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Case No: QB-2020-002215

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Royal Courts of Justice
Strand, London
WC2A 2LL

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Before:

MR JUSTICE MORRIS

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Between:

WINKWORTH FRANCHISING LIMITED — **Claimant**

- and -

(1) CALUM ALEXANDER MASON
(2) STILUM PROPERTIES LIMITED — **Defendants**

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MR JONATHAN COHEN QC and **MR ALEXANDER ROBSON** for the **Claimant**
MR EDWARD ROWNTREE for the **Defendants**

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APPROVED JUDGMENT

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MR JUSTICE MORRIS:

Introduction

1. This is an application for an interim injunction brought by Winkworth Franchising Limited ("the Claimant") against Mr Calum Mason ("the First Defendant") and Stilum Properties Limited ("the Second Defendant"). The Claimant seeks to enforce, pending trial, the terms of two franchise agreements ("the Franchise Agreements") made between the Claimant, the First Defendant, and another party.

2. The Claimant is a company operating estate agent franchises under the name "Winkworth". Since 2008, the First Defendant has been operating a Winkworth franchise from premises at 45 to 47 Westow Hill, Crystal Palace, London SE19 1TS ("the Premises") pursuant to the Franchise Agreements. They were both entered into on 1 August 2008. Those Agreements are a "sales franchise agreement" and a "lettings franchise agreement". It is common ground that the Franchise Agreements have now terminated with effect from a date in June 2020. Since then, the First Defendant has commenced trading as an estate agent from the Premises under the name "Maison Mason".

3. The Claimant seeks orders to prevent this activity being carried on from the Premises, requiring the Defendants to comply with the non-compete and non-solicitation covenants contained in the Franchise Agreements and, in addition, an order specifically that the Defendants remove a large sign obscuring the Winkworth sign on the Premises, thereby reinstating the Winkworth sign. The Claimant seeks further ancillary relief #9relating to disclosure, documents, confidentiality, and other matters). For present purposes, I deal only with the application to enforce the restrictive covenants.

4. Proceedings were issued on 29 June 2020 and on that date, Thornton J adjourned the matter to an *inter partes* hearing before me, giving directions for service of further evidence and skeletons. That hearing took place on Tuesday of this week. The materials before the court comprise two witness statements from Ms Tara Tan, the Claimant's in-house general counsel, and a witness statement from the First Defendant, and material exhibited to those statements. I have also received detailed written and oral submissions from Mr Cohen QC for the Claimant and Mr Rowntree for the Defendants.

Factual Background

5. The Claimant is a well-known estate agency brand with over 90 offices. Almost all of its offices are operated under franchises, independently owned and operated. The First Defendant was, until recently, a joint franchisee of Winkworth alongside his co-franchisee, Ms Stine Hoseth. Ms Hoseth has not been involved since 2011. However, her formal removal from the franchise business has been an issue in the last year. The Second Defendant is a company of which the First Defendant is the sole director and shareholder. It provided services in connection with the franchise business.

The Franchise Agreements

6. The Franchise Agreements were entered into on 1 August 2008. They are in materially similar terms. The parties to the Franchise Agreements were on the one hand, the Claimant and, on the other hand, the First Defendant and Ms Hoseth who were, together, defined in the Agreements as "the Franchisees". On the same date, the Second Defendant entered into deeds of covenant by which it committed to observe the provisions of the Franchise Agreements.

7. The Franchise Agreements provided, inter alia, as follows. Clause 1.1 provides:

> "'**Business**' means an estate agency business in residential property carried on from the Premises within the Territory according to the System...
>
> ...
>
> '**Term**' means the period of 10 years from the Commencement Date, together with any agreed extension in accordance with Clause 18 and thereafter until terminated by the Franchisor or the Franchisee on six (6) months' written notice. The length of the Term and any extension shall at all times be subject to any change in UK and European competition law..."

8. Clause 16.1 gives the Claimant a first right to purchase the Premises or of acquiring the lease of the Premises upon termination of the Franchise Agreements, including by "effluxion of time". The Claimant contends that this ensures that it has power to ensure continuity of Winkworth's occupation of the Premises.

9. Clause 18 contains a mechanism for a ten-year extension of the Term where certain conditions are met. Clause 18.1 provides:

> "Subject to Clause 19, the Term shall be capable of extension by the Franchisee. The Franchisee shall have the right to renew the franchise by notice to the Franchisor. Such notice may be given not more than 18 months nor less than 12 months before the tenth anniversary of the Commencement Date..."

Thus, the last date for service of notice was 31 July 2017.

10. By clause 18.2, the Claimant had until 31 April 2018 (i.e. three months before 31 July 2018) to serve a counternotice in writing or to refuse to renew on grounds stated at clause 18.3(a) and/or (b).

11. Clause 19 provides for termination in certain specific events including breach by the Franchisees. Clause 19.2 provides:

> "This Agreement shall expire at the end of the Term, but the Franchisor shall also be entitled to terminate this agreement at

> any time and without payment of compensation to the Franchisee..."

The clause then continues by setting out the circumstances where there would be entitlement to terminate. However, as will be seen later in this judgment, the particular relevant words of that clause are the opening words referring to the agreement expiring at the "end of the Term".

12. Clause 20 is headed "Effect of termination" and provides for certain matters:

> "Upon the expiry or termination of this Agreement for any cause or reason or upon any grounds set out herein..."

These matters include the Franchisees being required to cease carrying on the Business and return manuals and equipment, and allowing the Claimant access to records. By Clause 20.3, the Claimant may act as the agent of the Franchisee for the completion of any transactions with commissions being retained by the Franchisor in certain circumstances.

13. Clause 22 is headed "Competition". Clause 22.1 sets out covenants which apply during the subsistence of the Agreement. Clause 22.2 provides for post-termination restrictive covenants in the following terms:

> "For one year following termination of this Agreement by the effluxion of time or pursuant to the terms of either Clause 17 or Clause 19 the Franchisee agrees:
>
> (a) not to engage directly or indirectly in any capacity from the Premises in any business or venture competitive or in conflict with the Business or the System or the Franchise Services whether or not any Franchise Services are at that time operating within the Territory...
>
> ...
>
> (c) for one year following termination of this Agreement as aforesaid not to solicit any clients or former clients of the Business with the intent of taking their custom."

14. Clause 24 provides that "any notice required to be given in this Agreement shall be given in writing".

15. The Claimant seeks relief in respect of competition with the Business. The restriction is a restriction from competing from the Premises. The Defendants are free to compete from other premises or from no premises at all.

Chronology

16. The Defendants have operated the Winkworth franchise from the Premises since August 2008. From as early as March 2014, consideration was being given to the removal of Ms Hoseth and to the refurbishment of the Premises. On 31 July 2017, the time limit under clause 18 of the Franchise Agreements for the Franchisees to give

notice seeking to renew the agreements expired. The First Defendant asserts that he had actively sought a renewal since at least "2017/2018". It seems clear from the documents that some time in January 2018, the First Defendant made a request to renew the franchise. The First Defendant maintains that this was not the first occasion when he had sought renewal. At paragraph 10 of his witness statement, the First Defendant says that he raised renewal over the course of 2017 adding:

> "I cannot yet be certain whether I submitted a request before 31 July 2017 but I was never given the impression by the Claimant that that was important."

17. On 31 July 2018, the first 10 year period of the Franchise Agreements came to an end.

18. Regardless of the question of whether formal notice under clause 18 was ever given in time, over a considerable period of time in the course of 2019 and into 2020, there were informal discussions between the parties about a possible extension or renewal of the Franchise Agreements. It is common ground that there was no formal clause 18 extension and, further, it is common ground that, in fact, there has been no renewal of the Agreements. There is a dispute as to which side was ultimately responsible for the breakdown in discussions. That is something which I do not and cannot determine on this application.

19. The position in a bit more detail is as follows.

20. By a letter dated 15 January 2019, referring to the First Defendant's request in January 2018, Ms Piper, the Claimant's operations manager, set out the procedure for the granting of a new franchise agreement requesting relevant information, including corporate details, addresses, passports, DBS forms, a copy of the lease, and a commitment to pay legal fees. In February and March 2019, Ms Piper sent chaser emails.

21. On 30 April 2019, the First Defendant renewed the lease on the Premises for a term until 2034. The Defendants say that they entered into the lease on the basis that the new franchise agreements were going to be entered into. At the end of May 2019, Mr Dominic Agace, the Claimant's CEO, emailed the First Defendant for an update saying that this could not go on forever and they would have to put a hard date on finalisation of the situation.

22. On 4 June 2019, the First Defendant emailed Mr Agace indicating he was in the process of refinancing his house to pay off Ms Hoseth and he would have the money by the beginning of August. Mr Agace replied saying that he was content to proceed on that basis.

23. On 14 August 2019, Mr Agace wrote to the First Defendant suggesting that the Franchise Agreements had expired on 30 September 2018 and giving 6 months' notice of termination under the definition of "Term" to expire on 14 February 2020. However, he maintained in place the First Defendant's "option to renew" with a hard deadline to renew of 30 September 2019. He added that if there was no renewal by then, the Franchise Agreements would terminate on 14 February 2020.

24. On 23 September 2019, the First Defendant informed Mr Agace that the removal of Ms Hoseth had been agreed, as requested by the Claimant as a condition of renewal, and that he was able to renew the Franchise Agreements. Mr Agace replied that the First Defendant should speak to Ms Piper to progress renewal. Ms Piper followed up with an email on 26 September 2019 stating that, "We are ready to move on issuing a further 10 plus 10 franchise agreements" and setting out a list of information required for standard "due diligence" checks. Much of this information had, in fact, been requested in the letter of 15 January 2019. Ms Piper also requested documents relating to the buyout of Ms Hoseth.

25. On 30 September 2019, the First Defendant responded by sending some of the information requested including his passport, a copy of the new lease, and a statement of his assets. He expressed the view that he was renewing his existing Franchise Agreements and not starting a brand new one. Ms Piper acknowledged receipt and informed the First Defendant that the Claimant would be using Sherrards Solicitors to issue new documents. On 15 October 2019, after a chaser from Ms Piper, the First Defendant provided some further information requested.

26. On 26 November 2019, Sherrards contacted Hepburns, by then acting for the Defendants, outlining the process for renewal and asking for further information on four specific points. In particular, they asked about a Lloyds Bank charge registered against the Second Defendant and whether that had any impact on funding and whether consent was required from the bank for the change of control. On 2 December 2019, Hepburns responded to Sherrards enclosing a copy of the new lease and indicating that they were making further enquiries including "concerning Lloyds Bank". On 11 December 2019, Hepburns gave Sherrards the undertaking to be responsible for Sherrards' fees.

27. On 13 December 2019, the First Defendant entered into car lease contracts for his staff. The cars were delivered in February 2020. According to the Defendants, this was done on the premise that the Franchise Agreements would be renewed.

28. Then on 18 December 2019, by letter from Sherrards, the Claimant gave formal notice to the First Defendant and Ms Hoseth, copied to Hepburns, to terminate the Franchise Agreements on 6 months' notice and at the same time gave them a further opportunity to renew but stated that that would have to be completed by 31 March 2020, time being of the essence. The letter stated, inter alia, as follows:

> "This letter constitutes the requisite six months' written notice by WFL of the termination of each of the Franchise Agreements. Accordingly (subject to the below), the Franchise Agreements will each terminate with effect from 22 June 2020.
>
> For the avoidance of any doubt, this letter supersedes the notice issued by our client dated 14 August 2019.
>
> Notwithstanding this notice of termination, and without prejudice to it, our client remains prepared to grant a renewal of the Franchise Agreements. We have had sight of the numerous communications passing between the parties in this regard, from which it is clear that there has been a lack of

> progress on your part. This is a matter of frustration for our client. Our client is therefore not prepared to see the renewal process delayed and therefore instructs us that, if the renewals are not fully completed by 4pm on 31 March 2020 the right to renew shall cease and the Franchise Agreements will terminate on 22 June 2020. Time is now of the essence. We are aware you have engaged solicitors to handle the renewals and this letter is therefore being copied to them as a courtesy - they will need to engage with this firm in connection with the transaction and previous correspondence from our Mr Bagnell refers."

29. On 30 January 2020, Hepburns sent Sherrards Land Registry information for the new lease and evidence that Ms Hoseth was no longer a shareholder or director.

30. On 20 February 2020, the First Defendant wrote to Ms Piper complaining about the tone of the 18 December letter and that the reason for the delay was lack of activity on the part of Sherrards, suggesting that they had not been responding to Hepburns' attempts to contact them.

31. As the 31 March deadline approached, the following communications took place. On 3 March 2020, Hepburns asked Sherrards for an update. On 16 March 2020, Sherrards emailed Hepburns confirming that the Claimant was still awaiting full replies and underlying paperwork to queries raised back on 26 November, as well as details from Ms Hoseth needed for the execution of release paperwork. Hepburns replied by letter dated 23 March 2020 responding to the points in the 26 November email. As regards the issues of the Lloyds Bank charge, they stated that they were still awaiting information from the client, i.e. the Defendants. Thus, at that stage, the Claimant could expect a further response from the Defendants.

32. On 31 March 2020, the deadline for renewal passed.

33. On 26 May 2020, the Claimant sent an email to the First Defendant referring to the 18 December 2019 letter and pointing out that Sherrards had not heard further from him in relation the renewal. Termination would therefore take place on 22 June 2020. The First Defendant responded immediately, explaining that he had been trying to keep the business running amidst the COVID-19 situation and that he had every intention to renew. On the next day, he wrote again to the Claimant, referring to Hepburns' email of 3 March to which there had been no response and subsequently referring to Hepburns' email of 23 March. He complained that Hepburns had been chasing but the hold up had been from Sherrards although he acknowledged, in turn, that Sherrards had been chasing him. However, in these emails, the First Defendant made no reference to Sherrards' intermediate communication of 16 March 2020.

34. From 3 June 2020, Hepburns chased Sherrards for a response to their email of 23 March 2020. On 4 June 2020, Sherrards sent an email to the First Defendant indicating that the Claimant was going terminate.

35. On 11 June 2020, the First Defendant wrote to the Claimant by letter marked "without prejudice". For the reasons set out below, I have not taken its contents into account for present purposes.

36. On 19 June 2020, Sherrards wrote to the First Defendant and to Ms Hoseth. They noted the threat to operate a competing business from the Premises and referred to clause 22.2 of the Franchise Agreements. They stated that, if the First Defendant and Ms Hoseth sought to compete with the Claimant in breach of their obligation under Clause 22.2, the Claimant would have no choice but to make an application to the High Court for appropriate urgent relief.

37. On the same day, the First Defendant sought to obtain client data from Winkworth's customer relationship management database. In correspondence with that database, the Defendants stated:

> "I will be remaining in my office and have started a new trading company."

38. On 22 June 2020, according to the Claimant, the Franchise Agreements terminated pursuant to the notice given on 18 December 2019. On the same day, the First Defendant was in correspondence with a company preparing new business documentation for him, including shop signage and boards for his new business.

39. On 23 June 2020, the Claimant wrote to clients informing them that it had set up a new service company which would be operating the Crystal Palace Winkworth franchise from that date.

40. On 24 June 2020, Sherrards wrote again indicating that they were preparing an injunction application.

41. On or about 24 or 25 June 2020, the Defendants erected a sign at the Premises by way of a large banner over the Winkworth sign on the shop front of the Premises advertising their new business. The banner advertises the new business under the name "Maison Mason".

42. On 22 June 2020 and again on 26 June 2020, the First Defendant sent emails to clients indicating that he was setting up his new business under the name "Maison Mason" operating from the same place with the same team, only a different name and a different email. The First Defendant contacted a client in order to try to solicit her to transfer their custom to his new company.

43. On 25 June 2020, the Defendants' solicitors wrote saying that the Defendants were not prepared to offer undertakings, setting out reasons for not so offering. On the next day, there was an apparent change of position and the Defendants did offer undertakings for a limited period, on condition that proceedings were not issued.

44. On 29 June 2020, the Defendants then stated that they were would not, after all, offer undertakings. On the same day, the First Defendant was instructing his staff to put up Maison Mason boards at various addresses and to remove any Winkworth boards that they saw.

The Proceedings

45. By this application, the Claimant seeks various orders. Most particularly by paragraph 3 of the draft order, it seeks orders that the Defendants:

(1) Remove from and do not cause or permit to be displayed in the Premises any signage, branding, or other document advertising or referring to any business competitive with the Winkworth business and further do not remove, alter, or obscure the Winkworth signage and branding that appears on the Premises;

(2) Do not engage in any activity from the premises in any business competitive with the Winkworth business; and

(3) Do not solicit any clients or former clients of the Winkworth business with the intention of taking their custom."

The Claimant seeks ancillary orders for the return of materials concerned with the Winkworth business, to preserve confidentiality relating to the Winkworth business, orders relating to deposits held under the Tenancy Deposit Protection Service, and also orders in respect of the Claimant's rights under clause 20.3. As stated above, these matters do not fall for consideration in this judgment. It is also common ground that there should be a direction for speedy trial of the claim. It is hoped that such a trial can take place in early September this year which is a period of about eight weeks from now.

Relevant Legal Principles

46. The essential relevant legal principles are familiar and not controversial. As regards restrictive covenants in the case of employer/employee and franchisor/franchisee, I have been referred to Goulding: *Employee Competition (3rd Ed.)*, paragraphs 7.01, 7.13, and 7.123, and to *Dawnay Day & Co Ltd v de Braconier d'Alphen* [1998] ICR 1068 at 1080, and *TFS Derivatives Ltd v Morgan* [2005] IRLR 246. As regards the specific case of restrictive covenants in franchise agreements, I have been referred to *Chipsaway International Ltd v Kerr* [2009] EWCA Civ 320 and *Carewatch Care Services Ltd v Focus Caring Services Ltd & Ors* [2014] EWHC 2313 (Ch) at [128].

47. There is no dispute in the present case that, assuming that the Defendants are and remain bound by it, clause 22.2 is a valid post-termination restrictive covenant. There is no suggestion that it is an unreasonable restraint of trade.

48. As regards goodwill in a franchise agreement, I can do no better than cite the judgment of Dyson LJ (as he then was) in the *Chipsaway* case where he stated as follows:

> "...during the term of a franchise, goodwill is built up in the franchise territory with the use of a franchisor's name and branding. Such goodwill is a potentially valuable asset in the hands of the franchisee so long as he continues to trade in the franchise territory, and in the hands of a franchisor at the termination of the franchise agreement. A franchisor's interest in that goodwill is vulnerable to competition from a former franchisee who has knowledge of the area and experience of dealing with particular groups of customers. The commercial purpose of a post-termination covenant

> against competition is to prevent the franchisee for a period of time from continuing and competing in his former territory in the same line of business so as to enable the franchisor to exploit the goodwill that he has built up during the term, most obviously by recruiting another franchisee for the same area."

49. There is some doubt as to the effectiveness of a post-termination restrictive covenant where the parties continue the franchise informally after the expiry of the contractual term, i.e. where they "hold over" (see *Pratt: Franchising: Law and Practice*, paragraph 739, and *Flat Roof Co Ltd v Bowden* [2009] EWHC 2894 (Ch) and *PSG Franchising Ltd v Lydia Darby Ltd* [2012] EWHC 3707 (QB)).

50. As regards the approach to the grant of interim injunctions, the *American Cyanamid* principles are familiar. In this regard, I refer to *Gee on Commercial Injunctions (6th Ed.)*, paragraphs 2-015 to 2-018, and 2-031 and 2-032, and also to the *The White Book Service 2020 Vol.2*, at paragraphs 15-8, 15-15, and 15-17.

51. The following four questions fall to be considered:

    (1) Serious issue to be tried. Has the claimant shown a serious issue to be tried on whether he is entitled to an injunction? If not, no injunction will be granted;

    (2) Damages as an adequate remedy for the Claimant. If no interim injunction is granted but at trial his claim for an injunction were to be established, would damages be an adequate remedy for the Claimant? If so, no injunction should be granted, however strong the Claimant's case is. Adequacy of damages as a remedy has two facets: whether the loss can be quantified and calculated, and whether, in this case, the Defendants have the financial ability to meet any such award of damages;

    (3) Damages as an adequate remedy for the Defendants. If damages would not be an adequate remedy for the Claimant but damages would be an adequate remedy for the Defendants under the Claimant's cross-undertaking (in the event that an interim injunction was wrongly granted) then there would be no reason to refuse the interim injunction; and

    (4) Balance of convenience. If, however, there is doubt as to the adequacy of damages for both parties, the court considers the balance of convenience or, put another way, the balance of justice. Which course of action (granting or refusing injunctive relief) is likely to involve the least risk of injustice if it turns out that the course taken is wrong? (See *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, per Hoffmann J). Factors to take into account include the relative extent to which there is doubt as to whether damages would be an adequate remedy and the preservation of the status quo.

52. As regards to the relative strength or weakness of the Claimant's underlying claim, there is authority for the following three propositions:

    (1) Where the Defendants have no reasonably arguable case that they have a defence then *American Cyanamid* principles do not apply at all and the interim injunction will be granted without consideration of the *American Cyanamid* steps (see *Gee*,

Supra, at paragraph 2-018(3) and *The White Book Service 2020 Vol 2*, at paragraph 15-8);

(2) Alternatively, the strength of the Claimant's case falls to be taken into account when considering the balance of convenience as a factor in favour of the grant of an interim injunction (on the basis that if there is a high prospect of success at trial, the consequent risk of injustice to the Defendants (by the wrongful grant of interim relief) is commensurately low: see *The White Book Service 2020 Vol. 2*, paragraph 15-15). The last passage in that paragraph appears to doubt proposition (1) above; and

(3) Finally, and particularly in the case of an interim injunction relating to a post-termination restrictive covenant, then unless there are disputed facts which cannot be resolved without a trial, the court:

> "...can and should determine the scope of the restraints which as a matter of construction, the contractual terms seek to impose."
>
> (see *Arbuthnot Fund Managers Limited v Rawlings* [2003] EWCA Civ 518 at [20])

53. To the extent that there may be a tension between propositions (1) and (2) above, I have not undertaken, for the purposes of this application, a detailed analysis of the relevant case law and, in particular, *Series 5 Software Ltd v Clarke* [1996] 1 All E R 853. I do not need to decide which is the correct approach since, for the reasons set out below, it makes no difference to the outcome in this case.

54. As regards the particular case of interim *mandatory* relief, the following further principles apply:

(1) The court does pay attention to the relative strength of the apparent merits in exercising discretion (see *Gee* (supra), paragraph 2-031); and

(2) The court will take account of deliberate conduct by the Defendants which alters the status quo, taken when they know of the impending application to the court (*Gee* (supra), paragraph 2-032).

55. I have also been referred to a number of cases where the issue of adequacy of damages and the balance of convenience have been applied in the context of restrictive covenants both in employer/employee and franchisor/franchisee relationships. I refer in particular to: *Team 2 Clean v Mafti* [2014] EWHC 2645 (QB) at [28]-[29] (in a franchise agreement because of damage to reputation and goodwill and difficulty of demonstrating financial consequences, the balance of convenience usually favours the franchisor seeking the grant of an injunction); secondly, *Sunrise Brokers LLP v Rodgers* [2015] IRLR 57 at [53] (where Underhill LJ referred to the grave difficulties in assessing the loss suffered by an employer from an employee taking work with a competitor; - that loss related to both loss of business and loss of reputation); and, thirdly, *Apollo Window Blinds Limited v McNeil and Anor* [2016] EWHC 2307 (QB) at [41]-[43] (which suggested that damage to goodwill in a franchise case could not be established and was not a reason for granting interim relief).

The Parties' Cases in Summary

56. The Claimant contends as follows:

    (1) There is a serious issue to be tried in respect of its case. Indeed, there is no arguable defence to its claim and, for that reason alone, the interim injunction should be granted.

    (2) In any event, damages would not be an adequate remedy for the Claimant, if interim relief is not granted. The Claimant and its other franchisees stand to suffer irremediable harm if the Defendants continue to trade from the Premises in breach of the covenants. The damage will be difficult to prove and quantify at trial. There is also reason to believe that the Defendants do not have assets sufficient to pay any substantial damages.

    (3) On the other hand, damages would be an adequate remedy for the Defendants, and the Claimant and its parent company have assets sufficient to meet any order for damages made against it. The last stated accounts of the parent company showed total assets of in excess of £6 million as at 31 December 2019. There has been no material detrimental change to that financial position since then. For this reason, the interim relief should be granted.

    (4) Further and alternatively, the balance of convenience strongly favours the grant of interim relief.

57. The Defendants contend as follows:

    (1) There are serious issues to be tried as to whether the Defendants are bound by clause 22.2 of the Franchise Agreements. At this early stage in proceedings, they have identified at least four grounds of defence;

    (2) As regards adequacy of damages for the Claimant, the Claimant has taken no steps to find a replacement in the course of the six months since notice of termination was sent. No replacement franchisee is available and damages therefore would be an adequate remedy for the Claimant. Further, the loss of income pursuant to the terms of the Franchise Agreements is quantifiable. The Defendants would be able to pay any damages and costs. For this reason alone, there should be no interim injunction. It is in the Claimant's best interests that the Defendants should continue in business pending trial, even if the Claimant wins at trial. In that event, there will be a flourishing business and client base for the Claimant to recover.

    (3) As regards adequacy of damages for the Defendants, the effect of an injunction would be to close their business immediately. That would be catastrophic. It would have to make all employees redundant. All their customers would immediately seek alternative estate agents. There would be no point in fighting to trial as the business would have ceased to exist by then. The Defendants have defences with real prospects of success.

    (4) The balance of convenience favours the refusal of interim relief. The Defendants rely on the following. First, the Defendants' conduct has been entirely open. The

Claimant waited between 11 June and 29 June to issue its application. Secondly, there is no evidence of a devastating impact on Winkworth's brand and reputation. Thirdly, the Defendants are able and willing to continue to operate from the Premises pending trial in a way which properly preserves the very asset that the Claimant wishes to protect. Fourthly, the Defendants are working to maintain a flourishing business and client base. Fifthly, the Defendants are working on an appointment only basis. The agency door is not open to passers-by. This limits the damage that might be done by reason of the Defendants continuing to trade.

Discussion And Analysis

(1) Serious Issue to be Tried

58. The Claimant's is that it is clear that the Defendants have planned to operate and are now operating a new estate agency business under the name of "Maison Mason". The new business is trading from the Premises as evidenced by the signage over the shop front obscuring the Winkworth name. This new business is in competition with the business as defined in the Franchise Agreements. There is clear evidence that the First Defendant has been seeking, for the new business, the business of existing clients of his prior Winkworth franchise business. There is little or no dispute as to these facts. The Claimant contends that this conduct is in clear breach of the Defendants' non-compete and non-solicitation obligations in clause 22.2. The Claimant contends that the Franchise Agreements expired by effluxion of time at the point of the expiry of notice, namely, on 22 June 2020. It follows that the restrictive covenants in clause 22.2 are effective for one year from that date. That is the Claimant's position.

59. In my judgment, these contentions, based on the evidence before the court prima facie (and subject to the issue of construction of clause 22 addressed below), give rise to a serious issue to be tried in respect of the Claimant's claim for final injunctive relief. Furthermore, whilst the Defendants raise four grounds of defence, they do not contend that any of them are so strong so as to defeat the Claimant's claim at this stage. The Defendants therefore accept that there is a serious issue to be tried on the Claimant's claim.

60. However, the Claimant goes on to contend that these four grounds of defence are so weak that I can conclude that the claim is bound to succeed or at least that because it is so strong, interim relief should be granted in any event. I turn therefore to address each of the four grounds of defence raised.

(1) *Wrongful refusal to renew under clause 18*

61. The Defendants contend that the Claimant, in breach of the provisions of clause 18, refused to renew the Franchise Agreements. This refusal was a repudiatory breach of the Franchise Agreements which the Defendants *de facto* accepted on or around 11 June 2020 when the First Defendant indicated he was setting up the new business. The Defendants go on to submit that, in line with the well-known principle in *General Billposting Company Limited v Atkinson* [1909] AC 118, the terms of the post-termination covenant in clause 22.2 do not survive and the Defendants are therefore not bound by them.

62. Under the terms of clause 18.1, the last date upon which the Defendants could give notice to renew was 31 July 2017. The Defendants submit that there is evidence that the First Defendant gave such notice before that date. The Claimant failed to give a counternotice under clause 18.2 and was thus bound to renew the Franchise Agreements.

63. The evidence to support the Defendants' case that notice was duly given within time is that set out in paragraph 10 of the First Defendant's witness statements to which I have referred above. Mr Rowntree submits that in the limited time available to the First Defendant, this is the First Defendant's best evidence and that I cannot conclude that the First Defendant did not give notice to renew before 31 July 2017.

64. On the evidence before this court now, this defence is bound to fail. First, there is no *evidence*, that the Defendants did give notice in time. The statement that he is uncertain as to whether notice was given is not positive evidence that it was given. It does not even include a positive belief that notice was given. Secondly, by clause 24, any notice under clause 28 has to be given in writing. There is no evidence before the court that written notice was given. (I do not need to address a further argument that, in any event, notice had to be given by the First Defendant and Ms Hoseth jointly). If this defence were the only defence, the claim would be bound to succeed. I add, however, that since this issue depends on questions of fact and evidence, my conclusion does not preclude the Defendants from raising it as a defence in due course in the event that they are able to find further evidence to support their case.

(2) *Proper construction of clause 22.2*

65. The Defendants contend that on a true construction of clause 22.2, the post-termination covenants in that clause are not, or are no longer, binding upon the Defendants. The Franchise Agreements have terminated pursuant to 6 months' notice given by the Claimant under the provisions of the definition of "Term". Thus, they have terminated neither "by effluxion of time" nor "pursuant to the terms of either clause 17 or clause 19" as required by clause 22.2. "Effluxion of time" denotes the passage of time in the absence of any further act; but here it was the positive act of notice which terminated the Agreements. Mr Rowntree submits, first, that under the definition of "Term", in fact, the Agreements expired by effluxion of time at the end of 10 years, i.e. on 31 July 2018 and thus by now, the one-year duration of the covenants has expired. Alternatively, he submits that, on their true construction, these Agreements never expire "by effluxion of time" (because they can only be terminated otherwise) and thus in the present case, the restrictive covenants never came into force.

66. I do not accept these arguments. The key words are the additional words in the definition of "Term", namely:

> "the period of ten years ... <u>and thereafter until terminated</u> ... on six months written notice."

The Agreements do not expire after 10 years. Rather, they continue indefinitely unless and until terminated by notice. Mr Cohen QC contends that "effluxion of time" in these contracts means the expiry of the notice period. The wording used and, in particular, the relationship between the particular definition of "Term" (which here does not provide for a fixed term at all) and the words "effluxion of time" are somewhat

unfortunate. Nevertheless, I have reached the firm conclusion that the Claimant's construction of clause 22.2 is correct. The words "effluxion of time" are to be given meaning and that construction gives the only meaning which can reasonably have been intended, taking into account the relevant circumstances. Some further support for this construction is provided by the introductory words of clause 19.2 (set out above). The "end of the Term" is the end of the 6 months' notice period. In this way, effluxion and expiry can be regarded as synonymous.

67. Each of Mr Rowntree's two alternative constructions lead to conclusions which cannot have been intended. His first construction leads to the conclusion that covenants intended to apply once the franchise has ended in fact apply during the currency of the franchise, that is between 31 July 2018 and 31 July 2019. His second construction gives no meaning at all to the words "effluxion of time" and leads to the conclusion that where the Agreements terminate (otherwise than by notice under clauses 17 or 19), there are no binding post-termination restrictive covenants. If here "effluxion of time" means passage of time with no further action, the Agreements will never terminate by effluxion of time and the words do not have meaning.

68. Finally, I add, contrary to suggestions made in the course of correspondence and elsewhere, that the present case is not a case of "holding over" on implied terms following termination of a franchise. Here, the definition of "Term" means that the Franchise Agreements themselves remained in full force after 10 years and until 22 June 2020. Thus, the debate surrounding the case of *The Flat Roof Company* case does not arise for consideration. This issue is a pure question of construction and does not turn upon disputed facts which would require a full trial. In line with the approach in *Arbuthnot*, I decide this issue in favour of the Claimant.

(3) *Proper construction of clause 16*

69. Thirdly, the Defendants contend that the Claimant's right to purchase the Premises under clause 16 has not arisen; none of the conditions for the exercise of that right have arisen. In particular, the Franchise Agreements have not ended "by effluxion of time". Rather, for the same reasons as made on the second ground, the Franchise Agreements ended by 6 months' notice. In fact, on this application, the Claimant is not pressing for relief in respect of its right to purchase under clause 16 and so this is not in issue on this application. Nevertheless, in my judgment, if and when the Claimant does pursue this right, the Defendants' particular objection to that right based on the meaning of "effluxion of time" is unfounded, for the reasons which I have given in relation to the second ground.

(4) *Estoppel relating to the right to renewal*

70. Fourthly, the Defendants contend that the Claimant is estopped by convention from refusing to renew the Franchise Agreements. They submit that the estoppel arises from the common assumption shared by the parties that the Franchise Agreements would be renewed or that a new agreement would be entered into - by 31 March 2020. This assumption is evidenced by the parties' conduct and correspondence from January 2019, or at least from March 2019, until mid-2020. Both parties were operating on that basis throughout that period. The Claimant accepted this and sought to impose conditions for renewal. In reliance upon the shared common assumption, the First Defendant took a number of steps. The lease was renewed and Ms Hoseth was removed

from the business. The First Defendant entered into car lease contracts in December 2019 and he incurred expenses up to and including 23 March 2020. The Claimant failed to reply to Hepburns' email of 23 March 2020 and let the deadline of 31 March 2020 pass. The First Defendant had no reason to believe that renewal was not taking place until he received the email of 27 May 2020 which came out of the blue. These facts give rise to an estoppel by convention as a matter of law. The Claimant is estopped from denying that a new agreement is to be granted and thus estopped from serving notice of termination of the Franchise Agreements.

71. In my judgment, on the basis of the material before the court, this ground of defence is very weak. First, at best, the alleged common assumption was that the franchise, if it was to be renewed, had to be renewed by 31 March 2020. It was not. There can have been no continuing common assumption beyond 31 March 2020 that there would be renewal. Whilst the Defendants complain about an absence of a response to their letter of 23 March 2020, in fact, the evidence suggests that at that point in time, it was for the Defendants to provide further outstanding information, namely about the Lloyds Bank charge. Whilst I have been told now by Mr Rowntree on instructions that the charge has been released, that information was not provided by 31 March 2020.

72. Secondly, if this is correct, it follows that the Claimant did not resile from the shared assumption limited, as it always was, to 31 March 2020. There is nothing inequitable about the Claimant insisting on its contractual rights under the Franchise Agreements thereafter.

73. Thirdly, there is the difficulty that if a mere shared intention or hope to conclude an agreement is sufficient in law to establish an estoppel by convention, that would render nugatory basic principles of contract law, intention to create legal relations, offer and acceptance, and consideration. An agreement to agree is not generally binding and here what is alleged is even less than an agreement to agree. An estoppel cannot bind parties to a contract which has not yet been concluded.

74. At this stage, I am not in a position to determine definitively that there is or can be no defence of estoppel. Whether there is will ultimately depend upon the facts and the Defendants are not shut out from pleading their factual and legal case clearly and adducing evidence in support. Nevertheless, I conclude that as matters presently stand, their prospects of establishing such a defence are very weak.

Conclusion

75. In conclusion on the respective merits of the parties' cases on the underlying claims, whilst the Defendants' second and third grounds of defence are hopeless, and whilst their first ground cannot succeed on the evidence now before the court, I do not conclude at this stage that the Defendants have no defence to the claim at all (such as to warrant, effectively, summary judgment). Accordingly, I do not conclude that the *American Cyanamid* principles have no application at all (see Gee (*supra*), paragraph 2-018(3) as above). However, as set out below, the weakness of the Defendants' defence is highly relevant to the balance of convenience, should that stage arise for determination.

(2) Adequacy of Damages for the Claimant

76. The Defendants contend that damages would be an adequate remedy for the Claimant. As regards any trading loss suffered by the Claimant, this could be readily calculated from the income which Maison Mason generates in the period between now and judgment after the full trial. As regards damage to goodwill, this is not impossible to quantify (see *Apollo Blinds Limited* at [41]-[43]). There is significant evidence that the Defendants would be able to pay any damages and costs in the event that the Claimant succeeds at trial. They estimate their combined assets as being at least in excess of £200,000, together with the value of the lease of the Premises. On this basis alone, it is said no interim relief should be granted.

77. I am not satisfied that damages would be an adequate remedy for the Claimant. First as to trading losses, I agree that a good starting point would be the Defendants' trading income in the intervening period. However, I accept that there is likely to be argument on whether the Claimant could establish that all that income would have been earned by the Claimant in the Defendants' place. There is also the uncertain issue of customers who do not place business with the Defendants at all, but would have placed business with the Claimant.

78. Secondly, there is the wider damage caused to the Claimant's reputation and goodwill, arising from a perception that the Claimant had suddenly become inactive at the Premises and that the Claimant had been seen to be a failing business. This might lead to the perception of the Claimant being less reliable and damage to its reputation as an agency of high standing in the market.

79. In this regard I place reliance upon the judgment of Underhill LJ in *Sunrise Brokers* as to the grave difficulties in assessing loss in circumstances of a non-compete covenant. I do so in preference to the observations of the first instance judge in the *Apollo Blinds* case. As to that latter judgment, first it can be distinguished from the facts; in the present case, unlike in that case, the Claimant will be active in the local market in the intervening period up until trial. Secondly, I do not find the judge's reasons for finding no effect on goodwill (at the conclusion of [43] of that judgment) easy to understand. The judge appears to be saying there that there will be no effect upon goodwill if no interim relief were granted and to do so by reference to the hypothesis that the covenants were to be enforced in that period, in other words, on the basis that interim relief would be granted. In any event, those passages in the judgment do not stand as authority for the proposition that damage to goodwill can be readily quantified and compensated for.

80. Thirdly, and critically, I am not satisfied that, in any event, the Defendants have the means to meet any award of damages. On the evidence before me, it appears that the Defendants have assets of, at the most, in the region of £200,000, (which include the First Defendant's own home). This sum is not likely to be sufficient to meet any final judgment for damages and costs and, at the same time, to meet the Defendants' own costs of the trial. In this connection and to give some idea of likely costs of a full trial, the Defendants' costs of this application alone are in the region of £40,000. Although I have not seen any statement from the Claimant, the Claimant's costs will be at least this sum, if not more. Even if quantifiable damages were no more than £100,000 (on the basis of figures given in Ms Tan's first witness statement) when trial costs are taken into account, the Defendants will be most unlikely to satisfy all those awards.

(3) Adequacy of Damages for the Defendants

81. The Defendants contend that damages will not be an adequate remedy for them. However, the Defendants' loss of business in the intervening period will be quantifiable by reference to their record of trading from the Premises over the past almost 12 years. Furthermore, I take account of the fact that the Defendants have not, as yet, built up any substantial goodwill in connection with the Maison Mason brand.

82. The Defendants put forward items of damage which will not be quantifiable. First, the First Defendant, and understandably in the current COVID-19 environment, has raised concerns about his employees, suggesting that if an injunction is granted, he will have to make at least two of his employees redundant. In response to this concern, the Claimant has now offered an undertaking to pay those employees their contractual salary for the period up to the conclusion of trial, to the extent that the Defendants do not pay their salary and subject to being able to reclaim those amounts should it succeed at trial. In my judgment, this undertaking is sufficient to meet the Defendants' concern in this regard.

83. Secondly, the First Defendant makes a more general assertion that, if an injunction is now granted, there will be no business left to carry on even if they win at trial. As far as other outgoings are concerned, rent under the lease is not due until 29 September and the trial will take place before then. Moreover, the First Defendant's own evidence is that it is his personal reputation which attracts and has attracted customers to the business. On this basis, there is no reason to suppose that if he were to resume trading as Maison Mason from the Premises after trial, he would not continue to attract custom and to the extent that his volume of trading was reduced for a period of time, the loss thereby occasioned could be calculated. Finally, and significantly, in my judgment, the Claimant's financial worth (in excess of £6 million) will be more than enough to meet any award under its cross-undertaking in damages.

84. I conclude that damages would be an adequate remedy for the Defendants and, on this basis, there is no need to proceed to consider the balance of convenience. My conclusion is that, in principle, the Claimant should be granted interim relief in the terms sought in paragraph 3 of the draft order.

(4) The Balance of Convenience

85. If my conclusion on the adequacy of damages for the Defendants is wrong, I go onto consider the balance of convenience. This involves balancing the risks of injustice of a "wrong decision" at this stage. I am satisfied that the risk of injustice to the Claimant (if an interim injunction is now refused) far outweighs the risk of injustice to the Defendants (if an interim injunction is now granted).

86. First and most importantly, as matters presently stand, the Claimant has a very strong case on the underlying merits of the claim and so is likely to succeed at trial. As pointed out above, this is a relevant factor at the fourth stage of balance of convenience. Here, since the prospects of success at trial for the Defendants are slim then the risk of injustice to the Defendants arising from a decision to refuse a final injunction is commensurately slim. The other side of that coin is that the risk of injustice to the Claimant is much greater.

87. Secondly, in relation to the removal of the signage, I am also satisfied that if there is a higher merits threshold for the grant of such mandatory interim relief, the Claimant's case meets that threshold.

88. Thirdly, I take account of the fact that the Defendants did take positive steps (in relation to signage and solicitation of customers) after they had been put on notice on 19 June 2020 of the alleged breach of clause 22.2 and of the Claimant's intention to seek injunctive relief. In this way, they sought to alter the status quo. This further supports the conclusion that there should be interim relief to undo what they have done. The Defendants submitted that the First Defendant had at all times been open about the first Defendant's intention to set up the new business and that he had not been attempting to steal a march. In that regard, they sought to rely upon the terms of the 11 June 2020 without prejudice letter. The Claimant objected to the admissibility of that letter. I read the letter *de bene esse*. In my judgment, any such assertion in that letter is not material to the issues I have to decide because the Claimant's complaint relates to the First Defendant's actions once he had notice on 24 June of the Claimant's intention to seek an injunction from the court. This letter pre-dates such notice.

89. Fourthly and finally, the Defendants made the point that, in fact, it was in both parties' best interests for the Defendants to be able to continue the estate agency business from the Premises in the intervening period, not least because of the effect of the injunction sought is that the Premises will remain closed during that period (The Claimant has not proceeded with interim relief in relation to taking over the lease). Then at the close of submissions and picking up on a suggestion which I had made at the outset of the hearing, Mr Rowntree indicated that the Defendants are willing to continue the business until trial from the Premises and to do so under the Winkworth name, taking down the Maison Mason signage.

90. The Claimant is not willing to accept this suggestion. Mr Rowntree submitted that that refusal tips the balance of convenience in favour of refusing interim relief as it would remove the damage to the Claimant's reputation and goodwill. (In fact, this might be a point which also goes to the adequacy of damages for the Claimant).

91. However, in any event, I do not consider it unreasonable for the Claimant not to proceed in this way. The Franchise Agreements have terminated and there are no detailed terms in place to govern any ongoing relationship. More significantly than that, and without ascribing responsibility to either side, there has been a complete breakdown of trust between the parties, with each party accusing the other of unseemly conduct. A franchise relationship requires such trust. It would not be workable for them to cooperate in running the business from the Premises in these circumstances and whilst preparing for trial.

92. Mr Cohen QC posited an alternative solution of the grant by the Defendants of a licence under the lease to enable the Claimant to operate the Premises in the intervening period. This has not been offered by the Defendants. It would raise similar concerns about cooperation.

Conclusion

93. For the reasons set out above, there is a serious issue to be tried on the Claimant's claim for final relief, and damages would not be an adequate remedy for the Claimant. The

Claimant is entitled to interim relief on the basis that damages would be an adequate remedy for the Defendants and, in any event, would have been so entitled on the balance of convenience.

94. Finally, I am most grateful to counsel and to solicitors for the efficient and helpful way in which this application has been dealt with not least in the circumstances of the present COVID-19 situation. I will hear the parties on the terms of interim relief to be granted and upon directions for a speedy trial and any other consequential matters.

This Judgment has been approved by Morris J.