[2020] EWHC 1360 (Ch)

CLAIM NO: BL-2020-BHM-000023

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN BIRMINGHAM

BUSINESS LIST (ChD)

HIS HONOUR JUDGE SIMON BARKER QC

BETWEEN

(1) C WZRD LIMITED

(2) WZRD GROUP LIMITED

Claimants

-and-

(1) TORAY KORTAN

(2) THE TRADING WIZRD Ltd

Defendants

Representation
Mr Avtar Khangure QC instructed by Sydney Mitchell LLP for the Claimants
Mr James Palmer instructed by Howman Solicitors for the Defendants

Hearing : 28 April 2020
Judgment : 29 May 2020

JUDGMENT

I direct that pursuant to CPR 39APD6 paragraph 6.1 no tape recording shall be made of this judgment and that copies of this version shall stand as authentic and be treated as the official transcript.

JUDGE SIMON BARKER QC :

Introduction

1 This judgment concerns an interim application by the Claimants (respectively 'C1' and 'C2', collectively 'Cs') for an injunction against the First and Second Defendants (respectively 'D1' and 'D2', collectively 'Ds').

2 C1 was incorporated on 29.5.19 and C2 on 28.8.19. C1 is a wholly owned subsidiary of C2. C2's shares are held 45% by D1, 45% by Dilan Sharma ('DS'), and 10% by Oscar Hernandez ('OH'). DS arranged for the incorporation or acquisition of Cs, and DS, D1 and OH became directors of both companies. C1 was formed to provide an online platform for market analysis of, online courses about, and an online discussion forum focussed on, cryptocurrencies. D1 had previous experience of providing market analysis and courses and online discussion in this field but had fallen out with his previous business partners. D1 came to Cs with an online following. DS was to provide the financial backing. Originally the venture was to be 50:50 between DS and D1, however neither had the necessary technology skills. DS recruited OH to provide those skills and the respective interests were adjusted to 45:45:10. OH's task was to create or oversee the creation of a new online platform to enter the market. DS's evidence is that circa £250k was invested in Cs. The business model included selling lifetime 'membership' for some £500-£600.

3 There were delays in setting up the online platform, not caused or contributed to by D1. C1 eventually commenced trading on 1.12.19. During the development period D1 introduced his followers to Cs and transferred his registered trademarks (comprising or including a wizard's hat design) to Cs. In the first month or so of trading more than 1,200 members signed up with C1 and the revenue appears to have been in the order of £720k to £750k.

4 By Christmas 2019 D1 had become disillusioned and by early 2020 relations between DS and D1 had broken down. On 14.1.20 D1 downloaded a copy of Cs' database of members and contacts. On 27.1.20 D1 formed D2 intending to trade in competition with Cs. It is clear from the evidence that D1 downloaded Cs' database for his own purposes. From about 11.2.20 D1 has sought to promote himself independently of and in competition with Cs. D1 has also made online postings encouraging Cs' members to seek subscription refunds and otherwise disparaging Cs and DS. There is an enormous volume of screenshot and similar material of disparaging communications by or to each of D1 and DS in the hearing bundle and as added to immediately before and

after[1] the hearing. The vast majority of the screenshot and similar material is unnecessary and disproportionate for present purposes and, probably, also for a trial. DS's conduct has not all been open and straightforward, for example in relation to the opening of and mandate for Cs' bank account with Lloyds Bank plc, but D1's conduct in relation to the database had no justification.

5 From January 2020 onwards Cs' solicitors were corresponding with D1 about his breaches of duty. In response to a request from D1 to resign as a director, Cs' solicitors made clear that Cs' position was that D1 could resign, but on terms they specified. On 12.3.20 Cs' solicitor wrote a letter before action to Ds. The letter before action was lengthy and set out both Cs' detailed complaints and an explanation of the legal basis for the complaints. It attached appendices including a 3 page, 12 paragraph, detailed undertaking required of D1. The detailed undertaking included that D1 (1) would not solicit and/or otherwise deal with any individual, company or business on the database for 18 months, (2) would not challenge Cs' rights to the trademarks or use "WZRD" or "WIZRD" in connection with any business or brand, (3) would forego any monies that might otherwise be due to him from Cs as compensation for his wrongdoing (thereby all admitted), and (4) would pay £30k to Cs' solicitors within 7 days as a contribution towards Cs' costs. D1 did not accept the terms specified as conditions of resignation or provide the undertakings sought. D1 may then have been unaware that he could simply resign as a director of Cs.

6 Cs issued proceedings on 25.3.20 for breach of statutory and fiduciary duty as a director, infringement of trade mark, and passing off. By the Claim Form, Cs seek various forms of monetary relief and quantify their claimed loss and damage or accountable profit at £1million. At the same time Cs issued an application for interim injunctive relief.

7 On 25.3.20 I made an order giving directions for a remote hearing of the interim application on 31.3.20. At that hearing, following discussions between the parties' counsel before and during the hearing, Ds gave undertakings, as a holding measure, in or substantially in the form of the injunctive relief sought pending Ds' consideration of the application, the preparation of evidence in answer and reply, and an effective hearing of the application. A return date was agreed for 17.4.20. This proved over-ambitious and the effective hearing was relisted for 28.4.20 for 1 day.

8 There is no formal agreement between D1 and Cs whether as a director, employee or shareholder. Thus, D1 is under no contractual restraints as to future business activity. No doubt advised by his solicitors and counsel, D1 resigned as a director of Cs on 15.4.20.

[1] I have informed Cs' and Ds' solicitors that I shall not have regard to emails and attached material received after the hearing.

9 Cs' application sought injunctive relief under four heads : (1) an interim injunction until trial or further order to restrain Ds future activities, including from competing with Cs; (2) an injunction until trial or further order to restrain Ds from using a wide range of information defined as confidential information with orders for delivery up of the database; (3) an injunction until trial or further order to restrain D2 from passing itself off as associated with Cs; and, (4) an injunction until trial or further order to restrain Ds from infringing Cs' registered trademarks. In the event, continuing undertakings were agreed on or before 28.4.20 in respect of (2) the confidential information and database, (3) passing off, and (4) trademarks. What was not agreed was (1) the injunction restraining Ds' future activities.

10 The form of the injunction sought is expressed as follows :

> 1. The First Defendant must not by himself, his agent, servant or otherwise, howsoever carry on with being employed or otherwise engaged by all[2] concerned or interested in any capacity (whether for reward or otherwise) or provide any commercial or any technical advice to, or in any way assist, the Second Defendant in the supply, organisation or development of the business of the Second Defendant.
>
> 2. The First Defendant must not:
>
> a) Whether alone or jointly with or as manager, agent, consultant or employee of any person, firm or company, directly or indirectly, carry on or be engaged in any activity or business within the United Kingdom or Europe which shall be in competition with the business of the Claimants;
>
> b) Solicit or endeavour to entice away from the Claimants' business or custom or a Restricted Customer with a view to providing goods or services in competition with any Restricted Business;
>
> c) Solicit or endeavour to entice away from the Claimants' business or custom of a Prospective Customer, with a view to providing goods or services in competition with any Restricted Business;
>
> d) Offer to employ or engage or otherwise endeavour to entice away from the Claimants any Restricted Employee in the course of any business concerned which is in competition with the Restricted Business;
>
> e) Interfere endeavour to interfere with the supply of goods and/or services by any Restricted Supplier to the Claimants.
>
> 6. … [T]he Defendants must not either by their own account or through others, whether directly or indirectly, and whether by themselves or through their servants, officers or agents, in any way cause, induce, encourage or permit any third party to do anything that would be in breach of paragraphs 1 [and 2] of this Order.

[2] Should be 'or'

> **Restricted Business** means the supply, organisation and development of online education services in the sector of cryptocurrency and/or market analysis in the cryptocurrency sector.
>
> **Restricted Customer** means any person, firm, company or other organisation who, at any time was a customer or in the habit of dealing with the Claimants.
>
> **Prospective Customer** means any person, firm, company or other organisation with whom the Claimants may deal
>
> **Restricted Employee** means any person who was employed as an employee of the Claimants who could materially damage interests of the Claimants if he/she became employee in any competing business.
>
> **Restricted Supplier** means any person, firm, company or other organisation who, supplied goods and/or services to the Claimants including, but not limited to any individual who provided services to the Claimants by way of a Consultancy Agreement.

11 In the case summary filed for the application, Cs describe the purpose of the injunctive relief as being to prevent Ds from continuing to trade at Cs' expense and to Cs' detriment. As is apparent the injunction sought is cast in extremely wide terms. As I understand it, D1 has no intention of trading through D2; however, Cs do not trust D1 and maintained their application for relief as set out at paragraph 1. I must therefore form a view on that aspect of the application. Assuming that D2 does not trade, the real issue and argument on the injunction concerns the terms of paragraph 2(a)-(e). The additional restraint of inducing sought at paragraph 6[3] logically stands or falls with the grant or refusal of an injunction under either or both of paragraphs 1 and 2.

12 It is common ground that the general principles applicable to the grant or refusal of an interim injunction, familiar as the American Cyanamid principles, apply in this case. Mr Khangure QC, Cs' counsel, submitted that, although the draft order accompanying the application notice seeks an interim injunction for the usual period, until trial or further order in the meantime, there is a special factor in this case in that the appropriate term of a suitable injunction will expire before the case is ready for trial or a trial can be accommodated. Mr Khangure QC submitted that a 'springboard' injunction is the correct form of relief in this case and that the appropriate period is 6 months.

13 The familiar case where a springboard injunction is sought is where an ex-employee misappropriates trade secrets or confidential information (going beyond the information which the ex-employee had absorbed and come to know in the ordinary course of conducting day to day duties), commonly nowadays a database or an electronic or internet based document, such as a schedule with details of customers and/or suppliers and/or pricing structures,

[3] If granted I would substitute 'authorise' for 'permit'.

with a view to securing an unfair advantage in establishing or participating in a rival business. The point of the springboard injunction is to neutralise the timing advantage which the ex-employee seeks to gain and protect the employer from unfair competition. As Mr Khangure QC pointed out, similar principles apply to directors.

14 In this case Cs wish to have D1 kept out of the marketplace for a period of time estimated by Cs as sufficient for Cs to overcome (1) the double blow of (a) losing D1's services and (b) recovering from the damage allegedly done by D1 in criticising Cs' business and encouraging members to press for refunds, and, in addition, (2) re-establish their business.

Relevant principles

15 When considering whether to grant an interim injunction applying American Cyanamid principles the court is exercising a discretion in relation to what is intended to be a temporary remedy. The evidence is untested and incomplete and not, at this stage, for determination. The first question is whether there is a serious question to be tried? If so, the next question is whether damages would be an adequate remedy for the applicant? There are flip-side considerations at this point; first, if an injunction is wrongly granted, would damages be an adequate remedy for the respondent and, secondly, if so, is the applicant able to give a satisfactory cross-undertaking in damages? If damages would not be an adequate remedy for either side, the court considers where the balance of justice lies. The relevant factors will be case specific. Where the factors are broadly evenly balanced the court will look to preserve the status quo ante. As a last resort, the relative strength of opposing disputed cases may be taken into account.

16 In this case as already noted, there is a claim for substantial monetary relief and on Cs' case the period sought for injunctive relief will expire before a trial can take place. In Lansing Linde Ltd v Kerr [1991] 1 WLR 251 the Court of Appeal held that, where the appropriate period of any injunction would expire before a trial could be held, it is appropriate to take the claimant's prospects of success into account when considering the balance of convenience. Staughton LJ observed that what is required is "some assessment" of a claimant's prospects of success and cautioned against trial by written evidence at the interim stage.

17 The foundation for the grant of injunctive relief in a springboard case is to prevent a person who has wrongfully obtained information in confidence from using it as a springboard for activities detrimental to the confider, see Terrapin Limited v Builders Supply Co (Hayes) Ltd and others [1960] RPC 128.

18 Mr Khangure QC referred to a useful summary of the purpose of a springboard injunction set out in Gee on Commercial Injunctions (6th Edn) at 2-027 :

> "Springboard relief is not intended to punish the defendant for wrongdoing. It is merely to provide fair and just, and proportionate protection against ongoing harm resulting from the wrongdoing, whilst that unlawful harm lasts. What is fair and just in any particular circumstances depends on (1) the effect of the unlawful acts upon the claimant; and (2) the extent to which the defendant has gained an illegitimate competitive advantage. The appropriate measure for the length of a Springboard injunction is the length of time that it would have taken the wrongdoer to achieve lawfully what he in fact has achieved unlawfully, relative to the claimant. Its purpose is to put the parties back into the position they would have been in had there not been the past misuse of confidential information or wrongdoing, through putting the defendant at a special disability for a period to ensure that the defendant does not obtain an unfair start over the claimant".

In this passage the key principles from a number of authorities are drawn together. However, it is also relevant and important to refer to those principles and their sources a little more fully. Before so doing, it is worth noting that (1) the purpose of any injunction granted is restorative not punitive; (2) the measure of protection is based on (a) the resultant effect of the wrongdoing on the claimant and (b) the unlawful advantage to the defendant; and, (3) the duration or longstop point is when the harm ceases to be ongoing.

19 In QBE Management Services (UK) Ltd v Dymoke and others [2012] EWHC 80 (QB), Haddon-Cave J reviewed the authorities and refined the key principles to 8 points : (1) the court has the power to grant an injunction; (2) the purpose is to prevent the defendant from taking unfair advantage, for example misuse of a database obtained in breach of fiduciary duty; (3) exercise of the power is not confined to misuse of confidential information but may apply to breaches of contractual or fiduciary duties; (4) the injunction must be sought and obtained while the unlawful advantage is still being enjoyed by the wrongdoer; (5) the injunction (a) should have the aim simply of restoring the parties to the competitive position they each set out to occupy and would have occupied but for the defendant's misconduct and (b) would not be fair and just if it had a more far reaching effect; (6) an injunction will not be granted where monetary relief would provide an adequate remedy to the claimant for the wrong done to it; (7) an injunction is not intended to punish the defendant for wrongdoing, its purpose is merely to provide fair and just protection for unlawful harm on an interim basis with regard being had to the effect on the claimant and the extent to which the defendant has gained an illegitimate competitive advantage; and, (8) the burden falls on the claimant to spell out the precise nature and period of the competitive advantage. In formulating these principles, for (5) and (6) Haddon-Cave J drew on the judgment of Sir Donald Nicholls V-C In Universal Thermosensors Ltd v Hibben and others [1992] 1 WLR 840 at p.855A-B

20 More recently still, in Forse and others v Secarma Ltd and others [2019] EWCA Civ 215 the Court of Appeal (by the Master of the Rolls at [34]) observed that where the outcome of the interim hearing effectively determines all or a

substantial part of the relief sought, the court must assess and take into account each side's case, both as regards liability and the duration of the unfair advantage, but, in so doing, must not conduct a mini trial. The court must keep in mind that disclosure will not have occurred and the witness evidence will be incomplete and untested by cross-examination.

21 It is also relevant to have regard to the duties imposed by law on a director both while in office and subsequently. By s.172 of the Companies Act 2006 ('the 2006 Act') a director is under a duty to act in good faith in the way in which he considers most likely to promote the success of the company. S.175 requires a director to avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. S.170(2)(a) continues the s.175 duty, after a director ceases to be such, as a duty to avoid conflicts of interest as regards the exploitation of any property, information or opportunity of which he became aware while a director.

22 As pointed out by Mr James Palmer, Ds' counsel, by reference to Attorney - General v Blake [1998] Ch 438 at p.453-4, the courts generally do not recognise the concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gives rise to it. Equity does not demand a duty of undivided loyalty from a former employee to his former employer and, absent a valid and enforceable contractual restraint, a former employee is free to set up in a competing business in close proximity to his former employer and deal with its former clients. Of course, and as conceded by Mr Palmer, the position of a director is somewhat different in that by statute a director's fiduciary duty to avoid certain conflicts of interest continues after vacation of office, namely in respect of any property, information and opportunity of which the director became aware while in office.

Relevant circumstances and counsels' submissions

23 It is important to start with as balanced a view of Cs as is presently available. There are 2 directors (DS and OH) and until 15.4.20 D1 was also a director. Cs have not at any time had any employees. DS has stated that £250k was invested in Cs over the period to the point at which D1 withdrew. Cs were start-up businesses with barely 1 month of established trading at the point of disintegration. C1 traded briefly and, for that brief period, very profitably, but there is no evidence, at least none before the court, to enable even a provisional view to be formed of the sustainability of Cs' business or the scope or quality of the service it in fact provided or was capable of providing.

24 As to the service, the evidence at present points to the value being reposed in a combination of some or all of D1's knowledge and following, Cs' database, Cs' functioning communications platforms, Cs' designs and tradenames registered as trademarks, and Cs' other assets in the form of cash balances. As to D1's

knowledge and following, D1 was at all times and is a free agent and these are instantly portable and, absent wrongdoing, could not be constrained by Cs or restrained by court order. As to Cs' database, its origins are in dispute - it may have been developed largely from D1's followers or it may have been compiled from online activities undertaken by Cs; that cannot be determined at present but its origin is not material at present because, in its compiled form as a directory for reaching some 22,000 people, it was and remains Cs' property. As to communications platforms, their functionality is unaffected by D1's conduct. As to the trade marks the position is similar to the database. As to Cs' other assets, there are significant cash balances with Cs' bank and with intermediate payment or collecting agents (in particular Shopify and PayPal) but these, or the latter, are vulnerable to repayment claims. As to Cs' prospects, on DS's evidence Cs' cashflow has gone from very significant to nil in just 3 months. Finally, with regard to D1's followers, while he must not make use of the database, Cs have no property or rights in relation to his own records of his own followers established before and outside his involvement with Cs; put another way, there is no suggestion or evidence that D1 has assigned any contact or communication rights to Cs so as to limit an independent right to make contact with followers.

25 Mr Khangure QC summarised the matters complained of by Cs, by reference to DS's evidence, as (1) D1 has distanced himself from Cs and has encouraged Cs' members to follow D1 to D2 or his new venture; (2) D1 has encouraged Cs' members to complain to Cs' remaining directors; (3) D1 has promoted D2 to Cs' members on Cs' communications platform (Discord Chat) and other online platforms; (4) while a director D1 has solicited Cs' members and contacts for the benefit of D2; (5) D1 has encouraged Cs' members to make offensive online postings about DS and OH and to send them offensive messages; and, (6) in online postings D1 has falsely accused DS of fraud, kidnapping and theft. There is evidence to support complaints (1) – (4) and it is relevant to the form of the injunction sought by Cs. As to (5) and (6), DS's evidence for Cs contains examples of offensive and inappropriate social media postings by D1 which were potentially indirectly damaging to Cs but neither DS nor OH are claimants and no reputational damage claim is alleged and no relevant relief is claimed by Cs.

26 In the context of Cs' complaints, a material starting point is that D1, by his legal representatives, has acknowledged that his conduct in relation to the database was a breach of his fiduciary duties and also that his conduct in encouraging members to seek refunds was also a breach of his fiduciary duties as a director of Cs. This is based on D1's own written evidence in which he has admitted downloading the database and incorporating D2 while still a director of Cs. D1 also accepted that he had been critical of Cs' service and had encouraged claims for refunds but said that his criticisms were true and fair.

27 In relation to the database, D1 said that he did not use it but relied on his own social media following. In relation to the incorporation of D2, D1 said that he realised that he was not going to be paid by Cs and needed an income, but in any event he had not traded, and did not intend to trade, through D2. Cs responded that the important commercial difference between a database and a social media following is that the former is a known pool of actual or potential customers with whom there may be direct targeted contact; and, that D1's word cannot, or at this stage should not, be taken as reliable.

28 I note from DS's evidence, drawn to my attention by Mr Khangure QC as supported by exhibits, that there are examples of D1 promoting himself on social media as a rival to Cs while still a director of Cs and promoting a rival website.

29 On the other hand, at this stage I am cautious about the weight to attach to DS's complaints in his evidence about D1's personal social media communications attacking him personally. DS has chosen not to be a party to the proceedings and raise any such complaint formally. Also a clear picture of the dealings between DS and D1 is not before the court, nor should it be at an interim hearing as this is not the appropriate forum for fact finding about such matters.

30 Mr Palmer sensibly acknowledged that Cs have demonstrated reasons to believe that they will succeed at trial in establishing breach of statutory duty by D1 as a director.

31 Mr Palmer's arguments centred on Cs' obligation, as claimants seeking injunctive relief, to identify the unjust advantage D1 had secured and how its consequences could and should be addressed. In relation to the database there had been no use and there is no evidence to gainsay D1's word. Thus, Cs' claim really depended on damage caused by social media postings undermining Cs' online platform and encouraging refund requests. Again, Mr Palmer conceded that there is credible evidence of such conduct by D1. Mr Palmer submitted that that was damage done to Cs but it did not point to future harm that needed protection by an injunction as sought. Mr Palmer also submitted that while DS's evidence pointed to damage caused historically to Cs, once the access to and use of the database was removed from Ds that brought an end to any unjust advantage. Mr Palmer submitted that Cs' complaints all sounded in damages or financial relief and there was and is no ongoing harm calling for an injunction.

32 Mr Palmer accepted that D1 is the source of the material for Cs' online platform and courses, but that was a vulnerability of Cs at all times because D1 was at

all times free to leave Cs and start up in competition. The only continuing restraint on D1 was and is that imposed by ss.170 and 175 of the 2006 Act. Mr Palmer submitted that just as Cs need to find a replacement for D1 so too D1 needs to develop or find a platform in order to earn any revenue from his knowledge and skills.

33 Turning to the period sought for injunctive relief, Mr Palmer submitted that the claimed period of 6 months is not explained by reference to what needs to be done or restrained and how the period is calculated or estimated; nor is there any explanation why whatever may need doing cannot be done in less time. In short, 6 months as a springboard period is wholly unsupported and unjustified by Cs' evidence and is merely an assertion.

34 Mr Palmer submitted that on analysis there is neither a risk of continuing unlawful activity (because an undertaking is offered in relation to non-use and destruction of the database), nor of unfair advantage because nothing D1 has done wrongfully or arguably wrongfully causes a continuing disadvantage to Cs which they would not otherwise have faced had D1 simply resigned as a director and walked out on Cs on 15.4.20 or on any earlier date. Moreover, in practice D1 is out of the market commercially for the present time for a number of reasons. First, he does not have a platform from which to trade; secondly, it is part of Cs' own case that D1's contacts with his followers cannot be commercially exploited or monetised in the same way as there database; and, thirdly, D1 does not have access to funds to buy or develop a platform.

35 As to creation of his own database, D1 previously did not have and presently does not have a database. He did previously have and still has a following, that is not Cs' property or preserve. Any future database must be compiled from scratch.

36 Mr Palmer's overall submission was that in substance the combination of the very wide terms of the injunction sought and the duration sought go far beyond restoration and constitute punishment of D1. Moreover, and as appears from the prayer for relief in the claim, the real remedy is in damages. If it is the case that D1 is unable to pay damages or other financial remedy awarded against him, that is not a reason for granting an injunction instead; rather it emphasises that what Cs seek is a punitive remedy not a restorative or compensatory remedy.

37 If, notwithstanding all of this, there is to be an injunction it should be in very much more limited form than that sought by Cs and for a short period.

38 Mr Khangure QC submitted that the relief sought was aimed solely at preventing Ds from taking unfair advantage of their wrongdoing and affording

Cs a fair, just and proportionate opportunity to restore Cs' business to the position it would have been in but for D1's wrongdoing; thus, that relief sought was entirely consistent with principles identified by Sir Donald Nicholls V-C in Universal Thermosensors and summarised by Haddon-Cave J in QBE.

39 Mr Khangure QC submitted that the real problem is that Cs' reputation has been destroyed. Pausing here, I note that even if that is so, it is far from clear at this stage that the real or material damage was not self-inflicted in that D1 was free to leave Cs on a whim or at the drop of a hat. Uttering trade libels while an officer or employee may well be disloyal, but the wrongdoing causes pecuniary losses and the relevant injunctive relief, if any is to be granted, is to restrain repetition and future publication.

40 Mr Khangure QC submitted that Cs are suffering continuing losses and that the misappropriation of the database cannot be ignored. Mr Khangure QC submitted that this coupled with the egregious nature of D1's breaches of fiduciary duties more than justifies the exercise of the discretion to grant an injunction as sought in Cs' favour.

41 As to duration of the injunction, Mr Khangure QC relied in particular on DS's 3rd witness statement, particularly paragraphs [80]-[83] :

> "80. The facts are that TK has obtained a significant commercial advantage over the Companies by taking and obtaining the Database and by his concerted and continued online campaign to discredit the Companies' and harm their reputation. By his unlawful actions of breaching his fiduciary duties in ruining the reputation of the Companies whilst promoting himself and his own commercial interests (in competition with the Companies), taking confidential information, and making a series of defamatory comments, TK has secured the opportunity to establish a competing business without any of the start-up investment made by the Companies, and without facing competition from the Companies which need to spend some time rebuilding their reputation and repairing the damage to their credibility caused by TK. It is unjust that TK should be able to benefit from his unlawful conduct to date.
> 81. OH and I have been trying to continue running the Companies with a view to continuing to trade once we are in a position to do so. At the moment, due to TK's actions, we are very limited as to what we can achieve. The reputation of the Companies is so bad that we receive chargeback and refund requests on a daily basis. Most of the Companies' funds are frozen due to the volume of chargeback requests. Without any cashflow, we cannot carry on without making further investment personally. Before TK decided to leave, we had planned to launch a number of affiliated companies within the WZRD Group but that opportunity has now been lost together with the potential income stream it would have created.
> 82. I consider that it will take us at least 6 months to restore the Companies to the position that they were in before TK started his online campaign. That doesn't take into account recovering the lost revenue that we have suffered. Whilst we have developed functionality in the platform, we are essentially starting from an unsound position because we have to rebuild the Companies' reputation and undo the damage done by TK, we are not simply building a customer-base from scratch. We are also now significantly behind on delivering content because due to the ongoing dispute and the damage done to the Companies, we

have been unable to attract any traders and/or analysts in the field to develop and deliver content. Many are simply not prepared to talk to us.
83. TK however has manoeuvred himself into a position where he can simply launch a new business with the significant following that the Companies built. He has painted himself as the victim and bolstered his personal reputation whilst at the same time ruining the Companies".

42 Mr Khangure QC submitted that the advantage secured unlawfully by D1 for Ds is that Cs' members and anyone thinking of becoming a member of C1 have been told that Cs are not to be trusted and, further, that D1 has put himself up as a trustworthy alternative. Thus, it is not appropriate to measure the period of an injunction by how long it would have taken D1 to get going as a rival but how long it will take for the parties to be restored to competitive position they each set out to occupy and would have occupied but for D1's misconduct. On that basis 6 months was the appropriate term and the form of the injunction sought also necessary for restoration.

Decision

43 From the first hearing date of Cs' application, 31.3.20, Ds have given undertakings in, or substantially in, the form of the relief now sought. Thus, Cs have had the effective benefit of the injunctions sought for almost 2 months. It is also the case that the 6 months period sought was contended for after the Covid-19 lockdown and so must be assumed to have that fully taken into account.

44 The undertakings in relation to (1) the database and claimed confidential information, (2) alleged passing off by D2, and (3) trade mark claims have been and are offered on a continuing basis. The database undertakings include delivery up or destruction of any and all copies and verification by affidavit, including verification of the extent of use (said by D1 in evidence before me to have been none). Thus, the database injunctive relief aspect has been or will shortly be resolved on a final basis. Further, D1's statement contains the required acknowledgment that false statements may give rise to contempt proceedings and his verification of non-use of the database, whether by affidavit or witness statement, will be on the same basis.

45 Although, as I recall, not expressly offered, the import of D1's evidence and Mr Palmer's submissions leads to a conclusion that, if required, D1 and D2 would offer an undertaking that D2 would not trade.

46 Turning to the injunctive relief in contention and starting with the American Cyanamid criteria, it is conceded by Ds that Cs have demonstrated a strong case in respect of breach by D1 of his statutory duties as a director in relation to the database and encouraging refunds. There is at least a serious question to be tried; in practice these aspects are conceded. Ds have also conceded the

principle of interim injunctive relief by offering undertakings, but challenge the ambit as sought against D1 by paragraphs 1 and 2. Cs have the means to give a worthwhile cross-undertaking in damages. Further, it is commonplace for courts to impose interim or springboard injunctions on errant directors who seek to set up competing businesses while in office and/or utilising misappropriated information or other property. The precise terms will vary according to the circumstances, including any particular agreement(s) between the company and the director, and the appropriate enforcement of the director's statutory duties. In this case the balance of convenience is with Cs. The aim of any interim injunctive relief is to be confined restoration of the status quo ante.

47 The combination of the nature of D1's wrongdoing, both acknowledged and further alleged, and his departure from Cs, including his resignation as a director, do, as Mr Khangure QC contended and Mr Palmer acknowledged, potentially engage the springboard principle. I must consider both the extent to which D1 gained an illegitimate advantage and the effect of the unlawful acts on Cs. I must do this having regard to and making a broad assessment of each side's case in an interim context, that is keeping in mind that disclosure has not occurred, witness evidence is incomplete and untested, the scrutiny imposed by the trial process can sometimes reveal strong cases to be weak and vice versa, and a mini-trial is not to be undertaken.

48 D1 certainly behaved badly as a director of Cs. Certain admitted conduct is at odds with the duties imposed by the 2006 Act on directors and it is far from evident that D1 could successfully invoke the relief provided for at s.1157 of the 2006 Act. Cs have a strong prospect of succeeding at trial in establishing liability for breach by D1 of his fiduciary duty while a director of Cs.

49 D1's encouragement of members to seek refunds is likely to cause damage; at one level that will be quantifiable. True it is that that damage may possibly be continuing and the deterrent effect on prospective members may be very hard to quantify. On the other hand, Cs cannot expect to retain membership loyalty or avoid claims for refunds if they make no offering on their platform and that is an inherent vulnerability in Cs' business model.

50 Cs had established their trading platform by November 2019 and traded as from 1.12.19. What Cs failed to do was subject D1 to any restrictive terms, thus at all times he was free to resign as a director, simply walk away from Cs, and immediately set up or join a competing business. The logic must have been or included that the value of his shareholding and the damage D1 could inflict on himself by leaving would deter him from so doing. However, at all times D1 was free to resign and compete with Cs, subject to having a platform and subject to the duty under s.175 of the 2006 Act as continued by s.170. That was a risk Cs took and, in that sense, they are to some extent authors of their own misfortune. In the event, D1 appears to have had resignation in mind before

15.4.20, but may have been deterred by Cs' proposed terms or for other reasons chose not to resign until 15.4.20. Thus, he continued to burden himself with the full range of director's duties for some months in 2020.

51 From February 2020, at the latest, Cs have known that to continue trading as intended they would need to recruit a replacement for D1. Cs' contention that D1's disparaging remarks (1) caused them to concentrate their resources on attempting to set the record straight and rebuild Cs' position and (2) undermined their prospects of finding a replacement for D1 has some force, but it must not be taken too far or attributed disproportionate weight given D1's freedom from contractual restraint, whether as a shareholder or director.

52 Turning to D1's position, the advantage he gave himself was access to a structured client list. However, on his evidence it was not exploited at all and will not be exploited. Through his counsel, D1 has acknowledged the limited continuing statutory duty under the 2006 Act. D1 had and has no contractual obligations to Cs. His evidence is that he has not received any of the revenue earned by Cs and has no capital to start his own business. He did not have, and never has had, his own platform. He has a history of falling out with platform hosts. His field of work is in commenting on and informing others about cryptocurrencies and, on the evidence available, he appears knowledgeable, or, at least, he has a following. By contrast, Cs had a database but no actual customer base independently of D1.

53 When issuing their application and over the period 25.3.20 to 15.4.20, Cs were entitled to seek protection under the full range of director's duties. Since 15.4.20, the duty under s.175 of the 2006 Act continued by s.170, has continued to apply to D1. That said, the evidence is unclear as to any property, information or opportunity of Cs of which D1 became aware while a director other than the database.

54 It is difficult to see how an injunction continuing the statutory duty, at least for the springboard period claimed by Cs (6 months), if not until trial, could be disputed. I dare say it would not have been disputed had it been expressly sought, and, of course, it could have been offered. It is important to keep in mind that, whether by agreement or imposition under law, that is D1's sole continuing obligation to Cs.

55 The relief actually sought by Cs goes considerably further. The language of paragraph 1 of the injunction is aimed at prohibiting D1 from having any involvement in D2's business irrespective of the nature of that business. As to paragraph 2, at paragraph 2(e) Cs seek to restrain D1 from interfering with the supply of goods or services to Cs by "Restricted Suppliers", widely defined as any supplier of goods or services to Cs; but there is no evidence that D1 has

done this or even that he knows the identity of Cs' "Restricted Suppliers" or any of them. Similarly, by paragraph 2(d) Cs seek an injunction relating to enticement of its employees; but the evidence is that Cs had no employees. At paragraph 2(c) Cs seek to restrain D1 from soliciting or enticing away any "Prospective Customer", defined as anyone with whom Cs may deal; as this is an injunctive restraint to which a penal notice is to apply, on the evidence before me this is an impossibly wide and uncertain definition. At paragraph 2(b) Cs seek to restrain D1 from soliciting any "Restricted Customer", defined as anyone who at any time was a customer or in the habit of dealing with Cs; but, as a result of other agreed terms, D1 has no record of who to avoid. At 2(a) Cs seek to restrain D1 from, in any capacity whatsoever, undertaking any competitive activity in the UK or Europe; there being no contractual restraint, the sole justification for this must be D1's admitted wrongdoing and Cs' further allegations, moreover there is no sufficient evidence to support the proposition that there should be a Europe wide territorial restraint. This brief canter through paragraph 2 of the injunction leads me to conclude that it is a widely drawn 'boiler plate' formula derived without specific attention to Cs actual business and the specific detriments fairly, justly and proportionately to be neutralised.

56 As already noted, paragraph 1 of the order sought has been addressed to some extent at least by D1's wider statement that D2 will not trade. The form of words of paragraph 1 of the injunction sought by Cs is wide enough to exclude D1 from any and all involvement with D2 irrespective of D2's business were it to trade. In my view that is too wide a form of injunction to impose on a person whose sole continuing obligation to Cs is as noted above. The appropriate course is to limit D1 from so assisting D2 in any commercial activity carried on by D2 in competition with Cs. Of course, D1 may give an undertaking to that effect.

57 As to the appropriate term of this injunction, it has been effectively in place in the form sought since 31.3.20, i.e. for almost 2 months. What if any further term is required?

58 The evidence of DS relied on make the following main points : (1) that D1 has unlawfully take Cs' database and pursued an online campaign to defame and denigrate Cs while promoting Ds with the result that D1 has secured the opportunity to establish a competing business without any start up investment; (2) D1 has caused such reputational damage that Cs receive refund claims on a daily basis and Cs have had to abandon planned launches of affiliated companies and lost further revenue streams; (3) Cs have a platform but no customer base, no material and, because of D1's conduct, cannot attract a replacement for D1; and (4) D1 is ready to launch a new business with the' following built up by Cs. These grounds lead DS to say that 6 months is the minimum necessary period for a springboard injunction.

59 I attach some, but little, weight to D1's misappropriation of the database for future use by D2 or otherwise in a competing business by D1. There is no evidence of actual use for a rival business.

60 Next, there is evidence of denigration and disparaging criticism, and of encouragement to members to claim refunds. That will have been and may continue to be damaging. On the other hand, the claim form does not identify a trade libel or reputational damage claim; no injunctive relief is sought to prohibit repetition or publication of alleged trade libels; and, the appropriate remedy is very largely, if not entirely, monetary. As to the cause of the breakdown in relations between DS and D1 and the general content of the online postings and exchanges, these are not matters for interim determination. There are discreditable comments made on both sides. What is relevant is that there is cogent evidence of D1 having encouraged refund claims and appearing to have promised free online access for up to 9 months to Cs' dissatisfied customers or some of them. There is also evidence of D1 making disparaging remarks about his then fellow director, DS, and Cs. Further, and as already noted more than once, Cs' predicament flows in no small part from vulnerability in its own business model for which it is not entitled to protection by injunction against a former director otherwise free to compete.

61 As to Cs' evidence that they are significantly behind in delivering content, if so this is at least in part, if not principally, because D1 alone was engaged for that purpose and was not made subject to any notice period. On top of that, a critical feature of Cs' business plan was or must have been D1's continuing availability and, irrespective of the acrimony between D1 and Cs' other directors, a sudden departure by D1 was always a possibility and must always have been foreseen as being likely to undermine Cs' customer base's confidence in Cs as a reliable cryptocurrency platform. Cs must bear the consequences of that risk. Thus, any falling behind in ability to deliver on line content has to be viewed in the context of business risk which in turn would include the likelihood of exposure to refund requests.

62 As to difficulties in replacing D1, as it stands this is assertion by DS; there is no evidence of approaches to or rejections by alternatives to D1, or even of who else there might be in the pool of alternatives to D1. Further, there is no evidence before me that D1 is in a position to simply launch a new business.

63 Finally, Cs' unspecified loss of expansion and failure to implement affiliated business plans referred to by DS at [81] in his 3rd witness statement are an irrelevant consideration as they have nothing to do with restoration.

64 Cs are entitled to fair, just and proportionate protection for the purpose of restoring what has wrongfully, or arguably wrongfully, been taken or undermined, but no more. They bear the burden of spelling out the precise nature and period of Ds' unfair and unjust competitive advantage and their own unfair and unjust competitive disadvantage. On the material before me I could form the view that Cs have failed to provide appropriate evidence and have merely asserted a 6 month period with the result that they are left to their financial remedy. I consider that would be harsh but not unjust. However, I also recognise that there must be some period for which suitable protection should be in place which would not inflict a punishment on D1. As I see it, there is no single correct answer. What does appear to me though is that Cs have not factored into their estimation or assertion of an appropriate period D1's rights and entitlements and their own inherent vulnerabilities. In my view, this has caused them to overstate the relevant period.

65 On the evidence before me, my view is that any period longer than 3 months would be excessive, i.e. not fair, just and proportionate. I consider 6 months, that is a further 4 months, to be too long. In my view the appropriate period is 3 months (i.e. until 30.6.20).

66 I return to the relief sought at paragraphs 1, 2 and 6 against D1.

67 As to paragraph 1, the substantive effect of this injunctive relief would be achieved by an undertaking from D1 and D2 that D2 will not carry on business. I understood D1's stated intention not to trade through D2 to be unlimited in time. If an undertaking is not forthcoming, an injunction to restrain D1 from being involved in any business of D2 in competition with Cs' business as carried on at the time D1 ceased to be a director, operative until 30.6.20, is appropriate.

68 As to paragraph 2, in my view an injunction in the form sought at paragraph 2 against D1, whatever its duration, would go well beyond that which is fair, just and proportionate protection for Cs against the risk of any ongoing harm which might result from D1's wrongdoing, both acknowledged and credibly alleged. Paragraph 2 of the order sought goes well beyond neutralising D1 and restoring the status quo. It seeks injunctive relief in respect of which there is no evidence or is contradictory or inconsistent underlying evidence from DS (e.g. employees). It is aimed at cocooning Cs and trussing up D1. In my view it crosses the line between legitimate protective restraint and punishment.

69 In practice Cs have had the benefit of the injunctions sought in the form of undertakings since 31.3.20, i.e. for almost 2 months. In addition, Cs have had since February, at the latest, i.e. a period of at least 3 months, to seek a replacement for D1's role. By continuing undertakings D1 has agreed not to

disclose or use any confidential information which is very widely defined and includes, but is by no means limited to, the database.

70 On the evidence before me it seems to me that Cs have a legitimate interest in keeping D1 to his continuing obligation as a former director. No such relief is sought expressly but it seems to me to be within the scope of paragraph 2. In addition, it seems to me to be sensible to remind D1 of his continuing duty and formally to hold him to it.

71 Similarly, Cs are, in my view, also entitled to seek an order curtailing D1's encouragement to Cs' members to seek refunds. The latter restraint does not mean that, should he set up successfully in competition, D1 may not also provide similar or competing services, on whatever terms he chooses, to persons who happen also to be Cs' members or customers. Nor is it to be understood as an embargo on comparative advertising.

72 As to the duration of these injunctive restraints on D1, the continuing duty under s.175 of the 2006 Act has no statutory time limit. The usual interim period of until trial or further order is appropriate. That said, it is likely that as time passes so the risk of or scope for unfair exploitation of any property, information or opportunity of which he became aware while a director will diminish. Similarly, in relation to restraining D1 from encouraging Cs' members to seek refunds, that too seems to me to fall outside the springboard principle and should continue until trial or further order.

73 Finally, as to paragraph 6, I consider that given the words "otherwise, howsoever"[4] and "in any capacity" in paragraph 1, the terms of paragraph 6 add nothing of substance and decline to include paragraph 6 in the form of the injunctive relief granted.

74 Accordingly, on the issue of the form of injunction, if any, to be granted in addition to the agreed undertakings, I shall order

(1) an injunction until 30.6.20 to restrain D1, whether by himself, his agent, servant or otherwise howsoever, from carrying on with, being employed or otherwise engaged by, or being concerned or interested in any capacity (whether for reward or otherwise), or providing any commercial or any technical advice to, or in any way assisting, D2 in the supply, organisation or development of a business in competition with that carried on by Cs while D1 was a director of Cs; and,

(2) an injunction until trial or further order (a) to hold D1 to his continuing obligations as a former director under the 2006 Act, and (b) to restrain D1

[4] Comma should be omitted.

from encouraging Cs' members to seek or progress claims for subscription refunds and to maintain online and social media silence (save to say responsively that he is prohibited from comment by court order) on that topic.

In the usual way, and as indicated in this judgment,undertakings may be given in place of the imposition of injunctive relief.