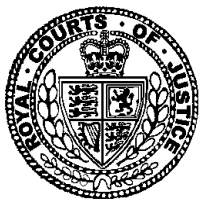

Neutral Citation Number: [2022] EWHC 269 (QB)

Case No: QB-2021-000926

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 11 February 2022

Before :

DAVID PITTAWAY QC

(Sitting as a Deputy High Court Judge)

- -

Between :

(1) EVILLE & JONES (GROUP) LIMITED

(2) EVILLE & JONES (G.B.) LIMITED **Clai**

- and -

(1) DR JASON ALDISS

(2) JAVIER GARCIA MELERO

(3) LUISE CASTROMIL CABO **Defen**

(4) VETLINE LIMITED

- -

- -

Daniel Tatton Brown QC (instructed by **Humphries Kerstetter**) or the **Claimants**

Christopher Stone (instructed by **John Howe & Co)** for the **First Defendant**

Hearing date: 10 November 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

DAVID PITTAWAY QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 12 February 2022.

David Pittaway QC:

1.
In this case, I am asked to enter summary judgment under CPR Part 24 (2) against the First Defendant ("Dr Aldiss") on the grounds that there is no reasonable prospect of success in defending the claim and there is no other compelling reason why the case should be disposed of at trial. The application is limited to those matters set out in paragraphs 64 – 67 of the Amended Particulars of Claim ("APOC") insofar as they relate to liability. The Second Claimants do not seek summary judgment in respect of the unlawful means conspiracy claim at paragraph 67A.

2.
The claim form was issued on 12 March 2021. An application was made by the claimants for interim relief which came before HHJ Bird (sitting as a Judge of the High Court) on 22 March 2021. The court made various orders mainly against Dr Aldiss who gave further undertakings. Dr Aldiss had previously given contractual undertakings on 30 October 2020. The Claimants agreed to discontinue their claims against the Second and Third Defendants in July 2021, with no order as to costs. The Fourth Defendant ("Vetline") entered a creditors' voluntary liquidation in August 2021.

3.
The background to this claim is Dr Aldiss was until his summary dismissal on 17 August 2022 employed by the Second Claimant as Joint Managing Director and was responsible for the day to day running of the business. The First Claimant is the holding company for the Second Claimant. For convenience I propose to refer to them as the Claimants. The Claimants business provides veterinary services for export certification and inspection services for public and private sector customers throughout the UK. Dr Aldiss signed a shareholders' agreement on 31 October 2018 which contains a variety of restrictive covenants. He ceased being a shareholder on 30 October 2020. Those covenants accordingly expire on 29 April 2022.

4.
The case against Dr Aldiss is that he has acted in breach of a number of the restrictive covenants and that he has misused confidential information in breach of an equitable duty of confidence. The Claimants allege that following his summary dismissal, Dr Aldiss committed numerous breaches of the Shareholders' Agreement, by competing with their business, soliciting their clients and poaching their staff, and that he breached the equitable duty of confidence through misuse of their confidential information and entered into an unlawful means conspiracy with the Fourth Defendant. The alleged breaches are fully detailed in the skeleton arguments before me.

5.
The covenants in the Shareholders' Agreement relied upon are to be found at clause 11. I have set out the relevant parts below.

"11.1 ……not, either solely or jointly with or through any other person, on their own account or as agent, manager, adviser or consultant for any other person or otherwise howsoever, directly or indirectly:

11.1.1 for so long as he is a registered holder of any Shares, carry on or be engaged, concerned or interested in, or assist, a business which competes, directly or indirectly, with a business of the Group as operated at any time during the previous 12 months in a territory in which the Group has operated such business during such previous 12 months;

11.1.2 during the Restricted Period, carry on or be engaged, concerned or interested in, or assist, a business which competes, directly or indirectly, with a business of the Group as operated at any time during the Relevant Period In a territory in which the Group has operated such business during such Relevant Period;

... 11.1.4 during the Restricted Period, solicit or accept custom or business from any person in respect of goods and/or services competitive with those manufactured and/or supplied by the Group at any time during the Relevant Period, such person having been a customer of the Group in respect of such goods and/or services during such Relevant Period;

... 11.1.8 during the Restricted Period, induce, solicit or endeavour to entice to leave the service or employment of the Group, or employ, any person who, during the Relevant Period for that Shareholder, was an employee of the Group occupying a senior, managerial, technical, sales or research position or was a consultant to the Group or carried out duties for and on behalf of the Group and who (in any such case) is in possession of Confidential Information or able to influence the client, customer, supplier or other relationships or connections of the Group…"

Application for summary judgment

6.
Before I turn to my consideration of the grounds for this application, I should set out the test required for summary judgment in CPR 24.2, which states:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

7.
The test to be applied as to whether a party has any real prospect of successfully defending a claim is set out by Lewison J in **Easyair Ltd v Opal Telecom Ltd**[2009] EWHC 399 (Ch) at [15]. As noted in the White Book (para. 24.2.4) the Court of Appeal set out a shortened version of those principles in **Global Asset Capital Inc v Aabar Block Sarl**[2017] EWCA Civ 37, [2017] 4 W.L.R. 16 at [27]:

"(1) The court must consider whether the case of the respondent to the application has a realistic as opposed to fanciful prospect of success – in this context, a realistic claim is one that carries some degree of conviction and is more than "merely arguable".

(2) The court must not conduct a "mini-trial" and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process.

(3) If the application gives rise to a short point of law or construction then, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should "grasp the nettle and decide it".”

8.
Mr Tatton Brown QC has referred me to the judgment of Leggatt J in **Gestmin SGPS S.A v Credit Suisse (UK) Ltd** [2013] EWHC 3560 (Comm) [15]-[22], where he concluded at [22]:

“…the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.”

9.
Taken from **Easyair Ltd v Opal Telecom Ltd,** Mr Stone summarised the authorities in his skeleton argument as follows:

i)
the court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: **Swain v Hillman**[2001] 2 All ER 91;

ii)
a “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: **ED & F Man Liquid Products v Patel**[2003] EWCA Civ 472 at [8],

iii)
in reaching its conclusion the court must not conduct a “mini-trial”: **Swain v Hillman**;

iv)
This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: **ED & F Man Liquid Products v Patel** at [10];

v)
However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: **Royal Brompton Hospital NHS Trust v Hammond (No 5)** [2001] EWCA Civ 550.

Mr Stone added:

vi)
Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: **Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd** [2007] FSR 63.

vii)
The Supreme Court has recently emphasised that the factual assertions of the respondent should be rejected as being demonstrably unsupportable by contemporaneous documents only in “clear cases”: **Okpabi and Others v Royal Dutch Shell Plc and another**[2021] UKSC 3, 1 WLR 1294, per Lord Hamblen at [110]. Lord Hamblen cited the judgment of Carnwath LJ in **Mentmore International Ltd v Abbey Healthcare (Festival) Ltd**[2010] EWCA Civ 761 at [23], in which he drew a distinction between those contemporaneous documents which “may be very powerful cross-examination ammunition” and those which provide “the kind of ‘knock-out blow’ which Lord Hope seems to have had in mind [in Three Rivers]”.

viii)
The overall burden rests on the Claimants to establish that the Dr Aldiss’ case has no real prospect of success: **ED&F Man Liquid Products Ltd** at [9].

ix)
At [20] and [21] of his judgment in **Mentmore**, Carnwath LJ cited the judgments of Lord Hope in **Three Rivers DC v Bank of England** (No 3) [2003] 2 AC 1, at [95], and Colman J in **De Molestina v Ponton** [2002] 1 All ER (Comm) 587, at 600g, which are, respectively, authority for the proposition that: i) more complex cases and ii) cases reliant on inferences drawn from the documents, are unlikely to be suitable for summary judgment. Both types of case are likely to require discovery and oral evidence before they can be fairly determined. As Colman J said, “Where in a complex case, as may often be the situation, the frontier between what is merely improbable and what is clearly fanciful is blurred, the case or issue should be left to trial”. As Lord Hobhouse said in **Three Rivers DC** at [158], “The criterion which the judge has to apply under CPR Part 24 is not one of probability; it is absence of reality.”

10.
It is common ground that provisions in the Shareholders’ Agreement relied upon are in restraint of trade and, therefore, prima facie unenforceable unless they are reasonable. They will only be enforced if the claimants can (1) demonstrate a legitimate interest or interests that are protected by the covenants; and (2) that the restraints are no more than is adequate for that purpose.

11.
There has been some discussion as to the reliance that should be placed on the decision of Asplin LJ in **Guest Services Worldwide Ltd v Shelmerdine**[2020] IRLR 392, at [41], where she accepted that generally the court is less vigilant where restrictive covenants are contained in a shareholders’ agreement than an employment contract. However, it is agreed that the distinction is not clear-cut and depends upon the facts of each case.

12.
At [42], Asplin LJ cited part of the judgment of Sir Ross Cranston in **Ideal Standard International SA v Herbert**[2019] IRLR 431 at [28]:

“My reading of these authorities is that it is not simply a matter of categorization, non-compete clauses in employment agreements on one hand, non-compete clauses in shareholder agreements on the other. Non-compete clauses for the vendor of a partnership share or the shares in a business will generally be enforced as reasonable and enforceable. Apart from anything else, such clauses are negotiated in a commercial context and have the legitimate aim of preventing vendors from attacking the goodwill of the partnership or business from which they have just transferred. Towards the other

end of the spectrum are ordinary employees, who have a small shareholding in their employer-company as part of a share participation scheme."

Part 1 - Submissions

13.
The allegations at paragraphs 64-66A of the Amended Particulars of Claim are that Dr Aldiss breached various provisions of the Shareholders' Agreement, specifically, clauses 11.1.1; 11.1.2; 11.1.4 and 11.1.8, which I have set out above. There are detailed witness statements from Mr Hartwell, the Claimants' CEON and from Dr Aldiss in response, to which I have had regard.

14.
It follows that the first issue which I have to consider is whether there is a triable issue in respect of the enforceability of the clauses in the Shareholders Agreement upon which the Claimants rely. The period relied upon is 18 months following the cessation of the agreement. It is accepted that those clauses are in restraint of trade and therefore prima facie unenforceable unless they are reasonable. However, Mr Tatton Brown submits that the court is less vigilant to scrutinise covenants in a shareholders' agreement than in an employment contract, **Guest Services Worldwide Ltd v Shelmerdine**[2020] IRLR 392 at para 41 per Asplin LJ, where the Court of Appeal upheld a 12 month non-competition covenant.

15.
Mr Tatton Brown relies upon the fact the restrictions are mutual. Unlike in **Shelmerdine** (where the restrictions applied only to one class of shareholder, namely Employee Shareholders) the restrictions in clause 11 apply to all shareholders. Thus, Dr Aldiss benefitted from the restrictions (because his co-shareholders are also subject to them) as well as being burdened by them. He submits that this is a key distinction from covenants in an employment contract. In **Bridge v Deacons (A Firm)**[1984] 1 AC 705 PC the Privy Council upheld a 5 year non-competition covenant. In upholding the restraint the Privy Council held at page 716:

"the question of mutuality of the contract is a most important consideration. The contract applied equally to all the partners. None of them could tell whether he might find himself in a position of being a retiring partner subject to the restriction in clause 28, or of a continuing partner with an interest to enforce the restriction"(at p.716).

He relies upon a parity of reasoning in this case.

16.
In particular he submits that Dr Aldiss was the most senior employee in the business. As such he inevitably had access to all confidential information involved in the running of the business. Any suggestion that there was not such information or that he would not have had access to it, it is submitted, is fanciful. That information will have included customers' identities, contact details and contractual arrangements, details of employees, their remuneration, strengths and weaknesses, strategic plans and financial information. As with **Shelmerdine** the Claimants have a legitimate interest in seeking to prevent him from competing with the business and soliciting clients or poaching employees given the knowledge he would foreseeably obtain. He relies upon **Thomas v Farr Plc**[2007] ICR 932 as authority for the proposition that non-competition covenants can be justified because of the difficulties in policing non confidentiality restrictions. He also relies upon the parties to the Shareholders' Agreement being experienced commercial parties.

17.
He submits that a restraint of 18 months is reasonable to protect the relevant interests. The unchallenged evidence indicates that relevant contracts with clients can often last for several years, so it is reasonable to prevent competition for 18 months. For example, the Food and Standards Agency contract is for 3 years (with a possible 2 year extension). He relies upon **Cavendish Square Holdings BV v El Makdessi** [2013] 1 All ER (Comm) 787 where Burton J observed (in the context of a vendor-purchaser agreement) at para. 23(iv) that "there is no reported case in which a restriction otherwise reasonable has been held unreasonable on grounds of duration", and a similar observation was made by the Privy Council in **Bridge v Deacons** (supra) in the context of the partnership agreement.

18.
He stresses that the relevant restrictions are qualified and limited in their ambit, reducing the restrictive effect. For instance, the prohibition in clause 11.1.2 is not a prohibition on competition per se. It is a prohibition on being engaged with a business which competes with the Claimants business as operated during the previous 12 months.

19.
Finally, he submits that even if in principle there is a triable issue as to the enforceability of the covenants in the shareholders agreement, then there plainly is not in relation to the covenants Dr Aldiss had undertaken to abide by. This is because of the public interest in enforcing restraints entered into by a party in negotiations in order to avoid legal proceedings, **Credico Marketing Ltd v Lambert** [2021] EWHC 1504 at [296] per Cavanagh J. The effect of this is that the restrictions relating to the clauses 11.1.3 to 11.1.8 are on any view enforceable.

20.
As to Dr Aldiss's defence, Mr Tatton Brown submits that Dr Aldiss cites no factual basis for the plea that the covenants are unenforceable other than to assert that the restrictions prevent him from earning a living for 18 months, that he entered into the shareholders' agreement without having had the opportunity to or having been advised to seek legal advice and that he did so not long after his father had died when he was suffering from mental health problems.

21.
Mr Tatton Brown submits that the facts that Dr Aldiss's father had recently died and Dr Aldiss suffered poor mental health are unfortunate but are not reasons to question the validity of the restrictions of the Shareholders Agreement as a whole. Further that it is factually incorrect that Dr Aldiss could not have sought legal advice had he wanted to. He was sent the Shareholders Agreement on 22 October 2018, over a week before it is dated. The reason he did not do so is presumably (as he says) because he signed it "in a spirit of trust and belief in the fairness of E&J". He puts forward no evidence to suggest he was hoodwinked or misled into signing it or that this trust was misplaced. Further that the restrictions plainly do not prevent him from earning a living for 18 months. He states himself that he is "busy" and lists the numerous projects with which he is concerned.

22.
Mr Stone submits that the reasonableness of the restrictive covenants in this case should be approached with the vigilance more akin to an employment contract. He relies upon the fact that Dr Aldiss was an employee of the Second Claimant and was employed before becoming a shareholder. In any event he was only a minor (5%) shareholder of the First Claimant. As a result he had the same inequality of bargaining position of many employees, whom the court protects. The Shareholders'

Agreement was not negotiated between commercial parties acting in their own interests. It was drafted for the Claimants and presented to the Dr Aldiss who felt that he had no real choice but to sign it without having taken legal advice and without being given the opportunity to do so. He also places reliance that at the time Dr Aldiss signed the agreement, his father had recently died and he was suffering from mental health problems, and was subsequently diagnosed with bi-polar disorder. In passing, I note that no medical evidence has been produced to support this submission.

23.
He submits that at a final hearing the burden will be on the Claimants to establish the reasonableness of the covenants. He asserts that, for the purpose of this application, no attempt has been made by the Claimants, specifically in Mr Hartwell's witness statement, to justify the need for a non-compete covenant; or the 18-month duration of the covenants.

24.
As to non-competition, he submits that the courts have encouraged greater vigilance over such covenants given the danger that they can be used merely to prevent competition rather than protect legitimate business interests. He relies upon the well-known principle in **Office Angels Ltd v Rainer-Thomas**[1991] IRLR 214 at [50], [54] that, if covenants of a narrower ambit would have sufficed for the employer's protection, a non-competition clause will not be upheld. Thus, he submits that no justification has been offered for why a covenant prohibiting competition is necessary in this case in addition to the post-termination restrictions prohibiting non-solicitation and non-dealing, and the clause protecting confidential information.

25.
As to duration, he submits that it is for the Claimants to show that it is necessary for the covenants to last for 18 months in order to protect their legitimate interests. His case is that the reasonableness of the duration can only properly be determined after trial rather than on a summary judgment application, **Stenhouse (Australia) Ltd v Philips**[1974] AC 391 at 402D, where it was said that:

"It is for the judge, after informing himself as fully as he can of the facts and circumstances relating to the employer's business, the nature of the employer's interest to be protected, and the likely effect on this of solicitation [or in this case "competition"], to decide whether the contractual period is reasonable or not".

26.
He submits that there is a strong prima facie case that the duration of each of the covenants (and in particular the non-competition covenant) is unreasonable, where there is no evidence that Dr Aldiss would have access to any confidential information which remained commercially sensitive for 18 months. He relies upon an absence of evidence of any recurrent contact between Dr Aldiss and customers in his role such that he was likely to acquire knowledge of or influence over them; and certainly none that would justify keeping Dr Aldiss out of the market and/or away from those clients for 18 months in order to protect those relationships. In particular where during his employment, the Claimants received over 95% of their income from one client, the FSA, under a fixed term contract the term of which expires after the relevant restrictions. Further that the confidential information that Dr Aldiss had access to was as an employee and not as a shareholder. He also submits that there can be no justification for the restrictions lasting for 18 months from the date that he ceased to be a shareholder where, as in this case, that date could be months after the date he ceased to be an employee and therefore have access to relevant information or relevant client.

27.

Mr Stone submits that the restrictive covenants include a non-competition covenant, which is much more draconian than a targeted non-solicitation clause, and in this case could be effectively policed given the relatively small number of the Claimants' customers. Thus, he submits that the Claimants have no legitimate interest in preventing Dr Aldiss from working with a company to pursue opportunities with local authorities, which were not previously the Claimants' customers, to work at Inland Border Facilities ("IBF") at which the Claimants have never worked, to do post-Brexit work with EU countries which the Claimants had never done.

28.
Finally, he submits that the reasonableness of the covenants can only be determined at trial in light of all the relevant circumstances of the case. However, for the purpose of this application, Dr Aldiss' case that the restrictive covenants are unreasonable has conviction and is not fanciful. If that contention is accepted, summary judgment cannot be given in respect of paragraphs 64-66A of the Amended Particulars of Claim, and is particularly strong in respect of paragraph 64, which relies on the non-compete covenants.

Discussion

29.
After careful consideration of the matters raised both in the detailed skeleton arguments and oral submissions, I have concluded that Dr Aldiss has no real prospect of successfully defending the issue as to the reasonableness of the covenants in the shareholders agreement. In reaching this decision, I have considered the decision in **Shelmerdine**. Whilst I accept Mr Stone's submission that Dr Aldiss's position may be closer to an employee with a small shareholding, it is significant that he was managing director of the Second Claimant, and therefore in a privileged position to know all the confidential matters relating to the Claimants' business. I am satisfied that the there is no real answer to the Claimants' case that they were legitimately entitled to the protection set out in the restrictive covenants, including the non-competition clause. It seems to me that third witness statement prepared by Mr Hartwell, sets out clearly the basis upon why that protection was justified. I do not consider that any further investigation of this issue at trial is required for me to reach this conclusion. Turning to the period of 18 months, Mr Stone has not advanced any serious argument as to why the period was inappropriate. I accept Mr Tatton Brown's submissions that having regard to the long term nature of the Claimants' contracts, that a period of 18 months was not unreasonable. I have also had in mind the dicta in **Cavendish Square Holdings BV v El Makdessi.** I am satisfied that both the restraints themselves and the period of 18 months are no more than are adequate for that purpose. I have also considered the passage in **Credico Marketing Ltd v Lambert** regarding undertakings given,to which Mr Tatton Brown referred me**.**

30.
The points put forward by Mr Stone that Dr Aldiss did not seek legal advice before entering the agreement or that he had personal issues at the time do not take the matter any further. It would have been open to him to have sought a delay if he had chosen to do so. From my examination of the substantial quantity of material before me, I accept Mr Tatton Brown's submission that Dr Aldiss is a sophisticated commercial operator.On the material put before I am also satisfied that on this issue Dr Aldiss does not have a reasonable prospect of success nor is there any other compelling reason for this issue to be subject of a full trial.

Part 2 - Submissions

31.

The second issue I have to determine is whether Dr Aldiss has any real prospect of successfully defending the allegations that he breached the covenants.

32.
The facts and matters relied upon are set out in Mr Tatton Brown's skeleton argument and were also subject to lengthy oral submissions. For reasons which will become clear later in this judgment, I do not propose to set an exhaustive recital of them out in this judgment. He has referred me to a large number of documents, including emails, which have been obtained from Hallmark, which he submits show that Dr Aldiss has no realistic defence to the allegations that he has breached the restrictive covenants.

33.
He submits that the evidence demonstrates that Dr Aldiss's involvement with Vetline did not end on 20 October 2020 upon his resignation as a director, and that he has remained comprehensively involved in its operations, including in its joint venture with Hallmark. Consequently, he says that Dr Aldiss has acted in breach of the non-compete provisions of the Shareholders' Agreement of 2018, clause 11.1.1 and then clause 11.1.2, by carrying on or being engaged, concerned or interested in, or assisting Hallmark and the Vetline being businesses which compete, directly or indirectly, with the claimants' business. He submits that Dr Aldiss has acted in breach of clause 11.1.4 of the shareholders' agreement on numerous occasions by soliciting or accepting custom or business from a person in respect of services competitive with those supplied by the Group, such person having been a customer of the Group in respect of such services. Further that Dr Aldiss has acted in breach of clause 11.1.8 of the Shareholders Agreement (and in breach of the contractual undertakings he gave to the First Claimant on 30 October 2020) in that he has solicited or endeavoured to entice to leave the service or employment of the Second Defendant, Mr Castromil, who occupied a senior, managerial or technical position and was able to influence client, customer or other relationships or connections of the Group.

34.
Further Mr Tatton Brown submits that Dr Aldiss has acted in breach of the equitable duty of confidence in that he used confidential information concerning the identity or contact details of the Claimants' employees in order to solicit or encourage employees to leave to join Hallmark, or to provide such information to third parties on behalf of Vetline or Hallmark, when he knew or ought to have known that that information was fairly to be regarded as confidential. He has also acted in breach of the equitable duty of confidence in that he has taken receipt of and encouraged the use of confidential information concerning (1) the identity or contact details of the Claimants customers and (2) pricing and supply details, in order to solicit or accept custom or business in unlawful competition with the Claimants, when he knew or ought to have known that that information was fairly to be regarded as confidential.

35.
Further he submits that Dr Aldiss has lied to the Claimants and has provided shifting, false and misleading evidence to the court and his associates, including Mr Savulescu and Mr Hamilton, provided false and misleading evidence to the court.

36.
Mr Stone submits that the striking feature of this application is the sheer breadth of factual allegations in respect of which the Claimants are seeking summary judgment. Essential features of the claims against Dr Aldiss are based upon disputed facts and the drawing of inference from Dr Aldiss'

behaviour rather than conclusive contemporaneous evidence. He submits that it is inappropriate for those factual disputes to be resolved at a summary hearing without the opportunity to test the evidence of the witnesses by way of cross-examination and prior to either party conducting a disclosure exercise. The serious allegations against Dr Aldiss can only properly be resolved at a final trial.

37.
He submits that there are substantial factual questions regarding the Claimants business model during the Relevant Period in relation to the export work done by Assured Veterinary Certification LLP ("AVC"). He raises issues as to whether post-Brexit export and import work, to and from the EU was in competition with the business conducted prior to Brexit, and whether work at IBF was the same as, and was competitive with, work at ports. He draws a fundamental distinction between Hallmark competing against the Claimants for work that they may now like to expand into and Hallmark competing against "a business of the Group as operated at any time during the Relevant Period …".

38.
Further he submits that there are also disputes about the business of Vetline and Hallmark at the relevant times and to what extent Dr Aldiss was involved in each business. Dr Aldiss says that Vetline was a recruitment agency, which did not trade until January 2021, and that it only moved into assisting Hallmark with import and export controls after he had no further involvement with the company. He accepts that the Claimants have identified emails that they say contradict those assertions, however, he submits that while they may provide ammunition for cross-examination, they do not establish that Dr Aldiss' factual assertions are fanciful or that his defence on the facts is bound to fail.

39.
It seems to me that Mr Stone identifies the main dispute as to whether the businesses of Hallmark and the Claimants are complementary rather than competitive. Mr Stone submits that the true position can only be determined after trial. He relies upon the factual averments about the business of Vetline that form the basis of Dr Aldiss' Defence being also asserted in Vetline's Defence, which is supported by a witness statement from its managing director, Mr Savulsecu. Vetline are no longer taking part in these proceedings.

40.
Mr Stone accepts that after Dr Aldiss left Vetline, he did subsequently work with Hallmark to develop Hallmark's import and export control work. He draws the distinction that it was Brexit-related work which was not competitive of work done by the Claimants during the Relevant Period, and Dr Aldiss did not have a specific role in that partnership beyond unremunerated coaching and mentoring. He emphasises that Dr Aldiss never received any remuneration from Vetline or in respect of the agreement with Hallmark. Further Dr Aldiss had no involvement with Hallmark prior to ceasing to be a shareholder of the First Claimant. It is accepted that Dr Aldiss assisted Hallmark through entering into a consulting agreement with them and advising and supporting Hallmark's work in developing post-Brexit import and export controls. However, that work was not competitive of work undertaken by the Claimants during the Relevant Period.

Discussion

41.
I have concluded that it would not be appropriate for me to conclude at this stage of the claim that Dr Aldiss acted in breach of the covenants. There is a substantial amount of documentary material before

me which may well lead a trial judge to reach that conclusion but, in my view, it cannot be said that this is a case where I should grasp the nettle and enter summary judgment. To do so, would be for me to undertake a mini-trial of the detailed allegations made against him.

42.
Whilst I accept that criticisms may be well made as to Dr Aldiss's actions and, indeed, his failure to produce any documentation since the proceedings began, it seems to me that the matters that require to be explored are not suitable for an application for summary judgement. I have particularly in mind the judgment of Lord Hamblen in **Okpabi and Others v Royal Dutch Shell Plc and another**[2021] UKSC 3, 1 WLR 1294, at [110] that the factual assertions of the respondent should be rejected as being demonstrably unsupportable by contemporaneous documents only in "clear cases". Although on one interpretation of it, Mr Stone's submissions, particularly in relation to the non-competition clause, could be viewed as coming close to an absence of reality, as Lord Hobhouse said in **Three Rivers DC** at [158], I consider that would be a conclusion too far.

43.
In this case, there has not been full disclosure nor full and final witness statements nor have any witnesses been subject to cross-examination. I do not consider that I can say at this stage that the matters raised on Dr Aldiss's behalf give rise to there being no reasonable prospect of defending these proceedings, or indeed, could be properly described as fanciful. In these circumstances, although I am satisfied that the reasonableness of the covenants has been established, I decline to find at this stage that Dr Aldiss breached those covenants without further enquiry at trial.

Conditional Order

44.
Mr Tatton Brown has subsequently reminded me that he also made submissions as to the court's powers under CPR 24.6 and PD 24.4 and 5 to make a conditional order. I have re-read the relevant parts of the transcript containing Mr Tatton Brown and Mr Stone's submissions and the passages in their skeleton arguments. I have also considered the authority of **Gama Aviation (UK) Limited v Taleveras Petroleum Trading DMCC**[2019] EWCA Civ 119 referred to in Mr Stone's skeleton argument. As a result of the conclusion I have come to, I have not invited Mr Stone to make further submissions on this point.

45.
The relevant part of PD 24 states that:

"4. Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order, as described below.

"5.1 The orders the court may make on an application under Part 24 include:

(1) judgment on the claim,

(2) the striking out or dismissal of the claim,

(3) the dismissal of the application,

(4) a conditional order.

"5.2 A conditional order is an order which requires a party:

to pay a sum of money into court, …"

46.
It seems to me that the starting point is for me to consider whether I consider that it is improbable that the defence will succeed. In **Gama Aviation (UK) Limited** it was held:

“42. As the Rules make clear, on an application for summary judgment the court may make a conditional order (CPR 24.6). A typical condition will be to require the defendant to pay a sum of money into court or to provide security in some other form. Such an order may be made, as CPR 24 PD para 4 states, "where it appears to the court possible that a … defence may succeed but improbable that it will do so". It is not necessary to show that a defence is "shadowy" or "dubious in its bona fides " (expressions which were sometimes used in considering whether to give conditional leave to defend under the pre-CPR regime), although if a defence is shadowy or of doubtful good faith that will no doubt be a relevant consideration in exercising the power to make a conditional order and deciding the amount of any security which should be ordered.

43. It follows that there is a category of case where the defendant may have a real prospect of success, but where success is nevertheless improbable and a conditional order for the provision of security may be made. This is the typical case where a conditional order may be made requiring the provision of security for the full sum claimed or something approaching that sum.”

47.
Mr Tatton Brown has pointed out the conclusions I have reached in paragraphs 41 and 42 above. Although, I have expressed the view that one interpretation of Mr Stone’s submissions on non-competition could be considered as coming close to an absence of reality, I considered that would be a conclusion too far for me to make. In my view, for the reasons already explored, I am not permitted to engage in a mini-trial, which in my view I would be obliged to do to unravel the factual allegations made in this case. In his skeleton argument, Mr Stone drew my attention to the judgment of Simon Brown LJ in **Olatawura v Abiloye**[2003] 1 WLR 275 [26] where he said the court “will be reluctant to be drawn into assessments of the merits of a claim beyond what is necessary to establish whether the person concerned has “no real prospect of succeeding.” Although I have expressed doubts about the success of a defence to the claim, or part of it, I do not consider that I could go as far as saying that the success of the defence is improbable.

48.
Finally, I should add that I have more sympathy as to Mr Tatton Brown’s submissions on Dr Aldiss’s alleged impecuniosity, where I do consider that the material regarding his finances in his third witness statement is inadequate, as well as being inaccurate certainly as to the ownership of the field adjacent to the property in which he lives. It does seem to me that Dr Aldiss has failed to discharge the burden that on the balance of probabilities that he would be unable to comply with a condition requiring payment into court, or has shown that he does not have the necessary funds, or could not obtain such funds.

49.
It follows that I decline to make a conditional order in this case.