Neutral Citation Number: [2019] EWHC 1714 (QB)

Case No: QB-2019-002102

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2019

Before :

CLIVE SHELDON QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

Monex Europe Limited	**Claimant**
- and -	
(1) Charles Pothecary	
(2) Guy Kaufman	**Defendants**

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- -

William McCormick QC (instructed by **Shakespeare Martineau LLP**) for the **Claimant**
Caspar Glyn QC (instructed by **Penningtons Manches)** for the **Defendants**

Hearing date: 21 June 2019

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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.

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MR CLIVE SHELDON QC

CLIVE SHELDON QC :

1. This is an application for an interim injunction brought by Monex Europe Limited ("Monex") against two of its former employees: Charles Pothecary and Guy Kaufman. Monex seeks an order restraining its former employees from working for a competitor, Global Reach Group Limited ("Global Reach"), in alleged breach of a post-termination restraint.

2. Monex provides commercial foreign exchange services for corporate clients and high net-worth individuals. It is the European arm of a wider group of companies, known as the Monex Group. I am told that it is one of the leading specialists in commercial foreign exchange services. I am told that Global Reach is an institutionally-backed, market leading specialist in personal and corporate foreign exchange.

3. Charles Pothecary worked for Monex from 24th February 2014 to 30th April 2019. Guy Kaufman worked for Monex from 2nd October 2017 to 8th May 2019. Their contracts of employment contained post-termination restraints. The Defendants offered undertakings to Monex that they would comply with a number of the post-termination restraints, but they did not undertake to comply with a non-competition restraint.

(i) The Proceedings

4. On 11th June 2019, Monex issued a claim in the High Court for injunctive relief/damages. An application was made for an interim injunction to enforce the non-competition restraint. This application was listed before me on 22nd June 2019.

5. The parties were agreed that it will not be possible for a speedy trial of Monex's claim to be heard until October 2019, which will be after the period of restraints will have expired, or almost expired. The effect of this is that both parties have quite correctly invited me to consider this application in line with the test approved by the Court of Appeal in *Lansing Linde Ltd. v. Kerr* [1991] ICR 428, which provides a qualification to the normal *American Cyanamid* test (see *American Cyanamid v. Ethicon Ltd.* [1975] AC 396). That is, in considering the application, I need to take a wider view of the "balance of convenience", and give some consideration to whether Monex would be likely to succeed in establishing an entitlement to injunctive relief at trial. It is not enough to decide merely whether there is a serious issue to be tried: see *Lansing Linde* at 435D-F.

6. At the hearing before me, I was provided with witness statements from a number of individuals, and a bundle of document which included the Defendants' employment contracts. The hearing before me lasted almost one day. At the end of the hearing, I informed the parties that I was refusing the application for the interim injunction, and would provide my reasons at a later date. These are my reasons.

(ii) The Evidence

7. At a hearing of an application for interim relief, it is not for the Court to make findings of fact that would be binding on a judge hearing any trial of the substantive action. It is necessary, however, for me to set out some of the key evidence of the parties, much of

which is not disputed. The disputes between the parties were essentially as to the degree of access that the Defendants had to certain confidential information, and the level of involvement that the Defendants had with clients that they had introduced to Monex after those clients had started trading.

8. Charles Pothecary entered into a contract of employment with Monex on 11th February 2014. He was initially employed as a Treasury Consultant on a basic salary of £18,000, with an opportunity to earn commissions. Guy Kaufman entered into a contract of employment with Monex on 11th September 2017. He was initially employed as an Account Manager on a basic salary of £23,000, with an opportunity to earn commissions.

9. The terms and conditions of employment for both Mr. Pothecary and Guy Kaufman were the same. After completing a probationary period, they were entitled to one month's notice of termination. The contract of employment contained confidentiality provisions. These provided that "during or after" their employment with Monex, they could not disclose, use or exploit "Confidential Information".

10. Mr. McCormick QC, acting for Monex, referred me to two aspects of the definition of "Confidential Information" that were relevant to this application. Clause 10.2.2 refers to: "the Company's business plans, programmes and details of business opportunities; accounts, financial information, such as pricing/cost structures, balance sheets, budget and financial forecasts and marketing information and projects". Clause 10.2.4 refers to "details of the Company's customers, prospective customers, suppliers, prospective suppliers and other business contacts, including but not limited to their contact details, accounts, financial and other arrangements, list and requirements".

11. Clause 14.4 of the employment contracts contained a "garden leave" clause, entitling Monex to require departing employees to cease performing their job, and not to contact clients for a period of one month. Both Mr. Pothecary and Mr. Kaufman were placed on "garden leave" for one month. The contract provided that this period of "garden leave" should be deducted from the term of the other post-termination restrictions.

12. I was referred to clause 14.6. of the employment contracts. This was a curious provision. It said that the employee confirmed and acknowledged that he had had the opportunity to take legal advice that the provisions of "Schedule 3" were "fair and reasonable"; and that following the termination of employment and before commencing new employment, the employee would bring "Schedule 3" to the attention of the new employer. In fact, Schedule 3 to the contracts was headed "Personal Account Notice", and dealt with matters such as a prohibition on dealing in investments. Mr. McCormick QC impressed on me that the reference to "Schedule 3" was an obvious mistake, and it was intended to refer to "Schedule 6", which contained the post-termination restraints. He contended that Charles Pothecary and Guy Kaufman were educated people and would have known this. In the absence of hearing directly from the Defendants, I cannot be sure that they were likely to have realised the mistake, and make no finding on this matter. In any event, it did not seem to me that, even if they did realise the mistake, this was of particular importance to the main issues that I was required to consider: the meaning, and reasonableness of, the non-competition covenant.

13. Schedule 6 to the employment contracts is headed "Restrictions During And After Employment". Under the heading 'Post Termination Restrictions", paragraph 2.1 contained six restrictions. The preamble to each of these restrictions stated that:

> "For 6 months after the date of the termination of your employment in competition with the Company, you shall not directly or indirectly do or attempt to do any of the following whether alone or on behalf of or in conjunction with another person, firm company or other entity in any capacity".

14. Paragraph 2.1.1 (the key provision with which this application was concerned) prohibited the employee from doing the following:

> "undertake, carry on or be employed, engaged or interested in any capacity (in which you were directly or indirectly involved in relation to your employment with the Company or any Associated Company) in a business similar to a Restricted Business, which trades or an objective or anticipated result of which is to trade in the Territory in competition with the Company or associated Company".

15. Paragraph 2.1.2 required a former employer not to "entice, induce or encourage a Client to transfer or remove business from the Company or Associated Company". Paragraph 2.1.3 required a former employer not to "solicit, deal with or accept business from a Client for a business similar to a Restricted Business in competition with the Company or Associated Company".

16. The term "Client" was defined as meaning a person:

> "who is at the expiry of the Relevant Period or who was at any time during the Relevant Period a client of the Company or Associated Company (whether or not services were actually provided during such period) or to whom at the expiry of the Relevant Period the Company or any Associated Company was actively and directly seeking to supply services in either case for the purpose of a Restricted Business; and with whom (directly or indirectly through subordinates or colleagues) you had material dealings at any time during the Relevant Period or for whom you were responsible or about whom you were in possession of confidential information, in any such case in the performance of your or their duties to the Company or any Associated Company."

17. The term "Restricted Business" was defined as meaning

> "the business of the Company or any Associated Company in which you were directly or indirectly involved in relation to your employment or pursuant to your duties, had direct personal

> managerial, supervisory, analytical or material involvement, at any time during the Relevant Period."

The term "Relevant Period" was defined as meaning "the period of 12 months ending on the day when your Employment Contract terminates".

18. The term "Territory" was defined as meaning

> "the location of any of the financial markets or exchanges in any country covered or planned to be covered before the expiry of the Relevant Period by the Company or Associated Company in a Restricted Business. A business in which you are involved will be operating within the Territory if it is located or will be located within the Territory or is conducted or to be conducted wholly or partly within the Territory."

19. On, 14th February 2014, Charles Pothecary signed a declaration confirming that he agreed and accepted that the terms set out in Schedule 6 were reasonable for the legitimate protection of Monex's business interests given his role. He agreed to be bound by the terms. Guy Kaufman signed a declaration to the same effect on 13th September 2017.

20. In his First Witness Statement, Nicholas Peter Edgeley, the Executive Director and Managing Director of Monex, explained that Monex's offices are based in the City of London. Mr. Edgeley describes Global Reach as one of Monex's competitors. He explained that Monex has always included strict post-termination obligation clauses in its contracts of employment. He said that "These are necessary in order to protect the integrity of our company." He also said that "an enormous amount of time, energy and expense is dedicated to training staff to ensure they meet [Monex's] very highest standards", and that this training is ongoing over the life cycle of employees.

21. Mr. Edgeley stated that the post-termination restrictions are "essential to the smooth operation of its business, as it would be hugely damaging if every time it hired and trained staff, and provided them with confidential information, the employee could simply leave and work for a competitor, or worse, start a competing business." Protecting what he describes as Monex's "unique trade secrets", confidential information and business strategy had been "vital". Mr. Edgeley described Monex's confidential information as including "Monex's database, individual client data, client pipeline . . . and confidential information relating to industry and country sectors".

22. Mr. Edgeley asserted that Charles Pothecary and Guy Kaufman would, from the outset of their employment, have been exposed to that confidential information, as well as "highly confidential information as to how Monex operates as a business. This is not just limited to client data."

23. Mr. Edgeley contended that a non-competition provision of 6 months allows Monex to protect the company from a client relationship being "broken by an ex-employee". He explained that former employees had passed on or used details of Monex's clients to seek advantage. He says that a period of 6 months gives Monex time to "further cement existing client relationships".

24. Mr. Edgeley explained that Charles Pothecary was initially employed as a Treasury Consultant, then as an Account Manager and finally as a Senior Account Manager within Monex's sales team. His role involved generating quality leads and contacting prospects via the telephone and through face to face meetings or networking, "closing" opportunities, managing prospects through the compliance process, and assisting the trading team with client relationships. Charles Pothecary was also said to have had a high level of access to and knowledge of confidential information.

25. With respect to Guy Kaufman, Mr. Edgeley said that he was employed as an Accounts Manager and then became a Senior Account Manager within the sales team at Monex. His role was the same as that of Mr. Pothecary. Mr. Kaufman was also said to have had a high level of access to and knowledge of confidential information.

26. In the inter-partes correspondence preceding the issuance of the claim, a suggestion was made by Mr. Pothecary and Mr. Kaufman that Monex had "waived" enforcement of the non-competition covenants. There was also evidence in the witness statements that went to this. This matter was not developed during the course of the hearing before me, and I say no more about it in this judgment.

27. Mr. Edgeley informed the Court that he was authorised by Monex's Board of Directors to give a cross-undertaking in damages. He provided the Court with Monex's latest statement of accounts: for the financial year ended 2018. These show Monex as having net assets of £34,318,552; the profit for 2018 being £2,730,265. Mr. Caspar Glyn QC, representing the Defendants, accepted that Monex was good for the cross-undertaking.

28. There was evidence before me concerning *Whataspp* exchanges between Charles Pothecary and Tadhg Hale, a Senior Account Manager employed by Monex. An allegation was initially made by Monex that this evidenced Mr. Pothecary seeking to meet up with Mr. Hale possibly with a view to enticing him to join him at Global Reach. Mr. McCormick QC informed me that the Claimant was not relying on this evidence for the purposes of the application, and I make no further mention of it.

29. In his witness statement, Charles Pothecary says that throughout his time at Monex, and in spite of his different job titles, his primary role was to source potential clients to Monex and offer the firm's services for their Currency Exchange requirements. He described his job as primarily being a "cold calling" role. He said that his main area of focus was the film and media industry, although he had a small number of clients from other industry areas. He explained that none of his clients were based in the Czech Republic or Slovakia, the current focus of his role at Global Reach.

30. Charles Pothecary described the training he received at Monex. He said that the focus of the training was on the sales/pitch process, with some basic training on Monex's key products.

31. Charles Pothecary said that his role was not to trade with or care for the client, but to convert them into a client. He spent 90% of his time researching, finding and prospecting clients. These were self-sourced from publicly available information. Once he had identified a lead, he would look the company up on Monex's Customer Relationship Management (CRM) system.

32. Charles Pothecary said that the CRM system was used for two purposes: first, to review the trading history of leads/prospects that had been converted into clients; and second, to avoid conflicts with other employees, so that one employee did not pitch to another employee's prospects or clients. On searching a name on the CRM system, he could discover if the person was a current client, or prospect. If they were a client of Monex (but not one that he had introduced), the CRM system allowed him to see the name of the account manager and designated dealer but no information about their trades. If they were a prospect, he could obtain information about key individuals at the company and their contact details derived from public information, a record of actions taken to follow-up the prospect and, infrequently, notes of the prospect's anticipated trades and exposures, and what they may require going forward. There was a rule that no account manager could contact someone else's prospects within three months of their last engagement.

33. With respect to his own clients, Charles Pothecary said that he could also obtain information about their trades and exposures as well as future trades and exposures and what they may require going forward. With respect to the clients of his line manager, George Peck, he said that he did not know them very well and did not have access to confidential information about them.

34. Charles Pothecary said that he had about 190 clients, of whom only a very small number traded regularly. He said that he had little to do with his clients once they had been taken on; and that only in rare circumstances would he speak to them again. Mr. Pothecary gave as an example an occasion where the client was unhappy with his relationship with the trader who he was dealing with at Monex, and Mr. Pothecary called the client to re-build a rapport with him.

35. Charles Pothecary described "pipeline" review meetings that were held at Monex. He said that this usually involved 3 or 4 account managers meeting together with their line manager for about 10 to 15 minutes to discuss their "pipeline" of prospects for the month. The account managers would provide a small amount of information about their prospects, including the company name, whether it was anticipated that they would trade this month and details of that trade.

36. Charles Pothecary explained in his witness statement that he had sent information about his pipeline of prospects to his personal email address on some occasions. He said that had been useful to him when he was on holiday and had wanted to stay in contact with his prospects. Mr. Pothecary also admitted that he had sent this information to his personal email address upon leaving Monex, and forwarded that information to his Global Reach email address. He said that he did this because the spreadsheet included some personal bills information. Mr. Pothecary said that he deleted the pipeline information immediately when he opened it. This has not been disputed by Monex.

37. Charles Pothecary described his new role at Global Reach: he is sourcing leads and prospects from public lists, but is working in a completely new industry sector, with a focus on different countries than at Monex: Czech Republic and Slovakia. He has given undertakings that he will comply with the post-termination restrictions at section 2 of Schedule 6, other than the disputed clause 2.1.1.

38. Guy Kaufman's evidence was similar. He said that his role at Monex was a "B2B sales role" which was mainly done through cold calling. He targeted a wide variety of industries. His single largest client was located in the Bahamas. Guy Kaufman said that during his time at Monex he travelled abroad a lot. Mr. Kaufman has given the same undertakings as Charles Pothecary.

39. In his second witness statement, Mr. Edgeley sought to rebut some of the evidence given by the Defendants. Essentially, his evidence suggested that the Defendants had downplayed their access to confidential information and their ongoing relationship with clients.

40. Mr. Edgeley said that it was not correct that all clients were sourced via cold calling from publicly available information. He referred to a list of leads which had been used by Charles Pothecary which had been paid for by Monex and was not a publicly available source. Mr. Edgeley also said that the Defendants' work was not limited to cold calling. He referred to the job description for all Account Managers which described the responsibility of the role as including to "develop and maintain strong client relationships". He said that all salespeople were involved with clients in some capacity, and worked in tandem with the dealers. He explained that "We market together, and offer a joined up service so as to secure the client's business". As Mr. McCormick QC put it in his oral submissions, there was no hermetically sealed division at Monex between the salespeople and the dealers who carry out the trades for their clients.

41. Mr. Edgeley provided evidence showing that Charles Pothecary had contact with clients after they had been "on-boarded": that is, had been converted from being a prospect to carrying out a trade with Monex. The evidence included one email exchange between Charles Pothecary and one of Monex's dealers, in which Mr. Pothecary could be seen to be liaising with the dealer as to how to respond to a client's questions about foreign spreads/pricing. In his oral submissions, Mr. Glyn QC argued that the Defendants' additional involvement with clients had to be seen in context. The primary focus for the Defendants was on bringing in new clients, rather than working to retain them. That could be seen, for instance, in the Defendants' commission structure.

42. Mr. Edgeley sought to rebut a suggestion made by Charles Pothecary in his statement that he had no involvement with people in the "commodities and financial sector" when working at Monex, and yet this was the area which was his focus at Global Reach. Mr. Edgeley produced evidence that showed Charles Pothecary had sought to target prospects in the "financial sectors" when he was at Monex.

(iii) <u>The Law</u>

43. There was no dispute between the parties as to the applicable legal principles. These are helpfully encapsulated by Freedman J. in the recent case of *Argus Media Limited v. Halim* [2019] EWHC 42 (QB) at paragraphs 116 to 128:

(1) A restrictive covenant is void as an unreasonable restraint of trade unless the employer can show that it goes no further than is reasonably necessary to protect his legitimate business interests;

(2) The Court is entitled to consider whether a covenant of a narrower nature would have sufficed to protect the employer's position;

(3) The reasonableness of a post-termination restraint is determined by reference to the circumstances of the parties at the time the contract of employment was entered into, having regard to the contractual provisions as a whole and to the factual matrix to which the contract would then reasonably have been expected to apply;

(4) The Court will never uphold a covenant merely to protect an employer from competition by a former employee. They are commonly used and upheld where lesser forms of restriction (such as confidentiality clauses, or prohibitions on solicitation or dealing) would be inadequate or difficult to police;

(5) The Court must decide what the covenant means when properly construed. If there are is an element of ambiguity and there are two possible constructions of the covenant, one of which would lead to a conclusion that it was an unreasonable restraint of trade and unlawful, but the other would lead to the opposite result, the Court should adopt the latter construction on the basis that the parties are treated as intending their bargain to be lawful and not to offend the public interest;

(6) It is not the function of the Court to give a restrictive covenant a meaning it cannot reasonably bear in order to improve it so as to make it a restraint that would be of some use in practice;

(7) Even if the covenant is held to be reasonable, the Court will decide, as a matter of discretion, whether the injunctive relief should be granted having regard, amongst other things, to its reasonableness at the time of trial.

44. As for whether it was possible for a Court to apply a "blue pencil" to language contained in a covenant to make it comprehensible and reasonable, I was referred by Mr. McCormick QC to *Egon Zehnder Ltd. v Tillman* [2018] ICR 574. In that case, Longmore LJ observed at [29] that "it is well settled that parts of a single covenant cannot be severed". Rather, it was "a requirement of severance that it can only take place where there are distinct covenants". The Court of Appeal held that a single covenant preventing an employee from engaging or being concerned in a competing business in any one of several capacities, had to be read as a whole and could not be severed.

45. The *Tillman* case was appealed to the Supreme Court and, on July 3rd 2019, after the oral hearing of this application, the Supreme Court delivered its judgment. Before I handed down my reasons in this matter, the parties drew my attention to the Supreme Court's judgment and to paragraph 87, in particular. At paragraph 87, Lord Wilson stated that when considering whether severance of words in a post-termination restraint was permissible, the Court should consider "whether removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract".

46. At paragraph 88, Lord Wilson held that on the facts of that case, the words "or interested" were "capable of being removed from the non-competition covenant without the need to add to or modify the wording of the remainder" of the covenant. In addition, "removal of the prohibition against [the former employee] being "interested"

would not generate any major change in the overall effect of the restraints". Accordingly, Lord Wilson decided that the words "or interested" should be severed and removed.

(iv) What does clause 2.1.1 mean?

47. I heard detailed argument by both Counsel as to the meaning of clause 2.1.1. In a nutshell, Mr. McCormick QC contended that it was a covenant which sought to restrain the Defendants from working or being involved in any capacity in a foreign exchange business anywhere in the world for a period of six months. Mr. Glyn QC contended that the clause could not bear this meaning, that some of the language used was "a nonsense"; and that, in any event, even on Mr. McCormick QC's proposed construction, the covenant was unreasonably wide.

48. There is some attraction to Mr. Glyn QC's primary argument. There are aspects of the covenant which do not make obvious sense. First, I note that the covenant provides that the Defendants cannot "undertake, carry on or be employed, engaged or interested in any capacity (in which you were directly or indirectly involved in relation to your employment with the Company or any Associated Company) in a business similar to a Restricted Business". The underlined words are, in my judgment, intended to relate back to the words "employed, engaged or interested in any capacity". They were obviously intended to narrow the role that the Defendants were prohibited from taking in the future.

49. The underlined words when applied to a former employee not being "interested in any capacity" are hard to comprehend. In his oral submissions, Mr. McCormick QC came up with one possible meaning for these words: they described a situation where the former employee had held shares in the Company. (I note in this regard that there is a reference to shareholding at clause 2.3: "Nothing in Section 2.1 will prevent you from holding or being interested in bona fide investments representing not more than three per cent of any class of shares or securities in any Company"). As a matter of ordinary language, it is not easy to see how holding shares in Monex was a "capacity" in which an employee would have been "directly or indirectly involved in relation to [his] employment."

50. Second, as Mr. McCormick QC acknowledged, the reference to "Territory" in the non-competition covenant was "problematic". The covenant provided that the business with which the Defendants could not be involved was one which was "similar to a Restricted Business, which trades or an objective or anticipated result of which is to trade in the Territory in competition with the Company or associated Company". The definition of "Territory" was

> "the location of any of the financial markets or exchanges in any country covered or planned to be covered before the expiry of the Relevant Period by the Company or Associated Company in a Restricted Business. A business in which you are involved will be operating within the Territory if it is located or will be located within the Territory or is conducted or to be conducted wholly or partly within the Territory."

The meaning of the first sentence, which I have underlined, is difficult to fathom, given that Monex did not trade in any "financial markets" or "exchanges".

51. It seems to me that at trial Monex would be likely to persuade the Court that something has "gone wrong" with the drafting of these two passages in Schedule 6. In those circumstances, Monex would seek to persuade the Court that it is "clear what correction ought to be made to cure the mistake": see Lord Hoffman in *Chartbrook Ltd. v. Persimmon Homes Ltd* [2009] 1 AC 1101 at 1114 (referred to in *Prophet plc. v. Huggett* [2014] IRLR 797 at [20]).

52. With respect to the first sentence of the definition of "Territory", I consider that the Court is likely to construe the language as meaning "worldwide" or "global". As Mr. McCormick QC has explained, given that Monex is a global business, the territorial reach of the covenant should be every country in the world, and that is what the wording of "Territory" was intended to mean. This construction gives some meaning to the definition, but does not do so in a way which narrows its interpretation, thereby making it easier for Monex to justify the covenant's reasonableness.

53. It is more difficult for me to accept Mr. McCormick QC's attempted construction of the language that I have underlined at paragraph 48 above as applied to "interested in any capacity". The example proffered by Mr. McCormick QC did not make complete sense to me. I accept, however, that it is possible that at a trial of this matter Mr. McCormick QC, or those instructing him, would be able to come up with further examples that might enlighten the judge as to the correct meaning of the underlined words. Alternatively, the Court might be persuaded that the words "interested in any capacity" should be severed in accordance with the principles set out by the Supreme Court in *Tillman*.

(v) <u>Is clause 2.1.1 a reasonable restraint of trade?</u>

54. I do not need to reach a firm conclusion on whether Monex is likely to persuade the Court at trial of the correct meaning of the underlined words, or whether the words "interested in any capacity" are likely to be severed, because I have no doubt that on Mr. McCormick's construction of the term "Territory", clause 2.1.1 is unreasonably wide and is therefore unenforceable. On Mr. McCormick's construction, clause 2.1.1 would restrain the Defendants from working or being engaged in any capacity in a foreign exchange business anywhere in the world for a period of six months (or five months where, as here, they had already been put on "garden leave" for one month).

55. In my judgment, Monex has fallen far short of demonstrating that it would be likely to persuade a Court at trial that such a wide-reaching covenant is no more than is reasonably necessary to safeguard its legitimate business interests.

56. Mr. Glyn QC for the Defendants accepts that Monex has legitimate business interests to protect. I agree. Monex has legitimate interests in protecting its confidential information, and client connection. From the evidence that I have seen, the Defendants did have access to confidential information relating to the prospects and clients that they had worked with. From the evidence that I have seen, the Defendants did have a degree of client connection. They were not merely salespeople who had no further dealings or contact with their clients once they had "on-boarded" them to Monex and

they had started trading. There was evidence that the Defendants worked in tandem with the dealers and played a part in maintaining the client connection.

57. Nevertheless, the evidence does not come close to demonstrating that at the time when the contracts of employment for the Defendants were entered into, having regard to the contractual provisions as a whole and to the factual matrix to which the contract would reasonably have been expected to apply, Monex required the Defendants to be shut out entirely from working in the foreign exchange markets, anywhere in the world, for a further period of five months (having served one month on "garden leave") so as to protect Monex's business interests.

58. Even if a non-competition covenant with a global reach was justified at all, there is no basis for contending that a restraint of six months (including one month on "garden leave") was required. The shelf-life of the confidential information that the Defendants had, or would be expected at the outset of their employment to have had, access to was relatively short. Mr. McCormick QC accepted that the information which the Defendants were privy to degraded over time. Mr. Glyn QC observed that the price offered and paid on a particular foreign exchange transaction was short-lived, as price depends on a variety of issues. Mr. Glyn QC also pointed out that there was never the same "spread" (the difference between the purchase price and sale price for a currency). This depends on the size of the trade. Accordingly, previous tolerance for a "spread" was no real indication of future "tolerance". Mr. Glyn QC's observations strongly suggest that a period much shorter than six months would be required to safeguard Monex's confidential information. I agree with those observations, and consider that they are likely to find favour with the Court at trial.

59. The same applies to client connection. Although I accept that the Defendants would be expected at the outset of their employment to have, and that they did have, an ongoing relationship with their clients and prospects, these were not relationships that in my judgment were so entrenched that they could not readily be rebuilt by the trader team working in tandem with another salesperson in a much shorter period than six months (including the period of "garden leave"). Mr. McCormick QC contended that salespeople had to be somewhat sparing with their calls to clients and prospects, so that the clients and prospects would not feel harassed. However, that does not mean that a few calls over, say, a three-month period could not be made, and that these would not allow Monex to maintain or restore the relationship that had been previously held by the Defendants.

60. In the circumstances, if a worldwide non-competition covenant was reasonable at all, a restraint of significantly less than six months (including the "garden leave" period) would in my judgment have sufficed.

61. Furthermore, I do not consider that, for these Defendants, a worldwide non-competition covenant was justified at all. The Court was not presented with evidence that the confidential information that was known to the Defendants, or at the outset of their employment would have been expected to have been known by them, was truly global. In addition, there was no evidence that the Defendants' client contacts were global. There was no evidence that the Defendants' prospects or clients traded, or considered trading, in many currencies, let alone every currency, or that this was reasonably expected at the outset of their employment.

62. Given the limited nature and extent of the Defendants' access to confidential information and their client connections, a far more narrowly tailored non-competition covenant – in terms of geography or currency, and in terms of period of restraint -- would in my judgment have protected Monex's legitimate business interests. This would also be far less restrictive for the Defendants.

(vi) Conclusion

63. For these reasons I consider that, taking into account the likely prospects at trial, as well as the protection that is afforded to Monex by the undertakings that have been given (including the undertakings not to solicit and not to deal with clients), the balance of convenience weighs heavily in favour of the Defendants. Accordingly, I dismiss Monex's application for an interim injunction.