Neutral Citation Number: 2013 EWHC 3685 QB
Case No: HQ13X03409
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25th November 2013

Before :

THE HONOURABLE MRS JUSTICE SIMLER DBE

- -

Between :

CROESUS FINANCIAL SERVICES LIMITED	**Claimant**
- and -	
MR MATTHEW BRADSHAW	**Defendants**
and	
MR DAVID BRADSHAW	

- -
- -

Mr Jonathan Davies (instructed by **Leeds Day**) for the **Claimant**
Ms Judy Stone (instructed by **Heckford Norton**) for the **Defendants**

Hearing dates: 4th – 7th November 2013

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Approved Judgment

Introduction

1. The Claimant commenced business in March 2002 and provides advice and products in the financial services sector including life assurance, pensions, investments and savings products. Its client base is stable and made up of a majority of very long standing clients. The servicing of these clients is dealt with on a team basis between the client, the administrator and the financial adviser. Financial advisers are assigned or have a group of clients and it is their responsibility to provide ongoing reviews, advice and day-to-day servicing of the client's financial arrangements. The Claimant has concentrated on receiving recurring fee income for servicing and advising clients on their existing investment portfolios. Recurring fee income now accounts for approximately 60% of the Claimant's turnover and initial fees. Fees; when new money is invested or arrangements are re-organised accounts for the remaining 40% of turnover. Initial fees are paid when new investment advice is given. Recurring fees are paid as a percentage of clients' investment and pension holdings and are paid for providing ongoing financial advice and administration of these funds.

2. The Defendants are father and son. The second Defendant, David Bradshaw, is the father of the first Defendant, Matthew Bradshaw. David Bradshaw acted as an adviser for the Claimant since shortly after it was first formed in 2002. I shall return to the details of the agreement under which he worked for the Claimant below. Matthew Bradshaw commenced working for the Claimant pursuant to a signed contract dated 26 April 2010. He had not previously been an IFA or involved in the financial services industry and had recently returned from the US to live in the UK. Because he was due to retire in the near future, David Bradshaw was keen to bring Matthew Bradshaw into the business as his successor.

3. The claim arises out of Matthew Bradshaw's resignation on 14 December 2012 and the Claimant's wish to hold both Defendants to express restrictive covenants and confidentiality clauses contained in their written contracts. Matthew Bradshaw met with Mr Fry, the Claimant's chief executive, to hand in his notice. His resignation letter handed to Mr Fry in this meeting gave one month's notice to terminate. There is a dispute about the conversation that ensued but Matthew Bradshaw left immediately and did not work his notice. He joined a competitor company in January 2013, and has, on his own admission, been doing business with many of the Claimant's clients and has solicited (again on his own admission) at least one former client of the Claimant. Other clients have requested to transfer their business to Attain Wealth Management Ltd - his new employer. That loss of clients and the consequent loss of renewal income for the Claimant has led to this litigation.

4. The Claimant's case in summary is that Matthew Bradshaw, with the assistance support and encouragement of David Bradshaw, persuaded many former clients to transfer their investments to Attain. It is alleged that this conduct amounted in both cases, to breaches of their post-termination restrictions operative for 12 months, prohibiting them both from soliciting and dealing with former clients and the misuse of the Claimant's confidential information. There is also an allegation that there was an unlawful means conspiracy between the two Defendants who used the unlawful means of breach of contract and breach of confidence. Finally there is an allegation that the second Defendant induced breaches of contract by the first Defendant. The

Claimant claims to have suffered loss as a consequence of these breaches which is to be measured by reference to the loss of value represented by those clients who transferred their business and investments as a result of unlawful conduct by the Defendants.

5. It was not until 2 July 2013 that these proceedings were issued by the Claimant, together with an application for an interim injunction. The Defendants were not served until late on the 8 July 2013 and at the time of service there had been no pre-action correspondence whatever with the second Defendant. The parties very sensibly reached agreement about contractual undertakings to be provided by the Defendants pending a speedy trial and there was therefore no order on the application for an interim injunction. The Defendants maintain that they have both complied with those undertakings and they deny any and all wrongdoing.

6. As will appear from the various headings set out below, the parties helpfully agreed a list of issues to be determined depending on my findings in relation to the individual issues that arose.

Approach to the evidence

7. I have heard oral evidence on behalf of the Claimant from Jonathan Fry and Paul Kingston, both members of senior management. I also heard from Lorraine Maxwell who is a director of the Claimant, and Peter Luscombe, the adviser to whom Matthew and David Bradshaw's client bank was transferred after they left the Claimant.

8. Jonathan Fry's evidence was the subject of particular criticism from Ms Stone on the Defendants' behalf. She submitted that he was wholly unreliable; that he had shown himself willing to mislead the court in his sworn evidence; to misrepresent the position as between the parties at the interim stage; and to make and maintain serious allegations without any foundation. I do not accept that there was any intentional misleading or misrepresentation by Mr Fry. He readily accepted that his witness statement was incorrect when challenged and under persistent questioning, accepted a few instances where this could be misleading, particularly where he had drawn inferences from events but in respect of which he had no positive proof. Much of his evidence, albeit not all, was consistent with contemporaneous documents or other evidence in this case. In the circumstances, I cannot accept Mr Fry's evidence as "wholly unreliable". Where his evidence was contradicted by contemporaneous documents I scrutinised it with particular care in deciding whether or not to accept it.

9. For the Defendants I heard evidence from David and Matthew Bradshaw. I also had evidence from two clients, one called to give evidence and the other in the form of a hearsay statement, both of which I accept. Neither David nor Matthew Bradshaw was entirely credible or satisfactory. Both have sought, ex post facto to rely on or exploit infelicitously expressed statements made by the Claimant in contemporaneous correspondence, even though the intended meaning of such statements was accepted and acted on at the time. When it suited them, their recollection of significant issues or events was incomplete or hazy and their explanations often implausible, and sometimes, evasive. In David Bradshaw's case, where it has been convenient for him to do so, he has used his medical condition as

an excuse for poor recollection or non-involvement in what was going on at the time. In the latter case his reliance on his medical condition was inconsistent; for example, he was too unwell on 7 December to give advice in relation to Matthew Bradshaw's email forwarding a client list, but well enough to attend a meeting with Bob Phillips (on his account on 10 December 2012) even though there was no need for him to do so. Again where possible, I have relied on the contemporaneous documents and have scrutinised the Defendants' evidence with particular care.

The contracts

10. David Bradshaw and Matthew Bradshaw had written contracts in almost identical terms (though there is a question about the extent to which Matthew Bradshaw's contract continued after the initial four month period). Both contracts provided for one months' prior notice in writing to terminate the employment and reserved the right on behalf of the Claimant to pay salary in lieu of notice.

11. Both contracts contained clauses relating to confidentiality and post-termination restrictive covenants in identical terms as follows: –

> "7 Confidentiality
>
> You shall not make use of, divulge or communicate to any person (other than with proper authority) any of the trade secrets or other confidential information of or relating to the company or any of its customers, suppliers, details of clients, potential clients, consultants, product details, prices, discounts, specific products, applications, existing trade arrangements or terms of business which you may receive or become aware of as a result of being in the employment of the company. This obligation of confidentiality shall continue to apply without limit in time after the termination of your employment, except that it shall not apply in respect of information which is or comes into the public domain for reasons other than your default"
>
> "16 Restrictive covenants
>
> 16.1 Within this clause the following words shall have the following meanings:
>
> "Termination Date" shall mean the date of termination of your employment with the company.
>
> "Relevant Period" shall mean the two years period ending with the Termination Date
>
> "Prohibited Business" shall mean any business or activity carried out on (sic) by the company at the Termination Date in which you have been directly concerned at any time in the Relevant Period

> "Restricted person" shall mean any person firm or company who:-
>
> i) was at any time in the Relevant Period a client or supplier of the company and/or
> ii) was negotiating with the company with a view to dealing with the company as a client or supplier
>
> "Territory" shall mean within a ten mile radius of your principal place of business
>
> 16.2 You shall not so as to compete with the company or to harm the goodwill of the company during your employment and the period of 12 months after the Termination Date (howsoever occasioned) directly or indirectly either on your own account from behalf of any other person, firm, company or organisation whether as an employee, representative, agent or otherwise:
>
> 16.2.1 Canvass or solicit or do business with any Restricted Person with whom you have had personal contact in the course of your duties here during the Relevant Period.
>
> 16.2.2 Induce or seek to induce any employee of the company who was an employee at the Termination Date (howsoever occasioned) in the Prohibited Business and with whom you shall have had material dealing in the course of your duties hereunder the Relevant Period to leave the company's employment whether or not this would be a breach of the contract on the part of the employee.
> …
> 16.3 Each of the restrictions and each part thereof contained in this clause are considered reasonable by the company and by you and are intended to be separate and severable. In the event that any of the said restrictions shall be held void, but would be valid if part of the wording thereof was deleted, such restrictions shall apply with such deletion as may be necessary to make it valid and effective."

12. Both David Bradshaw and Matthew Bradshaw signed and dated this agreement confirming that they had "read and understood the terms and conditions of employment as set out above and hereby accept them".

The history of events

13. David Bradshaw joined the Claimant on 1 July 2002 as a commission only consultant. The Claimant's commission scale for consultants was set out in a letter dated 15 April 2002. For those generating commissions of £50,000-£75,000, 55% was payable. 60% was payable in respect of sums in excess of £75,000. Consistently with that scale, he and the other consultants hired at the time were initially offered 55%.

14. The Claimant was keen to build recurring income and therefore offered a retirement deal to all those joining at that time, in return for their recurring income stream (in

effect, their client bank) on retirement. David Bradshaw was concerned, however, that the Claimant might no longer be in existence at the date of his retirement and was not prepared to give up current earnings for the promise of something on retirement that might disappear. Paul Kingston accepted that this was the case. Accordingly instead David Bradshaw preferred to receive a higher commission rate immediately. This was agreed by letter dated 29 January 2003 setting out an increased commission rate of 60%. Although David Bradshaw maintained that the increase by 5% was merely to achieve a fair and reasonable rate of commission, I do not accept this and it is not reflected in the letter. The 29 January letter confirms that his share of commission receipts was initially to be 55%. The letter reflects an agreement to increase this by 5% and although not as clearly worded as it could have been, I am satisfied that this was in return for his agreement to transfer renewal commissions to the Claimant on retirement. There is otherwise no explanation for that increase and I cannot accept his evidence that his client base was not discussed and simply did not come into the equation. At that time this issue was highly significant for the Claimant which would continue operating after these consultants retired. Conversely, what happened to their renewal commissions after retirement (some 10 years away for David Bradshaw) was of much less significance to the consultants.

15. David Bradshaw's evidence about this and later discussions about buying his renewal commissions is unsatisfactory. His first statement omits all reference to important letters in 2008 and onwards. In his second statement he sought to suggest that there was broader disagreement with the 8 September 2008 letter (referred to below) than it is clear there was; and I reject as unfounded his statement that "nobody at the Claimant mentioned to me that I would be selling my clients to the Claimant when I retired and/or that, when I had done so, Matthew would continue to service and maintain their business as clients of the Claimant." His letter to Mr Fry of 29 April 2009 (referred to below) reflects his clear understanding that this is what had been agreed.

16. By letter dated 30 June 2006, which refers to previous conversations between David Bradshaw and Jonathan Fry, a pension was established for David Bradshaw. The letter expressly referred to employee contributions being made on David Bradshaw's behalf into the pension at a rate of £300 per month, "in respect of compensation for the initial commission you are forgoing by taking fund based renewal on your business."

17. Between 2006 and 2008 the renewal income increased and accordingly the pension contributions increased – so that by April 2008 the contribution had increased to £500 per month.

18. By letter dated 8 September 2008, following an audit of the Claimant's personnel files, the Claimant wrote to David Bradshaw to formalise the agreement already in place in respect of his renewal commissions. The letter confirmed that Mr Bradshaw was being paid a more generous rate of commission on all business, namely 60% rather than 55% of commission on receipts; that the Claimant was paying pension contributions on his behalf, increasing each year until his 65th birthday; and that this was in exchange for all recurring income exclusively belonging to the Claimant at retirement age of 65. The letter invited David Bradshaw to confirm in writing his agreement to these arrangements.

19. If, as David Bradshaw suggested, this did not accurately reflect the agreements already in place in relation to the transfer of his renewal commissions, I am quite sure that he would have said so. He did not respond contesting this letter or asserting that it entirely misrepresented the agreed position. He simply did nothing.

20. Having been chased for written confirmation of the letter of 8 September 2008, he replied (by letter dated 29 April 2009) that he "agreed completely with the first two bulleted paragraphs", his only disagreement with the third bulleted paragraph being the suggestion of an enforced retirement age of 65.

21. By a further letter dated 2 March 2010 headed "retirement deal", Jonathan Fry wrote to David Bradshaw confirming details of the meeting that had been held between them. The letter again confirmed the arrangement in place in respect of employer pension contributions paid in exchange for purchasing exclusive entitlement to his renewal commissions. There was agreement that David Bradshaw need not retire at 65 and "for the period of your age 65 - age 66 you will continue to be credited with the renewal commission that you have accrued to date in the normal manner, however, at your 66th birthday the entitlement to the renewal commission and any percentage thereof ceases and the renewal commission becomes the sole property of Croesus Financial Services Limited."

22. Although David Bradshaw was at pains to suggest that this meant, even after he had retired and ceased to be a registered IFA he would be entitled to renewal commissions until his 66th birthday, I cannot accept that this is what was intended or understood at the time. The statement in the letter was made in the context of his desire to work beyond 65 and was designed to address that situation. Once he retired, whether at 65, 66 or in between, such renewal commissions would cease. That was the whole point of the deal the Claimant had been seeking to achieve, as is made clear at the end of the third paragraph. The Claimant's position in this regard was reiterated at a meeting in late April 2012, as recorded subsequently in an email dated 30 April 2012 at 16.55. There was no challenge by David Bradshaw to that email, either immediately or at any time up to or after, his retirement despite an email dated 11 December 2012 from Paul Kingston to him making clear that the last payment of commission he was owed would be paid on 15 January 2013. He responded to that email on 17 December 2012 at 10.44 making no comment or challenge to this point. Indeed it was not until October 2013 (when this litigation was on foot and documents were being scrutinised in that context) that the point was raised for the very first time on his behalf. I find that this is an example of David Bradshaw seeking to take out of context and treat literally statements that were well understood and acted on differently at the time.

23. The 2 March 2012 letter was signed by David Bradshaw as confirmation of his agreement on 3 March 2010. Thereafter each year David Bradshaw's pension contribution was reviewed in April increasing to £800 per month in April 2011. This contribution continued until he reached age 65 in July 2012. I did not understand there to be any challenge to the fact that the total employer pension contributions paid by the Claimant to David Bradshaw amounted to £41,200 and additional commission payments made to him under the increased commission arrangement of 60% instead of 55% is estimated to be £70,000.

24. So far as succession planning was concerned, this was discussed at a meeting on 19 January 2009. The record of this meeting states that it was held to discuss the progression of the business/working relationship between David Bradshaw and Simon Bissmire, and I accept that this was its purpose.

25. However by March 2010 (as reflected in the 2 March 2010 letter) Matthew Bradshaw had returned from the US and David Bradshaw was keen to see if he "could get him into the Claimant". David Bradshaw recognised that neither Mr Fry nor Mr Kingston were wildly enthusiastic and that both Mr Fry and Mr Kingston were reluctant to allow Matthew Bradshaw to join because of "potential pitfalls". David Bradshaw maintained that this was simply because Matthew Bradshaw was an unknown quantity and had nothing to do with a concern about the risk of transfer of his client base or renewal commissions to Matthew Bradshaw. I cannot accept this. It is clear from the letter of 2 March 2010 that their concern was to ensure "if/when he takes over looking after your clients that the entitlement to the renewal commission built up until your retirement belongs to Croesus Financial Services. Any new renewal commission that is generated by him by his own efforts will be credited to his income." I am satisfied that this point was discussed subsequently on a number of occasions but its impact may not have hit home until 30 April 2012, as referred to below.

26. Matthew Bradshaw was engaged under a written agreement dated 26 April 2010. The agreement was sent under cover of a letter dated 26 April 2010 which stated

> "The contract covers the initial 4 month period whereby Croesus Financial Services Ltd will pay for your services on an employee basis. Thereafter as agreed, the cost of your services will be met by deduction from David Bradshaw's earnings on a basis to be agreed between you."

27. Matthew Bradshaw commenced work and training in May 2010. He was preoccupied with passing his final exam and spent a significant amount of time in the initial period studying. He also learnt by observing his father with clients. Most of the client bank was made up of retail clients, that is to say non-professionals. His work involved reviewing their arrangements and making appropriate recommendations in relation to pensions and investments.

28. Soon after he started his father gave him all the contact telephone numbers and addresses of the client bank so that he could contact them and arrange visits. David Bradshaw also gave him his data file of information in relation to the clients. The data contained everything relevant to the client's history of investing. Matthew Bradshaw had business cards printed with his mobile phone number on them and I accept that this was the primary means of communicating with him by telephone.

29. He also set up a private email account: mattbcfp@gmail.com. I accept that this was to be a dedicated work account because he was warned that there were difficulties accessing the Claimant's email system remotely. Matthew Bradshaw contacted his father about work issues on David Bradshaw's external account, shawgooduk@yahoo.co.uk. Matthew Bradshaw was given a Croesus account and a VPN connection but suggested that the VPN was problematic initially.

30. By email dated 9 May 2011, Lorraine Maxwell instructed the Claimant's financial advisers not to use personal email accounts for company business for data protection reasons. She emailed Matthew Bradshaw and David Bradshaw again on 10 October 2011 reiterating this instruction and indicating that her audit of their email use showed continued personal emails. This point was discussed at a meeting on 2 November 2011 and again they were asked not to use external email accounts for business purposes. Matthew Bradshaw states that from that time onwards he and his father tried to comply with this instruction and only resorted to using external accounts when they were unable to access emails otherwise. This is supported by the evidence of his private email use during 2011 and 2012. In particular, in 2012 he sent his father only four emails on the private account, the last one on 26 July 2012 (before the December 2012 email) and all were sent in the period during which his father did not have broadband; and he sent himself only two emails, in August and September 2012, (before the emails that are challenged in this case). I find that for the most part both David Bradshaw and Matthew Bradshaw used the Claimant's email system.

31. The work pattern adopted by David and Matthew Bradshaw was normally to have about 5 to 8 client appointments each week. David Bradshaw introduced Matthew Bradshaw to most of his clients in the first year of work, as David Bradshaw accepted (not to only half of them, as Matthew Bradshaw stated). This was particularly important for Matthew Bradshaw. His father promoted and supported him, and could reassure clients that Matthew would be a reliable and professional successor so that their finances were in safe hands and there would be continuity. Clients were told that David Bradshaw would be available in the background giving advice and support. Matthew Bradshaw accepted that but for these introductions by his father it is unlikely that he would have been able to obtain client loyalty or to establish himself with these clients so quickly.

32. In his second witness statement Matthew Bradshaw states that when he commenced work with the Claimant he was not told about any agreement with his father about the purchase of his clients; this was never mentioned in any email or document he saw. He goes on to state however, that he became aware from casual conversations with his father that the Claimant had agreed to increase his pension contributions as a result of the closure of the Ramsay office in return for his agreement to sacrifice some of his right to initial commissions. He maintained that this was the position all the way through until he left the Claimant.

33. Even if this was the initial position, which I find surprising, it is not credible that he remained ignorant of the retirement agreement reached by the Claimant and his father, given the emails he was included in. By email dated 15 December 2010 from Paul Kingston addressed to all IFAs, and received by Matthew Bradshaw, the question of the split of renewal commissions and its interplay with the new Intelligent Office system that had been introduced was raised. The email identified the importance of correctly allocating any renewal to the appropriate adviser before addressing the commission split. It made express reference to David and Matthew Bradshaw. Matthew Bradshaw maintained that he did not think this email was directed at him but thought it was simply information for everyone. I cannot accept this. He was a commission only adviser and entirely reliant on earning commission.

I cannot accept that this question of allocation, and what it meant for him personally, would not have been discussed with his father given its importance.

34. In April 2012 there was a meeting between Matthew and David Bradshaw, Jonathan Fry and Paul Kingston to discuss concerns that renewals accrued to David Bradshaw should not "inadvertently seep" to Matthew Bradshaw. The discussion during that meeting is reflected in an email sent by Paul Kingston to both dated 30 April 2012, and accepted as accurately recording the meeting:-

- "David reaches age 65 soon… Once he has our obligations to his pension cease.
- His share of renewal will continue to be paid up until age 66 or at a point where his FSA registration is cancelled… whichever comes first.
- We need to ensure that as far as possible the renewal that David has accrued does not, inadvertently seep to Matthew"

35. There was discussion about a possible short-term fix with an intention to try to come up with a more permanent solution that would ensure that Matthew felt he could service the clients after David Bradshaw's retirement with some reward for doing so. The only conceivable reason why Matthew would not be rewarded for visiting and advising clients after David Bradshaw's retirement was that all renewal or recurring commissions in relation to those clients would belong exclusively to the Claimant pursuant to the agreement reached between it and David Bradshaw.

36. Matthew Bradshaw maintained nevertheless that he did not know that his father's renewal commissions were understood by the Claimant to be remaining with them after his father's retirement date; and that he had no discussion with his father about this issue at any time, even after this meeting. This is simply not credible and he was driven ultimately to accept that he understood the retirement deal at this meeting. David Bradshaw plainly understood the Claimant was concerned that renewals he had accrued should not be paid to Matthew on his retirement and that this meant in the case of clients who needed lots of attention and work but did not invest any new money, Matthew would effectively be doing work for free. In the circumstances I cannot accept as credible the suggestion that there was no discussion between David Bradshaw and Matthew Bradshaw on this topic after this meeting. I infer that Matthew Bradshaw's reluctance to accept this was deliberate because it is a significant plank in the Claimant's case against him. It is clear to me that both David Bradshaw and Matthew Bradshaw regarded the position as unfair and would have preferred David Bradshaw's renewal commissions (built up over decades) to go to Matthew. I am quite sure that this was a bone of contention for them from this point onwards.

37. Also in April 2012 a consultation process commenced within the Claimant to discuss the impact of the Retail Distribution Review ("RDR") and the likely regulatory changes due to come into effect by 31 December 2012. A one day meeting of all the Claimant's IFAs took place on 19 April 2012 to discuss these issues and to enable advisers to express their views. There were speakers from Vanguard Asset Management Ltd, O & M Investment and Aviva. It is clear that the

Claimant was taking these issues seriously and seeking to involve its advisers in likely changes at an early stage. Matthew Bradshaw attended this meeting. Mr Kingston sent an email dated 26 April 2012 to all attendees recording the issues discussed at that meeting and updating them on any developments.

38. By an email dated 14 June 2012 (again addressed to all IFAs and received by Matthew Bradshaw) Jonathan Fry updated the advisers on the continuing developments in relation to the RDR. Among other things, he dealt with issues relevant to client agreed remuneration (CAR) which was an aspect of the new regime, and set out the pros and cons of remaining independent versus becoming restricted advisers. It is clear that the Claimant had not decided on its own approach to RDR at that stage and was open to discussion and suggestions from its advisers. The email ended with an invitation to IFAs to feel free to speak to Jon Fry, Paul Kingston or Lorraine Maxwell with any queries, concerns or suggestions. Matthew Bradshaw raised no concerns, queries or issues with the Claimant at that point (or indeed at all during the consultation period).

39. At some point between 14 June and 12 July 2012 Matthew and David Bradshaw attended a meeting with Robert Price of Attain, a direct competitor of the Claimant. Robert Price had previously worked for the Claimant and knew David Bradshaw. Matthew Bradshaw gave evidence that the reason for this meeting was that they "wanted to get Mr Price's take on RDR and wanted to pick his brain". This was therefore a discussion limited to general issues concerning RDR and how Attain thought the market was likely to change; he was curious about what Attain's take on these issues was, but nothing more. I note that David Bradshaw's only reference in his witness statement to this meeting is as follows: "the Claimant has alleged that I attended Matthew's interview with Attain. This is untrue. I do not even know whether and when Matthew had his interview. I did introduce Matthew to Robert Price, a former employee of the Claimant who is at Attain and with whom I have kept in touch." David Bradshaw says nothing about meeting Robert Price to discuss RDR in this statement. Indeed he states that in view of his impending retirement, he was not as involved in these issues as Matthew, though he attended some of the earlier meetings about RDR at the Claimant.

40. I reject as entirely implausible, the evidence that this meeting was about RDR. The Claimant had made no decisions on RDR up to this point and remained open to suggestion from its advisers. The regulatory aspects of RDR had not been finally determined. Despite invitations to do so, Matthew Bradshaw had engaged in no discussions whatever with the Claimant yet he suggests that he chose to speak about these issues to one of its competitors, without revealing this to the Claimant or reporting back on his findings if his stated curiosity was genuine. That he was by then unhappy about the renewal commissions arrangement with the Claimant, makes it all the more likely that he was speaking to Attain about the possibility of transferring to them. Moreover, I find that the only credible explanation for David Bradshaw's presence at that meeting with Attain (in circumstances where he would not be affected by the RDR changes at all given his impending retirement, and he was unwell, as he repeatedly stressed) was to talk about Matthew Bradshaw joining them and the transfer of their renewal commissions to Attain.

41. Another meeting of IFAs at the Claimant took place on 12 July 2012, and a further meeting took place on 6 August 2012. I find (contrary to what Matthew Bradshaw

said at [66] of his second witness statement) that these were genuine consultation meetings to discuss the impact of RDR and how the Claimant should react to it. Advisers' views and concerns were genuinely sought and considered. I find that Matthew Bradshaw was passive so far as the Claimant was concerned, and there was no input whatever from him. Given his stated concern about the impact of the changes on him and the industry, the curiosity he says he had about how Attain was likely to react to these changes, the only credible reason for his passivity so far as the Claimant was concerned, is the fact that he had by then decided to move to Attain and was in the process of negotiating terms to do so.

42. During this same period between July and September 2012, Matthew Bradshaw states that he had several meetings with Mr Price and Gordon Crothers of Attain at their offices. There is no evidence that David Bradshaw attended these meetings, but I cannot accept, given their close working relationship and the fact that Matthew Bradshaw regularly sought advice and support from his father in relation to his work as an IFA, that they were not discussed with him, and David Bradshaw's evidence on this point is contradicted by Matthew's - ([130] of Matthew Bradshaw's second witness statement).

43. Although in his witness statement, Matthew Bradshaw attempts to give the impression that his interest in continuing these discussions was to learn about their views on the effects of RDR etc., he accepted in cross examination that these meetings were not about RDR but were about him joining Attain. Matthew Bradshaw states that a potential package from Attain was outlined but that he was not interested in this informal offer, and was not interested in moving. I find this implausible. If correct, it is difficult to see how any more than a single meeting would have been necessary. I infer that there were ongoing negotiations at these meetings because, as Matthew Bradshaw told me, he needed a guaranteed minimum income from Attain before he would move. Until such a guarantee was forthcoming (and this was not offered until about 12 December 2012) Matthew Bradshaw could not accept the offers made by Attain.

44. At a meeting on 28 September 2012 all the Claimant's staff were informed that management had decided that the restricted adviser route was the best approach in the circumstances, and that they would therefore join St James's Place ("SJP"). The FSA requirements that advisers be registered meant that each adviser's registration with the Claimant would come to an end but would commence with SJP. A new company called Delta Wealth Management Ltd ("Delta") would be created as a sister company to the Claimant and would have a single restricted strategic partner in SJP. The intention was that the Claimant would continue to provide independent financial advice to all existing clients as required but clients would be given the option of having advice provided by Delta and SJP. The changes were a direct consequence of the RDR.

45. Matthew Bradshaw accepted that despite these changes he could continue to advise clients in the same way; that he would continue to have the same clients; and that the range of products he could advise on would be the same, except perhaps for annuities. He accepted that with David Bradshaw's support and his own commitment, the change to Delta/SJP would not have been a problem for clients and that he and his father would be in a position to reassure the majority of clients and to retain them. There was no threat to his income from these changes. The only

threat to his income would be the loss of recurring income he would suffer upon his father's retirement, as he accepted.

46. On 16 October 2012 Paul Kingston emailed advisers setting out a timetable for authorisation through SJP. Matthew Bradshaw was chased for his completed SJP application form on two occasions in October 2012 and was chased in relation to other aspects of his application during November and early December 2012. It was suggested to him in cross-examination that this was a delaying tactic on his part because he had by then decided to transfer to Attain. His response was defensive identifying quirks in the emails put to him rather than answering the question. I infer that he was doing the minimum necessary as slowly as possible in order not to raise suspicion about his intentions during this period.

47. On 22 October 2012 Paul Kingston issued to all staff a question and answer document dealing with questions management had received following the decision to join SJP. Although this document had been relied on by Matthew Bradshaw as evidencing a repudiatory breach by the Claimant, in cross examination he accepted that he did not take issue with it.

48. By three separate emails dated 2 November 2012, emails apparently coming from Matthew Bradshaw's work email were sent to his home email address attaching differently formatted versions of a client list belonging to the Claimant. Matthew Bradshaw states that he does not specifically remember sending an email to himself on 2 November 2012 and according to his mileage record of the day he had two appointments in Letchworth. He then proceeds to identify a number of curious features about the email. Nevertheless he goes on to say that he frequently used client lists for his work and remembers that about this time, Mr Kingston asked him to review a certain group of clients for which a client list would have been required. He therefore remembers sending an email of this nature at about this time and says he would have sent the email to his personal address as it was difficult to access his work email while travelling.

49. By an email dated 7 December 2012 Matthew Bradshaw emailed a further client list and sample client letter to David Bradshaw's home email address. Matthew Bradshaw states that he does not specifically remember sending an email to his father on that date. Nevertheless, he goes on to say that he thinks he asked his father to review the documents attached to that email to see if he could spot any problems and that he would have done this in the ordinary course of his work with the Claimant. He states that he remembers Mr Kingston asking him to check the list before he sent the email but cannot now remember whether or not he and/or his father made any corrections.

50. On 28 November 2012 Mr Kingston told Matthew Bradshaw (by email) that one of his main introducers, Heckford Norton solicitors, had not yet responded to SJP's requests for a reference for Matthew. He asked Matthew Bradshaw to give Bob Phillips of Heckford Norton a nudge about this.

51. A meeting accordingly took place on 12 December 2012 with Bob Phillips. Both David and Matthew Bradshaw attended, although there was no legitimate need for David Bradshaw to be present. David Bradshaw described the meeting (taking place on or around 10 December 2012) as a meeting for both of them to ascertain

Bob Phillips' attitude to SJP. In cross-examination he said he really attended because it was a good opportunity for him to say goodbye to Bob Phillips. I find it odd that David Bradshaw would attend a meeting to discuss SJP given his medical condition and impending retirement and reject as implausible in the circumstances, his stated reasons for doing so.

52. As Matthew Bradshaw said, Bob Phillips was his main introducer by that stage. He must therefore have known him well. Moreover on Matthew Bradshaw's case the issue to be discussed was SJP's request for a reference in relation to Matthew only. By this stage David Bradshaw's retirement was imminent so that RDR was of no concern to him, and on his own evidence, he was not at all well. I find that the discussion concerned whether Bob Phillips would recommend clients to "us" as David Bradshaw accepted, but I find that his reference to "us" was not a reference to the Claimant, but a reference to Attain. I find it inconceivable in the circumstances described, that Matthew Bradshaw said nothing to Bob Phillips about moving to Attain. I am quite sure that Matthew Bradshaw told Bob Phillips all about Attain and sought to persuade him of Attain's merits. That he was successful in this regard is evidenced by letters from clients introduced by Heckford Norton seeking to transfer with him to his new company (for example pg.194), as early as 2 January 2013.

53. Matthew Bradshaw reported back to Paul Kingston on 12 December 2012 about this meeting. He explained Heckford Norton's position in relation to SJP and asked for a further period of three months before any change in his status to attempt to persuade introducers to continue working with him despite such change. I cannot be sure whether this was a genuine request that he thought had any prospect of being accepted but it seems unlikely. It must have been clear to him by then, that after David Bradshaw's retirement he would not receive commission on existing business, but would be limited to commission on new business only; and as a registered Croesus adviser, he would not be permitted to advise on SJP products.

54. The impression given by Matthew Bradshaw's witness evidence is that he resigned giving one month's notice without having any job to go to, and that he only took this decision to resign following the discussion with Paul Kingston about Heckford Norton's position in relation to SJP. At [134] of his second statement he states: "ultimately I contacted Attain and asked if they were still looking.… We came to an agreement and on the 2 January 2012, I signed my contract with them." No date is given by him for this important contact in his written evidence.

55. When asked in cross-examination about when he first had an offer from Attain, Matthew Bradshaw stated that it was not until 15 or 16 December 2012; and that he did not realise that this date was sufficiently significant to be mentioned in his witness statement. This is a startling omission and can only have been deliberate.

56. It was suggested to him that it did not stack up that he would hand in his notice without a job to go to, and he then accepted that he was told of the offer on 12 December 2012.

57. Having given this evidence he then asserted that the Heckford Norton meeting was on 11 December 2012 (a change from his earlier evidence). I am satisfied that the Heckford Norton meeting took place on Wednesday, 12 December 2012, (as

referred to in Paul Kingston's email to Matthew Bradshaw of 14 December 2012 (563)). I infer that the reason for his reticence and the inconsistent evidence he gave in relation to Attain's offer, was his desire to portray his resignation as pre-dating and being independent of that offer. I am satisfied in the circumstances, that Matthew Bradshaw was holding an offer of employment from Attain before he attended the meeting with Heckford Norton, and before he attended the meeting with Mr Fry on 14 December 2012.

58. David Bradshaw was equally keen to give the impression that he did not know when Attain offered Matthew a job and that he never discussed this with Matthew. I find this implausible in all the circumstances. Having attended the first meeting with Attain I cannot accept that he had no further involvement, particularly in circumstances where there was negotiation about a guaranteed income for his son. An arrangement involving guaranteed income is unusual in this industry and Matthew Bradshaw was a relative new-comer to it. The only real value he might bring to Attain was the client bank built up by his father. In the circumstances I am quite sure that no such guarantee would have been offered without some assurance from David Bradshaw about his client bank and the transfer of renewal commissions to Attain.

59. On 14 December 2012 Matthew Bradshaw wrote a resignation letter offering one month's notice. He left his repackaged iPad on his desk, and I accept (because there was no reason to doubt it) Lorraine Maxwell's evidence that she was handed his keys together with the iPad that had been left on his desk (and therefore reject Matthew Bradshaw's evidence that he handed his keys to Mr Fry during the meeting).. He met with Jonathan Fry. There is a direct conflict between Jonathan Fry's and Matthew Bradshaw's evidence as to what was said next. Matthew Bradshaw maintains that he was told to leave immediately and given no choice about it, and that there was no mention of notice pay in lieu and he was not paid any. By contrast, Mr Fry states that there was a discussion about the reasons for Matthew Bradshaw leaving, about outstanding compliance issues and then agreement was reached that Matthew could leave immediately without working or being paid his notice.

60. I find (in light of the oral evidence and contemporaneous documents referred to below) that there was a mutual agreement that Matthew Bradshaw could leave without working his notice and that he would be paid up to and including 14 December 2012. I find that Matthew Bradshaw wished to leave immediately because he had an offer from Attain. I reject his evidence to the contrary as unpersuasive and inconsistent with the more contemporaneous correspondence referred to below.

61. Jonathan Fry prepared a file note dated 14 December 2012 (562). There was no adequate basis for concluding that it was not contemporaneous. He maintained that save in one respect the file note was correct and accurately reflected the discussion he had with Matthew Bradshaw at the meeting on 14 December 2012, and I accept this to be the case. It is common ground that there was a discussion about compliance issues at the meeting (as reflected in the file note) and Mr Fry gave evidence that he did not believe that there were any outstanding compliance issues for Matthew Bradshaw to complete. The latter point is contradicted by the file note which states that Matthew Bradshaw advised him that he had a couple of cases to

finish and that they agreed he would finish the paperwork – Mr Fry gave no explanation for this error, but in the context of other matters discussed, it was of less significance, and I find that it was a simple mistake. The file note continues that they agreed "by mutual consent that he could leave immediately without working or being paid for his notice." At [38] of his second witness statement Mr Fry states that Matthew Bradshaw was in fact paid in lieu of notice; but in evidence he explained that this was a reference to a payment made in settlement of employment tribunal proceedings.

62. Paul Kingston wrote to Matthew Bradshaw by email dated 14 December 2012, expressing disappointment, surprise and regret that Matthew Bradshaw would not be part of the "new chapter". It is clear that Mr Kingston had anticipated further meetings with Heckford Norton in order to persuade them of the merits of SJP Matthew Bradshaw left that afternoon.

63. By email dated 17 December 2012 from David Bradshaw to Paul Kingston, David Bradshaw confirmed that December was his final month and that he should be de-authorised. He stated that he had been "effectively out of it for a couple of months with a hernia and surgery for it, combined with a re-occurrence of heart arrhythmias…" so would be unable to attend leaving drinks on 20 December 2012 for those reasons. So far as Matthew is concerned he said

> "It is unfortunate the way it has worked out with Matthew who I had hoped would continue to look after my old clients after I had retired. He is, however, his own man and has been headhunted with a package that is too good to turn down, while allowing him to also retain his solicitor connections and remain independent."

64. In his second statement, David Bradshaw sought unconvincingly to explain away the statement that Matthew had been headhunted by reason of the fact that he was unwell and on severe pain medication. He goes on to say that he believed Matthew had been treated very badly but that these statements were thoughtless. I find that David Bradshaw was much more involved in the Attain process than he has been prepared to admit, and helped negotiate the package that was too good to turn down.

65. By letter dated 20 December 2012 from Jonathan Fry to Matthew Bradshaw, he stated: "as agreed in our meeting your contract for services terminates on 14 December 2012, by which time you have agreed that all outstanding compliance on any cases being processed will be complete. … Any commissions due on business completed up to and including 14 December will be paid in the normal manner, i.e., on the 15th of the month after commission has been received.…"

66. Matthew Bradshaw did not respond to that letter asserting that there had been no such agreement. Moreover, I note that letters sent by his solicitors (drawn to my attention by Ms Stone in closing but not before) dated 8 March 2013 and 26 April 2013, are inconsistent with the evidence he now puts forward in relation to the meeting on 14 December 2012 .

67. On 2 January 2013 Matthew Bradshaw signed a contract with Attain, and started working for them as an IFA on 7 January 2013. He says ([141] of his second

statement) that Attain were quite happy to guarantee him £3500 per month as they knew he would be able to re-establish relationships with introducers and "there would be nothing to prevent me from working with my former clients at the Claimant from December 2012." This evidence is inconsistent with Matthew Bradshaw's evidence to me that initially he intended to abide by his covenants with the Claimant, which would have prevented any business dealing with former clients.

The issues

68. In light of these findings of fact (and the further findings and inferences referred to below) I turn to consider the issues

1. Were the restrictive covenants in the "contract of service" sent to Matthew Bradshaw on 26 April 2010 still in force, in particular:

a) did that contract only apply during the first four months of Matthew Bradshaw's work such that it had no effect following that period; and/or

b) Did Matthew Bradshaw's employment terminate in September 2010 such that he became self-employed at that time and the restrictive covenants no longer applied from one year after the termination of employment?

69. Matthew Bradshaw started working for the Claimant on 4 May 2010 pursuant to a contract signed by the Claimant and countersigned by him. The contract provided by clause 1 that "his permanent employment with the company" would commence on 4 May 2010 subject to a three month probationary period. Clause 3 of the agreement provided that he would receive salary of £25,000 per annum paid in equal monthly instalments in arrears for an initial period of four months only. There are other clauses that clearly indicate that the contract was intended to continue beyond the initial four-month period: for example clause 3(iv) providing for eligibility to join a group stakeholder scheme on completion of his three month probationary period; clause 9 providing for notice to increase to a maximum of 12 weeks for 12 complete years worked.

70. The contract was sent under cover of a letter dated 26 April 2010 which stated: "The contract covers the initial four-month period whereby Croesus Financial Services Limited will pay for your services on an employee basis. Thereafter as agreed the cost of your services will be met by deduction from David Bradshaw's earnings on a basis to be agreed between you."

71. It is submitted on Matthew Bradshaw's behalf that the only possible reading of the cover letter is that this contract only applied to the first four months of Matthew Bradshaw's work for the Claimant. Whatever the subjective intention of the Claimant, its intention as objectively viewed was that the contract would only cover the first four months. Moreover Ms Stone contends that this interpretation is wholly consistent with the behaviour of the parties at the time. She relies on the fact that contrary to what is stated in the contract, following the initial period, Matthew Bradshaw was not required to work at Raleigh house (clause 2); he was not required to work fixed hours (clause 4); he was not given holiday entitlement (clause 5); he was not paid sick pay; and he was not required to notify the Claimant of any

absences (clause 6). Furthermore she argues that it is also consistent with the fact that on receipt of Matthew Bradshaw's resignation Jonathan Fry accepted the resignation as a termination of Matthew Bradshaw's "contract for services" rather than "contract of service".

72. The contract must of course be construed by ascertaining the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time it was made. It must be so construed without regard to the previous negotiations of the parties or any declarations of subjective intent: Investors Compensation Scheme Ltd v West Bromwich BuildingSociety [1998] 1WLR 896 at 912 – 913.

73. The objective intention of these parties, looking at both documents as a whole and without taking a single sentence from the cover letter in isolation, was to enter into a contract that was not time-limited, but that provided for an initial four-month period under which salary at a rate of £25,000 per annum would be paid. The meaning conveyed by the cover letter to a person with all the background knowledge available to the parties in 2010 is that the contract covers two periods: an initial four-month period; and the period "thereafter", in which the cost of Matthew Bradshaw's services would be met from David Bradshaw's earnings on an agreed basis. The terms of the contract itself convey that after the four-month period the contract would continue to apply between the parties but that Matthew Bradshaw would become a commission only employee from that date and no longer entitled to any guaranteed salary payments.

74. I do not accept that Matthew Bradshaw understood the contract as being limited to the first four months of his working relationship with the Claimant at the time; or that he treated the contract as not continuing to apply. On the contrary the contract was in identical terms to the continuing contract David Bradshaw had with the Claimant, as Matthew Bradshaw must have known. I find that Matthew Bradshaw regarded it as a continuing contract as evidenced by the fact that he gave one month's notice to terminate in accordance with its terms; and at least initially intended to abide by the covenants in his "ongoing" contract. His suggestion that one month was simply plucked out of the air by him lacks any credibility. The fact that terms as to place of work and hours of work were not as a matter of fact enforced by the Claimant after the initial four-month period does not alter the position - had it chosen to do so the Claimant could have enforced these provisions. Nor do I find compelling the fact that Jonathan Fry, who is not a lawyer, referred to this as a contract for services rather than a contract of service.

75. In the alternative, Ms Stone contends that since the covenants in clause 16 only apply for 12 months after the "termination date" and termination date is defined as "the date of termination of your employment with the company" (see clause 16.1) even if there was a rolling contract, it was a contract for services – Matthew Bradshaw being self-employed following the expiry of the four-month period - so that the date of termination of his "employment" was nevertheless 4 September 2010, and any covenants could have had no effect more than a year after that date.

76. I cannot accept this argument. The term "employment" in clause 16.1 refers to the relationship between the Claimant and Matthew Bradshaw to do work personally, whether under a contract for services or a contract of service. Any reasonable

person having the background knowledge available to the parties at the time of the contract would have expected that clause 16 would apply from the termination date of the relationship and not the termination date of the initial four-month period, even if his status (as an employee or as a self-employed individual) changed at that point.

77. In the circumstances I am satisfied that there was an ongoing written contract between Matthew Bradshaw and the Claimant until it was terminated in December 2012.

2. If not was the Claimant in repudiatory breach of contract and/or did it renounce the contract by the following either cumulatively or in isolation:

a) Paul Kingston advising Matthew Bradshaw in a meeting of 28 September 2012 that his registration as an IFA would be revoked at the end of December 2012;

c) Paul Kingston on 12 December 2012 flatly refusing to give Matthew Bradshaw a period of three months grace in which to attempt to persuade his clients and introducers to continue to work with him despite his changed status?

78. There is no dispute that the classic definition of a repudiatory breach entitling an employee to resign is where the "employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract": Western Excavating v Sharp [1978] ICR 221 (CA) at 226. If so, the employee is entitled to leave with or without giving notice.

79. It is trite law that there is to be implied into any contract of employment a term that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

80. The question whether or not there has been a repudiatory breach of the duty of trust and confidence is a question of fact: Woods v WM Car Services (Peterborough) Ltd [1982] IRLR 413 at 415. It is highly context specific. Reliance may be placed on any conduct by the employer which, objectively considered constitutes a breach of the employer's duty not seriously and without reasonable and proper cause, to damage the degree of trust and confidence which the employee was entitled to have in the employer.

81. The context in which changes at the Claimant took place is the RDR as described above. This initiative applied across the whole financial services sector. The changes were mandatory and introduced a regime where any client receiving advice from an IFA would have to pay directly or indirectly the fees of the IFA, rather than the cost of such advice being covered by charges under the contract for the financial services product. This was a new and more transparent way for clients to pay for financial services advice and led inevitably to changes in the structure of such service providers. Because of a concern that clients would be unwilling to pay upfront for advice provided by their advisers the Claimant explored the possibility

of establishing a separate company which would have a single restricted strategic partner that could give advice to clients without charging a direct fee and in circumstances where the cost of advice could continue to be covered by the charges inherent within the contract for the product.

82. There was, as I have found, a long period of consultation conducted by the Claimant with its advisers as to the impact of the regulatory changes and its own response to them. During the course of that lengthy process all advisers had the opportunity to raise concerns, make suggestions, and comment on the proposed course of action that the Claimant was considering. Again, as indicated, Matthew Bradshaw was passive in this process and gave the impression that he was happy to go along with it. His first apparent objection came two days before his resignation.

83. The decision communicated to Matthew Bradshaw in the meeting of 28 September 2012 (to move from independent adviser status to tied status) was a management decision which the Claimant was well entitled to make and I have no doubt that it acted reasonably and appropriately in the consultation period leading to this decision. Matthew Bradshaw had no contractual right to work as an independent as opposed to a tied adviser; and he was given three months' notice of the change, allowing him plenty of time to prepare for it or to explore other options if that is what he chose to do.

84. To wait almost 3 months before requesting a further grace period (if he was making a genuine request), without previously having made known any concern whatever in relation to these changes, was unreasonable conduct on Matthew Bradshaw's part. I am satisfied that the refusal to accommodate this request was itself reasonable. It was not feasible from a regulatory perspective for Matthew Bradshaw to continue to be registered with the Claimant but to advise on SJP products.

85. If Matthew Bradshaw was unhappy with the route adopted by the Claimant in response to RDR he was entitled to leave the Claimant's services. However, I am satisfied that looked at objectively, the circumstances do not give rise to any fundamental breach by the Claimant entitling him to treat the contract as at an end.

3. Did Mr Fry tell Matthew Bradshaw to leave immediately on 14 December 2012 and if so was this a repudiatory breach of contract by the Claimant?

86. Alternatively Matthew Bradshaw contends that, if there had been no prior repudiatory breach, having resigned on a month's notice by letter dated 14 December 2012, Mr Fry's behaviour at the meeting on 14 December 2012 constituted such a breach. The conduct relied on in this respect is Mr Fry telling Matthew Bradshaw to leave immediately, without any agreement as to pay in lieu of notice and no such payment being made.

87. In my judgment Matthew Bradshaw has failed to establish his case on the facts as regards this issue. I am satisfied that on 14 December 2012 Matthew Bradshaw left his repackaged iPad on his desk, together with his keys, before speaking to Mr Fry. His resignation letter offered one month's notice because this was the contractual notice he was required to give. However I find that he hoped to be released early

because he had an offer of employment with Attain. He met with Jonathan Fry and explained that he did not wish to transfer to Delta but wished to remain as an independent financial adviser and to leave immediately. Mr Fry agreed that Matthew Bradshaw could leave without working his notice and that he would be paid up to and including 14 December 2012.

88. In light of my conclusion that there was no repudiatory breach of contract by the Claimant, there is no need to address the interesting argument advanced by Mr Davies that it should not necessarily be assumed that any wrongful termination of the contract by the employer will necessarily involve a repudiatory breach, particularly where the wrongful conduct is requiring an employee to leave immediately where that employee has given notice and/or that all restrictive covenants necessarily become unenforceable upon the employee's acceptance of the employer's repudiatory breach. The time may have come to revisit the rule in General Billposting Co Ltd v Atkinson [1909] AC 118 (HL) but in light of my findings, this is not the appropriate case to do it.

4. Were the restrictive covenants unenforceable in restraint of trade by being wider than reasonably necessary to protect any interest of the Claimant as assessed at the time they were entered into?

89. There is no dispute between the parties as to the applicable principles here.

90. A claimant seeking to rely on restrictive covenants must show that such covenants are both reasonable in the interests of the contracting parties and reasonable in the public interest: Office Angels v. Rainer-Thomas [1991] IRLR 214 (CA). The starting point for any such consideration is the proposition that contracts which restrain trade are unenforceable unless they are reasonable and it is for a claimant therefore to satisfy the court that the restrictions are no more than is reasonably necessary for the protection of the business. The burden is on the party seeking to enforce the covenant and reasonableness is determined by reference to the circumstances at the time when the contract was made or the covenants were agreed.

91. Where the court is presented with two equally tenable meanings of a covenant, one which would lead to its enforceability, the other to it being struck down, the proper approach is that identified by Chadwick LJ in Arbuthnot Fund Managers Ltd v Rawlins [2003] EWCA Civ 518. 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 task of the court, in construing the contractual term is simply to ask itself: what did these parties intend by the bargain which they made in the circumstances in which they made it?"

92. Ms Stone accepts that the protection of "goodwill and the connections of loyal customers" is a legitimate protectable interest here. She contends however, that the covenants contained at clause 16 of each agreement are unenforceable for the following reasons:

(a) They are too broad: they prevent Matthew Bradshaw who was a junior employee with no IFA experience at all when he started and not even

qualified, from canvassing, soliciting or doing business with any client with whom he had "personal contact in the course of (his) duties" within the two years ending with his termination date. This fails to limit the restriction to those with whom Matthew Bradshaw had business dealings and would include clients with whom he had trivial or chance contact in the course of his duties. It is suggested that it would restrain him from doing business with clients with whom he had bumped into in a corridor or simply taken a phone message.

(b) The covenants go beyond merely seeking to prevent solicitation and would prevent both Defendants from doing business with former clients even if they contacted him.

(c) The covenants last too long having regard to the position of the parties at the time the provisions were agreed: no positive evidence has been adduced as to the reason for the length and nature of the restraint. Moreover Matthew Bradshaw has explained that it would take no more than a few months at most to arrange for a new adviser to meet with clients and establish new relationship.

(d) The covenants would unreasonably restrain the Defendants from being able to pursue their trade and earn money for a lengthy period.

(e) The covenants would prevent clients from being able to choose to whom to entrust their financial affairs for a lengthy period.

93. I reject these submissions for the reasons set out below.

94. First, although Matthew Bradshaw was a junior employee in the sense that he had no IFA experience when he started and was not yet qualified, his circumstances were not those of an ordinary junior employee. He was recruited specifically as David Bradshaw's successor. David Bradshaw had built up a loyal and stable client bank over decades and it was this connection that the Claimant sought to protect so far as Matthew Bradshaw was concerned.

95. In my judgement the phrase "personal contact in the course of (his) duties" is capable of two meanings: the extravagantly wide meaning advanced by Ms Stone that would result in the clause's unenforceability; and a narrower alternative (as advanced by Mr Davies) that would lead to the opposite result. In adopting the narrower construction, I regard as important the principle that the parties are to be deemed to have intended their bargain to be lawful and not to offend against the public interest. Mr Davies contends and I agree that "in the course of his duties" is a restricting factor in relation to the relevant contact and connotes "business contact". The clause is therefore concerned with business contact that must be undertaken personally by the covenantor. It can be taken to cover such contact as is more than trivial or de minimis. Bumping into a client in the corridor or taking a phone message (both trivial contacts) were both unlikely to happen as a matter of fact (as the parties are to be taken as knowing given the way advisers operate with their own

dedicated client base and only infrequently attending the office) and are not covered by the clause.

96. Secondly, the practical difficulty of defining and policing solicitation and proving that solicitation has occurred can justify the use of a non-dealing clause in combination with a non-solicitation clause. Moreover a non-dealing clause may be valid notwithstanding the potential interference with the client's choice as to from whom to obtain financial advice: see Beckett Investment Group Limited v Hall [2007] ICR 1539 at [29] (CA). As Maurice Kay LJ stated in that case, during the period of restriction "the client is not compelled to remain with the covenantee. If he cannot await the expiration of the period of restriction he can in the meantime seek the advice of any service provider with which the covenantor is unconnected." These observations apply equally here.

97. Nor do I accept that the covenants would unreasonably restrain the Defendants from being able to pursue their trade and earn money for a lengthy period. They are free to pursue their trade and earn money immediately for so long as they do so without soliciting or doing business with the Claimant's clients.

98. As for the length of the period of restraint, to have any prospect of retaining the loyalty of Matthew and David Bradshaw's former client base the Claimant needed a reasonable period in which to establish or attempt to establish relationships between those clients and the new adviser. This is an important aspect of the reasonable protection of the Claimant's legitimate business interests. Establishing a new relationship, in circumstances where the majority of clients are only contacted on an annual basis, depends on demonstrating integrity, reliability and good performance and is built up gradually over time. It is not simply a question of organising a first meeting between new adviser and client. Nor can the process be artificially speeded up: any unwarranted contact (without a proper financial basis) or contact at a different time than expected is likely to be viewed with suspicion or as a hard sell, and may be counter-productive.

99. Any period of fixed duration bears an element of arbitrariness (as the Court of Appeal held in Beckett (above)) but having regard to the evidence about the strength of the relationship between the adviser and the client, the pattern of contact and the fact that 12 months appears to be an industry standard, in my judgement 12 months was reasonable both for non-solicitation and non-dealing having regard to the interests of the parties and the interests of the public in this case.

5. Was the first Defendants in breach of clause 16.2.1 of the Matthew Bradshaw agreement by canvassing, soliciting or doing business with the restricted person set out in the Claimant's updated schedule of loss?

100. Matthew Bradshaw admits that he has done business with some clients with whom he had personal contact in the course of his duties with the Claimant. He has set out those dealings in his second witness statement. His evidence is that he has not, however, solicited or canvassed any clients with the exception of Michael Chambers of Hunt and Coombs.

101. Although it may not matter in light of Matthew Bradshaw's admissions, the Claimant's case is that there was more extensive soliciting and canvassing of clients than Matthew Bradshaw has been prepared to admit.

102. It is often assumed that there is no solicitation where it is the customer who first contacts the ex-employee. From his evidence, this seems to have been the basis on which Matthew Bradshaw proceeded. However this is not necessarily the case and although the question who made the first contact is relevant, all the circumstances surrounding that contact must be considered, each case depending on its own facts. There is no general rule that wherever a customer initiates contact, an individual can respond and even go so far as making a presentation without breaching a prohibition on solicitation as Ms Stone submitted. Rather, these are questions of fact and degree. There is obviously a distinction to be drawn between solicitation and dealing with; accordingly, a critical element that distinguishes the two is that solicitation requires persuasion or encouragement of clients to transfer their business.

103. Before receipt of the Claimant's second letter to clients dated 10 January 2013 (telling them that Matthew Bradshaw had left the Claimant) which was relied on as the trigger for clients to contact them, there is evidence of clients contacting Matthew and/or David Bradshaw. For example, by email dated 2 January 2013 Glenn Burbidge (one of their clients) wrote saying "I still have not heard from Croesus re you departure etc. Could you please let me know what Croesus and your current situation is." (4/252) It is clear that Mr Burbidge already knew of Matthew Bradshaw's departure from a prior conversation and his follow-up letter dated 11 January 2013 is contrived; Matthew Bradshaw accepted that he had asked for it to be sent (4/260). I infer that there had been a prior discussion between Matthew Bradshaw and Mr Burbidge that was probably initiated by Matthew Bradshaw, in which Matthew Bradshaw said he would take Mr Burbidge's business with him to Attain but wanted a documentary trail suggesting that the contact had come from the client.

104. Although he started working for Attain from their business premises on 7 January 2013 Matthew Bradshaw was not registered with the FSA or FCA (as the case may be) until 8 February 2013 so could not give advice or have business dealings with clients until then. Nevertheless throughout January and early February 2013 Matthew Bradshaw received letters from clients all sent to his home address and not to Attain's business premises, and then visited them. This pattern continued in the months after he was authorised to transact business on behalf of Attain: letters from clients went to his un-registered home address. Matthew Bradshaw's evidence was that each of these clients had telephoned him and that he had asked them to write to him at home so that he would have a record of this contact. He accepted this may not have been "his best idea" and said he did not think of giving them Attain's business address to write to him there. I find this implausible. Again, it is strongly suggestive of steps taken to cover his tracks.

105. His evidence was that once clients had written to him, he made an appointment to visit them and did so, only to tell them that he would not be able to do business with them for the time being as a result of the covenants. In some cases he said that such visits were purely social and on occasion, David Bradshaw joined him on the visit. He admitted always keeping Attain literature in his car in case, even where he was

making a purely social visit and admitted in at least one case, giving the standard Attain client agreement to former clients (1/378). Again, I find his evidence implausible. If Matthew Bradshaw was genuinely simply telling clients that he would not be able to do business with them for the time being, he could have made this point in the first conversation without any need for a follow-up letter, still less a follow-up visit. I infer that his reason for visiting clients (having established a documentary trail of client contact first) was to encourage or persuade them to transfer to Attain, leaving them with literature from Attain where possible.

106. I am satisfied on the evidence that Matthew Bradshaw's communications with clients, even where they contacted him in the first instance, involved material encouragement or persuasion of those clients to transfer their business to Attain. In the circumstances, I find that Matthew Bradshaw solicited such clients in breach of his contract with the Claimant.

6. Did Matthew Bradshaw send to himself an email to his external account on to November 2012 and an email to his father's external account on 7 December 2012 attaching client lists ("client lists")? If so was this in breach of clause 7 of the Matthew Bradshaw Agreement and/or the implied duty of fidelity?

7. Has Matthew Bradshaw made use of the client lists in breach of the duty of confidence owed to the Claimant in respect of that information and or in breach of:

a) clause 7 of the Matthew Bradshaw agreement;

b) if Matthew Bradshaw was employed pursuant to a contract of employment and in so far as any use occurred during that contract, in breach of the implied term of good faith and fidelity?

8. If so has Matthew Bradshaw obtained an unfair commercial advantage by the misuse of confidential information?

107. In light of the findings of fact I have made above I am satisfied that Matthew Bradshaw sent the emails to his external account on 2 November 2012 and a further email to his father's external account on 7 December 2012 attaching client lists. I am not satisfied that Matthew Bradshaw had legitimate reasons for sending the email of 2 November 2012. Although the review of client lists was a regular part of his work, there is no evidence that Matthew Bradshaw did any work on the client lists. Similarly so far as the 7 December 2012 email is concerned, there is no evidence that Matthew Bradshaw was being asked to check addresses or for any other errors in the list and he forwarded the email without comment or request to his father. I find it implausible that at a time when his father was so ill he would trouble him with such an email. The fact that he forwarded the email without comment raises suspicion. The suggestion that he telephoned his father to explain what was necessary at the same time was not in his written evidence, and in any event, his primary position was that he could not recall this event. Moreover there is no evidence that he did any work or that his father did any work on this later list.

108. However I have not been satisfied by the evidence that either Matthew or David Bradshaw retained or misused these lists after they left employment. I have not been persuaded that there is any evidence of systematic solicitation of clients by reference to client lists or confidential information. Only a small proportion of the 250 clients that formed David and Matthew Bradshaw's client bank had contact with them after they left the Claimant. Had there been systematic solicitation by reference to lists, I agree with Ms Stone that a more dramatic pattern of dealings with former clients would have emerged.

109. In light of this conclusion there is no need to address the further issues raised under this heading.

9. Was David Bradshaw in breach of clause 16.2.1 of the David Bradshaw agreement by canvassing soliciting or doing business with the Restricted Person set out in the Claimant's updated schedule of loss?

10. Did David Bradshaw's receipt of the email of 7 December 2012 constitute a breach of:

a) clause 7 of his contract of employment;

b) the implied term of good faith and fidelity?

11. Has David Bradshaw continued to make use of the client lists in breach of a duty of confidence and/or clause 7 of his employment contract?

110. In light of my findings about the Heckford Norton meeting in December 2012, I am satisfied that David Bradshaw solicited business from Bob Phillips on behalf of his son Matthew. I am also satisfied that he made visits with Matthew Bradshaw to a number of clients, and spoke to some clients by phone. He was retiring or retired at these times. Whether these were social contacts or not, it is clear that business was discussed and the purpose and effect of his presence and his involvement in these contacts was to encourage or persuade clients to remain with Matthew Bradshaw on transfer to Attain. To that extent I find that he breached clause 16.2.1 by canvassing or soliciting clients as defined.

111. For the reasons given above, I have not been satisfied by the evidence that David Bradshaw used client lists in breach of contract or duty.

12. Did Matthew Bradshaw knowingly induce David Bradshaw to breach his contract by

(c) inducing him to canvass solicit or do business with the Claimant's clients and thereby knowingly cause Matthew Bradshaw to breach clause 16.2.1 of the Matthew Bradshaw agreement?

112. There is no dispute as to the relevant legal principles in relation to inducing a breach of contract. These were restated by the House of Lords in OBG Ltd and Another v

Allan and Others 2008 1 AC 1 at [39]: to be liable for inducing breach of contract, "you must know that you are procuring an act, which as a matter of law or construction of the contract, is a breach. You must actually realise that it will have this effect. Nor does it matter that you ought reasonably to have done so." So far as inducement is concerned, the question is, "did the Defendants acts of encouragement, threat, persuasion and so forth have a sufficient causal connection with the breach by the contracting party to attract accessory liability?"- see OBG Ltd at [36].

113. I have not been satisfied on the evidence I have heard that David Bradshaw took action amounting to a knowing inducement of his son to breach his son's contract of employment. Rather, they acted together as set out below.

14. Did the Matthew Bradshaw and David Bradshaw conspire to injure the business interests of the Claimant by doing the following:

a) acting in concert to transfer Matthew Bradshaw and David Bradshaw's client base from the Claimant to Attain;

b) using unlawful means to do so in particular, did they do so by breaching clauses 7 and 16 of their service agreements;

c) knowing that their actions were unlawful;

d) intending to injure the Claimant (i.e. were they aware that their conduct would or would likely harm the Claimant);

e) causing the Claimant to suffer damage as a result?

114. So far as conspiracy by unlawful means is concerned, again the law is not in dispute. Conspiracy involves the agreement of two or more parties to do an unlawful act, or to do a lawful act by unlawful means. A combination to do a tortious act, such as to break or threaten to break a contract, or to procure a breach of contract is an unlawful means conspiracy. This is what is alleged by the Claimant here. Causing damage to the Claimant must have been part of the combiners' intentions, but it need not be the main or predominant purpose.

115. The Claimant's claim under this heading is that Matthew and David Bradshaw "acted in concert" to transfer their client base from the Claimant to Attain. The allegation is that David Bradshaw provided assistance, advice, direction or instruction to Matthew Bradshaw as to how to effect the transfer, and that he used his influence over the clients to persuade them to transfer.

116. There is in my judgement evidence of the two Defendants acting in concert in relation to clients in this case and I am satisfied that the Claimant has proved its case under this heading.

117. Although I accept that David Bradshaw was unwell and that having retired he had no personal interest in doing work with his old client base, it is clear that he was keen to place his son Matthew in a position where he could be his successor in

relation to these clients despite the agreement he had reached with the Claimant in relation to his renewal or recurring commissions.

118. There was a motive for the two of them to take action in 2012: both were unhappy with the arrangements recorded by the 30 April 2012 email from Paul Kingston referring to the need to avoid any "inadvertent seep" of renewals accrued by David Bradshaw to Matthew Bradshaw. The email highlighted the potential for Matthew Bradshaw to stop being rewarded in his work for the Claimant after David Bradshaw's retirement which was by then becoming more imminent. David Bradshaw well understood the importance of the agreement he had reached with the Claimant in relation to his renewal commissions, and that he had received both pension contributions and additional commission payments by way of consideration for it. He must therefore have known and understood the likely damage the Claimant would suffer as a consequence of transferring those renewal commissions elsewhere. I find that such loss and damage resulted from their combined actions.

119. David Bradshaw arranged for Matthew Bradshaw to meet his contact at Attain, and attended the meeting. I have already found that the only credible explanation for his presence at that meeting was to talk about Matthew Bradshaw joining Attain and the transfer of their renewal commissions to Attain. In the negotiations that followed, given David Bradshaw's position and knowledge of the industry it is inconceivable that Matthew Bradshaw was not advised, assisted and supported by David Bradshaw to achieve this purpose.

120. I have already found that both Defendants breached clause 16 of their agreements with the Claimant by soliciting or canvassing clients; and Matthew Bradshaw's breaches went further. Matthew Bradshaw visited clients with his father David Bradshaw in circumstances where both had restrictive covenants in their service agreements that prevented dealing with such clients. Moreover they both well understood that David Bradshaw had, in effect, sold his client bank to the Claimant. The inevitable inference is that David Bradshaw was present at client meetings in order to assist Matthew Bradshaw in retaining and preserving the client relationship. It is clear that for the vast majority of these clients David Bradshaw had been their financial adviser for decades and his presence must have been a source of encouragement and persuasion. Matthew Bradshaw was capitalising on his father David Bradshaw's lengthy years of working for and connections with these clients. The efforts that they went to in order to cover their tracks so far as client contact was concerned, gives rise to the strongest inference that they knew what they were doing and that it was a breach of contract.

Relief

121. The Claimant has established that the restraint sought to be imposed by clause 16.2.1 is no wider than was reasonably necessary to protect the Claimant's legitimate business interests. Its imposition was in the interests of both parties and not contrary to the public interest. It is therefore enforceable against both Defendants. However even if enforceable the court has discretion not to grant an injunction to enforce clause 16.2.1.

122. Ms Stone submits that it would not be reasonable to make any order for an injunction in this case: an injunction would interfere with Matthew Bradshaw's

commitments to third parties; there is less than two months remaining in respect of the covenants; the Claimant delayed in seeking to enforce the covenants at the outset; and the status quo should be preserved.

123. The Defendants have breached the express negative covenant in their contracts and I am satisfied that this has caused and continues to cause damage to the Claimant. The grant of an injunction here would not be so prejudicial to the Defendants or cause them such hardship that it ought not to be granted. A limited injunction for the remaining period would allow a further short period in which the Claimant can seek to consolidate its position in relation to clients. The order I have in mind (prohibiting solicitation, canvassing and dealing with clients as defined by clause 16.2.1) would exclude those clients already excluded from the contractual undertakings given by the Defendants and would thereby preserve the current status quo. An order in these terms would also give rise to no interference with Matthew Bradshaw's commitments to third parties. Although I accept that the Claimant delayed in seeking to enforce the covenants, and that this would have been a powerful argument against any interim order, in all the circumstances of this case I do not regard it as overriding the factors referred to above as justifying the exercise of my discretion in favour of a grant in this case.

Damages

124. By its original schedule of loss the Claimant sought more than £1 million against two individuals on a basis that it has now accepted as materially flawed. The most recent schedule of loss amounts to less than one-tenth of the original claim: the total sum now claimed against these individuals is £117,555.43. It was highly unsatisfactory to have a further version of the schedule of loss produced at a very late stage, as the Claimant accepted.

125. There are three aspects in respect of which loss is claimed:

    i) Loss of new business for the period 15 December 2012 to 14 December 2013 estimated in the sum of £19,279.98;

    ii) Loss of recurring income for the same period estimated at £48,275.45; and

    iii) Loss of future income post 14 December 2013 estimated at £109,845.11 but capped at £50,000.

126. So far as loss of new business is concerned the Claimant has taken the actual performance of the "Bradshaw" clients over the years 2010, 2011 and 2012 as historic performance figures and produced an average performance figure. Since the agreement with the relevant new adviser for commission split is 50/50, the average performance figure is then divided by two. A similar approach based on historic performance figures was adopted in relation to recurring income. This appears to be a broadly reasonable approach to the quantification of loss in what is necessarily a speculative and hypothetical exercise subject to what is set out below.

127. So far as future income is concerned the Claimant made the following assumptions: it adopted the figures identified at (i) and (ii) above by way of multiplicand;

although the policy life is eight years it assumed a three-year multiplier should be adopted; as at 14 December 2013 it assumed 60% of clients would be retained and that each year for three years thereafter there would be a 10% attrition rate. A cap of £50,000 was then applied. Again, this appears broadly reasonable, subject to what is set out below.

128. Ms Stone maintains that the figures at (i) and (ii) are inflated. They do not give credit for commissions received by the Claimant from clients who left part way through the period, which affects all those who transferred since none transferred immediately. Further she submits that they do not take account of the fact that the transfer of commissions is rarely clean so that a trickle of commissions comes in despite such transfer. I see the force of this submission, but its effect has not been quantified. Adopting a broad brush approach and doing the best I can to estimate its effect, I propose to reduce by one third the figures under these heads to reflect her criticisms.

129. So far as (iii) is concerned she maintains that the 60% retention rate is too high; and more generally that such loss as the Claimant sustained flows not from Matthew or David Bradshaw's activities but from the Claimant's failure to put in place a new adviser relationship with clients. Again adopting a broad brush approach and doing the best I can to estimate the loss suffered under this head whilst still recognising that a cap has been applied, I propose to reduce to £30,000 the recoverable loss.

130. The parties are invited to agree a form of order reflecting my conclusions, and any consequential orders, failing which I will hear further submissions.