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Title:	**Court of Appeal decision on enforceability of non-solicitation covenant**
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Date:	15/11/2013
Case Name:	(1) LEONARD COPPAGE (2) FREEDOM SECURITY SOLUTIONS LTD v SAFETYNET SECURITY LTD (2013)
Court:	CA (Civ Div) (Ryder LJ, Sir Bernard Rix, Sir Stanley Burnton) 11/10/2013
Subject:	DAMAGES - EMPLOYMENT
Comment:	The Court of Appeal considers whether a restrictive covenant (a non-solicitation covenant) is binding on a former employee or whether it is unenforceable as being in unreasonable restraint of trade and provides an overview of the relevant jurisprudence. Brief consideration is also given to the fiduciary duties of company directors.

The appellant, Mr Coppage, had joined the respondent company ('Safetynet') in July 2008, of which he became business development director on 5 May 2013, at which time he entered into a new contract. Mr Coppage was a self-styled "key figure" who was "able to and did bring and retain new business" as a result of his apparent "pizzazz". On 14 April 2012, Safetynet had commenced a redundancy process but Mr Coppage resigned on 16 April 2012.

The principal question on appeal concerned the enforcement of a restrictive covenant which prevented Mr Coppage, for the period of six months after his employment, from approaching any individual or organisation who was a customer of Safetynet during Mr Coppage's period of employment for any reason whatsoever if the purpose of the approach was to solicit business which could have been undertaken by Safetynet. This was, therefore, a non-solicitation covenant which had formed part of Mr Coppage's contract of employment at all times.

It is fair to say that the trial judge, His Honour Judge Simon Brown QC, had been far from impressed by Mr Coppage's evidence of fact. The Court of Appeal recorded the judge's conclusion that Mr Coppage "had deliberately sought to mislead the court".

At trial, the court was satisfied that Safetynet had made out its claim for breach of contract and/of fiduciary duty and found that damages of at least £50,000 were proved.

Sir Bernard Rix gave the only substantive judgment with which the other members of the Court of Appeal (Sir Stanley Burnton and Ryder LJ) agreed.

Mr Coppage contended that to be reasonable the non-solicitation clause ought to have been limited to the non-solicitation of "current customers", i.e. customers "during the last 12 months" of his period of employment. It was argued that the failure to draft the clause as such, which would have been possible, gave Safetynet greater protection than necessary. It was further contended that there was no breach of fiduciary duty unless such a breach was initiated before resignation. Finally, it was submitted that there was no basis on which the court could find a loss of £50,000 proved.

Most of the relevant fundamental legal principles were not in dispute and the Court of Appeal took as correct an overview from Chitty on Contracts (31st edition) at paras 16-105ff. The Court of Appeal stressed that cases turn very much on their facts but it applied dicta in John Michael Design Plc v Cooke (1987) 2 All ER 332, 334 that a customer whose future custom is uncertain is "the very class of case" against which such a covenant is designed to give protection. It is essential that an employer can show that the restraint is designed for the protection of a proprietary interest of the employer for which the restraint is reasonably necessary.

The appellant made much of the unreported decision in Arbuthnot Fund Managers Ltd v Rawlings (2003) EWCA Civ 518
as apparent support for the proposition that, to hold a clause reasonable, the court was obliged to limit the non-solicitation clause to customers who had been customers within the last 12 months of employment. Counsel, however, rowed back from that submission on appeal: authority does not demand such an approach. Arbuthnot, the court said, is a "rather difficult case on which to build any lessons".

The Court of Appeal was satisfied that G W Plowman & Son Ltd v Ash (1964) 1 WLR 568 (CA) remains the leading authority. In that case, a restraint to last for two years post-termination was reasonable even though it applied to customers who had ceased to be customers before the end of the defendant's employment. As Davies LJ said, "the employer is entitled to retain the possibility that those who at one time during the employee's employment placed orders with the employer and have discontinued their custom might come back again..."

The Court of Appeal also considered Gledhow Autoparts v Delaney (1965) 1 WLR 1366 (CA), but concluded that the covenant in that case, to last three years post-termination, was essentially an anti-competition clause, and Office Angels Ltd v Rainer-Thomas and O'Connor (1991) IRLR 214 CA
, relating to a six month non-solicitation clause. In that case, the question was whether, on the evidence, a covenant in another form, less far-reaching and potentially less prejudicial, would have afforded adequate protection. In this case, however, on the evidence, 98 of the

106 customers which had given business to Safetynet at any time during Mr Coppage's employment remained customers at the time of his departure. This was at the "wholly opposite extreme" to that case, the court found.

The Court of Appeal was plainly influenced by the fact that the covenant was only of six months' duration. Such a period as short as six months is, the court said, a "fundamental consideration of reasonableness". Construed sensibly, the covenant's purpose was to counter the diversion, from employer to employee, of realistically available custom of customers who would be known to Mr Coppage through his employment.

Finally, the Court of Appeal again cautioned against arguments founded on remote possibilities or unlikely situations, approving dicta in Regus (UK) v Epcot Solutions (2008) EWCA Civ 361
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The Court of Appeal was also asked to consider whether solicitation by a former employee of his former employer's known customers after his resignation is enough to constitute a breach of fiduciary duty, or whether something further is required. The touchstone to this ground of appeal was the allegation that Mr Coppage had - whilst still a director - planned his resignation, the incorporation of a competitor firm and commenced the solicitation of Safetynet's customers, i.e. taken firm steps to compete.

The Court of Appeal cursorily set out the statutory regime which is set out in s.170 to s.177 of the Companies Act 2006
. Having conceded that it is "not clear" how the 2006 Act and the long-standing common law regime are intended to bed down together, the court was satisfied that the judge's treatment at first instance was "brief and uninformative". Having not heard full argument, the court declined to decide the issue but did suggest that certain findings at trial suggested pre-resignation activity and forward planning. Albeit strictly obiter, the court appeared to approve dicta in Foster Bryant Surveying Ltd v Bryant (2007) IRLR 425
in which was held that a director's fiduciary duty ceased on resignation as a director, but might be broken where the director, whilst still a director, acted in anticipation of his resignation.

On quantum, the Court of Appeal was not satisfied that the decision was arbitrary. Although there had not been any itemisation of the sums which Safetynet had lost, it had adduced evidence of gross revenue lost from five customers and Mr Coppage, himself well informed as to the company's performance, had adduced no evidence to the contrary.

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