OUTER HOUSE, COURT OF SESSION

[2021] CSOH 40

CA26/21

OPINION OF LADY WOLFFE

In the cause

APEX RESOURCES LIMITED

Pursuer

against

ROSS MACDOUGALL

First Defender

LISA MULHOLLAND

Second Defender

JENNA HILL or SEAGRIFF

Third Defender

CAVAL LIMITED

Fourth Defender

Pursuer: O'Brien QC, Tosh; Russel + Aitken Edinburgh LLP on behalf of Miller Samuel Hill Brown LLP
First to Third Defenders: Tyre; MacRoberts LLP
Fourth Defender: Webster QC; Anderson Strathern LLP

9 April 2021

Background

Introduction

[1] The pursuer and the fourth defender ("Caval") are both recruitment consultants specialising in matching individuals looking for work within the construction sector with employers looking to fill vacancies in that. The first to third defenders are former employees of the pursuer, having given up their respective employments with it in late December 2020 (the first defender) or in January 2021 (the second and third defenders). (I shall refer to the first to third defenders collectively as "the former employees".) Not long after that, the former employees all joined Caval, which, though it was an established recruitment agency elsewhere in the UK, had (on the pursuer's narrative) established itself in Glasgow only in January 2021. The former employees each signed employment contracts with the pursuer ("the contracts"). Each of those contracts contained a number of restrictive covenants precluding them *inter alia* from competing with the pursuer or from soliciting clients of the pursuer for a specified period of time in a specified geographical area (the UK).

The interim interdicts

Interdicts against the former employees (first to third conclusions)

[2] This matter called before the Court on 5 March 2021 on the pursuer's *ex parte* motion for *interim* interdict against the former employees from breaching their restrictive covenants and also for interdict *ad interim* in terms of its fourth conclusion against all of the defenders, including Caval, from breach of confidence. Mr Tosh appeared on that occasion ("the first hearing"). After Mr Tosh's very full and careful submissions, made under reference to the relevant productions, including Caval's reply to the pursuer's pre-action letter advancing reasons why the pursuer's case was said to be ill-founded, and the relevant authorities, I

granted *interim* interdict against each of the defenders. In respect of each of the former employees the interim interdicts were in identical terms, apart from the date to which the interdict would run, reflecting their different dates of departures from the employment of the pursuer. I therefore need quote only one of the *interim* interdicts granted against the former employees. The interdict against the first defender was in the following terms:

> "1. interdicts the first defender,
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> (i) in competition with the pursuer and/or so as to harm or interfere with the goodwill of the pursuer, until 27 June 2021, directly or indirectly, whether on his own account or in conjunction with or on behalf of any person, firm, company, business entity or other organisation (a) being employed or engaged in, or (b) performing or providing services to or in respect of, or (c) otherwise being concerned with, or (d) having any interest in any business or activity carried on by the pursuer on 27 December 2020 in which the first defender was directly concerned at any time in the period from 27 December 2019 until 27 December 2020 (the '**Relevant Period**') in competition with the pursuer in the United Kingdom, whether as principal, agent, director, partner, proprietor, employee, consultant or otherwise;
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> (ii) in competition with the pursuer and/or so as to harm or interfere with the goodwill of the pursuer, until 27 June 2021, directly or indirectly, whether on his own account or in conjunction with or on behalf of any person, firm, company, business entity or other organisation and whether as principal or otherwise:
>
> (a) canvassing, soliciting or assisting in canvassing or soliciting business from, or dealing or doing business with, any person, firm, company or other organisation whatsoever who was at any time in the Relevant Period a client of the pursuer (a '**Restricted Person**') (i) with whom the first defender had any material dealings in the course of his employment with the pursuer in the Relevant Period or (ii) for whom the first defender was, in a client management capacity on behalf of the pursuer, directly responsible in the Relevant Period;
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> (b) canvassing, soliciting, assisting in canvassing or soliciting business from, or dealing or doing business with, any person, firm, or company who was on 27 December 2020 negotiating or in material discussions with the pursuer with a view to dealing with the pursuer as a client (a '**Restricted Contact**');

(c) canvassing, soliciting, assisting in canvassing or soliciting, or dealing with, any person in respect of whom the pursuer is in possession of personal information for the purposes of its business of advising on or advancing that person's career (i) with whom the first defender had material dealings in the course of his employment with the pursuer in the Relevant Period, or (ii) with whom the first defender was, in a client management capacity on behalf of the pursuer, directly responsible in the period from in the Relevant Period; and

(iii) until 27 June 2021, directly or indirectly, whether on his own account or in conjunction with or on behalf of any person, firm, company, business entity or other organization and whether as principal or otherwise inducing, seeking to induce, soliciting, enticing, or procuring any person who was employed by the pursuer on 27 December 2020 with whom the first defender had material contact or dealings in the course of his employment with the pursuer in the Relevant Period and who either (a) had material contact or dealings with any Restricted Person or Restricted Contact in the course of his duties of employment with the pursuer or (b) who is likely to come into possession of confidential information in performing his duties of employment with the pursuer or any Associated Company, to leave the pursuer's employment, whether or not that would be a breach of contract of the part of the said employee".

The date of expiry of the *interim* interdicts against the second and third defenders were, respectively, 4 July and 23 July 2021, being six months from the date each left the pursuer's employment.

[3] Each of the terms capitalised in the *interim* interdicts are defined terms in the contracts. It is not necessary for present purposes to set out those detailed and inter-linked definitions, although I was taken through these are first hearing.

Interdict against all of the defenders (the fourth conclusion)

[4] The *interim* interdict granted against all of the defenders, concerning confidential information, was in the following terms:

"4. interdicts the defenders from using or disclosing to any third party any information which is in their knowledge or possession, which was obtained by the first, second and third defenders in the course of their employment with the

pursuer, and which is confidential to the pursuer and, without prejudice to the foregoing generality:

(i) Any such information regarding persons seeking employment with the assistance of the pursuer;

(ii) Any such information regarding positions, vacancies, or recruitment requirements of any client of the pursuer;

(iii) Any such information regarding the pursuer's staff, especially salary and personal details;

(iv) Any such information other than that available to the public, regarding the financial and operational performance of the pursuer;

(v) Any such marketing and sales information of the pursuer;

(vi) Any such information concerning the business plans or dealings of the pursuer;

(vii) Any such historical or current information given to the pursuer in confidence by any client of the pursuer; and

(viii) Any such information contained in any document marked 'Confidential' (or with a similar expression)."

The recall hearing

[5] The defenders' motions for recall, due originally to call before me on 29 March, were heard on the afternoon of 2 April. On that occasion, the pursuer was represented by Mr O'Brien QC, as well as Mr Tosh, who appeared on his own at the first hearing on 5 March 2021. Ms Tyre represented the former employers and Mr Webster QC appeared on behalf of Caval. In advance of the recall hearing all parties produced written submissions (in the form of Notes of Argument or speaking notes) together with some authorities. I have had regard to these materials and do not propose to repeat them.

The motions moved and the undertakings provided at the recall hearing

The pursuer's amendment

[6] As is common in cases such as these, there was some refinement of the motions made by the time of the recall hearing. The pursuer moved (i) to amend its conclusions directed against the former employees relating to the "restricted Contracts" (a defined term in the contracts), which had inadvertently omitted the proviso regarding material dealings contained in the relevant covenants ("the amended conclusions) and (ii) to delete article 24 of condescendence. The defenders did not oppose that motion.

The former employees' undertakings for all but the non-compete conclusion

[7] The former employees thereafter offered undertakings in terms of the conclusions, as amended ("the undertakings"), other than in respect of sub-paragraph (i) of the first, second and third conclusions (the "non-compete" interdict or "non-compete clause", as the context requires). The former employees each undertook not to act in the manner set out in parts (ii) and (iii) of the specific conclusion directed against him or her, or in the manner set out in the fourth conclusion insofar as directed against that individual. (The references in those undertakings to the first, second and third conclusions were references to those conclusions as prospectively amended in terms of a minute of amendment which had been tendered on behalf of the pursuer.) The pursuer accepted the undertakings.

The breach of confidence interim interdict against Caval not insisted in

[8] In the course of submissions, Mr O'Brien indicated that the pursuer no longer insisted on its fourth conclusion insofar as directed against Caval. Accordingly, the only

disputed matter to resolve at the recall hearing was whether the non-compete interdict against each of the employee defenders should be recalled.

Focus of recall hearing on the non-compete interim interdict

[9] Given the foregoing, the focus of Ms Tyre's submissions was to seek recall of the non-compete interim interdict.

Discussion

The challenge to the non-compete clause and the non-compete interim interdicts

[10] The former employees challenge the non-complete clause as unenforceable and, separately, they challenge the width and scope of the non-compete *interim* interdict. They challenge the latter on the footing that the non-compete interdict is so wide that each of the defenders could easily fall foul of the restrictions through error, mistake or ignorance and certainly without any intention of doing so. As a consequence of the non-compete interdict they are unable to be employed at all in their sphere of work, in the United Kingdom, in any capacity with Caval (or any other similar business), until the *interim* interdicts against each of them expires (on 27 June, 4 July and 23 July 2021 respectively).

[11] In developing her submission, Ms Tyre argued that the effect of the non-compete interdict was that the employee defenders would be unable to accept employment in any "other recruitment consultancy or business or organisation or firm" for a period of six months after they ceased their employment with the pursuer. She acknowledged that, arguably, the former employees should not have accepted employment with a competitor, Caval, but that the former employees are now not able to work in their current roles given the width of the latter part of *interim* interdict, without the risk that there may be, by

accident, some form of unknown cross-over between work carried out by both the pursuer and Caval. Similarly, she criticised the non-compete clause (and the interdict) because it extended throughout the UK, it endured for six months and it encompassed "any business or activity carried out by the pursuer". In her submission, the non-compete clause (and interdict) placed severe restrictions on the former employees' employment opportunities. While restrictive covenants were permissible to protect legitimate business interests of a company or employer, they were not designed to make employees unemployable or to take away their livelihoods.

The test to be considered

[12] Ms Tyre founded strongly on the case of *Quilter* v *Falconer &Continuum* 2020] EWHC 3294 ("*Quilter*") (especially paras 161 to 164, and paras 171 to 180), a decision of Mr Justice Calver, in which the restrictive covenants in that case were held to be unenforceable and wider than was reasonably necessary. In that case, Mr Calver set out three questions (derived from *TFS Derivatives Ltd* v *Morgan* [2005] IRLR 246 at paragraphs 36 to 8 and *Office Angels Ltd* v *Rainer Thomas & O'Connor* [1991] IRLR 214 at paragraphs 21 to 25) at paragraphs 162 to 163, namely:

> "(1) Have the former employers (Quilter) shown on the evidence that they have legitimate business interests requiring protection in relation to the employee's employment?
>
> (2) What does the covenant mean when properly construed?
>
> (3) The covenant must be shown by the employer to be no wider than is reasonably necessary for the protection of his legitimate business interests. Reasonable necessity is to be assumed 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. The covenantee must show that the covenant is both reasonable in the interests of

> the contracting parties and reasonable in the interests of the public. As Lord Parker stressed in *Herbert Morris Ltd v Saxelby (supra)* at p.707, for any covenant in restraint of trade to be treated as reasonable in the interests of the parties 'it must afford no more than adequate protection to the benefit of the party in whose favour it is imposed'.
>
> 163. Even if the covenant is held to be reasonable, the court will then decide whether, as a matter of discretion, the injunctive relief sought should in all the circumstances be granted, having regard, amongst other things, to its reasonableness as at the time of trial."

The first and second questions

[13] In relation to the three questions to be posed, Ms Tyre accepted, in my view rightly, that the pursuer had a legitimate interest to protect, although she was sceptical about the need to protect client relationships. (I discuss this below). There was no real dispute among the parties as to the interpretation of the non-compete clause. On a proper construction, it only prohibited each former employee from (reading short) being employed in:

(i) any business or activity which was (a) carried on by the pursuer on the date of termination of their employment and (b) in which he or she was directly concerned at any time in the period of 12 months before that date;

(ii) in which they would be operating in competition with the pursuer and/or so as to harm or interfere with the pursuer's goodwill;

(iii) in the United Kingdom;

(iv) for a period of 6 months after termination of employment.

The pursuer's business was and is the supply of construction and industrial workers and the former employees were all directly concerned in that business during their employment with the pursuer. Accordingly, the effect of the non-compete clause was directed towards the former employee's employment in a business or activity involving the supply of

construction or industrial workers. Mr O'Brien submits that this is a perfectly reasonable result when the pursuer and Caval operate within the same "very competitive" market.

The third question

[14] Where parties joined issue was on whether the non-compete was too wide (as the former employees contend) or whether it was no wider than reasonably necessary for the protection of the pursuer's legitimate business interests.

The pursuer's legitimate business interests

[15] The pursuer's averments on the legitimate interests it seeks to protect are found in articles 13 and 14 which, so far as material provide:

> "13. […] The pursuer can only perform those services if it has strong relationships with both its employer clients and its candidates. The relationships that the pursuer builds with its employer clients and its candidates are its only source of income. Those relationships have substantial value. Those relationships are built by the pursuer acting through its recruitment consultants. The pursuer's recruitment consultants are assigned to manage the pursuer's relationships with particular employers and candidates. The success of the pursuer's business depends on the strength and continuity of its relationships with its clients and candidates. <u>The strength and continuity of those relationships are vulnerable when recruitment consultants leave the pursuer's business. The pursuer relies on the integrity and stability of its workforce. It also depends on the details of its clients and the other confidential information it holds remaining confidential.</u> Confidentiality allows the pursuer to preserve its client relationships by not exposing them to approaches by the pursuer's competitors, particularly when those relationships are vulnerable. The pursuer's business is particularly vulnerable to its competitors because it is a conduit between employers and candidates. The pursuer's competitors can readily step and connect the same employers with the same candidates if the pursuer's confidential information is disclosed to third parties." (Emphasis added.)
>
> 14. The six month period of post-termination restrictions are reasonable. That period is necessary to enable the pursuer to transition the management of its relationships with its employer clients and its candidates to new or recruitment consultants with its business. It also protects the pursuer against

> a former employee seeking to capitalise on the personality he or she has brought to the pursuer's relationships with its employer clients and its candidates to divert income and business opportunities away from the pursuer's business. It is a standard component of employment contracts in the recruitment industry."

I have highlighted the passage Ms Tyre criticised. I consider this issue further, but first note the former employees' reliance on the facts and outcome of *Quilter*.

The former employees' reliance on Quilter

[16] Ms Tyre founded strongly on *Quilter*. The pursuer did not suggest that *Quilter* was wrongly decided. Indeed, it provides a recent, full and careful exposition of the law in this area and of the test to be applied in the consideration of the enforceability of non-compete and similar restrictive covenants. I propose to adopt and apply the approach set out by Calver J in that case, and the three questions he identifies to determine the lawfulness or enforceability of restrictive covenants used by employers. The principal issue in that case, as in this, is the third question: whether the clause in question is no wider than is reasonably necessary for the protection of the employer's legitimate business interests.

[17] It is a truism that each case will turn on its own facts and circumstances and I am bound to observe that the terms of the restrictive covenant in that case, and the factual context, are very different from those in the present case. Moreover, the question of whether a particular restrictive covenant is reasonably necessary for the protection of the employer's legitimate business interests is likely to be highly sensitive to the context or field of employment to which it is applied, as well as to the case the employer makes in respect of the legitimate interest it seeks to protect. Different considerations may apply in industries where establishing a client relationship requires compliance with detailed or onerous regulatory requirements (e.g. as in financial services and the obligations to confirm the

identity and source of funds of a new client), and where, as a consequence, once established, those same regulations create a certain friction or inertia for an existing customer to overcome in order to leave, if it is obliged to repeat those procedures with a new service provider. Clients of businesses which operate in areas without such regulations or similar formalities, may more readily leave one service provider for another. These, and other context-specific considerations, may be important factors informing the assessment of the reasonableness or otherwise of the scope and duration of a restrictive covenant. So, too, will be nature of the business interest the employer seeks to protect. Accordingly, an identically worded clause might be demonstrated to be reasonably necessary in one context, but not in another.

[18] Turning to the facts in *Quilter*, the duration of the restrictive covenant was, at nine months, materially longer than the six months' duration of the non-compete clause at issue here. This nine-month period is referred to in no fewer than five of the fourteen factors that the court in *Quilter* identified in determining that the clause in that case was objectionable. I also note that the case concerned a very different employment sector, namely financial services. By contrast with the process required to be followed to take on a new client in the financial services industry, there is a far greater ease of movement by clients from one recruitment agency to another in the industry in which the pursuer operates. Furthermore, one of the factors that the court in *Quilter* found objectionable was that the non-compete clause also precluded the former employee from doing any business with *new* clients of her new employer. That is not the case with the several restrictive covenants here: by reason of the defined terms (albeit not all of these feature in the non-compete clause), the restrictions on each of the former employees is specific to the particular clients they had as the pursuer's consultants (the stipulation in the non-compete clause is that the individual defender was

"directly concerned" in a specified period). I also accept Mr O'Brien's submission that, by reason of the use of mandates issued by departing clients in fields such as the financial services sector or law or accountancy, possible breaches of restrictive covenants may more readily come to the notice of a former employer in those sectors than in the field in which the pursuer operates (ie for which mandates are not used by the successor employer to recover files from the former employer). Accordingly, while that was a factor which led the court in *Quilter* to conclude that a non-compete clause was not necessary or could not be justified on the basis that a non-solicit clause would otherwise be impossible to police, that is not the case here, for the reasons noted. In the present case, the pursuer has sufficient averments to advance a case that a non-compete clause may be regarded as reasonably necessary, notwithstanding the existence of the non-solicit covenant (now embodied in the undertakings).

[19] Furthermore, the court in that case was considering the issue of enforceability after proof and, indeed, the court found that the only justification established in the evidence that the non-compete clause was necessary was that it was difficult to police post-termination obligations of confidentiality. By contrast, at this stage the pursuer's averments are accepted as *pro veritate*.

[20] For these reasons, the case of *Quilter* is distinguishable on its facts from the present case. Cogently reasoned though it is, and no doubt correctly decided on its facts, it does not dictate the outcome of the former employees' motion for recall.

Consideration of the non-compete clause and the third question

[21] Furthermore, in my view, Ms Tyre overstates the effect of the non-compete clause as rendering the former employees "unemployable'. The non-compete clause does not have

this effect. Rather, it is confined to the specific sector of recruitment (in the construction field) in which the pursuer is a specialist provider. Moreover, the non-compete clause operates in a bespoke (not blanket) fashion in respect of each of the former employees, because it is confined to the specific periods (defined as "the Relevant Period") for which each of the three former employees was employed (the dates of the Relevant Period are different for each of the former employees); and there is the further qualification that he or she was "directly concerned" in the pursuer's business. The former employees are free to become employed or engaged in any recruitment agency other than one involving placements within the construction industry, or indeed they are free to become employed or engaged in any other field of employment.

[22] In relation to the scope and geographical reach of the restrictive covenant, it was not suggested that there was any mismatch, in the sense that the non-compete clause encompassed a wider geographical area or a broader range of activities than that in which the former employees were engaged.

[23] Finally, in my view, the pursuer has sufficient averments of a compelling and reasoned basis for the six months' duration of the non-compete clause, a duration Ms Tyre suggested was unjustified. While the former employees accepted that the pursuer has a legitimate business interest in protecting its confidential information and that of its clients and candidates (see their note of argument, para 6.3), the pursuer's position is that it also has other legitimate business interests that merit protection, namely (i) the strength and continuity of its relationships with its clients and candidates and (ii) the integrity and stability of its workforce: article 13 of condescendence. It is well-recognised that those are legitimate business interests that employers are entitled to protect: *Sundolitt Limited* v *Addison* [2017] CSIH 15 ("*Sundolitt Limited*"), paragraph 21.

[24] The pursuer's relative averments are contained in articles 13 to 16 of Condescendence, some of which are set out above (see para [14]). At the first hearing, Mr Tosh augmented these averments in his oral submissions. As he explained, in relation to the pursuer's legitimate business interests, the assets of the pursuer's business are not tangible. The whole value of the pursuer's business resides in the strong and consistent personal relationships individual employees build up over time with the pursuer's clients, whether they are prospective candidates to be placed or prospective employers accepting individuals for placement, and the confidentiality arises in respect of the details of those client contacts. These relationships were central to the pursuer's business. He contrasted this with other kinds of businesses, for example, supplying good, and in respect of which the personal relationship was secondary to the goods supplied. For these reasons, it is not a question of just transferring the clients of a departing employee to a new employee. It took time for the new employee to develop a personal relationship anew. That was the legitimate business interest the pursuer seeks to protect. I accept the force of those submissions.

[25] For all of these reasons, I determine the third question in favour of the pursuer: the pursuer has averred and presented a *prima face* case that the non-compete clause is no more than is reasonably necessary to protect its legitimate business interests.

[26] Accordingly, notwithstanding the carefully argued and full written and oral submissions on behalf of the former employees advanced at the recall hearing, I remain of the view that the pursuer has presented a *prima facie* case (in my view a strong one), that it has legitimate business interests to protect and that, on a proper construction, the post-termination obligations imposed by the contracts on the former employees go no further than is reasonably necessary to protect those legitimate business interests: *Sundolitt Limited*, paragraphs 21 to 23.

[27] Furthermore, I do not accept the submission that the terms of the interlocutor was too broad or unclear. In any event, at most Ms Tyre figured an accidental breach and a breach of that character is unlikely to be visited with any sanction for breach or contempt.

[28] If, after the determination of the three questions there is a residual discretion (as suggested in para 136 if *Quilter*), in our procedure, at this preliminary stage, that is likely to coincide with the balance of convenience, to which I now turn.

Balance of convenience

[29] To the extent that this was put in issue, I find that the balance of convenience continues to favour the pursuer. Given the timing of the grant of *interim* interdict relative to the commencement of the six-month period, which in the case of the first defender was in late December, the non-compete clause is not in fact relied on for the whole six months. At the first hearing, Mr Tosh referred to the case of *Chill Foods (Scotland) Ltd v Cool Foods Ltd* 1977 SLT 38 and Lord Maxwell's observation (at p 41) that the balance of convenience will favour the protection of an existing business as against a new one. It was explained at the first hearing that, while Caval was an existing recruitment consultant elsewhere in the UK, it only established a physical office in Scotland (in Glasgow) in January 2021. In that respect it was a new business in the jurisdiction in which the pursuer operates. Furthermore, I was advised at the first hearing that the pursuer estimated it was losing £5,000 per week since January, when the Glasgow office of Caval was opened. While the businesses the pursuer and Caval engage in may also now be conducted in part remotely or online, I nonetheless regard Lord Maxwell's observation to be apposite. I also accept that it is not enough for the defenders to say that the pursuer's remedy lay in a claim for damages, as proof of loss in such cases may be difficult to establish. For completeness, I should note that, while I was

referred to a number of email exchanges, and on which the parties offered different interpretations or explanations, those kinds of disputes are more appropriately resolved at a proof, rather than on *ex parte* submissions, and I placed no weight on those materials.

Decision

[30] For these reasons the motion for recall is refused. I reserve meantime all question of expenses.

Coda

[31] Immediately before the case called before me on 9 April to give my decision, the first and third defenders produced an affidavit from an individual who used the services of several recruitment consultants, including the pursuer. The subject-matter related to whether the first defender had had contact with him. That issue is now covered by the undertakings. The matters spoken to in the affidavit are not relevant to the non-compete clause and does not cause me to change my decision, which is to refuse the motion for recall of the non-compete order.