Neutral Citation Number: **[2019] EWHC 42 (QB)**

Case No: **HQ18X03224**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2019

Before:

MR JUSTICE FREEDMAN

- -

Between:

ARGUS MEDIA LIMITED	**Claimant**
- and -	
MR MOUNIR HALIM	**Defendant**

- -

- -

Gavin Mansfield QC and Nicholas Goodfellow (instructed by **Locke Lord (UK) LLP**) for the **Claimant**

Naina Patel (instructed by **Pennington Manches LLP**) for the **Defendant**

Hearing dates: 12th December – 21st December 2018

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APPROVED JUDGMENT

Mr Justice Freedman:

Introduction

1. This is a speedy trial of the Claimant Argus's claim against the Defendant, Dr Mounir Halim. Dr Halim was employed by Argus from 6 January 2014 until 31 August 2018 as a Business Development Manager (later VP Business Development) in respect of Argus's fertiliser business. Dr Halim resigned on notice on 12 July 2018, and his employment terminated on 31 August 2018.

2. The case of Argus is that Dr Halim formed a price reporting agency ("PRA") "Afriqom" which competes with its fertiliser business. It is alleged that Dr Halim has been in breach of express and implied terms of his contract of employment (including restrictive covenants contained therein), duties of fidelity/trust and confidence and duties of confidence by preparing to and setting up his new venture 'Afriqom', misusing confidential information in doing so and soliciting, dealing and competing in breach of his covenants.

3. At trial, Argus seeks injunctions:

    3.1 to enforce the post-termination restrictions ("PTRs");

    3.2 to restrain Dr Halim from misusing its confidential information;

    3.3 on a springboard basis, to deprive Dr Halim of an unlawful head-start he is alleged to have obtained prior to termination of employment, and which he continues to develop while acting in breach of his PTRs.

4. Dr Halim denies the allegations. By way of summary only, he says that:

    4.1 his business is not in competition with Argus;

    4.2 in any event, the PTR's are too wide in scope and duration, so are unenforceable restraints of trade;

    4.3 he has not been in breach of confidence and his steps to set up Afriqom during his employment were no more than legitimate preparatory steps;

    4.4 he has been discharged from the PTRs due to Argus repudiating his contract of employment due to reading personal emails in his work inbox.

5. Pending trial, Dr Halim has given undertakings, including as to non-solicitation, non-dealing and no misuse pending this trial (as reflected in paragraphs 4-5 of the Order of Mr Justice Andrew Baker dated 21 September 2018 and paragraphs 4-5 of the prior Interim Consent Order dated 18 September 2018). On 27 September 2018, Mr Justice Andrew Baker declined to provide additional non-compete and springboard relief pending trial. Mr Justice Andrew Baker declined to make any such orders, having regard to the availability of springboard relief to the extent that it would emerge that there was an unlawful head-start by the absence of relief at the interim stage**.**

6. Following Argus's application for a split trial, the parties agreed that this trial would focus on liability and injunctive relief (paragraph 1 of the Order of Mr Justice Pepperall dated 29 November 2018). Argus now seeks final injunctive relief restraining any misuse of confidential information, breach of Dr Halim's restrictive covenants until 15 May 2019

and springboard relief in similar terms but going beyond that duration of the covenants and (i.e. 15 May 2019) together with an additional 3-month period (in its opening, it had sought an additional 3-9 month period). Dr Halim denies liability and says in any event that no injunction is appropriate: if it is, he says that since there has not yet been a trial on quantum, at highest any injunction should be interim only.

7. The Court has heard evidence from seven Argus witnesses (Ms Williamson, Mr Nash, Mr Thompson, Ms Wong, Ms Newbury, Ms Kewish and Mr Thomas), Mr Binks (who is in effect an Argus witness, but technically was called on the basis of a witness summons issued on behalf of Dr Halim) and two witnesses on behalf of Dr Halim (Dr Halim himself and his wife Ms Benadada). There have been skeleton arguments lodged in advance of the trial and at the end of the trial on 21 December 2018. Since the conclusion of submissions, there have been lodged with the Court further submissions from Dr Halim on 31 December 2018 and in response from Argus on 5 January 2018. On 11 January 2018, I sent a draft judgment to Counsel in anticipation of receiving suggested typographical changes and with a view to giving judgment on 14 January 2018. In addition to receiving them, I also received a document of 4 pages from Counsel for Dr Halim. It contained an apology that some of the points might have been picked up on 31 December 2018, because they arose out of points in the written Closing Submission of Argus which were adopted in the draft judgment. I take into account the reluctance which the Court has to revisit points in the draft judgment because the purpose of providing it in draft is to receive a list of typing corrections and any other obvious errors. However, I am conscious that the effect of the speedy trial has been to impose a great burden on the parties and indeed the Court to have this matter adjudicated upon during the currency of the post-termination restraints. In these circumstances, I extended the time for the hand-down by a day, noting that Argus may or may not wish to respond substantively. In the event, subject to protest, Counsel for Argus has addressed the substance of the points raised. I have made some revisions where I considered appropriate to the judgment.

Observations about the witnesses

8. The two principal witnesses in the case in terms of time in the witness box were Ms Williamson and Dr Halim. There was an important background. In about July 2017, Ms Williamson became the Senior Vice President and Global Head of Fertilisers. She became the line manager to Dr Halim in July 2018. Dr Halim had not been asked to apply for that job, and it was thwarting to his ambitions that he was not even asked to apply for this position. He was at about that time given the role of Vice President of Business Development. It did not involve a new contract or a pay rise at that time, and he considered it a form of appeasement rather than promotion. He felt very frustrated by his last period at Argus, particularly having Ms Williamson put into a role which he must have believed that he could have fulfilled. When his proposal for an African fertiliser weekly report was not accepted by Ms Williamson, he believed that his ambitions were not being fulfilled. It may be that he was entitled to feel thwarted by Argus, but the issues which I have to decide, albeit against that important background relate to the activities of Dr Halim thereafter when he conceived of the idea of the Afriqom business and how he brought it into fruition. Against this backdrop, I make some observations about the witnesses.

9. I found Ms Williamson to be very analytical, she expressed herself particularly clearly and generally was an impressive witness. However, her evidence was sometimes reduced in its effectiveness by not giving way even on points of little importance, as if any concession would weaken Argus's case. A flavour of this point is that she insisted that

IFDC had been 'hopeful' of having an African fertiliser report, but insisted that it was not 'disappointed' by the decision not to have one, which seemed to me in context to be a distinction without a difference and one only not conceded because of a belief that it might give some credence to Dr Halim's position. Of greater significance, she did not readily concede any points in paragraph 37(j) of her statement amounted to general know-how rather than confidential information. I take into account in my assessment of the evidence the shortcomings to which I have drawn attention. However, overall, I found her to be a reliable witness.

10. Mr Nash gave evidence as an editor within Argus's editorial department. I found him to be a very knowledgeable witness about the market in which he operated. He is very intelligent, but he was also ready to say when he could not answer a question due to his own lack of knowledge.

11. Mr Thompson is the Chief Strategy and Business Development Officer of Argus. He was sympathetic to Dr Halim's situation in these proceedings, effectively as the little man against a very large corporation. This however made the more forceful the important areas of disagreement between his evidence and that of Dr Halim. His evidence was understated. He was particularly co-operative with the questioner in answering the questions and was ready to give way about matters of which he had no knowledge. His evidence was therefore particularly telling.

12. Mr Binks, CEO of Argus who had played a major role in the development of Argus over decades, gave evidence without the degree of preparation of other witnesses, coming to give evidence without any witness statement having been submitted. His evidence was of a person who is a little detached from the particular issues and details of this case. The fact that there were differences between his evidence and that of Mr Thompson, for example in respect of the context in which Acuity was mentioned, in the end rendered the evidence given by both of them more rather than less plausible.

13. Ms Wong and Ms Newberry gave evidence as specialists in conference production and logistics respectively. Ms Newbury is now a Senior Conference Producer. They were involved in the field specifically of organising conferences which was not central to Dr Halim's sphere of operation, albeit that he did participate in conferences by attending and speaking. Mr Thomas gave evidence from the perspective of the consulting part of the business, showing a significant involvement of Dr Halim, albeit that this was not at the centre of what Dr Halim did for Argus. Their answers were of assistance to the Court, albeit that they were from particular parts of the business of Argus which were relevant, but not at the centre of the dispute.

14. Mr Kewish who is part of the technology team at Argus was highly knowledgeable about his area. His evidence has been very helpful indeed as regards the investigation of the activities of Dr Halim particularly in respect of his domain registrations and his downloads as well as his access to confidential information.

15. I now refer to the evidence of Dr Halim. I readily accept that these proceedings are very stressful particularly for him and his wife, and that he is battling with limited resources against a large corporation whilst at the same time struggling to preserve his nascent business. I have had to consider whether he was not only being thwarted in his ambitions whilst at Argus, but also being treated harshly and unfairly for forming the business of Afriqom, and the extent to which these proceedings as a whole or aspects of them reflect an unreasonable attempt to stifle a legitimate business. Dr Halim is highly intelligent and educated. He also came over as a cooperative witness with the process of questioning.

When he was struggling in an answer to a question, he said that English was his third language, but his English was at all times excellent, never struggling for any word or expression. To the extent that he had difficulties in the witness box, they were usually caused by contemporaneous documents and by the overall probabilities which were put to him. I have had to test his evidence against those documents and overall probabilities. I make my findings about his evidence below.

16. Ms Benadada, his wife, gave evidence. I have had to assess documents including in May and June 2018 in which she held herself out as Business Development Director in communications to Restricted Customers. I shall make my findings about her evidence below.

The facts

17. Argus is a leading international energy and commodity PRA which produces various price reports, organises conferences and provides consulting and training. Dr Halim's employment contract was dated 4 December 2013 ("the Contract"). Dr Halim was employed by Argus from 6 January 2014 until 31 August 2018.

18. Originally Dr Halim was employed as Business Development Manager at a salary of £87,500. His role was to promote Argus's price assessments to be used as benchmarks/in indexation in supply contracts in the fertiliser industries with a focus on the European and African markets. I shall return to the terms of employment later in this Judgment.

19. On 7 April 2016, Argus launched a new global weekly publication known as 'Argus NPKs.' (NPK fertiliser is a complex fertiliser comprised primarily of the three primary nutrients required for healthy plant growth, namely nitrogen, phosphorous and potassium.) According to his evidence, Dr Halim was the driving force for this initiative. It was not necessarily integral to his work in business development, but he *"was worried about recognition in the business and I wanted the management to see what I'm capable of, so I had to think beyond – outside the box, to bring in something"* [Day 5, lines 3-7]. This initiative evidences a person who was highly motivated and also concerned that his talents were not being appreciated fully at Argus.

20. The 2017 appraisal for Dr Halim evidences that the NPK report delivered well above the business case in subscription revenues. The appraisal also stated that during 2017 Dr Halim was *"promoted to VP Business Development, a role well deserved by many years' experience and a strong track record."* It refers under key achievements to the profile of Dr Halim that he *"presented at major conferences raising Argus profile and particularly our knowledge in the NPK and Africa market sector."* Critically in view of the events which were to unfold, it states under *'new publication'* that he *"detected a major movement in the industry and conceived the African report idea to reap first market mover advantage, grow with market and (un)lock it. Drove the development work to unlock the market and develop the report, assessments, contacts and prospects."* Under the heading 'line manager', it was stated that Dr Halim had uncovered two openings, one of which was a new range of price assessment for African fertilisers (and the other of which was an appetite from the market for a sulphur AOM screen), following extensive travel digging out more information on the markets and scouting for new potential indexation opportunities. This section of the document went on to state *"Going into 2018, the priorities are to deliver together with Lauren Williamson a business case for the Product Review Committee on the African opportunity as well as secure buy in from the main sulphur players for AOM."*

21. The background to the African opportunity was as follows. In the second half of 2017, Dr Halim proposed a separate weekly Africa-focused fertiliser market report to Argus (Halim 4, paragraph 49) to sit alongside its other weekly regional fertiliser market reports for Brazil, Europe, North America and Russia. In the course of preparation of a business plan, in July 2017, the following correspondence took place by email. On 6 July 2017, the predecessor to Ms Williamson, Ms Josefine Ahlstrom wrote in response to an ideas template submitted by Dr Halim in respect of African Fertiliser, saying *"Agree, great idea. Probably worth adding comments on potential overlap/cannibalisation (or not) with other reports as well as if the report would be based on existing or new assessments."* (Mr Thompson had written saying *"Looks good – I like it!"*). Dr Halim responded saying in respect of cannibalisation *"for sure, it's been considered, particularly for NPKs (the only one with relative impact) and will be tackled in the business plan."* In fact, no business plan was produced because the idea was rejected.

22. Despite the favourable reaction of Ms Ahlstrom and Mr Thompson, by the end of August, the idea was communicated to Ms Williamson, who started her post as Senior Vice President and Global Head of Fertilisers in July 2017. Although she only became line manager to Dr Halim in July 2018, before then from July 2017, Dr Halim had a dotted line of report to her: see Williamson 3, paragraph 21. Ms Williamson was not supportive of the idea. She said that that the regional reports were not performing as strongly as the global weekly reports. She also felt that an African weekly report would cannibalise the global reports. The word "cannibalise" in this context was a term used to mean *"when a product competes with another, in that it is using the same or similar information that would be part of another and so it reduces the client's need to buy one of the products."* (Williamson Day 2, page 14, lines 10-14).

23. In cross-examination, Ms Williamson was asked about the evidence of cannibalisation. Her answer was complicated [Day 2, page 10, line 18 – page 11, line 12] as follows:

> *"The cannibalisation comes from the fact that the strength of our portfolio, our revenue and generation is largely allocated to the global reports. Those are huge reports and we are able to capture a much wider customer base with them. The regional reports reach a limit very quickly and when they reach that limit in saturation and market point, we struggle with profitability.*
>
> *Q. Sorry?*
>
> *A. That is because -- if you take, for example, the Brazil reports. It has struggled to get anywhere close to $200,000, it has been losing money and we also have two editorial resources devoted to it. That is two people working on it full-time, plus the port from the Houston office and that is without including cost allocations for production, for data and for other support teams on it. So it is very difficult to maintain and we do risk cannibalisation. I had a conversation with sales just last week about they were concerned selling certain products to customers because it would cannibalize that Brazil report."*

24. As regards cannibalisation, in her second statement at paragraph 15, Ms Williamson said that she explained to Dr Halim on numerous occasions that a separate African report brought with it a risk of undercutting existing reports by "cannibalising" portions of those reports in a regional report, and thus the regional report would compete with existing reports. At paragraph 16, she referred to experience in other markets such as in the US and in Brazil where there was duplication between the global report and the local report and certain clients opted to unsubscribe to certain global reports. In her first statement,

Ms Williamson stated (paragraph 35) that the commercial department agreed that a separate report was unlikely to be a large revenue generator *"as the risk of cannibalising our global reports was high given the global impact on the markets and existing Africa coverage."* Ms Patel was critical of the absence of detailed evidence from Ms Williamson about cannibalisation. She also pointed out that the specific example of the Brazil report in paragraph 23 above which Ms Williamson gave in her oral evidence was of the regional report cannibalising the global report. If the products are sufficiently similar such that the global can affect the regional, that logic must carry with it at least the possibility of the regional affecting the global. In any event, her evidence referred to in this paragraph is of clients unsubscribing to the global report.

25. As regards cannibalisation, there was a contradiction between Dr Halim's oral and written evidence. Orally, he said that he did not recall Ms Williamson expressing a concern to him that a separate African report would be cannibalised [Day 5, pages 87-88 and 101-106]. However, in his written evidence at paragraph 52 of his fourth statement, he said *"Ms Williamson's other strong objection to the idea which she also raised in this conversation was the fact that a weekly Africa focused fertilizer report would cannibalise the weekly global reports."* In my judgment, the significance of this is twofold. First, it shows that Ms Williamson was not inventing this concern for the purpose of these proceedings, but it was a concern at all times. Secondly, the contradiction affects the credibility of Dr Halim's evidence as regards cannibalisation, and his belief that the African report would not affect the global report needs to be viewed with greater caution.

26. Further, as for the existing global reports, each of the seven reports contain sections typically running to several paragraphs and covering a number of countries in Africa. Argus is active in the fertiliser markets in Africa as evidenced by the following by way of example:

    26.1 It holds specific events focused on the fertiliser markets in Africa such as hosting a session at the Argus FMB Africa Fertiliser Conference 2015 in Addis Ababa, and a related video of Dr Halim explaining the significant scope of Argus's activities in Africa: see Williamson 2, paragraph 19;

    26.2 Argus was and is expanding its Africa coverage as evidenced by the launch of a Nigerian fob urea price in December 2017: see Williamson 2, paragraph 13. In the same paragraph, Ms Williamson referred to 40 price assessments and methodologies covering the Africa fertiliser markets and content pieces tied to global reports covering Africa. Its most in-depth report is the Sub-Saharan Africa report, and there are other price assessments under confidential development of which Dr Halim would be aware.

    26.3 As regards the Sub-Saharan report, this has been published since 2016 called 'Argus Fertilizers in Sub Saharan Africa' ("SSA Report"). The report includes analysis of the markets for nitrogen, phosphate, potash and NPK fertilisers (Williamson 3, paragraph 67). Work on this report took three years to produce (Williamson 3, paragraph 8d.). The report is prepared in collaboration with the International Fertilizer Development Centre ("IFDC"), which provides data to Argus for the purpose of the report on an exclusive basis.

26.4 The African markets are import-dependent and therefore there are related import (global) price assessments, as recognised by Dr Halim in a video in 2015 which in the words of Ms Williamson "highlights the importance of global pricing data/information and the interdependence of global and regional data/information": see Williamson 2, paragraph 14.

27. Dr Halim has highlighted the fact that the primary opposition to his intended Africa publication for Argus was because of a belief that regional publications did not sell enough rather than cannibalisation. That much is evident from Verizon messages of Ms Williamson of 10 September 2018 stating that she thought that there was more to gain from global coverage rather than regional, and that "Regional pubs are losing like crazy right now…" It also seems evident from the answer quoted above concerning the Brazil regional publication, albeit that a concern within that answer was the risk of cannibalisation. Nevertheless, it is still significant that even outside the context of this litigation and justifying restrictive covenants, a significant concern at the time was the risk of cannibalisation.

28. Dr Halim's Africa idea was rejected on three separate occasions: 6-8 September 2017 (Halim 4, paragraphs 52-54), 22 September 2017 (Halim 4, paragraphs 57-58) and 11 December 2017 (Halim 4, paragraphs 64-65). Ms Williamson's account of the December 2017 discussions is that *"everyone agreed, though, that we needed to expand our coverage on Africa and discussed alternative methods including boosting coverage in global reports, potentially launching a quarterly supplemental report to the global reports or our Outlooks and hiring a designated stringer (a freelance reporter) for the region."* (Williamson 2, paragraph 35). Argus instead asked Dr Halim to work on a non-subscription-based quarterly periodical for Africa which would be included without additional charge for subscribers (Halim 4, paragraph 67; Williamson 1, paragraph 35). When reference was made to "the African opportunity" in performance objectives for 2018, it was to this.

29. As part of his preparations for the 11 December 2017 discussion at which he pitched the idea, Dr Halim prepared a mock-up of the proposed report ("the Africa Mock Up") (Halim 4, paragraph 63). The Africa Mock Up contained graphics and ideas for choices of price assessments.

30. As part of the increasing coverage of Africa by Argus in the last few months of the employment of Dr Halim at Argus:

30.1 Argus held its Argus Africa Fertiliser conference in Addis Ababa from 26-28 February 2018.

30.2 There was created a proprietary Africa map marketing collateral to showcase at conferences, which had its debut at the Argus's West Africa fertiliser conference in May 2018: see Williamson 1, paragraph 36;

30.3 A Cape Town office was opened for Argus to have stronger presence in Africa: see Williamson 1, paragraph 37;

30.4 On 19 June 2018, Ms Williamson presented to the board Argus's fertiliser strategy for its board of investors including improving regional coverage for Africa, Latin America and Asia, which report was shared subsequently with Dr Halim: see Williamson 1, paragraph 39.

30.5 In September 2018, after months of planning, Argus launched a new conference in Cape Town ('Argus Added Value Fertilizers Africa') to add to its existing African conferences.

30.6 There were other more specific product-based initiatives relating mainly to Morocco and Nigeria mentioned in Williamson 3, paragraph 88.

31. There was an issue as to whether, as Ms Williamson asserted, in his last few months with Argus, Dr Halim *"very clearly stopped supporting African initiatives during the final months of his employment. Not under direction but of his own volition"* Day 2, page 63, line 18 – Day 2, page 64, line 21). Dr Halim's assertion was that this was because during the last few months, Argus was not doing work to increase benchmark and indexation in Africa. The specific examples in the preceding paragraph indicate that there was a desire to expand, and to the extent that Dr Halim was inactive as regards Africa in his last few months for Argus, this says more about his intent to set up Afriqom than about the direction of the business of Argus. I accept the evidence of Ms Williamson about the increasing coverage by Argus of Africa.

Events leading to termination of employment

32. It is apparent that the relationship of Dr Halim with Ms Williamson deteriorated. Dr Halim was upset that he had not been asked to apply for the position which she filled in July 2017. He then felt frustrated by the rejection of the weekly Africa fertiliser publication. He began to consider resigning and took certain preparatory steps to establish Afriqom. On 18 March 2018, Dr Halim sent an email to Imad Bouziane and Joffrey Niel regarding the company set up of Afriqom. He took legal advice, incorporating a company Afriqom FZ LLC ("Afriqom") in the UAE on 22 April 2018 and registering the domain name afriqom.com on 22 May 2018 (Halim 4, paragraphs 92-97). On 13 May 2018, whilst in Dubai on Argus business, Dr Halim had a meeting with lawyers in respect of the formation of a company.

33. From early 2018, there was a significant increase in the number of emails passed on from Dr Halim's work email address to his iCloud account. The graphic analysis of this shows that this started from a trickle to a large number especially in May and June 2018. Dr Halim says that the reason for this was that he had started to work more at home in order to attend more to his autistic son aged about three. I do not doubt the concerns which Dr Halim had for his son, which must be very profound. However, I do not accept that this is what caused this movement of emails to the iCloud account. I take the view that the reason or a principal reason for the same was to prepare for his departure and have on his own system documents which he could use for his own business containing information of Argus, and, to use a colloquial expression, to be able 'to hit the ground running'.

34. I have reached this view for the following reasons and each of them, namely:

34.1 If Dr Halim had sought to change his working patterns in this way, then he would have been expected to have consulted with Ms Ahlstrom and/or Mr Thompson and/or Ms Williamson. There is no documentary evidence that Dr Halim consulted about a desire to change is working patterns due to the condition of his son. Mr Thompson to whom he reported indirectly through Ms Ahlstrom was aware of the condition of Dr Halim's son, but not in the context of changing work patterns. Ms Williamson, who prior to becoming line manager in July 2018 had a dotted line report to her from Dr Halim to Ms

Ahlstrom to her and who corresponded with Dr Halim at length prior to July 2018, particularly as regards increased African coverage, only got to know about the condition of Dr Halim's son in the lead up to the termination [Day 2, page 73-74]. The sudden surge of this pattern of transferring emails around the very time of incorporation of the Afriqom suggests that the transfers were around Dr Halim's new business rather than a change in pattern of working for Argus;

34.2 The fact that he did not upon the termination of his employment return this information from the iCloud account until required to do so indicates that this was intended. I do not accept that Dr Halim simply forgot about the return of this material: the sheer quantity of the same and that he was specifically asked to return electronic material indicates to me that he preferred to retain the same because at all material times before and after the termination he required the same for his new business;

34.3 In this judgment, I make other findings against Dr Halim relating to his conduct in connection with the termination of his employment such as his provision of false and misleading information relating to his intentions. This absence of candour is relevant to assessing the reason for the transfer of material to the iCloud account.

35. On the same day as Dr Halim registered the domain name, namely 22 May 2018, and from then until 3 June 2018, Ms Benadada started to send emails as Business Development Director to companies, some of whom were Restricted Clients or arguably so, to arrange meetings on behalf of Afriqom ("**Benadada Emails**"). Neither was she Business Development Director nor did she have any experience in price reporting or fertilisers. In fact, she did not have a position with Afriqom: on the contrary, Afriqom was described by Dr Halim as a one-man band [Day 5, page 125, lines 4-5].

36. She sought to arrange meetings at the International Fertilizer Association conference ("**IFA**") in Berlin from 18-20 June 2018. These included:

36.1 undisputed Restricted Clients: Alexfert; Arab Potash Company ("**APC**"); Acron; SABIC; Mekatrade; ZFC;

36.2 2 disputed Restricted Clients: Uralchem; Yara.

37. Dr Halim attended the IFA event on Argus's behalf in Berlin in June 2018. His wife Ms Benadada attended with him. Dr Halim says that he does not know about the work she did on behalf of Afriqom at the IFA: he says he deliberately did not ask her. He claims that she was acting on the instruction of a *"potential investor"* in Afriqom (Halim 4, paragraph 100) (Halim 3, paragraph 10).

38. Other features about the Benadada Emails are as follows:

38.1 They advertise Afriqom's services as something live at that time, not as a future plan. They refer to the Afriqom Website, as part of the email footer. Although this suggests that the website was live by that time, it is more likely than not, as Ms Benadada said, that it was not live and that this was a device to get through to potential customers;

38.2 She would require information in order to write the emails: prima facie this would be expected to have come from Dr Halim, but her evidence is that it came from the investor;

38.3 She was in Berlin with her husband at the time when she met with eight customers: prima facie Dr Halim would have been expected to have known about those meetings, but it was her evidence and that of Dr Halim that he did not know of the emails or of the meetings;

38.4 If there were meetings, one would expect some notes to have been taken about them, yet none were disclosed and it is claimed that there were none.

38.5 The Benadada Emails were not disclosed either in Dr Halim's standard disclosure, nor in his disclosure of 26 November 2018. In the end, the existence of these emails only got out because Mekatrade disclosed the same to Argus shortly before the specific disclosure application.

39. From the start of trial, Argus had an alternative case about this (Opening Submissions, paragraph 38f), namely that Dr Halim turned "a blind eye" to what was going on, that is to say that he knew that this was about to take place, and he did not protest. He did not care that Ms Benadada would be conducting research. This was not only to help the investor, but ultimately to assist Afriqom. At lowest, it was intended to assist the new business by enabling the investment: in the event, the investor did not proceed.

40. This emerged from the cross-examination as follows. The investor approached Dr Halim to conduct research to establish whether the planned business was viable. He refused because of his duties to Argus. The investor knew Ms Benadada before he knew Dr Halim, and so the following occurred in Dr Halim's words [Day 5, page 165, line 12 – page 167, line 17].

> *"Q. But let's just work for a minute with what you tell the court. The potential investor who didn't become an investor, says to you: will you do some market research for this project in Berlin? And you say no, because you're a very ethical individual?*
>
> *A. Absolutely not.*
>
> *Q. If you are so confident in your idea, why didn't you just tell him there's no need for that to happen?*
>
> *A. It's not for him. I've already told him that but he's still hesitating and he wanted to do an extra verificational search. That's not for me to tell him not to do.*
>
> *Q. It might be for him to tell you not to do it through your company though, mightn't it, Mr Halim?*
>
> *A. He was not asking me to do it through my company. He was asking me to do it -- me to do it. I was not even thinking it is Afriqom or not.*
>
> *Q. You are saying that he asked your wife to do it through your company? That's your evidence.*

A. I did not say that. What I said or what I would like to say, what I said exactly, is he spoke to me and asked me to go and speak to people at that conference. I said absolutely not. Explained why to him. Because this guy, this potential investor is a friend of ours and in fact, he was a friend of my wife before me, so he knows her very well and he asked me "I know Sam" my wife, "goes with you to this conference, do you mind if I ask her?" And I said very clearly, "This is between you and her. I'm not going to tell you or her what to do." So he did not say that she will speak on behalf of Afriqom, to me or anything like that.

Q. But after you have had the conversation with the investor, the potential investor, you thought, did you, that he was going to speak to your wife about getting her to do some research into this?

A. It is a possibility because I said to him "It's not up to me, it is up to you and up to him, the potential investor and up to her."

Q. You say it's up to her. Did it not strike you as inappropriate that your wife should be carrying out research on behalf of Afriqom?

A. I didn't think that certainly. Otherwise I would have stopped it straight away. But we live in very, very strong relationships but at the same time, we're very, very strong and independent individuals. I would never tell her what to do and she would never tell me what to do.

Q. I don't want to -- not interested in prying in the dynamics of your marriage, I am just thinking in a more corporate sense, Mr Halim. This is your company. So when it comes to acting on behalf of your company, then you are going to decide what she can or can't do?

A. Again, Mr Mansfield, I did not know nor did the potential investor say that she would be acting on behalf of Afriqom. He said she will go and speak to people in that conference, to check the idea."

41. The inherent probabilities on paper suggest that this contact with the customers must have been directed and controlled by Dr Halim and that Ms Benadada simply did what she was told to do by him. Those probabilities still give me cause to accept that this is exactly what occurred. I take into account that nowadays usually inherent probabilities are more important than a judge's view of the demeanour of a witness: see the reference to *Gestmin* below. However, having observed the witnesses give evidence, and particularly Ms Benadada, I find that although this account is difficult to take at face value, I am not satisfied to the balance of probabilities that her insistence that she was not acting under Dr Halim's instructions is untrue.

42. Nevertheless, although I have not found proven the case that Ms Benadada acted under Dr Halim's direction, I am satisfied in the light of the above evidence that at lowest Dr Halim deliberately "turned a blind eye" to her actions. He knew that she was conducting market research to assist a prospective investor with a view to his investing in Afriqom, which meant contacting customers, and he must have known that this would include customers of Argus. There is no distinction here in principle to the research being (a) for the investor to appraise whether to invest as part of due diligence, or (b) for the benefit of Afriqom. In either scenario, this was to involve contact with participants at the conference who were likely to be customers of Argus with a view to assessing whether they would one day

become customers of Afriqom, Dr Halim's "one man" business. Both scenarios were ultimately for the benefit of Afriqom, whether directly or indirectly.

43. However independent minded Ms Benadada is, it was not Dr Halim's prerogative consistent with his duty of fidelity to permit this to occur. It was his duty to take steps to seek that it did not occur. Any approach to customers or prospective customers which he made or which he could influence or control should have been for the benefit of Argus alone and certainly not for a nascent competitor. In my judgment, Dr Halim only needed to say that he did not wish the approaches to occur, and I have no doubt that they would not have taken place. Whether or not he knew more than he stated in the quotation from his evidence set out above, this itself amounts to a breach of the duty of fidelity because he permitted research to be undertaken with such customers for the investor and therefore for himself and his corporate vehicle. In my judgment, this goes beyond merely preparatory activity such as registering a company. Dr Halim should have stated to the investor that such research could not be permitted by him whilst he was an employee of Argus and/or he should have intervened to exhort that it should not take place.

Resignation

44. On 25 June 2018, Dr Halim instructed Arch-Legal in Dubai to hold Afriqom's capital ($120,000) until the creation of an Afriqom bank account. Thereafter, knowing that the funds were in place, Dr Halim sent in his letter of resignation. There then ensued conversations about his resignation which I discuss below.

45. On 12 July 2018, Dr Halim submitted a letter of resignation. It was four days after he had obtained funding of $120,000 for his new business. Although there was a commitment to invest by his two investors on about 25 June 2018, he only felt able to act upon it following receipt of the money. He believed that this seed money would enable him to operate for the first year. It follows that by the time he resigned from his employment, he had decided very specifically what he was going to do. The company was already established: there were two investors, but he would be the only person directing it: it would be in effect a one-man company.

46. There is a conflict of evidence about conversations surrounding the resignation which took place between Mr Thompson, Chief Strategy and Business Development Officer at Argus, and Dr Halim on 12/13 July 2018. The evidence is significant because it gives an insight into whether Dr Halim was open and truthful about his intentions, and to the extent that he was not, why he might not have been. Before considering the evidence which is based on an appraisal of the evidence of Mr Thompson and Dr Halim, and also Mr Binks who spoke with Mr Thompson, it is useful to consider both the letter of resignation of 12 July 2018 and his first letter in response to the first letter of the solicitors for Argus. The dates of those letters were as follows: Argus's solicitors Locke Lord (UK) LLP ("Locke Lord") wrote on 31 August 2018 and the response of Dr Halim was to Mr Binks and Mr Thompson on 3 September 2018. The need to appraise oral evidence against the background of the written contemporaneous evidence is well established: see *The Ocean Frost* [1985] 1 Lloyds Rep 1 at 43 per Dunn LJ, at 57 per Robert Goff LJ and the observations of Leggatt J in *Gestmin SGPS S.A. v Credit Suisse* [2013] EWHC 3560 (Comm) at [15-24].

47. The letter of resignation of 12 July 2018 was, as accepted by Dr Halim, a retrospective about his time at Argus, and said very little about his future intentions. It concluded by saying that he was *"in need of this rare and expensive commodity called time, energy and opportunity…"* and that he would be able to focus on his child. It was the absence of information in this letter which caused Mr Thompson to ask for details about Dr Halim's work intentions: this in turn was relevant so that it could be appraised whether he was about to compete with Argus and also it informed as to whether the full period of notice would be required. I shall return to the discussions which then ensued between Mr Thompson and Dr Halim.

48. On 31 August 2018, the letter from Locke Lord stated that it had come to the attention of Argus that (i) Dr Halim had established websites in the names of africaopenmarkets.com and afriqom.com (registered on 22 May 2018) for the purposes of his new business, (ii) Afriqom used the byline Africa Open Markets (rendering the same acronym AOM as the one used for Argus Open Markets), (iii) the business would be in competition with the Restricted Business and was described as a PRA, (iv) Afriqom offers a weekly report entitled African Fertiliser on a subscription basis and on a similar model as Argus, (v) he had been emailing Argus's materials to his private email address for a considerable period apparently for his new business, (vi) he was about to attend the African Green Revolution Forum 2018 in Rwanda in the first week of September as a marketing opportunity for the new business. Accordingly, undertakings were sought in the terms of the PTRs.

49. On 3 September 2018, Dr Halim replied saying that he reiterated that he had not left for opportunities in direct competition with Argus in major PRAs. He had pushed for Africa coverage in Argus, but it had been rejected (it would not make enough revenue, no more than $100,000 per annum). He then said: *"Now I am developing a different model to Argus where I plan to publish hybrid publications with consulting and pricing on regions/products that Argus do not cover (as previously mentioned)".* He said about the website that *"I was not involved in the development of the site".* On the subject of "start-up", he said *"As explained before, I have joined a couple of other guys that are trying different ideas in different commodities and wanted me to bring my fertilizer ideas to their group".*

50. Against this correspondence, the conversations of 12/13 July 2018 can be assessed. The evidence was as follows. Dr Halim's evidence was that he was asked by Mr Thompson to provide details of his plans for leaving, and he said that he would finalise them first and confirm the following day (Halim 4, paragraph 104). He said that he would be discussing both the timing (and he had not finalised when he wished to leave) and what he was going to do. It was put to Dr Halim that this was an excuse to avoid having a conversation about what he was going to do. He did not accept that, but I find that it was exactly for that purpose, and also in order to have the opportunity to plan exactly how he would phrase what he was about to do (which he had avoided identifying in his letter of 12 July 2018).

51. Dr Halim acknowledged that he made a mistake in his first statement about not mentioning the conversation of 13 July 2018, mistakenly referring to a conversation later on 12 July 2018 (his fourth statement in this regard was correct). He said at paragraph 11 of his first statement (and see also paragraph 108 of his fourth statement) *"I told him that I was joining a small start-up and it was a price reporting agency in the fertiliser market. I explained to Mr Thompson the start-up would be doing products that Argus did not do*

currently." In evidence [Day 5, page 203], Dr Halim accepted in cross-examination that he was not correct when he said that he was joining a start-up: in fact, he had created his own company. It was at this point that he sought to invoke the fact that English was his third language. In fact, as noted above, his English is of a high standard: Dr Halim is a highly educated man, and his intelligence and linguistic proficiency were very evident throughout his evidence.

52. When it was put to him that it was not true that he would be doing products which Argus did not do currently because the Afriqom business was on the same range of products as Argus reported on, he said *"Product is what Argus is selling and that's a global report and I was going to do a regional report and, therefore, it is a different product that Argus is not doing."* [Day 5, page 204, lines 18-22]. He stuck to this that as far as he was concerned the product was not the kind of fertiliser but the regional report in respect of Africa. He also maintained that a regional report was not the same product as a global report.

53. In respect of Dr Halim's email of 3 September 2018, it was put to him that when he referred to his having a "*different model to Argus where I plan to publish hybrid publications with consulting and pricing on regions/products that Argus do not cover (as previously mentioned)",* he was saying that it was a different product because of its hybrid nature. He said that his reference to consulting was not to consulting of the kind that Argus did, but to the more detailed nature of his product. This passage deliberately did not spell out that he was intending to publish an African weekly report that would report about the same products and prices as Argus's global report, albeit with more detail, and the sentence as a whole was not a straightforward summary of the planned publication.

54. Further, when in the email, he referred to joining *"a couple of other guys that are trying different ideas in different commodities and wanted me to bring my fertilizer ideas to their group",* this was inconsistent with the evidence that he has given that he was starting a one-man company: this was untrue and misleading. The unsatisfactory nature of the evidence of Dr Halim in this regard is apparent particularly from the following part of his cross-examination [Day 6, page 3, line 10 – page 4, line 18 which I shall set out in full:

> *"Q. So, this gives the impression, doesn't it, that you are joining two other guys who have a group already.*
>
> *A. Reading exactly on this, on a group, yes. It's -- for me it was a figure of speech, what I'm saying that these guys -- two guys are not a group. It's obvious in that sense, but in this sentence that's what it says, yes.*
>
> *Q. It is your words. You are giving the impression that you were joining something existing, aren't you?*
>
> *A. I said I've joined a couple of other guys that are trying different ideas.*
>
> *Q. Yes, and you are bringing something new to their group.*
>
> *A. Correct, so I was the one that is going to be doing on fertilisers.*
>
> *Q. Yes, but in fact what we know is that you had set up a new company of your own, Afriqom, correct?*

A. Correct.

Q. Which you described as -- you are a one-man band in that. That's what your evidence says.

A. And still -- and I'm still describing it as it is.

Q. Yes, so it wasn't true, was it, for you to say that you were joining a couple of other guys? You were setting up your own business.

A. My own business with these two other guys and that's their involvement in them being part of this, this venture.

Q. But the only involvement, as I understand it now, I appreciate you don't want to tell the court about it, but the only involvement of any other guys is people who are investors and shareholders.

A. Absolutely correct.

Q. So, you are not carrying on business with any other guys.

A. By carrying on business --

Q. They are not involved in Afriqom and won't be.

A. No, they're not."

55. I now refer to the evidence of Mr Thompson. According to him, the main part of the conversation was on 13 July 2018: see his witness statement paragraphs 11-14. At paragraph 14, he stated *"During the course of the conversation on 13 July, however, he indicated that he was planning to pursue the second option, of joining a two-person start-up which had been in existence for two years. He was very clear with me that although he would still be focused on the Fertiliser space, he would not be doing anything that was directly competitive. I asked him what he would be doing and he said that they had a few different ideas they were looking into. I asked him what fertilizer product areas he might be working on and he said that he wouldn't be working on any products or services that he'd covered at Argus. I did not get the impression that he would be pursuing a price reporting agency business or business model and he certainly never said to me that he would be pursuing a PRA business (which would have been directly competitive)."*

56. Despite searching and impressive cross-examination from Ms Patel at Day 3, pages 112-127, Mr Thompson did not waver from this evidence. The reliability of this evidence also comes because Mr Thompson reported to Ms Williamson on 13 July 2018 stating that Dr Halim had indicated that he would finish at the end of August and that he had said that *"he is going into a related space but not a direct competitor and not covering any of the products he's been involved in with us. I've reminded him of his obligations…"*.

57. The next part of the transcript is revealing [Day 3, page 129, line 3-page 130, line 6]:

"Q. The only reason that Mr Binks asked you if Mr Halim was joining Acuity was because you had said he was going to a start-up PRA in the fertiliser sector?

A. No, I did not. I have repeated this several times. I said to Mr Binks actually it was the conversation with Mr Binks was effectively replaying the conversation I had with Mounir. And I said he was going to a two-person

start-up that had been in operation for two years which since turns out is exactly the profile of Acuity.

Q. You didn't say to Mr Binks that he was not going to be competing?

A. Yes, I said he would not be competing.

Q. You said he wasn't going to be competing?

A. Yes.

Q. So why would Mr Binks have asked if he was joining Acuity then?

A. Because I think, and I can't speak for him directly but the profile of a two-person start-up that had been operating for two years, sounds very much like Acuity, as far as I understand.

Q. But if you said that he was not going to be competing, Mr Binks is not going to ask you if he is going to Acuity which is a direct competitor, isn't it?

A. He asked me the question and I said, "he can't be because he's not going to be competing", so I assumed the profile of the company struck a chord with Adrian, in that it is the same profile, been operating for two years, two people."

58. I find this to be particularly compelling because it chimes with the admitted reference to joining a two-person start up in the conversation of 13 July and also with the statement in the subsequent email of 3 September *"as I mentioned before"* that he was joining up with *"a couple of other guys that are trying different ideas in different commodities, and wanted me to bring my fertilizer ideas to their group".* The fact that he does not refer to joining a PRA in that email and the connection between joining two other people and Acuity makes it more probable that the reference by Mr Binks to Acuity was because of the connection which he drew between joining two people and Acuity rather than because Dr Halim had mentioned a PRA. If he had mentioned that he was joining a PRA, then he would be expected to have said so in the email of 3 September.

59. This then leads to a consideration of the evidence of Mr Binks who attended under a witness summons issued by Dr Halim and on the basis of a witness summary. He is the chairman and CEO of Argus. He was told that Dr Halim had told Mr Thompson that he was not going to compete in any way with Argus. He wanted to know more detail, and he did not want him to join a PRA because of the seniority of his position. *"He had access to customer databases, our commercial terms with customers, editorial procedures. In fact, everything we do…"* He did not want a recurrence of the situation with Acuity. That was a statement, and not a question to Mr Thompson. Mr Thompson told him that Dr Halim was going to a business which had been in existence for two years. Mr Thompson did not say that Dr Halim was joining a PRA in the fertiliser space. Mr Binks raised that. In cross-examination, he took the view very strongly that *"every PRA in the fertiliser space is likely to compete with us in one area or another…given the global coverage that we do, any fertiliser PRA will compete with us in one area or another…I don't think it is conceivable that a PRA could start and not compete with us in the fertiliser space."* When it was suggested that a fertiliser PRA might not be competing because it might be about a product not offered by Argus at a snapshot, he maintained that the fertiliser PRA would still compete [Day 4, pages 10-12]. He said that Mr

Thompson might have not been involved in the fertiliser sector during the Acuity period and may not have known about Acuity.

60. My findings arising out of the foregoing are as follows:

60.1 The documentary evidence is strong to the effect that Dr Halim did not say that he was going to a PRA in the fertiliser sector: it is not mentioned in the letter of termination (but then almost nothing is said) nor does it appear in the email to Ms Williamson of 13 July nor in the email of 3 September;

60.2 I am satisfied from the evidence which I have heard from Mr Thompson, Ms Williamson and Mr Binks that if it had been mentioned that he was about to go to a PRA, then they would each of them have been put on alert about competition. All the evidence was to contrary effect, namely that the remarks made indicated that Dr Halim was not going to compete, *"not covering any of the products he's been involved in with us"*.

60.3 The weight to be attached to the evidence of Dr Halim is undermined by the respects in which he provided misleading information. There may be an explanation why he did not identify what his intentions were in his letter of termination of 12 July, but on 13 July, he actively misled when he said that he was joining a two-person business as if he was joining the business of others. He also said that the business had been going for two years: I accept the evidence of Mr Thompson, which in this regard was corroborated by Mr Binks. Although the evidence was not at one in this regard, the evidence of Mr Thompson is entirely logical that Mr Binks' remark about Acuity was sparked not by a reference to a PRA, but to the reference to a two-person business formed two years ago.

60.4 Dr Halim's evidence is undermined also by his email of 3 September which contained positively misleading information including the information about (i) joining a two-person company "*trying different ideas in different commodities"* (a variation on the information provided on 13 July 2018 and no reference to a PRA); (ii) the misleading reference to a hybrid when the business was to be a PRA in the fertiliser sector; and (iii) the reference to regions/products being different instead of stating that there was an intention to report about fertiliser prices in Africa.

60.5 In the light of the foregoing, I reject Dr Halim's case that he mentioned that he was setting up a PRA. Had he done so, I am satisfied that Mr Thompson, Mr Binks and Ms Williamson would not have been prepared to accept that Dr Halim did not intend to compete.

60.6 By contrast, I found Mr Thompson's evidence to be reliable. As noted above, he was co-operative with the questioner and factual and understated in his responses. He readily said when he did not know or recall something. He had been well disposed to Dr Halim, with whom he got on well, and I did not detect hostility or a desire for confrontation in his evidence. I accept his acknowledgment in cross-examination that he found it difficult watching what Dr Halim was going through [Day 3, page 83, lines 2-10]. The good relations

were reciprocated: hence, Dr Halim had turned to Mr Thompson on 12 July rather than with his line manager Ms Williamson. In these circumstances, it is particularly telling that Mr Thompson's evidence is clearly and unequivocally at odds with the evidence of Dr Halim.

61. Mr Thompson was not particularly searching in his questioning of Dr Halim. Having considered the written and oral evidence, it seems to me that he did not probe the answers to his questions. He was willing to take the answers at face value. Ms Williamson was willing to defer to Mr Thompson. Mr Binks was more circumspect, but the reality is that Dr Halim misled them as the nature of his business and intended business.

62. In these circumstances, the case on acquiescence fails at the first hurdle because absent accurate information to Argus, there was nothing in which to acquiesce. In order for acquiescence to be capable of arising, it would have been necessary for Dr Halim to provide Argus with a full and/or accurate account of his plans such that Argus could establish that it *"has been aware of the Defendant's intentions as to future work from the outset and failed to raise concerns with him then…"* (Defence, paragraph 48). Dr Halim singularly failed to provide this account since he did not say he was going to be publishing an African weekly fertiliser report. On the contrary, for all the reasons above, he avoided giving a full or accurate account of his plans and/or such information as he did provide was misleading.

63. Any case on detrimental reliance required for a case of acquiescence would also fail. Dr Halim has not changed his position in reliance on anything said or done by Argus on 12/13 July. He had decided to resign to pursue Afriqom's business before he spoke with Mr Thompson. The wheels for Afriqom were already in motion well before then. He resigned because he had secured funding for Afriqom. Further, by 31 August 2018, when Argus had unravelled the position and required undertakings, two points emerged. First, Argus would regard him as acting in breach of covenant if he pursued the Afriqom business, and second Dr Halim was intent on continuing with the business and not because of any assurance provided to him by Argus.

The handover

64. An end date of 31 August 2018 having been agreed, it was incumbent on Dr Halim to cooperate and facilitate an orderly handover. Dr Halim's position was made more difficult by the theft of his personal laptop and telephone on 18 July 2018 whilst he was having work drinks in Holborn. For whatever reason, there was a delay in the collection of a replacement laptop. In early August 2018, Ms Williamson was making contact with Dr Halim seeking an update on handover items and was evidently dissatisfied with the queries which had been unresolved. It was the evidence of Ms Williamson that Dr Halim failed in that duty, which then led to his being put on garden leave on 15 August 2018. Dr Halim says that he believed that he would have had until 31 August 2018 to complete this process.

65. Thereafter, Ms Williamson was given access to the inbox of Dr Halim and his access to the systems of Argus was removed. I shall discuss this further in the section below about whether or not there was interference with privacy rights of Dr Halim at this stage and, if so, whether this amounted to a repudiatory breach of contract.

66. On 20 August 2018, there was an email from a GoDaddy domain sent to the email account of Dr Halim regarding registration of domain names 'africafertilizercomplex.com' and 'africafertilizercomplex.org'. On the same date, Dr Halim completed his registration for the African Green Revolution Forum ("AGRF"), a key African conference in Rwanda: an email was sent to Dr Halim's Afriqom email address confirming this. On 27 August 2018, Dr Halim registered the domain name 'africaopenmarkets.com'. On 29 August 2018, he posted a message advertising Afriqom on the chat forum of AGRF.

67. Afriqom's website went temporarily live on 29 August 2018 for a few hours, but did not in fact launch until 3 September 2018: see Halim 4, paragraph 158. Dr Halim explained this was because his developer relative had tried to publish it to see if the two domains were linked and failed to unpublish [Day 6, p.199, line 22 – p.200, line 7]. Mr Kewish accepted that a website might be live if published to see if linked to another and if you failed to correctly unpublish it [Day 4, pages 116-118].

68. On 31 August 2018, Dr Halim's employment terminated. I have considered above the correspondence of 31 August 2018 of Locke Lord and 3 September 2018 of Dr Halim. A further letter was sent by Locke Lord on 3 September 2018. Despite the letters seeking undertakings, on 5-8 September 2018, Dr Halim attended the AGRF conference in Kigali, Rwanda. On 5 September 2018, he met Mr Groot from IFDC at the AGRF for about 45 minutes and showed him a copy of a report. On the next day, he met with Ms Kalihangabo from the Africa Development Bank and showed her a copy of a report. On 7 September 2018, Dr Halim emailed to arrange meeting in Cape Town later in the month. On the same day, there was an email from Locke Lord regarding urgent injunctive relief. There was a holding response from Pennington Manches on behalf of Dr Halim. These proceedings were issued on 11 September 2018, and an interim injunction application was made supported by the first witness statement of Ms Williamson.

Terms of employment

69. Dr Halim's employment contract was dated 4 December 2013 ("the Contract") which included these express terms as to fidelity, confidentiality and PTRs:

> ***"6. Fidelity***
>
> *6.1 You will at all times well and faithfully perform your duties for the Company and promote the Company's interests. You will at all times conform with the Company's reasonable instructions and will comply with all the Company's rules, regulations, policies and procedures from time to time in force.*
>
> *6.2 You will devote your full time, attention and abilities to the Company's affairs during your working hours. Whether full time or part time, you may not without the Company's express consent in writing work as an employee or freelancer for any other person, firm or company.*
>
> ….
>
> ***15. Employers Property***
>
> *15.1 On termination of your employment with the Company, or at any time during your employment at the Company's request, you must return to the Company*

all of the Company's property that may be in your possession or under your control, including but not limited to, all documents (in hard or soft copy) relating to the business of the Company or of its clients, and all notes, memoranda and other documents (in hard or soft copy) produced by you during your employment with the Company and any copies thereof.

16. Confidentiality

16.1 You will not during your employment or at any time afterwards (unless authorised to do so by the Company or a Court):

(a) use for your benefit or the benefit of any other person;

(b) disclose to any other person; or

(c) through any failure to exercise all due care and diligence cause or permit any unauthorised disclosure of

any Confidential Information of the Company and/or Associated Company which you obtained by virtue of your employment or in relation to which the Company is bound by an obligation of confidence for a third party.

16.2 Confidential information shall include without limitation information relating to the Company's and/or Associated Companies details of suppliers and their terms of business, details of customers or clients and their requirements, the prices charged in terms of business with customers or clients, financial information, results and forecasts, details of employees and their remuneration, ideas, business methods, financial, marketing development or manpower plans, sales agreements, computer systems and software, know-how or trade secrets or other matters connected with the products or services manufactured, marketed provided or obtained by the Company and its Associated Companies or any information which you are told is confidential or any information which has been given to the Company and/or any of its Associated Companies in confidence by customers, clients, suppliers or other persons.

….

17. Restrictions

17.1 In this clause:

***"Restricted Business"** means the business of price assessments and indexes, business intelligence and market data on the global crude and products, natural gas, coal, electricity, emissions, fertilizer and transportation industries of the Company and any Associated Company at the time of the termination of your employment with which you were involved to a material extent during the period of 12 months ending on the date of the termination of your employment;*

***"Restricted Client"** means any firm, company or other person who, at any time during the period of 12 months ending on the date of the termination of your employment, was a client of or in the habit of dealing with the Company or any Associated Company or with whom we or any Associated Company were involved in negotiations with a view to such firm, company or other*

person becoming a client of ours or any Associated Company and in each case with whom you had contact during the period of 12 months ending on the date of the termination of your employment;

….

17.2 You will not during the continuance of your employment or for a period of 9 months from the termination of your employment solicit or endeavour to entice away from us or any Associated Company the business or custom of a Restricted Client ***with a view to providing services to that Restricted Client in competition with the Restricted Business*** *(emphasis added).*

17.3 You will not during the continuance of your employment or for a period of 9 months from the termination of your employment provide services to or otherwise have any business dealings with any Restricted Client ***in the course of any business concern which is in competition with the Restricted Business*** *(emphasis added).*

17.4 You will not during the continuance of your employment or for a period of 9 months from the date of termination of your employment accept employment or be engaged in ***the provision of services in competition with the Restricted Business with any person, firm, company or body*** *(emphasis added).*

….

17.6 The period of restriction referred to in this clause shall be reduced by any period during which you are required by the Company to remain away from your place of work pursuant to clause 11.4.

17.7 The obligations imposed on you by this clause extend to you acting not only on your own account by yourself, your employees or agents or otherwise but also on behalf of or through or in conjunction with any other firm, company or other person and shall apply whether you act directly or indirectly.

70. It is common ground that the Contract also contained implied terms as to fidelity, trust and confidence and confidential information. Dr Halim also owed an equitable duty of confidence in relation to Argus' business secrets or confidential information of an equivalent degree of sensitivity.

Duty of fidelity and trust and confidence

71. These terms are spelled out by Argus. In addition to those express terms, as a matter of law by virtue of his status as an employee Dr Halim owed duties:

> 71.1 not, without reasonable and proper cause, to act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and the employee;
>
> 71.2 of good faith and fidelity *Ranson v Customer Systems Plc* [2012] IRLR 769 (para.30).

72. Incidents of the obligation of good faith and fidelity, include (see, for example, *QBE Management Services Ltd v Dymoke* [2012] IRLR 458 at 169 and 216 ("*QBE v Dymoke*")):

> 72.1 a duty not to work in competition with one's employer.

72.2 a duty of confidence subsisting whilst an employee not (without the employer's informed consent) to disclose, or make any use of, confidential or business sensitive information except for a proper purpose and in the exercise of her or his duties (*Marathon Asset Management LLP v Seddon* [2017] ICR at paragraph 111, citing *Robb v Green* [1895] 2 QB 315, 317, 318-319, 320),

72.3 a duty of confidence applying after the contract of employment terminates, not to use or divulge to any third party any trade or business secret, or confidential information of a degree of sensitivity warranting protection akin to that afforded to trade or business secrets.

73. An employer must not solicit the business of his employer's customers during his employment. It is irrelevant that the solicitation takes place only very shortly before the employment ended: see *Wessex Dairies v Smith* [1935] 2 KB 80 where the act of solicitation took place on the employee's last day of employment.

74. An employee's duty of fidelity is not attenuated by his/her period of garden leave: *Imam-Sadeque v Bluebay Asset Management* [2013] IRLR 345 at paragraphs 144 and 145.

75. On behalf of Dr Halim, it is added that the scope of the duty of fidelity in any particular case will depend on the particular circumstances of a given employment relationship: *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 (CA) at 174. The key question in identifying a breach is whether the steps taken impaired the employee's ability to serve his employer faithfully: *Ranson v Customer Services Plc* [2012] EWCA Civ 841; [2012] IRLR 776 at paragraph 43.

76. Further, taking preparatory steps in relation to activity, even where competitive, which will not be engaged in until after employment has ended may not be a breach of the duty. This may include discussing an idea, making a decision, consulting lawyers and setting up a company: *Shepherds Investments Ltd v Walters* [2006] EWHC 836 at paragraph 108; *Pennwell Publishing (UK) Ltd v Ornstien* [2007] EWHC 1570; [2007] IRLR 700 at paragraph 53.

Duties of confidence and confidential information

77. The Contract includes an express term imposing a duty of confidence at clause 16. That operates during and after Dr Halim's employment.

78. Trade secrets and information of equivalent confidentiality to trade secrets are subject of an implied duty of confidence which continues after termination of employment: *Faccenda Chicken Ltd. v Fowler* [1987] Ch 117. Reference is made in that case to three categories of information, namely:

78.1 Class 1: Trivial or public information which is not confidential at all and which an employee is free to disclose or use;

78.2 Class 2: Information which the employee must treat as confidential (either because he is expressly told that it is confidential or because from its character it obviously is so) but which once learned necessarily remains in the servant's head and becomes part of his knowledge and skill applied in the course of his master's business. It might well be a breach of the employee's duties if he were to disclose this

information while employed but (subject to any express contractual provision) there is generally no restriction on him using or disclosing such information after termination of the employment.

78.3 Class 3: Specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the employee may have left the service, they cannot lawfully be used for anyone's benefit but the employer's.

79. In *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251 Staughton LJ defined a trade secret as information (page 260B):

79.1 used in a trade or business;

79.2 which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret;

79.3 in respect of which the owner has limited the dissemination of it or at least has not encouraged or permitted widespread publication.

But such a definition is likely to be over-inclusive: *Vestergaard Frandsen S/A v Bestnet Europe Ltd ("Vestergaard")* [2013] UKSC 31, [2013] 1 WLR 1556 at paragraph 44ff.

80. In *Lansing Linde*, Butler-Sloss LJ emphasised that the definition of trade secret has to be interpreted in the wider context of highly confidential information of a non-technical or non-scientific nature, which may come within the ambit of information the employer is entitled to have protected (page 270F).

81. Both parties rely upon *Coco v Clark* [1969] RPC 41 at 47-48 (cited with approval by the Supreme Court in *Vestergaard*) where Megarry J identified three elements to a claim for breach of confidence:

81.1 The information itself must have *"the necessary quality of confidence about it"*;

81.2 The information must have been *"imparted in circumstances importing an obligation of confidence"*; Megarry J stated:

> *"It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."*

81.3 There must be an unauthorised use (or threatened use) of that information to the detriment of the party communicating it.

82. An express contractual clause cannot be used to deem confidential what is on any view either part of the employee's skill and general knowledge or otherwise not confidential: *Ixora Trading Inc v Jones* [1990] FSR 251. An attempt to deem confidential non-Class 3 information post-termination must be subject to principles of restraint of trade: *Goulding, Employee Competition* (3rd Edition) at paragraphs 4.46-4.78. A distinction must always be drawn between information capable of separate identification and protection and information that forms part of the inalienable general knowledge, experience and acquired skill of the party receiving and using such information.

83. There were references by Argus to the seniority of Dr Halim, particularly from Mr Binks, as noted above, who regarded his impending departure as a serious matter due to such

seniority. *"I did not want him joining a price reporting agency, a competitor, because of the seniority of his position."* The level of seniority informs as to the kind of protection required in respect of his activities particularly after the currency of his employment. In my judgment, Dr Halim was appointed in a well remunerated position with a responsibility for business development for the entirety of Argus's European and African fertiliser business. He was given sole responsibility for business development in the Europe and Africa regions [Halim Day 5, page 44, line 6 – page 45, line 1]. This involved developing relationships for Argus with all sorts of different people. They might be "producers or traders, importers, exporters, various people" [Day 5, page 45 lines 6-16]

84. His role involved raising the profile of Argus and encouraging the use of Argus's price assessments in supply contracts in the Fertiliser industry (Williamson 3, paragraph 19). This involved face to face meetings with key decision makers at actual or potential clients of Argus. Dr Halim was required to understand and explain the price methodology of Argus and the reasons for using its price indices. This engagement by Dr Halim would lead to subscription for Argus's Fertiliser reports. Argus's subscription-based services all operate on an annual renewal basis (Williamson 3, paragraph 10).

85. There were limitations in respect of Dr Halim's seniority. Although internally, his role was described as being at a *"senior level"*, he was a manager and not a director, which he had sought [Day 3/pages 92-93]. He did not manage anyone, Argus had a flat structure, and he entered at the lowest rung of business development [Day 1/pages 128-129; Day 3/pages 86-88]. Mr Binks stated that Dr Halim did not attend the weekly management meetings for senior management in London. Ms Williamson accepted that she had not involved him e.g. in her June 2018 presentation to top management [Day 1, pages 130-132]; Mr Kewish stated that Dr Halim's access to Birst was limited compared with people at more senior levels [Day 4, page 131, line 24 – page 132, line 6].

86. Dr Halim's evidence was that his role was focused on driving indexation as this was how Argus made a lot of its revenue [Day 5, page 48, lines 1-9]. Dr Halim also spoke regularly at Argus's conferences and had material involvement in the consulting part of Argus's Fertiliser business (Wong, paragraphs 7-10) (Newbury, paragraphs 11-22) (Thomas, paragraphs 6-19, identifying numerous emails over the years involving Dr Halim in consulting). Argus's consulting department carries out single client project work and 'multi-client' studies with topical or regional focus, which provide a detailed analysis of emerging markets (Williamson 3, paragraphs 8d.,11). Neither was consulting the centre of his role nor was he an integral part of the consulting department. He was not involved in bids [Thomas Day 4, page 147, line 19], he did not have access to the consultancy shared drive and he was not invited to conference pre-planning meetings with individuals from the conference, marketing and sales teams [Wong Day 4, page 29, line 21 – page 30, line 11; Newbury Day 4, page 56, lines 14-19]. He was involved in conferences, but for specific duties and on request [Newbury Day 4, page 59, lines 20-23]. Taking the evidence as a whole into account, I find that Dr Halim, albeit not central to the conferences' department, did have substantial involvement in respect of conferences, giving advice to the conference department and collaborating between the PRA business and the conference department. He was very active in the conferences themselves, speaking, chairing and hosting round table events as well as networking heavily. He was able to acquire and did acquire information concerning Argus's fertiliser consulting business. According to Dr Halim, his involvement in conferences and consulting was no more than 5% of his role [Day 6, page 186, lines 4-6]: even if that was a correct percentage, it still formed a substantial part of his time. I conclude that he was

involved in Argus's fertiliser consulting business to a material extent throughout his employment.

PART 2: SUBMISSIONS ON ISSUES

BREACH OF COVENANT

Issue 1: In carrying on the Afriqom business, is Dr Halim engaged in the provision of services in competition with the Restricted Business, for the purposes of clauses 17.2 ("Non-Solicit"), 17.3 ("Non-Deal") and/or 17.4 ("Non-Compete") (together the "PTRs")?

87. This issue runs through the case. Fundamental to Dr Halim's case is that his weekly Africa Fertiliser Report does not compete with the Argus weekly global fertiliser report. He contends that a regional report is totally different from a global report. It attracts a different readership of people who are specialists in Africa, for whom most of the global report is irrelevant, and whose content is not sufficiently detailed and specialist for their needs. They are sufficiently different that one product is not interchangeable for the other. He also points to the fact that just as some customers will purchase products of competing PRAs, so too there will be an appetite to purchase both an Africa product and a global product from Argus. He says that the evidence that has been given about cannibalisation is without any statistical analysis, but is in effect anecdotal, and in any event, the main driver against the regional offering was a concern (which he believed to be false) that regional publications did not generate sufficient revenue.

88. It is necessary first to consider the law as to what amounts to competition in the context of restrictive covenants. In *Morris-Garner v One Step (Support) Ltd* [2017] QB 1 (overturned on appeal, but not on this issue) the Court of Appeal (Christopher Clarke LJ) stated:

> *57. "Whether or not A is carrying on business in competition with B in a particular area or areas is dependent on at least two considerations, each of which raises questions of definition. The first is whether A and B are properly to be regarded as supplying goods or services which are sufficiently comparable to mean that they are in competition…*
>
> *58. The second consideration is whether Positive Living is to be regarded as competing in the same area as that in which One Step was carrying on business in December 2006.*
>
> *59. As to that, A and B, whilst supplying identical, similar, or interchangeable products, may operate in areas which are sufficiently disparate to mean that they are not in reality in competition. Whether that is so may depend, at least, in part on (a) the nature of the product(s) supplied; and (b) whether potential consumers could realistically be expected to purchase from either A or B. That in turn may depend on the manner in which consumers make decisions about what to purchase.*
>
> *60. The answer to the question may also turn on whether the area in which A and B are said to be in competition ought to be subdivided to allow for the fact, if such it be, that in sub-areas 1, 2, and 3 A carries on business in the supply of product X, whereas B supplies only product Y and does not aim or has no prospect of supplying product X. In such a case it may be that, although A and B both carry on business supplying products X and Y in the area taken as a whole, they are not in truth in competition in sub-areas 1-3….*

> *61. The analysis in the previous paragraph assumes that in the relevant sub-areas B does not aim, or has no prospect, of supplying product X. That in turn raises the question of whether A and B are in competition if B hopes to do so. The answer to that seems to me to depend on (a) the degree of similarity between products X and Y; (b) the genuineness of B's hope; and (c) whether, and to what extent, it is realistic to expect that he may obtain customers for Y as well as X.*
>
> *Conclusion on competition*
>
> *….*
>
> *64. Whilst the issue of competition can be analysed in the way that I have suggested the question whether A is in competition with B needs to be considered with a rather broader brush. The essential question is whether the scope of the businesses was the same, and, as Rose J put it, in Invideous Ltd v Thorogood [2013] EWHC 3015 Ch whether the provision of adult services to any authority in those regions was "within the scope of [One Step's] business plan". It is also necessary to bear in mind that A can be in competition with B if both of them are supplying the same product and B seeks to provide it to outlets previously supplied only by A."*

89. In *Gamatronic (UK) Ltd v Hamilton* [2016] EWHC, Mr Choudhury QC sitting as a Deputy Judge of the High Court (as he then was) applied the *Morris-Garner* approach and distilled four questions from it at paragraph 95 (which I shall adapt to the fact of this case), namely:

> "*i) Were the two companies supplying goods or services which are sufficiently comparable to mean they were in competition?*
>
> *ii) If so, were they competing in the same area?*
>
> *iii) If [Afriqom] was not supplying the same products or service as Argus did it have a realistic prospect of doing so (or vice versa)?*
>
> *iv) Was the scope of [Afriqom's] business the same as Argus or was the provision of goods or services provided by [Argus] "within the scope of [Afriqom's] business plan"?*

90. In deciding that the two businesses in that case were competitive, the Court observed that *"[t]here was nothing of significance to suggest that Vox's products would only be of interest to a unique sector of the market to which Gamatronic UK had no access…"* (paragraph 101(ii)).

91. There has been a focus on whether interchangeability of products is required. It is not a particularly precise concept, and that by itself seems to be a problem about applying it as a sole or a necessary criterion. Subject to that, if there is interchangeability within the same area, it is very likely that competition will be established. However, in my judgment, and contrary to the submission on behalf of Dr Halim [Day 7, page 69, line 21 – page 70, line 4], interchangeability of products is not a pre-requisite of a finding that two business are competitive. It suffices if the products are 'similar' (paragraph 59 of *Morris-Garner*) or 'sufficiently comparable' (paragraph 95 of *Gamatronic UK*). Every

case is fact specific: in each case, a broad-brush approach is appropriate (paragraph 64 of *Morris-Garner*).

92. In my judgment, the businesses are similar and sufficiently comparable for them to be competitive. I reach this conclusion without relying on the broader approach of Mr Binks that two Price Reporting Agencies are likely per se to be competitive, but for more specific reasons as follows:

    92.1 Not only are both businesses Price Reporting Agencies, but they both provide price reporting information for the same types of Fertiliser product in the African market. Argus's weekly reports each include market commentary sections dedicated to Africa, that provides market information and information on pricing, and some of the weekly reports also include price assessments for the African region. For example, Argus NPKs includes six price assessments related to African regions or countries: see 4 October 2018 report at [1/9/89A]).

    92.2 The direct overlap clearly emerges, when one considers the market commentary sections. Argus and Afriqom are frequently reporting on the same trades/tenders and providing information that is the same, or highly similar. Afriqom and Argus report on many of the same trades, as evidenced by a table annexed to Argus's closing submissions comparing Afriqom's 21 September template report with Argus's NPK, Nitrogen and Phosphates reports for 20 September as follows:

Afriqom 21 September template Report 24/97	**Comparison with Argus's NPK, Nitrogen and Phosphates Reports**
Same/similar trades/tenders as in Argus NPKs	
24/101 **Burkina Faso** Sofitex tender…volumes are 69,000t 14-18-18SB…OCP was offering in the range of 370$/t W Africa cfr	6/45/1135 **Burkina Faso** Sofitex's annual tender seeking 69,000t of 14-18-17+6S+1B are heard to range from $355-375/t cfr…
24/102 **Ghana** Reference to tender for 30,000t tender for NPKs, made up of three different types, including 15-15-15	6/45/1135 **Ghana** Refers to buyer seeking 7,500 of 15-15-15 grade NPK [**Note:** Could be the same tender, but in any event similar price reporting content]
24/102 **Ethiopia** Reports on tender for NPs and provides volume breakdown of tender in a table	6/45/1135 **Ethiopia** Reports the same tender, see volumes/products are the same - 100,000t for 19-38-0+7S

	- 450,000t for 19-38-0+7S+0.1B - 75,000t of 18-37-0+8S+2.2Zn+0.1B [**Note:** Argus provides **more detailed** information about the range of fob prices for each of these products cf. Afriqom]
Same/similar trades/tenders as in Argus Nitrogen	
24/99 **Morocco** 35,000t of AN cargos, of Russian origin, is reported to be in the range of high 220's $/t to low 230's $/t Jorf cfr	21/4682.10 **Morocco** unconfirmed reports of a low-price sale of 10,000t of AN by a Russian producer, netting in the low-$200s/t fob Baltic [**Note:** Either the same or a very similar trade Note diff between price cfr and fob likely to be cost of freight]
24/102 **Ethiopia** Reference to EABC tender for 500,000t of Urea compared to last year's 550,000t	21/4682.5 **Ethiopia** Reference to tender for EABC for 500,000t of granular urea [Note: Argus goes on to provide **detailed information** about prices offered for the tender]
Same/similar trades/tenders as in Argus Phosphates	
24/102 **Sudan** DAP Ameropa tender 25,000t cargo	21/4682 **Jordan** Refers to 25,000t DAP for Sudan…via Ameropa

92.3 A number of Afriqom's price assessments are either the same, highly similar, or closely linked to prices that are reported on by Argus (Nash paragraphs 6-11). At the time of the preparation of the prototype report, the AAF Sample Report produced in December 2017 [10/394.2] did include several price assessments already in Argus NPKs [1/89A] (i.e. the West Coast Price, 15-15-15 blend index cfr West Coast Africa, 15-15-15 fob Morocco). There was a suggestion by Dr Halim that Afriqom reports are mainly on imports into Africa, that is cfr prices, whereas Argus prices are more fob prices. However, that was unconvincing in that (a) there was a large degree of overlap of the basis of the prices being fob prices, and (b) contrary to the submission on behalf of Dr Halim (Closing Submissions,

paragraph 26), I found the evidence of Mr Nash persuasive that generally it was possible to calculate the cfr price from the fob price: Nash, Day 3, pages 19-31.

92.4 Clients would be interested in the same or similar price assessments and Argus and Afriqom will compete to provide those assessments. A difference in the amount of detail is a difference in degree and not in kind, and competition could still take place. Indeed, in the comparison of the reports, sometimes it is Argus, and not Afriqom, that is providing more detailed pricing information, contrary to assertions of Dr Halim 4, paragraph 52.

92.5 A granular "line by line" comparison of the products disclosed has limited probative value because (i) there are instances where the information is the same, and (ii) the content of reports will change over time as they reflect the trades that are happening, and the needs and wishes of clients. Dr Halim accepted this [Day 6, pages 131-132, especially at page 131 lines 12-15, and page 135, lines 7-8]. Mr Binks said that Argus will respond to market feedback and how the market in question trades and if there is demand for a price [Day 4, page 21, line 22ff]).

92.6 There is a very significant degree of overlap with the customers targeted by each. Dr Halim may be hoping to attract "local" African clients [Day 5, pages 72, line 22 – p.73, line 2], but the disclosure in Volume 24 shows that he has been soliciting mainly global businesses outside Africa including Restricted Customers. Aspirationally, not only would Afriqom wish to have such clients, but Ms Williamson said that Argus has some "local stakeholder" clients, and would wish to have more [Day 1, page 198, lines 16-17]. Ms Williamson said that in numeric terms, a majority of Argus's fertiliser clients are defined as regional clients as opposed to large companies: see Day 1, pages 125-126. These clients might only be interested in a small number of prices pertaining to their business: see Williamson 3, paragraph 136.

92.7 There are cross overs between global and regional markets because fertilisers *"trade across border, out of region, into region, so you can't just carve out a region and say: this is a separate from the world market. It won't be separate from the world market"*: see Mr Binks, Day 4, page 20, lines 18-22 and see also Dr Halim Day 5, page 25 lines 10-14 who said *"if you are talking about global markets and if you are talking about a regional market, at some point there will be some cross overs which we have mentioned throughout our evidence."* Ms Williamson said *"…the global market is inclusive of local and regional markets tied to that product line."* [Day 2, page 76, lines 5-6]. Further, such cross-overs affect Afriqom's weekly report which contains commentary on the state of the global fertiliser markets: see for example the 'THIS WEEK' sections in its 28 September and 5 October reports commenting on the global markets. Despite such cross-over, it is possible that the regional report would contain more inland prices (Nash, Day 3, p.13, lines 11-12)

92.8 Dr Halim accepted that if one report contained the same information as that within another report, that could have a detrimental impact on the sales of the other report [Day 5, page 26 lines 10-22]. This passage in his evidence is very probative in respect of competition, where he said:

"…the impact of one report containing the same data as another report, could have a detrimental effect? A. Absolutely. Q. The one on the other? A. Absolutely. Q. And the detrimental effect would be in relation to sales of that

report? A. Absolutely. Q. Even though in this case, we are comparing your Afriqom report with Argus's NPK report, the one could have an effect on the sales of the other; yes? A. If they are covering the same prices and same market, then yes."

92.9 This much was inherent in the initial evidence of Dr Halim when he believed that Afriqom's Nigeria map had been plagiarised by Argus which he suggested was based on commercially sensitive information, and that Argus's inclusion of his (allegedly) confidential information ('the Nigeria map') in their reports could *"paralyse sales"* (Halim 5, paragraph 76). I take into account that when it was proven that the information in Argus's report came from an earlier map of Argus, and that Dr Halim had included the same information in a presentation at Argus, Dr Halim changed his position to argue that the information in the map is not confidential [Day 5, pages 40, 41]. This attempted retraction does not assist Dr Halim's case. The earlier considered witness statement clearly represents his view, and the attempt to withdraw from it was in a different context in order to save his credibility: in fact, it further damaged it.

92.10 As to the evidence about cannibalisation to which I have referred above, it is right to comment that Ms Williamson's primary driver against a regional weekly report appeared to be driven by the lack of profitability of regional weekly reports relative to global weekly reports. Nonetheless, I accept the evidence of Ms Williamson about her concerns which included cannibalisation. As already noted, Dr Halim changed his evidence as to what Ms Williamson did or did not say about cannibalisation.

93. Dr Halim is critical about the absence of detailed evidence of cannibalisation. However, he recognised cross-over between the global and regional products, in the context of saying that some customers would do both (Halim, Day 6, page 143). He seemed to use this to negative cannibalisation, but it seems to me to be equally a reason for fearing cannibalisation. Ms Williamson has done enough in her evidence to indicate that there is the real possibility of a customer taking the view that the regional product provides so much information that it can cancel the global product (or indeed as indicated above in respect of Brazil, the other way round). This point remains valid even although there will be some customers who will add a regional subscription to a global subscription. She also recognised that some customers might purchase a number of competing global subscriptions [Day 1, page 190, lines 3-10], but she pointed out that *"we often find areas of indexation where they don't take one of the competitors because they get the information somewhere else."* Day 1, page 190, lines 21-23. If, contrary to the foregoing, interchangeability is required to establish competition, then as Mr Mansfield QC commented in his final oral submission *"Even if you take interchangeability these are interchangeable to the extent that one person might buy one of them and not the other."* [Day 7, page 173, lines 3-5].

94. Dr Halim has very closely modelled Afriqom's services and marketing literature on those provided by Argus:

94.1 Afriqom's brochure includes the strap line 'Africa Open Markets'. This renders the acronym 'AOM' the same as that for Argus's service offering 'Argus Open Markets' that Dr Halim was involved in delivering for Argus (Williamson 3, paragraph 125). Argus Open Markets and AOM are registered trade-marks of Argus's (Williamson 1, paragraph 59)].

> 94.2 The brochure also uses a demand tracker illustration that is very similar to a graphical concept prepared for the purpose of the AAF Report. The countries listed are the same and the order of the fertiliser products listed is the same.

95. The primary finding is that even if the scope of the business of Afriqom is limited to the Africa Fertiliser report, it is competitive with the business of Argus. There is an issue as to whether there is more extensive competition which has been going on between Afriqom and Argus. Taken at face value, the brochure appears to indicate that the two businesses are competitive in respect of matters such as consulting services and training services, where Dr Halim says there is no current activity of Afriqom, and having a global reach not limited to Africa.

96. The summary of Afriqom's service lines on its website are closely modelled on Argus's service offerings in the Fertiliser sector, comparing Argus's summary with Afriqom's, offering (a) price assessments and market intelligence for the fertiliser market; (b) weekly market reports relating to trades for the same types of Fertiliser product: Nitrogen; Potash; Phosphates; NPK and Sulphur; (c) monthly forecasting information; (d) consulting services and detailed country by country market information as regards the fertiliser market in Africa; (e) training services in relation to the same Fertiliser products. This comprises service lines that extend beyond Africa. On the About Us page it says *"we also cover global fertiliser markets"*. The consulting page states *"[o]ur forte goes beyond Africa"* and the training offered by Afriqom provides insight on the *"global NPK trade"*.

97. I accept that at the point when it was published, the website of Afriqom did not provide a picture of what it was doing. Nevertheless, I find that the Afriqom website was significant in that (a) it supports the case that providing services in or about Africa contains cross overs with a more global market, (b) it shows a perceived need to give itself credibility in respect of a global offering, which must have been to be able to compete with the likes of Argus, (c) it indicates a desire subject to market conditions to add to those services such as to be definitive of what is the *"scope of the business"*.

98. I take the view that bearing in mind the matters set out above, Afriqom was a business in competition with Argus as regards its business in respect of Africa. I reject the case of Dr Halim that Afriqom was not competitive because it was confined to Africa, which is to be treated as a separate product. It was not a separate product either geographically or as regards the subject of the price reporting. Further, whilst it is not essential for the decision, I take the view that the scope of the business of Afriqom is not limited to what it was doing at a snapshot of time. Thus, some of the material on its website was relevant to define the scope of its business which went beyond beyond price assessments and beyond Africa. In this regard, the response of Dr Halim to Mr Annequin is instructive on 3 September 2018 where Mr Annequin of IFDC referred to Afriqom's consulting offering, and Dr Halim responded that he *"wanted to offer the complete package"*. In other words, the consultancy was more than merely some long-term hope, but was a part of the scope of the services which Afriqom intended to offer. In addition to the competition of the Africa Fertiliser report, this too would be in competition with the business of Argus: see the reference to the scope of the business by Rose J in *Invideous Ltd v Thorogood* above.

99. It was suggested that the absence of competition was proven by reference to the absence of evidence of any customer having transferred from an Argus product to an Afriqom product. This point does not take the matter very far in view of the following, namely (1) the fact that at this stage, there has not been a trial on damages, (2) the consequence of the undertakings

is likely to have restricted competition from a very early stage, and (3) the consequence of the speedy trial is likely to have affected the ability of Dr Halim to trade effectively even outside the undertakings. In any event, there was some evidence of relationships having been affected. Ms Williamson referred in unspecific terms to a relationship with IFDC having been *"derailed to some extent"* [Day 2, page 184, line 22] and to ETG having stated that *"they will not spend as much with us because they are reserving budget elsewhere"* [Day 2, page 185, lines 12-14]. Ms Newbury spoke of the relationship with IFDC and said that they were struggling with funding (IFDC being an entity that receives grants) and so might seek a reduction on or reports for free or might only take some of Argus' reports [Day 4, pages 88-90].

100. A possible, but in no way decisive, indicator of whether the new business was competitive, is the belief of Dr Halim that it was not competitive. He has expressed that in his evidence. However, this indicator is undermined by the way in which Dr Halim has not been open or truthful on my findings in the information which he provided to Mr Thompson on 12/13 July 2018 and in the information which he provided on 3 September 2018 to Mr Thompson and Mr Binks. That indicates a desire to conceal information because of a knowledge that his business at least might be regarded as competitive and thus forbidden to him under the PTRs.

101. Despite the preceding paragraph, the question as to whether for the purposes of the PTRs the businesses are competitive is to be decided by reference to objective considerations. Having regard to the findings above, I have come to the clear conclusion that in carrying on the business of Afriqom, Dr Halim is and has been engaged in the provision of services in competition with the Restricted Business.

Issue 2: Was Dr Halim engaged in the provision of such services prior to termination of his employment on 31/8/18?

102. Issue 2 is concerned with whether Dr Halim acted in competition with Restricted Business by setting up Afriqom while still employed by Argus: see Particulars of Claim paragraph 38(e) and Defence paragraph 45.8. The issue covers the same ground as issues 7, 8 and 11 which are considered below.

Issue 3: Has Dr Halim solicited or dealt with Restricted Clients for the benefit of Afriqom either before or after termination of his employment?

103. Issue 3 is defined in terms of solicitation or dealing with Restricted Clients, as the covenants in clause 17 of the Contract apply during employment as well as post-termination. However, in the period before termination, Dr Halim's duty of fidelity prohibited him from soliciting or dealing with any clients, whether Restricted Clients or not. In respect of the pre-termination period, this issue is closely linked to Issue 11. In the amended list of issues, Ms Patel sought to narrow this issue despite the greater breadth of the pleadings, but sensibly by paragraphs 45-50 of her Closing Written Submissions, this issue 3 has been approached in the same way as Issue 3 according to Argus.

104. Solicitation requires a direct and specific appeal rather than a more general approach: *QBE v Dymoke* at paragraph 184. In *Baldwin v Maidstone* (QBD) (Mercantile Court) , 3 June 2011 at paragraph 132, it was held that an advertisement in the local newspaper was not sufficiently targeted to amount to solicitation. Each case must be fact specific.

105. The definition of Restricted Clients in clause 17.1 of the Contract extends to individuals/companies that:

105.1 were clients or in the habit of dealing with the company, or with whom Argus had negotiations with a view to such individual/company becoming a client (i.e. it extends to potential clients); and

105.2 with whom Dr Halim had contact in the last 12 months of his employment (see 130-131 below on how 'contact' should be construed).

106. As regards the Benadada Emails sent from 22 May 2018, I have been unable to find proven the allegation that such emails were sent by Ms Benadada under the instruction of Dr Halim, but I do find that Dr Halim deliberately "turned a blind eye" to her actions, in order to be able to deny that they were his actions at a later stage. Some of those emails were sent to a number of undisputed Restricted Clients. In my judgment, knowing that his wife was about to do such research, and not objecting to that, Dr Halim was in breach of his duty of fidelity in that he ought to have told her to desist: I believe that she would have desisted.

Meetings in Rwanda

107. I find that Dr Halim's meetings with IFDC and the Africa Development Bank at the AGRF were acts of solicitation or business dealings within the meaning of clauses 17.2 and/or clause 17.3.

IFDC

108. Dr Halim admits that IFDC was a Restricted Client (Defence paragraph 37). He admits that he met both Mr Groot and Ms Chilande (both of IFDC) at the AGRF conference in Rwanda, but says their discussion was purely social. I do not accept this: no doubt there were social aspects to the meeting, but it must be borne in mind that the reason for going to Rwanda was to build up his business and there is a high degree of overlap between social and business: one promotes the other: sometimes business relationships take many drinking sessions and meals over a long period of time to bear fruit. I accept the evidence of Ms Wong who was at the Rwanda conference that it was related to her by Mr Groot that the meeting lasted 45 minutes and continued thereafter with Ms Chilande, Dr Halim showed him a 10 page report, and when asked about whether he saw further collaboration opportunities with Dr Halim, Mr Groot said *"He's looking for good data and we're looking for good data, so who knows…"* (Wong, paragraph 19). This was both an act of solicitation within the meaning of clause 17.2 and business dealings within the meaning of clause 17.3. I infer from the foregoing the likelihood that there were other meetings with other Restricted Clients at Rwanda, or at least some competing business, in that such solicitation was the whole purpose of attending the conference, and the fact that Dr Halim had acted as such with IFDC establishes that he saw no barrier to behaving likewise with other Restricted Clients.

109. The inference of solicitation with IFDC in Rwanda derives further force from his further meeting with IFDC whilst in Cape Town later in September: indeed, this involved business dealings and was a further act of solicitation. Dr Halim's explanation that this meeting was for social and not business reasons lacks credibility:

109.1 Dr Halim sent to Mr Annequin his new mobile number on 1 September 2018, the first day after his employment terminated.

109.2 Mr Annequin was one of the key individuals at IFDC with whom Dr Halim corresponded during his employment with Argus (Williamson 3, paragraph 92).

109.3 Afriqom featured significantly in Dr Halim's exchanges with Mr Annequin. On 3 September Mr Annequin made a joking reference (in French) to Dr Halim's first 'public day' at Afriqom. On the same day, Mr Annequin (in French) referred to Afriqom's consulting offering, to which Dr Halim responded that he *"wanted to offer the complete package".* (This text message also contradicts Dr Halim's claim that he does not offer consultancy and training).

Africa Development Bank

110. Dr Halim met with Ms Kalihangabo of the Africa Development Bank in Rwanda which was an act of solicitation and amounted to business dealings. The Africa Development Bank is a Restricted Client because it paid to attend Argus's conference in February 2018 (Wong, paragraph 15b). Dr Halim had contact with Africa Development Bank during the last 12 months of his employment as follows. The email evidence suggests that he had met with Ms Kalihangabo at the Argus Africa Conference on 26 February 2018 [9/46/2173]. The claim that this meeting never happened, despite his email saying *"coming to you"* after Ms Kalihangabo had informed him where she was located is improbable: there are no follow up messages showing that they could not find each other. That there was a meeting is also supported by what Ms Kalihangabo told Ms Wong, namely that she thought the report which Dr Halim had shown her was *"the same report that she had recently been speaking to him about when he was at Argus"* (Wong, paragraph 20). On the balance of probabilities, I am satisfied that there was contact either at the hotel or when speaking about the report "recently" whilst at Argus (it is possible that this was the same occasion). I have taken into account the fact that Ms Kalihangabo did not give evidence, but Dr Halim was unconvincing when these matters were put to him in cross-examination on Day 6, pages 30-39, and it is apparent from the evidence regarding IFDC and others referred to below that Dr Halim was not being careful to observe his restrictive covenant as regards non-solicitation.

Other targets of solicitation

111. In early September 2018, Dr Halim sent emails to arrange meetings in Cape Town: these were acts of solicitation directed towards Restricted Clients for the business of Afriqom as follows:

111.1 Seven undisputed Restricted Clients: APC; IRM; Sirius; One Acre Fund; Royal Dutch Shell plc; Keytrade; Indorama.

111.2 Disputed Restricted Clients: Africa Development Bank [24/298]; ETG; As to Africa Development Bank, I have found that this was a Restricted Client above. As to ETG, I accept the inference of Argus that this too was a Restricted Client. This is based on the Dr Halim's reference to ETG in a handover email dated 10 August 2018 where he said *"apart from etg, I have no reach"* : there were so few contacts mentioned that the inference must be that his contact was recent.

Provision of services (clause 17.3)

112. Afriqom claims to have four paying customers. One such customer is Phosagro. Dr Halim admits that Phosagro is a Restricted Client. The issue here is that the dealing was with 'Phosagro Trading SA', a company based in Switzerland, which is said not to be a Restricted Client. I have come to the view that on the information before the Court, Argus has been unable to prove that he had contact with Phosagro Trading SA in the 12 months prior to termination of the contract. He was involved in peer review of a consulting project for Phosagro Trading SA that commenced in May 2017 and lasted until the Autumn of 2017: see (Thomas, Day 4, pages 141-144)**,** but that does not prove that Dr Halim had

contact with Phosagro Trading SA. I have reached this view following further consideration since the provision of a draft of the judgment. However, it does not render lawful the conduct of Dr Halim as regards Phosagro in that he provided such services contrary to Clause 17.4. Further, this involvement is also further evidence of Dr Halim's material involvement in consulting work.

113. Afriqom has been sending its reports to a wide variety of recipients, seemingly on a 'free trial' basis, which involves the provision of services or at least soliciting:

113.1 Two (now) undisputed Restricted Clients (Halim 6, paragraphs 30, 37): OCP Africa and SAFTCO. OCP Africa is a subsidiary of OCP and SAFTCO is a trading arm of OCP. Ms Williamson explains why these parts of the OCP Group are also Restricted Clients (Williamson/3/182-183). Insofar as it is suggested that the meetings in November 2017 and December 2017 (Halim 5, paragraphs 35-36) comprised de minimis contact, I reject that. There was a significant business element to the discussion, and in any event, in this context, and as described in paragraphs 109-109 above, continuing social contact has a business purpose.

113.2 Two further disputed Restricted Clients: Acron Group [24/428] and ETG. As to these entities:

113.2.1 Dr Halim admits that Acron Group is Restricted, yet says his dealings were with a subsidiary, Acron AG. Although there is reason to believe that this company is a Restricted Client, I do not find the case sufficiently proven.

113.2.2 In relation to ETG, Argus has been informed that it plans to allocate some budget for Afriqom at the expense of its budget for Argus's services (Williamson 3, page 184). This therefore suggests that ETG's status is likely to change to a paying customer status in the near future, if this has not happened already.

114. In the circumstances, there is ample evidence of solicitation or business dealings with Restricted Clients. There is the inference that without restraint, Dr Halim would continue to solicit or deal with Restricted Clients.

Issue 4: Are clauses 17.2 and/or 17.3 unenforceable restraints of trade for the reasons set out in Defence 6.1-6.2 [1/4/31]?

Issue 5: Is clause 17.4 an unenforceable restraint of trade for the reasons set out in Defence 6.3 [1/A4/32]?

RESTRAINT OF TRADE

115. These two issues are about restraint of trade. Paragraph 6.3 of the Defence repeats most of the material in the preceding paragraphs 6.1 and 6.2. It is therefore intended to deal with the restraint of trade issues as a whole.

General Principles

116. A restrictive covenant is void as an unlawful restraint of trade unless the employer can show it goes no further than is reasonably necessary to protect his legitimate business interests: Herbert Morris Ltd v Saxelby [1916] AC 688, HL.

117. The Court is entitled to consider whether a covenant of a narrower nature would have sufficed to protect the employer's position as explained in the following passage of Sir Christopher Slade in *Office Angels v Rainer-Thomas (supra)* [50]):

> *"The Court cannot say that a covenant in one form affords no more than adequate protection to a covenantee's relevant legitimate interests if the evidence shows that a covenant in another form, much less far reaching and less potentially prejudicial to the covenantor, would have afforded adequate protection". (emphasis added)*

118. It is well-established that the reasonableness of a PTR is determined by reference to the circumstances of the parties at the time the contract of employment was concluded. In *Gledhow Autoparts Ltd v Delaney* [1965] 1 WLR 1366, Diplock LJ, as he then was, said this at p. 1375:

> *"The defendant was in fact employed for over six years by the plaintiffs and no doubt became a valuable servant and acquired considerable knowledge of and personal relation with the plaintiffs' customers. It is natural in those circumstances to tend to look at what in fact happened under the agreement. But the question of the validity of a covenant in restraint of trade has to be determined at the date at which the agreement was entered into and has to be determined in the light of what may happen under the agreement, although what may happen may cover many possibilities which in the result did not happen. A covenant of this kind is invalid ab initio or valid ab initio. There cannot come a moment at which it passes from the class of invalid into that of valid covenants."*

119. The general principles as regards the enforcement of covenants was summarised by the Court of Appeal in *FSS Travel and Leisure Systems v Johnson* [1998] IRLR 382 in the judgment of Mummery L.J. at paragraphs [29–34]:

> *"(1) The court will never uphold a covenant taken by an employer merely to protect himself from competition by a former employee.*
>
> *(2) There must be some subject matter which an employer can legitimately protect by a restrictive covenant. As was said by Lord Wilberforce in Stenhouse Ltd v Phillips [1974] AC 391 at p.400E (cited by Slade L.J. in the Office Angels case [1991] IRLR 214, supra):*
>
> > *'The employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation.'*
>
> *(3) Protection can be legitimately claimed for identifiable objective knowledge constituting the employer's trade secrets with which the employee has become acquainted during his employment.*

> *(4) Protection cannot be legitimately claimed in respect of the skill, experience, know-how and general knowledge acquired by an employee as part of his job during his employment, even though that will equip him as a competitor, or potential employee of a competitor, of the employer.*
>
> *(5)* ***The critical question is whether the employer has trade secrets which can be fairly regarded as his property, as distinct from the skill, experience, know-how, and general knowledge which can fairly be regarded as the property of the employee to use without restraint for his own benefit or in the service of a competitor.*** *This distinction necessitates examination of all the evidence relating to the nature of the employment, the character of the information, the restrictions imposed on its dissemination, the extent of use in the public domain and the damage likely to be caused by its use and disclosure in competition to the employer.* (emphasis added)
>
> *(6) As Staughton L.J. recognised in Lansing Linde Ltd [1991] IRLR 80 … the problem in making a distinction between general skill and knowledge, which every employee can take with him when he leaves, and secret or confidential information, which he may be restrained from using, is one of definition. It must be possible to identify information used in the relevant business, the use and dissemination of which is likely to harm the employer, and establish that the employer has limited dissemination and not, for example, encouraged or permitted its widespread publication. In each case it is a question of examining closely the detailed evidence relating to the employer's claim for secrecy of information and deciding, as a matter of fact, on which side of the boundary line it falls. Lack of precision in pleading and absence of solid evidence in proof of trade secrets are frequently fatal to enforcement of a restrictive covenant…"*

120. In *TFS Derivatives Ltd v. Morgan* [2005] IRLR 246 at paragraphs [36-38], Cox J stated the correct approach to the question of assessing reasonableness of covenants:

> "*...In assessing reasonableness, there is essentially a three-stage process to be undertaken.*
>
> [1] *Firstly, the court must decide what the covenant means when properly construed.*
>
> [2] *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.*
>
> [3] *Thirdly, once the existence of legitimate protectable interests has been established, the covenant must be shown to be no wider than is reasonably necessary for 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.*"

121. On the first question of construction, Cox J. stated (at paragraph [43]):

> "*[I]f, having examined the restrictive covenant in the context of the relevant factual matrix, the court concludes that there is an element of ambiguity and that there are two possible constructions of the covenant, one of which would lead to a conclusion that it was in unreasonable restraint of trade and unlawful, but the other would lead to the opposite result, then the court should adopt the latter construction on the basis that the parties are to be deemed to have intended their bargain to be lawful and not to offend against the public interest.*" (That approach was adopted by Waller LJ in *Turner v Commonwealth & British Minerals Ltd* [2000] IRLR 114 (CA) per Waller LJ at para.14

122. In *TFS Derivatives*, the Court enforced a non-competition clause (with some blue-pencilled removal of some unreasonably wide wording). It did so on the basis of the closeness of contacts that were formed between employees and their broker contacts and the confidential information to which the employee would have been exposed. The Court emphasised in particular the difficulty of policing other forms of protection (see paragraph [84] of the Judgment).

123. It is not the function of the court either 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 (*Prophet v. Huggett* [2014] EWCA Civ 1013, at paragraph 35). Nevertheless, where there are two possible constructions available, the Court is entitled to prefer the construction that is consistent with business common sense and to reject the other: *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at paragraph 21.

124. Non-competition restrictions are commonly used, and upheld, in scenarios where lesser forms of restriction (such as confidentiality clauses or prohibitions on solicitation or dealing) would be inadequate or difficult to police.

125. A non-compete covenant avoids a number of difficulties presented by these other types of covenant and as such will often be the only practicable means to protect an employer's legitimate interest: see *Littlewoods Organisation Limited v Harris* [1977] 1 WLR 1472 at page 1479 Lord Denning MR:

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

126. This approach was reaffirmed by the Court of Appeal in *Thomas v Farr plc* [2007] IRLR 419, paragraphs 41-42 per Toulson LJ:

> *"41. In order to establish that the inclusion of a non-competition clause in an employment contract was reasonably necessary for the protection of the employer's interest in confidential information, the first matter which the employer obviously needs to establish is that at the time of the contract the nature of the proposed employment was such as would expose the employee to information of the kind capable of protection beyond the term of the contract (i.e. trade secrets or other information of equivalent confidentiality). The degree of the particularity of the evidence required to establish that matter must inevitably depend on the facts of the case. To say this is to say nothing new. Aldous LJ stated the principle in Scully UK Ltd v Lee [1998] IRLR 263 at 23:*
>
> *'In cases where a restrictive covenant is sought to be enforced, the confidential information must be particularised sufficiently to enable the court to be satisfied that the plaintiff has a legitimate interest to protect. That requires an enquiry as to whether the plaintiff is in possession of confidential information which it is entitled to protect. (See Littlewoods Organisation v Harris [1977] 1 WLR 1472 at 1479F). Sufficient detail must be given to enable that to be decided but no more is necessary."*
>
> *42. Provided that the employer overcomes that hurdle, it is no argument against a restrictive covenant that it may be very difficult for either the employer or the employee to know where exactly the line may lie between information which remains confidential after the end of the employment and the information which does not. The fact that the distinction can be very hard to draw may support the reasonableness of a non-competition clause. As was observed by Lord Denning MR in Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 , 1479, and by Waller LJ in Turner v Commonwealth & British Minerals Ltd [2000] IRLR 114 , para 18, it is because there may be serious difficulties in identifying precisely what is or what is not confidential information that a non-competition clause may be the most satisfactory form of restraint, provided that it is reasonable in time and space."*

127. In *Tradition Financial Services Ltd v Gamberoni and others* [2017] IRLR 698 at paragraph 96 ("Gamberoni"), the court reiterated that:

> *"the necessity for non-compete provisions arises where non-solicitation and non-dealing covenants and confidential information restrictions are difficult to police or where there are material disputes as to what information is confidential."*

128. In *QBE v Dymoke* at paragraph 210, Haddon-Cave J (as he then was) identified the general approach the Court should adopt when considering the enforceability of the non-competition covenants. His first three points mirror the guidance of Cox J in *TFS Derivatives*. He then added three further principles, summarising *Norbrook Laboratories (GB) Limited v Adair* [2008] IRLR 878 at paragraphs [38] to [46] as follows:

> *"…*

(4) Even if the covenant is held to be reasonable, the Court will 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 at the time of trial.

(5) The burden is on the covenantee to establish that the restraint is no greater than reasonably necessary for the proper protection of protectable interests.

(6) Reasonable necessity is to be assessed from the perspective of reasonable persons in the position of the parties at the time that the contract was entered into or varied and 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".

What do the PTRs mean?

129. This is largely self-evident, but there are some matters of construction which I shall take first. The construction points are to be considered by reference to the *Rainy Sky* approach cited above about business common sense. I also have regard to principle cited above by Cox J that where there are two possible constructions one of which is in unreasonable restraint of trade and unlawful, but the other would lead to the opposite result, then the Court should adopt the latter construction.

130. I accept the pleaded case of Argus in paragraph 2 of the Reply that the language *"had contact"* within the definition **"Restricted Client"** is to be construed as meaning material and not de minimis contact, in the course of Dr Halim's employment. Applying the *Rainy Sky* approach, this is consistent with business common sense. Indeed, in a clause not containing the 12-month limitation which was upheld, the Court in *International Consulting Services (UK) Ltd v Hart* [2000] IRLR 227 per Mr Nicholas Strauss QC sitting as a Judge of the High Court (at paragraph 38) who said:

> *"Whilst I have no doubt that, as a matter of construction, contact means some substantial contact (not for example a mere handshake) in the course of Mr. Hart's employment, it can plausibly be suggested that the provision would apply even if the contact consisted of, for example, a substantial business discussion of some kind taking place at a conference two or three years before Mr. Hart left ICS, with a customer who subsequently had abortive negotiations with others at ICS."*

131. I consider at least for the purpose of this case that there is no practical difference between substantial contact and contact to a degree which is material. This construction accords with business common sense. I do not accept that the construction should be any contact whatsoever because of the absence of the words 'to a material extent' because this is a non-commercial construction. I find that contact in this sense is justified bearing in mind the nature of the role of Dr Halim in business development where he would develop relationships over long periods of time and where there was considerable investment in his doing so: see Williamson 3, paragraphs 131 and 133. If, contrary to the foregoing, contact is to be interpreted as referring to any contact, I should have found that the clause was not too wide on the basis that it would remove arguments about the materiality of contact in the context of a clause limited to contact within the 12 months prior to termination.

Other limitations in the scope of the PTRs

132. Dr Halim's criticisms of the definition of "Restricted Business" in paragraph 6.1.2 of the Defence are ill-founded because the definition is clearly limited to parts of Argus's business in which he was involved to a "material extent" in the last 12 months of his employment, and this extends to the sector (i.e. Fertiliser) and geographical region (Europe and Africa) with which Dr Halim had material involvement.

133. The non-solicitation clause is limited because it is by reference to a Restricted Client which is confined to a client of or in the habit of dealing with Argus (or any Associated Company) with whom Dr Halim had contact within the 12 months of the termination of his employment. This therefore excludes somebody with whom Dr Halim only had historic contact as at the time of termination of his employment. If Dr Halim has been in contact with a client within the last 12 months of his employment this is an indicator of whether a business relationship exists: see Williamson Day 2, page 145, lines 20-24.

134. The restrictions in Clauses 17.3 and 17.4 are limited to businesses in competition with the Restricted Business. The Restricted Business is limited to such business as existed at the time of termination of employment *"with which you were involved to a material extent during the period of 12 months prior to the termination of his employment"*. This therefore excludes those parts of the business in which Dr Halim was not involved to a material extent and those in which he was involved, but only historically (that is more than 12 months prior to termination of his employment).

135. However, it does go beyond the work of price assessment and market intelligence for the fertiliser market and market reports relating to trades for the same types of Fertiliser product. I am satisfied from the evidence that Dr Halim's involvement in consulting services, training services and forecasting in respect of fertilising was to a material extent during the period of 12 months prior to the date of termination of his employment. When he said that no more than 5% of his work was in the consulting and conference aspects of Argus's business apart from the statistical shortcoming of self-reporting, I regard that together with the evidence to which I have referred above as sufficiently substantial to require protection.

136. The covenants are not restricted by area. However, this is not surprising because the business was a global market. In any event, the restriction was narrowed by reference to the sector (fertilisers) and geographical region (Europe and Africa) in which he had a material involvement in the last 12 months of his employment.

The legitimate interests to protect

137. I have come to the view that there were at least two legitimate interests to protect, namely confidential information and/or business connections including customer connections.

Confidential information

138. It was the case of Argus that it was envisaged from the outset of his employment that in order to perform his role, Dr Halim had access to a wide variety of highly confidential information (Particulars of Claim, paragraphs 10-11). Before setting out this information in some detail, a broad picture is derived from Argus's Closing Submissions which I accept on the basis of the evidence as a whole:

> *"49. For Argus's business as a PRA, the lifeblood of its business is its (a) client base, (b) product portfolio, and (c) information sources.*

50. Given the nature of confidential information that Dr Halim had access to (Williamson 3, paragraph 37) (Kewish, paragraph 25), this was likely to be of significant commercial value to a competitor and justified post-termination protection:

50.1 Client contact and sales information provides a new competitor direct access to a potential market for the sale of price reporting products in the Fertilizer industry.

50.2 Knowledge of a new product development would enable a competitor to market that product for its own business, notwithstanding that the product has been produced by someone else.

50.3 The identity and contact details of information sources assists a competitor particularly a new market entrant) to obtain data from which a reliable market report can be produced. Dr Halim accepts this was confidential [Halim, Day 5, page 33, lines16-24]. *Getting information on the African Fertilizer market is more difficult given the nature of the market and having a developed network of sources would "hugely" assist when starting up* [Nash, Day 3, page 80, lines1-19]*."*

139. It is necessary to consider the information in more detail, bearing in mind the requirement of sufficient detail as referred to in the quotation above of Toulson LJ in *Thomas v Farr plc* above. Such information is set out in detail in (Williamson 3, paragraph 37-38) and (Kewish, paragraph 25). This includes information relating to:

139.1 Price assessments and market trade data sets for all products covered by Argus: Dr Halim denies that price assessments are confidential, but does not make a case about market trade data sets (Particulars of Claim paragraph 10a and Defence paragraph 12.1). Williamson 3, paragraph 37a refers to the relationship building required in order to build information resources, that raw data is obtained using NDAs or on the understanding that it is confidential. Further, price assessments are provided to clients using a myriad of private and public sources to evaluate and analyse information to produce Argus content. Further at Williamson 3, paragraph 37b, she refers to market trade data sets for all products covered by Argus are a key component of price assessments: they are used to construct forecasts of future price movements, make continuing decisions on what price assessments should be developed and inform Argus's view about the state of the market and trading patterns and trends in the fertiliser market. In the course of cross-examination, Dr Halim did not wish to reveal a source of a map in the Afriqom Report, and one of his reasons, the main one, was that it was confidential to his business, just as the sources of Argus's information were confidential to Argus: see Day 5 pages 33-34.

139.2 Argus's information relating to new product development (and regarding business and product development strategies): (Particulars of Claim, paragraph 10b-c.). Dr Halim admitted that this information was confidential and that Dr Halim had access to it insofar as it related to fertilisers (Defence paragraph 12.2-12.3).

139.3 Indeed, one of those products that was developed was a weekly report for the African fertiliser market. (I have already considered that an African weekly report is competitive with the Argus business.) In cross-examination, it was suggested that product development was only confidential in relation to products under development, and it would not include the African weekly report

which had been rejected. Ms Williamson made the distinction between the content of providing information about Africa to the market and what she called productization, that is the specific way in which it was externalised, in this instance in an African weekly report. As she put it, in market speak *"For me this is all the same trajectory of one product. It can evolve and morph into different ways that it can be productised, brought to the market, so the makings are still the same."* [Day 1, pages 150-153, the quote being at page 152, lines 18-23]. Ms Williamson had another answer to the suggestion that confidentiality was lost on rejection. She said that "*if something is rejected, and that is very clear, I would say the information that goes into whatever product is being developed is still in the ownership of Argus… When I think about other industries, if somebody designed a car for Honda and they decide to hold off on that design, an employee can't take that design to Toyota..."* [Williamson Day 2, page 149]. Attention was drawn by Mr Halim to the unsettled nature of Argus' future plans for a different Africa focused product: paragraph 44 of the Defendant's Closing Submissions. I am satisfied on the evidence that Argus had been and continued to be in the process of deepening its involvement in the Africa market, and I reject the notion that the fact that the proposed plan was at that time not being proceeded with had led to a loss of confidentiality.

139.4 Financial and performance data relating to the fertiliser sector: Dr Halim says that this information was publicly available (Particulars of Claim paragraph 10d. and Defence paragraph 12.4). Williamson 3, paragraph 37d. and Mr Kewish referred to Dr Halim having access to information on request available through Birst which is a tool used by senior sales staff that contained detailed client, sales revenue and licensing data which is not publicly available. This also provided to him detailed sales information relating to transactions that had been agreed with clients (Particulars of Claim paragraph 10e. and Defence paragraph 12.5 and Williamson 3, paragraph 37e.)

139.5 Company and contact details relating to clients: Dr Halim admits that this information was confidential, but said that he only had information relating to his "own clients": the clients were of course the clients of Argus, but it is that sense of proprietorship which is one of the reasons why customer connection is a legitimate interest (Particulars of Claim paragraph 10f. and Defence paragraph 12.6). Ms Williamson 3, paragraph 37g. says that he had access via Birst to client information relating to Argus Fertilisers globally, and before that he was able to request and receive this information.

139.6 Marketing lists were confidential, but Dr Halim says that he only had access to them with the permission of the marketing manager (Particulars of Claim paragraph 10g. and Defence paragraph 12.7). (Delegate lists appear to me only to be protected in advance of the conference so as to entice people to book and attend).

139.7 Marketing and conference strategy plans were confidential, which Dr Halim recognises, albeit that he says that he only had access to them when they were presented to him (Particulars of Claim paragraph 10h. and Defence paragraph 12.8 and Williamson 3, paragraph 37i.).

139.8 Internal methodology and compliance procedures (Particulars of Clam paragraph 10i. and Defence paragraph 12.9), but it has not elicited a plea one way or the other. Ms Williamson has given evidence in chief at Williamson 3, paragraph 37j including among other things about the way of working of Argus in analysing and forming judgments on data and assess prices, Argus's information sources for the primary data and market information and the types of data obtained. In cross-examination, it was suggested that this was just part of general know-how. Whilst at first not giving way, which I indicated above was a less impressive part of her evidence, Ms Williamson recognised that there was a degree of knowledge and skill at industry level common to PRA's, but she explained that there is "an Argus view, there is an Argus approach, there is an Argus hierarchy when it comes to information and data" and said:
"When I'm saying "the Argus way", it means how we look at data sets, and it depends on the data set. It might be pricing, how are we looking at pricing, how are we looking at the methodology that goes into that? You can call data sets bids, offers, transactions, how we have a certain hierarchy of where we place that data. You can look at imports, exports, how we model it for forecasting, what methodologies that go into our forecasting, back testing methods, how we use linear regression, also the Argus way of thinking in terms of price reporting is really, really unique, and it is a very specific way of approaching market trade, commenting on it, analysing it, it's picking up elements of news and policy that is relevant and can shift buyers, sellers, government, all the things that impact economics, that's roughly what I'm referring to.

MR JUSTICE FREEDMAN: And how does the Argus employee come to learn the Argus way?

A. I would say part of that is through time, part of that is through being with a team that reinforces our way of working, part of that is in dealing with other departments. We have a lot training that goes on, and that training internally is confidential, and I'm pretty sure those are noted as confidential as well. It's training on how we assess, how we launch market reports, it's training on our own business. I think a lot of companies have just very specific ways and habits of approaching their business, and we have a pretty robust process of reinforcing that."

Whilst this takes the position closer to confidential information, the cross-over from general skill and know-how to this information is difficult to draw.

139.9 Confidential internal presentations comprise information to which Dr Halim had access only when presented to him (Particulars of Claim 10j., and Defence paragraph 12.10).

140. These pleas have elicited an admission, namely that *"some of the confidential information referred to in paragraph 10 of the Particulars of Claim would cause harm to the Claimant if disclosed to a competitor depending on the circumstances including the nature and currency of the information, the identity of the competitor and the circumstances of the disclosure."* Despite this, it is denied that any of the information amounted to trade secrets or information of a degree of sensitivity warranting protection

akin to that afforded to trade secrets (Defence paragraph 13.2). This apparently involves a very substantial admission because in the context of admissions concerning confidential information, it is said at the same time that the information was confidential and some of it would cause harm if disclosed to a competitor in some circumstances. That is a very odd plea because whilst there is nothing prescriptive in the cases, the combination of the confidentiality and harm inside the hands of a competitor strongly indicates information of the kind worthy of protection even after the termination of employment, and goes a long way to establishing it.

141. There is a telling aspect concerning confidentiality in respect of a map of Nigeria. Dr Halim claimed that Argus had misused his confidential information about Nigerian blending plants. Dr Halim suggested that Argus's inclusion of his (allegedly) confidential information in their reports could *"paralyse sales"* (Halim 5, paragraph 76). Argus then proved that the map of Nigeria in its report came from an earlier map of Argus's, and that Dr Halim had included the same information in a presentation at Argus. Faced with that, Dr Halim changed his position to argue that the information in the map was not confidential [Halim Day 5, page 40 lines 7-9 and page 41, lines 11-19]. I find that it was his evidence prior to the change of position which was the telling evidence, confirming the competitive advantage of having confidential information.

142. I have reached the following conclusions in respect of the foregoing, namely:

142.1 There are significant admissions in the Defence as regards the scope of confidential information of advantage to competitors. Dr Halim echoed this by way of example in his evidence as to the source of maps, and at first in his evidence concerning map of Nigeria;

142.2 I was impressed by the evidence of Ms Williamson and other evidence provided by other witnesses, in particular Mr Kewish, in respect of confidential information, and I accept it save for the evidence of delegate lists which had a limited and irrelevant confidentiality to this case;

142.3 In the course of the evidence, there were specific heads of confidential information which were identified, and they were different from general skill and know-how (save for the item about internal methodology and compliance procedures where I have concerns that this appears to be close to general know-how and skill). The confidential information has been particularised sufficiently to enable the Court to be satisfied that the plaintiff has a legitimate interest to protect: see the citation from *Thomas v Farr* above;

142.4 Subject to the reservations in respect of the evidence of delegate lists and internal methodology and compliance standards, I am satisfied that the information in question was confidential of the kind that can be protected after the termination of employment as well as during the employment, and in particular that (i) it would be of considerable advantage to competitors, such as would be capable of causing real harm to Argus, and (ii) it was understood that the information was of a nature that a reasonable person would recognise that it was confidential;

142.5 I also accept that it was a legitimate interest to protect in principle through PTRs both due to the nature of the information and the fact that a mere

restriction against use of confidential information is difficult to police: see the citation from *Littlewoods Organisation v Harris* above.

Trade including customer connections

143. Dr Halim's role enabled him to develop extensive client relationships, given that his *"key activities"* included arranging face to face meetings (Williamson 3 paragraph 19). This would lead to subscriptions for Dr Halim's products (Williamson 3, paragraph 20), and consulting opportunities as well as valuable information for the editorial/price reporting teams. These relationships take time to build due to the specialised nature of Argus's work (Williamson 3, paragraph31). His first job description is all about building up connections including that his role was *"to engage with industry managers across Europe*

- *to build the company profile and promote the Argus brand;*
- *Explain the position of Argus price indices/benchmarks in the market;*
- *Explain the merits of Argus pricing methodology;*
- *Encourage the further use of Argus price indices in supply contracts."*

It was described as a *"strategic face-to-face role"*. The typical industry entities were *"major suppliers, distributors, dealers and retailers, and end users and the appropriate government and regulatory entities."* His position would focus on European and African markets, but there would be a need to coordinate with Asia, the CIS and the Americas (in other words, most of the rest of the world). His key activities would be *"to arrange face-to-face meetings with decision makes in all sectors of the industry, and to meet, promote, explain and answer all matters concerning Argus price methodology."* He was given sole responsibility for business development in the Europe and Africa region and in that capacity, he developed relations with different people such as producers, traders, importers and exporters. [Day 5, pages 44-45] Dr Halim readily accepted in his evidence how his role was to build up connections: conferences were especially important to get to people in the fertiliser industry who might be difficult to contact otherwise [Day 5, pages 63-66].

144. All of this from the outset evidences the customer and trade contact and relationship-driven nature of his activities. It also inter-relates with the confidential information referred to above, and how in such a key role, he would have to have detailed knowledge concerning the products. In the section below about duration of the covenants, I shall refer to how lengthy was the process of developing relationships, contacts and sources. All of this shows that the need for covenants has been demonstrated around these legitimate interests to protect.

The PTRs were no wider than reasonably necessary to protect the legitimate interests

Duration of the covenants

145. The duration of 9 months is justifiable by reference to (a) the annual renewal cycle that applies for Argus's subscription products, and (b) the one-year cycle for physical commodity term supply contracts (Williamson 3, paragraph 29), and (c) the time taken by Argus to establish a new report, and (d) the shelf life of confidential information to which it was envisaged Dr Halim would have access.

146. As regards the annual renewal cycle, the evidence is that a lot of physical commodity term supply contracts have a one-year cycle. This means that the business development teams will be engaging with Argus' clients, encouraging using Argus prices through that one-year cycle period: see Williamson 3, paragraph 29. Renewals for Argus's services would take place at different points throughout the year with *"clusters of renewals around periods…that coincide with the business cycle…"* with this occurring at different times depending on the country in question [Williamson, Day 1, page 125, lines 11-14].

147. As regards the time taken by Argus to develop a new report through to the point at which it can be launched (Williamson 3, paragraph 31), the long process for developing a new report is due to the importance of quality control and the need to take a long-time verifying information from sources before committing to publication: see Nash Day 3, pages 75-76. Mr Nash explained that *"the reliability of our pricing is ultimately what defines us"* [Day 3, page 81, lines 3-6]. Dr Halim accepts Argus's evidence that it takes 6 months to launch a new price assessment (Halim 5, paragraph 46), and doing this is one of the constituent parts of launching a new market report.

148. It was apparent from the evidence that it took a long time for Argus to test products and bring them on to the market. Typically, it would take a year. The NPK report took almost a year [Nash, paragraph 17] and that was typical according to Dr Halim [Halim, Day 5, page 56, lines 7-16]. Building in the time for developing relationships, contacts and information sources, building up market expertise and the subsequent creation of a report, a typical period is over a year: see Williamson 3 paragraph 31. It was clear from the evidence that building up relationships took a long time, often taking a lot of encounters from meeting at conference, to going out for drinks and to meals with them. Argus is reliant on individual employees to develop its business relationships, and invests considerable time and expense in so doing: see Williamson 3, paragraph 33. It also takes a long time to build up and replace the expertise of employees at Argus to become subject matter experts able to converse with people in the industry: see Williamson 3, paragraph 31. This has to be balanced against the evidence of Mr Nash when he accepted that a leaner organisation than Argus could get a report up in a period much shorter than a year [Day 3, pages 76-77], but still this evidence did not suggest that it could be done in a period of a few days or weeks.

149. On the basis of all of this, the 9-month restriction was no more than was reasonably necessary. In respect of the submission on behalf of Dr Halim that a 9-month restriction was arbitrary, I accept the answer of Argus, namely that on the basis that a 12-month period could have been justified, the position applies *a fortiori* to a 9-month period. Indeed, there are good reasons for an employer to approach the matter conservatively: even if the covenant does not give as much protection as it might require or be entitled to, it increases the chance of resisting a challenge to the covenant.

150. I am satisfied that a 9-month period is no longer than is reasonably necessary. It does not mean that the period is arbitrary if it is less than a full year. There is still the opportunity to retain clients before the end of their one-year cycle even if this does not fall within the 9-month restriction. Further, a desire to be conservative is understandable in circumstances where excessive duration of a covenant can render the covenant unenforceable. In any event, if a year is a reasonable period, it is not an objection to have a period shorter than one year in duration.

Too junior for the PTRs?

151. It was suggested that Dr Halim's role at the time of his appointment was too junior to justify protection with such covenants. This was said to come from the limits on the

seniority of his role observed above. I have taken all of that into account, but I do not agree that Dr Halim's role was too junior to justify his being subject to the covenants. He was appointed to a well remunerated role with responsibility for business development for the entirety of Argus's European and African fertiliser business: see Halim Day 5, page 44, lines 16-17. I accept the submission of Argus as to the scope of his responsibilities in this respect, and the very substantial access which he was given to confidential information and to exploit connections with customers, suppliers and providers of information. At the time of commencement of his employment, it was envisaged that he would over the course of his employment develop relationships and receive confidential information such that the PTRs were a reasonable and necessary protection of the interests of Argus. Whilst there was a flat structure in business development at Argus, and there was no-one in business development below Dr Halim, in substance, he was a person who was given the opportunities which he would have been able, unless restrained from doing so, to divert to himself both confidential information and valuable connections.

The need for anti-competition covenants and not just confidential information covenants and solicitation of/dealing with customer covenants

152. I have referred above in the section about what the PTRs mean to the way in which the definitions of Restricted Clients and Restricted Business built into the PTRs have the effect of confining their ambit and effect. In coming to the view, which I do, that the PTRs were no wider than reasonably necessary to protect the legitimate interests of Argus, I bear in mind the restrictions built into the ambit of the covenants. Further, there are within those paragraphs in particular conclusions as to how not only were the PTRs confined in their ambit and effect, but the restrictions were no more than reasonably necessary. For example, in the discussion relating to the word "contact" within the definition of a Restricted Client, there is reference to the reasonableness of that term as well as to its meaning.

153. The difficulty in policing the misuse of Argus's solicitation of customers was foreseeable from the outset of Dr Halim's employment, and this justifies the non-dealing covenant. Further, the difficulty in policing also applies to covenants against non-dealing. In any event, the fact that a legitimate purpose of the covenants is to preserve confidential information justifies having a non-compete provision. The non-compete covenants were not wider than reasonably necessary. It was foreseeable from the outset that prohibitions against confidential information, solicitation of and dealings with clients would be inadequate. Dr Halim's work involved the gathering and evaluation of information from a wide variety of sources, much of it confidential and valuable in the hands of a competitor. Proving exactly what information is confidential for the purpose of a restriction limited to confidential information and taking effective steps to guard against its use, and establishing precisely how and to what extent an employee has misused confidential information can all be difficult exercises. Such was the nature of the confidential information that it would not be a sufficient restriction to prevent solicitation or dealing with customers.

154. Further, the nature of business development work in this sector is that it involves a lot of international travel, and much trade and client contact occurs face to face at meetings and conferences. The market is not transparent. Identifying and evidencing solicitation or dealings with customer or other business connections can be very difficult. Also, such is the lengthy process of courting an introduction into a customer or other business connection that it is not sufficient to limit the protection to customers with whom Dr Halim has dealt. Further, the business connections in this industry included suppliers of the confidential information about pricing and the trade connections referred to in paragraph 143 above

which were such an integral part of Dr Halim's work for Argus. In my judgment, this is a case where the confidential information and the need to protect customer or other business connections and the considerations in this section about the need for non-competition covenants justify the imposition of the anti-competition covenant of Clause 17.4 in the present case. I find that the considerations quoted above in *Littlewoods* at page 1479, *Gamberoni* at paragraph 96 and *Thomas v Farr plc* at paragraph 42 all have direct application to this case, and together with the matters set out above amply justify Clause 17.4.

Conclusions on the PTRs

155. For all these reasons, I have come to the conclusions, by way of summary only, and not detracting from the detail above, that:

155.1 Argus has the burden of proving that the covenants go no further than is reasonably necessary to protect its business interests, examined at the time of the inception of the contract, and it has discharged that burden;

155.2 The protection was required because of confidential information for the reasons set out above;

155.3 In particular, it would not be sufficient protection simply to have a covenant against the use or disclosure of confidential information for the reason cited above by Lord Denning MR in *Littlewoods Organisation v Harris above.*

155.4 Further or in the alternative, the protection is required because of the extensive business including client connections that were expected to be made by Dr Halim;

155.5 In particular, it would not be a sufficient protection simply to have a covenant against solicitation of and/or dealing with clients for the reasons given above including (a) the nature of the customer and business connections, (b) the fact this would not provide sufficient protection against the use of confidential information, and (c) the difficulty of detection of a covenant against solicitation of and/or dealing with clients;

155.6 The protection period of 9 months is no longer than is reasonably required in order to protect those interests;

155.7 The covenants are no greater than reasonably necessary for the proper protection of the above interests, which are protectable interests. I have assessed reasonable necessity from the perspective of reasonable persons in the position of the parties at the time that the contract was entered into and 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.

DISCHARGE BY REPUDIATORY BREACH

Issue 6: Is Dr Halim discharged from further performance of the PTRs by operation of the principle in General Billposting v Atkinson?

156. Dr Halim contends that there has been a repudiatory breach of contract by Argus by reference to his privacy rights and that he has accepted such repudiatory breach as terminating his contract, and is accordingly discharged from the PTRs.

157. The breach of contract relied upon is the breach of the implied term as to trust and confidence. The conduct said to amount to a breach of contract comprises the examination of Dr Halim's emails by Argus including emails which were of a private nature not relating to his work without reference to him. It is said that that comprised a breach of the implied term as to trust and confidence and reliance is also placed on Dr Halim's privacy rights, amounting to a repudiatory breach of contract. The reference to that implied term is a shorthand for an implied term that an employer without reasonable and proper cause would not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: Steyn LJ in *Malik v Bank of Credit and Commerce International S.A.* [1997] IRLR 462 (who said that the test was conjunctive (both limbs were required)), but the subsequent EAT decision of *Baldwin v Brighton & Hove City Council* [2007] IRLR 232 explained why the test was disjunctive. This is exactly the term pleaded in the Defence at paragraph 8.

158. Breach of that term, if established, is repudiatory of the contract, but that is because of the way the term is formulated, namely it is conduct calculated or likely to destroy or seriously damage trust and confidence. Reliance is placed on Article 8 of the ECHR, but it is not the case that any invasion of a privacy right will have the effect of being a breach of that implied term. Sometimes it might be that serious, and other times it might not be. In respect of instances where a breach of a privacy right is not calculated or likely to destroy trust and confidence or not so serious in itself to amount to a repudiatory breach of contract, there might be an argument that it generates a claim simply to damages. However, in this case, no claim for damages for breach of a privacy right is pleaded. The question as to whether there has been a repudiatory breach in this case comprises (a) whether the conduct was a breach of the privacy right, and, if so, (b) whether it was conduct calculated or likely to destroy or seriously damage a relationship of trust and confidence between employer and employee or was otherwise a repudiatory breach of contract.

159. It is first necessary to consider the facts. I find the following facts, namely:

> 159.1 Dr Halim signed up to a policy in the Electronic Information and Communications Policy in the Employee Handbook which provided a right to Argus to access and inspect without notice to the employee any materials created, sent, received or accessed using Argus's IT systems, including the email system. Under the same Policy, Argus was entitled to monitor or review the use of Argus's IT systems to investigate breaches of contracts.
>
> 159.2 Ms Williamson was getting concerned about what she regarded as lack of handover by Dr Halim. It was this that made her consider with HR the possibility of looking at his emails and at garden leave. Dr Halim regarded this as unnecessary because he was not due to finish until 31 August 2018. It is submitted on behalf of Dr Halim that if Ms Williamson had real concerns about handover, she should have expressed this more clearly to Dr Halim so that he knew what he had to do, and by when. It seems to me that there was tension between Ms Williamson and Dr Halim at the time about the absence of urgency in respect of the handover. Even if it could have been handled better (it was made no easier by the fact that Ms Williamson was in the United States and Dr Halim in the UK), prima facie an employer is entitled to have concerns for an early handover and is not required to leave it until close to the termination of the employment, and it is the responsibility of an employee to cooperate accordingly.

159.3 Ms Williamson communicated with HR from 6 August 2018 with a view to having access to Dr Halim's emails and then with a view to having Dr Halim placed on garden leave. In the event, it was not until 15 August 2018 that Dr Halim was placed on garden leave, and then Argus proceeded to take *"viewer control"* of Dr Halim's inbox. This was done without warning or asking for his permission.

159.4 The purpose of this was to see electronic communications relating to work, and there is nothing to suggest that Argus was searching for personal material. By way of example, there is no evidence that family videos were inspected. There is evidence that the emails between Dr Halim and Ms Benadada which were searched appeared to be connected with work. In fact, they concerned her reaction to the communications about the failure to provide a handover. It seems to me to be very dubious that a communication on the work email to a spouse which on its face was about a work matters is protected private communication. A fortiori in this case where, albeit not known to Argus at the time, Dr Halim had been prepared to turn to a blind eye to communications of Ms Benadada for him/Afriqom during the currency of his employment to Restricted Clients among others.

160. As a matter of construction of the Policy, I find that this access was conferred upon Argus in respect of emails on the Argus system. I also accept that it was appropriate to exercise that right from the time when Dr Halim was on garden leave. From that time onwards, he was no longer going to be involved actively in the affairs of Argus.

161. It is contended on behalf of Dr Halim that a right to access and inspect materials is not the same as a right to read all emails received into the inbox (Rejoinder, paragraph 19.1). I do not agree. It seems to me that it can give a right to read all emails received into the inbox. It is a broad power conferred upon the employer. It may be that that there are limits to that power such as that it should not be used arbitrarily or capriciously or irrationally. However, in the circumstances in which it was used, I find that it was used properly as part of the handover.

162. It was also contended on behalf of Dr Halim that in effect the power of access was being confused with a right to monitor or review records of use. It was submitted that since at the relevant time no breaches of contract were under investigation, this was an unlawful exercise. Ms Williamson said in her evidence that she regarded this power as active looking over communications as they took place and whilst an employee was still acting as such. At the relevant time, there were no longer live communications, and so this was the exercise of the power of access and inspection and not monitoring which was being exercised: see Williamson Day 2, page 126, l29. The words in the Policy are not easy to interpret, but I am persuaded by that distinction, and so access was permitted in the instant case.

163. Ms Patel submits on behalf of Dr Halim that the Policy is an illegitimate interference with the Article 8 ECHR rights of Dr Halim in that it reduced the private social life in the workplace to zero and/or there was no consideration of the employees' Article 8 ECHR rights to strike a fair balance between the employee's rights to respect for his private life and the rights of Argus. She referred to the case of *Barbulescu v Romania* [2017] IRLR 1032 *("Barbulescu")* of the European Court of Human Rights. That was a case where there was a regulation prohibiting the use of the internet for personal reasons, but nothing was said about the possibility of the employer monitoring the communications. In

Barbulescu, the messages were between the applicant and (a) his brother and (b) his fiancée, some of which were of an intimate nature. At paragraph 121 of the Judgment of the majority of the Grand Chamber, it was stated that there had to be proportionality and non-arbitrariness, such that there had to be built into the system adequate safeguards, and a consideration as to whether a less intrusive measure would have sufficed.

164. I am satisfied that this case is very different from *Barbulescu* in that here the Policy was adequately brought to the attention of Dr Halim. The particular access to the emails was by reference to the work interests of Dr Halim, unlike Barbulescu where there were printed out intimate personal conversations not by reference to work interests. The core communications with Ms Benadada were by reference specifically to the business of Argus. In my judgment, in this case, that justified the interrogation of the emails in respect of a departing employee in this case. Further and in any event, I accept the submission of Argus that there is no reason in the circumstances of this case that its Policy was too wide in this regard. It did not remove the private life of an employee if use of the work emails was subject to access and even monitoring. The employee would know about this by reference to the documents signed, and further this did not prevent his communicating in respect of private life through a phone or computer.

165. If in fact it were the case that there was a breach of the privacy right either because access was not permitted to the emails under the Policy or because the Policy was too broad to be relied upon or because Dr Halim should have been allowed an opportunity to remove his personal emails, in my judgment, the breach of the privacy right does not justify a termination for repudiatory breach. First, the emails examined were only by reference to what were believed to be emails relating to the business of Argus. Secondly, if Dr Halim had not successfully avoided detection for his breaches of fidelity, Argus would have been able to have had access to the emails (or, if this is called monitoring, to monitor them). The way in which this was expressed in the Closing Submissions on behalf of Argus is *"viewed objectively, against the backdrop of Dr Halim's conduct review of emails was justifiable."* If, in fact, it does not go so far whether because subjective knowledge was required and a responsive investigation or because the Policy was too wide, then, in my judgment, the particular breach of a privacy right (if it was such) was not such as to be calculated or likely to destroy or seriously damage the relationship of trust and confidence or otherwise so serious as to amount to a repudiatory breach of contract. In the circumstances, any breach of a privacy right would at highest be a right in damages, which has not been claimed.

166. In the circumstances, I find that (a) Argus was not in breach of contract, whether by reference to the conduct of the implied term as to trust and confidence and/or any right of privacy under ECHR Article 8, or (b) if Argus was in breach of a privacy right of Dr Halim, it was not such as to be a repudiatory breach of contract. In these circumstances, the case of Dr Halim by reference to being discharged from the PTRs by reason of repudiatory breach must fail.

167. It therefore follows that it is unnecessary to determine what it is agreed between the parties was a novel question of law about the timing of the acceptance of repudiatory breach, and I shall not decide it. That question is as follows. It is common ground that a repudiatory breach needs to be accepted in order to take effect: without this, it has been said that it is a thing writ in water: see the words of Asquith LJ in *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 (CA) at 421. There was an acceptance at latest by the Rejoinder served on 30 November 2018, and it is strongly arguable that it was accepted in Dr Halim's Supplement Skeleton Argument dated 20 September 2018. However, by

then, the employment relationship was at an end: all that remained of the employment contract was the PTRs. The Court is bound by *General Billposting v Atkinson* [1909] AC 118 in the normal case of a repudiatory breach of the employer accepted by the employee during the currency of the employment relationship, having the effect of discharging the employee from the PTRs. This view was questioned by Phillips LJ in *Rock Refrigeration v Jones* [1997] ICR 938, who said that *"negative restraints agreed to apply after the termination of employment should not be equated with the primary obligations that are discharged when a contract of employment is terminated consequent upon repudiation"* (at 958). Subsequent cases have stated that below the Supreme Court, the Court is bound to follow *General Billposting v Atkinson* in the case of termination for repudiatory breach during the currency of the employment relationship. The apparently novel point in this case is whether the reasoning of General Billposting applies too where the employment relationship is at an end and where all that remains are the PTRs. In those circumstances, the question is as follows: is the critical point the termination of the employment relationship such that it is too late to be discharged from the PTRs or is the contract of employment still alive, such that the PTRs are continuing primary obligations, which can be discharged like any other primary obligation upon acceptance of a repudiatory breach? In view of the fact that I have not been addressed in detail on this issue, and having regard to my finding that there has been no repudiatory breach, I do not need to express a view, and I decline to do so.

EXPRESS AND IMPLIED DUTIES OF FIDELITY AND TRUST AND CONFIDENCE

Issue 7: What steps did Dr Halim take to set up Afriqom during his employment?

Introduction

168. This question can be approached from the perspective of the head-start. What was it that enabled Dr Halim in September 2018 to attend two major conferences in Africa, the IFDC and the Cape Town conferences? As noted above, at the first of those conferences in the first week of September, that is within days of the termination of his employment, he met with Mr Groot from IFDC at the AGRF conference on 5 September 2018 and on the next day with Ms Kalihangabo from the Africa Development Bank. By this time, he had a website, marketing literature and a report to show. No doubt his ability to do all of this made his meetings more effective potentially.

169. Dr Halim's answer is that these matters took days to prepare. Perhaps he did some things in the latter part of his garden leave period. He was different from Argus. He did not have to spend months to form a product. This was part of his know-how. As for ideas in other publications, he could obtain those from other companies in the same industry. They were in the public domain. He claims that his actions were legitimate preparatory acts, but they were in his own time, without the use of confidential information and not involving soliciting by him of customers or any trading.

170. In my judgment, the evidence shows that Dr Halim was able 'to hit the ground running' because he was in breach of the express and implied terms of fidelity during the period of his employment.

The law

171. The general principles relating to employee's duties of good faith and fidelity include the following (*QBE v Dymoke* at paragraph 169):

171.1 It is indisputable that an employee owes his employer a contractual duty of 'fidelity', but how far it extends will depend on the facts of each case.

171.2 The more senior the staff the greater the degree of loyalty, fidelity and diligence required.

171.3 The first task of the court is to identify the nature of the employee's obligations of fidelity and then to decide whether the employee's activities are in breach.

171.4 The mere fact that activities are described by an employee as 'preparatory' to competition does not mean that they are legitimate.

171.5 It is a breach of the duty of fidelity for an employee to misuse confidential information belonging to his employer.

171.6 The court should ask whether the activities in which the employee is engaged affect his ability to serve his employer faithfully and honestly and to the best of his abilities.

172. In **Shepherds Investments Ltd v Walters** [2007] IRLR 110 the Court observed that (paragraph 131):

> *"It is obvious, for example, that merely making a decision to set up a competing business at some point in the future and discussing such an idea with friends and family would not of themselves be in conflict with the best interests of the company and the employer…At the other end of the spectrum, it is plain that soliciting customers of the company and the employer or the actual carrying on of trade by a competing business would be in breach of the duties of the director and the obligations of the employee. It is the wide range of activity and decision making between the two ends of the spectrum which will be fact sensitive in every case…"*

What did Dr Halim do whilst still an employee of Argus?

173. The evidence shows that Dr Halim started actively to promote Afriqom's business during his employment by (a) setting up a company in UAE, and obtaining investment for it; (b) establishing and launching Afriqom's website, (c) turning a blind eye to his wife's activities for Afriqom, and (d) preparing a report and marketing brochure.

174. One aspect of this was that from January 2018 onwards and on an increasing basis, Dr Halim transferred from the Argus account to his iCloud account a large amount of documents of Argus. His evidence is that this was part of a working pattern to enable him to conduct more work from home, particularly in the context of wanting to spend more time being there for his autistic child (Halim 4, paragraphs 77-80). I have no doubt about how concerned he was as a father about his responsibilities for his child. However, I regret that I do not accept that this explains the surge in the transfer of such documents. A document prepared for the interim injunction application shows from hardly any such emails, there was a gradual increase in such emails to a surge with steep increases in March and April to a peak in May 2018, and that it remained high, albeit not as high, in June and July 2018.

175. A striking example happened on 22 January 2018. Dr Halim sent himself the raw word template for the AAF Sample Report, that is the document which he prepared for Argus for the proposed Africa weekly report which Argus decided not to use. Within 30 minutes of that, he forwarded to himself on his iCloud Account an email sent to him by Imad Bouziane, one of the people with whom Dr Halim had contact in March 2018 as regards the formation

of the Afriqom company. There has not been identified any business need for Dr Halim to have sent to himself the word and pdf versions at this time. (Dr Halim says he did *"exactly the same"* on an earlier occasion for Argus NPKs (Defence, paragraph 29) but that email reveals him only having sent himself the pdf version). Although referred to in the Defence, there is no evidence in his witness statement (Halim 4, paragraph 68) of any *"presentations"* or *"negotiations"* for which Dr Halim claims he needed this document. Dr Halim mentioned in paragraph 13 of his Rejoinder that a key goal for 2018 was to present a business case to the Product Review Committee for a periodical for Africa, but there is no evidence that he did make such a presentation: on the contrary, on Dr Halim's case, Argus had *"no interest"* in pursuing the report by this time, and hence he would take this forward for himself (Halim 4, paragraph 93). Thus, the inference is that this was done for the purpose of Dr Halim's purposes and put in word form deliberately so that he could use the same for his own purposes.

176. There are substantial similarities between the content of the Afriqom Report and the AAF Sample Report as described in Williamson 3, paragraph 150. She alludes to seven matters including (a) the similarity of presentation of the title of the publication, (b) the layout of the front page, (c) each report having a graph on the front page, similar in style and location and (d) the similar format of issue number and date presentation. There is also to be noted the inclusion in the Afriqom Report bearing the date of 17 August of a demand tracker graphic that looks substantially the same as that produced for the AAF Sample Report. Also striking is the copying of the precise ordering of countries, products and numbers for the demand tracker in the AAF Sample Report (i.e. Nigeria, Mali and Burkina Faso) into Afriqom's report and brochure. All of this is indicative of Dr Halim having misused the Sample Report which he emailed to himself in raw format.

177. There were many other documents that were transferred to the iCloud account of Dr Halim. There are specific documents where on the balance of probabilities it appears that a purpose of the transfer was to assist the nascent business of Afriqom including the following:

177.1 13 February emails of Argus's NPK, Phosphate and Nitrogen reports: These are the three global weekly reports of Argus that contain the most African content (see Halim 4, paragraph 82 where he refers to the *"large majority of imports"* into Africa being these three products) and sent to himself around the time when (on his own case) he came up with the idea of Afriqom, sending on 13 February 2018, by emails, PDF copies of 3 global weekly reports (Williamson 3, paragraph 154). Ms Williamson accepted that Dr Halim would have needed to be on top of these reports for the Addis conference at the end of that month, but as she said, that did not explain why he would need to email to his personal account when he has a work iPhone [Day 2, p.171].

177.2 27 April email attaching the SSA Report: Contrary to Dr Halim's Defence in which he asserts that the SSA Report was *"not relevant to Africa's price reporting"* [1/4/45], this was directly relevant to the 'COUNTRY pack' offering on the Consulting page of Dr Halim's website which are said to provide information on market size and market structure on key countries in Africa. Compare the description of this service offering with the index for the SSA Report.

177.3 26 June email attaching a power point document entitled 'Map Ideas': This was not shared with Dr Halim's team (Williamson 3, paragraph 163.2) and the timing (after the IFA conference and before his resignation) suggests it was for his new

business, all of which renders improbable the suggestion of Dr Halim that it was so that it could be used on the NPK report (Halim 6, paragraphs 43-44).

Ms Patel takes issue with the fact that these documents were not put specifically in cross-examination. Whilst that is correct, the general point, of which this was a part, was put firmly, namely that Dr Halim had transferred documents to the iCloud account for his own new business and not for Argus and that there was no good reason for the transfers of the documents. This was put both specifically as regards the AAF Sample Report transferred on 22 January 2018 and more generally as regards the vast number of documents so transferred at the very time of the preparatory steps for the new business: see by way of example, Day 6, page 187, line 23 – page 192, line 6. It is sufficient to put the general points and the failure to put these specific documents does not invalidate the point. It is apparent from his other answers to the general points and to the AAF Sample Report that Dr Halim would have given substantially the same answer, namely that he would not misuse documents and that the documents were transferred to the iCloud in order to advance the business of Argus, particularly in the context of working more from home. In addition to the general point that not every single point has to be put provided the broader points are put, in this case there were limitations in time in the context of a speedy trial, such as made it particularly unrealistic for every single point to be put.: see Phipson on Evidence 19th Edition, paragraph 12-12. For the avoidance of doubt, if this approach were wrong, my overall conclusions would not be affected if none of these documents were taken into account.

178. At paragraph 16 of the Closing Submissions of Dr Halim, it is sought to demonstrate how particular documents transferred may not have been misused or may not have been controversial. As regards the documents in the above paragraph and the raw word template for the AAF Sample Report transferred on 22 January 2018, I conclude that this has been misused for the new business. As regards the other documents above, the inference is that these documents have been transferred for the purpose of the new business. As regards the other documents, whilst Dr Halim has been able to suggest in respect of some of them that they might have been available from other sources and/or that they were not confidential, and in respect of other documents the possibility of specific legitimate uses for the purpose of Argus, the overall point is the same. There is no reason for this surge of documents being transferred when they could all have been carried around on Dr Halim's work iPhone without a transfer to his personal iPhone, and coinciding with the planning of the new business. The inability of Argus to demonstrate a specific misuse of information of each document does not legitimise the course of conduct of the transfer and retention of this information to the personal email of Dr Halim.

179. There is no sensible explanation for the surge of documents in the early months of 2018 coinciding with events such as:

179.1 in March 2018, Dr Halim had discussions regarding the set-up of Afriqom which was incorporated as Afriqom FZ LLC on 22 April 2018.

179.2 on 13 May 2018, Dr Halim visited lawyers in Dubai in connection with Afriqom whilst also on a business trip for Argus.

179.3 on 22 May 2018, Dr Halim registered the Afriqom domain name (www.afriqom.com) ("Afriqom Website").

179.4 from 22 May until 3 June 2018, the Benadada Emails were sent, naming Ms Benadada as Business Development Director. As found above, Dr Halim

deliberately turned a blind eye to Ms Benadada providing this service for Afriqom and therefore permitted her to act as an agent on his behalf.

179.5 On 9 June 2018, Dr Halim described himself in an email to the UAE visa authorities as the 'Managing Director' of Afriqom.

179.6 On 25 June 2018, Dr Halim sent an email regarding the provision of US$120,000 in relation to Afriqom and the setting up of its bank account.

180. The spike thus coincides exactly with the steps taken to form the business and to obtain investment for the same. The clear inference is that the iCloud account was intended for the purposes of his own business. Thus, the spike in use of the iCloud account was to store this information for use for his own business.

181. If in fact this was all being done for Argus business as Dr Halim has contended, then he would have been open about this way of working and compliant when asked to return or erase any electronic information which he held when put on garden leave in an email sent to him on 15 August 2018. Dr Halim was asked to return property of the Claimant and was asked to erase permanently electronic information. In respect of the communications which he transferred to his iCloud, he neither returned nore erased them. In cross-examination, he was unable to explain why he did not do this.

182. Yet he was alive to the distinction between the Argus account and his iCloud account. In communications in March 2018 with Imad Bouziane and Joffrey Neil regarding the new business, he wrote on the Argus email to them in error. He then asked them (in a mixture of French and English) to use in future the iCloud account and to delete the email on the Argus account.

183. If the activities of Dr Halim had been legitimate both by reference to preparatory acts before termination of his employment and in connection with the business of Afriqom, then Dr Halim would have been more forthcoming in disclosure in this action. Instead, his disclosure was wholly inadequate. I accept that there were difficulties in complying fully with disclosure for so long as Dr Halim was undertaking disclosure without legal assistance. However, the extent of the shortcomings was so great that I conclude that in part at least it is due to his intention to conceal from Argus his activities. A part of this was to prevent Argus from knowing the extent to which he had used his time at Argus in order to create the head-start for himself by breaches of his duty of fidelity.

184. The true picture has only slowly emerged during the litigation, but the picture remains opaque. The standard disclosure on 12 November 2018 revealed only two emails sent from Afriqom email accounts and only one Afriqom report (2/11/18), beyond the 7 September 2018 prototype he had already disclosed.

185. On 20 November 2018, Argus issued an application for specific disclosure. That led to D disclosing a further tranche of documents on 26 November 2018, but even after that, Mr Justice Pepperall was satisfied that Dr Halim's approach to disclosure was deficient and that he had (amongst other things) failed to disclose copies of Afriqom's weekly reports that he described as *"obviously relevant"*, and ordered various categories of further disclosure ("**29 November Order**"). The Judge limited the extent of further disclosure that was ordered against D on the basis of what could reasonably be provided by him within 2 working days, given the speedy trial timetable. On 3 December 2018, Dr Halim disclosed a further 496 pages of documents, which was bundle number 24 of the bundles of documents.

186. Among other documents, this has revealed the Benadada Emails of May/June 2018, correspondence with the UAE authorities in June 2018 in which Dr Halim called himself the managing director of Afriqom and correspondence relating to the receipt of $120,000 investment into Afriqom. Curiously, there has not been disclosed any business plan or other documents to the investors in or before the time of the investment of the money, and it seems quite unlikely that there has been no such document. However, the 3 December disclosure did contain emails to Restricted Clients between 7 September and 13 September 2018 in order to arrange meetings during the week commencing 24 September 2018 in Cape Town. Dr Halim referred by email dated 7 September 2018 to a publication called 'African Fertiliser' ("**Afriqom Report**") that is *"about to be launched"*. This history of inadequate disclosure is in my view further evidence showing that Dr Halim has sought to conceal both his breaches of his duties of fidelity during his employment and his breaches of the PTRs after the termination of his employment.

187. The report that Dr Halim was demonstrating at the AGRF in the first week of September 2018 is said by Dr Halim to be a Prototype ("the Afriqom Prototype Report"). Argus's case is that Dr Halim could not have produced the Afriqom Prototype Report, the Afriqom Website or the Marketing Brochure in so short a space of time: the work put into them must have taken Dr Halim considerable time during his employment, and is derived from Argus's own documents, and its confidential information.

188. There are dates in August 2018 during the garden leave when work took place for the new business which went beyond merely preparatory acts or were preparatory, but were not consistent with the duty of fidelity. I refer to the following:

188.1 On or before 17 August 2018, Dr Halim appears to have created Afriqom's weekly fertiliser report (as included within the three thumbnail images of Afriqom's brochure). Dr Halim claims that the date of 17 August is not precise and that therefore it was not or not necessarily created at that time. It seems more likely to me to have been created at least in part on 17 August.

188.2 On 20 August 2018, Dr Halim registered domain names africafertilizercomplex.org and africafertilizercomplex.com.

188.3 On 27 August 2018, Dr Halim registered the africaopenmarkets.com, and it appears also used this domain to also publish the Afriqom Website. The main website domain has always been afriqom.com and this is the address advertised in brochures for the AGRF. He created the marketing brochure on the same date.

188.4 Whilst it is possible that the Afriqom Website went live from before the time when the Afriqom Website address appeared on the footer of emails from months earlier, it seems more likely that this was not the case. In fact, the website went live on or before 29 August 2018. Apparently, this was in error, and when this was noticed, it was postponed until after the termination of Dr Halim's employment.

188.5 On 29 and 30 August 2018, Dr Halim sent the AGRF Messages soliciting for business from a wide variety of stakeholders at the AGRF, including several Restricted Clients, including IFDC, Africa Development Bank, OCP Group and Yara (Williamson 3, paragraph 119).

189. There has been an abundance of evidence as to whether Dr Halim used Argus's documents and information in order to set up Afriqom during his employment with the Claimant. The evidence shows that typically it takes Argus a long period of time in order to

be able to launch a new market report. The specific period of time which it took to produce the Argus NPK report was a period of almost a year: see Nash, paragraph 17. The length of time that that Dr Halim spent developing the AAF Sample Report from the point at which he first considered potential price assessments for inclusion (Williamson 3, paragraph 82), to the presentation of the concept on 11 December 2017 was about 5 months. The period of time between the date when Dr Halim first emailed himself the raw word template of the AAF Sample Report and his 'official' launch of Afriqom (circa 7 months).

190. By contrast, Dr Halim's employment ended on 31 August 2018, and yet he was able to attend two important annual conferences, namely the AGRF and Cape Town conferences in September 2018. By this time, he had a website, marketing literature and a report to show. As noted above, he showed a report on 5 September 2018 to Mr Groot from IFDC at the AGRF conference and on the next day to Ms Kalihangabo from the Africa Development Bank. By 21 September 2018, he had produced Afriqom's first weekly report, reporting on the same or similar trades to those of Argus as shown in the table above.

191. I reject the notion that this could all have been achieved without breaches of the duty of fidelity and without misuse of confidential information including the AAF Sample Report and other documents transferred to Dr Halim's iCloud for the purpose of his new business.

192. I accept the argument of Argus that it is to be inferred that when Dr Halim was pursuing discussions in early 2018 regarding the concept of a weekly African fertiliser report, he did so for the purpose of Afriqom:

192.1 By contrast to the 2017 AAF Conference, which Dr Halim followed by distributing detailed meeting notes, following the 2018 AAF Conference, no meeting notes were circulated to Ms Williamson or the team [Williamson Day 2, page 172, lines 10-14]: *"We did not have meeting notes from him for the Africa conference that he attended in the spring. That was a big one, where there would have been numerous contacts, and we did search very hard for it, and we did not come up with anything."*

192.2 At the 2018 AAF Conference, around the time when on Dr Halim's own case – (Halim 4, paragraph 92) he came up with the idea of Afriqom, Dr Halim was promoting *"new developments designed for Africa alone"*: see email to Indorama. Indorama is also one of the Restricted Clients that Dr Halim emailed on 11 September 2018 to arrange a meeting in Cape Town in late September 2018.

192.3 There are several other emails sent by Dr Halim in advance of the 2018 AAF Conference that emphasise Dr Halim proposing to discuss *"particularly the African angle"* in relation to Argus's fertiliser experience. The inference is that he was using this conference as a platform for his then embryonic Afriqom business. Dr Halim did not share these *"solely Africa"* discussions with Ms Williamson or the team (Williamson 3, paragraph 153).

Here too Ms Patel states that these specific matters were not the subject of specific cross-examination. Whilst these specific points were not made in cross-examination, there was put to Dr Halim that he was at this time involved in preparing for his new and competing business and involved in more than legitimate preparatory activities from January 2018 onwards. The reasoning in paragraph 177 above applies that the general points were put, that not every point has to be put in cross-examination and that if, which I do not accept, it were wrong to find these points, their absence would not affect my overall findings.

193. I also accept Argus's argument that there is an inference that Dr Halim sought to consolidate his relationship with IFDC, which was a key contact for Argus, for the benefit of Afriqom prior to his employment terminating. The following matters are material:

193.1 The joking reference in the text message from Mr Annequin to Dr Halim regarding his first 'public day' at Afriqom [9D/1259]. The text message exchange does not include any introduction from Dr Halim as to what Afriqom is. This appears to indicate that there was an attempt to confide in him about Afriqom whilst still an employee of Argus.

193.2 The email exchange between Dr Halim and Mr Annequin of IFDC on 25 May 2018 sent by Mr Annequin to Dr Halim's iCloud Account with a document entitled 'IFDC Argus partnership – beyond 2018'. Dr Halim says that Mr Annequin had asked him not to bring this to anyone at Argus's attention because it was confidential to IFDC: see Defence, paragraph 31. This is illogical given the *"commercial partnership"* between IFDC and Argus to which the document related: see Williamson Day 2, page 175 lines 2-9.

194. I refer above to the sections on the competitive nature of the businesses of Afriqom and Argus relating to the similarity of the products as regards reporting in respect of Africa (paragraphs 79-83) and to the section about confidentiality of the information (paragraphs 114-118). I refer to the way in which he obtained for himself documents such as the AAF Sample Report and other documents diverted to his iCloud account which have enabled him to produce his prototype and thereafter to move to his weekly report within such a short period of the termination of his employment. I reject the suggestion that this was all work which he did in the course of a small number of days prior to going to the AGRF conference. In the light of the foregoing coupled with untrue information provided to Argus about his business and the inadequate approach to disclosure in this case, I am satisfied that it was by a breach of his duties of fidelity and/or confidence that Dr Halim was able to attend the September conferences and to be capable of making an impression on prospective clients with his marketing material and prototype and then within such a short period to move to the first Afriqom weekly report.

Issue 8: Did those steps amount to more than legitimate preparatory steps?

195. Whether viewed cumulatively or in isolation, Dr Halim's actions crossed the line beyond legitimate preparatory steps. There must have been an immense amount of time spent in planning and obtaining investment in the new business at the expense of his work for Argus. Similarly, it affected his ability to serve Argus faithfully and gave rise to an obvious conflict between his actions and his role with Argus e.g. at the AAF conference. He used the documents which he downloaded on to his iCloud account from the Argus account, notably the AAF Sample Report. All of this led to the ability to produce the Afriqom weekly report which was strikingly similar to the Argus weekly report. He was able by all of this to create the Afriqom prototype and the Afriqom weekly report within a matter of days following the termination of his employment. Further, Dr Halim was obliged to obtain permission before working as an employee or freelancer for any other person, firm or company, whether in his spare time or not. He failed to do this. On the contrary, he provided misleading information about his intentions. I refer to all of the matters above as regards the preparatory steps and breaches of duty: it is not necessary to repeat all of them. In the circumstances, the preparatory steps as a whole were not legitimate and amounted to breaches of the duty of fidelity and other breaches of contract on the part of Dr Halim.

Issue 9: Did Dr Halim use Argus's documents and information (whether confidential or not) in setting up Afriqom during his employment with Argus?

196. There has been an abundance of evidence as to whether Dr Halim used Argus's documents and information in order to set up Afriqom during his employment with the Claimant. I reject the notion that Dr Halim was able to move to the prototype and then to the weekly publication for Afriqom within days of his leaving Argus. I am satisfied that the ability to move to the launch of the new report within days of the termination of Dr Halim's employment with Argus was made possible by the misuse of Argus's documents and information. On the balance of probabilities, I find that Dr Halim misused the AAF Sample Report and other documents belonging to Argus for the purpose of Afriqom's business. I refer in particular to the evidence above as regards the transfer of the AAF Sample report to the iCloud account, and to the striking similarities between the Afriqom documents and the Argus documents.

197. Dr Halim claims in his Defence that the concept that Afriqom is now producing is *"materially different"* from that produced in advance of the 11 December Meeting (Defence, paragraph 27.3.1, 27.3.3) because it details estimated consumption. This is incorrect as the graphic in the AAF Sample Report is specifically headed *"est. 2018 demand"*.

198. Further, there is evidence that Dr Halim has also taken and misused a chart from one of Argus's presentations and replicated it in a substantially similar form on Afriqom's website. Similarly, a chart on Afriqom's consulting page appears to have been developed using one of Argus's consulting charts.

199. In my judgment, the contention that Dr Halim was ready to go to the AGRF conference in the first week of September 2018 and to provide Afriqom reports on the basis that they took only hours to prepare defies probabilities and common sense. It is also to be seen in the context of matters affecting his credibility directly related to this including the untrue information which he provided to Mr Thompson in particular about his business intentions, the surge of information transferred to his iCloud account and his retention of the same after termination of his employment and his failure to provide adequate disclosure. It is convenient for Dr Halim to contend that this was the case, but I reject his evidence to this effect.

Issue 10: Did Dr Halim breach clauses 6.1 or 6.2?

200. Dr Halim's actions in respect of Afriqom as described under issue 7 above were a clear breach of the duty of fidelity. Dr Halim has devoted work time whilst employed by Argus towards Afriqom's business and engaged with clients of Argus's with a view to promoting Afriqom's services. It is not necessary to repeat the same again.

Issue 11: Did Dr Halim solicit the business of Argus clients while still employed by sending the AGRF message?

201. This was an act of solicitation which Dr Halim ought to have foreseen would have been received by Argus's clients. Messages in the chat forum were not advertisements to the world at large, they were targeted to the conference attendees. He knew that certain key clients, such as the IFDC were attending the conference. Dr Halim's participation in the chat forum for AGRF encouraged people to meet and do business with him.

202. Dr Halim's actions were in breach of duty of fidelity whether or not those who he solicited were Argus's clients. He should not have been sending messages seeking to arrange meetings with potential clients and promoting his services while still an Argus employee.

203. Dr Halim's evidence is that he took a *"commercial decision"* (Halim 4, paragraph 155). He knew he was in in breach of duty in doing this, but decided to breach his duties because of the potential benefit to be derived from meetings at the AGRF.

MISUSE OF CONFIDENTIAL INFORMATION

Issue 12: Is the express contractual duty of confidence (clause 16) an unreasonable restraint of trade?

204. At paragraph 77 of its written Closing Submissions, Argus says the following:

> *"It is accepted that clause 16.1 only applies, post termination, to restrict D from misusing trade secrets or information of a sufficiently confidential nature to warrant equivalent protection. Construed in this way, the clause aligns with the implied duty of confidence as pleaded at (PoC/6c) and is not a restraint of trade. Even if the clause were found to be unenforceable, D remains bound by the implied duty of confidence in his contract and by his equitable duty."*

205. The foregoing is an acknowledgment of a difficulty in the ambit of Clause 16.1 which is drawn so widely as to deem confidential what is or may be part of the employee's skill and general knowledge or otherwise not confidential e.g. prices charged, financial information, ideas, business methods etc., unless as a matter of interpretation, its ambit is very seriously restricted. As noted at paragraph 82 above, an express confidentiality covenant cannot do that: see *Ixora Trading Inc v Jones* there cited, and the reference to such clauses being subject to restraint of trade. Thus, Argus accepts that clause 16.1 only applies, post termination, to restrict Dr Halim from misusing trade secrets or information of a sufficiently confidential nature to warrant equivalent protection: alternatively, it seeks to get to the same result through the implied duty or equitable duty of confidence.

Issue 13: What is the scope of Dr Halim's implied contractual duty of confidence in the period after termination of employment?

206. This is settled law. The scope of the implied duty of confidence has been referred to above by reference to the cases of *Faccenda Chicken* at page 136B-E and *Lansing Linde* at page 260B.

Issue 14a: Did Dr Halim act in breach of confidence by sending Argus's confidential information to his personal iCloud account for purposes of establishing Afriqom?

207. I refer to the findings above under the heading "What did Dr Halim do whilst still an employee of Argus?" relating to the transfer of materials to the iCloud account and to the misuse of those materials. I accept the submission of Argus that the dramatic increase in volume of emails sent to Dr Halim's iCloud Account occurred because Dr Halim started to send such emails for the purpose of advancing Afriqom's business. There was no legitimate justification for the dramatic increase in volume of emails to Dr Halim's iCloud Account in 2018. The suggestion that it was because he travelled a lot is not an answer because there is nothing to suggest that his travelling changed in 2018 from previously: see Williamson Day 2, page 173, lines 1-12. He said that he had done this since joining Argus, but the volume increase is extraordinary and coincides exactly with the establishing of Afriqom: see Williamson 3, paragraph 162. Whereas Dr Halim sent 24 such emails to the iCloud Account

in last seven months of 2017, he sent more emails per month in March, April, May, and June 2018 with a peak of 73 emails in May 2018 (that is more than 3 times as many emails in one month as in the entirety of seven months in 2017). He said that he was working more from home (Defence paragraph 28.1) from April 2018, but there was nothing documented at the time about this, and the fact that he did not return or erase these documents despite requests prior to the termination of his employment is strong evidence that he wished to retain these documents for himself. I reject the innocent reasons given for this course of conduct and find that it was to facilitate the intended business of Afriqom.

Issue 14b: Did Dr Halim act in breach of confidence by retaining Argus's confidential information in his personal iCloud account on termination of employment? Further, was such retention in breach of clause 15.1?

208. Clause 15.1 obliged Dr Halim to return all documents (in hard or soft copy) relating to Argus's business. On 15 August 2018, Argus wrote to Dr Halim and reminded him of his contractual obligations, including the obligation to return all company property including documents and Argus's solicitors' letter of 31 August 2018 also draws attention to this. Dr Halim did not do this, by his own admission (Defence, paragraph 45.4). I reject his explanation that this was a *"genuine oversight"* as it lacks credibility. He did this for the benefit of Afriqom.

Issue 14c: Did Dr Halim act in breach of confidence by using Argus's confidential information in preparing his own competing business of Afriqom during and/or after his employment?

209. Dr Halim has acted in breach of confidence by misusing the concept, work product and information contained in the AAF Sample Report together with Argus's market feedback about the concept. I refer to the matters set out above relating to the misuse of the AAF Sample Report, including (a) the document itself, and (b) the information contained within it, for the benefit of Afriqom, both during and after the termination of his employment with Argus.

210. The concept and work product of the AAF Sample Report was of a degree of sensitivity to justify post-termination protection. Dr Halim accepts that when he was involved in developing the Argus NPK report this was confidential to Argus [Halim, 19 December, page 56, lines 4-6].

211. Dr Halim has attempted to pick out isolated aspects of the information contained in the AAF Sample Report and challenge its confidentiality. This approach is misguided:

> 211.1. The fact that any particular piece of information contained within the AAF Sample Report may or may not have been sufficiently confidential to warrant post termination protection, does not detract from the confidentiality that arises in the overall work product.
>
> 211.2. The value of having access to the AAF Report at an early stage in the product development cycle would be of considerable value to a competitor; the market feedback obtained by Argus about the AAF Report is also valuable (see by analogy [Halim, 19 December, page 57, lines 7-16] accepting that it would be "bad" for Argus if a competitor was to learn that it was thinking of developing a new report).

212. Dr Halim has acted in breach of confidence by misusing confidential information relating to Argus's information sources to enable himself to be in a position to produce a weekly market report within such a short time of the termination of his employment. Ms

Williamson gave a flavour of the lengths that Dr Halim went to in getting the Argus NPK report off the ground [Day 2, page 168/lines18-25] where she describes how Dr Halim did *"numerous business trips to meet market participants and understand the market and develop relationships to start the project"*.

213. The NPK report took almost a year (Nash 17) and a typical time period is over a year (Williamson/ 3, paragraph 31) . Dr Halim says in his fifth witness statement that it would take *"three to four months to produce the report"* without his African heritage and *"extensive travel"* throughout Africa (Halim 5, paragraph 40.4). What Dr Halim overlooks is that:

> 213.1. He developed these relationships whilst working for Argus, and his knowledge of the identity of such sources was confidential (Williamson 3, paragraph 37.j.iii).
>
> 213.2. Some information sources will only share information with one PRA (i.e. on an exclusive basis) [Williamson, Day 2, page 133, lines10-11]. An illustration of this is Argus's agreement with IFDC relating to information that provides the basis for the SSA Report (Williamson 3 paragraph 44).
>
> 213.3. The assistance to be gained from having a developed network of sources is hugely significant [Nash, Day 3, page 80, lines1-19].

214. Even if Dr Halim could have streamlined the process of launching a new report, he would not have been in a position to launch a new report when he did. Given the 17 August Afriqom Report, it appears likely that Dr Halim had prepared Afriqom's first report before his employment terminated. Alternatively, this occurred within a few weeks. This can only have been achieved by the misuse of Argus's confidential information sources.

INJUNCTIVE RELIEF

Issue 15: Should the Court address injunctive relief as a matter of final relief, or as further interim relief pending the hearing on financial remedies?

Issue 16: Should the Court grant an injunction to enforce clauses 17.2, 17.3 and/or 17.4?

215. The starting point in the consideration of a claim by an employer to enforce an employee's negative covenant is that the ordinary remedy is an injunction, and proof of damage to the claimant is not required: see *Dyson v Pellerey* [2016] ICR 688. That starting point is subject to the following:

> 215.1 As an injunction is a discretionary remedy, there may be cases in which it might be appropriate to refuse an injunction.
> 215.2 The type of case in which it may be just to refuse an injunction include where the granting of an injunction would be so prejudicial to a defendant and cause him such hardship that it would be unconscionable for the claimant to be given injunctive relief if no damage to the claimant would be caused if there were no enforcement.
> 215.3 The burden is on the defendant to persuade the Court not to grant the injunction (see *Dyson* citing *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272 at 277 where Colman J stated:
> *"The effect of the authorities can be summarised as follows:*
>
> *1. Express or implied negative covenants will in general be enforced by injunction without proof of damage by the plaintiff.*

> *2. The principle does not depend on whether the plaintiff is a person or a corporation. The ready availability of the remedy is not the consequence of equity's regard for the plaintiff's personal feelings but of equity's perception that it is unconscionable for the defendant to ignore his bargain.*
>
> *3. Although absence of damage to the plaintiff is not in general a bar to relief, there may be exceptional cases where the granting of an injunction would be so prejudicial to a defendant and cause him such hardship that it would be unconscionable for the plaintiff to be given injunctive relief if he could not prove damage. In such cases an injunction will be refused and the plaintiff will be awarded nominal damages."*

216. In *Dyson v Pellerey* above, Sir Colin Rimer approved the foregoing, save that he did not regard the word "exceptional" as an appropriate word, saying that categories of circumstances where the Court might not grant an injunction were not closed.

217. It was submitted on behalf of Dr Halim that therefore it is necessary to know the full extent of loss suffered by Argus to assess properly whether a final injunction is appropriate. I am prepared to assume for this purpose alone that if there is a hearing of financial remedies, it will not be proven that Argus has suffered loss. That would not in my view prove that anything bearing in mind how speedily Argus took action, and the limited capacity for new business of Afriqom bearing in mind the undertakings provided, the short period to the speedy trial and the distraction of the attention of Dr Halim from the new business to preparation for trial. Nevertheless, I have held that the legitimate interests which the covenants are seeking to protect are confidential information and trade connections. Each of the covenants in Clauses 17.2, 17.3 and 17.4 relate specifically to competing activities. My findings above are to the effect that business of Afriqom is and will be, save if restrained, in competition with that of the business of Argus. In my judgment, that carries with it the risk that business which would or might otherwise be obtained or retained by Argus would or might go to Afriqom. In view of how speedily Argus took action in this case, there has been little scope for damage caused within the short period.

218. Dr Halim has suggested that either no loss will occur from his activities even without an injunction or that damages would be an adequate remedy. As regards the former, I accept the evidence in Williamson 3, paragraphs 188-189 as regards the possibility of his securing that a subscription with Afriqom might be taken at the expense of a subscription with Argus and that if a subscriber leaves Argus, it might be difficult to win back the business. The provision of free trials for potential customers among other things indicates a real scope for damage to Argus, if indeed no damage has yet occurred. It would also be difficult to assess the extent to which Dr Halim's actions would have caused opportunities for new business to be lost for Argus because of the launch of the new business.

219. If I had been of the view that damages were in principle an adequate remedy, despite the starting point that the ordinary remedy for enforcement of these negative covenants is an injunction, there must be real doubt as to the ability of Dr Halim to be able to pay such damages having regard to what was said on his behalf about the money for the lawyers having run out [Opening Day 1, page 115, line 15 - page 116, lines 1-2]. This is not conclusive as to his financial circumstances, but absent detailed explanation as to how he would be good for damages (as well as costs) if he lost the action, it presents another answer to the case that damages would be an adequate remedy.

220. Insofar as Dr Halim prays in aid how damaging an injunction would be to his nascent business, the answer is as follows. First, he has prepared for this business in breach of his

duty of fidelity. Secondly, he has done so with his eyes open as regards at least the possibility that his activities amount to a breach of the PTRs. Thirdly, when he was asked about his intentions, he gave misleading information to Mr Thompson: had he told the true position, he would have been asked to provide undertakings at that stage, and probably would have been put on garden leave for a longer period of time in the meantime. Fourthly, when he was asked to provide undertakings on 31 August 2018, he did not provide them, and had he done so and desisted from his competitive business, the harm to him would have been much less.

221. A further argument on behalf of Dr Halim has been acquiescence on behalf of Argus to the new business of Dr Halim. Although acquiescence is not fully pleaded, it is stated in the Defence that Argus *"has been aware of the Defendant's intentions as to future work from the outset and failed to raise concerns with him then…"* (Defence, paragraph 48). This is wrong. Even on his own evidence, Dr Halim did not give a full or clear account of his plans. He did not say he was going to be publishing an African weekly fertiliser report. On the contrary, not only did he not give a clear account of his plans, but as I have held, his explanation given in his email has been misleading. In this regard, I refer to my findings concerning the discussions which he had with Mr Thompson on 12/13 July 2018 and the explanation of his plans on 3 September 2018. It is therefore apparent that neither was there clear and unequivocal conduct or a representation giving rise to the basis for acquiescence, nor was there reliance on the same by Dr Halim making it dishonest or unconscionable for Argus to complain about the same or to seek injunctive relief: see *Shaw v Applegate* [1977] 1 WLR 970 at page 978D per Buckley LJ. On the contrary, immediately before termination of employment, on 31 August 2018 when Argus's solicitors wrote to Dr Halim seeking undertakings that he would comply with clauses 17.2-17.4, it was plain that Argus would regard him as acting in breach of covenant if he pursued the Afriqom business.

222. I accept that an injunction will cause Dr Halim hardship, but in the circumstances, I do not regard such hardship as making it unconscionable for an injunction to be ordered against him. In my judgment, Dr Halim has brought this hardship upon himself by his conduct, particularly in the respects set out in the previous paragraph but one above. I stated at the outset of this judgment that it would be necessary to consider whether these proceedings as a whole or aspects of them reflect an unreasonable attempt to stifle a legitimate business. That is not what has occurred: Dr Halim has conducted himself unlawfully in connection with Afriqom, and Argus is seeking reasonably to protect its business against that unlawful conduct. In the circumstances, the general rule applies that the PTRs will be enforced, and Dr Halim has not persuaded the Court to take the view that there should be no injunction.

223. Further, having considered that the PTRs were at the time of the contract no wider than reasonably necessary to preserve the legitimate interests identified above, I have considered whether at the time of the enforcement, it is reasonable to enforce them. For substantially the same reasons that I have found that they were reasonably necessary at the inception, in my judgment it is reasonable by injunction to enforce them at this stage.

224. The position is not affected by the offer on behalf of Dr Halim on 21 December 2018, the last day of the trial, for the duration of the covenants not to act as such in respect of the services that he was not offering. Whilst that indicates at least that he is not offering such services at present and is willing to desist from offering them, it does no more and it does not assist one way or the other as to whether enforcement of the covenant is reasonable at this stage and as to whether the Court ought to order injunctions as sought.

225. In view of the foregoing, in respect of issue 15, this is the trial of liability and injunctive relief. There is no basis to treat the continuation of injunctive relief as an interim matter and await any further trial, if there is one, as regards damages. In respect of issue 16, an injunction to enforce Clauses 17.2-17.4 is appropriate.

Issue 17: Should the Court grant an injunction to restrain Dr Halim from misusing Argus's confidential information?

226. There are a number of reasons why I regard an injunction as regards the misuse of confidential information as inappropriate. I say this notwithstanding the fact that since September 2018, there has been an undertaking in place as regards confidential information. The reasons for my reservations are not because of a belief that there has been no misuse of confidential information, but for the following reasons:

226.1 The injunction sought is defined by reference to Confidential Information, and insofar as that has a definition, that appears to be by reference to the language of Clause 16.1. As set out in paragraphs 204-205 above, Argus has acknowledged a difficulty about the ambit of Clause 16.1 such that it ought to be construed as being limited to trade secrets or other information of a sufficiently confidential nature to warrant equivalent protection. As drafted and without being interpreted in this narrow way, the clause is so wide that it appears to restrict the use of general know-how which is impermissible. Given that the only way that the Clause might be given effect would be to restrict its application to such as to limit it to that which meets the threshold of information meriting such protection, then the Clause provides an unsuitable basis for the definition of Confidential Information in an injunction.

226.2 In any event, despite the broad terms of the undertaking thus far, the breadth of the wording of Clause 16.1 is far too imprecise in the context of a permanent injunction, leaving a defendant in difficulty to know what is and is not the subject of an injunction. It is no answer to say that this is a problem for a committal. If an injunction is so uncertain that a respondent is likely to be in doubt as to its ambit, then generally it should not be ordered.

226.3 No time period has been attached to the injunction. There may be cases where it suffices to say that it is for so long as the information is outside the public domain, but particularly in a case such as the present which has the difficulties already as discussed in the previous sub-paragraph, this formula simply would add to the uncertainty.

226.4 It seems to me in circumstances where Argus has enjoyed the benefit of the undertaking as to confidential information for almost four months and where it is about to have a permanent injunction in place to enforce the PTRs at Clauses 17.2-17.4 based in part upon the legitimate interest of the confidentiality of information of Argus, the relief going forward in the form of the PTRs meets the justice of the case. Accordingly, in the exercise of my discretion, I should not add to the scope of the injunctions by a further injunction as regards confidential information on top of the injunctions which I intend to order mirroring the form of the PTRs.

Issue 18: Has Dr Halim obtained an unlawful head-start by any of the breaches alleged above?

Issue 19: What is the appropriate scope and duration of springboard injunction to undo the unlawful head-start?

227. Dr Halim has obtained an unlawful head-start and has been able to hit the ground running by establishing a new market report before his employment with Argus had even terminated. The head-start achieved was only possible by Dr Halim (a) misusing Argus's confidential information, (b) acting in breach of fidelity, and (c) being in breach of PTRs. Each of these activities can be the basis for springboard relief: see *QBE v Dymoke* above.

228. It is well established that the Court has power to grant a springboard injunction to cancel out an 'unfair head-start' obtained by unlawful means. As explained by Haddon-Cave J in ***QBE v Dymoke*** at paragraphs 239–247:

> *"First, where a person has obtained a 'head start' as a result of unlawful acts, the Court has the power to grant an injunction which restrains the wrongdoer, so as to deprive him of the fruits of his unlawful acts. This is often known as 'springboard' relief.*
>
> *Second, the purpose of a 'springboard' order as Nourse L.J. explained in Roger Bullivant v Ellis [1987] ICR 464 is "to prevent the defendants from taking unfair advantage of the springboard which [the Judge] considered they must have built up by their misuse of the information in the card index" (at page 476G)…*
>
> *Third, 'springboard' relief is not confined to cases of breach of confidence. It can be granted in relation to breaches of contractual and fiduciary duties…and flows from a wider principle that the court may grant an injunction to deprive a wrongdoer of the unlawful advantage derived from his wrongdoing…*
>
> *Fourth, 'springboard' relief must, however, be sought and obtained at a time when any unlawful advantage is still being enjoyed by the wrongdoer…*
>
> *Fifth, 'springboard' relief should have the aim "simply of restoring the parties to the competitive position they each set out to occupy and would have occupied but for the defendant's misconduct"…It is not fair and just if it has a much more far-reaching effect than this, such as driving the defendant out of business…*
>
> *Sixth, 'springboard' relief will not be granted where a monetary award would have provided an adequate remedy to the Claimant for the wrong done to it…*
>
> *Seventh, 'springboard' relief is not intended to punish the Defendant for wrongdoing. It is merely to provide fair and just protection for unlawful harm on an interim basis. What is fair and just in any particular circumstances will be measured by (i) the effect of the unlawful acts upon the Claimant; and (ii) the extent to which the Defendant has gained an illegitimate competitive advantage…The seriousness or egregiousness of the particular breach has no bearing on the period for which the injunction should be granted…*
>
> *Eighth, the burden is on the Claimant to spell out the precise nature and period of the competitive advantage. An 'ephemeral' and 'short term' advantage will not be sufficient…"*

229. At paragraph 284 of *QBE v Dymoke*, Haddon-Cave J said the following:

> *"The Court must assess the actual advantage gained by wrongdoers as a result of their unlawful activities and grant appropriate relief. Springboard injunctive relief is for unlawfully 'stealing a march' on competitors. The essential question is therefore: how much of a march have the Defendants in this case, in fact, stolen on the Claimant as a result of their wrongdoing? This depends on both the length and tensile strength of the 'springboard' itself and gauging the relative advantage gained by its use…".*

230. Helpful guidance was given by Simler J in *De Vere Holding Company Ltd v Belgravia Wealth Management Europe KFT* [2014] EWHC 3189. At paragraph 39, she said:

> *" ... Even if I am satisfied that the defendants, or some of them, have made unlawful use of material belonging to the claimants, that is not enough to found a claim for springboard relief. The claimants must show that the defendants have gained an unfair competitive advantage over the claimants and that that advantage still exists and will continue to have effect unless the relief sought is granted. It is clear from the authorities that the court should exercise considerable caution both as to whether to grant such an injunction at all and, if so, as to its form and duration. In particular, the duration of such an injunction should not extend beyond the period for which the defendants' illegitimate advantage may be expected to continue because such injunctions are granted to protect against and to prevent further loss, rather than being used to punish for past breaches of contract."*

231. Argus contends that as a result of his breaches of his duty of fidelity and/or confidence and/or PTRs, Dr Halim got a head-start of being able to launch a competitive business at least 12 months before he would otherwise have been in a position to do so if he had acted lawfully. It is also said that regard must be had to the period of almost 4 months (by the time of judgment) that Dr Halim has been permitted to continue to act in competition with Argus because there was no non-compete undertaking: only undertakings against solicitation and dealing with Restricted Clients and in relation to confidential information. In deciding not to grant an interim injunction as regards non-dealing, Andrew Baker J took into account the possibility of the Court at trial ordering a springboard injunction of longer than the PTRs to cancel the unlawful advantage of dealing in breach of the PTRs.

232. In these circumstances, Argus seek springboard relief for the duration of the covenants (i.e. 15 May 2019) together with an additional 3-month period to reflect the time between 21 September 2018 and the date of judgment, during which Dr Halim has been able to continue to benefit from his unlawful head-start and has benefited from running his Afriqom business in breach of his non-compete restriction. In its opening, Argus placed reliance on its evidence that it would have taken Dr Halim 12-18 months to reach the position he was in at the AGRF conference which would have been to September 2009 at earliest and to March 2020 at latest.

233. Argus submits that the wording of the restraint is flexible according to the particular case. It contends that in this case, the appropriate relief, as in *Dorma UK Ltd. v Bateman* [2015] IRLR 616 is to adopt the wording in the PTRs

234. I have come to the view that springboard relief is not appropriate in the circumstances of this case. I reach this conclusion for the following reasons:

234.1 Despite the serious and protracted breaches of duty of fidelity and/or confidence during the currency of the employment contract, there is no evidence of the provision of services to clients during the currency of the employment contract.

234.2 This is not a case where Dr Halim has disabled Argus for example by poaching key employees or by soliciting successfully to himself a key customer at the expense of Argus. There is no evidence of losses of custom of Argus either during the time of the employment contract or thereafter, albeit that there have been difficulties in retaining custom in respect of some customers who have been solicited.

234.3 On the contrary, the application for the injunctions and the undertakings sought have been at such an early stage that the head-start of being able to publish the Afriqom weekly report must have been in large respects reduced.

234.4 It is possible that there is missing significant evidence in the nature of the disclosure which might be obtained at the quantum stage, and particularly any evidence of the precise business acquired by Afriqom. Notwithstanding this, I have been asked by Argus to order the springboard injunction as a final injunction at a time when this evidence is not available. Argus has been unable to define the precise nature and duration of the competitive advantage if any arising out of the unlawful acts of Dr Halim. In any event, it seems unlikely that any further evidence available as to quantum would be of such assistance that it might change the position as regards a springboard injunction.

234.5 I am mindful about the impact of the combined effect of the injunctions which I shall grant in respect of the PTRs and these proceedings on Dr Halim. As regards the former, if Dr Halim has earned any advantage by trading in breach of the non-dealing PTR, the effect of having now to cease to do so for the next four months must present him with a serious credibility problem in the market, albeit one of his own making. Likewise, the effect also of his having to prepare for and concentrate on this speedy trial must have affected his ability to trade as effectively as he would have done without these proceedings.

234.6 There has not been presented a springboard injunction in confined terms by reference to the particular advantage which Dr Halim obtained, confined to particular customers which he solicited and/or his particular competitive endeavours. The terms of the PTRs were not designed specifically around the particular head-start obtained in this case.

234.7 In any event, there has not been shown that in addition to the injunctions which I am about to order up to 15 May 2019 that without a springboard injunction, Dr Halim will continue to earn an unfair competitive advantage. Bearing in mind the need to exercise considerable caution about a springboard injunction both as to whether such an injunction should be granted at all and, if so, as to its form and duration, I am not persuaded that it would be right to do so in this case.

DISPOSAL

235. There will be injunctions in the terms of Clauses 17.2, 17.3 and 17.4 until the expiry of 9 months from the commencement of the garden leave, that is until 15 May 2019. There will be no further injunction in respect of confidentiality or springboard.

236. This has been ordered to be a split trial. I have found that there have been breaches of duties of fidelity and of confidence and of the PTRs which are identified in this judgment. It will be necessary to consider how this is to be drawn up in an order and how the issue of damages is to be taken further, if at all. Further, if there are further or more precise findings as regards the extent of the breaches which are capable of being given and which would be required for the assessment of damages, then this should be reserved so that this aspect of the case, so closely related to damages, is not closed by reason of this judgment being determinative of all issues of liability. This is not intended as an encouragement to the continuation of this action, but it is intended as pragmatic given the close link between liability and quantum.

237. The parties should endeavour to agree a form of order, and the Court will resolve such matters, if any, as remain in issue.

238. I am extremely grateful to all Counsel for the outstanding way in which they have conducted this trial which has been of the highest standard and of great assistance to the Court.