

Neutral Citation Number: [2010] EWHC (Ch) 1178

Case No: HC10C00888

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26th May 2010

Before :

MR JEREMY COUSINS QC, SITTING AS A DEPUTY JUDGE OF THE
CHANCERY DIVISION

Between :

**ASSOCIATED FOREIGN EXCHANGE
LIMITED**

Claimant

- and -

**(1) INTERNATIONAL FOREIGN
EXCHANGE (UK) LIMITED
(2) SAEED ABBASSI**

Defendants

APPROVED JUDGMENT

Mr Patrick Green (instructed by **Messrs Sibley & Co**, of 1 Heathcock Court, 415, Strand, LONDON WC2R ONT) for the Claimant

Mr Marcus Pilgerstorfer (instructed by Messrs Keystone Law, 53, Davies Street, LONDON W1K 5JH) for the Defendants

Hearing date 12th May 2010

MR JEREMY COUSINS QC:

BACKGROUND

1. The Claimant (“AFEX”) seeks to enforce a restrictive covenant contained in a contract of employment (“the employment contract”) made between it and the Second Defendant, Mr Saeed Abbassi, which was made on 1st December 2008.
2. AFEX’s business consists of trading in foreign currencies. Mr Abbassi was engaged as an account executive.
3. On 24th September 2009, AFEX placed Mr Abbassi on 3 months’ garden leave because it concluded that he had wrongly speculated with €350,000 worth of client funds. Whilst the propriety of Mr Abbassi’s dismissal has not been formerly conceded in these proceedings, it is common ground that his employment with AFEX terminated on 24th December 2009. At least for the purposes of the hearing before me, no suggestion was made on Mr Abbassi’s part to the effect that the circumstances of termination of his employment would entitle him to treat himself as discharged from observing the provisions of the restrictive covenants in his contract of employment.
4. In December 2009 or January 2010 (there is an issue as to the precise timing) the First Defendant, International Foreign Exchange (UK) Limited (“IFX”), employed Mr Abbassi as a senior dealer. IFX also deals in foreign exchange transactions, and is therefore a trade competitor of AFEX.
5. AFEX maintains that since commencing his employment with IFX, Mr Abbassi has acted in breach of the restrictive covenants to which he was subject under the terms of his contract with AFEX. An injunction is sought to restrain any further breaches.

THE EMPLOYMENT CONTRACT

6. Mr Abbassi's employment with AFEX began on 8th March 2004, but the employment contract containing the relevant covenants was dated 1st December 2008. It was signed by Mr Abbassi and on behalf of AFEX.
7. The employment contract provided that Mr Abbassi would be employed as an Accounts Executive, and that his remuneration would be £35,000 per annum, together with 20 per cent commission on monthly revenue. It was common ground at the hearing before me that the annual value of the commission was approximately £100,000.
8. Mr Abbassi's role was to buy from and sell foreign currency to AFEX's existing clients and to pursue new contacts with the purpose of expanding AFEX's business.
9. The employment contract made detailed provision in respect of Mr Abbassi's usual hours of work "during which 45 minutes may be taken for lunch between 12:00 p.m. and 2:00 p.m.". Under clause 5.3 he waived his right under the Working Time Regulations 1998 to have his working time limited to an average of 48 hours per week. Mr Abbassi was entitled to 20 days holiday per annum which could not be taken in periods of more than 10 days at a time. Detailed provisions were made in respect of sickness and absence. He was entitled to join AFEX's pension scheme to which AFEX would make a contribution.
10. With regard to termination, the employment might be terminated by either party's providing to the other not less than 2 months' notice, but there was an express reservation to AFEX of the right to place Mr Abbassi on garden leave. It was envisaged that AFEX might pay for Mr Abbassi to attend courses in the course of his employment; in the event that he gave notice of termination within 6 months of attending such a course, or in the event of dismissal for gross misconduct, Mr Abbassi was to reimburse AFEX in respect of all costs associated with such attendance.

11. Mr Pilgerstorfer, learned counsel for IFX and Mr Abbasi, emphasised that the contract of employment was not negotiated by means of collective bargaining, and he suggested that it was therefore made with inequality of bargaining power.

12. The restrictive covenants were contained in clause 13.1 and were in the following terms:

“13.1 The Employee undertakes that he will not, in any Capacity (without the previous consent in writing of the Employer) for:

...

13.1.2 A period of 12 months immediately after the Termination Date, [in any Capacity for a Competitor] negotiate or, solicit Business from, or endeavour to entice away from the Employer a Customer, or a Potential Customer.

13.1.3 A period of 6 months immediately after the Termination Date, undertake [for a Competitor], to provide or supply either directly or indirectly, any Restricted Services to or for any person who is or was a Customer, or a Potential Customer.

...

13.3 The periods for which the restrictions at clauses ... 13.1.2, 13.1.3 ... apply shall be reduced by any period that the Employee spends on Garden Leave (pursuant to clause 10) immediately prior to the Termination Date.”

13. I shall refer to the provisions of clauses 13.1.2 and 13.1.3 respectively as “the non-solicitation covenant” and the “non-dealing covenant”.

14. The terms used in clause 13 were defined in as follows:

“Business” means all and any business or other commercial activities of the Employer in the field of international payment services, foreign exchange risk management, buying and selling foreign exchange, or foreign exchange outsourcing with which the Employee has been concerned or involved to any material extent at any time during the 12 month period immediately prior to the Termination Date.

“Capacity” means as an agent, consultant, director, employee, owner, partner, shareholder or in any other capacity.

“Competitor” means – any institution, bank, firm, company or other business entity that engages in Business similar to that carried on by the Employer during the period of the Employee’s employment including but not limited to: Travelex, Moneycorp, Corporate FX, Cambridge Mercantile, Baydonhill, Worldfirst Currencies, Currencies Direct, Globex, HIFX, IFX, Schneider FX, Raphael Bank, Customs House, AMEX, Interchange, Smart Currency Exchange and PEX.

“Customer” means any firm, company or person who during the 12 months prior to the Termination Date has been supplied with any Restricted Services and with whom the Employee had contact in order to supply Restricted Services in the course of his employment.

“Potential Customer” means a Customer who the Employee has had contact with at any time during the 12 month period prior to the Termination Date and with whom the Employee has been actively soliciting business for the purpose of providing Restricted Services.

“Restricted Services” means all and any services of any kind including the provision of foreign exchange services which shall be provided by the Employer [or any Group Company] in the normal course of Business.

15. It is the enforceability of the non-solicitation covenant only that is now in issue before me, but alleged breach of the non-dealing covenant is relied upon by AFEX as part of its case (though not presently pleaded). AFEX alleges that since at least the 16th February 2010, IFX has been aware of the terms of the employment contract and has procured Mr Abbassi to breach it.

THE APPLICATION

16. On 17th March 2010 AFEX issued the Claim Form and an application for an injunction. The application came before Mr Justice Roth on 18th March 2010 who made an order by consent upon the undertakings of IFX and Mr Abbassi, and upon a cross-undertaking in damages given by AFEX. Mr Abbassi undertook not to breach the non-dealing clause until 24th March 2010 (the date upon which the operation of that clause contractually terminated), and further, until the return date, not to breach the non-solicitation clause. IFX undertook, pending the return date, not to procure Mr Abbassi’s breach of his

undertakings. The consent order included directions for the serving of evidence before the return date, and it is pursuant to those directions that the matter is now before the Court.

17. A Defence, on behalf of both IFX and Mr Abbassi, was served on 13th April 2010, and evidence, as I shall describe below, has been served on behalf of all the parties.
18. AFEX's application is supported by three witness statements from Mr Stuart Holmes who since November 2004 has been the global sales director of AFEX.
19. IFX and Mr Abbassi rely upon two witness statements from Mr Thomas Greenwood, a director of IFX, a statement from Mr Abbassi and a statement from Mr Sean Collins, a dealer employed by IFX. Although initially there appeared to be some dispute with regard to whether Mr Holmes' second and third statements, Mr Greenwood's second statement and Mr Collins' statement might be admitted in evidence, very sensibly the parties agreed at the hearing that the application should proceed with all of the statements being considered.
20. IFX and Mr Abbassi maintain that an injunction should not be granted because the non-solicitation covenant is unenforceable. Further, they contend, that Mr Abbassi has not committed a breach of the non-solicitation covenant, and that in any event the evidence does not establish any liability as against IFX. It is further submitted that other equitable considerations militate against the grant of an injunction.
21. It is common ground that, assuming the non-solicitation covenant to be enforceable, the latest date upon which it would still operate is the 23rd September 2010, and that there is therefore no prospect of this action's being tried before the expiration of the relevant period. Both counsel submitted that although the well established principles described in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 are applicable in considering whether an interim injunction should be granted or continued, the application of those principles

has to be refined in such circumstances, for the reasons Staughton LJ explained in *Lansing Linde Ltd v Kerr* [1991] IRLR 80, at page 83:

“If it will not be possible to hold a trial before the period for which the plaintiff claims to be entitled to an injunction has expired, or substantially expired, it seems to me that justice requires some consideration as to whether the plaintiff would be likely to succeed at trial. In those circumstances it is not enough to decide merely that there is a serious issue to be tried.”

22. As Mr Pilgerstorfer observed, this was the approach adopted by the Court of Appeal in *Credit Suisse Asset Management Limited v Armstrong & Others* [1996] ICR 882 (another case concerned with an injunction to enforce restrictive covenants in employment contracts); see especially the judgment of Neill LJ at page 452.

THE ISSUES

23. In deciding whether to grant an injunction until 24th September next, I have to give consideration to AFEX’s prospects of success in relation to four principal issues:
- (1) Whether the non-solicitation covenant is enforceable (“the Enforceability Issue”).
 - (2) Whether, if enforceable, the covenant was breached by Mr Abbassi (“the Breach Issue”).
 - (3) Whether, if enforceable, IFX induced or procured Mr Abbassi to commit a breach of that covenant (“the Procurement Issue”).
 - (4) Whether there are any other factors which should affect the grant or refusal of equitable relief by way of injunction (“the Relief Issue”).

THE ENFORCEABILITY ISSUE

The evidence for AFEX

24. In his first witness statement, Mr Holmes said that AFEX's business was based upon a relatively small number of clients who had a large number of regular transactions, and a large number of clients who had a smaller number of intermittent transactions. He said that without the clients who have large transactions, AFEX would be unable to compete actively for the services of clients with smaller transactions, or for new clients, as the exchange rates offered would be uncompetitive. Mr Holmes identified three customers which he said were of particular importance; Game Bore Cartridge Limited ("Game"), Cross Services Limited ("Cross Services") and 1927 Limited ("1927"). He said that 1927 was one of AFEX's biggest clients producing approximately £175,000 per annum in revenue; as for the others mentioned, these each produced revenue of approximately £20,000 per annum.
25. Mr Holmes said that AFEX worked extremely hard within a competitive market to maintain a good relationship with its clients, by giving to them the best possible rates for their currency transactions. As a result, he said, AFEX had been able to develop longstanding relationships with its clients.
26. In his second witness statement, Mr Holmes described how an affiliate agreement was established with the Gun Trade Association on behalf of AFEX with Mr Abbassi's assistance. That agreement provided an affiliate commission from revenue generated from business derived from an endorsement of AFEX to its members. Currently, he said, AFEX had twelve active clients and two prospective clients which had come directly from the Gun Trade Association's members.
27. In answer to the suggestion that the non-solicitation clause was unreasonable, Mr Holmes said that a company known as Travelex, a major competitor, also has a 12-month non-solicitation post-termination of employment provision for its account executives as did another company called Baydonhill; a copy

Baydonhill's provision (but only an extract from the relevant contract) was actually exhibited in Mr Greenwood's evidence.

28. Mr Holmes said that AFEX's business experience was that it retained over 95% of its business relationships over a 12-month period. He said that AFEX did not simply sell cheaper foreign exchange in a competitive market, but it sold a payment service which in all cases improved and streamlined the payment processing which helped to build long term relationships. He contrasted the operation of AFEX with that of other competitors explaining that at other brokerages account executives would "lose both credit and the direct contact with his trading accounts; AFEX, almost exclusively, does it differently – the commission and trading interaction is held with the account executive for the lifetime of the account with AFEX whilst the account executive stays with the company".
29. Mr Holmes said that it was perfectly clear that when an employee leaves AFEX, having had contact with some of its clients, he would "have highly confidential information about those clients, as to their commercial needs and perhaps, particularly, as to margins and therefore the ranges of charges which they have effectively been prepared to pay us for the foreign exchange services which we provide. This information is plainly highly confidential, not least because, in the hands of a competitor, it would allow the competitor to lure the customer away by undercutting us: it is rather like knowing what a competitor's tender is going to come in at or what another sealed bid is in an auction".
30. Mr Holmes said it was very difficult to prove that information of the kind described had been used against AFEX by a recently departed employee, but he suggested that this reinforced one of the legitimate interests of the business for which its restrictive covenants provided proportionate protection. He continued:

“... A recently departed employee will know which clients are the most profitable overall and which provide the most business. This is clearly highly confidential information which again should not fairly

be accessible to a competitor from a former employee. Such information allows the employee to target particularly good clients and, in combination with confidential information on margins, focus their efforts on undercutting us with our key customers.”

The evidence for IFX and Mr Abbasi

31. Mr Greenwood, in his first witness statement, suggested that the 12-month non-solicitation provision was too long, unreasonable, and ought not to be enforced. He acknowledged that a similar restriction, but for a period of 6 months, rather than 12 months, after termination of employment, was contained in IFX’s contracts with its employees. He said his understanding was that the majority of companies in the industry had contracts with their employees containing 6-month non-solicitation clauses. He produced an extract only from a contract of employment relied upon by a company known as HIFX, and an extract only from Baydonhill’s form of contract. Notably the Baydonhill contract was not limited in terms of non-solicitation to 6 months but rather 12 months. (I note at this point that Mr Collins’ evidence, in his short witness statement, was to the effect that he had learned from his father, until recently a director of Baydonhill, that its non-solicitation clause provides now for only a 6-month period.)
32. Mr Greenwood suggested that AFEX had not given a reason as to why a 12-month non-solicitation provision was necessary. He drew attention to the fact that this matter had been raised in correspondence as early as 17th February 2010, and on several occasions since then. He exhibited the relevant correspondence.
33. Mr Greenwood said:

“It is the nature of foreign exchange business that most customers trade frequently, making one-off deals on a weekly, fortnightly or monthly basis. A smaller number of clients, those with fewer currency exchange requirements, can trade once every two months or so. The exception would be when a customer makes a forward buying or forward selling contract. A forward contract involves a payment at a future date, or a series of payments throughout the term of the contract, and although this is still a single deal, there will be regular contacts

with the customer throughout the contract term as they draw down or make payments against the contract. The term of most forward contracts is four months or less. In addition, customers do not commit to doing more than one deal at a time with any given broker or brokerage – and certainly, there are no contractual obligations requiring them to do so. In my experience, customers understand that the foreign exchange market is highly competitive and that, in order to get the best deal for themselves, they are free to negotiate with and use whichever broker they wish for any given transaction.”

34. Mr Greenwood contrasted the difference between the foreign exchange industry, and, by way of example, the insurance industry, where customers typically enter into annual contracts through brokers. He stated his belief that the object of a non-solicitation clause was to give an employer an exclusive opportunity of securing a relationship with customers after one of its employees leaves, but he could not understand why it should take 12 months to do so. He noted that according to Mr Holmes’ evidence, Cross Services had been secured as a customer by the Claimant in a period of about only 8 months rather than 12 months.
35. In his second witness statement, Mr Greenwood suggested that people working in the foreign exchange business moved with regularity. He returned to the subject of industry practice in terms of non-solicitation and repeated that “the majority of our competitors rely on a 6-month restriction or less”. He exhibited extracts for businesses known as Cambridge Mercantile Corp (UK) Limited (a 6-month non-solicitation clause) and Travelex (a 3-month clause).
36. Mr Greenwood disputed any suggestion that AFEX was different in its business operation in offering a “payment service”. Mr Holmes’ evidence he said was confusing and potentially misleading. He continued:

“All businesses hope to retain their customers over a 12-month period (in fact IFX aims to retain its customers for far longer than that). However, customers have no obligation to use or retain any particular broker for any given trade. They can – and frequently do – shop around amongst foreign exchange brokers before making a transaction, so any broker wishing to compete needs to offer a similarly inclusive and attractive package of services above and beyond the ability to offer a preferable rate of exchange.”

37. All foreign exchange brokers operate in a similar model to that of AFEX, Mr Greenwood suggested.
38. Mr Greenwood disputed any suggestion of confidentiality. He said that the first thing a broker did when calling a prospective customer was to find out the rate which the existing provider had quoted. He said that the market was “cut throat” with a highly competitive spread, so that “all the information Mr Abbassi might need if he wished to win over his previous customers is freely available from the customers themselves. He does not need to use any further information that the Claimant considers to be confidential”.
39. In his evidence, Mr Abbassi acknowledged that when working for AFEX he had a book of over 120 customers and that many of them traded on a weekly or monthly basis, with the rest trading less often. He said that each trade was a separate trade, and there was no commitment from any customer to trade with him. He observed that the customers were free to check rates offered by other brokers, and did so. Many of his clients, he said, were close personal friends.

The submissions on behalf of AFEX

40. Mr Green, learned counsel for AFEX, submitted that the non-solicitation clause was reasonable, enforceable and should be enforced.
41. Mr Green emphasised that the non-solicitation clause was only engaged in respect of customers or potential customers with whom Mr Abbassi had had contact in the 12-month period prior to the termination of his employment. Further, the clause lasted a maximum of 12 months, less any period of garden leave; see clause 13.3.
42. Direct dealing with customers was important, Mr Green submitted. First because it helps to establish a relationship and, secondly, because by such dealing the employee would have information as to spreads relating to that particular customer. He submitted that the very fact that customers were free, without any restriction, to take their business from one dealer to another,

underscored the importance and reasonableness of attempting to build up and protect goodwill. He relied on the evidence that competitor organisations sought by non-solicitation clauses to protect their goodwill and pointed out that whilst many competitors restricted non-solicitation periods affecting employees to 6 months, this was by no means universal and others, such as Baydonhill, appear to adopt a 12-month period, or at least to have done so until the relatively recent past. The reasonableness and necessity for the protection of goodwill was thus demonstrated by industry wide practice, so that the only question remaining related to the length of the restriction. As to this Mr Green noted, by way of example, that the evidence appeared to demonstrate that in the case of Cross Services it had taken longer than 6 months to establish a relationship.

43. Mr Green relied upon a number of authorities in support of his submissions; first upon the *Credit Suisse* case (*supra*) in which the employer provided fund management services to private clients. The notice periods for the various employees ranged between three and twelve months, but the handbook governing the terms of employment provided that during the respective notice periods the employer might place the employees on garden leave. In each case the notice period was followed by a further 6 months' period in which competing with, or soliciting, the employer's business was prohibited. The application for an injunction was heard by Mr David Steele QC, sitting as a deputy High Court judge. In the case of four employees, their notice periods had expired, but in the case of the other six, there remained six months to run. The deputy judge held that it was inappropriate to enforce any further period of garden leave, but held that injunctive relief should be granted as to the restrictive covenants. The Court of Appeal upheld the deputy judge's order. As to the inter-relationship between the garden leave provision and the non-solicitation clause, Mr Green drew attention to what Lord Justice Neill (with whose judgment Morritt and Hutchison LJJ agreed) said, at page 894:

“The court can exercise its discretion in deciding the permissible length of garden leave but, if the restrictive covenant is valid, the employer is entitled to have it enforced, subject to all the usual grounds on which an injunction may be withheld, such as delay and a finding

that damages would be an adequate remedy in the circumstances. Moreover, it is to be remembered that the existence of a garden leave clause may be a factor to be taken into account in determining the validity of a restrictive covenant as at the date of the contract.

I would, however, add a caveat. Terms which operate in restraint of trade raise questions of public policy. The opportunity for an individual to maintain and exercise his skills is a matter of general concern. I would therefore leave open the possibility that in an exceptional case where a long period of garden leave had already elapsed, perhaps substantially in excess of a year, without any curtailment by the court, the court would decline to grant any further protection based on a restrictive covenant. But that is not this case.”

44. Next Mr Green relied upon *TFS Derivatives Ltd v. Morgan* [2005] IRLR 246, a decision of Mrs Justice Cox. In that case there was a 6 months’ prohibition, post-termination of employment (less any period of garden leave) on any employment which was competitive with the business of a former employer. The judge found that the employee in that case was “very highly valued” by the employer, generated most of the income in the relevant trade, had strong relationships with traders, was paid a salary well above that of a junior broker, and was actually paid more than a person that the employee named as senior to him. On the employee’s resigning from his employment, and giving 3 months’ notice, he was placed on garden leave for the remainder of the notice period. The employee resisted an application for an injunction to restrain him from working for a competitor on the basis that the restriction went beyond what was necessary to protect the employer’s legitimate business interest, and was therefore unreasonable as being in restraint of trade. Mrs Justice Cox upheld the clause insofar as employment by a competitor business was concerned. Mrs Justice Cox referred to the passage in the judgment of Sir Christopher Slade in the well known case of *Office Angels Ltd v. Rainer Thomas & O’Connor* [1991] IRLR 214 in which his Lordship said at paragraphs 21-25:

“(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].”

45. Mrs Justice Cox then identified the relevant principles to be applied in paragraphs 37-40 of her judgment:

“37. 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. In this case, as will be seen later on, the defendant concedes that TFS have demonstrated on the evidence legitimate business interests to protect in respect of customer connection, confidential information and the integrity or stability of the workforce, although the extent of the confidential information is in dispute in relation to its shelf life and/or the extent to which it is either memorable or portable.

38. 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.

40. If a restrictive covenant applying after employment has terminated is held to be unreasonable, then it is void and unenforceable. The court cannot read down such a clause in an effort to render it reasonable and enforceable. In certain circumstances, however, if only a discrete phrase within a particular covenant is held to be

unreasonable, individual words or phrases may be “blue-pencilled” or severed, provided that what is left makes independent sense without the need to modify the wording and that the sense of the contract is not changed. I shall consider this issue in greater detail below.”

46. Mr Green submitted that there was no difficulty in identifying what the covenant meant when properly construed, and indeed there was no argument with regard to that point. He submitted that AFEX had shown, by evidence, that it had a legitimate business interest requiring protection in relation to Mr Abbassi’s employment, and he referred to the evidence which I have described above. He submitted that in the light of that evidence the non-solicitation covenant was no wider than reasonably necessary for the protection of AFEX’s business interests when judged from the perspective of reasonable persons in the position of the parties at the date when the employment contract was made. He drew attention to the contractual provisions as a whole, stressing the inclusion of the garden leave period in the overall period of non-solicitation, again emphasising the need for there to be dealings between Mr Abbassi and customers or potential customers for the clause to be operative. In all these circumstances he submitted that it was reasonable for an injunction to be granted requiring compliance with the non-solicitation clause until 24th September. Further, he argued, there was nothing which would justify any restriction of the operation of the non-solicitation clause.
47. In developing his careful and thorough submissions, Mr Green relied upon a number of other authorities including *International Consulting Services (UK) Ltd v Hart* [2000] IRLR 227 (QBD), *Dawnay, Day & Co Ltd & Anor v D’Alphen & Ors* [1997] IRLR 442, CA, *Dairy Crest v Piggott* [1989] ICR 92, CA, and *Home Counties Dairies Ltd v Skilton* [1970] All ER 1227, CA.

The submissions on behalf of IFX and Mr Abbassi

48. Mr Pilgerstorfer, in his submissions on behalf of IFX and Mr Abbassi, maintained that the non-solicitation clause had a number of extremely wide dimensions. First it is of 12-months duration. Secondly it is geographically unlimited. Thirdly, as to activity, it is extremely wide, affecting any

negotiating, or soliciting business or endeavouring to entice away a customer. Fourthly, it applies not only to AFEX's customers but potential customers, which he submitted was a restraint on competition, given that AFEX, by definition, had not even won business from such persons. Fifthly, the clause applied to activity "in any Capacity" (as defined), and sixthly in respect of working for competitors it applied to any institution etc. engaged in a business "similar to that carried on" by AFEX. The list of competitor businesses set out in clause 13 of the employment contract is expressly non-exhaustive.

49. The scope of these restrictions, Mr Pilgerstorfer argued, was wholly unreasonable.
50. Mr Pilgerstorfer relied upon the following passages in the Contracts of Employment Division of *Harvey on Industrial Relations*,:

"[195] It is not uncommon to find in a contract of employment a promise by the employee that upon leaving the firm's employ he will not set up in competition with his employers or solicit their customers or enter the employment of a rival and so on. Such a clause is valid provided it is confined within reasonable limits, but a clause which is too wide will be held void as being in unreasonable restraint of trade. It is always important therefore to remember that invalidity is the default position with any such clause.

...

[216] ...If [the clause] is more than adequate [to protect the employer], it will be struck down. If it is no more than adequate it may be upheld, but not necessarily so. The employer's interest is but one of the factors to be taken into account. The restraint must be considered too from the employee's point of view. Is it a reasonable restraint to impose upon him in view of the principle that he ought to enjoy complete freedom to follow his trade or calling? It is a question of balancing the two competing interests. It is a matter to be judged on the facts of each case. But it is not a question of fact; it is a question of law (*Dowden & Pook Ltd v Pook* [1904] 1 KB 45, CA; *Mason*¹).

[217] Because each case depends on its own facts, there is little that can be said by way of general guidance (see for example the restatement of this point in *Dairy Crest Ltd v Pigott* [1989] ICR 92, CA). Normally the restraint will be limited either in point of time or to some specified geographical area or both, as well as defining the kinds

¹ *Mason v Provident Clothing & Supply Co Ltd* [1913] AC 724.

of activity which are to be banned. These factors all interrelate. The longer the time, the smaller must be the geographical area and the narrower the nature of the restriction. The more lowly the employee, the less the restraint that is reasonable. The weaker the employee's bargaining position, the more jealous the court will be of his interests: a travelling salesman may have no choice but to agree to a wide restriction, but 'a managing director can look after himself' (*M and S Drapers v Reynolds* [1956] 3 All ER 814, [1957] 1 WLR 9, CA, distinguishing *Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA).

51. Dealing with the *Credit Suisse* case, relied upon by Mr Green, Mr Pilgerstorfer fairly observed that in that case the employees concerned were, on the whole, of high status and earning power. He drew attention to what the trial judge had said as to “the temptations of employers to exaggerate the needs for protection”. In particular, Mr Pilgerstorfer emphasised that whilst in *Credit Suisse* the trial judge had found that some protection for a period of 12 months following termination of employment was appropriate, Lord Justice Neill observed at page 895:

“It seems clear that the judge considered that the complete protection for 12 months afforded by the garden clause was unnecessary but that some protection for this period was appropriate. He therefore enforced the more limited protection in the restrictive covenants.

I consider that on the facts of this case the judge was entitled to reach the conclusion that he did. It may be that another court might have taken a different view and have concluded that a total period of protection of six months was sufficient. But I can see no error of principle in the judge's approach and I do not consider that he was plainly wrong. ...”

52. In developing his submission that the scope of the non-solicitation clause was unreasonable, Mr Pilgerstorfer referred to the evidence which I have mentioned above, emphasising the mobility of customers, and Mr Greenwood's evidence that it should not take 12 months for an employer to secure a relationship, relying upon the example of Cross Services.
53. Mr Pilgerstorfer disputed any suggestion that Mr Abbassi held a senior post, describing him as working “at the coal face”. He referred to what he called Mr Abbassi's “modest” salary (and commission), his working hours, holiday entitlement, notice period and exposure to having to pay for courses attended.

He noted the sickness absence policy to which Mr Abbassi was subject, and the absence of any collectively bargained agreement. All of these features, he contended, militated against any finding that Mr Abbassi held a senior post. The approach of other employers operating in the same market, Mr Pilgerstorfer suggested, indicated that competitors did not consider such a long non-solicitation provision to be necessary. He said that generally competitors imposed substantially shorter restrictions. He submitted that AFEX had not given any good reason for why a 12-month period of protection was necessary, despite correspondence requesting it to do so.

54. Mr Pilgerstorfer argued that it was incumbent upon the court to balance the clause from Mr Abbassi's point of view with that of AFEX. He maintained that Mr Abbassi had a legitimate interest in being able to exercise complete freedom to trade and perform his calling.
55. Realistically Mr Pilgerstorfer accepted that he could not suggest that AFEX had no legitimate interests to protect; his submission was directed towards the extent of those interests and whether the level of protection sought was reasonably necessary.
56. In answer to Mr Green's observation that only extracts from restrictive covenants in competitors' contracts had been produced, Mr Pilgerstorfer said that what had been disclosed was all that IFX and Mr Abbassi had. I can see no reason to doubt that.
57. In developing his submission that it was unreasonable for there to be protection in respect of potential customers, Mr Pilgerstorfer referred to the decision of Mr Nicholas Strauss QC, sitting as Deputy Judge of the Queen's Bench Division, in *International Consulting Services (UK) Ltd v. Hart* [2000] IRLR at page 227. Although in that case the court had upheld a 12-month non-solicitation clause, the judge described it as a "borderline case" and stressed, at page 232, the complexity of negotiations, and the length of the period of time over which they were often conducted and the central and influential position held by the employee in question.

58. Mr Pilgerstorfer argued that in any event it was necessary for AFEX to establish the need for 12 months' protection generally and in relation to potential customers. He drew attention to the decision of Mr Justice Eady in *Basic Solutions Ltd v. Sands* [2008] EWHC 1388 (QB) and in particular to paragraphs 20 and 21 of the judgment. In that case, Mr Justice Eady said that he could not see, as a matter of general principle, how the fact that there might sometimes be long lead times in tendering for and obtaining contracts should, in itself, have a bearing upon the period for which restrictive covenants should be effective. He held that the claimant in that case had not managed to demonstrate that a 12-month period was reasonably necessary. In that case, too, the relevant covenant applied to potential customers.
59. In concluding his submissions on this part of the case, Mr Pilgerstorfer submitted that there were a number of factors relevant to the reasonableness or otherwise for the protection sought. These included the frequency of transactions with customers, the fact that customers shopped around, that there was no real loyalty of customers to the business and that no confidential information in truth was affected. The width and scope of the clause was also a factor to be taken against it. As a matter of principle he accepted that a blue pencil could be applied to the non-solicitation of potential clients, but his attack on the reasonableness of the clause was directed at the clause as a whole.

Discussion and conclusions

60. There is no difficulty in construing the non-solicitation clause, and it is not suggested that there is.
61. In my judgment, further, it is clear that AFEX has demonstrated that it has legitimate business interests which require some protection. This, effectively,

is accepted on the part of both Defendants because they have not suggested that no period of restraint is required but rather that anything more than six months is unreasonable. In any event the evidence of Mr Holmes to which I have referred persuades me that, in his words, “a recently departed employee” will have knowledge of the most profitable clients and those which provide the most business, enabling them to be targeted, with a view to undercutting AFEX. In the case of a recently departed employee there is a real prospect that there will have been dealings or communication close in time to his departure, so that the influence of the relationship with the customer may be significant. These are legitimate interests to protect, so that a non-solicitation covenant can be justified.

62. The covenant, to be enforceable, however, must be no more than is reasonably necessary to protect the business interests concerned. This is to be judged as at the time when the contract was made, viewed from the perspective of persons in the position of the parties, looking at the contractual provisions as a whole, and in the factual setting in which the contract was expected to operate. It is not necessary to refer to the extensive authority beyond *Credit Suisse*, and *TFS Derivatives* for this principle.
63. In the present case there was a two months’ garden leave provision, which was to operate in conjunction with a six months’ non-dealing covenant, albeit that the six months’ period concerned was to be reduced by the period of garden leave. For the sake of completeness I must add that although Mr Abbassi was in fact placed on garden leave for three months (rather than the contractual two), I cannot have regard in assessing the reasonableness of the non-solicitation clause to anything longer than the shorter period of garden leave; at the time when the contract was made, it was that period of garden leave which was in contemplation.
64. I do not regard Mr Abbassi as having held a senior position with AFEX. The terms of his employment are not consistent with that, and I consider that Mr Pilgerstorfer’s observations in that regard are fairly made. Equally, I am not persuaded on the evidence that it will probably be established that there was

likely to be any adverse effect on customer connections, as a result of Mr Abbassi's solicitation, after any significant break (such as six months) in his dealing with them. In *Stenhouse Australia Ltd v Phillips* [1974] AC 391, Lord Wilberforce delivering the opinion of the Privy Council said at page 402:

“The question is not how long the employee could be expected to enjoy, by virtue of his employment, a competitive edge over others seeking the clients' business. It is, rather, what is a reasonable time during which the employer is entitled to protection against solicitation of clients with whom the employee had contact and influence during employment and who were not bound to the employer by contract or by stability of association. This question, secondly, their Lordships do not consider can advantageously form the subject of direct evidence. It is for the judge, after informing himself as fully as he can of the facts and circumstances relating to the employer's business, the nature of the employer's interest to be protected, and the likely effect on this of solicitation, to decide whether the contractual period is reasonable or not. An opinion as to the reasonableness of elements of it, particularly of the time during which it is to run, can seldom be precise, and can only be formed on a broad and common sense view.”

(This passage was cited in the judgment of Balcombe LJ in *Dairy Crest Ltd v Pigott* [1989] ICR 92.)

65. In the highly competitive market in which AFEX operated, with customers hunting for keen prices, and being hunted by dealers seeking to undercut one another, I consider that it is likely to be found that by the time that an individual such as Mr Abbassi has seen out his six-month non-dealing covenant, during which he has been on garden leave for two months, things will have moved on so much that protection against solicitation from him is unnecessary. A significant amount of business with AFEX's customers is likely to have occurred in the intervening period. Customers are likely to have had dealings with other individuals at AFEX, and very possibly with other dealers either because they have sought prices from them, or because they have been canvassed by the dealers.
66. I consider it unlikely to be established that information as to pricing with which an employee would become familiar is a significant factor. The foreign exchange market is notoriously fast moving, and the evidence confirms this.

Information as to margins in September is unlikely to be of much value the following April. What is critical from a customer's standpoint is the price to be paid for the currency, and it is not difficult to accept that a dealer is likely when canvassing a prospective customer to ask what that customer is paying for a particular currency.

67. As for the likely outcome at trial, the evidence for AFEX, in my judgment, falls well short of demonstrating that it is anything like usual or necessary to take many months to establish a relationship with a new client. The fact that it may on occasions do so does not justify a non-solicitation clause affecting all customers; this seems to me to likely to be found to be disproportionate.
68. Similarly the evidence does not demonstrate that Mr Abbassi was engaged habitually, or even usually, in difficult projects whereby his involvement was pivotal or even significant, in the winning of business. This case is to be distinguished from one like *International Consulting* where the judge found (at page 231) Mr Hart to have "a senior and central position in the organisation" who had frequent contact with prospective clients, providing technical expertise, and who operated as a senior consultant and project manager (page 229).
69. In all the circumstances, and despite Mr Green's powerful submissions, I conclude that at trial it would be likely to be held that the twelve months' duration of the non-solicitation clause goes beyond what is reasonably necessary for the protection of AFEX's legitimate interests. Indeed, it is my view that at trial it would be likely to be held that any period beyond six months would be objectionable. I consider that therefore it is likely that the non-solicitation covenant will be held to be unenforceable. This conclusion is sufficient to dispose of the application now before me, but since the other issues have been fully argued, it is appropriate for me to deal with them.
70. I should add that if I had reached a different conclusion as to likely findings at trial in respect of the reasonableness of the duration of the covenant, I would not have been satisfied that it was likely to be found reasonable or necessary to

extend protection beyond customers to potential customers. Of course there will be businesses in which protection in respect of potential customers is appropriate; for example where the building up of a relationship is a long and difficult process, perhaps involving protracted negotiation by a senior employee whose post-contractual solicitation of such potential customers it is sought to restrain. There may be circumstances in which attempting to establish relationships with potential customers has involved significant investment not only in time, but in money. There is, in this case, however, nothing in the evidence which approaches that.

THE BREACH ISSUE

71. The Breach and Procurement Issues raise distinct questions, but the evidence concerning them overlaps considerably, and therefore I deal with the evidence on both issues at this point.

The evidence for AFEX

72. In his first witness statement Mr Holmes said that on 16th February 2010 Birinder Lally, an employee of AFEX, spoke to Mike Brearley at Cross Services (a customer of AFEX since January 2009) and was informed that Mr Abbassi on behalf of IFX had sought to procure business. This caused Mr Holmes to telephone Mr Greenwood to remind him of the restrictive covenants in the employment contract. Mr Holmes' evidence is that Mr Greenwood denied knowledge of those covenants, but said that he had seen the contract. Mr Holmes then forwarded him a copy of the employment contract by e-mail. Mr Holmes alleges that in the course of the telephone conversation, Mr Greenwood said that with effect from 1st April 2010 Mr Abbassi would be pursuing his previous clients that he had when working for AFEX and that these were "fair game" for IFX. This allegation is disputed.
73. Mr Holmes said that Mr Greenwood also stated that Mr Abbassi had been employed by IFX since December 2009.

74. According to Mr Holmes, on 17th February 2010 he telephoned Mr Greenwood again to ensure that Mr Greenwood had spoken to Mr Abbassi in order to prevent solicitation of AFEX's clients in breach of the non-solicitation clause. Mr Holmes maintains that Mr Greenwood's response was belligerent, and that he challenged the covenants.
75. On 17th February 2010 AFEX instructed its solicitors, Messrs Sibley & Co, to write to Mr Greenwood and Mr Williams, the Managing Director of IFX, and also to Mr Abbassi in connection with alleged breaches of the restrictive covenants. He described, in his evidence, the exchanges of correspondence that then followed.
76. In its letters of 17th February 2010 sent to both directors of IFX and to Mr Abbassi, Sibley & Co, having referred to the relevant covenants and asserted breach of them, asserted that in the circumstances AFEX was entitled to seek injunctive relief but was willing not to do so if appropriate undertakings, in terms suggested, were given. The letters sent to Mr Greenwood and Mr Abbassi were returned unopened, the reason given being that they were refused. However the letters were also sent by fax. It is clear that, by one route or another, Sibley & Co's letters were received on behalf of IFX and Mr Abbassi because solicitors acting on behalf of those parties, Messrs Keystone Law, responded in letters dated 17th February and 19th February 2010. In its letter of 17th February (sent on behalf of IFX), Keystone Law asserted that Mr Abbassi was employed in January 2010, disputed any use of information confidential to AFEX and stated that in the meanwhile IFX confirmed that it had not asked and would not ask Mr Abbassi to use any such confidential information. Further, it requested details of clients allegedly approached in breach of the employment contract, but confirmed that IFX had not asked and would not ask Mr Abbassi to act in breach of any of the covenants to the extent that the same were enforceable. In its letter of 19th February on behalf of Mr Abbassi, Keystone Law raised an issue, not pursued at the hearing before me, to the effect that it might be that the circumstances of the termination of Mr Abbassi's employment meant that any post-termination restrictions would not apply. The letter challenged the enforceability of the

non-solicitation covenant on the basis that it was longer than reasonably necessary and invited justification of its length. The misuse of confidential information was denied.

77. In further exchanges of correspondence, the enforceability or otherwise of the non-solicitation clause was explored. It is not necessary for me to describe these exchanges in relation to the breach and procurement issues.
78. On 23rd February 2010, in a letter to Keystone Law, Sibley & Co repeated allegations of breach of restrictive covenants and referred to the telephone conversation which Mr Holmes had with Mr Greenwood in the course of which Mr Holmes asserts that Mr Greenwood indicated that AFEX's clients, and specifically 1927, would be "fair game" as from April 2010. Once again, appropriate undertakings were sought, and it was stated that unless they were received by 25th February legal proceedings would follow.
79. On 25th February 2010, Keystone Law, by letter, responded to the correspondence from Sibley & Co, repeating the denial that Mr Abbassi had begun working for IFX before January 2010. It was denied that IFX had undertaken any business for Cross Services or 1927, but asserted that IFX was entitled to speak to either and any other companies requiring foreign exchange, and might well do so, but would not be using confidential information belonging to AFEX. It was stated that AFEX could not rely on covenants in the contract to stifle fair competition. The enforceability of the non-solicitation clause was disputed.
80. In a separate letter of 25th February 2010, Keystone Law denied that Mr Abbassi was undertaking business for Cross or 1927.
81. In his first witness statement, Mr Holmes said that whilst he did not accept a number of points made in the correspondence from Keystone Law, AFEX relied upon the assurances given and decided not to take the matter further. The position changed, however, according to Mr Holmes, when on 9th March 2010, Mr James Collins, another employee of AFEX, was informed by Mr

Malcolm Winter of Game, a customer of AFEX since May 2007, that on three occasions during February 2010 Mr Abbassi had sought to solicit business from Game. It was this information, Mr Holmes said in his second witness statement, that convinced AFEX that nothing short of injunctive relief would stop Mr Abbassi from soliciting AFEX's customers in breach of covenant. In answer to evidence served on behalf of IFX, Mr Holmes said that he was "100 per cent sure" as to the "fair game" assertion made by Mr Greenwood with regard to dealing with AFEX's clients from April 2010 onwards.

82. The remainder of Mr Holmes' second witness statement consists substantially of a commentary on evidence served on behalf of IFX and Mr Abbassi.
83. Mr Holmes' third witness statement exhibits further correspondence to which I need not refer. Much of that correspondence is taken up with the position of another former employee of AFEX, subsequently employed by IFX. I do not consider that that correspondence in any way assists in resolving the issues with which I have to deal.

The evidence for IFX and Mr Abbassi

84. In his first witness statement Mr Greenwood says that it was in the middle of December 2009 that he was contacted by Mr Abbassi who explained that he was on garden leave until the end of December when his employment with AFEX would terminate, after which he would be looking for a position. Mr Greenwood said that following discussion it was agreed that Mr Abbassi would join IFX in January 2010. At paragraph 4 of this statement Mr Greenwood said:

"We obviously discussed his existing customers, many of whom were longstanding friends of his. However, the offer IFX made to him was not conditional in any way upon him bringing customers with him. We particularly needed an experienced broker to develop certain new strategies we wanted to follow."

85. Mr Greenwood exhibited Mr Abbassi's contract of employment with IFX. It records that the employment began on 4th January 2010. Under this contract

he was entitled to a basic salary of £45,000 per annum, together with commission.

86. Mr Greenwood's evidence concedes that Mr Abbassi showed him the employment contract with AFEX and that the restrictions were discussed. Mr Greenwood further conceded that in January, February and March 2010 IFX had dealt with nine of AFEX's customers, and conducted business generating revenue for IFX of a little over £3,700. Mr Greenwood said that IFX was prepared to offer that amount to AFEX. It was also suggested that Mr Abbassi would explain how those particular deals came to be done. Mr Greenwood conceded that the deals were effected by Mr Abbassi in breach of the non-dealing clause.
87. As to Mr Holmes' evidence with regard to the "fair game" comment, Mr Greenwood said that this was "incorrect" and that what he had said was that IFX could, at any time, approach AFEX's customers and that Mr Abbassi could deal with them after 1st April "and this was irrelevant to the 12-month non-solicitation clause". He said that he told Mr Holmes that as the 12-month non-solicitation clause was unenforceable, there was nothing to stop Mr Abbassi from approaching those customers.
88. Mr Greenwood said that no confidential information belonging to AFEX had been used by IFX. With regard to the non-acceptance of letters from Sibley & Co, Mr Greenwood stated that the letters had been wrongly addressed.
89. In his second witness statement, Mr Greenwood dealt with a number of matters which do not concern the breach and procurement issues, but he concluded the statement by saying that AFEX had produced no evidence whatsoever that IFX had procured any breaches, failed to prevent or restrain breaches and tortiously interfered with AFEX's business.
90. Mr Abbassi's evidence is similar to that of Mr Greenwood's with regard to the commencement of employment, which Mr Abbassi confirms began on 4th

January 2010 with IFX. He also confirms that there were conversations with regard to the contractual restrictions placed upon him by AFEX.

91. In his statement Mr Abbassi said:

“Whilst I felt I was entitled to speak to my old customers and do business for them at IFX if that is what they wanted me to do, I was not encouraged to do so by IFX. We also discussed the 6-month non-dealing clause but I have to say I did not really understand what it meant and soon forgot about it and why it was different from the non-solicitation clause.”

92. Mr Abbassi observed that in hindsight the matters just described were “perhaps unfortunate”. He said that he did not set out to encourage old customers to follow him, and that had he done so he would have made a good job of it. He said that when he secured his job offer from IFX he called a few of his customers to tell them that he was moving there, but he did not do so until about the middle of December 2009 when he had been offered a job.

93. Mr Abbassi said that he was never asked or encouraged by IFX to get old customers to follow him but that he merely made a couple of calls to tell friends where he was and that this led to a limited number of deals concerning two of AFEX’s customers, ETA Enclosures UK Ltd and BSA Guns Ltd. Mr Abbassi concedes that in all he made deals on behalf of nine of AFEX’s customers which generated a revenue for IFX of less than £4,000. He confirms Mr Greenwood’s evidence in this respect. He said that he had not been paid any commission by IFX in respect of those deals and received a written warning from IFX for doing those deals without informing IFX that the customers were those of AFEX. He asserts that he can honestly say that it did not occur to him that he should “perhaps” not have done those deals.

94. Mr Abbassi denied using any confidential information belonging to AFEX.

The submissions on behalf of AFEX

95. Mr Green submits that the concessions made in the evidence of Mr Greenwood and Mr Abbassi quite clearly demonstrate that AFEX's customers were approached by Mr Abbassi and that therefore both the non-dealing and non-solicitation clauses were breached.

The submissions on behalf of IFX and Mr Abbassi

96. Mr Pilgerstorfer submits that the non-solicitation clause was not breached by Mr Abbassi, who had merely called friends to advise them of his move.
97. Mr Pilgerstorfer submits that the evidence as to information provided by Cross Services and Game is inadequate to establish a breach of the non-solicitation clause. He points out that there is no direct evidence from the employees of AFEX who received the information as to the alleged solicitation, and equally there is no direct evidence from Cross Services or Game.
98. He submits that it is clear that Mr Abbassi's employment did not begin with IFX until 4th January 2010.

Discussion and conclusions

99. I consider it most unlikely that at trial it would be established that Mr Abbassi began working for IFX before 4th January 2010. His evidence, and that of Mr Greenwood, is supported by the written contract of employment which has been produced.
100. The evidence discloses very clearly that the non-dealing clause was breached by Mr Abbassi. It seems to me that it will be very difficult to accept that he did not appreciate the effect of the non-dealing clause as he has asserted in his evidence.
101. Equally I consider that at trial it would be likely to be established that Mr Abbassi did solicit business on behalf of IFX from his former customers at AFEX. It seems to me that his explanation for contacting his old customers is unlikely to be accepted. He did not need to wait until he knew that he had his

position with IFX simply to advise his contacts as a social courtesy. It seems to me much more likely that the purpose in contacting them was to seek to attract custom.

102. Mr Green makes a fair point when he submits that despite Mr Greenwood's promise of an explanation from Mr Abbassi as to how he came to deal with the AFEX customers listed in the exhibits to Mr Greenwood's witness statement, explanations (which I do not find convincing) have been given in relation to only two.
103. In the circumstances I conclude that it is likely that a breach of the non-solicitation clause will be established at trial if the clause is found to be enforceable.

THE PROCUREMENT ISSUE

104. I have set out above the evidence concerning this issue.

The submissions on behalf of AFEX

105. Mr Green submits that the evidence establishes that IFX knew of the non-solicitation clause as a result of discussions between Mr Holmes and Mr Greenwood, and the admitted discussion of the contractual provisions between Mr Abbassi and Mr Greenwood.
106. With regard to whether breaches of the non-solicitation clause were procured by IFX, he relies on the fact that Cross and Game had informed AFEX that Mr Abbassi called on behalf of IFX. He relies further upon the "fair game" conversation with Mr Greenwood. Mr Green also submits that procurement should be inferred from the facts that Mr Abbassi is employed by IFX and acts under its instruction and supervision and that IFX stands to gain financially.

The submissions on behalf of IFX and Mr Abbassi

107. Mr Pilgerstorfer submits that no tort has been committed by IFX. He submits that there is no evidence to support any such allegation and draws attention to the fact that there is no direct evidence that IFX induced or procured Mr Abbassi to act as he did. On the contrary, Mr Pilgerstorfer submits, Mr Abbassi has said that he was not encouraged in his conduct by IFX but rather warned him in respect of his dealings with AFEX's customers.

Discussion and conclusions

108. In my judgment it is likely that at trial AFEX would be likely to establish that Mr Greenwood told Mr Holmes that with effect from April 2010 he considered that Mr Abbassi would be free to pursue his former AFEX clients. This is entirely consistent with Mr Greenwood's asserted view that he considered the non-solicitation clause to be unenforceable. I consider that Mr Holmes evidence as to Mr Greenwood's comment about "fair game" is likely to be accepted.

109. However, I do not consider that encouragement to solicit AFEX clients before April 2010 can be inferred merely from the alleged facts that Mr Abbassi called, and said he was calling, customers on behalf of IFX. Nor do I consider that IFX's financial gain from any dealings with AFEX's customers should lead to an adverse inference against IFX. Mr Abbassi had his own interests to serve in getting in business, and he did not need to alert IFX to the fact that he was approaching customers in breach of the non-dealing or non-solicitation covenants.

110. Although Mr Greenwood accepts that there was a discussion of Mr Abbassi's clients at about the time of his being recruited to IFX, I do not consider that this suggests that the discussion was for the purpose of encouraging Mr Abbassi to deal with, or solicit business from, those customers in breach of any restriction.

111. On the material presently before me, I am not persuaded that it is likely that AFEX would prove at trial that IFX procured or otherwise encouraged Mr

Abbassi to act in breach of any terms of the employment contract. This is not to say that the grant of injunctive relief would be inappropriate (if I had found it likely that the non-solicitation covenant would be held to be enforceable). Relief on a *quia timet* basis might well have been justified given the stated attitude of IFX expressed by Mr Greenwood to the effect that IFX at any time, and Mr Abbassi from April 2010, were free to approach AFEX customers. An assertion that they would be “fair game” from that time suggests that IFX probably would encourage such seeking of business by Mr Abbassi. In the event I have concluded that Mr Greenwood’s assessment of the validity of the non-solicitation covenant is likely to be vindicated, so that IFX has not threatened the commission of any tort.

THE RELIEF ISSUE

112. If I had concluded that AFEX was likely to succeed at trial with regard to the enforceability of the non-solicitation covenant, the question would have arisen as to whether, as a matter of discretion, an injunction should have been granted.

Delay

113. Mr Pilgerstorfer’s principal submission for why an injunction should be refused was that there was undue delay between the discovery of alleged breaches of the employment contract in February, and the issue of an application on 17th March – a whole month. This delay, Mr Pilgerstorfer argues, was in the face of an unequivocal statement in Keystone Law’s letter of 19th February (sent on behalf of Mr Abbassi) to the effect that a 12 month non-solicitation covenant was unenforceable. Further, Mr Pilgerstorfer submitted, the reason given for delay (learning on 9th March of alleged solicitation of Game on three occasions during February) is not satisfactory. This was, he argued, because according to Mr Holmes’ evidence, it was in late February that AFEX relied, in deciding not to take the matter further, on IFX’s and Mr Abbassi’s assurances as to non-use of confidential information in order to solicit business; Mr Holmes’ evidence does not explain why the

discovery of alleged solicitation of Cross, as to something that had happened in February, changed the position.

114. Mr Pilgerstorfer maintained, further, that in any event there was unacceptable delay from 9th March to 17th March, and when the application was issued it was on a “without notice” basis.
115. In my judgment delay from 9th March to 17th March would not of itself justify refusal of relief if otherwise it were appropriate. It was reasonable for AFEX to reflect on the newly discovered information, and solicitors and counsel needed to be instructed to prepare for an application. Similarly, whilst it might have been unnecessary to attempt to proceed on a “without notice” basis, doing so ought not to cause the subsequent denial of relief, on notice, that might otherwise be justified. The evidence of Mr Holmes, contained in his first witness statement, set out the history of exchanges between the parties and their solicitors. I do not consider that the manner of the making of the application was intended to mislead the Court, and I am satisfied that Mr Green (who was instructed by that time), if the application had been heard without notice, would fairly have put before the Court all relevant points.
116. As for the overall delay from February to March, again I do not consider that such delay would have justified refusal of an injunction, if it had otherwise been justified. It is not as if this is a case in which some third party right has intervened, or either defendant can set up a case of acquiescence or prejudice. The case turns substantially on the consideration of documents, and whilst there are factual matters in issue, many of the salient facts are not in issue, for example the accepted dealing with AFEX’s customers on several occasions, and the expressed attitude of Mr Greenwood to the enforceability of the non-solicitation clause. In many ways it is therefore similar to *Leigh v National Union of Railwaymen* [1970] Ch 326 (a decision of Goff J) in which an injunction was granted even after a delay of many months.
117. Mr Pilgerstorfer submitted that further reasons for refusing injunctive relief were that damages would be an adequate remedy, and the balance of

convenience was against the grant of injunction. I disagree with these submissions. Whilst it might well be the case that trading in breach of a non-dealing clause could relatively easily be monitored, as records of deals would be likely to evidence such events, it would be much harder to establish whether improper solicitation had been the effective cause of any trade. Still further, if the purpose of solicitation was to establish a foundation for dealing after the expiration of the covenant, it would be very difficult to prove what effect any such solicitation had on post-expiration trading. Establishing causation, and quantifying loss arising from breaches, would therefore be problematic, strongly suggesting that damages would not be an adequate remedy.

118. If AFEX had established that it were likely to succeed at trial in respect of the enforceability of the non-solicitation covenant, which of necessity would involve demonstrating the likelihood of an ultimate finding that it had business interests which reasonably required protection in the meantime, it seems to me that in all the circumstances the balance of convenience would have justified the grant of injunctive relief. I take into account, on the other side of the balance, that it would mean no more than that Mr Abbassi and IFX were in the meantime merely additional competitors in an already competitive market.

DISPOSAL

119. In the light of these conclusions, it follows that I refuse to grant an injunction until trial. The Defendants' undertakings, to the extent that they have not expired with the passing of time, must be discharged.
120. I intend to hand this judgment down at the time indicated. The parties and their representatives need not attend. If it is not possible to agree all consequential orders a further hearing at the earliest convenience of the parties will have to be listed. Time in respect of any consequential matter will run from the date of that further hearing.

121. I express my gratitude to both counsel for their extremely helpful and succinct submissions which have greatly assisted me.