transfer Agreement

10. Pursuant to the Transfer Agreement made between the Claimant, Create Bidco 1 Limited ("Bidco") and the Defendants, the Defendants transferred their interest in the Claimant to Bidco (clause 2.1). By clauses 3 and 4, Bidco was to pay the Defendants consideration by way of three separate tranches on 17 December 2017, in December 2018 and on 29 November 2019 (the third tranche). The total consideration has amounted ultimately to approximately £10 million. (As explained below to date about £7 million of that consideration has been paid by Bidco. Further deferred consideration of £2.78 million and interest has not been paid).

11. By clause 15.1 ("the Restrictive Covenants"), for a period of 5 years from 18 December 2017, the Defendants would not directly or indirectly carry on, be otherwise engaged, concerned or interested in any capacity in any business which is or would be in competition with the Claimant nor solicit or deal with the Claimant's clients, staff and supplies. In particular, the Restrictive Covenants included non-solicitation obligations towards the clients. By clause 15.1(b) the Defendants agreed not to solicit or canvass any person who as at 18 December 2017 was a customer of or was otherwise doing business with the Claimant at any time during the preceding 12 months or was in the process of negotiating or contemplating doing business with the Claimant. By clause 15.1(e) they agreed not to induce or attempt to induce any customer to cease or refrain from conducting business with, or to reduce the amount of business conducted with, the Claimant. By clause 16.2 the Defendants were not to use confidential information for their own purposes.

The Consultancy Agreements

12. On the same date as entering into the Transfer Agreement, each Defendant (referred to as "the Consultant") entered into a consultancy agreement with the Claimant (referred to as "the Client") in materially the same terms. The Consultancy Agreements were initially for a period of two years until 17 December 2019, but, as a result of the Settlement Agreement (below) were extended until 30 April 2020.

13. The Consultancy Agreements provided, inter alia, as follows

> " *1.1* ***Definitions***

…

Confidential Information*: information in whatever form (including without limitation, in written, oral, visual or electronic form or on any magnetic or optical disk or memory and where ever located) relating to the business, customers, products, affairs and finances of the Client for the time being confidential to the Client and trade secrets including, without limitation, technical data and know-how relating to the Business of the Client or any of its suppliers, customers, agents, distributors, shareholders, management or business contacts, and including (but not limited to) information that the Consultant creates, develops, receives or obtains in connection with his Engagement, whether or not such information (if in anything other than oral form) is marked confidential.*

Services: *the services provided by the Consultant in a consultancy capacity for the Client as more particularly described in the Schedule 1*

…"

Schedule 1 identified "Services" as follows

"…

- <u>Handover of existing client books</u>

- Handover of all task related to the efficient and successful operation of the Business of the Client" (emphasis added)

14. The Consultancy Agreement further provided, inter alia, as follows

"2.1 The Client shall engage the Consultant and the Consultant shall provide the Services on the terms of this agreement

3 DUTIES AND OBLIGATIONS

…

3.4 During the Engagement, the Consultant shall:

…

(b) provide the Services with all due care, skill and ability and use his best endeavours to promote the interests of the Client;

…

(d) promptly give to the Board all such information and reports as it may reasonably require in connection with matters relating to the provision of the Services or the Business of the Client

…

(g) immediately report to the Board upon becoming aware of any circumstances which could impact on the Consultant's fitness and propriety, or that of any other director, employee or consultant of the Client, and also report the Consultant's own wrongdoing and any wrongdoing or proposed wrongdoing of any other employee, director or consultant the Client;

…

6. OTHER ACTIVITIES

Nothing in this agreement shall prevent the Consultant from being engaged, concerned or having any financial interest… in any other business, trade, profession or occupation during the Engagement provided that:

…

(b) the Consultant shall not engage in any such activity if it relates to a business which is similar to or in any way competitive with the Business of the Client without the prior written consent of the Board; and

(c) the Consultant shall give priority to the provision of the Services to the Client over any other business activities undertaken by the Consultant during the course of the Engagement.

7 CONFIDENTIAL INFORMATION

…

7.2 the Consultant shall not… either during the Engagement or at any time after the Termination Date, use or disclose to any third party… any Confidential Information.……

12. OBLIGATIONS

On the Termination Date the Consultant shall:

> *(a) immediately deliver to the Client all Client Property and original Confidential Information in his possession or under his control;*
>
> *(b) irretrievably delete any information relating to the Business of the Client stored on any magnetic or optical disk or memory and all matter derived from such sources which is in his possession or under his control outside the premises of the Client. For the avoidance of doubt, the contact details of business contacts made during the Engagement are regarded as Confidential Information, and as such, must be deleted from personal social or professional networking accounts;*
>
> (c) *provide a signed statement that he has complied fully with his obligations under this Clause 12, together with such evidence of compliance as the Client may reasonably request."* *(emphasis added)*

15. Clause 13 contained further restrictive covenants precluding preventing the Defendants from engaging in conduct competitive with the Claimant for a period of 6 months after the Termination Date.

Events between December 2017 and the Settlement Agreement

16. In mid-June 2018, concerns were raised about the speed with which the Defendants were handing over clients. On 10 July 2018 Mr Thomas emailed Joe Cormack, a CFM IFA who was training, noting that he was to "chase Roger & Karen for handover plan". A few moments later Mr Thomas wrote to the Defendants, concerning Joe's training in the following terms:

> *"A big part of this is the handover of your clients to him, which we've spoken about previously. Can you please confirm what the overall plan is regarding this. I'm aware that some clients are being handed over on an ad hoc basis as and when review are due, but we've talked about a more global approach based on geography and complexity of need"*

17. Board minutes of July, September and October 2018 of LTV UK Holdings and of the Claimant recorded the slow progress in relation to handover. It was also noted that the Claimant needed to find a couple of IFAs to drive the handover plan. In an email dated 30 January 2019 to the Defendants Mr Thomas proposed a weekly scorecard to show progress of key areas of client handover. Ms Scott emailed Mr Lee indicating that she was not happy with the idea. There was no reference in any of these exchanges to the need for a three-way face-to-face meeting as part of handover.

18. By July 2019 the parties were in dispute about matters arising from the Transfer Agreement and Consultancy Agreements. Bidco had failed to pay part of the second tranche of the deferred consideration. In turn Bidco raised a concern about an issue relating to "Advisor Contacts". At that stage, the Claimants did not raise a complaint about the Defendants' obligations under the Consultancy Agreements relating to

handover of clients and this did not form part of the issues settled by the Settlement Agreement.

The Settlement Agreement

19. On 18 November 2019 the Defendants, Bidco and the Claimant entered into the Settlement Agreement. Under clause 2.1 the Bidco was to pay £200,000 on 18 November 2019 and to use reasonable endeavours to pay remaining outstanding sums ("the Second Payment") by 31 December 2019. Clause 2.1 continued as follows (with parties identified):

> *"**2 Full and Final Settlement***
>
> *2.1 Pursuant to the terms of this Agreement*
>
> *…*
>
> *(c) if [Bidco] has not made the Second Payment in full by 31 December 2019 then interest shall accrue on any unpaid amount from 1 January 2020 at the rate of 6% per annum;*
>
> *(d) if the [Bidco] fails to pay the full balance of the Second Payment by [30 April 2020] the [Defendants] shall be immediately released from the restrictive covenants contained at clause 15 of the [Transfer] Agreement;*
>
> *(e) the [Defendants] shall continue to provide services pursuant to the Consultancy Agreements until 30 April 2020;*
>
> *(f) from 1 January 2020 to 30 April 2020, each of the [Defendants] shall be paid a consultancy fee of £6000 per calendar month for their services under the Consultancy Agreements on the first working day of each month;*
>
> *(g) the [Defendants] shall be released from the restrictive covenants set out at clause 13 of the Consultancy Agreements on 1 May 2020;*
>
> *(h) the [Defendants] shall provide the [Claimant] with all information related to all clients, prospective clients, suppliers and prospective suppliers and shall ensure a thorough handover of current clients (including the Mike Williams clients) and suppliers to an [Claimant] adviser and Mark Thomas of the [Claimant] as soon as possible and by no later than 30 April 2020;*
>
> *(emphasis added)*
>
> *…"*

For present purposes, the content of clause 2.1 (h) is at the heart of the dispute between the parties.

20. Clause 2.2 provided that the Settlement Agreement was in full and final settlement of all relevant claims. However such claims did not include any claim of prior breach of the handover obligation in the Consultancy Agreement.

Events from November 2019 onwards

21. Payment of the Second Payment was not made by 30 April 2020. As a result by clause 2.1 (d) of the Settlement Agreement the Defendants were released from the Restrictive Covenants in the Transfer Agreement. On 1 May 2020 the Defendants commenced a competing business as financial advisers and incorporated ScottLee Financial Planning LLP.

22. On the same day, Mr Thomas sent an email to CFM's staff pointing out that the Defendants' contract with the Claimant had now expired and noting that the Defendants had been extremely busy with handing over clients and thanking them for that and for building the business skilfully and carefully over many years. WhatsApp exchanges between Mr Thomas and the Defendants on that afternoon suggest that, as far as Mr Thomas was concerned, the Claimant, was still assessing if all requirement had been met; Mr Lee did not agree with that.

23. In the days that followed and up to about 14 May 2020, the Defendants took steps to obtain authorisation by the FCA through Tenet. They contacted IFAs and other staff of the Claimant asking whether they were interested in working for the Defendants' new business. Three members of Claimant staff resigned on the basis that they were going to work for the Defendants. Mr Lee engaged in discussions via his LinkedIn with a number of clients of the Claimants. Miss Scott also contacted clients of the Claimants and offered a CFM IFA a role in the new business. A number of clients of the Claimant have now informed the Claimant that they plan to move their business to the Defendants.

The Claimant's case for final springboard relief

24. In summary, the Claimant contends, before me, as follows:

    (1) The Defendants, in breach of their obligations under clause is 2.1 and 3.4(b) and (d) of the Consultancy Agreements and under clause 2.1(h) of the Settlement Agreements, have failed to hand over, thoroughly or at all, a substantial number of clients to the Claimant.

    (2) The Defendants, in breach of their obligations under clause 12 (b) of the Consultancy Agreements, have failed to delete the contact details of clients (on their own personal LinkedIn and Facebook accounts).

    (3) The Defendants, in breach of their obligations in clause 3.4 (b) of and 6 (b) and (c) of the Consultancy Agreements, shortly after the Settlement Agreement was concluded in November 2019 and prior to 1 May 2020, engaged in preparatory acts for the purpose of setting up their competitive business.

(4) As a result of the unlawful acts identified in (1) and (2), the Defendants have obtained a "head start" and an unfair competitive advantage. Had they complied with their obligations in relation to handover and deletion of contacts, their business activities (and in particular successful solicitation of clients of the Claimants) would have been delayed by at least 18 months from 1 May 2020.

As clarified in oral argument, the Claimant does not contend that the alleged breaches arising from preparatory acts give rise to the unlawful competitive advantage asserted.

25. The Claimant's case is summarised by Mr Mehrzad QC in his skeleton argument in the following terms:

> "… Shortly after the Settlement Agreement was concluded the [Defendants] set about setting up a competing business and taking steps to divert clients that they were contractually obliged to hand over to CFM. Further, instead of deleting client contacts, the [Defendants] had been copying client contact details and then actively communicating with them in order to solicit them for their competitive business. In short, the [Defendants] have sought to divert away from CFM the very clients they were obliged to hand over thoroughly to CFM in the first place and, indeed, had been paid millions of pounds to do so."

I address first, the alleged breaches of contract and, secondly, the alleged unlawful advantage arising therefrom.

(1) Breaches of contract

Failure to hand over clients

26. Breach by failure to hand over is set out at paragraphs 28 and 29 of the Particulars of Claim. Although not fully easy to understand, the essential allegations appear to be as follows:

(1) The obligation to conduct a "thorough" handover contained in clause 2.1(h) of the Settlement Agreement required, as a matter of construction, the Defendants to attend a three-way face-to-face meeting with the client and an adviser of the Claimant. That obligation arose from "the matrix of background facts known to the parties at the time of entering into the Settlement Agreement that face-to-face three-way client handover meetings had taken place". Following the Transfer Agreement in December 2017, the Defendants had attended such three-way meetings. "As a matter of practice", that was the process put in place by the Claimant and the Defendants. The Claimant relies further upon the reference in clause 2.1(h) to handover being made to a CFM advisor and Mark Thomas.

(2) It appears to be alleged (although not clearly pleaded) that the prior obligation to "hand over the existing client book" contained in the Consultancy Agreements also required a "thorough" handover, and thus, three-way face-to-face meetings.

(3) The Defendants ceased to hand over clients in that thorough manner or at all. The date from which they are alleged to have so ceased is "from shortly after the dispute arose which led to the Settlement Agreement". (The reference to breach dating back to September 2017 appears to be a slip for September 2019). (See paragraphs 29.2 and 29.3).

(4) The Defendants have failed to hand over thoroughly, or at all, at least 100 clients to the Claimant as set out in Annex 5 to the Particulars of Claim (paragraph 29.5).

Preparatory steps to set up competing business

27. The second main breach pleaded is breach by taking preparatory steps. The allegation is made at paragraph 30 as follows:

> "The Defendants, without reporting the same to the CFM Board, began to take active steps to compete with, or prepared to compete with CFM, from around the Settlement Agreement dated 18 November 2019 and prior to the end of their consultancies with CFM in breach of clauses 3.4 (b) and/or 3.4 (g) and/or 6 (b) and/or 7.2 of the Consultancy Agreements and/or clause 15.1 (h) of the Transfer Agreement."

28. Particulars of this allegation are then set out in some considerable detail in multiple sub-paragraphs of paragraph 31 The "preparatory acts" relied upon include the following:

(1) The Defendant incorporated a company by the name of "ScottLee Financial Planning Ltd".

(2) On 9 January 2020, Ms Scott forwarded documents to a personal email account setting out commission rates for, and fees and incomes earned by CFM IFAs.

(3) On 6 March 2019 Ms Scott synced her CFM contacts with her personal professional networking account on LinkedIn, meaning that she was able to connect, and, it is reasonably inferred, that then did connect, with some or all of her CFM clients via LinkedIn.

(4) On 26 March 2020, Ms Scott forwarded further Confidential Information to her personal email account, by way of a list of contact details for all CFM staff and IFAs.

(5) From late March 2020 the Defendants took further active steps in preparation for their new business, including: discussing between themselves obtaining office space, and taking steps with a view to applying to Tenet and to Sense, both FCA regulated networks, in order to pursue authorisation with the FCA; purporting to hand over clients but leaving her personal mobile phone number on the letters; Mr Lee forwarding to his personal email address Confidential Information relating to 13 CFM clients with details of their investment in Aviva; on 30 April 2020 contacting further CFM clients about their intentions for their new competitor business.

29. At this stage of the pleading, there is no allegation of breach of clause 12 (b) of the Consultancy Agreements concerning failure to delete contact details.

(2) The unlawful advantage

30. Paragraph 32 of the Particulars of Claim then pleads the consequences of the breaches pleaded in paragraphs 28 to 31 alleging the taking of advantage of a head start in the following terms:

> "Immediately following the end of their consultancies on 30 April 2020, the Defendants took advantage of their head start again as a result of the above unlawful breaches of contract to compete with the CFM by taking inter alia the following steps…"

31. Sub-paragraphs 31.1 to 31.12 then set out a number of post-30 April 2020 actions as summarised in paragraph 23 above. At paragraphs 32.8, 32.10 and 32.12, it is alleged that since 1 May 2020 both Defendants have contacted CFM clients and/or remain connected via social media account with CFM clients. In each sub-paragraph, it is alleged (in somewhat varying terms) that the Defendant in question had remained connected with those clients after 30 April 2020 and was thereby in breach of the contractual obligation to "delete the contact details of CFM clients on [his] social media and professional networking accounts pursuant to clause 12 (b) of the Consultancy Agreements"

32. Then under the separate heading "E. RELIEF", the Particulars of Claim continue as follows:

"**Final springboard injunction**

36. By reason of the foregoing, it is averred that:

36.1 the Defendants have breached their contractual duties as particulars under Section D above.

36.2 By doing so, the Defendants enjoy, and continue to enjoy, an unlawful advantage for the benefit of their competitor business.

36.3 CFM is entitled to be restored to the position but for the Defendant's contractual breaches.

36.4 A monetary award would not suffice for CFM. CFM's losses are yet to crystallise and it may be impossible to compensate it in financial terms for the loss of clients.

36.5 The duration of clients-connections for CFM are several years, if not for a lifetime.

37. CFM reserves the right to particularise the precise nature and period of the competitive advantage for the purpose of final injunctive relief prior to an expedited trial."

The case set out in Mr Mehrzad's skeleton argument mirrors the pleaded case.

Mr Thomas's evidence

33. In his witness statements, Mr Thomas gives evidence concerning the agreements, the alleged breaches and the unlawful advantage.

The contractual obligations and breach

34. Mr Thomas explains (at paragraph 28) that the purpose of the Consultancy Agreements was to ensure a smooth transition of the business from the Defendants to the Claimant by, most importantly, undertaking a thorough handover of the hundreds of clients in the Defendants' client books to CFM IFAs who would be responsible for those clients going forward, for the foreseeable future, following the Defendant's departure, "particularly given that ordinarily, CFM clients would engage CFM on a long-term, or even for life basis". He describes this as a central purpose of those Agreements: "ensuring that the [Defendants] handed over their clients to CFM, having been paid millions of pounds for their business". He describes the background to, and completion of, the Settlement Agreement. At paragraphs 48 and 49, he again describes the obligation for a "thorough handover" together with the obligation not to compete whilst consultants as a key and express part of the transaction, continuing:

> *"In order for CFM to have any value… the [Defendants] had to hand over their clients thoroughly before the end of their consultancies and in line with their duty to promote the best interests of CFM, do what was needed to ensure that the clients stayed with CFM once they had left the business.…*
>
> *Whilst... there was potential for the restrictive covenants in the Transfer Agreement to fall away in the event of non-payment… CFM should still have been protected. The clients should have been handed over thoroughly and in a way which was in CFM's best interests (i.e. the [Defendants] would not have told the clients or indicated to them that they would be competing with CFM in due course) and then, from the clients' perspective, the Defendants would have disappeared off the face of the earth when the Consultancy Agreement ended and the clients would have had no way to contact them or vice versa."*

These paragraphs are subsequently relied upon as evidence of the nature of the competitive advantage gained by the Defendants.

35. At paragraph 58 Mr Thomas identifies 122 clients who were either not handed over thoroughly and/or at all and/or have had discussions with the Defendants and subsequently decided to leave CFM and/or are connected with the Defendants on Facebook or LinkedIn. He further explains that Ms Scott has synced all of her contacts with her personal LinkedIn account. He then refers to the schedule to the draft order listing 241 CFM clients.

The head start

36. In a lengthy section to his first witness statement, under the heading "Respondents' Head Start", Mr Thomas sets out a substantial number of factual matters over 70 paragraphs running to 13 pages. These factual matters expand upon the pleaded facts relating to the Defendants' conduct, both during the period of the consultancy up to 30 April 2020 and in the period from 1 May 2020 onwards. In particular, he states that initially there would be a three-way face-to-face meeting with the client, one of the Defendants, and the new CFM adviser. He adds that such meetings "were crucial to allow the client the opportunity to meet its new CFM adviser and to develop rapport".

37. However by September 2019, CFM was concerned that a significant number of clients had not been handed over. Subsequently he had found out that, instead of deleting contacts, the Defendant had been copying contact details and actively communicating with CFM clients. At paragraph 118 he sets out in a little more detail, the allegations that the Defendants have continued to target CFM IFAs and clients following 1 May 2020.

38. Despite being entitled "Head Start", there is no further explanation of the nature and length of the head start said to have been derived from the failure to hand over and the failure to delete contacts.

39. However, at paragraphs 7 to 13 of his second witness statement witness Mr Thomas expands upon the Claimant's case of the nature and length of the head start. He refers to his earlier evidence and to the fact in the letter before action the undertakings sought were for a period of 18 months. He continues as follows:

> "*9. In reality 18 months is a conservative view of the head start that the [Defendants] have obtained. I understand the length of any final springboard injunction will be a matter for evidence and submission at trial, but, as so advised, CFM may seek an injunction lasting several years.*
>
> *10. As I explained at paragraph 48 and 49 of my first witness statement, this is because of the close and long term relationship between an advisor and a client which in turn meant that it was critical for clients to be handed over thoroughly by the [Defendants].*"

Then he sets out the nub of the alleged head start in the following terms:

> "*11. By failing to handover clients as contractually required, those clients were ripe for picking by the [Defendants] as soon as their consultancies ended with CFM 30 April 2020. In comparison with the position of the [Defendants] would have been in had they not committed the unlawful acts, but had instead thoroughly handed over those clients to CFM in line with their contractual obligations, I am confident in saying that it would have taken the [Defendants] is at least 18 months, if not several years, to have diverted them from CFM to their new business. Instead the clients which*

> *had not been handed over started to leave CFM immediately to join the [Defendants'] new competitive business. That would not be happening had the [Defendants] complied with their obligations to handover clients thoroughly and delete contact details (again as explained at paragraph 48 and 49 of my first witness statement). It should be evident that unless restrained pending a speedy trial (which I see Ms Scott does not oppose) that unfair competitive advantage will continue to have effect."*

The Proceedings to Date

40. On 15 June 2020 the Claimant issued and served the claim form together with Particulars of Claim and an application notice seeking an interim springboard injunction with a return date of 19 June 2020.

The Consent Order

41. On 18 June 2020 a consent order ("the Consent Order") was made by Stewart J and sealed, restraining the Defendants, until further order, from soliciting clients in similar terms to the order now sought. On the face of the Consent Order was a penal notice pointing out, inter-alia, "any other person who knows of this order and does anything which helps or permit the Respondent or any of them to breach the terms of this order may also be held to be in contempt of court and may be imprisoned, fined or have their assets seized." The Consent Order went on to provide directions for the service of further evidence and for the application "to be relisted to be heard on 10 July 2020 with a time estimate of 1 day".

42. In fact prior to the making of the consent order by Stewart J, the parties had submitted to the court a signed consent order ("the Signed Order"). The Signed Order differed from the Consent Order in that it provided that the application was "to be relisted on an expedited basis in the window commencing 30 June to 10 July 2020 and in any event no later than 10 July 2020". On 26 June 2020, by email to Stewart J, the Defendants sought to have the Consent Order amended under the slip rule to reflect accurately what the parties had agreed in relation to a hearing window. The Claimant did not agree to that amendment. In an email received by the parties on 30 June 2020, Stewart J explained what had happened and gave the Defendants the opportunity to make an application to amend the order and to seek a hearing date earlier than 10 July 2020. The Defendants did not make such an application and the hearing proceeded before me commencing last Friday. The Defendants rely upon the Claimant's conduct in relation to the changed wording found in the Consent Order in support of their contention that relief should be refused on grounds of absence of "clean hands". (See paragraph 108 et seq. below)

Notification of the Consent Order to third parties including Old Mutual Wealth

43. In the meantime on 19 June 2020, Addleshaw wrote both to the Defendants and to a number of third parties, including a number of financial providers, giving notice of the terms of the injunction in the Consent Order.

44. On 19 June 2020 Addleshaw wrote to Flint Bishop asking the latter to confirm by return that "your clients have not been and will not be, directly or indirectly, in contact with any of the clients listed at Schedule 1 of the Injunction… about the transfer of their business from CFM on or after 18 June 2020". Flint Bishop replied on 22 June 2020 that by that letter Addleshaw appeared to be asking them to agree that a non-solicitation injunction had become a non-dealing injunction, and pointing out that their clients had agreed to a temporary non-solicitation injunction pending a hearing of the application.

45. As regards third parties, Addleshaw's letter of 19 June 2020 to Old Mutual Wealth stated, inter-alia, as follows:

> *"…*
>
> *We enclose an injunction order made by Mr Justice Stewart on 18 June 2020 (the Injunction). Pursuant to paragraph 1 of the Injunction the Respondents are prevented from directly or indirectly soliciting certain clients from Create including (but not limited to) 244 named clients listed at Schedule 1 to the injunction.*
>
> *Create considers that for all intents and purposes, pursuant to the terms of the Injunction the Respondents (and by extension ScottLee Financial Planning LLP) are unable to solicit any clients of Create."*

The letter then set out the terms of the penal notice as set out above and continued:

> *"You must not facilitate a breach of the Injunction including by authorising or processing any transfer of assets under management of Create to ScottLee Financial Planning LLP that relate to clients that have been directly or indirectly solicited by the Respondents."*

The letter concluded by instructing Old Mutual Wealth to contact Addleshaw if they were or became aware of a CFM client having been solicited directly or indirectly by the Defendants or if they had received or did receive a request to transfer management of assets from CFM to ScottLee.

46. The Defendants complain that, by this and letters to other third parties, the Claimant has sought to misrepresent the nature and extent of the injunction and to place themselves in the position they would have been if they had obtained a wider non-contact/non-dealing injunction. The Defendants rely upon this conduct too in support of their case on "clean hands" (see paragraph 112 below).

47. Moreover a dispute has arisen as to what Old Mutual Wealth is, and is not, permitted to do in the face of the injunction. Womble Bond Dickinson, solicitors for Quilter plc ("Quilter") have written to the Court by letter dated 9 July 2020 seeking directions and putting forward three alternative wordings for an amendment to the injunction to clarify the position (see paragraphs 114 and 115 below).

Communications between the Claimant and clients following the Consent Order

48. On 22 June 2020 a CFA client, Mr Morley sent an email to Paul Morton a CFM IFA informing him that he had decided to transfer the management of his portfolio to Ms Scott's new business. The email continued:

> "*This decision is in no way a reflection of the service that you have provided over the past couple of years and I would like to thank you for all that you done in that time. This is more concerned with the long association I have had with Karen as a financial adviser from the beginning of my investment history"*

On 3 July Mr Morton wrote to Mr Morley informing him of the injunction and purporting to explain the effect of the injunction being that the Defendants from 18 June 2020 "cannot be, directly or indirectly, in contact with clients of CFM requesting the transfer of their business" As a result the Claimant could not arrange a transfer of the agency to ScottLee without it first checking that there has not been a breach of the injunction.

49. On or around the same date, emails in similar terms were sent by Mr Morton and Mr Bolton (another CFM IFA) to other CFM clients (Mr Harrison and Mr and Mrs Smith) who had indicated that they were wishing to transfer their business to the Defendants.

The relevant legal principles

Springboard Injunctions

50. A "springboard" injunction is an injunction restraining a defendant from conduct which would otherwise constitute the benefit of a competitive advantage obtained by the defendant's unlawful conduct (such as breach of confidence, or breach of contract).

51. The relevant principles for the grant of a *final* springboard injunction are summarised in the judgment of Haddon-Cave J (as he then was) in *QBE Management Services (UK) Ltd v Dymoke* [2012] IRLR 458 (QB) at §§240-247 and 284-285. I take full account of each of 13 identified principles and of his further judgment [2012] EWHC 116 (QB) §8. For present purposes, key points from his judgments are as follows:

(1) Springboard relief can be granted in relation to breaches of contractual and fiduciary duties, as well as breach of confidence.

(2) The aim is to restore the parties to the competitive position they would be in but for the defendant's unlawful conduct.

(3) Relief is not intended to punish the defendant for wrongdoing.

(4) The burden is on the claimant "to spell out the precise nature and period of competitive advantage. Ephemeral and short term advantage is not sufficient."

(5) In assessing length of springboard, the question is how much of a march the defendant has stolen as a result of its wrong doing.

(6) The measure for the length is the length of time it would have taken the wrongdoer to achieve lawfully what he in fact achieved unlawfully, relative to the victim.

(7) It is relevant to look at the period of time over which the unlawful activities have in fact taken place.

Interim injunctions: the *American Cyanamid* principles

52. As regards the approach to the grant of interim injunctions, the *American Cyanamid* principles are familiar. In this regards I refer to *Gee on Commercial Injunctions* (6th edn) §§2-015 to 2-018. The following four questions fall to be considered:

(1) Serious issue to be tried: Has the claimant shown a serious issue to be tried on whether he is entitled to an injunction? If not, no injunction will be granted.

(2) Damages as an adequate remedy for the claimant. If no interim injunction is granted, but at trial his claim for an injunction were to be established, would damages be an adequate remedy for the claimant. If so, no injunction should be granted, however strong the claimant's case is. (Adequacy of damages as a remedy has two facets: whether the loss can be quantified and calculated; and whether the defendant has the financial ability to meet any such award).

(3) Damages as an adequate remedy for the defendant. If damages would not be an adequate remedy for the claimant, but damages would be an adequate remedy for the defendant under the claimant's cross-undertaking (in the event that an interim injunction was wrongly granted), then there would be no reason to refuse the interim injunction. (Again, adequacy of damages has two facets: whether quantifiable and financial ability to pay).

(4) Balance of convenience: If however there is doubt as to the adequacy of damages for both parties, the court considers the balance of convenience or rather the balance of justice: which course of action (granting or refusing injunctive relief) is likely to involve the least risk of injustice if it turns out that the course taken is wrong – see *Films Rover v Cannon* [1987] 1 WLR 670 per Hoffman J at 680. Factors to take into account include: the relative extent to which there is doubt as to whether damages would be an adequate remedy for either party; the status quo, and in some cases, the strength of the parties' underlying cases.

Sometimes the term "balance of convenience" is used to describe all of stages (2) to (4).

53. Two further matters are relevant to the present case.

(1) In relation to stage (1), as to the content of the standard of a "serious issue to be tried", the claimant will succeed, unless he is unable to show, by the evidence, that he has "any real prospect of succeeding in his claim for a permanent injunction at trial": see *American Cyanamid* at 408A-B. In my judgment, this is similar to the standard for summary judgment; thus unless the claimant's prospects of success are no better than "fanciful", there will be a "serious issue" to be tried. (Somewhat confusingly, the phrase "frivolous or vexatious" is sometimes used (by Lord Diplock at 407G and in other cases)).

(2) It has long been recognised that where an interim injunction will give the claimant all or substantially all of the relief sought by way of final injunction (because by the time of trial the period of any final injunction will have expired), there must be some assessment of the claimant's prospects of success at the final trial: see *NWL Ltd v Woods* [1979] 1 WLR 1294 at 1306-1308 and *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251. In such circumstances, it is not enough for the claimant to show a serious issue to be tried. In *Lansing Linde Ltd v Kerr,* Staughton LJ explained the position as follows (at 258B)

> *"…if it will not be possible to hold a trial before the period for which the plaintiff claims to be entitled to an injunction has expired, or substantially expired, it seems to me that justice requires some consideration as to whether the claimant would be likely to succeed at a trial. In those circumstances it is not enough to decide that there is a serious issue to be tried. …. On a wider view of the balance of convenience it may still be right to impose such a restraint, but not unless there has been some assessment of the plaintiff's prospects of success. I would emphasise "some assessment", because the courts constantly seek to discourage prolonged interlocutory battles on affidavit evidence"*

54. This assessment of the merits is part of the balance of convenience at stage (4): see *Lansing Linde* per Beldam LJ at 266 A-C (citing *NWL v Woods*) and at 266 F-G; and *MPT Group v Peel*, below at §104.

Interim springboard injunctions

55. The application of these principles in the case of an interim *springboard* injunction is not straightforward. I have been referred to two particular cases: the decision of Mr Edward Pepperall QC (as he then was) in *MPT Group v Peel* [2017] EWHC 1222 (Ch) and the recent decision of the Court of Appeal in *Forse v Secarma Ltd* [2019] EWCA Civ 215. In both cases, the court applied the "*Lansing Linde"* approach to an application for an interim springboard injunction.

56. In *MPT Group v Peel*, Mr Pepperall stated as follows at §22:

> *"In covenant cases, the length of the potential final injunction is of course certain. Springboard cases are, however, different. It cannot be right that I should take the likely length of any springboard advantage as 12 months simply because such period is asserted by MPT. Miss Pennifer is right to submit that I first need to form some view upon the evidence as to the likely length of any final springboard injunction and then as to the likely date when judgment might be handed down after a speedy trial"* (*Emphasis added*)

The judge then went on to make an assessment, as a preliminary question, and in order to decide whether the *Lansing Linde* approach was to be applied at all, of the likely

length of any springboard injunction (in comparison with likely date of final judgment). He concluded that the final injunction would last, at most, until December 2017 and that judgment would likely be handed down in October 2017. It would not be possible to have a trial until any springboard advantage was likely to have expired or substantially expired: see §§31, 34 and 35. For this reason, he proceeded to a *Lansing Linde* examination of the merits, and in particular of the alleged unlawful conduct said to give rise to the competitive advantage. He declined relief at the fourth stage, because the claimant was not likely to establish a sufficient breach of confidence to justify a springboard injunction at trial: see §§104-105.

57. In *Forse* Sir Terence Etherton MR (§§28-31) first summarised the *American Cyanamid* principles and then referred to *NWL v Woods* and *Lansing Linde* (referring to the passage set out in paragraph 53(2) above). Then, turning to interim *springboard* relief, he stated at §34 as follows:

> *" It follows that an interim springboard injunction effectively delivers to the claimant, in advance of the trial, all or part of the substantive relief which the claimant seeks. At the same time, it operates in restraint of the defendant's freedom to trade or carry on business or to deploy their skills. Such an injunction may also have consequences for the defendant as regards third parties, whether employees or others, if the defendant is precluded from continuing to honour commitments to such third parties. For those reasons, **save only where the time gap between the application for interim relief and the trial is insignificant**, the court should adopt the approach in Lansing Linde on applications for an interim springboard injunction. The judge should assess and take into account the strength of each side's case both as regards liability and also the length of time during which any unfair advantage from the springboard will continue. In carrying out that exercise, the judge cannot conduct a detailed mini trial on disputed evidence. He or she must, however, undertake a fair and reasonable evaluation of the evidence bearing in mind that there will have been no disclosure, and the witness evidence will be incomplete and untested by cross-examination. I will return to this issue in the context of the assessment of whether the period of unfair advantage would be likely to have expired before the trial has been completed*." *(emphasis added)*

58. Subsequently, when considering the scope and duration of the springboard injunction in that case, he added at §59:

> "*Since a springboard injunction should never last longer than is reasonable to remove the unfair advantage secured by the defendant, a judge granting an interim injunction must always do their best to estimate what is the length of the reasonable period. If it is shorter than the period before the trial will commence (the date of which should always be ascertained), they should specify the period and relief will be limited accordingly. If it is at least as long as the period prior to*

> *commencement of the trial, it will not normally be necessary to say more than that. In any case, the judge must always state the grounds for their conclusion. They should avoid being too prescriptive because the evidence will be incomplete and untested at the interim stage and, as the present case shows, it may prove to be incorrect and even knowingly false."*

At §63 he said:

> *"Ms Frost's evidence was that pen testers are highly skilled and relatively rare in the market, and it is not easy to recruit to replace departing testers. She said that it is even harder to recruit where there is a new competitor in the market seeking to take over Secarma's business. In view of those difficulties, the time it took the defendants to plan and execute the recruitment of Secarma's employees would have been a reasonable starting point for assessing how long it would take to remove the unfair competitive advantage obtained by Xcina. Furthermore, the Judge would have been entitled and right to take into account that the defendants' evidence on this aspect is incomplete and untested and possibly, as indeed it transpired, inaccurate. That is why it would have been wrong for the Judge to have been too prescriptive about the likely time that it would take to remove Xcina's competitive advantage but, on the other hand, perfectly legitimate to conclude that it was likely to be not less than the period of some four to five months prior to the trial*."

(*emphasis added)*

Analysis of the principles

59. First, the *Lansing Linde* approach applies, in principle, to an application for an interim springboard injunction. However, as pointed out by Mr Pepperall QC in *MPT* there is the difference that, whilst in a post-termination restrictive covenant case, the length of the injunction sought is determined by the terms of the covenant itself, in the case of a springboard injunction that period of time is at large and itself a matter for the court to determine and is not known at the time of the application for interim relief.

60. Secondly, if the time gap between the application for interim relief and the trial/final judgment is insignificant, the *American Cyanamid* approach to the merits of the claimant's case is to be applied. On the other hand, if the time gap is significant, the *Lansing Linde* approach should be adopted for an interim springboard injunction: *Forse* at §34. The significance of the time gap is thus a "threshold question". As to how the court is to assess the significance or otherwise of the time gap, in my judgment this is to be judged by reference to the length of the final springboard injunction (the advantage). So that if the final injunctive relief is a period of, say, 12 months, a gap of 3 months to trial would be insignificant; whereas if the final relief is a period of 6 months, a gap of 5 months to trial would be significant.

61. Thirdly, it follows that the steps to be taken in the analysis strictly turn on whether the significance or otherwise of the gap between breach and final judgment is to be assessed

by reference to (a) the length of period of the final injunction *sought by the Claimant* (as suggested by *Lansing Linde* itself and *NWL v Woods***)** or (b) *the Court's view* of the likely length of that period (as per *MPT* at §22). This is not an easy question.

62. In my judgment it is the former (the period sought by the Claimant). The entire rationale for the *Lansing Linde* approach is that the decision at the interim stage will determine the proceedings once and for all; by the time of trial, there will be nothing practical in dispute, regardless of whether an interim injunction is granted or refused. However, this is not necessarily the case in a springboard injunction case, where at the interim stage the length of the final injunction is not known. In the present case, even if the *Court* were to take the provisional view that the Claimant would be unlikely to obtain a final injunction for a period substantially longer than the gap to trial, that would not put an end to the litigation. Whether or not an interim injunction up to trial was granted, on the parties' pleaded case, the Claimant would still be seeking, and the Defendant would still be resisting, the grant of a final injunction of much longer duration. Thus the decision would not put an end to the litigation one way or the other.

63. However, in my view, whichever approach to "significance" is to be taken, *on the facts of the present case*, the grant or refusal of the interim springboard injunction will, unusually, depend on whether the Claimant can show a "serious issue to be tried" at stage (1). This arises as follows.

64. For reasons explained (in paragraphs 69 to 75 below), I have concluded that, at stage (3), damages would be an adequate remedy for the Defendants. Turning then to the alternative analyses:

(1) The gap to trial is "insignificant" by reference to the length of the claimed injunction (18 months). *Lansing Linde* does not apply at stage (4). If there is a serious issue to be tried and damages are adequate for the Defendants, stage (4) is not reached. On the other hand, if there is no serious issue to be tried, that concludes the matter in favour of the Defendants at stage (1).

(2) If, on the other hand, the gap to trial is "significant" by reference to the Court's view that the likely length of the final injunction and that length would be at most a few months, then in principle *Lansing Linde* would apply at stage (4). If there is a serious issue to tried and damages are adequate for the Defendants, stage (4) is not reached. On the other hand, if there is no serious issue to be tried, that concludes the matter in favour of the Defendants at stage (1).

65. On any analysis, stage (4) is not reached at all, and thus there is no requirement to assess the likely merits on the *Lansing Linde* approach. (I add this: if, contrary to paragraph 54 above, the *Lansing Linde* approach comes at stage (1), in the present case I consider here that the gap is "insignificant" (see paragraph 62). Thus the test remains "serious issue to be tried".

Interim relief: The Parties' cases in summary and the Issues

66. On its application for interim springboard relief, the Claimant contends as follows:

(1) There is a serious issue to be tried in respect of its claim for final injunctive relief, in relation to each of the breaches of contract, the nature of the "springboard" and the length of the springboard.

(2) Damages would not be an adequate remedy for the Claimant. Damages for the Defendants are quantifiable and an adequate cross-undertaking has been given; no fortification is required.

(3) The gap between the application for interim relief and judgment after trial is insignificant. A final judgment after speedy trial can be expected by October 2020 (5 months from breach). The unlawful advantage is at least 18 months from breach.

(4) Accordingly there is no need to consider the merits under the *Lansing Linde* approach.

(5) Even if *Lansing Linde* is applied, there is a strong case of breach of contract by the Defendants and a strong case that that breach has resulted in an unfair competitive advantage of duration of at least 18 months, and certainly of 5 months.

(6) Relief does not fall to be refused on grounds of breach of the "clean hands" principle.

67. The Defendants submit:

(1) The 5 month gap between 1 May 2020 and final judgment is significant. There is no basis for the asserted length of advantage of 18 months. Even if a case could be made out for any unlawful advantage, that could be no more than a few months. It is likely that any alleged advantage will have expired or substantially expired by October 2020. The court must apply the *Lansing Linde* approach to the Claimant's claim.

(2) The Claimant does not have any real prospect of success in obtaining a final springboard injunction; thus, even, on *American Cyanamid* there is no serious issue to be tried. There is no breach of handover obligations; even if there is technical breach of the deletion obligation, this gives rise to no competitive advantage; in any event the alleged competitive advantage is misconceived both as to its nature and length. In any event, on the *Lansing Linde* approach the Claimant is not likely to succeed on these elements of the claim. On either basis, interim relief falls to be refused.

(3) Alternatively, relief should be refused because of the Claimant's breach of the "clean hands" principle, as a result of its misconduct relating to the Consent Order and relating to notification of the Consent Order to third parties.

(4) If relief is to be granted, the Claimant's cross-undertaking in damages should be fortified by payment into court of £400,000.

The Issues on the application for interim relief

68. In the light of my conclusions at paragraphs 63 to 65 above, I will address, first and somewhat out of the usual order, the question of adequacy of damages for the Defendants. I will then turn to deal with the merits of the Claimant's claim to ascertain whether there is a serious issue to be tried. I will conclude by addressing the Defendant's "clean hands" argument and considering the position of Old Mutual Wealth.

Analysis of the issues

(1) Damages as an adequate remedy for the Defendants

69. The Claimant's evidence is that damages would be an adequate remedy for the Defendants if an interim injunction is "wrongly" granted now. Any loss in the interim period arising from the slow down in their plans will be limited to lost profit and is quantifiable (see Thomas 1st paras 139 and 140). In his second witness statement, Mr Thomas's evidence (at paras 97 and 98) is that on the basis of a speedy trial in September, the Defendants' loss would be "around £40,000", setting out the basis of that figure, and relying upon the Defendants' own estimate of likely trading volumes. Further the Claimant (and its parent company) have given a cross-undertaking in damages which is sufficient to meet any claim for such loss.

70. By contrast, Ms Scott gives no evidence to suggest that any loss of the Defendants is not quantifiable. As to the quantum of loss, at paragraph 122 of her witness statement, she asserts that, effectively, the "potential losses to our new business" are £200,000, but provides no further explanation. The Defendants have not contradicted the Claimants' basis for the sum of £40,000.

71. On the basis of this evidence, I am satisfied that the Defendants loss is quantifiable. Mr Roseman did identify this as being in issue (as opposed to the issue of fortification of the cross-undertaking). There is no evidence that that it is not quantifiable. The question then is whether the Claimant would be able to compensate the Defendants for such loss.

72. The Defendants contend that the cross-undertaking offered by the Claimant and its ultimate parent company LTV Group SA is meaningless. Detailed examination of the unaudited accounts of the Claimant and of its ultimate parent LTV Group SA reveals that they are flawed, that Bidco and LTV UK are insolvent and that the Claimant's net assets, stated to be in excess of £2.6 million, are in fact no more than £104,066. They therefore seek fortification of the cross-undertaking by payment into court of the £400,000, being £200,000 in respect of costs and £200,000 in respect of damages arising from the wrongful grant of the interim injunction.

73. The relevant principles in relation to fortification of a cross undertaking are set out at paragraph 15.4 Admiralty and Commercial Courts Guide and in *Gee*, supra, §11.004, where it is emphasised that the enjoined party must show some real evidence which objectively establishes risk of loss in a likely amount.

74. First, I find that, apart from a passing assertion by Ms Scott, there is no *evidence* to support the conclusion that the Defendant's losses will be any greater than in the region of £40,000 (on the basis of an annual loss of £125,000). The evidence supports this latter figure. Secondly, the cross-undertaking is to meet any loss caused by the

imposition of the interim injunction, namely the restraint on their business activities. It does not cover the Defendants' costs of the trial and is not intended to allow for "security for costs" to be provided by a route other than CPR 25.12 Thirdly, even on the detailed critique of the Claimant's accounts and those of LTV Group, the Claimant's net assets of £104,066 exceeds by some margin the Defendants' potential losses. For these reasons I conclude that fortification by payment in is not appropriate in this case and I exercise my discretion not to make such an order.

75. For those reasons, I find that damages would be an adequate remedy for the Defendants.

(2) The merits of the Claimant's claim for final injunctive relief: serious issue to be tried

A. The alleged "unlawful conduct"

(1) Failure to hand over clients

76. The first issue is the content of the obligation to "hand over" clients imposed, initially, by the Consultancy Agreements, and subsequently by the Settlement Agreement. The Claimant's case is set out in paragraph 26 above. In particular the Claimant's pleaded case appears to be that a three-way face-to-face meeting was contractually required with each client. By contrast, the Defendants contend that the obligation to "hand over" comprised (a) informing the client, whether by telephone, email or letter, that they would no longer be there IFA and that another CFM IFA would be taking over; and (b) providing full access to all relevant client information to the new CFM IFA. These are the "core obligations". It is denied that there was any contractual obligation to conduct a three-way face-to-face meeting with each client and the new IFA.

77. The Consultancy Agreements refer only to the term "handover". The Settlement Agreement refers, for the first time to "thorough handover", at the same time referring to a handover to both a CFM IFA and Mr Thomas. The obligations, in clause 3.4(b) of the Consultancy Agreements, of all due care and skill and best endeavours to promote the interests of CFM import an obligation to carry out handover diligently. To that extent, it is arguable that the "handover" obligation in the Consultancy Agreements imported a duty to carry out handover "thoroughly" or at least to a high standard of diligence.

78. As regards the central question of whether, as a matter of contractual construction, a three-way face-to-face meeting was required, it does appear that initially some three-way meetings did take place: Thomas 1st para. 63. However as to whether the Claimant will establish at trial that it was a contractual term that there had to be a three-way face-to-face meeting with each client to be handed over, the following matters undermine such a conclusion:

(1) The terms "handover" or "thorough handover" are not defined in either agreement.

(2) As regards the Consultancy Agreements, the three-way meetings which did take place, took place after the Agreements were concluded. They cannot form part of the factual matrix for those Agreements. (This appears to be conceded in paragraph 29.3 (iii) of the Particulars of Claim.) There is no evidence of any reference to, or consideration of, such meetings prior to the conclusion of those Agreements. Further

the reference to "client *books*" might indicate that passing over of information is intended. These points support the conclusion that three-way meetings were not required prior to the Settlement Agreement.

(3) Further if, as the Claimant contends, the obligation in both Agreements was for a "thorough" handover, it would follow that "thorough" carries the same meaning in both contracts. If that is right, it follows from (2) above, that three-way meetings were not required in the Settlement Agreement either.

(4) Assuming however that the content of the obligation in the Settlement Agreement was different and more demanding, despite discussion (and concerns) about the progress in the handover process in 2018 and 2019, there was no reference at all to a requirement for such a meeting in those discussions or in the lead up to the Settlement Agreement. Indeed there was no reference at all to such a requirement until the Claimant's letter before action dated 26 May 2020.

(5) There is evidence that there was to be no uniform process for all handovers. See in particular, a varied approach based on "geography and complexity of need" (see paragraph 16 above).

(6) In any event such a uniform and time intensive approach would arguably be unworkable. There were hundreds of clients to be handed over. The Defendants could not insist that each client attend a face-to-face meeting, nor could they force the relevant CFM IFA to attend. There is also doubt whether the Claimant had sufficient IFAs in place to operate such a process: see paragraph 17 above.

(7) The lack of clarity in the Claimant's pleaded case at paragraph 29 reflects the contradictions inherent in the seeking to establishing the allegation.

79. However, whilst the Claimant's case is weak, I am not satisfied that there is no real prospect of success. First, three-way face-to-face meetings did take place before the Settlement Agreement. Secondly, the change in the Settlement Agreement in the wording of the handover obligation, by the addition of "thorough" and the identification of handover to two specific individuals, were very arguably intended to add to the handover obligation and to make it more stringent. If handover in the Consultancy Agreements meant compliance with the "core obligations", then handover in the Settlement Agreement required more than that. On this hypothesis, the Defendants have not put forward an alternative explanation of what more was required. It is arguable that that additional element required the face-to-face meetings, some of which had taken place in the intervening period. Thirdly, as regards the Defendants' contention that the Claimant did not complain of breach of the handover obligation, on the basis of Mr Thomas' second statement and the documents exhibited, it is likely that Claimant will establish that, in 2018 and 2019, there were concerns raised by the Claimant that handover was not happening quickly enough and that a plan for handover was sought, but not provided. At no point was it alleged that this amounted to a breach of contract, nor was there any reference to a need for a three-way face-to-face meeting in every case or indeed at all. Nevertheless this background of delay and concerns supports the contention that the amended wording was intended to make the obligation more stringent, and that in practice a face-to-face meeting was the only way to achieve that.

80. As to breach, there are weaknesses in the Claimant's case. I note, first, that the breach is alleged to have occurred only from some time in September 2019 onwards (and not before) (see Particulars of Claim para 29.2). Secondly, if the content of the "handover" obligation is as contended for by the Defendants, there is no allegation, and no evidence, that they did not comply with those "core obligations" of informing the client of the change of IFA and giving the new IFA full access to relevant information. Thirdly, the Claimant contends that the named clients have not been handed over "thoroughly" or "at all". That suggests that in some cases clients have been handed over, but not thoroughly and in other cases clients have not been handed over at all. However despite being requested to do so, the Claimant have not identified which clients fall into each of these two categories. They have not identified, in respect of each of the clients in Annex 5 to the Particulars of Claim what the Defendants failed to do, in relation to handover.

81. Nevertheless it follows that if (as I find above) there is a real prospect of establishing that there was a contractual requirement for three-way face-to-face meetings, then, on the basis that the Defendants have failed to hold such meetings with a number of clients, then there is also a real prospect of establishing breach of the handover obligation.

82. On the basis of the material before the Court, whilst the Claimant's case faces substantial difficulty, I am satisfied that there is a real prospect that the Claimant will establish at trial that the Defendants were in breach of the obligations, in the Consultancy Agreements and in the Settlement Agreement, to hand over the clients. There is a serious issue to be tried on this aspect.

(2) Copying across and/or failure to delete contact details

83. The Claimant's case here is that:

(1) On 6 March 2020 Ms Scott deliberately "synced" her LinkedIn account with her CFM contacts (through Google). This is part of the Defendants' preparatory acts in breach of clauses 3.4(b) and/or (g) and/or 6(b) and/or 7.2 of the Consultancy Agreements.

(2) Each Defendant failed, by 30 April 2020, to delete his/her contacts details with CFM clients on his/her Facebook and/or LinkedIn accounts, thereby acting in breach of the deletion obligation in clause 12 (b) of the Consultancy Agreements.

84. The Defendants respond as follows:

(1) Ms Scott did not actively transfer any CFM contacts to her LinkedIn account. Syncing happens automatically, and the evidence suggests that no Google contacts have been transferred across.

(2) The obligation to delete in clause 12(b) applied only to contact details of clients where those details had been obtained first since 18 December 2017 i.e. during the consultancy, and not to those who were clients before that date. Further connections made after 1 May 2020 were not made using any confidential information. In any event, failure to delete has given no competitive advantage (see paragraph 98 below)

85. As regards the first aspect – syncing - this allegation concerns preparatory acts before 1 May 2020. As such, and as explained below, even if there is breach, it is accepted by Mr Mehrzad that the Defendants have not obtained any material competitive advantage as a result of this breach. Thus, establishing breach does not go to support the claim for a springboard injunction. The factual issue is contested: see Thomas 1st para 81, and 2nd para 58 and Scott paras 53 to 58. It is not necessary to make an assessment of the likely outcome of that issue. I observe only that Ms Scott's stated evidence is that she "never knowingly synced any contacts on LinkedIn, whether my CFM accounts or personal contacts".

86. The second aspect is potentially relevant. Ms Scott accepts that she has made "connections" with a number of CFM clients through LinkedIn (both before and after 1 May 2020) and that as at 30 April 2020 she and/or Mr Lee were connected with more than 40 CFM clients through LinkedIn and/or Facebook.

87. On the material before the Court, I consider that there is a real prospect that the Claimant will establish that the Defendants failed to delete contact details of CFM clients in breach of clause 12(b). First, as regards the second part of clause 12(b), on the argument to date, I am not persuaded that "the contact details of business contacts made during the Engagement" refer, as a matter of construction, to the contact details of CFM clients (see the distinction between "customers" and business contacts" in the definition of Confidential Information in clause 1.1). On the other hand, if the words do refer to CFM clients, the Defendants' argument that the clause is limited to clients first contacted after 18 December 2017 is weak. It makes no sense for them to be required to delete only those clients, in circumstances where (as demonstrated by the list prepared by Ms Scott) the Defendants' contacts will have been made whilst they were fully active in the business i.e. before 18 December 2017. Secondly, however, if these client details do not fall within the second part of clause 12(b), there is a strong argument that they fall within the first part, as being "any information relating to the Business" of CFM stored on relevant disk or memory, and/or that they fall within the more widely drawn definition of "Confidential Information" in clause 1.1 (the words "as such" in the second part confirm that clause 12(b) imposed an obligation to delete all Confidential Information). On either basis, the Defendants were bound to delete that information from their Facebook and LinkedIn accounts on 30 April 2020. Whether any competitive advantage has been gained from such breach is considered below.

(3) Preparatory acts during the consultancy before 1 May 2020

88. The Defendants were subject to a number of obligations of loyalty toward the Claimant during the course of the consultancy – include positive obligations to advance the interests of the Claimant and negative obligations not to be engaged in activity relating to a competing business. There is evidence to support the Claimant's case that the Defendants were in breach of these obligations in the period from about January 2020 to 30 April 2020; in particular in relation to FCA authorisation through Tenet and Sense. (In a series of emails between the Defendants and Tim Davis of Sense between 28 April and 1 May, there is evidence of the Defendants and Sense being engaged in preparatory discussions and conduct for the grant of FCA approval for up to a week before 1 May 2020, that the Defendants wished to keep this activity confidential; and possibly that the Defendants had been taking steps to invite CFM IFAs to join them before 1 May). There is also evidence to support the further pleaded allegations of acts preparatory for

competition: see paragraph 28 above. On the material before me I consider that the Claimant has a real prospect of establishing that that the Defendants were engaged in preparatory acts in breach of relevant clauses of the consultancy Agreements.

89. However, despite the fact that these allegations form a central part of its pleaded case, it is now accepted by Mr Mehrzad QC that no or no sufficient competitive advantage has been obtained as a result of such breaches. They are therefore not relied upon directly to support the final springboard injunction. Whilst Mr Mehrzad contended that these (non-causative) breaches could be taken into account when considering what is "fair and just" under the *QBE* principles, there is a strong argument that to do so would run counter to the seventh *QBE* principle, as amounting to punishing the defendant for wrongful conduct.

B. The nature and period of the competitive advantage

90. The Claimants rely upon the cumulative effect of failure to hand over and failure to delete contact details as giving rise to unfair competitive advantage justifying the final springboard relief.

91. The Claimant's case on the nature of the competitive advantage has emerged only slowly. It is not pleaded, but is contained in Mr Thomas' second witness statement: see paragraph 39 above. A further brief explanation was then given in Mr Mehrzad's skeleton argument (§§40.4 and 47.3). The essential logic, as there explained, is that if the Defendants had thoroughly handed over the clients to the Claimant and its current IFAs properly and at the same time deleted all their contact details of those clients, the clients would have become "embedded" with the Claimant "for years, even a lifetime" and lawful solicitation would have taken a much longer period – at least 18 months, and possibly several years. Inherent in this allegation are two aspects: it would have taken the Defendants longer to solicit the clients in the first place, and once contacted, it would have taken longer to persuade (or "entice") the client to switch to their business or indeed the client would not have switched.

92. In my judgment, the Claimant's case here is very weak. On the material before the Court, I would not be satisfied that it is *likely* to succeed. The Defendants' case is supported by the following considerations.

93. First, the lifelong or long-term relationship between the clients and the Claimant is a relationship between client and IFA, and in the present case, prior to handover, has been a relationship with one of the Defendants. If the lifelong connection had been with the Claimant, there would have been no need for any handover obligation and no need for the restrictive covenants in clause 15.1(b) and (e) of the Transfer Agreement. This is recognised by Mr Thomas in his second witness statement.

94. Secondly, the underlying logic of the asserted competitive advantage is somewhat difficult to follow. It assumes that handover of a client to a new IFA destroys the client's long established rapport with his former IFA, Ms Scott or Mr Lee and further that the new relationship is somehow then set in stone. It further assumes that, following thorough handover, the client would necessarily or be likely to remain with the Claimant and that it would take the Defendants 18 months to "entice" the client to their new business.

95. Thirdly, there is evidence of actual client behaviour which undermines Ms Thomas' assertion of what would happen where there *is* thorough handover. Most particularly, Mr Morley's email of 22 June 2020 shows a CFM client switching his business to ScottLee. It is evidence that, from the client's point of view, the longstanding connection is with the individual, namely Ms Scott – and not with the Claimant. It also provides evidence that despite having been transferred to the new CFM IFA, Mr Morton, two years earlier, this client had not become "embedded" with the Claimant such as to render it impossible or difficult for him to be "enticed" away by the Defendants. Finally, from consideration of the colour-coded version of Schedule 3 to the draft order, the Claimant does not appear to be alleging that there was a failure to hand over Mr Morley (only that he appears to have remained connected on social media). His case is therefore some evidence of what might have happened "but for" the alleged breach of the handover obligation. Moreover, clients, Mr Harrison and Mr Smith, have both recently indicated that they were transferring their business to ScottLee. Again, the colour-coded Schedule 3 shows that, in neither case, does Claimant appear to be alleging that there was a failure to hand over, nor in fact that they remained connected on social media as at 30 April (i.e. no suggestion that their details had not been deleted). By contrast, the Claimant has produced no evidence of a client who has been handed over resisting an attempt by the Defendants to entice him to their new business. There is further evidence that from the client's point of view, the lifelong or longstanding attachment was with the Defendants personally. In an earlier email, another client (Mr and Mrs Gillott) informed a CFM IFA that they had decided to move their business to ScottLee due to the longevity of their relationship with Mr Lee.

96. Fourthly, the existence of the restrictive covenants against solicitation and dealing in clause 15 of the Transfer Agreement, and the fact that the parties agreed that they should fall away on 30 April 2020, undermines the existence of the alleged competitive advantage. The longstanding personal relationship between the individual IFA makes it very likely that when the IFA leaves the Claimant company, the client will also leave and follow the individual IFA. That is the very reason why the restrictive covenants were needed to protect the Claimant. If thorough handover ensured embedding and guarded against competitive advantage, there would have been no need for the restrictive covenant against solicitation, and it would have served no purpose. To the extent that it is suggested that the restrictive covenant had additional purpose, because it was for 5 years and the competitive advantage is only 18 months (albeit not the limit of the Claimant's case), it might then be said that the 5 year period was an unreasonable restraint of trade by reference to the Claimant's interests that it sought to protect. In this way, the Claimant is seeking to achieve, by an alternative route, the protection provided by the restrictive covenants, which are no longer in force.

97. Fifthly, as regards the length of the competitive advantage, the Claimant's case is that it is either "at least 18 months" or "several years". (At a later stage it is said to "not less than the period to trial"). No clear reason or evidence is given to support these alternative periods.

98. Sixthly, as regards the failure to delete contact details (and assuming that the client has been handed over), Ms Scott's evidence is that all this contact detail information is freely and publicly available and easily found on a simple search on LinkedIn (or Facebook). The information could be obtained within a matter of hours or days. The Claimant has not contradicted this evidence. Moreover, the Claimant has not suggested

that, if they had deleted, the Defendants would not have been able, easily or at all, to recall the names of or identify the clients, and thus that, given that there was a large number of the clients, it would have taken them a substantial time to identify the clients, before then being able to search for them on LinkedIn. It follows that any competitive advantage conferred by having retained these details on 1 May could last for no more than a matter of days.

99. Finally, it is very arguable that the Claimant has "not spelled out the precise nature and period of competitive advantage". At best, its case is one of ephemeral and short term advantage and that is not sufficient.

100. However, whilst very weak, I am not satisfied that at trial the Claimant has no real prospect of establishing its case on the competitive advantage.

101. First, in his witness statements, Mr Thomas himself provides some *evidence* to support its case. The fact that this evidence is an assertion may not be surprising when what is being considered is what would have happened in a "counterfactual" hypothesis. That evidence can be tested in cross-examination at a trial.

102. Secondly, whilst, following thorough handover, a client may not be embedded with the CFM IFA such that that relationship is "set in stone" with no prospect of the Defendants ever enticing him away, nevertheless in such a situation, there is likely to be an inertia to move *back* across to the Defendants. Certainly such a move back would be less likely than if there had been no handover to the new CFM IFA at all. Moreover, the very purpose of the Transfer Agreement was to switch the "long-term relationship" from the Defendants to the Claimant; the goodwill of the assets acquired.

103. Thirdly, the fact that three particular clients indicate that they have transferred, apparently after thorough handover, does not lead to the conclusion that all, or a substantial number of, clients would have transferred to the Defendants readily or without substantial delay to the Defendants.

104. Fourthly, as to the length of the competitive advantage, whilst the Claimant's case is for an advantage of 18 months duration, at this stage it is sufficient to show a real prospect of establishing a period of advantage lasting until at least final judgment after a speedy trial: see *Forse* supra, §§59, 63.

105. Finally, whilst the Defendants complain that the Claimant has still not pleaded its case for *final* springboard relief, it has now set out its case sufficiently for *interim* relief.

106. I conclude that, whilst its case is very weak, the material before the Court does not disclose that the Claimant has no real prospect of successfully establishing its case on the nature and length of the springboard relief it seeks.

Conclusions on the four *American Cyanamid* stages

107. In the light of the foregoing analysis, my conclusions on the application of *American Cyanamid* stages is as follows:

(1) At stage (1), the Claimant has shown a serious issue to be tried, in relation to the alleged breaches of contract and in relation to the nature and length of the claimed

unfair advantage. It has therefore shown a serious issue to be tried in respect of its claim for a final springboard injunction.

(2) At stage (2), damages are not an adequate remedy for the Claimant.

(3) At stage (3), damages are an adequate remedy for the Defendants. Subject to the issue of "clean hands", there is no reason to refuse the interim injunction.

(4) If follows that stage (4) is not reached at all and thus the question of "the significance of the gap", and thus whether the *Lansing Linde* approach to the merits applies, does not arise.

I turn to the issue of "clean hands" and the position of Old Mutual Wealth.

(3) "Clean Hands"

108. The Defendants submit that I should exercise my discretion to refuse an interim injunction on the grounds that the Claimant has not come to court "with clean hands". It relies on two aspects of alleged misconduct by the Claimant: the failure to agree to the amendment of the Signed Order and misrepresenting the effect of the Consent Order to third parties.

109. In order to decline relief on this ground, I would wish to be satisfied that the Claimant's conduct was either dishonest or constituted "serious immoral and deliberate misconduct": see *Snell's Equity* (34th edn) §5-010 citing *CF Partners (UK) LLP v Barclays Bank Plc* [2014] EWHC 3049 (Ch) at §1133(4).

110. As regards the Claimant's conduct in relation to the amendment to Consent Order, I have considered the full chain of correspondence and events between 15 June 2020 when the Defendants received the application for interim relief, through the agreement to the Signed Order and thereafter until receipt of Stewart J's email on 30 June 2020. The Defendants' case is that, when the discrepancy between the Signed Order and the Consent Order relating to the hearing date was pointed out both on 19 June 2020 and then raised with the Court on 26 June 2020, the Claimant could and should have accepted that there was an "slip" error in the Consent Order, and should have agreed, there and then, to an amendment on that basis. The Defendants do not go so far as to say that the change made in the Consent Order was the result of the Claimant positively misleading the Court that the parties had agreed that change.

111. As evidenced by the manner in which this application has proceeded, the conduct of this litigation to date has been, and remains, uncompromising and hard-hitting on both sides. The Claimant's failure to agree to the correction of the Consent Order to reflect accurately the terms of the Signed Order was, in my judgment, misjudged and unnecessarily obstructive. Nevertheless I am not satisfied that this conduct was either dishonest or that it constituted "serious immoral and deliberate misconduct".

112. As regards the Claimant's conduct in relation to notifying third parties, and in particular Old Mutual Wealth, of the effect of the Consent Orders, the Defendants contend that, in ensuring that the hearing would not come on before 10 July 2020, the Claimant went about misrepresenting the correct position to third parties in order to prevent the Defendants contacting and dealing with clients. First, I do not accept that the Claimant

ensured that the hearing did not come on before 10 July. The Defendants were given, but did not take, the opportunity to apply to Stewart J for an earlier date, which was available. Secondly, I not satisfied that the Claimant misled Old Mutual Wealth. The 19 June letter encloses, and draws attention to, the Consent Order itself and summarises accurately its effect upon the Defendants, namely a prohibition on soliciting. As to the suggestion in the letter that Old Mutual Wealth might be facilitating breach of the injunction, it is not clear as a matter of law that the act of authorising or processing the transfer of a client *after* that client has been solicited is not capable of constituting a contempt by the third party. It might arguably amount to aiding and abetting a breach of the injunction or doing something which disables the court from conducting the casein the intended manner. In any event, I do not consider that the content of the notification to the third parties of the injunction, given the terms of the penal notice, was either dishonest or a serious immoral and deliberate conduct.

113. The Defendants further contend that the terms in which the Claimant notified the Consent Order *to clients* were misleading. There is some substance to this contention. I do not agree that the wording of the emails (paragraph 48 and 49 above) suggest that the Consent Order itself gives the Claimant power to refuse to transfer agency to ScottLee without first checking whether the injunction has been breached. On the other hand, I do consider that the words "cannot be … in contact with clients" would cover a communication *from* client *to* the Defendants where there is no solicitation by the Defendants or where any solicitation had occurred before 18 June 2020. Such communication very arguably goes beyond solicitation after 18 June 2020 and is not covered by the terms of the injunction. Going forward the Claimant must be very careful to explain the terms of the injunction clearly and precisely. However I am not persuaded that the terms of these notifications were either dishonest or amounted to serious immoral and deliberate conduct to warrant the refusal of relief on this ground.

(4) Old Mutual Wealth

114. Finally, Quilter, which operates Old Mutual Wealth, has written to the Court seeking guidance as to what it should do as regards authorising or processing the transfer of a CFM client in the face of notice of the injunction. Quilter and the parties are in agreement that the wording of the injunction should be modified, with a view to ensuring that Quilter is not in breach of the injunction by its future conduct. Three alternative wordings are proposed. The first, advocated by the Defendants, is based on its contention that transfer *after* solicitation cannot possibly amount to a contempt by Quilter and allows the latter to authorise such transfers. The second, advocated by Quilter, is for transfers to be allowed to go ahead, but for Quilter to retain any commission or adviser fees for the time being. The third alternative, favoured by the Claimant, is for it to be made clear in the injunction that no transfers at all which have been or will be submitted on or after 18 June 2020 are to be processed, unless agreed between the Claimant and the Defendants.

115. As I have indicated above, my present view, on the basis of limited argument, is that it not clear as a matter of law that the act of authorising or processing the transfer of a client *after* that client has been solicited is not capable of constituting a contempt by the third party. Accordingly the injunction to be granted consequential upon this judgment should contain wording the terms of the third alternative. This still allows the possibility of the Defendants producing evidence that any particular transfer request was not the result of solicitation after 18 June 2020. At the same time, the Claimant

has offered, and I will accept, a modification of the cross-undertaking in damages so that it is also given in favour of Quilter. Nevertheless there will be liberty to apply to the Defendants and to Quilter for the terms to be varied, to allow further argument on the issue if desired.

Conclusion

116. For the reasons set out above, there is a serious issue to be tried and damages are an adequate remedy for the Defendants. Accordingly the Claimant's application for an interim injunction succeeds and I will make an order for an interim injunction until conclusion of the speedy trial. The terms of the order will require further consideration. In particular the precise wording of the prohibition will need modification and there may be an issue as to the list of clients in Schedule 3, and in particular whether it is appropriate to include those clients who, from the colour-coded Schedule 3, appear to be included on the sole ground that their contact details are alleged to have been "synced" on 6 March 2020

117. I will hear the parties on other consequential matters, including directions for a speedy trial and other matters

118. Finally I am most grateful to counsel and solicitors for the efficient and helpful way in which this application has been dealt with, not least in the circumstances of the present Covid-19 situation.