England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2014] EWCA Civ 29
Case No: A2/2013/0297

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
MERCANTILE COURT
His Honour Judge Havelock-Allan QC

Royal Courts of Justice
Strand, London, WC2A 2LL
29th January 2014

Before:

LORD JUSTICE RIMER
LORD JUSTICE LEWISON
and
LORD JUSTICE BRIGGS

Between:

(1) PERSONNEL HYGIENE SERVICES LIMITED **(2) MICHAEL CHRISTOPHER PRENDERGAST** **(3) ANDREW JOHN PEAKE**	**Claimants/Respondents**
- and -	
(1) RENTOKIL INITIAL UK LIMITED (t/a INITIAL MEDICAL SERVICES) **(2) INITIAL MEDICAL SERVICES**	**Defendants/Appellants**

LIMITED

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
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Official Shorthand Writers to the Court)

Mr Chris Quinn (instructed by Yvonne McCabe, of Rentokil Initial plc) for the Appellants
Mr Hugh Sims and Mr Douglas Leach (instructed by Morgan Cole LLP) for the Respondents

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HTML VERSION OF JUDGMENT

Lord Justice Rimer :

Introduction

1. This appeal, brought with the permission of Hallett LJ, is by the defendants, Rentokil Initial UK Limited (t/a Initial Medical Services) and Initial Medical Services Limited. The latter company took over the former's business in September 2008. Although both are sued, nothing turns on the takeover and I shall generally refer to the appellants as 'Initial'. The claimants/respondents are Personnel Hygiene Services Limited ('PHS'), Andrew Peake and Michael Prendergast, of whom the latter two formerly traded as UK Hygiene.

2. Initial's appeal is against two orders made by His Honour Judge Havelock-Allan QC in the Bristol Mercantile Court on 17 April 2012 and 28 January 2013. By the first order, made following an expedited trial on 4 and 5 April 2012, the judge enjoined Initial: (i) until 15 January 2013, from making use of the claimants' confidential information or documents as defined in the order with a view to obtaining orders for goods or services from customers of the claimants; and (ii) until 15 July 2012, by way of 'springboard' relief, from contacting particular customers identified in the Schedules to the order for the supply to them of services they had received, or were receiving, under contracts with the claimants.

3. The judge had not, at the date of that order, delivered his judgment giving his reasons for making it. Paragraph 7 of the order adjourned until after its delivery issues as to costs and other matters. The judge delivered his judgment on 7 December 2012, following which the issue as to costs was argued by written submissions, upon which the judge ruled in a judgment of 20 December 2012. His costs order was dated 28 January 2013. It recorded the claimants' wish to discontinue their claim for damages against Initial and dismissed that claim. As to costs, the judge ordered the claimants to pay Initial's costs attributable to their damages claim, but otherwise ordered Initial to pay the claimants' costs of the action, including those of a hearing

on 6 February 2012 for an interim injunction, when Initial gave undertakings to desist the conduct complained of until, at the latest, 15 April 2012. The costs down to 6 February were to be paid on the indemnity basis and thereafter on the standard basis.

4. By the appeal, Initial challenges the grant of the injunctions, which it says were unjustified. If right on that, Initial might be entitled to an inquiry under the claimants' cross-undertaking in damages given on 6 February 2012 against Initial's undertakings given that day. Initial's undertakings expired, however, on 15 April 2012; and although two days later they were replaced by final injunctions, if those injunctions were wrongly ordered Initial can have no redress for business lost or other damage suffered by reason of them. On the other hand, it would be open to Initial to ask this court to review the judge's costs order of 28 January 2013. Initial abandoned, however, what it had originally advanced as a free-standing challenge to that order.

5. Mr Quinn represented Initial before us, as below. Mr Sims and Mr Leach represented the claimants before us, as they also did below.

The facts

6. I take these, in part verbatim, from the judge's judgment. Part of the business of PHS is the provision of clinical waste services. By an agreement of 22 December 2011, PHS purchased the clinical waste services business of the second and third claimants, who had traded as UK Hygiene ('UKH'). It was the events following that purchase that led to the proceedings, but I must first set out the events that led up to it.

7. UKH's business involved the provision of waste bins for offensive and/or hazardous waste and the servicing of the bins by collecting and replacing them at regular intervals and disposing of the waste. UKH (either itself or through its company, Merchant Rentals plc) would enter into rental agreements with customers in relation to the use of bins and associated equipment, and also into service agreements for the collection of the bins and the disposal of the waste. The rental agreements typically ran for at least 39 months and a total period of up to 75 months. The customer could give notice to terminate after the minimum term, the notice period varying from three to 12 months. The service agreements, some of which were oral and some in writing, were on like terms as to duration and notice as the rental agreements.

8. UKH performed its rental and service agreements by sub-contracting. Until 2007, its sub-contractor was Biffa. In about February 2007, it entered into negotiations with Rentokil Initial UK Limited, the first defendant, as to a possible substitution of Initial as a sub-contractor in place of Biffa. Initial traded as Initial Medical Services and was a subsidiary of Rentokil Initial plc, which also carried on a clinical waste services business.

9. In order that UKH and Initial might respectively assess the merits of such a business relationship, UKH had first to furnish Initial with details of its customers and of the services it provided. UKH regarded this information as confidential, and on about 21 March 2007 UKH and Initial entered into a confidentiality agreement in relation to it. Its material terms were as follows:

> '1. "Confidential Information" shall mean all information furnished by one party to the other including not only written information but information transferred orally, visually, electronically or by any other means and all analyses, compilations, data

> studies and other documents containing or based in whole or in part on any such information or reflecting the views, opinions or interests of the Business.
>
> 2. Confidential Information shall only be used for the purposes of assessing the possibility of and discussing proposals for a future business relationship between the Parties in the Business ("the Purpose"). …
>
> 4. The Confidential Information shall be held by the party to whom it is disclosed in complete and strict confidence and shall not be disclosed or used for any purposes other than the Authorised Purposes without the prior written consent of the other party. In no event shall the Confidential Information (or any part thereof) be used to the detriment of the other party.
>
> 5. The terms and conditions contained in this Agreement shall continue to apply whether or not the Parties conclude an agreement for joint participation in the Business.
>
> 6. Such Confidential Information as may be in written form held electronically or by any other means and all copies thereof will be destroyed or returned to the other party immediately if the Parties agree not to proceed with a transaction involving the Business or if the other party requests that Confidential Information be destroyed or returned for whatever reason. …
>
> 8. The terms and conditions of this agreement shall not apply to Confidential Information which:
>
> (i) at the date of disclosure can be shown to be already in the public domain …
>
> 11. Both parties shall indemnify the other in full for all direct and indirect damages, costs, expenses, charges and taxes, legal and otherwise, in respect of any breach of this agreement and it agrees that the non-breaching party shall be entitled both to damages as compensation and to injunctive relief since the confidential information provided is special, unique, commercially sensitive or otherwise of such value that damages alone would not represent an adequate compensation for any such breach'.

10. Following the signing of that agreement, there was an exchange of commercially sensitive information between UKH and Initial. In particular, UKH provided details to Initial about its customers including (a) the site or customer name, (b) the address or postcode where the services were provided, (c) the customers' service requirements, (d) anonymised details of the length of contracts with customers, and (e) that the price charged under the contracts was fixed for a minimum period. Initial responded by quoting the prices it proposed to charge UKH for servicing the customers. It made clear that if it became the sub-contractor, it would require additional information in respect of existing and any new customers, namely contact names, telephone numbers and other relevant information in the customer's risk assessment form.

11. Initial's offered terms were accepted by UKH and on some date between 4 and 16 April 2007 UKH and Initial entered into a sub-contract. They did so by signing, and on the terms of, an Initial document described as a Waste Transfer Note. It was for a fixed term of three years and thereafter until terminated by either side on at least a quarter's notice. For the fixed term period, UKH agreed to pay Initial £64,618 against which Initial was, in place of Biffa, to discharge the

obligations of UKH and Merchant Rentals under the rental and service agreements with the customers listed in the schedule to the sub-contract (the same customers in respect of whom UKH had provided information under the confidentiality agreement). The terms of the sub-contract contained no provisions imposing any restraint upon Initial in engaging in competing activities with UKH after its termination.

12. The business of Initial Medical Services was transferred to Initial Medical Services Limited in about September 2008, another subsidiary in the Rentokil group, following which the sub-contract was novated with Initial Medical Services Limited.

13. The sub-contract ran smoothly until December 2011. Some of the existing customers' contracts came to an end, and were not renewed, and so those customers dropped off the original list. UKH also recruited new customers, their names were added to the list and UKH provided Initial with like confidential information in relation to them as it had under the confidentiality agreement in relation to its then customers. When the claim started, Initial was servicing 130 UKH customers, of whom 53 were new customers. 51 customers had departed.

14. On 21 December 2011, Merchant Rentals assigned to UKH the benefit of all its contracts with UKH customers; and on the following day, UKH sold its clinical waste business to PHS, which thus acquired the entirety of the UKH portfolio. PHS's commercial strategy was to perform customers' contracts itself, through its own workforce, rather than by a sub-contractor. On 5 January 2012, Messrs Prendergast and Peake – who had traded as UKH but were now with PHS – had a meeting with representatives of Initial at which they informed them of the sale to PHS and that PHS intended to give notice terminating the sub-contract. Notice was given on 13 January 2012, terminating the sub-contract on 15 April 2012. Its giving provoked the activity that led to the proceedings.

15. Initial considered it was entitled to contact UKH's customers to inform them of the PHS acquisition, that Initial's services were going to end on 15 April 2012 and that it would be open to any customer to transfer its custom to Initial once the minimum period of that customer's contract with UKH had run its course. Initial's instructions to its sales staff did not, however, make it clear that customers could only be invited to contract with Initial once they were in a position lawfully to terminate their contracts with UKH: instead, Initial's management gave the staff the impression that Initial could move to capture the customers' business as soon as its sub-contract ended on 15 April.

16. The result was that on about 12 January 2012, five members of Initial's sales staff embarked on a campaign of contacting UKH customers. Between then and 6 February, at least 29 customers were telephoned, perhaps another 25 as well. The staff who contacted them used information stored on Initial's iCabs database. That was an electronic system set up in 2010 to store the details of customers for whom Initial provided services, as well as of potential customers. From about July 2010, all the confidential and restricted information provided to Initial by UKH was put on to the database. It also included any information provided by UKH's customers themselves, as well as information about them obtained from publicly available sources. Initial's approaches to customers included the making of untrue or misleading statements, such as that the contracts with UKH were null and void following the PHS takeover, that PHS was going to hike the prices, that UKH would cease to exist and all its contracts would end after 15 April. Initial conceded at the trial that this was wrong and that it had attempted to procure a breach of contract by these customers.

17. Such approaches ceased when the claimants applied, as they did on 27 January, for an interim injunction. The hearing of the application was on 6 February, when Initial gave undertakings until, at the latest, 15 April 2012, following a speedy trial to be conducted in the meantime. The undertakings were not to make use of 'the Confidential Information or the Documents with a view to obtaining orders for goods or services from the Customers' and not to publish or say words to the effect that the customers' contracts were at an end or otherwise encouraging the customers away from the claimants. The 'Confidential Information' was defined as the following information in relation to customers, namely their names, addresses, contact names, telephone numbers, service requirements, and price charged by Initial to the claimants in respect of the customers; the 'Documents' meant any form of media in which such information was stored; and 'customers' meant those customers serviced by Initial pursuant to the sub-contract dated 16 April 2007.

18. The speedy trial took place in April. It was confined to liability issues that required to be answered in order to enable the court to decide whether Initial should be ordered to deliver up hard copies of documents containing details of UKH's customers and for injunctive relief. Any claim for damages was to be tried later; and the judge noted that, at the date of the trial, it was unclear whether UKH had lost any customers as a result of Initial's actions.

19. I outlined, in [2] above, the order made by the judge on 17 April 2012, but should explain it further. He restrained Initial for a period of nine months from the termination of the sub-contract on 15 April 2012 – that is, until 15 January 2013 – from using any of the 'confidential information' or 'documents' as defined in the order 'with a view to obtaining orders for goods or services from the customers'. 'Confidential information' meant such information as defined in the confidentiality agreement of about 21 March 2007 (see [9] above), limited to a list of seven heads of commercially sensitive information relating to the claimants' customers; and it extended not just to UKH's customers as at March 2007, but also to their new customers acquired since then. 'Documents' meant any form of media in which such confidential information was stored. The judge also granted a 'springboard' injunction until 15 July 2012 preventing Initial from contacting those customers of UKH it had contacted between 12 January and 6 February 2012 for the purpose of supplying, or persuading them to contract with Initial for the supply of, services they had received or were receiving under contracts with the claimants.

The judge's reasons for granting the injunctions

(a) Confidentiality

20. The judge explained that the claim was based on breach of confidence and was for injunctive relief restraining Initial from breaching the undertaking of confidentiality it had given to UKH. He said the first issue was whether the information provided by UKH to Initial under the confidentiality agreement of March 2007 as to UKH's existing customers was confidential. The second issue was whether any duty of confidence continued to apply once the sub-contract was entered into.

21. The judge held that the information so provided by UKH was confidential. That conclusion is not challenged by Initial, but it is worth noting the essence of the judge's reasoning. Whilst the judge did not regard all the information provided by UKH (see [10] above) as of great commercial value, he did regard as of real value the information as to the address and postcode of the site at which the services were provided and the particular service requirements of the

customer at such site. Initial had made the point that at least the identity, address and contact details of each customer were obtainable from websites on the internet, and that its service requirements could also be deduced from the information about them on such websites. Even if that was so, what was not public knowledge was that the customer obtained its required services from UKH. UKH's customer list was private information, even if it included some publicly available information; and the knowledge that the relevant organisations were customers of UKH rather than of another service provider would be of strategic value to a competitor of UKH. The fact that part of the information in a database can be found in the public domain did not mean that the confidential part lost its confidentiality; and, the judge held, a database which collects in one place information from disparate public sources may acquire a confidentiality of its own by reason of its unique compilation. His conclusion was that the information that UKH supplied about its customers was confidential and it did not lose its confidential status by being subsequently transferred on to Initial's iCabs database. Nor did it lose it because some of it may have been absorbed into the memory of members of Initial's sales team.

22. The next issue, which is challenged, was whether the duty of confidentiality continued to apply once the sub-contract had been concluded. Whereas clause 4 of the confidentiality agreement imposed an express obligation of confidentiality, it did so only for the purposes of enabling the parties to evaluate the potential benefits of a future business relationship. There was no express term in the sub-contract controlling the use of such confidential information either during the currency of the sub-contract or after its expiry.

23. The judge held that the information continued to be confidential during and after the sub-contract and that the omission so to provide expressly in the sub-contract was an oversight. He also held that the confidentiality under the sub-contract applied not just to the information provided by UKH in relation to existing customers, but also to the information provided by it in relation to new customers. The essence of his reasoning was as follows.

24. First, clause 5 of the confidentiality agreement provided that its terms were to continue 'whether or not' an agreement was concluded for joint participation. He regarded it as reasonable to suppose that the parties considered this as covering the position if a sub-contract were to be concluded and he noted that clause 5 was of unlimited duration. Second, the sub-contract was effected by using Initial's standard form of Waste Transfer Note, and whilst a few modifications of its terms had been the subject of at least limited negotiation:

> '44. … It was a far cry from the process that would have taken place if the parties' lawyers had been asked to draft a sub-contract from scratch. I think it inconceivable, if that had happened, that the issue of confidentiality would not have been expressly addressed.'

25. Third, the reasonable man would regard it as clear that the information provided in relation to existing customers under the confidentiality agreement was intended to remain similarly confidential under the sub-contract. Fourth, it was a necessary inference from, or an implied term of, the sub-contract that like information provided by UKH to Initial in respect of new customers would also be confidential. The judge said:

> '47. … the circumstances of the sub-contract here cannot be divorced from the background of the Confidentiality Agreement. Under that Agreement, customer details were disclosed for the purpose of enabling Initial to "evaluate the potential benefits of a proposed future business relationship". They were expressly agreed to

> be confidential and not to be disclosed to others or used to the detriment of UKH. The same details, and further details of new customers, were made available under the sub-contract for the purpose of enabling Initial to perform the sub-contracted services. It is wholly illogical that they should not still be treated as confidential, let alone that they should not be prohibited from being used to the detriment of UKH e.g. as the platform for a sales campaign to persuade the customers to defect to Initial.'

(b) Injunction restraining use of the confidential information post the sub-contract?

26. Having held the information provided by UKH in respect of existing and new customers to be confidential for the purposes of the operation of the sub-contract, the judge dealt next with Initial's submission that such confidentiality obligation could not be used as a basis for imposing a post-contract restraint upon the activities of Initial when, it was said, the only proper basis upon which Initial might be so restrained was if it was subject to an express post-termination restrictive covenant, which it was not. The judge was referred to, and distinguished, the decision of the Court of Appeal in *Caterpillar Logistics (UK) Ltd v. Huesca de Crean* [2012] EWCA Civ 156; [2012] ICR 981, and held that the absence of a such a restrictive covenant did not bar the grant of an appropriate post-termination injunction restraining the misuse of the confidential information.

27. The judge considered next whether a post-termination injunction was appropriate. He noted that Initial had offered no undertaking not to use the confidential information after 15 April 2012 and found that there was a real risk that, unless restrained, it would re-launch its campaign to target the claimants' customers by making use of the confidential information. It was said by Initial that damages for any such misuse of the information would be an adequate remedy. The judge said that had given him the 'greatest pause for thought'. He said, however, that there were two difficulties about it. First, the difficulty in establishing an entitlement to damages and to prove quantum. Second, a loss of customers would, for PHS, be a loss of part of the goodwill for which it paid when buying the business of UKH; and it would not be easy to put a price on such damage or on its cost in undermining PHS's business strategy of acquiring a client base in the field of waste disposal. The judge noted that the problems in policing any injunction would also be real but he regarded them as overstated: the claimants could monitor any premature terminations of contracts by customers and any failures to renew on expiration of minimum terms or requests for renegotiation of pricing, and they could ask the customer the reason. The judge rejected the argument that an injunction restraining unauthorised use of the confidential information would be an unjustified restraint on competition: it would not prevent Initial from approaching UKH customers provided that it used no confidential information when making it.

28. His conclusion was, therefore, that a non-user injunction ought to be granted, although he made it clear that it only applied to information about customers who were still customers of the claimants and were being serviced by Initial as at 15 April 2012. As for its duration, the claimants' bid was until the end of May 2015, when the minimum term of the last of the claimants' customers would end. The judge rejected that, favouring a nine-month restraint until 15 January 2013. That date represented, in his estimate, the latest time by which Initial could be expected to have discovered the identity of UKH's customers through a campaign of canvassing based on publicly available sources of information.

(c) Springboard injunction?

29. The claimants also sought a 'springboard' injunction restraining Initial from making contact with any of the claimants' customers for a specified period. The judge cited at length from Haddon-Cave J's restatement of the principles upon which such relief may be granted in *QBE Management Services (UK) Ltd v. Dymoke and others* [2012] EWHC 116 (QB); [2012] IRLR 458, but summarised the core of the principles in his own words as follows:

> '71. Springboard relief is granted where it is shown that the defendant has attempted to make use of confidential information following the termination of the agreement or relationship under which the information was disclosed. It is granted for a limited period and is designed to prevent unfair advantage being taken of the head start the defendant has obtained by having the confidential information. It imposes a restriction on making approaches or further approaches to customers which is additional to the restraint on making use of the confidential information itself. In effect it is a moratorium on attempts at poaching, which is intended to redress the competitive advantage the defendant has obtained from seeking to make use of the confidential information in the first place.'

30. The judge concluded that it would be appropriate to grant a springboard injunction. His reasons were these:

> '85. The claimants' case, in summary, is that Initial derived an unfair advantage from instructing its sales team to use the Confidential Information to target UKH's customers. Even though the defendants undertook to desist from canvassing those customers between 6 February and 15 April, and have agreed to deliver up copies of the Confidential Information and to quarantine the information so far as possible where it has been assimilated into the iCabs database, there remains an advantage to be exploited after 15 April. It is an advantage derived from the making of the earlier contacts, the knowledge of UKH's customer base which would have been absorbed by the members of Initial's sales team who conducted the sales pitch in January, and from the fact that the process of isolating and segregating the Confidential Information remaining on the iCabs database is not yet complete and will take time and further negotiation.
>
> 86. In broad terms I accept that argument. My conclusion is that a residual competitive advantage from Initial's unlawful marketing campaign in January remains, but that the advantage is one which relates to the customers who were approached and who, in consequence, may have been persuaded to reconsider their allegiance to the claimants after 15 April. The advantage in respect of customers who were not the subject of an approach at that time is negligible because of the undertakings given on 6 February and the subsequent moratorium on further canvassing. I consider that the claimants' interest in those customers is sufficiently protected by the non-user injunction. I will therefore confine the springboard relief to the customers who were approached as defined in the Schedules of customers [at given pages of the trial confidential bundle]. …
>
> 88. As for the duration of the springboard injunction, a restraint lasting 18 months [for which the claimants had asked] would be excessive. The restraint on further contact with the customers previously contacted should not last for longer than is reasonably necessary to preclude the defendants from capitalising on the head start they gained from the marketing campaign in January. The minimum time it would

> have taken Initial to identify the customers contacted and assess their waste disposal requirements using only publicly available sources is a guide. I consider that period to be nearer to 6 months than 18 months. Taking into account the moratorium between 6 February and 15 April, I take the view that justice will be done by applying a restraint on contact after 15 April for no more than 3 months.
>
> 89. For the above reasons, the springboard injunction is granted until 15 July 2012, limited to customers who had been targeted between 1 January and 6 February.'

The appeal

31. Mr Quinn, for Initial, disclaimed any challenge to the judge's finding either as to the confidentiality of the information relating to existing customers provided by UKH to Initial under the confidentiality agreement (a list of such customers being then attached to the sub-contract) or as to the like information that UKH provided in relation to new customers during the currency of the sub-contract. Initial does, however, challenge the judge's holding that the express obligation of confidentiality imposed by the confidentiality agreement in relation to existing customers became an obligation under the sub-contract; and, if it did not, his further submission was that there could be no basis for any conclusion that it was an implied term of the sub-contract that the information in relation to new customers could or would be confidential.

32. The submission as to the existing customers was based on the proposition that the obligation imposed by the confidentiality agreement was imposed only for the limited purpose for which that agreement was entered into, which clause 2 explained was for the purpose of assessing the possibility of a future business relationship between the parties. Once the parties had, as they did, decided upon such a relationship, the purpose of the confidentiality agreement was spent; and the consideration of whether, and to what extent, Initial was to be subject to any obligation of confidentiality under, and after the termination of, that relationship must depend upon its own terms.

33. That relationship was in the event constituted by the sub-contract, which was entered into by the signing of the Waste Transfer Note. That document said nothing about confidentiality and so imposed no obligation of confidentiality. There was, said Mr Quinn, also no reason why a party like Initial, which had agreed to receive information in confidence for the sole purpose of deciding whether or not to enter into a business relationship with UKH, would agree to continue to be bound by any such confidentiality obligation if it *did* decide to enter into such a relationship. There was, therefore, no basis for the judge's conclusion that Initial was agreeing to be so bound. Mr Quinn said it was obvious that one of the attractions to a competitor like Initial of a trading relationship with UKH would be that, upon its termination, Initial would be free to seek to secure its own contracts with such customers. I understood the argument to be that, in doing so, Initial would have expected to be entitled to make use of all the information it had obtained about them from UKH, including information that it accepts was confidential.

34. I would not accept as well-founded this challenge to the judge's reasons for his different conclusion. My intuitive reaction is that it would be surprising if information, admittedly confidential, provided to Initial for the purpose of deciding whether it wanted to become a UKH sub-contractor, would retain its confidentiality if the answer was 'no' but would lose it if the answer was 'yes'. The judge held that the obligation of confidentiality continued under the sub-contract, and founded his reasoning primarily on the terms of clause 5 of the confidentiality

agreement. In my view, he was entitled so to hold. Clause 5 provided expressly that the confidentiality terms were to continue to apply 'whether or not the Parties' entered into the sub-contract, one sense of which was that they were to continue to apply if UKH and Initial *did* enter into the sub-contract. Of course in that event, and for the purposes of performing the sub-contract, Initial would be making use of the information – but it would be doing so with UKH's written authority (see clause 4) implicitly provided by the sub-contract they signed, to which a list of the same customers was attached.

35. The judge's conclusion that the information provided in relation to existing customers continued to be confidential notwithstanding the entry into the sub-contract was, therefore, in my view correct; just as, I would hold, was his further conclusion that a similar obligation of confidentiality applied to the like information provided by UKH in relation to its new customers. The reasonable man would, I consider, have had no hesitation in so concluding. In my judgment, any conclusion that such information was not also confidential would have been extraordinary.

36. I add that, even if clause 5 of the confidentiality agreement had not made the position as clear as the judge held it did, I consider that the judge would anyway have been entitled to arrive at the like conclusion in relation both to the information concerning existing customers and that concerning new customers. In *Saltman Engineering Coy. Ld,. Ferotec Ld and Monarch Engineering Coy (Mitcham), Ld v. Campbell Engineering Coy., Ld.* (1948) 65 RPC 203, Lord Greene MR said, at 211:

> 'If two parties make a contract, under which one of them obtains for the purpose of the contract or in connection with it some confidential matter, even though the contract is silent on the matter of confidence the law will imply an obligation to treat that confidential matter in a confidential way, as one of the implied terms of the contract; but the obligation to respect confidence is not limited to cases where the parties are in a contractual relationship.'

Given the acceptance that the information provided by UKH in relation to customers was confidential, that shows that Initial would anyway have been under an obligation to UKH to respect the confidence in such information.

37. In the course of his submissions, Mr Quinn advanced a slightly different basis of attack on the judge's findings as to the express and implied terms in the sub-contract as to the confidentiality of the information relating to existing and new customers. He submitted that, if clause 5 of the confidentiality agreement *did* result in the confidentiality obligation in relation to existing customers becoming an obligation under the sub-contract, it was an unreasonable obligation to purport to impose upon Initial in its sub-contracting capacity and was therefore void. If so, it followed that there was no basis for implying a like term in relation to new customers, because that too would likewise have been unreasonable and void.

38. I would not accept that submission. It emerged in the course of argument as an offshoot of Mr Quinn's primary submission (to which I am about to come) that the validity of the confidentiality obligation found by the judge should be measured in like manner as covenants in restraint of trade. As I shall explain, I regard the submission as mistaken, and its deployment in the manner just mentioned as a further application of such a mistaken approach.

39. Mr Quinn's principal challenge to the judge's decision was that, accepting that the customer information was confidential, it was contrary to principle and wrong for the judge to have granted any post-contract injunction restraining Initial from using that information in the conduct of its own trade. The essence of the argument was that the confidentiality obligation was one to which Initial was tied permanently. Initial recognised that such obligation did not formally prevent it, post the sub-contract, from dealing with any of UKH's customers, provided that in doing so it only made use of information that was in the public domain; and its right in that particular respect was expressly recognised by paragraph 4 of the order of 17 April 2012. Mr Quinn submitted, however, that in practice, if Initial *did* engage in any competing dealings with former customers of the claimants, there would be something approaching a presumption that, in doing so, it had made use of the confidential information. The consequence is that, for all practical purposes, Initial could not safely deal with such customers at all and would be in a like position as if it were subject to a permanent restraint upon competing with the claimants.

40. It followed, said Mr Quinn, that the confidentiality obligation imposed upon Initial was in substance a covenant in the nature of a restraint of trade. Any such restraints, which are normally framed in terms of carefully defined limits as to time and space, are only allowed to stand if, in their particular circumstances, they are regarded as reasonable with reference to the interests of the parties and of the public. If the temporal restraint is too long, or the spatial restraint too wide, the court will not enforce the restraint at all: in particular, it will not re-draft it in permissible terms and enforce the re-draft. In this case, however, Initial was subjected to a permanent obligation of confidentiality. It is true, said Mr Quinn, that the claimants did not seek a permanent injunction. But they did seek a materially longer restraint than the judge actually imposed. That was because the judge regarded any greater restraint as unreasonable. Had the claimants imposed an express non-dealing restraint for the period for which they had contended, it would not have been enforced, nor would any lesser restraint, and Initial would have won the case. Yet because the claimants' case was based on breach of confidence, they were held entitled to an injunction for what the judge held to be a reasonable period, being an injunction akin to one enforcing an obligation in restraint of trade.

41. Mr Quinn's point came down to this. He said that if the claimants wanted to impose such a restraint, they had to do so by way of a covenant expressly directed at achieving such a purpose; and, in any proceedings, they would then have to justify the covenant as reasonable. It was not, he said, open to them to achieve the like result by the alternative course of the enforcement of an indeterminate obligation of confidentiality. The judge ought, he said, simply to have refused any injunction.

42. Mr Quinn relied for that submission, as below, upon the decision of the Court of Appeal in *Caterpillar Logistics Services (UK) Ltd v. Huesca de Crean* [2012] EWCA Civ 156; [2012] ICR 981. The defendant in that case was employed by the claimant as a logistics centre manager at one of its sites. Her role involved commercial issues relating to a logistics services agreement between the claimant and a customer, QH. Her employment contract included no restrictive covenant limiting her activities after its termination, but did include an express covenant binding her, both during and after her employment, to respect the confidentiality of the claimant's confidential information. She left the claimant's employment and went to work for QH. The claimant sued her for (i) an injunction restraining the use or disclosure by her of any confidential information, (ii) an order (referred to as the 'barring out relief') restraining her during her employment with QH from undertaking any task or having any dealing in relation to

the logistics services agreement or the commercial relationship between the claimant and QH, and (iii) ancillary relief.

43. The judge dismissed the claimant's application for an interim injunction for such relief, and this court, by a majority (Stanley Burnton and Lewison LJJ, Maurice Kay LJ dissenting in part) dismissed its appeal. All three members of the court held that there was no justification for the claimed barring out relief as this was not relief for which the claimant had contracted. It could have required the defendant to enter into an express covenant not to enter the employment of a customer or competitor – that is, by a conventional covenant in restraint of trade – and, provided that it was limited in time and was reasonable as between the parties and in the public interest, it could have been enforced. It had not, however, done so and so was not entitled to any barring out relief. I do not cite them, but [61] to [65] in the lead judgment of Stanley Burnton LJ provide full reasoning for the court's conclusion to that effect.

44. That part of the decision in *Caterpillar* is not of direct relevance for present purposes: there was in this case also no express covenant barring Initial from dealing with any of the claimants' customers, or former customers, nor did the claimants seek any barring out relief that would prevent such dealings. All that that they did seek was an injunction restraining misuse by Initial of the claimants' confidential information in relation to its customers. The claimant in *Caterpillar* also sought like injunctive relief. If Mr Quinn's submission to us is correct, one would have expected the court in *Caterpillar* to have refused such injunction on the grounds that (a) the enforcement of an employee's confidentiality obligation is in substance akin to enforcement of an covenant in restraint of trade, and (b) if no such covenant has been entered into, nor will the court enforce an indeterminate confidentiality obligation without first being satisfied as to its reasonableness as between the parties and in the public interest.

45. The court in *Caterpillar,* however, said nothing that provides a shred of support for Mr Quinn's submission. Having despatched the claimant's bid for a barring out order, Stanley Burnton LJ turned to consider the claimant's appeal against the judge's refusal to restrain the misuse of claimant's confidential information. He had earlier noted that the judge had refused to grant any such restraint upon the grounds (i) that the absence of any time limit in the confidentiality agreement precluded its enforcement, and (ii) it was anyway too widely expressed, and did not sufficiently specify the information entitled to protection. Stanley Burnton LJ expressly disagreed with the judge as to ground (i), and observed that confidentiality agreements are commonly of indeterminate length and are enforced, and cited as an example *SBJ Stephenson Ltd v. Mandy* [2000] IRLR 233 (see [66]). He did not express a separate view on the judge's ground (ii). At [67], however, he said that he would uphold the judge's refusal to grant an interim injunction 'on the simple ground that the claimant has not established any arguable case that she has broken or intends to break or even that there is a real risk that she will break the terms of the confidentiality agreement'. I interpret that as showing that if the claimant *had* established such an arguable case, it might in principle have been entitled to an appropriate injunction, although Stanley Burnton LJ also added that the relief sought by the claimant was 'hopelessly wide and vague'. Lewison LJ agreed with Stanley Burnton LJ. Maurice Kay LJ, whilst also agreeing with him on the 'barring out' claim, 'would have granted limited and tightly drawn injunctive relief to protect the claimant's confidential information'.

46. I therefore derive from *Caterpillar* that (i) if relief of a 'barring out' nature against a former employee is sought, it is essential that it should be based on an express (and reasonable) covenant by which the employee agrees to such a barring out, but that (ii) the absence of such a covenant will not prevent the employer from obtaining injunctive relief to enforce the former

employee's continuing obligation to respect the confidentiality of information provided to him by the employer. With respect to Mr Quinn's argument, his proposition that *Caterpillar* supports the conclusion that the omission to obtain a barring out covenant precludes the separate enforcement of a confidentiality obligation which is not first subjected to, and survives, a 'reasonableness' test appears to be based upon a misapprehension as to what *Caterpillar* decided. The proposition is, I consider, wrong in principle, as is reflected in the approach of all members of this court in *Caterpillar*. Mr Quinn showed us no other authority in support of his proposition, and I would not accept that there is any substance in it.

47. I would therefore reject Mr Quinn's submission that in this case it was wrong in principle for the judge to enforce Initial's confidentiality obligation by injunction. The judge was entitled to find that Initial remained bound by a confidentiality obligation in relation to the information about the claimants' customers that had been provided to it; and his discretionary decision to grant the limited temporal injunction that he did was, for the reasons he gave, a proper exercise of his jurisdiction.

48. Mr Quinn turned next to a challenge to the judge's decision to grant the temporally more limited springboard injunction. He said that, having identified the applicable principles explained by Haddon-Cave J in the *QBE Management Services* case, the judge failed to apply them. Mr Quinn submitted, first, that Initial obtained no 'head start' in this case by the use it made of the confidential information during its campaign to attract the claimants' customers in January and February 2012. That was because the claimants themselves had and retained exactly the same confidential information and so were able to use it in order to re-secure the same customers for themselves following the termination of the sub-contract. Second, Initial was anyway not taking any 'unfair' advantage in its approach to customers in early 2012 because what the claimants were seeking to prevent Initial from making use of was the fact that it was they, Initial, who had been servicing the contracts in question – which is precisely what the claimants had agreed with Initial. Third and fourth, it was said (in slightly different ways) that any unlawful advantage that Initial may originally have obtained was not still being enjoyed by Initial by the time of the trial: it was not suggested that there was by then any continuing conduct by Initial of which complaint could be made by the claimants. Of course, in the meantime Initial had given undertakings not to continue the conduct which it had earlier recognised as wrongful and so if such conduct had continued it would have been in breach of its undertakings. The essence of Mr Quinn's point was, however, as pithily summarised by Briggs LJ during the argument, that the two-month passage of time since Initial's undertaking in February had resulted in the board losing its spring. Fifth, springboard relief should not be granted if damages will be an adequate remedy and damages would here have been an adequate remedy. Sixth, there was insufficient evidence as to either the effect of Initial's unlawful acts or as to the extent of the illegitimate advantage it had obtained to justify the three-month injunction that the judge granted. Seventh, the claimants had anyway not discharged the burden of proving the nature and period of the competitive advantage. Moreover, the judge had said that, at the date of the trial, it was not clear whether the claimants had lost any customers as a result of Initial's canvassing and that ought to have been fatal to the grant of springboard relief.

49. I do not accept that these submissions, separately or collectively, mount any serious challenge to the judge's decision to grant the springboard relief that he did. As for Mr Quinn's first point, the 'head start' that is relevant in this context is not the defendant's head start over the claimant: it is the obtaining by the defendant of a head start in comparison with the position in which he would have been if he had not made any improper use of the confidential information at all. If

in such a case, and without use of the confidential information, it would have taken the defendant, say, four months to be in a position to secure the competing contracts, the defendant has thereby improperly obtained a four months' head start. It may be that the claimants themselves also had all the information they needed to re-secure the same customers' business; but in doing so they were entitled to assume that Initial would not, at the same time, be competing improperly with them by making use of confidential information in breach of its obligations.

50. As for the point that by the time of the trial, the board had lost its spring, the case made is an unusually unattractive one, coming as it does from a defendant whose admittedly misguided sales campaign in early 2012 was only halted by the making of an application for interim relief and whose offered undertakings were only until 15 April 2012, after which, but for the grant of further injunctions, it would then have sought to build on the improper approaches it had made earlier in the year. In any event, the judge made clear findings in paragraphs 85 and 86 that the board *did* continue to have some spring in it (see [30] above), and there is no basis upon which this court can hold that he was not entitled so to find. As for the nature of the relief granted, this was a matter within the discretion of the judge, and I have not been persuaded that there is any basis upon which this court can or should second-guess the judge's decision to grant the limited injunctive relief that he did. The same applies to the judge's decision to grant an injunction rather than damages: as I discuss below, the judge had well in mind whether this was a case in which it was appropriate to grant injunctions rather than to award damages.

51. Finally, Mr Quinn submitted that this was not a case in which the judge should have granted any injunction restraining the misuse by Initial of the confidential information in relation to the claimants' customers. Damages would, he said, have been an adequate, or the proper, remedy and therefore an injunction ought not to have been granted.

52. I regard this as an impossible submission. The judge considered that there was a real risk that, if no injunction were granted, Initial would continue to use the claimants' confidential information to target their customers. If that happened, and the claimants were left to a remedy in damages, they would be faced with inevitable and obvious problems in proving their case in respect of any customer they claimed had been diverted from them by reason of the wrongful use of the confidential information; and a loss of customers would also be damaging to PHS's goodwill, being damage which would be hard to measure. This was a case in which Initial was under an obligation not to use the claimants' confidential information for its own purposes, but in which it was threatening to do so. It was, in my judgment, a plain case in which it was open to the judge to conclude that the grant of a permanent injunction was the right remedy; and his decision to grant such an injunction is not open to serious challenge.

53. I would dismiss the appeal.

Lord Justice Lewison :

54. I agree. I add only a few words on *Caterpillar Logistics Services (UK) Ltd v Huesca de Crean* because I think that Mr Quinn's submissions mischaracterised the reasons why the injunction restraining Mrs de Crean from misusing confidential information was refused. The essential disagreement between the majority (of which I was one) and Maurice Kay LJ who was in the minority was whether *on the facts* there was any real risk that the claimant's confidential information would be misused. This reflects the principle that a claimant is not entitled to a *quia timet* injunction merely by saying *timeo*. If I had thought that there was a real risk of

misuse of the claimant's confidential information then I would have agreed with Maurice Kay LJ that an injunction should have been granted. I cannot of course speak for Stanley Burnton LJ.

Lord Justice Briggs :

55. I agree with both judgments.
