Neutral Citation Number: [2014] EWHC 2213 (QB)

Case No: TLQ/13/0127

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2014

Before :

MR JUSTICE PHILLIPS

- -

Between :

ONE STEP (SUPPORT) LIMITED	**Claimant**
- and -	
(1) KAREN MORRIS-GARNER	
(2) ANDREA MORRIS-GARNER	**Defendants**

- -
- -

Mr Craig Orr QC and **Mr Mehdi Baiou** (instructed by **Pitmans LLP**) for the **Claimant**
Mr Stephen Knafler QC and **Mr Peter Irvin** (instructed by **Neves LLP**) for the **Defendants**

Hearing dates: 15 – 17, 20 – 24, 27 – 29 January, 2, 3 April 2014

- -

Approved Judgment

Mr Justice Phillips :

Introduction

1. Until 20 December 2006 the first defendant was a director and the owner of one-half of the issued share capital of the claimant ("One Step"), a company in the business of providing "supported living" services to children leaving care and vulnerable adults. One Step supported service users referred from local authorities mainly in the West London and the Thames Valley areas. It had at least considered expansion into the Midlands.

2. On 20 December 2006 the first defendant sold her shareholding in One Step for £3,150,000, resigned as a director and entered into a deed with (amongst others) One Step whereby she agreed not to compete with or solicit clients or customers of One Step for a period of three years from the date of the Deed. The second defendant, the first defendant's civil partner, agreed to the termination of her employment by One Step and entered into a similar agreement not to compete with or solicit clients or customers of the claimant for the same three year period.

3. Unknown to One Step, the first and second defendants had already, the previous July, incorporated a company named Positive Living Limited ("Positive Living"), the first defendant owning 51% of its issued share capital, the second defendant owning the balance of 49%. In August 2007 Positive Living commenced trading. Part of its business was running a residential care home for six residents, but the main part involved providing rented accommodation to vulnerable adults and associated support and care services, trading in West London, the Thames Valley and the West Midlands. In relation to the former two areas, Positive Living dealt with several of the local authorities who had provided business to One Step. Positive Living's business was successful. The company was sold by the defendants in September 2010 for £12,823,205.

4. In these proceedings One Step seeks remedies for what it alleges were blatant breaches by the defendants of their restrictive covenants. One Step contends that Positive Living was clearly set up to and did compete with One Step and solicited One Step's local authority clients for business. One Step further alleges that the defendants used confidential information belonging to One Step, induced each other to breach the covenants and conspired with each other to injure One Step by unlawful means.

5. The defendants contend that the similarities between the two businesses were merely superficial and that, properly analysed, Positive Living did not operate in the same market as One Step and the defendants did not breach any of the restrictive covenants, nor did they act unlawfully. The second defendant pleaded that, in her case, the restrictive covenants were in unreasonable restraint of trade.

6. This judgment determines the issues of liability which arise between the parties, together with the question of the nature of the remedies to which One Step is entitled if liability is established. The parties agreed, and I have directed, that the

quantification of any remedy should be deferred until after issues of liability have been determined.

7. At the start of the trial and at the invitation of the parties, I ordered that the identities of service users of both One Step's and Positive Living's services should be kept confidential and not be reported. For that reason in this judgment I shall refer to individual service users by their initials.

The background facts

(i) The concept of supported living

8. It is common ground that the concept of supported living was introduced and developed during the 1990s as an alternative to residential care for vulnerable people, including those with mental health and learning disabilities. It involves providing vulnerable people with rented accommodation and the support they need to lead as full and independent lives as possible within the community. The object is to avoid the need for institutional care, reduce the risk of vulnerable people becoming homeless and help those currently in institutional care to move to a more independent and stable home in the community.

9. One of the main principles underlying supported living is that vulnerable people should have control over the care and support they get, who they live with (if anyone) and how they live their lives. The concept assumes that all vulnerable people, whether with learning or other disabilities, are able (and should be supported) to make their own choices about how to live their lives.

10. Supported living was consistent with and encouraged by government policy designed to promote independence, choice, inclusion and rights in the provision of health and social care as reflected in the following (amongst other) initiatives:

    (i) the White Paper Valuing People: A New Strategy for Learning Disability for the 21st Century, presented to Parliament in March 2001;

    (ii) the Department of Health's Building Capacity and Partnership in Care initiative, issued in October 2001;

    (iii) the Department of Health Guidance on Supported Housing and Care Home Regulation, issued in August 2002 (the "DOH Guidance");

    (iv) The Supporting People programme, introduced in 2003; and

    (v) The White Paper Our Health, Our Care, Our Say, presented to Parliament in January 2006.

11. Although local authorities invariably required that providers be accredited by them before being invited to tender for work, there was (prior to 2010) no requirement that a provider of supported living services should be licensed or registered. A service provider would only have to register under the Care Standards Act 2000 as a domiciliary care agency if the services it provided included personal care which involved physical and intimate touching of the service user. As for the dividing line

between personal care which could only be provided by a registered DCA and that which could be provided without registration, the DOH Guidance stated as follows:

"Personal care

…. Its established, ordinary meaning includes four main types of care which are:

- *assistance with bodily functions such as feeding, bathing, and toileting*
- *care which falls just short of assistance with bodily functions, but still involving physical and intimate touching, including activities such as helping a person get out of a bath and helping them to get dressed*
- *non-physical care, such as advice, encouragement and supervision relating to the foregoing, such as prompting a person to take a bath and supervising them during this*
- *emotional and psychological support, including the promotion of social functioning, behaviour management, and assistance with cognitive functions*

It is only the two more intensive kinds of personal care (1st and 2nd bullets), which trigger the requirement under the Care Standards Act for registration as a domiciliary care agency, although other kinds of personal care and support may also be provided by such an agency.

Non-physical care, emotional and psychological support do not of themselves trigger a requirement for registration with the National Care Standards Commission. Such care and support may be provided by various agencies according to the context and the persons' overall needs. In certain circumstances, these will be part of housing-related support, funded through Transitional Housing Benefit, or, from April 2003, Supporting People"….

(ii) The origins of One Step's business

12. The first defendant qualified as a social worker in 1996 and was employed by the London Borough of Ealing as a Child Protection Social Worker. During her time working there, the first defendant realised that there was no real provision for young people leaving the care system. In May 1999 the first defendant left Ealing Social Services to set up her own unincorporated business, One Step at a Time ("OSAAT"), to fill this gap. The business was based in Northolt in West London. The second defendant worked for OSAAT as its Operations and Area Manager.

13. OSAAT's business of providing accommodation and support to young people leaving local authority care expanded rapidly. Whilst focusing on young people leaving care, by 2001 OSAAT's Employee Handbook recorded that it had been successful in working with various client groups, including Young people/Adults with disabilities. It further stated that there was no maximum limit on the age of clients it would accept.

14. In 2002 the first defendant advertised OSAAT business for sale, ultimately agreeing to sell a 50% interest to the Costelloe family, Martin Costelloe being a successful entrepreneur with expertise in sales and marketing. One Step was incorporated as the vehicle for the transaction, acquiring OSAAT's business from the first defendant by

an assignment dated 31 October 2002, the price being £1,450,000 (although £749,950 of that sum was funded by setting off a loan from the first defendant). The first defendant and Charmaine Costelloe (Martin Costelloe's wife) each subscribed for 50% of the issued share capital of One Step and were appointed its directors.

15. Mrs Costelloe (and other members of her family, including her husband) and the first defendant (apparently on behalf of members of her family, although they did not sign) entered a further agreement ("the Shareholders Agreement"), also dated 31 October 2002. The Shareholders Agreement included the following:

    (a) provisions for dealing with a situation of deadlock between the directors by the service of a Deadlock Notice, constituting an offer by the server of the notice to sell all their shares to the other party at the price specified, but also an alternative offer to buy all the other party's shares at the same price;

    (b) provisions restricting any shareholder, during the course of the agreement or for three years thereafter, from engaging in a business which was in material competition with One Step or soliciting One Step's significant clients, such provisions being in materially the same terms as the restrictive covenants subsequently entered in 2006 (see paragraph 24 below);

    (c) a provision that the second defendant could act as an alternate director for the first defendant.

(iv) One Step's business from 2002 to 2005

16. One Step's business was thereafter run by the first defendant and by Martin Costelloe, the latter taking on the role of placement resources manger. The second defendant was at first the manager of the West London office, then became the Area manager, and finally the Supervisor of the Area manager.

17. Whilst the parties disagree as to the precise nature and proper characterisation of One Step's business in the ensuing period, certain matters are clear. First, One Step's supported living services were explained and marketed as extending well-beyond supporting young-people leaving care. In 2002 One Step engaged Nicholas Rootes, a copywriter, who produced a brochure for One Step's services by the end of that year. The brochure, which Mr Rootes explained was prepared primarily on dictation from the first defendant, referred to One Step supporting people including those with (i) mental health issues (ii) physical disabilities (iii) challenging behaviour (iv) offending behaviour and (v) mild to moderate learning difficulties, in addition to young people leaving care. Reference was also made to One Step having "*flexible service options which allow us, in consultation with their social workers, to tailor the services we provide specifically to the needs and preferences of each person*" and to the fact that "*Assistance is given in accessing additional services and support groups, depending on each individual's needs"*.

18. Second, One Step's business prospered greatly in the period 2002 to 2005. In the year ended 31 October 2003 One Step made profits of £543,000 on sales of £1,957,000. By 2005 profits were £940,000 on sales of £5,027,000.

19. Third, in 2003 One Step established a new hub for its business in Reading, focusing on both children leaving care and on adults with mental health and learning disabilities. By 2005 One Step had 9 adult clients in Reading. Also in 2003 One Step set up a Family Assessment Centre in Reading.

(v) The breakdown in the relationship between the defendants and the Costelloes

20. In 2004 the working relationship between the first defendant and Mr Costelloe broke down to the extent that legal proceedings were threatened and One Step's ongoing business was significantly undermined. In late 2004 and early 2005 steps were taken to market One Step for sale. A proposed sale to Sovereign Capital Partners LLP proceeded through the due diligence stage, but Sovereign pulled out of the transaction late in 2005.

21. In May 2006 Mrs Costelloe gave notice of her intention to serve a Deadlock Notice under the terms of the Shareholders' Agreement. She duly served such a notice on 11 August 2006, offering to sell her shares to the first defendant for £3,150,000, alternatively offering to buy the first defendant's shares for the same price.

22. The first defendant elected to require Mrs Costelloe to purchase her shares, perhaps not surprisingly in retrospect given that the defendants (unknown to the Costelloes at that time) had incorporated Positive Living one month before. There was some delay, which the Costelloes attribute to having to raise finance for the purchase, during which the first defendant issued proceedings in the Chancery Division to enforce the sale.

(v) The buy-out of 20 December 2006

23. On 20 December 2006 the first defendant entered a sale agreement, agreeing to resign as a director of One Step and to sell her 50% interest in One Step for £3,150,000 to Community Support Project Limited ("CSPL"), a company owned by Mr Costelloe which had acquired or was to acquire Mrs Costelloe's 50% of One Step.

24. That agreement was entered pursuant to a Deed of Compromise executed on the same date between the first defendant, One Step and the Costelloes, providing for a compromise of the Chancery Division proceedings (to which effect was given by a Tomlin Order). The first defendant further agreed, for a period of 36 months, to be bound by the following restrictive covenants, in which One Step was referred to as "the Company":

> "*1. All information concerning the business transactions of the Company and of any person with whom the Company is in a confidential relationship shall be kept confidential unless or until [the first defendant] can reasonably demonstrate that any such communication, information and material is, or part of it is, in the public domain through no fault of her own, whereupon to the extent that it is in the public domain or is required to be disclosed by law, this obligation shall cease.*
>
> *2. [The first defendant] shall not without the prior written consent of the Board (such consent to be withheld only so far as may be reasonably necessary to protect the legitimate interests of the Company);*

> *2.1 engage as a director, principal, partner or consultant or accept employment or assist in any capacity in any business concern (of whatever kind) which shall be in material competition with the Company;*
>
> *2.2 whether alone or jointly with or as principal partner agent director servant or consultant of any other person or persons directly or indirectly in competition with any of the businesses or activities of the Company as at the date of this Deed:*
>
> *2.2.1 either on her own behalf or on behalf of any other person or persons knowingly canvass solicit or approach or cause to be canvassed or solicited or approached for orders in respect of any services provided or any goods dealt in by the Company any person or persons who at the date of this Deed or within one year prior to such date is or was a significant client or customer of the Company (and for the purposes of this clause it is agreed that the clients or customers of the Company are the local councils paying for the services provided by the Company rather than the consumers of those services);"*

25. As part of the same global transaction, the second defendant (with the benefit of independent legal advice) entered into a Deed of Compromise with One Step, terminating her employment and waiving any rights or claims she might have against One Step. The second defendant also agreed to be bound for 36 months by restrictive covenants in identical terms to those as given by the first defendant, save that they did not include the provision as to confidential information.

(vi) One Step's business after December 2006

26. Once under Mr Costelloe's sole control, One Step's business began to grow once more, assisted by advice from Alex Bowman, a commissioning officer at Brent Council who was subsequently recruited by One Step in the Spring of 2007.

27. In March 2007 Mr Costelloe entered negotiations with Farouq Sheikh of CareTech Group plc for the sale of the One Step business. Caretech's due diligence reported that, since the buy-out, the business had demonstrated significant recovery in terms of occupancy levels and confirmed that One Step was on track for profitability and growth. On 26 July 2007 CareTech Holdings plc acquired CSPL, One Step's parent company, for a total consideration of £11,017,000.

28. After the sale to CareTech, Mr Costelloe continued as a salaried employee and was asked to expand One Step's business into the Midlands. In late 2007 Mr Costelloe heard that the first defendant had set up in competition with One Step, following which CareTech's solicitors entered into correspondence with the defendants' solicitors. The defendants denied they were competing with One Step and CareTech did not then pursue the matter.

29. However, in early 2008 CareTech recalled Mr Costeloe from the Midlands to assist One Step's business in London, which had experienced a significant downturn. This was in due course attributed by CareTech to competition from the first defendant's business, leading eventually to the present proceedings. Mr Costelloe acknowledges

that he is assisting One Step in the proceedings on the basis that he will receive a percentage of any recoveries.

(vii) The establishment of Positive Living

30. As mentioned above, Positive Living had been incorporated by the defendants in July 2006.

31. On 8 March 2007 the defendants obtained registration of Positive Living as a domiciliary care agency with the Care Quality Commission, enabling Positive Living to provide physical and intimate care of a type which a service provider such as One Step could not provide.

32. Positive Living started marketing its new business from the Spring of 2007, as is apparent from a round-robin email circulated by the first defendant in March 2007 to potential local authority clients (although it is not clear precisely which ones) in the following terms:

> "*Positive Living is now accepting referrals for placements in your area.*
>
> ***What is Positive Living?***
>
> *Positive Living is an organisation that enables clients with personal care needs to live in the community rather than in a residential establishment. Positive Living is unique in this respect as although we provide accommodation and support we differ in that we can provide personal care as we are registered with the Commission for Social Care Inspection. Although we are aware that there are other providers locally that offer semi-independent accommodation we are not aware of any organisations that are registered with the commission to meet personal care needs.*
>
> *Therefore we are able to administer medication, bath clients, help with dressing, go shopping on their behalf, cook meals for clients etc….*
>
> *Positive Living evolved as a community care option that can provide that extra bit of care needed compared to standard semi independent organisations.*
>
> *I have attached our brochure for your perusal and would very much like the opportunity to come along and meet with you to discuss our services as we provide a range of options that is best discussed face to face. I will contact you in the very near future in order to try and make a convenient appointment for you but if you are able to email any dates and times to me that would be great.* "

33. It is apparent from the above that Positive Living was offering to provide rented accommodation and support services, such as those provided by One Step (which it is to be inferred was one of the "*other providers locally*" referenced in the email), but seeking to distinguish its service on the basis that it was able to "*provide 'that extra bit of care needed'*".

34. Positive Living produced a brochure which referred to offering "*a comprehensive range of possible placement options that ensure the needs of both users and Placing Authorities are met in every respect"*. The brochure advertised both Positive Living ("*Flexible placement options ensure service users receive care and support that is tailored to their needs")* and Positive Support ("*.. for service users who have support needs but do not require care as they have no care needs"*). The defendants assert that the latter option was only available in the Midlands, where One Step was not operating, although nothing in the brochure indicates such a restriction.

35. In August 2007 Positive Living started accepting placements in Campion House, Denham, Buckinghamshire, a property owned by the first defendant which had previously been leased to One Step for use in its business. This property accepted users referred from authorities throughout the Thames Valley and was joined in 2008 by a further property in High Wycombe known as The Beeches.

36. In early 2008 Positive Living opened a facility in Northolt, known as Oaklands, to accept referrals from West London local authorities. A further property, Acorn House, was opened in July 2008.

37. Also in July 2008 Positive Living opened Hilltop in Dudley, West Midlands. During 2009 the defendants opened a further three properties in that area.

38. Positive Living also operated a residential care home, Brickbridge House in Stafford, from about March 2008. One Step makes no claim in relation to this aspect of the defendants' business.

39. In January 2010 the defendants took steps to offer Positive Living for sale and for that purpose instructed Bates Weston Corporate Finance to prepare an Information Memorandum dated January 2010, expressly stated to be based on information and opinions provided by the defendants.

40. The Information Memorandum referred to Positive Living throughout as a supported living business, operating in "*the fragmented market for supported living businesses ..*". The description of the first defendant included a reference to her "*successful exit from a previous care company ...*".

41. The Information Memorandum further explained that the strategy for the business was to develop a management structure and facilities around geographic clusters, the three regions chosen being Thames valley, West London and West Midlands. The business had 11 facilities across these regions and "*currently has capacity for 46 supported living places … New community placements can also be added at any time."*

42. On 20 September 2010 the defendants sold their shares in Positive Living to a company in the Craegmoor group for £12,823,205.

Whether Positive Living was in material competition with One Step

43. As the defendants were directors of Positive Living and closely involved in its business, it is common ground that they would be in breach of their respective non-compete covenants if Positive Living was in "material competition" with One Step during the duration of those covenants. The parties were also agreed that the word "material" adds little to the concept of competition, meaning "non-trivial". Otherwise, there was fundamental disagreement as to the proper construction of the non-compete covenant.

(i) The proper construction of the non-compete covenant

44. In *Clarke v. Newland* [1999] 1 All ER 397, Neill LJ summarised the principles applicable in construing restrictive covenants as follows:

> "From these cases and other cases in the same field it is possible to collect certain rules: (1) that the question of construction should be approached in the first instance without regard to the question of legality or illegality; (2) that the clause should be construed with reference to the object being sought to be obtained; (3) that in a restraint of trade case the object is the protection of one of the partners against rivalry in trade. To these rules can be added a fourth: (4) that the clause should be construed in its context and in the light of the factual matrix at the time when the agreement was made … "

45. The context of the non-compete covenants in the present case is that the first defendant was the founder of One Step's business, the public face of the company and the person with the most contacts and strongest relationships with One Step's clients, the local authorities. The agreement of the first defendant and her civil partner not to compete with One Step was plainly an important if not crucial part of the transaction in which the first defendant received a very substantial sum in exchange for her interest in One Step.

46. Mr Orr QC, leading counsel for One Step, contended that Positive Living would be in competition with One Step if it was a rival in business, that is to say, that the services it offered were effectively interchangeable with those offered by One Step in a particular geographical area or which One Step could otherwise readily supply as part of its business in that area. It was not necessary that the services be precise substitutes, only that they were sufficiently interchangeable so that they were within the same market.

47. I accept that analysis and would add this. At the time the covenants were entered, the involvement of the first defendant in a similar business to that conducted by One Step in West London and the Thames Valley would obviously have been very damaging to One Step, not simply in terms of direct loss of business, but in terms of client perception of One Step. In my judgment, that factual matrix requires a broader rather than a narrower interpretation of the phrase "in material competition".

48. In his closing submissions, however, Mr Knafler QC, leading counsel for the defendants, advanced a new and far narrower construction. Basing his argument on the uncontroversial proposition that the restrictive covenants must be construed as a

whole, Mr Knafler contended that the starting point should be the covenant against non-solicitation (clause 2.2.1), prohibiting solicitation of local authorities that had been significant clients or customers of One Step in the previous year. Mr Knafler argued that the effect of that prohibition was that the defendants were thereby permitted to solicit any other local authority and that the non-compete covenant should be construed consistently with that implicit permission: the non-compete covenant was a "standard" provision which should be construed as subsidiary to the specifically drafted non-solicitation clause.

49. In my judgment there is no basis for such an extreme construction. The non-compete and non-solicitation covenants are drafted as independent restrictions, dealing with distinct and well-recognised issues: one deals with competition in general terms (which is qualified by "material") and the other with specific solicitation of existing clients (which is not so qualified). Neither is stated to be subsidiary to the other and there is no basis for inventing such a linkage. Further, as Mr Knafler also contended that the only local authority which was a significant client within the non-solicitation covenant was the London Borough of Ealing (a contention considered below), the logical effect of his argument on construction was that Positive Living was entirely free to compete with One Step for business from any other local authority, including "poaching" One Step's existing service users. Such a result would be entirely uncommercial and would be contrary to the obvious intention of the provisions.

50. Mr Knafler argued that his construction should nonetheless be preferred because, he contended, the non-compete covenant would be in unreasonable restraint of trade and so invalid if it extended to doing business with parties other than One Step's significant clients in the previous 12 months. That argument falls foul of the principle that a clause should first be construed without regard to questions of illegality. But in any event, it is well established that it is reasonable to protect not only a businesses' relationship with existing customers but also the more general goodwill of the business, including potential new clients: see *Allied Dunbar v. Weisinger* [1988] IRLR 60 at paragraph 26, where Millett J. stated:

> "*… the prospect of obtaining new clients from recommendations and referrals was obviously part of the goodwill of the defendant's practice. There could be no certainty that the plaintiff could secure such clients for themselves but they were entitled to try and prevent the defendant from denying them the opportunity of succeeding* ".

51. *Allied Dunbar* was a case where a vendor had entered both non-solicitation and non-compete clauses. The necessity for and reasonableness of a non-compete clause which was wider than the non-solicitation clause was recognised and upheld. The same reasoning applies in the present case.

(ii) Material competition between the businesses – West London and Thames Valley

52. The defendants have throughout been reluctant to accept that Positive Living was a supported living business, but in my judgment it is entirely clear that both One Step and Positive Living were businesses in the supported living market in the West London and Thames Valley regions during 2007 to 2009, One Step having been in that market for several years before that period. As the first defendant accepted in

cross-examination, the provision of accommodation was the core of both businesses, with both businesses providing a range of support and/or personal care to the tenants of such accommodation. Indeed, the Information Memorandum published by Positive Living unequivocally described Positive Living as a supported living business.

53. It is also clear that the supported living market was mixed, both in terms of the service users and providers. The parties' experts on care issues agreed that supported living encompassed service users with a wide range of needs, from occasional support to significant dependencies, and that both One Step and Positive Living were supported living businesses. The defendant's expert, Philip Madden, stated in his report:

> "*Supported living tenancies for people with significant dependencies are indeed common. There can be different way their need can be met. Separate parts of the same organisation can provide housing and support service (including registerable personal care), or different combinations of separate services work together. In my experience [local authority] commissioners vary in their approach to this, dependent on each individual, the services available, budget constraints and ideology.*"

54. As for the range of providers, Mr Madden's oral evidence was that:

> "*… if you were in any one local authority – any one local authority – there would, at any one moment of time, be a range of potential providers. There would be one man bands, very small organisations; there would be regional examples of large organisations. There would also be people who provided quite specific services. And there would be organisations who provided a huge range of services. So at any one moment of time a commissioner in a particular authority would be looking at a very wide range of potential providers* "

Farouk Sheikh, a director of the CareTech group, the purchasers of One Step in 2007, gave evidence to the same effect:

> "*We saw what was out there was a mixed economy; … local authorities were quite keen to work with a mixture and range of sort of service providers*"

55. It follows from the above that, on the face of matters, One Step and Positive Living were both competing in the supported living market for placement referrals from local authorities in the West London and Thames Valley regions.

56. The defendants nonetheless contend that Positive Living was not in fact competing for the same business as One Step. They have attempted to draw a number of distinctions between the businesses and the clients they were seeking to obtain. Certain of those alleged distinctions do not survive even cursory scrutiny:

i) Several of the witnesses called by the defendants confirmed witness statements in which it was asserted that One Step only ever catered for children leaving care ("CLC"), whereas Positive Living dealt only with adults. These assertions were plainly incorrect and had to be withdrawn: whilst OSAAT's initial business had been catering for CLC, the business had expanded to include adults even before it was acquired by One Step. More significantly, One Step's expansion into Reading in 2003 involved significant numbers of adult clients, referred by local authority teams responsible for adults with mental health and learning disabilities. By 2006 the majority of One Step's clients were adults, with a range of needs. Even some of the clients referred as CLC had disabilities or had transferred to the care of adult teams within the relevant authority. I accept One Step's contention that by the time the restrictive covenants were entered, One Step was a diversified supported living provider.

ii) The first defendant did recognise in her witness statement that One Step provided services to "*some adults with mild disabilities*", but contended that One Step provided the same services to those adults as they provided to CLC, that is to say, support and life-skills training. She asserted that, with just two exceptions, One Step did not provide any personal care to clients. However, whilst it was common ground that One Step could not itself provide registerable personal care (the first two bullet points of the DOH Guidance), there was ample evidence that One Step provided non-registerable personal care, a prime example being service user GH. A detailed examination of that evidence is unnecessary because the first defendant accepted in giving evidence that One Step did indeed provide emotional and physical support to its adult clients, falling within the fourth bullet point of the definition of personal care. Mr Knafler pointed out that, in the case of children, One Step could not provide <u>any care</u> with accommodation (because that would trigger a requirement to register as a children's home), and that Mr Costelloe had confirmed to regulators that One Step generally provided support services only and no care services. Whilst this forensic point was skilfully deployed, the evidence demonstrated that the support provided by One Step to its adult clients undoubtedly included significant elements of personal care, including prompting personal hygiene activities and meal preparation.

57. The one undoubted distinction between the two businesses was that Positive Living was registered as a domiciliary care agency whereas One Step was not so registered during the relevant period. The defendants contend that this distinction entailed that the businesses were simply not trading in the same market. First and foremost, they say that Positive Living only catered for clients with registerable personal care needs, which One Step could not and did not itself provide. Second, they say that Positive Living's registration meant that they would be viewed by local authority commissioners as an entirely different type of provider than One Step, a perception which they say would have been confirmed by the parties' respective marketing materials and statements of purpose.

58. The immediate and, in my view, insuperable difficulty for the defendants in relation to their contentions in this regard is the fact (recorded by Mr Madden as set out above) that local authorities look to different providers to provide different aspects of a service user's care package. Sheenagh Burgess, One Step's care expert (who was

herself a local authority commissioner for many years), explained the concept of "split provisioning" as follows:

> "*The Local Authorities I have worked in were both willing and accustomed to split provision of care/support between providers, depending on the nature of care/support required, the availability of an appropriate provider, cost, and wishes of the individual service user. The clear, statutory, responsibility for the overall care package lies with the LA care manager, not the provider. If the care package is complex, then one provider is likely to take a lead, on a day to day basis, 'on the ground'. This role would be defined in the contract with the provider. The coordination of services to meet complex needs typically did not simply relate to personal care and housing related support, but also to a range of health care, family arrangements, and cultural/religious needs.*"

59. Mr Madden agreed in his report that arranging for one agency to provide intensive/registerable care and another agency to provide accommodation and support was "*quite common*", although he had "*equally found it was quite common for them not to be split.*" Mr Madden attempted to resile to some extent from this position in his oral evidence, suggesting that he was not referring to planned split in provision from the outset, but to providing for a new need that developed during a placement. However, I am satisfied that Ms Burgess' account, which Mr Madden had undoubtedly understood and accepted in terms in his report, presents the more accurate picture.

60. Among the reasons why split provisioning is attractive to local authorities was that domiciliary care is cheaper than life-skills training, and the authority might wish to have such services provided separately or provide them itself. Further, there was no guarantee that Positive Living would itself provide or continue to provide any domiciliary care: its contracts provided that the registered care element was severable so that the client might obtain that care from another provider. This was necessary to avoid Positive Living's properties being classified as residential homes where registered care was necessarily provided.

61. In any event, Mr Madden did not suggest that planned split provisioning never occurred, even if his final view was that it was not typical. In my judgment, once it is accepted that a local authority might have been persuaded to split the provision of (i) registered domiciliary care and (ii) accommodation and support between two agencies, the fact that Positive Living was able to provide both aspects ceases to be a distinction which entails that Positive Living was not in competition with One Step.

62. Further, the point is not merely theoretical because One Step, as at December 2006, did indeed have two adult clients who had been referred by the Ealing adult disabilities team, AH and JC, who had registerable personal care needs which were met by separate domiciliary care agencies visiting the accommodation provided by One Step. The first defendant had asserted in her witness statement that AH did not have "intensive personal care needs", but the contemporary records demonstrate the contrary.

63. Further, the first defendant contended that JC had been placed with One Step in exceptional circumstances because his previous placement had broken down and he was homeless. She also suggested that One Step was not seeking referrals of this or any type of adult client. However, the documents revealed that JC had been moved from a nursing home to a step-down unit in November 2005 and that that placement had not broken down: the referral to One Step was because Ealing wanted to place him in supported living with a sophisticated care package. It took One Step until July 2006 to find suitable accommodation to accept the placement – there was nothing urgent about it. The email correspondence concerning the placement, in which the first defendant was involved, gives the lie to numerous of the defendants' contentions as to One Step's business and the business it was seeking to attract in 2006:

(a) On 9 December 2005, after receiving a referral for JC from Ealing, Mr Costelloe emailed the first defendant, asking "*What is your view on this placement – the personal care needs are addressed by another agency ?is it viable"*

(b) the first defendant did think the placement was viable and One Step started to look for suitable accommodation. On 25 May 2006 Mr Costelloe emailed Ms Whaley, the Deputy Manager at the Northolt office, referring to the fact that Ealing had approved the placement and stating:

"*Lets make sure we are on the case with the flat and ensure that we assess him properly as he is a wheelchair user etc. Personal care is their remit and will be done by others that we will need to liaise.*

This is a client group that we will go for all over West London and is long term ([YS],[AH]) and unlike Leaving care – YMCA's are not an option!!"

(c) After a chasing email from Ealing on 20 July 2006, Ms Whaley emailed the first defendant as follows:

"*.. do you want me to arrange a date and time or not as this could bring us a lot of future business working with adults with physical disabilities."*

(d) On 27 July 2006 the first defendant emailed Mr Costelloe referring to problems locating a flat suitable for JC's needs, the main problem being the need for a walk-in shower. She concluded: "*We are obviously working intensively to try and sort this out".*

(e) Mr Costelloe replied that day that One Step would have to put in a shower itself, stating *" …it will mean we will keep the placement for ever as they wont want to move him out once settled … maybe we will spend a grand or so but it will be well worth it …."*

(f) The email chain concluded with the first defendant asking if Mr Costelloe would email Ealing about obtaining a grant for the installation of a shower.

64. It is apparent from the above that JC, a case requiring registerable care by a separate agency, was not an emergency placement but one which One Step fought hard to obtain over a period of months, recognising its value and the value of the prospect of further similar placements. The first defendant was intimately involved in that process

(although when giving evidence she at first said she had no involvement with JC's case whatsoever) and also understood its value. It is noteworthy that the above email exchanges involving the first defendant took place only days after the defendants had secretly incorporated Positive Living. In my judgment these documents support my overall view that the first defendant's evidence, both in her witness statements and given orally, significantly misrepresented the facts of the case in an attempt to improve her position in the case. Combined with her argumentative and uncooperative stance, she was in my view an unsatisfactory witness who lacked credibility.

65. One Step subsequently, after December 2006, did obtain further clients with personal care needs, provided by separate agencies, the records in my judgment clearly recording that such care was provided to both VD (an existing client who developed care needs) and RC. One Step itself arranged, on behalf of the local authority, that a domiciliary care agency provide personal care to certain clients. Mr Knafler contended that for One Step to have done so would have been a criminal offence. I express no view on that contention, but merely observe that the process demonstrates that One Step could and did provide support services in tandem with another agency providing registered care.

66. On the other side of the coin, there is also a serious issue as to whether it was indeed the case that all Positive Living's clients in West London and Thames Valley regions required registered personal care, or whether they could have been serviced by a provider such as One Step. The care experts agreed that, of the 36 Positive Living clients they both considered, 14 had registered personal care needs. Ms Burgess did not consider that there was evidence that the remaining 22 clients had such needs, 6 of whom were placed in the community. Mr Madden accepted that one of those 22 might not have had registerable needs, but disagreed in relation to the others. The reason for the disagreement in 14 cases was that Mr Madden was told by the defendants that those clients required the "administration of medication", which Mr Madden considered was registerable care, whereas Ms Burgess did not. The entries in the care plans and assessments suggests that 6 of those 14 users were self-medicating, whereas the exact degree of assistance in the other 8 cases was unclear (Mr Madden interpreted "medication – oral" as placing medicine in the client's mouth. Ms Burgess considered it simply meant that the client was taking medicine orally).

67. There was much debate during the trial on the issue of when administration of medicine was registerable care. The parties and their experts ultimately appeared to have reached consensus that (a) during the relevant period there was no special test relating to administering medication – it was a matter of applying the DOH guidelines, that is to say, did the administration require intimate touching (such as putting medicine in a client's mouth); and (b) the question of how particular forms of administration of medicine would be viewed by the regulator was an open question.

68. Mr Madden initially expressed the view that as medicine went inside a client's body, any assistance at all with medication was registerable care. However, he subsequently accepted that the same reasoning would apply to food, and that supporting meal preparation was certainly not registerable care. I accept Ms Burgess' view that administering medicine was only registerable if it involved touching, such as placing medicine in a client's mouth. Simply directing the client to his medicine, or placing it in a dosset box, was not registerable care, and in any event that was a service which One Step provided for numerous of its adult clients in Reading. In my judgment, on

the balance of probabilities, at least some if not all of the 14 clients to whom Positive Living claimed to have been administering medicine were not receiving registerable care and could have been clients of One Step, without the need for the involvement of a separate domiciliary care agency.

69. Perhaps recognising the difficulties in his position, Mr Madden introduced a new argument during his oral evidence, namely, that the 14 service users to whom medicine may have been administered in any event lacked mental capacity, so rendering the care registerable. I do not accept that contention: the relevant care plans did not have the "green dot" marker which denoted a lack of mental capacity and capacity is to be presumed unless the contrary is determined.

70. In summary, I consider that the fact that Positive Living was able to provide registered care services does not entail that it was not in competition with One Step. I find that Positive Living competed for and obtained clients in West London and Thames Valley who had support-needs only, and I also find that One Step was perfectly able to and did compete for clients who had registerable care needs on the basis that those needs would be met separately.

71. Neither do I accept that the marketing materials and statements of purpose issued by the respective companies demonstrate that they were in different markets or would be so perceived by the relevant local authorities. Whilst those materials perhaps emphasised different starting points or strengths, they were both offering supported living services to a broad range of clients. The fact that two businesses emphasise different aspects of their services does not in any sense mean that they are not in competition for a broad range of work.

72. Mr Knafler advanced another new argument in closing, namely, that the non-compete covenant did not prevent Positive Living seeking adult client referrals from authorities where One Step were only catering for CLC in December 2006. Mr Knafler argued that One Step was not in an advanced state of preparation to conduct such business (see the discussion of *Dawnay, Day & Co. Ltd. v. D'Alphen* below) so it did not form part of One Step's goodwill. I see no merit at all in that contention. One Step's business was providing a range of supported living services to a range of service users in two regions, with a hub in each. It was able to offer and provide any of those services to any of the authorities within those regions and would hope to receive cross-referrals between different teams in each local authority and between different authorities (which Burgess made plain was the way that local authorities often operated). The fact that it had not yet provided a particular service to a particular authority did not entail that it was not very much in the market for such services, albeit unsuccessfully to that point.

73. I am therefore entirely satisfied that the defendants were in breach of the non-compete covenant by trading in West London and Thames valley from August 2007 to December 2009.

iii) Material competition between the businesses – the Midlands

74. It is clear that from about 2004 Mr Costelloe had viewed the Midlands as a potential area for expansion of One Step's business. Birmingham was referred to as an option (the other being Manchester) in a business strategy report prepared for One Step by

Tom Conlin in February 2004, the Midlands was a feature of marketing work done by Mr Rootes in the period 2004 to 2007 and regional growth was referred to in a sales prospectus prepared in mid-2004. Mr Costelloe's evidence was that he and the first defendant had agreed in 2005 to press on with plans to expand the business as quickly as possible, with the focus on the Midlands, not merely to appease the potential purchaser of the business, Sovereign: he was not challenged on this account.

75. Mr Costelloe accepted that the expansion plans were put on hold after the Sovereign deal collapsed, but contended that they were revived after the buy-out and continued, by Mr Costelloe, after One Step was sold to CareTech, with a placement being referred from Birmingham in 2007 (albeit placed in accommodation in London).

76. The defendants accept that Positive Living, (or a predecessor business called Positive Support, subsequently subsumed into Positive Living) did obtain support-only clients in the Midlands during the operation of the restrictive covenants, but contend that they were not thereby in breach of the non-compete covenant, One Step having no business at all in the Midlands in December 2006.

77. One Step's case is that its plans and intentions to expand into the Midlands were part of its goodwill in December 2006, warranting protection under the terms of the non-compete clause. Reliance is placed on the Court of Appeal decision in *Dawnay, Day & Co. Ltd. v. D'Alphen* [1998] ICR 1068, in which it was held that a non-compete clause covered not only existing business but also other kinds of business which were in an advanced state of preparation, and were valid and enforceable. Evans LJ stated at p. 1108:

> "*Taking these factors together, Dawnay Day clearly in my view was entitled to claim protection not only for those kinds of business which Dawnay Securities was carrying on when the managers left, in the sense that their desks were actively dealing with clients, but also for the other kinds which were in an advanced state of preparation. That would mean that facilities were being installed, traders recruited and trained, and that all the necessary connections were being established with intended or hoped-for clients. The managers were privy to the plans generally and to details of that sort. If some protection post-termination is justified, then it becomes necessary to consider how long the period should be*."

78. However, no matter how firm One Step's plans may have been for the Midlands (in the mind of Mr Costelloe if not the first defendant), they can hardly be considered to have been in an advanced state of preparation in December 2006. The contrast with the position in *Dornay Day* is obvious. One Step had no facilities in the Midlands, having neither identified an office there nor found accommodation for users. One Step had not recruited, let alone trained staff. Nor had it established connections with potential commissioners, having neither applied for accreditation nor been invited to tender for business. There is no suggestion that One Step's managers were involved in considering any such matters. The most that can be said was that there had been a general intention to expand in that direction, in respect of which feelers had been put out by Mr Rootes some time before. But even those intentions were at best dormant and unexpressed at the time the restrictive covenants were entered.

79. It follows that Positive Living's business in the Midlands did not place the defendants in breach of the non-compete covenant.

Whether the defendants breached the non-solicitation covenant

80. One Step claims that seven local authorities fall within the definition of significant clients or customers: (i) Buckinghamshire; (ii) Ealing; (iii) Hillingdon; (iv) Hounslow; (v) Oxfordshire; (vi) Windsor & Maidenhead; and (vii) Wokingham. Those seven have been claimed on the basis that they each referred one or more users during 2006 (roughly the 12 months prior to the covenants), each accounting for revenue in excess of £30,000, and were important sources of prospective future referrals.

81. The defendants have not seriously disputed the allegation that they solicited local authorities (being the class of clients or customers for the purposes of the covenant) for business. That was a realistic concession given the first defendant's round robin email of Spring 2007, an email from the first defendant to Jill McIver at the Leaving care team at Hillingdon dated 14 August 2007 and a reference provided by Sue Graham of Ealing confirming that Positive Living had approached Ealing at the end of 2007. I have no difficulty in inferring that the defendants solicited all seven of the local authorities identified by One Step for business.

82. The defendants case is that (1) none of the local authorities approached, except Ealing, was a "significant client" of One Step within the meaning of the clause and (2) in each case Positive Living was soliciting different services to those supplied by One Step.

83. The basis for the defendants' assertion that only Ealing was a significant client of One Step is the argument that a client authority cannot be "significant" unless it had placed "at least 3 or 4" service users with One Step during the relevant period. Only Ealing met this arbitrary test. However, it is beyond doubt that each service user was a valuable ongoing source of income for One Step, One Step having only 53 clients as at 20 December 2006. In my judgment any authority which placed a service user with One Step for a prolonged period during the relevant year was potentially significant, in part because of the consequent income and in part of the possibility of further referrals from an existing client. In my judgment One Step is perfectly justified in regarding any authority which referred business worth more than £30,000 in 2006 as having been significant.

84. The basis for the assertion that Positive Living was offering to provide different services is, in the case of four of the authorities, that One Step had only provided services to CLC clients whereas Positive Living was offering services to adults and, in the case of Oxfordshire, that that authority was primarily using One Step's Family Assessment Centre. In the case of Ealing (accepted to be a significant client), the argument is One Step was only providing "transitional care" whilst that Positive Living was providing a 24 hours a day "package" of care (although Mr Knafler accepted that one of Positive Living's service users, LO, was in a community flat, receiving only 21 hours of support per week).

85. However, the restriction imposed by the non-solicitation clause was on the defendants soliciting a significant client for "*any services provided*" by One Step, not limited to just the specific type of service which had been supplied by One Step to the specific

client in the previous year. Such a restriction is entirely reasonable: what is reasonably protected is the business relationship with the client, not the provision of just one type of service. Given that I have already found above that Positive Living's services were interchangeable with services provided by One Step, it follows that any solicitation of a significant client for the provision of those services will be a breach of the clause.

86. I therefore find that the defendants breached their non-solicitation covenants in the respects alleged by One Step.

Whether the second defendant's covenants were unreasonable

87. The second defendant pleaded a separate argument that, as she was only an employee and not a shareholder of One Step, the covenants she entered were unreasonable and unenforceable against her. Although she said in giving evidence that she had agreed to the covenants "under duress" from the first defendant, no defence of duress was formally advanced at any stage. Indeed, the argument that she was, as any employee, not bound by the covenants was not mentioned in her written or oral closing arguments.

88. It is perhaps not surprising that the argument was not pursued. Although the second defendant was of course an employee of One Step, the real reason she was required to enter the covenants was because she was the first defendant's civil partner and, as soon turned out to be the case, her business partner. It was necessary for her to enter the covenants (a) to give the purchaser proper and reasonable protection against competition from the vendor and thereby (b) to enable her partner to sell and thereby realise £3,150,000. The deed the second defendant executed was an integral part of the transaction.

89. It is now recognised that the law does not rigidly categorise covenators as vendors or employees. As Evans LJ said in *Dawnay, Day* (above) at p. 1106E – 1107A:

> "*The question is one of substance, not form … and the court has always to try and apply the test of reasonableness to the facts and of the particular case ….*
>
> *In my judgment, far from confining the circumstances in which covenants in restraint of trade may be enforced to certain categories of case, and defining those categories strictly, the courts have moved in the opposite direction. The established categories are not rigid, and they are not exclusive. Rather, the covenant may be enforced when the covenantee has a legitimate interest, of whatever kind, to protect, and when the covenant is no wider than is necessary to protect that interest*"

90. In the present case One Step plainly had a legitimate interest in restraining the second defendant because she was very closely associated with the first defendant both personally and professionally. The covenants were no wider than necessary: whilst they were not expressly limited in geographical terms they were limited to acts which were in competition with One Step, which is entirely reasonable: see *Emersub v. Wheatley* (unreported, 3 July 1998).

Whether the first defendant breached obligations of confidence

91. On 12 April 2006 the first defendant, whilst at One Step, emailed to her personal email address a large quantity of One Step's confidential market research and other marketing research, including Mr Rootes' list of "warm leads" and a contact list from 23 February 2005 showing "*every contact made and every action taken, including follow-up planned"*.

92. One Step asserts that this action, at a time when the first defendant was in dispute with Mr Costelloe, was a misappropriation of confidential information by the first defendant with a view to using it, in breach of her covenant as to confidentiality and (perhaps more obviously) in breach of her equitable duties of confidence, for the purposes of setting up new business. One Step invites the inference that it was so used.

93. The first defendant's explanation for this conduct was that she may have done this because she sometimes worked at home or because she knew that Mr Costelloe was litigious and she wanted to have access to the information for that purpose. No submissions were made in relation to these aspects of the case in the defendants' extensive written closing arguments.

94. Given the timing and extent of the extraction of material, I am satisfied, on the balance of probabilities, that the first defendant was taking the information for subsequent wrongful use. I am further satisfied that she did so wrongfully use the material. I should add that I did not believe her explanations, finding her in this respect and more generally to be a less than credible witness.

95. I therefore find that the first defendant did breach her confidentiality covenant and her equitable duties of confidence.

One Step's claims in tort

96. Mr Orr made it plain in his closing submissions that the claims against the defendants for inducing breach of contract and conspiracy were advanced primarily as an alternative in case the covenants were found to be unenforceable against the second defendant: that would be a route to finding her liable for the breaches of the covenants by the first defendant.

97. As I have found that the second defendant's covenants are clearly enforceable (and the contrary was not even argued in closing), it is not necessary for me to decide these further complex claims, requiring consideration of the precise nature of legal advice received by the defendants, their understanding of its effect and whether they consequently held an honest belief that the first defendant was not acting in breach of her covenants.

Remedies

98. One Step recognises that the usual remedy for the breaches I have found above would be ordinary compensatory damages. However, Mr Orr contends that this is a case in which such damages would not do justice between the parties, as is sometimes recognised to be the case where contractual or proprietary rights arising from

restrictive covenants have been invaded. He argues that it is inherently difficult for One Step to prove that any particular business was lost to One Step by reason of competition from Positive Living, let alone the ongoing damage that would have been caused. One Step might possibly be left without any substantial remedy, notwithstanding that it had a legitimate interest in the defendants not carrying on the competing business which they conducted and from which they made huge profits.

99. In *Attorney General v. Blake* [2001] 1 AC 268 Lord Nicolls stated at 285 B-D

> "*The law recognises that damages are not always a sufficient remedy for breach of contract. This is the foundation of the court's jurisdiction to grant the remedies of specific performance and injunction. Even when awarding damages, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer. This applies to interference with property rights. Recently, the like approach has been adopted to a breach of contract. Further, in certain circumstances an account of profits is ordered in preference to an award of damages. Sometimes the injured party is given the choice: either compensatory damages or an account of the wrongdoer's profit*

100. One Step contends that it is entitled to either an account of the defendants' profits from their wrongdoings or *Wrotham Park* damages, the amount which would notionally have been agreed between the parties, acting reasonably, as the price for releasing the defendants from the restrictions (which One Step will argue would have been structured as a percentage of the defendants' profit on sale of Positive Living's business).

(i) Account of profits

101. Whilst the House of Lords in *AG v. Blake* declined to set rigid parameters for the availability of an account of profits in breach of contract cases, it was recognised that they would only be awarded in exceptional circumstances.

102. In *Experience Hendrix v. PPX enterprises Inc* [2001] All ER (Comm) 830 the Court of Appeal refused to order an account, even though the claimant had a legitimate interest in preventing the defendant's profit-making activity and the breaches were flagrant and for its own gain. Peter Gibson LJ stated:

> "*… like Mance L.J., I do not think the present case an appropriate one for ordering an account of profits. He has drawn attention … to the features of this present case which distinguish it from the circumstances in Blake. No doubt deliberate breaches of contact occur frequently in the commercial world; yet something more is needed to make the circumstances exceptional enough to justify ordering an account of profits, particularly when another remedy is available.* "

103. Whilst the defendants appear to have planned to start a competing business even before they entered the covenants and thereafter breached them thoroughly and with at least some degree of deliberation (particularly in relation to the first defendant's use of confidential information), the breaches were relatively straightforward and unremarkable. They cannot be regarded as exceptional so as to justify ordering an account of profits.

(ii) Wrotham Park damages

104. In contrast to the position in relation to an account of profits, it appears that it is not necessary that there be exceptional circumstances for there to be an award of *Wrotham Park* damages, which might be considered to be simply one form of compensatory damages, in the form of the sum the claimant should have received from the defendant for giving consent: *Experience Hendrix* (above) per Mance LJ at 24-25 and *Giedo van der Garde BV v. Force India Formula One Team Ltd.* [2010] EWHC 2373 (QB).

105. In *WWF World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc* [2008] 1 WLR 445 Chadwick LJ explained that:

> "*When the court makes an award of damages on the Wrotham Park basis it does so because it is satisfied that that is a just response to circumstances in which the compensation which is the claimant's due cannot be measured (or cannot be measured solely) by reference to identifiable financial loss* "

106. In my judgment this is a prime example of a case in which *Wrotham Park* damages should be and are available. The defendants have breached straightforward restrictive covenants in circumstances where it will be difficult for One Step to identify the financial loss it has suffered by reason of the defendants' wrongful competition, not least because there was a degree of secrecy in the establishment of Positive Living's business which has not been fully reversed by the disclosure process. In my judgment it would be just for One Step to have the option of recovering damages in the amount which might reasonably have been demanded in 2007 for releasing the defendants from their covenants, not least because the covenants provided that the restraint was subject to consent, not to be unreasonably withheld.

Conclusion

107. I have found that the defendants breached the non-compete covenant by reason of Positive Living's activities in West London and Thames Valley, but not in respect of the Midlands. They are both also liable for breach of the non-solicitation clause to the extent alleged by One Step. The first defendant is also liable for breaching her duties of confidentiality.

108. One Step is not entitled to an account of profits but is entitled to judgment for damages to be assessed on the alternative bases of (i) Wrotham Park damages and (ii) ordinary damages, and to elect as between those two bases.