



[2015] JMCC Comm. 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2015 CD 00036

BETWEEN COLUMBUS COMMUNICATIONS JAMAICA LIMITED CLAIMANT
AND SEAN LATTY 1ST DEFENDANT
AND DIGICEL JAMAICA LIMITED 2ND DEFENDANT

Mr. Hugh Small Q.C., Mr. Conrad George and Mr. Adam Jones instructed by Hart Muirhead Fatta for the Claimant

Mr. John Graham and Ms. Annaliesa Lindsay instructed by John G. Graham & Co for the 1st Defendant

Mr. B. St. Michael Hylton Q.C., Mr. Kevin O Powell and Ms. Melissa S. McLeod instructed by Hylton Powell for the 2nd Defendant

Heard: 1, 6, 7, 8 and 22 May of 2015

Injunction – Interlocutory - Restraint of trade - Covenant by employee not to be involved in any business that is of the same nature as that of the employer for 6 months from end of employment - Employee resigning and employer seeking to enforce covenant - Whether covenant is unreasonable

Laing J

[1] By Notice of Application filed March 27, 2015, (the “**Application**”) the Claimant sought the following relief:

1. *An order that the 1st Defendant shall not, until 10th May 2015 undertake any work for or be employed or be in any way engaged by any party other than the Claimant;*
2. *An order restraining the 1st Defendant, whether by himself, his agents, employees and/or servants, directly/indirectly or in any way whatsoever for a period of six (6) months commencing on the effective*

date of his termination of his employment with the Claimant, from working for, dealing with or being associated with the 2nd Defendant or any associate company or affiliated entity.

3. *An injunction restraining the 2nd Defendant, by itself, its servants and/or agents, directly or indirectly in any way howsoever, from engaging, employing, or in any dealing directly/indirectly with the 1st Defendant until;*
 - (i) *the expiry of the 1st Defendant's notice period; and further*
 - (ii) *until six months have elapsed following the termination of his employment contract.*
4. *An order restraining the 1st Defendant, whether by himself, his servants and/or agents, whether directly or indirectly howsoever, from having any contract and/or dealings with any supplier, business partner and/or customer, directly, indirectly or howsoever for a period commencing from the date of this order until 10th May 2015 and then thereafter for the period of restraint under the restraint of trade clauses in his contract of employment.*
5. *An order requiring the 1st Defendant to return any confidential information of the Claimant in his possession in whatever format including, without limitation, computer files, documents, e-mails, business cards and contact details, that he acquired in the course of his employment as Managing Director of the Claimant.*
6. *An order requiring the 1st Defendant to disclose to the Claimant whatever confidential information of the Claimant he has already shared with, disclosed and/or divulged to the 2nd Defendant;*
7. *An order requiring the 2nd Defendant forthwith to deliver up any confidential information of the Claimant provided to it by the 1st Defendant, however delivered and/or provided to the 2nd Defendant whether by the 1st Defendant himself, his agents, employees and/or servants, directly or indirectly in any way however.*
8. *Costs and Attorneys' costs.*
9. *Such further and/or other relief(s) and/or direction(s) in the premises as to this Honourable Court may seem fit.*

Background

[2] There was no significant issue joined between the parties as to the factual matrix which led to the issuing of the claim and the Application in this matter. The 1st

Defendant has significant experience in the telecommunications industry having been employed to the 2nd Defendant in 2001 for a period of 13 years. The 1st Defendant commenced his employment with the Claimant in June 2014. On 19 January 2015, at the end of his 6-month probationary period, the 1st Defendant confirmed the terms of his contract with the Claimant for his employment in the position of managing director (the “**Columbus Contract**”).

[3] The Columbus Contract contained a non-compete/restraint clause (the “**Restraint Clause**”) and a confidential information clause (the “**Confidentiality Clause**”), both of which are at the heart of this matter. The Restraint Clause is in the following terms:

“At the sole discretion of the Company for a period of six (6) months commencing from the date of separation from the Company for any reason whatsoever, you will not either individually or by a company or partnership whether as a principal or for your own account or as a shareholder or other equity owner in any Company and/or together with or on behalf of any other person and/or company and/or any other legal personality howsoever constituted directly or indirectly, provide to any third party any product or service or otherwise engage in any business that is of the same nature as the business of Columbus Communications Jamaica Limited.”

[4] The Confidentiality Clause provides as follows:

“Except as authorized or required by your duties, you shall keep secret and shall not use or disclose, and shall use your best endeavours to prevent the use or disclosure whether by you or by any servant or agent acting on your behalf or any other person or to any person of any of the company’s, the group company’s or its suppliers, business affiliates or customers confidential information which came to your knowledge during your employment”.

[5] By a letter dated February 10, 2015 the 1st Defendant tendered his resignation from employment with the Claimant, stated to be effective May 10, 2015 (“the **Letter of Resignation**”) thereby purporting to fulfill the 3 months notice which he was contractually required to give.

[6] While the 1st Defendant was in Trinidad on Business for the Claimant, he sent the Letter of Resignation by e-mail to Mr. John Reid (“**Mr. Reid**”), who is the President and

Chief Operating Officer of Columbus Communications, the parent company of the Claimant.

[7] On arrival at the Airport in Jamaica the 1st Defendant was contacted by telephone by an employee of the Claimant who directed him to return the Claimant's laptop, company car, identification and access badge as well as credit card. The 1st Defendant was also advised not to return to the Claimant's offices.

[8] The 1st Defendant returned all the items as requested to another employee of the Claimant while at the Airport, save for the Claimant's motor car which was returned the following day to the parking lot of the Claimant's offices.

[9] Between February 10, 2015 and February 13, 2015 there were reports of the 1st Defendant's resignation and intended move to the 2nd Defendant published by the Jamaica Gleaner and the Jamaica Observer, 2 of the country's leading media houses. The Gleaner's report of Friday February 13, 2015 reported on an announcement by the 2nd Defendant "on Wednesday" (presumably February 11, 2015) and quoting from a statement issued by the 2nd Defendant related to the employment of the 1st Defendant.

[10] By e-mail dated February 16, 2015 Mr. Reid suggested that the 1st Defendant took a week vacation while they work on the next stage. The e-mail further stated that "*We also agreed that you would not go into the office, as this would be awkward for you and for Columbus*".

[11] There was further communication between the Claimant and the 1st Defendant including the exploration of the possibility of the 1st Defendant's notice period ending early on April 30, 2015 instead of May 11, 2015. By an undated letter addressed to the 1st Defendant and evidently sent by e-mail dated March 9, 2015, the 1st Defendant was advised by the Claimant by of the new terms of his contract of employment, and informed that he would continue on garden leave until April 30, 2015 (the "leave Period") during which he would receive his pre-resignation salary and benefits and "*...will not work for any other employer, nor provide services to any other entity...*".

[12] By letter dated March 12, 2015 the 1st Defendant responded by complaining of the conduct of the Claimant following receipt of the Letter of Resignation and asserted that a broadcast by the Claimant to its staff had made it clear that his employment was terminated with immediate effect. The 1st Defendant closed by indicating that:

“Based on the foregoing and the summary manner in which I was expelled from the company, I cannot accept an offer for re-engagement”.

The 1st Defendant then commenced his employment with the 2nd Defendant and the Claimant filed this claim and the Application.

The Law

[13] The Claimant was initially seeking to enforce the notice period of the Columbus Contract as well as the Restraint Clause. Accordingly the Claimant sought:

- 1. An order that the 1st Defendant shall not, until 10th May 2015 undertake any work for or be employed or be in any way engaged by any party other than the Claimant;*

[14] The issue of the granting of an injunction to achieve the enforcement of the notice period has now naturally fallen away since the three (3) months notice period expired on or about May 11, 2015. However, the issue as to whether the Claimant repudiated the Contract and whether such repudiation was accepted by the 1st Defendant would still be relevant to the extent that it affects the timeline and commencement point of the contractual six (6) months post employment restraint of trade obligations. This of course depends on whether the Court finds that there is such an obligation for which the Claimant deserves injunctive relief.

[15] In determining the circumstances in which an interim injunction ought to be granted our Courts have consistently been guided by the principles laid down **American Cyanamid v. Ethicon [1975] 1 All ER 504** which have for convenience been reduced to four main considerations, which in summary are:

1. Is there a serious issue to be tried?
2. Would damages be an adequate remedy?
3. Does the balance of convenience favour the granting of an injunction?

4. Where there is an even balance between the parties' cases, the court should favour the status quo.

Is there a serious issue to be tried as to whether the Restraint Clause is enforceable?

[16] The English Court of Appeal in **Lawrence David Ltd v Ashton [1991] 1 All E.R. 385** confirmed that the American Cyanamid considerations apply equally to restraint of trade cases and the parties are in agreement on this.

[17] The applicable law in relation to restraint of trade clauses is set out in **Halsburys laws of England/EMPLOYMENT volume 16, (2014)** as follows:

“A Covenant in restraint of trade between an employer and an employee is unenforceable unless it is reasonable as between the parties and it is reasonable with reference to the public interest.

However:

(1) a restraint clause in a contract of employment is enforceable only if it protects an interest of the employer that is considered by the law to be properly protectable; in the past this has essentially meant either trade secrets and other confidential information or trade connections, suppliers and customers but more recently it has been accepted that an employer may have a legitimate interest in preserving workforce skills or keeping key staff, especially in a highly competitive business.

(2) the criteria for the validity of such a clause are stricter in the case of a contract of employment than in the case of a contract for the sale of a business, since the parties are less likely in the former case to be bargaining at arm's length and, further, it is particularly important in the case of an employee that the law is not used to stifle bona fide competition or to prevent the employee from using his own skills and knowledge, even if gained wholly or partly in the employer's service.”

[18] This case bears some parallels with the case of **Digicel (Jamaica) Limited v Sharon Carty and Cable and Wireless Communications Plc Claim No 2014 CD 00084**. Both cases demonstrate the competitive nature of the telecommunications industry in Jamaica and the difficulties which arise when the high demand for the

relatively few highly qualified and specialized employees fuel a movement of these persons between the corporate participants. In the **Carty** Case, Ms Carty who was an analyst and the Head of Group Analysis at Digicel (Jamaica) Limited (“**Digicel**”) resigned from this position and suggested that she would begin working with Cable and Wireless Communications Plc (“**CWC**”) at the end of her 3 month contractual notice period. Ms Carty’s contract of employment with Digicel contained a confidentiality clause and a one year non-compete clause. Digicel sought to enforce Ms Carty’s contract of employment and was successful in obtaining pre-trial interim relief in the form of an injunction.

[19] Digicel also successfully obtained an injunction to restrain CWC from employing or continuing to employ Ms Carty. Digicel claimed that CWC had induced Ms Carty’s breach of her contract with Digicel.

[20] In the **Carty** case, Sykes J, reviewed in detail and analysed the law relating to restraint of trade clauses. At paragraph 70 Sykes J accurately identified the main requirements that the Claimant needed to satisfy in respect of the restraint of trade clause at the application for interim injunction stage, in order to be successful on its application. The Learned judge indicated that firstly, the Claimant must:

“(a) identify with some degree of precision what specific trade secret, confidential information akin to 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.”

[21] The Claimant in this case submitted that the restraint of trade provisions in the Contract are enforceable because they are reasonable. The Claimant asserts that:

- (1) the Claimant and the 2nd Defendant are direct competitors in almost every aspect of their respective business, and
- (2) the 1st Defendant has trade secrets that are protectable by law, the term “trade secrets” also encompassing highly confidential information of a non-

technical or non-scientific nature such as customers names as held in *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418.

The Challenge to the Restraint Clause.

[22] Counsel for each Defendant argued that the Restraint Clause is on a strict interpretation of its terms unenforceable.

[23] Mr. Graham submitted that the effect of the unusual and unreasonable width and scope of the clause is to prevent the 1st Defendant from working in the telecommunications industry in any capacity.

[24] Mr. Hylton Q.C. submitted that on a strict construction of the Restraint Clause, it is directed at restraining the 1st Defendant from carrying on business in competition with the Claimant, personally, as a shareholder in another company or as a member of a partnership. He submits that even if the clause is construed as preventing employment, it would be unenforceable because it is wider than necessary to protect the 1st Defendant's interest in circumstances where the Claimant has not established any confidential information to which the 1st Defendant was privy or which could be used by the 1st Defendant in his employment with the 2nd Defendant.

[25] I agree with Mr. Hylton's submission that the clause seems more appropriate to the sale of a business. However notwithstanding the somewhat unusual form of the clause in the context of employment contracts, it is my view that the restraint clause is sufficiently wide to encompass the employment of the 1st Defendant with the 2nd Defendant in the capacity of Chief operating Officer of the 2nd Defendant's mobile business. The 1st Defendant would still be caught by it since he is an employee of the 2nd Defendant and therefore as agent of the 2nd Defendant he would "...otherwise [be engaged] in a business that is of the same nature as the business of Columbus Communications Jamaica Limited."

[26] The Claimant states its business in its filed particulars of claim as follows:

"Columbus is in the business of providing commercial and residential telecommunications services (fixed line telephone and fixed line

broadband internet access), business telephony services and digital video transmission.”

Mr. Hylton makes the point that the [proposed] acquisition of the Claimant by Cable and Wireless Communications Plc will not involve a corporate merger. He argues that since the Claimant is not involved in the mobile telecommunications market, the Claimant and the 2nd Defendant are “*not direct rivals (or indeed rivals at all) in the provision of mobile telecommunications services*”.

[27] Mr. Reid in his affidavit filed April 1, 2015 avers that the 2nd Defendant and the Claimant are competitors in several sectors namely:

- (i) Provision of individual communications;
- (ii) provision of commercial communications;
- (iii) provision of broadband internet access; and
- (iv) Provision of corporate and or commercial logistic enterprise solutions.

Mr. Reid indicates further that in late 2013 and/or early 2014 it became apparent that the 2nd Defendant would be entering the digital cable television sector as it acquired local sports broadcasting network, Sportmax, and one of the Claimant's main competitors in the cable sector, Telstar Limited.

[28] At paragraph 5 of the Affidavit of Ms Gail Moss-Solomon (Legal and Regulatory Director of the 2nd Defendant) filed on behalf of the 2nd Defendant on April 1, 2015, she confirms that the 2nd Defendant competes with the Claimant in some areas of business including subscriber (Cable) television, fixed line and broadband internet services.

[29] I have little hesitation in finding that the 2nd Defendant engages in business of the same nature as the Claimant and that they are competitors. I do not think it matters much that the core business of the 2nd Defendant might be mobile telephony. Digital data may be transmitted by cable or wirelessly. By way of example, a subscriber to the 2nd Defendant's cellular and data service can use that service to stream digital video content. It is therefore my view that the Claimant's confidential information in relation to consumers, markets or business strategies for instance, can be of significant benefit to

the 2nd Defendant, notwithstanding the different emphasis each company may place on particular market segments or products.

[30] The Restraint Clause in this case is clearly much different than the one which was under consideration in the **Carty** case. Whereas the clause in **Carty** included a geographical limitation (“Caribbean and Central American Region”) in this case there is none. The clause in the **Carty** case restricted Ms Carty’s employment:

“...as, manager, agent, consultant or employee of any person, firm or company which shall be 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”.

Counsel representing Ms Carty argued that because the restraint clause was not sufficiently limited in its geographical scope it was inherently bad and could not be saved. Sykes J did not agree and noted the limited effect of geographical restrictions in the context of multinational corporations and the ability of employees to effectively work remotely using available technology.

[31] Sykes J reviewed a number of cases which suggested that there was a presumptive unreasonableness in respect of restraint clauses that were not sufficiently limited in geographical application and/or time. The learned Judge concluded that:

“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.”

[32] The approach suggested by Sykes J in the **Carty** case is consistent with the view of Mr. Justice Andrew Smith in **Ashcourt Rowan Financial Planning Ltd v Carlton John Hall [2013] EHC 1185 (QB)**. Of the cases relied on by the parties, **Ashcourt** contains the clause which perhaps most closely approximates to the Restraint Clause, albeit still being substantially different. On the particular facts of **Ashcroft** the Court found the clause to be too wide since it prohibited the employee from being even indirectly concerned in the business or activity of a direct competitor whether or not the

work or activity to be done by him actually itself directly competes. The Clause in **Ashcourt** was in the following terms:

“2. You covenant that you shall not at any time during your employment or for the period of 6 months from the Termination Date without the prior written consent of the Company either alone or jointly with or as employee, manager, officer, director, agent, consultant, contractor or partner of any other person, firm, company or organisation directly or indirectly be engaged or concerned in any business or activity which competes directly with the Business and with which Business you have been concerned in the performance of your duties under these Terms and Conditions during the 12 months immediately preceding the Termination Date.”

[33] Justice Smith in **Ashcourt** adopted the approach of Cox J in **TFR Derivatives v Morgan [2005] IRLR** which deserves reproduction:

“Firstly, the court must decide what the covenant means when properly construed. Secondly, the court will consider whether the former employers have shown on the evidence that they have legitimate business interests requiring protection in relation to the employee’s employment. In this case, as will be seen later on, the defendant concedes that TFS have demonstrated on the evidence legitimate business interests to protect in respect of customer connection, confidential information and the integrity or stability of the workforce, although the extent of the confidential information is in dispute in relation to its shelf life and/or the extent to which it is either memorable or portable.

Thirdly, once the existence of legitimate protectable interests has been established, the covenant must be shown to be no wider than is reasonably necessary of the protection of those interests. Reasonable necessity is to be assessed from the perspective of reasonable persons in the position of the parties as at the date of the contract, having regard to the contractual provisions as a whole and to the factual matrix to which the contract would then realistically have been expected to apply.

Even if the covenant is held to be reasonable, the court will then finally decide whether, as a matter of discretion, the injunctive relief sought should in all the circumstances be granted, having regard, amongst other things, to its reasonableness as at the time of trial.”

Is there confidential information in need of protection by restraint?

[34] It was argued by the Claimant that the restraint of trade provisions are not only meant to prevent the dissemination of confidential information but to “prevent a

competitor from benefitting from the technical, operational and strategic knowledge given to the 1st Defendant". The Claimant also made the point that even if such knowledge is not easily disseminated it may nevertheless be easily applied in the day to day operations of the 2nd Defendants business.

[35] The Claimant submitted that the 1st Defendant by virtue of the knowledge he acquired while employed to the Claimant, will be able to pre-empt or counter the strategic moves planned by the Claimant and predict with accuracy the Claimant's response to the strategic moves which the 2nd Defendant may make.

[36] The Claimant also argued that there is a competitive position between itself and the 1st Defendant notwithstanding the evidence contained in the first affidavit of Ms. Gail Moss-Solomon that the 1st Defendant will not be involved in the 2nd Defendant's fixed line, broadband internet or business solution divisions, nor will he be engaged in the 2nd Defendant's cable operations. She stated that unlike his functions at the 1st Defendant he would not be developing any corporate or marketing strategies in relation to these areas.

[37] In countering the evidence of Ms Moss Solomon, the Claimant submitted that there is convergence of the markets in which the Claimant and the 2nd Defendant operate especially in light of the merger between the Claimant and Cable and Wireless Communications ("CWC") when taken in conjunction with the acquisition of the Sportmax Network and Telstar Cable by the 2nd Defendant.

[38] The Claimant in seeking to support its assertion that there are trade secrets or confidential information akin to trade secrets which are in the possession of the 1st Defendant, relies heavily on the fact that the 1st Defendant in January 2015 attended a strategic meeting in Florida, U.S.A., at which there was the development and fine tuning of a strategy to deal with the competitive threat posed by the 2nd Defendant.

[39] The Claimant produced evidence in the form of an excerpt of one of the PowerPoint demonstrations presented at the strategic meeting and this extract became a source of dispute as between the Claimant and the 1st Defendant.

[40] Unlike the case of **Carty** where Ms Carty did not dispute that she was exposed to confidential information but sought to minimize the extent of her exposure, there is no similar concession in this case. The 1st Defendant submitted that the Claimant had not demonstrated “... with any degree of precision what specific trade secrets, confidential information akin to trade secrets, pricing formula, list of customers, processes or methodologies that were made known to the 1st Defendant during his employment that justify restraint”. Interestingly, the 1st Defendant argued that the fact that the Claimant had exhibited the extracts of the PowerPoint presentation placed such information in the public domain and “any risk of disclosure by the 1st defendant is now mute”. The Claimant on the other hand argued that these submissions demonstrated why it could not have exhibited the other material it has which it claims is in the possession of the 1st Defendant and which the Claimant asserts is of an even more highly confidential nature.

[41] The Claimant’s position was that the extracts exhibited constituted sufficient evidence of the type of information which was in the possession of the 1st Defendant. The Claimant did indicate that the material which was not exhibited was available and the Claimant did offer the documents for inspection, under certain conditions intended to guarantee their continued confidentiality.

[42] The 1st Defendant’s Counsel complained that the limited inspection opportunity given by the Claimant was insufficient to allow the 1st Defendant to sufficiently respond to the assertion that he did receive all the information. The position of the 1st Defendant was that he did not receive all the information which the Claimant asserted that he received and any information he did receive, although arguably confidential at that time, was now in the public domain through, *inter alia*, the Claimant’s launches of new products in other territories. In the end the parties were unable to agree on a suitable methodology for inspection of the documents and the Claimant took the decision not to exhibit any additional information. This decision was criticized by the 1st Defendant who argued that the Claimant having asserted that there was confidential information had not fulfilled its legal obligation to place such information before the Court.

[43] Whereas the Claimant has a duty to sufficiently identify the confidential information for which it seeks protection from disclosure, there may be exceptional

circumstances where a litigant for security reasons or otherwise may not find it prudent to exhibit all the information it has to the Court. In this case although there is a secure mechanism for the keeping of “*security files*” containing sensitive information, given the unavailability of a “*for the Judges eyes only*” filing process within the Registry, one can appreciate the reluctance of the Claimant.

[44] I find on a balance of probabilities that there is sufficient evidence before the Court contained in the PowerPoint extracts of the type of information which would constitute trade secrets or confidential information akin to trade secrets which the 1st defendant had obtained during his course of employment with the Claimant and of which he still has knowledge. This information includes the information presented at the meeting in Miami a portion of which is in evidence including the Claimant’s Engineering/Network Plan, IT Plan, and strategic information the Claimant had in relation to Digicel and Market environment as well as product opportunities. I make this finding although I accept the evidence of the 1st Defendant that he has returned to the Claimant any confidential information that he had stored on his laptop and there is no evidence that he still has such information on any media.

[45] As Denning J indicated in **Littlewoods Organisation v Harris [1997] 1 WLP 1472**, information, even if contained only in the employees head is still capable of being protected from disclosure. Such information is worthy of protection by the Courts to prevent its disclosure to the 2nd defendant and damage to the Claimant. I find that the Claimant has identified such information with sufficient precision and that the exhibited documents do not constitute mere “snippets” as characterized by the 1st Defendant.

[46] I do not find that the filing of all the other evidence which the Claimant says it has would affect the Court’s finding that on a balance of probabilities there is confidential information that is within the knowledge of the 1st Defendant which he obtained from Claimant (as distinct from the 1st Defendant’s own skills and knowledge even if gained wholly or partly in the service of the Claimant and which would could not be the subject of protection as a matter of law- see **Halsburys** supra).

[47] I also do not find that the fact that there were no follow-up meetings involving the 1st Defendant in which the strategies outlined in the presentation and discussed at the meeting in Florida detracts from the finding that the 1st Defendant possesses information which is capable of warranting the protection of the Court.

Is the Restraint Clause wider than necessary and therefore unenforceable?

[48] The Restraint Clause in this case is much wider than the clause in the **Carty** case and I agree with the submissions of Mr. Graham that on a strict interpretation it purports to prohibit the 1st Defendant from engaging in employment with almost any telecommunications provider anywhere on the planet, in any capacity, since this would cause him, in breach of the Restraint Clause, to provide to a third party a product or service or otherwise engage in a business that is of the same nature as the business of Columbus Communications Jamaica Limited.

[49] The less than precise and broad language of the Restraint Clause is exacerbated by the fact that the Claimant provides a wide range of services. A similar clause applied in the context of an employer with a much more limited scope of business would provide the employee with more options when considering employment in other business sectors. Further, had the Restraint Clause (as in the Carty example) only restrained the 1st Defendant from being engaged in a similar post or function to his assigned position with the Claimant, then it would further open the realms of possibilities for the 1st Defendant and would be less objectionable.

[50] I find that the plain and ordinary meaning of the Restraint Clause as well as its scope is clear and the Court does not have to resort to the use of any tools in its interpretation. I do not accept the submissions made on behalf of the Claimant that in view the 1st Defendant's former senior position with the Claimant the only effective way of protecting itself from the unfair use by the 1st Defendant of its confidential information is to preclude his direct or indirect involvement with/employment by the 2nd Defendant for a reasonable time. I find that the Restraint Clause is too wide in its scope and is as a consequence unreasonable. It goes much further than is necessary to protect the Claimants interest or to protect any confidential information belonging to the Claimant

which is currently possessed by the 1st Defendant. Accordingly, I find that the Restraint Clause is unenforceable. I am somewhat fortified in my conclusion by the fact that none of the teams of Counsel with their diligent research and vast resources have been able to identify any authority in which a Court has upheld the enforceability of such a wide clause in the context of employment contracts, on what could be considered to be similar facts.

[51] I find that there is no serious issue to be tried as to whether the 1st Defendant by being employed to the 2nd Defendant after the end of his contractual notice period (on or about May 11, 2015) is in breach of the Restraint Clause. I am therefore of the view that the Claimant fails at the first hurdle and for this reason the Court refuses to grant the orders that have been sought by the Claimant in the following terms :

An Order restraining the 1st Defendant, whether by himself, his agents, employees and/or servants, directly/indirectly or in any way whatsoever for a period of six (6) months commencing on the effective date of his termination of his employment with the Claimant, from working for, dealing with or being associated with the 2nd Defendant or any associate company or affiliated entity;

An order restraining the 1st Defendant, whether by himself, his servants and/or agents, whether directly or indirectly howsoever, from having any contract and/or dealings with any supplier, business partner and/or customer, directly, indirectly or howsoever for a period commencing from the date of this order until 10th May 2015 and then thereafter for the period of restraint under the restraint of trade clauses in his contract of employment.

[52] The contractual notice period having expired on or about May 11, 2015, the issue as to whether an injunction ought to be granted restraining the 2nd Defendant in respect of that period has evaporated. There is also no need for the Court to consider whether there is a serious issue to be tried as it relates to the Claim against the 2nd Defendant for inducing a breach by the 1st Defendant of the Columbus Contract. Since the notice period has expired and the Court has decided not to grant an injunction against the 1st Defendant during the 6 month post contractual period (due to the non-enforceability of

the Restraint Clause), the Court sees no basis for the grant of an injunction restraining the 2nd Defendant from employing the 1st Defendant during this six month period. I accordingly refuse the order sought by the Claimant for:

An injunction restraining the 2nd Defendant, by itself, its servants and/or agents, directly or indirectly in any way howsoever, from engaging, employing, or in any dealing directly/indirectly with the 1st Defendant until;

- (i) the expiry of the 1st Defendant's notice period; and further*
- (ii) until six months have elapsed following the termination of his employment contract.*

[53] I am not satisfied on a balance of probabilities that there is a serious issue to be tried as to whether the 1st Defendant has any confidential information of the Claimant on any storage medium and it is not necessary for me to make any order for the return of such information. I am also not satisfied that there is a serious issue to be tried as to whether the 1st Defendant provided any such confidential information to the 2nd Defendant and there is no need for an order that the 2nd Defendant returns such information. Following naturally from these findings is the conclusion that there is no basis for the disclosure order against the 2nd Defendant.

[54] Based on the aforementioned findings, it is not strictly necessary for me to address the other issues raised on the Application such as the adequacy of damages and the factors to be weighed in assessing the balance of convenience. Although considerable time has been spent on them I am not of the view that it is necessary for me to even offer my obiter conclusions. It was necessary for Counsel to address those other issues since if the Court came to a different conclusion as to the validity of the Restraint Clause, those other issues would fall for consideration.

[55] For the reasons above the Application is dismissed with costs to the Defendants to be taxed if not agreed.