



Neutral Citation Number: [2024] EWHC 100 (KB)

Case No: KB-2023-004331

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 January 2024

Before :
Dexter Dias KC
(sitting as a Deputy High Court Judge)

Between :

(1) Sparta Global Limited
(2) Condor Topco Limited

Claimants

- and -

(1) Ben Hayes
(2) Kubrick Group Limited

Defendants

Paul Nicholls KC and Marie-Claire O’Kane (instructed by **Osborne Clarke LLP**)
for the **Claimants**
Judy Stone (instructed by **TLT LLP**) for the **First Defendant**
Simon Devonshire KC (instructed by **Eversheds Sutherland**) for the **Second Defendant**

Hearing date: 7 December 2023

JUDGMENT

Dexter Dias KC :

(Sitting as a Deputy High Court Judge)

1. This is the judgment of the court. It provides full reasons for the decision communicated electronically to the parties on 19 December 2023.
2. To assist in following the court’s line of reasoning, the text is divided into 11 sections, as set out in the table below.

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CS1/§7 or DS2/§2: claimant/defendant first or second skeleton argument and paragraph number.

§I. INTRODUCTION

3. The claimant Sparta Global Limited (“Sparta”) seeks interim injunctive relief pending trial against a former employee, the defendant Ben Hayes.
4. The claimant is represented by Paul Nicholls KC and Marie-Claire O’Kane of counsel, instructed by Osborne Clarke LLP. The defendant is represented by Judy Stone of counsel instructed by TLT LLP. As will be explained, Mr Hayes’s new employer is sought to be added as second defendant. This is Kubrick Group Limited (“Kubrick”). Kubrick is represented by Simon Devonshire KC, instructed by Eversheds Sutherland. The court is grateful to all legal teams for their assistance.
5. Sparta carries on business in the niche area known as “HTD”, that is, “hire, train, deploy” in the technology sector. It seeks to identify, support, train and deploy people from underrepresented groups and offer them to institutional clients,

such as HSBC, Shroeders, Credit Suisse and Lloyds. These “Spartans” can ultimately be taken on by client companies on a full-time basis.

6. The defendant worked for the claimant as Sales Director of the Financial Services Division. He began his employment with Sparta in November 2020 and worked for the claimant until he tendered his resignation on 25 September 2023. He then signed a contract to work for Kubrick. By reason of his role with Sparta, the defendant had access to and gained knowledge of the company’s confidential and commercially sensitive information. It is submitted by the claimant that Mr Hayes had “detailed knowledge of Sparta’s business and its dealings with clients; its approach to pitches; how it analysed the strengths and weaknesses of competitors; approaches it took to client pitches; how it sought to win business and pricing information”. This information is said to be of great value to a competitor. Kubrick is one of Sparta’s market competitors, and is specifically identified as such in Mr Hayes’s contract of employment.
7. Mr Hayes’s employment contract contains post-termination restraints (“PTRs”). He has offered full undertakings to abide by those covenants, including against solicitation, but the claimant is not satisfied. During Mr Hayes’s employment, he signed an investment agreement (“IA”). The relief sought in the application before the court today is primarily based on covenants in the IA. A distinctive feature of the two documents is that although the covenants in both the employment contract and the IA restrain an individual from joining a competing business (the “non-compete” covenant or clause) and soliciting Sparta’s clients (the “non-solicitation”), the scope of restrictions in the IA extend beyond those in the contract of employment. Sparta seeks what it terms the “better protection” provided by the IA. The provisions are, as the claimant recognises, “plainly wider” than the restrictions in the contract of employment. There is no “carve out” for undertaking a different role for a competitor. Thus, there is a prohibition on working for a competitor in any capacity, even in a role that does not compete. The IA also prevents Mr Hayes from working for a competitor for 12 months as opposed to the 6 months restriction in the contract of employment. A vital question is whether the IA restrictions amount to an unreasonable and unlawful restraint of trade.
8. However, this is an interim application. At this stage, the court must endeavour to “hold the ring” and do, as the statute requires, what is “just and convenient”. Should, therefore, the IA covenants be enforced on an interim basis until trial? Is the IA a commercial arrangement agreed with an equality of bargaining power and where parties are the best judges of what is reasonable (*Guest Services v Shelmerdine* [2020] IRLR 392 at [41]). Or is the IA more akin to an adjunct to an employment contract, a type of further employee benefit? Given that the trial cannot take place until the covenants have substantially expired, should the court approach the question of interim enforceability by making “some assessment” of the merits – the likely outcome of the claim to enforce the covenants in a final order? This approach was set out by the Court of Appeal in *Lansing Linde v Kerr* [1991] 1 WLR 251, per Staughton LJ at 285A-D:

"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 a trial. In those circumstances it is not enough to decide merely that there is a serious issue to be tried. The assertion of such an issue should not operate as a *lettre de cachet*, by which the defendant is prevented from doing that which, as it later turns out, he has a perfect right to do, for the whole or substantially the whole of the period in question. On a wider view of the balance of convenience it may still be right to impose such a restraint, but not unless there has been some assessment of the plaintiff's prospects of success. I would emphasise 'some assessment,' because the courts constantly seek to discourage prolonged interlocutory battles on affidavit evidence. I do not doubt that Lord Diplock, in enunciating the *American Cyanamid* doctrine, had in mind what its effect would be in that respect. Where an assessment of the prospects of success is required, it is for the judge to control its extent."

9. Reduced to its essence, the claimant submits that the IA covenants are likely to be enforceable at trial and the court should on an interim basis enforce these restrictions now as any lesser protection would result or is likely to result in significant commercial damage to Sparta. Against this, Mr Hayes submits that the undertakings he has offered in respect of his contract of employment are plainly sufficient and the terms of the IA are more than is reasonably necessary to protect Sparta's legitimate business interests. Accordingly, the IA covenants are likely to be held void and in restraint of trade at trial. They should not be enforced on an interim basis.

§II. APPLICATIONS

Application 1

10. The claimant's first application was dated 10 November 2023. This was for the enforcement of the PTRs in the contract of employment. In addition, the claimant sought an imaging order at that point limited to securing an image of the defendant's devices. What should happen to that image was said by the claimant to be decided upon at the proposed return date. Finally, the claimant sought to restrain the use or disclosure of confidential information. On this last matter, Mr Hayes has also given full undertakings. The case came before the court on 17 November 2023. At the hearing, the claimant sought relief until a return date, which was listed for 7 December 2023.

Application 2

11. On 24 November 2023, the claimant issued a second application notice with an amended claim form. Sparta made applications concerned with procedural matters around the identity of parties and general related relief in the case. It is this application notice that is before the court.

12. The claimant seeks to add Condor Topco Limited (“Condor”) as second claimant. Condor is a company connected to Sparta. The significance of adding Condor is that unlike Sparta, Condor is party to the IA. Sparta is owned through a series of companies including Condor. Further, as already touched upon, the claimant applies to add Mr Hayes’s new employer Kubrick as second defendant and to restrain Kubrick from procuring Mr Hayes’s alleged breaches or making any use of the information obtained through them.
13. The claimant maintained its application for an imaging order of the defendant’s devices. It also filed an application for specific disclosure and/or delivery up against Mr Hayes and Kubrick.
14. The court must consider the status of these various applications. For their part, Mr Hayes and Kubrick apply for their costs, should they prevail, which they seek to be awarded on an indemnity basis. The claimant sought relief until the expedited trial. A trial date with a three-day listing was obtained for the second half of March 2024. These are among the chief issues before the court.

§III. EVIDENCE

15. The court has received an electronic bundle extending to 989 pages; a supplementary bundle; a bundle of authorities running to 653 pages, including 29 cases and two extracts from leading textbooks. The evidence included three statements from Ms Sen, Chief People and Compliance Officer of Sparta, dated 10 and 24 November and 4 December 2023. Ms Sen is also a Director of Sparta. Also filed was a statement from David Rai, Chief Executive of Sparta and a director of Condor. Mr Rai’s statement is dated 24 November 2023.
16. Mr Hayes filed a statement on his own behalf dated 29 November 2023.

§IV. CHRONOLOGY

17. I now set out some significant dates, provided in tabulated form for ease of reference. This is not, and cannot be, an exhaustive summary.

Date	Detail
2020 13 October	IA involving private equity house and certain Sparta personnel.
24 November	Mr Hayes’s contract of employment with Sparta.

2021 8 March	Mr Hayes signs Deed of Adherence.
2023 August	Mr Hayes interviewed by Kubrick.
25 September	Mr Hayes's notice to resign. Subsequently placed on garden leave.
22 October	End of gardening leave (final date of employment).
6 November	Sparta letter to Mr Hayes asking whether he intends to take up employment with Kubrick. No allegations of misuse of confidential information made.
9 November	Mr Hayes replies that he is reviewing Sparta's letter and taking legal advice. He requests the IA "deed", saying he has not received a copy.
10 November	Sparta serves Mr Hayes with an unsealed copy of the claim for injunction proceedings and application for interim relief to last until 25 March 2023 - 6 months from the 25 September resignation. The draft order contains a penal notice. No undertakings sought from Mr Hayes.
13 November	Mr Hayes's solicitors (TLT) reply. Mr Hayes rejects the suggestion he has misused confidential information, but offers undertakings that he would not solicit Sparta's clients nor misuse its confidential information.
15 November	Sparta rejects undertakings and insists on the full relief applied for.
16 November	Mr Hayes offers an undertaking that he will perform only a role involving different duties from those he performed for Sparta – confined to the Technology Partners Manager Role (" TP Role ") until 25 March 2024.

17 November	First hearing. Sparta indicates that it will apply to enforce the IA (as well as apply for the imaging order) at the adjourned hearing date on 7 December.
22 November	Parties agree draft order, including directions for service of evidence.
24 November	Application notice 2 (see above).
5 December	Letter from claimants’ solicitors (Osborne Clarke LLP): application for imaging order withdrawn along with specific disclosure application. Interim relief against Kubrick withdrawn altogether.
7 December	Second hearing. Return/adjourned date.

§V. COVENANTS

18. The express covenants in the IA that the claimant seeks to enforce are as follows:

Clause 16.1(f) [**“Clause F”, or the “non-compete”**]:

“in the case of any Manager who is not David Rai or Tim Staton, he or she will not at any time while the Manager is a director, employee or consultant of the Company or any other Group Company or during the period of 12 calendar months from the Applicable Date, directly or indirectly:

- (i) engage in; or
- (ii) be concerned or interested in, any Restricted Business in the Restricted Territory’

The Term ‘Restricted Business’ means

“the business carried in by the Target [the Claimant] and any other business conducted or proposed to be conducted by any Group Company in the 24 calendar month period immediately prior to the Relevant Date [the date when a person ceases to be employed] including (but not limited to) the business of the training and deployment of technology and business consultants to public and private sector organisations”

The ‘Restricted Territory’ is the UK and anywhere else where the Claimant has in the 24 months prior to the termination of the individual’s employment actively explored carrying on business.

The ‘Applicable Date’ is the earlier of the date when the employee ceases to be employed or to hold an interest in shares.

Clause 16.1(g) [**“Clause G” or the “non-solicitation”**] provides that:

“in the case of a Manager who is not David Rai or Tim Staton, he or she will not during the period of 12 calendar months from the Applicable Date, directly or indirectly:

(i) seek to procure orders from or solicit the custom of or deal with any person, firm, organisation or company with whom he or she had any material dealings at any time during the period of 12 calendar months ending on the Relevant Date so as to compete with or harm the goodwill of the Company or any other Group Company during such period.”

§VI. LAW

19. The claimant submitted in its first skeleton argument (CS1/§12) that until the return date the Court should apply the *American Cyanamid* test of considering whether there is a serious issue to be tried and, if so, where the balance of convenience lies (*American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504). The court was referred to the judgments of Elisabeth Laing and Nugee LJ in the case of *Planon v Gilligan* [2022] EWCA Civ 642. In *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, the House of Lords set out 3 questions to ask when deciding whether to grant an interim injunction. The questions are:

- (1) Is there a serious question to be tried?
- (2) Would damages be an adequate remedy for either of the parties injured by granting/not granting the injunction?
- (3) If not, where does the balance of convenience lie?

20. The court retains a residuary discretion in respect of grant as injunctions are discretionary remedies. Questions two and three are often combined into a single question, with the adequacy of damages weighing in the balance of convenience assessment. While in *Boydell*, Bean LJ recognised the “seminal” status of *American Cyanamid* (*Boydell v NZP Ltd* [2023] EWCA Civ 273), he stated at [14] that:

“Lord Diplock’s speech is neither a statute nor a biblical text, and should not be read as if it were either. The *Cyanamid* case itself was a large and

complex patent claim. The interlocutory injunction which was the subject of appeal to this court (where the hearing lasted eight days) and the House of Lords (where it took a mere three days) had been granted in the High Court on 30 July 1973. The case did not come to trial until the autumn of 1977, and the trial lasted some 100 working days (see [1979] RPC 215). It is one thing to say in a case of such complexity and duration that on an interlocutory injunction application the court should not go beyond asking whether there is a serious question to be tried. But in an employment case of far more limited scope it may be unjust to stop at that: and it should always be remembered that the statutory test for the grant of an injunction is whether it is just and convenient. Hence the decision of this court in *Lansing Linde Ltd v Kerr* [1991] IRLR 80, [1991] ICR 428 that where it will not be possible to hold a trial until the period of the covenant has expired, or substantially expired, it is permissible for the judge to form at least a preliminary view of the claimant's prospects of success, and to factor that in at the 'balance of convenience' stage of the analysis."

21. To assess the validity of restrictive covenants, a three-part test applies (1) whether the former employer has a legitimate business interest in need of protection; (2) what the covenant means when properly construed; (3) whether the employer has shown that the restriction or restrictions are no wider than is reasonably necessary for the protection of its legitimate business interests (*TFS Derivatives Ltd v Morgan* [2005] IRLR 246 at [36]-[38] per Cox J; *Office Angels Ltd v Rainer Thomas & O'Connor* [1991] IRLR 214 at [21]-[25], per Sir Christopher Slade). As Lord Parker emphasised in *Herbert Morris Ltd v Saxelby* [1916] 1 A.C. 688 at p.707:

"A restrictive covenant is void as an unlawful restraint of trade unless the employer can show that it goes no further than is reasonably necessary to protect his legitimate business interests."

22. If a restrictive covenant applying after employment has terminated is held to be unreasonable, then it is void and unenforceable.
23. To clarify the scope of the dispute, I would make three initial points.
24. First, there has been no argument about the construction of the terms of the contract. The question for the court's determination is its enforceability, essentially the reasonableness of the restrictions, rather than its meaning.
25. Second, the defendant has not disputed that the claimant has a legitimate business interest in need of protection. Toulson LJ stated in *Thomas v Farr* [2007] ICR 932 at [42] that:

"there must be some subject matter which an employer can legitimately

protect by a legitimate covenant. Indeed Lord Wilberforce said in *Stenhouse Australia v Phillips* [1974] A.C. 391; [1974] 2 W.L.R. 134 at 400 E “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.”

26. The claimant maintains through Ms Sen that Mr Hayes has had access to “the nuts and bolts of the business model”, becoming privy to a “wide range of confidential information, proposals and prices and discounts”. Ms Sen stated in her third statement that this was “a pipeline of future work – gold dust”.
27. Third, there was no argument about severing or blue-pencilling part of the covenant along *Egon Zehnder* lines (*Egon Zehnder v Tillman* [2019] UKSC 32). The question is whether the terms of the IA, as commonly understood by the parties, should be enforced on an interim basis until trial.

§VII. SERIOUS ISSUE TO BE TRIED

28. The defendant submits that there is not a serious issue to be tried for two reasons. First, because Mr Hayes has “offered appropriate undertakings”; second, because the sheer extensiveness of the IA covenants renders them unreasonable, void and “hopelessly unenforceable” (DS1/§10). Certainly, the question of the validity or otherwise of a covenant against competition can raise a serious issue to be tried, as was the case in *Planon* (see [111]), and the defendant accepts that the serious issue to be tried test is not “demanding”.
29. I cannot accept the defendant’s submission that the question of the enforceability of the IA covenants is “frivolous or vexatious, or otherwise demonstrably bad” (the defendant relying on and citing *Planon v Gilligan*). To my mind, there is plainly an issue to be determined that has a reasonable prospect of success. This judgment proceeds on the basis that it is reasonably arguable that the IA covenants will be enforceable, that is that they are overall reasonable. That does not mean that at trial the argument is bound to or even will succeed, but it does meet the arguability threshold at this interim stage. Thus, it seems to me that there is clearly a serious issue about whether the greater scope of prohibitions and restrictions contained in the IA covenants is reasonable and enforceable. This argument was not pressed hard on behalf of the defendant, and it was obvious that Mr Hayes had stronger points.
30. Since as part of the interim relief that Sparta seeks would be in place for a substantial part of 12-month operational period by the time of trial in March, I find that the court should make “some assessment” of the ultimate merits on *Lansing Linde* grounds (I further develop the jurisprudence gathering around this concept shortly and in particular the decision in *Boydell*). By the time of the return date hearing in December, the claimant accepted through Mr Nicholls that the court could make “some assessment” of merits in its determination of

the interim application. Therefore, any dispute about whether to apply the *Lansing Linde* principle fell away. The question became one about the preliminary assessment on the facts.

§VIII. ADEQUACY OF DAMAGES

31. In the defendant's first skeleton argument, it was accepted that damages would not be adequate for Sparta (DS1/§13.2). This stance was confirmed by the defendant at the first hearing. It is put this way by the claimant: "the loss of a client may also lead to the loss of repeat business, [and] it would be very difficult to calculate damages and Mr. Hayes would be unable to pay the large sums in question" (CS1/§57). I concur. As the Court of Appeal said in *D v P* [2016] EWCA Civ 85 at [15]:

"... in cases such as this damages are not what an employer wants. The damages potentially sufferable by a covenantee such as the claimant by breach of the relevant restraint will usually be unquantifiable and will rarely, if ever, provide the covenantee with an adequate substitute for an injunction."

32. By contrast, the claimant submits that damages would be adequate compensation for Mr Hayes. Any future loss accruing to him would fall into what Mr Nicholls calls "classic damages territory". This is because Mr Hayes could "quantify" his loss of salary with precision and damages would accordingly provide him with a complete remedy. This is disputed by the defendant. Mr Hayes places reliance on *Planon* at [111] where the court said:

"it is quite unrealistic to argue that (since the Claimants have the resources to honour the crossundertaking) damages would be an adequate remedy for the Defendant if an injunction against competition was granted at the interlocutory stage, but was proved at trial to have been an unenforceable restraint of trade. Except in cases of very wealthy defendants, or where the claimant employer is offering paid garden leave for the whole period of the restraint, this argument has no traction. Mr Gilligan's evidence is that he has a wife and child, a mortgage and other family commitments. It is by no means clear that his current employers would be able and willing to transfer him to work which had no connection with facilities management software; indeed it would be risky for them to do so in the face of a non-competition injunction breach of which would be a contempt of court. The likely effect of such an injunction would be to deprive him of his income until and unless he can find a new job."

33. It was submitted that enforcement of the covenants would damage Mr Hayes's standing and attractiveness in the marketplace. I find that there is merit in this argument. It is clear to me that damages would not be an adequate remedy for Mr Hayes. There may be an unquantifiable impact on his future employment prospects in this highly technical field. Therefore, the court must examine the balance of convenience. As part of that exercise, as already indicated, the

parties accept that the court should make some assessment of the merits of the case - the ultimate enforceability of the IA covenants.

§IX. INVESTMENT AGREEMENT

34. In *Boydell v NZP Ltd* [2023] IRLR 572 Bean LJ stated that while at the interim stage of a complex case the court may not go beyond whether there is a serious issue to be tried, that may not be the position in all cases. For example, he stated at [14]:

“in an employment case of far more limited scope it may be unjust to stop at that: and it should always be remembered that the statutory test for the grant of an injunction is whether it is just and convenient.”

35. Bean LJ continued, referring to *Lansing Linde v Kerr*, that:

“where it will not be possible to hold a trial until the period of the covenant has expired, or substantially expired, it is permissible for the judge to form at least a preliminary view of the claimant’s prospects of success, and to factor that in at the “balance of convenience” stage”.

36. As Silber J stated in *CEF v Munday* [2012] FSR 25:

“28 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 a trial. In those circumstances it is not enough to decide merely that there is a serious issue to be tried.

29 Similar approaches were advocated in cases such as *Lawrence David Ltd v Ashton* [1989] I.C.R. 123 at 135. In those circumstances, the proper approach is not to apply the *American Cyanamid* test on this application, but instead to consider in respect of claims for an injunction whether it is more likely that CEF would succeed at trial.”

37. While *Dwyer (UK Franchising) Ltd v Fredbar Ltd* [2023] FSR 4 was a franchising case, the court said of relevance:

“the court will consider a number of factors in assessing reasonableness including the factual and contractual background and the relevant bargaining strength of the parties.” [71] (and see also [65]).

“inequality of bargaining power ... is a significant factor in determining reasonableness” and “where there is such inequality, the court will be astute to examine any restrictive covenant critically to ensure that it is only upheld if it is reasonable between the parties in all the circumstances.” [73].

“[It] may make an agreement “more akin to a contract of employment” [77], particularly where a party is not given any opportunity to negotiate the terms [81].”

38. I make two preliminary observations. First, I cannot definitively settle the question of Mr Hayes’s seniority due to fundamental factual disputes between the parties that remain irreconcilable. However, there is sufficient material beyond the factual disputes that allow the court to form a preliminary view on the likely merits of the enforceability of the covenant – indeed, both parties have accepted that the court can do this on the facts.
39. Second, the defendant states that he did not see the terms of the IA. There is no evidence that he did. However, he did sign the deed of adherence in March 2021. I am satisfied that Mr Hayes is bound by the IA.
40. I now review the factors relevant to the nature of the IA. I emphasise that at this point the court does not, and cannot, definitively rule on the status of the agreement. That would be premature and is for the trial. The court makes no final findings of fact, but assesses the evidence currently before it touching on the relevant factors.
41. The IA restrictions have several relevant features. First, they extend beyond activity which competes with Sparta (*Scully v Lee* [1998] IRLR 259). Second, they are not confined to preventing Mr Hayes from undertaking the kind of work which he undertook for Sparta (*Wincanton v Cranny* [2000] IRLR 716). Third, they extend beyond clients with whom Mr Hayes dealt (*Austin Knight v Hinds* [1994] FSR 42). I next consider the question of the notice period and examine the decision of this court in *Quilter Private Client Advisers Ltd v Falconer* [2020] EWHC 3296 (QB). This characterisation of the effect of the construction of the covenants was not disputed by the claimant during the hearing. Indeed, the court specifically asked Sparta’s leading counsel whether the covenant prevented Mr Hayes taking a role for Kubrick that did not compete and it was explicitly stated that this was the effect.
42. In the instant case, Mr Hayes was subject to a 6-month probationary period. He could have been dismissed at a week’s notice. Further, Sparta could unilaterally extend the period of probation. After that, he was subject to the statutory minimum notice period. I judge that Mr Hayes’s vulnerability to being dismissed with a week’s notice must be weighed against the IA’s 12-month restriction and the fact that when he became subject to the restrictions on 8 March 2021, he was still within his probationary period. The reasonableness of the term must be judged in that light, particularly if the restraint purports to prohibit entirely non-competing activity while working for a competitor (working in any capacity), even if the activity relates one of the Sparta group companies about which Mr Hayes knew nothing. I emphasise that I do not read *Quilter* as authority for the proposition that the notice period determines reasonableness of restriction. I understand that Calver J simply deemed it an additional factor in the overall and holistic assessment of reasonableness of duration of restraint. Indeed, the judge stated in terms at [175(2)]:

“The length of the period of notice can be an indication of the unreasonableness regarding the duration of the restraint.”

43. This must make sense. It is essentially about balance and proportionality, hallmarks of reasonableness. Mr Nicholls makes the point that any reliance on the notice period is a “bad point” (CS2/§52), since the court is considering a shareholder agreement and not a contract of employment. However, where the court is considering the true nature of the overall arrangements, and whether the IA amounted to an independent and discrete shareholder contract or an arrangement closely tied to employment status, then it seems to me that the defendant is correct that notice period is a further factor that the court ought to have regard to. But I stress that in this case I do not place any great weight on the length of notice period, while not ignoring it as it is a relevant factor. It is simply a limited part of a far larger composite picture. That is my approach. The significance of notice period should not be overstated.
44. As indicated, I cannot in this judgment determine Mr Hayes’s precise level of seniority. However, the notice period arrangements are one factor pointing away from great seniority. That said, I cannot accept the defendant’s submission that they “undermine Ms Sen’s insistence that he was senior” (DS1/§12.4). Mr Hayes signed the deed of adherence when still in his probationary period. In the employment contract, 6 months protection was considered sufficient. Yet this is doubled in the IA without any real explanation. The restrictions purport to cover any work carried on by a company within the claimant’s Group, regardless of whether Mr Hayes was involved or knew anything about that area of the business.
45. Mr Hayes’s evidence is that he was put under pressure to sign the deed of adherence. This has not been or not been seriously disputed by Sparta. On the face of it, it is not an assertion that is incapable of belief. It is thus a matter that the court can properly take into account. Looking at the evidence presently available, there is nothing to indicate that there was meaningful negotiation of the IA covenants, if any at all. Mr Hayes has supplied evidence that he was never given a copy of the IA. There is no evidence from Sparta to contradict this and indeed no submission by the claimant to the contrary. Nor is there evidence that he signed the IA. Thus, Sparta seeks to enforce a covenant with a 12-month operative period that there is no evidence that Mr Hayes ever received or signed. His evidence is that he repeatedly requested a copy of the IA, but it was never provided. This evidence, once more, is uncontested, as is his evidence that he first saw the IA as Ms Sen’s exhibit following his resignation.
46. The nature of the IA must be considered. The defendant submits that Mr Hayes “is simply an ordinary employee, with a small shareholding in his employer company” (DS1/§10). However, the IA was not offered to all the approximately 150 employees of the business. It is restricted to 10 or so shareholders. Mr Hayes was one of the best paid employees and was Director of the Financial Services Practice. The value of the shareholding is disputed between the parties and at the interim stage the court is unable to quantify it with precision. The defendant disputes the claimant’s £1.5 million valuation. But even if the true value is several hundred thousand pounds, this is a valuable holding. That is one factor pointing towards a commercial arrangement. However, against that

range other factors, including the alleged inequality of bargaining power and fait accompli nature of the arrangement. Further, it must be remembered that the shareholding amounted to no more than 0.35% of the company.

47. The starting-point of an evaluation of such restrictive covenants is that on public policy grounds, as has been widely stated by the courts, PTRs are prima facie void and unenforceable as they prevent open competition. They therefore require justification by the party seeking their enforcement. Ultimately, they must pass the reasonable necessity test (*Herbert Morris Ltd v Saxelby* [1916] 1 A.C. 688). What is reasonable is highly fact- and context-sensitive. As Gross J said in *Meridian VAT Reclaim v Lowendal* [2002] EWHC 1066 at [24], the application of the doctrine of restraint of trade will “likely be influenced by the context and nature of the contract in question”.
48. The claimant accepts in its written submissions that there are indeed “various shades of shareholder agreements” (CS2/§36). Further, in *Ideal Standard v Herbert* [2019] IRLR 431 at [28] an example is provided of an employee with a small shareholding in a company as a part of that person’s employment which the court treats differently from a commercial agreement case. The claimant submits that in respect of this particular IA, the court should “take a less stringent approach than would be taken to a clause in an employment contract” (CS2/§41). Naturally, this is not a binary question. The nature of the arrangement between parties and the way in which it came to pass must be carefully weighed by the court and situated along a calibrated spectrum.
49. The IA was formulated and agreed in October 2020, and therefore before Mr Hayes became a Sparta employee. The evidence before the court suggests that it was presented to him as a fait accompli with no negotiation about its terms. He could either sign it or not while he was still in his probationary period. Thus, viewing all the rival factors in the round, the court reaches the preliminary view – no more than that at this point – that there was a clear inequality of bargaining power when the defendant became bound by the covenants in the IA by signing the deed of adherence towards the end of his probation period. The nature of the arrangement is critical. At this point, and making a preliminary assessment on an interim basis, the evidence before the court suggests that in the spectrum or “shades” of shareholder agreements, this arrangement is “more akin to a contract of employment” as it was termed in *Dwyer (UK Franchising) Ltd v Fredbar Ltd* [2023] EWCA Civ 889, at [77]. This is not, the court emphasises, a final conclusion or final finding of fact. It cannot be given the interim stage reached and the limited disclosure and evidence. But parties agree that the court should make some assessment of merits. That in turn requires a preliminary assessment of the nature of the governing contract. I cannot accept, as the claimant submits, that irrespective of whether these clauses were in the IA or a contract of employment they would be reasonable (CS2/§42). The nature of the arrangement is critical and different answers about reasonableness may be reached depending on whether the arrangement is contained in a contract of employment or an independent shareholder agreement. The true status of the IA must be determined finally at trial. This court at this point must make, and is limited to, making the best preliminary assessment it can. It determines none of the trial issues. I emphasise that the court’s provisional view that the agreeing

of the IA was more akin to an employer/employee arrangement does not automatically render the IA covenants unreasonable. On these facts, the court has to form a preliminary view about the status of the agreement given the differing levels of scrutiny different types of contracts receive from the court. To this end, parties provided detailed rival arguments about the status of the IA accordingly.

50. In its first skeleton argument, the claimant recognised that the case where an employee has a small shareholding in a company as a part of that person's employment may be treated differently from a business sale case: *Ideal Standard v Herbert* [2019] IRLR 431, at [28]. My preliminary view of merits is that it is more likely than not that at trial the court will hold the arrangement to be more akin to a contract of employment and intricately connected to Mr Hayes's employment rather than a business sale case with something approaching an equality of bargaining power or "bargaining strength" (*Dwyer* at [71], [73]). It is in this context that the court must consider the reasonableness of the 12-month restriction and the broad scope of the IA covenant which lacks any carve out. It is implicit in taking a preliminary view of merits that the court must make some assessment on a balance of probabilities of how the trial court would rule on the status of the IA. This is not ruling that the IA is void for unreasonableness, but that at trial the court is likely to so hold – a conceptually different preliminary determination.
51. The question in this case is not whether non-compete clauses as a class are "legitimate" (cf. CS2/§45). The question is whether the restraints in this IA are reasonable. Are they the minimum reasonably necessary to protect Sparta's confidential and commercially sensitive information that the defendant possesses by reason of his former employment? I cannot accept that a complete restraint on Mr Hayes working for Kubrick in any role "may be the only way to protect such [confidential] information" in this case (CS2/§45, citing *Thomas v Farr*). The protection sought through the employment contract in the first application is a clear example of how the claimant originally understood the level of protection it required to safeguard its interests. In the first application notice the claimant sought only the protection of the contract of employment PTRs. In the claimant's skeleton argument that immediately preceded the first hearing of this claim, the claimant modified its position. It stated that it sought interim relief through the enforcement of PTRs in both the contract of employment and the IA (CS1/§1). However, it continued at §§24-25:

"24. There may, however, be an easier solution. The covenant in the employment contract is narrower. It is shorter. It lasts only 6 months. In fact, the definition of Termination Date means that the restraint only runs from the date when garden leave commenced so there are only 5 months more to run if one takes the 6 months as running from the date when the Defendant gave notice not the date of termination.

25. Certainly for the purposes of this application, but the Claimant will suggest the same at the Return Date, it is necessary to consider only the employment contract. If it is possible to get on a speedy trial by the latter half of March 2024, the investment agreement will only have to be considered at trial."

52. Thus, until the submissions at the outset of the first hearing, it was being suggested by the claimant that there would be sufficient protection until trial provided by the covenants in the contract of employment. Further, the draft order accompanying the application specified an expiration date of 25 March 2024, the period of restraint of the contract of employment and not the IA. It seems curious if those covenants were deemed by the claimant insufficient to protect its legitimate business interests that the first application notice, the accompanying draft order and the claimant's first skeleton argument would have been drafted in terms that indicated that the contract of employment provided sufficient protection until (expedited) trial. It is for these reasons that between the first hearing and the adjourned hearing date on 7 December, Eversheds Sutherland, Kubrick's solicitors asked the claimant's solicitors very directly in a letter dated 5 December what had changed (B978):

“Whilst (as already made clear) our client will abide by any interim injunctive order made, it will not be able to keep Mr Hayes on the books if he is unable to do any work. We have to say that we are surprised by this change of position. As apparent from your Leading Counsel's skeleton argument at the hearing on 17 November 2023, Sparta's stated position at that stage was that it was only seeking to enforce the employment non-compete at that hearing and on any Return Date (paras 24 to 26), and in advocating the reasonableness of that restriction relied on the fact that the clause did not preclude his working for Kubrick in a non-competitive role (e.g. paras 34 and 35). Sparta's position at that stage was that this would hold the ring over to the speedy trial in March 2023. We do not understand what has changed.”

53. There was no answer; there was no evidence filed in explanation; there was only the oral submission made by counsel asserting “surprise” at Mr Hayes's proposed role. This is in the face of the defendant's early undertakings to be confined to “duties and activities which are materially different” to his previous role and that did not compete. The suggestion of surprise is, I am bound to observe, surprising in itself. The claimant has been told in terms from 16 November of Mr Hayes's intention to perform the Technology Partners Manager role.

54. In the first skeleton, it was asserted by the claimant that the PTRs in the contract of employment were reasonable for the following reasons:

“34. Non-compete covenants have been struck down because they are not limited to activity which competes with the employer: *Scully v Lee* [1998] IRLR 259 or because the activity in which the employee is restrained from engaging is not confined to that which was undertaken by the employee for the employer: *Wincanton v Cranny* [2000] IRLR 716. Covenants restraining solicitation with clients have been struck down because they extended to clients with whom the employee had not dealt: *Austin Knight v Hinds* [1994] FSR 42.

35. The covenants in this case have none of those defects and so are appropriately focused and do not offer the employer more than adequate protection.”

55. It should be noted that the restrictions in the IA contain each of these “defects” in that the restrictions are not limited to competing activity (as confirmed on behalf of the claimant during the course of the adjourned hearing); they extend to activity beyond that which Mr Hayes previously undertook for Sparta; they extend to clients with whom he had not dealt. In addition, they are of double the duration. In a situation where I judge that the IA is likely to be deemed to be closer to an employment contract, it is likely that the court at trial will hold the IA restrictions to be an unlawful restraint of trade. Thus, *strictly* as a preliminary view, I find that the claimant is unlikely to persuade the trial judge that the IA covenants are reasonable and enforceable against the defendant. The covenants are likely to be held to be too broad and beyond the bounds of reasonableness.
56. I emphasise that I have not conducted a “mini-trial”. There has not been full disclosure or anything approaching it. There remain important disputes of fact. The assessment of prospects, therefore, is one factor in the assessment of the balance of convenience and in deciding what is just and convenient in the case at this stage. As Staughton LJ said in *Lansing Linde* at 259, it would be wrong to regard prospects of success as “the sole consideration”.

§X. BALANCE OF CONVENIENCE

57. The claimant relies on several factors in favour of grant. The defendant was undoubtedly privy to confidential and commercially sensitive material. Should he work for Kubrick in any capacity, there remains the risk of what Mr Nicholls terms “inadvertent” disclosure, and this risk cannot, he argues, be controlled without a complete prohibition. This is because it is difficult to differentiate between confidential and non-confidential material. It is also difficult to police non-solicitation covenants where the former employee has knowledge of commercially valuable material not in the public domain. Dissemination, whether inadvertent or not, would cause great damage to the claimant’s legitimate business interests. The defendant should therefore be restrained from working in the HTD “space”, but that is not the same as his not being able to work at all. He has previously worked for years in recruitment consultancy and could again. The 12-month restriction, given his seniority and access to such valuable information that carries the risk of commercial damage on disclosure, is both necessary and reasonable. It is proportionate to the risk that the facts of this case produce. That can be tested by the fact that Kubrick itself operates by imposing a 12-month restraint covenant.
58. Against this, the defendant submits that should the court grant the application, he would lose his job. The enforcement of the covenant would damage his standing and attractiveness in the relevant employment marketplace. The loss of job would cause great hardship for his family and may have a detrimental effect on his well-being and mental health. The risks the claimant asserts are mitigated by the defendant working for Kubrick in a non-competing capacity. Thus, the prejudice that the claimant claims has been greatly inflated. Sparta had previously sought the protection of the employment contract covenants and Mr Hayes has given full undertakings in respect of them. That is how the ring

should be held. The IA far exceeds the breadth of the employment contract covenants and are likely to be unenforceable as an unlawful restraint of trade.

59. I turn to the court's analysis.
60. There is no doubt that the defendant was and remains privy to confidential and commercially sensitive information. I judge that there can be no question but that the claimant has a protectable legitimate business interest. It is a common feature of commercial life that when an employee in possession of such information joins a competitor, there is a risk of prejudice to the previous employer. However, that is not a complete answer to the question before the court as the logic would be that covenants in all such situations should be enforced. They are not. It is necessary to identify what the real extent of the risk is.
61. One starts with the first application. The protection of the legitimate business then deemed necessary was limited to the terms of the employment contract. The claimant can enjoy the full force of that protection through the defendant's undertakings to the same effect. When in the second application the claimant sought greater protection, Mr Hayes's solicitors asked in terms for an explanation for the change of stance, but no explanation was forthcoming. As Ms Stone submits, there is no evidence in the three witness statements of Ms Sen that explains Sparta's change of position. At the December hearing, it was submitted by Mr Nicholls that the claimant was "surprised" that the defendant would take on the TP manager role. However, an oral submission from counsel is not evidence. The defendant points out that it was clear that Mr Hayes would be working for Kubrick and what his proposed role would be from 16 November. This could not have been a "surprise". As Ms Stone submitted, "nothing has changed"; Sparta "must have envisaged that Mr Hayes could work for Kubrick."
62. The fact remains that there is no evidence before the court from the claimant about why what was once deemed to be adequate protection now is insufficient. There is no evidence about what has materially changed. In the absence of any credible evidential basis for the need for significantly greater protection, a clear inference is that the original protection is sufficient to protect the claimant's legitimate interests. If it were not, it is hard to conceive how Sparta's application would have been formulated and restricted in this way in the first place. While I do not regard this factor as determinative of the application, it is a factor against grant.
63. The next question is the risk of disclosure of confidential information. I cannot accept that there is any merit in the way that the claimant's application was originally to be presented. In part it was based on unfounded allegations contained in the witness statement of Ms Sen that Mr Hayes had misused confidential information. The claimant has put before the court no evidence that he has passed on confidential information, and seemed to accept as much during the adjourned hearing. On his Sparta laptop that remained in the claimant's possession was a slide deck that Mr Hayes presented as part of his Kubrick interview. The claimant does not allege that this presentation revealed any confidential information. As the evidential picture has developed, and now

following investigation by Kubrick of Mr Hayes's Outlook account, there is no evidence of misuse of confidential information, along with the laptop having been searched by Sparta's CIO, albeit not by a forensic expert. The Kubrick search has satisfied Sparta. Consequently, any question of future risk cannot be grounded in any pattern of previous misuse. Instead, the claimant submits that such PTRs exist because of "human nature" and its fallibility. The suggestion is that Mr Hayes might "inadvertently" let some detail of commercial significance slip causing damage to Sparta's business interests. I find such arguments, lacking any solid evidential foundation, to carry little weight in this case, especially when contrasted by the lack of evidence of misuse by Mr Hayes. Naturally, the evidence at trial may be different following full disclosure. The court on an interim application must proceed on the evidence before it and not speculate.

64. The claimant seeks to justify the lack of carve out and absolute prohibition on working for Kubrick by the defendant's membership of Sparta's senior management team, which extends to the activity of the group. He had access to confidential information from the outset. Against this, the defendant submits that he could nevertheless be dismissed very quickly. As indicated, the court on this interim application is unable to definitively settle the extent of Mr Hayes's seniority. But the question of "inadvertent" disclosure seems a fragile basis upon which to advance the claimant's case in the concrete context of the practical realities of the prevailing situation. It is not reasonably arguable that there is a material as opposed to fanciful risk of future disclosure of confidential information by Mr Hayes. This is because he will not work in any activity that competes with Sparta. He will not be client-facing. As a further step of what Mr Devonshire on behalf of Kubrick calls "pragmatic distancing", the defendant will only work in a staff recruitment role. It is difficult to understand how there could be inadvertent disclosure when Mr Hayes is performing such a role. He will not attend any commercial team meetings; he will not have access to Kubrick's client database or systems; he will be "ring-fenced" from any client-based work whatsoever. On behalf of the claimant, the point is made that it is sometimes difficult to distinguish between confidential and non-confidential information. However, with the very specific ringfencing that surrounds the defendant's role, restricting it to staff recruitment, it is difficult to envisage a situation in which he would make such damaging inadvertent disclosures. This significantly reduces the risk of prejudice to the claimant. This in turn affects, without determining, the balance of convenience. This makes it more likely that lesser restrictions than those set out in the IA clauses would be sufficient to protect Sparta's interests.
65. Looking at the impact on the defendant, the court accepts the point made on behalf of the claimant that the fact that a person may be unemployed because of the operation of a non-compete PTR does not in itself render it unenforceable (*Planon* at [91]). Against this, the defendant's evidence is that IA covenant enforcement would result in the loss of his job. I judge that the position is more nuanced than that. Job loss is not a certainty. Mr Devonshire on behalf of Kubrick was very candid about the position. In response to a direct question from the court, he could not say "hand on heart" that Mr Hayes would definitely lose his job. Counsel's submission is not, of course, evidence. However, there

is no evidence filed by Kubrick precisely because the application for interim relief against Kubrick was withdrawn. Nevertheless, Mr Devonshire stated that job loss was something that would be “seriously considered” and a “commercial decision” made. The result, I judge, is that there is a real and serious risk that the defendant would lose his job with Kubrick if the IA covenants were enforced and he could not work for Kubrick in any capacity.

66. The loss of employment with Kubrick would in all likelihood have serious consequences for the defendant. He is the sole income provider and has monthly financial commitments of a mortgage and household bills. His wife has given up employment to care for their daughter who lives with autism. I am not persuaded by the claimant’s argument that the loss of income could be eliminated by his finding a role in recruitment consultancy, where he has previously worked extensively and which does not compete with HTD (as stated at CS2/§55) This is because the HTD field is a specialist technology niche and not being current in it is likely to damage Mr Hayes’s standing and attractiveness as a participant in it should he work in an unrelated field. There is an undoubted benefit to staying actively involved and connected to the sector. Thus, I do not accept the submission that the “only effect” of enforcing the injunction to prevent Mr Hayes working for Kubrick would be “a loss of income” (CS2/§58). There are wider risks around his future employability and the ease of his returning to the HTD sector that also flow from covenant enforcement in this case. I am thus not satisfied that “an award of damages to cover his lost income would provide a complete remedy” (CS2/§58) as the impact on the defendant may be unquantifiable.
67. The defendant’s evidence is that loss of employment would also adversely impact his mental health and well-being. While this remains a risk, and is often the case, I am not persuaded that this factor carries much weight in this case.
68. In the defendant’s first skeleton argument, it was submitted that he had been working for Kubrick “since before the proceedings were issued” (DS1/§13.6), and that accordingly this was the “status quo”. However, at the return date hearing it seemed that Mr Hayes, while on the Kubrick books, was on gardening leave and, as Ms Stone put it, he “had not worked for Kubrick in any meaningful sense”. This position was adopted out of an abundance of caution. It seems therefore that the question of status quo is of minimal assistance to Mr Hayes. What Mr Hayes now seeks is to actively work in a completely unrelated non-competing role at Kubrick until the outcome of the trial.
69. Overall, having evaluated the factors relied upon by the parties relevant to balance of convenience side by side and holistically, I judge that the risk of prejudice and injustice to the defendant significantly outweighs that to the claimant. The claimant will enjoy *all* the protection it initially sought. The role that Mr Hayes will undertake at Kubrick is completely non-competing, non-client-facing and carries with it no serious or credible risk of inadvertently passing on commercially sensitive information.
70. As Silber J said in *CEF* at [36]:

“An employer’s justification for a restraint has to be analysed and to be scrutinised with particular care, as experience shows that employers in many cases exaggerate the reasons why post-termination restraint provisions are reasonable. So a decision tailored to the facts of the claim against particular employees is required.”

71. As Sir Christopher Slade said in a judgment with which Butler-Sloss and Mann L.JJ. agreed in *Office Angels*:

“49 ...The Court cannot say that a covenant in one form affords no more than adequate protection to a covenantee’s relevant legitimate interests if the evidence shows that a covenant in another form, much less far-reaching and less potentially prejudicial to the covenantor would have afforded adequate protection.”

72. I am quite satisfied that the covenants in the employment contract, about which full undertakings have been given, do provide sufficient protection of Sparta’s legitimate business interests. The limitation or carve out in the employment contract bears the hallmarks of what would be a reasonable restraint in a way that the covenants in the IA do not. The employment contract is parsimonious and sensitive to the nature of the role that Mr Hayes was in fact performing, all hallmarks of reasonableness. Thus, the factors against grant strongly outweigh factors in favour of grant.

73. There are factual disputes before the court that mean that it cannot definitively determine Mr Hayes’s true level of seniority. Doing the best the court can, I cannot find on the evidence as it stands that Sparta has demonstrated that as a result of a 0.35% shareholding interest, Mr Hayes should be subject to a different category of restriction with double the duration of restraint and prohibited from any work for Kubrick even where the activity cannot possibly compete. On these facts, such a clause appears stamped with unreasonableness. The court emphasises that this is not a final decision, but the taking of a “preliminary view” on the basis of the evidence presently before the court. It determines nothing for trial and simply is a factor affecting the balance of convenience. Thus, with this clear understanding, and to the extent that the court can make “some assessment” of the prospects of success having been invited to do so by parties on both sides, I judge that the evidence points to the IA not being enforceable against Mr Hayes as being closer to an employee shareholder contractual arrangement, based on an inequality of bargaining power, not having been negotiated, having been presented as a fait, without Mr Hayes receiving legal advice and amounting to only 0.35% of the company’s shareholding. The defendant’s very limited shareholding was compensable on his termination by £1. While I have concluded that the IA covenant is likely to be unenforceable on the *Lansing Linde* lines, I am satisfied that even if the *American Cyanimid* test simpliciter were applied, there would be precisely the same result. That is because even without a consideration of merits, the balance of convenience clearly falls in favour of the defendant due to the obvious and highly detrimental impact on him and by consequence his wife and vulnerable child.

74. On the evidence currently before the court, the balance of convenience lies decisively against granting the injunction sought. The merits can be revisited and definitively decided at the expedited trial in March, but the ringfencing of Mr Hayes’s role until then will provide the claimant’s interests with effective protection. This being the court’s view, I am mindful of what Lord Diplock stated in *American Cyanimid* at [408F]: where “factors appear to be evenly balanced”, it is “prudent” to preserve the status quo. Here, it is not arguable that matters are “evenly balanced”; the court judges that they fall decisively in the defendant’s favour. This is particularly so because Sparta has all the relief it originally sought and continually fails to explain despite repeated enquiry from the defendant and the court why such protection is no longer sufficient.
75. Consequently, Sparta’s application for interim relief grounded in the IA covenants is dismissed.

§XI. DISPOSAL

76. Condor consents to be being added as second claimant. Kubrick does not object to be added as second defendant. Therefore, following the court’s analysis set out above, the applications are disposed of as follows:
- (1) Application to enforce IA covenants against the defendant: **dismissed**.
 - (2) Application to join Kubrick as second defendant: **granted**.
 - (3) Application to join Condor as second claimant: **granted**.
77. The court will hear argument about costs at the next hearing. In particular, and in light of this judgment, the court wishes to hear further submissions about the imaging order and the withdrawn application to seek interim relief against Kubrick.

UPDATE

78. The court has been informed that since the beginning of the 2024, the claimants have agreed a variation to Mr Hayes’s undertakings to permit him to work for Kubrick as Talent Acquisition Specialist.