



[2014] JMCC COMM 14

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2014CD00084

BETWEEN	DIGICEL (JAMAICA) LIMITED	CLAIMANT
AND	SHARON CARTY	FIRST DEFENDANT
AND	CABLE & WIRELESS COMMUNICATIONS PLC	SECOND DEFENDANT

IN CHAMBERS

**Michael Hylton QC, Kevin Powell and Melissa McLeod instructed by Hylton Powell
for the claimant**

**Ransford Braham QC, Trudy Ann Dixon Frith instructed by Grant Stewart Phillips
and Co for first defendant**

November 26, 28 and December 5, 2014

INJUNCTION – RESTRAINT OF TRADE – EMPLOYEE AND COMPETITOR RESTRAINED BY CLAUSES – WHETHER RESTRAINT CLAUSE TOO WIDELY DRAWN – INTERPRETATION OF CONTRACT

SYKES J

[1] Friday, May 16, 2014 will live long in the memory of Miss Sharon Carty. That was the day she signed a contract with Cable & Wireless Communications plc ('CWC'). It was that act that led to a series of events that have placed her at the receiving end of Digicel (Jamaica) Ltd's ('Digicel') wrath. She did not tell anyone at Digicel of her intention before she did this. It appears that the only person who knew what was afoot were persons at CWC. These included Mr Niall Merry, who is now at CWC but was Miss Carty's boss when he was at Digicel. When Miss Carty signed the contract there was the small matter of two clauses which have an important place in this case. One clause forbade her from disclosing any confidential information to anyone even after she left Digicel (the confidentiality clause). The other prohibited her from working for a period of one year after ending her employment with Digicel with any competitor (the non-compete clause).

[2] Approximately three weeks after Miss Carty signed her contract with CWC and concealed this important fact from Digicel, she wrote a letter dated June 6, 2014 to Mr Brian Finn, informing him that she was resigning from her position of Head of Group Analysis effective June 6, 2014. The letter also conveyed the impression that she would begin working with CWC after September 5, 2014, the end of the three-month notice period she was required to give to Digicel.

[3] In her capacity as an analyst at Digicel and even more so as Head of Group Analysis, Miss Carty was exposed to confidential information. This is not disputed by her. What she tries to do is to minimize the extent of her exposure. She says that her exposure was primarily to information on the retail side of the operations

and other than when she worked on two projects she was not exposed to the full range of confidential information within the bowels of Digicel.

[4] Why is there this fuss about an analyst? Data analysis is at the heart of a successful mobile phone operator's operations. The mobile service provider has to be as fast as a cheetah, as nimble as a cat and as sure footed as a mountain goat in this type of industry. The presence of any of the three deadly sins of sloth, lack of agility and uncertainty can be debilitating but the presences of any two or all three will quite likely prove fatal. The mobile service operator has to be able to recognise trends in the market place and plan for what it believes are new market possibilities. It has to be able to distinguish a lasting trend from a passing fad. In the same way the Kodak's death arose from its inability to recognise that digital photography was the future (the lasting trend) and failed on invest in it (because it thought that digital photography was passing fad), so too can misreading the data lead to the demise of a mobile service provider. Depending on its analysis, the operator has to decide whether to invest in a new advertisement campaign, invest in new equipment, take on additional staff, retire old equipment, develop new price packages, retire old packages or simply redesign them. The operator has to monitor its rivals (existing and to come) and decide how to respond to competition. It has to be aware of what is happening in the world of technology and determine whether new developments may have an impact on their business. To do all this analysis, analysis and more analysis is the order of the day. The data gathered and analysed are about demographics, usage patterns, what services are used by which demographic, what times of the day are certain services used and by which demographic. Even the type of phones used are important. Income levels of the users are important in order to decide which services can be sold to a particular demographic and at what price. Strategic decisions need to be made concerning when the business decisions are to be implemented: is it going to be at Christmas or will it be at a major sporting event. Getting a few weeks head start on your rivals can make the difference between great revenue or even a loss. Analysis lays down the tracks on which the train

will run in the future. This is why Miss Carty was important to Digicel and now important to CWC. Both companies are agreed on one thing: Miss Carty is good at what she does and is invaluable to both.

[5] When Miss Carty decided to and actually signed the contract with CWC she was still Head of Group Analysis. She was still exposed to and was using confidential information which, to her certain knowledge, would be used by Digicel in its operations and planning. It means that she would be attending meetings, if any were held, between May 16, 2014 and June 6, 2014, when she resigned, in her capacity as Head of Group Analysis when she knew that she would be leaving soon. It means that she would have had continued access to the analytical work of those whom she supervised. She would have been privy to discussions about the data. She would know what perspectives were being taken on the data. She would know how Digicel intended to use the data or might be planning how to use the data. One can therefore understand, even if one disapproves of the language, the sprinkling of Digicel's June 9, 2014 letter with words and expressions such as 'your scarcely credible assertions', 'most gross breaches of trust', 'outrageous breach of trust and loyalty', 'undermined trust and confidence', and 'shameful repudiation.' Digicel was a fuming employer.

[6] Digicel's response to this perceived repudiation was swift. In its June 9, 2014 letter Digicel indicated that it was treating the contract as at an end as of midday June 10, 2014. Miss Carty was reminded of the confidentiality clause and informed that Digicel 'will take all steps necessary to protect [their] rights generally.'

[7] Digicel, through its lawyers, wrote to CWC, by letter dated June 22, 2014, saying that Miss Carty had a non-compete clause and that Miss Carty was bound by the clause. CWC was told, by Digicel's lawyers, that Miss Carty's employment with CWC was a breach of the one year non-compete restriction. CWC was informed that Miss Carty had access to confidential information and that Digicel could suffer harm if she actually joined CWC. CWC was specifically told that if it took

on Miss Carty as an employee, in light of the non-compete clause, then CWC would have procured a breach of contract with Digicel.

[8] Digicel has sought to enforce the contract by asking for pre-trial interim relief in the form of an injunction. In response to this enforcement action by Digicel Miss Carty has said that the non-compete clause is too wide and goes further than is necessary to protect Digicel's interest. She also says that the clause speaks to the Caribbean and Central America but she is now working in North America and therefore the clause, even if valid, applies to a geographical area where she is not physically located.

[9] Digicel has sought to restrain CWC from employing or continuing to employ Miss Carty. CWC says that it has not procured any breach of contract and in any event the allegations outlined by Digicel do not amount to the tort of inducing breach of contract. The judgment is divided in two main parts. The first will deal the restraint clause in relation to Miss Carty and the second will look, briefly, at the case against CWC.

THE CASE AGAINST MISS CARTY: THE CONTEXT AND THE RESTRAINT CLAUSES

[10] Miss Carty began her career with Digicel in January 2011 and within twenty five months was promoted to Head of Commercial Group Analysis where she remained until June 2014 when her employment was terminated by Digicel. This rise, by any measure, was swift and a measure of the high value Miss Carty has intrinsically and also the value added she brought to Digicel's operations.

[11] It is common ground that she had access 'to highly sensitive and confidential information' but says she, 'that was limited to the consumer and retail segments of the Claimant's business except for two projects in which [she] was involved where [Digicel] conducted high level data validations of new investment opportunities' (Carty affidavit of August 29, 2014). She goes on to say that, other than these two projects she did 'not have knowledge of confidential information

and secrets as to the business solutions and wholesale segments of Digicel and the Digicel Group' (Carty affidavit of August 29, 2014). She only had exposure 'to information on financial, marketing, customer data, branding information and pricing strategy' in relation to the retail and consumer segment of Digicel's business.

[12] According to Miss Carty when she was at Digicel the functions she performed were:

- (1) prepare/review weekly and daily revenue, Key Performance Indicators ('KPI') and subscriber tracker report for 29 markets in the Caribbean, Central America, and South Pacific and highlighting major budget risks to senior management in this regard;
- (2) review business cases for promotions to retail/consumer segment to ensure that revenue risk and expected financial performance is realistic;
- (3) analyse and monitor financial performance of 23 markets via daily KPIs including trend analysis and highlighting any financial risk and supporting markets by recommending commercial strategies to increase revenue for retail segment only;
- (4) review new budgets and forecast targets to ensure that they are achievable for retail segment only; and
- (5) prepare and review monthly reports on market share and KPI benchmarking for retail segment only.

[13] In her present job with CWC Miss Carty said she did among many things:

- (1) benchmark Business Solutions commercial activities against other players in similar markets;

- (2) collecting and analyzing data on customer demographics, preferences, needs and buying habits to identify potential markets and factors affecting product demand for CWC Business Solutions;
- (3) developing commercial business cases for new investments and product launches for CWC Business Solutions;
- (4) analyzing Business to Business commercial campaigns and analysis of profitability;
- (5) gathering, analysing and comparing competitor data and pricing to that of the organisation;
- (6) building and maintaining a market intelligence database and use same to examine, analyse and complete statistical data;
- (7) monitoring activities of competitors in the Business Solutions market;
- (8) staying current with industry trends and literature across all relevant and related topics; and
- (9) evaluating business solutions on competitor products and promotions as against CWC offerings.

[14] All these activities were to be performed in relation to the Caribbean and Central American market where CWC operates. One of the arguments put forward, which this court at this stage will say is rejected, is that Miss Carty was physically present in the United States of America and therefore outside of the Caribbean and Central American region. The implication being that she was outside of the physical geographical space and thus the non-compete clause is

ineffective. The reasons for not accepting this argument are out further in this judgment.

[15] Miss Carty says that her job does not include residential customers which was the group she was focused on while at Digicel.

[16] Now to the contract itself and the terms. As noted earlier, Miss Carty was first employed to Digicel in January 2011. In January 2013 she signed a contract containing clauses 18 and 26 which read as follows:

Clause 18

You may not during or after the termination of your employment disclose to anyone other than in the proper course of your employment any information of a confidential nature relating to the company, its business, related businesses, or customers. Breach of this clause may lead to dismissal without notice. You acknowledge that the disclosure of any confidential information would cause damage to the Business.

Clause 26

You covenant with the Company, that you will not within the Caribbean and Central American Region, for the period of one (1) year after ceasing to be employed under this Agreement (without the prior written consent of the Company), either alone or jointly with, or directly or indirectly as, manager, agent, consultant or employee of any person, firm or company which shall be in competition with Digicel or any Group Company carry on or be engaged in the post or function similar to your assigned position with the Group or

carry out any activity with that person, firm or company, similar to the activities you carry out hereunder.

[17] Digicel, in order to enforce these clauses, seeks injunctions in these terms:

(1) an injunction to restrain the 1st defendant from commencing or continuing employment with the 2nd defendant in breach of her contract of employment with the claimant until the hearing of the claim or until June 8, 2015 (whichever is sooner);

(2) an injunction to restrain the 1st defendant from disclosing to the 2nd defendant or to any third party without the claimant's consent confidential information in relation to the business of the claimant and its affiliated companies until the hearing of the claim;

(3) an injunction to restrain the 2nd defendant from employing the 1st defendant and thereby causing or facilitating a breach of her contract of employment with the claimant until the hearing of the claim or until June 8, 2015 (whichever is sooner)

THE LAW RELATING TO RESTRAINT OF TRADE

[18] When considering restraint of trade clauses, in the context of employer/employee contracts, it is important to appreciate the nature of the problem. It is this: an employer has taken into the entity a person to perform a particular skill. Over time the person has acquired expertise in the particular skill. His or her knowledge has been deepened and broadened. After a few years such a person may feel that he is not being rewarded sufficiently or even if he or she is

adequately rewarded, he or she may form the view that more can be earned by either starting a business or going to a rival company.

[19] During the time with the first employer, the employee may have gained access to information which are either trade secrets or confidential information akin to trade secrets. These secrets and information are what has given the employer a competitive edge over the rest of the field. In some instances, the edge may not be a secret potion, recipe or manufacturing process. In the service industry for example, it may be the fact that a particular computer programme can carry out a type of operation which enhances the productivity of a particular company. It may be that the employer has identified, through its data analysis, an underserved segment of a market. The employer may have spotted a trend and is waiting for the appropriate time to take advantage of that opportunity. The employer wishes to protect this kind of information. On the other hand the employee wishes to maximize his or her worth by seeking other employment opportunities. The employer usually inserts clauses to prevent the employee utilizing the confidential information he or she acquired about the employer's business and to prevent the employee taking a job with a rival. This is why the confidentiality and the non-compete clauses are fraternal twins. They go everywhere together. One without the other spells disaster.

[20] In some instances, the field in which the employer operates is highly competitive and very technologically driven. For example, it may be that all operators in the field use the same software but one employer may have stumbled upon a method to get more out of the software than his competitors thereby cutting down transaction times with a consequent reduction of costs and thus an increase in revenue and/or profit. It may be that the tweak that can be made to the software is relatively simple, easy and quick which means that unless the employer is able to enforce the clauses the competitive edge can be eroded quite quickly.

[21] It was Lord Denning with characteristic common sense and a great sense of pragmatism who observed in **Littlewoods Organisation v Harris** [1997] 1 WLR 1472, 1479:

But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not: and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.

[22] The idea being expressed by Lord Denning was expressed earlier by another outstanding Master of the Rolls. It was Sir Nathaniel Lindley who expressed the view that '[t]he prohibition against disclosing secrets is practically worthless without the restriction against entering the employ of rivals' (**Haynes v Doman** [1899] 2 Ch. 13, 23).

[23] Mr Ransford Braham QC has relied on a number of cases in support of his opposition to the injunction. The primary submission seemed to be that clauses in restraint of trade are inherently bad unless they are shown to be reasonable. A secondary submission flowing out of this basic premise was that if the restraint clause is unlimited in geographical space then it was inherently bad and could not be saved. This court will accept that some of the cases in the last twenty years cited by counsel do indeed say what has been attributed to them or a very close variant. However, this court is of the view that any case which says that today should be regarded as inconsistent with the logic, reasoning and analysis of the judgments of the House of Lords in **Thorsten Nordenfelt (Pauper) v The**

Maxim Nordenfelt Guns and Ammunition Company, Limited [1894] AC 535 and consequently of imperfect pedigree. It will be shown that after **Nordenfelt** such an argument should rarely be advanced because not only would be inconsistent with the actual decision on the facts but also fundamentally at odds with the underlying reasoning of the House of Lords. It is the view of this court that **Nordenfelt** has laid down the law in a manner that is fair, balanced and will lead to better results if the law is analysed in the manner set out in the decision.

[24] The first case cited by counsel is that of **Herbert Morris Ltd v Saxelby** [1916] AC 688. In that case the matter had gone to trial. There were two clauses in question. One clause prohibited disclosure of the information during or after his employment to any person corporate or natural. The second clause was a non-compete clause barring the employee from working for any rival company in the entire United Kingdom and Ireland. The clauses were in respect of a young man in his early 20s who was subject to a seven year restriction. The undisputed facts as narrated in the judgment of Lord Atkinson are the following:

- (1) the employer's business was highly specialised and had very specialised customers which were the Admiralty, the War Office, the Government Ordnance Factory, numerous foreign and colonial Governments, railway companies, torpedo factories, Aircraft Department;
- (2) there was no evidence that the employee ever met any of the officers of the customers or that he was acquainted with them or had any personal influence with any of the customers;
- (3) there was no danger of the employee enticing away any of the customers and therefore this possibility was not necessary to be protected by any of the covenants;

- (4) the employer kept detailed records of manufacture for various customers and there was no proof that the employee had made or was threatening to make use of any of this kind of information;
- (5) the documents used in the business were said to contain information so 'detailed and minute that it would be impossible for any employee to carry it away in his head. He might retain the recollection of the general character and principles of the elaborate scheme of organisation, but no more' (page 703);
- (6) the information in the documents was 'not in the nature of a trade secret such as a secret process of manufacture. The sheets, cards, and formulae and other documents are private and confidential document' and no breach in respect of those documents had been proved or threatened (page 703);
- (7) the employee after leaving the employer had tried to get employment with companies outside of the field of his employer but his knowledge was too specialised to be of any value to other firms and so he took employment with a competitor.

[25] Unsurprisingly, the court took the view that the employer had no legitimate interest to protect by the clauses and so the claim was dismissed. The employer could not point to any trade secret or confidential information akin to trade secrets that has to be protected. It was not a sale of business case with the goodwill being transferred as well. Reduced to core, the case was simply about spiting the employee who dared to leave the employment and to bar him from

working for anyone for seven years. To put it another way, the restraint was unreasonable having regard to all the circumstances of the case and therefore was unenforceable. **Saxelby** was nothing more than an example of a clause when analysed in the way **Nordenfelt** indicated could not withstand the test of reasonableness. Nothing more needs be taken from the case.

[26] Prior to **Saxelby**, there was the justly famous case of **Thorsten Nordenfelt (Pauper) v The Maxim Nordenfelt Guns and Ammunition Company, Limited** [1894] AC 535. In that case there was a twenty five year non-compete clause barring the employee from working for any competitor anywhere in the world. The clause was very wide in its prohibition. It was not limited to any geographical space and on a plain reading was worldwide in its application. That this was plainly understood to be the case can be gleaned from the submissions of Mr Nordenfelt who appeared in person before the House. He argued that '[i]t cannot be the law that a man should be prevented from earning his living in any part of the wide world.' He also submitted that decision was 'inconsistent with the decision of the Court of Appeal in *Davies v. Davies* and with *Tallis v. Tallis* in which Lord Campbell C.J. expressly stated that though the restriction may be unlimited in respect of time, there must be some limit of space.' The worldwide non-compete clause was upheld. This outcome was very significant because up to this case the prevailing orthodoxy seemed to have been that the common law would not uphold restraint clauses unless they were limited in time, geographical space and that there was good consideration given by the employer in exchange for getting that agreement.

[27] Since this case no appellate court has remotely suggested that it was wrongly decided or was a very generous interpretation in favour of the employer. No case has improved on its reasoning and analysis. What has happened, sadly, is that the case has not been referred to by first instance judges, and what is even more regrettable, not referred to by some appellate courts, with the consequence that the law is in danger of plunging back into the thicket from which **Nordenfelt** led

the law. The cases are framing the major premise of their legal argument in a manner that causes great discomfort. The case is also important for its analysis of the law and the reasons given for departing from the established orthodox position and establishing a new orthodoxy which was that a clause of unlimited geographical application may be upheld provided it was reasonable having regard to all the circumstances of the case. This case is so important that a great deal of time must be spent on it because it is the view of this court, that any subsequent case that is inconsistent with the reasoning ought not to be followed. The case reset the common law on firmer and better intellectual foundations.

[28] The first judgment to be examined is that of the Lord Chancellor himself Lord Herschell. His Lordship noted that initially the common law was that all restraints of trade were void regardless of whether good consideration was given. Overtime, the law evolved to the point where it still maintained the general prohibition but that was now subject to this: the restraint must be limited in time and geographical location and for good consideration, that is to say, the restraint must be partial. This development led to a distinction between general restraints (which were thought to be automatically void without further enquiry) and partial restraints which might be upheld if the restraints were thought to be reasonable. In other words, if the restraint was too general, that is unlimited in geographical application and/or time, then it was void with or without consideration but if it was a partial restraint then it was good. Partial here refers to the time and geographical extent to which restraint applied. The Lord Chancellor held that the law had now arrived at the point where the giving of consideration was not so crucial but the critical factor was whether the restraint was reasonable and it did not matter whether the restraint was general or partial.

[29] Lord Watson took the view that while it may be true to say that the law was concerned with clauses that restrained a man from exercising his vocation the law was equally concerned that bargains fairly struck should be enforced and the fact that this restraint was worldwide was not sufficient to make it inherently

unreasonable. What his Lordship was saying was that a general restraint was no longer automatically bad without further consideration.

[30] It must be observed that many of the early cases on restraint of trade came out of an agrarian society and many of the early industries were based on agriculture which took place in close proximity to the enterprise in question. Also most of the early cases did not involve multinational companies operating around the globe. The litigants in those early cases were primarily thinking of the United Kingdom, Ireland and possibly Europe. The rapid advance of technology made what was thought of as unreasonable in times past now seen as entirely reasonable in later times. The essence of this thought was captured by Lord Ashbourne who stated at page 556:

The cases that have been referred to are interesting and important as shewing the history, growth, and development of an important branch of our law. In considering them it is necessary to bear in mind the vast advances that have since the reign of Queen Elizabeth taken place in science, inventions, political institutions, commerce, and the intercourse of nations. Telegraphs, postal systems, railways, steam, have brought all parts of the world into touch. Communication has become easy, rapid, and cheap. Commerce has grown with our growth, and trade is ever finding new outlets and methods that cannot be circumscribed by areas or narrowed by the municipal laws of any country. It is not surprising to note that our laws have been also expanded, and that legal principles have been applied and developed so as to suit the exigencies of the age in which we live.

And at page 557:

In the early times all agreements in restraint of trade were discountenanced; but by degrees, as the exigencies of an advancing civilization demanded, this was found to be too rigid, and our judges considered in each case what was reasonable and necessary to afford fair protection.

[31] Lord Ashbourne concluded his review by holding that the true position was that the test to be applied was whether the restriction was reasonable and offered fair protection to the contracting parties having regard to all the facts and circumstances of the case. No longer was there this proposition that a general restraint was inherently bad and could not be saved.

[32] Lord Macnaghten's judgment has been the most celebrated from this case and rightly so. His Lordship's judgment did the intellectual spade work in this area of law. There is no need to go back beyond this case unless one is a legal historian. Lord Macnaghten recast the law and replaced the legal foundations of the earlier case law with a more lasting and enduring principle which has stood the test of time and is unlikely to be improved upon. His Lordship held that at all times, despite the utterances establishing the distinction between general and partial restraint, the test was one of reasonableness. The dicta in cases in the 1600s and 1700s to the effect that all restraints, general or partial, were inherently bad and therefore void which later was refined to establish the distinction between general and partial restraints were doing nothing more than reflecting what was thought to be reasonable. At page 564 the Law Lord stated:

In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void (Colgate v. Bachelor). In time, however, it was found that a rule so rigid

and far-reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognised that all partial restraints might be good, though it was thought that general restraints, that is, restraints of general application extending throughout the kingdom, must be bad. Why was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential distinction between the two cases.

[33] Lord Morris was in no doubt about where the law should go. His Lordship held at page 575:

*It appears, however, to me that the time for a new departure has arisen and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement whether in general or partial restraint of trading. These considerations, I consider, are whether the restraint is reasonable and is not against the public interest. In olden times all restraints of trading were considered *primâ facie* void. An exception was introduced when the agreement to restrain from trading was only from trading in a particular place and upon reasonable consideration, leaving still invalid agreements to restrain trading at all. Such a general restraint was in the then state*

of things considered to be of no benefit even to the covenantee himself; but we have now reached a period when it may be said that science and invention have almost annihilated both time and space. Consequently there should no longer exist any cast-iron rule making void any agreement not to carry on a trade anywhere. The generality of time or space must always be a most important factor in the consideration of reasonableness though not per se a decisive test.

[34] From these judgments and particularly this last passage, there should be by now no argument about presumptive unreasonableness in respect of restraint clauses. The proper approach is that of examining the clause in light of the actual facts and then a determination made as to whether the clause is reasonable in the circumstances of the particular case. The implication here is that what is reasonable in one context may well be unreasonable in another context even if the identical words are used in the clauses under consideration. This approach is actually very consistent with Lord Hoffman's propositions regarding the interpretation of contracts which has now been accepted by the Judicial Committee of the Privy Council and the Court of Appeal of Jamaica. More on this will be said later in these reasons for judgment.

[35] Lord Morris was in no doubt that technological innovations have made space and time almost meaningless. By this his Lordship meant that whereas a few hundred years ago excluding the employee from working within ten, fifteen or fifty miles (we now speak of kilometres) was considered unreasonable, technology has made these distances seem quite reasonable having regard to the circumstances of the case. So too a limitation of four, five or six years in times past was considered unreasonable a twenty five year limitation might not be unreasonable having regard to all the circumstances of the case.

[36] There are not many souls brave enough to deny that the dicta of Lord Ashbourne, Lord Macnaghten and Lord Morris are inapplicable today. Technology has been marching on. Depending on the field and the circumstances of the case, a non-compete clause covering a whole geographical region comprising independent countries, overseas territories and overseas departments may well be upheld. For this reason, Miss Carty cannot rely on the proposition that because she will be located in the United States of America and not physically present in the Caribbean and Central American region and therefore the non-compete clause is inoperable so far as it relates to her.

[37] Lord Macnaghten's judgment in **Nordenfelt** will be examined further to show how his Lordship arrived at the position that the law on restraint was based on reasonableness. Let it be recalled that Lord Atkinson, in **Saxelby**, took the position that 'the law upon this subject of the validity or invalidity of contracts in restraint of trade has been authoritatively determined by the decision of this House in the *Nordenfelt* case, as it is for the sake of brevity, commonly called, and that it is laid down in the clearest and most happily selected language of the oft-quoted passage of the judgment of Lord Macnaghten' (page 699). The passage then cited by Lord Atkinson was the culmination of a chain of reasoning in which Lord Macnaghten was slaying the argument that covenants in restraint of trade were prima facie bad unless they could be justified on the ground that they were reasonably necessary to protect the legitimate interests of the employer.

[38] Lord Macnaghten agreed with the result of the decision of the Court of Appeal but gave an extensive judgment because the judges of the Court of Appeal arrived at their decisions by different routes. His Lordship was particularly concerned with reasoning of Lord Bowen which was felt to be erroneous.

[39] Lord Bowen in his judgment had censured Lord Langdale for introducing into the law a fundamental error when Lord Langdale decided the case of **Whittaker**

v Howe 3 Beav. 383, 394. The error, according to Lord Bowen, was that Lord Langdale when considering, in **Whittaker**, whether a restrictive covenant was reasonable or not did not apply the well-known distinction, that developed at common law, between general and partial restraints with the former being automatically bad while the latter may be good if found to be reasonable. Lord Langdale was charged by Lord Bowen with '[appearing] to miss the whole point of the common law classification.' Lord Bowen then stated that James VC in **Leather Cloth Company v. Lorsont** Law Rep. 9 Eq. 345 had introduced 'language calculated in several passages to confuse, and not to throw light upon our conceptions of the established common law doctrine' and further that the Vice Chancellor's 'expressions are at times coloured by the same kind of misapprehension of the common law as that which pervades the judgment of Lord Langdale in **Whittaker v Howe**.' To disagree with a colleague is one thing but to castigate judges of the eminence of Lord Langdale, James VC and Sir Edward Fry in the way Lord Bowen did is indeed another thing and undoubtedly such an attack had to be addressed by the House of Lords.

[40] It was these grave charges and unflattering comments about eminent judgments that led Lord Macnaghten to observe that these statements by Lord Bowen were 'a very grave censure' and therefore needed, first to be examined to determine whether Lord Bowen was correct and second, if he was not, determine what the correct legal position was. What followed as a comprehensive, exhaustive, exhausting and very intricately woven judgment which examined all the major cases on restraint going back several hundred years and tracing judicial observations on this corner of the law from its incipient stages through to full maturity as expressed in **Nordenfelt**. Anyone who wishes to understand the law on restraint of trade and to understand how and why it developed in the way that it did would be well advised to spend time on Lord Macnaghten's judgment.

[41] Lord Macnaghten said, 'I have read, I think, every reported case upon the subject, and I must say, with the utmost deference to Lord Bowen's opinion, that I

cannot help thinking that Lord Langdale and James V.C. and Sir E. Fry have rightly apprehended the common law doctrine as it may be traced in the books, and as it is expounded by some of the leading authorities on the subject in modern times.'

[42] This raises the question of what doctrine did Lord Langdale and James VC rightly apprehend? According to Lord Macnaghten, at the time of Elizabeth I it was thought that all restraints of trade were automatically bad and could not be saved regardless of how reasonable they were. Gradually this automatic rule gave way for reasons already mentioned. Lord Macnaghten summarised the law in this way at page 565:

*The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, **if there is nothing more**, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—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. (emphasis added)*

[43] Here Lord Macnaghten is making the point that one does not say there is restraint of trade and therefore bad unless reasonable. If the restraint was justified then it was good. In fact after this passage the Law Lord continues his

analysis and noted that at one time it used to be the case 'it was incumbent on the plaintiff to shew that the restriction sought to be enforced was neither excessive nor contrary to public policy' but the better opinion was that 'that the Court ought not to hold the contract void unless the defendant "made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion or that the public interest would be sacrificed" if the proposed restraint were upheld: Tallis v. Tallis.' After this reference, Lord Macnaghten reviews other cases and the burden of this review was to show that one does not decide a restraint is bad without close consideration of the circumstances such as whether the person bound was an apprentice, employee, a business or a partnership. If the person was an apprentice or employee then there was a stricter approach to restraint clauses. If the restraint was in the context of a sale of business and goodwill, the non-compete clause would not be subject to the same degree of rigour as the restraint clause in an employer/employee context. His Lordship held that the correct approach is to measure the restraint against the interests of the individual concerned. The general proposition that if the restraint is general then it is injurious to the public was not sound because depending on the circumstances the public may not be adversely affected by restraint. In order to demonstrate this point Lord Macnaghten referred to a case decided by Lord Kenyon who had to consider whether a covenant restraining a surgeon from practicing had an adverse impact on the public. Lord Kenyon reasoned that since anyone could practice as a surgeon in the particular area then the restraint was not contrary to the public interest. This approach was applauded by Lord Macnaghten.

[44] Lord Macnaghten noted that Sir Edward Fry held the view that the cases had established the proposition that where the courts had held that a covenant of unlimited prohibition was bad that was because the cases found that in all the circumstances the unlimited restraint was unreasonable and not because an unlimited restraint was incurably bad. Lord Bowen took issue with this and remarked that it was never the case that courts looked at the circumstances to

determine whether the restriction was reasonable but rather held the prohibition unreasonable because it was unlimited. Lord Macnaghten then showed, by citing the reasoning from cases, that the courts in fact looked at all the circumstances before coming a decision one way or the other and that there was no automatic and inflexible rule that once the prohibition was unlimited, that without more made it bad. By so doing, Lord Macnaghten demonstrated beyond any doubt that it was Lord Bowen who has misread the case and not the eminent judges who were excoriated by Lord Bowen. Since this effective refutation was done Lord Macnaghten's views have been unchallenged intellectually.

[45] Lord Macnaghten concluded by stating that the true test is this: what is a reasonable restraint with reference to the particular case? This should have settled the matter once and for all but there occurred shortly after **Nordenfelt** unpropitious language that may unwittingly be used by some to cast doubt on what Lord Macnaghten was saying. It is found in Lord Parker's judgment in **Saxelby** where his Lordship stated that Lord Macnaghten was laying down the principle that if a restraint clause does nothing more than restrain the employee then it is automatically bad and further that reasonable restraint can only be found if it goes no further than what is adequate to protect the interest of the party who imposed the clause. This is the passage from Lord Parker that is capable of meaning what has just been said. It is found at pp 705 – 706:

As I read Lord Macnaghten's judgment, he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them.

[46] It is accepted that while that portion of Lord Macnaghten's judgment referred to by Lord Parker is capable of being understood in the way Lord Parker stated it, it is the view of this court that in light of the reasoning of Lord Macnaghten just examined the judgment was more nuanced than indicated by Lord Parker. It appears that Lord Parker was paraphrasing Lord Macnaghten and that attempt at paraphrasing many have led to the use of language that might suggest the contrary of the core of Lord Macnaghten's reasoning. It is this court's view that what Lord Macnaghten was saying and has always been saying having regard to his Lordship's destruction of Lord Bowen's analysis, is this: where the clause simply restrains the employee and does nothing more it is more likely than not to be found to be unreasonable, not because of a default and automatic presumption, but because a restraint in these terms, without more, is strong evidence of unreasonableness and if there is nothing else then it will be found to be unreasonable. As noted earlier, **Saxelby** was itself a demonstration of the preferred analytical route. The end result may be the same but the analytical route to the outcome is vital because unless the proper analytical process is undertaken there may be the introduction of faulty legal analysis by the use of unfortunate language.

[47] The next case cited was that of **FSS Travel and Leisure Systems Ltd v Johnson**. The employee left his job as a computer programmer with FSS and went to work for a direct competitor. FSS succeeded on all grounds except that the trial court found that the period of one year of restraint was too long. FSS appealed and the employee also appealed arguing that the trial judge's decision should be upheld on an additional ground, namely, that FSS has failed to prove the trade secrets it was entitled to protect. FSS had pleaded that its computerized booking system for the travel industry was confidential information. Before going on it should be noted that FSS had apparently secured an interim injunction. The Court of Appeal upheld the decision of the trial judge on the ground that FSS had no trade secrets to protect. The court declined to answer the question of whether one year was unreasonable.

[48] The court examined the evidence and concluded that FSS had not established that it had any trade secret worth protecting. On reading the evidence examined by the court it will be seen that FSS was saying that it had the most advanced travel booking software in the entire United Kingdom which was able to do things in a manner that the rest of the industry had not yet figured out how to do. This capability was developed because the employee in question was an integral part of working on the programmes over such a long period of time and had figured out how to do things with the programme which others had not yet done. This was, in this court's very respectful view, the trade secret or confidential information akin to trade secret that FSS was seeking to protect. The secret was not to be found in any one specific computer programme but rather in the knowledge that adjustments could in fact be made which were in fact made to FSS's programmes that enabled its programmes to do certain operations which its rivals had not yet figured out. It was this that gave FSS its competitive advantage and that was why it was the leader in its field. When viewed in this way the decision, on facts, may well be open to question.

[49] The case of **Townends Grove Ltd v Cobb** [2004] EWHC 3432 is next. In that case the first two defendants left their first employer and went to work with the third defendant. The first employer sought to enforce the restrictive covenants by applying for an injunction pending trial. In the end, the injunction was refused because the judge took the view that there was uncertainty regarding the construction of the restraint clauses and this uncertainty was in the context of relatively short restraint times (6 months and 12 months) when it was common ground that a trial date was some time away which itself meant that if the injunctions were granted the employer would have received the substantial remedy without there being a trial. In coming to his decision the judge felt that it was quite proper to look at the relative strengths of the claimant's case in the circumstances of short restraint periods and any injunction granted would in effect grant the final remedy without a trial. It was these considerations that led the judge to examine the clauses with a view to assessing the likely way they

would be interpreted. Some of the clauses were held to be vague, imprecise and went further than was necessary to protect the legitimate interest of the claimant. There was, therefore, a likelihood that some or part of the relevant clauses would be found to be void on the ground of being in restraint of trade.

[50] The learned judge in **Townends** expressed the view that the 'general principle is that all covenants in restraint of trade are void on public policy grounds unless they are no more than reasonably necessary for the protection of the legitimate business interests of the employer' (para 24). The judge also said that restrictive covenants which operate after the termination of an employee's contract are to be narrowly construed' (para 23). This is one of those judgments that cannot stand with the analysis in the **Nordenfelt** case. Having settled the matter regarding restraint clauses and how they should be analysed, the court turns to the law relating to the interpretation of contracts and how it applies to restraint clauses.

CONTRACTUAL INTERPRETATION

[51] Mr Braham sought to extract from the cases that there was something peculiar about restraint clauses which led courts to examine the words of the clause in question to see whether the words are too vague, too imprecise and therefore unenforceable. This submission tended to suggest that if the words on their face were not precise enough then that without more meant automatically that the covenant was unenforceable.

[52] In addition to this, Mr Braham also submitted that where a restraint clause was too vague and imprecise then an injunction could or should not be granted. The reason for this, it was submitted, was that any injunction granted would have to state in precise terms what the defendant was prohibited from doing. For the injunction to do this in the context of an imprecise contract, it would mean that the injunction would be doing what the contract should have done namely, be specific and clear, and this clarity and precision cannot suddenly appear in the terms of the injunction without the same clarity in the actual clauses. Counsel

said it is not the job of the court to do for the contract what the parties to the contract failed to do themselves.

[53] There are three difficulties with these submissions. It fails to take account of the House of Lords decisions in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896 and **Chartbrook Ltd v Persimmon Homes Ltd and another (Chartbrook Ltd and another, Part 20 defendants)** [2010] 1 All ER (Comm) 365. In both cases Lord Hoffman delivered influential judgments. This court is of the view that Lord Hoffman's propositions have to be acknowledged and applied to restraint clauses because the propositions are of general application to all contracts. They apply to all types of contracts and documents. In **Investors Compensation**, Lord Hoffman stated that the proper interpretation of a contract begins with the words used which are interpreted against the background which would have been reasonably available to the parties at the time of the contract. Lord Hoffman did indicate that what is capable of being 'background' for the purposes of contractual interpretation is wide indeed. In **Bank of Credit and Commerce International SA v Ali** [2002] 1 AC 251 his Lordship said at paragraph 39 that admissible background means

... anything which a reasonable man would have regarded as relevant [and] that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: "we do not easily accept that people have made linguistic mistakes, particularly in formal documents". I was certainly not

encouraging a trawl through "background" which could not have made a reasonable person think that the parties must have departed from conventional usage.

[54] Part of the background and context here would be that the parties are in an employer/employee relationship and by contract the employer is seeking to restrain the employee from competing with him for a period of time and also trying to prevent the employee from using any trade secrets or confidential information akin to trade secrets.

[55] In **Chartbrook** Lord Hoffman stated at paragraph 25:

[25] What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied.

[56] Earlier in the judgment Lord Hoffman gave this advice at paragraphs 21 – 24:

[21] When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did. The fact that the court might have to express that meaning in language quite different from that used by

the parties ('12 January' instead of '13 January' in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352, [1997] AC 749; 'any claim sounding in rescission (whether for undue influence or otherwise)' instead of '[a]ny claim (whether sounding in rescission for undue influence or otherwise)' in the Investors Compensation Scheme case [1998] 1 All ER 98, [1998] 1 WLR 896) is no reason for not giving effect to what they appear to have meant.

[22] *In East v Pantiles (Plant Hire) Ltd [1982] 2 EGLR 111 at 112 Brightman LJ stated the conditions for what he called correction of mistakes by construction:*

'Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction.'

[23] *Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in KPMG LLP v Network Rail Infrastructure Ltd [2007] EWCA Civ 363, [2007] Bus LR 1336, I would accept this statement, which is in my opinion no more than an expression of the commonsense view that we do not readily accept that people have made mistakes in formal documents. The first qualification is that 'correction of mistakes by construction' is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said (at [50]):*

'Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph "as it stands", as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended.'

[24] The second qualification concerns the words 'on the face of the instrument'. I agree with Carnwath LJ (at [46]) that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.

[57] Thus the meaning of the contract is the understanding a reasonable person would have if that person had the background information reasonably available to the parties at the time of the contract. If the language is not quite right the court must still make effort to give effect to what the parties agreed. The necessary conclusion from this is that the identical words used in two different contexts and background can yield different meanings provided, of course, that the meaning arrived at, is within the range of meanings the words can legitimately tolerate. Lord Hoffman also stated that the meaning of a document is not just the meaning of the words. It is the meaning of the words used when examined against the matrix of facts and the relevant background at the time of the contract. The approach of Lord Hoffman has been applied to this jurisdiction by the Privy Council thus settling the issue as far as Jamaica is concerned (**Thompson and another v Goblin Hill Hotels Ltd** [2011] 1 BCLC 587 on appeal from Jamaica w

here the Court of Appeal reaffirmed that Lord Hoffman's propositions were the law of Jamaica).

[58] So pervasive has Lord Hoffman's approach become that it has been applied to wills (**Marley v Rawlins** [2014] 2 WLR 213). There is also the discussion by the Supreme Court in **Rainy Sky v Kookmin Bank** [2012] Bus LR 313 [14] – [30].

[59] This court observes that this principle is quite consistent with Lord Macnaghten's reasoning in **Nordenfelt**. Lord Macnaghten had stated that reasonableness of the restraint cannot be determined in the abstract but has to be looked at in the context of the particular case. This is what led Lord Macnaghten to observe that restraint clauses relating to apprentices may not necessarily be interpreted in the same way as restraint clauses in sale of business cases (including goodwill) or restraint clauses against professional persons (doctor and lawyers).

[60] The second difficulty flows out of the first. If Lord Hoffman's propositions are applied then it follows that an injunction can indeed be granted if the wording of the contract makes it possible for an injunction to be framed with precision provided that the wording of the injunction is within the linguistic range of the words used by the restraint clauses in the contract. In other words, the injunction cannot rewrite the contract but the fact that the parties may have used words that are vague and imprecise does not prevent the court from looking at the contract in the way suggested by Lord Hoffman and deciding what a reasonable man in the same circumstances of the parties and with the same information available to him as was available to the parties or reasonably available to parties would have understood the contract to mean. Once this is done, then an injunction, if warranted can be granted in terms appropriate to the case in light of what the contract means or appears to mean. The expression 'appears to mean' takes account that at the time of the application for the injunction the case may not have been tried and there may be a substantial dispute between the parties on the meaning of the words. In these circumstances, the court has to determine a

prima facie meaning of the words being fully aware that the prima facie meaning at this stage may prove to be incorrect when the full trial is completed. Despite this risk, the court must give the words used some meaning if for no other reason than that contracting parties rarely, if ever, use words that have no meaning.

[61] Mr Braham's primary cases against this second difficulty are **Mason v Provident Clothing and Supply Company Ltd** [1913] AC 724 and **JA Mont (UK) v Mills** [1993] FSR 577. In respect of **Mason** this court concludes that it is not inconsistent with Lord Hoffman's proposition. In fact, it demonstrates it. The evidence in the case did not disclose any reason for the restraint. The words of Viscount Haldane LC brings out the lack of any legitimate purpose being served by the clause. At page 731 Viscount Haldane stated 'this is not the case of an agreement made to protect the sale of a goodwill, or to guard against the disclosure of special trade secrets.' These are the two legitimate purposes identified by this corner of the law which can be included in a contract. Later his Lordship stated at page 733 – 734 that having examined the evidence there was nothing in the nature of trade secrets that required protection. This reasoning is completely in harmony with Lord Macnaghten's methodology, which was this: the restraint, when examined in the context of the case, was not reasonable because it was not directed at protecting the sale of goodwill and neither was it directed at prevention of disclosure of trade secrets or confidential information akin to trade secrets and therefore it was unenforceable.

[62] The court now turns to the **Mont** case. In that case the employee had worked all his life in the paper tissue industry. He left his job and took other employment with a rival. His previous employer sought to enforce the restraint clauses by applying for an injunction pending trial. The employee resisted on two grounds: (a) the clause was too wide because it had no geographical restriction; no occupational restriction and (b) no injunction could be granted because the restraint clause itself was too vague and imprecise and the injunction could not, by its terms, be more precise than the actual words used in the contract. The trial judge granted the injunction and the Court of Appeal reversed that decision.

Simon Brown LJ held that the clause was too wide. His Lordship further held that there was no attempt to frame the clause narrowly in order to direct its effect in a proper direction. His Lordship added that if the court were to uphold the wide clause then there would be no incentive for any employer to draft restraint clauses appropriately and thus the employee would be saddled with significant costs to escape the tentacles of a clause of undue width.

[63] While the actual decision in the case may be acceptable, the concern of this court is the analytical method by which the decision was made. There was no indication that the court looked at the contract against the matrix of facts (such as there was at the interlocutory stage) and background available to the parties. The court seemed to have accepted the proposition that because the clause did not refer to any geographical or occupational limitation then it was inherently bad regardless of the circumstances. It has been shown that the analytical method is that established by **Nordenfelt** is that the clause must be looked at in its factual context and a number of factors would then be taken into account in the evaluation process. These include but are not limited to (a) whether the restraint is in the context of a low level employee and the employer; (b) whether it is a sale of business including goodwill; and (c) whether the covenantor is a professional person. Since the **Mont** court did not follow the judicial method outlined by Lord Macnaghten while the conclusion may be acceptable the route to the conclusion is not and this undermines the strength of that authority.

[64] One gets the impression that the decision was influenced by the underlying concern that should the injunction be granted then there would not be any incentive for the employer to draft appropriate restraint clauses. If that is correct then it must be remembered that it is the employer who will usually approach the court to enforce the covenant. When this happens, as a practical matter, it will be for the employer to demonstrate that there is something to protect since the restraint clauses are designed to protect trade secrets and confidential information akin to trade secrets. Also the restraint clauses, if it is sale of

business along with goodwill, are also designed to restrain competition for a period of time. The restraint of competition from a former employee is not usually seen to be a desirable object of restraint clauses and is more likely to be found to be unreasonable since they may have the effect of preventing the employee from applying his skill and expertise for the benefit of himself. If the employer is able to show that there is something to protect there will also have to be the undertaking as to damages and that he is able to meet that undertaking. These are matters that the court can insist upon. The protection for the employee is not perfect but there is sufficient there to grant some protection against costs. In any event, if the employer fails at trial costs may be awarded against him. In any event in the light of the way that law relating to the construction of documents has developed this concern expressed by the trial judge, respectfully, can no longer be regarded as a legitimate objection to enforcing what may be described as vague or imprecise clauses.

[65] The third difficulty is that it criticized Lord Denning's dictum in **Littlewoods** that the clause could be read so that it can be applied to the circumstances of the case. However, the idea of adjusting restraint clauses through interpretation to meet the circumstances of the case provided the words can carry the meaning being attributed to the words used is not new and actually reflects Lord Hoffman's thinking in **Investors Compensation** and **Chartbrook**. Sir Nathaniel Lindley in **Haynes v Doman** [1899] 2 Ch 13 said more or less the same thing. His Lordship observed at pages 25 – 26:

Agreements in restraint of trade, like other agreements, must be construed with reference to the object sought to be attained by them. In cases such as the one before us, the object is the protection of one of the parties against rivalry in trade. Such agreements cannot be properly held to apply to cases which, although covered by the words of the agreement, cannot be reasonably supposed ever to have

been contemplated by the parties, and which on a rational view of the agreement are excluded from its operation by falling, in truth, outside, and not within, its real scope. But, even if some extreme case of a technical breach producing no injury to the party to be protected could be proved, sound principle requires, not that the agreement should be held void in toto, but only so far as it is really unreasonable. Even if the restriction could not be so construed as to exclude such a case, no jury would give the plaintiff any damages, and no judge would grant him an injunction. In such an extreme case the defendant is sufficiently protected against oppression without holding the agreement void in toto, and I am unable to see that public policy requires more.

[66] What the Master of the Rolls is really saying is that the agreement must be interpreted in the context of what it is designed to do and against the background of what was known or reasonably available to the parties. Thus the decision in the **Mont** case is not only inconsistent with high authority from eminent judges from appellate courts in his country but also inconsistent with reason itself. Finally, for a robust application of these principles one only needs to refer to the case of **Beckett Investment Management Group Ltd v Hall** [2007] ICR 1539. In that case, a restraint of trade case, not only **Investors Compensation** applied but Maurice Kay LJ drew upon a line of cases which permitted severance of that part of the restraint clause which could be removed but still leave the essential meaning of the clause intact. The concrete outcome of all that has been said so far is that rarely, if it was the case, will an employee be able to wriggle out of a restraint clause on the ground of vagueness and imprecision.

WHAT ARE THE COURTS LOOKING FOR TO DETERMINE WHETHER RESTRAINT CLAUSES SHOULD BE UPHELD?

[67] Thus far in these reasons, no clear examination of what the courts actually look for in order to determine whether a restraint clause is reasonable and therefore should be upheld has been undertaken. Reference has been made to the protection of goodwill in the case of a sale of business and protection of trade secrets or confidential information akin to trade secrets. Focus is now directed at a more detailed examination of what judges mean when they say that a clause is reasonable if it protects goodwill, trade secrets and confidential information akin to trade secrets. By so doing it will be seen what the employer is not allowed to do by way of restraint clauses in the contract. In summary the clauses should seek to protect trade secrets, confidential information akin to trade secrets but not to prohibit the apprentice or employee from using the skill, knowledge and expertise acquired during the course of the apprenticeship or employment. As Farewell LJ indicated in **Sir W C Leng & Co v Andrews** [1909] 1 Ch 763, 773 – 774:

The doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction. The case in which the Court interferes for the purpose of protection is where use is made, not of the skill which the man may have acquired, but of the secrets of the trade or profession which he had no right to reveal to anyone else—matters which depend to some extent on good faith. A good deal has been said about organization. ... To acquire the knowledge of the reasonable mode of general organization and management of a business of this kind, and

to make use of such knowledge, cannot be regarded as a breach of confidence in revealing anything acquired by reason of a person having been in any particular service, although the person may have learnt it in the course of being taught his trade; but it would be a breach of confidence to reveal trade secrets, such as prices, &c., or any secret process or things of a nature which the man was not entitled to reveal.

[68] In seeking the injunction the employer, in employer/employee type cases, must be able to show that there is some trade secret or information akin to trade secrets that warrants protection. The court must be astute to spot whether, in the circumstances of the case, the restraint clauses are directed at forestalling competition and nothing else.

[69] Despite the earlier criticism of the **FSS** case, this passage by Mummery LJ offers guidance on what the courts are to look for in employer/employee type cases. His Lordship said at pages 512 – 513:

On the question of the validity of a restrictive covenant for the protection of an employer's trade secrets, Mr Tabachnik, Q.C. cited decisions of this court for a statement of the applicable principles: Littlewoods Organisation Ltd v. Harris [1977] 1 W.L.R. 1472; Office Angels Limited v. Rainer-Thomas [1991] I.R.L.R. 214; and Lansing Linde Ltd v. Kerr [1991] I.R.L.R. 80. Those cases expound and exemplify well-settled legal propositions affecting restrictive covenants in an employment contract. (1) The court will never uphold a covenant taken by an employer merely to protect himself from competition by a former employee. (2) There must be some subject matter which an employer can legitimately protect by a restrictive covenant. As was said by Lord

Wilberforce in Stenhouse Ltd v. Phillips [1974] A.C. 391 at 400E (cited by Slade L.J. in the Office Angels case, supra): 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. (3) Protection can be legitimately claimed for identifiable objective knowledge constituting the employer's trade secrets with which the employee has become acquainted during his employment. (4) Protection cannot be legitimately claimed in respect of the skill, experience, know-how and general knowledge acquired by an employee as part of his job during his employment, even though that will equip him as a competitor, or potential employee of a competitor, of the employer. (5) The critical question is whether the employer has trade secrets which can be fairly regarded as his property, as distinct from the skill, experience, know-how, and general knowledge which can fairly be regarded as the property of the employee to use without restraint for his own benefit or in the service of a competitor. This distinction necessitates examination of all the evidence relating to the nature of the employment, the character of the information, the restrictions imposed on its dissemination, the extent of use in the public domain and the damage likely to be caused by its use and disclosure in competition to the employer. (6) As Staughton L.J. recognised in Lansing Linde Ltd, supra, at 84, the problem in making a distinction between general skill and knowledge, which every employee can take with him when he leaves, and secret or confidential information,

which he may be restrained from using, is one of definition. It must be possible to identify information used in the relevant business, the use and dissemination of which is likely to harm the employer, and establish that the employer has limited dissemination and not, for example, encouraged or permitted its widespread publication. In each case it is a question of examining closely the detailed evidence relating to the employer's claim for secrecy of information and deciding, as a matter of fact, on which side of the boundary line it falls. Lack of precision in pleading and absence of solid evidence in proof of trade secrets are frequently fatal to enforcement of a restrictive covenant.

[70] Mummery LJ's dicta were dealing with the examination of the court after a trial.

With suitable adjustments the passage provides a guide as to what to look for at this stage when an interim injunction is being sought. Before Digicel can claim successfully the injunction sought it ought to be able to (a) say with some degree of precision what specific trade secret, confidential information akin to a trade secret, pricing formula, list of customers, processes, methodologies were made known to the employee during his employment and (b) show that the clauses are reasonable in the circumstances of the case. Digicel has sought to do this through the affidavits of Mr Richard Fraser, attorney at law and regulatory counsel for Digicel.

[71] Mr Richard Fraser stated in his affidavit that Digicel and CWC are fierce, uncompromising and ferocious rivals in 14 countries in the Caribbean and Central America. Each company, he says, 'possesses and continues to develop commercially sensitive information including but not limited to commercial strategies, products and pricing strategies and market analysis' (Fraser affidavit of July 10, 2014). He also says that the nature and extent of this competition were well known to Miss Carty. He claims that she was 'directly involved in the

analysis and planning of several commercially sensitive retail initiatives which focused on the competitive dynamics which exist between the Digicel Group and C&W Group' (Fraser affidavit of July 10, 2014). He says that Miss Carty was part of teams that provided essential and critical commercial support services to many business units in the Caribbean and Central America including the markets where the parties compete head to head. In respect of this last assertion by Mr Fraser, Miss Carty accepts that she was part of the team spoken of but that she was limited to the retail segment of Digicel's business and was not exposed to all divisions within the Digicel group. In particular she was not exposed to the wholesale business and business solutions divisions.

[72] Miss Carty says that she has not revealed and does not intend to reveal any confidential information regarding Digicel's initiative. She also claims that any disclosure of such initiative would now be useless because Digicel has either rejected them or they are now in the public domain (Carty affidavit dated August 29, 2014).

[73] It seems to this court that Mr Fraser has identified with sufficient specificity the matters which he says Digicel does not want disclosed. He speaks of commercial strategies, products, pricing strategies and market analysis. Miss Carty has specific knowledge of these things. Even if the court accepts that she was restricted to the retail side of the business it is clear that she was exposed to either trade secrets peculiar to Digicel or confidential information akin to trade secrets. What Mr Fraser identified was not Miss Carty's skill and knowledge of executing analysis of the type required by Digicel but rather those things, to use Lord Shaw's words, which are the property of Digicel. These are the actual pricing strategy, the actual market analysis, the actual products and not the skill required to conduct an analysis of pricing, marketing and products.

WHETHER AN INJUNCTION SHOULD BE GRANTED

[74] Lord Diplock **American Cyanamid v Ethicon** [1975] AC 396 reminds us of the purpose of an interim injunction. It is to restrain the defendant from doing acts which are alleged to infringe the claimant's legal right. The object of the injunction is to protect the claimant from harm which could not be adequately addressed or remedied in damages. Generally, at this stage, the court is not getting into the full merits of the case and should not do so. However, in restraint cases, there is the concern that unless a trial can be had within a very short time the claimant may secure the full remedy without a trial. In such circumstances the law is that the court can then take account of the strength of the claimant's case.

[75] Lord Diplock developed guideline questions which the court should consider. These are (a) is there is a serious issue to be tried or put another way, the claim must not be frivolous or vexatious; (b) if damages are an adequate remedy and **the defendant is able to pay** then the injunction should not normally be granted because even if the claimant suffers the apprehended harm he can be compensated; (c) if damages are not an adequate remedy for the claimant and he is in a position to compensate the defendant under his undertaking as to damages then in the normal course of things the injunction should be granted; (d) if damages are not sufficient to compensate the claimant and he is not in a position to honour any undertaking as to damages and it appears that the defendant may suffer significant injury then the injunction normally should be refused; (e) if there is some doubt as whether damages would be adequate for either party then the court should consider the balance of convenience, that is to say, which of the parties is likely to suffer the most if the injunction is granted or withheld. It is perhaps helpful to take account of Lord Hoffman's dicta in **National Commercial Bank v Olint** [2009] 1 WLR 1405. His Lordship stated that the basic principle should be that the court takes the course which seems likely to cause the least irremediable prejudice to one party or the other. The factors that go into making this determination will vary from case to case. What is needed is

a close examination of all the circumstances of the case and the factors weighed accordingly.

[76] In this case there is no doubt that there is a serious issue to be tried. Also there is nothing to suggest that Miss Carty is able to compensate Digicel for any loss it may suffer if its trade secrets or confidential information is used to the disadvantage of Digicel and it suffers loss. There is every reason to believe that Digicel can compensate Miss Carty for any loss she may suffer if she is restrained from working for CWC.

[77] The restraint period is one year. It is now five months into the restraint year. A relevant consideration is whether a trial can be completed early enough so that Digicel does not, in practical terms, secure the final remedy of barring Miss Carty from working for a competitor for the full year without a trial. The other side of the coin is that an early trial is desirable so that Miss Carty does not get the benefit of her alleged breach of the covenant by pleading that she should be allowed to work because a trial is a far way off. If the court is permitted to invoke the spirit of Lord Watson in **Nordenfelt**, parties who enter bargains should be held to them unless there is some compelling reason not to do so.

[78] Mr Braham submitted that Miss Carty is living and working in the United States and not in the Caribbean or Central America and therefore clause 26 does not apply because the restraint applies to the region mentioned. The court does not accept this argument because the clauses are directed at restraining Miss Carty from working for a rival which operates in the same geographical area as Digicel. It is not where CWC's offices are located but rather whether Miss Carty's employment is, in real-world terms, work in Central American and the Caribbean. The fact that it is technologically possible work in physical space different from where the employer does business should not be allowed to defeat a restraint clause. Miss Carty is required under her present job to analyse data for CWC. She is obliged to keep abreast of what CWC's main rival is doing. CWC, based on the evidence presented, does not have any operations in the United States of

America. Miss Carty's present work with CWC is directed to having CWC become a better mobile service provider in the markets in which it competes with Digicel. The court cannot take a Pollyannaish approach to the issue. In accordance with Lord Hoffman's prescription it is the view of this court that the parties could not have contemplated that if Miss Carty was physically located in the United States of America but her work at CWC was directly related to the markets in which Digicel and CWC are competitors then the restraint clauses are of no effect. There is no need to give the parties an intention they could not have possibly had. If Mr Braham's submissions were accepted on this point it would render useless restraint clauses in cases where the work done can be done remotely from outside the area of business operations.

[79] Mr Braham submitted that Miss Carty is the sole earner in her family and has a young child. While it may be a hard thing if she were to be restrained, Miss Carty is an intelligent and highly capable woman. She must have appreciated that the non-compete clause, if enforced, might create the possibility that she could not work for a rival company. The court cannot help but note the irony that in CWC's contract with Miss Carty there is a non-compete clause.

[80] This issue of being the main family income earner is not new. In **Brake Brothers Limited v Ungless** [2004] EWHC 2799 (QB) (unreported), Gloster J enforced a six month restraint covenant despite the fact that Mr Ungless was 32 years old, married with two young children and was the main family earner. Also in **Brake** it is instructive to examine the time line of litigation in the context of a six month restraint. In that case, the second employer gave an undertaking to employ Mr Ungless at the end of the restraint period should the company be successful in the litigation.

[81] In this case at bar, CWC obviously contemplated the possibility that Digicel may well succeed in getting an interim injunction. At paragraph 10 of Miss Belinda Bradberry's affidavit it is noted that CWC would suffer hardship of the injunction were granted. The hardship being that if the restriction on employing Miss Carty

is imposed, CWC would need to find a suitable replacement 'while making payment to Ms Carty for salary, honouring the contractual obligations between CWC and Ms Carty.' This is a factor to be taken into account because it does appear that the hardship being put forward has been planned for by CWC.

[82] Mr Braham next raised the issue of whether a trial can be had early enough in the restraint period. The additional facts in the **Brake** case on this point are these. In December 2004 Mr Ungless gave three months' notice to his employer. He was placed on what is called in England, garden leave. This leave was to last until March 19, 2004 and it was at the end of that period that the six month restraint would be activated which meant in practical terms it was nine months ending on September 19, 2004. Proceedings were issued by the employer on March 9, 2004 when it failed to secure satisfactory assurances that the defendant would comply with the six month restraint period. On March 9, 2004, an interim injunction was sought but it was not granted until March 22, 2004. By this time the garden leave had come to an end. Speedy trial orders were made and the trial began in May, that is to say, when the trial commenced two months into the six month restraint had passed. When judgment was handed down on July 9, 2004 four months of the six months restraint had passed. The injunction was granted. From this case it can be seen that the fact that a significant period of time had passed into a short period of six months was not a bar to enforcing the covenant when only two months were left to run.

[83] In the present case it must be remembered that litigation is now taking place in an era where witnesses do not have to travel great distances to be in court. The Civil Procedure Rules make provision for evidence by video link. The Supreme Court now has a court room equipped to conduct trials by video link. The Evidence Act has provisions for statements to be admitted into evidence if the witness is too ill to attend court or is off the island and cannot return or if the witness cannot be found. From an examination of the affidavits and documents exhibited, it seems that there is not much more to come on the restraint clauses

issue. The affidavits have explained in fair detail how the matter developed to the present. Those affidavits can be made to stand as the witness statement of the witnesses supplemented by other affidavits or witness statements. The point is that, subject to the availability of counsel, the Supreme Court has the capacity to commence and complete a trial including delivery of judgment not later than March 21, 2014. There is now a commercial division exclusively dedicated to cases like the present. Gone are the days when it used to be said judges, court room and time are unavailable. The real question is whether the attorneys are available to take the dates being offered by the Commercial Court.

[84] If the parties approach the matter with great realism it does not appear that is much disputed evidence on the restraint point. Although there is the case against CWC for inducing breach of contract, the procedural rules permit the court to adjudicate on the restraint clause issue and defer the trial of the inducing breach of contract to a later date. If the parties defer the inducing breach of contract to later in the year, the restraint clause issue could be completed by the end of February 2015.

[85] Mr Braham also submitted that there was no evidence of damage or risk of damage to Digicel. A similar argument was made in **Brake** and her Ladyship pointed out that the damage may be the deliberate or inadvertent contravention of the defendant's confidentiality obligations. To put it another way, the claimant did not have to prove that there was in fact a breach of any of the obligations. The point is that the purpose of the clause is prevent that risk from becoming reality. The restraint clauses are seeking to restrain the conduct from occurring and not seeking to remedy it after it has occurred. An identical conclusion was reached by Nelson J in **Intercall Conferencing Services Limited v Andrew Steer** [2007] EWHC 519 (QB) (unreported). His Lordship held at paragraph 34:

The capacity in which the employee in fact works for the new employer cannot in itself be decisive. If he possesses

confidential information which it is appropriate to protect and there is a risk that in the course of his new work the duty of confidentiality may be breached, it matters not in precisely what capacity he is to work. Here, it is to be noted that the Defendant had access to confidential information when he was head of training even though that was not as substantial as when he became HDS. Breach of the confidentiality clause would therefore be risked in employment in a training post.

[86] Nelson J is addressing the risk of disclosure arising from being employed to a rival. Once the employee is with the competitor the risk exists regardless of where the employee is employed. It is that risk that the application for the injunction in this case is directed at eliminating or reducing. On the question of damage Nelson J noted that the loss to the employer would be the advertent or inadvertent disclosure of confidential information which would have an adverse effect upon the employer's business.

[87] Mr Braham submitted that the injunctions were not necessary in light of the undertaking not to use the confidential information. In **Brake** undertakings were given by both employee and his new employer not to use any confidential information. Her Ladyship, enforced the covenant by granting the injunction despite the undertakings. Her Ladyship said at paragraph 60:

I do not consider that the undertakings which it has offered, which nonetheless involve Mr Adams and Mr Ungless working as buyers in effectively the same capacity as they were for Brakes, as sufficient protection for Brakes' legitimate interests.

[88] This court takes the same view of the matter.

[89] Mr Braham submitted that the clauses in this case are wider than necessary.

The court will simply say that Lord Hoffman's dicta above must be borne in mind. A similar argument was made in **Intercall Conferencing Services**. In that case, the employer sought an interim injunction in February 2007, after the employee gave notice in January 2007 that he was leaving, to enforce a restraint clause for the restraint period or until trial. The defendant's response was that (a) he was bound by the confidentiality agreement; (b) he had not breached it; (c) no real risk that it will be breached; (d) the non-compete clause was too wide; (e) no claim for damages was made and (f) employer will suffer no financial loss.

[90] It was said that the non-compete clause had no area restriction and therefore too wide which meant it was enforceable. Despite these submissions an injunction was granted. Nelson J noted that the defendant was restrained from being employed but simply not in competition with the employer.

[91] Mr Braham went further to submit that clause 26 prohibits Miss Carty from working in CWC in any capacity and to that extent was too wide. In light of **Investor Compensation** and **Chartbrook** the court can adjust the clause.

[92] Mr Braham next suggested that there was undue delay by the claimant. The court does not agree. What the court sees is that Digicel wrote one letter to Miss Carty dated June 9, 2014. The most important point for present purposes is that Digicel reminded Miss Carty about the non-compete clause and that Digicel would vigorously pursue its rights under the contract. There is a second letter dated June 22, 2014 from Digicel's attorneys at law to CWC. CWC is told of the non-compete clause. CWC was asked not to employ Miss Carty because to do so at the time would be a breach of Miss Carty's contract with Digicel. CWC was warned that action would be taken against it if it employed Miss Carty.

[93] There was no immediate response from either Miss Carty or CWC. The claim was issued on July 10, 2014 a mere five weeks after the alleged breach of contract. On July 11, 2014, Digicel came before the court to ask for permission to

serve CWC outside of the jurisdiction and to serve Miss Carty by email. Both defendants filed an acknowledgement of service on July 24, 2014. In her acknowledgement Miss Carty said that she received the claim form and other documents on July 11, 2014, the same day permission was granted to serve her by email.

[94] Clearly, Miss Carty would need time to appreciate what was happening, retain and instruct counsel who would then need to prepare the necessary documentation to respond. Her affidavit was filed on September 5, 2014.

[95] CWC's acknowledgement of service was filed on July 24, 2014 and in it CWC indicated that it was served on July 15, 2014. CWC like Miss Carty would need time to appreciate the nature of the claim made against it, seek and retain counsel. CWC filed three affidavits between September 5 and 10, 2014. The acknowledgments of service indicated that both defendants are represented by the same firm of attorneys at law. The affidavits were filed by the same firm of lawyers.

[96] The conclusion on the restraint clause part of the case is that no ground has been found to decline to grant the injunction. The terms in which the injunction is sought can be adjusted to meet the reality of the claim. The court now goes to the injunction against CWC.

THE CASE AGAINST CWC: INDUCING BREACH OF CONTRACT

[97] Thus far the court has looked at the position of Miss Carty vis a vis the restraint clauses. It is now time to look at CWC. The position here is much simpler. The case against CWC is that it procured a breach of contract between Miss Carty and Digicel. The allegations are that during the one year period, CWC offered Miss Carty a job knowing full well that she was under a one year non-compete clause. The letter from Digicel's lawyers referred to above specifically told CWC

of the non-compete clause and also that Digicel would take legal action if Miss Carty was offered employment by CWC.

[98] Additionally, Mr Niall Merry, one of the deponents for CWC worked at Digicel between 2008 and 2013. He was Group Head of Commercial Operations and a senior manager. He directly supervised Miss Carty while he was at Digicel. It is alleged that he was aware of the terms of her employment and in particular the non-compete and confidentiality clause.

[99] When Mr Merry became Group Head of Commercial Operations he knew of the commercial sensitivity and confidentiality attaching to Miss Carty's role. Mr Merry is now at CWC. It is now common ground that in April 2014 Mr Merry received an email from Ms Peta-Gaye Hardy, Head of Commercial Analysis of CWC, informing him that Miss Carty was interested in joining CWC. Miss Carty's résumé was attached. This was before Miss Carty signed the contract with CWC.

[100] It is also common ground that there were email exchanges between Miss Carty and Mr Merry in which he congratulated her on her new role at CWC.

[101] Mr Braham submitted that Digicel cannot make the bricks of the tort of inducement of breach of contract from the material available. Counsel relied on Lord Hoffman in **OBG Ltd v Allan** [2008] 1 AC 1 for the proposition that (a) liability for inducing breach of contract is secondary liability; (b) in order for there to be an inducer there must be contract and breach of that contract by the contracting parties; (c) the inducer must have induced the breach of contract; (d) the inducer must actually know of the terms of the contract; (e) the inducer must have the intent of bringing about the breach; and (f) negligence or engaging in in conduct that has the effect of bringing about the breach is not sufficient. There must be 'intentional causative participation' in the breach. The inducer must have also intended to persuade the contract breaker to breach the contract.

[102] The argument ultimately is one in which the real issue is whether the conduct of Mr Merry and possibly others should be regarded as the conduct of CWC for the purposes of this claim. To put it another way, who are the natural persons, if any, who knew of Miss Carty's contract and the non-compete clause? When did they know and what exactly did they know? Did they with this knowledge intentionally set out to induce Miss Carty to break her non-compete clause with Digicel?

[103] Mr Braham's response was that CWC did not inveigle Miss Carty to jump ship. It was a decision that she had made independently and having made that decision, Miss Carty reached out to CWC who then responded favourably. That, however, is not the only view of the matter. There is no doubt that the non-compete clause was intended to apply after Miss Carty left the employment of Digicel. Mr Braham said that CWC received assurances from Miss Carty that she was not a party to contract with a non-compete clause. From how the matter was presented the court got the impression that these clauses are standard in this industry. Digicel is alleging that Mr Merry because of his previous position in Digicel would have had specific knowledge of the non-compete clause and his knowledge is the knowledge of CWC for these purposes.

[104] Intention is always a matter of inference in the absence of a confession by the party in question. In this case, Digicel submits, CWC knew through Mr Merry of the non-compete clause. CWC knew that employing Miss Carty within the year would be a breach of the non-compete clause. Miss Carty with CWC's full knowledge breached that agreement by being employed to CWC. In these circumstances Digicel is saying that the inference is that CWC intended to bring about the breach and proceeded to acts to bring about the breach.

[105] It would seem to this court that the case as put by Digicel is capable of supporting the grant of an injunction. The deponents have strenuously denied any wrong doing. So this means that there is a serious issue to be tried. Clearly damages for Digicel are not an appropriate remedy since what they want is to

prevent Miss Carty working for its rival with consequential risk of disclosing confidential information akin to trade secrets. Also damages are not an adequate remedy for CWC since they are interested in the services of Miss Carty. In these circumstances the court can legitimately take into account the relative strength of either party's case. This court is of the view that Digicel's case at this point appears stronger.

[106] It seems to this court that the least injustice would be caused to CWC if the injunction were granted because in the circumstances there is no evidence that Miss Carty is seeking to return to Digicel and therefore there is no risk of her taking any of CWC's confidential information with her. On the other hand the risk to Digicel is greater because Miss Carty was in fact exposed to confidential information while at Digicel.

BREACH OF CONFIDENCE

[107] Mr Braham submitted that there was no breach of confidence pleaded. This claim is about the risk of breach of the confidentiality clause as well as a possible breach of the non-compete clause. It is risk of breach that is activating Digicel. Digicel need not wait for an actual breach. It is entitled to seek to enforce the contract in order to forestall a possible breach. Mr Braham said that the pleading in the particulars of claim are not specific enough. The court disagrees. The pleadings and Mr Fraser's affidavit set out what the information being protected is. It is highly sensitive and confidential information relating to marketing, product and customer data, branding information and pricing strategy. In any event Miss Carty seems to know what is being referred to because in her affidavit she does accept that she was exposed to confidential information but sought to limit the extent of her exposure.

RESOLUTION

[108] The injunctions sought by Digicel are granted. The draft is to be amended to meet the circumstances of this case.