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| **Neutral Citation No: [2020] NICh 4**<br><br>***Judgment: approved by the Court for handing down (subject to editorial corrections)****| ***Ref:*** **McB11166**<br><br>***Delivered:*** **02/04/20** |

**11/120672**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISION**

_____

**Between:**

**FRYLITE LTD**

**Plaintiff**

**and**

**PAUL JAMES GILROY**

**Defendant**

_____

**McBRIDE J**

**Introduction**

[1] The plaintiff's case is that the defendant, in breach of agreement dated 26 March 2006; in breach of a Service Agreement and in breach of his contract of employment, competed with the plaintiff in the business of collecting used cooking oils and fats and as a result the plaintiff has sustained loss.

[2] On 10 October 2011 the plaintiff issued a writ seeking, *inter alia*, an order restraining the defendant from engaging in business in direct competition with the plaintiff's business up until 25 March 2012 together with a claim for damages by reason of the defendant's breach of agreement dated 26 March 2006; breach of a Service Agreement and breach of his contract of employment.

[3] On 28 October 2011, Deeny J granted an interlocutory injunction restraining the defendant from engaging in business in direct competition with the plaintiff's business prior to 25 March 2012.

[4] The period restricting competition by the defendant, in the agreement dated 26 March 2006 and the Service Agreement has now expired and therefore the sole relief now sought by the plaintiff is damages.

**Representation**

[5] The plaintiff was represented by Mr Brian Fee QC and Mr Egan of counsel. The defendant appeared as a litigant in person.

**Background**

[6] As appears from the pleadings and the oral and affidavit evidence filed, the following background factual matters are not in dispute:

(i) The plaintiff is a limited liability company carrying on business in the supply of fresh oils and fats and the recovery of used cooking oil and fats ("UCOs").

(ii) The defendant was formerly employed by the plaintiff as a manager working at its depot in Craigavon, Co Armagh.

(iii) The defendant's wife, Michelle Gilroy, was the legal owner of a business called Rof Environmental ("Rof") which traded as a collector of UCOs.

(iv) By way of an Asset Purchase Agreement ("APA") dated 12 September 2006 Agri Energy Ltd ("Agri") purchased Rof.

(v) The APA was entered into between Mrs Michelle Gilroy, Agri and the defendant. It contained the following material terms:

(a) The consideration for the purchase of Rof was the aggregate of an initial payment of £250,000 and a deferred payment of £200,000. Payment of the deferred sum was conditional upon certain specific business performance targets, detailed in Clause 4 of the APA, being met.

(b) Under Clause 5.3.2 the defendant agreed to enter into a Service Agreement with Agri.

(c) It was further agreed between the parties that the defendant would be restricted from competing with Agri's business in the island of Ireland during his employment under the Service Agreement and for a period of two years following the termination of his employment with Agri. Clause 12.8 ("the restrictive covenant") provided as follows:

> "12.8 The seller (Michelle Gilroy) and Mr Gilroy each respectively undertake that they shall not:

> 12.8.1 In the case of Mr Gilroy while employed by the buyer (Agri) under the Service Agreement and during the two year period beginning on the date on which his employment by the buyer terminates (whether under the Service Agreement or otherwise) and in the case of the seller during the two year period commencing on the completion date (in each case the relevant two year period being the restricted period) in the restricted period carry on or be employed, engaged or interested in any business which would be in competition with any part of the business as the business was carried on at the completion date;
>
> 12.8.2 During the restricted period, deal with or seek the custom of any person that is at the completion date, or that has been at any time during the period of 12 months immediately preceding that date, a client or customer of the business.

Business is defined in the APA as follows:

> "The business of collecting, distributing and selling used cooking oils, fats and virgin oil products as carried on by the seller at the completion."

[7] Before entering into the APA the defendant sought and obtained independent legal advice.

[8] The Service Agreement dated 12 September 2006 contained the following material terms at clause 5.1:

> "During the period of the Service Agreement the defendant shall:
>
> a. Faithfully, diligently and in good faith exercise such powers and perform such duties (if any) on behalf of the company or any group company as are consistent with the employee's position and shall not to do or say anything that is harmful to the company or any group company or which is likely to lead to a person to ceasing to deal with the company on substantially equivalent terms to those previously offered or at all.

b. Exclusively devote the whole of the employee's time, skill, ability and attention to the business of the company or any group company unless prevented by ill health from doing so;

c. Use all reasonable endeavours to promote the interests and reputation of the company or any group company;

d. Accept any offices or directorships as reasonably required by the Board or the board of directors of any other group company."

Clause 5.5. provided as follows:-

> "The employee shall not while employed by the company without the prior written consent of the Board either solely or jointly, directly or indirectly, carry on or be engaged, concerned or interested (whether as shareholder, holder of securities, director (whether executive or non-executive) in any other trade or business …"

Clause 16.2 provided as follows:-

> "The employee acknowledges in order to protect the goodwill of the company the employee hereby undertakes with the company that he shall not, whether alone or jointly with or through or on behalf of any other person (whether as a director, manager, consultant, adviser, employee, agent, partner, promotor, shareholder or otherwise) directly or indirectly;
>
> a. For a period of one year from the termination date operate, carry on or be engaged, employed, concerned, or interested in or assist any business in the prohibited area which is in competition with, or is likely to be in competition with, the business in which the employee was materially involved in the one year before the termination date;
> b. For a period of one year from the termination date, provide any advice, technical or otherwise to any person carrying on business in the prohibited area which is in competition or likely to be in competition with the business…
> c. In connection with the carrying on of any business in competition with the business, for a period of one year from the termination date seek to obtain orders from, solicit the custom of, or do business or interfere with or entice away

from the company any person who is, or at any time during the one year period immediately preceding the termination date, was , a client or customer of the company …"

d. ……

e. For a period of one year from the termination date, induce or attempt to induce any supplier of the company to cease to supply or to restrict or vary the terms of the supply of the company."

The plaintiff alleged that the defendant entered into this Service Agreement. The defendant however denied that he signed this or any Service Agreement.

[9] Agri paid the initial consideration and employed the defendant as a manager based at its Craigavon depot.

[10] In the events which happened the business performance targets set out in the APA were not met. As a result the defendant arranged a meeting with Mr Robert Behan, Managing Director of Agri. Following this meeting there was an exchange of emails between Mr Behan and the defendant during January/February 2008. Eventually, it was agreed between the defendant and Mr Behan that Agri would pay the deferred consideration of £200,000, notwithstanding the fact the business performance targets set out in the APA had not been met. Agri subsequently paid this consideration.

[11] The email exchange between the defendant and Agri consisted of the following emails:

(i) Email dated 7 January 2008 at 2:58pm from Mr Behan to the defendant. It stated as follows:

> "Paul,
> Further to our conversation of last Friday we agreed that you would email me an overview of your proposal both in terms of the earn out but also how you would like to manage and develop the business on a go forward basis.
>
> I will aim to come and see you in Segoe on the morning of January …."

(ii) Email dated 16 January 2008 at 9:28pm from Defendant to Mr Behan. It stated as follows:

> "Robert,
> Further to our discussions regarding the losses to both my previous employer and myself, my thoughts would be:

Earn out.
Should be paid by four equal payments, balance 2007/2008/2009/2010.

Terms and conditions of contract have not been honoured.

Having resolved these issues once and for all, I would be confident we could develop and expand the business a discussed in July 06.

Plan of action:
…
I look forward to seeing you on Tuesday 22 January 2008.

Regards
Paul"

(iii) Email dated 19 January 2008 at 7:54pm from Defendant to Mr Behan:

"Robert, I forward you more details.

Earn out

Should have been paid but as a gesture of good will I will advise Rof to accept it over 4 years with no conditions.

Regarding the management and development of the business:

Well as yet the terms and conditions of my current contract haven't been honoured.

(a) What package is on the table for me?

(b) What is my position with Agri Ireland?

(c) What sort of Capex figure have you in mind for Portadown.

(d) Is Portadown to be the hub of Agri Ireland?

Regards Paul"

(iv) Email dated 14 February from the defendant to Mr Behan it stated:

> "Further to our meeting in Seagoe on 22 January it was agreed that Rof would accept earn out over 4 years.
>
> Balance at 07 payable now. Then 08/09/10.
>
> There will be no conditions attached to this earn out.
>
> PG will be paid £10,000 net minimum bonus early September 2008. His package would then be up for review.
>
> Offices will be fitted out and equipped. An administrator will be employed. Robert please advise if I have overlooked anything.
>
> Regards Paul"

(v) Email from Mr Behan to the defendant on 18 February 2008 at 09:07 it stated:

> "Paul, exactly as we discussed. Norman will be in touch ref payment and administrator."

[12] On 26 March 2010 the plaintiff entered into a Business Sale Agreement ("BSA") with Agri whereby the plaintiff acquired Agri's UCOs business in Ireland. The BSA contained the following material terms:

(a) By Clause 2.1 "the vendor (Agri) shall sell its title rights and interest and the purchaser (the plaintiff) shall purchase such title rights and interest in the business with a view to transferring the business to the purchaser as a going concern with effect from the completion date, including:

(i) The goodwill …
(ii) The benefit of the claims …"

(b) By Clause 1 "business" was defined as follows:

> "Business means the business of direct or indirect sale, marketing and/or distribution of new cooking oils, the direct or indirect collection, origination, purchasing and processing of waste cooking oils and the provision of new and used cooking oil collection, storage, filtering and management systems as carried on by the vendor in Northern Ireland under the name "Agri Energy".

(c) "Claims" was defined as:

> "Claims means all rights and claims of the vendor existing at completion under any warranty, term, condition, guarantee or indemnity, whether express or implied, in favour of the vendor in relation to the business."

[13] By reason of the terms of Clause 10 of the BSA the defendant's employment with Agri terminated on 26 March 2010 and the plaintiff employed the defendant from that date on the same terms and conditions.

[14] On 23 September 2011 the plaintiff dismissed the defendant from its employment for gross misconduct on the ground that the plaintiff was satisfied, after completing an investigation and a disciplinary process, that the defendant was the owner and operator of a company called GreaseCo Ltd ("GreaseCo") which commenced trading in or about November 2010 and which was a direct competitor of the plaintiff. The plaintiff was further satisfied that the defendant had used his position as an employee to direct the plaintiff's customers to GreaseCo. The defendant denied that he either owned or operated GreaseCo and denied that he had directed the plaintiff's customers to GreaseCo.

**The Plaintiff's Case**

[15] As appears from the Amended Statement of Claim the plaintiff submits that the defendant is in breach of the APA; the Service Agreement and in breach of the express and implied terms of his contract of employment as he:

(a) Established, operated, managed and controlled GreaseCo which is a business in direct competition with the plaintiff's business.

(b) Diverted the plaintiff's customers to GreaseCo.

(c) Established and operated GreaseCo whilst he was employed by the plaintiff.

(d) Breached the terms of the APA and in particular the covenant set out at Clause 12.8 ("the restrictive covenant").

(e) Failed to devote the whole of his time, skill and ability to the plaintiff's business, and

(f) Acted in bad faith and in a manner calculated to damage the plaintiff.

[16] The plaintiff claims, in accordance with a report prepared by Mr Nicholl, accountant, of GMcG, chartered accountants, that it has sustained a total loss including interest of between £505,674 and £569,944.

**Defendant's Defence**

[17] The defendant denies that he breached the terms of the restrictive covenant; denies he entered into a Service Agreement, denies he breached its terms and further denies that he breached either the express or implied terms of his employment. He further submits that the restrictive covenant was superseded by a later agreement which came about as a result of the email exchange, which is set out in paragraph [11] above, between the defendant and Mr Behan. He submits that it was agreed in this exchange that he would no longer be bound by the restrictive covenant. In his affidavit he further alleged that:-

(i) The right to enforce the restrictive covenant was not assigned to the plaintiff by Agri and therefore the plaintiff could not sue on this covenant, and

(ii) The restrictive covenant was not necessary to protect a legitimate interest and was therefore unenforceable.

These two grounds however were not pursued at the hearing.

**Issues in Dispute**

[18] Accordingly, the following issues fall for consideration:

(i) Is the defendant in breach of the restrictive covenant and/or the covenants contained in the Service Agreement and/or in breach of his contract of employment?

(ii) Was the restrictive covenant and the covenants in the Service Agreement superseded by a new agreement set out in the email exchange between the defendant and Mr Behan which released or otherwise waived these covenants?

(iii) Is the plaintiff entitled to the benefit of the restrictive covenant and the covenants contained in the Service Agreement?

(iv) Is the restrictive covenant unenforceable as it is unreasonably in restraint of trade?

(v) If the defendant is in breach of the restrictive covenant or in breach of the Service Agreement and/or in breach of his contract of employment what loss has the plaintiff sustained?

**The Evidence**

[19] The plaintiff called the following witnesses:

(a) Mr Eamon McCay, director and chairman of the plaintiff company.

(b) Mr John Condon, private investigator.

(c) Mr Nicholl, accountant.

(d) Mr Robert Behan, chief executive of Agri.

(e) Mr George McCay – sales manager of the plaintiff company.

(f) Mr James Arnold – lorry driver employed by the plaintiff.

The defendant gave evidence in person. He called no other witnesses.

**Evidence of Eamon McCay**

[20] Mr Eamon McCay is the director and chairman of the plaintiff company. He adopted as his evidence the contents of affidavits sworn by him on 6 October 2011 and 26 October 2011, which were made in respect of the application for interlocutory injunctive relief.

[21] He stated that whilst the plaintiff's core business was the sale of fresh cooking oil and fats it also, initially as a service to its customers, recovered and disposed of their UCOs. The UCOs were then recycled and used in a variety of ways including use as bio-diesel. Traditionally the disposal of UCOs was part of a gratuitous service provided to customers but as a result of the growth in the recycling market the value of UCOs as a commodity increased and accordingly the Plaintiff from May 2011 started to pay its customers for their UCOs. He explained that traditionally all the UCOs were shipped to England for repossessing. Recently the company however had invested in building its own repossessing plant at Strabane at a cost of £2M to process UCOs.

[22] He stated that after the plaintiff acquired Agri on 26 March 2010 it employed the defendant as a manager responsible for the operation of its business at the Craigavon depot. Mr McCay stated that he wanted to continue to employ the defendant because of his extensive experience, of over 20 years in the waste fats collection industry and because he had detailed knowledge of the customers, the seasonal trends, the routes used by drivers and the workings of the Craigavon depot. This important information was known only by the defendant and was not recorded in any formal document.

[23] From in or around 2011 due to the value of UCOs as a commodity, a number of new operators entered the waste fats collection market. As a result of the increased competition Mr McCay stated that the plaintiff employed aggressive tactics to retain its customers and obtain new customers. In particular, in response

to the increase in the price paid for UCOs and in a bid to retain its customers the plaintiff, contrary to the defendant's advice, decided that from May 2011 it would pay its customers for their UCOs.

[24] In or around 2011 Mr McCay stated that the plaintiff noted a fall of 52% in the amount of UCOs it shipped to England for processing.

[25] In March 2011 Mr McCay stated the plaintiff became aware of a new operator in the waste fats collection market call GreaseCo Ltd ("GreaseCo"). The Plaintiff made a number of enquiries and conducted various investigations, including the engagement of a private investigator. As a result of these enquiries and investigations it obtained the following information:

(a) The defendant's wife held the licence for GreaseCo.

(b) A number of customers complained that after they had requested the plaintiff to collect their UCOs, the collection was actually made by GreaseCo.

(c) An anonymous email dated 27 March 2011 sent to the plaintiff alleged that the defendant was collecting barrels of fats and paying £10-£15 per barrel.

(d) Some customers and drivers advised the plaintiff that the defendant was the owner and operator of GreaseCo.

(e) A quotation dated 15 September 2011 from Drumack, a company, which alters and repairs lorries, was sent to "Paul" at the Craigavon Depot. This document set out quotations for altering a number of vehicles. The vehicles referred to in the quotation were vehicles which were not owned by the plaintiff.

[26] Following receipt of this information the plaintiff instructed a private investigator, Mr John Condon, of Collingwood de Caunteton Ltd to carry out an investigation into GreaseCo and any links it had with the defendant. Mr Condon furnished two reports dated 15 August 2011 and 5 September 2011 to the plaintiff.

[27] The central findings of Mr Condon's report were that:

- GreaseCo, operated in the collection of UCO's.
- Some of GreaseCo's customers had originally been customers of the plaintiff.
- GreaseCo used premises at Unit C6 Edenderry Industrial Estate to store drums of UCOs.

- The defendant was the tenant of Unit C6 since December 2010.

- GreaseCo sent UCOs from Unit C6 to a reprocessing facility in England.

[28] The photographs in the report provided by the private investigator showed a number of barrels which Mr McCay stated were recycled barrels provided by Mulrines who imported orange juice concentrate in these barrels. It was his evidence that Mulrines exclusively sold their used barrels to the plaintiff. It was therefore his evidence that these barrels belonged to the plaintiff.

[29] In light of the plaintiff's concerns and the contents of the private investigator's report the plaintiff wrote to the defendant by letter dated 22 August 2011 suspending him from its employment. By letter dated 23 August 2011 it advised him of the nature of the allegations against him and enclosed the private investigator's report dated 15 August 2011 and requested that the defendant attend a disciplinary hearing. The initial disciplinary hearing took place on 26 September 2011. The plaintiff was represented by Mr Gormley and Mrs Mitchell. The defendant attended unaccompanied. He denied all allegations at the meeting.

[30] The disciplinary meeting reconvened on 19 September 2011 and prior to that meeting the defendant was provided with the private investigator's report dated 5 September 2011 together with a number of statements including a statement by Mr George McCay, statements from four customers of the plaintiff, a statement by Mulrines and a statement by Mr Arnold. At the meeting the defendant again denied all allegations.

[31] By letter dated 23 September 2011 the plaintiff confirmed in writing its decision to dismiss the defendant for gross misconduct.

[32] Although Mr McCay was not in attendance at any of the disciplinary hearings he stated that at the disciplinary meetings that the defendant denied any knowledge of the ownership of GreaseCo, denied knowledge that his wife held a waste transport licence, denied that he had ever discussed the existence of GreaseCo with his wife and gave no explanation why customers and drivers alleged that he was collecting UCOs and had a side-line business. He further denied that he was the tenant of unit C6 and denied that unit C6 was used for storing UCOs. He had further failed to explain why Drumack had sent a quotation to the Craigavon Depot addressed to "Paul" for alteration to lorries not owned by the plaintiff.

[33] The defendant in cross-examination attacked Mr McCay's credibility. He put to him that when he collected UCOs from Rof he had asked the defendant to pay cash and on other occasions had asked for cheques to be paid to a company other than the plaintiff. Mr McCay, in reply stated that he was comfortable with his tax affairs. He stated that he had asked for cheques to be made out in the name of another trading name of the plaintiff and has requested cash in cases where he did not trust the customer. The defendant further put to Mr McCay that at a time when

he was in partnership with Mr Thompson he had asked customers to tip the weight of the UCOs in his favour and against his partner. Mr McCay replied that he had no recollection of this happening.

[34] The defendant also put to this witness that the figures for the reduction in UCOs shipped to England did not reflect an actual loss in the amount of UCOs collected as UCOs were now taken to Strabane for processing. Mr McCay accepted some UCOs went to Strabane for reprocessing but said this did not explain the drop of 52% in the tonnage of UCOs shipped to England and this represented the loss to the plaintiff due to competition by GreaseCo.

[35] Mr McCay did accept when questioned about competitors that since 2001 there were several other new operators including Biogen, Pure Oils, Green Leaf and Filter Fry operating in this market. He further accepted that two former employees of Agri were now in direct competition with the plaintiff. He denied however that customers had left the plaintiff due to the fact the plaintiff did not pay for UCOs until May 2011. Mr McCay confirmed that a sales meeting had taken place on 6 May 2011 which he had attended and he accepted that the minutes of this meeting recorded that since the last sales meeting, only 85 of the 126 new customers gained in November 2010 were still with the Plaintiff. He further accepted that this minute noted that there were other competitors in the market including Biogen and recorded that since the merger of the plaintiff with Agri a number of former employees had left and were now acting in direct competition with the plaintiff.

[36] In cross examination, Mr McCay accepted that the plaintiff had only obtained statements from four customers but stated that hundreds of the plaintiff's customers had left and gone to GreaseCo. He said the reason the plaintiff had only obtained four statements was that this was sufficient for the disciplinary process. He denied that the plaintiff company had a record of all weekly collections and denied that the plaintiff had ever prepared a list of customers who had migrated to other operators.

[37] Mr McCay was unable to give direct evidence in relation to the question whether the defendant owned, operated and or managed GreaseCo and in particular whether he acted in breach of the covenant in the APA, or otherwise acted in breach of his contract of employment. He was only able to relate what others had told him and what was contained in the records written by others. I therefore give little weight to his evidence as no reasons were advanced to the court why the persons having direct knowledge of the matters alleged were not called. For example no reasons was given why the customers who had provided statements were not called and why the persons who had conducted the investigation and disciplinary process were not called.

[38] Secondly, I do not accept the evidence this witness gave in relation to the losses sustained by the plaintiff because it I found this witness to be neither credible nor a reliable witness. When the defendant challenged this witness about the honesty of his dealings with him whilst in the employment of Agri and when he

acted in partnership, Mr McCay stated he had "no recollection" of such dishonest behaviour. I consider that if Mr McCay had not engaged in such dishonest conduct he would simply have denied same rather than using a form of words which indicated that such dishonest conduct may have happened. Secondly, although this witness in his evidence in chief took time to impress upon the court the nature of the plaintiff's business and how it had invested £2M in building a new processing plant at Strabane he denied in cross examination that the reduction in tonnage in UCOs sent to England was due to the fact some of the UCOs were now sent to Strabane for processing. I consider that this was a dishonest answer. I am therefore unable to accept this witness's evidence that the sole reason for the reduction in the tonnage of UCOs collected and sent to England was due to competition by GreaseCo. I am satisfied that part of the reduction in tonnage sent to England was due to the fact UCOs were now being sent by the plaintiff to its own processing plant in Strabane.

[39] Thirdly, as appears from the minute of the sales meeting dated 6 May 2011, there were, according to this witness many competitors in the market. Accordingly I am satisfied that competition from GreaseCo was not solely responsible for the reduction in the UCOs collected by the plaintiff.

**Mr George McCay**

[40] Mr George McCay is a brother of Eamon McCay and is employed as a Sales Manager by the plaintiff. He stated that he attended the sales meeting in May 2011 to discuss the reasons for the drop off in the amounts of UCOs collected. After this meeting he carried out a number of enquiries. In particular he spoke to some of the plaintiff's customers and obtained statements from four customers about GreaseCo's activities. He further discovered that Mrs Gilroy held the licence for GreaseCo. In addition he spoke to a driver employed by GreaseCo who advised him that although he could not disclose the name of the owner of GreaseCo, the owner was the "boss man". Mr McCay also gave evidence about speaking to the chef in Benedicts. When he was present the chef telephoned GreaseCo and when he asked to speak to the owner he was put through to a man called James. The chef advised Mr McCay that James had a "hoarsey" voice.

[41] Under cross-examination Mr George McCay stated that he knew all of the plaintiff's lost customers were lost to GreaseCo. He knew this because the sales team and the accountancy team had prepared weekly sheets which verified that all the customers lost by the plaintiff had migrated to GreaseCo. He further stated that every month he attended a sales meeting where these weekly sheets were analysed.

[42] When asked by the court to explain why these documents were never provided to the court even though they would have been evidence to support the plaintiff's case that 100% of the lost customers had migrated to GreaseCo and why these sheets were not given to the plaintiff's accountants to enable him to analyse the actual loss, Mr McCay was unable to give a reason.

[43] I consider that the evidence given by Mr George McCay to prove that the defendant was in breach of the covenant in the APA Service Agreement and/or otherwise was in breach of his contract of employment, should be given limited weight. I make this finding for the following reasons. Mr McCay referred to four statements from former customers of the plaintiff. The four statements were written "word for word" in exactly the same terms. He accepted that he had written the statements which were then presented to the witnesses and signed by them. None of the four customers was called to give evidence. No reasons was proffered as to why these witnesses were not called and accordingly the defendant did not have an opportunity to cross examine them and the court had no opportunity to assess these witnesses' credibility or demeanour. The other evidence given by Mr McCay related to a conversation he had with one of GreaseCo's drivers and hearsay evidence from a chef at Benedict's who advised that the man he spoke to called James had a "hoarsey" voice. I consider that that evidence is not sufficient to establish on the balance of probabilities that the defendant was the owner or operator of GreaseCo.

[44] I am however satisfied from the evidence given by this witness that the plaintiff was concerned about lost customers and reduced collections of UCOs arising from competition as appears from the discussions which took place at the monthly sales meetings. I am further satisfied, on the evidence of this witness, that weekly sheets were prepared and presented at the monthly meetings which set out the number of customers who had migrated from the plaintiff to GreaseCo. These documents however, although clearly relevant to calculation of loss, were never produced to the accountant who was asked by the plaintiff to prepare a report for the court setting out details of the loss sustained. Further these documents were not provided to the court. I draw an adverse inference from the fact they were not given to the accountant and not produced to the court. This is because these documents would have provided strong supporting evidence in respect of liability and quantum and I consider the reason they were not provided to the accountant and to the court was because the plaintiff knew that production of these documents would have produced a lower figure for loss than the figures calculated by the accountant based on other information provided to him by the plaintiff and its representatives.

**Mr Robert Behan**

[45] In 2006 Mr Behan was the director and chief executive of Agri. He is presently a director of a company which is a 50% shareholder in the plaintiff company and is a director of the plaintiff.

[46] Mr Behan swore two affidavits on 7 October 2011 and 25 October 2011 in connection with the injunction application. He adopted these affidavits as his evidence before this court.

[47] Mr Behan stated that he was directly involved in the negotiations to purchase Rof. He recalled that all of the negotiations were conducted with and by the

defendant and the only time he met Mrs Gilroy was at the solicitor's office when she signed the APA.

[48] Mr Behan stated that he required the defendant to sign the APA as the defendant possessed essential business information relating to the customer base, routes and markets of Rof. As a result Agri required him to also enter into a Service Agreement and be a party to the APA. In particular Agri required the defendant to sign up to the restrictive covenant because 85% of the value of the business was goodwill and it was the view of Agri and also his own view that the restrictive covenant was necessary to protect this goodwill. He further stated that the restrictive covenant was for a period of 2 years because this was the standard period of restriction used in the business. He advised that the restrictive covenant covered the island of Ireland because the business operated both in Northern Ireland and in the Republic of Ireland.

[49] Mr Behan recalled that the business performance targets set out in Clause 4 of the APA were not met. The defendant was very unhappy because this meant the deferred payment or earn-out was not paid by Agri. As a result Mr Behan met with the defendant on 4 January 2008. Thereafter there was an email exchange between them and Mr Behan confirmed the email exchange which is set out at paragraph 11 above.

[50] In the email exchange and at the meetings with the defendant Mr Behan stated that he had agreed to waive the business performance target set out in the APA and had further agreed to pay the deferred consideration over a period of 4 years. He denied that he ever released the defendant from the obligations contained in the APA or Service Agreement and in particular denied that he ever waived the restrictive covenant. He stated that if any request had been made by the defendant for the release of the restrictive covenant this would have set "alarm bells ringing". He opined that it made no sense for Agri to release the defendant from the restrictive covenant for no consideration in circumstances where the defendant was central to the business and where the defendant had already threatened to leave. It was as a result of these factors, namely the risk of the defendant leaving and later setting up in competition that Mr Behan had agreed to pay the deferred consideration.

[51] In cross-examination the defendant put to Mr Behan that the covenant had never been adhered to by him and he had acted in breach of the covenant from the outset as appeared from the fact he acted for other companies including Arrow and Cork Oils whilst he was employed by Agri. Mr Behan denied knowledge of this and said that he thought the defendant was only ever trying to get new customers for Agri. Mr Behan further denied that the defendant had ever provided to him a list of Rof's customers although he confirmed that attempts had been made to obtain such information as Agri wanted to create a database of Rof's customers.

[52] I found Mr Behan to be a very straightforward and credible witness. I accept his evidence that the majority of the purchase price for Agri consisted of a payment

for the goodwill of the business. In these circumstances I find Mr Behan was prepared to pay the deferred consideration in an attempt to protect the payment the plaintiff had made for goodwill by retaining the defendant in its employment and thereby protect the company from competition, which would likely have ensued after a period of 2 years if the defendant had left its employment. I further accept his evidence that he was never asked to and never agreed to release the defendant from the restrictive covenant in the APA and or the agreements in the service agreement. I make this finding because the defendant in the email exchange never asked to be released from the covenants and the only reference in the emails to "no consideration" related to the earn-out or deferred consideration and did not refer to the restrictive covenant in the APA or the conditions in the Service Agreement. This appears most strikingly in the email dated 14 February 2008 which was sent by the defendant, which states in unambiguous terms:- "no conditions attached to this earn-out". I am therefore satisfied that the restrictive covenant and the covenants in the Service Agreement were not released and that no new agreement was entered into by way of the email exchange which superseded or waived the restrictive covenant or the covenants contained in the Service Agreement. Accordingly I find that the defendant was not released from the restrictive covenant or the other covenants contained in the Service Agreement.

**Mr Arnold**

[53] Mr Arnold is employed by the plaintiff as a lorry driver. He recounted to the court a conversation he had with two former employees of the plaintiff who advised him that the defendant had opened up another company which was competing with the plaintiff and that he was doing very well.

[54] I accept Mr Arnold's evidence but I give no weight to what consisted essentially of gossip by two former employees who at the time of this conversation were in direct competition with the plaintiff.

**John Condon**

[55] Mr Condon is a private investigator employed by Collingwood de Caunteton. He was instructed by the plaintiff to carry out an investigation into the activities of GreaseCo and any links the defendant might have to it. Mr Condon prepared two reports dated 15 August 2011 and 5 September 2011. The central findings in his two reports were as follows:-

- GreaseCo operated in the UCOs collection market.
- At least one of its customers was a former customer of the plaintiff.
- It operated from premises at Unit C6 Edenderry Industrial Estate, Belfast. Drums of oil/fat were brought to the premises, stored on the premises and

later vehicles came to the premises and transported the UCOs to a facility in Lancaster, England.

- The defendant was the tenant of Unit C6 and had been since December 2010. He paid the rental for the premises.

- Recycled barrels from Mulrines were present at the premises.

[56] The defendant did not challenge this witness's evidence. I therefore find that there is no reason to doubt the independence, professionalism and accuracy of the evidence which he gave to the court. Accordingly I find that GreaseCo operated from premises at unit C6 in Edenderry Industrial Estate. I further find that the defendant was the tenant of these premises from in or around December 2010 and at the time of this witness's investigation was responsible for payment of the rent. I further find that recycled barrels from Mulrines were present at the premises.

**Mr Tony Nicholl**

[57] Mr Nicholl is a partner in Goldblatt McGuigan, Forensic Accountants. He prepared a report dated 21 December 2017 and an addendum report dated 27 September 2019 setting out his calculation of the loss sustained by the plaintiff by reason of competition by GreaseCo.

[58] Mr Nicholl calculated the average amount of UCOs collected each month by the plaintiff prior to October 2010. He then calculated the "shortfall" each month thereafter by deducting from this average figure the actual amount of UCOs collected each month. He then multiplied the "shortfall" by the selling price and after deducting a figure for rebate and shipping costs, he calculated the lost profit figure for each month.

[59] In relation to the period of loss Mr Nicholl provided calculations for 2 different periods of time. Option 1 calculated loss from November 2010 until 25 March 2012. November 2010 was the date Mr Nicholl considered to be when loss commenced because this was the date when the plaintiff's collection on UCOs dropped off significantly. The date of 25 March 2012 is the end date of the 2 year period following the termination of the defendant's employment with Agri, which was in March 2010. The total loss of profits for this period amounted to £310,252. In addition to past loss of profits Mr Nicholl includes additional costs. These relate to the costs of employment of an additional employee. The total cost for this amounts to £28,355. When interest is added the total loss is £505,674.

[60] Option 2 calculates loss from the period November 2010 until 25 September 2012 on the basis that, if the defendant had abided by the 2 year restrictive covenant he would not have been able to set up in competition until 25 March 2012 and for a period of time after this it would have taken the defendant time to make inroads into the plaintiff's business and therefore a claim is made on a diminishing basis from

April 2012 until 25 September 2012. Under Option 2 the total loss profits is calculated as amounting to £395,813. Additional costs for employment of another employee is calculated at £45,296 and when interest is added the total loss is £569,944.

[61] Under cross-examination Mr Nicholl accepted that he had not received any weekly sheets or other records from the plaintiff detailing the actual number of customers who had migrated to GreaseCo over the relevant period. He accepted that such documentation would have enabled him to accurately calculate the actual loss.

[62] Mr Nicholl's calculation of lost profits is based on the instructions provided to him by the plaintiff. I consider that some of these instructions were incorrect and accordingly this has a bearing on Mr Nicholl's calculations. First he was advised by the plaintiff that 100% of the reduction UCOs collected by the plaintiff was due to competition by GreaseCo and he calculated loss on this basis. I am satisfied however that the reduction was not solely due to competition by GreaseCo. In particular I have found that part of the reason for the reduction in UCOs being sent to England was because some UCOs were now processed by the plaintiff at their own processing plant in Strabane. Indeed this was accepted by Mr McCay in his evidence. Further, I am satisfied that there were a number of other competitors in the UCOs collection market. Accordingly I am satisfied that some of the reduction in UCOs collected by the plaintiff was due to competition by companies other than GreaseCo. Accordingly, as Mr Nicholl made no allowance for these factors I cannot and do not accept the figures calculated by him for lost profit sustained by the plaintiff.

[63] Secondly in calculating lost profit Mr Nicholl only deducted from the figures for gross loss, a sum for rebate and shipping costs. Before one could arrive at a proper calculation of net lost profit, I consider that a number of other expenses ought to have been deducted from the gross loss figures, including for example staff costs, transport costs etc. No explanation was given why such expenses were not deducted from the gross figure.

[64] Thirdly, Mr Nicholl's calculations were based on average figures. No reason was given why the plaintiff had not simply produced its accounts to demonstrate lost profitability in the relevant period. I found this surprising as such accounts would have been of assistance in not only calculating lost profits but would also have established that the plaintiff did in deed sustain loss in the relevant period. Accordingly I draw an adverse inference from the failure to produce accounts.

[65] In relation to the period of loss I am satisfied that the period must end on the date on which injunctive relief was granted namely October 2011. There was no finding of contempt of the injunction since that date and therefore I am satisfied that the defendant was not competing with the plaintiff during this period and therefore any loss sustained by the plaintiff ended in October 2011. In relation to the period when loss commenced I find that GreaseCo was set up in or around October/November 2010. Mr Nicholl in his evidence accepted that any fledgling

company needed time to make in-roads into the plaintiff's business. I therefore consider that GreaseCo could not have made in-roads into the plaintiff's business for at least a few months. Indeed when the figures for UCOs collected by the plaintiff are analysed there was no real reduction in UCOs collected until March/April 2011. I therefore consider that the appropriate period of loss is from April 2011 through to October 2011 i.e. a period of some 7 months.

**The Defendant's evidence.**

[66] Mr Gilroy swore an affidavit on 2 December 2016 and also gave oral evidence. He stated that he was employed by RoF. After it was sold to Agri he was employed by Agri as a manager based at its Craigavon depot. After Agri was sold to the Plaintiff he then commenced employment with the plaintiff. He stated that he was very experienced in waste fats and oils business and had worked in this industry for many years.

[67] The defendant recalled signing the APA and stated he had received independent legal advice before he signed it. He denied however that he signed the Service Agreement. He stated that the performance targets set out in the APA were not met because Agri was not running the business properly. As a result he met Mr Behan and threatened to leave the company if the deferred consideration was not paid. This led to the email exchange between himself and Mr Behan. The defendant stated that it was his view that as a result of this email exchange the restrictive covenant was waived and he was therefore no longer bound by it.

[68] In respect of GreaseCo he accepted that he had helped his wife to set up this company. He further accepted that he had rented unit C6 at Edenderry Industrial Estate but he stated that he was using the premises to carry out experimental work with food traps. When his wife and son had set up GreaseCo he then permitted them to use the unit of which he was a tenant.

[69] The defendant recalled attending the disciplinary meetings. He stated that he did not tell the truth at these meetings in relation to GreaseCo because it was his view that it was "none of their business what I was doing with cooking oil".

[70] He advised the court that he was not the owner of GreaseCo and stated that the plaintiff had no evidence to prove he was. He stated that the drums located in unit C6 were not provided by Mulrines.

[71] Under cross-examination he denied he owned and operated RoF. He accepted however that he helped set up GreaseCo and had advised his wife and son where to get customers. He further accepted that he allowed GreaseCo to operate from the unit which he rented. He accepted that he lied at the disciplinary meeting when he said that he knew nothing about GreaseCo and further accepted he lied when he said at the disciplinary meeting that he had not leased the unit at Edenderry.

[72] In relation to the quote sent by Drumack to him at the Craigavon depot he said that it was sent in error. Later in his evidence he said that this quotation related to work that he did for Cork Oils.

[73] During his evidence the defendant stated emphatically that he was never bound by any covenant in the APA and that from its inception he had ignored it and worked in breach of it.

[74] In relation to the Service Agreement he denied that he had ever signed this.

[75] I found the defendant's evidence to be vague, evasive, unclear and confusing in many respects. In the course of his evidence however he made a number of significant concessions. In particular he accepted that he helped his wife set up GreaseCo; that he permitted GreaseCo to use unit C6 at Edenderry; that he was the tenant of this unit and that he had breached the restrictive covenant throughout the time he was employed by the plaintiff.

[76] I further find that his explanations regarding the Drumack quotation being sent to him at the Craigavon depot to be incredible. I find that the reason the invoice was sent to the defendant was because he was actively involved in getting lorries converted to enable them to collect UCOs. I am satisfied that he had requested Drumack to prepare a quote in respect of alterations to vehicles owned by GreaseCo. I am therefore satisfied that Drumack sent the quotation to him because he was involved in the business of GreaseCo.

[77] I further find that his evidence in relation to the use of unit C6 regarding a grease trap was completely unconvincing. I find that the reality is that he was under pressure to explain the findings of the private investigator that he was the tenant of these premises. I therefore find that he came up with this completely implausible explanation. I am satisfied that unit C6 was rented by the defendant; that he pays the rent and that the unit is used by GreaseCo and that the defendant is therefore in breach of the restrictive covenant as he is the owner and operator of GreaseCo.

[78] I further find that the barrels found at unit C6 were barrels that previously contained orange concentrate and I find that these were barrels came from Mulrines. I accept that they exclusively provided barrels to the plaintiff and accordingly I find that these barrels situate at unit C6 belonged to the plaintiff.

[79] In addition I find that the defendant did sign the Service Agreement. He conceded this in his affidavit sworn on 21 October 2011 at paragraph 24(i) when he stated:-

> "With regard to paragraph 38 I do accept that I signed a service agreement although I do not think it was exactly

the same as the one exhibited in draft form as I believe the statement of hours was different".

[80] During the hearing the defendant then produced a signed Service Agreement and I am satisfied that this is the agreement he signed. This Service Agreement contained the relevant restrictive clauses set out above.

[81] I further find on the basis of his own admissions that the defendant frequently and flagrantly breached the restrictive covenant and the covenants in the Service Agreement. In his evidence he admitted that he worked with Cork Oils and Arrow Oils and he stated that he was entitled to act in this way knowing it was in breach of the restrictive covenant and in breach of the Service Agreement.

[82] I am therefore satisfied on the basis of the defendant's own evidence that he was acting in breach of his contract of employment; in breach of the Service Agreement and in breach of the restrictive covenant.

**Consideration**

**Question 1 – Did the defendant act in breach of the restrictive covenant and/or the covenants in the Service Agreement and/or in breach of his contract of employment?**

[83] No evidence was given by Mrs Gilroy or the defendant's son and no reason was adduced to the court for their failure to give evidence. As a result the plaintiff was unable to cross examine them. I am satisfied that they had relevant evidence to give about the ownership of GreaseCo and accordingly I draw an adverse inference from their failure to give evidence. Based on all the evidence, but particularly the evidence of Mr Condon and the defendant I have found that –

- GreaseCo operated in UCOs and collected UCOs from some of the plaintiff's customers.

- The defendant, on his own admission assisted his wife in setting up GreaseCo.

- The defendant rented unit C6 and GreaseCo operated its business from these premises.

- The defendant asked Drumack to provide a quotation to him for altering lorries which were to be used by GreaseCo.

- The defendant admitted that he had frequently breached the restrictive covenant in the APA throughout his period of employment with the plaintiff.

- Mulrines' barrels were present at unit C6 and I have found that these barrels were provided exclusively to the plaintiff and therefore I am satisfied that these barrels were present at unit C6 because the defendant collected UCOs from the plaintiff's customers.

[84] I have further found that the defendant entered into the APA and by reason of Clause 12.8 he agreed not to compete with the plaintiff during his employment and for a period of 2 years from the date of termination of his employment. I have further found that he signed the Service Agreement. This required him, *inter alia* not to carry on or be interested in any other trade and for a period of 1 year from termination not to compete or entice away the plaintiff's customers. In addition I am satisfied that at common law a number of terms were implied into the defendant's contract of employment including a duty to act in good faith and not place himself in a position in which his acts conflicted with those of his employer together with a duty to avoid competing with his employer during his period of employment so as to harm his employer's business.

[85] In light of my findings of fact I am satisfied the defendant acted in breach of Clause 12.8 of the APA and in breach of its duties under the Service Agreement and in breach of the implied terms of his employment.

**Question 2 – Was the restrictive covenant in the APA assigned by Agri to the plaintiff?**

[86] Although the defendant made this case in his earlier affidavits he did not pursue this at the trial and accordingly the issue was not the subject of submissions. In any event I am satisfied that the restrictive covenant was not personal in nature and Clause 2.11 of the BSA effected an assignment of the benefit of all rights and claims enjoyed by Agri to the plaintiff. This included the restrictive covenant and accordingly I am satisfied that the benefit of the restrictive covenant was assigned by Agri to the plaintiff and the plaintiff is entitled to the benefit of it and to sue on it.

**Question 3 – Was the restrictive covenant in the APA and or the covenants in the Service Agreement superseded, waived or released by the email exchange between the defendant and Mr Behan?**

[87] I have found as a matter of fact that the defendant never asked Mr Behan to remove the restrictive covenant in the APA and Mr Behan never indicated his consent to such a removal, release or waiver.

[88] I further find that on any proper construction of the emails taken individually and collectively that there was no agreement reached that the restrictive covenant or the covenants in the Service Agreement would be released or waived. The reference to "no conditions" in the email exchange specifically relates to the "earn-out" or deferred payment as confirmed in the defendant's own email. In addition I find that any other interpretation flies in the face of the plain meaning of the words used.

Further it is contrary to the understanding of Mr Behan, whose evidence I accept. I am satisfied that the interpretation suggested by the defendant would make no sense in circumstances where he was threatening to leave the plaintiff's employment. Why would the plaintiff in circumstances where it had paid a large sum for the purchase of the goodwill of Agri, release the restrictive covenant in circumstances where the defendant was threatening to leave as this would mean he could immediately compete with them?

[89] Accordingly I am satisfied that the restrictive covenant in the APA was not waived, released or removed as submitted by the defendant.

**Question 4 – Is the restrictive covenant unreasonably in restraint of trade as it is not necessary to protect the plaintiff's legitimate interest?**

[90] Although the defendant raised this matter in his affidavits it was not pursued by him at trial and accordingly I heard no submissions on the point. I am satisfied however on the basis of the evidence that the goodwill of the business represented a major part of the purchase price as this business held assets of minimal worth. I am further satisfied when the defendant entered into the APA that he and his wife had independent legal advice and each party was therefore satisfied subjectively that the covenant was reasonable. Given that this covenant was contained in a transfer of a business and given that the parties entered into the agreement at arm's length I am satisfied that the covenant was reasonable in all the circumstances to protect a legitimate interest namely the goodwill of the business. Accordingly I do not find that it was in unreasonable restraint of trade. The term of 2 years was standard in the business.

**Question 5 – What damage has the plaintiff sustained?**

[91] On the evidence I find that the period of loss was the period between April and October 2011. The starting date reflects the date when I consider GreaseCo started to make in-roads into the plaintiff's business and the end date is the date when the injunction was granted. Since that date I am satisfied that the defendant has not breached the injunction and therefore has not been acting in competition with the plaintiff. If he had been it would have been open to the plaintiff to bring contempt proceedings. No such proceedings have been brought.

[92] Secondly I have found that the loss of profits set out in Mr Nicholl's report is over-inflated as it fails to have regard to the fact some UCOs were sent to the plaintiff's Strabane plant for repossessing and this partly explains the reduction in UCOs shipped to England. Further I am satisfied that part of the reduction was due to competition by other competitors. I consider that there were a number of other big competitors in the market including two previous employees and Biogen who were all considered a threat to the plaintiff's business as appears from the sales meeting minute. It is difficult to be definitive how many customers migrated to GreaseCo but applying a broad brush I consider that in or around 40% of the

plaintiff's customers would have migrated to GreaseCo and the other 60% migrated to other competitors.

[93] I further consider that Mr Nicholl's method of calculating lost profits is flawed as it does not deduct a number of expenses which ought to be deducted including staff costs. Applying a broad brush I consider that the monthly figure for lost profits calculated by Mr Nicholl should be reduced by 25% to reflect other expenses.

[94] I do not consider it appropriate to include a cost for employing a new employee especially as the defendant was no longer employed the plaintiff and therefore the plaintiff was not liable for his wages.

[94] Taking Mr Nicholl's monthly calculations for lost profit for the months from April to October 2011, I find that there was a total loss of £136,184. I consider that 25% should be deducted from this figure to reflect additional expenses. This produces a figure for lost profit of £102,138. I consider that 40% of this loss was due to competition by GreaseCo and therefore the loss sustained by the plaintiff due to the defendant's breach is £40,855.

[95] I further consider that the plaintiff is entitled to interest at a rate of 3% from the date of the issue of the writ. I therefore ask the plaintiff to provide the correct figure in respect of interest which should then be added to the principal damage figure of £40,855.

**Conclusion**

[96] I find for the plaintiff and make an order that the defendant do pay the plaintiff the sum of £40,855 and interest thereon at a rate of 3% from the date of the issue of the writ.

[97] I will hear the parties in respect of costs.