PROTECTING THE BUSINESS: GOOD FAITH, COMPETITION AND CONFIDENTIALITY

by

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1. INTRODUCTION

1.1 In this paper, we consider recent cases on

- the duty of good faith,
- fiduciary duties,
- garden leave,
- confidential information,
- restrictive covenants,
- remedies available where there is unfair competition by employees.

2 DUTY OF GOOD FAITH

Background

2.1 The employee's duty of good faith governs the parties' rights and obligations during employment. This duty is implied into every contract of employment: *Robb v Green*[1] and *Attorney-General v Blake*[2]**:**

> *"The employee must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third party without the informed consent of his employer."*

2.2 The duty ends with termination of the employment save for the continuing duty not to misuse trade secrets (*Mont (UK) Ltd v Mills*[3]). (cf. The dicta of Scott VC in *Symbian v Christensen* that putting an employee on garden leave terminated the duty of good faith: see, further, below).

2.3 The duty of good faith is interpreted by the standards of an ordinary person of honesty and intelligence (*Robb v Green*). As Lord Greene MR said in *Hivac Ltd v Park Royal Scientific Instruments Ltd* [4]"The practical difficulty in any given case is to find exactly how far that rather vague duty of fidelity extends."

2.4 There are three areas where the precise ambit of the duty merits careful consideration.

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[1] [1895] 2 QB 315
[2] [1998] 2 WLR 805, CA, per Lord Woolf MR
[3] [1993] IRLR 172
[4] [1946] Ch 169

Actual Competition

2.5 It is a breach of the duty of good faith for an employee to be engaged in competition with his employer. Competitive activity during his employer's time will almost certainly amount to a breach. Save in exceptional cases, this is also likely to follow where competition is in the employee's spare time: see *Hivac*.

2.6 In *Marshall v Industrial Systems and Control Ltd*[5], Mr Marshall as MD placed a tender for a contract on his employer's behalf at the same time as tendering for the same business on his own behalf. The EAT found that this conduct justified summary dismissal.

2.7 In *Symbian v Christensen* [6], an express clause preventing the employee from engaging in any other employment during the term of the contract was enforced by an injunction, albeit in a limited manner: the defendant was restrained from being employed by a competitor firm during a six-month period on garden leave under notice (see, further, below).

Preparation for Competition

2.8 Whereas actual competition during employment is unlawful, the courts accept that an employee may prepare for future competition when his employment has ended.

2.9 *Balston Ltd v Headline Filters Ltd* [7]illustrates this. Mr Head decided to resign as an employee and director but, before giving notice to his employer, agreed to take a lease on business premises for the purpose of future competition. Having ceased to be a director but during his notice period, he bought a company off the shelf. None of these steps amounted to a breach, either of his duty of good faith as an employee or of his fiduciary duties as a director.

Where is the Dividing Line between Actual Competition and Preparation for Competition?

2.10 Where is the line between the permissible and the impermissible? In *Lancashire Fires Ltd v SA Lyons & Co Ltd*[8], Arthur Wright was projects manager and brother to his employer, Jim. At the end of 1993, Arthur began to plan setting up his own business in competition with Lancashire Fires. He bought equipment and rented premises. Jim (his employer and brother) eventually heard that he was setting up his own business. He confronted him and Arthur resigned.

2.11 Lancashire Fires issued proceedings against Arthur's new company alleging that Arthur had misused confidential information and had breached his duty of good faith.

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[5] [1992] IRLR 294
[6] [2001] IRLR 77, CA
[7] [1993] FSR 385
[8] [1996] FSR 629, [1997] IRLR 113

2.12 The Court of Appeal considered the duty of fidelity as developed in *Robb v Green* and *Hivac*. The Court held that Arthur *plainly* breached his duty of fidelity. Arthur was not simply seeking employment with a competitor or taking preliminary steps to set up on his own. His activities at his new premises and his business dealings placed him *well on the wrong side of the line*. The Court concluded, "Indeed any employee with technical knowledge and experience can expect to have his spare time activities in the field in which his employers operate carefully scrutinised."

2.13 There are three points to note about *Lancashire Fires*. First, the case cannot be distinguished by the family relationship, which was not directly relevant to the issues. Secondly, the Court found that Arthur had misused confidential information for the purpose of his new business. The duty of good faith may demand higher standards of loyalty where the employee has access to confidential information (although a different approach was adopted by the trial judge). Thirdly, the decision suggests that exacting standards of fidelity are required from employees during the employment. The distinction between actual competitive activity that is impermissible, and preparation for future competition that is allowed, has been maintained. However the range of activities that amount to actual competition has arguably been enlarged.

2.14 The Court of Appeal has recently held that it does not follow from the fact that a newly formed company did not trade until the employee's current employment contract was terminated that the employee's ability to serve his employer was unimpaired by his interest in that company whilst his employment continued: *Ward Evans Financial Services Ltd v Fox*[9].

2.15 In that case, following the formation of their company, the employees had failed to act in the best interests of the employers whilst still employed by them and their interest in the new company, which they hoped to exploit upon termination of their contracts, was a strong factor in their failure to do so.

3 FIDUCIARY DUTIES

Fiduciary duties owed by an employee

3.1 Is an employee a fiduciary who may also owe fiduciary duties in addition to the duty of good faith?

3.2 *Neary v Dean of Westminster*[10] provides an illustration of these principles. The retention by Westminster Abbey's organist of fees, which were undisclosed albeit not dishonestly, amounted to a breach of the duty so as to justify summary dismissal.

[9] [2002] IRLR 120. Cf *ABK Ltd v Foxwell* [2002] EWHC 9 (Ch).
[10] [1999] IRLR 288

3.3 *Nottingham University v Fishel*[11] is an important case for a number of reasons. Dr Fishel was a clinical embryologist, specialising in IVF treatment. He was scientific director of the NURTURE clinic at Nottingham University. The success of the clinic meant he was so well rewarded that the University sought to renegotiate his contract. Disillusionment followed for Dr Fishel, leading to his resignation, and setting up elsewhere. Retrieval of deleted material from his computer, revealed extensive private work which had been undertaken, by Dr Fishel and embryologists working for him at the clinic, for which payment had been received by Dr Fishel.

3.4 Dr Fishel had failed to obtain the university's consent for this outside work in breach of his contract of employment. This private work, however, did not prejudice the work of the clinic; rather, it benefited it.

3.5 The university claimed damages for breach of contract and inducement to the other embryologists to breach their contracts, and an account of profits for breach of fiduciary duties. As to the contractual claim, Elias J held that Dr Fishel did breach his contract, but that the university suffered no recoverable loss, and restitutionary damages were inappropriate (judgment was given after the Court of Appeal's, but before the House of Lords', decision in *AG v Blake*: see, further, below).

3.6 In considering the claim for an account of profits consequent upon a breach of fiduciary duties, Elias J embarked upon a careful examination of the question: is an employee a fiduciary? He concluded that the employment relationship was not a fiduciary relationship but that fiduciary duties *can arise out of* the employment relationship. It is necessary to ask what duties the employee undertakes, and whether the employee agrees to act solely in the employer's interests in respect of those duties. If he does, he may be subject to fiduciary duties in relation thereto.

3.7 On the facts, Elias J held that Dr Fishel was not subject to fiduciary duties in relation to the work abroad which he personally undertook. He was under no obligation to obtain such work for the university, and he did not use his position with the university to make a secret profit. However, since it was his duty to supervise and allocate work to the embryologists for the benefit of the university, to send them to undertake private work abroad, from which he stood to make a financial gain, gave rise to a conflict of duty and interest, and the imposition of fiduciary duties on Dr Fishel. He was liable to account to the university for the profits which he made from this deployment of other embryologists. Dr Fishel was not liable in damages for inducing breaches of contracts, since the university had suffered no recoverable loss as a result thereof.

[11] [2000] ICR 1462, [2000] IRLR 471 (Elias J). See also *Normalec v Britton* [1993] FSR 318 and *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 274-5 and 290 as examples of cases where an employee has been said to be in breach of a fiduciary duty.

Fiduciary duties owed by a director

CMS Dolphin Ltd v Simonet

3.8 In *CMS Dolphin Ltd v Simonet*[12] an employee and director of an advertising agency resigned to set up a competing business taking staff and customers with him. He was held liable to account for the profits made as a result of diverting the business opportunities of the agency. Lawrence Collins J held that the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property. The director becomes a constructive trustee of the fruits of his abuse of the company's property, which he has acquired in circumstances where he knowingly had a conflict of interest, and exploited it by resigning from the company[13].

Bhullar v Bhullar

3.9 In *Bhullar v Bhullar*[14] a family company (Bhullar Bros Ltd) was in the business of property investment. It acquired an investment property known as Springbank Works. Family relations broke down and one brother, Mohan (and his son), told another, Sohan (and his sons), at a board meeting that he did not wish any further property to be acquired by the company. Subsequently, Sohan discovered that White Hall Mill, a property next to Springbank Works, was on the market and purchased it in the name of a company which he and his sons controlled.

3.10 The Court of Appeal held that Sohan (and his sons) had acted in breach of their fiduciary duty to the family company. Jonathan Parker LJ stated that the rule that a fiduciary was not allowed to enter into engagements in which he had, or could have, a personal interest conflicting, or which might possibly conflict, with the interests of those whom he is bound to protect was universal and inflexible. The test was whether 'reasonable men looking at the facts would think there was a real sensible possibility of conflict'. Where a fiduciary, such as a director of a company, exploited a commercial opportunity for his own benefit, the relevant question was not whether the party to whom the duty was owed (ie. the company) had some kind of beneficial interest in the opportunity but whether the fiduciary's exploitation of the opportunity was such as to attract the application of the rule.

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[12] [2001] 2 BCLC 704.

[13] p733, para 96. The Judge reviewed a number of relevant authorities: *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, [1967] 2 AC 134n; *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443; *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3d) 371; *Island Export Finance Ltd v Umunna* [1986] BCLC 460; *Balston Ltd v Headline Filters Ltd* (above); *Framlington Group Plc v Anderson* [1995] 1 BCLC 475. See, also, *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch) and the casenote at [2004] 5 ELA Briefing 72.

[14] [2003] 2 BCLC 241 (CA), [2003] EWCA Civ 424.

3.11 Since the only capacity in which Sohan and his sons carried on business was as directors of the family company, in which capacity they were in a fiduciary relationship with the company, and since at the material time the company was still trading and acquisition of the property would have been commercially attractive to the company, Sohan and his sons were under a duty to communicate the existence of opportunity to acquire the property to the company.

3.12 Applying the test that 'reasonable men looking at the facts would think there was a real sensible possibility of conflict', Sohan and his sons acted in breach of their fiduciary duty. The Judge ordered, upheld on appeal, that Silvercrest held the property White Hall Mill on trust for the family company, that Silvercrest transfer the property to the family company at the price that was paid for it, and there be an account of profits.

Duty to disclose own misconduct

3.13 A related question that arises is whether an employee or director owes a duty to disclose his own misconduct to his employer or the company. This requires a consideration of five principal authorities: *Bell v Lever Bros*, *Sybron v Rochem*, *Horcal v Gatland*, *Tesco v Pook*, and *Item Software v Fassihi*.

Bell v Lever Brothers

3.14 The starting point for the analysis of whether an employee has a duty to disclose his own wrongdoing has for many years been, and remains to this day, the decision of the House of Lords in *Bell v Lever Brothers Ltd*[15].

3.15 It is not an altogether easy decision to follow, or to interpret. This is for several reasons. First, there are a number of different grounds for the decision reflecting the various claims advanced some by way of late amendment to the pleaded case and some not even apparently reflected in the pleadings. Secondly, the action was tried by a judge and jury, with the result that some of the key facts are to be found in the answers to questions put to the jury. Thirdly, not only did the House of Lords split 3 to 2, but the majority differed in the result from both the trial judge and a unanimous Court of Appeal. Moreover, consideration by their lordships of the issue of an employee's duty to disclose his own wrongdoing is secondary to their main focus which is on the doctrine of mistake.

3.16 Despite these qualifications it is necessary, in order to understand the law in this area and its development over the 70 years since *Bell*, to take some time to examine the speeches of their lordships on this issue. This requires an appreciation, albeit in summary form, of the facts of the case.

The facts

3.17 The facts in *Bell* concerned essentially two companies, two individuals and some cocoa. The first company is Lever Brothers Ltd itself. Lever Brothers owned 99% of the share capital of the Niger company. The Niger Company

[15] [1932] AC 161.

dealt in West African produce, including cocoa, but was making heavy losses. To address this problem, Lever Brothers made two appointments to the Niger company in 1923. Mr Bell (then a "joint manager of one of the great London banks") was appointed as Executive Chairman, and Mr Snelling ("an accountant of exceptional ability") as Executive Vice-Chairman. Each was appointed on a five-year contract, which in 1926 was replaced by a fresh five-year contract. Each became a director of the Niger company.

3.18 The appointments were a resounding success. Messrs Bell and Snelling converted great losses into great prosperity. Whilst doing so, in a 6-week period in 1927, Messrs Bell and Snelling entered into 4 cocoa transactions on their own account, making for themselves a profit of £1,360. The fact of the transactions remained unknown to either Lever Brothers or Niger until the later events which gave rise to the litigation.

3.19 By 1929, the position of Niger had so greatly improved that it merged with a competitor on favourable terms. The result of the merger, however, was that there were no positions available for the two individuals who had been so instrumental in turning around the company's fortunes. As a consequence, agreements were entered into between Lever Brothers and the two employees, terminating the employment of the latter in return for payments of £30,000 to Mr Bell, and £20,000 to Mr Snelling, no doubt sizeable sums at the time.

3.20 Some two months after the termination of their employment, and the payment of the agreed compensation, the four cocoa transactions came back to haunt the employees. In the course of arbitration proceedings, inquiries were made as a result of which the four transactions were brought back to the minds of the employees who then described the transactions to Lever Brothers.

3.21 The company was none too impressed to learn of the previously undisclosed profits made by their employees, and shortly afterwards commenced proceedings against them. As Lord Atkin put it (212) "Levers discovered facts which indicated that their expenditure of £50,000 and their expressions of regard had been misplaced."

3.22 The company sought recovery of the profits made by the employees on the transactions, damages for fraudulent misrepresentation and concealment, rescission of the termination agreements, and repayment of the monies paid under a mistake of fact.

Wright J

3.23 The company's case was advanced before Wright J on the basis of fraud and mistake. No case was put of duty to disclose.

3.24 In response to specific questions put, the jury decided importantly that there was no fraudulent misrepresentation or concealment by the employees concerning the cocoa transactions, that they had entered into the four transactions for their own benefit, that the company were entitled to terminate their employment because of the transactions and would have done

so had they known about them at the time, but that the employees did not have the transactions in mind when entering into the termination agreements.

3.25 On the basis of these answers, the judge decided that the termination agreements should be set aside on grounds of mutual mistake. He held that all parties entered into those agreements under the common mistake that the contracts of service were binding, in the sense that they could not at that moment have been got rid of without the employees' consent.

The Court of Appeal

3.26 The Court of Appeal (Scrutton, Lawrence and Greer LJJ) took the same view as the trial judge on mistake. They also held that, although it was not pleaded, that his judgment could be supported on the ground that the employees during the termination negotiation were under a duty to disclose the offending transactions of 15 months before; and that they were not excused from disclosure by reason of the fact that, as the jury had found, the transactions had passed from their minds.

The House of Lords

3.27 As we have said, the House of Lords allowed the appeal by a 3 to 2 majority. However, there is only one dissenting speech, that of Lord Warrington with whose speech Viscount Hailsham agreed. In addition, as Lord Warrington explained, he purposely avoided dealing with the question whether the employees were under an obligation as servants to disclose to Lever Brothers their breaches of the service agreements. The three law lords in the majority – Lords Blanesburgh, Atkin and Thankerton – each gave speeches, each of which requires some examination, although in the event only two are helpful for present purposes.

3.28 Lord Blanesburgh allowed the appeal on the ground that no case other than their pleaded case was open to the company, and mutual mistake had not been pleaded. As to the alleged duty of disclosure, he added that he agreed with the answer given on this by the other two lordships who were in the majority.

3.29 Lord Atkin decided that, even if it was open to them, an argument based on mutual mistake could not succeed. He concluded (223) that it would be wrong to decide that an agreement to terminate a contract is void if it turns out that the contract had already been broken and could have been terminated otherwise. The contract released is the identical contract in both cases, and the party paying for release gets exactly what he bargains for. There is no relevant mistake of fact.

3.30 Turning to the disclosure argument (227), Lord Atkin began by noting that the jury had negatived fraudulent concealment. This claim, however, was based upon the contention that Bell owed a duty to Levers to disclose his misconduct, and that in default of disclosure the contract was voidable. Lord Atkin pointed out that ordinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The exceptions include contracts of utmost good faith

(*uberrimae fidei*), of which contracts of insurance are an example but contracts of employment are not.

3.31 In a passage oft-quoted in later cases, Lord Atkin said (228):

"It is said that there is a contractual duty of the servant to disclose his past faults. I agree that the duty in the servant to protect his master's property may involve the duty to report a fellow servant whom he knows to be wrongfully dealing with that property. The servant owes a duty not to steal, but, having stolen, is there superadded a duty to confess that he has stolen? I am satisfied that to imply such a duty would be a departure from the well established usage of mankind and would be to create obligations entirely outside the normal contemplation of the parties concerned."

3.32 Lord Atkin bolstered his view by considering the homely examples of a master who, having raised his butler's wages, later seeks recovery of the increase upon his subsequent discovery that the butler had previously received a secret commission from the wine merchant; and the master who, having given his cook a month's wages in lieu of notice, seeks their return on subsequently discovering the cook had been pilfering the tea. In neither case could the master succeed. As Lord Atkin concluded:

"He takes the risk; if he wishes to protect himself he can question his servant, and will then be protected by the truth or otherwise of the answers."

3.33 Finally, Lord Thankerton held (231) that in the absence of fraud, neither a servant nor a director of a company is legally bound forthwith to disclose any breach of the obligations arising out of the relationship so as to give the master or the company the opportunity of dismissal. There may well be cases, he added, in which the concealment of the misconduct amounts to a fraud on the master or company, but the jury had excluded that view in the present case. Accordingly, the employees here had no legal duty to disclose their cocoa transactions either at the time of their commission or in negotiating the termination agreements (232).

Conclusions from Bell v Lever Bros

3.34 In the light of this analysis, the following conclusions may be derived from the decision in *Bell* which are relevant for the purpose of our present inquiry:

- It was apparently material to the decision in the case that there was no fraud on the part of the employees. The offending transactions were not in their minds when entering into the termination agreements.

- Only two of their five lordships expressed any reasoned view on an employee's or director's duty of disclosure of their own misconduct (although a third agreed with these two). In so doing, Lords Atkin and Thankerton held that there was no general duty on the part of an employee to disclose either own past misconduct to their employer or company. Lord Thankerton extended this principle, *obiter*, to a director.

- Such duties of disclosure generally arise in specific classes of contracts of utmost good faith, of which the employment contract is not one. To impose such a duty on an employee, however, would be to create obligations outside the normal contemplation of the parties.

- Lord Atkin stated that an employee may be under a duty to disclose to the employer the misconduct of a fellow employee.

Sybron Corporation v Rochem Ltd

3.35 Matters were taken a step further by the Court of Appeal in *Sybron Corporation v Rochem Ltd*[16]. The case is important not only for the development in the law which it represents, but also because the three members of the Court carefully consider the effect of the decision in *Bell v Lever Brothers*.

The facts

3.36 On any view, the position of the employee in *Sybron*, a Mr Roques, was particularly unmeritorious. As Stephenson LJ said of the case advanced for the employee by his counsel Mr (now Justice) Munby "If this is the law, in my judgment there is something very seriously wrong with the law." By the end of his judgment, he was able to express himself "happy to find that the law is not so outrageous as to enable Mr Roques to keep" his money. It was undoubtedly a hard case; whether it made bad law is another matter.

3.37 Sybron was an American financial conglomerate. One of its group companies was Gamlen Chemical Co Ltd which specialised in chemicals and equipment for cleaning ships and industrial sludge. Mr Roques was employed by Gamlen as its European zone controller, in effect the No.1 for Europe. He had the power of hiring and firing over the whole of the European zone. His right-hand man was a Mr Bove.

3.38 During the last 2 of his 21 years of employment by Gamlen, Mr Roques conspired with other employees, including but not limited to Mr Bove, to set up and carry on a new business, Rochem, in competition with and so as to injure the business of Sybron, and to conceal their involvement from Sybron. In effect, the judge found that what he called the top management, headed by Mr Roques and Mr Bove, defected, unknown to Sybron whilst still employees, to the Rochem companies and worked actively against their employers.

3.39 One of the terms of Mr Roques' employment entitled him to the benefit of a life assurance policy into which he and his employer made contributions. Following his early retirement, Mr Roques was paid a lump sum and received annual payments pursuant to the terms of this policy. Under rule 8(b) of the scheme, he would not have been entitled to this benefit in full if he had been dismissed for fraud or serious misconduct.

3.40 When Sybron subsequently discovered Mr Roques' involvement in the conspiracy it brought a large claim for millions of dollars as damages for

[16] [1984] Ch 112.

conspiracy, one small part of which concerned an attempt to recover monies paid pursuant to the life assurance policy.

The Court of Appeal

3.41 The judge decided that Sybron could rely on rule 8(b) of the scheme and granted the orders sought by Sybron. The Court of Appeal dismissed Mr Roques' appeal.

3.42 It might be thought that since the employees in *Bell v Lever Brothers* were acquitted, yet Mr Roques' was found guilty, of fraud, that the case of *Bell v Lever Brothers* was distinguishable from the dispute between Sybron and Mr Roques. But the case was not clearly decided on that straightforward basis.

3.43 This may be due to a submission on behalf of Mr Roques which the trial judge accepted and which was cited without apparent disapproval by Stephenson LJ. That submission was that the House of Lords in *Bell* made it clear that in general terms if the employee has committed a fraudulent breach of the terms of his employment, there is no superadded duty upon him to report his own dishonesty (121). It seems to me to be far from clear that the House of Lords went that far. But Stephenson LJ found it unnecessary to resolve that issue by finding an alternative route to reach what he clearly considered the just result in the case before him.

3.44 In his judgment, what entitled Sybron to recover the payments made to Mr Roques was the latter's serious misconduct in breach of contract in failing to report to Sybron the fraudulent misconduct of Bove, his No.2, and the other subordinates. He does note, though, that it is puzzling that it never seems to have occurred to counsel or to any of the many judges who dealt with *Bell* that they might have to consider the duty of Bell to report Snelling's misconduct, or Snelling's duty to report Bell's.

3.45 Stephenson LJ found support for this approach in an earlier decision of the Court of Appeal in the case of *Swain v West (Butchers) Ltd*[17]. This led Stephenson LJ to express the following general principle, which he considered followed from *Swain* and was consistent with *Bell v Lever Brothers,* namely (126):

> *"that there is no general duty to report a fellow-servant's misconduct or breach of contract; whether there is such a duty depends on the contract and on the terms of employment of the particular servant. He may be so placed in the hierarchy as to have a duty to report either the misconduct of his superior, as in Swain, or the misconduct of his inferiors, as in this case."*

3.46 Fox LJ agreed, expressing himself in similar terms (129):

> *"I am not at all saying that an employee has in every case a duty to disclose to his employers any information that he has about breaches of duty by his fellow employees. I can see that ordinary usage is in many respects against such a rule. The matter must depend, I think, upon all the circumstances of the case. The important*

[17] [1936] 3 All ER 261.

circumstances in the present case are that Mr Roques was in a senior executive position in the group and there was existing a continuing fraud by the employees against the company, of which he was well aware."

3.47 Kerr LJ held that Mr Roques was throughout in fraudulent breach of a clear duty owed to his employers to put an end to the activities of Mr Bove and the other conspirators, who were engaged in seeking to destroy the employers' business for their own purposes, and this continuing breach of his duty induced the mistake on Sybron's part.

3.48 But it is in its analysis of *Bell v Lever Brothers* that Kerr LJ's judgment is perhaps most illuminating. He considered that all that *Bell v Lever Brothers* decides, at most, is that Mr Roques was under no duty to disclose his own misconduct. He said "at most" because he was far from convinced that *Bell v Lever Brothers* applies, even to this extent, to cases where the concealment is fraudulent, as in *Sybron*, since the absence of fraud was stressed throughout the appellate proceedings in *Bell v Lever Brothers* itself.

3.49 All members of the Court of Appeal were clear that the fact that compliance by Mr Roques with his duties in this regard would inevitably have revealed his own fraudulent complicity was irrelevant.

Horcal Ltd v Gatland

3.50 The next case in this line of cases is another decision of the Court of Appeal in *Horcal Ltd v Gatland*[18].

The facts

3.51 Mr Gatland was managing director of Horcal, who were building contractors. The chronology of events is of some importance to the outcome of the case and needs to be set out in some detail.

3.52 In early 1978, disagreements arose between Mr Gatland and a Mr Watson, the controlling shareholder of Horcal, and they decided to separate. On 3 June 1978, Mr Watson made proposals to Mr Gatland in effect for the purchase by Mr Gatland of Mr Watson's interest in Horcal including a proposal as to the price.

3.53 Whilst negotiations on this proposal were underway, on 12 June 1978, Mr Gatland on behalf of Horcal provided an estimate for building works to a client, Mrs Kingsbury, who accepted the estimate the same day. Shortly thereafter, and before 24 July, Mr Gatland decided to receive the payment personally from Mrs Kingsbury for this work and to pay the expenses himself on the basis that this would not deprive the shareholders of any profit since he was to become the sole shareholder if the proposal then on the table was implemented.

[18] [1983] IRLR 459 (Glidewell J), [1984] IRLR 288 (CA).

3.54 However, Mr Gatland and Mr Watson were unable to agree on this proposal and on 24 July they agreed a different means of parting company. That is, Mr Gatland would leave Horcal in return for a payment of £5,000.

3.55 At the date of entering into that agreement, the building contract with Mrs Kingsbury was not in his mind although he had by that date decided to pocket the proceeds himself. Subsequently, Mr Gatland was paid for that building contract by the end of August 1978. His resignation took effect on 31 October 1978, and he was then paid the £5,000 termination payment. He managed to keep secret from Horcal the building contract with Mrs Kingsbury.

3.56 Unfortunately for Mr Gatland, during the following year Mrs Kingsbury complained about some aspect of the job that had been done which brought the whole matter to the company's attention, including the payments she had made direct to Mr Gatland.

The Court of Appeal

3.57 Horcal, the company, commenced an action against Mr Gatland to recover the sum of £5,000 paid to him pursuant to the termination agreement. It was claimed that the sum of money had been paid under a mistake of fact, and that the agreement under which it had been paid was void, the basis of that allegation being that Mr Gatland had committed a breach of his duty as director and that he had failed to disclose that breach of duty to Horcal at the date the termination agreement was made, thereby inducing a unilateral mistake on the part of the company.

3.58 Glidewell J dismissed the company's claim and the Court of Appeal dismissed the appeal.

3.59 The leading judgment was given by Robert Goff LJ, although it will be seen that the decision turned essentially on the facts of the case. In the course of his judgment, Robert Goff LJ said (para 16) that the company's argument, that a director is under a duty to disclose any breach of duty on his part before an agreement of the kind in the present case was entered into, could lead to the extravagant consequence that a director might have to make a "confession" as a prerequisite of such an agreement.

3.60 However, it was not necessary to decide whether the company's argument was correct or not. This is because, on the judge's findings, Mr Gatland had committed no breach of duty by the date of the termination agreement on 24 July which he would have had to disclose if any duty of disclosure rested on him. All that had happened was that, by that date, Mr Gatland had formed the intention to pocket the proceeds but had done nothing to implement that intention. As Lawton LJ stated in his judgment, the law is concerned with deeds, not thoughts (para 24). It does not appear from the report that *Sybron v Rochem* was cited to the Court, although it is to be noted that the third member of the Court was Fox LJ who had been a member of the Court in *Sybron*. Fox LJ simply stated that he agreed with Robert Goff LJ.

Tesco Stores Ltd v Pook

3.61 We turn now to *Tesco Stores Ltd v Pook*[19].

The facts

3.62 Mr Pook was employed by Tesco as the new grocery development manager in its e-commerce department. Part of his duties involved the approval of invoices. He concocted false invoices, approved them for payment and also received a bribe in excess of £300,000 from a customer. Subsequent to the commencement of the civil proceedings brought by Tesco against Mr Pook, he was convicted of theft and sentenced to 3 years 11 months' imprisonment, which he was still serving when the trial was heard by Mr Justice Peter Smith.

3.63 The day before Mr Pook attended a disciplinary hearing and was dismissed, he applied to exercise share options which – unsurprisingly – the employers refused.

Peter Smith J

3.64 Undeterred, in the course of proceedings commenced by his employers, Mr Pook counterclaimed in relation to the denial of the exercise of his share options. It is in this context that the duty to disclose arose.

3.65 However, what the Judge had to say on this subject is obiter. This is because he held that there was an implied term in the share option scheme that the option was not exercisable as long as the employee was in repudiatory breach of the contract of employment.

3.66 As the Judge stated, that finding made it unnecessary to consider the alternative argument based on the positive obligation to disclose (paragraph 53). Nevertheless, consider it he did.

3.67 The argument for Tesco was that Mr Pook was under a positive obligation to disclose his breaches of fiduciary duty. He failed to do so. Had he done so the contract of employment would have been *immediately terminated* by Tesco.

3.68 Having considered the authorities, the Judge stated his opinion that directors have a positive duty to disclose breaches of their fiduciary duty. He was of the opinion that senior employees (of the kind identified in *Sybron*) have a similar duty. He did not believe that the finding of such duties is in conflict with the authorities starting with *Bell* and following (paragraph 65).

3.69 He reasoned that it would be an odd thing if Mr Pook was under an obligation to disclose breaches of duty of fellow employees (as in *Sybron*) but not under an obligation to disclose his own breaches.

3.70 Is this decision consistent with the authorities as the Judge suggested? First, the Judge considered *Bell v Lever Brothers*. It seemed to him that if Messrs Bell or Snelling owed a fiduciary obligation, then Lord Atkins' decision may not

[19] [2004] IRLR 618.

have been the same. This ground for distinguishing *Bell v Lever Brothers* is difficult to reconcile with Lord Thankerton's clear dicta (albeit *obiter*) that, in the absence of fraud, neither a servant *nor a director* of a company is legally bound forthwith to disclose any breach of the obligations arising out of the relationship (p231).

3.71 Next, Peter Smith J turned to *Horcal v Gatland*. He cited the passage from Robert Goff LJ's judgment, to which we have already referred, in which he recognises the force in the argument against a duty to disclose on the ground that it could lead to the extravagant consequence that the director might have to make a "confession" as a prerequisite to a termination agreement. Peter Smith J concluded from this passage that had it been necessary for Robert Goff LJ to decide this point then he would have accepted that a director had a positive duty to disclose breaches of fiduciary duty (meaning his own). But it is difficult to see how that conclusion can be drawn from the passage of Robert Goff LJ's judgment which he cites.

3.72 There must, therefore, be some doubt as to how much assistance, if any, can be derived from *Tesco v Pook* where the dicta on the duty to disclose are admittedly obiter and where the earlier authorities are not wholly persuasively distinguished.

Item Software (UK) Ltd v Fassihi at first instance

3.73 This brings me to Item Software itself. The matter came on for trial before Nicholas Strauss QC sitting as a deputy judge of the Chancery Division. He gave judgment on 5 December 2002[20]. The appeal against his findings on disclosure was dismissed by the Court of Appeal on 30 September 2004[21]. Between the two hearings, the first instance judgment in *Item Software* was the subject of consideration by Hart J in the case of *British Midland Tool Ltd v Midland International Tooling Ltd*. It will be convenient to consider these three decisions in chronological order.

The facts

3.74 First, the facts in *Item Software*. Item supplies reliability software. The major part of its business was the distribution of software products produced by another company, Isograph. Item paid Isograph royalties on sales. Mr Fassihi was at the relevant time the sales and marketing director of Item.

3.75 There came a point when Item decided to try to negotiate more favourable terms with Isograph. Item sought a reduction of royalties on sales; Isograph refused. This caused something of a deterioration in the relation ship between the parties leading Item to serve conditional notice of termination of the distribution agreement.

3.76 During the notice period of the distribution agreement, and whilst Mr Fassihi encouraged Item to take up a tough stance in the ongoing negotiations with Isograph, he also wrote to Isograph suggesting that he would set up his own

[20] [2003] IRLR 769.
[21] [2004] IRLR 928.

company to take over the distribution agreement with Isograph. This was, on any view, a gross breach of duty on the part of Mr Fassihi who had also put himself in a position in which his personal interest conflicted with his duty to Item.

3.77 The distribution agreement between Item and Isograph was brought to an end. Isograph then entered into a new agreement with a company which was ostensibly operated by a close friend of Mr Fassihi, who persuaded a number of Item's employees to leave Item and join the new company. When Item discovered what was going on, they summarily dismissed Mr Fassihi.

3.78 Item commenced proceedings against Mr Fassihi and others. It claimed that Mr Fassihi breached his duty as a director and as an employee to act in good faith in Item's best interests in three respects and that this resulted in the termination of the Isograph agreement, with the consequence that Mr Fassihi was liable for Item's loss of profit.

3.79 The first two alleged breaches of duty are not relevant for our purpose save by way of background. They were, first, that Mr Fassihi sought to divert Item's contract to his new company and, secondly, that having done so he continued to press Item to take a hard line in negotiations with Isograph in order to improve his own prospects of securing the business for his own company.

3.80 As to these breaches, the Judge found that the possibility that Mr Fassihi's attempt to secure the contract for himself made a difference to Isograph's position in the negotiations was negligible. Neither was the Judge satisfied that Item would have negotiated any more cautiously even if Mr Fassihi had not been egging it on.

Nicholas Strauss QC

3.81 It is, however, the third alleged breach which is of interest for present purposes. Item contended that Mr Fassihi was in breach of his duty to act in the interests of Item by failing to disclose what he had done.

3.82 The Judge, Nicholas Strauss QC, found it was highly probable that had Mr Fassihi disclosed what he had done, it would have led Item to accept Isograph's proposal instead of indulging in the further brinkmanship which caused Isograph to lose patience and serve notice of termination.

3.83 Given the Judge's conclusions on what caused the termination of the agreement, the crucial issue of law arising, as the Judge identified it was whether, in addition to Mr Fassihi's breach of duty in seeking to divert Item's main contract to his new company, the failure to disclose that misconduct to Item was a further breach of duty. What had to be considered, the Judge said, was "whether an employee or director of a company is ever, and if so in what circumstances, obliged to disclose his own misconduct to the company which is a victim of it" (para 38).

3.84 The Judge reviewed the relevant authorities, including *Bell v Lever Brothers*, *Horcal v Gatland*, *Sybron v Rochem*, *BCCI v Ali*, *Nottingham University v Fishel*, and *Neary v Dean of Westminster*.

3.85 Having done so, the Judge summarised the position on the authorities in the following propositions (para 51).

- *Bell v Lever Bros* is authority for two quite different propositions in relation to the disclosure of misconduct.
- The first proposition is that an employee's duty to act in good faith and in the interests of his employer does not require him to disclose his own misconduct at or after the time it is committed, even where it may be in the employer's interests to know of it.
- The second proposition is that the employee will still owe no duty to disclose his own misconduct, if he later enters into a contract with the employer to vary or terminate his contract of employment, even if the misconduct would be a material matter to be taken into account by the employer.
- As to the first proposition, it is not an absolute rule. There are cases in which particular aspects of the employee's functions in the business require disclosure of the relevant facts, even if this involves owning up to misconduct.
- It is possible that the general rule will also be inapplicable if, in the circumstances, the concealment of misconduct is fraudulent.
- It is not clear on the authorities whether the position of a director is the same as that of an employee.

3.86 The Judge held that in that case Mr Fassihi's misconduct did give rise to the super-added duty of disclosure. This was principally because, given his involvement in the negotiations on behalf of Item, his duties of fidelity and care required him to disclose information relevant to those negotiations, including his own attempt to sabotage those negotiations. He further held that this was a case of fraudulent concealment. For these reasons, the Judge considered that *Bell v Lever Bros* was distinguishable, and the non-disclosure of his misconduct was a breach of duty by Mr Fassihi.

3.87 That being so, it was unnecessary for the Judge to decide whether *Bell v Lever Bros* was distinguishable for the additional reason that Mr Fassihi was a director of Item as well as an employee. However, he expressed his opinion that Mr Fassihi did owe a duty of disclosure by virtue of his position as a director.

RGB Resources Plc v Rastogi

3.88 Very shortly after judgment was given at first instance in *Item Software*, Laddie J made some interesting observations on this area in *RGB Resources Plc v Rastogi & Ors*[22]

3.89 Mr Patel, the fourth defendant, applied to strike out the claim brought against him following the collapse of RBG Resources, of which he was a senior executive. RBG alleged that Mr Patel owed duties *inter alia* to make enquiries concerning the other defendant employees in so far as their conduct gave rise to a suspicion of dishonesty and/or to take steps to stop or prevent the dishonest activities of others affecting RBG and to disclose such activities to RBG and, where necessary, to third parties including the authorities and RBG's auditors.

3.90 In this context, Laddie J considered whether there was "a general obligation to whistleblow"[23] and "a duty to investigate"[24].

3.91 As to the former, the Judge considered *Sybron v Rochem* and continued[25]:

> "There is no general rule…that before this duty [to whistleblow] can be imposed, the employee must be given a supervisory function over the other employees. Whether or not Mr Patel was under a duty to report wrongdoing by his co-defendants is a matter of fact which is dependent upon a multitude of factors, including the terms of his contract of employment, his duties and his seniority in the company. One of the relevant factors will be the nature of the wrongdoi8ng and its potential adverse effect on the company. Where, as here, the alleged wrongdoing went to the very survival of the company, it is more likely that the court would imply a duty to report. As the extract from the judgment of Stephenson LJ set out above indicates [in *Sybron*], such a duty may include a duty to report the wrongdoing of his superiors."

3.92 Laddie J recognised that it could not be assumed that there was a universal obligation to investigate whether there had been wrongdoing in the company. Such an obligation is likely to arise in fewer cases than those in which there is an obligation to report wrongdoing already known to the employee. A major factor in deciding whether such an obligation exists must be the terms of the employee's contract of employment and the duties he has been assigned within the company[26]. The Judge held that there was a sufficiently arguable case that Mr Patel was under an obligation to investigate in the circumstances that had arisen.

British Midland Tool

3.93 Before turning to the appeal in the *Item Software* case, it is worth noting another decision which was given between *Item Software* at first instance and

[22] [2002] EWHC 2782 (Ch). See the casenote by Lewis (2004) 33 ILJ 278 and the casenote by Wynn-Evans on *Tesco v Pook* and *Item Software* at (2005) 34 ILJ 178.
[23] Paras 37-46.
[24] Paras 47-49.
[25] Para 40.
[26] Para 47.

in the Court of Appeal. It is the case of *British Midland Tool Ltd v Midland International Tooling Ltd*[27].

3.94 Four directors of the claimant company left and set up the defendant company in competition with the claimant. One director retired in order to be free from his fiduciary duties and begin the plan for the new business without being in breach. The other directors remained until the plan was implemented. Steps to implement the directors' plan were commenced during their notice periods. The defendant company was incorporated and premises and finance were secured, leaving the main task of recruiting a workforce, which was achieved by indirect approaches through the third defendant after he retired and by responses to a newspaper advertisement.

3.95 The claimant successfully sued the new company and the directors for unlawful means conspiracy. The directors were in breach of their duties to act in good faith in the company's best interests and not to embark on a course of action where their personal interests would conflict with those of the company. The duty to act in the company's best interests included a duty to inform the company of any activity, actual or threatened, that would damage the company's interests.

3.96 In the course of his judgment, Hart J endorsed the approach of Nicholas Strauss QC in *Item Software*. In some important words of general application, Hart J said (para 89):

> *"A director's duty to act so as to promote the best interests of his company prima facie includes a duty to inform the company of any activity, actual or threatened, which damages those interests. The fact that the activity is contemplated by himself is, on the authority of Balston's case, a circumstance which m ay excuse him from the latter aspect of the duty. But where the activity involves both himself and others, there is nothing in the authorities which excuses him from it."*

Item Software in the Court of Appeal

3.97 Back to *Item Software*. Mr Fassihi appealed the Judge's decision on the disclosure issue. The appeal was dismissed by the Court of Appeal.

3.98 In the course of an illuminating judgment, Arden LJ subjected the leading authorities, in particular *Bell v Lever Bros* to careful analysis, and also reviewed the policy reasons behind those decisions. Mummery LJ and Holman J agreed with Arden LJ on the disclosure issue.

3.99 What are the key points to emerge from the Court of Appeal on the disclosure issue?

3.100 First, it should be noted that, whilst the Judge had addressed this issue principally in terms of an employee's duty, Arden LJ did so by focussing on the duties of a director. This was the logical starting point, she thought, since the duties of a director are in general higher than those imposed by law on an employee (para 34).

[27] [2003] 2 BCLC 523.

3.101 Secondly, Arden LJ preferred to base her conclusion on the fundamental duty to which a director is subject, that is the duty to act in what he in good faith considers to be the best interests of his company. The duty is expressed in general terms, which is one of its strengths. It is dynamic and capable of application in cases where it has not previously been applied but the principle or rationale of the rule applies. On the facts of this case, there was no basis, concluded Arden LJ, on which Mr Fassihi could reasonably have come to the conclusion that it was not in the interests of Item to know of his breach of duty.

3.102 Thirdly, Arden LJ turned to *Bell v Lever* and subsequent cases. She noted the differences in approach between Lords Atkin and Thankerton who gave the leading speeches on disclosure and then asked what was the *ratio* in *Bell v Lever* on the disclosure point. She answered this question in part by identifying what was not the *ratio*. She held that the majority in *Bell v Lever* did not decide that there could never be a duty to disclose his own misconduct on the part of the employee. She also held that the majority did not decide that a fiduciary would not owe any such duty. Her conclusion that Mr Fassihi was bound to disclose his misconduct was consistent with policy and also economically efficient.

3.103 Fourthly, it was unnecessary in Arden LJ's view to consider to what extent an employee has a duty to disclose his own misconduct. She noted that, following the *Sybron* case, one route by which it might be concluded that Mr Fassihi had a duty to disclose his own wrongdoing is that no logical distinction can be drawn between a rule that an employee should disclose his own wrongdoing and a rule that he should disclose the wrongdoing of his fellow employees even if that involves discloses his own wrongdoing too. She added that the Court had not been taken to any of the developing jurisprudence on the mutual duty of trust and confidence (para 60).

Conclusion

3.104 The following conclusion may be drawn from the present state of the authorities in the light, in particular, of the decision of the Court of Appeal in *Item Software*.

- There is no general rule that an employee or director may never owe a duty to disclose his own misconduct. *Bell v Lever Bros* is not authority for any such general rule.

- An employee or director may owe a duty to disclose the misconduct of other employees, even where that necessarily involves discloses his own misconduct. Whether he owes such a duty depends on all the circumstances, including his position within the business and his express contractual obligations: *Sybron v Rochem*.

- The director's duty to act in what he in good faith considers to be the best interests of the company may require the director to disclose his own misconduct. This general formulation is preferable to seeking to

identify particular duties of disclosure, in part, because it has the merit of flexibility in novel circumstances: *Item Software*.

- The issue whether an employee owes a duty to disclose his own misconduct is undecided. Earlier authorities such as *Sybron* are likely to be relevant to the determination of that issue, as is the evolving jurisprudence on the mutual duty of trust and confidence: *Item Software*.

4 GARDEN LEAVE

4.1 Garden leave involves a period of enforced absence from the office, and usually suspension from duties, for an employee subject to notice of termination (whether notice was given by the employer or by the employee).

4.2 It has the merit, from the employer's point of view, of restricting competition, and making available the employee's services if desired, for a limited period of time. Its major drawback is the cost to the employer.

William Hill v Tucker

Background

4.3 The duty of good faith has particular significance where an employee is put on garden leave. The duty continues during this period and it is this duty which prevents the employee working for a competitor before the expiry of the notice period.

4.4 The availability of garden leave has been reduced by the decision in *William Hill v Tucker*[28].

4.5 There is an important background to *William Hill*. An employer faces a problem when confronted by an employee who, despite having entered into a contract of employment, refuses to work. Worse still, he intends to leave without giving proper notice, in order to join a competitor. The employer is told that the courts will not grant an injunction which has the effect, albeit indirectly, of forcing the employee to work for the employer. This undesired effect may materialise if the employee is prevented from working for another resulting in his idleness or starvation that forces him back to work for the employer. This left the employer with no effective remedy.

4.6 A number of exceptions were developed. First, if the employee was not compelled to go back to the employer and could realistically go and work elsewhere, albeit not with a competitor, then an injunction could be granted (e.g. *Warner Bros Pictures Inc v Nelson*[29]). Secondly, where the employee was happy to continue working for the employer, and trust and confidence was

[28] [1998] IRLR 313
[29] [1937] 1 KB 209

maintained, the Courts were more inclined to grant an injunction to ensure the employee worked out his notice: *Evening Standard v Henderson*[30].

4.7 But the third exception to the traditional answer emerged. The employer agreed to pay the employee's salary and all benefits, would not insist on him coming to work and would not sue for his failure to work. He was put on garden leave.

4.8 The employer then faced a further problem. On behalf of employees, it was argued that the employer himself was in breach of contract by not allowing the employee to work. If the employer was in breach of contract, then the employee could say 'you have broken the contract, I shall accept this breach by ending the contract; I am free to join the competitor'. Whether the argument succeeds depends on whether the employer has a right to put an employee on garden leave. In *GFI v Eaglestone* [31] and *Eurobrokers v Rabey*[32], the courts began to grapple with this question. The existence or otherwise of a right to work was the issue in *William Hill*.

Facts

4.9 Five companies offered spread betting. William Hill Index Limited was one for which Mr. Tucker worked as a senior dealer. He was required to give six months' notice of termination.

4.10 Mr. Tucker purported to resign on one month's notice in order to join City Index, a rival to William Hill. William Hill replied that six months' notice was required, that Mr. Tucker was not required to attend work, that he would receive his salary and other contractual benefits and they reminded him of his continuing duty of good faith.

4.11 William Hill applied for an injunction to restrain Mr. Tucker from joining a competitor until the expiry of his notice. The Judge refused the application. He stated that the employer was obliged to provide work for the employee which it did not do, entitling the employee to accept this repudiatory breach and end the contract. William Hill appealed.

Decision of the Court of Appeal

4.12 The Court of Appeal rejected Williams Hill's appeal.

4.13 *First*, the Judge's decision was based on a duty on the employer to provide a skilled employee with work and the opportunity to exercise his skills save where there is an express or implied right not to do so. The Court of Appeal rejected that proposition.

4.14 *Secondly*, the Court identified the proper approach to be adopted. Under the contract, what does the employer agree to do? The answer is based on terms of the contract in the light of all the surrounding circumstances.

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[30] [1987] ICR 588
[31] [1994] IRLR 119
[32] [1995] IRLR 206

4.15 *Thirdly*, certain situations are recognised by the courts as giving rise to an obligation for the employer to provide work. For example, actors who need to exercise their skills and where publicity is of utmost importance.

4.16 In contrast, the courts have in the past been reluctant to find an obligation to provide work in cases where an employee is engaged on an indefinite contract with a fixed wage and no remarkable features. It is this category which needs to be re-examined in the light of *William Hill*.

4.17 Fourthly, a new approach is found in the decision. The Court recognised the changed social conditions in which we live. This can be traced back to a comment of Lord Denning in a 1974 case of *Langston v AUEW*[33], right through to Lord Justice Dillon in *Provident Financial Group v Hayward*[34]. These changed social conditions must inform the legal approach to be adopted. It is not suggested that there is an obligation to find work if there is none to be done or none that can be done with profit to the employer.

4.18 Nor is the employer bound to allocate work to the employee in preference to another if there is not enough for both. But what the courts are now prepared to do, according to *William Hill*, is to find that there is a right to work in certain situations where previously there was none. But how do you distinguish that situation now? The *William Hill* decision points to three factors.

- first, the post of senior dealer held by Mr. Tucker was specific and unique;
- secondly, the skills necessary to the proper discharge of his duties required frequent exercise;
- thirdly, the contract provided for the hours and days of work, and imposed on the employee the obligation to work those hours necessary to carry out his duties. There was also an express right of suspension. This term would be unnecessary if an implied right to place an employee on garden leave existed. If the employer were entitled to keep his employees in idleness, the investment in his staff (a commitment referred to in the staff handbook) would be as illusory as the limited power of suspension would be unnecessary.

Lessons to be learned

4.19 *First*, given the wider range of contracts where a right to work may exist, there is an increased necessity for the employer to incorporate an express garden leave clause into contracts.

4.20 *Secondly*, even where there is an express garden leave clause the Courts will not necessarily grant the injunction. The Courts have recognised that garden leave provisions are capable of abuse. If an employer seeks a garden leave injunction then it must be justified on similar grounds to that necessary to the

[33] [1974] IRLR 15
[34] [1989] IRLR 84

validity of a restrictive covenant. This reflects what was said in the 1996 case of *Cantor Fitzgerald v George*[35].

4.21 *Thirdly*, the precise ambit of the right to work remains unclear. Lord Justice Morritt identified three criteria. The first is that Mr. Tucker held a specific and unique post. But that could be said of many people who are employed in a position of seniority or importance. Secondly, spread-betting skills require frequent exercise. That argument can apply with equal force across a whole range of professions. Thirdly, the terms of the particular contract. Most contracts identify specific hours and days of work, impose on the employee an obligation to carry out duties, contain a limited power of suspension, and staff handbooks often refer to the employer's investment in staff.

Later Cases

4.22 In the absence of a garden leave clause, it has been held that the words "The Executive shall exercise such powers perform such duties (*if any*)…" (emphasis added) are sufficient to make clear that there might not be any duties to perform. This supported the conclusion that there was no obligation to permit the employee to do his work, but only to pay his remuneration, so that the employer was entitled to send him on garden leave during a period of notice: *SBJ Stephenson Ltd v Mandy*[36].

4.23 In deciding whether to grant a garden leave injunction and, if so, for how long, the court is always concerned to consider what is the minimum period of protection which the employer reasonably needs. Thus, in *AOL v Keeling*, Unreported, February 2000 (Pumfrey J), a garden leave injunction was granted covering 6 months of a 12-month notice period when the employee had sought to leave after 3 months. In *AOL*, the court also demonstrated its reluctance to strike down a garden leave clause on the ground that it is in unreasonable restraint of trade.

Symbian Ltd v Christensen

4.24 This case casts doubt on the proposition that the duty of good faith continues during a period of garden leave.

Facts

4.25 Mr Christensen was Executive Vice President, Sales & Marketing, for Symbian, subject to 6 months' notice of termination.

17.3.00	Christensen accepted an offer to join Microsoft, a competitor, with effect 1.4.00.
22.3.00	Christensen told Symbian that he would be joining Microsoft, and was put on garden leave.

[35] Unreported
[36] [2000] IRLR 233 (Bell J)

28.3.00 Christensen accepted that he was required to give 6 months' notice of termination, but claimed his new position would not be competitive with Symbian.

4.4.00 Christensen resigned with immediate effect.

12.4.00 Symbian commenced proceedings for an injunction.

8.5.00 Symbian's application came before Scott VC.

4.26 Christensen's contract provided

- that he would not during the term of the agreement be engaged in any other business (clause 4.3);
- for garden leave during notice (clause 12.3); and
- that, for 6 months from the earlier of (i) garden leave starting, or (ii) termination of employment, he would not engage in business of a similar nature as he had engaged in over the previous 12 months'.

4.27 Symbian sought an injunction restraining Christensen from

- undertaking employment with any present or intended future competitor of Symbian, and
- otherwise acting in breach of his duties of good faith.

Scott VC's Judgment

4.28 Scott VC (unreported) found the first head of relief too wide, and the second unsupportable. He stated that

- the serving of garden leave notice by an employer destroys the employment relationship (although not the employment contract);
- the implied duty of good faith does not survive during garden leave; and
- a garden leave injunction cannot be based on the implied duty of good faith.

4.29 Scott VC did, however, grant an injunction restraining Christensen from working for Microsoft during the garden leave period based upon the express "exclusive service" term at clause 4.3 of his contract (see above).

The Court of Appeal's decision

4.30 The Court of Appeal dismissed the appeal without dealing with Scott VC's observations on garden leave and the duty of good faith. It noted, however, that counsel for Christensen "confessed to some difficulty" in seeking to justify that part of Scott VC's judgment in his favour.

Crystal Palace v Bruce

4.31 Burton J granted a garden leave injunction pending a speedy trial to stop the football manager, Steve Bruce, from leaving his club Crystal Palace, and joining rivals Birmingham City, in breach of a 9-month notice period in his contract: *Crystal Palace FC (2000) Ltd v Bruce*[37].

4.32 Significantly, Burton J considered it arguable that it was a sufficient legitimate interest of an employer to stop an employee helping a competitor during his notice period so as to justify a garden leave injunction. This finds some support in dicta of Dillon LJ in *Provident v Hayward,* but the proposition is still open to argument both ways.

TFS Derivatives Ltd v Morgan

4.33 *TFS Derivatives Ltd v Morgan*[38] dealt mainly with the reasonableness of a six month non-compete covenant in the context of an equity derivatives broker (see paragraph 6.4 below). (Because of the precise wording of the covenant, it was upheld – albeit with a little "blue-pencilling".)

4.34 However, during the hearing Counsel for the broker in question advanced the proposition that the relevant covenant was in restraint of trade on the basis that an alternative clause would have been more appropriate, ie. a clause providing for six months' notice entitling the employer to place the broker on garden leave for the whole of that period.

4.35 He accepted that there was little authority on the interplay between garden leave and restrictive covenants. But he asked the court to take the opportunity "to say something about the reasonableness and greater attraction of garden leave clauses generally" and to strike down the clause in question.

4.36 Cox J declined the invitation. But she did say that she was not persuaded that garden leave clauses negated the necessity for non-compete clauses, particularly on the facts of the particular case, citing the following reasons:

4.36.1 Six months' garden leave could be regarded as more onerous as it prevented the broker from working in any capacity rather than in the particular business area covered by the covenant.

4.36.2 A garden leave clause would not be sufficient protection if the employee was summarily dismissed or walked away without giving notice.

4.36.3 Enforced garden leave might be a breach of the implied term of trust and confidence.

4.36.4 Just because the employer had to pay for garden leave did not make it more reasonable for the employee.

[37] [2002] SLR 81. A further garden leave case in relation to a football manager was settled at the door of the court: *Reading FC v Pardew*, see *The Times* 19.9.03.
[38] [2005] IRLR 246.

4.37 Clearly this did not form the reasoning of the decision. But Cox J's comments raise interesting questions.

Conclusion

4.38 *William Hill* marks a significant shift in the balance of power to employees. Even if there is no general right to work, an employer will be taken to be under an obligation to provide work to the employee far more than previously.

4.39 The correctness of Scott VC's dicta in *Symbian*, to the effect that garden leave destroys the implied duty of good faith, is doubtful. It is difficult to reconcile with the Court of Appeal's statements in *Provident v Hayward* (above). Similarly, query how it sits with Cox J's comments in *TFS Derivatives v Morgan* (which seem to envisage the implied duty not only continuing but potentially being breached by an express garden leave clause.) Despite this, some contracts now expressly provide that the duty of good faith continues during garden leave.

5 CONFIDENTIALITY

5.1 There are three common ways of protecting confidential information[39]:

- the implied duty of confidence;
- a confidential information covenant; and
- a non-competition covenant.

The implied duty of confidence

5.2 In the absence of a restrictive covenant protecting confidential information, it may be possible to rely on the implied duty of confidence.

5.3 In order for this to be effective, there must be imparted to the employee protectable confidential information.

5.4 The principles developed in relation to commercial confidence form the foundation for this branch of the law in relation to employment[40]. These principles were considered and applied by Lindsay J in *Douglas & Ors v Hello! Ltd & Ors*[41], who held that the law of confidence could encompass photographs of an event such as a wedding, and no less so because the event could have been described in words or by drawings. (This was upheld by the

[39] As to the circumstances in which a third party may be restrained from using confidential information which has come into its possession, see the principles discussed in *Royal Brunei Airlines v Tan* [1995] 2 AC 378; *Thomas v Pearce* [2000] FSR 718; *ABK Ltd v Foxwell* [2002] EWHC 9 (Ch); Douglas v Hello! Ltd [2005] EWCA Civ 595.
[40] The starting-point is *Coco v A N Clarke (Engineers) Ltd* (1969) RPC 41.
[41] [2003] EWHC 786 (Ch). See, also, *Douglas v Hello! Ltd* [2001] 2 WLR 992; *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908; *A v B* [2002] 3 WLR 542; *Campbell v MGN* [2002] EWCA Civ 1373.

Court of Appeal[42], applying *Campbell v Mirror Group Newspapers*[43].) The decision is also an interesting example of the balancing exercise between freedom of expression and confidentiality which required to be carried out by section 12 of the Human Rights Act 1998 in deciding whether injunctive relief should be granted.

5.5 In *Faccenda Chicken Ltd v Fowler*[44], Goulding J (at first instance) identified three classes of confidential information:

- information too trivial to be protectable;
- information protectable without covenant but only during the currency of the employment;
- information which is a trade secret and protectable after the employment has ended.

5.6 In deciding whether information is class 3 protectable information, all of the circumstances must be considered, in particular:

- the nature of the employment;
- the nature of the information;
- any emphasis placed by the employer on confidentiality; and
- whether the allegedly confidential information can be easily separated from the rest of the employee's knowledge and skills.

5.7 In *Poeton Ltd v Horton*[45], Poeton was engaged in the electroplating business, and Mr Horton was its sales engineer. After Horton had left and set up a competing business, using a number of the ideas used in Poeton's process, Poeton commenced an action for misuse of confidential information said to consist in:

- the electrolyte,
- the apparatus, and
- a customer list.

5.8 The judge found for the company in respect of the apparatus, and for Horton in relation to the other two categories of information.

5.9 However, Horton's appeal was allowed by the Court of Appeal. Having considered the four *Faccenda* tests for class 3 protectable information (see above), the Court concluded that the information whilst arguably class 2 was not class 3.

[42] [2005] EWCA Civ 595.
[43] [2004] 2 AC 457.
[44] [1986] ICR 297
[45] [2000] ICR 1208

5.10 Importantly, the Court stated that:

- Poeton could have protected themselves by covenant but did not;
- a court would not be astute to find class 3 confidential information tucked away in a much wider, but unjustified, claim to confidential information; and
- such claims were easily made but expensive and time-consuming to refute.

5.11 To like effect is the recent decision of Jacob J in *Cray Valley Ltd v Deltech Europe Ltd*[46]. The claimant company, which produced solvent-based resins, argued that it was the way in which certain steps in the manufacturing process were implemented, their timing and the control temperature during the process amounted to confidential information, even though the same basic steps would be used by any manufacturer, since they would determine the product's ultimate qualities and suitability for a given customer. The claim for breach of confidence failed. The judge held that the information did not have the necessary quality of confidence and had not been imparted in circumstances giving rise to an obligation of confidence. So much of it had been published already and was second nature to the employees and so much of the recipes had been non-critical to the manufacturing process and so easy to reverse engineer that a reasonable person of conscience would not see the information as a trade secret that was not to be used. That was supported by the fact that no employee was ever told to treat the recipe as trade secrets or that there was anything confidential about them. Unless information was obviously confidential, the law did not step in to protect an employer who failed to take steps to protect the confidentiality by way of contractual provisions.

5.12 In an interesting application of the above principles, Andrew Smith J decided in *Fibrenetix Storage Ltd v Davies*[47] that the claimant's general pricing information was not so confidential as to justify protection: there was no evidence that its pricing policy was unusual in the industry or of particular value to the claimant; the defendant had necessarily acquired information about the pricing policy in the course of his employment; had not been privy to significant information that was not readily available within the company, and there was no evidence that the defendant had been given special instructions about the confidential or sensitive nature of the information or the need to keep it secret.

A confidential information covenant

5.13 In *FSS Travel and Leisure Systems Ltd v Johnson*[48], the Court of Appeal approached an attempt to protect confidential information by restrictive covenant as follows:

[46] [2003] EWHC 728 (Ch).
[47] [2004] EWHC 1359 (QB).
[48] [1998] IRLR 382

- does an employer have trade secrets that are legitimately protectable by a restrictive covenant? Can the trade secrets be fairly regarded as the employer's property? Are they distinct from skill, experience, know-how and general knowledge, which can be regarded as the property of the employee;

- it is necessary to examine all evidence relating to the nature of the employment, the character of information, restrictions imposed on its dissemination, extent of use in the public domain, and damage likely to be caused by its disclosure;

- the employer must identify precise information, which is said to be confidential. See also *Brooks v Oylslager OMS (UK) Ltd*[49]; *Murray v Yorkshire Fund Managers Ltd*[50].

5.14 There are procedural and substantive lessons to be learned from *SBJ Stephenson Ltd v Mandy*[51]. SBJ were insurance brokers for whom Mr Mandy worked as Divisional Director. He was required to give 6 months' notice of termination. He found alternative employment with a competitor, Amilcroft, and gave notice of termination (but not expressly 6 months). A disagreement soon developed, which Mandy claimed amounted to a repudiatory breach of his employment contract by SBJ, and which he purported to accept. SBJ claimed that his walking out without notice was, in itself, a repudiation, which they accepted and then sought to enforce restrictive covenants contained in his employment contract.

5.15 Having granted interim injunctions, the judge ordered a speedy trial. However, Mandy appealed the interim order, and the appeal came on shortly before the speedy trial was due to start. The Court of Appeal declined to consider the merits of the appeal in view of the proximity of the trial: *Unreported, 30 June 1999*.

5.16 At the trial, a number of issues arose, including enforceability of the covenants, repudiation, breach and damages. A widely-drawn covenant against the disclosure of "information relating to the affairs of the Company" was upheld. Its purpose was to protect the sort of information which a man of ordinary honesty and intelligence would recognise to be the property of his old employer and not his own to do with as he likes. Bell J drew a distinction between objective knowledge (which was protectable, and might include what an employee remembers, including customer names), and subjective knowledge (which was not protectable since it comprised the employees' skills and knowledge). The class of information which could be protected by an express covenant of this kind "was wider than trade secrets … but was narrower than confidential information".

5.17 In *Archer v Williams*[52], the claimant sought injunctive relief and damages against her former PA who disclosed information about the claimant's

[49] [1998] IRLR 590 (CA)
[50] [1998] 1 WLR 951
[51] [2000] IRLR 233 (Bell J)
[52] [2003] EWHC 1670.

professional and private life to the media. The claimant relied upon express confidentiality provisions in the defendant's letter of engagement and also upon the equitable duty of confidence.

5.18 In relation to the duty of confidence, Jackson J considered the foundation of the claim to be Megarry J's judgment in *Coco v Clark* (above) who said that three elements are normally required if, apart from contract, a case for breach of confidence is to succeed. First, the information must have "the necessary quality of confidence about it"; secondly, the information must have been imparted in circumstances importing a duty of confidence; and, thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it. The judge referred to the recent consideration of these principles by Lindsay J in *Douglas v Hello! Ltd* (above). In cases such of these, the rights of the parties under Article 8 and under Article 10 of the European Convention on Human Rights must be evaluated and weighed against each other. Neither enjoyed automatic primacy over the other.

5.19 The judge granted the injunction against further disclosure of the confidential information, and also £2,500 damages for injury to feelings caused by the breach of confidence in reliance on the principles set out in *Cornelius v De Taranto*[53] and *Campbell v MGN*[54].

6 RESTRICTIVE COVENANTS

6.1 A number of recent cases illustrate a range of common problems encountered when seeking to enforce restrictive covenants.

General principles of construction and enforcement

Turner v Commonwealth & British Minerals

6.2 In *Turner v Commonwealth & British Minerals Ltd*[55], the court gave important guidance on the proper approach to the construction and enforcement of restrictive covenants:

- It held that if a particular construction of a covenant would lead to the view that it was unenforceable, then an alternative view, if legitimate, which led to enforcement ought to be preferred.

- Further, in determining whether a restrictive covenant is reasonable, the fact that an employee was paid something extra for agreeing to it does not relieve the employers of the necessity of justifying the restraint but it is a legitimate factor to take into account in considering the interests of the parties.

- Also, the fact that the employee had received legal advice, and there was equality of bargaining power, could be prayed in aid of enforcement.

[53] [2001] EMLR 329 at pp344-349.
[54] [2002] EWHC 499 (QB).
[55] [2000] IRLR 114

Arbuthnot Fund Managers v Rawlings

6.3 Chadwick LJ identified the importance of the court construing the terms of the contract at the interlocutory stage as follows in *Arbuthnot Fund Managers Ltd v Rawlings*[56]:

- The first task of the court – faced with the contention that post-termination restraints on an employee's ability to engage in future business activity are not enforceable – is to construe the contract under which those restraints are said to be imposed. That is a task which the court ought to carry out on an application for interim relief if it can properly do so.

- The first principle in construing written documents is that the court should consider the circumstances at the time when they were made, and the position of the parties who entered into them[57].

- The second factor which it is necessary to keep in mind is that it is not the function of the court to strive to give to the clause a meaning which enables it to have effect within the constraints of public policy if that is not the meaning which, as a matter of construction, the parties are to be taken to have intended that it should have[58]. The court must steer a course between giving to the clause a meaning which is extravagantly wide, and giving to the clause a meaning which is artificially limited.

- The next task for the court is to ask whether, given what the contractual terms mean, it is plain and obvious that they cannot be enforced having regard to the well-known limitations on restrictions in restraint of trade.

TFS Derivatives v Simon Morgan

6.4 In *TFS Derivatives Ltd v Simon Morgan*[59], Cox J reviewed and applied the principles applicable to the enforcement of a non-competition covenant following a trial of the action.

6.5 Simon Morgan, an equity derivatives broker, resigned on 7 June 2004 to join GFI, a rival of his employer, TFS. On 22 June, he was placed on garden leave until the expiry of his notice period which was 7 September. TFS obtained injunctions without notice on 6 September, and a speedy trial took place 9-11 November.

6.6 The principal restriction which TFS sought to enforce had the effect of keeping Mr Morgan out of competition in the market place in which he

[56] [2003] EWCA Civ 518 noted in (2003) 10 ELA Briefing 109.
[57] See *Home Counties Dairies Ltd v Skilton* [1970] 1 WLR 526 (CA) per Harman LJ at p533; *Haynes v Doman* [1899] 2 Ch 13 (CA) per Sir Nathaniel Linley MR at p25.
[58] See *Mont (UK) Ltd v Mills* [1993] IRLR 172 (CA) per Simon Brown LJ at para 28.
[59] [2004] EWHC 3181 (QB).

worked until 22 December 2004. Clause 12.1(a) of his contract was in the following terms:

"In view of your access to sensitive information about the Group and its business and since you are likely to acquire personal knowledge of and influence over its clients and in order to protect the goodwill of the Group, you agree that during your employment and for the periods set out below after its termination (less in the case of paragraph 12.1(a) any period during which you are not required to attend for work pursuant to [a garden leave clause]), you will not (except with the prior written consent of the Board) directly or indirectly do or attempt to do any of the following:

(a) for 6 months undertake, carry on or be employed, engaged or interested in any capacity in either any business which is competitive with or similar to a Relevant Business within the Territory, or any business an objective or anticipated result of which is to compete with a Relevant Business within the Territory."

For this purpose

"'Relevant Business' means the business of any business of the Company or any Associated Company in which, pursuant to your duties, you were materially involved at any time during the Relevant Period;

'Territory' means England and any other country or state in which the Company or any Associated Company is operating or planning to operate at the expiry of the Relevant Period;

'Relevant Period' means the period of 12 months ending on the last day of your employment or the period of your employment if shorter than 12 months."

6.7 Cox J cited the judgment of Sir Christopher Slade in *Office Angels v Rainer Thomas*[60] for the relevant principles before identifying a three-stage process which has to be undertaken.

6.8 First, the court must decide what the covenant means when properly construed. Here she adopted the approach described by Chadwick LJ in *Arbuthnot,* above (at paras 20-24) and by Waller LJ in *Turner*, above (at para 14). She accepted the submission that if, having examined the restrictive covenant in the context of the relevant factual matrix, the court concludes that there is an element of ambiguity and that there are two possible constructions of the covenant, one of which would lead to a conclusion that it was in unreasonable restraint of trade and unlawful, but the other would lead to the opposite result, then the court should adopt the latter construction on the basis that the parties are to be deemed to have intended their bargain to be lawful and not to offend against the public interest[61].

6.9 In construing the covenant in question, Cox J severed the words "or similar to" in accordance with the blue pencil principles discussed in *Attwood v*

[60] [1991] IRLR 214, CA, at paras 21-25.
[61] Para 43.

Lamont[62], *Sadler v Imperial Life Assurance Co*[63], and *Marshall v NM Financial Management Ltd*[64].

6.10 Secondly, the court will consider whether the former employers have shown on the evidence that they have legitimate business interests requiring protection in relation to the employee's employment. In this case, the defendant conceded that TFS had demonstrated on the evidence legitimate business interest to protect in respect of customer connection, confidential information and the integrity or stability of the workforce, although the extent of the confidential information was in dispute in relation to its shelf life and/or the extent to which it was either memorable or portable[65].

6.11 Thirdly, once the existence of legitimate protectable interests has been established, the covenant must be shown to be no wider than is reasonably necessary for the protection of those interests. Reasonable necessity is to be assessed from the perspective of reasonable persons in the position of the parties as at the date of the contract, having regard to the contractual provisions as a whole and to the factual matrix to which the contract would then realistically have been expected to apply[66]. In this context, Cox J relied on the approach of Lord Denning in *Littlewoods v Harris*[67]. She also made a number of interesting observations on the relationship between garden leave and post-termination covenants (discussed further below).

6.12 Cox J added that even if the covenant is held to be reasonable, the court will then finally decide whether, as a matter of discretion, the injunctive relief sought should in all the circumstances be granted, having regard, amongst other things, to its reasonableness as at the time of trial[68].

Hollis v Stocks

6.13 A clause preventing an assistant solicitor from working "as a solicitor" within 10 miles of his previous employer's office for 12 months from the termination of his employment was upheld in *Hollis v Stocks*[69]. The words "as a solicitor" were not present in the contract but the CA concluded that, on an objective reading, the first instance judge was right to determine that they should be "read in". Further, the judge knew the area well and was right to conclude that a 10-mile radius was reasonable.

Restraint?

6.14 Disputes sometimes arise as to whether a provision in an employment contract is in the nature of a restraint of trade and hence subject to the

[62] [1920] 3 KB 571, CA.
[63] [1988] IRLR 388, High Court.
[64] [1996] IRLR 20, High Court.
[65] Para 37.
[66] Para 38.
[67] [1977] 1 WLR 1472, CA; also applied recently in *Corporate Express Ltd v Day* [2004] EWHC 2943 (QB), para 40.
[68] Para 39.
[69] [2000] IRLR 712, CA

doctrine. In *Sweeney v Peninsula Business Services Ltd*[70], an employment tribunal held that a contractual term that employees who left employment with the company lost the right to claim for outstanding commission was an unlawful restraint of trade. It regarded the commission document as imposing a penalty on resigning employees. On that basis, it held that it was an economic disincentive which discouraged employees from resigning and working for competitors. The EAT held that that interpretation was wrong. The contract of employment did not impose any restraint as to whom the applicant could work for. There was nothing in the commission arrangement which supported the conclusion that it was a restraint of trade.

6.15 In *Leeds Rugby v Harris/Bradford Bulls*[71], a clause in a termination agreement that a rugby league player return to his previous employer (Leeds) after a period playing rugby union, if Leeds exercised the option to require him to do so, was a restraint of trade. However, in the circumstances of the case the restraint was considered to be reasonable.

A non-competition covenant

6.16 The rationale for a non-competition covenant is

- the difficulty of precisely identifying what information is, and what is not, protectably confidential;
- the difficulty of policing a bare restraint against misuse of confidential information;
- the difficulty of identifying customers of the business so that a non-solicitation of customers covenant may prove ineffective.

6.17 A non-competition covenant was upheld in *Turner v Commonwealth & British Minerals Ltd*, although the basis for doing so is questionable. Employees entered into severance agreements containing 12-month non-competition covenants, in relation to mining and exploration in Central Asia, in return for which payments were made. The covenant was enforced as reasonable; it was justified, apparently, by the need to protect trade connections. However, in *Forshaw v Archcraft Ltd*[72], a proposed contract that imposed a nationwide ban on manufacturing staff working, post-termination, in a competing business for a period of 12 months was "obviously too wide".

Non-Solicitation of Customers

6.18 A number of issues have arisen in recent cases in connection with covenants prohibiting solicitation of customers.

[70] [2004] IRLR 49 (Rimer J presiding).
[71] [2005] EWHC 1591 (QB)
[72] [2005] IRLR 600

Who are customers?

6.19 In *International Consulting Services (UK) Ltd v Hart*[73], a covenant purported to restrain the employee for 12 months from soliciting or dealing with those who in the 12 months before his termination were negotiating with the employer for the supply of services. The judge refused to strike this down on the grounds of uncertainty. However, mere contact was not enough. What was required was a discussion between the parties about the terms of a contract which both parties have in view and which is a real possibility. Yet, it was not necessary for the employee against whom the covenant is enforced to have been involved in those negotiations provided he had dealt with the potential customer during the last 12 months.

6.20 Similarly, in *Axiom Business Computers Ltd v Jeannie Frederick*[74], the Court of Session (Outer House) was faced with an application to enforce an 18-month restraint against transacting business with customers. For the purpose of the term, "customers" included those with whom the employer had concluded business transactions as well as those with whom he, on behalf of his employer, had already had dealings whether or not such dealings had resulted in the conclusion of a business transaction. The Court enforced this provision on the basis that the nature of the business was such that significant time and resources were invested in negotiations with a view to forming a relationship[75].

Must the employee have had contact with the customer?

6.21 In favour of the view that contact is not necessary: *Plowman v Ash*[76]; *Business Seating (Renovations) Ltd v Broad*[77].

6.22 Vinelott J believed such contact was essential in *Austin Knight (UK) Ltd v Hinds*[78].

6.23 The Court of Appeal held that a backward temporal limitation on contact between the employee and customers (e.g. requiring dealings within, say, the last six months) was unnecessary in *Dentmaster (UK) Ltd v Kent*[79].

6.24 The Court of Appeal upheld a non-solicitation clause in *Wincanton Ltd v Cranny*[80], on the basis that the defendant was forbidden to solicit only (a) in respect of services he himself had been engaged in providing in the last 12 months of his employment with the company and (b) persons with whom he himself had dealt in the course of their dealings with the company during the previous two years.

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[73] [2000] IRLR 227 (N Strauss QC)
[74] 20 November 2003; see also the casenote at [2004] ILJ 167.
[75] Para 33.
[76] [1964] 1 WLR 568 (CA)
[77] [1989] ICR 729 (Millett J)
[78] [1994] FSR 52
[79] [1997] IRLR 636
[80] [2000] IRLR 716, CA

6.25 However, an employee might be restrained from soliciting anyone at a client company provided he has had contact with at least someone within it. An argument to the contrary was rejected by Stanley Burnton J in *LC Services Ltd v Brown*[81]. He stated that an employer is entitled to protection against a former employee using his contact with one department of a customer as a reference to obtain business from another department, relying on the judgment of Nicholas Strauss QC in *ICS v Hart*[82].

6.26 He added that the fact that the provisions in question covered customers who had decided to sever their relationship with the claimant did not render them unreasonable: the employer is entitled to protect the hope that he will succeed in salvaging that business, citing *Plowman v Ash*, above.

Non-Poaching of Employees

6.27 It has taken five recent cases for a clearer picture to emerge on whether an employer can prevent the poaching of his employees by a former employee.

6.28 In *Hanover Insurance Brokers Ltd v Schapiro*[83], the relevant covenant provided:

> *"You will not for a period of 12 months … solicit or entice any employees of the company to the intent or effect that such employee terminates that employment."*

The court held there are "difficulties in law" of such covenants. The employee has the right to work for the employer he wants to work for if that employer is willing to employ him. Staff are not an asset of the company "like apples or pears or other stock in trade."

6.29 *Ingham v ABC Contract Services Ltd* [84]was decided by a different division of the Court of Appeal, a little under three months after *Hanover*, but five days before it was reported and without being referred to it. In *Ingham*, the relevant covenant provided the employee:

> *"will not within 12 months … solicit or entice or endeavour to solicit or entice away any director, manager or servant of the Company or any associated company whether or not such person would commit any breach of his contract of employment by reason of leaving the service of such company."*

The Court held that the employer had a legitimate interest in maintaining a stable, trained workforce in what was acknowledged to be a highly competitive business.

6.30 A short time later, a non-poaching covenant was enforced at first instance in *Alliance Group Plc v Prestwich*[85], that case concerned covenants by a vendor of a business, which the courts are much more inclined to enforce, than those in an employment contract.

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[81] [2003] EWHC 3024 (QB) at para 83.
[82] [2000] IRLR 227.
[83] [1994] IRLR 82
[84] Unreported
[85] [1996] IRLR 25

6.31 The enforceability of non-poaching covenants was just one of the issues that arose in *Dawnay, Day & Co Ltd v D'Alphen*[86]. The facts involve three Eurobond dealers. They wanted to set up on their own and entered into a joint venture with Dawnay, Day, an investment bank. The bank invested capital in a new joint venture company. The individuals invested their skills in return for a shareholding and financial benefits.

6.32 A clause in the shareholders' agreement provided that the individuals would not

> *"for a period of two years from the date of this agreement solicit or entice away or endeavour to solicit or entice away from the company any person who is for the time being a director, officer, employee or other servant of the company."*

This covenant was unenforceable as it extended to solicitation of employees of all kinds.

6.33 Non-poaching covenants were also contained in the employment contract. There were two. First, each manager was prohibited for a year after the end of his employment from soliciting anyone who during the manager's employment was a director or senior employee of the company. Secondly, he was prohibited, for a similar period, from employing or offering employment to any such person. Mr Justice Robert Walker judged the second of these to be indefensible in an employment contract. As to the first – the genuine non-poaching covenant – the trial judge considered himself bound by the decision of the Court in *Ingham* as to the enforceability in principle of such a covenant, whereas Dillon LJ's contrary dicta in *Hanover* was described as a general view unnecessary to the decision. The covenant provided no more than reasonable protection in the circumstances.

6.34 In *TSC Europe (UK) Ltd v Massey* [87]covenants were contained in a share sale and purchase agreement, and in an employment contract. In the latter, the individual employee (who was also a vendor of shares) agreed that, for a period of three years from the date of the share agreement or one year following the effective date of termination of his employment, whichever was the later, he would not

> *"solicit, procure or induce or endeavour to solicit, procure or induce, any employee to leave his employment with such company."*

6.35 Peter Whiteman QC, approached the covenant in line with Evans LJ in *Dawnay, Day*, on the basis that the company's interest in maintaining a stable, trained workforce is one which it could properly protect within the limits of reasonableness.

6.36 There were two vices of the covenant. First, it prohibits the soliciting of any employee without reference to their importance to the business or whether they have any specific knowledge. Secondly, the covenant prohibits the employee from soliciting any employees even if their employment with the

[86] [1998] ICR 1068
[87] [1999] IRLR 22

relevant companies commenced after the defendant had left. These two vices meant that the restrictive covenant was unreasonable.

6.37 In *SBJ*, the court adopted a generous construction of the non-poaching covenant which it enforced.

6.38 *Dawnay, Day* is also authority for the proposition that the categories of legitimate interests which may be protected by restrictive covenant are not closed. On this point, see also *Dranez Anstalt v Hayek*[88].

Limiting the Width of Restrictive Covenants

6.39 As stated above, in *Symbian v Christensen*, the Court of Appeal upheld Scott VC's decision to grant an injunction to enforce an embargo on working for other companies during the term of the employment agreement, on the basis that the embargo was modified to limit it to work for a particular firm during the garden leave period. There could be no restraint of trade objection in the circumstances. Had there been a restrictive covenant that, for the period of six months after termination, the defendant should not enter into the employment of a competitor, that restriction would have been "eminently reasonable for the purpose of protecting the confidential information of Symbian…": Morritt LJ.

6.40 On an objective reading of the non-compete clause in *Hollis & Co v Stocks*[89], the defendant was prevented from working for 12 months "as a solicitor". The Court of Appeal varied the injunction so as to include these words.

6.41 However, it was not possible to "read down" a non-compete clause which prevented the defendant from being involved "in any capacity…in any business of whatever kind within the UK which is wholly or partly in competition with any business carried on by the company": *Wincanton Ltd v Cranny*[90]. The decision of the Court of Appeal in *Mont (UK) Ltd v Mills*[91], was fatal to the enforceability of a clause drawn so intentionally wide.

Employer Repudiation

The general principle

6.42 "If an employer repudiates the contract of employment, he may not then seek to enforce the restrictive covenants contained in it." This orthodox view was founded on the House of Lords decision in *General Billposting Co Ltd v Atkinson*[92]. Based on the common law rule that where a party has repudiated a contract, and the repudiation is accepted by the innocent party thereby bringing the contract to an end, the contract-breaker cannot insist on the performance by the innocent party of continuing obligations under the contract.

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[88] [2002] 1 BCLC 693.
[89] [2000] IRLR 712, CA
[90] [2000] IRLR 716, CA
[91] [1993] IRLR 172
[92] [1909] AC 118

6.43 In *Cantor Fitzgerald International v. Callaghan*[93], the employer's refusal to pay particular sums to its employees was deliberate and determined, motivated by a desire improperly to pressurise the employees into harder work. The decision wholly undermined the contract of employment and constituted a repudiatory breach.

Cantor Fitzgerald v Bird

6.44 This issue – the effect of a repudiation on the enforceability of restrictive covenants – was one of a number of issues raised in the recent case of *Cantor Fitzgerald International v Bird & ors*[94]. When broker rivals Icap poached three employees – Messrs Bird, Boucher and Gill - from Cantor Fitzgerald International (CFI), the employees resigned and, when their requests for early release were refused, they left immediately alleging that CFI had repudiated their employment contracts. At a speedy trial, the court was faced with a number of issues.

6.45 First, had CFI repudiated the employment contracts? The employees argued that CFI had repudiated their contracts by breaching the implied term as to trust and confidence[95]. The breach was said to consist in the manner in which CFI sought to introduce a new pay system. Previously, CFI's employees were paid by way of a basic salary ("a fixed draw") and an annual bonus. CFI wished to change to a commission-only basis, arguing that employees would benefit from the new system. McCombe J found that the hard sell of the new terms to two of the three employees went too far. The promotion was aggressive and the explanations of the new proposals were perfunctory and misleading. There was much use of swearing and obscenities[96], salaries had been stopped for a day, and there had been no consultation of any sort. This combination of events amounted to a breach of the implied term of trust and confidence. The term was not, however, breached in the case of the third employee to whom a different executive had sought to sell the new pay deal and did so in a more acceptable and less undermining style.

6.46 Secondly, did the employees affirm their contracts following CFI's repudiation? CFI argued that the delay of two months before the employees walked out amounted to affirmation. McCombe J reviewed the law on affirmation[97] which he graphically described as "essentially the legal

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[93] [1999] IRLR 234 (CA)

[94] [2002] IRLR 867.

[95] The Judge briefly reviewed the authorities on constructive dismissal and the implied term as to trust and confidence: *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27; *Malik v BCCI* [1997] IRLR 462; *Millbrook Furnishing Inds Ltd v McIntosh* [1981] IRLR 309; *Lewis v Motorworld Garages Ltd* [1985] IRLR 465; *Johnson v Unisys* [2001] IRLR 279; *Cantor Fitzgerald v Callaghan* [1999] IRLR 234; *R F Hill Ltd v Mooney* [1981] IRLR 258.

[96] At para 105, the Judge referred to a number of authorities concerning the use of foul language by employer to employee: *Palmanor Ltd v Cedron* [1978] IRLR 303; *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84; *Hilton International Hotels (UK) Ltd v Protopapa* [1990] IRLR 316; *Isle of Wight Tourist Board v Coombes* [1976] IRLR 413; *Moores v Bude-Stratton Town Council* [2000] IRLR 676.

[97] *Chitty on Contracts*, 28th ed, Vol 1, para 25-002; *Callaghan* (above); *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443; *Waltons and Morse v Dorrington* [1997] IRLR 488.

embodiment of the everyday concept of 'letting bygones be bygones'"[98]. In particular, he held that an employee will not have affirmed the contract unless, first, he has knowledge of the facts giving rise to the breach and, secondly, he has knowledge of his legal right to choose between the alternatives open to him. The employees had considered their position for some time, then gave notice of their intention not to renew their contracts upon their expiry at a future date. The Judge found that each employee was clearly indicating his discontent in the employment and was giving clear signs of an intention to leave. They did not affirm.

6.47 Thirdly, what was the effect of the repudiation? It seems to have been common ground that CFI was not entitled to enforce the restrictive covenants against those two employees whose contracts had been repudiated.

6.48 Fourthly, what relief was appropriate having regard to the third employee who had joined Icap and whose contract had not been repudiated by CFI? Injunctions were granted restraining him from breaching restrictive covenants in his contract. Further, an injunction was granted restraining Icap for a period of 6 months from inducing CFI employees to breach their employment contracts. This was on the basis that Icap decided that all employees should go down the route of alleging constructive dismissal. In Mr Boucher's case, Icap had no grounds for considering that he had a constructive dismissal claim to make yet was prepared to take the risks inherent in that course. The decision is under appeal to the Court of Appeal.

Rock Refrigeration v Jones

6.49 However, a Court of Appeal judge has recently concluded that the rule in *General Billposting* accords neither with current legal principle nor with the requirements of business efficacy, and the time may come when the rule is abrogated or at least qualified.

6.50 Reconsideration of the orthodox approach was as a result of attempts to circumvent the rule by expressly providing that restrictive covenants would apply in the event of termination following the employer's repudiation. Thus, in *Briggs v Oates*[99], Scott J considered a covenant that provided:

> *"The salaried partner shall not at any time either during the continuance of this agreement or during the period of five years after it shall have determined for whatever reasons practise as a solicitor"*

Scott J concluded that the covenant did not apply where the employer had repudiated the contract. This decision was followed by Lord Coulsfield in *Living Design (Home Improvements) Ltd v Davidson* [100] where the covenant purported to apply after the termination of employment "however that comes

[98] Para 129.
[99] [1990] ICR 473
[100] [1994] IRLR 69

about and whether lawful or not". The two decisions were doubted by Sachs J in *A v B*[101] but approved by Laws J in *D v M*[102].

6.51 The point came before the Court of Appeal in *Rock Refrigeration Ltd v Jones*[103]. Mr Jones was employed by Rock when he entered into a new contract. This contract contained a restrictive covenant applying after termination "howsoever arising" and "howsoever occasioned". Within two months, Mr Jones left to join a competitor. Rock applied for an injunction. The court held that the covenant was unreasonable because it would take effect even where the contract was terminated by the company's repudiatory breach.

6.52 The Court of Appeal allowed Rock's appeal. The majority stated that the law applicable to covenants and restraint of trade had no relevance in this situation. The doctrine applies only where an otherwise enforceable covenant exists.

6.53 However, Phillips LJ concluded that the rule in *General Billposting* accords neither with current legal principle nor with the requirements of business efficacy. The problem with the rule stems from the decision of the House of Lords in *Photo Productions Ltd v Securicor Transport Ltd* [104] which laid to rest the theory that a contract was abrogated or rescinded upon acceptance of a repudiation. The effect of accepting repudiation was, first, that the unperformed primary obligations of the defaulting party were substituted by the obligation to pay compensation; secondly, that the unperformed obligations of the innocent party were discharged.

6.54 Phillips LJ believed the negative restraints of a restrictive covenant, applying after the termination of employment, should not be equated with the primary obligations discharged when a contract is terminated upon repudiation. It is arguable then that not every restrictive covenant will be discharged upon a repudiatory termination.

6.55 Phillips LJ then posed the next crucial question: if the restrictive covenants would, if valid, have survived had the employee been wrongfully dismissed by the employer, does this feature render them unreasonable and consequently void as being in unlawful restraint of trade? "No", was the answer he gave.

6.56 A further question may then arise as to whether, if Phillips LJ is right and a restrictive covenant can apply notwithstanding an employer's repudiatory breach, whether the provision for its application in those circumstances is subject to the reasonableness test of the Unfair Contract Terms Act 1977. This is more pressing since it has been held that contracts of employment are subject to UCTA: *Brigden v American Express Bank Ltd*[105].

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[101] Unreported
[102] [1996] IRLR 192
[103] [1997] ICR 938
[104] [1980] AC 827
[105] [2000] IRLR 94 (Morland J)

Campbell v Frisbee

6.57 The possible departure from the General Billposting principle was taken a stage further by Lightman J in *Campbell v Frisbee*[106]. The model Naomi Campbell engaged Vanessa Frisbee as a personal assistant under an oral contract for services. The parties entered into a written Confidentiality Agreement under which Ms Frisbee undertook to protect any information obtained during the performance of her duties as strictly confidential and not to divulge that information to any member of the public or media. The contract for services remained in force between 24 January 2000 and 7 April 2000 when relations totally broke down between the parties. Ms Frisbee alleged that on that date Ms Campbell violently assaulted her and that the acceptance of this repudiation discharged the contract for services and the Confidentiality Agreement. Shortly thereafter, Ms Frisbee sold her story to the News of the World for £25,000. The article contained allegations about Ms Campbell's personal life. Ms Campbell commenced proceedings against Ms Frisbee for breach of the express and implied obligations of confidentiality, and applied for summary judgment in respect of the admitted disclosure by Ms Frisbee of certain information about Ms Campbell's private life.

6.58 Having considered the proper approach to an application for summary judgment in such circumstances[107], Lightman J identified the issue of law for him to decide as the effect of a repudiation (which was assumed for the purpose of the application) upon the obligations of confidence owned by Ms Frisbee. Lightman J reviewed *General Billposting Co v Atkinson*, *Rock Refrigeration Ltd v Jones*[108] and concluded that if it was necessary to decide the application by reference to the principles applicable in the case of repudiation of a contract of employment by an employer, he would unhesitatingly hold (following the judgment of Morritt LJ in *Rock*) that repudiation by Ms Campbell and acceptance of that repudiation by Ms Frisbee did not prejudice the rights of Ms Campbell in respect of confidential information acquired by Ms Frisbee in the course of her work. He added[109]

> *"There can be no conceivable justification for granting as a windfall to a wrongly dismissed employee a present of his employer's trade or other secrets or confidences."*

6.59 However, this being a contract for services (and not a contract of service or employment), there was according to Lightman J no conceivable basis for the suggestion that a repudiatory breach by the client entitled the independent contractor to a release from obligations of confidentiality[110]. The Judge also rejected an alternative argument for Ms Frisbee, namely that there was a public interest in the disclosure of the revelations she had made and that the

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[106] [2002] EWHC 328 (Ch). See the casenotes at [2002] ILJ 353 and [2003] ILJ 43.
[107] ie. that the Defendant has no real prospect of successfully defending the claim: CPR Part 24.2; *Three Rivers District Council v Bank of England (No 3)* [2001] 2 All ER 513 (overriding objective).
[108] The analysis of Phillips LJ being referred to with approval by Simon Brown LJ in *Hurst v Bryk* [1999] Ch 1, 31G-H (decision upheld by the House of Lords on other grounds: [2000] 2 WLR 740).
[109] Para 21.
[110] Para 22.

existence of this public interest provided a justification for what otherwise would have been a breach of confidence[111]. As a result, Lightman J granted summary judgment for Ms Campbell.

6.60 The Court of Appeal, however, allowed Ms Campbell's appeal and set aside the summary judgment[112]. The Court of Appeal did not believe that the effect on duties of confidence assumed under contract when the contract in question is wrongfully repudiated is clearly established. While the Court did not consider it likely that Ms Frisbee would establish that Lightman J erred in his conclusions in a manner detrimental to her case, it could not be said that she had no reasonable prospect of success on the issue. The issue of law was not one that was suitable for summary determination under CPR Part 24[113]. The Court also considered that the public interest question was also not appropriate for summary determination noting that the courts are in the process of adapting the law of confidentiality in the light of the Human Rights Act 1998 in order to reflect the conflicting Convention rights of respect for private and family life and freedom of expression[114].

The Interrelationship between Garden Leave and Restrictive Covenants.

6.61 The leading authority remains *Credit Suisse Asset Management Ltd v Armstrong*[115] which held:

- There is no set-off between the period covered by a restrictive covenant and a period of garden leave. If a restrictive covenant is valid, the employer is entitled to have it enforced.

- A garden leave clause may be a factor taken into account in determining the validity of a restrictive covenant.

- In exceptional cases where a long period of garden leave had already elapsed, perhaps in excess of a year, the court may decline on public policy grounds to grant any further protection based on a restrictive covenant.

6.62 In *TFS*, above, the defendant submitted that a 6-month non-competition covenant was in unlawful restraint of trade because an alternative clause would be more appropriate, more flexible and, therefore, more reasonable; namely, a clause providing for 6 months' notice entitling the employer to place the defendant on garden leave for the whole of that period[116].

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[111] Paras 23-42, where Lightman J reviewed the authorities concerned with balancing Article 10 (freedom of expression) with Article 8 (right to privacy) of the European Convention of Human Rights.
[112] [2002] EWHCA Civ 1374.
[113] Para 22.
[114] Paras 33-35, referring to the guidance to be derived from *Douglas v Hello! Ltd* [2001] 1 QB 967 and *A v B* [2002] 3 WLR 542.
[115] [1996] IRLR 450
[116] Para 76.

6.63 Cox J indicated that she would decline the invitation to provide general guidance in relation to the role and usefulness of garden leave clauses as opposed to non-compete clauses. She nevertheless added that she was not persuaded that the point had been reached for garden leave clauses, despite their popularity and prevalence, to negate the necessity for non-compete clauses in all cases[117].

TUPE

6.64 The problems of construing an existing restrictive covenant following a TUPE-transfer are illustrated by *Morris Angel & Son Ltd v Hollande*[118].

6.65 Attempts to introduce restrictive covenants after a TUPE-transfer were declared invalid as they amounted to a variation in terms and conditions *by reason of the transfer*: *Credit Suisse First Boston (Europe) Ltd v Padiachy* [119]and *Credit Suisse First Boston (Europe) Ltd v Lister*[120].

6.66 The value of a business, especially where acquisitions are concerned, may also be affected by the decision of the EAT in *Unicorn Consultancy Services Ltd v Westbrook*[121] that an entitlement to profit-related pay transferred under TUPE. This is likely to have particular significance to e-businesses.

7 REMEDIES

Injunctions

7.1 There are a variety of forms of injunction which may be sought in employment disputes. There are also procedural rules, some of which apply generally to applications for injunctions, and some of which are relevant to particular types of injunction only.

General

7.2 They are two Parts of the Civil Procedure Rules (CPR) which are most relevant to injunction applications. Part 23 states the general rules about applications for court orders. Section I of Part 25 provides the essential guide to the court's powers and procedures when applying for interim remedies.

7.3 Generally, an application should be made on notice to the other parties by serving an application notice (23.3). However, an application may be made without notice (formerly "*ex parte*") if it appears to the court that there are good reasons for not giving notice (23.4(2) and 25.3(1)). Where an application is made without notice to the respondent, the evidence must set out why notice was not given (25PD3.4).

7.4 A person served with a without notice order may apply to have the order set aside or varied. Such an application must be made within 7 days after the

[117] Paras 77-84.
[118] [1993] ICR 71 (CA)
[119] [1998] IRLR 504
[120] [1998] IRLR 700
[121] [2000] IRLR 80

date on which the order was served on the person making the application (23.10).

7.5 Part 25 sets out:

- the types of interim remedies that may be granted (25.1);
- the time when an order for an interim remedy may be made (25.2); and
- how to apply for an interim remedy (25.3).

7.6 Parts 23 and 25, the notes to them, and the Practice Directions (23PD and 25PD) should be consulted carefully before any application for an injunction is made.

Search Order

7.7 Search orders were formerly known as Anton Piller orders (from the case of *Anton Piller KG v Manufacturing Processes Ltd*[122]. They are provided for in Part 25.1(1)(h) as follows:

"an order (referred to as a "search order") under section 7 of the Civil Procedure Act 1997 (order requiring a party to admit another party to premises for the purpose of preserving evidence etc.)"

7.8 A search order is draconian. It should only be sought in a compelling case. There are particular conditions to be satisfied and procedures to be followed both before and after such an order is made.

7.9 The purpose of a search order is to preserve evidence that a defendant, warned of impending litigation, would be likely to conceal or destroy so that it would not be available as evidence supporting a claimant's cause of action. It is an order obtained in secrecy requiring the defendant to permit his business premises and often his home as well to be entered and searched. It could have the effect that the defendant's business would be destroyed without the defendant being in a position to apply to the court for the order to be set aside before it was executed. Therefore, applicants for an order of such severity are under a strict duty to make to the court a full and frank disclosure of all matters that could be relevant and, having obtained the order, neither to act oppressively nor abuse their power in executing the order (*Columbia Pictures Inc v Robinson*[123]).

7.10 It should be noted, however, that 25PD3.3 requires that the evidence in support of an interim remedy (apparently, whether the application is made with or without notice) must set out the facts on which the applicant relies for the claim being made against the respondent, including all material facts of which the court should be made aware.

[122] [1976] Ch 55, CA.
[123] [1987] Ch 38, Scott J.

7.11 In the early cases, three essential pre-conditions were identified for the making of a search order:

- an extremely strong prima facie case;
- the damage, potential or actual, must be very serious for the applicant; and
- there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.

(*Anton Piller*, above, per Ormrod LJ at p62).

7.12 For a recent restatement of these principles, see *Dyno-Rod Plc v Debel Ltd*[124] per Laddie J at paragraphs 4, 5 and 8, where he said:

"…the Claimant must show a strong prima facie case. It must show damage, potential or actual damage, which must be of a very serious nature and it must show that there is clear evidence that the Defendants have in their possession incriminating documents. It must also show that there is a real possibility that the Defendants might destroy such material before an application inter partes can be made, and it must show that harm likely to be caused by the execution of the order to the respondent and his business affairs must not be excessive or out of proportion to the legitimate object of the order. Those are the criteria for the grant of search and seize orders, but similar factors apply to freezing orders."

7.13 The duty on an applicant applying for a search order is onerous. It is well-established that an applicant who applies for relief without notice is under a duty to investigate the facts and fairly present the evidence on which he relies (*Marc Rich v Krasner*[125], per Morritt LJ, who reviewed the earlier authorities including *Bank Mellat v Nikpour*[126]; *Lloyds Bowmaker v Britannia Arrow*[127]; *Brinks Mat v Elcombe*[128]; and *Behbehani v Salem*[129]). The duty of disclosure extends not just to material facts which were or ought to have been known to the applicant; it also includes the effect of the order which is being applied for. More generally there is a duty to present a without notice application fully and fairly (*The Gadget Shop Ltd v The Bug.Com Ltd*[130]).

7.14 A failure in the duty of full and fair disclosure may result in the search order being set aside (*Kuwait Oil Tanker Co*[131]; *Worldcom International v Home*

[124] [2004] EWHC 1100 (Ch).
[125] 15 January 1999, CA.
[126] [1985] FSR 87.
[127] [1988] 1 WLR 1337.
[128] [1988] 1 WLR 1350.
[129] [1989] 1 WLR 723.
[130] [2001] FSR 383, Rimer J.
[131] 27 November 1995, CA.

Communications Ltd[132]); *The Giovanna*[133]; *St Merryn Meat Ltd v Hawkins*[134]; *Elvee Ltd v Taylor*[135]*; In re RSM Industries Ltd*[136]).

7.15 However, sometimes a defendant's reliance on alleged non-disclosure may be seen as an act of desperation, as Slade LJ pointed out in the *Brink's Mat* case at p1359:

> *"In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the Rex v Kensington Income Tax Commissioners [1917] 1 KB 486 principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience."*

7.16 A useful summary of the principles relevant to the exercise of the court's discretion to set aside a without notice order for non-disclosure was recently given by Alan Boyle QC, sitting as a deputy judge of the Chancery Division, in *The Arena Corporation Ltd v Schroeder*[137] at paragraph 213 as follows:

(1) If the court finds that there have been breaches of the duty of full and fair disclosure on the *ex parte* application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.

(2) Notwithstanding that general rule, the court has jurisdiction to continue or regrant the order.

(3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.

(4) The court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.

(5) The court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.

(6) The court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the

[132] 16 September 1998, Timothy Walker J.
[133] [1999] 1 Lloyd's Reports 867, Rix J.
[134] 29 June 2001, Geoffrey Vos QC.
[135] [2002] FSR 738, CA.
[136] 16 March 2004, Aldous J.
[137] [2003] EWHC 1089 (Ch).

plaintiff's case is allowed to undermine the policy objective of the principle.

(7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.

(8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.

(9) There are no hard and fast rules as to whether the discretion to continue or regrant the order should be exercised, and the court should take into account all relevant circumstances.

7.17 It is also the duty of counsel and solicitors, when they make a without notice application for relief, to make in the course of the hearing a full note of the hearing, or, if this is not possible, to prepare a full note as soon as practicable after the hearing is over, and to provide a copy of that note with all expedition to all parties affected by the grant of relief on that without notice application. This is essential so that the parties affected may know exactly what occurred and the basis and material on which the order was made, and so that in this way they may be provided with the material to make an informed application for discharge (*Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd*, 23 September 1999 (Lightman J); *Thane Investments Ltd v Tomlinson*, 6 December 2002 (Neuberger J)).

7.18 Anyone considering applying for a search order would be well-advised to consider with care the structures of Hoffman J in *Lock International Plc v Beswick*[138]. At p1281c, Hoffman J said:

> *"Even in cases in which the plaintiff has strong evidence that an employee has taken what is undoubtedly specific confidential information, such as a list of customers, the court must employ a graduated response…there must be proportionality between the perceived threat to the plaintiff's rights and the remedy granted. The fact that there is overwhelming evidence that the defendant has behaved wrongfully in his commercial relationships does not necessarily justify an Anton Piller order. People whose commercial morality allows them to take a list of the customers with whom they were in contact while employed will not necessarily disobey an order of the court requiring them to deliver it up. Not everyone who is misusing confidential information will destroy documents in the face of a court order requiring him to preserve them."*

Immediate Delivery Up Order

7.19 Where the strict preconditions for the grant of a search order are not satisfied, a less draconian yet still effective order is for the defendant to deliver up immediately (or forthwith) property belonging to the claimant. This is sometimes known as a doorstep Piller. This signifies that the claimant's representatives may serve the order at the defendant's premises, seek immediate delivery up, but without any requirement on the defendant's part to permit access to the premises.

[138] [1989] 1 WLR 1268.

7.20 However, an applicant for a "doorstep Piller" should carefully consider *Adams Phones Ltd v Goldschmidt*[139]. In that case, Jacob J made the following observations:

(1) Because the order did not require the defendants to permit entry or a search, a standard requirement of search orders, namely that there be a supervising solicitor, was not included and was not considered at the time of the without notice application. That was a mistake. In future, the claimant and the court should more carefully consider requiring a supervising solicitor for orders which approximate to full seizure, such as orders requiring immediate positive action by a party, particularly if the required action is at all complex.

(2) It was also a mistake for the claimant to serve the order on a Saturday morning. There was no urgency calling for this, but by serving on a Saturday, it was near certain that the defendants would not be able to take legal advice.

(3) The presence, even nearby, of the claimant or his employee at execution is a matter which might operate oppressively, particularly on a defendant deprived of legal advice and unprotected by a supervising solicitor. The court should be told of an intention to bring along such a person when the order is sought.

Interim Injunction

7.21 An application may be made for an injunction pending trial, such as to enforce restrictive covenants. The courts have frequently considered the correct approach to such applications.

7.22 The court is not precluded from considering the strength of each party's case when deciding whether to grant an application for interlocutory relief, but should rarely attempt to resolve difficult issues of fact or law, and any view as to the strength of the parties' cases should be reached only where it is apparent from the affidavit evidence and any exhibited contemporary documents that one party's case was much stronger than the other's. It follows that the major factors relevant to the court's discretion are (a) the extent to which damages are likely to be an adequate remedy for each party, and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court was able to reach as to the relative strength of the parties' cases (*Series 5 Software Ltd v Clarke*[140] explaining and applying *American Cyanamid Co v Ethicon*[141]; *CMI-Centers for Medical Innovation GmbH v Phytopharm Plc*[142]; *Townends Group Plc v Cobb*[143]; *Raks Holdings AS v TTPCom Ltd*[144]; *Cream Holdings Ltd v Banerjee*[145]).

[139] [2000] FSR 163.
[140] [1996] 1 All ER 853, Laddie J.
[141] [1975] 1 All ER 504.
[142] [1999] FSR 235, Laddie J.
[143] 26 November 2004, Ch. D, Michael Briggs QC
[144] 29 July 2004, Ch. D, Lloyd J

7.23 A defendant who has entered into a contractual restraint should seriously consider offering an appropriate undertaking until trial, provided that a speedy trial can be fixed and the claimant can satisfy the cross-undertaking in damages. It is only if a speedy trial is not possible and the action cannot be tried before the period of the restraint has expired or has run a large part of its course, that it will be necessary to have a contested interlocutory application: *Lawrence David Ltd v Ashton*[146]; *Lansing Linde v Kerr*[147].

Springboard Injunction

7.24 Where an employee has used confidential information belonging to his employer in his new business, and thereby gained "an unfair start" or "springboard", the court may grant an injunction to prevent the employee from taking unfair advantage of the springboard. The term of any such injunction should not extend beyond the period for which the advantage may reasonably be expected to continue (*Terrapin Ltd v Builders' Supply Co (Hayes) Ltd*[148]; *Roger Bullivant Ltd v Ellis*[149]; *PSM International Ltd v Whitehouse*[150]; *Universal Thermosensors Ltd v Hibben*[151]; *Midas IT Services v Opus Portfolio Ltd*[152]; *Sun Valley Foods Ltd v Vincent*[153]).

Disclosure Order

7.25 The court may, in an appropriate case, order a defendant to disclose contacts he has made with clients both before and after the termination of his employment (*Intelsec Systems Ltd v Grech-Cini*[154]).

Norwich Pharmacal orders

7.26 The *Norwich Pharmacal* case[155] established that where a person, albeit innocently, and without incurring any personal liability became involved with the wrongful act of another, that person came under a duty to assist the person injured by those acts by giving him information which he was able to give by way of discovery that disclosed the identity of the wrongdoer (*Ashworth Security Hospital v MGN Ltd*[156]).

7.27 As Lord Woolf stated in *Ashworth* (paras 57-73), "new situations are inevitably going to arise where it will be appropriate for the [*Norwich Pharmacal*] jurisdiction to be exercised where it had not been exercised

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[145] [2004] UKHL 44 (see further below). The test in the Human Rights Act 1998, section 12(3), on an application for an interim injunction to restrain publication of confidential information until trial, was whether the applicant's prospects of success at trial were sufficiently favourable to justify the making of such an order in the particular circumstances of the case.
[146] [1989] ICR 123, CA.
[147] [1991] 1 All ER 418, CA.
[148] [1960] RPC 135, Roxburgh J.
[149] [1987] FSR 172, CA.
[150] [1992] IRLR 279, CA.
[151] [1992] 1 WLR 840, Sir Donald Nicholls VC.
[152] 21 December 1999, Blackburne J.
[153] [2000] FSR 825, Jonathan Parker J.
[154] [2000] 1 WLR 1190.
[155] [1974] AC 133.
[156] [2003] FSR 311, HL.

previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy." See, also, *Camelot v Centaur Communications Ltd*[157].

7.28 The employer may have difficulty in locating the source, if confidential information has been leaked. The case of *Camelot v Centaur Communications Ltd* [158] may help. Shortly before Camelot, the national lottery operator, was due to publish its financial statements, an unknown person sent a copy of the draft accounts to a journalist employed by Centaur.

7.29 The Judge granted an injunction restraining Centaur from using the draft accounts. Interest in this case lies principally in Camelot's attempt to secure delivery up of the leaked document in order to assist in identifying the source of the leak.

7.30 The Court of Appeal held that the public interest in enabling Camelot to discover the disloyal employee was greater than the public interest in enabling that person to escape detection. The suspicion amongst employees inhibited good working relations because of the risk that the employee might disclose other confidential information. See, also, *Interbrew SA v Financial Times Ltd*,[159]; *Ashworth Security Hospital v MGN Ltd*[160].

7.31 However, although an order to disclose the identity of the source of confidential information contained in draft legal advice of counsel was ordered by Morland J in *Sir Elton John v Express Newspapers*[161], this was overturned by the Court of Appeal. The Court gave considerable weight to the Press's freedom of expression.

7.32 The jurisdiction of the court is not confined to the case of identifying wrongdoers (*CHC Software Care Ltd v Hopkins & Wood*[162]). It also extends to cases where there is a good indication of wrongdoing, but not every piece of what the claimant needs to plead a case is fully in position (*Carlton Film Distributors Ltd v VCI Plc*[163])).

Evidence

7.33 Careful consideration should be given to the methods of obtaining evidence. The court has power to exclude admissible evidence (CPR 32.1) and may exercise this power in the case of evidence unlawfully obtained.

7.34 In relation to evidence gathering, regard should be had to the Regulation of Investigatory Powers Act 2000 (especially sections 1, 2 and 4), The

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[157] [1998] IRLR 80.
[158] [1998] IRLR 80
[159] 20.12.01 (Lightman J) Times Law Reports, 12.3.02 (CA)
[160] [2002] 1 WLR 2033 (HL). But see the later decision of the Court of Appeal that an application that the intermediary provider of the confidential medical records be ordered to disclose the identity of his employee-source was not suitable for summary judgment: *Mersey Care National Health Service Trust v Ackroyd* [2003] EWCA Civ 663.
[161] The Independent, 7th March 2000, [2000] 3 All ER 257
[162] [1993] FSR 241, Mummery J.
[163] [2003] FSR 876, Jacob J.

Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (especially Regulation 3), and the Data Protection Act 1998 (especially section 35(2)). Human rights considerations may also arise in this context, notably the article 8 right to privacy.

Section 12 of the Human Rights Act 1998

7.35 Special considerations arise when the grant of an injunction may interfere with the exercise of the Convention right to freedom of expression. This may occur where it is sought to restrain publication of confidential information.

7.36 Section 12 of the Human Rights Act 1998 provides as follows:

"No such relief [which might affect the exercise of the Convention right to freedom of expression] is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

7.37 For some time, the meaning of the word "likely" in this section has been unclear. The matter was recently considered by the House of Lords in *Cream Holdings Ltd v Banerjee*[164]. The House rejected the submission that "likely" here means "more likely than not" or "probable". Lord Nicholls of Birkenhead, with whom the other members of the House agreed, adopted a flexible approach when he stated (paragraph 20):

"The intention of Parliament must be taken to be that "likely" should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace American Cyanamid standard of "real prospect" but permits the court to dispense with this higher standard where particular circumstances make this necessary."

7.38 Lord Nicholls explained this further (paragraph 22):

"…the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at the trial…But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include…where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

7.39 See, also, *Imutran Ltd v Uncaged Campaigns Ltd & Lyons*[165]; *Douglas v Hello*[166]; *A v B*[167]; *Theakston v MGN Ltd, 14.2.02 (Ouseley J).*

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[164] [2004] UKHL 44.
[165] [2002] FSR 20.
[166] [2001] QB 967 (CA); [2000] FSR 651
[167] [2001] 1 WLR 2341 (Jack J); Times Law Report, 13.3.02 (CA)

Effect of breach of confidence injunction on third parties

7.40 It is a well-established principle that if a person, with knowledge of an order of the court, does some act which has the effect of interfering with or wholly undermining the manifest purpose of such an order then he will be guilty of contempt even though the order was not made against him ("the *Spycatcher* principle"): *Attorney-General v Times Newspapers Ltd*[168]. The essence of the contempt consists in the interference by the third party with the course of justice in the proceedings in which the order was made.

7.41 It has recently been held that the *Spycatcher* principle is limited to interlocutory, and does not extend to final, injunctions: *Jockey Club v Buffham*[169]. Gray J stated (paragraph 26):

> *"I accept that a claimant in a confidence action enjoys … a windfall consisting in protection pending trial against invasion of his right of confidentiality by third parties. But the reason for the existence of that windfall is the need for the court to be able to enforce, through the machinery of the law of contempt, the object for which the interlocutory injunction was granted and not to protect the confidential information as such… at the end of the trial in a confidence action the claimant would be entitled to invite the court to make an injunction contra mundum. Such injunctions can be granted, at least in the exercise of the protective jurisdiction of the court: see Venables v News Group Newspapers Ltd [2001] Fam 430."*

The Summary Procedure

7.42 Clients often want a speedy resolution of whether a restrictive covenant is enforceable. *TSC Europe (UK) Ltd v Massey* [170] is an example of the use of the court's summary procedure to determine the enforceability of a non-poaching of employees covenant.

7.43 The covenant required the employee, for a period of three years from the date of the share agreement or one year following the effective date of termination of employment, whichever was the later, not to "solicit, procure or induce or endeavour to solicit, procure or induce, any employee [of the relevant company] to leave".

7.44 The employee issued a summons seeking to determine the enforceability of the covenant pursuant to Order 14A.

7.45 Referring to principles relating to striking out, the Judge concluded that the question of law was suitable for determination under Order 14A without a full trial of the action. The facts disclosed by the affidavits were sufficient to enable him to determine what were the legitimate interests of the company and whether the protection taken by the covenant was no more than reasonable to protect them. Such an approach is supported by the encouragement given to the summary resolution of issues (where appropriate) by the Civil Procedure Rules (esp. Part 24).

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[168] [1992] 1 AC 191.
[169] [2003] 2 WLR 178.
[170] [1999] IRLR 22

7.46 Alternatively, the enforceability of a covenant can be determined by way of preliminary hearing: *Leeds v Harris/Bradford Bulls*[171].

Speedy trial

7.47 There could be no question of granting injunctive relief when three-quarters of the permitted period of restraint had passed: *Wincanton Ltd v Cranny* [172]. It was up to an employer who believed an ex-employee was in breach to move quickly and, if unsuccessful at first instance, to ensure than any appeal was brought on fast: per Sedley LJ. The claimants should from the outset have concentrated their efforts on securing a speedy trial: Simon Brown LJ. They should not have been given permission to appeal. Further, it was possible for the claimants to quantify their loss. The right course was to allow the second defendant to continue trading so that it could better discharge its liability.

7.48 In *Hollis v Stocks*[173], the Court of Appeal hearing disposed of the claim for an injunction. This approach was approved by Sedley LJ, para 31.

Damages

7.49 If an employer loses clients following the breach of a restrictive covenant, it is difficult to quantify damages. This is the justification for an injunction and the inadequacy of damages is a precondition to its grant. Three cases consider ways of overcoming the problems of quantification.

7.50 First, in *SBJ*, the court assessed the loss of income from 8 clients which had been solicited by Mr Mandy in breach of restrictive covenants. This was relatively straightforward. What was more difficult was the assessment of future losses relating to these same 8 clients. The court approached the issue as a loss of chance case, applying the guidance given in *Allied Maples Group Ltd v Simmons & Simmons*[174].

7.51 Secondly, the unreported case of *Taylor Stuart & Co v Croft*, 7 May 1997. The plaintiff was a firm of chartered accountants, whose salaried partner, Mr Croft, left and took a number of clients with him.

7.52 The contract contained clause 14.3 in the following terms:

> *"In the event that the Salaried Partner shall be in breach of the [restrictive covenant] the parties hereby agree that a reasonable measure of damages in respect of work taken away from the Firm shall be twice the aggregate fees derived from the client during the year immediately preceding the termination of employment of the Salaried Partner or (if greater) during the year preceding such year."*

7.53 It was necessary to consider whether this clause was a liquidated damages clause or a penalty. The test to apply was whether the clause was a genuine pre-estimate of the plaintiff's loss, which is to be determined objectively irrespective of the actual intentions of the parties.

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[171] [2005] EWHC 1591 (QB)
[172] [2000] IRLR 716 CA
[173] [2000] IRLR 72, CA
[174] [1995] 1 WLR 1602

7.54 The Judge held that the effect of clause 14.3 was more to quantify the maximum damage that could be suffered by the plaintiffs than to pre-estimate their probable damage. At common law, damage suffered by the plaintiffs as a result of a breach of the restrictive covenant would be measured by the plaintiffs' loss of the profit they would have earned from that client if the employee had not broken the contract. Clause 14.3 did something different: it valued the capital value of a client who was wholly lost to the employer, on the assumption that he would have remained with them but for the defendant's breach of contract. It did not take into account the possibility of a client going out of business or any of the other reasons for ceasing to instruct the plaintiffs. Clause 14.3 was a penalty and therefore unenforceable. The case highlights difficulties in recovering damages. Loss may be difficult to prove and a fixed payment clause runs the risk of being struck down as a penalty.

Account of Profits for Breach of Contract

7.55 The House of Lords' decision in *Attorney General v Blake* [175] provides a potentially revolutionary approach to remedies for breach of contract. The general rule is that damages for breach of contract compensate for loss or injury. This case establishes that a defendant may be required to account to the claimant for profits received from the breach, even where the claimant has suffered no loss. Lord Nicholls' leading judgment anticipates that an account of profits will be appropriate only in exceptional circumstances. In determining when such a remedy will be appropriate, Lord Nicholls outlined the following principles:

"The Court will have regard to all the circumstances, including the subject-matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit".

7.56 Lord Nicholls disagreed that the two situations identified by Lord Woolf MR in the Court of Appeal ('skimped performance' and the case where the defendant obtains a profit by doing the very thing he contracted not to do) were appropriate for an award of restitutionary damages.

7.57 On the facts of this case, the House of Lords found that the Attorney General was entitled to be paid a sum equal to the profits made by George Blake, a former member of the secret service, from his autobiography which was published in breach of a contractual undertaking to the Crown not to divulge information gained by him as a result of his employment.

7.58 In the employment area, the *Blake* decision will mean that ex-employers may be able to seek an account of profits for breaches of restrictive covenants and

[175] [2001] IRLR 36, [2000] 3 WLR 625

confidentiality clauses. See, also, *Esso Petroleum Co Ltd v Niad Ltd, 22.11.01 (Sir Andrew Morritt VC); Experience Hendrix LLC v PPX Enterprises Inc*[176].

Costs

7.59 *SBJ* also illustrates the danger for a new employer of funding the defence of its new employee in resisting an attempt by the old employer to enforce restrictive covenants. The financial support given by Amilcroft (in the form of loans) to Mr Mandy to defend the litigation, resulted in Amilcroft being ordered to pay half of SBJ's costs on the basis of the principles set out in *Symphony Group Plc v Hodgson*[177].

7.60 In *Desquenne et Giral UK Ltd v Richardson*[178], the Court of Appeal held that where an injunction was granted or continued on the basis of the balance of convenience in order to hold the ring until the dispute between the parties could properly be decided at trial, it was inconsistent to say that there were successful or unsuccessful parties for the purposes of the rules relating to costs. In such circumstances, the only proper order was that the costs of both parties were to be reserved to the trial judge because only then could it be determined which party was successful and which was unsuccessful.

7.61 Where a party threatened to apply to the court for an injunction but decided not to do so shortly before the application is due to be made, the proposed defendant was entitled to the costs of the work involved and consequential to meeting the threat of the injunction even though no proceedings had been commenced: *Associated Newspapers Ltd v Impac Ltd*[179].

Consent Orders

7.62 The court has jurisdiction to vary or set aside a consent order based on restraint of trade grounds but will be reluctant to do so given the public interest in upholding consent orders: *Gerrard Ltd v Reed, 21.12.01 (Blackburne J); WWF for Nature v WWF Entertainment Inc*[180].

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[176] [2003] EWCA Civ 232.
[177] [1993] 4 All ER 143
[178] [2001] FSR 1 (CA). For a discussion of costs and related issues (including the making of an interim order for costs, and a wasted costs order, in injunction proceedings) see *Archer v Williams* [2003] EWHC 1670 (QB) per Jackson J at paras 83-93.
[179] [2002] FSR 18.
[180] [2002] FSR 504 (Jacob J, CA).