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IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
[2021] EWHC 2909 (QB)



No. QB-2021-2854

The Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Friday, 27 August 2021

Before:

MRS JUSTICE FARBEY

B E T W E E N :

(1) SOURCE BIOSCIENCE UK LIMITED  
(2) SOURCE BIOSCIENCE LIMITED  
(3) SOURCEBIO INTERNATIONAL PLC

Claimants

- and -

(1) RUSSELL WHEATCROFT  
(2) AID GENOMICS UK LIMITED

Defendants

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MR T CROXFORD QC and MS I BUCHANAN (of Counsel) appeared on behalf of the Claimants.

MS E BANTON (of Counsel) appeared on behalf of the Defendants.

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**J U D G M E N T**

**(Via Microsoft TEAMS)**

MRS JUSTICE FARBEY:

- 1 The claimants apply for interim relief against the defendants in relation to a claim issued on 23 July 2021. The claimants form part of a group of companies that provides laboratory services to a range of clients in the pharmaceutical industry, including the NHS and private healthcare providers. The first claimant includes within its core business genomic sequencing and infectious disease testing, including the provision of COVID-19 testing services. The first defendant is a former employee. The second defendant is another life sciences company that wishes to enter the market for COVID-19 testing.
- 2 The application for interim relief was made on 9 August 2021 and listed for urgent hearing on notice to the defendants on 25 August. The defendants' solicitor did not receive a notice of hearing and had not filed or served evidence by the afternoon of 25 August, which rendered a fair hearing impracticable. The application was relisted for hearing today.
- 3 The claimants seek injunctive relief until the trial of the claim. The defendants now share a solicitor and have had, in the past day or so, the very great assistance of Ms Elaine Banton, who appears on their behalf today and who was able to take further instructions during the course of the morning. As a result, the second defendant has confirmed that it is willing to give undertakings in the terms sought in the draft order, so that there is no issue as between the claimants and the second defendant for me to resolve. Oral submissions concerned the first defendant.
- 4 In relation to the first defendant, the claimants seek prohibitions in relation to the disclosure of confidential information, the solicitation of customers, the offering of employment to the claimants' employees and other prohibitions that would, for a certain period, prevent the first defendant from competing with the claimants. The draft order also includes provision in relation to both defendants for the preservation of evidence and restraints on inducing breach of contract by the claimants' employees.
- 5 The first defendant has today indicated through Ms Banton that he is willing to give undertakings in relation to all matters covered in the draft order, save for two prohibitions which for convenience have been referred to as clauses (d) and (e). They are that:

“(d) Prior to the Relevant 3 Month date, be involved in any capacity with any business concern which is or intends to be in competition with any Restricted Business.

(e) Prior to the Relevant 3 Month date, be involved with the provision of goods or services to or otherwise have any business dealings with any Restricted Customer in the course of any business concern which is in competition with any Restricted Business.”

The “Relevant 3 Month date” is 29 September 2021, which is the end date of covenants by which the claimants claim that the first defendant is bound. It is the claimants' case that clauses (d) and (e) seek no more than to hold the first defendant to his contractual terms.

- 6 In support of the application, the claimants have provided witness statements from Anthony Ratcliffe, who is the chief financial officer of the third claimant, and Jay LeCoque, who is the

executive chairman of the third claimant. I have considered the witness statement of the first defendant and that of Kelvin Wu on behalf of the second defendant. The defendants' solicitor has also made a witness statement for which I am grateful.

7 The first defendant began working for Source Bioscience UK Limited in June 2014. He was initially engaged as marketing manager. At the time of his initial engagement, he was also appointed to the executive board. He was expected to have contact with customers and suppliers of the claimants. By an employment contract dated 10 June 2014, a number of post-termination restrictions were agreed, which include the following:

“21.1 In order to protect the confidential information and trade secrets and business connections of the Company to which the Employee has access as a result of the Appointment, the Employee covenants with the Company that they shall not:-

(a) ...

(b) ...

(c) for three months after Termination, be involved in any Capacity with any business concern which is (or intends to be) in competition with any Restricted Business; or

(d) for three months after Termination be involved with the provision of goods or services to (or otherwise have any business dealings with) any Restricted Customer in the course of any business concern which is in competition with any Restrictive Business; or...

21.4 The periods for which the restriction in clause 21.1 apply shall be reduced by any period that the employee spends on Garden Leave immediately prior to Termination.”

8 I shall refer to these obligations as “the Covenants”. A “Restricted Business” is defined in the draft order essentially as being business of the first claimant with which the first defendant was involved to a material degree from 1 September 2020.

9 In September 2015 the first defendant was promoted and became commercial director. In March 2020 he was again promoted to become chief operating officer of the Source Group. The first defendant resigned on 31 May 2021. In June 2021 Source Bioscience UK Limited learnt that he was going to work for the second defendant. This much is not in dispute.

10 The claimants' evidence is that, at a meeting on 29 June 2021, Source raised concerns with the first defendant. During that meeting the first defendant told Source that he had accepted a role with the second defendant, but they were not intending to establish a COVID testing business in the UK. The claimants' evidence is that the defendant said that he had not approached any Source employees. He had not approached any of Source's partners or suppliers.

11 A second meeting was held on 1 July 2021 at which the first defendant reiterated that the second defendant were not competitors of Source. In their skeleton argument, Mr Thomas Croxford QC and Ms Isabelle Buchanan, who appear on behalf of the claimants, direct my attention to significant evidence which may suggest that what the first defendant said was not true. Mr Croxford contends that the first defendant is at least arguably dishonest, as I am able to infer on the face of the papers which I have before me. He says that the second defendant has taken advantage of the first defendant, using him as a recruiting sergeant for taking employees from Source.

12 I make it plain that it is not my task to make findings of fact today. That will be the task of the judge who hears the claim. Nevertheless and irrespective of any dishonesty, there is, in my judgment, a wealth of evidence to suggest that the first defendant may have done much more than accept a job from the second defendant. First, as he has already accepted in correspondence, the first defendant was a conduit for the recruitment to the second defendant of a number of other Source employees. There is email correspondence before me in which he appears to organise employment and contractual terms for four Source employees.

13 Mr Croxford makes the point that the first defendant's knowledge of the wrongdoing of solicitation of the Source employees is apparent from an exchange of messages between himself and two of the solicited employees, in which he asks those employees to conceal the second defendant's COVID-19 testing business from the claimants, and to conceal from the claimants the fact that he had solicited their employment with the second defendant. There is some force in this point.

14 Secondly, the first defendant appears to have become involved with a plan by the second defendant to expand its infrastructure through a "design and build" project: see email from Alison Hodgkiss of Overbury dated 9 July 2021, with the subject line "AID meeting with Overbury", which is, at least arguably, inconsistent with other evidence before me that he has not been asked to do any acts on behalf of the second defendant. The first defendant has told me through counsel today that he cannot recollect Ms Hodgkiss' name, despite the fact that he was the person who arranged the meeting between her and the second defendant. Ms Hodgkiss' email states:

"Hi Russell. Let me know who the other parties are and I can add them to the meeting."

15 The first defendant maintains that his relationship with the second defendant is not a real or compelling threat. I do not agree. By his own admission, he has operated a vehicle for consultancy services since at least November 2016. At para.25 of his witness statement, he says:

"It should be made clear that since 7 July 2021, AID Genomics UK Limited have withdrawn their offer of employment to me...and I do not expect...employment with AID Genomics UK Limited in the future. I am currently not employed or actively seeking employment."

16 In addition, the first defendant has produced a letter which is exhibited to his solicitor's statement. It is dated 25 August 2021 but refers to earlier events as follows:

"Dear Mr Wheatcroft

## Lapse of Employment Offer dated 29 May 2021 (“Offer”)

As advised to you on 7 July 2021, as you have not been able to negotiate an early release from your employment with Source BioScience UK Limited, the Offer has lapsed on that date. We further follow up by this letter to confirm our position that it is with regret that our company will be unable to offer you any form of employment in the next six months. We wish you all the best in your endeavours going forward.”

It is signed by Kelvin Wu. As Mr Croxford submits, the letter is carefully crafted to refer only to employment. It is silent on the overall relationship, including consultancy.

- 17 The first defendant’s case before me today is that his consultancy services pose no threat to the claimants because of the delay in bringing the present application. That is not the same thing as saying that he has no intention of providing consultancy services to compete with the claimants’ business through the second defendant or anyone else. He has in my judgment resolutely failed to state that he will not offer services to the second defendant, either in his written evidence or in the time with Ms Banton that he was permitted today to finalise his position in relation to the draft order. The first defendant has refused to give any assurance that he would not be involved with any competing business. He has refused to give any assurance that he would not provide goods or services to or deal with the claimants’ customers.
- 18 The power to grant interim injunctions is now contained in section 37(1) of the Senior Courts Act 1981 which permits the High Court to grant an injunction in all cases in which it appears to the court to be just and convenient to do so. Ms Banton emphasised the discretionary nature of the court’s jurisdiction. It is not in dispute that the *American Cyanamid* principles apply and that there is a three-part test:
- (1) There must be a serious issue to be tried;
  - (2) Damages must not be an adequate remedy for the claimants and the claimants’ cross-undertaking must be capable of adequately compensating the defendant should the injunction be wrongly granted;
  - (3) The balance of convenience must favour the employer.
- 19 The courts have confirmed that the *American Cyanamid* principles are to be applied in employee restrictive covenant cases (see, for example, *Lawrence David Ltd v Ashton* [1991] 1 All ER 385, 392F, 393C per Balcombe LJ). As to the test to be met on the first limb (“serious issue to be tried”), the bar is low for the employer applicant. They must show that the claim is not frivolous or vexatious and therefore that the restrictive covenant is not obviously bad (*Lawrence David*, 394G). Further, the Court of Appeal has observed that the starting point should be “recognition of a basic principle... that contracting parties should ordinarily be held to their bargain” (*D v P* [2016] EWCA Civ 87, [2016] ICR 688, per Sir Colin Rimer).
- 20 Covenants in contracts of employment are generally speaking valid if contractually enforceable and reasonable. Reasonableness is to be determined on the facts as they stood at the time of contracting (*Patsystems v Neilly* [2012] EWHC 2609 QB, [2012] IRLR 979, para

33). The test of reasonableness requires a balancing exercise between the legitimate interests of the employer's business and the individual's rights and will turn on the facts of the case.

21 Against this legal background, I shall deal with each of the *American Cyanamid* limbs in turn.

Serious issue to be tried

22 Ms Banton submits that there is no serious issue to be tried because the covenants did not survive the first defendant's first promotion, which was confirmed by letter dated 16 September 2015. The basis for her submission appears to be that that letter (and a similar letter, relating to a further promotion, dated 25 March 2020) was not signed and in any event did not have the force of a contract of employment. I would reject that submission, essentially for the reasons advanced by Mr Croxford. It is arguable, and there is a serious issue to be tried, that the letters varied existing contractual terms and that, unless varied in those letters, the terms of the existing contract of employment remained in force. It is arguable that the objective intentions of both the first defendant and the second defendant were to that effect: not least, that is what the two letters say.

23 Mr Croxford took me to case law to the effect that, in considering the force of contractual covenants, the court will look not only at the actual position at the date that the employment started but at the forward-looking contemplation of the parties which can include promotion (*Egon Zehnder Limited Ltd v Tillman* [2017] IRLR 828). Ms Banton directed my attention to other authority which she contends reaches the opposite conclusion: *Tenon FM Ltd v Cawley & Ors* [2019] IRLR 435. But that case can be distinguished on its facts and Mr Croxford's point is arguable, which is all that the claimants must demonstrate at this stage. There is in my judgment a serious issue to be tried as to the effect of the covenants and whether or not they bind the first defendant.

Damages as an adequate remedy

24 Mr Ratcliffe has explained at para.112 of his statement why damages are in his view not an adequate remedy for the claimants. He notes - by way of example - that the first defendant has knowledge of the claimants' internal discussions over the relative merits of manual and mechanised COVID-19 testing and of the claimants' intentions in that regard. If that information was disclosed to a competitor, the claimants would lose their competitive advantage and the competitor would gain an unfair advantage through benefiting from the claimants' wide and well-established experience and expertise in this industry. Further, the first defendant is aware of the precise profitability of the services offered to the claimants' customers, as well as the claimants' differential pricing models. He could deploy this information to the claimants' detriment and a competitor's advantage.

25 I accept the claimants' submission that quantifying the sort of harm that would be caused by the claimants' loss of competitive lead would be hard. Mr Ratcliffe notes that such difficulty is only exacerbated by the current COVID pandemic, the unpredictable developments of which mean that opportunities to secure business are won and lost in a particularly short space of time. There was no serious challenge to Mr Ratcliffe's evidence or to the submissions that Mr Croxford made on it.

26 The loss which may be suffered by the first defendant until 29 September would be quantifiable as loss of income. The claimants' cross-undertaking in damages could adequately remedy that loss should the injunction transpire to have been wrongly granted.

Balance of convenience

27 In my judgment this favours the claimants who are asking the first defendant to do no more than adhere to his contractual terms. The provisions of clauses (d) and (e) are limited in scope. They do not prevent the first defendant from operating his consultancy business. They are limited in time, and indeed will expire in about one month for reasons that concern the precise wording of the Covenants, which they faithfully reflect. They give proper protection to the claimants in circumstances where there is prima facie evidence that the first defendant has made determined efforts to place his loyalties with the second defendant. Nothing that has been said to me today assuages that concern. The letter which seeks to put distance between the first defendant and the second defendant is very recent. The claimants have through no fault of their own been unable to probe it. I was told today that the defendant suffers ill-health, which I do not belittle, but there is no medical evidence before me.

Just and convenient

28 Ms Banton's main point today is that the delay in bringing the application was sufficient to deprive the claimants of the benefits of urgent relief. While delay may often militate against the grant of urgent relief, it does not do so in all cases. The claimants sent pre-action letters to the defendants on 7 July 2021. The parties then engaged in correspondence, seeking to agree appropriate undertakings. The first defendant initially appeared to wish to give undertakings but withdrew agreement on 9 August 2021. The claimants issued the application eight working days later. Mr Croxford has told me, and I accept, that the application has been made now because the covenants will only take effect on the termination of employment which has not yet arisen.

29 In my judgment, there has been some element of delay in the context of seeking formal relief from the court, but this has been adequately explained. I do not regard the delay as so culpable that I should deny relief. The claimants were seeking to avoid a duty judge appointment in vacation by offering to accept undertakings which have now, in very great part, been accepted as appropriate by the defendants. Had the matter been brought on earlier, there is no reason to suppose either that the first defendant would have displayed more flexibility or that the application of the *American Cyanamid* principles would have been different.

30 For these reasons I have concluded that it is just and convenient to grant the relief set out in clauses (d) and (e). The first defendant has offered to give undertakings in relation to the balance of the relief sought. I will accept his undertakings provided that he is aware, and I am confident that he will have been advised, that undertakings have the same force as an order. I will accept undertakings from the second defendant and ask counsel to amend the draft order accordingly for my approval.

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**CERTIFICATE**

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