



Neutral Citation Number: [2025] EWHC 553 (KB)

Case No: KB-2024-004164

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12 March 2025

**BEFORE:**

**JEREMY HYAM KC**  
**SITTING AS A DEPUTY JUDGE OF THE HIGH COURT**

**Between :**

**KAU MEDIA GROUP LIMITED**  
**- and -**  
**THOMAS HART**

**Claimant**

**Defendant**

**Rhys Johns** instructed through Direct Access for the **Claimant**  
**James Wibberley** instructed by Acuity Law for the **Defendant**

Hearing dates: 3-4 March 2025  
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## **Approved Judgment**

This judgment was handed down remotely at 14:00 on 12/03/2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **Jeremy Hyam KC sitting as a Deputy Judge of the High Court:**

### **Background**

1. By a claim issued on 13 December 2024, the Claimant, Kau Media Group Limited ('KMG') a digital marketing agency, seeks to enforce two post-termination restrictions ("PTRs") contained in a contract of employment ("the employment contract") made between it and its (now) former employee, the Defendant, Mr Tom Hart in late 2020. The stated purpose of the claim is to restrict Mr Hart working for his proposed new employer, MiSmile Media Ltd ('MML') pursuant to those PTRs. The remedy sought in the Claimant's skeleton for trial is an order that:-

#### *"The Defendant*

- 1) *Must not be engaged or concerned or interested or participate in a business the same as or in competition with the KAU Media Group Ltd, including MiSmile Media Ltd or any associated company to MiSmile Media Ltd for a period of 6 months from 1<sup>st</sup> January 2025.*
  - 2) *Deal or provide or supply any Relevant Person as defined in his employment contract, with any Products or Services as defined in his employment contract for a period of 12 months from 1<sup>st</sup> January 2025."*
2. The Claimant's claim is resisted by the Defendant on the basis that:-
  - (a) the Defendant's proposed new employment does not put him in breach of the PTRs in his employment contract because his proposed new employment with MML is not in competition with KMG and will not involve him competing for the work of clients for whom he was responsible whilst he was employed by KMG;
  - (b) In so far as the covenants are engaged, they are not enforceable because (i) KMG has not demonstrated any legitimate business interest they seek to protect; and (ii) they go wider than is reasonably necessary to protect any legitimate interests that KMG might seek to demonstrate; and
  - (c) The Court should in any event refuse to grant injunctive relief as there is no risk of loss to the Claimant and an injunction would serve no legitimate purpose.

### **The issues**

3. As is observed in one of the leading textbooks, Harvey on Industrial Relations and Employment Law Chapter 6, Restraint on Competition at [197]  
*"We live in a free market economy, and the employer must be prepared to face competition from others, including its ex-employee. It cannot therefore impose a restraint on its employee simply to stop them competing. ....On the other hand, the employer is entitled to protect its rights. It is entitled to keep what it has, and can legitimately seek to stop its ex-employee from making use of that which may be regarded as belonging to the employer."*
4. There is no dispute that the relevant PTRs in this case engage the restraint of trade doctrine. Covenants in restraint of trade are *prima facie* unlawful. It is for the

promissee (here the Claimant) to establish that any PTR relied on is reasonable as between the parties and to satisfy that burden the promisee must show first that the PTR in question protects legitimate business interests of the promisee and secondly that the PTR goes no further than is reasonably necessary to protect those interests. In addition there is a third element recognised by the Supreme Court in *Harcus Sinclair LLP v. Your Lawyers Ltd* at [48] which is that the promisee must show that the restriction is commensurate with the benefits secured to the promisor under the contract. If the promisee fails to establish the reasonableness of the PTR then the PTR is void and unenforceable.

5. The parties agreed that in this context the approach adopted by Cox J. in *TFS Derivatives Ltd v. Morgan* [2005] IRLR 419 §35-38 was a useful one for the Court to adopt in seeking to determine the relevant issues in this case. That is to say approaching the pleadings and evidence by a four stage process as follows:
  - (a) First, identifying what the terms of the PTRs mean and whether they are engaged on the facts by the Defendant's proposed employment.
  - (b) Second, if those terms are engaged on the facts, whether the Claimant has established its pleaded case that it has a legitimate business interest deserving of protection by the Court upholding such restrictions. If not, then the analysis ends there.
  - (c) Third, if the legitimate business interest is established, whether the covenant is in all the circumstances reasonable, to protect that interest.
  - (d) If the covenant is not reasonable, and therefore not enforceable, a further question may arise whether the objectionable parts of the PTR can be removed or 'severed' without altering or re-writing the clause (for example by deleting words/clauses an issue considered by the Supreme Court most recently in *Tillman v. Egon Zehnder Ltd* [2019] UKSC 32.)

### **Procedural history**

6. The following facts are not substantially disputed.
7. The Defendant was employed by the Claimant from around 23 November 2020 in the role of Account Director. His employment was governed by an employment contract signed by the parties on 2<sup>nd</sup> October 2020. The base salary in his initial employment contract was stated to be £38,000. The contract also provided for a commission calculated in accordance with the Claimant company's Commission Plan.
8. From around 2021 the Defendant became Account Director for MiSmile Network Limited ('MNL'). MNL was a relatively long-standing client (some six or seven years) of the Claimant generating significant revenue for the Claimant company. The MiSmile Network is a UK wide group of dentists and orthodontists that provide "Invisalign" – a tooth alignment treatment.
9. On 4<sup>th</sup> September 2024 (just under four years into his employment) the Defendant met with Mr Kashif Khokhar, Director and Shareholder of KMG, to tell him that he intended to resign his post. He did not say that he had a new role lined up. Mr Khokhar was disappointed and on 11<sup>th</sup> September 2024 offered the Claimant a £100,000 salary to encourage him to remain.

10. At a meeting on 18<sup>th</sup> September 2024 that increased salary offer was rejected by Mr Hart.
11. On 19<sup>th</sup> September 2024 Mr Hart called Mr Khokhar and told him he had taken a job at MML. The precise details of that call are not recalled by Mr Hart, but Mr Khokhar's recollection is that in the course of that conversation Mr Hart said it was "*the worst thing he had done*" implying that he felt disloyal to KMG in taking such a job, and that "*he has said "no" to Sandeep a lot*" implying that he had been asked on more than one occasion by Dr Sandeep Kumar (CEO and Shareholder of MNL) if he would come and work for MML (an associated company to MNL set up in April 2024). Mr Khokhar also said that Mr Hart told him he had been "*offered equity in the company and a large remuneration package.*" Mr Khokhar says that he made Mr Hart aware that to take such as job was "*against his contract*" and told him "*he is not allowed to join our client*", to which Mr Khokhar says Mr Hart responded that he had already said "*yes*". At that date (19<sup>th</sup> September 2024) MNL was a client of the Claimant company albeit that a notice of termination of the engagement had been given in July 2024 by Dr Kumar in respect of MNL. Dr Kumar at that time had expressed the view that he was taking the marketing 'in house' and had set up MML for that purpose.
12. On 25<sup>th</sup> September 2024 there was a formal HR meeting at the Claimant's premises. At that meeting Mr Hart said to those who were present including Mr Khokhar, that he had already signed a contract with MML. This was false. In his oral evidence to the court Mr Hart said that he made this false statement to make clear to Mr Khokhar that he was definitely leaving.
13. On 9<sup>th</sup> October 2024 a formal pre-action letter was sent to the Mr Hart by solicitors then acting on behalf of the Claimant, Kingsley Napley. That letter said, *inter alia*:-

"As you are well aware, MiSmile is a large dental network owned by Sandeep Kumar and his wife and children, including Rahil Kumar, for whom KMG has been providing marketing services for over six years. On 30 April 2024 a connected entity was established by Rahil Kumar, named MiSmile Media Limited. MiSmile Media provides marketing for dental practices which is in direct competition with the services provided by KMG. Despite this you confirmed in a meeting with your line manager, Ben Heayberd, the COO of KM, Abid Masood, an HR representative and Mr Khokhar on 25 September 2024 that you had signed an employment contract with MiSmile on 18 September 2024 and that your role would start on 1 January 2025. You formally emailed KMG with notice of your resignation on the same day.

Prior to your resignation, on 31 July 2024, MiSmile served a notice of termination on KMG. The agreement will terminate on 31 December 2024 just one day before your new role is due to begin. In discussion with our client Sandeep Kumar said that MiSmile Media would now be providing MiSmile with its

marketing service and it is clear from the later conversations noted above that these services will be led by you”

14. The letter recited the key terms of the employment contract including the post termination restrictions in Schedule 1 of the employment contract. It is convenient to repeat them here. The restrictions are as follows (I have emboldened the key terms for ease of identification):

*“You agree that you shall not either on your own account or on behalf of any other person, firm or company directly or indirectly:*

*“2.1 during the **Initial Restricted Period**: (a) be engaged or concerned or interested or participate in a business the same as or in competition with the **Business** or relevant part thereof provided always that this paragraph shall not restrain you from being engaged or concerned in any business concern in so far as your duties or work shall relate solely to services or activities with which you were not concerned to a material extent during the **Protected Period**...”*

*2.2 during the **Extended Restricted Period**: (a) in respect of any **Products or Services** solicit, facilitate the solicitation of or canvass the custom or business of any **Relevant Person**; (d) in respect of any **Products or Services**, deal with or provide or supply any **Relevant Person**...”*

15. These emboldened terms are defined in the contract as follows:

*“**Initial Restricted Period**” means the period of 6 months following the Termination Date.*

*“**Extended Restricted Period**” means the period of 12 months following the Termination Date.*

*“**Protected Period**” means the period of 12 months immediately preceding the earlier of the Termination Date and the commencement of any Garden Leave Period.*

*“**Business**” means the business of the Claimant or any other member of its group as at the date of termination.*

*“**Products or Services**” means “... any products or services competitive with those supplied by the Company or any member of the Group at any time during the Protected Period and in the supply of which you were involved or concerned or for which you were responsible at any time during the Protected Period...”*

*“**Relevant Person**” means “... any person, firm or company who or which at any time during the Protected Period: 6.9.1 was a client or customer of the Company or any member of the Group; 6.9.2 received Products or Services from the Company or any member of the Group; 6.9.3 introduced clients or customers to the Company or any member of the Group; or 6.9.4 with whom or which the Company or any member of the Group was in negotiations during the Protected Period with a view to providing the Products or Services; and with whom or which you had material dealings or for whom or which you were responsible at any time during the Protected Period”*

16. The Kingsley Napley letter of 9<sup>th</sup> October 2024 concluded by saying:

**“Breaches**

*In view of your close involvement and relationship with MiSmile since September 2021 and the termination of the MiSmile service agreement alongside your resignation and*

*commencement of your new role, which neatly coincide, our client believes that you have acted in bad faith and in breach of your obligations in order to assist MiSmile in establishing a competitive threat to KMG.*

*Additionally, you have confirmed to our client that once your employment with KMG has ended, you intend to work for MiSmile and/or MiSmile media providing media services to MiSmile in breach of the post termination restrictions referred to above and appended to this letter in full.*

***Urgent next steps***

*In light of the above, as a matter of urgency, our client requires you by no later than **close of business on 16 October 2024** to execute and return the Deed of Undertakings appended to this letter.”*

17. Solicitors for Mr Hart responded to this letter. They rejected the allegation of bad faith, asserted that Mr Hart was well aware of his obligations of confidentiality, that he had not, nor would not, use or disclose any confidential information obtained during his employment for the benefit of MML or any other third party. His solicitors said he was willing to sign undertakings confirming his commitment to maintain confidentiality of any further information acquired during his time at KMG. That letter also said (my emboldening)-

*“As you will be well aware, the courts have consistently demonstrated a reluctance to enforce post- termination restrictions where the result would be to unreasonably restrict an individual’s ability to earn a living. The courts will not enforce restrictions that prevent our client from pursuing lawful employment, particularly when KMG’s legitimate business interests are already adequately protected. In this case, preventing Mr Hart from working for MiSmile Media—a company that does not directly compete with KMG—would be disproportionate and unenforceable, particularly in light of Mr Hart’s preparedness to enter into undertakings.*

*Our client has no intention of interfering, enticing or poaching staff, customers, or otherwise acting in a way that would damage KMG’s business. To reinforce this, Mr Hart is prepared to sign undertakings to the following effect*

- *He will not use any confidential information from KMG in his role at MiSmile Media; and*
  - *He will not seek to induce, solicit or otherwise interfere with any clients or staff of KMG during the restricted period.”*
18. That letter was responded to by Kingsley Napley on 22<sup>nd</sup> October 2024 who reasserted that Mr Hart would be in breach of the “non-compete” and “non-deal” obligations in the contract and that the proffered undertakings were inadequate. The letter said that unless a deed was entered into saying that the obligations in the employment contract were respected in full, High Court proceedings would follow.
19. Solicitors for Mr Hart responded on 29<sup>th</sup> October 2024 in summary saying there were no grounds on which the Court would award an injunction and that undertakings already

offered should have been sufficient and that any High Court proceedings would be resisted.

20. Proceedings were eventually issued but only some six weeks later on Friday 13<sup>th</sup> December 2024. By that time Kingsley Napley were no longer instructed and Mr Johns, Counsel for the Claimant, was acting on a direct access basis for the Claimant.
21. The initial application made by the Claimant was for an interim injunction. This was listed by the Court for a hearing on 10am Thursday 19<sup>th</sup> December 2024. Mr Hart's solicitors were aggrieved by the sudden issuance of proceedings for injunctive relief after a six week delay and the absence of proper notice of the application and wrote both to the Court and the Claimant seeking adjournment of the application and, pragmatically, offering undertakings pending directions speedy trial. Notwithstanding, the Claimant sought to have the case relisted before 1 January 2025.
22. The matter came before Mrs Justice Stacey on 19<sup>th</sup> December 2024 on the papers. She refused the relisting request noting that litigation had been threatened against the Defendant since early October but the claim form was only issued on 13<sup>th</sup> December. The note of her reasons makes clear that her view was that the application had been filed with undue haste, inadequate notice, without regard to the fact that there were clearly substantive issues to resolve such that a time estimate of 1 hour was unrealistic, and there was no cross-undertaking in damages. Her note concluded: "*The application can be listed with a 3 hour time estimate at the beginning of term if it is the intention of the claimant to proceed with their application. The parties are expected to agree appropriate directions in advance of the hearing*".
23. Ultimately a consent order listing the matter for a speedy trial was filed by the parties which contained directions for trial and undertakings that the Defendant would not work or provide services to MML or its associated companies, deal with or solicit for business or provide services to any client of the Claimant and otherwise comply with the post-termination restrictions pending the trial listed 3<sup>rd</sup> - 4<sup>th</sup> March 2025. The order also contained a cross undertaking as to damages from the Claimant.

## **The Pleadings**

24. Particulars of Claim were filed in accordance with the directions and are dated 28<sup>th</sup> January 2025. The Particulars of Claim are essential to defining the issues in dispute at trial. The Defendant, at the close of the case, argued that the Claimant's argument in closing had proceeded on a basis that was insufficiently pleaded. In particular, the Defendant argued that there had been inadequate pleading of the Claimant's case on "*customer connection*" as the basis for injunctive relief, as opposed to protection of confidential information. It is necessary therefore to note what is and is not alleged by those pleadings.
25. At paragraph 4 of the Particulars of Claim it is alleged that while employed by the Claimant the Defendant:  
*"provided for MiSmile specifically paid search marketing, paid social media marketing, display advertising, web design, creative services, and video advertising. He would have daily contact with MiSmile"*

This was uncontentious save to the frequency of contact with MiSmile – “MiSmile” being the Claimant’s shorthand for the client MiSmile Network Limited referred to in this judgment as MNL.

26. At paragraph 5 it is alleged:

*“In addition the Defendant had access to the client book, potential clients being targeted, business practices and processes, supplier contacts, commercial price data, and confidential information about employees and employment terms. All of this information would be exceptionally useful to a competitor looking to compete with the Claimant.”* (my emboldening).

27. The Defendant made no admissions to that paragraph save that it was pleaded that the Defendant:-

- (a) *“Knew the identities and key contacts of the clients he was the Account Director for ....The Defendant was only aware of other clients of the Claimant in so far as: (i) they were mentioned in passing by other employees; or (ii) publicly advertised by the Claimant on its website (as most of the Claimant’s key clients, including MiSmile, are). The Defendant does not know the key contacts at clients for which he was not the Account Director.*
- (b) *Only knew the identity of potential clients if and in so far as he was asked for input by the Claimant’s sales team.*
- (c) *Had a broad idea of the Claimant’s charging structure, but nothing more. Commercial terms were negotiated and agreed by the Claimant’s sales and finance teams.*
- (d) *Knew what the Claimant’s business practices and processes were; however, these were standard within the industry. Agencies specialising in performance marketing work with a limited number of search providers (e.g. Google) and social media firms (e.g. Facebook). There is nothing confidential about the way in which the Claimant operates.*
- (e) *Does not understand the reference to “supplier contacts” and had no knowledge of anyone’s employment terms bar his own.*“

28. At paragraph 8, 9 and 10 of the Particulars of Claim it is alleged that:

*“MiSmile Ltd established MiSmile Media Ltd with a view to undertake its own in house marketing work, and to compete in the market to provide services to other dental and/or healthcare practices. **This would be in direct competition with the Claimant**”*

And that

*“the value of any loss of market position, arising from **the use of confidential information, poaching potential target customers, and soliciting current clients is incalculable.**”*

And that:

*“Moreover MiSmile Media Ltd is a new company attached to a very large and profitable company (MiSmile Ltd) with significant industry reach. The **Defendant would be able to provide them with significant marketing industry knowledge taken from the Claimant’s process and systems which have been refined over many years***



*at substantial cost and would provide them with an accelerated market position that no-one but the Defendant could provide”*

29. Paragraph 8 (direct competition) was denied on the basis that MML was not and would not be in competition with the Claimant for a number of factual reasons connected with the difference in the nature of the business of the Claimant and the business of MML, not least that (i) MNL had brought its marketing function in house and was therefore no longer in the market place and (ii) that MML providing such services to an associated company MNL in the same group of companies, was of a different kind to the services provided by the Claimant.

30. As to paragraph 9 and 10 it was said:

“Paragraph 9 is inadequately pleaded and is in any event denied. The Claimant has failed to identify the “confidential information” in question or why it is said that the same was known to, and moreover would have been retained by, the Defendant following the end of his employment. The Defendant was an Account Director with responsibility for specific accounts; it does not follow that he knew or would have retained knowledge of the Claimant’s wider client base or the terms on which the Claimant provided services to them. In so far as the Defendant knows and has retained any “confidential information” (and that Defendant cannot provide a direct response to such allegation, because it is inadequately particularised) the same can be protected by specific (and limited) covenants governing the use of confidential information alone.

The Claimant has additionally failed to set out any basis for asserting that MiSmile Media would look to target the Claimant’s clients, as opposed to looking to sell additional services to practices who are already clients of the MiSmile Group. If there are practices using the Claimant’s services and MiSmile Media wants to know details of the package provided by the Claimant, it can simply ask the practice in question for details of its package with the Claimant.

Paragraph 10 is similarly inadequately pleaded because it fails to provide any particulars of the “processes and systems” in question or why it is said they are confidential (as opposed to knowledge of how the performance marketing industry works being part of the Defendants’ so-called ‘stock in trade’). As set out above, the Defendant will say there is nothing unique or confidential about the way in which the Claimant provides services to clients. So far as the Defendant is aware, MiSmile Media want to employ him because of his knowledge of MiSmile’s business (i.e. not his knowledge of how the Claimant operates).”

31. There was no Reply.
32. The Particulars of Claim did not identify or plead any breach of the terms of the PTRs (or any other breach of contract) but rather pleaded particulars of ‘*anticipated breach*’ of the PTRs. This led to the Defendant to invite the Court to strike out certain matters in the witness statement of Mr Khokhar dated 21<sup>st</sup> February 2025 at §36 onwards where he appears to make allegations that (i) the Defendant, in breach of contract, was working for MML while still employed by the Claimant, (ii) began employment with MML in or around November 2024 and (iii) breached his undertakings.
33. At the hearing Mr Johns on behalf of the Claimant was invited by the Court to decide whether he wished to apply to amend his pleadings in relation to these additional matters but confirmed he did not seek to do so.

### **Analysis of pleaded case**

34. By reference to its pleaded case KMG is seeking to restrain Mr Hart from working in what KMG say is “*direct competition*” with its business. KMG claims it has a proprietary interest in “information”— obtained by Mr Hart in the course of his employment as to KMG’s customer lists, pricing and KMG’s business model which, KMG say, expose KMG to the risk of Mr Hart in a new employment at MML - which the Claimant says occupies the same or a very similar business space (digital marketing in the dental sector). The particulars of claim also raise “*poaching of target customers*” or “*solicitation of current customers*” as a relevant concern justifying injunctive relief. I should say immediately that point “*poaching of target customers*” is unlikely to be a ground for injunctive relief unless it can be established that the prospective customer is one with whom the employer has been negotiating and can thus be identified: see *International Consulting Services(UK)Ltd v. Hart* [2000] IRLR 227. As to “*solicitation of current customers*” that is a well-recognised ground covered by post termination restrictions and may, see for example, *Plowman v. Ash* [1964] 1 WLR 568 extend to ex-customers who ceased to be customers during the period of employment but may yet come back to the employer. But as the authorities make clear an employer cannot impose a restrictive covenant to prevent an employee soliciting its customers if the employee had no significant contact with those customers – see *Herbert Morris v. Saxelby* [1916] 1 AC 688. Thus it would be necessary for the Claimant to plead and prove that there were specific current (or recently departed) customers with whom the Defendant had established contact (e.g. accounts managed by Mr Hart) that were liable to be solicited by him in his new post.
35. At the close of the case Mr Wibberley for the Defendant argued that that trade connections ground was never properly pleaded and had it been so different evidence may have been adduced to meet it, including the offer of undertakings not to approach particular clients or customers of the Claimant (indeed such offer is made in the pre-action correspondence recited above).
36. In my judgment and having regard to the nature of the PTRs there is force in this objection. Given the previous offer of undertakings not to approach specific customers in pre-action correspondence, I consider it was incumbent on the Claimant to identify (whether by a confidential list at least some further particularity) those customers in

respect of whom the “customer connection” ground was relied on as a legitimate proprietary interest deserving of protection. That said, the nature of the non-solicitation/non-deal PTR and its specific wording is such that it is tolerably clear that that PTR (2.2(a) and (d)) relates to those previous customers (relevant persons during the protected period) with whom Mr Hart had material dealings while Account Manager.

37. In my analysis I consider that the Claimant on the pleadings:

- (i) Is basing the claim for injunctive relief on the allegation that MML is in direct competition with KMG a provider of digital marketing services;
- (ii) Is alleging that Mr Hart, by dint of his position of Account Director at KMG has acquired knowledge of objective information worthy of protection such as lists of customers, costings and strategy for those clients he has worked with which might be used to the Company’s detriment;
- (iii) Is arguing that Mr Hart is subject to a ‘*non-compete*’ PTR on the basis that MML is a direct competitor of KMG occupying the same space in the relevant market place;
- (iv) Is arguing that Mr Hart is subject to a “*non-deal/non-solicitation*” PTR with respect to relevant persons – customers/clients of KMG during the period of 12 months prior to termination (including MNL) with whom the Defendant had material dealings.

### **The evidence**

38. The evidence consisted in witness statements from Mr Khokhar on behalf of the Claimant, and Mr Hart and Dr Sandeep Kumar on behalf of the Defendant together with the documents to which those witnesses referred.

### **Mr Khokhar**

39. Mr Khokhar is a Director and Shareholder of KAU Media Group Ltd. He explained that KMG works with a wide range of healthcare businesses and that a significant part of its customer base is the dental industry. KMG is a purely digital agency. Its services include Paid Search, Social, Display Advertising, SmartChat, SEO (Search Engine Optimisation), Creative services, Web design, Hosting, Ecommerce, Email Marketing, Video Advertising and more. MNL he said was a longstanding client of KMG and are a large dental provider owned by Dr Sandeep Kumar. He describes MML as being set up as “*an in-house dental agency service provider for the MiSmile Network business*”. In his statement he made suggestions to the effect that he suspected that although given initial assurances by Dr Kumar that MML would not impact the advertising contracts provided by KMG to MNL, “*this all changed when Tom was involved in MiSmile Media*”. There was no sound factual basis for this suggestion other than his suspicion based on the chronology of events. That chronology was that MML was set up in April 2024. Some months later, but well before any notification of resignation by Mr Hart, notice of termination of MNL’s contracts with KMG was given in July 2024. Mr Hart gave notice of resignation on 4<sup>th</sup> September 2024. The date of termination of the MNL contract was initially to be 31<sup>st</sup> October 2024 but extended by agreement until 31<sup>st</sup>

December 2024. That agreement was later withdrawn and the contract ended at the end of October 2024.

40. At paragraph 26 of his statement Mr Khokhar said “A key purpose of having a restrictive covenant is to stop a client taking an employee or employees of our agency... the covenants are to stop clients taking staff and their knowhow and gaining a competitive advantage of in-housing the marketing”. That was a surprising way of putting the purpose of the PTRs when looked at objectively from the standpoint of when the contract of employment was made. Mr Khokhar was challenged about this in evidence. He accepted that no similar (no poaching) clauses were imposed in any contract with any client. Mr Khokhar was also questioned about the extent to which there was any “confidential information” worthy of protection since the information that the Defendant had about MNL and the operations of the group that Mr Hart had obtained working for KMG, was not confidential since it was information already known by MNL itself and would be shared with MML as a matter of course. Mr Khokhar maintained that he considered the information including spend budgets was information that would give a competitor an advantage in the marketplace.
41. Two further aspects of his evidence were important. First, when asked to explain the scope, as he understood it, of the non-compete PTR, he acknowledged that it may be unreasonable to seek to stop an employee going to a large digital marketing company working across a number of different sectors. He accepted that the wording of the non-compete PTR would potentially apply to nearly any employment of Mr Hart as an Account Director in the digital marketing sector if there was cross-over between sectors in which Mr Hart had worked for KMG. He said he would only seek to enforce such a covenant if the agency was a small one, and the area it was involved with was in direct competition with KMG (in other words a situation with facts similar to the present case). That response rather suggested that he acknowledged that the non-compete PTR as drafted may be too wide.
42. Second, he acknowledged that even when told of Mr Hart’s intended resignation in September 2024, and notwithstanding his assertions of access which the Defendant had to confidential information, Mr Khokhar did not put the Defendant on garden leave, did not seek to restrict his access to company data, did not remove him from the MNL account or any of Dr Kumar’s Companies. This was suggestive that there was little, if any, truly confidential information to which Mr Hart had access.
43. While I am willing to accept some of what Mr Khokhar said at face value as to the nature of the business and the chronology of events, other parts of Mr Khokhar’s evidence were unsatisfactory. He said that following the notification of resignation by Mr Hart he instigated ‘high level’ monitoring of Mr Hart’s emails which culminated (in January 2025) in him discovering what he described as “mass deletion” of emails by Mr Hart. Given the absence of any such allegation in the Particulars of Claim signed with a statement of truth on 28<sup>th</sup> January 2025, or in his statement signed with a statement of truth on 21st February 2025, this suggestion appeared to be at the very least an exaggeration of the true facts in an attempt to cast Mr Hart in a poor light. Such emails as were produced as an exhibit to his statement in order to suggest that Mr Hart had been acting in breach of covenant and/or breach of undertaking were unconvincing as proof of any breach, (hence no application to amend) but more importantly, given

there are no pleaded allegation of breach are strictly irrelevant to the issues I have to decide.

44. Mr Johns nonetheless invited me to consider that evidence as relevant to Mr Hart's credibility, and in his written opening suggested that "*If the court finds that D has been operating in breach of his employment contract whilst employed and worse still in breach of his undertaking to C, it would be fair to draw an adverse inference against D*". I decline to make any such finding, not only because the evidence does not justify it, but because, as noted above, this is an allegation which if it was to be made at all, should have been properly pleaded.

### **Mr Hart**

45. Mr Hart gave evidence and was cross examined. He explained that he did not have access to confidential information as such but simply knew identities and contacts of the customers he managed. He had not access to any specific 'client book' and did not work in 'sales'. He explained that while he was working for KMG they were not interested in targeting smaller dental practices and said the largest difference between KMG and MML was the size and type of client that they were likely to target. The MML business model was based on providing services to individual (i.e. small) practices.
46. In cross-examination Mr Hart accepted that he told Mr Khokhar that he had signed a contract but that this was a lie. He agreed that part of his role as Account Director would be to assist with pitches to new clients, and that he would know from his work with KMG the historic approach to clients, what strategies might work, what the budgets were and what strategies were less successful. That through his employment with KMG he would know his own clients and, in relation to MNL would know the practices and the members, and that he was aware that between MNL and another large dental client the 'client spend' per month on marketing (e.g. through Google, Meta etc.) was in the region of £400,000pcm, which in itself would generate significant revenue for KMG.
47. Mr Hart had learnt from his experiences at KMG and had become more expert in digital marketing in the dental sector in the sense of knowing what strategies were likely to work and what not.
48. In terms of knowledge of 'objective' information belonging to KMG, beyond his 'know-how' his evidence really amounted to him accepting that he knew the clients of KMG which he account managed and knew how much those clients were charged for KMG's services, what their budgets were, and what strategies had proved successful and unsuccessful in generating revenue both for KMG and for the client themselves. He acknowledged there was one dental client who was both a network member of MNL and a client of KMG in its own right. But that was the only one, and the typical spend of a small practice would be in the region of £600-900pcm on digital marketing services.

**Dr Sandeep Kumar**

49. Dr Sandeep Kumar is the CEO of MNL. He explained that MNL's business was "Invisalign" – a teeth alignment treatment. He explained that MML had been set up in April 2024 and was focussed on the MNL clients and with the intention of bringing the digital marketing services in house. There was a small – maybe 1% - business in providing services to dental clients outside the network. He did not accept that MML was a competitor of KMG, primarily because (i) the focus of the business was provision of services 'in-house' to the associated network MSN; and (ii) such business MML did outside these parameters was and was likely to be negligible (certainly within the currency of any restrictive covenant).

## **The Law**

50. There was very little dispute about the legal principles which are helpfully set out in the authorities I was referred to. In particular, Gloster J in *Brake Brothers Limited v Ungless* [2004] EWHC 2799 gives a very helpful summary of the key propositions applicable to a case such as the present at §15 which I reproduce below:

*(1) Covenants in restraint of trade are prima facie unlawful and accordingly are "to be treated with suspicion" see per Laddie J in Countrywide Assured Financial Services Limited v. Smart ChD, Laddie J, 7 May 2004.*

*(2) It is for the covenantee to identify a legitimate business interest that is capable of protection.*

*(3) It is for the covenantee to show that the covenant extends no further than is reasonably necessary to protect that interest and the court will enforce the covenant only if it goes no further than is reasonably necessary to protect the trade secrets or other legitimate interests of the previous employer: see, for example, Scott LJ (as he then was) in Scully UK Ltd v. Lee [1998] 1 ICCR 259.*

*(4) The court will scrutinise more carefully covenants in employment contracts, as opposed to ordinary commercial contracts where it will more readily uphold the covenant as being agreed between parties of assumed equal bargaining power.*

*(5) A covenant should be assessed for its validity at the date upon which the contract was made.*

*(6) A covenant will be upheld if the employer can show that it has been designed to protect his legitimate interests that, properly construed, the covenant extends no further than is reasonably necessary to protect those interests: see Mason v. Provident Clothing and Supply Ltd [1913] AC 724; Herbert Morris v. Saxelby [1916] 1 AC 688.*

*(7) If a covenant can be construed in two ways, one of which leads to its invalidity, then the court should prefer the alternative construction: see Tern v. Commonwealth and British Minerals Ltd [2000] IRLR 114 at paragraph 14.*

*(8) A covenant should be interpreted in the context of the agreement as a whole so as to give effect to the intention of the parties.*

*(9) The legitimate interests which justify the imposition of a covenant in restraint of trade are (i) trade connection; (ii) trade secrets or confidential information akin to a trade secret; and (iii) staff stability.*

*(10) Trade connection is established where it can be shown that, by virtue of his position with the employer, the employee will have recurrent contact with customers or, as in this case, suppliers, such that the employee is likely to acquire knowledge of and influence over the customers or suppliers.*

*(11) An employee has a legitimate interest in maintaining the stability of his workforce.*

(12) *In order to determine whether an item of information is a trade secret or confidential information akin to a trade secret, the court should have regard to a number of factors as described the Court of Appeal in Faccenda Chickens v. Fowler [1987] 1 Ch 117 at pages 137B to 138H, including the nature of the employment and the nature of the information itself. It is clear that this must be a trade secret or information of such a highly confidential nature as to require the same protection. This was explained by Lord Shaw in Herbert Morris v. Saxelby (supra) at page 714 as follows:*

*"Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge - these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability - all those things which in sound philosophical language are not objective, but subjective - they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and expand his powers is advantageous to every citizen, and may be highly so for the country at large. This distinction, which was also questioned in argument, is just as plain as the other.*

*An excellent concrete example of the latter point may be found in the present case. The second head of the injunction claimed is "from divulging or communicating ... information as to the customers or affairs of the plaintiff company and from otherwise divulging or using such information". This [is] purely objective, and it was with exact correctness made the subject of a separate claim."*

*A trade secret has also been defined as information used in a business, the disclosure of which to a competitor would be liable to cause real or significant harm to the owner of the information and the dissemination of which has either been limited or not encouraged: see Lansing Linde v. Kerr [1991] 1 WLR 251 at 260B to D per Staughton LJ. Other factors include whether the employer impressed upon the employee the confidentiality of the information (the attitude of the employer towards the information provides evidence which may assist in determining whether the information can properly be regarded as a trade secret); whether the relevant information can be easily isolated from information which the employee is free to use; and whether it is information, the use of which a man of average intelligence and honesty would regard as improper.*

(13) *It is clear that an area or non-competition covenant may be justified where the interest to be protected is trade secrets or confidential information akin to a trade secret, notwithstanding that there is an obligation present in the contract not to divulge confidential information post termination. Such a covenant, the authorities show, may be justified because it can be difficult for a former employer to police compliance with an obligation relating to trade secrets or confidential information akin to a trade secret. In addition, such a covenant can be justified by the fact that there are serious difficulties in identifying precisely what is, or what is not, a trade secret, or confidential information akin to a trade secret; see Littlewoods Organisation v Harris [1997] 1 WLR 1472 at pages 1479A-E, where*

*Lord Denning said:*

*"But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the*

*line between information which is confidential and information which is not: and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. 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 to be reasonable if limited to a short period."*

*Likewise in CR Smith Glaziers Limited v Greenan (1993) SLT 1221, the court said at page 1223F:*

*"... it is well established that a prohibition against disclosing trade secrets is practically worthless unless it is accompanied by a restriction upon the employee possessed of secrets against entering the employment of competitors."*

*See also Printers & Finishers Limited v. Holloway [1965] 1 WLR 1 at page 6; Faccenda Chicken Limited v Fowler [1987] 1 Ch 117 at pages 137G-138G; Turner v. Commonwealth & British Minerals Limited [2000] IRLR 114 at paragraph 18; Kall-Kwik Printing v Rush [1996] FSR 114 at page 124. However, the courts will scrutinise their covenants with particular care because of their broad anti (inaudible) effect, enquiring whether a lesser form of restriction (for example a non-solicitation clause) might not have given the employer sufficient protection and have been a more proportionate form of embargo than one which bars out competitive employment in the whole of the United Kingdom; see Office Angels Limited v Rainer-Thomas [1991] IRLR 214 paragraphs 45-58 and Countrywide Assured Financial Services Limited v Smart (*supra*).*

*In any event, a balance has to be struck between the degree of protection legitimately required by the claimant (which is permissible) and the degree of restriction or legitimate use of skill and knowledge and legitimate competition (which is impermissible); see Office Angels (*supra*) at paragraph 58. In considering the anti-competitive effect of the area covenant, the court should consider whether the existence of the provision would diminish the defendant's prospects of employment; Stenhouse Australia Limited v Phillips [1974] AC 391 at page 124C-D.*

*(iii) In cases where a restrictive covenant is sought to be enforced the trade secret (or confidential information akin to a trade secret) must be particularised sufficiently to enable the court to be satisfied that the employer has a legitimate interest to protect, but no more than that; see Scully UK Limited v. Lee (*supra*) [1998] IRLR 259 at paragraph 23.*

*(iv) The covenant to protect the use or disclosure of trade secrets (or confidential information akin to a trade secret) does not depend upon the employee taking documents or memorising the contents of documents. It can properly apply to trade secrets (or confidential information akin to a trade secret) which the employee may carry away in his head; see, eg, Polly Lina Limited v Finch [1995] FSR 751 at page 757.*

51. As already noted, most recently the Supreme Court has confirmed that covenants in restraint of trade are *prima facie* unenforceable and will only be enforced where they go no further than is reasonably necessary to protect the legitimate business interests of the claimant; Harcus Sinclair LLP v Your Lawyers Limited [2021] UKSC 32; [2022] AC 1271 at [48].
52. The approach applicable to determining whether a covenant is void or enforceable are helpfully summarised in TFS Derivatives Ltd v Morgan [2005] IRLR 246. It was agreed



by the parties this was an appropriate approach to apply in the present case:- §35-38 (my emphasis emboldened):-

35 ...*the relevant legal principles to be applied in order to answer that question [whether a restrictive covenant is reasonable and enforceable] were set out by the Court of Appeal in the case of Office Angels Limited v Rainer Thomas & O'Connor [1991] IRLR 214, in the judgment of Sir Christopher Slade, with whom the other members of the court agreed. At paragraphs 21 to 25 he summarised the relevant principles as follows:*

*"(1) If the Court is to uphold the validity of any covenant in restraint of trade, the covenantee must show that the covenant is both reasonable in the interests of the contracting parties and reasonable in the interests of the public: (see for example Herbert Morris Ltd v Saxelby [1916] AC 688 at p.707 per Lord Parker of Waddington).*

*(2) A distinction is, however, to be drawn between (a) a covenant against competition entered into by a vendor with the purchaser of the goodwill of a business, which will be upheld as necessary to protect the subject-matter of the sale, provided that it is confined to the area within which competition on the part of the vendor would be likely to injure the purchaser in the enjoyment of the goodwill he has brought, and (b) a covenant between master and servant designed to prevent competition by the servant with the master after the termination of his contract of service: (see for example Kores Manufacturing Co Ltd v Kolok Manufacturing Ltd [1959] Ch 109 at p 118 per Jenkins LJ).*

*(3) In the case of contracts between master and servant, covenants against competition are never as such upheld by the court. As Lord Parker put it in Herbert Morris Ltd v Saxelby (supra) at p 709:*

*'I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. **Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained.***

*On this appeal we are not concerned with trade secrets. The plaintiff's staff handbook contained special provisions (in clause 4.3) dealing with confidentiality, but no issue concerning confidentiality has been raised in this court.*

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

*'The employer's claim for protection must be based upon the identification of **some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation.***

(5) *If, however the Court is to uphold restrictions which a covenant imposes upon the freedom of action of the servant after he has left the service of the master, the master must satisfy the Court that the restrictions are no greater than are reasonably necessary for the protection of the master in his business: (see Mason v Provident Clothing & Supply Co Ltd [1913] AC 724 at p.742 per Lord Moulton). As Lord Parker stressed in Herbert Morris Ltd v Saxelby (supra) at p.707, for any covenant in restraint of trade to be treated as reasonable in the interests of the parties 'it must afford no more than adequate protection to the benefit of the party in whose favour it is imposed' [Lord Parker's emphasis]."*

36. Thus, [a relevant clause will be] unlawful unless it is justified by [the Claimant] as being reasonable, in the interests both of the parties and of the public. In assessing reasonableness, there is essentially a three-stage process to be undertaken.

38. Firstly, **the court must decide what the covenant means when properly construed**. Secondly, the court will consider whether the former employers have shown on the evidence that **they have legitimate business interests requiring protection in relation to the employee's employment**. ....Thirdly, once the existence of legitimate protectable interests has been established, **the covenant must be shown to be no wider than is reasonably necessary for the protection of those interests**. Reasonable necessity is to be assessed from the perspective of reasonable persons in the position of the parties as at the date of the contract, having regard to the contractual provisions as a whole and to the factual matrix to which the contract would then realistically have been expected to apply.

39. Even if the covenant is held to be reasonable, **the court will then finally decide whether, as a matter of discretion, the injunctive relief sought should in all the circumstances be granted**, having regard, amongst other things, to its reasonableness as at the time of trial.

53. At each of the four stages outlined above, the burden of proof is on the employer - see Coppage v Safety Net Security Limited [2013] EWCA (Civ) 1176; [2013] IRLR 970 at [9].

54. On the specific topic of protection of trade secrets/confidentiality I was also referred by the Defendant to FSS Travel and Leisure Systems v. Johnson [1998] IRLR 382 where Mummery LJ set out the position as follows:-

Trade Secrets - The Law

*On the question of the validity of a restrictive covenant for the protection of an employer's trade secrets Mr Tabachnik QC cited decisions of this court for a statement of the applicable principles: Littlewoods Organisation Ltd -v- Harris [1977] 1 WLR 1472; Office Angels Limited -v- Rainer-Thomas [1991]*

*IRLR 214; and Lansing Linde Limited -v- Kerr[1991] 1 AER 418. Those cases expound and exemplify well settled legal propositions affecting restrictive covenants in an employment contract:-*

*1. The court will never uphold a covenant taken by an employer merely to protect himself from competition by a former employee.*

*2. There must be some subject matter which an employer can legitimately protect by a restrictive covenant. As was said by Lord Wilberforce in Stenhouse Limited -v- Phillips [1974] AC 391 at page 400 E (cited by Slade LJ in the Office Angels case supra):*

*"The employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation."*

*3. Protection can be legitimately claimed for identifiable objective knowledge constituting the employer's trade secrets with which the employee has become acquainted during in his employment.*

*4. Protection cannot be legitimately claimed in respect of the skill, experience, know-how and general knowledge acquired by an employee as part of his job during his employment, even though that will equip him as a competitor, or potential employee of a competitor, of the employer.*

*5. The critical question is whether the employer has trade secrets which can be fairly regarded as his property, as distinct from the skill, experience know-how, and general knowledge which can fairly be regarded as the property of the employee to use without restraint for his own benefit or in the service of a competitor. This distinction necessitates examination of all the evidence relating to the nature of the employment, the character of the information, the restrictions imposed on its dissemination, the extent of use in the public domain and the damage likely to be caused by its use and disclosure in competition to the employer.*

*6. As Staughton LJ recognised in Lansing Linde Ltd (Supra) at p.425h the problem in making a distinction between general skill and knowledge, which every employee can take with him when he leaves, and secret or confidential information, which he may be restrained from using, is one of definition. It must be possible to identify information used in the relevant business, the use and dissemination of which is likely to harm the employer and establish that the employer has limited dissemination and not, for example, encouraged or permitted its widespread publication. In each case it is a question of examining closely the detailed evidence relating to the employer's claim for secrecy of information and deciding, as a matter of fact, on which side of the boundary line it falls. Lack of precision in pleading and absence of solid evidence in proof of trade secrets are frequently fatal to enforcement of a restrictive covenant. Later*

*decisions have not improved upon, or doubted the correctness of, the approach adopted by Cross J in Printers & Finishers Ltd -v- Holloway [1965] 1 WLR 1 at 5 A-C:*

*"If the information in question can fairly be regarded as a separate part of the employee's stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of his old employer and not his own to do as he likes with, then the court, if it thinks that there is a danger in the information being used or disclosed by the ex-employee to the detriment of the old employer, will do what it can to prevent that result by granting an injunction."*

*Cross J gave examples of clear cases for restraint of an ex-employee eg using or disclosing a chemical formula, a list of customers, methods of construction or design features made known to the employee while in employment. He then considered knowledge which was not readily separable from the employee's general knowledge and his acquired skills: eg knowledge of the difficulties encountered in a process or of an expedient which the employee had found out for himself by trial and error during his employment. He doubted whether " any man of average intelligence and honesty would think that there was anything improper in his putting his memory of particular features of his late employer's plant at the disposal of his new employer." (p.6C-D).*

55. I was also directed to authority in respect of determining the ‘*in competition with*’ question. Where it is alleged two businesses are in competition, there are two questions to be considered. The first is whether the products and services provided are sufficiently comparable to mean they are in competition. The second is whether the two businesses are to be regarded as competing in the same area see - *Morris-Garner v One Step (Support) Ltd* [2017] QB 1 at [57] to [61].

### **Summary of the arguments of the parties.**

56. At the close of the case Mr Wibberley for the Defendant submitted that the Claimant had not made good his case with respect to the protection of confidential information or trade secrets e.g. client book, charging structure, business practices. None of this, he said fell into the category of trades secrets and echoed Mummery LJ's observation *supra* that “ *Lack of precision in pleading and absence of solid evidence in proof of trade secrets are frequently fatal to enforcement of a restrictive covenant*”.
57. He pointed out that certain matters that might have been proved from accounts information had not been produced, and that generally the injunction claim was based merely on assertion that there was a proprietary interest deserving of protection when on close analysis there was nothing more than business ‘know-how’.
58. In terms of competition he said it had not been properly proved that KMG was in fact in the same market for small dental practices, and that in any event MNL, KMG's former large client had already exited the marketplace since those services were now being provided in house by MML. As to the witnesses he said Mr Hart was an honest witness ready to make concessions whilst Mr Khokhar was unreliable and had taken on the role of advocate for his cause. He argued that in any event ‘non-compete’ covenant

was too wide to be enforceable and could not be cured by severance. Insofar as it was open for the Claimant to argue customer connection, he said that again MML's products and services were not in competition with KMGs and there was no basis for a 12 month restriction which was unreasonably long. These were clients in a fast-changing market where there was weekly contact. The 12 month 'non-dealing' or 'non-solicitation' clause was unreasonable. Mr Wibberley stood by and referred to the submissions in his skeleton argument.

59. Mr Johns for his part adopted Cox J.'s approach to the issues and argued that "*what MML say they are doing today is of little relevance in relation to the covenants*". He argued that MML was a digital marketing company occupying the same market space as KMG and was in direct competition with it, not just for former clients such as MNL, who might otherwise come back, but to new clients large or small in the dental sector. That the client information and client list which Mr Hart had obtained in the course of his employment was an obvious proprietary interest worthy of protection as was information in relation to clients who were being targeted by KMG. The risk, he said, was of Mr Hart being now able to use that information to offer similar services to the same clients at a discounted rate, or at least knowing how to price services attractively to them and service their needs, thus taking business away from KMG. He said the fact that Mr Khokhar had accepted that, if interpreted widely, the 'non-compete' clause was unreasonable, did not mean the clause was, reasonably interpreted, unenforceable. He explained that Mr Khokhar had given evidence that he would only enforce in much narrower circumstances and that is how the clause should be fairly interpreted. That the 'non-compete' was as narrow as it could reasonably have been having regard to the internet marketplace; included a carve out in respect of areas of work or marketing in which the Claimant had not been involved during the relevant period; and was time limited to 6 months. He pointed out that Mr Hart had lied to Mr Khokhar, and overall, was not reliable. He said that the stipulations of 6 months for the non-compete and the 12 months for the non-deal/non-solicitation clause were reasonable. He also continued to rely on his written submissions made in opening to the effect that the PTRs were both reasonable and necessary to protect KMG's legitimate business interests; that it was not just MNL who were a 'Relevant Person' (a point conceded by the Defendant) but Sandeep Kumar was plainly also a 'Relevant Person' because he was the owner of a number of dental companies and a substantial asset for KMG to protect. He argued that if Mr Hart was not leaving KMG, that it was doubtful that Mr Kumar's companies would also be leaving KMG. The fact that Kumar's companies may have left in any event does not "*denude the 12 month restriction of any use*" since there were other businesses/customers that might be protected from leaving.

### **Determination of the issues**

60. For reasons which follow I find that the Claimant has not established that either PTR is enforceable in the present circumstances, and refuse the application for injunctive relief.

### **What the terms of the restricted covenant – in this case described as post termination restrictions - are and whether they are engaged on the facts?**

61. The terms of the restrictive covenant are twofold. 2.1 is a 'non-compete' clause, while 2.2 (a) is a 'non-solicitation' and 2(d) a 'non-dealing' clause.

## Clause 2.1

62. Clause 2.1 provides that for a six month period from the termination date, [Mr Hart] must not be engaged or concerned or interested or participate in a business **the same as or in competition with KMG** ... provided always that this paragraph shall not restrain [Mr Hart] from being engaged or concerned in any business concern in so far as [his] duties or work shall relate solely to services or activities with which [he was] not concerned to a material extent during the 12 months immediately preceding the Termination Date (24. 12.2024).
63. The first issue here is whether MML is a business which is “*the same as or in competition with*” KMG. Following the approach in *Morris-Garner*, the first question is whether KMG and MML are properly to be regarded as supplying goods and services which are sufficiently comparable to mean that they are “*in competition*”. In my judgment this first question focuses on the nature of the service provided. The digital marketing service provided by MML for MNL are ostensibly, identical in kind to that formerly provided by a relevant part of KMG’s business. Services (albeit at arms’ length) i.e. from one company to another are provided ‘in house’ but they are, on the face of it, of the same kind. But that is not the end of the enquiry.
64. The second issue is whether MML is competing in the same “area” as that in which KML was or is carrying on business. Here the Defendant points to two relevant distinctions. First MNL has left the marketplace. It has taken a decision to bring its services in house. MML is not competing with KMG in the same marketplace for MNL’s work. That has already been withdrawn from KMG and has been taken in house. No third party digital marketing provider can compete for it. The landscape has fundamentally changed and had done so before termination. Second, MML is focussed on providing digital marketing services to small dental practices as part of the MiSmile Network, by contrast with KMG whose focus is not on small practices. Having considered this matter carefully, and notwithstanding Mr Khokhar’s consideration that MNL, although it served notice in July 2024 might yet return to the marketplace, I am not satisfied that it has been established by the Claimant that MML is ‘*in competition*’ with KMG nor that MML is, or is focussed on, providing the same kind of services in the same area. I accept the evidence of Mr Hart and Dr Kumar that it is essentially focussed on the MNL network whereas KMG’s focus is on the wider market and larger dental service providers.
65. I also reject the subsidiary argument for the Claimant that MML is not limited to its in house work for MNL and may compete for small practice work outside. I am not satisfied that that this is, or is likely to be, within the period of the PTRs, a sufficiently large aspect of MML’s business to mean that the two businesses are properly operating in the same ‘area’ as to be in competition. The only proper evidence on this issue is from Dr Kumar who at paragraph 12 of his statement says:  
“*MiSmile will be actively promoting media services to MiSmile practices, MiSmile will not be actively targeting practices outside of the MiSmile network. Notwithstanding this, if any independent dental practices want to engage with MiSmile Media, we will have discussions with those practices to see what services they need, how we can help them and what if any bespoke services we can offer them.*”

66. There is thus a possibility of competition which in turn leads to the question whether this kind of work (for small individual practices) was something which forms a core part of KMG's dental sector business. I am not satisfied that it does on the evidence. Any such possibility is small, may only arise in relation individual practices, and is not such as would justify engagement of the restrictive covenant.
67. My decision above is sufficient to determine the issue, but for completeness I should add that I do not find that the Claimant has established a legitimate business interest requiring protection. The primary relevant interest relied on by the Claimant is 'confidential information'. I agree with the Defendant that it is settled law that this category of legitimate interest does not cover "the skill, experience, know-how, and general knowledge" acquired by an employee. It only protects 'objective' knowledge – see Mummery LJ in *FSS Travel supra*. I have already indicated that there is force in the Defendant's submission that the confidential information must be particularised sufficiently to enable the court to be satisfied that the Claimant has a legitimate interest to protect. Given that the identified competitor MML will already possess the MNL data and information by dint of being an associated company under the same ownership I do not consider that there is any legitimate proprietary interest here to protect. MNL by bringing the work in house to MML and employing Mr Hart is not thereby giving to MML confidential information which is the property of KMG. I have already concluded above that the confidential information if it is such in relation to other dental businesses apart from MNL is not sufficient to amount to a legitimate proprietary interest deserving of protection by injunctive relief.
68. I therefore consider that the Claimant has failed to establish that MML is in competition with KMG and that KMG has not established that it has a legitimate proprietary interest under the non-compete clause that is required to be protected beyond Mr Hart's 'know how' which is not something which it owns. As Mummery LJ observed above:

“It must be possible to identify information used in the relevant business, the use and dissemination of which is likely to harm the employer, and establish that the employer has limited dissemination and not, for example, encouraged or permitted its widespread publication. In each case it is a question of examining closely the detailed evidence relating to the employer's claim for secrecy of information and deciding, as a matter of fact, on which side of the boundary line it falls. Lack of precision in pleading and absence of solid evidence in proof of trade secrets are frequently fatal to enforcement of a restrictive covenant”

69. Having regard to the totality of the evidence I am not satisfied that the Claimant has proved a proprietary interest in information used in the KMG's business the use and dissemination of which is likely to harm KMG.
70. In any event, I consider that clause 2.1 was so wide as to be unreasonable and unenforceable. Viewed from the time at which the contract was made, the width of the

clause is so wide as potentially to prevent the Defendant from working for any digital marketing service provider which operates in any sector in which the Defendant had worked in the Protected Period. This is because KMG works across a wide range of sectors and Mr Hart was Account manager for different businesses in different sectors. I considered that Mr Khokhar's concession that he would only seek to enforce the covenant if Mr Hart was seeking to work in a small rather than large marketing company, and in relation to the dental sector, to be fatal to the argument that this PTR was reasonable from the viewpoint of the time the contract was made and what was in the reasonable contemplation of the parties.

71. For these reasons I dismiss the claim in respect of the enforcement of the non-compete clause 2.1. It is not necessary to go on to consider whether the clause is capable of severance but if that were to be an issue I would say it is not.

**Clause 2.2.(a) and (d)**

72. As Harvey on Industrial Relations and Employment Law notes, at [220.11]:

“Covenants restraining employees from soliciting business from a defined class of customers or clients (or suppliers or other key business partners) of their former employer will potentially be an enforceable restraint and generally likely to be viewed more favourably by the court than non-competes, being more concerned with a legitimate interest and less about restrictions on economic activity in a free market”.

73. Using the approach already identified, the first question is what the clause means and whether it is engaged on the facts. My interpretation of the clause (which contains non-dealing and non-solicitation provisions) is that it means that for a 12 month period, Mr Hart is prohibited, in respect of any competitive products or services (which I interpret as digital marketing in the relevant marketplace (i.e. similar service and similar customer base) from either soliciting or dealing with any person who was a customer of KMG in the 12 month period prior to termination.
74. For reasons I have already given I have found on the present facts that MML (at least for the period of the PTRs) is not and is not likely to be '*in competition with*' KMG. For that reason, I consider 2.2(a) and (d) are not engaged. The products and services provided by MML are not “competitive” with those provided by KMG. This is because (i) KMG and MML are not in competition; and (ii) because they provide different services to a different potential customer base.
75. In addition, I do not consider that the non-dealing and non-solicitation provisions are enforceable because they are not reasonably necessary to protect any proprietary interest that has been proved by the Claimant.
76. It is therefore not necessary to consider this clause further. However, were it necessary to do so, I also consider that the period of 12 months is unreasonable and disproportionate to the salary and benefits package agreed in his employment contract at the time it was made. There is no explanation by the Claimant (upon whom the burden of proof lies) why in what is a fluid market for digital marketing provision and



where (judging from the MNL notice period of 3 months) a period of 12 months (rather than a much shorter period say, 3 or 6 months) has been chosen by the employer to prevent non-solicitation or non-dealing. That period appears much too long in the particular circumstances and is not properly justified on the evidence. I do not consider the clause can be severed to render it effective.

### **DISPOSAL**

77. In the light of these conclusions, I refuse to grant an injunction and the claim is dismissed. The Defendant's undertakings, to the extent that they have not expired must be discharged.
78. I express my gratitude to both counsel for their helpful submissions both written and oral.