Neutral Citation Number: [2008] EWHC 1080 (QB)

Case No: HQ08X01012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2008

Before :

HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.
(Sitting as a Judge of the High Court)

- -

Between :

WRN LIMITED	**Claimant**
- and -	
TIMOTHY MARK AYRIS	**Defendant**

- -
- -

Simon Colton (instructed by **Izod Evans**) for the **Claimant**
Louise Chudleigh (instructed by **Irvine and Partners**) for the **Defendant**

Hearing dates: 28, 29 and 30 April 2008

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Approved Judgment

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

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HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.

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Introduction

1. Between 6 September 1999 and 22 February 2008 the defendant, Mr. Timothy Ayris, was employed by the claimant, WRN Ltd. (*"WRN"*). The business of WRN includes the provision of radio and television broadcast and transmission services, in particular by means of satellites. Mr. Ayris was employed initially as Marketing and Rebroadcasting Manager of WRN. However, latterly, as from 29 October 2007, he was employed as Head of Sales and Marketing. With effect from 27 February 2008 Mr. Ayris has been employed by VT Communications Plc (*"VT"*) as Business Development Manager (Broadcast). VT is a competitor of WRN. It appears that VT is the principal United Kingdom-based competitor of WRN, although the business in which both WRN and VT is involved seems to operate internationally.

2. In this action WRN sought injunctions requiring Mr. Ayris to comply with various terms contained in one or other or both of two contracts which it was contended that Mr. Ayris had made with it. There was no dispute that Mr. Ayris entered into a contract (*"the Leaving Contract"*) in writing dated 20 December 2007 which he signed on about 25 January 2008. However, it was contended on behalf of Mr. Ayris that the Leaving Contract was unsupported by consideration, and thus did not give rise to obligations enforceable against him. The case for WRN was that Mr. Ayris had also entered into a contract (*"the Employment Contract"*) in about September 1999 on taking up employment with WRN in the first place. A form of the Employment Contract signed on behalf of WRN was put in evidence. Although that form contained an indication that it was intended that Mr. Ayris also sign the Employment Contract, no copy of it signed by him was produced. His evidence was that he did not recall signing the Employment Contract. Nonetheless, it was accepted on his behalf by his Counsel, Miss Louise Chudleigh, at the commencement of the trial that Mr. Ayris was, in principle, bound by the terms of the Employment Contract.

3. The case for WRN was that, unless restrained by injunction, Mr. Ayris would infringe various covenants contained in the Employment Contract and/or the Leaving Contract. Mr. Ayris's case was that he had not, save in minor respects and largely inadvertently, infringed any of the covenants which WRN sought to enforce. However, he also contended that the relevant covenants were unenforceable in any event as being unreasonable restrictions upon him in restraint of trade. Why, in practical terms, the issue of the enforceability of covenants against solicitation and dealing which WRN sought to rely upon as against Mr. Ayris was material was that WRN and VT shared a number of customers and Mr. Ayris in his new job was expected by VT to have contact with a number of customers which it had in common with WRN.

4. It is convenient to consider first the covenants in the Employment Contract which WRN sought to enforce against Mr. Ayris.

The relevant terms of the Employment Contract

5. By clause 13.1 of the Employment Contract it was provided that:-

> "*As a condition of your employment, you agree to be bound by the terms of the Trust and Confidence Agreement attached as Schedule 2 hereto.*"

6. Schedule 2 to the Employment Contract was indeed a document entitled *"Trust and Confidence Agreement Managers"* (*"the Schedule"*). All of the terms of the Employment Contract relied upon as against Mr. Ayris were contained in the Schedule. In the Schedule WRN was called *"the Company"* and Mr. Ayris was called *"the Manager"*.

7. Clause 1 of the Schedule contained various definitions. Those which were material for the purposes of this action were:-

> "*In this Deed, the following phrases shall, unless the context requires otherwise, have the following meanings:*
>
> *1.1 'Businesses' means all and any trades or other commercial activities of the Company or any Group Company:*
>
> *1.1.1 with which the Manager shall have been concerned or involved to any material extent at any time during his appointment by the Company which the Company or any Group Company shall carry on with a view to profit; or*
>
> *1.1.2 which the Company or any Group Company shall at the Termination Date have determined to carry on with a view to profit in the immediate or foreseeable future and in relation to which the Manager shall at the Termination Date possess any Confidential Business Information.*
>
> *1.3 'Confidential Business Information' means all and any Corporate Information, Marketing Information, Technical Information and other information (whether or not recorded in documentary form or on computer disk or tape) to which the Company or any Group Company attaches an equivalent level of confidentiality or in respect of which it owes an obligation of confidentiality to any third party:*
>
> *1.3.1 which the Manager shall acquire at any time during his appointment by the Company but which does not form part of the Manager's own stock in trade; and*
>
> *1.3.2 which is not readily ascertainable to persons not connected with the Company or any Group Company either at all or without a significant expenditure of labour skill or money.*

1.4 'Corporate Information' means all and any information (whether or not recorded in documentary form or on computer disk or tape) relating to the business methods, corporate plans, management systems, finances, maturing new business opportunities or research and development projects of the Company or any Group Company.

1.5 'Customer' means any person firm or company who or which shall at the Termination Date be negotiating with the Company or any Group Company for the supply of any Restricted Products or the provision of any Restricted Services or to whom or which the Company or any Group Company shall at any time during the period of one year prior to the Termination Date have supplied any Restricted Products or provided any Restricted Services.

...

1.8 'Marketing Information' means all and any information (whether or not recorded in documentary form or on computer disk or tape) relating to the marketing or sales of any past, present or future product or service of the Company or any Group Company including without limitation sales targets and statistics, market share and pricing statistics, marketing surveys and plans, market research reports, sales techniques, price lists, discount structures, advertising and promotional material, the names, addresses, telephone numbers, contact names and identities of customers and potential customers of and suppliers and potential suppliers to the Company or any Group Company, the nature of their business operations, their requirements for any product or service sold to or purchased by the Company or any Group Company and all confidential aspects of their business relationship with the Company or any Group Company.

...

1.11 'Restricted Products' means all and any products of a kind which shall be dealt in, produced, marketed or sold by the Company or any Group Company in the ordinary course of the Businesses.

1.12 'Restricted Services' means all and any services of a kind which shall be provided by the Company or any Group Company in the ordinary course of the Businesses.

1.13 'Technical Information' means all and any trade secrets, secret formulae, processes, inventions, designs, know-how discoveries, technical specifications and other technical information (whether or not recorded in documentary form or on computer disk or tape) relating to the creation, production or supply of any past, present, or future product or service of the Company or any Group Company.

1.14 'Termination Date' means the date on which the Manager shall cease to work in any of the Businesses."

8. Clause 2 of the Schedule was entitled *"Acknowledgements by the Manager"*. It was in these terms:-

"*The Manager acknowledges:*

2.1 that the Company and each Group Company possesses a valuable body of Confidential Business Information;

2.2 that the Company will give him access to Confidential Business Information in order that he may carry out the duties of his appointment;

2.3 that the duties of his appointment include, without limitation, a duty of trust and confidence and a duty to act at all times in the best interests of the Company;

2.4 that the Company requires all its senior employees to accept restrictions which are similar to those set out in clauses 3 and 4 for its and each of their mutual protection;

2.5 that the disclosure of any Confidential Business Information to any customer or actual or potential competitor of the Company or any Group Company would place such company at a serious competitive disadvantage and would cause immeasurable (financial and other) damage to the Businesses;

2.6 ...

2.7 (sales staff only) that the success of the Business depends, in part, on the Manager's successor and/or fellow employees establishing business relationships with the customers of and suppliers to the Businesses which are similar to those established and maintained by the Manager in the course of his appointment by the Company."

9. As was foreshadowed by the terms of clause 2.4 of the Schedule, the obligations contained in the Schedule differentiated between those applicable during employment, dealt with in clause 3, and those applicable after termination of employment, the focus of clause 4.

10. Of the provisions contained in clause 3 of the Schedule, only some of those included in clause 3.4 were material to the issues in this action. The relevant parts of clause 3.4 were:-

"*3.4.1 The Manager agrees that during the period of his appointment by the Company, he shall:*

...

3.4.1.2 not directly or indirectly disclose to any person, firm or company or use other than for any legitimate purposes of the Company or any Group Company any Confidential Business Information;

...

3.4.1.5 not without the prior authority of the Company remove from the Company premises or copy or allow others to copy the contents of any document, computer disk, tape or other tangible item which contains any Confidential Business Information or which belongs to the Company or any Group Company;

3.4.1.6 return to the Company upon request and, in any event, at the Termination Date all documents, computer disks and tapes and other tangible items in his possession or under his control which belong to the Company or any Group Company or which contain or refer to any Confidential Business Information;

3.4.1.7 if so requested by the Company delete all Confidential Business Information from any computer disks, tapes or other re-usable material in his possession or under his control and destroy all other documents and tangible items in his possession or under his control which contain or refer to any Confidential Business Information. "

11. The main focus of the claims of WRN was on the provisions of clause 4 of the Schedule, prescribing that which should be done, or not done, by Mr. Ayris after the termination of his employment. For present purposes the material terms of clause 4 were:-

"*The Manager will not directly or indirectly:*

...

4.3 for a period of 6 months after the Termination Date, seek in any capacity whatsoever any business, orders or custom for any Restricted Products or Restricted Services from any Customer;

4.4 for the period of 6 months after the Termination Date, accept in any capacity whatsoever orders for any Restricted Products or Restricted Services from any Customer;

4.5 at any time before or after the Termination Date, induce or seek to induce by any means involving the disclosure or use of Confidential Business Information any Customer to cease dealing with the Company or any Group Company or to restrict or vary the terms upon which it deals with the Company or any Group Company;

...

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

12. It is convenient in this judgment to refer to the covenants in clauses 4.3 and 4.4 of the Schedule collectively as *"the Relevant Covenants"*.

The relevant terms of the Leaving Contract

13. The Leaving Contract was essentially in the terms of the Schedule, but with two principal differences. The first was that the various clauses did not contain numbers for the sub-clauses and sub-sub-clauses as in the Schedule. The second, rather more material, was that in each of the sub-clauses of clause 4 for the period of 6 months was substituted a period of 12 months.

The history of Mr. Ayris's employment by WRN

14. Mr. Ayris was initially employed by WRN at a salary of £27,500 per annum. By clause 14 of the Employment Contract the notice which he had to give to terminate his employment was one week while he had been employed for less than two years, and thereafter one week for every completed year of his employment.

15. A copy of the job specification relating to the position of Marketing and Rebroadcasting Manager was put in evidence. It included:-

"*Specific Responsibilities:*

- *Initiate the strategic planning process for the development of an effective marketing campaign to bring new content partners to WRN channels.*
- *Initiate the strategic planning process for the development of the WRN rebroadcasting product.*
- *Develop and nurture senior level contacts in potential clients for broadcast and transmission services.*
- *…*
- *Develop senior level contacts with potential rebroadcasters in key markets.*
- *Develop relationships with existing rebroadcasting clients in all markets.*
- *Initiate contractual negotiations with potential local and national rebroadcasting partners.*"

16. In February 2003 Mr. Ayris's job changed. From a letter dated 12 February 2003 written to him by Mr. Karl Miosga, at that time managing director of WRN, and which he counter-signed to indicate agreement, it seems that the new job was variously described as *"Broadcast Sales Manager"* or *"Network Development Manager"*. In fact the job title used in the event was *"Marketing Manager"*. A job description of that position was put in evidence. Of the identified *"Key Result Areas"* in that document those said to be *"Role Specific"* included:-

> "*2.1 Identify New Sales Opportunities to bring to sales pipeline (heating up prospects)*
>
> *2.2 Develop Core Marketing Plan (all marketing activities)*
>
> *2.3 Represent public face of WRN and devise additional routes to market*
>
> *...*
>
> *2.7 Production of ad hoc tactical sales and acc man support data and accompanying materials*
>
> *2.8 Product development*
>
> *2.9 New Product and service launch*
>
> *2.10 Conferences.*"

Of those, 2.1, 2.3 and 2.10 were said to require as *"Skill Sets" "networking"*.

17. For a period at the beginning of January 2007, and then effectively from about April 2007, Mr. Ayris acted as Head of Sales and Marketing of WRN. He was formally appointed to that position by two letters, each dated 29 October 2007, written by Mr. Timothy Ashburner, a director of WRN. Mr. Ayris counter-signed each of those letters to indicate his agreement to the terms respectively therein contained.

18. By a letter dated 11 April 2007 written to Mr. Ayris by Mr. Gary Edgerton, at that time the managing director of WRN, and counter-signed by Mr. Ayris to indicate his agreement, the terms of the Employment Contract were varied so as to increase Mr. Ayris's salary to £46,000 per annum, plus an element of commission, and to increase the period of notice required to terminate the employment of Mr. Ayris to 13 weeks.

19. By one of the letters dated 29 October 2007 to which I have referred, with effect from 1 November 2007 Mr. Ayris's salary was increased to £49,500 per annum and the basis upon which his commission was assessed was revised. At this point Mr. Ayris was one of the senior employees of WRN, and apparently the highest paid.

20. The terms of the Schedule were not varied by any of the variations to the Employment Contract to which I have referred.

The resignation of Mr. Ayris and the circumstances in which the Leaving Contract was made

21. Mr. Ayris resigned his employment with WRN by a letter dated 17 December 2007. The letter was addressed to Mr. Ashburner, at this point interim managing director of WRN. It was short:-

> "*Please accept this letter as my resignation from the post of Head of Sales and Marketing at WRN.*
>
> *May I take this opportunity to wish the company the best of luck for the future.*"

22. It was common ground that Mr. Ayris handed the letter to Mr. Ashburner at a meeting between the two of them on the morning of 17 December 2007.

23. Mr. Ayris's account of what happened at the meeting on 17 December 2007, and later that day, he set out in a fourth witness statement dated 25 April 2008:-

> "*9. … On Monday 17th December 2007 at about 10.30 am I called Mr. Ashburner to ask if I could see him. He agreed and I went up to see him. I sat down in his office and said "I'll come out with this quickly, I am handing in my resignation". He looked shocked but quickly composed himself. He asked if I was going to VT and I said yes I'm afraid so. I said this because not long before another member of staff had left to join VT. I explained my reasons for leaving WRN and joining VT which included my length of time at WRN (eight and a half years) and that VT, being a bigger company offered me a great and more substantial career path. I also gave him details of how I had been approached by an employment agency called Candela Media who had been tasked by VT to fill the vacant position of Business Development Manager, Airtime (as the job was then called). I gave him a brief outline of the job I was to do and said that I was also going to be in a position to make recommendations to VT about strategic purchases and joked that I might recommend that VT buys WRN.*
>
> *10. I then said that I wanted to ensure that my remaining time at WRN was orderly and that my handover to Sophie Wilson was done effectively and smoothly so that I could leave WRN in a positive manner. I said this was important that we were bound to meet again at conferences or industry events and even transact business together in the future.*
>
> *11. I said that I would like to leave before my notice period and I identified the day I wanted to leave (Friday 22nd February) and with the holiday entitlement I was due that meant my last day in the office would be 8th February 2008. I even pointed out that my holiday entitlement would indicate that my last day working for*

WRN would be Wednesday 20th February 2008 but I asked if he could give me two extra days to make it up to the Friday 22nd February 2008. I chose these dates to leave so I could take my holiday entitlement to coincide with the half term holiday of my children and wife's schools and would allow me to go away with my family on holiday which I did on the week beginning: 18th February.

12. Mr. Ashburner verbally agreed these dates and I asked if he could write to me confirming these dates which he said he would do. I left the office about ¾ of an hour later feeling satisfied I had got the leaving dates sorted out and agreed.

13. After lunchtime that day, Mr. Ashburner came to my office in a flurry. He then said that he had been on the telephone with the company's insurance agents. He informed me that there were certain things WRN was not insured for, one of which was what he described as malicious attacks and he believed WRN was being maliciously attacked by VT (I assume this was in connection with another member of staff, the Operations Manager recently leaving for VT). He said that whilst I remained on the premises the company's insurance was invalid. I was rather taken aback by this explanation and asked if this was correct and he answered that it was. He then asked for my laptop and mobile phone and asked that I leave the building. I asked "is that it?" i.e. was I not coming back at all or having the chance to say goodbye to my colleagues. He said that I could return to work tomorrow. He also said that he could not honour the agreed leaving dates unless I signed a Trust and Confidence Agreement and that my personnel file was updated. I asked if he could provide me with a copy of the Trust and Confidence Agreement to read. He said this would be provided.

14. He then asked me if Mr. Gary Edgerton, former WRN Managing Director was behind me leaving WRN and joining VT and I replied that he was not.

15. I said that I had some private telephone numbers on my work phone and asked if I could write these down (as I did not at the time own a private mobile phone). He agreed that I could so I wrote out about ten numbers belonging to my family and friends. This was not done in the direct presence of Mr. Ashburner but he certainly kept appearing in the vicinity of my office. Then I gave him the phone, picked up my bag, took my coat and left the building.

16. I returned to work the next day (Tuesday 18th December) and was given back my phone and laptop in the late morning and carried on with my work."

24. Mr. Ashburner was asked about that account in cross-examination. He agreed that in the meeting on the morning of 17 December 2007 with Mr. Ayris Mr. Ayris had mentioned

a desire to leave three weeks before the end of his 13 week notice period. Mr. Ashburner told me that he had not agreed to that proposal, but had told Mr. Ayris that he would discuss it with his colleagues and get back to Mr. Ayris. Mr. Ashburner agreed that he had had a second meeting with Mr. Ayris on 17 December 2007. Mr. Ashburner accepted that on the occasion of that second meeting he had mentioned that there would probably be an insurance issue. However, while he accepted that he had had a conversation in substance to the effect of that which Mr. Ayris described as taking place on the afternoon of 17 December 2007, Mr. Ashburner put that conversation as having taken place two days later, on 19 December 2007. It was on that latter occasion that Mr. Ashburner had asked Mr. Ayris for his laptop and mobile telephone. Also on that occasion, according to Mr. Ashburner, he told Mr. Ayris that he would not agree to Mr. Ayris leaving early unless Mr. Ayris signed the Leaving Contract, so as to put Mr. Ayris's paperwork in order and up to date. Mr. Ashburner told me that he had said to Mr. Ayris that WRN did not have a signed copy of the Schedule on file and that it wanted a signed document. Mr. Ashburner said in cross-examination that he wanted Mr. Ayris to sign the Leaving Contract so as to bring his paperwork up to date. He was not trying, he told me, to prevent Mr. Ayris competing with WRN. He had not agreed with Mr. Ayris, Mr. Ashburner said, before he signed the Leaving Contract, that Mr. Ayris could leave WRN on 22 February 2008.

25. In cross-examination Mr. Ayris accepted that the Leaving Contract was sent to him for signature on 20 December 2007, the date it bore.

26. On 20 December 2007 Mr. Ayris sent an e-mail to Mr. Ashburner asking him, *"Can you write/email me officially about my notice period?"* That form of question is, perhaps, suggestive of Mr. Ayris believing at that time that some agreement had been made about his date of leaving, but wanting it recorded in writing. However, it is equally consistent with Mr. Ashburner having, as was common ground, by that date having informed Mr. Ayris that he was not prepared to agree to Mr. Ayris leaving earlier than 13 weeks from the date of his resignation unless Mr. Ayris signed the Leaving Contract. Be that as it may, Mr. Ashburner did not reply in writing to the e-mail of 20 December 2007. Mr. Ayris therefore sent a further e-mail on 3 January 2008 which was in the following terms:-

> "*Just following up on a couple of messages I sent before the hols.*
>
> *Can you confirm that my last day is Friday 22nd February 2008 and my last day in the office is Friday 8th February 2008 and that I will be taking the two intervening weeks as leave?*"

27. Mr. Ashburner's substantive response to the latter e-mail was a letter also dated 3 January 2008:-

> "*Thank you for your letter of resignation of 17th December, 2007, and I can confirm that your official leaving date will be thirteen weeks from that date, i.e. 14th March 2008.*
>
> *However, as discussed, WRN will agree to shorten this to Friday, 8th February subject to your personnel documentation*

being in order. Currently, this means signing your existing contract and the trust and confidentiality agreement. In order to expedite matters, can I suggest this is done by the end of this week.

When this is in order I will write to confirm the earliest date.

We wish you every success for the future."

28. Mr. Ayris replied to the letter dated 3 January 2008 in an e-mail of the next day. He wrote:-

> "*Thanks for the letter about my notice period however there seems to be an error.*
>
> *I had proposed that my last day working for WRN would be Tuesday 26th February but with my outstanding leave added my last day in the office would be Friday 8th February.*
>
> *I hope you can have the letter amended.*"

29. In his turn Mr. Ashburner responded to that e-mail in an e-mail dated 7 January 2008:-

> "*You have 5 days carried over from 2007; you are entitled to 2.08 days for every calendar month at WRN. Therefore with the actual leaving date of 8th Feb the cessation date is 20th Feb.*
>
> *Or alternatively if your cessation date is 26th Feb then you* [sic] *actual leaving date is 15th Feb.*
>
> *Can you let me know which one this is. Send me the signed documentation as requested and I'll issue a firm letter. An ammended* [sic] *letter is not necessary at the moment as your Cessation date is currently 13 weeks (14th March)* "

30. As I have recorded, Mr. Ayris signed the Leaving Contract on about 25 January 2008. Mr. Ashburner then wrote to Mr. Ayris a letter dated 25 January 2008 in which he said:-

> "*Thank you for signing the Trust & Confidence Agreement.*
>
> *This is to confirm that your leaving date will be 22nd February, but your last actual day in the office with* [sic] *be Friday, 8th February.*"

31. I shall indicate later in this judgment my conclusions as to whether Mr. Ayris was correct in his evidence that Mr. Ashburner agreed at their first meeting on 17 December 2007 that Mr. Ayris could leave on 22 February 2008, or whether Mr. Ashburner was right in saying that all he had said was that he would discuss the matter and get back to Mr. Ayris. However, what was quite plain on the undisputed evidence was that Mr. Ashburner and WRN wanted Mr. Ayris to sign the Leaving Contract because he was

leaving and so as to be in a position to seek to enforce, if necessary, the provisions in the Leaving Contract.

The alleged breaches of contract

32. The matters complained of as against Mr. Ayris as amounting to actual breaches of contract on his part were not, as facts, in dispute. There were actually three such matters.

33. The first related to a Rolodex which Mr. Ayris had had on his desk during the currency of his employment by WRN and which he removed when he left. A Rolodex is a rotating index on a stand. Often it contains file cards behind alphabetically arranged dividers and information, for example relating to names and addresses, is entered by hand on cards. In the modern office it is a rather old-fashioned tool. In the case of the Rolodex used by Mr. Ayris there were not file cards, but rather transparent sleeves into which other documents could be put. Those transparent sleeves contained, when Mr. Ayris removed the Rolodex, quite a number of business cards. The business cards included many presented by persons who were, or had been, representatives of customers of, or suppliers to, WRN. Copies of the relevant business cards were put in evidence. It was apparent, for example from the logo on a number of cards presented by employees of the BBC, that a fair number of the business cards were, by 22 February 2008, of some age, and that, at least in some cases, the information contained on the business cards was no longer current. Mr. Ayris's explanation in his third witness statement for removing the Rolodex on his departure appeared to be that he had swept it up inadvertently whilst clearing his desk. In cross-examination a rather subtler explanation emerged. Mr. Ayris told me that he considered the business cards in the Rolodex to be his personal property. He knew when he removed the Rolodex that the actual Rolodex, apart from the contents of the sleeves, was not his. He could have removed the cards from the sleeves and left the Rolodex, but he chose to take the Rolodex with the cards. He recognised that taking the actual Rolodex was a mistake and that he was not entitled to take it. The Rolodex and its contents were returned by Mr. Ayris to WRN on 4 March 2008 in response to a demand made by Messrs. Izod Evans, solicitors acting on behalf of WRN, in a letter dated 27 February 2008.

34. The position in relation to the other matters complained of emerged from the witness statement of Mr. Ayris dated 6 March 2008 made following an application without notice to Butterfield J. made on behalf of WRN seeking various injunctions. The application was disposed of by the giving by Mr. Ayris of a number of undertakings, one of which was to make a witness statement concerning any documents which he had in his possession or control which contained any *"Confidential Business Information of the Applicant as defined in clause 1 of the Trust and Confidence Agreement dated 20 December 2007"*. In the witness statement made in performance of that undertaking Mr. Ayris stated, at paragraph 3, that:-

> "*I have in my possession the following:-*
>
> *i. Approximately 50-80 business cards which I collected over time whilst in the employment of WRN Limited and before I was employed by WRN Limited. Some of the business cards are those*

of suppliers, the majority are those that I describe as general contacts. By general contacts I mean various people I have met at conferences and functions and generally anybody I have met over the years whether or not they relate to my industry. I do not believe that the general contacts fall within the definition of "Confidential Business Information" but I have decided to make reference to all the 50-80 business cards as some are those of suppliers;

ii. A copy of some of my contacts from my email address book which I had whilst at WRN Ltd. which constitutes the email addresses of some customers and suppliers but also general contacts of mine, who have nothing to do with WRN Ltd."

35. Shortly before the start of the trial Mr. Ayris gave the business cards referred to (to which I shall refer in this judgment as *"the Business Cards"*) back to WRN and agreed to delete from his e-mail address book the details of those contacts which he had carried over to his home e-mail address book from his WRN work e-mail address book. In this judgment I shall call the details in question *"the Addresses"*. I was told that the delivery of the Business Cards and the giving of the agreement to delete the Addresses from his home e-mail address book had been undertaken without admission of any wrongdoing by taking the Business Cards and copying the Addresses in the first place. It was made plain at the start of the trial that it would be necessary for me to reach conclusions as to whether Mr. Ayris had been entitled to remove the Business Cards and to copy the Addresses because WRN intended to contend that such actions had amounted to breaches of the Leaving Contract or the Employment Contract and that such contention, if found to be correct, was relevant to the question of the appropriate order to make as to costs in this action.

36. The Addresses Mr. Ayris accepted in cross-examination he had copied so as to be able to send a circular e-mail (*"the E-Mail"*) to his various contacts. A copy of the E-Mail was put in evidence. It was dated 25 February 2008, the working day after his employment by WRN came to an end and two working days before he joined VT. It was in these terms:-

"*Dear Friends*

This is a short note to let you know that I left WRN last week. After 8 and a half years with WRN it is time for me to move to new pastures. But luckily not too far as I shall be working for an international transmission company operating in broadly similar areas.

I hope to stay in touch with the many of you I have had the pleasure of meeting, working with or just emailing over the years at WRN. You have my personal email address now and I will send you my new work details as soon as I know them."

37. Mr. Ayris never in fact sent the further e-mail plainly envisaged by the second paragraph of the E-Mail. He might have done so at any point between starting

employment with VT and 6 March 2008, when the without notice application was made to Butterfield J. and Mr. Ayris gave undertakings which prevented him from making further communication.

38. Mr. Ashburner accepted in cross-examination that WRN had no evidence of Mr. Ayris acting in breach of any of the provisions of clause 4 of the Leaving Contract or the Schedule which it sought to enforce against Mr. Ayris. However, Mr. Ashburner contended that it was obvious from the terms of the E-Mail that, at least until this action was commenced, Mr. Ayris had intended to breach the obligations not to seek or to accept business, orders or custom from *"Customers"* for *"any Restricted Products or Restricted Services"*. Mr. Ashburner explained in cross-examination that it was obvious to anyone in the industry that if Mr. Ayris was moving *"not too far"* to *"an international transmission company operating in broadly similar areas"*, he was going to VT. I do not think that that was in dispute. However, Miss Chudleigh submitted that there was nothing wrong in Mr. Ayris telling any of his former contacts whilst at WRN that he was going to VT. Mr. Ashburner emphasised that the promise in the E-Mail to *"send you my new work details as soon as I know them"* could only have been made with a view to seeking business on behalf of VT, or doing business on behalf of VT, with those to whom the E-Mail was sent.

39. In the light of the return of the Business Cards and the agreement on the part of Mr. Ayris to delete the Addresses, the only relief pleaded in the Particulars of Claim which was pursued at trial was that which was founded on the versions of the Relevant Covenants to be found in the Leaving Contract, namely:-

> "*(2) An order that, until 22 February 2009, the Defendant must not seek in any capacity whatsoever any business, orders or custom or accept in any capacity whatsoever orders for:*
>
> *(a) Any products of a kind which are dealt in, produced, marketed or sold by the Applicant (or any company of which not less than 25 per cent is owned directly or indirectly by the Applicant or its holding company ("Group Company")) in the ordinary course of its business as a creator, distributor and transmitter of radio and/or television programs* [sic] *("Restricted Products");*
>
> *(b) Any services of the kind which are provided by the Applicant (or any Group Company) in the ordinary course of its business as a creator, distributor and transmitter of radio and/or television programs* [sic] *("Restricted Services");*
>
> *from any person, firm or company who or which was negotiating with the Applicant (or any Group Company) for the supply of any Restricted Products or the provision of any Restricted Services as at 22 February 2008 or to whom or which the Applicant (or any Group Company) had at any time during the period of one year prior to 22 February 2008 supplied any Restricted Products or provided any Restricted Services.*"

The enforceability of the Leaving Contract and the Schedule

40. Before considering whether Mr. Ayris was in breach of any of the provisions of the Leaving Contract or the Schedule it is appropriate to reach conclusions on the issues relevant to the question whether it was open to WRN to rely upon the material provisions of the Leaving Contract or the Schedule.

41. In the light of the acceptance on behalf of Mr. Ayris that he was in principle bound by the terms of the Schedule, the analysis for which Mr. Simon Colton, who appeared on behalf of WRN, contended, was that if, which he did not accept, the Leaving Contract was not binding upon Mr. Ayris because it was not supported by consideration, he was bound by the provisions of the Schedule, but that, if the Leaving Contract was supported by consideration the effect of entering into it was that the Employment Contract, or at least the Schedule, was discharged and replaced by the Leaving Contract. From a legal point of view Mr. Colton's analysis was conventional and I accept it as far as it goes. The logic of the position of Miss Chudleigh on behalf of Mr. Ayris had to be that the operative contract between WRN and Mr. Ayris was the Employment Contract, including the Schedule. Miss Chudleigh sought to challenge the enforceability of the provisions of the Schedule relied upon in the alternative by Mr. Colton on the grounds that they were unreasonable.

42. The answer to the question whether the Leaving Contract was supported by consideration depended, as it seemed to me, from a factual point of view on whether, at the first meeting between them on 17 December 2007, Mr. Ashburner had agreed with Mr. Ayris that the employment of Mr. Ayris by WRN might come to an end on 22 February 2008 and that his last day in work might be 8 February 2008. I have rehearsed the evidence of Mr. Ashburner and that of Mr. Ayris in relation to the relevant meeting and I have also considered the contemporaneous documents which it was urged upon me shed light upon whether any agreement was likely to have been made. Mr. Colton relied heavily upon the fact that in the written exchanges between them Mr. Ayris did not contend to Mr. Ashburner that an agreement had been made. He also relied upon the fact that, while in his e-mail of 3 January 2008 Mr. Ayris asserted that his employment would come to an end on 22 February 2008 and his last working day would be 8 February 2008, in his e-mail of the following day Mr. Ayris contended that his employment was to come to an end on 26 February 2008. Mr. Colton drew attention to the fact that in his third witness statement at paragraph 36 Mr. Ayris had said that he met Mr. Ashburner only once on 17 December 2007. In his fourth witness statement, in the passage which I have quoted, Mr. Ayris spoke of two meetings on that day. As Mr. Ashburner accepted that there had been two meetings on 17 December 2007, Mr. Colton submitted that the earlier confusion on the part of Mr. Ayris about how many meetings there had been indicated that his evidence as to what had been discussed at the first meeting on 17 December 2007 was unreliable.

43. With the benefit of having seen and heard both Mr. Ashburner and Mr. Ayris give evidence I am satisfied that the account of the events of 17 December 2007 given by Mr. Ayris in his fourth witness statement is correct and that Mr. Ashburner did indeed agree during the first meeting that Mr. Ayris's employment by WRN might come to an end on 22 February 2008 and that his last working day might be 8 February 2008. I am afraid that I found the explanations offered in cross-examination by Mr. Ashburner as

to why he would not have made the agreement contended for unconvincing. His explanations were that he felt that the decision to release Mr. Ayris three weeks earlier than his notice period was an important one which he considered should be discussed with his fellow directors and that he, Mr. Ashburner, was not the sort of person to make instant decisions. Moreover, Mr. Ashburner offered no real explanation for the meeting with Mr. Ayris which took place on the afternoon of 17 December 2007 unless what had happened was what Mr. Ayris said, which seemed to involve Mr. Ashburner realising that the position of WRN in relation to enforcing restrictive covenants against Mr. Ayris was weak, because no signed copy of the Employment Contract was held on WRN's files, and that his only lever over Mr. Ayris in seeking to persuade him to sign the Leaving Contract was Mr. Ayris's known desire to leave on 22 February 2008 and not to work for WRN after 8 February 2008. On the other hand, having decided to hand in his notice, all Mr. Ayris was really interested in at the first meeting on 17 December 2007 was whether, as he wished, arrangements could be made for his departure from WRN which would enable him to go on holiday with his family during the school half-term. I was impressed by Mr. Ayris as an honest and straightforward witness and I am confident that I can rely upon his account.

44. The issue as to upon what date Mr. Ashburner sought to take Mr. Ayris's laptop and mobile telephone away was again, as it seemed to me, a curious one. That the incident occurred, and what, in essence, happened, was not in dispute. The only contest was as to the date. I accept the evidence of Mr. Ayris as to the date. I therefore find, in effect, that Mr. Ashburner initially agreed to the employment of Mr. Ayris coming to an end on 22 February 2008, and him working up until 8 February 2008, but changed his mind once he realised that there was no copy of the Employment Contract signed by Mr. Ayris on WRN's personnel file and that he needed to have some means of persuading Mr. Ayris to sign up to the Leaving Contract.

45. In terms of legal analysis the effect of what was agreed on the morning of 17 December 2007 was that an oral agreement was made between WRN, acting by Mr. Ashburner, and Mr. Ayris to the effect that the terms of the Employment Contract as varied up to that date be further varied to the effect that Mr. Ayris's employment would terminate on 22 February 2008, he would not be required to work after 8 February 2008, and WRN would be relieved of the obligation of paying his salary after 22 February 2008.

46. In the light of my findings as to the agreement made on the morning of 17 December 2007, the only consideration passing from WRN which could be said to support the Leaving Contract was a promise to perform an existing contract. It is well-established that such will not, in law, constitute consideration, and that was accepted by both Mr. Colton and Miss Chudleigh. Consequently I find that the Leaving Contract was not valid and binding in law.

47. It is therefore necessary to move to consider the enforceability of the provisions of the Schedule relied upon, as matters have turned out, as justifying the grant of an injunction in the present case, namely the Relevant Covenants.

48. Each of those clauses contained a covenant on the part of Mr. Ayris restricting his freedom of action after the termination of his employment by WRN. Each was,

therefore, what is known as a restrictive covenant. The issue, in principle, is whether those clauses, or either of them, being restrictive covenants, were unenforceable as being in unlawful restraint of trade.

49. It was common ground that the principles to be applied in considering whether provisions like the Relevant Covenants in a contract of employment are in unlawful restraint of trade were conveniently summarised by Sir Christopher Slade in giving the only substantive judgment of the Court of Appeal in *Office Angels Ltd. v. Rainer-Thomas* [1991] IRLR 214 at page 217:-

> "*(1) If the Court is to uphold the validity of any covenant in restraint of trade, the covenantee must show that the covenant is both reasonable in the interests of the contracting parties and reasonable in the interests of the public: (see for example* Herbert Morris Ltd. v. Saxelby *[1916] AC 688 at p.707 per Lord Parker of Waddington).*
>
> *(2) A distinction is, however, to be drawn between (a) a covenant against competition entered into by a vendor with the purchaser of the goodwill of a business, which will be upheld as necessary to protect the subject-matter of the sale, provided that it is confined to the area within which competition on the part of the vendor would be likely to injure the purchaser in the enjoyment of the goodwill he has bought, and (b) a covenant between master and servant designed to prevent competition by the servant with the master after the termination of his contract of service: (see for example* Kores Manufacturing Co. Ltd. v. Kolok Manufacturing Ltd. *[1959] Ch 109 at p.118 per Jenkins LJ).*
>
> *(3) In the case of contracts between master and servant, covenants against competition are never as such upheld by the court. As Lord Parker put it in* Herbert Morris Ltd. v. Saxelby *(supra) at p.709:*
>
> *"I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilise information confidentially obtained."*
>
> *On this appeal we are not concerned with trade secrets. The plaintiff's staff handbook contained special provisions (in clause 4.3) dealing with confidentiality, but no issue concerning confidentiality has been raised in this court.*

4) *The subject-matter in respect of which an employer may legitimately claim protection from an employee by a covenant in restraint of trade was further identified by Lord Wilberforce in* Stenhouse Ltd. v. Phillips *[1974] AC 391 (at p.400) as follows:*

> *"The employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation."*
>
> *(5) If, however, the Court is to uphold restrictions which a covenant imposes upon the freedom of action of the servant after he has left the service of the master, the master must satisfy the Court that the restrictions are no greater than are reasonably necessary for the protection of the master in his business: (see* Mason v. Provident Clothing & Supply Co. Ltd. *[1913] AC 724 at p.742 per Lord Moulton). As Lord Parker stressed in* Herbert Morris Ltd. v. Saxelby *(supra) at p.707, for any covenant in restraint of trade to be treated as reasonable in the interests of the parties "it must afford* no more than *adequate protection to the benefit of the party in whose favour it is imposed" [Lord Parker's emphasis]"*

50. It is thus plain that it is up to the employer by evidence in the first place to demonstrate that it has legitimate business interests which require protection in relation to the employment of the employee, and then, further, by evidence to show that the covenant relied upon provides no wider a protection than is reasonably necessary for the protection of those interests.

51. In the present case it was common ground that WRN had legitimate business interests which required protection in relation to the employment of Mr. Ayris.

52. Miss Chudleigh, at paragraph 17 of her written opening skeleton argument, focused her attack on the Relevant Covenants on the issue of reasonableness. She submitted that the clauses went far wider than was reasonably necessary for the protection of the legitimate business interests of WRN because:-

> "*(i) "Businesses" in clause 1.1 of the Agreement … includes all and any trades or other commercial activities with which Mr. Ayris* "shall have been concerned or involved to any material extent at any time during his appointment". *This is far too wide as firstly* "material extent" *is not defined and, more importantly, the impact of the clause is that Mr. Ayris would be restrained from soliciting or dealing with businesses who he only had contact with at the early stages of his employment more than 8 years ago. The Court should note that "Restrictive Products" and "Restrictive Services" at clauses 1.11 and 1.12 are defined*

with regards to "the Businesses" ie trades or other commercial activities. For the clauses to bite Mr. Ayris has to have been involved with the customers at any time regardless of how long ago. There are approximately 19 organisations on WRN's list ... that Mr. Ayris did not have any material contact with in the 12 months before his departure. He will not have any special advantage in relation to these organisation [sic] *as he has no client connections with them and it is therefore unreasonable and an unfair restraint of trade that he should be restrained from doing business with them;*

(ii) "Customer" is defined at clause 1.5 as including: "any person firm or company who or which shall at the Termination Date be negotiating with" *WRN. Mr. Ashburner now says in his Third Witness statement that* "a negotiating Customer means" "a perspective *[sic – he actually said prospective]* client where a formal estimate or quote is issued to a specific request and where the customer has indicated their intention, informally or otherwise, to do business with WRN which might proceed to contract". *This has never been explained to Mr. Ayris and Mr. Ashburner's need to deal with this in his Witness Statement demonstrates nicely why the clause is unreasonable. The phrase "negotiating with" as set out in the clause could mean anything from initial telephone or email contact to an almost concluded Agreement. There are 27 companies who WRN say they were "negotiating" with (although this is not admitted). It is submitted that there is no legitimate business interest in preventing Mr. Ayris from doing business with or soliciting business from organisations with whom WRN was merely negotiating and that the lack of particularity with regards to the words "negotiating with" is fatal to the clause;*

(iii) The clauses in question prevent solicitation and dealing with regard to "Restricted Products". Mr. Ashburner explains WRN's business at paragraph 3 of his recent Statement as including broadcasting and transmission services. It does not make anything and does not produce, market or sell any type of product. It is therefore unreasonable to include this restraint within the clauses;

(iv) The clauses are geographically unlimited. This is particularly unfair and unreasonable as a number of the organisations with whom WRN does business are global, having operations in a number of different continents although WRN, in the main deals only with these organisations in one area. Examples taken from WRN's list ... are Adventis World Radio, Christian Vision, Eternal World Television Network, HCJB Radio, Can West, Trans World Radio, United Nations and VT Communications Limited. Take as an example, Trans World Radio. Trans World Radio has operations in Asia, Europe, the Middle East, Africa, Australia, Philippines, Canada and South America. Trans World Radio is a customer of WRN but not at every single location

where Trans World Radio operates. It is wholly unreasonable and unfair for Mr. Ayris to be restrained from dealing with Trans World Radio in (say) Uruguay or South Africa when WRN only does business with Trans World Radio in the UK. There are wholly different budgets, teams of people and requirements in different countries. This restraint very obviously goes far further than is reasonably necessary to protect WRN's legitimate interests;

(v) Some of the organisations listed as customers by WRN are agents. In particular, Elyxir Agency, Eurafilm, Gray Media and TMH Telemedia … Business is supplied to WRN via these agencies from other organisations. It is wholly unfair and unreasonable to seek to prevent Mr. Ayris soliciting work from or dealing with these agents with regard to business from companies entirely unconnected with WRN but this is what the clause as drafted prevents and what WRN is seeking;

(vi) The clauses run for 6 or 12 months. In either case, it is submitted that this period is excessive, does not correlate with the time WRN says it typically takes to conclude contractual negotiations with its customers and fails to take into account the 13 week notice period.

(vii) The non-dealing clause at 4.4 goes further than is reasonable [sic] *necessary to protect the WRN's legitimate business interests in light of the existence of the non-solicitation clause and prevents Mr. Ayris from accepting orders in respect of which there has been no solicitation or misuse of confidential information and where the customer has freely and independently sought to place such an order. This is particularly onerous for Mr. Ayris as there is some overlap between the business of his present employer and the business of WRN. It is estimated that at least 20 of the organisations on WRN's list are existing customers or suppliers of VT Communications."*

53. Miss Chudleigh revised her written opening skeleton argument to produce a written closing skeleton argument, but she did not alter the main thrust of her submissions from those which I have set out. She did, however, add, at paragraph 22(iii):-

> "*It is important for the Court to bear in mind when considering reasonableness that Mr. Ayris is still bound by an implied term of the contract not to use or disclose any of WRN's trade secrets. This is likely to include information relating to pricing, profit margins, costs and strategic plans. Accordingly, it does not require a non-solicitation or non-dealing clause to protect this type of information;*"

54. In her oral submissions Miss Chudleigh supplemented that submission by drawing attention to the covenants in clauses 4.5 and 4.8 of the Schedule.

55. Miss Chudleigh in her revised skeleton argument also added a new introduction, at paragraph 23, to what had originally been paragraph 17:-

> "*It is accepted that in theory and without prejudice to the argument set out above, WRN had a legitimate business interest requiring protection of its customer connections in relation to the employment of Mr. Ayris as he established personal relationships with some customers. It is disputed that there was a need to protect business secrets such as pricing information, contractual terms, renewal dates and strategies as this information is already protected by the implied term relating to the use of such information. Further, it is submitted that the clauses in question go far wider than is reasonably necessary for the protection of the legitimate business interests of WRN:*
>
> *(i) As is common ground, the covenants are not limited to those customers of WRN with whom Mr. Ayris personally dealt. Further, they are not restricted to customers that his subordinates and he had dealt with. This is unreasonable. See* Office Angels *at para 44:*
>
> "… a suitably drafted covenant precluding the defendants, for a reasonable period of time after the termination of their employment, from soliciting or dealing with clients of the plaintiff with whom they had dealt during the period of their employment, would appear to have been quite adequate for the plaintiff's protection …"
>
> *(ii) Moreover, the clauses are not limited to those customers in relation to whom Mr. Ayris worked indirectly (such as preparing proposals) in a time proximate to the termination date. ...*"

56. In his written opening skeleton argument Mr. Colton anticipated Miss Chudleigh's attack. He advanced the following contentions:-

> "*28. The restraints imposed by the restrictive covenants are reasonable as between the parties.*
>
> *29. The restrictions are no wider than are reasonably necessary in order to protect the legitimate interests of WRN.*
>
> *(1) The scope of the covenants is no more than is reasonable.*
>
> *(a) The covenants are not limited to those customers of WRN with whom Mr. Ayris personally dealt.*
>
> *(i) This is because, given the small size of WRN and Mr. Ayris's senior position, he would (or might) have relevant knowledge relating to all customers.*
>
> *(ii) As Head of Sales and Marketing, with duties including collating the terms of all proposals for presentation to the*

Board, Mr. Ayris had detailed knowledge of (and thus the ability to 'poach') all WRN's clients. Compare Plowman v. Ash *[1964] 1 WLR 568, esp. at 574-5 per Russell LJ.*

(b) The covenants are not limited to those customers with whom WRN already had a contract, but extends to those with whom WRN has ongoing negotiations. This is because negotiations in this industry can take a long time, goodwill builds up over the course of those negotiations, and because it is when companies are at the negotiation stage – before they have signed up to a contract – that they are most vulnerable to being 'poached' by rival companies.

(c) The covenants extend to both not "seeking" *and not* "accepting" *business, orders and custom.*

(i) It is commonplace and necessary to have such wording which extends beyond solicitation to mere 'accepting', 'dealing' or 'doing business with', since the employer will want to protect its goodwill even if it is the customer which first contemplates moving its business.

(ii) Such non-dealing clauses are, in principle, unobjectionable: compare (eg) John Michael Design plc v. Cooke *[1987] 2 All ER 332 (CA), where the clause in question prevented the employee* "canvassing, soliciting or accepting".

(iii) Further, the complex nature of the services provided in this particular industry means that a 'seller' will never in practice be wholly passive: this is not an industry in which a generic item (eg a bottle of milk) is sold for a fixed price.

(2) The duration of the covenants (12 months) reflects the time required to recruit, organise and train a suitable replacement, and to allow the replacement to develop a relationship with key personnel in client companies. This reflects the specialist nature of the industry, the annual cycle of events, the seniority and importance of Mr. Ayris in WRN, and the significance of personal client relationships.

(3) The geographical scope of the covenants (which is unlimited) is also reasonable. WRN has clients all over the world, and there would be no sensible reason why (for example) Mr. Ayris should be permitted to canvass clients outside the UK to the detriment of WRN's business. In any event, with covenants of this sort (non-dealing with customers) geographical scope is rarely a consideration: Plowman v. Ash *[1964] 1 WLR 568 at 572, per Harman LJ.*

(4) Overall, it is relevant that the market in which WRN (and Mr. Ayris, as WRN's employee) are and were engaged was a narrow, specialist one: compare Beckett Investment Management Ltd. v. Hall *[2007] EWCA Civ 613 at [25]-[26],*

per Maurice Kay LJ.

30. As regards Mr. Ayris, the restrictions are sufficiently limited to permit Mr. Ayris to make use of his general skill and experience in marketing, and even for him to work for a company which competes with WRN.

(1) WRN has not sought to enforce a 'non-compete' clause, only a 'no dealing' clause.

(2) WRN has not sought to prevent Mr. Ayris from working for VT Communications.

(3) Mr. Ayris can work with any number of clients (or potential clients) of VT, so long as they are not Customers of WRN.

Reasonableness in the public interest

31. There are two competing public interests here, namely that:

(1) a person should be held to his promise; and

(2) every person should be free to exercise his skill and experience to the best advantage of himself and of those who may want to employ him.

32. In this case:

(1) The public interest in holding a person to his promise is particularly relevant here.

(a) Mr. Ayris freely signed up to the restrictive covenants in question less than a month before he left his employment.

(b) Mr. Ayris had taken a number of weeks to consider his options before signing.

(c) When Mr. Ayris signed up to the restrictive covenants in January 2008, these were not merely some small part of an overall employment contract. Rather, these formed part of a severance agreement. Compare: Turner v. Commonwealth and British Minerals Ltd. *[2000] IRLR 114 at [19] (Waller LJ);* Thurstan Hoskin & Partners v. Jewill Hill & Bennett *[2002] EWCA Civ 249 at [18]-[19] (May LJ) and at [24] (Jonathan Parker LJ).*

(2) The restrictions imposed upon Mr. Ayris leave him free to exercise his skill and experience in working for a range of employers in a range of fields.

33. Accordingly, the covenants are reasonable in the public interest."

57. Mr. Colton's submissions in relation to the reasonableness of the covenants in the public interest were based entirely upon the premise that I found that the Leaving Contract was supported by consideration. They had no relevance to the reasonableness in the public interest of the Relevant Covenants. The submissions of Mr. Colton as to the reasonableness of the covenants as between WRN and Mr. Ayris also proceeded on the basis that the relevant covenants were to be found in the Leaving Contract, by which time Mr. Ayris held the position of Head of Sales and Marketing, and that the duration of the covenants was 12 months. However, the submissions could be fairly readily adapted to apply to the Relevant Covenants.

58. For the purposes of closing his client's case Mr. Colton produced a new written skeleton argument. In this document he responded point by point to the submissions in Miss Chudleigh's written opening skeleton argument which I have quoted. His submissions were as follows:-

> "*12. Miss Chudleigh suggests that the definition of* "Businesses" *is offensive because it refers to Mr. Ayris being involved in a commercial activity to a* "material extent"*, which is not defined* ***(Ayris skeleton, para 17(i))***
>
> *(1) This is simply a point of construction which does not render the clause void for uncertainty.*
>
> *(2) If a term in a covenant is unclear, then it is to be construed; it is not simply to be rejected as void for uncertainty: consider the approach taken to the phrase* "engage in or undertake the trade or business of an employment agency" *in* Office Angels *at paras 31-32. It cannot seriously be suggested that an ambiguous term is fatal to a covenant.*
>
> *(3) Here,* "material" *is not ambiguous. It plainly means* "substantial" *or* "significant".
>
> *13. Miss Chudleigh also complains that the definition of* "Businesses" *could extend to activities in which Mr. Ayris was involved some years ago.* ***(Ayris skeleton, para 17(i))***
>
> *(1) This is a theoretical problem, rather than a real one.*
>
> *(2) Mr. Ayris was always involved in sales and marketing activities for WRN, and WRN has always been in the same business.*
>
> *(3) Even if there were some argument which – in a different factual context – could have made this clause over-wide, at the time that this covenant was negotiated in 2008 it was plain that there was no risk of this at all.*
>
> *14. Miss Chudleigh takes a point that the term* "Customer" *is defined so as to include someone with whom WRN is only negotiating* ***(Ayris skeleton, para 17(ii))***.

(1) She argues that "the lack of particularity with regards to the words 'negotiating with' is fatal to the clause".

(2) This appears to be an argument about construction (ie, the suggestion that the clause is too vague to be understood) and about scope (too wide).

(3) As to the construction point:

(a) the point was (I am instructed) raised at the hearing on 19 March 2008;

(b) it was argued then that the clause was too vague to be understood;

(c) the argument was rejected as is evidenced by the use of the word "negotiating" *in the interim injunction granted:*

(4) The time for taking points of construction is at the interim hearing. It is, in any event clear that in the factual context "negotiating" *requires some ongoing process of discussion between the parties, which might include the issuing of a formal estimate or quote in response to a specific request, or where the customer has indicated their intention, informally or otherwise, to do business with WRN which might proceed to contract.*

(5) Properly construed in this manner, the definition of "Customer" *to include parties* "negotiating" *in this manner is not too wide. Mr. Ayris told the Court that he would hope negotiations for an agreement might conclude within 6 months, but it would only be after 12 months that he would conclude it was unlikely to come to any successful outcome.*

15. Miss Chudleigh argues that it is unreasonable to include a restraint relating to a "Restricted Product" *because none exists* ***(Ayris skeleton, para 17(iii))***.

(1) In brief, it is not unreasonable.

(2) If WRN produced no product, then the definition of "Restricted Product" *would simply be redundant. But this does not make the covenant difficult to enforce, or in any way unfair.*

16. Miss Chudleigh makes a point about geographical scope ***(Ayris skeleton, para 17(iv))***.

(1) However, the real argument is not about geography, but about whether the definition of "Customer" *is too wide. There is (and can be) no objection to WRN protecting its customer connections anywhere in the world where it deals with them.*

(2) Mr. Ayris has attempted to create a problem where none exists. He admitted in cross-examination that he had no real

idea as to whether global clients had regional offices which were different legal entities or not, nor what the internal working procedures and policies of the clients might be.

(3) All that is to be done is to decide whether – on a proper construction of the covenant – a regional office of a customer falls within the definition of "Customer"*. If it were relevant, WRN would say that a* [sic] *entity falls within the definition of* "Customer" *if the entity is (a) controlled by the main Customer (eg, as a subsidiary), or (b) subject to the same control as the customer (eg, same directors).*

(4) WRN's case is that no other formulation of the covenant would be sensible or practicable, and that WRN could not reasonably have drafted any narrower clause. A restrictive covenant could not possibly be drafted so as to allow for the different internal working arrangements peculiar to different clients.

17. The agency point is a bad one, too. ***(Ayris skeleton, para 17(v))***

(1) It really makes no difference whether a party with whom WRN contracts is acting as agent or not; indeed, WRN may not know if there is an undisclosed principal.

(2) The contract – and thus the protected relationship – is whomever WRN contracts with. If WRN has built a relationship with someone who acts as agent for a range of principals, then it is all the more legitimate for WRN to seek to protect that relationship. Mr. Ayris is <u>not</u> prevented from dealing direct with the principals.

(3) In any event, the list produced by WRN is <u>not</u> determinative of the enforceability of the covenant. If WRN <u>had</u> made an error, by including someone with whom it had not dealt, this would have no effect on the enforceability of the covenant.

18. Miss Chudleigh objects to the duration of the restrictive covenant ***(Ayris skeleton, para 17(vi))****.*

(1) 12 months is wholly justifiable for a number of reasons.

(2) The hiring of a replacement would take time.

(a) The process might include:

(i) appointing a recruitment agency or putting together an advertisement;

(ii) allowing time for people to apply;

(iii) considering the CVs so as to decide on first round

interviews;

(iv) scheduling the first round interviews;

(v) holding the first round interviews;

(vi) deciding who to shortlist for second interviews;

(vii) scheduling the second round interviews;

(viii) holding the first [sic – plainly second was meant] *round interviews;*

(ix) deciding on a candidate;

(x) negotiating terms with the candidate;

(xi) waiting for the candidate to serve his or her notice period (which might well be of 3 months' duration)

(xii) welcoming the new employee.

(b) The process might well be delayed, though, if no suitable candidates came forward; or if WRN personnel who should be interviewing were travelling to a trade fair abroad; or if WRN could not agree terms with the chosen candidate; or for any of a number of other reasons.

(3) Even once hired, it would take time for a new employee to get to know the customer connections as well as his predecessor had done. Mr. Ayris had build [sic] *relationships for WRN over a period of 8 years. Mr. Ayris accepted that the new Head of Sales and Marketing would need to go to NRB (in March) and SBES (in November).*

(4) Additionally, the confidential information which Mr. Ayris held would remain valuable for a long time, in circumstances where contracts are of 1 to 5 years' duration and the information might be of most practical assistance in the period leading up to renewal.

(5) In reality, any period is always arbitrary; that is no reason not to enforce it: see Beckett Investment Management Group v. Hall *at [29].*

19. Finally, Miss Chudleigh objects to there being both a non-dealing and a non-solicitation clause ***(Ayris skeleton, para 17(vii))***

(1) As set out at paragraph 29(i)(c) of WRN's skeleton, this is wholly justifiable in this context.

(2) The sales of services in this industry involves negotiation; it is not like selling bottles of milk at prices which are publicly

advertised. A 'non-solicit' clause would be worthless by itself."

59. The focus in the passage which I have quoted from the written closing skeleton argument of Mr. Colton was on justifying the covenants contained in the Leaving Contract. In his written closing skeleton argument Mr. Colton also devoted one paragraph to the position under the Schedule:-

> "*21. This would be defendable because:*
>
> *(1) Mr. Ayris had customer connections and confidential information from the beginning;*
>
> *(2) WRN was entitled to protect its legitimate interests from the beginning; and*
>
> *(3) the six month period is justifiable for similar reasons as later – especially by reference to the long shelf-life of Mr. Ayris' information, and the industry calendar.* "

60. It was common ground between Mr. Colton and Miss Chudleigh that the question of the reasonableness of the Relevant Covenants fell to be considered as at the date of the Employment Contract, September 1999. Mr. Colton submitted that it was appropriate, in considering reasonableness as at that date, to have regard to the possibility of the promotion of Mr. Ayris, as happened, in the fullness of time to the position of Head of Sales and Marketing. Miss Chudleigh disputed that contention. She submitted that one should consider reasonableness as at September 1999 simply in the context of the agreement then made for employment in the position to which the contract related. I accept the submission of Miss Chudleigh on that point. Any alteration in the role in which Mr. Ayris was employed of necessity involved some variation to the Employment Contract, and possibly the making of an entirely new contract. A contract varying or superseding the Employment Contract might have contained whatever modifications to restrictive covenants contained in the Schedule which the parties considered to be appropriate to the new situation. It should not be assumed that on any alteration in role the existing restrictive covenants in the Schedule would simply continue. Moreover, it would be a very strange position if restrictive covenants which were unreasonable in the context of the position to which Mr. Ayris was appointed by the Employment Contract, if considered on its own, became reasonable because of the chance that he might be promoted to a role in which the restrictive covenants would be appropriate.

61. While Miss Chudleigh took various points as to the unreasonableness of the Relevant Covenants, the real battleground, as it seemed to me, between the parties was whether those clauses were unreasonable because neither was limited in its effect to *"Customers"* with whom Mr. Ayris had had any dealings. That battleground was further refined because Mr. Colton's submission that, being not so limited, they were nonetheless reasonable, depended upon his contention that it was appropriate to take into account the fact that Mr. Ayris would, or might, obtain knowledge concerning *"Customers"* which he would be free to use for the benefit of a new employer unless restrained from so doing by the Relevant Covenants. His answer to the submission of Miss Chudleigh that, insofar as it was appropriate for Mr. Ayris to be inhibited from

utilising knowledge obtained by him of the *"Customers"* for the benefit of a new employer, such was provided for by clauses 4.5 and 4.8 or by an implied duty not to disclose trade secrets, was, I think, that clauses 4.5 and 4.8 might be too wide to be enforceable, and that in any event there was no objection to WRN being protected against misuse of information concerning its *"Customers"* by more than one covenant. Mr. Colton did not seek to make good the submission that clause 4.5 or clause 4.8 was, or might be, too wide to be enforceable. It is not self-evident on a superficial reading of those clauses that they are too wide. The submission that there was no objection to WRN being protected by more than one covenant seemed to me to be fundamentally at odds with the basic requirement of a restrictive covenant in a contract of employment that it imposes restrictions which are no greater than reasonably necessary to protect the employer in his business. If there is one adequate covenant, the employer does not need another one.

62. In my judgment both of the Relevant Covenants were too wide to be enforceable by reason of the fact that neither was limited to preventing Mr. Ayris having contact with customers with whom he personally had had dealings. At the commencement of Mr. Ayris's employment in September 1999 an important part of his job as Marketing and Rebroadcasting Manager, as made plain by the job description from which I have quoted, was to foster contacts with actual or potential customers. There could be no proper objection to a covenant restraining him for a suitable period after leaving WRN from soliciting or accepting business from contacts developed during the currency of his employment by WRN. However, there was, as it seems to me, no justification for restraining him in 1999 from having contact with customers of WRN with whom he personally had had no dealings. His job description did not suggest that he had any role in relation to customers of WRN with whom he personally had no contact. If, in some manner, he acquired knowledge about other customers with whom he had had no contact, if the knowledge in question fell within the scope of clauses 4.5 or 4.8 he was prevented from making use of it, but otherwise he was free to use it. It was not, as it seems to me, reasonable to provide for the Relevant Covenants to apply to all customers of WRN to guard against the possibility that clause 4.5 or clause 4.8, or both, might be found to be too wide to be enforceable. The proper way of dealing with that risk was surely to draft clauses which were not too wide.

63. The definition of the word *"Businesses"* in clause 1.1 of the Schedule was material because of the use of the word in the definition of the phrase *"Restricted Products"* in clause 1.11 and in the definition of the phrase *"Restricted Services"* in clause 1.12. There was a degree of discordance between the definition of *"Businesses"* and the definitions of *"Restricted Products"* and *"Restricted Services"* which was obvious if one reproduced the definition of *"Businesses"* in place of that word in the definition of either *"Restricted Products"* or *"Restricted Services"*. Taking the latter as an example, how the definition would read, if one reproduced in it the definition of the word *"Businesses"* in place of that word, would be:-

> " *'Restricted Services' means all and any services of a kind which shall be provided by the Company or any Group Company in the ordinary course of all and any trades or other commercial activities of the Company or any Group Company:*
>
> *1.1.1 with which the Manager shall have been concerned or involved to any material extent at any time during his*

appointment by the Company which the Company or any Group Company shall carry on with a view to profit; or

1.1.2 which the Company or any Group Company shall at the Termination Date have determined to carry on with a view to profit in the immediate or foreseeable future and in relation to which the Manager shall at the Termination Date possess any Confidential Business Information."

64. Thus the definition of *"Restricted Services"* was expressed in the present tense, whilst the definition of *"Businesses"* was potentially concerned in clause 1.1.1 with the past. The Relevant Covenants were each concerned with the future, viewed from the Termination Date; that is to say, what Mr. Ayris was not to do during the period of six months from the Termination Date. It does not seem to me that Miss Chudleigh's submission that the effect of the definition of *"Businesses"* was to bring within the scope of the Relevant Covnants *"businesses who he only had contact with at the early stages of his employment more than 8 years ago"* is well-founded. What the definitions of *"Restricted Products"* and *"Restricted Services"* refer to are, respectively, products or services of a kind sold or provided by WRN *"in the ordinary course of the Businesses"*. That focuses attention, as it seems to me, on the position current at the Termination Date. It could not, I think, be said that WRN provided a particular service *"in the ordinary course"* of a business unless that business was being carried on. The fact that a particular activity had been carried on in the past would thus not fall within the scope of the definitions unless it was being continued at the Termination Date. If the activity was being carried on at the Termination Date, then in principle Mr. Ayris would be restrained from dealing in products or services sold or provided in the ordinary course of that activity, even if he himself had not been involved in it recently, as long as at some point during his employment he had been *"concerned or involved to any material extent"* in that activity. The fact that Mr. Ayris's involvement in the activity may not have been recent does not seem to me, of itself, to make either of the Relevant Clauses too wide. I accept, of course, that the expression *"to any material extent"* was not defined for the purposes of the Schedule. However, it seems to me that it conveys, as a matter of English, a sufficiently precise meaning not to result in the conclusion that it is too vague to be given effect. Essentially, as Mr. Colton submitted, the words meant *"to any significant extent"*.

65. As I have noted, Miss Chudleigh challenged the definition of *"Customer"* in the Schedule as being too indefinite to be given effect because there was no definition of the word *"negotiating"* used in that definition. However, again I am not persuaded that her submission was well-founded. The word *"negotiating"* did not appear alone in clause 1.5 of the Schedule, but as part of a clause (in the grammatical sense), *"any person firm or company who or which shall at the Termination Date be negotiating with the Company or any Group Company for the supply of any Restricted Products or the provision of any Restricted Services"*. Thus one knew who had to have been *"negotiating"* with whom, when and about what. In the context, in my judgment, it was clear that what the word *"negotiating"* meant was *"in discussion about making a contract"* for the supply of the product or the provision of the service. It was not enough that there had been some enquiry or general expression of interest on the part of the third party. There had to be a specific proposal for supply or provision which was actively under discussion.

66. In her oral closing submissions Miss Chudleigh did not really pursue her submission that it was unreasonable to include mention of *"Restricted Products"* in the Relevant Covenants because WRN did not produce, market or sell any type of product. I think that she was right not to pursue it. I accept the submission of Mr. Colton that, if, in truth, WRN did not produce, market or sell any type of product, there was nothing to which the reference to *"Restricted Products"* could apply – it was simply surplusage. That would not make it too wide to be enforceable. However, while lovers of the English language may find it offensive, it would, in my view, be unreal for the Court not to recognise that, especially in the financial services sector, what traditionally would be regarded as a service is now frequently described as a *"product"*. A modern meaning of the word *"product"* thus seems to be something which can be sold, whether or not that thing has first undergone a process of production. The effect seems to be that in the Relevant Covenants the phrases *"Restricted Products"* and *"Restricted Services"* describe the same things.

67. I accept the submission of Mr. Colton that Miss Chudleigh's submission that the Relevant Covenants contain no geographical limitation was in reality an objection to the definition of *"Customer"* in clause 1.5. The force of the objection was, on the evidence, difficult to evaluate. It was not in dispute that WRN had customers all over the world. Some of those customers, it was said, had operations in different territories. It was contended that in some cases WRN provided services for an operation of a customer in one territory, but not another. The suggestion seemed to be that it was unreasonable to prevent Mr. Ayris approaching for business an operation of a customer of WRN in one territory, where WRN provided no services, just because in another territory WRN did provide services. However, what Miss Chudleigh's submissions did not seem to take into account was that, if a global organisation operated in different countries through locally incorporated companies, only the locally incorporated company for which WRN provided services was a *"Customer"* and thus caught by the Relevant Covenants, and that locally incorporated companies for which WRN did not provide services were not *"Customers"*, while if a global organisation was a single corporation which just had branch offices in various territories, in providing services to a particular branch office WRN was providing services to the corporation, which was thus a *"Customer"*. A single corporate entity cannot be artificially split and somehow treated as if it were a number of separate entities. Thus I reject the submissions of Miss Chudleigh in relation to the lack of any geographical limitation in the Relevant Covenants.

68. Miss Chudleigh's submissions in relation to what were described as agents also seemed to me to lack substance. It appeared that a misunderstanding had arisen as a result of the provision at an earlier stage of this action on behalf of WRN of what it contended was a list of its customers. Some of those listed were identified by Mr. Ayris as, in truth, agents. That may be so. If and insofar as a purchaser of *"Restricted Services"* acted by an agent, in my judgment the purchaser would fall within the definition of *"Customer"* in clause 1.5 of the Schedule, because the services were provided to it, but the agent would not, because no services were provided to the agent by WRN. The suggestion seemed to be that the agent would fall within the definition of *"Customer"*, and that that would mean that Mr. Ayris would be restrained from having contact with other principals of the agent. However, in my judgment that analysis is just not correct.

69. The evidence led before me in relation to the reasonableness of the length of the restrictions sought to be imposed on Mr. Ayris concentrated on the period of 12 months

contained in the covenants in the Leaving Contract, and not on the period of six months in the Relevant Covenants. There were three real aspects to the evidence. One was the pattern of contracts between WRN, or its competitors, and customers. Mr. Ashburner told me, and Mr. Ayris agreed, that contracts were typically of between one year and five years in duration, with an average duration being three years. Some contracts contained break clauses. Mr. Ashburner gave evidence of particular contracts having taken years – in one case about four years, in another case about ten years – to secure. Mr. Ayris told me in cross-examination that he would expect that a contract, in any particular case, would be secured within about six months, and, if negotiations went on as long as 12 months, he would think that the prospects of securing it were slight. Another aspect of the evidence was how long it might take to secure a replacement for Mr. Ayris. However, that evidence was all concerned with how long it might take to secure a Head of Sales and Marketing, not how long it might take to obtain a Marketing and Rebroadcasting Manager. The third aspect of the evidence was the pattern of trade fairs in the broadcasting sector. As Head of Sales and Marketing Mr. Ayris in 2007 attended two trade fairs for WRN, one in March and one in November. The suggestion was that WRN needed a restriction of 12 months to enable Mr. Ayris's replacement as Head of Sales and Marketing to attend the two trade fairs he had been to in 2007 in order to make contacts.

70. It is, I think, well-recognised that the fixing of a period in a restrictive covenant in a contract of employment is, to an extent, arbitrary. In general terms, in the case of an employee employed to sell, the purpose of the period for which the restrictive covenant is operative is to enable the employer to have an opportunity to replace the employee and for the replacement employee to have an opportunity to seek to forge for himself or herself the contacts which the previous employee enjoyed for the benefit of the employer. In his role as Marketing and Rebroadcasting Manager the fostering of contacts was an important part of Mr. Ayris's job. While there was little evidence about it, I am satisfied that the engagement of a replacement Marketing and Rebroadcasting Manager would involve advertising for applicants, considering applications, conducting interviews and making a decision. The successful applicant might have to give notice to an existing employer. Once the successful applicant took up his or her post he or she would have to introduce himself or herself to existing customers. I accept that it is material, in considering how long a period it would be reasonable for any restrictive covenant to endure, to have regard to the period of notice which Mr. Ayris had to give. When he commenced employment with WRN that period was one week. In the end I am satisfied that the period of six months specified in the Relevant Covenants was reasonable.

71. I was not persuaded by Miss Chudleigh's submissions that it was unreasonable for the Schedule to include both a non-solicitation and a non-dealing covenant. Both types of covenant are commonly included together in contracts of employment. A reason often advanced for including both is that it is sometimes difficult to prove solicitation, that successful solicitation results in dealing, and dealing is capable of objective demonstration relatively easily.

72. In the result, therefore, I find that the Relevant Covenants are unenforceable as being too wide on the sole ground that each extends to preventing Mr. Ayris from having contact with customers of WRN with whom he personally never had any dealings.

The Business Cards and the Addresses

73. WRN's case was that the Business Cards were its property and that it was entitled to them by reason of clause 3.4.1.6 of the Schedule, or its equivalent in the Leaving Contract. It also contended that the Business Cards constituted *"Confidential Business Information"* within the meaning of clause 3.4.1.6. So far as the Addresses were concerned, WRN's case was that the document, computer disk or other tangible item which contained them belonged to it, within the meaning of clause 3.4.1.5 of the Schedule or its equivalent in the Leaving Contract. Further or alternatively, it was contended on behalf of WRN that the Addresses amounted to *"Confidential Business Information"* which fell within clause 3.4.1.5 or clause 3.4.1.7 of the Schedule, or their equivalents in the Leaving Contract.

74. Mr. Ayris's case was that the Business Cards belonged to him and thus he had been entitled to take them with him when he left WRN. Moreover, it was contended on his behalf that clauses 3.4.1.5, 3.4.1.6 and 3.4.1.7 were unenforceable as they sought to protect mere confidential information, meaning by that information which was said to be confidential, but which was not alleged to be trade secrets. Miss Chudleigh submitted that the definition of *"Confidential Business Information"* in clause 1.3 of the Schedule was too wide and that in any event the Business Cards and the Addresses contained information which fell within the exceptions in that definition in favour of *"the Manager's own stock in trade"* and information already in the public domain.

75. In support of her submission that a clause in a contract of employment restricting the use which could be made after the termination of the employment of information obtained during the employment would only be enforced if it was reasonable, if in effect the clause operated as a restraint of trade, Miss Chudleigh drew to my attention the decision of Mr. Nicholas Warren Q.C., as he then was, in *Intelsec Systems Ltd. v. Grech-Cini* [1999] 4 All ER 11. Mr. Colton did not, I think, dispute the proposition advanced by Miss Chudleigh, but he reminded me of the well-known decision of the Court of Appeal in *Roger Bullivant Ltd. v. Ellis* [1987] IRLR 491, and provided me with a copy of the transcript of the judgments. At pages 11D to 13B Nourse LJ said:-

> "*In order to consider those submissions it is necessary to start by restating, so far as they are material, the principles of law upon which an employer's right to sue an employee for misuse of confidential information is founded. Those principles have, I believe, been clarified in the recent judgments of Mr. Justice Goulding and this court in Faccenda Chicken Ltd. v. Fowler [1985] 1 AER 724 and [1986] 1 AER 617. What is now clear, at all events in cases where there is no express agreement between the parties, is that the confidential information whose misuse is actionable at the suit of the employer may fall into one of two distinct classes. For present purposes it is convenient to state them in the reverse order to that in which they were stated in Faccenda Chicken v. Fowler. First, there are what this court compendiously described as trade secrets or their equivalent. They may not in any circumstances be used by the employee, either during or after the employment, except for the benefit of the employer. It was in order to protect information of that class*

that the second injunction was granted in the present case. Secondly, there is information which, although not falling into the first class, must nevertheless be treated as confidential by the employee in the discharge of his general implied duty of good faith to his employer. Such information may not be used by the employee during the employment except for the benefit of the employer but, if and only to the extent that it is inevitably carried away in the employee's head after the employment has ended, it may then freely be used for the benefit either of himself or of others.

In the present case it is, correctly, not suggested by Mr. Price, for the plaintiffs, that the information contained in the card index falls into the first of these two classes. He submits that it falls into the second class and that it is covered by the following passage in the judgment of this court which was delivered by Lord Justice Neill in Faccenda Chicken Ltd. v. Fowler [1986] 1 AER at page 625E:

"(3) While the employee remains in the employment of the employer the obligations are included in the implied term which imposes a duty of good faith or fidelity on the employee. For the purpose of the present appeal it is not necessary to consider the precise limits of this implied term, but it may be noted: (a) that the extent of the duty of good faith will vary according to the nature of the contract (see Vokes Ltd. v. Heather); (b) that the duty of good faith will be broken if an employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately memorises such a list, even though, except in special circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer (see Robb v. Green [1895] 2 QB 315 ... and Wessex Dairies Ltd. v. Smith [1935] 2 KB 80 ..."

Mr. Fitzgerald did not, as I understood his argument, contend that the information contained in the card index did not prima facie fall into the second class of confidential information. I think it is clear that it did. Moreover, it is obvious that, if it is a breach of the duty of good faith for the employee to make or copy a list of the employer's customers, the removal of a card index of the customers is an a fortiori case. "

76. A point made on behalf of the ex-employee in *Roger Bullivant Ltd. v. Ellis* was that the names and addresses in the card index which had been removed in that case were freely available in the public domain. About that submission Nourse LJ said at page 14A – E of the transcript:-

"*The value of the card index to Mr. Ellis and the other defendants was that it contained a ready and finite compilation of the names and addresses of those who had brought or might bring business to the plaintiffs and who might bring business to them. Most of the cards carried the name or names of particular*

> *individuals to be contacted. While I recognise that it would have been possible for Mr. Ellis to contact some, perhaps many, of the people concerned without using the card index, I am far from convinced that he would have been able to contact anywhere near all of those whom he did contact between February and April 1985. Having made deliberate and unlawful use of the plaintiffs' property, he cannot complain if he finds that the eye of the law is unable to distinguish between those whom he could, had he chose, have contacted lawfully and those whom he could not. In my judgment it is of the highest importance that the principle of Robb v. Green which, let it be said, is one of no more than fair and honourable dealing, should be steadfastly maintained.*"

77. Moreover, it is well-established that a compilation of publicly available information may attract the protection afforded to confidential information.

78. I am satisfied that the submission of Mr. Colton that the Business Cards belonged to WRN and not to Mr. Ayris is sound. Most of the Business Cards were collected by Mr. Ayris during the course of his employment by WRN from the representatives of actual or prospective customers or suppliers. Those cards (*"the WRN Cards"*) were given to him not as an individual, but as the representative of WRN. The purpose of him collecting and retaining the WRN Cards was so as to be able to know which persons in which organisations to contact for the purposes of the business of WRN. He was collecting the WRN Cards not to use for his own private purposes, but for the purposes of the business of WRN. In those circumstances it seems to me to be clear that the WRN Cards each became, on receipt by him, the property of WRN. Mr. Ayris said that some of the Business Cards he had collected before joining WRN. That, I think, was accepted. However, Mr. Colton submitted, rightly in my view, that by taking those cards (*"the Ayris Cards"*) to his office in WRN and adding them to the WRN Cards, it was clear that he was intending to use them for the purposes of carrying out his duties to WRN. That, contended Mr. Colton, in effect amounted to Mr. Ayris giving the Ayris Cards to WRN. I accept that submission.

79. Consequently I find that the Business Cards belong to WRN and that WRN was entitled to have them returned to it under clause 3.4.1.6 of the Schedule. The question whether the Business Cards were *"Confidential Business Information"* does not, strictly speaking, arise.

80. It is not, it seems to me, actually necessary to reach any conclusion as to whether the Addresses were *"Confidential Business Information"* or whether clause 3.4.1.7 of the Schedule was enforceable, because clause 3.4.1.5 prohibited not only the copying of any document or computer disk containing *"Confidential Business Information"*, but also the copying of any document or computer disk belonging to WRN. The Addresses were copied by Mr. Ayris from his laptop provided by WRN from a file of e-mail addresses belonging to WRN. Thus copying them was in breach of clause 3.4.1.5.

81. However, whatever the precise scope, if any, of *"Confidential Business Information"*

and the clauses of the Schedule inhibiting the use of such, it was clear, on the evidence, that much of the information contained in the Business Cards and in the Addresses was not confidential or treated by WRN as confidential, because the information had been made available to the public by WRN itself by putting it on its own website (*"the Website"*).

82. The *"Listeners Area"* on the Website listed 90 radio stations, of which 80 were identified by the name of the customer of WRN for whom WRN arranged transmission of its broadcasts. The other ten were WRN stations on which, as I understood it, it broadcast programmes which it had assembled from other customers. I was told that WRN differentiated between *"transmission"* customers, which were those for whom the service provided by WRN was a channel on which to broadcast their own programmes, and *"broadcast"* customers, which were those which provided programmes for WRN to incorporate into broadcasts which it made itself. It seemed that that differentiation was not one recognised throughout the industry, and also that some *"transmission"* customers were also *"broadcast"* customers. However, it was manifest from the Website that not only did WRN not regard the identities of its *"transmission"* customers as confidential, it actively collected their names together and publicised them.

83. It appeared that on the Website there was a page for each *"transmission"* customer which, amongst other things, included contact details. When he was asked about that Mr. Ashburner said that the details provided were intended for listeners who wished to make contact with the station in each case. That may be, but as an address, a telephone number and an e-mail address was given in each case, one imagines that all one would need to change in order to make contact with the person in charge of broadcasting at any particular station was to add, perhaps to the e-mail address, the words *"Station Manager"*, or some such.

84. In the *"About WRN"* section of the Website were contained a considerable number of press releases relating, amongst other things, to some of WRN's *"broadcast"* customers, and its suppliers. Each press release usually gave a name of a representative of the customer or supplier of WRN as someone quoted commending the particular transaction the subject of the press release. There were certainly two press releases relating to WRN's most important customer, China Radio International. There were references in the press releases to WRN using, and thus obtaining supplies from the operators of, Sirius satellite radio, Sky digital, the Hot Bird 6 satellite, the Eurobird satellite, Telewest Active digital, NTL digital, Digital Radio Mondiale, WorldSpace satellite radio, the Galaxy 25 digital satellite and AirChord. One of the press releases made the point that, *"WRN currently uplinks almost 1 in 3 of the non-BBC radio stations available on Sky"*.

85. Obviously all of the information on the Website was *"readily ascertainable to persons not connected with the Company or any Group Company ... without a significant expenditure of labour skill or money"*, and thus within one of the exceptions to the definition of *"Confidential Business Information"* in clause 1.3 of the Schedule. No one undertook, for the purposes of the trial, the task of seeking to demonstrate that there was some customer or supplier whose name appeared on one of the Business Cards or on one of the Addresses which was not identified on the Website. No explanation was

offered by anyone on behalf of WRN as to why, if some particular name of a customer or supplier did not appear on the Website, that was because the name of that customer or supplier was regarded as confidential. My impression from looking at the pages from the Website produced for the purposes of the trial was that, far from wanting to keep hidden the identities of its customers and the suppliers whom it was able to use, this information was actively promoted by WRN as part of its marketing in order to seek to impress by the numbers and quality of its customers and the facilities to which it could supply access. The highest that I think that it could be put on behalf of WRN that any information contained in the Business Cards or the Addresses was confidential was that each of the Business Cards and the Addresses gave the name of an individual at the customer or supplier concerned, and the name of that individual could not, at least in most cases, be obtained from looking at the Website. However, Mr. Ayris gave evidence that it was easy to obtain the contact details of relevant individuals by accessing the website of the customer or supplier of WRN or some other website. He produced pages of appropriate websites as part of his evidence. It seemed that he had reconstructed from publicly available information the Addresses. There were 108 names in the Addresses. Mr. Ayris said that it took him no more than two minutes to find the details he was looking for, putting the name and company of each individual in an internet search engine. Thus the exercise took about 3½ hours. Mr. Ayris was not challenged on this evidence. The pages of the websites produced by Mr. Ayris seemed in many cases to be the websites of the customers or suppliers concerned. It appeared that on such websites the occupiers of particular posts and their contact details were often given.

86. In the result, had it been necessary to reach any conclusion as to whether any information in the Business Cards or in the Addresses was *"Confidential Business Information"* as defined in clause 1.3 of the Schedule, I should have concluded that none was because even the names of the individuals not revealed on the Website could have been readily ascertained by accessing the websites of the customers and suppliers named on the Website. Taking about 3½ hours to do it over the internet does not seem to me to be *"a significant expenditure of labour skill or money"*. Certainly, had there been any issue in this action as to whether Mr. Ayris had obtained a *"springboard"* benefit by use of the information in the Business Cards or the Addresses, the saving of about 3½ hours of time would obviously have been de minimis.

Conclusion

87. For the reasons which I have given the claim of WRN for an injunction against Mr. Ayris fails. No relief is appropriate in respect of the Business Cards or the Addresses in relation to which I have found that WRN had good causes of action at the commencement of this litigation. Subject to hearing Counsel, it seems to me that the appropriate order is to dismiss the action, but no doubt Counsel will wish to address me on the appropriate order to make as to costs.