

Case No: HQ16X00656

Neutral Citation Number: [2016] EWHC 648 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2016

Before :

HIS HONOUR JUDGE MCKENNA
(Sitting as a Judge of the High Court)

Between :

BARTHOLOMEWS AGRI FOOD LIMITED

Applicant

- and -

MICHAEL ANDREW THORNTON

Respondent

Daniel Stilitz QC and Zac Sammour (instructed by **T Gleeson Solicitor, Company Secretary**
and Group Legal Counsel) for the **Applicant**

Michael Duggan QC (instructed by **Birketts LLP**) for the **Respondent**

Hearing dates: 14 March 2016

Judgment

His Honour Judge McKenna :

Introduction

1. This is the application of the applicant, Bartholomews Agri Food Limited (“Bartholomews”) for an interim injunction against the Respondent, Michael Andrew Thornton in which Bartholomews seeks to enforce the terms of a restrictive covenant contained in the Respondent’s contract of employment.
2. In support of its application, Bartholomews relies on witness statements made by Gary Scott Herman, its Managing Director (and Chief Executive of its parent company, Bartholomews (Holdings) Ltd), and Timothy Andrew Gleeson, its Company Secretary and Group Legal Counsel. The Respondent, for his part, has filed three statements of his own and in addition also relies on a statement from Mr John Bianchi, the Managing Director of Pro Cam UK Limited, the company for which the Respondent intends to work on the expiry of his notice period.
3. Initially in the first statements of Mr Herman and Mr Gleeson, whilst there is some passing reference to confidential information, the emphasis was placed on the customer connection which it was said the Respondent possessed. However in Mr Gleeson’s second statement, more emphasis was placed on confidential information, which it was said that the Respondent possessed so that there are two aspects of protectable interests which it is said are protected by the restrictive covenant, namely, customer connection and confidential information.
4. The Respondent for his part resists the application on the basis that the restrictive covenant relied on by Bartholomews is in restraint of trade, unreasonable and unenforceable. It is too wide and moreover Bartholomews have failed to demonstrate that there is any confidential information to be protected as opposed to information which the Respondent is permitted to use by virtue of his skill and experience developed over many years.

Background

5. Bartholomews is an agricultural merchant supplying a full range of products and services to the agricultural sector including the provision of agronomic advice to individual farmers, landowners and their managers with an annual turnover of in excess of 111 Million pounds. It operates in West and East Sussex, Kent, Hampshire, Wiltshire and Dorset. It is part of a larger group of companies, the holding company for which is Bartholomews (Holdings) Ltd. Other group companies include Churchill Freight Services Ltd, Bartholomews Specialist Distribution Ltd, Shoreham Silo Services Ltd and Ultimate Fertilisers Ltd. Total group turnover in 2014 is said to be in excess of 117 million pounds.
6. The Respondent is an agronomist who began working for Bartholomews, then known as Bartholomews (Chichester) Limited in September 1997 as a trainee agronomist. As such, the Respondent provides advice to Bartholomews’ customers on issues such as crop planting and rotation, seed choice, and soil condition and crop nutrition advice in the form of fertiliser application.

7. The Respondent resigned on the 21st December 2015 and on or about 22nd March 2016, on the expiry of his Notice Period, the Respondent intends to take up employment with Pro Cam UK Ltd which is a retailer which supplies its customers with seed from multiple seed producers.
8. On the 6th January 2016 Bartholomews purported to place the Respondent on garden leave until the termination of his employment. There is an unresolved factual dispute between the parties as to whether the imposition of garden leave by Bartholomews on the 6 January preceded an offer from the Respondent to that effect, it being common ground that there is no provision in the Contract of Employment between the Respondent and Bartholomews for the imposition of garden leave.

The Relevant Provisions of the Contract

9. The Respondent signed a document entitled “Conditions of Service Principal Statement” on 28 November 1997 which purported to incorporate what were described as common Terms and Conditions for all employees of Bartholomews (Holdings) Ltd. That document included the following relevant provisions: -

“INTRODUCTION

This document is a written form of agreement between the Employee and Bartholomews (Holdings) Ltd and therefore any Company owned by Bartholomews (Holdings) Ltd. Keep this document safe. Any changes to the Contract will be made to you in writing.

6 TERMINATION OF EMPLOYMENT

Employees who wish to leave the Company must give written notice of this intention. The period of notice varies with the type of job being undertaken and is notified separately to employees in a document that is an integral part of the Contract of Employment.

10. COMPANY CONFIDENTIALITY

Employees should not, during the continuance of their employment, or at any time thereafter, divulge any of the details of the business or trade information relating to Bartholomews (Holdings) Ltd or any subsidiary Company, acquired during their employment by the Company, or any person, firm, or other organisation.

10.2 PROTECTION OF KNOWLEDGE ACQUIRED DUE TO THE COMPANY’S SPECIALISED BUSINESS

Employees shall not, for a period of six months immediately following the termination of their employment be engaged on work, supplying goods or services of a similar nature which compete with the Company to the Company’s customers, with a

trade competitor within the Company's trading area, (which is West and East Sussex, Kent, Hampshire, Wiltshire and Dorset) or on their own account without prior approval from the Company. In this unlikely event, the employee's full benefits will be paid during this period."

It is to be observed at the outset that these provisions have not been well drafted. There are no definitions and, on one reading, the covenant prevents the Respondent from being able to work in the six specified counties at all, albeit that Bartholomews does not interpret the clause in that way. What then is meant by the words "of a similar nature?"

The Issue

10. The issue for determination at this stage is whether Bartholomews can demonstrate that there is a serious question to be tried so far as the enforceability of clause 10.2 is concerned. That is to say what Patten J (as he then was) described in *BSW Ltd v Balltech Ltd* [2006] EWHC 822(CH) at paragraph 19 as "*a minimalist approach which sets the threshold at a level which does little more than exclude claims which might be characterised as frivolous or vexatious*"
11. In this regard, Bartholomews must demonstrate that it has legitimate business requiring protection and that clause 10.2, on its true construction, is no wider than is reasonably necessary for the protection of those interests. This involves construing the restrictive covenant in order to consider the question whether, without having to resolve disputes of fact, as was submitted by leading counsel for the Defendant was the case here, the restrictive covenant is so obviously unenforceable in its wording that even at this interim relief stage the issue can be resolved. As Chadwick LJ put it in *Arbuthnot Fund Managers Ltd v Rawlings* [2003] EWCA Civ 518 at paragraph 20:
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"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 to be imposed. That, as it seems to me, is a task which the Court ought to carry out on an application for interim relief (if there is one) if it can properly do so. Unless the Court is satisfied that there are disputed facts which bear on the construction of the relevant contractual terms, and that those facts cannot be resolved without a trial, the Court at the interlocutory stage is as well able to construe the relevant contractual terms as a court will be at a trial. There is no need to put off until trial determination of the question – what do the contractual terms mean? The court can, and should, determine the scope of the restraints which, as a matter of construction (the contractual) terms seek to impose"

The Evidence

12. It was Mr Herman's evidence that the Respondent was very much a confidant of Bartholomew's customers, many of whom were small family owned businesses

working in isolated conditions. The customers therefore placed considerable reliance on the Respondent and his role was very much that of a trusted advisor. The advice appropriate for a particular client would depend on a range of issues such as the client's soil type, size of his workforce, customer base and to a degree his personal temperament. The Respondent had some 52 active agronomy clients, the vast majority of whom were based in what Mr Herman described as Bartholomew's core trading area of West and East Sussex, Kent, Hampshire, Wiltshire and Dorset. In fact, it appears that the majority of the Respondent's clients are based in West Sussex and that there are no such clients in Wiltshire, Dorset or Kent.

13. In his first witness statement Mr Gleeson suggested that in addition to the particular customers for whom the Respondent was responsible, the Respondent would also engage with other customers of Bartholomews, for whom he was not directly responsible, at various events organised by Bartholomews. At those events he would have the opportunity to talk to those customers and learn more about their businesses interests and concerns.
14. Mr Gleeson expanded on that aspect in his second witness statement and drew attention in particular to the Respondent's attendance at the 2016 Spring Cropping Launch, organised by Bartholomews in November 2015. That was an event for its agronomist staff and those farm traders who bought and sold to farm and he exhibited to his second statement a PowerPoint presentation entitled Spring Cropping Launch which he asserted contained confidential information.
15. What is said on behalf of Bartholomews is that the evidence demonstrates that the Respondent had developed relationships with Bartholomews customers which fell into two broad categories:
 - i) Customers for whom the Respondent was an exclusive agronomic advisor (of which there were 52), and;
 - ii) Customers with whom the Respondent had dealt in the course of marketing activities. Moreover the Respondent had, as a result, acquired confidential information about Bartholomews' pricing, services and customer base.
16. The Respondent, for his part, suggested that the role he was going to take up with Pro Cam (UK) Ltd, namely "*Seed and Traits Technical Manager*" was rather different from that which he had undertaken with Bartholomews since, although he would still continue to carry out some agronomy advisory work for clients, he would also be taking on a national technical role advising his new employer on the development of its arable seed portfolio and working with its national team of agronomists advising them on and promoting arable seed portfolios. He did however make it clear that he wanted to continue to work with some of his existing client base if they wished to move with him.
17. So far as confidential information is concerned, in his first witness statement, the Respondent asserted that the only relevant information which he possessed was knowledge of his clients that he had acquired over time and which was in his head. He denied that this was confidential information properly described and largely related to names and locations of clients which would be publically available. To the extent that he had information relating to individual farming clients, farms and crop yields, this

was information a farmer would provide to any agronomist with whom he intended to work and would only be relevant to a particular season and was therefore already out of date. The Respondent also played down the significance of information relating to Bartholomews' customer pricing structures since they would change from season to season.

18. In his third witness statement the Respondent comprehensively addressed the issue of the nature and extent of any confidential information arising out of his attendance at Bartholomews Spring Cropping Launch in November 2015 and sought to demonstrate why the information contained in the PowerPoint was not confidential and in any event largely obtainable elsewhere and now out of date.

Discussion and conclusions

19. It was submitted on the part of Bartholomews that there plainly were legitimate business interests requiring protection, namely its customer connection and its confidential information. Moreover on a true construction of clause 10.2, it was a non-dealing covenant which went no further than was necessary to protect those legitimate business interests since:
 - i) It was limited in time, namely 6 months, which was no longer than reasonably necessary to provide Bartholomews with the opportunity for it to introduce one of its other agronomists to customers who had been serviced by the Respondent and for that agronomist to develop a relationship with those customers, having regard to the evidence as to peak farming periods;
 - ii) It was limited to the supply of goods or services of a similar nature to those supplied by the Respondent in competition with Bartholomews;
 - iii) It was limited to dealings with Bartholomews' existing customers, a necessary provision to protect confidentiality and customer connection because of the Respondent's possession of confidential information relating to Bartholomews' business. In this regard reliance was placed on the authorities of *GW Plowman & Son Ltd v Ash* [1964] 1WLR 568, *Business Seating v Broad* [1998] ICR 729 and *Dentmaster (UK) Ltd v Kent* [1977] IRLR 636 to support the validity of a covenant of short duration, regardless of whether or not the employee concerned had himself had any recent connection and / or notwithstanding the absence of a so-called backstop temporal limit.
20. Considerable reliance was placed on an admittedly unusual aspect of clause 10.2 namely that Bartholomews would continue to pay the Respondent his full remuneration for the duration of the covenant even if the Respondent had entered into other employment and was being paid by his new employer (provided of course that he did not breach clause 10.2). This, it was said, tolled heavily in favour of upholding the clause since it shifted the benefit and burden of the clause away from the employer and in favour of the employee and allowed the Respondent, in effect, to receive a windfall benefit while still furthering his career.
21. Moreover, the covenant was limited to a narrow category of cases and only to the counties of West and East Sussex, Kent, Hampshire, Dorset and Wiltshire, notwithstanding that it would have been justified to have sought a wider restriction

against competing within those areas altogether. In particular it did not prevent the Respondent from providing agronomic advice to any person who was not an existing customer of Bartholomews or from providing agronomic advice to customers in any other part of the United Kingdom (such as for example in Cambridgeshire where Pro Cam (UK) Ltd was based, or Surrey, which is close to the Respondent's home). Furthermore it did not prevent the Respondent from providing agronomic services which were dissimilar to those provided by Bartholomews or through a body which was not a competitor of Bartholomews such as a government agency.

22. I am not persuaded by the submissions made on Bartholomews' behalf. To my mind clause 10.2 is in restraint of trade and unenforceable. It was imposed on the Respondent as long ago as 1997, at a time when the Respondent was a trainee agronomist with no experience and no customer contacts and its terms were, in my judgement, manifestly inappropriate for such a junior employee and I reject the distinction sought to be made on behalf of Bartholomews that (contrary to the position in *WRM Ltd v Ayris* [2008] IRLR 889) the Respondent was never promoted but remained on the same terms and conditions throughout his employment, as a mischaracterisation of the Respondent's position. In *Pat Systems v Neilly* [2012] IRLR 979 Underhill J (as he then was) held that an employment non-competition covenant that had been unenforceable at the time it was agreed (which was conceded in that case, but not by Bartholomews in this case) given the employee's status and role at the time, remained unenforceable regardless of the employee's promotion to a role where the covenant would have been regarded as reasonable. That to my mind is the position here.
23. Moreover, the covenant is, to my mind, plainly far wider than is reasonably necessary for the protection of Bartholomews' business interests. It applies to all customers of Bartholomews and of its associated companies, regardless of whether the Respondent had knowledge of those customers and regardless of whether the Respondent ever carried out any work for those customers.
24. Bartholomews' voluminous evidence is singularly lacking in information as to the number of customers they have, the number of agronomists they employ and as to the turnover and activities of its various associated companies. This latter defect was one which leading counsel for Bartholomews sought to remedy, on instruction, during the course of his submissions. However what is clear from the evidence is that Bartholomews' 2014 turnover was in excess of £111,000,000, of which the Respondent's customers contributed £1,257,000. This means that the Respondent was responsible for just over 1% of Bartholomews' turnover. It follows that the remaining 98% plus of turnover was generated by customers with whom the Respondent did not directly deal. As it seems to me, it would be wrong to restrict the Respondent from having dealings with the customers representing that 98% of Bartholomews' customers.
25. In my judgement it was simply not reasonably necessary for the protection of the customer connection for Bartholomews to have imposed such a wide ranging covenant on the Respondent. If the clause had provided that the Respondent could not, for 6 months, deal with or solicit customers with whom he had dealt for a period of time before the termination of his employment that would have been sufficient. There is a lack of any correspondence between the area and the customers with which the Respondent had dealings.

26. Nor am I persuaded by the significance attached to the unusual provision in clause 10.2 providing for the Respondent, during the period of the covenant, to continue to be paid in full provided of course that he complied with the restriction contained in clause 10.2. To my mind it is contrary to public policy in effect to permit an employer to purchase a restraint (see Simon Brown LJ in *JA Mont (UK) Ltd v Mills* [1993] IRLR 1782 at paragraph 37-40,) albeit that in that case the restriction was contained in a severance agreement rather than a contract of employment).
27. So far as confidential information is concerned, there has been no attempt properly to define confidential information in the Respondent's Contract of Employment. Clause 10 is not limited to confidential information that relates to business or trade information. Much reliance was placed in the latter tranche of Bartholomews' evidence on the Respondent's attendance at the 2016 Spring Crop Launch in November 2015 and in particular to a PowerPoint presentation made at that event, which it is asserted contained confidential information. The difficulty with this aspect however is that the Respondent did not retain the document itself and it cannot sensibly be contended that he could have memorised it. As the Respondent comprehensively demonstrated in his third witness statement, the document contains a welter of general statistical information readily available elsewhere in the public domain and is in any event largely out of date. There is no evidence as to the specific confidential information which it is said the Respondent has in his possession as opposed to the skill and knowledge which he has obtained and developed by virtue of his career over the past 18 years.

Disposal

28. It follows in my judgement that the application for interim injunctive relief is refused.