Neutral Citation Number: [2024] EWHC 562 (KB)

Case No: KB-2023-003441

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:13/03/2024

Before :

MR JUSTICE KERR

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Between :

X-R TOURING LLP	**Claimant**
- and –	
(1) JOSHUA JAVOR **(2) WILLIAM MORRIS ENDEAVOR ENTERTAINMENT (U.K.) LIMITED**	**Defendants**

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Mr Thomas Croxford KC and Ms Celia Rooney (instructed by **Russells**) for the **Claimant**
Mr David Reade KC (instructed by **Marriott Harrison LLP**) for the **First Defendant**
Mr Adam Solomon KC (instructed by **Morgan, Lewis & Bockius UK LLP**) for the **Second Defendant**

Hearing date: 9 February 2024

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down at 10am on 13 March 2024 may be treated as authentic.

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Mr Justice Kerr :

Introduction

1. There are two applications before the court, made on 19 and 20 October 2023. Each of the defendants applies to strike out the claim or for summary judgment. The claimant (**X-R**) operates a UK based concert booking agency for artists in the music industry and is the former employer of the first defendant (**Mr Javor**), who has left that employment to work for the second defendant (**WME**), a company in the same business.

2. The claim, brought in September 2023, is in two parts. First, X-R seeks a declaration and injunction to enforce post-termination restrictions in Mr Javor's employment contract; against Mr Javor, damages for breach of them; and against WME, damages for inducing breach of them. Second, X-R seeks a declaration of entitlement to commission and, in the claim form and prayer to the particulars of claim, appropriate monetary remedies[1] in respect of bookings which, X-R says, originated during Mr Javor's time at X-R.

3. The applicable principles are familiar to the parties and the court. The rules in play are CPR rule 3.4 and rule 24.2. The court can strike out a claim or part of it if it appears that the statement of case or part discloses no reasonable grounds for bringing the claim (rule 3.4(2)(a)). The correct approach in summary judgment applications may be found in authorities such as *Easyair Ltd v. Opal Telecom* [2009] EWHC 339 (Ch) per Lewison J (as he then was) at [15]. There must be grounds for bringing a claim. Its prospects must be more than fanciful.

4. I must not conduct a mini-trial. I can look at uncontradicted accounts and documents. Generally, I take the facts and the law at their highest in the claimant's favour, except for any facts that are implausible even without further investigation. If a decisive short point of law or construction is suitable for summary determination, I should grasp the nettle and decide it. But if disclosure or testimony is needed to decide a point, there should be a trial on that point. I should take into account not just current evidence but also evidence that can reasonably be expected to be available at trial.

Outline of the Facts

5. X-R was incorporated in 2005. Among the founding members was the late Mr Stephen Strange, a legend in the industry. X-R's business is to organise and schedule concerts in many countries at which artists perform; and to negotiate and agree the terms on which they will perform, customarily though not always in return for a percentage of the artist's gross earnings from the performance.

6. Mr Javor joined X-R in 2008 as an employee and booking agent, working as part of Mr Strange's team. By the time Mr Strange died in September 2021, Mr Javor had become his leading team member and is described by Mr Ian Huffam of X-R as Mr Strange's "trusted right hand man". Mr Javor took over Mr Strange's roster of illustrious artists, including many well known names.

7. X-R's case, assumed for present purposes to be correct, is that the lead time for arranging a performance can be long; many concerts are negotiated, arranged and booked months, sometimes years, in advance of the performance. X-R's case is that Mr Javor was involved in discussions in 2022 and 2023 with concert promoters and client artists about performances that subsequently took place, or were scheduled to take place, after he left X-R to work for WME.

[1] However, in its skeleton argument, X-R says its "only claim in respect of the Commission Obligation is a claim for declaratory relief."

8. From 1 April 2022 Mr Javor entered into an employment contract with X-R. Although it is dated "May 2022" and he did not sign it until 29 June 2022, it is common ground that it took effect from 1 April 2022 which is the start date mentioned in clause 1, with continuity of employment since January 2008. He was employed, as before, as a booking agent securing bookings for X-R's artists and negotiating with promoters the terms on which the artists would perform.

9. Clause 1 provided for a fixed term of almost one year's employment up to 30 March 2023, unless extended by agreement, or unless the contract were terminated earlier. X-R could terminate on three calendar months' notice, or immediately on payment of three calendar months' pay in lieu of notice, within the one year term; or, at X-R's option, with part or all of the three month period spent on garden leave and/or working from home or performing different duties from the usual ones.

10. Mr Javor's "basic salary" was, by clause 4, £350,000 per annum, payable in monthly instalments. That sum was described as his "basic" salary but he was not entitled to any further remuneration such as bonus or commission. He was, straightforwardly, employed on a fixed salary.

11. Clause 13, at the heart of this case, was headed "Post-Termination Obligations". It was not divided into sub-paragraphs. I will refer to the first passage in bold italics below as **the non-solicitation covenant** (or **the covenant**) and to the second as **the commission provision**. Clause 13 as a whole provided:

> "***You shall not during your period of employment or for a period of 12 months from the date of termination (howsoever termination occurs) endeavour to entice away from the Company or solicit or interfere with any employee, client, artist, person, firm or company who was at any time during the 12 months immediately preceding the termination date engaged by, doing business with or was a client / artist of the Company and with whom you had material or personal contact during the 12 months immediately preceding the termination date.*** You shall not interfere or seek to interfere with the continuance of the supply (or the terms of such supply) of services to or by the Company from any business or customer who was at the date of termination of your employment providing or supplying material business services to the Company. ***All commission and other monies related to bookings or potential bookings discussed, scheduled, made or contemplated (whether or not actually contracted) or to be made prior to the date of termination of your employment (whether or not such bookings are to take place after the end of your employment with the Company), shall belong to the Company, and if any such commission or other monies are received by you or any other person or entity associated with you (including any future employer) you undertake to hold such monies on trust for us, and pay to us immediately all such monies without deduction or set off. You shall ensure that all such bookings are contracted via the Company and that the Company shall be entitled to receive 100% of all applicable commission(s) payable in respect of such bookings.***"

12. Mr Javor then worked for X-R under his contract through the rest of 2022. In January 2023, he was considering alternative career options, including joining WME, as he told Ms Lucy Dickins, a California based manager of WME (or its US parent), at the time. He showed Ms Dickins the salient parts of his employment contract, including the termination provisions and the post-termination obligations (respectively, clauses 1 and 13).

13. Ms Dickins' evidence is that WME took legal advice on clause 13 and, without waiving privilege in respect of the advice received, she and WME's chief operating officer, Mr Dan Limerick, formed the view on the basis of that advice that the commission provision was unenforceable. On the other hand, she considered that the non-solicitation covenant "should be adhered to by [Mr Javor]" (see paragraphs 10 and 11 of her witness statement).

14. On 3 March 2023, Mr Matt Woolliscroft, a promoter of proposed concerts by Coldplay (a major client of X-R) at Wembley in August 2025, emailed Mr Javor about the proposed string of dates and possible clashes with international football fixtures. A decision from the Football Association would be sought by September 2023, Mr Woolliscroft explained. Mr Javor was then, of course, still employed by X-R, but the one year term was due to expire at the end of March 2023.

15. After it did expire, on 16 May 2023 Mr Javor informed the directors of X-R verbally that he had decided to leave X-R. The next day, he confirmed that in an email saying it should be considered his "notice of resignation". He noted in the email that his employment contract had "expired on 30 March 2023" but he had "continued to work beyond that date on the basis that we were negotiating new terms, but those discussions have been unsuccessful". His employment would, he said in the email, "terminate on 31 May 2023".

16. On 17 May 2023, the day after the email was sent, Mr Javor signed a detailed written contract with WME, of which I have a heavily redacted copy. The start date or proposed start date, if there was one, is redacted out (clause 1.2). It is not clear from the document what country's or state's law governs it; though I was told at the hearing there is a redacted out choice of law clause stating that the governing law is that of England and Wales. The inference is that Mr Javor would start at WME once he had extricated himself from X-R.

17. As early as 19 May 2023, solicitors' correspondence between X-R and Mr Javor started. X-R were clearly highly suspicious of Mr Javor's activities and sceptical about his continuing loyalty to X-R. It is clear from the correspondence that X-R already believed Mr Javor's allegiance lay elsewhere. An injunction application against him was threatened and undertakings sought. The barrage of correspondence continued unabated for months thereafter but without any application for an injunction being made.

18. On 31 May 2023, Mr Javor's solicitors stated in a letter that to be helpful, he was willing to extend his employment until 14 June. After that, it was extended for further short periods week by week in June 2023, though Mr Javor (not on garden leave) did not attend X-R's offices between 16 May and 11 July 2023. During that absence from his place of work, Mr Javor and at least one of his X-R team provided on 22 June 2023 an update to Coldplay's manager about the August 2025 Wembley dates, together with the "rate card" for the venue of £700k per night.

19. On 12 July 2023, X-R's solicitors noted in a letter Mr Javor's reappearance at the office. They accepted that he would work out his notice and that his last day of employment would be 17 August 2023. The tense correspondence continued; undertakings were refused and Mr Javor's solicitors said in a letter of 19 July 2023 that he "does not agree to be gagged" and if "asked a straightforward question about his future plans, our client is entitled to say that he is leaving [X-R] and that he intends to join WME at a later date".

20. On 20 July 2023, Coldplay's management announced concert dates in 2024 and "holding" dates in 2025. X-R's Mr Huffam formed the view that Mr Javor had been in discussions with Coldplay about concert dates intended to be performed after Mr Javor's departure from X-R; as well as similar discussions about concerts in other countries, namely Hong Kong, Japan, South Korea, Mexico, Spain and Brazil. In his view, as he explained in his witness statement, these concerts were "precisely what clause 13 is intended to capture".

21. On 11 August 2023, with a week of his employment left, his solicitors refused to provide information about his client contacts. His solicitors wrote that he "will not be providing a running

commentary regarding the clients he had, or did not have, material or personal contact with during the last 12 months". The solicitors assured X-R that he "will abide by the terms of the non-solicitation restrictive covenant in the first sentence of clause 13 of his employment contract".

22. Next, Ms Dickins explains in her witness statement that "[a]round 14 August 2023" (a Monday), WME released a press statement to certain media outlets regarding Mr Javor joining WME. It is common ground that this would be a matter of interest in industry circles. The day before the statement was released to the media, Mr Javor received another email of 15 August from Coldplay's manager about financial terms for the Coldplay shows and in particular the commission payable.

23. The press statement was in fact dated 16 August 2023, the penultimate day of Mr Javor's employment with X-R, and marked "London, UK". In it, WME announced that he "has joined the agency's London office as Partner and co-head of London's music department". In his 17 years with X-R Mr Javor had "guided the careers of a diverse range of artists". They were then named, with Coldplay first on the list, followed by Eminem. There were 32 named artists. Mr Javor had, according to a quote attributed to Ms Dickins:

> "not only built a roster of artists that shape music, he's also been an integral part of building the international touring industry as we know it today".

24. Mr Javor was then himself quoted as saying:

> "Steve Strange and I built an incredible business at X-Ray over the last 18 years through teamwork and passion for our artists … I'm excited to start this next chapter at WME and to continue this legacy with the team in London and across the world."

The statement ended with a list of WME's roster of artists, client highlights and achievements.

25. Mr Javor's last day of employment with X-R was 17 August 2023. X-R's solicitors complained in a letter that day that a "plethora of news stories appeared online" at around 5pm the previous day. The solicitors had not at that stage seen the press statement or discovered its timing. They regarded the news stories as evidencing a breach of the non-solicitation covenant and lamented that "acknowledegments [sic] and confirmations given by a longstanding member of its staff appear to have proven to be hollow and false".

26. Mr Javor began working for WME the next day, 18 August 2023. The solicitors' correspondence continued, its tone a bit fractious but within the bounds of courtesy. X-R then brought this claim, on 6 September 2023. No interim relief was sought. After that, in the period from 21 September to 2 October 2023, five members of Mr Javor's former team at X-R resigned and have since started working for WME: Paul Lomas, Hannah Edds, Gill Beattie, Claire MacLeod and Kath Butler.

27. Mr Huffam explained in his witness statement that X-R is "suspicious" of Mr Javor's and WME's assurances that these five "independently reached out to WME". In his view, "the prospect of those individuals all independently seeking fresh employment without the slightest encouragement from [Mr Javor] strikes me as slight".

The Non-Solicitation Covenant

28. As explained above, the non-solicitation covenant in the first sentence of clause 13 of Mr Javor's employment contract says he shall not during employment and for 12 months thereafter:

> "endeavour to entice away … or solicit or interfere with any employee, client, artist, person, firm or company who was at any time during the 12 months immediately preceding the termination date engaged by, doing business with or was a client / artist of the Company and with whom you had material or personal contact during the 12 months immediately preceding the termination date."

29. The issues arising from the non-solicitation covenant, applying the principles I have mentioned, are whether there is any real prospect of the covenant being found enforceable at trial; if so, whether there is a real prospect of the claimant proving a breach of it by Mr Javor; and, if so, inducement of the breach by WME. It is common ground that the restraint of trade doctrine applies to the covenant, that its purpose is to protect X-R's business connections with its customers and employees; and that these connections are, in principle, legitimate and protectable interests.

Submissions of Mr Javor:

30. Mr David Reade KC submits that the position is already clear at this stage. The claim for breach of the non-solicitation covenant is doomed to fail; first, because the covenant is plainly unenforceable and, second, because there is no real prospect of establishing a breach of it by Mr Javor (and without any such breach, WME cannot have induced any breach). All that being plain and obvious at this stage, I should grasp the nettle and so decide, avoiding a futile and unnecessary trial.

31. In his skeleton argument, Mr Reade set out many of the principles governing post-termination covenants in restraint of trade, by reference to well known cases. I record that among the citations were *Quantum Actuarial LLP v. Quantum Advisory Ltd* [2022] 1 All ER (Comm) 473, per Carr LJ (as she then was) at [53]-[61]; *Proactive Sports Management Ltd v. Rooney* [2012] FSR 16 (in the judgment of Arden LJ, as she then was, at [59]); *Marshall v NM Financial Management Ltd* [1997] ICR 1065, [1997] 1 WLR 1527, per Millett LJ at 1533B-C; *Office Angels Ltd. v. Rainer-Thomas* [1991] IRLR 214, per Sir Christopher Slade at [21]-[25]; and *TFS Derivatives Ltd v. Morgan* [2005] IRLR 246, per Cox J at [36]-[38].

32. I do not think it is necessary to go through the cases and repeat here the principles and propositions for which they stand as authority. There was no dispute between the parties about what those principles and propositions are; which is not surprising as they are well known and the law is quite well settled. The dispute was about what result their application here should produce.

33. On the construction of covenants in restraint of trade, Mr Reade referred me to *Arbuthnot Fund Managers Ltd v Rawlings* [2003] EWCA Civ 518, per Chadwick LJ at [24]; and *Prophet plc v Huggett* [2014] EWCA Civ 1013, per Rimer LJ at [33]. The court steers a middle course between giving the clause an extravagantly wide interpretation and an artificially narrow one. The court asks itself the question what the parties intended by their bargain, at the time they entered into it.

34. Of two possible meanings, the court will prefer one that preserves the clause's validity, but only if the language is truly ambiguous and both interpretations tenable. This is, again, not controversial. And Mr Reade reminded me of the decision in *JA Mont (UK) Ltd v Mills* [1993] FSR 577 and in particular the observation of Simon Brown LJ, as he then was, at 584-585 that "the court should not too urgently strive to find within restrictive covenants *ex facie* too wide, implicit limitations such as alone could justify their imposition."

35. On the meaning of solicitation, Mr Reade referred me to the decision of Haddon-Cave J (as he then was) in *QBE Management Services (UK) Limited v Dymoke* [2012] IRLR 458, at [184]-[185]. The

judge referred there to the "time-honoured test" in *Trego v Hunt* [1896] AC 7, which drew a distinction at pages 20-21 between a general appeal for custom and a specific and direct appeal to those who were customers of the previous firm. The latter is solicitation, the former is not.

36. Although Mr Javor had agreed in correspondence (without offering a formal undertaking) to abide by the non-solicitation covenant, Mr Reade made clear, as his solicitors had done in correspondence, that this did not mean Mr Javor conceded the validity of the covenant. On the contrary, Mr Reade submitted that it was unenforceable because, while it was aimed at protecting X-R's customer connections, a legitimate interest capable of protection in principle, it went further than reasonably necessary to protect that interest.

37. Developing that argument, Mr Reade pointed out that the employment was terminable, within the one year term, on three months' notice and an option to put Mr Javor on garden leave during all or part of that period, but with no set-off of time spent on garden leave against the duration of the post-termination restriction. Thus, the true period of restraint was up to 15 months out of the market, including any time spent on garden leave.

38. Mr Reade said the claimant bears the burden of showing the reasonableness of the clause, yet X-R's evidence in support of that case was inadequate. It had not properly pleaded or led evidence about why the covenant was reasonable. The evidence of Mr Huffam about customer connection was "equivocal". He appeared to be saying the connection was really with Mr Strange, while he was alive; not that Mr Javor was uniquely placed, unlike other members of Mr Javor's team, to take over the connection with Mr Strange's artists.

39. Further, said Mr Reade, there was no prospect of establishing a breach of the non-solicitation covenant by Mr Javor. The alleged enticing away of employees is not, he pointed out, pleaded as part of the complaint. It can therefore be disregarded and does not assist X-R's case. The only pleaded breach is the soliciting of artists by means of the communications leading to the press articles announcing Mr Javor's departure from X-R and that he had joined or was about to join WME.

40. That allegation is not, Mr Reade says, of a specific and direct appeal to the artists mentioned in the articles to move their business from X-R to WME. The pleading alleges merely a general appeal for business. The press statement falls far short of solicitation. It did not suggest that any clients would move with Mr Javor away from X-R. The claim should be struck out also because Mr Javor had confirmed that he would comply with the covenant in future and X-R could raise no doubt that he would be as good as his word.

Submissions of WME:

41. For WME, Mr Adam Solomon KC submitted in his skeleton argument that "none of the small number of relevant facts is disputed" and that the points in issue are "eminently capable of being dealt with summarily". That did not mean things said by a claimant must be accepted without analysis or that a claimant could rely on later disclosure in the hope that (as expressed by Mr Micawber) something will turn up. There was no arguable breach or wrongful act by either party, he contended; and anyway both the provisions in issue were "obviously unenforceable".

42. WME had, Mr Solomon pointed out, assured X-R that it required Mr Javor to comply with the non-solicitation covenant. The latter, likewise, had committed to abiding by it and had done so. It was therefore irrelevant that formal undertakings had been refused. WME's submissions on the prior issue of unenforceability came at the end of the exposition: the covenant must be

unenforceable because it purports to prohibit the poaching of any employee, however junior, with whom Mr Javor had material or personal contact during the 12 months up to termination.

43. There was no justification in the evidence for the restraint to apply to an employee who is "very junior and has no access to confidential information, or who has nothing to do with sales or trade relations (such as the person who cleans the office)", Mr Solomon submitted. He relied on the decision of Peter Whiteman QC (sitting as a deputy judge of the High Court) in *TSC Europe (UK) Ltd v Massey* [1999] IRLR 22 at [51], following dicta in *Hanover v Schapiro* [1994] IRLR 82, CA; and on the decision of Robert Walker J (as he then was) in *Dawnay, Day & Co Ltd v de Braconier d'Alphen* [1997] IRLR 285, at [78].

44. The non-solicitation covenant could not be saved by severance, applying a "blue pencil", WME submitted. The covenant here offended against the third criterion for severance articulated by Lord Wilson JSC in *Egon Zehnder Ltd v Tillman* [2019] UKSC 32, [2020] AC 154, at [87]:

> "whether removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract. It is for the employer to establish that its removal would not do so. The focus is on the legal effect of the restraints, which will remain constant, not on their perhaps changing significance for the parties and in particular for the employee."

45. As to arguable breach of the non-solicitation covenant, Mr Solomon submitted, first, that there is no pleaded or factual basis for asserting that Mr Javor has already breached the covenant. Only the press articles resulting from WME's press statement are relied on. These do not arguably amount to solicitation. Echoing Mr Reade's argument, he contended that the required exerting of "influence" over clients, with "a material element of persuasion" was lacking (*Towry EJ Limited v Bennett* [2012] EWHC 224 (QB) per Cox J at [440]; cf. Lewison LJ in *Ranson v Customer Services plc* [2012] IRLR 769, at [31], citing Maugham LJ in *Wessex Dairies v Smith* [1935] 2 KB 80, at 89).

46. Turning to the inducement claim in tort, Mr Solomon submitted that the particulars of claim contained no plea that X-R had suffered any loss, without which element the cause of action for inducing breach of contract is not complete (Clerk & Lindsell on Torts (24th ed), at 23-58; *Jones Brothers (Hunstanton) Ld. v Stevens* [1955] 1 QB 275, CA).

47. The bare assertion of "loss and damage" at paragraph 25 of the particulars of claim does not suffice to plead the full cause of action, says Mr Solomon. And even if it did, he says, the defendants' assurances of compliance are unassailable, without cross-examination, and fatal to the claim in tort; there is no basis for gainsaying those assurances. They also remove any basis for the grant of any declaratory relief, a discretionary remedy.

Submissions of X-R:

48. The submissions for X-R of Mr Thomas Croxford KC, leading Ms Celia Rooney, support their proposition that all issues arising in respect of the non-solicitation covenant are fit for trial and not fit for summary determination. No fatal blow is struck to the claim for breach of, and inducing breach of, the covenant. It is valid and likely to be held such at trial. There is a strong and properly pleaded case, X-R submits, that the press statement and resulting articles were part of a concerted plan to lure Mr Javor's "roster" of artists from X-R to WME, causing loss to X-R.

49. In slightly more detail, the following contentions are advanced. First, the assurances of compliance with the covenant are not accepted, not least because it has already been breached.

They are unsupported by any formal undertaking or by evidence from Mr Javor himself. At a trial, disclosure and cross-examination would be likely to confirm what is already a strong factual inference that the defendants acted in furtherance of a plan to solicit and obtain X-R's clientèle.

50. Mr Croxford submitted that the Court of Appeal in *Safety Net Security Ltd v. Coppage* [2013] IRLR 970 had doubted the reasoning in *Arbuthnot* (relied on by Mr Javor) and had emphasised that the validity of a post-termination covenant is "highly sensitive to the individual facts of each case" (per Sir Bernard Rix at [15]-[17] and at [24], Sir Stanley Burnton concurring, at [38] and Ryder LJ agreeing with both judgments, at [39]).

51. X-R's present inability to particularise its losses fully is a natural consequence of the clandestine manner in which the defendants have acted. However, that is not the same as saying that X-R has not pleaded its loss properly or that it cannot have suffered any loss or that it will not suffer losses in future. It is obvious that client movements cause loss to the loser and benefit the acquirer. The court takes account of evidence reasonably expected at trial as well as current evidence.

52. Mr Croxford submitted that the non-solicitation covenant protects X-R's legitimate interest in avoiding "a mass departure of clients and artists upon the departure of a particular booking agent" and goes no further than necessary to protect that interest; particularly since the employment contract contains no post-termination prohibition against being employed by a competitor such as WME. Mr Huffam's evidence about X-R's historic success in acquiring clients adequately documents its need and right to preserve those connections.

53. The switch to WME of five former members of Mr Strange's team in the wake of Mr Strange's trusted right hand man joining WME, speaks eloquently to the reasonableness of the covenant, Mr Croxford submitted. The five employees moving to WME and the timing also casts serious doubt on the reliability of the defendants' assurances of compliance with the covenant. It is most improbable they would have moved without Mr Javor's encouragement. Mr Huffam's belief has not been contradicted by evidence from Mr Javor.

54. As for breach of the covenant and the claim against WME for inducing the breach, X-R says the defendants have not answered its legitimate concerns about their involvement in the press statement, its timing, the extent of its distribution and their contacts with those who published the resulting subsequent articles. Solicitation can occur by indirect means; and it is a question of fact fit for trial whether what occurred here amounted to soliciting of Mr Javor's "roster" of artists named in the press statement to follow him to WME.

The non-solicitation covenant; reasoning and conclusions:

55. I will start by reiterating the common ground. The covenant is a restraint which must go no further than necessary to protect X-R's connections with its clients and employees. Those connections are, in principle, legitimate and protectable interests. The first issue is whether the covenant is arguably enforceable. It is for X-R to show that it is. The assurances that Mr Javor will abide by the covenant, without conceding its enforceability, do not take the issue of enforceability any further. There is no claim for an interim injunction.

56. In my judgment, there is an issue fit for trial as to whether the non-solicitation covenant is enforceable. I do not accept Mr Solomon's contention that it is "obviously unenforceable". Mr Javor was a senior booking agent with access to X-R's best clients. Commission payments from those artists or their management or the promoters of their concerts represent X-R's source of income, the life blood of its business.

57. I do not accept Mr Reade's submission that the covenant must be unenforceable because there is no set-off provision in respect of up to three months that could be spent on garden leave. Even taking the full period of 15 months' restraint, it is arguable that the period is not too long. As Mr Croxford pointed out, there is no prohibition against working for a competitor or dealing with (non-solicited) customers during the 12 months after termination. The covenant does not keep Mr Javor out of the market for up to 15 months.

58. Nor do I accept Mr Solomon's submission that the covenant is necessarily unenforceable because it restrains the poaching of any employee, however junior, with whom Mr Javor had material or personal contact during the 12 months up to termination. I do not agree that the part of the covenant dealing with the soliciting of employees necessarily applies to, in Mr Solomon's example, the person who cleans the office.

59. A trial judge might plausibly interpret "any employee" with whom Mr Javor had "material or personal contact" during the last 12 months of employment as denoting employees doing the same kind of work as Mr Javor, i.e. those involved in securing bookings; on the basis that "any employee" should be construed *eiusdem generis* with "any … client, artist …." etc. If that is right, there would be no need to consider whether the word "employee" could be severed applying the blue pencil test, recast by Lord Wilson JSC in *Egon Zehnder*.

60. I ask myself next whether X-R can show a real prospect of proving a breach of the non-solicitation covenant. In my judgment, it can for the following reasons. There are gaps in the evidence but it is possible to consider cumulatively the evidence before the court so far, without speculating about how the gaps might or might not be filled; but looking at the likely permissible inferences at trial and bearing in mind that Mr Javor has exercised his right to silence rather than give any evidence on these applications.

61. At present, the following matters taken together produce, in my view, a case with a real prospect of success at trial. Mr Javor had access to X-R's top clients. He was in discussions about bookings with some of them at the same time as he was in discussions with WME, which started at the latest in January 2023. It was not wrongful as such, while employed by X-R, to talk to WME about joining WME; but the fact and timing of the talks is relevant background and context.

62. Second, Mr Javor appears to have been anxious to extricate himself from X-R as soon as he could. He did not accept, in his email of 17 May 2023, that he would remain employed by X-R beyond the end of May 2023. The same day, he signed an employment contract with WME, the start date of which is not clear and was not included as part of the defendants' evidence to support their case.

63. After that, Mr Javor was a reluctant employee of X-R, extending his employment week by week, engaging (through solicitors) in contentious correspondence and staying away from his place of work for eight weeks from 16 May 2023, while communicating by email with, at least, Coldplay about the Wembley dates in 2025. Assuming he was doing his job properly, he must also have been in contact with other X-R clients while away from its offices. He was clearly an employee on his way out behaving in a "semi-detached" way.

64. Next, the creation of the press statement predated termination of Mr Javor's employment by some three days; it was put together on around 14 August and dated 16 August, the penultimate day of his employment with X-R; yet it announced in the perfect tense that he "has joined" WME's London office. That was not strictly correct; he was to join WME two days later. This point is

more than technical given that Mr Javor must have been closely involved in the making of the press statement, in which his own words are quoted.

65. It is in that context that the issue whether the press statement, taken together with whatever other contacts Mr Javor had with X-R's artists and clients, crossed what I will call the "*Trego* line" separating a general appeal for custom from a specific appeal to customers to transfer their custom. A possible sub-issue is whether solicitation must be "direct" or may, as Mr Croxford submitted, be indirect. This is not a case in which the covenant used the words "directly or indirectly" (the words included in the covenant in *Towry EJ Limited v Bennett* [2012] EWHC 224 (QB) (see per Cox J at [85] and also her excellent exposition of the cases on solicitation, at [434]-[440]).

66. While Cotton LJ in *Trego v. Hunt* referred to the need for a "specific and direct appeal", I do not read the authorities cited as supporting the dogmatic proposition that a solicitation request must be addressed to an *individual* customer in every case. There is room for, or may be at trial found to be room for, solicitation by an appeal to the customers collectively. If the request is powerful enough, it could amount to an act of solicitation even if it is not expressed as such in so many words. The question should be one of substance not form.

67. There are several indicators in the press statement that it could amount to an act of solicitation by Mr Javor, in concert with WME, of the artists named in it as forming the "roster" Mr Javor inherited from Mr Strange. The first is its timing, or rather prematurity, which I have already mentioned, coupled with the misleading statement that Mr Javor had already joined WME as at 16 August 2023.

68. As for the content, the artists whose "careers" Mr Javor is said to have "guided" are named *seriatim*. Then, those artists are collectively described by Ms Dickins as a "roster of artists that shape music". Next, she adds that the London office Mr Javor has joined "is doubling down on being the leading team in the region and on the international stage". Then, Mr Javor's words include his intention to "continue this legacy", referring back to the 18 years he spent building an "incredible business" with Mr Strange.

69. The reaction of the publications (such as "IQ") which picked up the press statement and published its contents, is some evidence of the press statement's likely intended effect. What X-R's solicitors described as a "plethora" of articles online started to appear, on the evidence, from about 5pm on 16 August 2023, i.e. when Mr Javor was still supposed to be a loyal X-R employee - although the IQ article did say, correctly, that he would be starting work at WME on 18 August.

70. The resignation of the five employees and its timing, and the timing of their recruitment by WME, is not in my judgment irrelevant. While there is no pleaded claim that those employees were solicited, the team move is circumstantial evidence that may undermine the credibility of Mr Javor's assurances of compliance with the covenant. My comments on the evidence thus far show why the assurances do not assist the defendants at this stage. It is for the court, not the parties or any of them, to decide whether a breach occurred.

71. I consider next the claim against WME for inducing breach of the non-solicitation covenant. In my judgment it is fit for trial, by parity of reasoning. If the press statement was an act of solicitation of the artists on X-R's books named in it, WME clearly gave its encouragement and support to that act of solicitation. It is not suggested that WME's senior management believed the non-solicitation covenant was unenforceable.

72. I do not accept Mr Solomon's submission that the plea of loss and damage is no more than a bare assertion and that the pleaded cause of action in tort is therefore incomplete, a case like *Jones Brothers (Hunstanton) Ld v. Stevens* of, in the words of Lord Goddard CJ giving the judgment of the court at 281, *damnum sine injuria*. In *Jones Brothers*, the employee enticed away by the defendant would not, on the evidence, have continued working for the plaintiff employer anyway. Here, persuading artists to use a different booking agency – if that is what happened, a matter for trial - is apt to cause loss to the agency whose artists are persuaded to move.

73. For those reasons, I dismiss the applications to strike out the claim or for summary judgment, in so far as they attack the cause of action for breach of, and inducing breach of, the non-solicitation covenant. I now turn to consider the commission provision, which all parties treated as separate from the non-solicitation covenant although appearing in the same numbered clause (clause 13) in Mr Javor's employment contract.

The Commission Provision

74. I remind myself of the terms of the commission provision, comprising the last two sentences of clause 13:

> "All commission and other monies related to bookings or potential bookings discussed, scheduled, made or contemplated (whether or not actually contracted) or to be made prior to the date of termination of your employment (whether or not such bookings are to take place after the end of your employment with the Company), shall belong to the Company, and if any such commission or other monies are received by you or any other person or entity associated with you (including any future employer) you undertake to hold such monies on trust for us, and pay to us immediately all such monies without deduction or set off. You shall ensure that all such bookings are contracted via the Company and that the Company shall be entitled to receive 100% of all applicable commission(s) payable in respect of such bookings."

75. The issues I have to decide are: whether there is any realistic prospect that the commission provision could at a trial be upheld as valid and enforceable; and if so, whether there is any prospect of X-R obtaining a declaration to that effect, the only remedy now sought. No allegation is made that WME induced Mr Javor to breach the commission provision. At this stage I must consider whether it is subject to the restraint of trade doctrine and, if so, whether it goes beyond what is necessary to protect any legitimate business interest of X-R.

Submissions of Mr Javor:

76. Mr Reade relied on the Privy Council's decision in *Stenhouse Australia Ltd v Phillips* [1974] AC 391, given by Lord Wilberforce, at 399-403. The reasonableness of a contract term that operates in restraint of trade is judged by its effect, not its form (402G). There was no direct covenant forbidding Mr Phillips from accepting insurance business but if he (or an entity with which he was associated) did so during the five years from termination of his employment, the covenant required him to pay half of any commission he received to his former employer.

77. Similarly, in *Marshall v NM Financial Management Ltd* [1997] ICR 1065, CA, the covenant provided that the employee would continue to receive commission after termination, provided he did not within one year of it become an independent intermediary or take employment with a competitor. The clause at issue, it could be said, dangled a carrot rather than, as in *Stenhouse Australia Ltd v. Phillips*, wielded a stick. The outcome was no different. Millett LJ (as he then was) said at 1071E-F:

> "The restraint is imposed in the form of a condition. It is settled law that there is no difference in this context between a contract by a person that he will not carry on a particular trade (which if valid would be enforceable against him) and a contract that if he does not do so he will receive a benefit to which he would not otherwise be entitled (which if valid would not prevent him from carrying on the trade but merely result in the loss of the benefit in question): see *Wyatt v. Kreglinger and Fernau* [1933] 1 K.B. 793."

78. Here, Mr Reade submitted, the commission provision operated in restraint of trade because it strongly discouraged Mr Javor from doing business post-termination with the artists with whom he had discussed or scheduled bookings pre-termination; and it went far beyond what was reasonably necessary to protect X-R's connection with its customers. It is not limited to binding agreements made between X-R and its clients. It applies to bookings made after Mr Javor has left X-R. Commission at 100 per cent is payable even if received not by him but by "any future employer".

79. Mr Reade gave examples of hypothetical cases to show how the clause would deter Mr Javor from working for WME or any other competitor. Commission would be payable even if an artist with whom he had dealt while at X-R were independently to approach WME, without Mr Javor's knowledge; and even if WME, and not Mr Javor, should receive the commission. Further, the effect of the clause was unlimited in time. Where the clause applies, Mr Javor would, in effect, be working for the benefit of X-R "as an unremunerated agent … even after the end of his employment", as Mr Reade put it.

Submissions of WME:

80. Mr Solomon supported and echoed the submissions of Mr Reade on the meaning and effect of the commission provision. The law recognises "indirect restraints where the restraint derives from the loss of a benefit rather than a direct prohibition on competing trade"; per Bacon J, accepting the submission of Mr Croxford KC for the claimant in *Steel v Spencer Road LLP (trading as The Omerta Group)* [2024] ICR 137, at [35]. Similarly here, Mr Solomon argued, there is a "crippling financial penalty for the whole of the commissions which might be generated as a result of dealings with an artist". Nor could the provision be saved by severance.

81. There was no need for a trial to determine whether the commission provision was valid; it was already obvious without further evidence that it was not, just as in *Stenhouse Australia Ltd v. Phillips* the judge at first instance in New South Wales had decided the issue on a summary basis. (Mahoney J in fact dismissed the summons seeking declarations, an injunction and damages after eliciting some evidence from a witness connected to the appellant, but the Privy Council did not find the evidence helpful; see the speech of Lord Wilberforce at 400C and 402A-F).

82. The claim for inducing breach of contract was untenable, said Mr Solomon, because WME's relevant officers held a genuine belief that the commission provision was unenforceable and that therefore they were not inducing a breach of Mr Javor's contract with X-R: see *Allen t/a David Allen Chartered Accountants v. Pollock* [2020] QB 781, per Lewison LJ at [33] and [37]. There is positive and unchallengeable evidence here that WME's officers hold the view, after taking legal advice on the issue (albeit without waiving privilege), that the commission provision is far too wide to be enforceable.

83. Mr Solomon took me through parts of the particulars of the claim against WME for inducing breach of the commission provision. He submitted that the pleas were unworkable; WME was said to be liable for inducing breach of the commission provision by securing to itself revenue from Mr Javor's work for X-R. The breach is said to be "anticipatory" and WME is said,

unrealistically, to be inducing that anticipatory breach. The remedies sought include a prayer that WME holds commission on trust for X-R, though declaratory relief only is now sought.

Submissions of X-R:

84. Mr Croxford submitted that the restraint of trade doctrine does not apply to the commission provision; or that it is not clear at this preliminary stage, without a trial, that it applies. He submits that the commission provision "does no more and no less than to clarify the legal position as regards the commission payable on bookings or potential bookings made, discussed, scheduled or contemplated during Mr Javor's employment by [X-R]". He sought to equate the commission provision with the "bonus clawback" provisions at issue in *Steel v Spencer Road LLP (trading as The Omerta Group)* [2024] ICR 137.

85. If the commission provision is a restraint of trade, it is reasonable, Mr Croxford submitted. It has a clear and obvious commercial purpose: to ensure that X-R fairly and properly retains the product of Mr Javor's work done during his employment with X-R. It goes no further than necessary to achieve that purpose and, as would be argued at trial, is of a kind commonly found in employment contracts in the music industry, as Mr Huffam states in his witness statement.

86. While Mr Huffam's proposition is disputed by WME's Ms Dickins, who does not agree that provisions of this kind are common in the industry, that is a matter for evidence at trial. Mr Croxford pointed out that the commission provision applies to concerts performed before the termination date; commission to which, on any view, X-R must be entitled. The issue of its enforceability was clearly one for trial by reference to witness evidence, documentary evidence and, it may be, expert evidence.

87. Mr Croxford also addressed the evidence of Ms Dickins that she and WME's chief operating officer, Mr Limerick, formed the firm view in January 2023, on the basis of legal advice, that the commission provision was unenforceable. That did not make any difference, said Mr Croxford. The only relief sought in respect of the commission provision is declaratory relief; there is "no present claim for breach thereof, or any inducement or procurement of a breach … by WME".

88. Furthermore, the underlying legal advice had not yet been disclosed and Ms Dickins had not yet been cross-examined. X-R was not willing to take her evidence on trust. X-R would seek disclosure of the legal advice on the basis that privilege in respect of it has been waived by WME, because of the reliance on the advice placed by Ms Dickins in her witness statement.

89. In oral argument, Mr Croxford submitted that if necessary the commission provision could be "read down" to preserve its validity, in line with Simon Brown LJ's reasoning in *JA Mont (UK) Ltd. v. Mills* [1993] FSR 577, at 582; or could be subject to severance if it was in some respects too wide. He equated the commission provision with the obligation of a fiduciary to account for any profit made by virtue of the fiduciary office, referred to as the "profit rule" in Snell's Equity, 34th edition, at 7-041ff.

90. Mr Croxford did accept in oral argument, in response to questions from the court, that the particulars of claim would need to be supplemented in order to plead properly the claim in respect of the commission provision in so far as X-R seeks to rely on WME holding on trust for X-R monies received directly by WME for performances discussed or arranged by Mr Javor and falling within the scope of the commission provision. That should not impel the court to strike out the claim as against WME in respect of the commission provision. The relief sought is, at present, limited to a declaration that it is valid and enforceable.

The commission provision; reasoning and conclusions:

91. Before considering the restraint of trade doctrine in the context of this provision, I find it helpful to remind myself of the factual context. Mr Javor was paid a fixed salary by X-R. He did not receive any remuneration in the form of a bonus or commission. The present case is therefore different factually from cases such as *Marshall v. NM Financial Management Ltd* and *Steel v. Spencer Road LLP*. In those cases (and probably also in *Stenhouse Australia Ltd v. Phillips*), the departing employee's remuneration included commission or bonus; not so here.

92. It is X-R, not Mr Javor, that receives payment in the form of commission. Indeed, receipt of commission from its clients is how it makes its living. Where a booking is made, payment of a commission is made by the client, artist, promoter etc (whom I will call **the counterparty**) directly to X-R. That payment is not made by or to the booking agent, a person such as Mr Javor, who has secured the booking. As I have said, his reward for his service is his salary.

93. To ensure that the counterparty pays the right person (X-R) where an X-R booking is secured by Mr Javor while still employed by X-R, X-R could in principle require the counterparty to enter into a contractual obligation to pay the due commission payment only direct to X-R and not via any third party such as Mr Javor. If the counterparty then paid the wrong person, X-R could sue the counterparty (and/or perhaps secure restitution from the payee).

94. If the booking is for a concert performance that takes place before Mr Javor leaves X-R, the case should be a simple one. X-R receives its commission direct from the counterparty and Mr Javor receives his salary. If the booking is secured by Mr Javor before leaving X-R's employment but the concert performance takes place after his departure, X-R can still insist, in principle, on a contractual obligation by the counterparty to pay X-R direct and not via any third party.

95. Whether that has actually occurred in this case is not clear from the evidence. The terms on which a booking is secured may vary, depending on the relationship with the counterparty. The evidence does not suggest X-R contracted on standard terms. It is a matter for negotiation between X-R (perhaps acting through Mr Javor where he was the booking agent before he left X-R) and the counterparty whether his departure from X-R would affect the counterparty's obligations to X-R under the booking contract.

96. Pausing there, if X-R had a direct contractual right to a commission payment and Mr Javor wrongfully persuaded the counterparty to pay him or WME instead, then he (and perhaps WME) would be inducing the counterparty to break its contract with X-R and, other things being equal, he and/or WME would be liable to X-R for inducing breach of the booking contract in addition to the counterparty being liable for breach of the booking contract.

97. I mention these scenarios because it is striking that none of them involves invoking any post-termination restraint. They are examples of how the law of contract and tort could affect relations between X-R, its counterparties and the departing Mr Javor, irrespective of any post-termination restraint. It is only if X-R fails to secure appropriate contractual rights directly against its counterparty that X-R may need to have recourse to a post-termination restraint imposed on Mr Javor.

98. The first possibly relevant post-termination restraint would be the non-solicitation covenant. I have already considered that. A second could be a non-dealing clause, if there were such a clause in Mr Javor's employment contract; but there is not. A third could be a temporary prohibition

against working for a competitor. Again, there is not one. Fourthly, the commission provision could come into play. It is against the background I have just outlined that I turn now to consider it.

99. The first question is whether the commission provision operates in restraint of trade. In my judgment, it clearly does and there is no realistic prospect of X-R persuading a judge otherwise at trial. I accept the submissions of Mr Reade and Mr Solomon that the provision, by its terms, operates as a strong disincentive to Mr Javor to work for any employer that has any clients in common with X-R.

100. He would have to account to X-R for commission received by him or a person associated with him including a current employer such as WME, even if his discussions with the client before termination were tentative, vague and inconclusive and did not lead to a booking; and even if he were not involved in and not even aware of the subsequent booking of the same artist by the relevant person. The obligation to "ensure that all such bookings are contracted via [X-R]" is absolute and unworkable.

101. I do not accept Mr Croxford's submission that the commission provision clarifies the legal position of Mr Javor as similar to that of a fiduciary as regards bookings discussed by him prior to his departure. The contractual structure I have outlined above does not leave any room for further obligations such as that of a fiduciary. The parties' respective obligations are a matter of contract and negotiated contract terms. Nor is there any legitimate analogy with the bonus clawback provisions considered by Bacon J in *Steel v. Spencer Road LLP*.

102. By the same reasoning, I accept the submissions of the defendants that it is obvious the restraint is unreasonably wide and that a trial is not needed to reach that conclusion. The commission provision is not time limited and the lead times between discussions and concerts (and presumably payment) can be long, as Mr Huffam's evidence shows. If valid, the commission provision would make Mr Javor's job with WME not worth his while, even though he is not restrained from dealing with clients, artists etc of X-R (provided he does not solicit them).

103. X-R could have protected itself, within the bounds of reasonableness, by means of a non-dealing covenant. As the cases show, such a covenant often accompanies other post-termination restraints such as non-solicitation obligations or a time limited prohibition against working for a competitor. There is no such covenant here. The commission provision cannot be saved by reading it down, nor by severance. It is in my judgment clearly unenforceable, as was the clause at issue in *Stenhouse Ltd*.

104. There is no present claim before the court against WME for damages (or any other monetary remedy) for inducing breach of the commission provision. There is an imperfectly pleaded claim against WME asserting that it has induced Mr Javor to commit an anticipatory breach of the commission provision and that it holds or may hold monies on trust for X-R as a consequence. The only relief sought is a declaration that the commission provision is valid, a proposition I have rejected.

105. In my judgment, any claim against WME arising from the commission provision is doomed to fail. Even if the provision were valid, WME is not bound by it. WME's liability to X-R would have to rest on some principle of trust law, restitution, knowing assistance, or some other such cause of action. Unless the provision itself were enforceable, it is impossible to see how such a cause of action could be established. None that has any chance of success at trial is pleaded.

106. For those reasons, the claim founded on the commission provision should be struck out or should be the subject of summary judgment. I will make an order to that effect. It is therefore unnecessary to say anything about the argument that WME's officers held and still hold an honest belief that the provision is unenforceable, based on legal advice. It is not surprising that they should hold that belief since, in my view, they were right and their lawyers were right so to advise WME.

Disposal

107. For those reasons, the claims alleging breach of, and inducing breach of, the non-solicitation covenant are fit for trial and should proceed; but the claims founded on alleged entitlement to commission are doomed to fail and should be struck out or should be the subject of summary judgment.

108. Since circulating the confidential draft of this judgment, I have received helpful written submissions on what order the court should make. I am grateful for those submissions. The court's order accompanies this judgment. The costs orders follow the respective successes and failures of the parties, without any interim payments. The particulars of claim need amending and a case and costs management conference needs to be fixed to deal with costs budgeting and directions for trial of what is left of the claim.