



Neutral Citation Number: [2021] EWHC 2562 (QB)

Case No: QB-2020-004249

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/09/2021

Before:

MARGARET OBI
(Sitting as a Deputy High Court Judge)

Between:

RICHARD BAKER HARRISON LIMITED

Claimant

- and -

(1) MARK BROOKS

(2) ANDREW SAMBROOK

(3) BS SOURCING LIMITED

Defendants

Edward Brown (instructed by **Mischon de Reya LLP**) for the **Claimant**
Charles Crow (instructed by **Irwin Mitchell LLP**) for the **First Defendant**
The Second Defendant appeared in person
No appearance from the Third Defendant

Hearing dates: 27-29 July 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MARGARET OBI

Margaret Obi:

I. Introduction

1. Richard Baker Harrison Limited (“RBH”) is the claimant in this case. RBH is a leading distributor of minerals and chemical raw materials which it supplies to manufacturers worldwide. It is not itself a manufacturer. RBH occupies a key position within the plastic, rubber, coating, adhesive and sealant, composite, ceramic and polishing sectors. It offers more than 100 minerals and chemicals to the market and operates out of five European warehouses.
2. This judgment follows the expedited trial of RBH’s claim to enforce obligations of non-competition, confidentiality, and post-termination restrictions against its former employees - Mr Brooks and Mr Sambrook (“the defendants”). The claim raises a number of issues. However, during the trial, the focus has been on the conduct of Mr Brooks and Mr Sambrook prior to their resignations. RBH alleges that Mr Brooks and Mr Sambrook established SBS Sourcing Limited (“SBS”) (a mineral sourcing and supply services business) as a nascent start up competitor and sought to transfer business away from RBH in breach of their contractual obligations. SBS is a shell company. It was established with a nominee director. It has played no active role in this litigation.
3. RBH’s Claim Form was issued on 2 December 2020, and an application for interim injunctive relief was made on 3 December 2020. Mr Brooks and Mr Sambrook subsequently agreed undertakings as set out in the Order of Bourne J, dated 10 December 2020. They agreed (amongst other things): (i) not to use, disclose or make copies of RBH’s confidential information either directly or indirectly; and (ii) to adhere to post termination restraints relating to RBH’s customers, prospective customers, and suppliers. However, both defendants reserved the right to challenge the enforceability of the post-termination restraints at trial. Bourne J issued directions which included limiting the trial to issues of liability and injunctive relief. However, during the hearing, I decided to determine liability and the enforceability of the post-termination restrictions only. If required (and if not agreed), focussed submissions can be made based on the findings of fact, in relation to springboard relief, damages, and costs (including the costs budget) at a later stage. In addition, I granted RBH’s application made under CPR r. 31.22(2) for any confidential document (contained in Volume 4 of the trial bundle) not to be treated as a public document, if referred to during the trial.
4. Mr Brooks and Mr Sambrook were represented by the same legal team (solicitors and counsel) until shortly before service of their joint Defence and Counterclaim (“the Defence”), dated 11 January 2021. In a notice, dated 8 January 2021, the court was informed by the solicitors that they ceased to act for Mr Brooks and Mr Sambrook. Thereafter, for financial reasons, both Mr Brooks and Mr Sambrook became litigants in person. Mr Sambrook remains a litigant in person. However, in a notice to the court, dated 21 April 2021, Irwin Mitchell LLP (not the same solicitors that had previously been instructed) confirmed that it had been instructed to act on behalf of Mr Brooks. It is apparent from the pleadings and witness statements of Mr Brooks and Mr Sambrook that their responses to the allegations are very closely aligned. At the outset of the hearing Mr Sambrook made it clear that he would be adopting the submissions made by Mr Crow, on behalf of Mr Brooks, insofar as they relate to the

joint allegations. Therefore, although Mr Sambrook is not legally represented, he has had the benefit of legal advice and assistance during a critical part of the pre-trial stage and some indirect legal assistance at trial.

5. Mr Brown, on behalf of RBH, submitted during his opening that it is unlikely the full evidential picture is before the Court as the defendants' disclosure has been sparse, involves admitted deletions of emails, and obvious omissions. In particular, he invited the Court to conclude that the communications between Mr Brooks and Mr Sambrook are conspicuous by their absence. Mr Brown submitted that there is clear evidence of the alleged wrongdoing based on the available contemporaneous documents and invited the Court to draw adverse inferences based on: (i) the contemporaneous documentary evidence; and (ii) the alleged failure by the defendants to provide proper disclosure (including non-compliance with a specific disclosure order made by Senior Master Fontaine).
6. The nature of the issues makes it necessary to consider the evidence in detail. However, I will not address each and every issue arising from the evidence; only such matters as have enabled me to determine whether RBH's claim is well-founded.

II. Background

7. On 1 February 2017, RBH was acquired by OBG Pharmaceuticals Limited ("OBG"); a privately owned company which is part of The O'Brien Group and has interests in pharmaceutical and industrial additives. The purpose of the acquisition was to expand OBG's Plastics Division by partnering the expertise of RBH with Hubron Speciality Limited ("Hubron") – an existing subsidiary of OBG. Hubron is a distributor of functional additives and specialty modifiers to the wider polymers sector. Between 2017 and 2019, RBH and Hubron pooled products, services, and resources to increase and diversify their expertise. By 2019, the two companies had merged and rebranded as RBH.
8. There is no disagreement between the parties as to the sequence of events and the disputed facts are limited. The dispute primarily relates to the inferences, if any, to be drawn from the primary facts.

Roles of Mr Brooks and Mr Sambrook

9. Mr Brooks joined RBH on 25 July 2011 as a Technical and Quality Manager and became a Product Manager in 2017. As a Product Manager, he was responsible for a number of suppliers, including Hoffmann Minerals GmbH ("Hoffmann"). Following the acquisition of RBH by OBG in February 2017 his job description changed to Market Manager. As a Market Manager, Mr Brooks was responsible for managing client relationships within the rubber, polishing and x-ray opaque materials markets. At the time of his departure from RBH, Mr Brooks had particular responsibility for the Hoffmann products in relation to elastomers and polishing and his salary was £47,127 per annum. He received a 10% of salary pension contribution per annum and a car allowance of £7,000 per annum. In 2019 he received a bonus of £1,775.
10. Mr Sambrook joined RBH as a Technical and Quality Manager on 1 December 2014. Mr Sambrook was responsible for incoming raw materials sourced for onward supply to various markets and for the technical aspects of these products. He had limited

customer engagement; his role was a support function. In July 2018, his job title changed to that of Technical Portfolio Manager. His role was to support the Market Managers and the Strategic Sourcing Manager with the technical aspects of new supplier sourcing. Once again, his customer engagement was limited. From October 2019 Mr Sambrook took up the role of Market Manager for Specialities. The purpose of the role was to achieve RBH's commercial objectives in relation to the ceramics market. At the time of his resignation, Mr Sambrook's salary was £40,825 per annum. He received a 10% of salary pension contribution per annum and a car allowance of £7,000 per annum. In 2019 Mr Sambrook received a bonus of £2,500.

The incorporation of SBS

11. Mr Brooks and Mr Sambrook agreed to set up a mineral sourcing and supply services business in September 2019 (approximately a year before they resigned). Mr Brooks indicated in his first witness statement that the idea was initiated by a "*somewhat drunken conversation*" in which they "*bounced around some ideas*" about what they might do in the future.
12. On 19 November 2019, Mr Brooks registered *sbssourcing.co.uk* as a domain name. A year later on 15 November 2020, following the resignations of Mr Brooks and Mr Sambrook, but during their periods of notice, SBS was incorporated through an incorporation service-provider. The SBS website stated that it provided technical sourcing in relation to two products: Talc and China Clay. Both of these products have applications in the ceramics, rubber, and specialities markets. As Market Managers of those markets, Mr Brooks and Mr Sambrook dealt with these products at RBH on a regular basis.

RBH's Discovery of SBS

13. Mr Brooks resigned on 1 September 2020 and Mr Sambrook resigned on 29 September 2020. Both provided three months' notice as required by their employment contracts. Mr Brooks and Mr Sambrook were each placed on 'garden' leave, from 2 October 2020 and 16 October 2020 respectively, in accordance with an express clause in their contracts of employment.
14. RBH did not initially suspect any wrongdoing. However, during a telephone call with Hoffmann, Mr Cicognani - the Managing Director of RBH, became concerned about the possibility of unlawful competition by Mr Brooks and Mr Sambrook and an investigation was initiated.
15. RBH discovered that Mr Brooks and Mr Sambrook had an involvement with SBS when Mr Andreas Mittmann (from Deutsche Oelfabrik Ges Chemie - 'DOG-Chemie') forwarded to Mr Cicognani an email that had been sent by Mr Brooks from an SBS email address on 9 November 2020. In that email, Mr Brooks was described as a "*Founding Partner*" of SBS. Mr Brooks stated in his email to Mr Mittman:

"I got you message on LinkedIn, as requested please find below my latest contact information for my new venture (sic)"

16. During the investigation, RBH also became aware that on 25 November 2020 Mr Sambrook had a LinkedIn profile in which he was described as the Technical Sales

Director of SBS. At that time he remained a serving employee of RBH; albeit on ‘garden’ leave. Mr Sambrook subsequently changed his profile to remove the reference to SBS.

Termination of the Exclusive Hoffmann Supply Contract

17. Hoffmann produces a mineral that is one of a kind in the marketplace. The supply contract and exclusive distribution relationship with RBH dates back to 1987. The exclusive distribution contract assisted RBH in building relationships with clients as it is the only entity that can supply the product in the UK market. The Hoffmann supply contract is said by RBH to have resulted in approximately £170,000 net profit to RBH per annum.
18. Hoffmann and RBH entered into a new contract on 27 May 2019, which provided for a one-year initial period, with a two-year automatic extension thereafter. On 21 May 2019, Dr Alexander Risch (Hoffmann’s Mineral Sales and Marketing Director) sent an email to Mr Cicognani which stated:

"I am extremely confident that the excellent cooperation between our two companies will continue for a long time to come."

However, on 27 May 2020, Hoffmann exercised a right of termination without explanation. If the contract had not been terminated prior to the renewal date (1 June 2020) it would have continued until the next lawful termination date of 1 June 2022 (confirmed by German legal advice). In its termination letter Hoffmann offered a short extension of the contract until 31 December 2020. RBH agreed to this proposal in the hope that it could persuade Hoffmann that it would be mutually beneficial for their commercial relationship to continue beyond the expiry of the extended period.

19. Hoffmann, in discussions following the notice of termination, raised a number of concerns including the apparent lack of importance of its products to RBH and the impact of Brexit. However, during a video-conference call on 4 November 2020, it became apparent that Dr Risch was aware that experienced employees had recently ‘left’ RBH. He also indicated that in future Hoffmann products would be sold by those with experience. As this was believed to be an indirect reference to the defendants, Dr Risch was asked directly whether Hoffmann intended to deal with Mr Brooks and Mr Sambrook going forward, but he refused to provide any information about Hoffmann’s relationship with RBH employees; nor would he confirm who would distribute Hoffmann products in the future. A note of the discussion was made by Mr Cicognani on 9 November 2020.
20. Hoffmann provided a letter to Mr Brooks for the purposes of these proceedings (‘the Hoffmann letter’) dated 13 January 2021. The covering email to Mr Brooks states:

"Please find enclosed the draft of the requested letter. If you want to have any changes, please feel free to contact me."

The Hoffmann letter asserts that the termination of the supply contract was an independent decision made of its ‘own accord’ and ‘free will.’ The letter goes on to state:

“The cooperation with RBH Ltd. could unfortunately not be continued based on our experience with the senior management of RBH Ltd. since their acquisition information letter of February 1, 2017.”

Suspected Unlawful Contact with Larsen Lorentzen VS

21. On 5 October 2020, RBH contacted a supplier - Larsen-Lorentzen VS (‘Larsen-Lorentzen’), in order to explain who would be responsible for the relationship following the departure of Mr Brooks and Mr Sambrook. On 6 October 2020, Mr Jess Larsen (company owner of Larsen-Lorentzen) sent an email response which stated:

“I had already sometime ago heard from Mark Brooks that he would be leaving the company so it was not a big surprise.”

Mr Cicognani subsequently telephoned Mr Larsen. Mr Cicognani was informed that Mr Brooks had sent Mr Larsen a note, in or around February 2020, stating that he was setting up his own business as he was not happy with RBH’s management.

22. During RBH’s investigation it was discovered, following an examination of its IT system, that on 7 February 2020 Mr Brooks sent an email to Mr Larsen in which he stated:

“...Your source looks very good, I don’t think I have ever seen a pumice that white, the gradings look very good also. We haven’t got a demand for it yet but might have an upcoming project which could be of interest.”

On 23 March 2020, Mr Larsen sent Mr Brooks an email stating that he had not received a response despite giving him (Mr Brooks) and RBH “*first rights about this light weight product*”. Mr Larsen went on to state that if RBH was not interested he needed to know as he had “*other companies standing by – who are interested.*” Mr Larsen sent a further email to Mr Brooks on 3 April 2020 stating that he needed to have an answer by the following week. Mr Brooks responded on 6 April 2020. He stated:

“I’ve dropped you a mail, might be in your junk mail?”

23. There is no record of the ‘*junk*’ email being sent from Mr Brooks’ RBH email account.

Suspected Unlawful Contact with DOG-Chemie

24. On 25 November 2020, Mr Cicognani emailed DOG-Chemie, to obtain an up-to-date product pricing schedule. Mr Mittmann responded to the query the same day. He stated:

“...since Marc is now dealing with SBS....do you have plans to replace him/his position?”

Mr Cicognani, in a further email, queried who SBS were and what Mr Brooks had shared with Mr Mittmann. In response, Mr Mittmann stated:

“...ups... seems I said too much. I thought Mark is already “out” and has communicated his future (sic).

Now I feel guilty and bad – to both sides.

Mark spent a call just before he left – nothing else. For a week or so I sent him a text via LinkedIn.

Asking for his new contact details. This is what I got....”

The attachment that was sent to Mr Cicognani revealed that Mr Brooks had provided Mr Mittmann with his SBS contact details via LinkedIn on 9 November 2020. At that time Mr Brooks remained a serving employee.

Suspected Retention of Confidential Information

25. RBH’s internal investigation revealed that Mr Sambrook had retained substantial quantities of confidential information, which he had forwarded to a personal email address.

RBH’s Exit Discussions with the Defendants

26. RBH arranged separate telephone meetings with Mr Brooks and Mr Sambrook on 12 November 2020. Both had an express contractual obligation to provide information reasonably requested under the terms of their employment contracts.
27. During Mr Brooks’ interview he was specifically asked if had taken any steps to engage any of RBH’s suppliers (or knew if anyone else had done so). He replied, “*no comment.*” When asked if he had discussed his resignation with Mr Sambrook, he stated that was “*Not Relevant.*” He denied speaking to any RBH clients about his resignation but when asked the same question about suppliers he replied, “*Of course.*” When asked about Hoffmann specifically he confirmed that he had told them he was leaving RBH. He denied diverting client business away from RBH and refused to disclose what he was planning to do following the termination of his employment.
28. Mr Sambrook, during his interview, denied speaking to Mr Brooks about his resignation. In response to a question regarding whether he had discussed his resignation with Mr Brooks he stated: “*No what has this [got] to do with Mark Brooks.*” He denied taking any steps to divert any client business away from RBH and denied speaking to Hoffmann about his resignation. He also denied taking or making copies of RBH’s confidential information.

III. Statements of Case

Particulars of Claim

29. At the heart of RBH’s claim is the allegation that Mr Brooks and Mr Sambrook made the decision to establish a business in competition with RBH; colluded in that endeavour; sought to carry on the business during such time as they were obliged to work for RBH; controlled SBS as de facto directors; and held it out as providing services in competition with RBH.

30. The particulars of breach relied upon include: causing the termination of an exclusive supply contract between RBH and Hoffmann dated 1 June 2019; doing so in order to divert the supply relationship from RBH to themselves and in order to profit at the expense of RBH; soliciting, attempting to solicit or attempting to disrupt RBH's relationship with Larsen-Lorentzen; taking steps to arrange for SBS to distribute Larsen-Lorentzen's products, rather than RBH; soliciting or interfering with RBH's relationship with its supplier, DOG-Chemie; soliciting or interfering with other suppliers and customers of RBH for their own benefit; inducing the breaches of obligation of each other; and misusing confidential information belonging to RBH between 2018 and 2020.
31. The Particulars of Claim state that during the period of their employment, in accordance with their contracts of employment, Mr Brooks and Mr Sambrook owed express contractual obligations to RBH. The relevant contracts of employment are both dated 1 May 2017 and include the following definitions:

"Confidential Information" means all and any information, in whatever form, of or relating to the Employer or any member of the Group which you (or, where the context so requires, another person) have obtained by virtue of your employment or engagement and which the Employer or any member of the Group regards as confidential, including (but not limited to):

(a) financial information, results and forecasts, sales targets and statistics, market share and pricing statistics of all products produced by the Employer or any member of the Group, profit margins of all products produced by the Employer or any member of the Group, price lists, discounts, credit and payment policies and procedures;

(b) information relating to business methods, corporate plans (including the development of generic business opportunities intended by the Employer or any member of the Group), business strategy, marketing plans, management systems, maturing new business opportunities, tenders, advertising and promotional material;

(c) information relating to and details of customers, prospective customers, suppliers and prospective suppliers including their identities, business requirements and contractual arrangements and negotiations with the Employer or any member of the Group;

(d) details of employees, officers and workers of and consultants to the Employer or any member of the Group, their remuneration details, job skills, experience and capabilities and other personal information;

(e) information relating to trade secrets, research activities, development projects, inventions, designs, know-how, technical specification and other technical information in relation the development or supply of any future product or service of the Employer or any member of the Group and information concerning the intellectual property portfolio and strategy of the Employer or of any member of the Group; and

(f) any information in respect of which the Employer or any member of the Group is bound by an obligation of confidence to a third party but excluding any information which:

(i) is part of your own stock in trade;

(ii) is readily ascertainable to persons not connected with the Employer or any member of the Group without significant expenditure of labour, skill or money; or

(iii) which becomes available to the public generally other than by reason of a breach by you of your obligations under this agreement;

"Copies" means copies or records of any Confidential Information in whatever form (including, without limitation, in written, oral, visual or electronic form or on any magnetic or optical disk or memory and wherever located) including, without limitation, extracts, analysis, studies, plans, compilations or any other way of representing or recording and recalling information which contains, reflects or is derived or generated from Confidential Information;

the "Employment" means your employment under this agreement; "Garden Leave" means any period during which the Employer exercises its rights under clause 16;

32. Mr Brooks and Mr Sambrook, in accordance with Clause 3.1 of their contracts of employment, were subject to the following duties:

3. DUTIES

3.1 During the Employment you will:

3.1.1 devote the whole of your working time, attention and abilities to the business of the Employer;

3.1.2 diligently exercise such powers and perform such duties as may from time to time be assigned to you together with such person(s) as the Employer may appoint to act jointly with you;

3.1.3 under no circumstances whatsoever either directly or indirectly receive or accept for your own benefit any commission, rebate, discount, gratuity or profit from any person, firm or company having business transactions with the Employer or any member of the Group in existence from time to time unless previously agreed with the person to whom you report;

3.1.4 promptly make such reports to the person to whom you report on any matters concerning the affairs of the Employer as are reasonably required;

3.1.5 report your own wrongdoing and any wrongdoing or proposed wrongdoing of any other employee or director of the Employer or any member of the Group in existence from time to time to the person to whom you report immediately on becoming aware of it; and

3.1.6 comply with any corporate governance code or guidelines to the extent required by law or regulation or as adopted by the Employer from time to time.

33. Clause 12 of their contracts of employment, state that Mr Brooks and Mr Sambrook were subject to the following obligations in relation to confidential information:

12. CONFIDENTIAL INFORMATION

12.1 You will not (save in the proper course of your duties or as specifically authorised by the Employer) either during the Employment or at any time after its termination (howsoever arising) directly or indirectly:

12.1.1 use any Confidential information;

12.1.2 disclose or permit the disclosure of Confidential Information to any person, company, or organisation whatsoever; or

12.1.3 make or use any Copies.

12.2 You are responsible for protecting the confidentiality of the Confidential Information and shall:

12.2.1 use your best endeavours to prevent the use or communication of any Confidential Information by any unauthorised person, company or organisation; and

12.2.2 inform the Employer immediately upon becoming aware, or suspecting, that any such person, company or organisation knows or has used any Confidential Information.

12.3 The restrictions above shall not apply to information which you or another person may be ordered to disclose by a court of competent jurisdiction or which you disclose pursuant to and in accordance with the Public Interest Disclosure Act 1998, provided you have complied with the Employer's policy (if any) from time to time regarding such disclosures, or as may be required by law.

34. In accordance with Clause 17 of Mr Brook's contract of employment he was subject to the following restrictive covenants:

17. RESTRICTIVE COVENANTS

17.1 In this clause 17:

"Capacity" means as agent, consultant, director, employee, owner, shareholder or in any other capacity;

"Customer" means any person, firm, company or entity who or which at any time during the Relevant Period (i) was provided with goods or services by the Employer; or (ii) was provided with pharmaceutical goods or services by the Employer or any member of the Group; or (iii) was in the habit of dealing with the Employer or any member of the Group, other than

in a de minimis way, and about whom or which you have Confidential Information; and in each case with whom or which you, or any person who reported directly to you, had Confidential Information at any time during the Relevant Period;

"Key Employee" means any person who immediately prior to the Termination Date was employed or engaged by the Employer or any member of the Group as a department lead/manager or above, or any other person employed or engaged by the Employer or any member of the Group who reported to you, or could materially damage the interests of the Employer or any member of the Group and with whom you had personal dealings during the Relevant Period;

"Prospective Customer" means any person, firm, company or entity to whom or which, during the period of six months prior to the Termination Date, the Employer or any member of the Group had submitted a tender, made a pitch or presentation or with whom or which it was otherwise negotiating for the supply of goods or services and with whom or which you, or any person who reported directly to you, had material dealings at any time during the Relevant Period;

"Relevant Period" means the period of 12 months ending on the Termination Date; "Restricted Business" means those parts of the business of the Employer and any member of the Group with which you were involved to a material extent during the Relevant Period;

"Supplier" means any person, firm, company or entity who or which was at any time during the Relevant Period a supplier of services or goods (other than utilities and goods or services supplied for administrative purposes) to the Employer or any member of the Group and with whom or which you, or any person who reported directly to you, had material dealings during the Relevant Period;

"Team Employee" means any person (including a Key Employee) who has been employed or engaged at any time in the six months prior to the Termination Date (whether or not they were employed or engaged immediately before the Termination Date) and shall be limited to individuals with whom you have worked as part of the same team;

"Termination Date" means the date on which the Employment terminates or, if you spend a period on Garden Leave immediately before the termination of the Employment, such earlier date on which Garden Leave commences.

17.2 You covenant with the Employer (for itself and as trustee and agent for each member of the Group) that you will not, directly or indirectly, on your own behalf or on behalf of or in conjunction with any firm, company or person:

17.2.1 for 12 months following the Termination Date solicit or endeavour to entice away from the Employer or any member of the Group the business or custom of a Customer or Prospective Customer with a view to providing

goods or services to that Customer in competition with any Restricted Business or otherwise induce, solicit or entice or endeavour to induce, solicit or entice any Customer to cease conducting, or reduce the amount of, business with the Employer or any member of the Group or discourage or prevent any Prospective Customer from conducting business with the Employer or any member of the Group;

17.2.2 for 9 months following the Termination Date be involved with the provision of goods or services to, or otherwise have any business dealings with, any Customer or Prospective Customer in the course of any business which is in competition with any Restricted Business:

17.2.3 for 12 months following the Termination Date solicit or endeavour to entice away from the Employer or any member of the Group the business or custom of any Supplier in the course of any business which is in competition with any Restricted Business;

17.2.4 for 9 months following the Termination Date be involved with the receipt of goods or services from any Supplier where such receipt would adversely affect the ability or willingness of the Supplier to meet the requirements of the Employer or any member of the Group;

17.2.5 for 12 months following the Termination Date offer to employ or engage or otherwise endeavour to entice away from the Employer or any member of the Group any Key Employee (whether or not such person would breach their contract of employment or engagement);

17.2.6 for 9 months following the Termination Date employ or engage or facilitate the employment or engagement of any Employee (whether or not such person would breach their contract of employment or engagement);

17.2.7 for 9 months following the Termination Date be engaged, concerned or involved in any Capacity with any business which is (or intends to be) in competition with any Restricted Business in conjunction with any Team Employee (whether or not such person would breach their contract of employment); ...

17.3 None of the restrictions in clause 17.2 above shall prevent you from:

17.3.1 holding an Investment;

17.3.2 being engaged or concerned in any business insofar as your duties or work relate solely to geographical areas where that business is not in competition with any Restricted Business; or

17.3.3 being engaged or concerned in any business insofar as your duties or work relate solely to services or activities of a kind with which you were not concerned to a material extent during the Relevant Period.

17.4 Each of the restrictions contained in this clause 17 (on which you have had the opportunity to take independent legal advice) is intended to be separate and

severable and while they are considered by the parties to be reasonable in all the circumstances, it is agreed that if any one or more of such restrictions is held to go beyond what is reasonable in all the circumstances for the protection of the legitimate interests of the Employer or any member of the Group but would be valid if any particular restriction(s) were deleted or some part or parts of its or their wording were deleted, restricted or limited then such restriction(s) shall apply with such deletions, restrictions or limitations as the case may be.

35. Mr Sambrook's employment contract contained the same post-termination restraints save for the non-dealing covenant in respect of customers and prospective customers (Clause 17.2.2 of Mr Brooks' employment contract). This clause was not included in Mr Sambrook's contract as it was considered unnecessary.
36. RBH state in the Particulars of Claim that the restrictive covenants in Clause 17 of the defendants' contracts of employment are no more than is reasonably necessary to protect its legitimate business interests in: (a) the protection of confidential information and trade secrets; (b) the protection of supplier connections, customer connections and maturing business opportunities; and (c) the maintenance of a stable workforce.
37. RBH also assert in the Particulars of Claim that Mr Brooks and Mr Sambrook were subject to:
 - i. The implied terms that they:
 - a. *"Would serve the Claimant with good faith and fidelity;"*
 - b. *"Would not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between himself and the Claimant."*
 - ii. The equitable duty not to misuse any of RBH's trade secrets and/or confidential information akin to a trade secret.
38. In addition, RBH assert that Mr Brooks owed a fiduciary duty to RBH that he would:
 - a. *"Preserve for the Claimant the key supplier relationships for which he was responsible and including, in particular, the relationship with Hoffmann...)"*
 - b. *"Not make any secret profit (including any secret future profit) from the key supplier relationships for which he was responsible and including, in particular, the relationship with Hoffmann."*
39. In support of the said fiduciary duty, RBH relies upon:
 - i. Clause 3.1.3 of Mr Brooks' contract of employment (and Clause 3 generally);
 - ii. The expectation that Mr Brooks would act with autonomy and independence in the development and preservation of the Hoffmann relationship;
 - iii. The position of Mr Brooks as the *"Hoffmann champion"* within the Claimant's business;

- iv. Mr Brooks' particular responsibility for the Hoffmann relationship, developed over many years of service for the Claimant;
 - v. Mr Brooks' access to confidential information in respect of the Hoffmann relationship, including Hoffmann's particular market strategies and future plans;
 - vi. RBH's investment in Mr Brooks' relationship with Hoffmann including by funding participation in international trade events and similar initiatives.
40. The Particulars of Claim state that SBS owes an equitable duty not to misuse any of the Claimant's trade secrets and/or confidential information akin to a trade secret.

Defence

41. Mr Brooks and Mr Sambrook in their joint Defence to the claim, admit that during their contract of employment they were subject to express and implied contractual obligations (save for the implied term of trust and confidence) and restrictive covenants. However, they deny that they breached their obligations and assert that the restrictive covenants go further than reasonably necessary for the protection of RBH's legitimate interests and so are unenforceable. Mr Brooks denies that he owed a fiduciary duty to RBH.
42. Although not expressly pleaded, in essence, the defence case is that Mr Brooks and Mr Sambrook took no more than preparatory steps consistent with the intention to trade in the future. Mr Brooks admits that in November 2020, after he had resigned, he paid £40.00 for the incorporation of SBS with the option to purchase within 12 months. This was with the intention of returning to work in the same market sector in which he had gained experience at such a time, and in such a way, as would not put him at risk of breaching the contractual restrictions that he was or may be subject to. Mr Sambrook denies that he caused SBS to be incorporated. Neither Mr Brooks nor Mr Sambrook are directors of SBS (de facto or otherwise) and neither control SBS, nor have any right to control it; SBS has no directors/shareholders other than the formation officer who was paid to incorporate it.
43. It is denied that any trading (in competition with RBH or otherwise) in fact occurred at any point in time. It is asserted that the Hoffmann contract was terminated as a result of dissatisfaction with RBH. This was due to various factors arising, in the main, from decisions made by Mr Cicognani and/or the senior managers of RBH.
44. Furthermore, Mr Sambrook did not take confidential information for his own personal use.

IV. Key Legal Principles

The significance of contemporaneous documents

45. In assessing the oral evidence, I have given due weight to the contemporaneous documents and to the inherent probabilities. I have also borne in mind the observations of Leggatt J (as he then was) in Gestmin SGPS SPA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) where he stated [at §18]:

“... the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

Inferences

46. By analogy with the principles governing the drawing of inferences from the absence of calling witnesses, it may be appropriate to draw an inference, based on material non-disclosure. Relevant considerations include the effect of the evidence before the Court and what other evidence might have been available. A failure to adduce relevant documents may strengthen the evidence of the other party and result in proof, but that may depend on the explanation given for the absence of the documents [see - Mackenzie v Alcoa Manufacturing Ltd [2019] EWCA Civ 2110.
47. It may also be appropriate to draw inferences where deliberate and unlawful activity has been established. See the approach to inferences in Roger Bullivant v Ellis [1987] IRLR 491 at 24, per Nourse LJ (unlawful copying of card index):

“While I recognise that it would have been possible for the first defendant to contact some, perhaps many, of the people concerned without using the card index, I am far from convinced that he would have been able to contact anywhere near all of those whom he did contact between February and April 1985. Having made deliberate and unlawful use of the plaintiffs' property, he cannot complain if he finds that the eye of the law is unable to distinguish between those whom, had he so chosen, he could have contacted lawfully and those whom he could not. In my judgment it is of the highest importance that the principle of Robb v. Green [1895] 2 Q.B. 315 which, let it be said, is one of no more than fair and honourable dealing, should be steadfastly maintained. (Emphasis added).

48. These issues and my findings in relation to the alleged non-disclosure by Mr Brooks and Mr Sambrook are addressed below under “*Analysis and Factual Findings.*”

The Obligation of Good Faith and Fidelity

49. The general principles relating to employees' duties of good faith and fidelity were helpfully summarised by Haddon-Cave J in QBE Management Services (UK) Ltd v Dymoke at [§169]-[§185]. At [§169]:

“The general principles relating to employees duties of good faith and fidelity are settled and can be summarised in the following propositions:

- (1) *It is indisputable that an employee owes his employer a contractual duty of 'fidelity,' but how far it extends will depend on the facts of each case (per Lord Green MR in Hivac v Park Royal [1946] Ch 169 at 174).*
- (2) *The more senior the staff the greater the degree of loyalty, fidelity and diligence required (per Openshaw J. in UBS Wealth Management (UK) Ltd v Vestra Wealth LLP [2008] IRLR 965 at paragraph [10]).*
- (3) *The first task of the court is to identify the nature of the employee's obligations of fidelity and then to decide whether the employee's activities are in breach (per Moses L.J. in Helmet Integrated Systems v Tunnard [2007] IRLR 126 at paragraph [32]).*
- (4) *The mere fact that activities are described by an employee as 'preparatory' to competition does not mean that they are legitimate (per Moses L.J. Helmet Integrated Systems v. Tunnard [2007] IRLR 126 at paragraph [28]).*
- (5) *It is a breach of the duty of fidelity for an employee to recruit or solicit another employee to act in competition (see British Midland Tool v Midland International Tooling Ltd [2003] 2 BCLC 523).*
- (6) *Attempts by senior employees to solicit more junior staff constitutes particularly serious misconduct (Sybron Corp v. Rochem Ltd [1984] Ch 112).*
- (7) *It is a breach of the duty of fidelity for an employee to misuse confidential information belonging to his employer (see Faccenda Chicken Ltd v Fowler [1987] Ch 117).*
- (8) *The court should ask whether the activities in which the employee is engaged affect his ability to serve his employer faithfully and honestly and to the best of his abilities (see Shepherds Investments Ltd v. Walters [2007] IRLR 110 at paragraph [131])."*

45. At [§171]-[§175], the Court said as follows:

"In Shepherd Investments Ltd and Anr v Walters & another [2006] EWHC 836 (Ch), Etherton J. held that when former directors and employees set up a competing business, diverting business opportunities and misusing confidential information, they had acted in breach, not only of their fiduciary obligations, but also their implied obligation of fidelity, from the moment that they procured the services of attorneys in the Cayman Islands to set up the rival business. On the facts of that case, Etherton J, held that a former employee was also in breach of obligations as a fiduciary, whether or not he was to be regarded as a director, and that he was in breach of his duty of fidelity.

172. In UBS Wealth Management v. Vestra Wealth LLP ...Openshaw J. said at paragraph 24:

" I cannot accept that employees, in particular senior managers, can keep silent when they know of planned poaching raids upon the company's existing staff or client base and when these are encouraged and facilitated from within the

company itself, the more so when they are themselves party to these plots and plans. It seems to me that that would be an obvious breach of their duties of loyalty and fidelity to [their employer].”

173. In *Kynixia v. Hynes* [2008] EWHC 1495 Wyn Williams J. said at paragraph 283:

“I simply do not see how one can be acting as a loyal employee when one knows that three senior employees (including oneself) may transfer their allegiance to a group of companies which includes a competitor and yet not only fail to divulge that knowledge but also say things which would have the effect of positively misleading the employer about that possibility.”

174. In *Tullett Prebon plc v. BCG Brokers LP* [2010] IRLR 648 Jack J. said at paragraphs 68-69:

“[A] desk head must not do anything to assist the recruitment of his desk... Where a desk head decides that he is in favour of the recruitment of his desk and thereafter assists the recruitment in such small or large ways as may arise, he is in plain breach of his duty: he has crossed the line between observing his duty to his employer and acting in the interest of his employer's rival.”

175. The position as regards mutual soliciting by employees is usefully summarised as follows in *Goulding on Employee Competition* (2nd Edition) at paragraphs [2.164] to [2.166]:

*“Discussions between employees as to proposed concerted competitive activity will rarely if ever be acceptable, given the near-inevitable damage to the employer as a result of such concerted activity. It remains possible that a discussion between close friends at a similar level within the business as to the potential of working together in the future would give rise to no breach. In such circumstances, neither employee would be soliciting the other and neither would be encouraging the other to terminate their employment with the employer. However, as set out in the *British Midland Tool* case, once an irrevocable intention to compete is formed, resignation and disclosure of the intention is probably the only certain means of avoiding a breach.”*

50. I gratefully adopt this as a summary of the principles relevant to this case.

V. Witness Evidence

51. Mr Cicognani, Mr Brooks, and Mr Sambrook provided witness statements in preparation for this trial and gave oral evidence. As stated above, the factual dispute between the parties is limited. What follows is an outline of the evidence given by the witnesses in relation to a number of key areas and, to the degree that there was a dispute, the nature of that disagreement. The extent to which I accept or reject the matters in dispute is addressed below under ‘*Analysis and Factual Findings.*’

RBH's Business Model and the Hoffmann Relationship

52. RBH has a small team (no more than 18 employees). The commercial team report to the senior management team. Mr Cicognani stated that as the Managing Director he is one of four members of the senior management team. The senior management team typically meets monthly and on a monthly basis Mr Cicognani reports to the RBH board (which in turn reports to the parent board). Mr Cicognani confirmed during cross examination that Mr Brooks did not attend the senior management meetings. However, he described both defendants as 'key employees' and explained in his second witness statement that "[e]mployees are encouraged to cross-refer clients' interests and supplier relationships within the firm and are encouraged to work collaboratively in teams where possible." He stated that Product Managers and Market Managers have invaluable market knowledge and therefore although they do not decide on the commercial strategy of RBH they have 'input and influence.' Mr Cicognani stated that he asked Mr Brooks during the exit telephone interview if there was anything he could do to persuade him to stay.
53. Mr Cicognani stated that RBH's success is based on its key relationships with a range of global suppliers. In his second witness statement he described client and supplier relationships as essential to RBH's business model. He said that without supplier relationships RBH does not have a business. Mr Brooks was the "*Hoffmann Champion*" and had been described as such in emails with Hoffmann. This aspect of Mr Brooks' role meant that he had particular obligations which included maintaining the relationship with Hoffmann and acting with autonomy and independence in developing and preserving the relationship. Although Hoffmann corresponded with other members of the team, Mr Brooks was the primary point of contact. RBH invested in furthering Mr Brooks' relationship with Hoffmann by funding his participation in international trade events. During cross examination, Mr Cicognani denied that he was unable to countenance that Hoffmann was genuinely dissatisfied with the RBH contract. He stated that until receipt of the termination letter he was unaware that Hoffmann was unhappy with RBH. He was also unaware of any delayed decision making which may have impacted on Hoffmann; if anything he tried to make decisions quickly for the benefit of the commercial team. He denied that he had been abrupt during a face to face meeting with Hoffmann representatives in 2017; he said such behaviour was not in his nature.
54. Mr Brooks and Mr Sambrook agreed in cross examination that they had responsibility for strengthening and preserving commercial relationships with suppliers for the benefit of RBH. The evidence of Mr Cicognani that these relationships would take "*a substantial amount of hard work, introductions, recommendations, investment and time to build and then maintain*" was not challenged in cross examination. Mr Brooks agreed that a key part of his role would be to manage and resolve any concerns raised by suppliers. He described Mr Pieter (from Hoffmann) and Mr Mittmann (from DOG-Chemie) as "*friends*", not just business contacts. Mr Brooks and Mr Sambrook agreed that they were responsible for informing RBH about competitive activity.
55. Mr Brooks did not dispute that he was the '*Hoffmann Champion*.' However, he stated that, after RBH had been acquired by Hubron, instead of being the sole point of contact for all Hoffmann products this was limited to rubber and polishing only. Other colleagues were the point of contact for the other markets. Mr Brooks stated that it had always been Hoffmann's preference to have one point of contact given the unique

nature of their products and he had warned Mr Cicognani that it was unlikely that Hoffmann would be happy with any variation to that arrangement. However, the change did take place and thereafter Mr Brooks' overall contact and dealings with Hoffmann diminished. Mr Brooks stated that this was one of several issues which contributed to Hoffmann's dissatisfaction. The other issues were as follows:

- i. Mr Cicognani's abruptness during a face to face meeting that took place whilst attending the European Coatings Show in Germany in 2017. Some of the Hoffmann representatives felt that Mr Cicognani had not shown due regard for the long standing relationship with the '*old RBH business.*' Mr Brooks was informed that Dr Risch had suggested Hoffmann should consider engaging a new UK distributor.
 - ii. Mr Cicognani arranged world-wide visits to the site of RBH's suppliers, following the acquisition in 2017, as a means of building relationships. However, Hoffmann was not included.
 - iii. There was undue delay to signing of a new updated contract. Mr Brooks was aware that this had been raised by Hoffmann as a serious concern.
 - iv. Mr Brooks and Mr Cicognani were invited to attend a Hoffmann distributor event 2020 in Italy. The event is held every three years. It is a key networking opportunity for Hoffmann distributors worldwide. Mr Cicognani informed Mr Brooks that he would not be attending as he "*couldn't justify the time.*" Dr Risch was disappointed as he wanted to discuss Hoffmann's new products and applications, as well as pooling knowledge from around the world.
 - v. The K Show held in Germany is the largest plastic manufacturing event in Europe. Hoffmann facilitates hotels and hospitality for their distributors, as hotel rooms are difficult to find during the event. Mr Cicognani arrived after Mr Brooks (and others) for the 2019 event and asked, "*who at Hoffmann he needed to speak to and what time he needed to be there*". Mr Brooks took from this that Mr Cicognani did not appear to know Dr Risch's name and had made no apparent effort to contact him.
56. Mr Sambrook stated in his first witness statement that he did not have any contact or dealings with anyone from Hoffmann for approximately the last 3 years of his employment at RBH. He stated that during that period the only time he had contact with Hoffmann was to confirm whether RBH representatives had secured rooms in the same hotel for the K show in 2019. During cross examination, he accepted that during the K show he was based at the Hoffmann stand and had attended dinner with a group which included Hoffmann representatives. Mr Sambrook also accepted that the Hoffmann UK Sales Manager had him sent an email (together with Mr Brooks and another Market Manager) on 13 December 2019. In that email the Sales Manager informed the three of them that he would be travelling to the UK. He indicated that he intended to visit RBH and also enquired whether it would be possible to arrange customer visits.

Level of Seniority

57. Mr Brooks reported to the Sales Director, who in turn reported to Mr Cicognani. During cross examination, Mr Cicognani accepted that Mr Brooks was not privy to the details of the Hoffmann supplier contract, did not have the authority to set ‘*top line*’ budgets or write down stock, had no managerial/supervisory responsibilities for other employees and had no power to determine RBH’s business strategy. Mr Brooks had no authority to assign Key Performance Indicators (KPI’s) to other employees nor could he authorise credit accounts (although he could make recommendations). These powers were all within the domain of the directors.
58. Mr Brooks described himself as a “*bottom rung*” employee from a client relationship perspective. However, he accepted during cross examination that in his curriculum vitae he states that at RBH he was the “*First point of contact for principal suppliers and customers.*” and had a “*Leadership*” role. He suggested that his curriculum vitae contained a degree of flourish and contained some inaccuracies as parts had been ‘*cut and pasted*’ from the curriculum vitae of a colleague. In his first witness statement he took issue with the assertion that he was a key employee. He stated that, when he resigned, RBH did not make any effort to retain him. He suggested that this was an indication that he was not as valuable to the business as is now being claimed.
59. Mr Sambrook stated during cross examination that he did not regard himself as less senior to Mr Brooks. He also stated that RBH made no effort to persuade him to stay after he submitted his resignation.

Access and Misuse of Confidential Information

60. Mr Cicognani stated that all Market Managers had access to RBH confidential information. This included RBH’s sales performance report, which contain information relating to the value, volume and gross margins of historical sales, current sales, and future orders as well as details of customers, products, and suppliers. In addition, Mr Sambrook was granted access to the technical sales library. Mr Cicognani stated that the Market Managers would discuss pipeline/opportunities collaboratively. However, during cross examination he agreed that technical information on talc and clay products is readily available online.
61. Neither Mr Brook nor Mr Sambrook deny that they had access to confidential information. However, they suggest that the significance of this information has been overstated. Mr Brooks, in reference to Mr Cicognani’s assertion that he had access to a “*vast database of technical information in relation to Talc and China Clay,*” stated talc grades are common widely traded products and the information for these products are in the public domain. Mr Sambrook made a similar observation. He stated that an internet search would reveal an array of freely available technical information on talc and clay. He also stated that talc and clay were not significant materials sold and used within the ceramics market.
62. Mr Sambrook sent sensitive confidential documents from the RBH database by attaching them in emails from his work address to his personal address between January 2018 and November 2020. Mr Sambrook states that for the majority of his working time during the last 3 years of his employment, he worked from home (spending less than 30 days per year in the office, which is a 3-hour return journey

from his home) and emailed RBH documents to his personal email account for printing purposes. He prefers to work from a hard copy and has always worked this way. Once he had finished working, he would delete the documents from his personal email and destroy the paper copies. He acknowledged that RBH had provided him with a printer for use at home. However, he already had a personal printer set up and there was no room on his desk for both, so for ease he used his personal printer.

Reasons for Resignation

63. Mr Brooks stated that a number of factors led to his dissatisfaction and disillusionment with RBS which over time led to his resignation.
64. One of the key factors was the dilution of his responsibility for client relationships (including Hoffmann) after the acquisition of RBH by OBG in 2017. He was no longer responsible for all products supplied by clients in his portfolio and some of his responsibilities were transferred to the customer relations team. Other reasons included: (i) the increased sales targets which Mr Brooks believed were unreasonable and unachievable; (ii) internal conflict and poor morale due to friction between the commercial team and the customer relations team; (iii) the reduction of Mr Brooks' responsibilities in relation to stock control which led to products being provided late and caused him embarrassment; (iv) the termination of the employment of a highly regarded Sales Director and a Strategic Sourcing Manager; and (v) the employment of a new Sales Director (Mr Brooks had expressed an interest in developing his career in that direction). As a result, Mr Brooks stated that he was keen to explore other opportunities whilst honouring his commitments and responsibilities to RBH. Although he took preparatory steps towards setting up a 'better' minerals sourcing business at some point in the future, immediately following his resignation, he intended to rely on his savings, get a part-time job and spend time with his children. Mr Brooks stated that he was aware of the restrictive covenants in his contract of employment and had no intention to breach them.
65. Mr Sambrook was furloughed from 1 June 2020 to 1 September 2020 due to the Covid-19 pandemic. Whilst on furlough he was asked to attend a meeting with Mr Cicognani on 12 August 2020 at the Manchester RBH office. Mr Cicognani informed Mr Sambrook that he would be furloughed until the end of October 2020 and during the meeting he queried whether Mr Sambrook's transition from a technical role to a commercial role had been successful. Mr Sambrook stated that the query with regard to his role was not raised in a supportive way; it was negative and highly critical. Mr Sambrook stated that it was at that moment that he decided that that he would leave RBH.
66. At the end of August 2020, Mr Cicognani informed Mr Sambrook that he would be required to start work again on 1 September 2020. However, Mr Sambrook had booked a family holiday on the understanding that he would be furloughed until October. Mr Sambrook stated that Mr Cicognani was disappointed and annoyed by the news that he would not be able to resume work at the beginning of September. As stated above, Mr Sambrook resigned on 29 September 2020. He denied during cross examination that he resigned in order to run SBS with Mr Brooks. He stated that he was planning to go to Australia and may or may not have come back to the UK.

Alleged Material Non-Disclosure

67. The defendants' joint first disclosure statement listed two documents. There had been no searches of email accounts or personal devices. At the Costs and Case Management Conference, Senior Master Fontaine made a specific disclosure order requiring the defendants to: (i) identify personal email addresses they have used since 1 January 2019 and notify RBH of the same; (ii) search the personal email accounts and identify what disclosure searches have been undertaken; (iii) identify what disclosable emails have been deleted, when, and for what purpose; and (iv) produce any continuing disclosure arising from the searches. On 19 March 2021, the defendants produced a further disclosure list with seven documents (making a total of nine).
68. Mr Brooks and Mr Sambrook admit that they did not give sufficient, or any substantive response, to pre-action correspondence prior to the instruction of their original legal representatives. Mr Brooks stated in his first witness statement that he did not respond to correspondence from RBH's solicitors because he considered the allegations to be completely unfounded and he was reluctant to incur legal fees. Mr Sambrook stated in his first witness statement that he did not reply because he thought RBH's complaints were groundless and were "*just scare tactics.*" He also stated that he was reluctant to incur legal fees. However, both defendants contend in their joint Defence that following the instruction of solicitors and counsel they complied with their disclosure obligations. However, as Mr Crow put it on behalf of Mr Brooks during his opening: "*he cannot disclose that which does not exist.*"
69. The position changed somewhat during oral evidence. Mr Brooks admitted under cross examination that he understood the importance of the obligation to preserve SBS emails but did not do so. He agreed with the proposition put to him by Mr Brown that this was because he recognised that he would be in trouble in this litigation if they were produced. Mr Brooks also confirmed that he used a second mobile telephone number registered by him in April 2020, which had not been disclosed. He also admitted that he had not disclosed any evidence regarding establishment of the SBS website, or ISP email account services despite acknowledging that they existed.
70. Mr Sambrook admitted during cross examination that he had deleted his LinkedIn account after receipt of the letters from RBH's solicitors. He stated this was because he "*freaked out.*" He denied that he had a SBS email account.

VI. Issues

71. Mr Brown and Mr Crow helpfully provided the Court with a list of issues. Although there is no agreed list of issues, there is no material difference between the parties as to the findings that the Court would have to make in order to resolve this dispute.
72. The list of issues are as follows:

Obligations During Employment

- i. What enforceable (express and/or implied) contractual and equitable obligations did: (a) Mr Brooks; and (b) Mr Sambrook owe to RBH?

- ii. Did Mr Brooks owe a fiduciary duty to RBH? If so, what was that duty?
- iii. Did Mr Brooks or Mr Sambrook breach any of their duties and/or induce the breaches of obligation of each other? If so, which?

Obligations Post Employment

- iv. Are the restrictive covenants in Clause 17 of the contracts of employment enforceable?
- v. Did Mr Brooks breach and/or did Mr Brooks or Mr Sambrook threaten to breach their restrictive covenants (if enforceable)?

VII. Analysis and Findings of Fact

- 73. My general assessment of the witness evidence and findings of fact in relation to the issues to be determined are set out below.

General Observations: Witness Evidence

Mr Cicognani

- 74. Mr Cicognani's evidence was given in a straightforward, clear, and coherent manner. He made appropriate concessions willingly. When questioned about the limits of Mr Brooks' role he readily accepted that important decisions on budgets and strategy were dealt with at director level. When he disagreed with any proposition that was being put to him, he did so in a calm and measured way. He had a reasonably good recollection of events but there were occasions when he could not recall if something had happened. For example, concerns being raised about decision making delays or Hoffmann's dissatisfaction with the commercial relationship with RBH.
- 75. Although it was clear from Mr Cicognani's oral evidence and witness statement that he has formed the view that Mr Brooks and Mr Sambrook breached their obligations to RBH, he did not attempt to argue the case from the witness box, and there was no indication that his evidence was tainted by any ill-will.
- 76. In my judgment Mr Cicognani was a careful and considered witness whose evidence was consistent with the contemporaneous documents.

Mr Brooks

- 77. Although appropriate allowances have been made for the inherent stress involved in giving evidence and the financial and personal pressure that these proceedings are likely to be having on Mr Brooks, I concluded that overall his evidence was unreliable. He struggled at times to maintain an account consistent with his pleaded defence whilst trying to answer questions honestly and significant matters which were omitted from his witness statements were mentioned for the first time during his oral evidence.
- 78. Mr Brooks, on at least two occasions, agreed with a proposition that was put to him by Mr Brown but then immediately retracted it. Nonetheless, by the end of his evidence he had made numerous significant concessions (some of which have been

mentioned above) which he did not retract. He admitted that: (i) he used a personal SBS email account and a Hotmail account for business purposes; (ii) he did not use his RBH email account for competitive activity, because he wanted to conceal his actions from RBH; (iii) he did not carry out searches of the SBS email account because he ceased to have access to it from December 2020 despite the letter from his solicitors, dated 28 April 2021, in which it was stated that he had searched deleted documents (and found nothing); (iv) he understood the importance of the legal obligation to preserve the SBS emails but failed to do so, because he recognised that it would cause difficulties for him in this litigation; (v) he used a second mobile phone registered to him in April 2020 (which he had not disclosed); (vi) he did not disclose evidence regarding the establishment of the SBS website despite being aware that such evidence exists; (vii) SBS would be in competition with RBH.

79. Furthermore, Mr Brooks claimed that he sent only one email from his SBS account which was the DOG-Chemie email that was forwarded by Mr Mittman. I accept the submission made by Mr Brown that it is inherently implausible that no other emails were sent from the SBS email account. If that were true, there would have been no reason for Mr Brooks to fail to preserve the SBS email account as the existence of the single email was already known. Mr Brooks also asserted that there are no electronic communications between himself and Mr Sambrook and denied that other than the *'somewhat drunken conversation'* there were any other discussions. I concluded that this was also inherently improbable given the nature of their relationship. They had worked together for many years and (according to Mr Brooks' version of events) he had taken preparatory steps with a view to setting up a business with Mr Sambrook at some point in the future. In these circumstances, there is likely to have been numerous electronic communications and face to face discussions.
80. Mr Brooks also stated that he published the SBS website in order to allow time for it to rise up the search engine pages. I have no reason to doubt that the position of SBS on the internet was important to him, but I do not accept that that is the primary reason that the website was published in November 2020. It is much more likely that the primary purpose of the website was to promote SBS's services to suppliers.
81. In short, although I did not reject the entirety of Mr Brooks' evidence, he made a number of significant admissions and many of his denials were unconvincing.

Mr Sambrook

82. Mr Sambrook gave oral evidence confidently, but his evidence was also unreliable in a number of key respects. I did not reject the entirety of his evidence and appropriate allowances were made for the inherent stress of giving evidence as a litigant in person and the financial and personal impact of these proceedings. However, I have come to the conclusion that he attempted to down play his involvement in any matters which might be held against him.
83. Mr Sambrook stated in his third witness statement that he had no *"working relationship/engagement with Hoffmann"* in the 3 years prior to resignation. Whilst I accept that, due to the nature of his role, Mr Sambrook had much less contact with Hoffmann in the years preceding his resignation than Mr Brooks, the suggestion that he had no work-related contact with Hoffmann is an overstatement. As stated above,

Mr Sambrook accepted that as part of the RBH team at the K show in October 2019 he was based at the Hoffmann stand and socialised with Hoffmann representatives. However, to the extent that Mr Sambrook meant to convey that (save for my findings in relation to RBH's claim) he had no direct business dealings with Hoffmann and did not sell or deal with Hoffmann products, I accept this aspect of his evidence.

84. Mr Sambrook repeatedly suggested that the establishment of SBS was no more than a '*thought experiment*.' He stated that with the benefit of hindsight they should not have created a website; he suggested that they "*got a bit carried away*." Given that Mr Sambrook, by his own admission, was shown the SBS website (designed by Mr Brooks) as well as the company logo and for a period of time described himself on his LinkedIn profile as the Technical Sales Director of SBS, it is quite clear in my judgment that the idea of going into business with Mr Brooks had progressed beyond mere hypothesis.
85. During Mr Sambrook's oral evidence, he described Mr Brooks as a friend. He claimed that, as far as he could recall, his face to face discussions with Mr Brooks, with regard to SBS, were limited to the '*somewhat drunken conversation*' referred to in Mr Brooks' first witness statement and an occasion on the golf course. However, he admitted during cross examination that they had conversations on an ongoing basis which developed into a gradual understanding and that they chose to "*speak face to face*." However, given the nature of the relationship between Mr Sambrook and Mr Brooks and their intended business venture there is likely to have been numerous electronic communications and face to face discussions during the relevant period. It is unlikely that the non-disclosure of any communications between Mr Sambrook and Mr Brooks is because there was nothing to disclose; it is much more likely that such disclosure would be damaging to Mr Sambrook's case.
86. The above features undermined Mr Sambrook's credibility and as a consequence I approached his evidence with caution.

What enforceable (express and/or implied) contractual and equitable obligations did: (a) Mr Brooks; and (b) Mr Sambrook owe to RBH?

87. There is no dispute that both Mr Brooks and Mr Sambrook owed the express duties as set out in Clause 3.1 of their contracts of employment (see paragraph 32 above). There is also no dispute that they owed express obligations to protect RBH's confidential information.
88. In addition, both defendants accepted that their contracts of employment included the implied term of good faith and fidelity. This abstract concept includes an obligation to refrain from conduct which would be regarded as unacceptable by reasonable and honest people. In essence, it is no more than an obligation to loyally carry out the role of an employee. However, unlike a fiduciary duty, it does not require the employee to act solely in the interests of the employer (see - *Nottingham University v Fishel* [2000] IRLR 471 and *Ranson v Customer Systems PLC* [2012] EWCA Civ 841) and mere preparations to set up a competing business after the termination of the employment are not necessarily a breach of contract.

89. The implied term of trust and confidence (in relation to both defendants) and the equitable duty relating to misuse of trade secrets (in relation to Mr Brooks) are denied. I will address each of these in turn.
90. Mr Brooks and Mr Sambrook state in their joint Defence that whilst a loss of trust and confidence might, in extreme circumstances, amount to ‘*some other substantial reason*’ for dismissal pursuant to s.98(1)(b) Employment Rights Act 1996, it is not a term that is implied into an employee’s contract of employment generally or the RBH contract of employment in particular. I do not accept this submission. It is well established that employment contracts contain an implied term of *mutual* trust and confidence; it is a duty which lies at the heart of the employer/employee relationship. It refers to an obligation that neither party will, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee (see - *Malik v BCCI SA* [1998] AC 20 where Lord Nicholls of Birkenhead stated: “[t]he trust and confidence required in the employment relationship can be undermined by an employer, or indeed an employee, in many different ways.”). The implied duty to maintain mutual trust and confidence is typically relied on by employees (at least in part because employers are more likely to rely on an express term) but it is clear that the duty is binding on both the employer and employee.
91. Therefore, in addition to an implied term of good faith and fidelity the defendants’ employment contracts also contained an implied term of mutual trust and confidence. However, these concepts tend to overlap and as a consequence the implied term of mutual trust and confidence adds little to the express contractual obligations and the duty of fidelity. Whether the defendants individually or collectively breached these terms is a separate matter and is addressed below.
92. Mr Brooks admitted that he was under a duty, whilst employed, to maintain the confidentiality of RBH’s trade secrets and/or confidential information, and not to use any information obtained in confidence as a consequence of his employment to the detriment of RBH. However, he denied that there were any equitable duties in relation to trade secrets and/or confidential information that were not covered by the express terms or applicable implied terms of the contract. I accept that submission.

Did Mr Brooks owe a fiduciary duty to RBH? If so, what was that duty?

93. A fiduciary relationship arises when one party undertakes to act on behalf of another, for the benefit of another, or place themselves in the position where they are obliged to act in the interests of another which gives rise to a relationship of trust and confidence. For example, the relationship between a trustee and the beneficiaries of a trust or a director and a company. This is distinct from the implied contractual duties of mutual trust and confidence and fidelity. An employee will not assume fiduciary obligations merely by reason that they are an employee. However, circumstances can arise in the context of an employment relationship which places the employee in the position of a fiduciary. An employee that has a fiduciary duty must act solely or exclusively in the interest of his employer and it will be easier for an employer to establish that activities in preparation for competition were themselves in breach of a fiduciary obligation (see *Helmet v. Tunnard* [2007] IRLR 126 CA paragraph 33).

94. Fiduciary duties may apply to only part of the employment relationship. As Elias J stated in *Fishel* :

“[Fiduciary duties] result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken.”

Accordingly, in determining whether a fiduciary duty arises in the context of an employment relationship the starting point is the contract of employment itself.

95. Mr Brooks’ contract of employment, dated 1 May 2017, refers to his appointment as a Product Manager. At that time, his annual gross salary was approximately £5k less than it was when he resigned on 1 September 2020. The contract stipulates that the payment of a bonus is at the absolute discretion of RBH subject to personal performance targets as will be notified to him from time to time. His normal working hours were said to be 8.30am to 5pm Monday to Thursday and 8.45am to 4pm on Friday (with 1 hour for lunch) together with such additional hours as may be required to fulfil his duties. The express duties in his contract of employment included: exclusive service (Clause 3.1.1); the obligation not to make a secret profit (Clause 3.1.3); the obligation to report any matters concerning the affairs of RBH (Clause 3.1.4); and the obligation to report his own wrongdoing and any wrongdoing or proposed wrongdoing of any other employee or director (Clause 3.1.5). As mentioned in paragraphs 33 and 34 above, there were also express obligations in relation to confidential information and post-termination restrictions. However, there was no express reference to any fiduciary duty. Furthermore, Mr Brown has not submitted that Clause 3 generally, or any of its sub-clauses, in and of themselves, impose a fiduciary duty on Mr Brooks. No doubt this is, at least in part, because Mr Sambrook was also subject to Clause 3 and there is no claim that he owed RBH a fiduciary duty. In these circumstances, there is, in my judgment, no fiduciary duty by reference to the terms of the contract of employment.
96. Mr Brooks’ job title changed in 2017 to Market Manager. He stated that the change of title was said to be a promotion, but he did not view it as such, particularly as he was no longer responsible for all products provided by suppliers within his portfolio. Although no job description has been provided there is no dispute that Mr Brooks’ responsibilities as a Market Manager included: (i) delivering sales and profit targets; (ii) leading new business development in the rubber and polishing markets; (iii) using business management systems to ensure effective pipeline management; and (iv) building relationships with clients in the relevant markets. He was responsible for up to 10 supplier relationships.
97. Mr Brooks was a trusted employee. His role included responsibility for customer retention and growth. He had a degree of autonomy with regard to the pricing of products within his remit, but he did not have any high level responsibility for strategy, performance, or financial matters. Nor did he have any responsibility for the production of financial information. His remuneration package was above the national average, but it was not particularly high in terms of management roles nationally. He

did not have any responsibility for hiring, firing, promoting, or remunerating employees. Although Mr Brooks had an influential role, he had limited authority. That said, the expression ‘*bottom rung*’ employee in the context of this case is a misnomer. RBH has a flat hierarchical structure; there are no levels between the Market Managers and the executives. Therefore, the fact that there were no customer relationship roles below Market Manager says very little about the seniority of that role. Mr Brooks was the first and most significant point of contact for principal suppliers and customers within his remit. He was a senior employee, but his role did not equate to the role of the sales director. To this extent I accept the submission that Mr Brooks was an ‘*employee carrying out instructions*’ and ‘*assuming responsibilities for which he was accountable to others*’ (per Etherton J, in *Shepherds Investments v. Walters* [2007] IRLR 110).

98. In light of the above, some special role or status is required for Mr Brooks to be held to be a fiduciary and in this regard RBH primarily relies on his role as the ‘*Hoffmann Champion*.’ I accept the evidence of Mr Cicognani that RBH is a relationship business; its entire business model is dependent upon establishing and maintaining deep and long standing commercial relationships. Although Mr Brooks was not the only “*Hoffmann Champion*” I also accept Mr Cicognani’s oral evidence that “*All leads would be funnelled through Mr Brooks.*” This is entirely consistent with the length and depth of Mr Brooks’ experience with regard to Hoffmann products. RBH trusted Mr Brooks to act with autonomy and independence in the development and preservation of the 30 year Hoffmann relationship. He had access to confidential information in respect of the Hoffmann contract, including Hoffmann’s particular market strategies and future plans. RBH invested in Mr Brooks’ relationship with Hoffmann including by funding participation in international trade events and shows. Mr Brooks agreed that a key part of his role involved managing unhappiness on the part of a supplier and resolving concerns as and when they arose.
99. In these circumstances, I have concluded that Mr Brooks owed fiduciary duties to RBH in relation to Hoffmann and other key suppliers. I have reached this conclusion because of the nature of Mr Brooks’ role and because RBH would have no control over how he deployed relevant information he obtained from customers/suppliers. RBH was dependent upon Mr Brooks to pass on relevant information and was vulnerable to potential misuse of such information, the dissemination of which was outside its control.
100. I am satisfied that Mr Brooks owed RBH a specific fiduciary duty to:
- i. Preserve for the RBH the key supplier relationships for which he was responsible including, in particular, the relationship with Hoffmann.
 - ii. Not make any secret profit (including any secret future profit) from the key supplier relationships for which he was responsible including, in particular, the relationship with Hoffmann.

Did Mr Brooks or Mr Sambrook breach any of their duties and/or induce the breaches of obligation of each other? If so, which?

101. Hoffmann’s business model required a UK distributor. The evidence of Mr Cicognani, which I accept, clearly indicates that during the video-conference meeting

that took place on 4 November 2020, the assertion by Dr Risch that in future Hoffmann products would be sold by those with experience was an indirect reference to Mr Brooks and Mr Sambrook. No other interpretation makes sense. Mr Cicognani's note of the meeting also suggests that Hoffmann was unaware that the defendants were subject to ongoing obligations. Furthermore, the Hoffmann letter indicates an ongoing connection with Dr Risch. The contents of the letter support the defendants' case but in the absence of sworn evidence I afforded it little weight.

102. Both defendants stated that over time they became dissatisfied with RBH and were keen to leave. Mr Brooks went further; he stated in clear terms that he had a desire to cause '*pain*' to RBH. I did not take this as an admission that he set up SBS in order to undermine RBH but as a clear indication of the depth of his resentment.
103. I am satisfied that the '*upcoming project*' mentioned in the email from Mr Brooks to Mr Larsen on 7 February 2020, is a reference to SBS. It is clear from the email exchange with Mr Larsen that the purpose of the enquiry was to present RBH with a business opportunity. There are no other reasonable interpretations.
104. There is no dispute that Mr Brooks contacted DOG Chemie using a SBS account. In that email Mr Brooks provided website details, company details, his personal mobile number and his new email address and it is clear from his choice of words that these were his current contact details; not methods of communication for some point in the future. That certainly appeared to be Mr Mittman's understanding as he stated, in his email to Mr Cicognani on 25 November 2020, that Mr Brooks was '*now dealing*' through SBS. There is no indication that DOG Chemie was aware of the post termination restrictions or any inability to trade.
105. Contrary to the submission made by Mr Crow I am satisfied that the factual matrix described above provides a sufficient evidential basis upon which inferences can be drawn. As foreshadowed above, there has been material non-disclosure by both defendants. The explanation provided (i.e. there is nothing to disclose) does not bear scrutiny and during cross examination the attempt by Mr Brooks to tow that line fell apart. I accept the submission made by Mr Brown that in these circumstances the Court is entitled to treat the defendants' evidence with a degree of scepticism, and they should not be given the benefit of any doubt. Therefore, based on the contemporaneous documents and my assessment of the oral evidence (including the admissions made by Mr Brooks) I am satisfied that it is fair and reasonable to draw the following inferences:
 - i) There was more than one SBS email and Mr Brooks' evidence to the contrary is untrue.
 - ii) Mr Brooks and Mr Sambrook have not preserved and/or have deliberately withheld SBS emails because they contain damaging details about the true nature and extent of correspondence with suppliers/customers including Hoffmann.
 - iii) The emails/documents in the sent folder of Mr Brooks' Hotmail account were intentionally not searched or were deleted as they would reveal damaging correspondence with RBH contacts.

- iv) Mr Brooks contacted Hoffmann and DOG Chemie, using his second mobile number, so as to avoid leaving an evidential trail.
 - v) The mobile phone records of the second mobile number were intentionally not searched or not disclosed as they would provide evidence of private communications with suppliers including Hoffmann, prior to Hoffmann's termination and the defendants' resignations.
 - vi) Correspondence with other suppliers/customers would have been to the same effect (at least) as the SBS email between Mr Brooks and Mr Mittmann, in which Mr Brooks outlined his new commercial venture.
 - vii) The defendants were not prepared to give a full/proper account of their own discussions or disclose electronic communications between themselves as they would include conversations regarding which suppliers to target (particularly Hoffmann).
106. In light of these inferences my findings (on the balance of probabilities) as to what the defendants did, and did not do, are as follows.

Findings of Fact

107. Mr Brooks was a more senior employee than Mr Sambrook due to his level of experience and the specific responsibility he had for managing supplier/customer relationships. This was reflected in the difference in their salaries.
108. Hoffmann was dissatisfied with RBH and lawfully terminated its long standing supply contract. The defendants were also dissatisfied with RBH and resigned. The defendants resigned for a number of reasons including deep displeasure with the senior management of RBS following its acquisition by OBG. They discussed their resignations with each other prior to handing in their notice and resigned with the intention of providing mineral sourcing and supply services through SBS.
109. In September 2019, Mr Brooks and Mr Sambrook agreed to establish SBS as a business (irrespective of incorporation and concluding contracts) and had frequent discussions thereafter. The plan was to operate within the Talc and China Clay market and therefore compete within the same sector as RBH. SBS replicated the RBH model in that it used a similar structure (i.e. relationship management plus 'back office, quality control etc) but the intention was to do it 'better.' The decision to progress the plan was taken by November 2019 and was discussed on various occasions thereafter. SBS was under the de facto control of the defendants. There was no formal 'agreement' between Mr Brooks and Mr Sambrook, but a clear understanding had been reached and they acted together. There was a period of time when they gauged the reaction of RBH suppliers/customers to assess whether the business would be viable.
110. By November 2020 Mr Sambrook had created a new LinkedIn profile in which he described himself as the Technical Sales Director of SBS. This was not 'kite flying;' it was an attempt to promote his new role and SBS in the marketplace. Nor was it part of a 'thought experiment.'

111. Mr Brooks caused Hoffmann's termination of the RBH relationship. Mr Brooks knew that Hoffmann was unhappy with the RBH relationship. He did not report this to RBH. He chose instead to take the opportunity to divert the supply contract to himself through SBS. Mr Sambrook knew this was the plan and acquiesced. There was no formal agreement with Hoffmann, but a clear understanding was reached that it would supply products to the market through SBS. Communication between the defendants and Hoffmann was via a non-RBH email account or private telephone calls. The plan was discussed at the K show in October 2019.
112. Communication with other suppliers was also via a non-RBH email account or private telephone calls. These conversations went beyond informing these suppliers that the defendants intended to leave RBH; they were informed about the defendants' new business venture. I acknowledge that on 27 November 2020 Mr Brooks, in response to an enquiry from a customer by text about a Hoffmann product, advised the customer that he was "*still under contract at RBH with garden leave restrictions in terms of speaking to customers.*" However, that does not mean that he did not breach his obligations in relation to other customers/suppliers on other occasions. There was an attempted solicitation/diversion of the DOG-Chemie and Larsen-Lorentzen relationships and attempted disruption/diversion of other RBH relationships. Therefore, the denials of Mr Brooks and Mr Sambrook in interview were untrue.
113. Actual trading activity in competition with RBH (irrespective of whether any revenue was generated) started no later than October 2020, in that, the defendants were 'open for business'; they were willing to service contracts with customers/suppliers. The SBS website was part of the promotion to their target audience. It is irrelevant that contracts may not have been won or were terminated before completion due to the interim injunction.
114. Mr Sambrook for reasons of convenience used his personal printer in his home office rather than the printer supplied by RBH. The confidential information Mr Sambrook emailed to himself primarily relates to Talc and China Clay products. This is not a coincidence. These products were the focus of SBS. Mr Sambrook was the Technical Director of SBS and retained these documents to further SBS's commercial interests. At no time did he disclose to RBH that he was emailing confidential information to himself.

Breach of Duty

115. Does the foregoing place Mr Brooks and/or Mr Sambrook in breach of their contractual duties? This is a fact-sensitive question.
116. It is true that certain conduct on the part of Mr Brooks and Mr Sambrook might not by itself have fallen on the wrong side of the permissible dividing line. For example: (i) discussing the possibility of starting a competing business; (ii) purchasing a domain name; and (iii) establishing and purchasing an option in a shelf company. However, this was not the limit of their activities. Their acts went far beyond proposed activity or potentially working together in the future.
117. Mr Brooks and Mr Sambrook took active steps to work for themselves and/or SBS in competition with RBH whilst they were serving employees. This activity occurred both before and during the notice period. SBS was a competitor. It had an active

website, an active email account (in use by Mr Brooks); and an active telephone number for Mr Brooks. There was an informal agreement in place with Hoffmann to trade through SBS and deliberate concealment from RBH which is consistent with defendants' recognition that their actions would not be authorised. Mr Brooks and Mr Sambrook were serving their own interests not those of RBH. They acted together and solicited each other to leave RBH. As Mr Brooks was in a more senior position his breach was more serious. There was no disclosure of these activities to RBH.

118. Mr Sambrook's actions in emailing confidential information to himself in 2020 until the date of his resignation were for the benefit of SBS. These actions were part of the inducement by Mr Brooks and Mr Sambrook of each other's breaches.
119. Many of the activities in the prohibited column of the Appendix to Chapter 3 of *Bloch and Brearley: Employment Covenants and Confidential Information -Law, Practice and Techniques* (Fourth Edition) apply to the circumstances of this case. These include: (i) competing in employer's time; (ii) soliciting employer's customers; (iii) soliciting employers' exclusive customers; (iv) soliciting/recruiting colleagues; (v) providing information to assist a competitor to recruit colleagues; and (vi) copying or memorising trade secrets or confidential information. When considered in totality, there can in my judgment be no basis for viewing the conduct of Mr Brooks and Mr Sambrook as anything other than a clear breach of Clause 3 of their employment contract, the implied duty of fidelity and the implied duty of mutual trust and confidence.
120. It follows from my findings that Mr Brooks also breached his fiduciary duty to preserve the Hoffmann relationship for RBH. In diverting that relationship he breached that duty.

Are the restrictive in Clause 17 of the contracts of employment enforceable?

The Objection to the Post-Termination Restraints

121. The defendants challenge the post-termination restraints in their RBH contracts of employment. It is not accepted that the covenants seek to protect legitimate interests, as opposed to simply restricting competition and, in any event, go further than reasonably necessary and are therefore unenforceable.
122. Mr Crow stated, during his opening, that his primary challenge relates to the duration of the covenants. He submitted that the 9 month non-dealing and the 12 month non-soliciting covenants should be no more than 6 months and 9 months, respectively. However, he also submitted in his skeleton argument that the post termination restraints are not justified, in circumstances where the identity of the suppliers and customers in the sector are common knowledge and where RBH plainly had the security of contractual arrangements with suppliers. In particular, he submitted that the 'customer' covenants are too wide as they include other customers for whom Mr Brooks was not directly responsible, but for whom he had confidential information by reason of the 'material dealings' provision and the definition of Restricted Business is insufficiently precise. Mr Crow further submitted that in relation to the 12 month non-solicit supplier clause: (i) there is no legitimate interest in the protection of non-exclusive suppliers; (ii) it is equally defective in terms of the imprecise Restricted Business limitation; and (iii) are unrestricted by reference to confidential information.

123. These submissions (insofar as they are relevant) have also been taken into account in relation to Mr Sambrook.

The Approach to Post-Termination Restraints

124. For a post termination restraint to be valid, it must be shown that there is some advantage or asset in the business which it would be unjust to allow the employee to appropriate for his own purpose. However, the court must be satisfied that the restriction is no greater than is reasonably necessary to protect the employer's legitimate interest. If a much less far reaching covenant would be sufficient to protect those interests, the restraint will be greater than is necessary and would not be enforceable (see – *Herbert Morris Ltd. v. Saxelby* [1916] A.C.688 and *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] IRLR 214). The reasonableness has to be determined by reference to the circumstances of the parties as at the date of the contract having regard to the contractual provisions and the context within which the contact was realistically expected to apply (see *TFS Derivatives Ltd v. Morgan* [2005] IRLR 246 at [§38]).
125. The Court will ordinarily ask the following questions:
- i.Has the employer established legitimate business interests which it can reasonably look to protect?
 - ii.Is the breadth of the restraint and the period of time no more than is reasonably necessary to protect those legitimate business interests?
126. In *TFS* at [§§36-38] Cox J set out the following approach to assessing the reasonableness of covenants:

“...In assessing reasonableness, there is essentially a three-stage process to be undertaken.

[1] Firstly, the court must decide what the covenant means when properly construed.

[2] 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. ...

[3] 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.”

127. It is recognised that non-solicitation clauses have a practical weakness, in that, defining solicitation and proving that it has occurred can be difficult. Therefore, a non-dealings provision is often necessary particularly where the nature of the industry involves the development of strong personal relationships with clients: *Towry EJ Ltd v Bennett* [2012] EWHC 224 (QB) at [§383]. For this reason, *Brearley and Bloch* at §11.130 describe non-solicitation and non-dealings clauses as “*the preferred type of covenant to protect customer connection*” (i.e. over a non-compete restriction) - see also *Croesus Financial Services Ltd v Bradshaw* [2013] EWHC 3685 where this approach was upheld.

Findings

128. There is no dispute with regard to the construction of the covenants; it is the scope and length which is challenged. Although Mr Crow’s skeleton argument refers to the effective termination date as both defendants were placed on garden leave the duration of the post-termination restraints starts from the date in which the garden leave commences (i.e. 2 October 2020 for Mr Brooks and 16 October 2020 for Mr Sambrook.)
129. I turn to whether RBH has legitimate business interests requiring protection.
130. RBH relies on establishing commercial relationships with suppliers and customers and protection of those connections is central to its success. RBH’s commercial dealings with Hoffmann was based on an exclusive relationship established over a long period of time in respect of a commercially desirable product. RBH invested in that relationship and information relating to the products (including pricing and sales information) is confidential information. The non-soliciting and non-dealing restrictions are intended to provide a reasonable period of time to enable RBH to protect its investment. The same is true of each of the other supplier connections.
131. RBH has a small number of key employees who work closely alongside each other. The employees are encouraged to cross-refer clients’ interest and supplier relationships within the company and work collaboratively in teams. It is clear from the evidence of Mr Cicognani that the purpose of doing so is to ensure that the effectiveness of the team is greater than the sum of its parts.
132. It is trite law that during the currency of the employment relationship the employer is entitled to protect confidential information whether it amounts to a trade secret or not: see *Faccenda Chickens v Fowler* [1987] Ch 117. The RBH commercial team worked collaboratively across markets and had access to commercial information. This is not disputed. It is clear that access to RBH’s confidential information would provide an obvious competitive advantage to any competitor. This, of course, does not include the defendant’s experience and general knowledge or indeed any information which is readily ascertainable to persons unconnected with RBH without significant expenditure of labour, skill, or money. Recognition of this limitation is reflected in the Bourne J order.
133. Pulling these threads together, I am satisfied that RBH’s customer/supplier connections, the stability of its workforce and the protection of its confidential information are all legitimate business interests requiring protection.

134. In terms of scope the restrictive covenants relate to business with which the defendants were involved to a material extent; there is no general prohibition on competition by way of a non-compete covenant. Mr Brooks and Mr Sambrook each received consideration of £1,000 when they signed the new contracts of employment in 2017. However, the restrictive covenants are not the same which reflects the different nature of their roles. There is no reason why there should only be protection of exclusive supply contracts. The restriction on preventing termination of existing contracts does not prevent the defendants from obtaining a contract in parallel to that of RBH; nor does it prevent the defendants from dealing or soliciting customers of RBH provided that it relates to a different commercial sector for the agreed duration. There are further limitations within the covenants (by reference to the defined terms and definitions of Customers, Suppliers and Employees) which are focussed and reasonable.
135. In these circumstances, I am satisfied that the breadth of the restraint is no more than is reasonably necessary to protect those legitimate business interests.
136. The key question with regard to the duration of the restrictive covenants is: What is a reasonable time during which RBH is entitled to protection against solicitation and/or dealing by the defendants with whom they had contact and influence during their employment? At §6.240, the editors of Goulding state:

“Recent cases have indicated a disposition to uphold covenants when the dispute centres on the reasonableness of the duration of the restraints”

The editors also cite the decision of Haddon-Cave J in OBE at [§215]:

“It will be seen it is only if the Court finds that a “much less far-reaching” covenant would have afforded adequate protection is it likely to regard the existing restriction as unreasonable. The exercise is not a marginal one, otherwise Courts would be faced with a paralysing debate in every case about whether a covenant with x days shaved off would still provide adequate protection.”

137. The suggested 3-month reduction of the restrictive covenants is not in my judgment a “much far less reaching covenant”. Bearing in mind RBH’s business, the nature of its interests to be protected, and the likely effect of solicitation and/or dealing with customers/suppliers, I am satisfied that the duration of the restrictive covenants is no wider than reasonably necessary to protect RBH’s legitimate business interests. The imposition of the restrictive covenants in the employment contracts of Mr Brooks and Mr Sambrook are not contrary to the public interest and are enforceable.

Did Mr Brooks or Mr Sambrook breach or threaten to breach their restrictive covenants (if enforceable)?

138. For the reasons, I have already stated, Mr Brooks and Mr Sambrook breached the non-solicitation provisions by disrupting and attempting to disrupt RBH’s relationship with key customers/suppliers. Mr Brooks also breached the non-dealing provision.

VIII. Conclusion

139. RBH's claim in relation to liability and enforceability of the restrictive covenants succeeds in its entirety.
140. I am grateful to counsel for their helpful written and oral submissions. The parties are invited to agree the terms of an order that reflects my conclusions and deals with any other consequential matters, failing which I will hear further submissions.