

## Excelerate Technology Ltd v Cumberbatch and another

[2015] Lexis Citation 6

Queen's Bench Division, Birmingham District Registry (Mercantile Court)

Judge Simon Brown QC

16 January 2015

*Restraint of trade by agreement - Employer and employee - Breach of duty - Use of confidential information - Claimant company alleging first defendant former director in breach of restraint of trade agreement and in breach of fiduciary duty by setting up second defendant company and using confidential information - Whether first defendant breaching agreement and fiduciary duty - Whether second defendant company inducing first defendant in respect of alleged breaches.*

### Judgment

Russell Bailey (Counsel) instructed by Willans (solicitors) Cheltenham for Claimant

Gary Selfe (Counsel) Direct Access for the Defendants

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

#### JUDGE SIMON BROWN QC:

1. The Claimant is a Cardiff based technology company established in 2001 employing just over 30 employees. Its innovative niche business is to add broadband via satellite to civilian emergency response vehicles ['ERV'] provided by a coachbuilder (here a company called Bence), for supply to public services such as the health and fire services. The co-founder and CEO is David Savage.
2. The First Defendant was the Technical Manager of the company from 2004 until his promotion to Technical Director in 2006, reaching a board position as such in 2008.
3. Following a review of the company by management consultants, the First Defendant was by all accounts 'shocked' to be placed on gardening leave as from 4th July 2011 and then made redundant as from 31st July 2011. The parties, separately advised by leading solicitors, agreed upon a settlement agreement whereby the First Defendant received £137,500 including £62,500 that was specifically referable to the First Defendant agreeing that his post contractual termination covenants be extended until 31st July 2012 i.e. 12 months. This latter sum was specifically repayable if Mr Cumberbatch did not abide by his restraints. The covenants, summarised below, were in fairly standard form for employees in this type of SME [Small to Medium Enterprise as defined by the Companies Acts]:

- a. non-compete: not to be employed or engaged by or otherwise interested in or concerned with any concern which competes with any business of the Company in which he was involved during the last 12 months of his employment;

b. non-dealing: not in competition with any business of the company in which he was involved during the last 12 months of his employment to deal with or accept orders from any third party with whom he had personal dealings within the last 12 months of his employment and who was a customer, agent supplier, investor or distributor of the Company or who was negotiating or contemplating doing business with the Company;

c. non-solicitation: not in competition with any business of the Company in which he was involved during the last 12 months of his employment solicit business or orders or canvass or facilitate the soliciting or canvassing of business or orders from any third party with whom he had dealings with during the last 12 months of his employment and who was a customer, agent supplier, investor or distributor of the Company who was negotiating or contemplating doing business with Company.

4. As a director of Excelerate, his fiduciary duties altered upon termination as summarised and explained in *Hunter Kane Limited v. Watkins* [2003] EWHC 186. In short, although he could legitimately use the skills and knowledge he had acquired during the tenure of his position, this would not extend to 'maturing business opportunities' sought and acquired by the company - the company's property (cp himself). [It is not clear if this sentence is intended to end this way]

5. The Claimant' case is that the First Defendant serially and covertly breached his fiduciary duties to the company and the agreement by setting up and being actively involved in (along with friends and former work colleagues, David Osmond and Marin Vincent), the Second Defendant company ['Red Foot'] as a direct competitor using confidential information belonging to the Claimant.

6. The Defendants were represented by highly experienced and competent solicitors until shortly before trial when a specialist barrister in this area of the law, Mr Self, took over their case under Direct Access. They accept that:

a. they knew of, and appreciated the import of, the covenants;

b. the Second Defendant was set up in competition with the Claimant, having its domain name registered on 11th August 2011 before incorporation on 5th September 2011 with Messrs Osmond and Vincent as shareholders and directors.

c. the First Defendant was informally involved with the Second Defendant through Mr Osmond during the 12 month covenant period;

d. The Second Defendant solicited and procured business with the Claimants former coach building partner, Bence, during the restricted period in relation to two specific projects: a contract with Cleveland Field Services ['CFS'] and Mobile Breast Screening ['MBS'] - the former being taken over from the Claimant and the latter one in which the Claimant had shown some prior interest;

e. The First Defendant worked at Bence's premises during the period of restriction; and

f. The First Defendant openly joined the Second Defendant as soon as his restriction period had elapsed in August 2012.

7. However, the Defendants and Mr Osmond deny that the First Defendant was involved in any business with the Second Defendant and Bence during the restricted period; such was undertaken by Mr Osmond and the Second Defendant independently of the First Defendant.

8. Paragraph 13 of the Re-Amended Particulars of Claim rehearses 9 pages of 7 allegations of breaches distilled from the witness evidence of Bethan Evans, the Operations Director of the Claimant, 15 trial volumes of documents and allegedly missing pieces of the evidential jigsaw from the Defendants' disclosure. Counsel have most helpfully and obligingly adopted these 7 headings of breach plus one for loss in their respective detailed final submissions - both written and oral. This judgment will follow their template.

9. This is essentially a case where credibility-the credibility of the First Defendant and Mr Osmond in particular-is crucial. The most compendious judicial statement on this is to be found in the dissenting speech of Lord Pearce in the House of Lords in *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403 at p 431:

*"Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."*

This is amplified by Lord Goff in *Armagas Ltd v. Mundogas S.A. (The Ocean Frost)*, [1985] 1 Lloyd's Rep. 1, p. 57:

*"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth." [emphases added].*

10. The absence of evidence can be as significant as the presence of it. Arden LJ in *Wetton (as Liquidator of Mumtaz Properties) v. Ahmed and others* [2011] EWCA Civ. 61 stated:

*11. By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.*

*12. There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see*

*whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.*

*14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence. [emphasis added].*

11. This judgment will follow all this guidance in the fact finding exercise necessary to determine the 8 issues of liability and quantum identified and agreed upon by the parties.

**(1) By the setting up of Red Foot and Mr. Cumberbatch's involvement in Red Foot (a) did Red Foot compete with Excelerate (b) did Mr. Cumberbatch breach his non-compete covenant and (c) did Red Foot induce that breach ?**

12. The Claimant submits there is a myriad of evidence that, when pieced together, points overwhelmingly to a resounding 'yes' to each of the three questions posed. In summary:

a. Mr. Cumberbatch, alone had the technical knowledge and expertise to undertake mobile broadband to ERV's at the time, having acquired the same during his employment with the Claimant - hence the covenants.

b. Mr. Cumberbatch, had surreptitiously obtained and retained confidential customer and supplier lists of the Claimant that facilitated direct competitive activity by himself, Mr Osmond and Red Foot.

c. During the traumatic month of July 2011, Mr Cumberbatch suddenly made 14 phone calls and sent 8 (still undisclosed) texts via his Excelerate mobile phone to Mr Osmond; requested, obtained and retained the highly confidential information concerning the end dates of vital HART contracts prior to the Red Foot domain name being registered on 19th August 2011 and Red Foot being incorporated with Mr Osmond and another as shareholders and directors just 5 days after the compromise agreement.

d. The Red Foot name, website, fictitious technical director of Gill Welch, e-mail addresses, social media and company proposals and revealed documentation all configure to Mr Cumberbatch being the founder and shadow technical director of the company, as he admitted at an Emergency Services Show after his restraint period had expired:

i. It is common ground that the name Red Foot has a connection with Mr Cumberbatch who has Barbadian heritage and connection and no connection with Mr Osmond. The explanation

provided by the Defendants that Mr Osmond chose it hoping to flatter Mr Cumberbatch so he would join him is nonsense; Mr Cumberbatch, who had lost his job, was always going to join Red Foot. Such nonsense is accompanied by inconsistency. First, Mr Osmond explained that he had chosen Red Foot as a company name in September 2011, whereas it was in fact chosen as the domain name in August 2011. Second, Mr Osmond's explanation that he discovered the name by googling indigenous Caribbean wildlife is demonstrably false.

ii. In his 'Linked In' entry, Mr Cumberbatch variously describes himself as being or having been a director of Red Foot.

iii. There are e-mail addresses for Mr Cumberbatch and Gill Welch at Red Foot but, despite numerous requests there has been no disclosure of those accounts. In one e-mail tracked down of 17th May 2012, Gill Welch states that he is copying in "*our MD*" and copies in Mr Osmond. This indicates that Gill Welch is not Mr Osmond.

iv. At a secretly recorded interview at the Emergency Services Show on 21/22 November shortly after the expiry of the covenants, Mr Cumberbatch explained that Red Foot was his company, that he did all the IT and that Mr Osmond was his partner.

v. A Project M proposal for an ESA grant of 410k euros. for Mobile Breast Screening describes Mr Cumberbatch as the Technical Director and as having an equity interest. This document was part of the procurement of an ESA grant of E 410,000. On Ds' case, that grant was obtained on the basis of misleading information. On C's case it represents the true position throughout, namely that LC is a shadow director of D2 and is beneficially interested as an owner of D2.

vi. There have been a number of inconsistent and evasive responses to requests by the Claimant to clarify the relationship of the Defendants to one another. In a letter from Mr Osmond to Willans (solicitors for the Claimant) of 31st August 2012, he denied Mr Cumberbatch was an employee of Red Foot but asserted he might be recruited - despite what is now an accepted fact that he was working on CFS at least from the first of that month. In a further letter of 17th September, he denied Mr Cumberbatch was a shareholder, director or employee. In a letter dated 24th September, from the Defendants' former solicitors, Davies & Partners, there is a significant failure to explain the relationship between the Defendants.

vii. Red Foot website describes a business directly competitive with that of the Claimant. The content demonstrates a detailed knowledge of satellite transmission that Mr Cumberbatch was familiar with from his time at the Claimant, unlike Mr Osmond. 'Gill Welch' therein describes a person identical to Mr Cumberbatch, not Mr Osmond or anyone else. Gill Welch is described as the 'founder' of Red Foot. The Claimant contends the founder of Red Foot is Mr Cumberbatch/Gill Welch. Various inconsistent explanations have been given for the Gill Welch entry. In correspondence Mr Osmond stated that it was an amalgam of potential subcontractors and consultants and had been posted in error by a marketing consultant. However, there has been no disclosure of any communications between Mr Osmond and the "marketing consultant". In his oral evidence Mr Osmond stated that the website had been dictated by him to the website designer without any documentation being created. In the Defence, it was contended that it was posted to encourage business and to lend credibility, that being said to be normal marketing activity; that is inconsistent with it being posted in error. It is also inconsistent with the claim that Red Foot had neither facility to nor intention of trading. In Mr Cumberbatch's first witness statement, he said it was just content to fill the site which was then forgotten about. In answer to correspondence about an email from Gill Welch, Davies & Partners asserted Mr Osmond was contemplating having an "Ask Gill" feature on the website. None of these contradictory explanations are credible. They are based on a deceit in that it was being represented to the public that Red Foot had a technical resource available to it that they did not have. The inescapable truth is that they did not misrepresent the position because Lindsay Cumberbatch was Gill

Welch and he was available to Red Foot and was its technological founder with a business partner in Mr Osmond.

viii. When the Claimant discovered through his Linked In entry that that Mr Cumberbatch was involved with Avanti, a supplier of bandwidth, they were concerned that his activity was likely to be competitive. The Defendants admit that it is the bandwidth supplier Red Foot has used for both CFS and MBS. When Gary Hopkins of the Claimant, raised with Mr Cumberbatch his involvement with Avanti, his first reaction was to deny it and claim that someone else must have put it there. Mr Cumberbatch removed it from his entry. His explanation was that he removed it because he did not want to upset Mr Savage. He certainly achieved that as it alerted the Claimant as to Mr Cumberbatch's contractual betrayal. In my judgment, he knew he was caught out and removed it in order to try to conceal his link with Red Foot and active promotion of competitive business with Excelerate.

e. Mr Cumberbatch was working at Bence premises during his restraint period at a time when Red Foot were in collaboration with Cleveland Fire Services for a new contract.

13. The Defendants do not seek to challenge these factual results of the diligent forensic exercise undertaken by Beth Evans, the Operations Director of the Claimants, nor have they disclosed any documentary evidence to counter it. Rather, they have attempted to explain them in evidence as the result of a chance phone call made sometime in May by Mr Cumberbatch to Mr Osmond whilst both were driving along the M4 in which Mr Cumberbatch asked Mr Osmond to come and work for Excelerate to help improve sales. This was immediately followed up by an informal meeting at a service station in which Mr Cumberbatch (in breach of his director's fiduciary duty to his company) briefed Mr Osmond about Excelerate and its business and technical affairs so sufficiently that he was able, opportunistically, independently and coincidentally with the First Defendant's redundancy, to start Red Foot from scratch and compete and take over the new CFS contract and replace Excelerate's position with Bence during the year that Mr Cumberbatch was restrained. This necessarily involves Mr Cumberbatch being in serious breach of his fiduciary duties as a director by releasing highly confidential information to a person who was not subject to an express confidentiality agreement. Mr Osmond's position is an unattractive one for anyone with any business ethics: viz that it was legitimate for him to exploit confidential information given to him in a bona fide discussion about a possible consultancy by setting up in competition with the very people who he was considering consulting for. This Defence case necessarily involves an assertion that the whole Red Foot business has been set up in order to unlawfully exploit confidential information given by Mr Cumberbatch to Mr Osmond whilst a director of the Claimant. As submitted by the Claimant, were the Defence case to be true, it would simply provide the Claimant with a different cause of action for breach of fiduciary duty / knowing assistance / wrongful exploitation of confidential information.

14. However, I disbelieve both Mr Cumberbatch and Mr Osmond in their evidence. It is unsubstantiated and simply incredible. Nobody at Excelerate knew anything about such a meeting, it was not sanctioned by any confidentiality agreement to have been signed by Mr Osmond and it was no business of the Technical Director of the company to be engaging sales consultants without at the very least gaining the approval of the Sales Director and CEO.

15. In my judgment, such clandestine meetings and discussions must have taken place between Mr Cumberbatch and Mr Osmond, not in May, but in July 2011 (after Mr Cumberbatch had been sorely jilted by the Claimant, as I found he was) as evidenced by the phone calls and texts on his company Vodaphone account, whilst Mr Cumberbatch was on gardening leave and under fiduciary and contractual duties to the company which he severely breached. I am satisfied that Mr Osmond, a corporate businessman, fully appreciated what he was doing: opportunistically inducing Mr Cumberbatch to breach his duties with a view to their mutual personal gain behind the safety of the corporate veil of a new company, Red Foot, set up deliberately by Mr Osmond and Mr Cumberbatch for their joint purposes in conspiracy against the Claimants and their business interests.

16. In my judgment, Red Foot was a tailor made corporate vehicle for a specialist IT engineer to perform the identical niche business the Claimant was undertaking. Only Mr Cumberbatch fitted the jacket of Gill Welch described in the Second Defendant's website as the Founder of Red Foot. Mr Osmond did not have the skill or the knowledge to fulfil the essential technical engineering role. As QED on this, there is one e-mail showing Gill Welch (i.e. Mr Cumberbatch) copying in Mr Osmond as MD of Red Foot - it is common ground that Mr Cumberbatch has been undertaking the Gill Welch role as Technical Director since the expiry of the restraint period in August 2012; not Mr Osmond.

17. There has been a legion of inconsistent unsubstantiated explanations about Red Foot by both Mr Cumberbatch and Mr Osmond when faced with the battery of evidence about Red Foot. In court, Mr Cumberbatch regularly repeated questions put to him and sought to buy time by asking to look at more documents before speaking; though rarely and tediously not in answer to the earlier short question. Beth Evans said that he was 'erratic' in his pre redundancy performance. In my judgment, he was 'erratic' in court but this was because he was deliberately obfuscating in his evidence knowing he had no valid answers to the forensic details being put to him about his role in founding Red Foot in conspiracy with Mr Osmond. This chimes with the furtive way he dealt with the Claimant's confidential customer information when getting it sent to his girl friend's address and thence to him personally. Mr Osmond was described as a 'fantasist' in court by the Defendant's own witness, Mrs Sue Brown of Bence. Poker like, he listened to the questions put to him in cross examination and then gave confident answers with a smirk occasionally boasting of his abilities and business ethics, including one incredible one that he was really was motivated to help the NHS through Red Foot, and was not in business out for personal gain. He never demonstrated any substance to these boasts but I gained the impression he was proud of his achievement in getting Red Foot up from scratch to win over Bence and then to beat Excelerate to the NHS HART contract.

18. By contrast, the Claimant's witnesses presented themselves as straightforward and open in all their dealings. The key witness, Beth Evans, was unshaken in her evidence and displayed a complete forensic command of all the material she has had unearthed and pieced together. She is a very impressive executive and witness.

19. The answers to the question posed is 'yes'.

**(2) Did Mr Cumberbatch provide Red Foot with confidential information, namely the renewal dates for HART contracts and did Red Foot induce that breach of confidentiality?**

20. The Defendants submit that there is no evidence of this.

21. However, Mr Cumberbatch asked Catherine Lane for the end dates to the HART contracts on 18th July 2011. Immediately after that information was sent he telephoned Mr Osmond. Mr Osmond created a spread sheet containing these same end dates as part of Red Foot business.

22. Mr Cumberbatch stated in his witness statement prepared for a summary judgment application that he did not know why he asked for this information. In his amended Defence, it was contended that he wanted it so that he could see how much profit he had made so as to assist him and his lawyers in his redundancy settlement negotiations. . In his oral evidence, he advanced another inconsistent, version, namely, that he wanted to be able to show that there was not a genuine redundancy situation.

23. As the Claimant submits, none of these reasons bear any close analysis. The document does not show what profit he had brought to the Claimant and, in any event, he would have been aware in sufficient terms of the value of the HART contract, its forecast profit and his contribution to the project. It does not show whether there might be a genuine redundancy because that would depend on expectation of future work levels and not the end dates or the amounts left to bill on the HART contracts.

24. Similarly, Mr Osmond gives various inconsistent explanations about his document and its provenance. In his first witness statement, he claimed that he got the end dates from the internet and telephone research. In his second witness statement he says that he got the information from Bence but Mrs Brown of Bence gave no evidence upon this despite being called as a witness. In his oral evidence he explained that he was handed a piece of paper and it was not sent electronically and so there was no record. He explained he had lost the piece of paper.

25. In my judgment, each of these contradictory explanations - typical of both Mr Cumberbatch and Mr Osmond- are made up to suit as at the time when confronted and are untrue. I accept the submissions of the Claimant that Mr Cumberbatch most probably phoned the details of the end dates of the Hart contract at 10.03 on 18th July 2011 (subsequent to the redundancy meeting of 13th July) and that Mr Osmond used them identically for Red Foot's spreadsheet and use in procuring the HART contract renewals and seeking to procure others ending on the list.

26. The answer to the question posed is again 'yes'.

**(3) Did Mr Cumberbatch through Red Foot solicit renewal business from Dave Berry at NWAT and thereby compete with the Claimant and did Red Foot induce that breach? Was the Claimant's confidential information used in that process ?**

27. The Defendants submit that there is no evidence of this.

28. However, an e-mail, curiously in its redacted form, on the face of it suggests 'Yes'.

29. There are other examples of similar approaches being made in relation to the HART contract.

30. Mr Osmond's position on this was typically fluid. The original position set out in the Defence and witness statements is that he was just 'testing the market' with his fledgling company. In cross examination he was asked what he would have done if he had received a positive response. He was pressed repeatedly and prevaricated saying he would have had to think about it. That is inconsistent with the earlier explanation which could only mean that he would not have taken on the contract at all.

31. The Claimant submits that it is obvious that if he had received a positive response and then had to say that Red Foot could not do what he had told them he could do, that would be very adverse marketing. Red Foot would have lost all credibility. By testing the market in this way, either the Defendants would get a negative response or they would get a positive response but, themselves, would have to respond in a way that would destroy any possible future business relationship.

32. In my judgment, this was a serious attempt to tout for the HART contract business by Red Foot with Mr Cumberbatch firmly on board working behind the scenes in the Bence premises ready and willing to fulfil the technical role he had performed at Excelerate despite the restraint imposed upon his in consideration for £62,500.

33. Again the answer to the question is clearly 'yes'.

**(4) Did Mr Cumberbatch provide confidential information to Bence regarding contract specification and change notices and did Red Foot induce that breach of confidentiality?**

34. The Defendants submit that there is no evidence of this.

35. However, this must be set in the context of Bence replacing the Claimant with Red Foot in 2012 on the CFS contract during the period of Mr Cumberbatch's embargo.

36. There can be no doubt that the Claimant's contract specifications and change notices had been the specific responsibility of Mr Cumberbatch whilst he was its Technical Director and that he, alone, had detailed knowledge of them.

37. There can be no dispute that Mr Cumberbatch did provide confidential details of these to Andy Carter, who was the Project Manager of Bence, for the design and build of ERVs.

38. A confidential letter of engagement sent by Mr James Brown, MD of Bence to Mr Carter on 16th January 2012 instructs him to *'conduct and independent audit into the HART contract so far'*. Ominously, it also states *'it is necessary for us to present the first part of your report in order to convince the HART management team that our Technology Subcontractor, Excelerate, needs further investigation'*.

39. Perhaps not surprisingly, the audit report duly obliged by reporting upon alleged deficiencies in the ICT of ERV's. Such information was obviously not independently known to Bence or Mr Carter; it can only have emanated from one source: - Mr Cumberbatch. It is ironical that if there had been any such deficiencies then they would have been down to him.

40. The report was used at a minuted meeting of Bence with the Department of Health on 23rd January 2012 casting doubts on Excelerate's ability to continue as ICT contractor.

41. A note of Mr Osmond of 7th February 2012 refers in some detail to the events of the meeting and suggests a way forward for Bence and Red Foot on the HART contract when it expired at end of March 2012.

42. The CFS contract duly went to Bence and Red Foot during Mr Cumberbatch's exclusion.

43. In my judgment, a start up company such as Red Foot with only an accountant and Mr Osmond could not conceivably have taken over from the Claimant on the HART contract as from the end of March 2012 without the detailed input of Mr Cumberbatch and persuading both Bence and the Department of Health that it was to be preferred because of the Claimant's alleged deficiencies.

44. In the Defence, it is alleged that Bence had said it did not want to work with the Claimant because CFS had said that they would not accept the Claimant as the technology provider. This is demonstrably untrue and is flatly contradicted by CFS.

45. In letter dated 23rd October 2012 from the legal department of the Department for Work and Pensions to the mediator of the inevitable ensuing mediation between the Claimant and Bence, it was confirmed that equipment provided by the Claimant fully met contract specifications and was fully functional.

46. Neither Mr Brown nor Mr Carter gave evidence to explain how they came about the disinformation about the performance of the Claimant on the HART contract. I draw the adverse inference that this would be because they would have to confess that such self serving falsehood had been fed to them by Mr Cumberbatch.

47. Susan Brown, the back office company secretary of Bence and wife of Mr Brown did give evidence, unlike her husband who was the MD and had been nominated pre trial as a witness to be called by the Defendants' in support of their case. She was a most unimpressive witness. She was belligerent and argumentative in the witness box and was unable to give any satisfactory explanation as to why Bence was secretly trying to procure an 'independent audit' that was biased against the Claimant upon a government contract renewal. Indeed, she was even unable to recognise the obvious that it was. She displayed a great hostility to the Claimant even to the extent of diminishing its patent capabilities such as being able to provide the necessary bandwidth for CFS. She disputed that the Claimant brought the CFS contract to Bence but the contemporaneous documentation made it clear that it did. She was not prepared to accept that the Claimant was the market leader in the field of supplying satellite facility to ERVs although that is not in dispute between the parties who would be expected to know.

48. I accept the submissions that on her own admission she produced the notes for the meeting with Russ Mansford which shows precisely what Bence were up to. They were presenting a one sided report as if it were independent and which they had given the Claimant no opportunity to comment on. They were making insinuations about the Claimant's solvency without affording their erstwhile business partner the opportunity to comment. They were making comments about staff and security without its input.

49. I find her to be a biased, untrue and unreliable witness who sought to smear the CEO of the Claimant with unsubstantiated allegations of misconduct about unrelated matters in a different time frame instead of squarely and honestly answering the questions of detail in this case. Furthermore, I draw the adverse inferences from her husband's absence and her aggressive performance as being part and parcel of covering up the key role of Mr Cumberbatch whilst he was at Bence's premises during his exclusion period in providing Bence with the necessary knowledge and skills to undertake the government contracts without the Claimant to the financial advantage of Bence and the Defendants. I should add that I find Mr Savage a very impressive witness, patently honest, clear and straightforward able to deal firmly and fairly with all questions asked put to him. Any suggestion that the relationship of Excelerate and Bence foundered due to dealings of Excelerate with government officials is rejected as an unwarranted smear and irrelevant. It foundered because of the Defendant's underhand dealings with Bence.

50. In my judgment the answer to the question is 'yes'.

**(5) Did Mr Cumberbatch through Red Foot attempt to take over the existing HART contracts in breach of confidence and in breach of non compete / non solicitation covenants and did Red Foot induce that breach?**

51. The Defendants submit there is no evidence of this.

52. However, forensically piecing it together as rehearsed above (4) and as submitted by the Claimant, Mr Cumberbatch accepted in evidence that he would have the knowledge of the specifications and any undocumented changes that the Claimant had made and he alone was responsible for them. It follows that it is extremely unlikely that anyone else knew of them, including Mr Carter, until he was told of them by Mr Cumberbatch.

53. After the Department of Health lawyers got involved and conducted their own audit, they reported on 23rd October 2012 that they had nothing but praise for Excelerate's performance and were content to sign any necessary change notices.

54. The letter of instruction to Mr Carter of 16th January 2012 clearly envisaged that the report should undermine the Claimant for the joint purposes of Bence and Red Foot. It specifically asks to consider whether

there had been the necessary change requests. It envisages that the report would be given to HART management to persuade them to carry out a further investigation into Claimant.

55. After just two mornings of work by Mr Carter to produce a report, Bence went to the HART management for a meeting on 23rd January 2012. The pre meeting notes clearly indicate that their intention is to undermine the Claimant. It is accepted that they produced this report to HART without giving the Claimant any opportunity to address the issues raised.

56. In addition Bence insidiously suggested to HART that the Claimant had cash flow problems and that there were issues with staff / security that they had not discussed with the Claimant.

57. The notes conclude that they want Russ Mansford of HART to instruct an audit of the HART contract in relation to the Claimant's performance - all being done behind the Claimant's back.

58. The notes of Mr Osmond record frustration that Mr Mansford would not go along with requiring a detailed audit into the Claimant's compliance and they (Mr Osmond and Mr Brown) were considering other ways of causing problems for the Claimant. Mrs. Brown was unable to refute this. A schedule of HART contracts clearly indicates that Bence and Red Foot were looking ahead to sharing to the saved margin between them by cutting the Claimant out.

59. The evidence of both Defendants, supported by Mr Osmond's further notes is that they have been asked to provide a contingency plan in the event that the Claimant becomes disqualified from continuing as sub-contractor.

60. The only inference to be drawn from these pieces of evidence is that Bence, Mr Cumberbatch, Mr Osmond and Red Foot conspired to take over the existing HART contracts from the Claimant knowing that it involved breaches of confidence and covenants on the part of Mr Cumberbatch.

61. I accept all the claimant's submissions upon this; the answer is clearly 'yes'.

**(6) Did Mr Cumberbatch through Red Foot work from / deal with Bence / compete with Exceletrate regarding CFS ?**

62. The Defendants submits there is no evidence of this but Red Foot and Bence were working to the position whereby Mr Cumberbatch would be able to participate after his exclusion expired as from 1st August 2012.

63. There is indeed a paucity of documentary (electronic and paper) material disclosed by the Defendants during that period. However, such as has been disclosed convey a clear picture of what occurred and what must have done too.

64. By 6th July 2012 Red Foot must have entered into a contract with Bence for the supply of technology as a subcontractor; such being competitive with the Claimant's business. It is irrelevant that the contract was to be performed outside the period of restraint. The accepted quotation provided for stage payments, the first to be on 27th July 2012.

65. The main contract had been awarded to Bence in early May 2012 - the same time that that Mr Osmond had secured the services of Mr Cumberbatch (as admitted by them both but as from 1st August).

66. A disclosed document updated 5th July 2012 showed the plan was for work to start on 31.05.12 enabling Red Foot to complete its first fix in July 2012 and second fix in August 2012. Significantly, earlier versions of this document have not been disclosed.

67. Quotations, disclosed as part of the CFS project, from a supplier of relevant satellite equipment, C-Com of Ottawa, Canada, used by Mr Cumberbatch were obtained by Red Foot on 10th April and 3rd July 2012.

68. These limited communications demonstrate quite clearly that Red Foot was working on the CFS project at least from 10th April 2012 and Red Foot must have been working with Bence at that time.

69. Mr Osmond contended in his first witness statement that he was first contacted by James Brown about CFS in late July 2012 which is demonstrably untrue.

70. It is inconceivable that Mr Cumberbatch did not have an input into the contract within the period of his restraints. He was the only person who was able to understand what was needed, the supplier details, the costings, the timescale etc. Mr Osmond denied, in re-examination, that he had access to Claimants sub-contract specification / costings; if so he would be starting from scratch without relevant knowledge and expertise unless he had the assistance of Mr Cumberbatch. Mrs. Brown asserted that Bence had received no request for documentation on this, nor involvement as one might expect.

71. Moreover, there has been no disclosure of quotes / estimates / invoices to show how the sub-contract price was calculated. Someone had to work out how many man hours would be required to do the fitting and perform the ongoing service requirements. The cost of bandwidth needed to be ascertained. Avanti was the bandwidth supplier with whom Mr Cumberbatch had been working. The unchallenged evidence of Beth Evans was that Mr Cumberbatch must have been assisting with the specification aspects.

72. I accept all the claimant's submissions upon this; the answer is clearly 'yes'.

**(7) By their involvement in MBS and their involvement with Bence on that project was Mr Cumberbatch in breach of fiduciary duty by exploiting a business opportunity, did Mr Cumberbatch exploit Excelerate's confidential information and was Mr Cumberbatch in breach of his covenants not to canvass or solicit orders or compete ? Did Red Foot induce any breaches of covenant and was it knowingly involved in any breaches of fiduciary duty or breaches of confidence?**

73. The idea of extending satellite broadband transmission on Emergency Response Vehicles to mobile breast screening units ['MBS'] was a novel and exciting one that Bence and the Claimant had explored since 2007 without ever coming to fruition. The reasons for this were technical and economic: there were issues over transmitting large quantities of data over broadband and providing the satellite usage at a reasonable cost which required a high degree of volume usage.

74. Mr. Cumberbatch had been closely involved in dealing with those issues whilst he was at the Claimant.

75. The Claimant submits that it was an ongoing and maturing business opportunity and therefore its property (see *Hunter Kane supra*) which it was entitled to protect; the Defendants submit that it was not and they were entitled to get involved in with Bence as Project M.

76. Contemporaneous documentation gives an unequivocal picture that supports the Claimant's submission. An e-mail dated 1st July 2011, however, shows that Mr Cumberbatch was involved in providing costings to Bence on Medical Image Transfer whilst working for Excelerate. Other documentation, including the minutes

of a monthly meeting between Bence (attended by James and Susan Brown amongst others) and Excelerate (Beth Evans and others) of 20th October 2011 refer to discussions about HART contracts and sales progress and quotations about MBS.

77. The Defendants admit they had discussions with Bence during the same time in competition with the Claimant who was unconcerned about MBS. They contend that Mr Cumberbatch was merely doing research into it that was not objectionable so far as Mr Savage was concerned.

a. The Defence dated March 2013 states that Project M is Red Foot's project with which Bence is assisting and it had had spent the last 18 months developing it viz: September 2011.

b. In the Further and Better Particulars of the Defence, it is stated that Mr Cumberbatch's discussions with Bence were initially in the latter part of 2011 but that the Defendants and Bence did not become involved in Project M until March 2012.

c. The Defence also states that Mr. Brown had suggested MBS to Mr. Savage but he was not interested. However, this is not supported by any witness evidence and is contrary to the unimpeachable evidence of Mr Savage and the contemporaneous documentation such as the Bence/Excelerate meeting minutes of 20th October 2011.

d. The Defence also states that Mr Brown suggested the Project to Mr Cumberbatch following the termination of his employment i.e. consistent with a date in September 2011.

e. In Mr Cumberbatch's first witness statement, he says he was asked by Red Foot (not Mr Brown) in September 2011 to assist with Project M. In his current statement he says that MBS was first discussed at a meeting at Bence attended by himself and Mr Osmond in January 2012. Mrs Brown supports this latter version.

f. As for Mr Osmond, he contends in his witness statements that he (not Mr Cumberbatch) was approached by Mr Brown about MBS in late 2011.

g. MBS was part of the planned Red Foot business from the outset as shown by reference to it on its website which was posted at the latest in December 2011.

78. The only consistency between the Defendants' various versions is that they were in agreement to proceed with MBS during Mr Cumberbatch's period of purdah.

79. The idea can only have emanated from Mr Cumberbatch and he, and they all knew, it had to be kept secret from the Claimant (as Mr Cumberbatch makes plain in his first witness statement) because the Defendants and Bence knew it was in breach of his covenants. It is disingenuous of them to assert that the Claimant had abandoned MBS - it had not as they all well knew.

80. In my judgment, by their involvement in Project M, Mr Cumberbatch went beyond mere research breaching his duty not to compete with the Claimant, exploited the Claimant's confidential information gleaned whilst working for them and breached his fiduciary duty by exploiting a business opportunity he came to know about whilst a director of the Claimant. He has dealt with Bence who was a customer of the Claimant. The answer to the questions is yes.

**(8) What remedies are available to C consequent upon any findings of breach of duty, whether contractual, tortious or fiduciary?**

81. The facts found from piecing and cross fertilising the whole of the evidence together amount to a finding that Mr Cumberbatch was personally and through Red Foot in breach of his contractual, tortious and fiduciary duties, as pleaded, to the Claimant. Red Foot was a company set up by Mr Cumberbatch and Mr Osmond to act as a corporate veil over his illegal activities and to further them.

82. Mr Self ably but rather half heartedly sought to query the legality of the restraint of trade covenants clauses as being a penalty. However, they were contractually agreed upon as part of a settlement agreement where both sides were expertly and capably advised by leading solicitors. The sum of £62,500 represents nearly a year's post termination salary for Mr Cumberbatch and is around what Mr Tranfield has estimated that Red Foot profited by working on the two CFS and MBS projects in the year in question. I reject the plea of illegality; it is a genuine pre-estimate of loss. The Claimant is a SME with just 30 employees and a small number of specialist public service customers dependent upon it; it is entitled to protect itself, its customers and trade secrets from competition from an ex employed Technical Director with key business contacts during the reasonable period of one year.

83. The Defendants are therefore jointly and severally liable to the Claimant for these breaches.

84. Mr. Cumberbatch is liable to repay the £62,500 together with interest for his breaches of contract. Red Foot is equally liable in damages on the basis that the sum paid to Mr Cumberbatch for compliance has been rendered worthless.

85. Mr. Cumberbatch is liable for common law damages for breaches of his restraints and Red Foot is liable in the same way for inducing those breaches. It is only CFS and MBS where the Claimant seeks to prove any loss as the other breaches did not lead to any loss to the Claimant or profit to the Defendants.

86. In my judgment, the Defendants deliberately poisoned the existing longstanding business relationship between Excelerate and Bence that would have foreseeably have continued with the 5 year renewal of the HART contract, the CFS contract and the MBS project. The minuted meeting of 20th October 2011 supports the same despite the evidence of Mrs Brown and the activities of Mr Brown who were only acting as they did because they thought they could get a better deal for Bence by dealing with Mr Cumberbatch behind the back of Excelerate.

87. I accept the evidence of Daniel Tranfield, the Financial Director of the Claimant and a Chartered Accountant, concerning the loss of profits that the Claimant has sustained on CFS and MBS due to the Defendant's breaches. He is in the ideal position to quantify contracts as it is very much part of his job and has the expertise and access to the relevant internal company financial information and external information in this high tech industry.

88. His calculations follow a standard format in calculating loss of profits and without delving into them as there is no challenge upon them, take into account all relevant factors.

89. Mr Tranfield calculates that the Claimant sustained £66,109 loss of profits on the CFS project and £92,234 on MBS due to the Defendant's wrongful activities. I accept these calculations. It is therefore otiose to consider his calculations for an account of profits of the Defendants or what are termed 'Wrotham Park' damages unless the Claimant's seek otherwise.

90. The Claimant accepts that the sum of £62,500, awarded under paragraph 84 of this judgment, must be offset from this total sum of £158,343 making the Defendants thereby jointly and severally liable in damages in the sum of £95, 843 for their wrongs in addition to the sum of £62,500.

91. Accordingly, there will be judgment for the Claimant in the sum of £ 158,343 against both Defendants.

Clerk: Helen Foster

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**CLAIM**

**IN THE HIGH COURT OF JUSTICE**

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**NO.3BM40042**

**QUEENS BENCH DIVISION**

**BIRMINGHAM DISTRICT REGISTRY**

**MERCANTILE COURT**

**BEFORE HIS HONOUR JUDGE SIMON BROWN QC**

**16 January 2015**

**BETWEEN:**

**EXCELERATE TECHNOLOGY LIMITED**

**Claimant**

**and**

**(1) LINDSAY CUMBERBATCH**

**(2) RED FOOT TECHNOLOGIES LIMITED**

**(3) DAVID OSMOND**

**Defendant**

**ORDER**

1. David Osmond be joined as a Third Defendant for the purpose of the Claimant's application for the costs of the action.
2. There be judgment for the Claimant against the First and Second Defendants in the sum of £ 158,343.00 together with interest assessed at £ 7,248.00.
3. The £ 62,500.00 paid into court pursuant to the order made on 10 October 2013 together with accrued interest (calculated as £ 223.45) shall be paid out to the Claimant's solicitors forthwith in partial satisfaction of the judgment debt.
4. The balance of the judgment debt and interest of £ 102,867.55 shall be paid by 30 January 2015.
5. The First, Second and Third Defendants shall pay the Claimant's costs of the action to be assessed upon a detailed assessment on an indemnity basis if not agreed.
6. The First, Second and Third Defendants shall make a payment on account of costs in the sum of £ 155,409.66 such payment on account to be paid by 30 January 2015.

**Judge's observations on Claimant's costs additional to their costs**

**budget**

The following costs (excluding VAT) are considered to be prima-facie reasonable:

|   |            |
|---|------------|
| (A) Costs for hearings 19.11.14 and 12.01.15  | £ 6,985.00 |
| (B) Costs for Claimant's application 09.12.14 | £ 1,782.50 |
| (C) Costs re First Defendant's IVA            | £ 3,562.50 |