Neutral Citation Number: [2022] EWCA Civ 864

Case No: CA-2021-000689

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
Mr Justice Cavanagh
[2021] EWHC 1504 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE WILLIAM DAVIS
and
SIR PATRICK ELIAS

- -

Between :

(1) CREDICO MARKETING LIMITED **(2) PERDM TRADING LIMITED**	**Claimants/ Respondents**
- and -	
(1) BENJAMIN GREGORY LAMBERT **(2) S5 MARKETING LIMITED**	**Appellants/ Defendants**

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- -

Rory Brown (instructed by **Brandsmiths**) for the **Appellants**
John Mehrzad QC and **Matthew Sheridan** (instructed by **Addleshaw Goddard**) for the **Respondents**

Hearing dates: 15 & 16 March 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 23 June 2022.

Sir Patrick Elias :

Introduction

1. This is an appeal against the grant of certain relief by Mr Justice Cavanagh following a speedy trial on liability with respect to the enforceability or otherwise of certain restrictive covenants. The judge held that the covenants were enforceable. The question in this appeal is whether he was right.

2. By way of background, I gratefully draw upon much of the succinct introduction in the judgment below.

3. Credico organises direct or face-to-face marketing campaigns on behalf of its clients. These campaigns typically last for many months and sometimes for years. Credico's clients are mainly charities and large companies in the broadband and energy fields. Credico does not carry out direct marketing itself; it does not make contact with potential customers, nor does it have any direct contractual relationship with the sales representatives who do. Rather it contracts with Marketing Companies ("MCs") which are based in cities and towns across the United Kingdom, and it is the MCs which then recruit and contract with the sales representatives who in turn approach potential customers. The representatives are described as Independent Sales Advisors ("ISAs"). The ISAs sell to customers through residential door-to-door sales and through the use of "pop-up" booths at locations such as shopping centres and supermarkets.

4. MCs are invariably owned by an individual who started off as an ISA and who, as a result of having been nurtured and encouraged by the owner of an MC, has started up his or her own MC. Both MCs and ISAs are remunerated entirely by commission. Credico pays the MC commission for each successful sale or lead obtained by an ISA, and the MC in turn pays the ISA a share of that commission. In addition, when the owner of an MC has sponsored an ISA to start up his or her own MC, the first MC owner will receive "override" commission from Credico for the sales achieved by that sponsored MC. If the new MC owner then in turn sponsors other ISAs to start up further MCs of their own, the original MC owner will receive override commission from these "second generation" MCs and so on. In this way Credico has been able to set up a wide network of MCs and ISAs, and successful MC owners have in turn been able to establish a subsidiary network of their own.

5. The principal role of Credico is to find clients who wish to conduct direct marketing campaigns and then arrange for the marketing itself to be conducted through MCs and ISAs. Credico also provides other services to MCs although the exact nature, scope, and value of these services was a matter of some dispute at trial. These services include giving guidance and advice to MCs and providing "back-office" services, such as arranging appropriate banking and insurance facilities and organising the payment of commission to those entitled to it. Credico imposes an appropriate charge upon MCs for some of these services. I will discuss the precise nature of the relationship in more detail below.

6. When an individual is invited to start up an MC, he or she enters into a contract with Credico in a standard form, known as the Trading Agreement. The Trading Agreement is a framework agreement which obliges the MC to operate solely as part of Credico's direct marketing network. Although the Trading Agreement does not promise that

Credico will offer the MC a particular amount of work, or indeed any work at all, it is obviously in Credico's interests to use MCs to the full and thereby maximise the access to potential customers through the use of the ISA networks. The Trading Agreement is terminable by either side upon 14 days' notice.

7. The Trading Agreement contains two covenants in clause 21 which restrict the right of an MC to work for anyone other than Credico. They lie at the heart of this appeal. The first covenant applies during the currency of the Trading Agreement; the second is a post-termination covenant which operates for six months following termination of that Agreement. They are as follows:

> "The Company shall not, without prior express agreement from PerDM:
>
> 21.1 at any time while this Agreement is in force directly or indirectly carry on, or be involved in, any similar type of business as outlined under this Agreement.
>
> 21.2 during the period of 6 (six) months after termination of this Agreement, for any reason directly or indirectly, carry on, or be involved in any similar business conducted in a similar manner to that contemplated in this Agreement, within a radius of 10 (ten) miles of the principal place of business of the Company at any time during the final 6 (six) months (or lesser duration) of this Agreement."

8. Clause 16 of the Trading Agreement provides that the owner of the MC will sign a document ("the Guarantee") under which he or she personally guarantees the obligations of the MC under the Trading Agreement. A standard form Guarantee is appended to the Trading Agreement. Clause 10 of the Guarantee expressly makes the restrictive covenants personally binding on the owner. It states:

> "I agree that Clause 21 of the Agreement shall apply to me as though for reference to "the Company" in the first line there was substituted a reference to myself."

9. An important feature of the Trading Agreement is that it is drafted with a view to ensuring that MC owners are not employees of Credico but run their own separate businesses. Indeed, MCs are required to incorporate their businesses. Credico also provides a model contract which MCs must adopt when engaging ISAs. It seeks to secure that ISAs will in turn not be employees of the MC for which they work. The reason for this is in part to minimise costs, but also to distance the activities of MCs and ISAs from Credico itself. The guidance provided by Credico to MCs about how they should run their businesses also seeks to reinforce the independence of ISAs. It constantly stresses that MCs should make clear that ISAs are free to act as they wish and, for example, that MCs should not instruct ISAs to go to particular streets or locations to do the direct marketing.

10. Mr Lambert was the sole shareholder and director of the MC known as S5. On 4 August 2010 he entered into a Trading Agreement with the second respondent, PerDM Trading

Limited ("PerDM") on S5's behalf, and signed the Guarantee on his own behalf. Prior to that, in 2009, he had started as an ISA before being offered his own MC. In 2016 the business of PerDM was transferred to Credico and, as the judge found, the contract was novated to Credico. At all material times Mr Lambert and S5 were operating out of an office in central Manchester. Mr Lambert was successful, this being reflected in the fact that he was one of the few MC owners to have been granted Regional Consultant status by Credico. He not only managed his own team of ISAs but by 2020 had approximately 19 other MCs in his network.

11. In these proceedings, the Claimants alleged that, in November and December 2020, S5 and Mr Lambert had acted in breach of the restrictive covenant in clause 21.1 of the Trading Agreement by encouraging and assisting S5 ISAs to conduct door-to-door sales campaigns for third parties. Initially, for a very short period between 9 and 20 November 2020, this was for a betting company called Novibet, and then (as the judge found) between 21 November and 12 December 2020 for a rival of Credico called Energy Sales Marketing ("ESM"). The ESM campaign was called the "60 Second Challenge": ISAs would seek to obtain details of potential customers in that time and pass them on to a telephones sales advisor.

12. Mr Lambert and S5 did not deny that S5 ISAs had carried out work for Novibet and then for ESM although the judge found that Mr Lambert was far less involved in these activities than Credico had alleged. Mr Lambert said that he had arranged for this work to be done because, no doubt as a result of Covid, Credico was failing to provide any appropriate work for S5 and its ISAs to do, and he needed to find a source of income for his ISAs in the run-up to Christmas. Credico disputes that the work offered was inappropriate, but the judge held that it was not necessary for him to resolve that issue because, either way, working for a third party without Credico's consent would be a breach of the covenant, assuming it to be otherwise lawful. Mr Lambert did in fact assert that the work for Novibet was done with Credico's consent, in which case it would not have amounted to a breach of the covenant, but the judge found that it was not. For the purposes of this appeal, the details of the work done are immaterial, although they might ultimately be relevant to the question of damages, which was not an issue before Cavanagh J.

13. The work conducted for Novibet and ESM had all taken place whilst the Trading Agreement was still in force. The allegation was, therefore, that it constituted an infringement of clause 21.1.

14. On 3 December 2020, after becoming aware that S5 and Mr Lambert had been working for third parties, Credico wrote to Mr Lambert and S5 requesting that they sign draft undertakings ("the Undertakings") that were enclosed with the letter, and warning that if Mr Lambert and S5 failed to do so, the Claimants would terminate the Trading Agreement and would apply to the court for injunctive relief. The draft Undertakings broadly mirrored the restrictive covenants in the Trading Agreement. Credico had also required all activity with third parties to cease by 7 December 2020. On that date Mr Lambert signed and returned the Undertakings on his own behalf and on behalf of S5, but only after deleting the wording in the draft Undertakings which referred to the consideration that had been given by Credico in return for the Undertakings. He did not draw Credico's attention to this deletion.

15. In fact Mr Lambert continued, albeit in a relatively minor way, to assist the ESM campaign even after signing the Undertakings. Credico had employed enquiry agents who became aware of this. In view of this, Credico's solicitors, Addleshaw Goddard, sent Mr Lambert and S5 a letter before action on 10 December 2020. Mr Lambert responded the following day by giving notice of termination of the Trading Agreement, which therefore expired on Christmas Day 2020. On 17 December 2020, Credico issued a claim form and an application for injunctive relief to enforce the restrictions in the Trading Agreement, and for ancillary relief. Mr Lambert and S5 consented to the injunctive relief sought and, in an order made by consent on 22 December 2020, Jacobs J granted the injunctive relief and gave directions for a speedy trial of the claim. As a result of the interim injunction, neither Mr Lambert nor S5 had traded between December 2020 and the date of the judgment. In fact they did not trade at all in the six month post-termination period.

16. The trial was conducted by Cavanagh J over six days from 12-20 May 2021. Judgment was handed down on the 4 June 2021. The judge found, in essence, that both the covenants were enforceable and that both Mr Lambert and S5 had been in breach of clause 21.1 and indeed of the Undertakings. On the same date the judge made an order making declarations to the effect that the covenants were enforceable and also an injunction to give effect to the post-termination covenant which by then had only three weeks to run.

The findings of the judge

17. The judge was faced with a raft of issues, both legal and factual. He dealt with them all with conspicuous care in an impressive judgment which had to be produced very rapidly. We are concerned in this appeal with only a small number of these issues, namely those relating to the enforceability of the covenants. However the judge's findings on other matters, and in particular his factual findings about the precise nature of the relationship between Credico on the one hand and S5 and Mr Lambert on the other, are of critical importance when determining the validity of the covenants.

18. The following are the judge's conclusions on matters which are no longer in issue in this appeal.

    (1) There was a novation of the S5 Trading Agreement from PerDM to Credico, and this included the personal undertaking by Mr Lambert. Credico was entitled, therefore, to enforce the covenants if they were otherwise lawful. The judge also expressly rejected an argument that the terms of the guarantee agreement (in which Mr Lambert bound himself to the covenants) were not transferred because the parties had not complied with the Statute of Frauds Act 1667.

    (2) As a matter of construction of the covenant, it covered the activities carried out by S5 for both Novibet and the ESM campaign. In particular, although the ESM campaign involved ISAs generating leads which were followed up by telesales operatives, this amounted to "procuring customers" as defined in the Trading Agreement.

    (3) Again, as a matter of construction of the post-termination agreement, this not only meant that there could be no direct marketing conducted in the ten mile radius from S5's base for the relevant six month period, but in addition S5's base itself could

not continue to operate from within that area even if the marketing was carried on outside the area. In substance, therefore, Mr Lambert could only operate within the six month period by obtaining new premises outside the relevant area.

(4) Although the judge found the arguments finely balanced, he rejected the submission of Credico that clause 21.1, which imposed restrictions for the duration of the Trading Agreement, was not subject to the restraint of trade doctrine at all. In reaching that conclusion, the judge had regard to the decisions of the Supreme Court in *Peninsula Securities Ltd v Dunnes Stores (Bangor) Limited* [2020] UKSC 36, [2020] 3 WLR 521, and of the Court of Appeal in *Quantum Advisory Ltd v Quantum Actuarial LLP* [2021] EWCA Civ 227. Although there were similarities between these trading arrangements and contracts awarding an exclusive agency, which generally did not require justification for restrictions against working for third parties whilst the agency was in force, there were factors in favour of subjecting this particular clause to the doctrine of restraint of trade. These were the lack of equality in the bargaining positions; the fact that the Trading Agreement did not oblige Credico to provide any work at all for S5; and the fact that Credico could appoint other MCs to operate in the same area in which S5 was based and active.

(5) The Undertakings given on 7 December constituted a binding contract whereby Credico agreed not to take legal action if Mr Lambert and S5 agreed to the Undertakings. The fact that Mr Lambert had struck out the reference to the consideration given by Credico before returning the signed Undertakings was immaterial; it did not invalidate the contract. Nor was the contract rendered unenforceable by virtue of the doctrine of restraint of trade, even though it mirrored clause 21 and this was so even if the covenants contained in clause 21, or either of them, would otherwise have been in restraint of trade. There was a powerful and quite distinct justification for enforcing such covenants, namely the public interest in holding parties to an agreement under which they attempted to compromise threatened legal proceedings: see *Davies v Hart* [2015] EWHC 3121 (QB), per Wilkie J, paras. 28-30. The judge also cited numerous other authorities which have held that there is a presumption that the restraints imposed by such compromise agreements are enforceable, although it was not entirely clear whether the presumption was irrebuttable. In any event, even if it might exceptionally be capable of rebuttal, it had not been so rebutted here.

19. This analysis of the Undertakings was particularly important given that this ruling of the judge has not been appealed. Credico submits that in view of this, and given that the scope of the Undertakings essentially mirrored the scope of clause 21, there was no point in the court engaging with the arguments on the validity of the covenants at all. Even if they, or either of them, were unlawful at common law, virtually identical obligations were enforceable by virtue of the Undertakings and these justified the imposition of the injunctive relief in their own right. For reasons I develop below, I consider that it is nonetheless legitimate for the court to consider the enforceability of the two covenants.

The nature and scope of the services provided by Credico

20. The principal service which Credico provided to S5 was the marketing campaigns for Credico's clients. As the judge pointed out, it would in practice be impossible for any MC to negotiate a marketing agreement directly with the client; only a large organisation like Credico could offer the scale of service which the client required. As Mr Lambert said in evidence, Credico is the middle-man in the arrangement. The Trading Agreement does not restrict the areas within which the ISAs can operate, nor does it provide that the MC will have the sole right to target a particular area. It is not unusual for MCs to move location, particularly if they have sponsored second generation MCs who are seeking to become established in their original area. Mr Lambert himself has moved from Birmingham to Reading and thence to Liverpool, Newcastle and finally, at the time when these events occurred, Manchester.

21. In practice those setting up MCs will often be inexperienced in the ways of marketing and it is in their and Credico's interests, particularly in the early stages, that they should receive support and guidance. This takes a number of forms.

22. First, MCs are required to enter into an agreement with ISAs on the terms set out in schedule 3 to the Trading Agreement. This is drafted on the basis that ISAs will be viewed as independent contractors and not employees.

23. Second, when each new marketing campaign begins, Credico will provide the MCs with a client brief plus various campaign materials such as podiums and leaflets. Training will be provided, although this will principally be by client representatives. Its purpose is to enable ISAs to be able to discuss the benefits of the particular product in their dealings with potential customers.

24. Third, there is back-office support of various kinds, some of which is identified in the Trading Agreement. This support includes banking and accounting services, the provision of insurance, and processing commission payments. The support is provided mainly by a team of Credico staff known as "the Hub team". All MCs are required to use the same bank, and Credico maintains detailed oversight of the bank accounts. It also has unilateral control of any Internet Banking Facility. In addition, the MC must appoint accountants and book-keepers nominated by Credico, and the MC pays the relevant charges. Similarly, it is a condition of the Trading Agreement that the MC will become insured with respect to its network and will pay the cost. With respect to processing payments, Credico itself works out the commission due and makes the relevant payments to ISAs on behalf of the MCs. Credico also arranges the payment of rent and other office charges. Each MC has to pay a charge referable to the cost of the Hub team, but Credico contend that this does not meet all the relevant back-office costs.

25. The judge was satisfied that these services were of "very considerable value" both to Credico and to the MCs. It freed the latter from administrative chores and enabled them to focus on their two main tasks, namely recruiting ISAs and increasing sales. Moreover, the judge held that he had little doubt that the services were provided at a lower cost than the MCs would individually have had to pay on the open market when they would not benefit from the bargaining power which Credico was able to exert.

26. In addition to these areas of support, there was also ad hoc advice and assistance. For example, considerable assistance was provided with respect to dealing with the implications of Covid 19.

27. It is important to note, however, that there are certain kinds of information which a company may acquire in the course of a business relationship, and which typically justify the imposition of restrictive covenants, which the judge expressly found did not arise on the facts here. These are justifications based upon the exploitation of goodwill, confidential information, and know-how.

28. The protection of goodwill is frequently relied upon as a justification for imposing covenants against competition, both for the duration of the relationship and for a period thereafter. For example, in franchise relationships the franchisee relies upon the goodwill built up by the franchisor and is in a position to get to know customers in the franchise area. It is well established that appropriately drawn post–termination covenants are justified in order to protect the franchisor's goodwill and to prevent the franchisee from exploiting the knowledge of customers gained during the franchise period for his own benefit and to the detriment of the franchisor's business: see e.g. *ChipsAway International Ltd v Kerr* [2009] EWCA Civ 320 (CA). Credico has no goodwill of this nature at all. It has no customers of its own. Indeed, as the judge noted, it does not assist an ISA seeking to sell a product for the potential customer to know that he or she is connected with Credico. Nor does that connection assist an MC to recruit new ISAs. Indeed, Credico discourages MCs from boasting their connection with Credico because it runs counter to the impression which Credico is keen to give that the MCs are wholly independent businesses. Its name as such carries no weight.

29. As regards confidential information, the judge held that the nature of the relationship between Credico and S5 did not involve the transfer of any information which could properly be described as confidential. The judge considered with care two sets of material supplied to S5 and Mr Lambert, namely territorial management data and sales/ISA performance data, which it was alleged fell into this category. The judge's conclusion about this information was in essence that it was useful management information whilst a campaign was on-going but was "virtually of no value when a MC ceased to participate in a particular campaign and when the MC left the Credico network". The information relied upon did not, therefore, begin to have the necessary quality of confidentiality about it. The covenants could not be justified on the basis that they were needed to protect confidential business information from being exploited by S5.

30. The judge dealt at some length with Credico's contention that there was extensive and valuable know-how given to S5 and its staff, albeit falling short of confidential information. The alleged know-how fell into two main categories, campaign specific know-how and general know-how. As to the former, the judge held that the information was either campaign specific, in which case it was of no value to other campaigns; or it was general advice about selling techniques which, whilst useful, was "run of the mill advice which was readily available from other sources". The best training ISAs received in this regard was the on-the-job training watching others working on the doorstep. As to general know-how involving such matters as sales techniques, recruitment, and business administration, again the significance of this had in the judge's view been exaggerated by Credico's witnesses. It was "of some assistance but it was not of great value." It could not be said, therefore, that Credico had so contributed to the know-how

of S5 that it had a continuing interest for that reason alone in preventing or restricting competition from S5 after the termination of the agreement.

31. The judge concluded that the most valuable assistance provided by Credico to MCs consisted of the ready-made clients, the processing of sales and commission, and the back-office support.

Should the court engage with the legality of the covenants?

32. A preliminary question is whether the court should address the restraint of trade principles at all. As I have explained, Mr Mehrzad QC, counsel for Credico, submitted that since the Undertakings justified the relief granted in any event, it mattered not whether the covenants were enforceable or not. The declarations and injunction would stand even if the covenants were in fact in unreasonable restraint of trade.

33. I recognise the obvious force of this submission; the court does not readily determine potentially difficult legal issues where this serves no useful purpose. But there are two factors in particular which lead me, albeit with some hesitation, to conclude that the court ought to consider these issues in this case. First, it seems that in the court below Credico placed great emphasis on these covenants; they do not appear to have suggested to the judge that he should first of all consider the Undertakings on the grounds that it would not be necessary to go further if the relevant relief could be granted on that basis. They appear to have been keen to have a ruling on the legality of the covenants. Indeed, the judge only considered the Undertakings on the basis that he might be wrong in his conclusion that the covenants were enforceable. Second, the cause of action in these proceedings has now been amended so as to allow claims of unlawful means conspiracy and unlawful interference with the trade of Credico. It is accepted that argument about the applicability of these torts will require the court to engage with the question whether similarly framed restraint of trade clauses in trading agreements with other MCs are legally enforceable or not.

34. Mr Mehrzad submits that this is not to the point: the ruling on the covenants in this case will not bind a court considering another case where the facts may be different: see *Virgin Atlantic Airways Ltd v Zodiac Seats Ltd* [2013] UKSC 46, [2014] AC 160 (SC) per Lord Sumption, para. 17. The circumstances of other MCs may be different and that could lead to a different conclusion about the enforceability of their covenants even if they are similarly worded.

35. This is no doubt legally correct but on the assumption (not disputed before us) that in substance all MCs are subject to the same or very similar trading agreements, it is not likely that there will be material factors with respect to other MCs which will be of such weight as to justify a court departing from Cavanagh J's approach. On any view, his ruling will carry very considerable weight in the next stage of the litigation. If, as I suspect may very likely be the case, a court finds that there is no material distinction between the facts of this case and the position of the trading agreement with the MC then under consideration, the ruling of Cavanagh J will be followed. It would be unfortunate if that ruling were then to be appealed to this court when we could decide it now, having already heard extensive argument on the point. Moreover, if this court is to overturn the judge, it is better that it should be done now before the trial on the amended claims rather than afterwards. For these reasons, therefore, I would reject this preliminary submission.

36. The critical issue is whether the restraint clauses were enforceable or whether they were in unreasonable restraint of trade. There is extensive case law on the principles to apply when considering the enforceability of such covenants. There has been no dispute about them; the focus has been on their application in the particular circumstances of the case. A detailed summary of these principles was helpfully set out in the judgment of Carr LJ in *Quantum Advisory Ltd v Quantum Actuarial LLP* [2021] EWCA Civ 227 (CA)**.** She noted that there are sometimes two distinct issues which need to be determined: first, is the restraint of trade doctrine engaged at all; second, if so, is the restraint reasonable in all the circumstances. Since it is now accepted that the restraint of trade principles are applicable to both covenants, the only question we have to determine is whether in each case the restraint is reasonable. Carr LJ helpfully set out the relevant principles on the issue of reasonableness as follows:

> "62. On the question of reasonableness, it is common ground that the test identified by Lord Macnaghten in *Nordenfelt* (at 565) is to be applied:
>
> > "reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."
>
> 63. Whilst in some of the authorities the courts have conflated the two (private and public interest) aspects of the test (see for example *Attorney-General of the Commonwealth of Australia v Adelaide SS Co* [1913] AC 78 (at 795 per Lord Parker) and *Esso* (at 324D per Lord Pearce)), the broad view appears to be that Lord Macnaghten's dichotomy is to be preferred. Where businesses have dealt at arm's length with each other, they can usually be regarded as adequate guardians of their own interests. However, the possible impact of the bargain upon third parties, or the public more generally, may call for careful judicial scrutiny. Clarity of analysis is more likely to be facilitated by preservation of both limbs of the exposition.
>
> 64. A court will be slow to substitute its (objective) view as to the interests of the contracting parties for the (subjective) views of the contracting parties themselves. The law recognises that if business contracts are fairly made by parties who are on equal terms such parties should know their business best (see in particular *Esso* (at 300C-D per Lord Reid; at 305B-D per Lord Morris and at 323B-E per Lord Pearce)). That consideration will carry less or no weight if the parties were negotiating on other than equal terms (see *Panayiotou* (at 332 per Jonathan Parker J)). The absence of independent legal advice for the weaker party may also be relevant (see *PSM* (at [100] per Arden LJ)).
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> 65. Beyond this, and again drawing the relevant threads together by way of summary:

i) The onus of establishing that a covenant is no more than is reasonable in the interests of the parties is on the person who seeks to rely on it (see in particular *Attwood v Lamont* [1920] 3 KB 571 (at 587-588 per Younger LJ). If he/she establishes that it is no more than reasonable in the interests of the parties, the onus of proving that it is contrary to the public interest lies on the party attacking it (see in particular *Saxelby* (at 716 per Lord Shaw));

ii) The time for considering reasonableness is again the time of the making of the contract (see in particular *Gledhow Autoparts Ltd v Delaney* [1965] 1 WLR 1366 (at 1377 per Diplock LJ); *Shell v Lostock Garage Ltd* [1976] 1 WLR 1187 (at 1197-1198 per Lord Denning MR) and *Schroeder* (at 1309H per Lord Reid));

iii) It is no answer on the question of reasonableness to say that there have been substantial financial rewards on all sides. The question of reasonableness has to be considered by reference to the terms of the contract (see in particular *PSM* (at [104] per Arden LJ));

iv) For a restraint to be reasonable between the parties it must be no more than what was reasonably required by the party in whose favour it was imposed to protect his legitimate interests (see in particular *Saxelby* (at 701 per Lord Atkinson) and *Schroeder* (at 1310B per Lord Reid and 1315H per Lord Diplock));

v) The court is entitled to consider whether or not a covenant of a narrower nature would have sufficed for the covenantee's protection (see in particular *Office Angels Ltd v Rainer Thomas and O'Connor* [1991] IRLR 214 (at 220 per Sir Christopher Slade));

vi) What is reasonable may alter with the changing nature of commerce and society (see in particular *Nordenfelt* (at 547 per Lord Herschell));

vii) Factors to be considered when assessing reasonableness between the parties include the character of the business (see in particular *Nordenfelt* (at 550 per Lord Herschell)) and also:

a) The relevance of the consideration for the restraint;
b) Inequality of bargaining power;
c) Standard forms of contract;
d) Whether the restraints operate during or post-contract;
e) The surrounding circumstances, including the factual and contractual background;

> (see in particular *Panayiotou* (at 329-336 per Jonathan Parker J));
>
> viii) The duration of an agreement in restraint of trade is a factor of great importance in determining whether the restrictions in an agreement can be justified (see in particular *Schroeder* (at 1312F-G per Lord Reid));
>
> ix) The level of compensation may be relevant to the question of reasonableness (see *Esso* (at 300B-C per Lord Reid) and *Panayiotou* (at 329-330 per Jonathan Parker J));
>
> x) The motives of the party challenging the contract are immaterial to the question of whether the terms of the contract are reasonable as between the parties (see in particular *Schroeder* (at 1309H per Lord Reid) and *Panayiotou* (at 336 per Jonathan Parker J)).

37. I need to say something more about item (iv), which is central to the argument concerning the post-termination covenant. It is firmly established that in both employment and business cases, the party seeking to enforce the covenant must be able to identify some legitimate interest which justifies the imposition of a restriction on competition. It is not reasonable, nor in the public interest, simply to prevent competition without more. It will always be in the interests of a business to restrict or prevent competition, but for the restraint to be justified there must be some interest of the covenantee which he can legitimately claim will be undermined without some protection. Sometimes this can be achieved by imposing a restriction on soliciting or dealing with clients, but in other cases a restriction on competition itself will be required if the interest is to be properly protected. In all cases the restriction must be reasonable in all the circumstances.

38. There are certain interests which have long been recognised as in principle warranting an appropriate covenant. As I have said, the protection of customer connection or goodwill is often the legitimate interest relied upon, as is the protection of confidential information and know-how. A party which has managed in the course of an employment or business relationship to obtain confidential information of value to the other party, or which has built up its knowledge by taking advantage of knowledge, such as working techniques or practices, which is not generally known or available can be restrained after the relationship has ended from exploiting the information or knowledge to its own advantage and to the detriment of the covenantee.

39. In a classic dictum about the nature of the interests which may be protected, Lord Wilberforce described them as follows in *Stenhouse Australia Ltd v Phillips* [1974] AC 391 (PC), 400:

> "The employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes even though he, the employee, may have contributed to its creation".

40. This was an employment case, but the requirement that there should be a legitimate interest to protect applies equally in the business cases. However, as Evans LJ observed in *Dawnay, Day and Co. Ltd v D'Alphen* [1998] ICR 1068, 1106:

> "The established categories are not rigid, and they are not exclusive. Rather, the covenant may be enforced when the covenantee has a legitimate interest, of whatever kind, to protect, and when the covenant is no wider than is necessary to protect that interest".

41. Evans LJ also expressed the view that if a sufficiently cogent commercial interest could be established meriting protection, it was capable of justifying protection whether or not it could be classified as "proprietary or quasi-proprietary". The epithet is, perhaps, unimportant; but the need for the covenantee to demonstrate the existence of an interest of substance, which might be undermined in the course of free competition, is not.

The role of the appeal court

42. The judge held that both covenants were enforceable. He did so after a careful analysis of the features of the contract and the relationship thereby established, including the bargaining power of the parties. In these circumstances, where the judge is making an evaluative judgment which involves weighing up numerous factors, it is now well established that it is not the job of the appellate court to decide the matter afresh, and it should be slow to interfere with the judge's evaluation. It must be satisfied that the decision was "wrong": see the detailed discussion of this issue in *Re Sprintroom Ltd* [2019] EWCA Civ 932; [2019] B.C.C. 1031, paras.72-79. As Lord Carnwath pointed out in *R (on the application of R) v Chief Constable of Greater Manchester* [2018] UKSC 47; [2018] 1 W.L.R. 409, para. 64, a court does not have to point to a specific error of principle, whether of law, practice or policy, before being able to conclude that the judge's decision was wrong; rather

> "The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion."

The enforceability of the covenants

43. Mr Brown, counsel for the appellants, has submitted that the basic starting point of the judge to the application of the doctrine of restraint of trade was misguided and involved two particular errors of law. First, it is alleged that the judge did not place the facts in the appropriate category by treating it as a covenant between businesses rather than one which was in substance, at least to a significant extent, a relationship of employment. Second, he assessed the validity of the covenants as at the date they were first made with PerDM whereas their validity should have been assessed at the date of novation.

44. The judge commented in his judgment that the level of scrutiny he should adopt was "somewhat stricter" than the standard to be adopted in a bespoke commercial agreement, but "considerably less" than would be applied to an employment agreement. He did not accept that the relationship was in substance an employment one, or akin to

an employment relationship. As he observed, it was never envisaged that Mr Lambert would provide his personal services to Credico through the vehicle of the MC; he ran his own business and engaged his own staff. In my judgment, to the extent that Mr Brown was contending that the judge erred in failing to apply the more stringent employment test, I would categorically reject that submission, essentially for reasons the judge gave. Mr Lambert was clearly in business. This was not in substance an employment relationship concealed as something else. S5 was a separate company which made profits on its own activities, and Mr Lambert derived his income by reference to those profits.

45. The more limited submission is that even if the judge could properly locate the covenant in the business field, he was plainly wrong to say that the scrutiny to be adopted was "considerably less stringent" than the court would apply to employment cases. It is asserted that on the spectrum from employment to business covenants, this placed the facts of this case much too firmly on the business side with the consequence that the judge analysed the covenants from a wrong starting point. Mr Brown submits that given the considerably stronger bargaining position of Credico - the fact that Mr Lambert was inexperienced, was not legally represented and that Credico simply imposed standard terms and conditions - together with Credico's very detailed involvement in the business of S5 (and with MCs more generally), the appropriate level of scrutiny should have been very close to that adopted in employment covenants.

46. I do not accept that a general observation of this nature about the appropriate level of scrutiny would of itself demonstrate any error of law, even if the court felt that it might suggest that S5 was more independent from Credico than was the case. I doubt whether it is helpful to try to locate the nature of the scrutiny required on a spectrum of that kind at all; in any event, it is only a short-hand for the much more detailed reasoning of the judge. The real issue is whether the judge did in fact take into account the factors which showed the level of dependence of S5 on Credico, including the involvement in its activities and the extent of any inequality of bargaining power in the relationship when the parties entered into the agreement. The judge plainly did address these issues with considerable care; he was well aware of the inequality between the parties and had a detailed understanding of the nature and extent of Credico's control over S5's activities. If his findings of fact were sustainable on the evidence, and his conclusion on the validity of the covenants was otherwise legally justifiable, any general observation as to the level of scrutiny he was adopting, even if it might be thought not wholly apt or accurate, would not of itself constitute an error of law. It might cause the court to take particular care in scrutinising the judge's reasoning, but in my judgment it would not of itself demonstrate that the reasoning was flawed.

47. As to the date at which the validity of the covenants should be determined, it is well established that it should be from the date when the contract was entered into. But in this case does that mean when it was originally entered into with PerDM or the later date when there was a novation of these obligations to Credico? The judge held, contrary to the position then adopted by both parties, that it was the former. He may have been right about that, but this seems to me to be an arguable point. The novation involves the creation of a new contract, and in some cases, depending on the wording of a covenant, it may have very different consequences when applied to the circumstances of the novated business than it did with respect to the original business. In so far as that may be material, it could affect the reasonableness of the covenant. We

were not referred to any direct authority on this potentially tricky point, but fortunately I am satisfied that the court does not have to determine it in this particular case. This is because the judge himself held that he would have reached the same conclusion on the enforceability of these covenants whichever date was adopted. Given that on the facts here the novation led to no material change in the context in which the covenants operated, that was an eminently sustainable conclusion. The only argument advanced as to why that might not be so was that Mr Lambert was a more experienced business man by the time Credico came into the picture than he had been when he first entered into the contract with PerDM. But even accepting that to be so, it would show that the inequality in bargaining power was less marked at the date of novation than it had been when the contract was originally drafted. Accordingly, to the extent that that factor has any significance at all, fixing the relevant date for the purpose of assessing the covenants as the date of novation would work in Credico's favour rather than in favour of the appellants. Accordingly, I am satisfied that nothing turns on this point on the facts of this case. Even if the judge chose the wrong date, this did not prejudice the appellants.

Clause 21.1: restraints operating during the contract

48. As I have said, the judge ruled that on balance the restraint of trade doctrine was applicable to this covenant. The only issue on appeal with respect to this provision, therefore, is whether the judge was entitled to conclude that the covenant was reasonable in all the circumstances.

49. What was the legitimate interest which Credico was entitled to protect? As I have indicated above, the judge rejected Credico's submission that it had a legitimate interest in protecting its know-how and/or confidential information. Nonetheless, he concluded that there was a legitimate interest to protect which he defined as follows:

> "Overall, in my judgment by far the most important matters that gave rise to a legitimate business interest on the part of Credico were the fact that it was expected that Credico would supply Mr Lambert and S5 with a ready-made stream of campaigns, and that they would provide him with back-office services that would be of great value to the functioning of S5, especially since all MCs enter into the Trading Agreements when their owners are starting off and inexperienced."

50. The judge held that the restriction went no further that was necessary to protect these interests. He observed that exclusivity clauses were "commonplace in agency agreements such as this". He drew support from the decision of the Court of Appeal in *One Money Mail Limited v RIA Financial Services* [2015] EWCA Civ 1084. In that case the defendant was an agent of One Money Mail which operated a money remittance business whereby money could be transferred to accounts in another country. He was himself Polish and dealt with remittances to Poland on behalf of Polish workers. He agreed not to work as a principal or as an agent of a competing business during the currency of the contract or for a period thereafter. The judge held that the covenants were unenforceable but the Court of Appeal overturned that decision on appeal. Longmore LJ, with whose judgment Lloyd-Jones and Briggs LJJ agreed, observed that the judge had found that in various ways One Money Mail had devoted time and money in supporting and training its agents and it was entitled to require that

the agent should work exclusively for it. This was so notwithstanding that, as in this case, One Money Mail could appoint another agent in the same area as the defendant was operating. Similarly, Cavanagh J. held that this was analogous to the support provided by Credico, coupled with the fact that Credico provided the opportunity for the MCs profitably to use their workforce.

51. Mr Brown advanced three reasons in particular why the judge was not justified in reaching this conclusion. The first was the fact that there was no obligation to provide work and since S5 could accept work only from Credico, this could mean that it had no work at all. Moreover, Credico could engage other MCs to work in the same areas in which S5 carried on its business. So far as this was concerned, the judge merely said that whilst these were factors which required Credico to justify the restraint, they did not demonstrate that the restraint was unreasonable in this case.

52. The second reason was that the judge wrongly described this as an "agency case". Indeed, he said that this was why it was "on the cusp of the categories of restrictions which are beyond the scope of the doctrine." Mr Brown submits that this is not a legitimate comparison, and that no support can be gained from the One Money Mail case. Typically, agents will not be relying upon the principal to provide them with work but will be generating their own custom, as in the *One Money Mail* case. Moreover, the agent will typically be relying upon the goodwill and good name stemming from the principal's reputation. Neither of those factors operates here. S5 could not generate its own work and Credico had no goodwill to protect.

53. Third, Credico could have adopted a narrower restriction which would have achieved its objective. The restriction could have been limited by preventing activity in competition with Credico or with its clients. The judge engaged with this argument but rejected it on the grounds that Credico's clients changed from time to time and it would have been "very difficult if not impossible" to police a more restrictive covenant. A blanket ban on carrying on the marketing activities was therefore justified.

54. I agree with the judge that the fact that Credico was not obliged to provide campaigns for S5 to work on did not in this case render the covenant unreasonable. I accept that in some, perhaps many, contexts that would be a powerful factor against treating the clause as valid. It cannot be reasonable to sterilise the activities of a business altogether, perhaps for a potentially lengthy period of time. Nor, indeed, can this be in the public interest.

55. However, there are significant factors which in this case largely mitigate this possibility. First, as the judge pointed out, when the contract was entered into (and whichever date is chosen) both parties expected a steady stream of work. Looking at the issue as a matter of substance, as the courts are required to do, there was no likelihood of work not being made available. Indeed, provided Credico itself has campaigns to run, it will always be in its interest to engage as many MCs to market the products as possible. Credico benefits from all sales, and it makes no sense deliberately to keep ISAs off the streets. The only circumstances when it is likely not to make work available is if it does not have appropriate work for the MC to do. Covid provided exceptional circumstances where this was (at least arguably) the case.

56. Second, again as the judge noted, the Trading Agreement can be terminated with two weeks' notice, so the MC can opt out of the arrangement very speedily.

57. Third, S5 could work elsewhere with the agreement of Credico. I would not put much weight on this factor, but in my view it is not an entirely irrelevant consideration. If Credico has no work to provide it may well think it in its own interests to allow an MC to work elsewhere if only because it helps keep that particular workforce together, and that might well be in Credico's longer term interests. Moreover, it may be that Credico has to exercise its discretion whether or not to grant its permission in good faith (although this point was not argued before us).

58. For these reasons, I do not consider that these contractual terms of themselves render the clause invalid. However, I do see force in Mr Brown's objection that, contrary to the judge's view, this Trading Agreement is not a typical agency agreement, essentially for the reasons he gives. There is no goodwill which Credico is seeking to protect, and typically the generation of work is not in the hands of the principal as with Credico. This is an unusual kind of agreement and care must be taken in drawing an analogy between it and agency arrangements. However, in this particular context I think that all the judge was saying was that the factors which justified an exclusive arrangement in the *One Money Mail* case were also in play here. In effect, Credico had invested time and some money in supporting and training the MCs and their workforce, and it was not unreasonable in those circumstances to require the MCs to work exclusively on their campaigns.

59. The question whether a less onerous covenant would have sufficed depends upon precisely what interest is being protected. The judge rejected the argument on the basis that any lesser covenant could not be easily monitored. Mr Brown responds that it could do, given the control Credico has over the accounts. However, whilst that may be an answer to control over S5's activities, it does not deal with a situation where Mr Lambert sets up a new MC under a new name.

60. The judge's approach suggests that if the difficulty of monitoring could be overcome, it would be unreasonable not to adopt a narrower restriction. But in my view that would not provide the protection which Credico seeks from this covenant. The interest which Credico has, at least while the Trading Agreement is in place, is not merely to prevent MCs acting in competition as such. Rather it is that since it is investing business opportunities and time and money in supporting S5 with campaigns and other forms of support, it is justified in requiring S5 in return to provide its services exclusively for Credico's benefit for the duration of the agreement. The investment is designed to secure an available workforce for its campaigns and working on another campaign whilst the Trading Agreement is in place, even if it is not actually competing with Credico's campaigns, would undermine the value of its investment.

61. In my judgment, therefore, the judge was fully entitled to conclude that the covenant in clause 21.1 was valid and enforceable. Indeed, I find it difficult to see how any other conclusion could properly have been reached on the facts.

The post-termination covenant

62. The judge also held that the post-termination agreement was a reasonable restriction on trade. He summarised why the usual kinds of interests could not be relied upon, such as goodwill, confidential information and know-how, or indeed the need to have an opportunity to find a new MC to replace S5, given that there were multiple MCs in each big city. However, he held that the same interest which justified the restriction during

the operation of the Trading Agreement, namely the investment of time and resources in S5, also justified the imposition of a post-termination covenant. The core of the judge's explanation for this conclusion is as follows:

> "If a business in Credico's position could train up a MC by giving it work to do and by providing it with the support it needed to function, only for the MC to start working for a competitor as soon as the Trading Agreement is terminated, there would be little incentive to invest in the MC at all. Credico is entitled to a reasonable post-termination restriction in order to protect itself against competition by persons who built up their knowledge and interest in the Credico network and who had benefited from Credico's investment in them. In my judgment, this applies even if there is no goodwill to protect."

63. The judge relied upon *Prontaprint Plc v Landon Litho Ltd* [1987] FSR 325 at 324 per Whitford J, cited with approval in *ChipsAway International v Kerr* [2009] EWCA Civ 320, para. 22, to support his analysis that Credico's investment in S5's business constituted a legitimate business interest which justified the imposition of a post-termination covenant.

64. The judge noted that "the standard of scrutiny is considerably less than would apply in the employment case", notwithstanding the inequality in bargaining power. Given the limited six month period and the fact that the ban was only in the ten mile radius area, the judge held that this was not too onerous.

65. The judge considered whether a more limited clause simply restricting competition with Credico and Credico's clients would suffice but he held, as with clause 21.1, that there was no satisfactory way of policing such a covenant particularly since "Credico's clients change from time to time."

66. I have not found this aspect of the appeal easy, particularly bearing in mind that I should not second guess the judge's conclusions on this point. Ultimately, however, I am persuaded that the judge was wrong in his conclusion with respect to this clause. This covenant is, as the judge recognised, very different from the restraint clause whilst the Trading Agreement is in place. As I have said, in my judgment the justification for that clause is that Credico is entitled to demand exclusivity as a quid pro quo for its provision of the campaigns and its support to S5 in conducting those campaigns. It can reasonably expect and require that whilst it is investing in an MC, it should have the exclusive benefit of the MC workforce. Moreover, the owner of the MC should not be entitled to undermine this interest by setting up a new MC under a different name; hence the reason that the owner is also bound by the covenants. But once the Trading Agreement comes to an end - following lawful termination by either party it should be noted - it obviously cannot expect to have the workforce available to it thereafter. So what is its interest in seeking to impose a restriction on an MC's ability to operate thereafter?

67. By rejecting Credico's contention that it had confidential information or business know-how which justified restricting S5's business activities, the judge effectively accepted that there was nothing in the nature of a proprietary or quasi-proprietary interest which could be exploited by S5's activities. Moreover, the judge held that in essence the training and support offered was either campaign specific and of no real

value once the campaign was over, or was of a kind which could without undue difficulty have been acquired elsewhere. There is no doubt, as the judge recognised, that an employee cannot be prevented from using the general knowledge and experience he gains during employment with another employer, even a competitor, following dismissal. It is only if there is some factor which renders the knowledge and experience special in the sense that it would be unjust for the employee to be allowed to use it to the detriment of the first employer, that a covenant is permissible. There was no such factor here.

68. The reason why the employee cannot be prevented from using his skills and experience is that it is contrary to the public interest to prevent competition per se. The judge rightly held that this is not an employment case, and in many business cases the courts must give considerable weight to the fact that the covenant has been agreed by the parties. But this is only where there is equal bargaining power. As Carr LJ pointed out in the *Quantum Advisory* case, where the parties do not have equal bargaining power, this is a factor of little or no weight.

69. In principle, I do not think that it can be in the public interest to prevent competition between businesses, absent some special interest which justifies it, any more than it is for employees. A business should be entitled to use its knowledge and experience gained in the course of business dealings in the same way as an employee. No doubt the courts will not need much persuading that there is a legitimate interest where equal parties have negotiated an agreement based on that assumption. But that is not this case.

70. I can see no justification for imposing the particular post-termination covenant in this case. Nor do I think it is warranted to impose a covenant which would forbid S5 working for a competitor, at least unless it is in competition with a campaign being conducted by Credico. I can see that there might well be a justification for preventing an MC and its owner from actually working on the same campaign as they were carrying out for Credico, although I doubt whether that could arise in practice. It would only do so if the client employed a number of companies to carry out the particular campaign. It might be said that since the training and support has been targeted to specific campaigns, an MC can lawfully be prevented from exploiting that information to the detriment of Credico. But even if that is so (and I do not say that it necessarily is) I do not see why it should be reasonable to prevent S5 or any other MC from working in competition with Credico if it is in connection with a campaign about which S5 and Mr Lambert have no knowledge or information. S5 will not have gained any insights into the running of such campaigns which would be unjustified for it to exploit. An MC has little knowledge of Credico's activities save in relation to the campaigns allocated to it.

71. Nor do I accept that the authorities of *Prontaprint* or *ChipsAway*, relied upon by the judge, do in fact support his analysis. These were both franchise cases and, as the judge himself recognised, they were concerned with the protection of goodwill. That raises wholly different concerns. As Dyson LJ pointed out in *ChipsAway*, in a judgment with which Thomas and Richards LJJ agreed, (para 22):

> "…during the term of a franchise, goodwill is built up in the franchise territory with the use of a franchisor's name and branding. Such goodwill is a potentially valuable asset in the hands of the franchisee so long as he continues to trade in the

> franchise territory, and in the hands of the franchisor at the termination of the franchise agreement. A franchisor's interest in that goodwill is vulnerable to competition from a former franchisee who has knowledge of the area and experience of dealing with particular groups or customers. The commercial purpose of a post-termination agreement against competition is to prevent the franchisee for a period of time from continuing and competing in his former territory in the same line of business so as to enable the franchisor to exploit the goodwill that he has built up during the term, most obviously by recruiting another franchisee for the same area."

Dyson LJ then cited *Prontaprint* which was to the same effect.

72. These are typical cases where a party has, as result of acting as a franchisee, gained knowledge and experience of dealing with particular groups of customers. The point is not that the franchisor has given the franchisee an opportunity to work and develop his business. It is the much more specific point that by virtue of doing that, the franchisee obtains information about clients which is, to use Lord Wilberforce's phrase, in the nature of a proprietary interest which the franchisor is entitled to protect from competition. S5 gained no such advantage in this case.

73. The other case which is to similar effect is the *One Money Mail* case. It is true that in that case Longmore LJ did seem to suggest that the investment of time and money amounted to an interest to protect with respect to post-termination covenants as well as to covenants operating during the agreement. However, in that case there were two further factors justifying the covenant; one was the evidence (not relied on in this case) that agents readily changed principals and therefore some restriction to prevent this might be justified; and critically, it was accepted that the agent was able to take advantage of customer loyalty which tended to be with the agent; in other words, without a restriction, the agent could undermine the principal's goodwill. I do not believe that this case justifies the conclusion of the judge.

74. I would briefly make three further points with respect to the judge's analysis. First, I do not understand on what basis the judge concluded that without a post-termination covenant there would be little incentive to invest in an MC at all. MCs have also had to commit both financially and in other ways in order to be recognised as MCs, and if they have a steady stream of campaigns, there is no obvious reason why they should choose to move unless alternative arrangements were obviously superior. There does not seem to have been any evidence to that effect and indeed the business support provided by Credico would be likely to encourage MCs to stay. Absent some such evidence, I do not see that the conclusion is warranted.

75. Second, the clause does not in fact prevent competition even with respect to campaigns which S5 has been conducting for Credico. Competition is permissible if it is outside the ten mile radius. In one sense it can be said that this makes the covenant more acceptable, because its effect is to limit the kind of competition which is forbidden. But it also suggests that it is a rather arbitrary clause. In franchise cases where the franchisee works in a particular area, a covenant covering that area makes sense because it is the place where he can exploit the franchisor's goodwill. There is no similar justification for selecting this area. There is no reason in principle why an MC cannot do as much

harm to Credico's business operating outside the ten mile radius as inside it. The effect of the clause, if valid and as interpreted by the judge, is to make the owner move the MC base outside the ten mile radius before the MC can compete. In my view it is at least arguable that it is not justified to impose a clause whose effect is to require an MC to undergo the cost and trouble of moving base before it can compete in the new area when the potential damage to Credico is likely to be the same, whichever area the MC operates in. However, the case was not argued on that basis and I do no more than raise the point.

76. Third, Cavanagh J. concluded with respect to both covenants that it was reasonable to restrict the right to undertake any activity, whether in competition or not, because of the difficulty of monitoring the narrower non-compete covenant. Given my conclusion that the post-termination covenant is in any event invalid, it is not necessary to engage with this analysis. Suffice it to say that I am not sure why the alleged problem of monitoring justifies the wider covenant. In so far as it is being said that it is difficult to establish whether the MC is active in the area at all, that problem will be the same if a covenant is in force, whether it is restricted to campaigns in competition or campaigns generally. Once it is established that there is campaign activity, I find it difficult to understand why it is hard to discover whether it is in a competing field or involves marketing a non-competing product. Indeed, one would have thought that it would quickly become known to any ISA in a particular locality if there is a competitor seeking to market the same or a competing product. If it does not become apparent, it suggests that there is no significant, if any, damage being caused to Credico; the impact of the MC's activities on Credico will have been at best marginal.

Disposal

77. In my judgment the judge was both entitled and right to declare that clause 21.1., which imposes the restraint operating for the duration of the Trading Agreement, was valid and enforceable. However, in my judgment he was wrong to hold that the post-termination covenant in clause 21.2 was also valid. Credico had no legitimate interest which justified the imposition of this particular covenant.

78. However, it would not be appropriate to discharge the injunction granted by the judge to restrain post-termination activities because even though that covenant is invalid and could not therefore justify the injunction, it was nonetheless appropriate relief to give effect to the relevant Undertaking, which was valid.

Lord Justice William Davis:

79. I agree.

Lord Justice Underhill:

80. I also agree with Sir Patrick's reasoning and decision. I much regret that this is the last occasion on which this Court will have the benefit of his wisdom and his mastery of the law.

81. In connection with the issue which Sir Patrick notes at para. 47, if it does in due course fall to be decided in another case it may be relevant to consider *Pat Systems Ltd v Neilly*

[2012] EWHC 2609 (QB), at paras. 32-40, which are concerned with an arguably analogous question.

82. We will consider submissions from the parties as to the form of the order giving effect to this judgment and consequential matters.