OUTER HOUSE, COURT OF SESSION

[2023] CSOH 22

CA27/22

OPINION OF LORD CLARK

In the cause

(FIRST) PURSUIT MARKETING LIMITED, and (SECOND) YOUR SHORTLIST LIMITED

Pursuer

against

(FIRST) KYLE THOMSON, (SECOND) LAURA LOCHHEAD and (THIRD) MICHELLE HODGE

Defender

Pursuers: Bowen KC, Brown; Campbell Smith LLP (for Bellwether Green, Solicitors)
First defender: Whyte; Balfour + Manson LLP
Second defender: Bradley; Urquharts, solicitors (for Livingston Brown, Solicitors)
Third defender: Kennedy; Drummond Miller LLP (for EMC, Solicitors)

21 March 2023

Introduction

[1] The pursuers are two companies involved in the information technology industry. They are subsidiaries within a group of companies. Employees of the first pursuer were, it is averred, given access to the electronic information and databases maintained for each of the subsidiaries, including the second pursuer. Initially, this action was raised against six defenders. The first to fifth defenders were former employees of the first pursuer, who went to work for a competitor company (the sixth defender). The pursuers raised this action seeking various remedies against all of the defenders including interim interdicts, which

were granted. In due course, the pursuers and the fourth, fifth and sixth defenders reached agreements to settle the action. The pursuers' case continues against the first, second and third defenders.

Background

[2] The contract of employment for the first pursuer's employees contains terms which can be characterised as a restrictive covenant. For a period of six months after termination of their employment, employees are obliged not to work for, or be involved with, a competitor; not to canvass or solicit orders for goods or services from customers of the pursuers; and not to entice or solicit away any employee of the first pursuer. The six-month period has now expired and the interim interdicts granted on these terms are at an end.

[3] The contract includes further clauses, which remain live. Clause 20.1 requires the employees, during or after employment, not to use or disclose any confidential information about the business or affairs of the first pursuer or any of its business contacts or about any other matter the employee becomes aware of in the course of employment. Confidential information for the purposes of clause 20 means any information or matter which is not in the public domain and which relates to the affairs of the company or any of its business contacts. Clause 27 prohibits the disclosure, again during or after employment, of any information of a confidential nature relating to the employer, its customers or suppliers or any third party which may have been obtained in the course of employment. Clause 27 also requires the employee not to remove any documents or tangible items that belong to the employer or which contain any confidential information, on termination of employment to return all such documents and tangible items, and, if requested, to delete all confidential information and destroy other documents and tangible information.

[4] The conclusions in the summons set out orders sought by the pursuers in respect of these clauses and a claim for payment of damages to the second pursuer in the sum of £825,000, for which the defenders are said to be jointly and severally liable. The defenders sought a diet of debate to challenge the relevancy and specification of the pursuers' case. At the beginning of the debate hearing, senior counsel for the pursuers moved to abandon the claim for damages. That motion was granted. Counsel for the first, second and third defenders then sought dismissal of the pursuers' action on the remaining matters.

Orders sought by the pursuers

[5] The pursuers seek interdict preventing disclosure of confidential information by the remaining three defenders (conclusion 6). Orders are also sought against the first and second defenders, but not the third defender, for the return of documents and information (conclusion 7) and for the deletion of any copies (conclusion 8).

Case against the first defender

Submissions for the first defender

[6] The pursuers admitted that there was no contract, or other commercial arrangement, between the second pursuer and the first defender. It was not clear how any obligations of confidentiality could exist in relation to the second pursuer. There were no averments of duties or obligations owed by the first defender to the second pursuer arising out of his employment with the first pursuer or following it. It was also for the second pursuer to identify, with reasonable precision, the range of information that the pursuer seeks to protect and articulate why that information is said to be of a confidential character worthy of

the law's protection, and to identify how the information was misappropriated and/or misused. That was not done.

[7] There was nothing averred that could possibly justify the court finding any reasonable apprehension of future harm by the first defender to the pursuers. The pursuers' averments were vague as to what files are said to have been copied, and which would be affected by the order. The only mention in the summons is of files accessed and copied on the first defender's last day of employment, although presumably he accessed others throughout his employment. The pursuers' averments as to copying these files suffered from fatal flaws. The expert report relied on by the pursuers was from a generalist IT firm, which counsel was told had pre-existing links with the pursuers. One would have expected a proper forensic IT consultant to give form and substance to what was said. There was no specification as to what credentials the expert is said to have and he merely responded to a series of questions posed by the pursuers.

Submissions for the pursuers

[8] The context was that a number of former employees of the first pursuer moved to work for a competitor, which was launching a business service almost identical to that of the second pursuer. The pleadings set out the nature of the second pursuer's business and in particular its unique character. The averments referred to precisely the sort of confidential information the pursuers are entitled to get protection for, by the court. The first defender's contract of employment covers use and misuse of such information. The dates and times when the first defender previewed confidential documents are averred and it was incorrect to say these were previewed as part of the employment when they were all previewed at the same minute in time. There was expert evidence that it is reasonable to conclude that the

files were copied to another destination, however it could not be determined from the information available where the files were copied to. The submission for the first defender that the pursuers do not specify a case on misappropriation or misuse was erroneous. The pursuers aver that this information was copied and the first defender then went to work for the sixth defender, and thereby misused that confidential information.

Case against the second defender

Submissions for the second defender

[9] The only possible relevant averments of fact in relation to conclusion 6 were allegations of accessing and copying an information sheet regarding Sage, said to be one of the second pursuer's partners. The pursuers' position is that the document was "previewed" and the pursuers agreed that this suggests that it was neither printed nor retained by the second defender. There is no averment that the second defender has used or disclosed any information which is confidential to either pursuer, nor that the document previewed was confidential to either pursuer. The second defender's call (to produce the document itself and aver its commercial value) was unanswered. In any event, the second pursuer was not her employer. Neither of the contractual terms relied upon provides protection for any confidential information belonging to the second pursuer. On conclusion 7, the pursuers have no relevant averment that the second defender copied any document or file from the IT systems on which she worked while employed by the first pursuer. The Sage sheet, on the pursuers' pleadings, is not confidential information. The same point applies to conclusion 8.

Submissions for the pursuers

[10] The second defender had access to confidential information she was privy to in the course of her employment. It is averred that, on the last day she worked for the first pursuer, she accessed and copied the information sheet regarding Sage, one of the second pursuer's partners. The pursuers offered to prove that this is confidential information. She had no involvement in the delivery of services to Sage and had no legitimate reason, or permission, for accessing that information sheet. Reliance was again placed upon the expert report. As she had no reason to preview the information the inference is that it was copied to an external device.

Case against the third defender

Submissions for the third defender

[11] There was no proper basis for the pursuers to infer either that the third defender has used or disclosed information confidential to the second pursuer, or that the third defender knew or should have known that the information was confidential. The pursuers did not aver what confidential information the third defender is said to have specifically used or why it was commercially sensitive information. The third defender was only a junior team member with modest earnings and limited decision-making authority. She did not have a substantial personal connection with relevant clients or knowledge of strategic information. She was never exposed to company secrets, nor privy to confidential or commercially sensitive information or data. There is no evidence of the third defender ever having accessed the Group IT System and copying or removing any of the suggested information or data.

[12] In any event, enforcement of the terms of the third defender's contract would be unreasonable, unnecessary and disproportionate. The terms were too wide in scope and duration and could not be said to be reasonably necessary in order to protect the pursuers' legitimate interests. The covenant in restraint of trade is unlawful and therefore unenforceable. The protection sought against the third defender is an unreasonable restriction on trade which is anti-competitive and thus contrary to public policy.

Submissions for the pursuers

[13] The third defender was one of a number of the employees of the first pursuer who went to work for a competitor and had commercially sensitive information regarding the second pursuer's business model. The factual matrix was sufficient for the purposes of the averment by the pursuers as to their apprehension that the third defender will misuse confidential information. The only reasonable inference was that the third defender will use information to assist the sixth defender in setting up a competing business.

Decision and reasons

General observations

[14] Confidential information can be the subject of either express contractual terms, implied terms, or, in England, an equitable obligation. While express contractual terms may seek to identify or define the confidential information, the same approach to the legal meaning of confidential information falls to be applied in all cases. Thus, where there is, as here, a definition of what is confidential information (clause 20.1), that adds nothing to the legal meaning of confidential information and such a clause cannot be used to make

something confidential when it is not, for example when it is part of the employee's skill and general knowledge, rather than information that should be subject to protection.

[15] That approach is well-established and I need not discuss the authorities in any detail. As is explained by Megarry J in the frequently cited and approved decision in *Coco* v *A N Clark (Engineers) Ltd* 1969 RPC 41, at 47, the information must firstly have the necessary quality of confidence. That is sometimes described as involving "trade secrets" and information of equivalent confidentiality to trade secrets, which are subject to an implied duty of confidence that continues after termination of employment: *Faccenda Chicken Ltd.* v *Fowler* [1987] Ch 117. At first blush, "trade secrets" may be taken to connote sophisticated and highly important matters. But the necessary quality of confidence can apply to information that is not common or public knowledge, not published, and not obvious, trivial or useless.

[16] The second point made by Megarry J is that the information must have been imparted in circumstances importing an obligation of confidence**.** In other words, the person receiving it, viewed objectively, should have appreciated that the information was given for a limited purpose and is confidential. It is also very important that the confidential information relied upon is identified, by stating what is said to be confidential. There are two main reasons for this requirement to state what the confidential information is: firstly, that if an interdict or order is being sought and it is of uncertain scope that can affect its enforceability; and, secondly, it can also leave the defenders in doubt as to precisely what is required of them. The issue of whether or not it is confidential can require evidence to be led.

[17] Conclusion 6 does not focus on copied material. Rather, it seeks interdict prohibiting the defenders from using or disclosing to any third party any information which is in their

knowledge or possession, which was obtained in the course of their employment with the first pursuer, and which is confidential to the first pursuer and the second pursuer and, "without prejudice to the foregoing generality" twelve types of allegedly confidential information not to be used or disclosed are stated.

[18] Clauses 20.1 and 27 apply both during and after employment and so there is, at this time, an extant duty not to use or disclose. No doubt if the pursuers were offering to prove, on a relevant basis, that there had been actual use and disclosure of confidential information that would strengthen their position on conclusion 6. But it is not necessary, in order for the claim on conclusion 6 to be relevant, for it to be established that actual use and disclosure has occurred or for there to be averments that it will necessarily occur. It will suffice if there is a real apprehension that it will occur, in other words a good reason for considering there to be a real likelihood of such use or disclosure, or a threat of such use, to the detriment of the pursuers.

[19] Conclusions 7 and 8 focus upon the information that is said to have been copied and rely upon the first and second defenders having possession of that information, said to be confidential, which they are obliged to return or delete.

The first and second defenders

[20] The pursuer's averments against the first defender list the areas of commercially sensitive information that he is said to have become aware of in the course of his employment, as Business Development Manager. It is also averred that on the last day of the first defender's employment with the first pursuer he "accessed and copied" from the Group IT System thirteen pieces or areas of information and data referring to the second

pursuer's business. He is also said to have tried to log in to the Group IT System the day after his employment ended with the first pursuer.

[21] The pursuers aver that the second defender was, for a period, the Client Account Manager and worked on the second pursuer's business. The areas of commercially sensitive information which she became aware of while working are listed. It is averred that the second defender accessed the Group IT System on the last day of her employment and copied an information sheet regarding Sage. The second defender is said by the pursuers to have had no involvement in the delivery of services to Sage and had no legitimate reason for accessing that information sheet or any permission to copy it.

[22] The averments state that the pursuers are apprehensive that the first and second defenders have used, and disclosed to the sixth defender, the commercially sensitive information they acquired while working for the first pursuer and are also apprehensive that they have disclosed to the sixth defender the information and data copied from the Group IT System.

[23] The fact that there is no contract, or other commercial arrangement, between the second pursuer and the first or second defenders does not preclude breaches of clauses 20.1 and 27. These clauses refer to confidential information about any of the first pursuer's business contacts or relating to the first pursuer, its customers or suppliers, or any third party. The pursuers aver that all staff are assigned to work on the business of the subsidiaries and are given access to the electronic information and databases which are maintained for each of the subsidiaries on the Group IT System.

[24] As noted, twelve types of what are said to be confidential information are identified in conclusion 6. The seven categories of "commercially sensitive information" to which the first defender had access, and the nine to which the second defender had access, are also

listed. It is expressly averred against the first and second defenders that the commercially sensitive information referred to and the information said to have been copied falls within clauses 20.1 and 27 and therefore is confidential information. Ascertaining whether or not this information is confidential will require assessment of all the evidence relating to matters such as the nature of the employment, the character of the information, whether it is already within the public domain and what harm, if any, is likely to be caused by its use and disclosure. These identified types of information are potentially capable of being established at a proof as being confidential. However, the reference in conclusion 6 to "without prejudice to the foregoing generality" shows that the order is being sought in respect also of unidentified confidential information. That part of the order is too widely expressed and the order can only be granted in respect of the specific types of information listed in conclusion 6.

[25] Counsel for the first defender referred to *Lux Traffic Controls* v *Healey* 1994 SLT 1153, in which Lord Abernethy (at p 1156) made reference to *Faccenda Chicken Ltd.* v *Fowler* about what amounts to confidential information. However, after the passage in the latter case to which counsel referred, it is made clear that in order to determine whether any particular item of information falls within (in that case) the implied term, it is necessary to consider all the circumstances of the case. That is the position here and it will be done at the proof. While a simple and inspecific assertion of confidentiality may well fail, in the present case the pursuers give sufficient support in their pleadings for the contention that information made available to the first and second defenders and copied by them is confidential.

[26] Whether or not, for the purposes of conclusion 6, there is a real apprehension of use or disclosure will hinge on the matter of whether the information averred as having been copied was indeed copied. It is possible that the pursuers will be able to establish, albeit by

inference, that the first and second defenders did copy the information and must have intended to use or disclose that information, there being no other purpose for copying it. If there is evidence of copying certain confidential information there may, on the whole evidence yet to be heard, be a sufficient basis for the interdict in terms of conclusion 6 preventing use and disclosure of confidential information of the kind listed in the conclusion.

[27] In relation to the information alleged to have been misappropriated and misused, the averments are about the first and second defenders having "accessed and copied" certain information. The orders sought in conclusions 7 and 8 relate only to the information that was allegedly copied. It is correct that the pursuers' expert advice refers to the documents accessed by the first and second defenders being "previewed", but the averments proceed upon the basis that it can be inferred that these were copied to another device. As noted, in the pleadings this is alleged to be confidential information. I do not accept that the court will be unable to find any reasonable apprehension of future harm by the first and second defenders to the pursuers, that decision being largely dependent upon what is proved about the conduct averred. The fact that copied information (if copying is proved to have occurred) has not actually been used or disclosed will no doubt be relevant to consideration at proof as to whether there remains a real apprehension of use or disclosure. The criticisms of the expert evidence can also only properly be dealt with at the proof.

[28] However, I reach a different conclusion on the relevancy of the pursuers' averments that they are apprehensive that the first and second defenders have actually used, and disclosed to the sixth defender, the commercially sensitive information which they acquired. In a case such as the present, it is common to have averments about an apprehension of disclosure at the outset when seeking interim interdict. The present case has gone on for a

substantial period of time. When one reaches the stage arrived it in this case, and there is no averment and no suggested evidential basis of there actually having been use or disclosure, no relevant case on the first or second defenders having actually used and disclosed the information to the sixth defender is made out. While the copying of previewed information, and its retention, can potentially be inferred, an inference of use or disclosure having actually occurred based on the averments here cannot reasonably be drawn.

[29] As the pursuers' case now founds upon contractual terms in the employment contracts with the first pursuer and the case for damages for loss caused to the second pursuer has been abandoned, it is unclear why the second pursuer has any continuing ground of action. It is difficult to discern any such ground from the pleadings (which also have a number of typographical errors referring to the second pursuer as the second defender). However, I was not addressed on this matter.

[30] Counsel for the first defender argued that the reference in the pursuers' pleadings to it being "believed and averred" that the sixth defenders had used confidential information given by the first and second defenders was irrelevant. In light of the conclusion reached on relevancy of the pursuers' case on actual use and disclosure it is not necessary to consider this point. Counsel for the first defender also referred to the first defender's averment, in relation to copying, that the only device he used on the day in question was his company laptop and that was returned the day after. This was met with a general denial by the pursuers. Counsel argued that this was a matter plainly within the pursuers' knowledge and so the general denial was ineffective and the point must be taken to be admitted. I do not accept that submission. It seems clear, given the inferences relied upon, that the pursuers cannot accept that the first defender had only one device and had no other means of copying available to him.

[31] For the reasons given, the pursuers have a relevant case for the orders sought in conclusions 6, 7 and 8 in relation to the first and second defenders, but conclusion 6 is not enforceable in respect of confidential information that is not listed in that conclusion.

The third defender

[32] The case against the third defender differs from that against the first and second defenders. It is not said that she accessed the Group IT System or previewed and copied any specific information or data. No case is made against the third defender for the return or deletion of specific information (conclusions 7 and 8 are not directed against this defender). While it is averred that she had access to certain commercially sensitive information, there is no more than an apprehension that she had actually used and disclosed such information. Absent any averments about copying, there is no sufficient basis averred upon which any inference of actual or likely breach of the contractual obligations can be drawn. The pursuers' case against the third defender is irrelevant.

[33] It is not necessary to consider the further point made on behalf of the third defender that enforcement of the terms of the third defender's contract would be unreasonable, unnecessary and disproportionate. In any event, these matters could not be determined merely on the basis of the averments. More fundamentally, it is difficult to see how these rigorous tests for enforcement of a restrictive covenant could have any bearing on the matters arising from conclusions 6, 7 and 8.

Conclusions

[34] For the reasons given, those parts of the pursuers' case against the first and second defenders founded upon alleged removal of specific information, and the duties to return

and delete it, are not bound to fail. That is principally because there are averments of accessing and copying previewed information which could be proved to be confidential. There is also a relevant case that such copying can provide a basis for interdict against use or disclosure of other identified confidential information, as a threatened breach. But the case based upon use or disclosure having actually occurred cannot succeed. Whether the averred position against the first and second defenders provides sufficient support to obtain the orders sought remains to be determined at the proof. In contrast, the case against the third defender has no sufficient foundation.

Disposal

[35] I shall sustain the first pleas-in-law for the first and second defenders, to the extent of excluding from probation the pursuers' averments that these defenders used and disclosed information to the sixth defender. I shall repel the pursuers' pleas-in-law insofar as they relate to the third defender and I shall sustain, in part, the third defender's first plea-in-law and dismiss the action against her. All questions of expenses are reserved.