Neutral Citation Number: [2016] EWCA Civ 180

Case No: A2/2014/2727

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE PHILLIPS
[2014] EWHC 2213 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2016

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE CHRISTOPHER CLARKE
and
LADY JUSTICE KING

- -

Between :

Karen Morris-Garner **Andrea Morris-Garner**	**Appellant**
- and -	
One Step (Support) Limited	**Respondent**

- -
- -

Stephen Knafler QC and Charles Béar QC (instructed by **Neves Solicitors LLP**) for the **Appellants**
Craig Orr QC and Mr Mehdi Baiou (instructed by **Pitmans LLP**) for the **Respondent**

Hearing dates: 25th and 26th November 2015

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Approved Judgment

LORD JUSTICE CHRISTOPHER CLARKE:

1. This case concerns alleged breaches of non-compete and non-solicitation covenants in the sale of a business providing "supported living" services for children leaving care and vulnerable adults.

2. "Supported living" is an alternative to placing vulnerable people in residential care homes. Instead the service supplier provides rented accommodation and the support services needed to enable them to live as independent lives as possible without the need for institutional care. The concept was introduced during the 1990s and developed pursuant to government policy during the early to mid-2000s.

The history

3. In setting out the relevant history below I adopt much of the summary contained in the judgment of Phillips J.

The business

4. Karen Morris-Garner ("KM-G"), the first appellant, qualified as a social worker in 1996 and was employed by the London Borough of Ealing as a Child Protection Worker. In May 1999 she left Ealing Social Services and set up her own business under the name One Step At A Time ("OSAAT"). OSAAT provided support (of which there was then a dearth) for young people leaving care. The business was based in Northolt, West London. In around 2001 Andrea Morris-Garner ("AM-G"), the second appellant, began working for OSAAT as its Operations and Area Manager. KM-G and AM-G (together "the appellants") are civil partners.

The first sale

5. OSAAT's business expanded rapidly. By an assignment dated 31 October 2002 KM-G sold OSAAT's business to One Step Support Limited ("One Step"), which had been incorporated on 13 September 2002 as the vehicle for the transaction. The purchase price was £ 1,450,000. £ 749,950 of that was funded by setting off a loan in that amount from KM-G to One Step. The effective purchasers of 50% of the business were the Costelloes. Martin Costelloe is a successful entrepreneur and Charmaine Costelloe is his wife. One Step's shareholders were KM-G and Mrs Costelloe each of whom owed 50% of the capital. Both were appointed its directors.

6. Mrs Costelloe and her husband and Aidan Costelloe entered into a Shareholder's Agreement of the same date with KM-G, apparently on behalf of members of her family (although they did not sign it), which 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 into in 2006 (as to which see [13] below);

c) a provision that AM-G could act as an alternate director for KM-G.

7. The development of OS's business after the first sale was described by the judge in the following terms:

> "16 One Step's business was thereafter run by [KM-G] and by Martin Costelloe, the latter taking on the role of placement resources manager. [AM-G] 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 [KM-G], 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. "

8. In 2004 the working relationship between KM-G and Mr Costelloe broke down. Legal proceedings were threatened and One Step's 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 ("Sovereign") fell through when they pulled out of the transaction in 2005.

9. On 6 July 2006 KM-G and AM-G incorporated Positive Living Limited. KM-G had 51% and AM-G 49% of the shares. No one else at One Step knew of this.

10. On 11 August 2006 Mrs Costelloe gave a Deadlock Notice to KM-G offering to sell her shares in One Step to KM-G for £ 3.15 m, or to buy KM-G's shares for the same price. KM-G elected to require Mrs Costelloe to purchase her shares.

The Sale Agreement of 20 December 2006

11. On 20 December 2006 KM-G entered into a sale agreement under which she agreed 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.

12. That agreement was entered into pursuant to a Deed of Compromise executed on the same date between KM-G, One Step and the Costelloes, providing for a compromise of proceedings which had been brought by KM-G in the Chancery Division against Mrs Costelloe for specific performance of her agreement to purchase KM–G's shares in One Step.

The covenants

13. Under the Deed KM-G agreed, for a period of 36 months from the date of the Deed, to be bound by the following restrictive covenants, in which One Step was referred to as "the Company":

> "*2.1. 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 [KM-G] 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. [KM-G] 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);*"
>
> [Bold added]

14. One Step's case in respect of the Thames Valley and West London was not advanced (nor did the judge decide in their favour) on the basis that the covenants were breached by reason of Positive Living engaging in a line of business which One Step was not carrying on at the time of the restrictive covenants, nor was it the appellants' case that the covenants were unenforceable on the grounds that they precluded them from carrying on some business.

15. As part of the same transaction, AM-G (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. She also agreed to be bound for 36 months by restrictive covenants in identical terms to those given by KM-G, save that they did not include the provision as to confidential information.

Events after the sale of One Step to CSPL

16. Mr Costelloe was now in sole control of the business. It began to grow once more, assisted by the recruitment of Alex Bowman, a commissioning officer at Brent Council, in the spring of 2007.

17. On 26 July 2007 CSPL, now One Step's parent company, was acquired by CareTech Holdings plc for £ 11,071,000. Martin Costelloe was retained as a salaried manager primarily responsible for the planned expansion of the business into the Midlands area.

Positive Living's business

18. By 8 March 2007 Positive Living had obtained registration as a domiciliary care agency ("DCA") with the Care Quality Commission under the *Care Standards Act 2000*. This enabled it to provide certain types of care that One Step, which was not so registered, could not provide.

19. The Department of Health guidance as to what personal care could only be provided by a registered DCA was 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…"

20. Positive Living started marketing its new business in the Spring of 2007, as appears from a round-robin email that KM-G sent to potential local authority clients 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."

21. As is apparent, Positive Living was offering to provide rented accommodation and support services such as those provided by One Step but distinguishing the service that it provided by emphasising its ability to provide "*that extra bit of care needed*" in the shape of personal care needs which only a DCA could provide.

22. Positive Living started accepting placements in August 2007 at Campion House, Denham, Buckinghamshire, a property owned by KM-G which had previously been leased to One Step for use in its business. This property accepted users referred from authorities throughout the Thames Valley.

23. The further development of Positive Living's business is recorded by the judge in paras 35ff. I summarise the position in the table below:

Date	**Name**	**Location**	**Area serviced**	**Service**
August 2007	Campion House	Denham Bucks	Thames Valley	Supported Living
2008	The Beeches	High Wycombe	Thames Valley	Supported Living
Early 2008	Oaklands	Northolt	West London	Supported Living
March 2008	Brickbridge House	Stafford		Residential Care home
July 2008	Hilltop	Dudley	West Midlands	Supported Living
2009	3 further properties		West Midlands	Supported Living

No complaint is made by One Step in relation to the residential care home.

The appellants sell their shares in Positive Living

24. On 20 September 2010 KM-G and AM-G sold their shares in Positive Living to a company in the Craegmore Group for £ 12, 823,205.

The claim

25. In late 2007 Mr Costelloe heard that KM-G had apparently set up in competition with One Step. Care Tech's solicitors corresponded with the appellants' solicitors. The appellants denied that they were competing with One Step and, as a result of what they were told, CareTech did not pursue the matter.

26. By early 2008 One Step's business had experienced a significant downturn, which it later attributed to competition from Positive Living.

27. On 11 July 2012 One Step issued these proceedings in which it sought remedies for what it claimed were breaches of the restrictive covenants in relation to material competition, solicitation and the use of confidential information.

28. The judgment determined the issues of liability and the nature of the remedies to which One Step was entitled if liability was established. Quantification was deferred for consideration later.

The Judge's findings

29. The judge referred to the summary by Neill LJ in *Clarke v Newland* [1999] 1 All ER 397 of the principles applicable to the construction of restrictive covenants, which include a requirement 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.

30. As to that he observed that at the time when the covenants were entered into the commencement by KM-G of 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 loss of business but in terms of client perception. That factual matrix required a broader rather than a narrower interpretation of "*in material competition*". He accepted the submission that Positive Living would be in competition with One Step if 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.

31. The judge rejected [49] the submission (a) that the starting point should be the covenant against non-solicitation (clause 2.2.1) which prohibited soliciting local authorities that had been significant clients or customers of One Step in the previous year; (b) that the defendants were thereby permitted to solicit any other local authority; and (c) that the non-compete clause should be construed consistently with that.

32. He also rejected the submission that the non-compete clause would be in unreasonable restraint of trade if it extended to doing business with parties other than One Step's significant clients in the previous 12 months. He regarded it as well established that it was reasonable to protect not only a business' relationship with its existing customers but also more general goodwill of the business including potential new clients, referring to *Allied Dunbar v. Weisinger* [1988] IRLR 60 at paragraph 26, where Millett J, as he then was, 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*."

33. The judge found that the provision of accommodation was the core of both businesses both of which provided a range of support and personal care to the tenants of such accommodation. He accepted the evidence of Philip Madden, the appellant's expert that:

> "*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*"

and 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.*"

34. In the light of that he found that both One Step and Positive Living were competing in the supported living market for placement referrals from local authorities in the West London and Thames Valley regions.

35. The judge rejected the suggestion made in some of the appellants' witnesses' statements that One Step only ever catered for children leaving care (which statement had, itself, to be withdrawn). By 2006 the majority of One Step's clients were adults with a range of needs. By the time that the restrictive covenants were entered into One Step was a diversified supported living provider. It was common ground that One Step could not provide registrable personal care (the first two bullet points in the DOH Guidance) but there was ample evidence that it provided non-registrable personal care.

36. The appellants had contended that Positive Living only catered for clients with registrable personal care needs which One Step could not provide and that Positive Living's registration meant that they would be viewed by local authority commissioners as an entirely different type of provider to One Step. The judge rejected this on the basis that (as recorded by Mr Madden) local authorities look to different providers to provide different aspects of a service user's care package.

37. He referred to and accepted the evidence of Ms Sheenagh Burgess, One Step's care expert, which was that:

> "*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.*"

38. Accordingly, as the judge found:

> "*…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*".

39. The judge found that KM-G had significantly misrepresented the facts of the case in an attempt to improve her position and was an unsatisfactory witness who lacked credibility. He held that, after December 2006 One Step obtained further clients with personal care needs which were provided by separate agencies.

Personal care

40. In respect of Positive Living's clients the experts considered 36 clients. They agreed that 14 had registered personal care needs but, in relation to the remaining 22, the experts were in disagreement. In respect of 14 of them the reason for the disagreement was that Mr Madden, the defendants' expert had been told that they required the administration of medicine. The judge found that some at least, if not all, of those 14 were not receiving registrable care and, thus, could have been clients of One Step. The entries in the care plans in respect of 6 of them suggested that they were self-medicating; and the exact degree of assistance needed for the other 8 was unclear because the notation "*medication – oral*" in the care plans was obscure. The judge accepted that registrable personal care only arose if it involved some form of touching such as placing the tablet into a patient's mouth. He also rejected the suggestion that any of the 14 users lacked mental capacity, so rendering the care registrable. He did so because the relevant care plans did not have the relevant "green dot" marker which denoted a lack of mental capacity and capacity was to be presumed unless the contrary was proved. I regard these rather limited factual findings, relating to some of the 14 (in which were included 6 who were self-medicating) as open to the judge. No error of law is apparent.

41. The upshot was, as he concluded, that the fact that Positive Living was able to provide registered care services did not mean that it was not in competition with One Step. Positive Living competed for and obtained clients in West London and Thames Valley who had support-needs only, and One Step was perfectly able to and did compete for clients who had registrable care needs on the basis that those needs would be met separately.

42. Thus the judge was "*entirely satisfied*" that the appellants were in breach of the non-compete covenants by trading in West London and the Thames Valley form August 2007 to December 2009.

43. By contrast Positive Living's business in the Midlands did not place the appellants in breach of the non-compete covenants. From that decision there is no appeal.

Non-solicitation

44. In respect of the non-solicitation covenant the judge accepted the submission of One Step to the effect that the appellants had solicited seven local authorities which fell within the definition of significant clients or customers namely: (i) Buckinghamshire;

(ii) Ealing; (iii) Hillingdon; (iv) Hounslow; (v) Oxfordshire; (vi) Windsor & Maidenhead; and (vii) Wokingham.

45. Those seven were said to be significant 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. The judge rejected the argument that a client authority could not be "*significant*" unless it had placed at least 3 or 4 users with One Step during the relevant period (in which case only Ealing would qualify). He did so on the basis that:

> "*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.*"

46. Positive Living had submitted that it was offering to provide a different service in that:

> "*in the case of four of the authorities ... One Step had only provided services to CLC clients whereas Positive Living was offering services to adults and, in the case of Oxfordshire … 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 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)*"

"CLC" stands for "Children Leaving Care".

47. The judge rejected this on the basis that the solicitation prohibited was for "*any services*" provided by One Step and was not limited to the specific type of service which had been supplied by One Step to the client, who was solicited, in the previous year.

48. Accordingly he found that the appellants breached their non-solicitation covenants in the respect alleged by One Step.

Breach of confidence

49. On 12 April 2006 KM-G, then still at One Step, emailed to her personal email address a large quantity of One Step's confidential market research and other marketing research including a list drawn up by Mr Rootes of "warm leads" and a list from 23 February 2005 showing "*every contact made and every action taken, including follow-up planned*". The judge was satisfied that KM-G took this information for subsequent wrongful use by her and that she did wrongfully use the material.

Remedies

50. One Step contended that damages would be very difficult to prove and would not, on that account, be an adequate remedy for the breaches which the judge had found. It sought either an account of the appellants' profits from their wrongdoings or *Wrotham Park* damages, being the amount which would notionally have been agreed between the parties, acting reasonably, as the price for releasing the appellants from the restrictions contained in the sale agreement.

51. As to the claim for an account of profits the judge did not regard the circumstances as sufficiently exceptional to make that an appropriate remedy.

52. As to *Wrotham Park* damages the judge referred, *inter alia*, to *WWF World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc* [2008] 1 WLR 445 where 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*"

53. The judge regarded the present case as a prime example of such a case. It would, he found, be difficult for One Step to identify the financial loss it had suffered by reason of the appellants' wrongful competition, not least because of the degree of secrecy in the establishment of Positive Living's business. Accordingly 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.

The appellants' submissions

Non-competition

54. The appellants submit that, in relation to breach of the non-competition covenant, the judge has applied the wrong test. It was not enough to show that Positive Living provided a type of service to some local authorities in the South that One Step could also have provided to them, if it had never in fact done so or actively sought to do so and merely had a "hope" (as the judge put it – see [62] below) that one of these authorities might have offered it such work. Further the absence of geographical overlap and the different services offered and provided by Positive Living and One Step made it unrealistic to suppose that they competed.

55. In support of their submissions the appellants made a detailed analysis of the evidence, as they saw it, as to the extent to which by December 2006 in relation to individual authorities from which Positive Living obtained adult placements in the period of the covenants[1], One Step had been, or was, soliciting or obtaining business in the adult market, or preparing to do so. The apellants' basic submission was that

[1] Positive Living appears to have secured no placements in respect of children.

the extent to which One Step had done that by December 2006 was so minimal that Positive Living could not truly be regarded as in competition with One Step.

56. This is not an exercise carried out by the judge and it involved, on the appellants' part, copious reference to documents which do not feature in the judgment. In those circumstances I am somewhat loathe to embark on an extensive evidential review. However, in order to evaluate these submissions it is necessary to consider what is said to be the position in respect of the individual authorities when the covenants were entered into. I propose to do so by setting out the relevant evidence and the submissions of the parties in an Appendix to this judgment. The conclusions I have reached in relation to that material are set out below.

Discussion

57. Whether or not A is carrying on business in competition with B in a particular area or areas is dependent on at least two considerations, each of which raises questions of definition. The first is whether A and B are properly to be regarded as supplying goods or services which are sufficiently comparable to mean that they are in competition. As to that, it was entirely open to the judge to hold that the products supplied by One Step and Positive Living – supported living for both children and adults – were of a type which (save as to registrable care) could be provided by either of them interchangeably. Insofar as One Step was not already providing child or adult care to any particular local authority in the Thames Valley of West London, it could readily do so.

58. The second consideration is whether Positive Living is to be regarded as competing in the same area as that in which One Step was carrying on business in December 2006.

59. As to that, A and B, whilst supplying identical, similar, or interchangeable products, may operate in areas which are sufficiently disparate to mean that they are not in reality in competition. Whether that is so may depend, at least, in part on (a) the nature of the product(s) supplied; and (b) whether potential consumers could realistically be expected to purchase from either A or B. That in turn may depend on the manner in which consumers make decisions about what to purchase.

60. The answer to the question may also turn on whether the area in which A and B are said to be in competition ought to be subdivided to allow for the fact, if such it be, that in sub-areas 1, 2, and 3 A carries on business in the supply of product X, whereas B supplies only product Y and does not aim or has no prospect of supplying product X. In such a case it may be that, although A and B both carry on business supplying products X and Y in the area taken as a whole, they are not in truth in competition in sub-areas 1-3. So, here, the appellants' case is that there was segmentation in the supported living market, arising from the way in which authorities make commissioning decisions, so that in respect of adult care there was no real competition in relation to authorities for which One Step had not provided adult services by December 2006.

61. The analysis in the previous paragraph assumes that in the relevant sub-areas B does not aim, or has no prospect, of supplying product X. That in turn raises the question of whether A and B are in competition if B hopes to do so. The answer to that seems to me to depend on (a) the degree of similarity between products X and Y; (b) the

genuineness of B's hope; and (c) whether, and to what extent, it is realistic to expect that he may obtain customers for Y as well as X.

Conclusion on competition

62. In the present case the judge found [73] that One Step and Positive Living were in material competition in West London and the Thames Valley, in each of which One Step operated from a hub and in each of which they provided a range of services, from August 2007 to December 2009. He rejected the proposition that One Step was not in December 2006 in an advanced state of preparation to provide both types of service ("*I see no merit at all in this contention*"); and accepted that One Step was very much in the market for adult referrals from clients to which it had provided CLC services and would hope to receive cross referrals (whether between teams or authorities).

63. I regard this as a finding to which he was entitled to come.

64. Whilst the issue of competition can be analysed in the way that I have suggested the question whether A is in competition with B needs to be considered with a rather broader brush. The essential question is whether the scope of the businesses was the same, and, as Rose J put it, in *Invideous Ltd v Thorogood* [2013] 3015 Ch whether the provision of adult services to any authority in those regions was "*within the scope of [One Step's] business plan*". It is also necessary to bear in mind that A can be in competition with B if both of them are supplying the same product and B seeks to provide it to outlets previously supplied only by A.

65. The factors to which the judge was entitled to have regard to justify his conclusion included the following.

66. **First,** the Thames Valley and West London are relatively confined, given that what is in issue is an aggregation of local authorities. The term Thames Valley is somewhat inexact but it was not suggested that there was any difficulty in identifying the authorities that fall within it or that those with which this case is concerned did not do so.

67. **Second**, the fact that One Step and Positive Living were supplying the same range of services to authorities in the same areas, each operating from their respective hubs, points very strongly to their being in competition in those areas in respect of all of those services.

68. **Third,** the separation between providing services for children and providing them for adults is not watertight. Children who mature into adults may still need local authority care in which case their service provider will acquire a relationship with the adult side of the local authority. This happened in the case of KL in Buckinghamshire where One Step obtained two further adult placements in 2007. Ms Burgess' evidence [35] was that any child who attained the age of 18 but who had or was likely to have ongoing needs was assessed in the same way as any other adult.

69. **Fourth**, there was evidence that if One Step was supplying a children's service it could come to the attention of personnel at the relevant authority who were in charge of, or concerned with, adult services by a referral from those in charge of children's

services. There could also be an inquiry or reference made of or to the latter by those in charge of adult services, which could lead to adult work. In his judgment the judge referred to two adult service users at Ealing, AH and JC. These placements with One Step had been made as a result of Ealing's CLC team referring One Step to Ealing's adult physical disability team after that team had been in touch.

70. **Fifth**, there was evidence before the judge that cross referrals took place between local authorities: see [46] in the appendix, although there was no direct evidence of that happening in relation to One Step. Ms Burgess also gave evidence of local authorities being part of a network of Supporting People managers across the south east.

71. **Sixth,** the judge was entitled to find that there was a realistic prospect of referrals of both types for adult business. One Step actively sought to cross sell its services within local authorities.

72. **Seventh,** the judge must have accepted that there was a realistic prospect of referrals (of either type) in relation to adult services such that it was inappropriate to sub divide the two regions, so far as adult care was concerned, into (a) authorities to which One Step had only been providing children's services and (b) those to which it had been providing adult services. He was entitled to take the view that there was, as at December 2006, no impenetrable barrier precluding One Step from securing adult work from the former. Even if One Step had, in this respect, a hurdle to climb, it seems to me that, in the light of the work it was doing up to 2006, it could properly be regarded as in competition with Positive Living in the two regions for adult work in relation to authorities to which it had previously provided only children's services (or to which it had not provided services at all).

73. **Eighth**, One Step had a number of things going for it. It was registered with CSCI/CQC as a provider of a Family Assessment Centre, which was a form of benchmark of quality. It was accredited as a Supporting People provider by the West London Supporting People Commissioning Bodies and in Reading. That was a government programme launched in 2003 to help end social exclusion and enable vulnerable people to obtain independence. Ms Burgess' evidence was that the Supporting People accreditation involved a rigorous process and was a benchmark for evaluating new providers.

74. **Ninth**, it is apparent that One Step's marketing efforts up to August 2005 had been extensive. There is some force in Mr Orr's submissions that Positive Living's view of Mr Rootes' database was unduly dismissive. Thus in relation to Oxfordshire there had been contact with Community Mental Health team managers and Oxfordshire referred CG to One Step. Even if CG is to be regarded as an out of borough placement it would seem likely that the efforts that had been made to market to the Mental Health Teams and/or One Step's reputation led or contributed to the placement.

75. There was, as is common ground, a substantial hiatus in Mr Rootes' marketing activities from August 2005. But he was re-engaged before the covenants incepted. One Step's business in 2006 must be looked at as including that which he was engaged in before the hiatus, and the hiatus itself made the potential significance of competition during the period of the covenant that much the greater.

76. The judge was also entitled to take the view that One Step was in competition with Positive Living in Ealing notwithstanding the conversation which is said to have taken place in June 2008 with Ealing officers when they said that in future Ealing was only going to deal with a registered care provider. Ealing was one of One Step's best customers. It accounted for about 24% of its turnover in 2006. By the time this conversation took place 4 out of 8 of Positive Living's placements obtained from Ealing (which Positive Living first approached at the end of 2007) during the covenant period had taken place. So competition had already begun by then. Further, since Positive Living's line was that businesses like One Step could not cater for personal care needs for which a registered care provider was required, the statement that in future Ealing was only going to deal with registered care providers could well be regarded as the result of competition which had already begun rather than a decision which meant that One Step was not a competitor all.

77. I would, accordingly, dismiss the appellants' appeal against the judge's finding that they were in breach of the non-compete covenants.

Solicitation

78. The non-solicitation covenant gives rise to three questions. The first is whether the appellants were persons who, through Positive Living, were directly or indirectly in competition with any of the businesses or activities of One Step at the date of the Deed. To that the answer, on the judge's findings is "Yes". The second is whether they solicited on behalf of Positive Living for orders in respect of any services provided by One Step. The third question is whether the authorities they solicited were at the date of the Deed or within one year prior thereto significant customers of One Step. On the judge's findings the answer to both the latter two questions is in the affirmative in relation to the seven authorities referred to in paragraph [80] of the judgment. He was right to hold that it was not necessary to show that they solicited the individual authorities for the same services as those with which One Step had supplied them in the year up to December 2006. The appellants were rightly found to be in breach of the non-solicitation clause.

Wrotham Park damages

79. The judge gave One Step the option to elect (as it did) for *Wrotham Park* damages. The appellants say he was wrong so to do. Mr Béar submits that the test for *Wrotham Park* damages is not simply a broad question as to whether they represent a just result. They can be awarded only (a) where the injured party is unable to demonstrate identifiable financial loss and (b) only where to do so is necessary to avoid manifest injustice.

80. The position, he submits, was accurately summarised by David Richards J, as he then was, in *Abbar v Saudi Economic and Development Company* [2012] EWHC 1414 in the following way:

> "*224 As an alternative to damages calculated on the conventional basis as the sum required to put the claimant in the position it would have been in if the contract had been duly performed, a claim is made for so-called Wrotham Park damages. For present purposes, such damages are to be taken as the sum which might reasonably have been negotiated between a claimant and a*

defendant as a quid pro quo for, in this case, Dr Abbar's consent to the continued retention and development of the Pinnacle site. It is now clearly established that such damages, described as "negotiating damages" by Neuberger LJ in ***Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd*** *[2006] 2 EGLR 29, are a form of compensatory damages available in cases of breach of contract, including non-proprietary breaches.*

225 Negotiating damages have not, however, replaced the usual compensatory damages as the primary remedy in damages for breach of contract. It is a basis of assessment available where a breach of contract ***has been established but the claimant cannot establish any financial loss, assessed on the usual basis****, flowing from the breach. In those circumstances, and where the defendant has proceeded to act without the consent of the claimant, justice requires that there should nonetheless be an award of substantial as opposed to nominal damages. That the* ***inability to demonstrate identifiable financial loss*** *of the conventional sort is a pre-condition to the award of such damages is made clear in a number of authorities, culminating in the decision of the Court of Appeal in* ***World Wide Fund for Nature v World Wrestling Federation Inc*** *[2008] 1 WLR 445. Chadwick LJ, with whose judgment the other members of the court agreed, said at [59]:*

> *"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****. Lord Nicholls' analysis in Blake's case demonstrates that there are exceptional cases in which the just response to circumstances in which the compensation which is the claimant's due cannot be measured by reference to identifiable financial loss is an order which deprives the wrongdoer of all the fruits of his wrong. The circumstances in which an award of damages on the Wrotham Park basis may be an appropriate response, and those in which the appropriate response is an account of profits, may differ in degree. But the underlying feature, in both cases, is that the court recognises the need to compensate the claimant in circumstances where he* ***cannot demonstrate identifiable financial loss.****"*

This pre-condition is clearly demonstrated by the judgment of Brightman J in ***Wrotham Park Estate Co Ltd v Parkside Homes Ltd*** *[1974] WLR 798 at 812 F-H and 815B and the judgments in* ***Experience Hendrix LLC v PPX Enterprises Inc*** *[2003] 1 All ER (Comm) 830 (see the judgment of Mance LJ at [14]-[15] and [34]-[35] and Peter Gibson LJ at [56]-[58]).*

226 Mr Crow QC submitted that the lack of an identifiable financial loss was not a pre-condition to an award of negotiating damages and that the law provided or was capable of providing a more flexible response, awarding such damages in circumstances where it was just to do so. No doubt a substantial

> *argument could be mounted in support of such a proposition, albeit at the risk of introducing greater uncertainty or unpredictability in this area of the law, but the passage cited above from the judgment of Chadwick LJ is binding on me.*"

81. As the citation from *Lunn Poly* indicates *Wrotham Park* damages are a form of compensatory damages, although not of the ordinary type. As a result "compensatory damages" is a phrase sometimes used to mean damages calculated in the ordinary way by assessing the actual financial loss incurred, e.g. a profit that would have been obtained, and sometimes to mean compensation in the form of the price which would be agreed in a hypothetical bargain with the claimant for the right to use property which has been appropriated without permission, or to be released from a burdensome negative covenant. The sum that the claimant could have obtained is what he may be taken to have lost: see Lord Hobhouse in *Blake* at 298 E – H; and the price for what amounts to the compulsory acquisition by the wrongdoer of the right; per Lord Nicholls at 281G.

82. Phillips J described [106] the present case as a prime example of one in which *Wrotham Park* damages should be and were available because the defendants had breached straightforward restrictive covenants in circumstances where it would be difficult for One Step to identify the financial loss it had suffered by reason of the defendants' wrongful competition. Accordingly, as he held, it would be just for One Step to have the option of such damages. He did not find that One Step was incapable of demonstrating identifiable financial loss. Nor did he find that such damages needed to be awarded to avoid manifest injustice.

83. Mr Béar also submits that there needs to be some **special circumstance** (the circumstances in which an account of profits and *Wrotham Park* damages may be awarded differing only in degree: *WWF* 475G) to justify the award of *Wrotham Park* damages. If it were otherwise, he submits, the exception would swallow up the primary rule; and it would be difficult to see why *Wrotham Park* damages were not available in a multitude of cases involving covenants against competition (contrary to what has been the position in the past). This would introduce a new element into the relations between covenantor and covenantee in several contexts, particularly employment and sales of a business. It might also contravene the basis upon which interim injunctions are typically granted, namely the inadequacy or unavailability of a monetary remedy.

84. Moreover, he submits, *Wrotham Park* damages have, in truth, an inherent tendency to be arbitrary. What supports or leads to the final figure and how it is to be calculated are often difficult to discern. Such damages are a licence for uncertainty.

85. Mr Orr submits that there are two questions. The first is whether the circumstances are such that the claimant cannot demonstrate identifiable financial loss, which includes circumstances in which proof is difficult or, at any rate, very difficult or where compensation cannot be measured or measured solely by identifiable financial loss. That covers a situation where the claimant suffers a general loss of goodwill. The second is whether *Wrotham Park* damages are a just response.

The authorities

Wrotham Park

86. In *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 the Earl of Stafford sold a parcel of land to a Mr Blake which contained a restrictive covenant whereby he was :

> "*Not to develop the said land for building purposes except in strict accordance with a layout plan to be first submitted to and approved in writing by the vendor*"

The retained land was transferred by the Earl to the plaintiff. The land sold to Mr Blake, which was an allotment site, was transferred eventually to Parkside Homes. By the time of the trial a group of 14 houses had been built on it and the purchasers were added as defendants.

87. Brightman J, as he then was, considered that he had jurisdiction to make mandatory injunctions against all the individual defendants and could therefore award damages in substitution. The plaintiffs conceded that the value of the *Wrotham Park* Estate was not diminished "*by one farthing*" in consequence of the development. The judge took the view that it would be unjust that the plaintiffs should receive no compensation and that the defendants should be left in undisturbed possession of the fruits of their wrongdoing. Having considered the wayleave cases and other authorities where the defendant had made wrongful use of property of the plaintiff, he described himself as faced with the problem of what damages ought to be awarded to the plaintiffs in the place of mandatory injunctions which would have restored the plaintiff's rights. He held that, if the plaintiffs were merely given a nominal or no sum in substitution for an injunction, justice would "*manifestly not have been done*".

88. He decided that, on the facts of that particular case, a just substitute for a mandatory injunction would be such sum "*of money as might reasonably have been demanded by the Plaintiffs as a quid pro quo for relaxing the covenant*", which he assessed at 5% of Parkside's anticipated profits.

89. *Wrotham Park* was a case in which the award was made in lieu of an injunction. Subsequent authority shows that the possibility of an injunction is not a requirement. It was not a case in which, although the plaintiffs had suffered financial damage (in the ordinary sense), it was impossible or even very difficult to prove it. The plaintiffs had simply suffered no financial damage at all.

AG v Blake

90. In *Attorney General v Blake* [2001] 1 AC 268 the House considered the remedy of an account of profits. In the course of his speech Lord Nicholls referred to *Wrotham Park* with approval and said:

> "*The Wrotham Park case, therefore, still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss. In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer*

> *from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained. In the present case the Crown seeks to go further.*"

The House decided, Lord Hobhouse dissenting, that "*when, exceptionally, a just response to a breach of contract so requires*", an account of profits was available for breach of contract.

91. Lord Nicholls' speech showed that cases in which the defendant who has wrongfully used the plaintiff's property is required to pay a reasonable price for the right of use are an exception to the general rule and do not conform to the strictly compensatory measure of damages for the plaintiff's loss [279]. He did not, however, need to express a view on the precise circumstances in which a *Wrotham Park* award would be made.

Experience Hendrix

92. In *Experience Hendrix v PPX Enterprises* [2003] EWCA Civ 323 the company which owned the rights to the recordings of Jimmy Hendrix reached an agreement, by way of settlement of a dispute, with PPX, a licensee, by which PPX agreed that it would not exploit certain master recordings of another musician where Hendrix, not yet a star, had only been a sideman. In fact PPX did so. Experience Hendrix's complaint was that artwork used in respect of the recordings gave a misleading impression of Hendrix's role in them (which was entirely subordinate) and that people might purchase these recordings instead of ones in which he featured, be disappointed and frustrated and avoid further purchases of his music – in effect a loss of goodwill. Experience Hendrix conceded that it had no evidence, and did not imagine that it could ever get any evidence, to show financial loss arising from these breaches, which, from a practical point of view, would be impossible. An account of profits was refused on the grounds that the case was clearly distinguishable from *Blake*.

93. But Lord Justice Mance considered that in the light of the terms of the settlement agreement "*any reasonable observer of the situation would conclude that as a matter of practical justice PPX should make, at the least, reasonable payment for its use of masters in breach of the settlement agreement*". That sum was to be such sum as might reasonably have been demanded by Jimmy Hendrix's estate as a *quid pro quo* for agreeing to permit the two licences into which PPX entered in breach of contract.

94. As he said:

> "*This involves an element of artificiality, if, as in Wrotham Park, no permission would ever have been given on any terms. And, where no injunction is possible, even the value of a bargaining opportunity depends on the value which the court puts on the right infringed (cf paragraph 19 above, citing Lord Nicholls in Blake). That said, the approach adopted by Brightman J has the merit of directing the court's attention to the commercial value of the right infringed and of enabling it to assess the sum payable by reference to the fees that might in other contexts be demanded and paid between willing parties. It points in the present case towards orders that PPX pay over, by way of damages, a proportion of each of the advances received to date and (subject to deduction of such proportion) an appropriate royalty rate on retail selling prices.*"

Mance LJ expressed the view (without the benefit of "*any expert evidence that might be available hereafter*") that he would be surprised if the appropriate rate was less than twice that which was agreed for the masters which PPX was permitted to exploit.

95. Lord Justice Gibson said:

> "*56 ……Although the Wrotham Park case related to an infringement of a property right, there having been a breach of a restrictive covenant imposed for the benefit of an estate, it is noticeable that Lord Nicholls did not treat the significance of the case as so limited. He discussed the case in the section of his judgment (commencing at p. 282) dealing with breach of contract. It is apparent that he regarded the case as a guiding authority on compensation for breach of a contractual obligation. True it is that the action was brought against the successor in title of the original covenantor; but it could hardly be suggested that the result would have been different if the parties had been the original contracting parties*"

and

> "*58 In my judgment, because (1) there has been a deliberate breach by PPX of its contractual obligations for its own reward, (2) the claimant would have difficulty in establishing financial loss therefrom, and (3) the claimant has a legitimate interest in preventing PPX's profit-making activity carried out in breach of PPX's contractual obligations, the present case is a suitable one (as envisaged by Lord Nicholls ([2001] 1 AC at pp. 283H – 284A) in which damages for breach of contract may be measured by the benefits gained by the wrongdoer from the breach. To avoid injustice I would require PPX to make a reasonable payment in respect of the benefit it has gained. I agree with the guidance suggested by Mance L.J. for the court assessing the damages*".

96. Lord Justice Mance drew attention to the fact that in *Blake* Lord Nicholls made plain that an award of profits was only appropriate in exceptional circumstances. But he did not apply the same epithet to *Wrotham Park* damages.

97. That case has, Mr Orr submits, a strong affinity to the present where there is a claim for damage to goodwill, inherently incapable of quantification in precise monetary terms, and where it would be practically impossible to reconstruct the process that would have been gone through in the individual placements of all of Positive Living's service-users to try to establish in respect of the 40 – 50 placements concerned whether they would otherwise have been made with One Step. The relevant documents were never in the possession of One Step and the material produced by Positive Living and Craegmore did not throw much light on why Positive Living as opposed to any other provider had been chosen. In *Experience Hendrix* Lord Mance regarded the case of *Esso Petroleum v Niad Ltd* as presenting a similar feature to the *Hendrix* case insofar as damages could be said to be an inadequate remedy because of the "*practical impossibility in each case of demonstrating the effect of a defendant's undoubted breaches of the appellants' general programme of promoting their product*". In *Niad* Esso had run a Pricewatch scheme and the garage owner had failed to abide by his agreement to limit prices in accordance with it; an account of profits was given as an option because it was almost impossible to attribute any lost sales to the breaches relied on.

98. Mr Orr draws attention to the fact that *Wrotham Park* damages have been awarded in a number of cases including *Giedo Van der Garde BV v Force India Formula One Team* [2010] EWHC 2373 QB (where Stadlen J considered them, *obiter*, as a possible alternative if no award had been made on conventional grounds); and *Vercoe v Rutland Fund Management* [2010] EWHC 424; and *Pell Frischmann Engineering Ltd v Bow Valley Oron Ltd* [2011]1WLR 2370.

Devenish

99. In *Devenish Nutrition Lt v Sanofi-Aventis* [2007] EHC 2384, an account of profits was refused because damages would be an adequate remedy. The claimants were said to be victims of a cartel in relation to the supply of certain vitamins. How much they had lost as a result was said by their expert to be difficult to calculate involving as it did an assessment of the amount of the overcharge (i.e. the difference between the amount charged and the amount that would have been charged if there was no cartel) and the proportion of it absorbed by upstream undertakings or passed on to downstream ones. Despite these difficulties the expert had, however, arrived at a figure, although the claim as formulated at the end of the hearing in respect of Devenish did not take into account any possible passing on of the excess: see Tuckey LJ at [151]. Tuckey LJ proceeded on the basis that Devenish had been able to calculate the damages in the form of the overcharge and, if it had passed the overcharge on it had suffered no loss.

100. Lewison J, as he then was, had considered the extent to which evidential difficulties were an insuperable barrier to effective compensation in domestic law. Having considered *Blake* and *The Mediana* [1900] AC 113 (where the wrongful taking of Lord Halsbury's chair was used as a guide to the assessment of damages for the detention of a spare emergency lightship) he cited *Watson Laidlaw & Co Ltd v Pott Cassel & Williamson* 32 RPC 104, a case of patent infringement in Java, and said the following:

> "*29 A number of points emerge out of these passages. First, the principle underlying the assessment of damages is that of restoration. Second, the restoration by way of compensation is often accomplished by "sound imagination" and a "broad axe"* [phrases used by Lord Shaw in Watson Laidlaw]. *This is true no less in claims for financial loss than in claims for personal injury: see Blayney v Clogau St David's Gold Mines Ltd [2003] FSR 19. Third, whatever method of assessment is followed, its object is the same, namely to get back to the position in which the victim would have been if the wrong had not occurred. This is true even where damages are assessed as user damages. Fourth, this range of remedies differs from, and is inconsistent with, an account of profits, whose object is to strip the wrongdoer of his personal gains.*
>
> *30 It is also the case that the common law has also taken a pragmatic view of the degree of certainty with which damages must be pleaded and proved. Ratcliffe v Evans [1892] 2 QB 524 was a case of malicious falsehood. The plaintiff was an engineer and boiler-maker. He alleged that a statement in the local newspaper that he had ceased business had caused him loss. The evidence that was given at trial consisted of general evidence of a downturn in trade; but the plaintiff did not give evidence of the loss of any specific*

> *customer. The jury awarded him damages of £120. Upholding the award, Bowen LJ said:*
>
> > *"In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."*
>
> *31This was a case where the only loss alleged was a loss in business. Yet the Court of Appeal upheld an award of substantial general damages. It did not require the loss of profits to be proved with exactness. Thus an award of general damages is regarded as sufficient to provide adequate compensatory damages for the wrong suffered, even where, at least in theory, the damages could have been the subject of more precise quantification*
>
> *32 I am not therefore persuaded that evidential difficulties of exact proof are insuperable difficulties to effective compensation as a matter of domestic law. Nor am I persuaded that the usual techniques by which the courts award damages in domestic cases are inadequate to produce a fair result.*"

101. Mr Béar submits that the claimants could prove financial loss even if that was on the general basis adumbrated in the cases to which Lewison J referred. Mr Orr accepts that One Step has put in an accountant's report from Mr Hine in which he computed what he described as "*the shortfall*" in One Step's profits from the time that Positive Living started trading until the date in September 2010 when the appellant sold it. He compared One Step's actual profits in that period with what he estimated the profits would have been if the trend that had been established before Positive Living started trading had continued. This produced a "shortfall". But that shortfall assumed (improbably) that all causation arguments were decided in One Step's favour i.e. that the placements that went to Positive Living would have come to One Step and continued with them after the expiry of the covenant. This produced a figure of between £ 2.44 and £3.60 million. But what he could not do - because it was extremely difficult to do so - was decide what ongoing loss there would be and he did not quantify loss of market share or general damage to reputation.

102. Like Lewison J, this court in *Devenish* held that the claimants were not entitled to an account of profits (a) because that was not available in a claim for a non-proprietary tort (Longmore LJ dissenting on this point); and (b) because damages were an adequate remedy.

103. Arden LJ held that "*the fact that damages will be very difficult to prove is not in my judgment enough to justify a gains-based remedy*" [11]. Longmore LJ's judgment contains the following passage:

> "*148 The bald assertion that the fact that damages are difficult to prove justifies a claim for account of profits cannot be accepted for many reasons which include*
>
> *i) difficulty of proof does not necessarily mean that no damages will be awarded;*
>
> *ii) if no or few damages are awarded, that does not mean that such damages are inadequate; loss of a possible sale is less serious than actual out-of-pocket loss;*
>
> *iii) the concept of damages being an inadequate remedy is a useful concept in the field of interlocutory injunctions but is a treacherous one if it is used as a supposedly principled reason for the disgorgement of profits made by somebody else;*
>
> *iv) it is clear on the authorities that apart from cases of the misuse of the claimant's own property, an account of profits outside the established categories is only to be made in "exceptional" cases per Lord Nicholls in AG v Blake (no less than 3 times) at 284H, 285D and F). A traitor, seeking to profit from his treachery by making a self-justificatory book about it, is indeed "exceptional". Cartels are not "exceptional" in that sense. It is difficult to see how one cartel could be more "exceptional" than another.* ***If the claim were allowed in the present case, it would quickly become the norm in all cartel cases that restitutionary awards should be made;***
>
> *v)* ***the claim as originally formulated is an all or nothing claim. It is thus different from the sort of award that is sometimes*** *made in the form of the price that the defendant would have had to pay to obtain a claimant's consent to do what he has done. That was possible in Wrotham Park Estates Co v Parkside Homes Ltd [1974] 1 WLR 798 and in the Experience Hendrix case. Here that is not an available option. To the extent that it may be said that the claimant should be content with a proportion of the defendants' profits rather than all of it, it is not possible to see a principled way in which that could be done since there is no obvious way in which the claimant's loss can be related to the defendants' gain*".

Tuckey LJ agreed with Lord Justice Longmore that the fact that damages were difficult to prove did not justify the claim for an account of profits.

104. As is plain, *Devenish* concerned a claim for an account of profits. Mr Béar submits that, if in a case such as that ordinary compensatory damages are an adequate remedy, precluding a claim for an account of profits, even though difficult to prove, that must also mean that it cannot be said that there is no identifiable financial loss or that there is any manifest injustice in not awarding *Wrotham Park* damages.

105. Mr Orr submits that what was being said was that difficulty of proof was not sufficient of itself to entitle the claimant to Wrotham Park damages. It was also

necessary to show that they were the just remedy. As Arden LJ pointed out in [111] "*the justice of the case must also relate to the measurement of the remedy*". Moreover at [106] Arden LJ said that she would not go so far as to say that damages could never be inadequate if the difficulty was one of proof and it was at least arguable that the court should order an account if the evidential difficulty was not the claimant's responsibility.

WWF v WWF

106. In *World Wide Fund for Nature v World Wrestling Federation Inc* [2008] 1 WLR 445 it was necessary for the Court, for the purposes of a *res judicata* / abuse of process argument, to decide whether the contention that the remedy then sought by the Fund, namely *Wrotham Park* damages, was "*a juridically highly similar remedy to the relief*" namely an account of profits that it had previously sought in the action. Chadwick LJ rejected the contention that an award of *Wrotham Park* damages was a gains-based remedy and not an award of compensatory damages, holding that it was the latter. After the passage from [59] cited by Richards J (see [80] above) he observed that to label an award of *Wrotham Park* damages as a "*compensatory remedy*" and an account of profits as "*gains based*" did not assist an understanding of the principles on which the court acts. The two remedies should be seen as a flexible response to the need to compensate the claimant for the wrong that had been done to him. It was for that reason that the remedies were juridically highly similar.

107. Lord Justice Chadwick also held that the court could award damages on the *Wrotham Park* basis even if there was no claim for an injunction and could be none [54]; a position approved by the Privy Council in *Pell Frischmann Ltd v Bow Valley Ltd* [2009] UKPC 45.

108. In the light of (a) Lord Nicholls' analysis in *Blake*; (b) what Lord Justice Gibson said in *Experience Hendrix* (and the order made in that case); (c) the judgment of Neuberger LJ in *Lunn Poly;* (d) Lord Justice Chadwick's analysis of the nature of the remedy; (e) his decision that a *Wrotham Park* award did not require a claim for an injunction or the possibility of one, I regard it as well established that the remedy is potentially available in breach of contract claims.

BGC Capital Markets

109. A working example of the court's approach, upon which the appellants rely, is to be found in the case of *BGC Capital Markets (Switzerland LLC) v Rees* [2011] EWHC 2009 QB where Mr Rees was induced by a broker called Tullet to terminate his contract without giving the requisite notice. BGC sought, in the alternative, a release fee on *Wrotham Park* lines. Sir Raymond Jack held that that was not available to them under either Swiss or English law. At [97] he said:

> "*The situation in the present case is one in which the court will ordinarily assess the loss of profit as best it may and award a figure. The assessment may or may not be difficult depending on the evidence which is available. But the court is used to that, and can arrive at a figure just as it can, for example, in the difficult situation where it has to assess the loss of future earnings of a seriously injured teenager. The intended function of the claim here is to avoid BGC's problem that it cannot show that it has suffered any loss because it has*

> *not in fact done so. In my judgment the award of release payment damages is not available as a substitute for conventional damages to compensate a claimant for damage he has not suffered. Nor should it be used to award a larger sum than a conventional calculation of loss provides.*"

110. In that case two trading desks, one at BGC and one at Tullet, were said to be in competition. The judge held that the trading on the Tullet desk was so minimal as not to amount to competition, so that BGC had no protectable interest, and that this was borne out by his finding that BGC could not show any damages, by way of loss of income or profit, from the breaches of which it complained.

111. Mr Béar submits that the present case is analogous. Mr Orr submits that it is different. BGC did not involve any loss of goodwill or market share. It had suffered no loss whatever, whether measurable or not. There was no alleged difficulty of computation. Nor had the defendant made a substantial gain from his breach. In the present case One Step was not in the position of having suffered no loss, but of having suffered a loss of goodwill which was inherently incapable of quantification and a loss of placements which it was in practical terms impossible to prove. In addition the last sentence of [97] in the judgment was wrong insofar as it represented a general statement, since *Wrotham Park* damages of their nature provide a larger sum than a conventional calculation may provide.

112. On the question whether an award of *Wrotham Park* damages met the justice of the case Mr Orr submitted that the judge's reference to the present case being a prime example of where such an award was appropriate was correct. Mr Béar had observed that the question was addressed by the judge in a very short paragraph. But that, Mr Orr submitted, had to be read in the light of the considerations to which the judge had earlier referred. These were (a) that the first appellant was the founder and public face of One Step and the person with the most contacts and with whom the strongest relationships with local authorities would have been made; her agreement and that of her partner not to compete was an important if not crucial part of the transaction [45]; (b) that her involvement in a similar business to that conducted by One Step in West London and Thames Valley would obviously have been very damaging to One Step both in terms of direct loss of business and client perception [47]; (c) that the restrictions agreed by the appellants were an important if not crucial part of the transaction in which KM-G received a very substantial sum [45]; (d) that the clause was intended to protect not only existing relationships but the prospect of future ones; [50] [98]; (e) that the appellants had planned to start a competing business before they entered into the covenants and they breached them secretly and with some degree of deliberation [103]; particularly in relation to the use made by KM-G of a raft of confidential information [94]; and (f) that by proceeding furtively the appellants were able to damage One Step's goodwill before it was even aware of the unlawfully competing business and the right or ability to obtain payment for a release or relaxation of the covenants or to limit or mitigate prospective competition by, for example, stepping up marketing activities and cementing relationships with existing customers.

113. In consequence, Mr Orr submits, the judge was entirely right to think that *Wrotham Park* damages were a just remedy. As he found, the restrictions against competition were crucial to the transaction; the breaches of covenant were extensive and thorough. The appellants established themselves in One Step's heartland and did the very thing

they had promised not to do. The covenants expressly contemplated the appellants seeking consent for activities that would otherwise have been in breach. Not having done so they should now pay the price they would have had to have paid if they had sought that consent.

Conclusion on Wrotham Park damages

114. I have found the question whether the judge was right to give One Step the option of *Wrotham Park* damages a matter of some difficulty.

115. I was initially attracted by the submission that the option to claim *Wrotham Park* damages ought not to have been afforded because of the absence of (a) a finding that One Step was incapable of establishing identifiable financial loss; (b) a finding that such damages needed to be available to avoid manifest injustice; and (c) sufficient factors to justify the grant of an exceptional remedy.

116. I have however, come to the conclusion that we should not overturn the finding of the judge. In so doing I have had the benefit of reading in draft the judgment of Lord Justice Longmore which has confirmed me in the view that I have come to hold.

Identifiable financial loss

117. Although the need to compensate a claimant in circumstances where he cannot demonstrate identifiable financial loss is referred to by Chadwick LJ in *WWF* as an underlying feature of a claim to an account of profits and *Wrotham Park* damages, and this was treated as a critical criterion by Richards J in *Abbar*, it does not seem to me that Chadwick LJ should be taken as having laid down that it was only in those circumstances that such an award could be made. The issue which he had to decide was whether an account of profits and *Wrotham Park* damages were juridically highly similar remedies. He decided that they were. It was not necessary for him to decide, nor should he be taken as having decided, that it was only where it was impossible to identify any financial loss that *Wrotham Park* damages should be available. This is particularly so when he regarded the two remedies as a flexible response to the need to compensate the claimant for the wrong that has been done to him. Such flexibility of approach may justify the award of *Wrotham Park* damages where it would be very difficult for the claimant to establish "ordinary" compensatory damages.

118. If and insofar as in *Abbar* Richards J regarded the absence of identifiable financial loss as an absolute requirement for *Wrotham Park* damages he was, in my view, in error. But his refusal to award such damages was correct. *Abbar* was a case in which it would have been perfectly possible for the claimant to prove damages. The alleged breach (none was found) was of an agreement that he would realise his share in a venture in which he had invested within 18 months. Expert evidence could have been adduced as to what that share would have been if that had happened. It was not. Instead the claimant sought to rely on a number of documents which were said to show the increase in value. The judge found that he had simply failed to place before the court the evidence necessary for an assessment of compensatory damages. Similarly in *BGC* the claimant had suffered no loss and there was no good reason to afford him a *Wrotham Park* option.

Manifest injustice

119. The judge concluded that an award of damages on the *Wrotham Park* basis was the just response in this case. That was, as it seems to me, the correct test. In *Wrotham Park* itself Brightman J held that without such an award justice would "*manifestly not have been done*". In *Experience Hendrix* Mance LJ concluded that "*any reasonable observer"* would think that a *Wrotham Park* award should be made as a matter of practical justice. It would not, however, be right to treat these expressions of the position in relation to the facts of particular cases as requiring the judge to assess whether manifest injustice would arise if Wrotham Park damages were not awarded, as opposed to whether they constituted the just response. It is important in this context to distinguish between the factual situations in earlier cases and the principles that have been developed in them. *Wrotham Park*, *AG v Blake* (an account of profits case) and *Experience Hendrix* were all cases where the claimant had suffered no financial loss (in the ordinary sense) at all. It does not follow that *Wrotham Park* damages can only be awarded in such a case. In an appropriate case justice may call for a claimant to be awarded compensatory damages in *Wrotham Park* form.

120. That the question for the court is what remedy is required to avoid injustice in the particular case is apparent from the summary of Lord Nicholls in *AG v Blake* ("*In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach")*; Gibson LJ in *Experience Hendrix* ("*To avoid injustice I would require PPX to make a reasonable payment in respect of the benefit it has gained*") and the reference by Chadwick LJ in WWF to "*the just response*". I note also that in *Pell v Frischmann* Lord Walker referred to the fact that the most recent cases were concerned with invasion of property rights and that the breach of a restrictive covenant was akin to the invasion of a property right since it was akin to a negative easement.

121. What is the just response is, quintessentially, a matter for the judge to decide. In the present case there is, in my view, no sound basis upon which we should interfere with the conclusion that he reached after a full hearing of the evidence and submissions. He expressed himself succinctly but in the context of the findings which Mr Orr summarised, as set out in [112] above, which support the judgment which he reached.

122. In particular the judge was entitled to take into account the difficulties which One Step would have in establishing damages on the ordinary basis. Whilst there may not be insuperable difficulties in putting forward some sort of case, there would seem to me to be very real problems in showing what placements One Step lost or might have lost because of the appearance of Positive Living on the scene. One Step could, of course, approach the authorities concerned for evidence and/or seek third party disclosure. One Step could also approach the users themselves, who often have a say in placement decisions. But the whole exercise would, as it seems to me, in practice be fraught with difficulty. In addition any loss of goodwill is inherently difficult to measure.

Exceptionality

123. The award of *Wrotham Park* damages has been said to be an exception to the general rule for the calculation of damages. That description has led to the submission that the present case is not, or not sufficiently, exceptional because damages can be assessed

in the robust manner contemplated in *Devenish* and the authorities quoted therein; and that, if the award is upheld, *Wrotham Park* damages will become the norm in, *inter alia*, cases involving restrictive covenants in employment and sale of a business cases.

124. *Devenish* was not cited to the judge and I do not regard it as confounding his conclusions. The Court has, no doubt, an ability to apply a "*broad axe*" in assessing damages. But I do not find it at all easy to see how this weapon could usefully be applied in the present case or how exactly general damages could appropriately be determined, whatever might have been the position in the claim for malicious falsehood in 1892.

125. There is some force in the submission that an award of *Wrotham Park* damages in the present case would make the exception the norm. In many cases it may be difficult to say what business the contract breaker has obtained which the innocent party would have obtained; and even more so to say what has been the effect on the goodwill and reputation of the innocent party, and what business the innocent party might, but for the competition, have secured (both in the period of restraint and thereafter).

126. However, in relation to that two points arise. First, the test is not whether the case is exceptional but what does justice require. The position is different in relation to an account of profits which is, truly, an exceptional remedy. Second, the facts of this case are, as it seems to me exceptional.

127. One possible objection to a *Wrotham Park* award is that it over compensates. I note, in this respect, that the expert report of Mr Andrew Grantham for One Step put the *Wrotham Park* damages figure at between £ 5.6 and 6.3 million in circumstances where the total value of the company postulated by the Deadlock Notice was £ 6.3 million and the sale price of KM-G's shares was half that. This figure appears to have been reached by a formula which involves an initial release fee of some £ 500,000 and an entitlement to a substantial share of the proceeds of the new business if sold. These figures, which, of course, the court may not accept, seem to be extremely high, especially in comparison to Mr Hine's figures (£ 2.44 to £ 3.60 million) for the shortfall in profits that One Step is said to have suffered between December 2006 and December 2009 on the hypothesis that sales achieved by Positive Living were all at the expense of One Step.

128. Further, whilst the form of such an award is that it is the price of release from the covenants, the substance is akin to an account of profits, being a proportion of the capital value derived from those profits. The situation differs from that in which a royalty is paid on the sale of a record where each record is, in effect, the product of the defendant's breach and the royalty is a fixed percentage of the price obtained on the sale of that record.

129. In *Lunn Poly* Neuberger LJ held that negotiating damages (in that case in lieu of an injunction) are normally to be assessed or valued at the date of the breach. In *WWF* Chadwick LJ said that the damages should be assessed as the sum which the court considers it would have been reasonable for the covenantor to pay and the covenantee to accept for the hypothetical release of the covenant assessed on the basis that the release would take effect from a date immediately before the covenantor was first in breach until the date any injunction to restrain further breaches took effect.

130. The amount taken as the reasonable sum for the relaxation of restrictive covenants, even if it is a modest percentage of future profits, may represent more, perhaps far more, than the loss realistically to be regarded as, in the event, suffered by their breach. A *Wrotham Park* award could, thus, bear no relationship to the practical effect of any competition from Positive Living. In the present case, some of the evidence suggests that One Step may in fact have suffered little or limited loss from the competition of Positive Living. Further, the assessment of a reasonable price may involve consideration of several imponderables, such as the likely effect of future competition which would also arise in any assessment of general damages.

131. I do not regard these considerations as justifying a denial of *Wrotham Park* damages for two reasons. First, the price that might reasonably be demanded for the relaxation of a covenant may necessarily exceed the loss that would have been suffered by the actual breach. This is because the price reflects the risk that breach of the covenant might result in a greater loss than has in fact been incurred. Thus in *Pell Frischmann* the price fixed by the Privy Council was $ 2.5 million when the profit in fact made was between $ 1 and $ 1.8 million. Second, in deciding on the appropriate price the Court must, itself, exercise a robust judgment which takes account of the likely extent and effect of any competition.

132. Further, *Lunn Poly* indicates that justice may require and entitle the court to take into account facts and events after the date of the hypothetical negotiation, although they would normally be irrelevant, or, if justice requires it, take a post breach valuation date. One possible circumstance when such events might be relevant is where the nature of the competition which in fact occurred was less than might have been possible if there had been no restrictive covenants at all.

133. I do not regard a decision in the present case upholding *Wrotham Park* damages as meaning that injunctions, which would otherwise be granted, are likely to be refused. In considering whether damages are an adequate remedy the primary focus must be on whether damages, assessed in the ordinary way, will be an adequate remedy. The fact that, in a case such as the present, where no injunction was sought, a *Wrotham Park* award was made, should not be a ground for refusing relief that would otherwise be granted.

134. Accordingly I would dismiss the appeal

Lady Justice King

135. I agree

Lord Justice Longmore

136. I agree with my Lord that the defendants were in breach of the non-compete covenant and the non-solicitation covenant and would dismiss the appeal in relation to those matters. I have found the question whether One Step is entitled to elect for *Wrotham Park* damages more difficult.

137. The judge's commendably brief reasoning on the question at para 106 of his judgment relies on numerous matters which he had to absorb during a 13 day trial during which he saw the relevant witnesses being cross-examined in considerable detail. He thought

that the justice of the case required a *Wrotham Park* award and that is a decision I would, for my part, wish to respect.

138. My lord in para 112 of his judgment enumerates the matters on which Mr Orr relied on behalf of One Step as being

i) KM-G was the public face of One Step at the time the business was sold;

ii) any involvement of KM-G and AM-G after the sale would have been very damaging both in the sense of lost business (loss of profit) and client perception (goodwill);

iii) the covenants were an important if not crucial part of the agreement for the sale of the business for which KM-G and her civil partner received a substantial sum of money;

iv) the covenants were intended to protect both existing relationships and the prospect of obtaining further business;

v) KM-G and AM-G intended from the very start to breach the covenants; the breaches were both deliberate and secretive; KM-G effectively stole and used a raft of confidential information (judgment para 91); and

vi) The furtiveness of KM-G's actions meant that she was able to damage One Step's business before it was even aware of the unlawful competition; that had the effect that One Step was unable to obtain any payment for the release of the covenants (although it had agreed not unreasonably to refuse consent to such breaches) or to mitigate prospective competition; moreover (I would add) it was also prevented from obtaining any effective relief by way of an interim injunction before trial on the ground that damages were unlikely to be an adequate remedy.

139. If, in these circumstances, the reasonable observer of the situation were to ask himself (to paraphrase Mance LJ in *Experience Hendrix v PPX Enterprises* [2003] EWCA Civ 323; 1 All E.R. (Comm) 830 para 42) whether as a matter of practical justice KM-G and AM-G should make, at the least, reasonable payment for competing and soliciting in breach of the covenants in the agreement for the sale of the business, the most likely answer would be "Yes".

140. Mr Béar submitted that the answer should be "No" because damages were an adequate remedy. But this was a curious response because his main submission was that One Step had in fact suffered no loss and could recover no damages at all. He offered little guidance on the question of how damages would be assessed if the court was satisfied that One Step had, in fact, suffered loss. My own view, on an inevitably more cursory examination of the facts and the evidence of the witnesses than that of the judge, is that any assessment of damages would be a very difficult exercise. One Step's accountant's expert report compared the profits between the start of the business and the sale with what the profits would have been if the trend had continued thereafter and he then calculated a "short fall" in the profits actually made. But as my Lord has pointed out (para 101 above) that assumes that payments which went to Positive Living would have come to One Step and continued with them during the

period of the covenants and after their expiry. It is not clear to me how a judge could resolve that causation argument.

141. If One Step had been able to sue for interim relief any judge would be likely to have concluded that an injunction should be granted because damages were not an adequate remedy. If a defendant has deliberately taken action which has the effect that interim relief is illusory, any contention that *Wrotham Park* damages should not be awarded because damages are in fact an adequate remedy needs to be looked at with a good deal of scepticism.

142. On the basis therefore that it is appropriate to consider the justice of the case on a broad brush basis I would have little difficulty in coming to the same conclusion as the judge.

143. The difficulty with this is that judges like to act in accordance with accepted principle and it is not easy to set out the principles by which it is possible to decide that *Wrotham Park* damages, as opposed to conventional damages, should be awarded. In both *Wrotham Park* itself and *Experience Hendrix*, the claimants had on one view suffered no loss and both Brightman J and Mance LJ felt that the deliberate breach of contract merited some compensation. Mr Béar submitted that the *Wrotham Park* principle is confined to cases where a claimant has suffered no identifiable financial loss. But, as Lord Hobhouse pointed out in his dissenting speech in *Attorney General v Blake* [2001] 1 A.C. 268, 298 the claimant in *Wrotham Park* (a decision which Lord Hobhouse along with the other members of the House approved) had suffered a loss, namely the sum which it could have extracted from the defendant as the price of its consent to the development. So here One Step have suffered a similar loss namely the sum which it could have required KM-G and AM-G to pay if they had (as they should have done) asked to be released from their covenants.

144. Mr Béar based his submission that *Wrotham Park* damages could only be awarded where a claimant is unable to demonstrate an identifiable financial loss on *World Wide Fund for Nature v World Wrestling Federation Inc* [2008] 1 WLR 445 in which the Fund sued the Federation for *Wrotham Park* damages after settling a dispute about the use of the term WWF in which it had been refused permission to amend to plead a claim for account of profits. This court held, relying on the wide *Henderson v Henderson* principle, that it was an abuse of process to claim such damages in a new action when they could have been included in the old action but it also considered whether the claim for *Wrotham Park* damages could be defeated by a plea of *res judicata*. For these purposes it was necessary to consider the nature of a *Wrotham Park* claim and Chadwick LJ (with whom Maurice Kay and Wilson LJJ agreed) held (para 60) that although such a claim was a claim for compensatory damages rather than a gains-based claim it was nevertheless "a juridically highly similar remedy to relief [an account of profits] previously sought".

145. But in the previous paragraph Chadwick LJ set out his understanding of *Wrotham Park* damages in the following way:

> "*59 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. Lord Nicholls's analysis in Blake's case demonstrates that there are exceptional cases in which the just response to circumstances in which the compensation which is the claimant's due cannot be measured by reference to identifiable financial loss is an order which deprives the wrongdoer of all the fruits of his wrong. The circumstances in which an award of damages on the Wrotham Park basis may be an appropriate response, and those in which the appropriate response is an account of profits, may differ in degree. But the underlying feature, in both cases, is that the court recognises the need to compensate the claimant in circumstances where he cannot demonstrate identifiable financial loss.*"

I do not read this paragraph as saying that *Wrotham Park* damages can only be available if a claimant shows he has suffered no loss rather than if it will be difficult to prove any damages. That issue (which is before us) was not before Chadwick LJ at all. His use of the phrase "identifiable financial loss" appears to derive from a sentence in the speech of Lord Nicholls in *AG v Blake* [2001] 1 A.C. 268, 285 in which he said:-

> "*Even when awarding damages the law does not adhere slavishly to the concept of compensation for financially measurable loss.*"

It was, of course, the position in *Blake* that neither the Attorney General nor Her Majesty's Government (on whose behalf he was suing) had suffered any financial measurable loss. But it does not follow that, if he or it had, an account of profits would not have been ordered. Still less does it follow that a *Wrotham Park* award can only be made if there is no identifiable financial loss. Chadwick LJ's use of the phrase "identifiable financial loss" was therefore not essential to his reasoning that such an award was essentially compensatory. Indeed an award in circumstances where there was loss but it was difficult to prove would be even more compensatory than an award in circumstances where there was no identifiable financial loss.

146. I would therefore reject Mr Béar's submission as inconsistent with *Experience Hendrix* (see below); to the extent that it is supported by *obiter dicta* in WWF, those *dicta* are not binding on this court and Richards J was, with respect, wrong in para 226 of *Abbar v Saudi Economic and Development Company* [2012] EWHC 1414 (Ch) to hold that they were binding on him.

147. In para 58 of *Experience Hendrix* Peter Gibson LJ did set out 3 important features which justified a *Wrotham Park* award:-

i) there was a deliberate breach by the defendant of its contractual obligations for its own reward;

ii) the claimant would have difficulty in establishing financial loss therefrom; and

iii) the claimant has a legitimate interest in preventing the defendant's profit-making activity in breach of contract.

These 3 features are present in this case and I would regard this case also as justifying a *Wrotham Park* award unless there is some countervailing feature which should prevent such an award. My Lord suggests that there are three features which might prevent such an award in the present case. These are:

i) calculating damage would not be so difficult as to be impracticable;

ii) such damages are likely to be excessive if one cannot take into account what actually happened after the time of the first breach of covenant;

iii) if *Wrotham Park* damages were awarded in the present (not untypical) case of breach of covenant, they would quickly become the norm in sale of business cases.

148. As to (i) that should generally be a matter for the trial judge; if the judge considers that the difficulty of assessing damages is such as to justify a *Wrotham Park* award, I do not think that this court should take a different view. As to (ii) again this is a matter for the judge conducting the assessment. He should be astute to avoid over-compensation. Phillips J had received submissions that the fall off of One Step's business was attributable to inefficiencies or lack of sufficiently enthusiastic employees to promote One Step's business rather than to any breach of contract on the part of KM-G but the judge did not accept that that was the case; if it had been, the case could hardly be a prime example for a *Wrotham Park* award.

149. I do, however, see the force of the third of the above features. It certainly led me in paragraph 148 (iv) of *Devenish Nutrition Ltd v Sarofi-Aventis* [2009] Ch. 390 to set my face against an award of account of profits in an ordinary case of breach of the anti-competition provisions contained in what was then Article 81 of the EC Treaty. But as I there pointed out the claim in that case was an all or nothing claim. A *Wrotham Park* award calculated by reference to some no doubt fairly modest percentage of the profit obtained by Positive Living is rather different.

150. Nor do I think this is a typical case of breach of non-competition covenants on the sale of a business. No doubt deliberate breach of contract is common in the sense that the purchaser of a business knows that what he or she is doing when they set out to compete. But the usual debate is whether the restriction is an unlawful restraint of trade and in many cases a defendant will have a good faith belief (perhaps based on advice) that it is unlawful. Not only does that not arise in the present case but the subterfuge and furtiveness to which KM-G resorted make this a by no mean typical case. As I have indicated those factors effectively deprived One Step of the opportunity to obtain interim relief. If such relief had been obtained this dispute would probably have been resolved long ago.

151. Therefore in cases of sales of a business I would add a fourth factor to be added to those enumerated by Peter Gibson LJ and listed in para [147] above namely:

iv) the result of the defendant's breach of contract has been that it is doubtful that interim relief could be obtained.

I do not intend, by adding this feature in cases of a sale of a business, to suggest that its absence will necessarily mean that *Wrotham Park* damages must not be awarded.

It is merely a feature which, if it is present, can be taken into account. If it is absent, the authorities collected in para 14-046 to 14-048 of McGregor on Damages (19th ed. 2014) will have to be considered with care.

152. For these reasons I would, like my lord, dismiss this appeal in every respect.

APPENDIX

The appellants' submissions

Milton Keynes, Oxfordshire and Slough

Placements

1. One Step had never undertaken any work in these areas, save for Oxfordshire. (As will become apparent this appears to be wrong in relation to Slough; see [61] below).

Marketing

2. One Step had not done anything of significance by way of actively soliciting work from any local authorities in these areas prior to August 2005 and nothing to solicit such work between August 2005 and December 2006.

3. Mr Rootes gave evidence of his marketing campaign in 2005 and produced the data on "*warm leads*" contained in his schedules recording his marketing efforts the last iteration of which was on 23 August 2005. The upshot of that, it was submitted, was that One Step was nowhere near achieving the sort of relationship with local authorities which might lead to them being persuaded that One Step was an appropriate organisation to which to send adult work.

4. In respect of **Milton Keynes** there had been a meeting with the Children's Services manager on 1 March 2005 after which brochures and other documents were sent, followed by an email to set up a Children & Family Team meeting and a note to follow up. Nothing is recorded thereafter.

5. In relation to **Oxfordshire** Mr Rootes' notes record a visit by Mr Costelloe to Sarah Clayson, the Children & Families Team Manager in what was described as a positive meeting. He noted "Recontact to follow up". He was also in email contact with Jan Lewis, the Leaving Care Team Manager and sent her details about, *inter alia*, unit costs and placement options for which she had asked. The note spoke of re-contacting her. Nothing is recorded in respect of this after that.

6. Contact was made with an Approved Social Workers Manager in the Mental Health Department (which deals with adults) who said that One Step's mental health unit was not suitable for her but that if Mr Rootes emailed her she would circulate it to all 7 (?) Community Mental Health Team managers. He did so. There was no evidence of anything further being done.

7. In relation to **Slough**, contact was made with Kaye Bryce, the 16 plus Team Manager and Mr Costelloe and KM-G attended a team meeting. The remit of the team was 16-24 year olds. The meeting was positive. Ms Bryce knew KM-G from the past. Mr Costelloe followed up with an email suggesting a visit to One Step's offices which Ms Bryce declined until Slough had a possible referral.

8. Contact was made by email with the head of the Community Mental Health Access team, which would deal with adults. A month later Mr Rootes spoke to the leader who said he would look up the email and reply in the next few days. Nothing seems to

have happened after that. Contact was also made with someone (job title unknown) at Placements.

Cross referrals and unilateral approaches

9. The judge had rejected the contention that the non-compete covenant did not prevent Positive Living from seeking adult client referrals from authorities where One Step was only catering for CLC in December 2006. He did so on the basis [72] that One Step's business was to provide a range of supported living services to a range of users in two regions with a hub in each and

> "*was able to offer and provide any of those services and would hope to receive cross referrals between different teams in each local authority and between different local authorities (which was the way that Ms Burgess had made plain that local authorities operated).*"

That was said by the appellants to be a misunderstanding of her evidence which was concerned with the possibility that a business which provided only CLC services to a local authority might be commissioned *by that authority* also to provide adult services. There was, it was submitted no realistic prospect that these three councils would unilaterally approach One Step and ask it to provide adult services given that One Step had never provided those authorities with any services in the past, was not on their "approved provider" lists, had made no significant efforts to secure adult work from them, and had not marketed to them at all in the 16 months prior to December 2006.

10. One Step had a presence on the internet but there was no evidence that in December 2006 local authorities in the South of England would characteristically approach One Step unilaterally to provide them with services or that that had ever occurred. To that there was one exception in that in February 2007 **Oxfordshire** had placed CG with One Step in Reading following a referral made in May 2006. There was no evidence that this was the result of any endeavours by One Step.

11. In those circumstances any "hope" that One Step might have entertained in December 2006 of receiving adult work from Milton Keynes, Oxfordshire or Slough was too speculative and remote to conclude that One Step was in competition for adult work to any material extent from these local authorities.

12. The appellants submitted that the object of a non-compete covenant is to protect the goodwill of the business and that that was largely the relationship it has with *existing* customers in the areas where the business operates. It can, however, in certain contexts include protection of trade that a business is in an "*advanced state of preparation*" to compete for and/or protection of the prospect of "*new clients from recommendations and referrals*": *Allied Dunbar v Weisinger* [1988] IRLR 60. This covenant did not extend that far and, in any event, One Step was not in an advanced, or, indeed, any state of preparation in terms of actively soliciting work from any of these three. It had no more than a hope that these authorities might approach it.

13. There was no evidence that One Step had acquired as at December 2006 any new work from these authorities (or others in the south) as a result of recommendations far less that this was a characteristic of its business. There was no evidence that One Step

ever sought to obtain or obtained any adult services work from the three counties' authorities. [That does not seem to me to be correct in relation to Oxfordshire and Slough: see above].

14. Further the problem experienced by One Step after December 2006 was one of falling sales to existing customers. Mr Bowman, One Step's business development manager, admitted that he had made inquiries about the reason for that. These revealed that some of the local authorities had failed to offer One Step new work because of concerns over quality and price; and there was no suggestion that Positive Living had been picking up work from those authorities that might have gone to One Step.

Wokingham, Windsor and Maidenhead, Buckinghamshire and Hillingdon Placements

15. As at December 2006 One Step provided CLC services to local authorities in four areas in which Positive Living subsequently provided adult services. The number of clients were as follow:

(a)	Wokingham	1 child
(b)	Windsor and Maidenhead	2 children
(c)	Buckinghamshire	KL (see [16] below)
(d)	Hillingdon	2 children

16. One Step had provided CLC services to some additional clients from these authorities but, with one exception, had never provided any adult services. The exception was KL, born on 27 November 1980, who was placed by Buckinghamshire in December 2000 initially when he was a CLC. Further placements contained from time to time when he was not detained and continued after he ceased to be a CLC and became an adult. The team that dealt with him was the Buckinghamshire adult learning disability team.

Marketing

17. One Step made no significant effort to secure any adult services from any of these four authorities prior to August 2005 and no effort at all in the 16 months up to December 2006. It had not actively marketed itself to any of these authorities as a provider of adult services.

18. In relation to **Wokingham** the Head of Adult Care put One Step on a briefing list for adult services "re supporting parents with disabilities". There was a meeting between Mr Costelloe and the Head of Learning Disabilities on 18 April 2005 which led to a meeting being arranged with someone from the CPTLD (community psychiatric team, learning disabilities) on 27 June 2005. Mr Costelloe cancelled that meeting. An email was sent requesting a reschedule and a note made to recontact to arrange meeting. There was no evidence of any attempt to revive it or of any further attempted contact during the rest of 2005 or in 2006. In the course of the communication Mr Costelloe was told that Wokingham did not have an approved provider list, just tendering for big contracts, and that for usual referrals the relevant team would get in touch.

19. In relation to **Windsor & Maidenhead** Mr Rootes emailed the Children & Families Team Manager whose secretary suggested he emailed Mr Richard Dawson the Contracts Manager. There were various attempts to arrange a meeting which took place on 23 March 2005 (with KM-G and Mr Castelloe attending) and was described by Mr Rootes as positive. Windsor asked for and later received a sizeable amount of necessary documentation. The result recorded by Mr Rootes was that One Step became accredited and received a placement. In fact 2 children leaving care were placed after this work. This was all related to children and families.

20. No such process was gone through to secure adult work. Mr Rootes had a long list of telephone numbers and email addresses on which the only officers with commissioning responsibility worked for children and families/children leaving care.

21. In respect of **Buckinghamshire** One Step only attempted to contact children and family services. On 21 April 2005 KM-G and Mr Costelloe had a positive meeting with the Head of Policy, Planning, Commissioning and Performance for Children and Young People. He was due to visit Northolt for a care leave referral meeting on 16 May 2005 but the referral did not happen. A note was made to recontact to ask to meet re potential referrals but nothing seems to have happened after that.

22. In relation to **Hillingdon** One Step never made any attempt to compete for adult services work prior to December 2006. Its only marketing work was a meeting with Huntingdon's 16-plus team Care Manager on 31 March 2005 which was positive and was followed by a visit by her to Northolt and related to children leaving care. Possible recontact is mentioned but there is no further record.

23. Ms Burgess had emphasised that in some local authorities there were commissioning teams that dealt with both children's and adult services; in others commissioners moved between children's and adult teams; some cases straddled both adult and children's teams and in any event commissioning officers discussed providers with each other. But none of that, the appellants submitted, justified the conclusion that it was likely that the local authorities to whom One Step provided CLC services would unilaterally invite One Step to provide adult services as well in circumstances where (i) One Step had never provided or actively sought to provide adult services to those authorities; and (ii) there was no evidence that at the time of sale it was actually a feature of One Step's business that it received cross referrals. It was unrealistic to conclude that, in the absence of One Step actively marketing itself for adult work it had any real "hope" that any of these four authorities would offer it adult work and in any event a mere "hope" was insufficient to make One Step and Positive Living competitors.

24. Since Positive Living did not provide any CLC services to these four authorities nor sought to do so One Step cannot have lost any CLC contracts because of competition from Positive Living. One Step's falling sales were attributable to other causes. Positive Living, in providing adult services to those authorities was in competition, not with One Step, but with other organisations which had been providing adult services to them and who were approved providers for those authorities or who solicited such work.

25. In short the judge was wrong in law and on the facts to conclude that in December 2006 One Step was in competition for adult work from any of these four authorities.

Ealing

26. In December 2006 One Step had 2 adults (a tiny proportion of **Ealing**'s total number of adult clients) who had been referred to it by Ealing as well as 3 CLC clients. By 2008 when Positive Living started to undertake adult services work for Ealing One Step's attempts to secure any work from Ealing were over and Positive Living was not taking any work from Ealing which would have gone to One Step.

27. Mr Bowman accepted in evidence that he ascertained from his investigation that Ealing was not willing to make referrals to One Step because of concerns about quality and price and that when he learnt of another provider winning work it was never suggested that One Step had lost a contract to Positive Living. He also accepted that One Step regularly reviewed referrals where it had not won work (it being the practice of local authorities to invite 3 organisations to tender for this type of work) to see whether it had lost work to Positive Living, but they had not retained the material. AM-G's evidence was that Positive Living was never invited to tender for the same work. Mr Costelloe admitted in his statement that on 6 June 2008 3 Ealing procurement officers informed him that Ealing had decided not to make placements except with registered agencies, which One Step was not. It did not become one until after the covenants expired.

28. That Positive Living was not the cause of the fall in One Step's sale is apparent, it is submitted, from the details of those sales contained in KM-G's 3rd witness statement:

2003	£ 568,534
2004	£ 977,263
2005	£ 1,263,446
2006	£ 775,658
2007	£ 179,953
2008	£ 194,532
2009	£ 194,532

Positive Living only started to work for Ealing in 2008. It took on 7 adult clients in January, March, May, June, July and August.

29. One Step had marketed to various existing and former clients in 2004 and 2005, but, as appears from his notes, Mr Rootes final marketing drive made no effort to secure any form of work from Ealing. A number of Ealing officers had concerns about quality and price at One Step. Ealing had a large number of adult clients and Positive Living only provided services to a tiny number of them. If One Step had been regarded as good enough it could have continued to secure work for Ealing regardless of the arrival of Positive Living. [One Step contends that the comments recorded in the Sovereign report were largely favourable and did not evidence any serious failings].

30. For all these reasons the judge was wrong in law to conclude that One Step and Positive Living were in competition for adult work from Ealing either during 2007 (during which Positive Living undertook no work for Ealing) or 2008 (during which Ealing decided to make no placements with unregistered agencies) or 2009, when Positive Living took 1 adult and One Step was unregistered.

Upshot

31. The position in respect of One Step up to December 2006 can be expressed in tabular form:

Authority	Solicitation of adult work Pre August 2005	Solicitation of adult work September 2005-December 2006	Provision of services for adults up to December 2006
Milton Keynes	None: only contact with Children's Services Manager	None	None
Oxfordshire	1 contact and 1 follow-up email with Mental Health Team mangers.	None	CG – see [74] above
Slough	1 attempt to contact Mental Health Team for substantive discussion. Contact with someone at Placements	None	None
Wokingham	1 meeting with Head of Learning Disabilities; a second meeting with someone from COTLD cancelled	None	None
Windsor & Maidenhead	1 preliminary meeting with the Contracts Manager	None	None
Buckinghamshire	None	None	KL {see [15] & [16] }
Hillingdon	None Only marketing work with 16 plus team	None	None
Ealing	Not recorded on Mr Rootes' summary		December 2006: 2 adults 3 CLC 2008 No adults

32. Mr Stephen Knafler QC on behalf of the defendants relied in his oral submissions on the position as it turned out to be after December 2006 in respect of the supply of services by Positive Living during the period of the covenant to authorities to which One Step also provided services:

Authority	One Step	Positive Living
Oxfordshire	Adult services 1 client [CG]	Adult Services 1 client [AB]
Ealing	Adult Services	Adult Services

Slough	None Quaere: see [198] below	Adult Services 2 clients
Wokingham	Children's Services	Adult Services
Windsor & Maidenhead	Children's Services	Adult Services
Buckinghamshire	Children's Services	Adult Services
Hillingdon	Children' Services	Adult Services
Milton Keynes	None	None
Hounslow	None	None

There is, however, an error in that summary in that Buckinghamshire had placed KL and two further adult service users with One Step: LR and DG.

33. He submitted that the apparent competition between One Step and Positive Living in respect of Oxfordshire and Ealing was not material competition. In respect of **Oxfordshire** the referral of CG which One Step obtained was an "out of borough placement" and not the result of CG operating in a regional catchment area where approaches to One Step from any local authority in the area were inherently likely to occur. A care provider may at any time receive such a placement from any authority anywhere in the country. One Step had received such placements from as far away as Newcastle and Suffolk. It had had one from Birmingham. As Ms Burgess explained, usually a local authority will place service users in their area or close by. But there may be cases where it is necessary to place them further afield either for family or social reasons, to remove the client from an abusive situation, or in order to place a client with a provider with skills which no local provider possessed or reasons linked to their criminal behaviour. In that case the authority is not likely to have an approved list for a distant area.

34. A report from Oxfordshire County Council of July 2004 in relation to CG, who was at that stage detained under the Mental Health Act at a Unit in a hospital, reveals that he was a paedophile and needed to be separated from his family, when he left the Unit. It is thus likely that the referral which took place in May 2006 was indeed an out of borough placement.

35. In respect of **Ealing**, One Step obtained adult work for a number of reasons. Ealing was where both appellants had worked. It was by far and away One Step's biggest client. So there were special reasons why Ealing should ask One Step to carry out adult work. And One Step and Ealing were not in truth in competition for adult work because by the time Positive Living started to work in West London in early 2008 One Step was no longer qualified to work for Ealing. In his witness statement Mr Costelloe describes a meeting that they had with representatives of Ealing on 6 June 2008. They explained that in future they would only be making referrals to CSCI[2] registered Domiciliary Care Agencies. One Step did register as a DCA but only on 14 July 2011. There is no evidence nor basis for saying that this change of policy was brought about by Positive Living.

36. In respect of **Wokingham, Windsor & Maidenhead, Buckinghamshire and Hillingdon** the prospect of One Step providing Adult Services to these authorities was

[2] Commission for Social Care Inspection, now the Care Quality Commission.

so slim that there was no material competition. As noted above the judge held that One Step could "*hope*" to receive cross referrals between different teams in each local authority and between different local authorities [72] but he made no findings as to how such cross referral would actually work in a particular case nor did he reflect how realistic that hope was. In truth it was so speculative and the prospect so remote that for Positive Living to take adult work from any of those did not amount to competition.

37. Mr Knafler submitted that a useful analysis was contained in the report of Mr Stephen Lewis, an accountancy expert for the defendants. That tabulated the number of service users per authority for One Step down to the end of 2006 and for Positive Living from 2007 onwards. I set out below the data in relation to the authorities where One Step and Positive Living provided services during the period of the covenant:

Authority	One Step Service users	% of Total Users	Positive Living Service users	%
Buckinghamshire	1	0.5%	10	14.3%
Ealing	60	31.1%	10	14.3%
Hillingdon	20	10.4%	13	18.6%
Windsor & Maidenhead	1	0.5%	3	4.3%
"Other councils"	54	28%	10	14.3%

38. Mr Lewis also performed an exercise at para 3.7.9 of his report in relation to Ealing and Hillingdon the effect of which was to show that in relation to those authorities the referring teams who dealt with One Step were, in respect of 77 referrals the Leaving Care team, in respect of 1 referral the Children and Families team, and in respect of another the Physical Disability Team. In respect of Positive Living 21 of the referrals came from the Learning Disabilities Team and 2 from Mental Health. This showed, it was submitted, the lack of overlap between referring departments. (It also begs the question as to what the position would be if Positive Living was not around).

39. According to Mr Knafler this evidence put holes in the argument of One Step that the fall in their business was because Positive Living had stolen it. The evidence showed that Positive Living was dealing with a different set of people to those who were dealing with One Step.

40. The fact that Positive Living had not poached the work provided by the commissioners for whom One Step usually worked was consistent with the evidence of Mr Bowman. In cross examination he said that there were a number of West London Boroughs with whom One Step has worked who had not raised concerns (unlike Brent) where referrals simply stopped without any complaints of which he was aware . At first there was a reduction in referrals and then there were referrals where One Step was not always winning the bids. It was a time when the recession was beginning to bite. He also said, that there were authorities which probably included Hillingdon, Hounslow and Ealing where the commissioners said that One Step had fallen out of favour because they were not competitive on price and there were quality concerns. He agreed that there was no occasion on which any local authority told him about any other organisation winning the work nor was it suggested

at any provider forum that One Step had lost a contract which had gone to Positive Living.

41. Mr Knafler also referred to the evidence of KM-G that it was usual for local authorities to ask three different providers to quote for the packages of accommodation and support. In 2013 the defendants had asked for a list of the names of all potential service users and the referring local authority teams in respect of whom One Step had provided an assessment who were not subsequently placed with One Step for the period of the covenant. They were told that One Step had not retained the records. He suggested that if One Step thought that Positive Living was taking its prospects the records would have been kept.

Discussion

42. As is apparent, an important issue was the extent to which, in practice, local authority departments refer service providers of, say, children's services to those responsible for adult services in the same authority, and vice versa, and as to whether local authority A will or may refer the possibility of using a particular service provider to local authority B or C. For whatever reason the joint statement of the experts says nothing useful on this subject.

43. There was, however, evidence bearing on the subject. **Mr Madden** said that every authority would have an Approved Provider list, periodically reviewed, of those organisations with whom they were prepared to do business. Sometimes the lists were closed for a short period if the authorities thought that they had enough organisations. Local authorities could not unreasonably exclude a provider organisation. So, in theory any organisation could be considered for any service but local authorities would be wary of organisations who over claimed. Approved lists would contain certain criteria relating to the types of client, nature of service, evidence of performance and price. Reputation could be a key factor.

44. In cross examination he said that local authorities would be bound to listen to someone who was saying that they had something to offer but any potential provider would have to demonstrate that they could adapt and meet the needs of the particular authority. If you demonstrated the capacity to listen, business was there. It would be contrary to the authority's objective to promote a diverse market to shut out people who were trying to demonstrate their ability. On the other hand authorities did not feel duty bound to keep asking people to come and see them. It was for the providers to show, by responding to adverts or tenders or by cold calling that they could meet the needs that the authority wanted to purchase. The onus was on the provider to explain what he could do and if you did that then you got the business. Sending information about what you could do was very important as was developing contacts and becoming known and listening to and having dialogue with the authority. That evidence, Mr Knafler submitted, showed that you had to be proactive and reach out to the authority.

45. In her report **Ms Burgess** said [91ff] that supply in the provider market lagged behind demand between around 2000 and at least 2006. Many new providers set up in what was an unregulated market. Commissioners had to rely on reference and inference in order or judge the quality of new business. Sometime owners, operators or managers of new businesses would be known to them already either because they had worked in

different known organisations or because they had worked together. If the provider was new to the authority *but was known in a similar and trusted neighbouring LA* it would likely have been considered for referrals and references would be sought.

46. Ms Burgess said (as is plainly correct) that referrals were made by a local authority as a single corporate entity. However, when deciding what placement to make managers would talk to colleagues. There may be over 100 care managers in the authority and each may consider a particular provider only once or twice. They will therefore talk to colleagues who have knowledge of that provider. In addition many clients have complex needs and care managers need to search around and talk to colleagues in other teams (e.g. mental health/learning disability) for advice on recommended providers who might meet the specific needs identified. Local authorities typically have special commissioning teams which service all social care teams. Commissioning officers will have an overview of the market and the strengths and specialisms of providers and will advise care managers. Young people in transition would often have their placement considered by a children's team in combination with an adult team (such as the learning disability or physical disability team) and responsibility would pass to an adult team when the child became 18. Thus she speaks of cross referral between children and adult teams in relation to the passage of a child into adulthood but this, Mr Knafler submits, goes nowhere near to suggesting, let alone establishing that an adult services team (dealing with adults who had not matured from being children in care) would unilaterally approach One Step and ask them to work for them. Positive Living only provided services to adults in the latter category.

47. The appellants contend that the judge failed (i) to try to form a realistic view in the light of the evidence of the likelihood of such referral happening; (ii) to analyse how and why an authority that had only asked One Step to provide children services would invite it to provide adult services; (iii) to examine how realistic was any hope that One Step might have to provide adult services to authorities where they had not done so before, and (iv) to take into account the obvious indications from the evidence that any hope was pure speculation.

48. Ms Burgess did not suggest, nor was there evidence, that a local authority would approach One Step or any other provider simply because of their presence in the region and reputation. The judge never considered how and why such an approach might occur and what the chances were. There are three reasons why any hope of this occurring was highly speculative. First, after 2006 there was no longer an undersupply of providers. Second, authorities had their formal approved provider list of persons to whom they would, ordinarily, turn. Third, there were new providers approaching local authorities for adult work and going much further than One Step in seeking to secure it. In those circumstances why would an authority itself approach someone who was neither on its list nor had approached it for that work. Fourth, One Step had not done anything significant to get itself in to a relationship with local authorities to which it had not previously supplied services for adults as a result of which an adult placement was a realistic possibility. Fifth up to the time of the trial (2014) there was, with the exception of Ealing (the cases of AH in June 2005 and JC in January 2006) no example of any sort of referral by the adult to the children's team or of the authority asking One Step to provide adult services.

49. A critical problem for One Step was, he submitted, that it could not show that before December 2006 it has taken any positive steps to form a reasonably close relationship and get new work from the local authority departments for whom, in the event, Positive Living worked. As a result it had to rely on the hope that local authority commissioners would unilaterally send them new work.

Solicitation

50. The covenant prohibited the appellants soliciting significant clients of One Step as at the date of the contract in respect of any service provided by One Step but only insofar as there was direct or indirect competition with any of the businesses or activities of One Step as at the date of the covenant. Insofar as Positive Living provided *adult services* to the same local authorities as those to which One Step provided *children's services* that was not in competition with One Step because One Step did not provide adult services to those authorities, was not on their approved provider lists for adult services; was not actively marketing itself to those authorities as a provider of adult's services; and was not realistically to be regarded as in competition for adult services work. Further in circumstances where there neither was, nor was there likely to be any material competition in practice, any solicitation or use of confidential information is irrelevant because it cannot have affected One Step's business.

One Step's submissions

51. The judge was entirely right to conclude that the appellants had breached the restrictive covenants into which they had entered by engaging as directors in a supported living business in competition with One Step in the West London and Thames Valley regions (Judgment [52] and [55]). In addition KM-G had breached her confidentiality covenant and her equitable obligations of confidence by misappropriating a large quantity of One Step's confidential material. The breaches were clear and premeditated. Positive Living was incorporated secretly and the appellants, as the judge found, breached the covenants "*thoroughly and with at least some degree of deliberation*" [103].

52. The judge made important findings of fact which are essentially unchallenged. He found that by 1996 One Step was a diversified supported living provider. Its business catered for adults as well as young people. After the Costelloes acquired their stake the focus of the business expanded. The brochure prepared by Mr Rootes made clear that One Step was a flexible provider catering for different groups of vulnerable people including those with mental health issues, physical disabilities and challenging and offending behaviour as well as young people leaving care. Its second hub in Reading focused both on CLC and adults with mental health and learning disabilities.

53. From its two hubs it serviced local authorities in the West London and Thames Valley regions. It operated a "core and cluster" model involving the establishment of a central office and the acquisition of a "cluster" of residential properties through purchase or rental in the nearby area to service local authority customers in the region. The catchment area for the two hubs encompassed all local authorities in the West London and Thames Valley regions including all of the local authorities identified by the appellants in their submissions.

54. As the experts for both parties agreed both Positive Living and One Step were supported living providers the core of whose business was the provision of accommodation, with each of them providing a range of support and/or personal care to the tenants of such accommodation. Positive Living adopted, and essentially copied, the "core and cluster" model. Campion House and The Beeches offered placements "*to Buckinghamshire, Oxfordshire, Reading, Slough, Wokingham, Windsor & Maidenhead, Bracknell Forest, Hertfordshire as well as many London Boroughs*" (see its brochure). Oaklands in Northolt, where the second hub was established, offered "*easy access to all London boroughs as well as Hertfordshire, Middlesex Surrey and the Thames Valley*" (see its brochure). Thus there was an overlap between One Step and Positive Living insofar as they both covered the Thames Valley and West London.

55. By December 2006 the majority of One Step's service users were adults (56(i)). In any event there is no hard and fast distinction between the provision of supported living services to adults and young people. Some of the young people who were placed with One Step were transferred to adult care facilities because they had disabilities or ongoing needs which fell squarely within the remit of Positive Living's business. Positive Living targeted young persons with disabilities.

56. The judge was right to find that the fact that Positive Living could provide registrable personal care did not mean that it and One Step were operating in different markets. One Step could and did cater for those with registrable needs on the basis that those needs would be met by a registered DCA and such split provision was generally acceptable to local authorities. The email set out at [20] in the body of the judgment made it clear that Positive Living was competing with "*standard semi-independent organisations*" (meaning One Step and similar unregistered support provider).

Milton Keynes, Oxfordshire & Slough

57. The judge did not err in his construction of the non-competition covenant. The relevant question is whether the services offered by One Step were sufficiently interchangeable with those offered by Positive Living that they could be said to be within the same market and thus in competition. That question he answered in the affirmative: [46-7]; [52 - 55]; [61]; [70 - 73].

58. The goodwill which a covenant may legitimately protect is not confined to existing trade connections with existing customers. It includes the reputation of the trader and the prospect of securing new customers from referrals or recommendations made by existing to new customers: *Trego v Hunt* [1896] AC 7; *Allied Dunbar v Weisinger* [1988] IRLR 60 (Millett J) or, *a fortiori*, adult business from an existing customer who has previously only referred children.

59. In respect of the factual points made One Step say the following.

Oxfordshire, Slough and Milton Keynes

60. **Milton Keynes** can be ignored because neither One Step nor Positive Living did any work for Milton Keynes during the period of restraint.

61. One Step did do work for **Slough** having 4 child placements prior to December 2006: see para 95 of KM-G's first witness statement.

62. The work that One Step did for Oxfordshire was very significant. CG who suffered from autistic spectrum disorder, schizophrenia and a learning disability was one of One Step's most valuable referrals (over £ 100,000 per annum). The placement began in February 2007 but he was referred to One Step in May 2006. As the judge found Oxfordshire was, even before the placement of CG, a significant client i.e. one that referred more than £ 30,000 of business in 2006: [83].

63. One Step marketed its support services widely especially among local authorities in the Thames Valley, West London and the South East[3]. It did so by correspondence, and distributing its brochure, which was available online, at meetings or to its local authority contacts. Mr Rootes, the author of One Step's brochure, carried out substantial work in 2004 and 2005 marketing One Steps services to new customers and cross selling One Step's services to other teams within those authorities which were already customers. This involved contact by telephone, email and letter. He used a series of email templates promoting One Step's business. Some of these focused on particular categories of service user but nevertheless advertised the full range of One Step's services.

64. Mr Rootes' records of his contacts show that he put in a great deal of work. His efforts covered all the authorities from whom PL subsequently obtained placement, including **Oxfordshire, Slough and Milton Keynes**. These were not minimal steps. His marketing efforts went into abeyance from about August 2005 to late 2006 because the working relationship between Mr Costelloe and KM-G broke down after the proposed sale of One Step to Sovereign Capital Partners fell through during which period she refused to approve further expenditure in respect of his efforts. Mr Costelloe remained intent on promoting and expanding the business and obtaining new referrals. Mr Rootes had attended work again by 6 December 2006 including work on a Marketing Action Plan, a Rebranding Guide and emailing 236 personalised emails in batches.

65. The judge did not misunderstand Ms Burgess' evidence. She referred in her report to cross-referrals between local authorities which, she explained, were accustomed to considering and obtaining references in respect of providers known in neighbouring local authorities. The due diligence report prepared by AMR for Sovereign when it was considering buying One Step in 2005 recorded that local authority area "*in different LAs have strong communication links with each other. This can help advertise One Step's good reputation*".

66. Whether or not One Step was on a local authority's approved provider list was a red herring. It was common ground at trial that no provider could be shut out from competing for any work in any local authority. OS was accredited by all West London Boroughs for Supporting People Work and this would have stood it in good stead with other authorities. Such accreditation according to Ms Burgess provides "*a benchmark for evaluating new providers*".

[3] See the examples of emails to Wokingham, Hillingdon, Brent, and Ealing in 2013 at footnote 29 of One Step' skeleton.

67. In respect of CG **Oxfordshire** were not pro-actively seeking an "out of area" placement. They simply thought that returning him to his family home would not be advisable. Their concern was not about placing him in borough. Nor is it right to say that One Step never sought any other adult service work from any of Milford Keynes, Oxfordshire and Slough. Mr Rootes approached the adult mental health teams of both Oxfordshire and Slough. One Step's hope of obtaining referrals was not speculative as Oxfordshire's subsequent placemen of CG showed.

68. One Step also cavils with Positive Living's contentions about the failing nature of its business. First, it submits, any such failure would not bear on whether Positive Living was a competitor. Second, the evidence shows that, after the appellants had left One Step, Mr Costelloe managed to put the business back on track and after the appellants had started trading through Positive Living, its occupancy levels increased significantly during 2007 and it was on track for profitability and growth (Judgment [26-7]). As Mr Bowman made clear in his evidence the problem encountered by One Step after the emergence of Positive Living was a failure to secure new referrals from established customers which resulted in falling sales. The distinction between falling sales and a reduction in new business is illusory. It was the latter which led to the former.

69. Whether referrals which One Step failed to get went to Positive Living is relevant to the question of loss not breach. In any event it is unlikely that One Step's established customers would be likely to admit that they preferred Positive Living over One Step when they knew that it had been founded by KM-G who had recently left One Step.

70. In short the judge was not in error. As at December 2006 One Step's supported living business encompassed Oxfordshire, Slough and Milton Keynes, all of which were serviceable from its hubs in Reading and Northolt. Protection of existing and future business was within the scope of the covenant.

Wokingham, Windsor & Maidenhead, Buckinghamshire and Hillingdon

71. As the judge held [80] – [83] all of these authorities were significant customers of One Step and important sources of prospective future referrals.

72. They were not all authorities for whom One Step had only provided CLC services prior to December 2006. In **Buckinghamshire** One Step had been providing supported living services in respect of KL, who suffered from significant learning disabilities and behavioural problems, for several years. He had first been placed with One Step as a young person leaving care in 2000 when he was 20, but had long been under the auspices of Bucks adult learning disability department, Positive Living obtained five referrals from that department during the period of restraint and two from the learning disability team based in High Wycombe which was the unit responsible for referring KL to One Step. One Step was actively seeking further referrals of vulnerable adults with mental health and learning difficulties in December 2006 and managed to secure two such in 2007.

73. In relation to **Wokingham, Windsor & Maidenhead, and Hillingdon** One Step only had CLC clients in December 2006, it had actively promoted its full range of services to those and other authorities in the region and had constantly sought to cross-sell its services within local authorities that were customers, such as those three. Mr Rootes

made specific approaches to personnel responsible for adult services in those authorities. From at least August 2007 Positive Living was competing for that work.

74. The question whether One Step was in an advanced state of preparation to compete for adult work does not arise. By December One Step had a diversified supported living business in West London and the Thames Valley. Ms Burgess' evidence, which the judge accepted, rebutted any suggestion that children's teams and adult reams operated independently and separately from adult teams and showed that there was a realistic prospect of cross referrals for adult supported living. Two examples of this were the cases of AH and JC, to which the judge referred at [62] – [63]. These were adults who were referred to One Step by the manager of Ealing's physical disabilities as a result of a cross referral from Ealing's CLC team.

75. All three of the authorities were well aware that One Step provided services for both children and adults, having each been provided with copies of One Step's brochure and approached by Mr Rootes.

76. In short One Step was carrying on a diversified supported living business at the time of the covenant which encompassed all four authorities and Positive Living began business in competition with it.

Ealing

77. The position in respect of Ealing is entirely plain. By December 2006 it was one of One Step's most important customers and accounted in 2006 for about 24% of One Step's turnover. Ealing had made supported living placements for both vulnerable adults and young people. At 20 December 2006 there were two adult service users and three people who had been referred after leaving care. After KM-G left One Step continued to seek and secure further supported living referrals including RC, an adult with registrable personal care needs, and four young people leaving care.

78. The appellants first approached Ealing on behalf of Positive Living at the end of 2007. They subsequent obtained at least 8 placements for vulnerable adults.

79. Contrary to the appellants' submission One Step had not ceased to seek work from Ealing after Positive Living started to undertake adult services for Ealing. Kim Whaley, the manager of One Step's business in West London confirmed in evidence that Mr Costelloe remained focused on securing further work from Ealing and attended a business promotion meeting with Ealing on 6 June 2008. When One Step seemed to fall out from favour with authorities such as Ealing Mr Bowman sought to address the issue with them. Mr Bowman's evidence was not to the effect that Ealing had during 2008 decided not to make any further referral to One Step and its placements remained in place. Mr Bowman did not purport to confirm that One Step's competitors did not include Positive Living, merely that he had never been explicitly told that One Step had lost a contract to Positive Living.

80. The true significance of the conversation between Mr Costelloe and the Ealing procurement officers in June 2008 was that it reflected the emergence of Positive Living which marketed itself as a registered provider that could provide "*that extra bit of care*". It had also represented in its marketing materials that One Step could not care for individuals with personal care need which was, as KM-G knew, untrue.

(Before she left she had been personally involved in the placement of JC who had registrable personal care needs met by a third party). Mr Costelloe made it plain to the officers at the meeting that they could not refuse to deal with One Step on the ground that it was not registered as a DCA and claimed that it was already providing supporting living services to three Ealing service users with registrable personal care needs (AH, JC and RC). If Ealing had adopted a policy decision to that effect they would have terminated those placements.

81. The schedules which produce the figures set out in [28] above are unreliable and the appellant abandoned reliance on them at the trial in the light of the criticisms made by One Step's accounting expert.

82. In short the judge did not err in law or fact. The inferences that the appellants invite the court to draw in relation to Ealing's attitude are not inferences which the judge drew and are not supported by the evidence. Even if they were that would not excuse the appellants' blatant breach of covenant.

83. The inference that is clearly to be drawn from the evidence is that doors were shut for One Step as a result of competition from Positive Living. The appellant set up a new supporting living business in One Step's back yard and solicited the contacts that they had made whilst at One Step for business on behalf of Positive Living. They targeted the same local authorities and same adult service users groups as One Step. They marketed themselves as a registered provider whilst at the same time wrongly representing that One Step was "*not able to cater for individual with personal care needs*".

84. Both One Step and Positive Living were looking to provide for young people (within six months of their 16th birthday) with mental health or other issues as appears, *inter alia*, from Positive Living's brochure, which also contained the inaccurate and damaging statement that One Step at a Time "*were not able to cater for individuals with personal care needs*". One Step could cater for non-registrable personal care needs and it could work in tandem with others who could provide registrable care needs when it was necessary to do so. Similarly on its website Positive Living claimed to provide support for any vulnerable "adult" 15 years or older. The report prepared for Craegmore when it acquired Positive Living referred to the fact that many of Positive Living's users had come from children's care homes or other children's facilities.