



Neutral Citation Number: [2022] EWCA Civ 642

Case No: CA-2021-000239

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Honourable Mr Justice Edwin Johnson
Claim No. BL-2021-001925

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 May 2022

Before:

LORD JUSTICE BEAN
LORD JUSTICE NUGEE
and
LADY JUSTICE ELISABETH LAING

Between:

PLANON LIMITED

**Appellant/
Claimant**

- and -

GILLIGAN

**Respondent/
Defendant**

Lucy Bone and James Green (instructed by **Gaby Hardwicke Solicitors**) for the **Appellant**
Timothy Sheppard and Oliver Lawrence (instructed by **Keelys LLP**) for the **Respondent**

Hearing date: 5 April 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 11 o'clock on 10 May 2022.

Lady Justice Elisabeth Laing:

Introduction

1. This is an appeal from a decision of Edwin Johnson J ('the Judge'). The Judge refused the applications of Planon Limited ('A') for an order to enforce a non-compete covenant in the contract of employment between A and Mr Gilligan ('R') preventing him from working for a competitor for 12 months, and for an order to require R to disclose his current contract of employment and job description. The non-compete covenant was part of a group of post-termination restrictions ('PTR's) in R's contract of employment with A.
2. On the day before the hearing of A's application for an injunction, R had offered undertakings to the Court which reflected all the PTRs in his former contract of employment, apart from the non-compete covenant.
3. Lewison LJ gave permission to appeal on 1 February 2022.
4. R, having been asked by the Court before the hearing whether he wished to rely on a Respondent's Notice ('RN'), lodged an RN on 1 April 2022. R contended in the RN that the Judge had erred in his approach to delay by A in applying to the court.
5. On this appeal, A has been represented by Ms Bone and Mr Green, and R by Mr Sheppard and Mr Lawrence. Ms Bone and Mr Sheppard represented the parties below. I thank counsel for their written and oral arguments. Ms Bone explained that this appeal was important to A, not only because of R's case, but because there were similar covenants in the contracts of employment of other employees.
6. Paragraph references are to the Judge's judgment, unless I say otherwise.
7. For the reasons give below, I have concluded that the Judge's approach to the preliminary assessment of the merits of A's case on the enforceability of the non-compete covenant was wrong and cannot stand. By the date of the hearing of this appeal, however, A had been in post since 1 September 2021, a period of seven months. The period of the relevant restriction ends on 5 August 2022, so it had about four months to run. Those are very weighty factors. I do not consider that, even if my preliminary view was that the covenant was more likely than not to be enforceable, it would be appropriate for this Court now to grant an injunction to enforce it. I say a little more about this issue in paragraphs 98 and 99, below.

The grounds of appeal

8. There were originally ten grounds of appeal.
 - i. The Judge did not apply the correct tests when considering whether the non-compete covenant was likely to be enforceable. He should have asked, but did not:
 - a. what does the covenant mean?
 - b. does the employer have a legitimate business interest which needs to be protected?

- c. does the covenant go no further than is necessary to protect that interest?
- ii. The Judge wrongly considered whether the non-compete covenant was ‘a complete ban on [R] working in this area of the software market’.
- iii. The Judge’s conclusion that A’s ‘prospects of success are not that good’ was plainly wrong, having regard to the limited scope of the non-compete covenant and to the other relevant factors (to which I will come).
- iv. The Judge wrongly considered the reasonableness of the non-compete clause by reference to R’s ability to work rather than by reference to A’s legitimate business interests. Had the Judge asked whether the covenant went no further than was reasonably necessary to protect those interests, the only conclusion open to him was that it was enforceable.
- v. The Judge failed to consider the significance of the small market to the width of the protection reasonably necessary to protect A’s legitimate business interests.
- vi. There was no evidence/proper basis for the Judge’s conclusions that
 - a. R would not be able to move into a job with ServiceNow UK Limited (‘SNU’) which did not breach the non-compete covenant,
 - b. R would not be able to find another job in another area of the software market and
 - c. the enforcement of the covenant ‘could quite easily translate into a period of unemployment’.
- vii. The Judge wrongly imposed a burden on A to show that R would be able to find employment during the period of the PTRs. If R wanted to persuade the Judge that that factor tipped the balance of convenience in his favour, it was for him to adduce evidence to support it.
- viii. The Judge wrongly held that damages would not be an adequate remedy for R if it turned out at trial that an injunction had been wrongly granted.
- ix. The Judge wrongly held that R would suffer reputational damage if the non-compete covenant was enforced against him. There was no evidence to support this conclusion. This ground is no longer pursued.
- x. The Judge was wrong to refuse to order R to disclose his contract of employment with SNU.

The PTRs

9. I will refer to R’s contract of employment (as amended; see paragraph 17, below) as ‘the Contract’. R acknowledged, by clause 11.1 of the Contract, that he would have access to confidential information in the course of his employment. He had ‘therefore agreed to accept’ the PTRs in clause 11. Clause 11.2 sought to restrain the disclosure of confidential information (as defined in the Contract). As the Judge observed (paragraph 11) the definition of ‘confidential information’ in the Contract seems to have omitted some words, as it ends with the phrase ‘including in particular (by way of illustration only and without limitation)’.
10. Clause 17.1 provides as follows:

‘17.1: In order to protect the confidential information trade secrets and business connections of [A] to which he has access as a result of the Appointment, the employee covenants with [A] that he shall not:

- a. *for 12 months after Termination solicit or endeavour to entice away from [A] the business or custom of a Restricted Customer with a view to providing goods or service to that Restricted Customer in competition with any Restricted Business; or*
 - b. *for 12 months after Termination in the course of any business concern which is in competition with any Restricted Business, offer to employ or engage or otherwise endeavour to entice away from [A] any Restricted Person; or*
 - c. *for 12 months after Termination, be involved in any Capacity with any business concern which is or intends to be in competition with any Restricted Business; or*
 - d. *for 12 months after Termination, be involved with the provision of goods or service (or otherwise have any dealings with) any Restricted Customer in the course of any business concern which is in competition with any Restricted Business; or*
 - e. *at any time after Termination, represent himself as connected with [A] in any capacity’.*
11. ‘Restricted Business’ is defined as ‘Those parts of the business of [A] with which [R] was involved to a material extent in the six months before Termination’. ‘Restricted Customer’ is defined as ‘Any firm, company or person who, during the six months before Termination, was a customer or prospective customer of or was in the habit of dealing with [A] with whom [R] had contact or about whom he became aware of informed in the course of his employment’.
 12. ‘Restricted Person’ is defined as ‘Anyone employed or engaged by [A] who could materially damage the interests of [A] if they were involved in any capacity in any business concern which competes with any Restricted Business and with whom [R] dealt with [sic] in the six months before Termination in the course of his employment’.
 13. The Judge noted (paragraph 14) that the effect of clause 17.4 was that the period of the PTRs ran from 6 August 2021, when R was put on garden leave. The Judge described subclause 17.1.a and subclause 17.1.b as ‘non-solicitation clauses’, subclauses 17.1.c and 17.1.d as ‘non-competition clauses’ and subclause 17.1.e as a ‘non-holding out clause’ (paragraph 15).
 14. Clause 17.2 provides for exceptions from clause 17.1. Clause 17.2.a creates an exception for some investments. Clause 17.2.b creates an exception which would permit the employee to be ‘engaged or concerned in any business concern insofar as the duties of the Employee or work shall relate solely to geographical areas where the business is not in competition with any Restricted Business’. Clause 17.2.c creates an exception which would permit an employee to be ‘engaged or concerned in any business concern, provided that the duties of the Employee or work shall relate solely to services or activities of a kind with which the Employee was not concerned with [sic] to a material extent in the twelve months before termination’. By clause 17.6 R acknowledged that he had been separately legally advised before entering into the Contract.

15. It is convenient here to describe the extent to which the Judge decided construction issues about the Contract.
 - i. The Judge observed (paragraph 18) that the definition of ‘Restricted Customer’ included a prospective customer of A. On one interpretation, that could include ‘almost anyone who was or might be a customer in the software market in which [A] has its business’. He accepted that that interpretation was somewhat mitigated by the closing words of the definition ‘with whom [R] had contact or about whom he became aware of informed in the course of his employment’. But that contact could have been at any time during the entire course of R’s employment (paragraph 18). Those qualifying words were enough to ‘tip the balance in favour of [A]’ so that clause 17.1.d should be enforced, despite the potentially wide definition of ‘Restricted Customer’ (paragraph 39).
 - ii. In paragraph 26, the Judge accepted that the effect of clause 17.2 was that R could be engaged or concerned in a business concern provided that his duties ‘shall relate solely to services or activities of a kind with which the Employee was not concerned with to a material extent in 12 months before termination’. The Judge did not quote clause 17.2 in his initial summary of the relevant clauses (paragraphs 9-19).

The facts

16. I will now summarise the facts, to the extent that they are referred to in the judgment. Some parts of the evidence, which I summarise in the next section of this judgment, and which are relevant to the grounds of appeal, are not described in the judgment. I will note any significant disputes about that evidence.
17. A is the UK subsidiary of a company based in the Netherlands, Planon BV (‘PBV’). PBV designs, develops and sells software for managing facilities. R is a former employee of A. He was first employed by A on 9 February 2015 as an account manager, with a written contract of employment. That contract contained the PTRs. On 1 May he was promoted to sales manager. That contract was amended by an amending agreement dated 1 May 2020. The amending agreement did not affect the PTRs.
18. On 23 July 2021, R gave one month’s written notice to terminate the Contract. He was put on garden leave on 6 August 2021. The contract of employment came to an end, in accordance with that notice, on 23 August 2021. R then started employment with SNU. According to A, SNU is a ‘key competitor’. R does not entirely accept this in his evidence. According to A, R’s employment by SNU led to many breaches of the PTRs and what A and the Judge referred to as R’s ‘common law duties of confidence’.
19. The Judge recorded that A had issued a claim form on 21 October 2021 and issued an application notice on 22 October 2021. No statements of case had been served by the date of the hearing of the application (5 November 2021). As appears from correspondence between the parties, that is still the position, nearly five months later, as the parties have agreed a series of extensions to the timetable for the service of pleadings.

The evidence

20. The Judge described the evidence in paragraph 7. A's evidence consisted of 2 witness statements. The first witness statement was by Mr Lucien Kamps, a sales director. It was dated 22 October 2021 ('A1'). R's first witness statement, in response to A1, was dated 29 October ('R1'). There was a second short statement from Mr Kamps, in reply to R1, dated 4 November 2021 ('A2'). There was a further statement from R, also dated 4 November 2021 ('R2'). A objected to the admission of R2. For reasons given in a separate judgment, the Judge admitted R2. I have not seen that judgment.
21. According to A1, A's business is the design, development and sale of facilities management software. A's customers include many businesses with premises, such as universities, hotels, public buildings, and large office blocks. A does not just sell software. It collaborates with its customers to 'identify, install and fine-tune software to meet customers' specific premises needs'. A also provides continuing technical support to its customers. A therefore has close relationships with its customers. It is one of 'the market leaders in this very niche industry'. It regularly updates its software with monthly new releases. The Dutch parent company has wholly-owned subsidiaries in 13 countries. Mr Kamps was the line manager of the Sales Managers employed by the subsidiaries in the United Kingdom, the Netherlands, and the Nordic region.
22. R was employed initially as one of two Account Managers in A, the United Kingdom subsidiary. Each was responsible for about 30 accounts. At that stage, the Account Managers were dealing with existing customers and finding new customers. R's focus was sales. He dealt with businesses based in the United Kingdom and international businesses with headquarters in the United Kingdom.
23. R spent a lot of time selling directly to A's existing customers, ensuring that they were happy with R's products and services, and identifying what else they might need. Business development was a significant aspect of his role, including selling to new customers. That included any inquiries made to A, and prospects R found himself, and prospects 'mapped out in [A's] pipeline data'.
24. R had access to Salesforce, A's global Customer Relationship Management software database. Only authorised staff have access to it. It is used in all A's subsidiary companies. An Account Manager has access to data about all the Group's customers, in order to enable Account Managers to contact any customers or potential customers. Mr Kamps listed, in paragraph 13 of his witness statement, the wide range of different types of detailed information about customers and potential customers, and their actual and potential requirements to which Salesforce gives access. All this information was essential to enable all the members of the sales team to do their jobs. Much of this information would be very valuable to a competitor. It shows which accounts generate the most revenue, and which customers contribute to 80% of A's revenue and are therefore 'strategic' customers. The information has been gathered over time: in some cases over as long as 20 years of trading. It is updated every day and is the foundation of all sales activities. 'Its significance to the operation and commerciality of the business cannot be overstated'.
25. R was also sent information about the developments which were planned for each product. Mr Kamps gave an example of that type of information in paragraph 17, which related to one 'solution area' alone. There were over 200 pages of sensitive information about it. He gave further examples in paragraph 18. Some of the information is about

plans for items which will be released over the next one to two years. Big additions to A's software platform can take many years, which can involve structural changes to existing packages, the involvement of customers in beta versions, and extensive testing. Many new developments are in progress at any one time. A's ability to develop new products is limited. Changes in priorities from time to time can mean that the projected dates for the release of planned developments can change. A's limited development capacity means that long-term planning is necessary.

26. Mr Kamps referred to other types of strategic information available in different documents in paragraphs 19, 20 and 21 of his witness statement. A 'roadmap' can show a list of releases for the next quarter, and some for the next year. He emphasised, in paragraph 22, that these were only a few examples of the 'hundreds of pages' of sensitive confidential information to which A had access. This information would be very valuable to a competitor. The sales team also had access to 'Sales Pipeline' information which set out the specific customers to whom the team should be aiming to sell for up to two years ahead. This was updated every day.
27. Product development was regularly discussed at weekly sales meetings, which R went to, and at other meetings, which he also went to. The documents seen by the sales team are labelled 'confidential'. The Sales Director was regularly reminded to stress this to its members. Account Managers would get feedback and, occasionally, complaints from customers. That is information which, if given to a competitor, might enable it to exploit A's weaknesses and give it some competitive advantage. Account Managers also had a lot of information about A's 'resellers' and 'technology partners'. Resellers are allowed to sell A's licences to their own customers. Technology partners can 'integrate their own solutions' with A. A publishes some information on its website. There is some information, however, to which R had access, which it does not publish, such as price agreements with resellers or problems or weaknesses with resellers or technology partners. Account Managers have access to all A's pricing information, the full price list, and profit margins and discount models. None of this is published. Quotations are given to prospective customers, but most are bespoke (with one exception, for which partial pricing information is published). Pricing and discount models guide Account Managers when they give quotations. They are absolutely confidential.
28. A has two 'innovation projects', the safety observation tool and the health and safety module. A has been planning to introduce these to give its products a competitive edge. They were due to be introduced either in Q4 of 2021 or in Q1 of 2022. R was involved in these and knew about detailed and critical customer feedback. He would be able to give a competitor insights into the weaknesses in the software and what A planned to do about them.
29. A reorganised its sales staff in January 2020. A was promoted to a Manager Sales, or, in his words, 'Head of Sales', on 1 May 2020. R signed the Contract. His original salary had been £50,000. It was to be increased to £74,000. A considered that the PTRs were appropriate to A's new role, so they were not changed. In particular, R was still significantly exposed to confidential information and he would still have contact with customers. If anything, A handled more sensitive and important confidential information in his new role. He had oversight of all the Account Managers, and therefore had access to information about all A's customers in the United Kingdom. In

his more senior role he dealt with customers with more authority and could thus get their confidence and deepen commercial relationships. He continued to have contact with his designated accounts, but over six months he began to hand them over to other members of the sales team. He stood in for Account Managers, nevertheless, when they were not available. He had particular responsibility for lucrative customers and those whose requirements were especially complicated. He intervened when customers complained. Though his role was primarily managerial, Mr Kamps could tell, from the evidence described in paragraph 37 of A1, that R was still having daily contact with customers.

30. R also had access to information about his team, such as their sales figures and performance. He was involved in setting their salaries. He would therefore know who the best performers were, and what salary offers might persuade them to leave A.
31. A has spent money recruiting and training employees, and is obviously keen to ensure that its staff are not easily poached, and to mitigate the risk of staff leaving for businesses which create or develop competing products. Staff have daily access to confidential information. It is easy to see how staff might be tempted or persuaded to share information with a new employer in a way which would be very damaging to A. Paragraph 40 of A1 describes, in general terms, three levels of information which could damage A. Information at the most sensitive level includes A's 'solutions roadmap', weaknesses which customers see in its products, information about the innovation projects, developments forecast for future months, and information about resellers and technology partners. 'This type of information would enable a competitor with wider resources to understand and prepare to overtake our next move'.
32. A's evidence was that the PTRs needed to last for 12 months adequately to protect A's interests. A's plans for the next two to four years are sensitive, but, necessarily more general, whereas the particular detail is 'fleshed out' 12 months ahead, including planned fine tuning of products, market strategies and the particular customers and markets A plans to target (A1, paragraph 41).
33. Despite the fact that facilities management and real estate software can be sold all over the world, it has been a 'niche market' for the past 30 years. A has, traditionally, only had four to five main competitors, and has therefore become a market leader. SNU has, over the past ten years or so, expanded as a provider of workflow software. Its revenues have grown at about 59% a year. Its product range has grown significantly. A's fears that SNU was poised to move into this niche market have materialised. SNU 'obviously has a significant amount of capital and investment behind it'. Its website shows that its product mirrors part of what A's software does. The similarity is very close. Until now, their range of products in facilities management software has been limited, but they are set up to expand significantly. That is why R's knowledge of A's confidential information is a very valuable asset to SNU. With that information, SNU can build the same products or close gaps. Their large investment means that they might be able to do so faster than A, with advance knowledge of what A plans, and how those products will be priced. That would give SNU a significant competitive advantage. In the last few months, SNU has been actively soliciting at least three key staff from A in addition to R. SNU have advertised for staff with relevant expertise in A's niche area. Mr Kamps refers to a recent 'hunting message' from SNU. SNU actively solicited an employee in the Netherlands in 2018. A applied successfully to court to stop that. As a result, A has

been monitoring SNU's recruitment activities. In June/July 2021, SNU advertised for a Solution Sales Manager. When, on 23 July, R rang Mr Kamps to tell him he was leaving, he asked R where he was going. R refused to say. Mr Kamps asked if he was joining SNU in the advertised role. R would only say that he was going to work 'in a solutions-based role'. When it was checked to see if the advertisement was still on-line, SNU's website showed 'No longer receiving applications'.

34. In his resignation letter dated 23 July 2021 R said that he could not see any future opportunities at A, that he felt he was 'starting to go a bit stale', and that he did not feel he was being paid enough. A wrote to R on 2 August. A was uneasy because R had been reluctant to say where he was going, at a time when SNU had been soliciting employees, and an advertisement for a Sales Manager had recently disappeared from their website. As R was aware, SNU was a 'key competitor'. A reminded him of the PTRs. R was entitled to keep his plans secret, but A asked to be told that R was not intending to join SNU or one of A's limited number of competitors in a role which would put R in competition with A. A would take any breach seriously. A was also going to write to SNU to draw its attention to the PTRs, without identifying R.
35. R replied on 5 August. The letter ended, 'Regardless of the above information, to respond directly to your statement: I can confirm that I am not intending to work for [SNU] (or indeed another of [A's] limited competitors) in a role that would place me in competition with [A]'. He said that 'in the capacity of my upcoming role, I will be abiding by the spirit of the restrictions, even though, as I set out below, I consider them to be unreasonable and therefore unenforceable'. His new role would not involve 'direct selling to customers' nor 'to be a main point of contact for customers'. Which prospects he was to target would not be his decision, and he would not be involved in it. He would not be in a position to breach the restriction on soliciting employees. He would 'not be disclosing any confidential information relating to' A, and he would not be involved in the provision of goods or service to any customer of A. He disputed that SNU was a competitor of A's, according to information on A's website and A's own systems, including Salesforce. SNU was not listed in the drop-down menu. There was no 'documented evidence' to support the statement that SNU was a competitor. The twelve-month period was, in any event, unreasonably long, especially since his notice period was only one month. The restraint on competition was an attempt to remove R from the labour market without payment for 12 months. He could have been dismissed on one month's notice just after he started and before 'I had gathered any information which would have been of interest to a competitor'. That showed that the restriction was unreasonable. If it was unreasonable then, it was unenforceable now. He did not think A could successfully enforce the PTRs even if it had reason to. By this letter, 'however, I would hope and trust that I have put any concerns of yours to rest'.
36. R's letter did not have that effect. Mr Kamps thought that the reference to the drop-down menu was 'entirely disingenuous as a regular feature of his meetings with R and other Sales Managers was that SNU had received a lot of investment' recently and that they had increased the products they offered at an alarming rate, that they were operating a solutions-based service like A's, and selling through partners, like A (A1, paragraph 54).
37. A put R on garden leave by a letter dated 6 August, as A had 'not clearly stated that [he] was not going to work for a competitor'. A again reminded R of the PTRs. On 2

September 2021, A discovered that A had joined SNU on 1 September 2021 as a Senior Solutions Sales Manager. The job description seemed to show that R would be doing what he focused on for A. His knowledge of A's customers and prospects would be 'highly valuable' to SNU. One of his responsibilities is closely to monitor competitors' activities and to report on 'opportunities, obstacles, challenges and red flags which might hinder [SNU] from capturing customer accounts'. According to A, it is now R's job to pass on to R all the knowledge of A's business which he now has; that is, information about A's products, marketing strategy, pipeline, and developments which are planned over the next two years.

38. Mr Kamps said that A was under a clear and calculated competitive attack from SNU. SNU was trying to buy access to the market and to A's confidential business information by recruiting A's experienced people and offering them more money. A, as a smaller business, relies on the PTRs to protect 'its business interests which have been acquired by hard work over several years'. SNU has the 'force of revenue with which to steal our ideas and take them to market quicker'. If they do, A and its subsidiaries will face 'real financial jeopardy' and could have to make redundancies.
39. A's solicitors wrote a letter before claim to R on 20 September, seeking undertakings. There was correspondence. A was not satisfied with what was offered. A then sought Board approval to 'proceed further'. Once A had that, its solicitors wrote to R's solicitors on 14 October 2021. On 15 October, R's solicitors offered contractual undertakings. A was not satisfied with R's position.
40. I also gather that there were confidential exhibits in A's evidence. They have not been referred to on this appeal. I have not seen them. I say no more about them.
41. R said, in paragraph 8 of R1, that he did not accept that the PTRs were reasonable, but that he had been 'very careful with what I do in my new role with [SNU] and have made sure that [SNU] are also fully aware of the position in which I am currently in'. In paragraph 9 he said that he would like to agree 'to restrictions to protect [A's] business, by which I will abide, but at the same time, I cannot be left in a position where I cannot work until August of next year. I need to earn a living and if [A] cuts me off completely from any work for 12 months, that is unfair to me, and I feel unreasonable. I am married with a wife who works part time and a 10-year-old son. We have a mortgage and have been financially supporting my wife's family in Brazil who have been hit by the pandemic. Cutting me off from being able to earn money would be catastrophic for us as a family and for my wife's family overseas. I am also aware that the stress this is causing me personally is likely to impact my performance with my new employer and it does feel like [A] is looking to attack me personally'.
42. R said that he did not create any new business opportunities for about the first 18 months of his time with A (paragraph 11). For the majority of R's employment, international companies with headquarters in the United Kingdom were targeted and managed by Team International 'of which I was not part'.
43. He did not think that he was under any duty to tell A where he was going. The account in A1 of the conversation on 23 July painted a picture that R was trying to hide something. He was not. It was none of A's business. R considered that his letter of 5 August was helpful. He genuinely did not consider that he was doing anything he should

not be doing. He was not being disingenuous when he drew attention to the drop-down menu. He had not come across SNU in any competitive situation he was aware of while he was employed by A. 50 companies featured and SNU did not. He does not believe that the conversations referred to in paragraph 54 of A1 (see paragraph 36, above) took place. SNU were not on R's radar at any time. He was 'somewhat taken aback to read Mr Kamps portray [SNU] in the way that he now does'.

44. R expressed his surprise at A's claim against him. He said that other people left A for a competitor in April 2019 but he did not know of any court proceedings against them. One then tried to solicit one of A's customers, but no formal action was taken. R took issue with an email to which Mr Kamps referred in paragraph 71 of A1. R said that what the email actually showed was that a client of SNU had decided to buy another SNU product. 'Stephen Galloway referred to the company as a 'prospect', which means that they are not a client of A. Mr Galloway also suggests that in order for [SNU] to compete with [A] for the 'FM tool' they will go to tender for, [SNU] would need to engage with another company (Nuvolo) in order to compete with A'.
45. A2 was limited to replying to the points in R1 which were relevant to A's application. I summarise some of them. A did not know R had gone to SNU until after he left A. Mr Kamps told R that SNU was a competitor and that A would enforce the PTRs. R chose to ignore those warnings. He could have retracted his resignation. He was also free to be employed in any software sales role, as long as it was not a role in facilities management software or the IWMS (that is, integrated workplace management systems) sector. The job market in software sales staff in the United Kingdom was 'currently burgeoning'. Mr Kamps believed that R would readily get a new job *if* the enforcement of the non-compete covenant meant that R had to leave SNU (my emphasis).
46. In paragraph 3 of R2, R said he had made an open offer to abide by the terms of the draft order, 'save for the restriction relating to my not being involved with any competitor of [A]'. R's primary position was that 'preventing me from working until August of next year would be unduly unfair on me and not necessary to give [A] the protection they want. I have been in sales all my working life so trying to restrain me from working as [A] is doing is unreasonable in my submission.' If he was wrong about that, A's case was, nevertheless, overstated and not supported by the facts.
47. R no longer had access to A's database or documents. It was almost three months since he had been put on garden leave. 'With that in mind', R had given further thought to A's evidence. R no longer had access to Salesforce. He accepted that the information in it could be 'valuable to a competitor as Mr Kamps contends'. R had no intention of 'using' any confidential information. In any event, the information was too extensive to carry around in his head. The only information he saw related to his own performance, or that of his team, or of other salespeople. He does not recall seeing any reports detailing 80/20 revenue analysis. He does not carry high level information from Solution Centre Roadmaps with him. 'I just cannot recall the level of detail that [A] appears to want to pin on me'. The fact that there were many pages of evidence he had not seen implied that it was 'very lengthy and detailed'. He questioned how A could think he could carry 'high level information from hundreds of pages of data in my head'. He thought that roadmaps had, since 2020, only been created for the following quarter. He could not now recall the detail of any report he had seen. He certainly did not have

the time or the inclination to read 200 odd pages about what might be built in the future. Even if he had access to the roadmap and future developments on the intranet he had 'no real interest in them'. His job was to sell a product and what mattered to him was what there was. 'Future developments were not sufficiently important to me to invest my time reading and learning about them'.

48. He did not believe he had ever had access to a product requirements document. He does not know what it is. He does not have access to sales pipeline information and does not have anything from it. It is not the type of information he has in his head and it is now three months since he left A. He can no longer recall very much about UK sales meetings. He does remember that there would be 'a demo of recent developments to the product, some review of numbers and then a discussion about their solution from partner or solution centre'. He has never had a conversation with anyone about the early termination of a contract. If there were issues about products or services 'these were dealt with by adding a fix to the next software release (products), or in the case of services, resolved by the Service team. I do not carry this information around in my head'. R does not have access to information about A's resellers and technology partners and has 'forgotten anything that I could possibly imagine being of interest to anyone outside of [A]'. A changes its prices annually, 'both from a model and value perspective'. There was far too much for him to carry in his head.
49. Mr Kamps 'vastly' overstated R's knowledge about the two innovation projects. R was aware of the safety observation tool project but 'had little interest in it'. The job description Mr Kamps referred to in paragraph 35 of A1 was 'never shared' with R. The assertion in A's skeleton argument that R's salary went up from £50,000 to £74,000 when he was promoted was untrue. It had been going up over the years. The actual increase was about 5%.
50. The timetable for the exchange of evidence was tight (see paragraph 20, above). Even so, R1 was R's opportunity to dispute or contradict the detailed factual case put forward in A1. A1, in the Judge's words, was 'fairly lengthy'. It would be obviously unfair for R to raise in R2, dated the day before the hearing, and without explanation, disputes about A1 which he had not raised in R1. To do that deprived A of the opportunity to indicate, in A2, the extent to which A accepted, or disputed, R's side of the story. I have summarised R2, but in my judgment, the Judge should have approached the matter on the basis that R should be taken as accepting the material in A1 which he did not, in R1, indicate that he disputed. There is, in the event, no indication in the judgment what weight the Judge gave to R2.
51. In any event, as is clear from my summary, the extent to which R disputed the substance of A's case, even in R2, is limited. His basic position was not to dispute that he had had access during his employment to information which was confidential and which would be useful to a competitor, but to say he did not have access to it any more, and had not taken it away in his head because it was all too detailed and he could not remember it, or, in some cases, he was not even interested in it. R's skirmishing about the question whether SNU was or is a competitor is nothing to the point. One of the premises of his vigorous objection to the non-compete covenant is that his work for SNU is a breach of that covenant (if that covenant is valid). That must entail that he accepts that SNU does compete with A.

The issues for the Judge

52. As the Judge observed, there were no pleadings. Both parties had served skeleton arguments, however.
53. In his skeleton argument R accepted two points about interim injunctions.
 - i. The Judge should apply the principles in *American Cyanamid Co v Ethicon Limited* [1975] AC 396.
 - a. There must be a serious issue to be tried.
 - b. Damages must not be an adequate remedy.
 - c. The court must consider which side the balance of convenience favours.
 - ii. Since it was likely that, if A succeeded, A would get most if not all of the relief which A would get after a trial, some assessment of A's prospects of success was appropriate.
54. R accepted that the law on restrictive covenants is summarised in *Coppage v Safety Net Security Limited* [2013] EWCA (Civ) 1176. He expressly accepted ten points about the law.
 - a. PTRs are enforceable if they are reasonable, but covenants in contracts of employment are viewed more strictly than covenants in other commercial contexts.
 - b. The employer must show that a restraint is reasonable in the interests of the parties, and, in particular, that it protects a proprietary interest of the employer and for which the restraint is reasonably necessary.
 - c. Customer lists and other such information are proprietary interests.
 - d. Non-solicitation clauses are seen more favourably than non-compete covenants, because an employer is not entitled to protection against mere competition.
 - e. The validity of a covenant is tested when the contract is made but in the light of what might fairly have been anticipated when the contract was made.
 - f. The covenant is to be given a meaning which is consistent with its language but it is not to be understood as including matters which are improbable or hypothetical.
 - g. Because it is difficult to test whether any particular customer would have done business with the employer in the future, a clause which is reasonable in terms of space and time is likely to be enforced; indeed it is in relation to the customer whose future custom is doubtful that the employer is entitled to protection.
 - h. Cases in this area turn on their own facts and the citation of precedent does not help.
 - i. In assessing whether a covenant is reasonable, the court must decide
 - i. what it means

- ii. whether the employer has legitimate business interests requiring protection and
 - iii. whether the covenant is no wider than is reasonably necessary for the protection of those interests.
 - j. There is a residual discretion: *Norbrook Laboratories v Adair* [2008] IRLR 878. I observe that the test which the Deputy Judge in that case, Elizabeth Slade QC (as she then was), applied, after a trial, was whether the defendant would ‘suffer exceptional hardship’ if an injunction were granted. She relied on paragraph 39 of *TFS Derivatives v Morgan* [2005] IRLR 246, in which Cox J was referring to the position at trial. See further, paragraphs 67, and 96, below.
55. R accepted that, on the facts, A had legitimate interests requiring protection. He made four points against the grant of an injunction.
- i. A was overstating the effect of R’s move to SNU.
 - ii. R has, and has had, no intention of trying to do anything against A’s business interests. He has told SNU about the covenants which apply to him.
 - iii. Clause 17 ‘as a whole’ was an unreasonable restraint of trade and went further than was reasonably necessary to protect A’s legitimate business interests.
 - iv. ‘In the alternative...disproportionate harm will be caused to [R] and his family if he is prevented from working until August 2022, which is to be coupled with the harm that may be caused to his standing in the workplace if clause 17.1.c is enforced against him’. The balance of convenience therefore ‘militates’ against the grant of an interim injunction in respect of clause 17.1.c.

The authorities on non-compete covenants

56. *Herbert Morris Limited v Saxelby* [1916] AC 688 concerned an engineer who had worked for the plaintiff for 12 years. His contract of employment contained a covenant restraining him, throughout the United Kingdom, and for seven years, from being involved in any way in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways or hand overhead travelling cranes. The House of Lords, upholding the Court of Appeal, decided that the covenant was unreasonably wide and unenforceable. There was ‘little or no evidence that the defendant ever came into personal contact with the plaintiff’s customers’ (per Lord Parker of Waddington, with whom Lord Sumner agreed, at p 711). The Court was not satisfied that the defendant ‘was ever entrusted with a trade secret in the proper sense of the word at all’ (ibid).
57. It is clear from the judgments that ‘...no person has the right to be protected against competition per se’ (per Lord Atkinson at p 700, 702, and per Lord Parker of Waddington at p 709). There is a distinction between the skill or knowledge which an employee obtains ‘by reason of his employment or training’, against which the employer is not entitled to protection, and influence over customers or knowledge of

‘trade secrets as would enable him, if competition were allowed, to take advantage of his employer’s trade connection or utilize information confidentially obtained’ (ibid). The employer in that case ‘very candidly admitted’ that the employer’s real aim was to stop competition by the defendant by using the skill and knowledge he had acquired during his employment, and that was the skill and knowledge which ‘an employee of any ability must necessarily obtain as opposed to knowledge of any matter and skill in any process in which the company could be said to have any property at all’ (per Lord Parker of Waddington at pp 710-711). That is “‘subjective” as opposed to “objective” skill and knowledge ...or skill and knowledge “which were his own” and in no sense the plaintiff’s property’ (ibid). He was exposed to confidential documents, but they were far too detailed for him to take away in his head. ‘All he could carry away was the general method and character of the scheme of organisation practised by the plaintiff company. Such scheme and method can hardly be regarded as a trade secret’ (Lord Parker of Waddington, p 712).

58. *Lansing Linde Limited v Kerr* [1991] 1 WLR 250 at p 260 concerned a twelve-month world-wide non-compete covenant. Because most of the period of the restraint would have elapsed by the date listed for the trial, the judge took into account the prospects that the covenant would be upheld at trial. The judge refused to grant an interim injunction. He held that a worldwide restraint was probably too wide to be upheld at trial. The Court of Appeal agreed with his approach.

59. One issue was whether the defendant had had access to ‘trade secrets’ during his employment. Staughton LJ referred to the three classes of information described by Goulding J in *Faccenda Chicken v Fowler* [1984] ICR 589, and to the decision of the Court of Appeal in that case (reported at [1987] Ch 117). He then said:

‘It appears to me that the problem is one of definition: what are trade secrets, and how do they differ (if at all) from confidential information? Mr Poulton suggested that a trade secret is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication.

That is my preferred view of the meaning of trade secret in this context. It can thus include not only secret formulae for the manufacture of products but also, in an appropriate case, the names of customers and the goods they buy. But some may say that not all such information is a trade secret in ordinary parlance. If that view be adopted, a class of information which can justify a restriction is wider, and extends to some confidential information which would not ordinarily be called a trade secret’.

60. Butler Sloss LJ agreed with the judgment of Staughton LJ. She referred to *Herbert Morris Limited v Saxelby*. She noted some of the developments in international business since that case had been decided. She said, at p 270 F-G:

“Trade secrets” has, in my view, to be interpreted in the wider context of highly confidential information of a non-technical or non-scientific nature, which may come within the ambit of information which the employer is entitled to have protected, albeit for a limited period.’

61. The covenant in *Scorer v Seymour-Jones* [1966] 1 WLR 1419 at 1427 prohibited competition in a specified area for a specified time. It was upheld ‘because otherwise the defendant would have been able to take unfair advantage of contacts and information’ about the plaintiff’s clients and properties which he had obtained during his employment. Danckwerts LJ noted, at p 1425-C, that it was very difficult to protect such knowledge without imposing a restraint on competition. A similar point, arising from the difficulty of proving the breach of a covenant not to use or disclose confidential information may justify a non-compete covenant. In *Littlewoods Organisation v Harris* [1977] 1 WLR 1472, Lord Denning MR said, at p 1479B:

‘The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held reasonable if limited to a short period’.
62. Sir Colin Rimer, with whom the other members of this Court agreed, noted that the trial judge in that case had made similar points in *Dyson Technology v Pellerrey* [2016] EWCA (Civ) 87, at paragraph 37. The defendant argued that he had no intention of breaching his obligations of confidence and that his new employer had not required him to. The trial judge had accepted his good faith, but had held that the purpose of a restraint of trade injunction is not just to stop deliberate disclosure of confidential information. The judge had held that it may be difficult to differentiate precisely between what is and is not confidential and it is also impossible for the first employer to monitor what the ex-employee is doing in his new job so as to detect whether an innocent breach has occurred. The Court of Appeal upheld the grant of an injunction in that case (see on this particular point, paragraphs 79, 85-87 of the judgment).
63. In *Office Angels v Rainer-Thomas* [1991] IRLR 214 the defendants worked for an employment agency. Their contracts of employment contained six-month non-solicitation covenants and six-month covenants against being involved in an employment agency within a 1000 metre radius of the branch at which they had worked. The non-compete covenant was expressed to be to protect the employer’s goodwill in connection with its ‘clients’. Sir Christopher Slade, with whom the other members of this Court agreed, held at paragraphs 39, 40 and 43 that where an employer expressly identifies the interest which a clause is designed to protect, he cannot seek to justify it by reference to a different interest. In paragraphs 49 and 50, he said that in considering the reasonableness of a covenant, the court may ask whether a covenant narrower than the covenant at issue would have given the plaintiff the protection to which it was entitled.
64. In paragraph 54 Sir Christopher Slade referred to *Scorer’s* case. He noted that a covenant against competition could be upheld for the reasons given in that case. It could also be upheld if a covenant against solicitation and dealing ‘would be of little help’. *Fitch v Dewes* [1921] 2 AC 158, a case about a solicitor’s managing clerk, was an example, as was a case in which there were recurring customers who were difficult to identify. He held that the covenant which prevented the defendants competing with the employment agency was unenforceable because it did little to protect the legitimate interest in that case, that was, the employer’s connection with its customers/clients.
65. *Rex Stewart Jeffries Parker Ginsberg v Parker* [1988] IRLR 483 concerned an 18-month restriction on competition imposed on a joint managing director of an advertising

agency. In paragraph 41, Glidewell LJ, with whom Sir Roualeyn Cumming-Bruce agreed, said, when considering whether the covenant lasted too long, that whether a provision was reasonable to protect an employer's interests was 'a matter of impression'. The judge had been entitled to decide that, given the defendant's seniority, 18 months was not too long.

66. Ms Bone relied on a statement by Lord Cairns LC in *Doherty v Allman* (1878) 3 App Cas 709 at p 720:

'If parties, for valuable consideration, with their eyes open, contract that a particular thing should not be done, all that a Court of Equity has to do is say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such a case the injunction does nothing more than give the sanction of the court to that which is already the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves.'

67. Nevertheless, there is a residual discretion to refuse such an injunction where some particular hardship would be caused to the defendant by the enforcement of the covenant although no damage would be caused to the applicant if there were no enforcement: see the cases referred to by Sir Colin Rimer in paragraphs 71 and 72 of the *Dyson* case, and his observations in paragraphs 73-75. Certainly, after a trial, prima facie the employer is entitled to an injunction, and the burden is on the defendant to persuade the court that an injunction should not be granted.

The judgment

68. The Judge noted the principles stated in *American Cyanamid*. The claimant must show that there is a serious issue to be tried, that damages are an inadequate remedy, and that the balance of convenience favours the grant of an injunction (paragraph 20). That approach was qualified in cases in which the effect of a grant of interim relief would be to give a substantial part of any relief to which the claimant would be entitled at trial. In such a case, the court may assess the claimant's likely prospects of success at trial (*Lansing Linde v Kerr* [1991] 1 WLR 251 at p 258B-C per Staughton LJ) (paragraph 21).
69. A key issue at trial would be whether clause 17 would be an unreasonable restraint of trade and unenforceable, in whole, or in part, for that reason (paragraph 22). There was clearly a serious issue to be tried. There were two difficulties with the submission that there was no evidence of any breach by R of clause 17. There were, at least, grounds for concern. There was a risk that R was 'in breach of obligations owed to [A] simply in performing his duties for [SNU]' (paragraph 23). If SNU was a competitor of A's, it seemed that, while the Judge was not making any final decisions at that stage, if it was right that R was going to work for SNU and 'in the same area of software as is comprised within [A's] business' it seemed 'more or less inevitable' that R would be in breach of, at least, clause 17.1.c of the Contract (paragraph 24).
70. The Judge was not making any final decisions. Nothing he said would bind the trial judge. He was only making 'some assessment', and not in 'in-depth analysis' which,

without a pleaded case, was difficult to do (paragraph 25). The subclauses of clause 17.1 were ‘very widely drafted’, in particular subclause 17.1.c. In the Judge’s view, the critical point was that clause 17.1.c was ‘likely to prevent [R] from being able to work for anyone in this particular market for the prescribed period of 12 months. In those circumstances it seems to me that the burden will lie upon [A] to demonstrate at trial that a restriction of this kind is reasonable by reference to matters as they stood either when [the Contract] was entered into, or if [A] is right on this point, at the time when [the Contract] came to be amended’. He summarised A’s argument, based on clause 17.2.c, that R would be entitled to be involved in a business concern provided that the duties or work ‘shall relate solely to services or activities of a kind which [R] was not concerned with to a material extent in the 12 months before termination’. He accepted that argument (paragraph 26).

71. In paragraph 27 he noted an argument that SNU was a large company which operated in various areas of the software market. For that reason, it would be possible for R to go and work in other areas of the software market. That was a ‘somewhat unrealistic submission’ as this was a niche area of the market. The parties could not agree how many companies operated in the market, but ‘given that it is a niche market and given that [R] has made his living and, as I understand it, continues to make his living in this particular market, it strikes me that it would, at the very least, be extremely difficult for [R] to transfer to another area of the software market and find alternative employment. It seems to me also that [R] is likely to be most marketable ... in this area of the software market and, as I have said, it seems to me that the effect of Clause 17.1.c is to operate as a complete ban on [R] working in this area of the software market for a period of 12 months. It seems to me that that could quite easily translate into a period of 12 months’ unemployment’ (paragraph 27).
72. Whether the correct viewpoint was 2015 or 2020 did not matter. Clause 17.1.c was always likely to have the effect of, at the very least, severely restricting [R’s] ability to find new employment if he subsequently wished to join another software company to which his skills and experience would render him marketable’ (paragraph 28). It seemed to the Judge that, as matters stood, and on the basis of the evidence, A ‘may have some difficulty in demonstrating at trial that the very wide restrictions in clause 17.1.c, at least, are, in their entirety, reasonable’ (paragraph 29). A’s prospects of success at trial in enforcing clause 17.1.c were not ‘that good’ (paragraph 30).
73. In paragraphs 31 and 32, the Judge accepted that damages would not, or might not, be an adequate remedy for A. There was also a risk that R would not be good for an award of damages. He added that ‘the point... cut both ways’, as if an injunction were wrongly granted, it might be difficult adequately to compensate R for his losses.
74. He considered the balance of convenience in paragraphs 33-39. There was a risk, if any injunction was granted, that A would not be able to work until August 2022. ‘That strikes me as an unreasonable result’. Both sides could suffer loss for which it would be difficult to compensate them (paragraph 33). He referred to the injunction against the disclosure of confidential information in paragraphs 34-35. The definition of confidential information was too wide. In paragraph 36, he considered delay. He accepted R’s argument that there had been ‘something of a delay between the initial exchanges of correspondence between the parties at the beginning of August this year’ and when the application was ‘finally’ made. ‘But it does not seem to me that there has

in this case been the sort of delay which would disqualify [R] from an award of interim injunctive relief’.

75. There was a ‘balance which needs to be struck fairly between [A] and [R]’. It seemed to him right in principle that there should be a grant of relief to A. It would be ‘both unfair and unjust, and, indeed, wrong, to deny’ [A] interim relief. The terms of injunction needed to be modified. The definition of confidential information needed to be cut back to make it less ‘oppressive’. It seemed to the Judge that the injunction should not contain the restriction at paragraph 2(c) of the draft order, ‘which I understand from Mr Sheppard to be the critical restriction in terms of this injunction having the *consequence that [R] becomes unemployed*’ (paragraph 37), my emphasis. The Judge rejected R’s submission that the definition of ‘Restricted Customer’ was too wide. It was sufficiently qualified by the phrase ‘with whom [R] had contact or about whom [R] became aware or informed in the course of his employment with [A]’ (paragraph 39).
76. The Judge was satisfied by the cross-undertaking in damages (paragraph 40).
77. The Judge considered the application for information in paragraph 42. He did not understand that R objected in principle to making an affidavit giving information. A lot of what was sought depended on the definition of confidential information. Subject to that, R should be required to provide information. What was sought was reasonable at this stage. He referred to paragraph 17 of the judgment of Mackay J in *Aon Limited v JCT Reinsurance Brokers Limited* [2009] EWHC 3448 (QB). Subject to minor amendment, he made an order for the preservation of documents in the terms sought by A (paragraphs 43-45).
78. In paragraphs 48-53, he made a ‘brief ruling’ on confidential information.
79. On 11 November 2021, the Judge’s clerk sent an email to the parties. The Judge’s comments included that he did not intend paragraph 6 of his order to require R to disclose his current contract of employment or job description. His principal concern was that this was a question on which SNU might wish to be heard. He did not intend to prevent A from renewing its application for those documents. He also wished to give R a further opportunity of considering his position on this question. The liberty to apply in paragraph 6 was confined to a renewal of that application and was for the benefit of A only. There was no time limit. It was for A to decide whether, and if so, when, to renew the application. There was also a general liberty to apply in the order.

Discussion

Did the Judge err in law in his approach to the enforceability of the non-compete covenant?

80. Grounds i., ii., and iv. in particular are a fundamental attack on the Judge’s legal analysis. If they are well founded, the Judge’s decision on the enforceability of the non-compete covenant cannot stand. I will therefore consider them first.
81. Mr Sheppard vigorously argued that the Judge is experienced in this field, was directed by the submissions of the parties to the right approach and, in any event, is well aware of the relevant tests. He invited this Court to take it as read that the Judge must have asked, and did ask, himself the right questions before he concluded that the A’s

prospects of success at trial in showing that the non-compete covenant was enforceable were ‘not that good’.

82. In considering that submission, I make due allowance for the fact that the Judge gave an ex tempore judgment on the day of the hearing, and for the pressures which giving judgment at the end of the contested application for an injunction of this kind do impose on a judge. It is an inevitable consequence of those pressures that the structure, clarity and polish of a judgment can suffer. I must also ‘resist the temptation to subvert the principle that [I] should not substitute [my] own discretion for that of the judge by a narrow textual analysis which enables [me] to claim that he misdirected himself’ (*Pigłowska v Pigłowski* [1999] 1 WLR 1360 at p 1372, per Lord Hoffmann).
83. The starting point is the Judge’s description of A’s case, in paragraph 5. It was that R ‘is, in his work for [SNU], in multiple breach of the PTRs...[A] seeks the grant of an injunction to restrain what it says are these unlawful activities...’ In another case it might be significant that, except to the limited extent that I have already indicated, the Judge did not decide what, on its true construction, the covenant meant. That can be explained in this case by the fact that, at least by the time the appeal reached this Court, there was no relevant dispute about the construction of the covenant. The parties agreed that the effect of the non-compete clause was, in short, to stop R from working in the field of facilities management software for the period of the restraint.
84. It is clear that the Judge asked himself whether the non-compete covenant was ‘reasonable’ or not. He did so in paragraph 22: ‘...a key issue in the trial...will be whether Clause 17, in some part or all, constitutes an unreasonable restraint of trade and is for that reason unenforceable either in whole or in part’. In paragraph 26 he said that the burden was on A to show at trial ‘that a restriction of this kind is reasonable by reference to matters as they stood’, either when the contract of employment was first made, or when it was amended. In paragraph 28, he considered what was the right date for assessing the ‘reasonableness’ of the non-compete covenant. He said in paragraph 29 that it seemed to him that A ‘may have some difficulty in demonstrating that the very wide restrictions in clause 17.1c, at least, are, in their entirety, reasonable’. It is also clear from a number of passages in the judgment that the Judge understood that the reasonableness of the non-compete covenant was in some way connected with its width or extent (see paragraphs 29 and 30, in particular).
85. The Judge referred to three authorities. None of those authorities concerns the test for establishing whether a covenant is enforceable. So the Judge did not incorporate the correct test by reference. The question then is whether by mentioning the reasonableness of, and/or the width of the restrictions the Judge did enough to show that he took the right approach. The references to reasonableness and to the width of the restrictions are not enough, on their own, to persuade me that the Judge did take the right approach. They do not show by reference to what criterion or criteria the Judge assessed the reasonableness of the restriction.
86. He might, nevertheless, have taken into account factors which do show that, even if he did not refer to the test, he was, nevertheless, applying it. The next question, then, is what the Judge expressly took into account against the enforcement of the non-compete covenant. There is one factor only. That factor, which he described in various different ways in the judgment, was the likely effect on R’s employment prospects. He took it

into account both in his assessment of the validity of the covenant, and in his assessment of the balance of convenience.

87. There are at least nine examples
- i. ‘The critical point here seems to me to be this. It seems to me that [the non-compete covenant] is likely to prevent [R] from being able to work for anyone in this particular market for the prescribed period of 12 months’ (paragraph 26).
 - ii. ‘...it strikes me that it would, at the very least, be extremely difficult for [A] to transfer to another area of the software market and find alternative employment’ (paragraph 27).
 - iii. ‘It seems to me that the effect of [the non-compete covenant] is to operate as a complete ban on [R] working in this area of the software market...’ (ibid).
 - iv. ‘It seems to me that that could quite easily translate into a period of 12 months’ unemployment’ (ibid).
 - v. ‘It strikes me that [the non-compete covenant] was always likely to have the effect of, at the least, severely restricting [R’s] ability to find new employment if he subsequently wished to join another software company to which his skills and experience would render him marketable’ (paragraph 28).
 - vi. R’s evidence ‘is to the effect that’ if an injunction is granted enforcing the non-compete covenant R ‘will no longer be able to work and that will cause him very considerable financial hardship’ (paragraph 32).
 - vii. If A were granted all the relief it sought ‘that will leave [R], it seems to me at the very least, at the risk of being unable to work until August of next year. That strikes me as an unreasonable result’ (paragraph 33).
 - viii. ‘...if [A] was to suffer unemployment and serious financial hardship as a result of the grant of an interim injunction, that too, might be difficult to compensate adequately’ (ibid).
 - ix. ‘It also seems to me that the interim injunction should not contain [the non-compete covenant], which I understand from Mr Sheppard to be the critical restriction in terms of this injunction having the consequence that [A] becomes unemployed’ (paragraph 37).
88. A further question is what factors the Judge took into account in favour of the enforcement of the non-compete covenant. He appears to have accepted that there was sufficient evidence of a breach of the PTRs.
- i. It was not possible to say that there was no evidence that R had breached the Contract. The pre-action correspondence gave grounds for concern whether it was an ‘inevitable consequence’ of R’s employment by SNU that he ‘will, at least in some respects, be in breach of his obligations to [A]...’ (paragraph 23).
 - ii. ‘...if one looks at what [A] understands [R] to be doing at [SNU], it would be a reasonable inference that there is at least some risk of [R] being in breach of his obligations owed to [A] simply in performing his duties for SNU’ (ibid).
 - iii. Although the Judge was not making a final decision about this, ‘as far as one can see...it seems more or less inevitable, if it is right that [SNU] is a competitor of [A], that [R] going [sic] to work for [SNU] and

working in the same area of software as is comprised within [A's] business, would put [R] in breach at least of [the non-compete covenant]' (paragraph 24).

89. It is also significant that the Judge took no account at all of A's position, or of its arguments in support of the enforceability of the covenant, when he considered its validity. He took A's position into account, rather, and to a limited extent, when, in accordance with *American Cyanamid*, he considered the adequacy of damages as a remedy, and the balance of convenience.
- i. He accepted that damages would not be an adequate remedy for A. 'I can see, if there are serious breaches of [the Contract]...in this case, it might well be the case that [A] could suffer very serious damage to its business and that damage might be of a sort which could not easily be remedied by an award of damages' (paragraph 31).
 - ii. He accepted A's submission, 'on the basis of the authorities, that in cases of this kind, it is injunctive relief which is really required by a company...which is seeking to protect its business interests and its confidential information and trade secrets' (ibid).
 - iii. In paragraph 37, he held that it was 'right in principle that there should be the grant of interim injunctive relief to [A]. It seems to me that it would be both unfair and unjust, and indeed, wrong, to deny [A] the grant of interim injunctive relief', although not in terms of the draft order.
90. Equally significantly, the Judge accepted four important points about confidential information. These were relevant to his analysis of the enforceability of the non-compete covenant, but do not feature at all in that analysis.
- i. He accepted that A was 'particularly concerned to protect its confidential information' (paragraph 49).
 - ii. Confidential information contained in a person's head can be protected by an order, just as much as confidential information contained in a document (paragraphs 49 and 50).
 - iii. He also accepted that he could 'see that potentially there is going to be a hole in the system of protection if confidential information does not extend to that which is in the mind of [R]' (ibid).
 - iv. The Judge's extensive consideration of the definition of 'confidential information' in the proposed order shows that the Judge also realised that a precise definition of 'confidential information' was not straightforward in this case.
91. I cannot accept Mr Sheppard's submission that it can safely be inferred that the Judge took the right approach. I am not satisfied by any material in the judgment that the Judge did analyse the case in the way in which the parties agreed that he should have done. He did not expressly apply the right test to the enforceability of the non-compete covenant. The principal factor he took into account against the grant of an injunction was that if the non-compete covenant was enforced, A would not be able to work for the period of the restraint. There is no authority which supports that approach. Even R did not argue that this factor was relevant to the enforceability of the covenant (see paragraph 55.iii, above). I therefore accept the submission which underlies grounds i.,

ii and iv. It follows that the Judge's decision on the enforceability of the non-compete covenant cannot stand.

Would A be more likely than not to succeed at trial in showing that the non-compete covenant is enforceable?

92. I have indicated in paragraph 7, above, that I do not consider, on the facts, that this Court should enforce the non-compete covenant now (and see further, paragraph 99, below). If there are other similar covenants, it is much better that, if a view about their validity is to be reached, it should be a definitive view based on findings of fact made after a speedy trial. I do not, therefore, consider that it would be appropriate for me to express a preliminary view about the validity of the covenant.

The remaining grounds of appeal

93. I have, in substance, either considered grounds i.-vii, or decided that it would not be appropriate for me to express a view on them. In the light of that, the other grounds are academic. I should say something about grounds viii. and x, nevertheless.

94. Ms Bone referred us to two first instance authorities about restrictive covenants in which the judge held that damages would be an adequate remedy for the employee. Those cases do not establish a rule of law to that effect. I consider, in principle, that restraining an employee from taking up a new employment opportunity for many months may well cause him damage that cannot be compensated in money alone, if it turns out that at trial that the covenant is not enforceable. Although this case may be on the borderline, I consider that it was open to the Judge to hold that damages would not be an adequate remedy for R.

95. I consider that the Judge was entitled to refuse to order the disclosure to A of R's new contract. He was careful to make clear that his order did not prevent A from applying for disclosure in the future. It is, in any event, unusual for the court to order, before standard disclosure, the disclosure of a particular document which would be disclosed, in any event, on standard disclosure.

A further point

96. Ms Bone submitted, relying on *Doherty v Allman*, that if the covenant was enforceable, A was ordinarily entitled to an injunction subject to the court's residual discretion where exceptional circumstances applied. That is right, after a trial, when the enforceability of the covenant will have been established definitively: see paragraph 67, above. That submission has less force at the interlocutory stage, as, at that stage, the court is only able to make a preliminary assessment of the enforceability of the covenant.

Should this Court grant an injunction now?

97. There are two points, in particular, which are relevant in this case.

98. The first is whether the delay to which the Judge referred in paragraph 36 was or is a reason for withholding relief, as is argued in the RN. It would not have been reasonable for A to take any action until it knew that R had in fact taken a job with SNU. R was evasive about this, and A did not know that he had done so until the beginning of September. It was also reasonable for A to try to reach agreement in correspondence

before taking proceedings; indeed, a large measure of agreement was eventually reached, but not until the very last moment. I consider, on balance, that the conclusion which the Judge reached on this question was open to him on these facts, and I would not have interfered with it.

99. The second is that R has now been in post for over 7 months, and the non-compete covenant has only about four months left to run. I consider that it would be contrary to the balance of convenience for this Court to enforce the non-compete covenant now. It seems to me likely that much, if not all, of the damage which R's employment by SNU might have caused to A's legitimate interests has already been caused. I also consider that, from the perspective of this Court, the status quo for the purposes of the balance of convenience is now that R is employed by A, and has been for several months.

Conclusion

100. For those reasons, while the Judge's reasoning about the enforceability of the non-compete cannot stand, I would, now, uphold the Judge's refusal to enforce the non-compete covenant, albeit for reasons which differ from his.

Lord Justice Nugee

101. I am very grateful to Elisabeth Laing LJ and Bean LJ for their respective judgments which I have read in draft. I agree with both of them. Insofar as they differ on the effect of the delay at the time of the hearing before the Judge, I do not think it is necessary for me to express a view: what is determinative of the appeal is that by the time of the hearing before this Court the balance of convenience points firmly away from granting an injunction.
102. It is not in those circumstances necessary for me to add anything, but I would just like to draw attention to two points that emerge from their judgments. First, an application for an interlocutory injunction is not the appropriate occasion to expect the Court to give any definitive answer to the question whether a covenant is enforceable or not. Ever since the seminal decision in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, it has been established law that the Court should not usually seek to resolve the substantive issues on such an application. At the first stage of the analysis the question is whether there is a serious issue to be tried. This is not a demanding test, and it really only serves to exclude the case where the claim is frivolous or vexatious, or otherwise demonstrably bad. If a restrictive covenant is clearly wider than is reasonably necessary for the protection of the employer's legitimate interests, then the Court can so hold and refuse an injunction, but prolonged examination of the merits at the interlocutory stage is not appropriate and in many cases of this type, as the Judge rightly found here, there will be at least a serious issue to be tried.
103. It is also well established however that at the third stage of the analysis, when considering the balance of convenience, the Court may, in cases of this type, undertake some assessment of the merits: *Lansing Linde v Kerr* [1991] 1 WLR 251 at 258C per Staughton LJ. But I emphasise, as Staughton LJ did, that this is merely "some assessment" or as Bean LJ refers to below, "a preliminary view". The overall question at the third stage is what is the most just and appropriate way to hold the ring pending trial. Since in many cases there may not be a trial until much of the putative period of restraint has expired, or indeed at all, the Court may take into account such a

preliminary view of the merits, particularly perhaps if it has serious doubts about the validity of the covenant. But it remains just that, not a definitive ruling, and it is only one of the factors that goes into the exercise of the discretion whether to grant an interlocutory injunction or not.

104. If therefore the employer wishes to establish the reasonableness and validity of a covenant, the only way to do so is to take the matter forward to trial. As both Elisabeth Laing LJ and Bean LJ refer to, it is possible in an appropriate case to make arrangements for a speedy trial, and some of the reported cases before us show that the Court can in suitable cases try claims such as these very quickly. A successful application for an interlocutory injunction by contrast does not establish that a covenant is in fact valid; nor does our decision in the present case entail that the covenant in question is not.
105. The second – and related – point which I specifically wish to associate myself with is that *Doherty v Allman* (1878) 3 App Cas 709 has no relevance to an application for an interlocutory injunction. That principle applies where it has been established that a covenant is valid; in such a case the normal reaction of the Court is to enforce by injunction the covenant that it has found to be valid and enforceable. But, precisely because at the interlocutory stage the Court is not determining whether the covenant is valid or not, but assessing where in its discretion the balance of convenience lies, the principle in *Doherty v Allman* has no application.
106. In the present case, I agree that the appeal should be dismissed for the reasons that Elisabeth Laing LJ and Bean LJ give.

Lord Justice Bean :

107. The substantive law on the validity of restraint of trade covenants entered into by an employee derives from the decisions of the House of Lords in *Mason v Provident Clothing and Supply Limited* [1913] AC 724 and *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688. There are some tricky areas such as severability, and covenants against poaching of staff have become recognised as a legitimate category, but the fundamentals have remained unchanged. They are conveniently summarised in, for example, the judgments of Sir Christopher Slade in *Office Angels Ltd v Rainer-Thomas* [1991] IRLR 214 and of Sir Bernard Rix in *Coppage v Safety Net Security Ltd* [2013] EWCA Civ 1176.
108. In particular, it remains the case that, as Lord Parker of Waddington said in *Herbert Morris v Saxelby* at page 709 F:-

“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 utilize information confidentially obtained.”

109. There are two ways of dealing with injunction applications of this kind. One is to order a very speedy trial (that is to say one taking place within weeks rather than months) and to make an interim order which will hold the ring for the short period pending that trial. But trials are very expensive, and the costs may be beyond the resources of one or even both parties. Sometimes the judge on the interlocutory application is in as good a position as a trial judge would be to assess the validity of the covenant. In a high proportion of cases, including this one, following the judge's decision on the interlocutory injunction application, time for service of pleadings is extended by agreement and the claim at first instance proceeds no further.
110. Where it is clear that there will be no trial until the period of the covenant has expired or nearly expired the judge may be asked to form a preliminary view on the merits of the claim. Such has been the approach taken in most cases since the decision of this court in *Lansing Linde v Kerr* [1991] 1 WLR 251. This preliminary view is a consideration to be factored into the balance of convenience under the third stage of *American Cyanamid v Ethicon* [1975] AC 306.
111. In this case it is not disputed that there is a serious question to be tried as to the validity or otherwise of the covenant against competition. But, with respect to Ms Bone, who put the case with great force and clarity, it is quite unrealistic to argue that (since the Claimants have the resources to honour the cross-undertaking) damages would be an adequate remedy for the Defendant if an injunction against competition was granted at the interlocutory stage, but was proved at trial to have been an unenforceable restraint of trade. Except in cases of very wealthy defendants, or where the claimant employer is offering paid garden leave for the whole period of the restraint, this argument has no traction. Mr Gilligan's evidence is that he has a wife and child, a mortgage and other family commitments. It is by no means clear that his current employers would be able and willing to transfer him to work which had no connection with facilities management software; indeed it would be risky for them to do so in the face of a non-competition injunction breach of which would be a contempt of court. The likely effect of such an injunction would be to deprive him of his income until and unless he can find a new job.
112. The other argument of Ms Bone which seems to be unsustainable is her attempt to rely on *Doherty v Allman* [1878] 3 App. Cas 709. In that well known case the House of Lords decided that where a negative covenant affecting land has been found to be valid *after a trial* the claimant is generally entitled to have it enforced by injunction rather than being confined to the alternative remedy of damages in lieu. At that stage, as Lord Cairns LC said, it is no longer a question of where the balance of convenience lies. But that has nothing to do with an application for an interlocutory injunction on the *American Cyanamid* basis.
113. Finally, there is the issue of delay. I would be the last person to encourage the approach of those litigators who fire off several aggressive letters per day, whether seeking to demonstrate their *machismo*, run up costs or simply batter the opposition into a state of exhaustion. But the Claimants' approach in this case seems to me to have gone too far in the opposite direction. Mr Gilligan joined ServiceNow on 1 September 2021. The very next day this came to Planon's attention. The letter before action was not sent until 20 September, and proceedings were not issued until 21 October. By the time of the hearing before the judge on 5 November Mr Gilligan had been working for ServiceNow

for over two months. By the time of the hearing before us that period had become seven months.

114. The significance of this is not that the Claimants deserve censure for proceeding at such a stately pace. Rather, it is that if Mr Gilligan's new job posed as severe a threat to Planon's protectable trade secrets or customer connection as the Claimants sought to argue, the damage would surely have been done in the first few days, and certainly well before the lapse of two months. It is important, too, to bear in mind the observation of Lord Diplock in *Cyanamid* ([1975] AC 396 at 408F) that "where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*". The judge would in my view have been justified in refusing an interlocutory injunction on this additional ground.
115. I too would dismiss this appeal.