[2013] JMCC Comm. 12

**JUDGMENT**

**IN THE SUPREME COURT OF JUDICATURE**

**COMMERCIAL DIVISION**

**CLAIM NO. 2011 CD 00029**

| | | |
|---|---|---|
| **BETWEEN** | **ALLIED PROTECTION LIMITED** | **CLAIMANT** |
| **AND** | **JOHN BARNES** | **DEFENDANT** |

**CONSOLIDATED WITH**

**CIVIL DIVISION**

**CLAIM NO. 2011 HCV 07746**

| | | |
|---|---|---|
| **BETWEEN** | **JOHN BARNES** | **CLAIMANT** |
| **AND** | **DONALD WILLIAMS** | **DEFENDANT** |

**Mrs. Symone Mayhew, Attorney-at-Law for the Claimant Allied and the Defendant Donald Williams.**

**Mr. Bert Samuels and Ms. Roxanne Mars instructed by Knight, Junor, Samuels, Attorneys-at-Law for John Barnes.**

**IN OPEN COURT**

**HEARD: 6th, 7th, 8th February and 23rd July 2013.**

**CONTRACT LAW - RESTRAINT OF TRADE COVENANT - WHETHER EXPRESS AGREEMENT/COVENANT BY FORMER MANAGING DIRECTOR AND SHAREHOLDER NOT TO SOLICIT CLIENTS - WHETHER TERM TO BE IMPLIED - CONSTITUENTS OF SOLICITING - NEED TO PROVE DIRECT AND TARGETED BEHAVIOUR ON PART OF COVENANTOR - ENCASHING CHEQUE WHETHER PROOF OF ACCEPTANCE OF TERMS OF LETTER**

**Mangatal J:**

[1]` This proceeding is a consolidation of two claims, Claim No. 2011CD00029 and Claim. No.2011HCV07746. It involves persons engaged in the security services industry and unfortunately, represents a contest and falling out between persons who had for decades been close friends and colleagues.

[2] Allied Protection Limited ("Allied") is a limited liability company incorporated under the laws of Jamaica. The company is in the business of providing security service to individuals and companies throughout the island. Mr. John Barnes is a former shareholder and former Managing Director of Allied. Mr. Donald Williams is the Chairman and the majority shareholder of Allied.

**Allied's Claim**

[3] The first claim surrounds an alleged breach of a separation agreement which Allied claims to have been entered into between itself and Mr. Barnes. By letter dated January 6 2011, Mr. Barnes tendered his resignation from his position as Managing Director of Allied effective March 31st 2011. Mr. Barnes first became associated with Allied's predecessor Allied Protection Systems and Services Limited as a shareholder, Director and General Manager in or about 1991. Mr. Williams and Mr. Barnes had however met each other and worked together many years before that. Mr. Barnes had 20% of the shares in the predecessor company. Mr. Williams and Mr. Barnes were close friends for many years and so too were their immediate families. That company merged with United Protection Limited in or about 2002 and the merged entity became Allied. Mr Barnes was made Managing Director and by agreement his share ownership in the new entity Allied was 9 %. This shareholding percentage was described by Mr. Barnes in his witness statement as being essentially proportionate to his 20% shareholding in the predecessor company. Allied avers that in his resignation letter, Mr. Barnes offered to sell his shares in Allied. Allied further states, that Mr. Williams on behalf of Allied, negotiated the purchase of Mr. Barnes' shares. In its Amended Particulars of Claim, Allied claims that the parties negotiated and agreed a separation agreement with the following terms:

a. ***The purchase of Mr. Barnes's shareholding by Allied for the sum of $10,000,000.00***

b. ***The withholding of the sum of $ 2 Million from the $10,000,000.00 aforesaid as a protection from loss of accounts over the 12 months following the Defendant's resignation, which if payable would be paid in increments of $ 500,000.00.***

c. ***The payment of $ 2 million as gratuity.***

d. ***A payment of $ 5 million to facilitate the transfer of firearm licences from the Defendant to another director of the Claimant.***

[4] Allied further asserts that in consideration of the foregoing terms, Mr. Barnes agreed not to solicit or attempt to obtain any of the company's contracts by direct or indirect approach within the period of twelve months from April 1, 2011 to May 1, 2012. According to Allied, a letter dated March 14, 2011 written on its behalf by Mr. Williams is evidence of the terms of the separation agreement agreed between the parties. In any event, it was Allied's case that it was an implied term of the agreement for the sale of Mr. Barnes shares that he would not do anything to undermine the value of the shares or the Claimant's business for a reasonable period following the sale of the shares.

[5] In its pleadings Allied claims that it made the aforesaid payments as agreed between the parties and that the payments were accepted by Mr. Barnes without reservation or protest.

[6] According to Allied, after Mr. Barnes demitted office on March 31, 2011, he became employed with another security company Securi Pro Limited, which in Allied's estimation is its direct competitor. Mr. Barnes' brother Winston Barnes is the principal of Securi Pro.

[7] Allied contends that Mr. Barnes breached the agreement between himself and the company as he was taking direct and indirect steps to solicit Allied's clients for Securi Pro within days of his separation from it. The particulars of breach which Mr. Barnes was allegedly guilty of are:

***e. Directly attending on clients of Allied to solicit their business and/or to encourage them to terminate their agreements with Allied and to enter into contracts/arrangements for private security services with Securi Pro;***

***f. Encouraging and soliciting security guards and other personnel attached to Allied to separate from Allied and to enter into contracts for services with Securi Pro which Mr. Barnes knows is likely to have a direct effect on the Claimant's contracts with the clients to whom the guards are presently assigned.***

[8] Allied in its Amended Particulars of Claim contends that it was as a result of Mr. Barnes' breach that it has issued this claim and that Allied has suffered damage since over the period April 1, 2011 to March 31, 2012, Allied lost several contracts to Securipro Limited, the annual value of which is $31,745,558.96. Allied claims:

a. A declaration that the Defendant is in breach of terms of the separation agreement with the Claimant.

b. Damages for breach of contract.

c. Interest on damages pursuant to the Law Reform (Miscellaneous Provisions Act).

d. Costs.

e. Further or other relief.

As it turns out, at the trial, Allied abandoned its special damages claim in the sum of $31,745,558.96 as Mrs. Mayhew, Counsel for Allied after questions from the Court, and objections from Mr. Samuels, properly conceded that it was not able to meet the evidential requirements with regards to proof of this aspect of the claim. The claim is now therefore for general damages. It was argued by Mrs. Mayhew that this would not be limited to the $2,000,000.00 withheld, as this sum did not represent liquidated damages.

**Mr. Barnes' Defence**

[9] In an Amended Defence filed on behalf of Mr. Barnes, dated June 06, 2012, it was denied by Mr Barnes that there was ever any separation agreement between himself and Allied. Mr. Barnes avers that the only agreement was that made by Mr. Williams and himself for the purchase of his shares, and there was no agreement between himself and Allied. The agreement for the purchase of his shares he contends was an oral agreement. He did admit that the parties, i.e. himself and Mr. Williams, agreed to a purchase price of $ 10,000,000.00 for the shares, but denies agreeing to any terms to govern the sale. It is Mr. Barnes' position that he did not agree not to solicit any clients of Allied. Nor did he agree to the withholding of the sum of $2,000,000.00 in the event of any significant loss of contracts/loss of accounts. Mr. Barnes dismissed the March 14th letter as being evidence of any agreement and regarded it as a unilateral decision by Mr. Barnes to not pay him $ 2,000,000.00. Indeed, in his amended Defence, that letter is described as being a sham. Mr. Barnes also in any event denies Allied's assertion that he solicited business from its customers or that he encouraged them to terminate their agreements. He also denies that he encouraged or solicited Allied's guards to leave and to offer their services to Securi Pro.

**Mr. Barnes' Claim**

[10] Subsequent to the filing of the Claim by Allied, Mr. Barnes by way of a Claim Form filed December 8th, 2011 brought his own claim against Mr. Williams to recover the sum of $ 2,000,000, the alleged shortfall in the price of the shares. Mr. Barnes is also seeking damages for breach of contract and interest at a commercial rate.

[11] In this suit, Mr. Barnes repeated his assertion that he and Mr. Williams orally agreed on January 7, 2011 to enter into an agreement for the sale of his shares for $ 10,000,000.00. In furtherance of this agreement, he transferred the shares to Mr. Williams' Daughter, Tamika Williams on or about February/ March 2011. Mr. Barnes avers that on March 14th, 2011 he received part payment for the cost of the shares by way of two cheques: one cheque for $7, 533,000.00 and a second cheque for $ 467,000.00 which totaled $8,000,000, leaving the balance of $2,000,000.00. Mr. Barnes claims that by letter dated April 4th, 2011, a written demand for payment of the

remaining balance of the purchase price of $2,000,000 was made of Mr. Williams. Mr. Barnes alleges that Mr. Williams did not satisfy the demand and continues to be in breach of the agreement.

**Mr. Williams' Defence**

[12] Mr. Donald Williams disputed the claim brought by Mr. Barnes on the same grounds on which Allied's rests its case. Mr. Williams contends that it was in his capacity as chairman of the company that he negotiated an agreement with Mr. Barnes for the company to purchase Mr. Barnes' shares for the sum of $10,000,000.00. He also avers that the payments totalling $8,000,000.00 were made by the company. Mr. Williams reiterated that the parties negotiated the retention of $2,000,000 from the purchase price, and that Mr. Barnes would not solicit or attempt to obtain any of the contracts held by Allied for a period of 12 months commencing April 1, 2011. Mr. Williams asserted that it would in any event have been an implied term of the agreement for the sale of shares, that Mr. Barnes would not solicit Allied's clients for a reasonable period after the sale of his shares. Mr. Williams denies receiving a written demand from Mr. Barnes for the $2,000,000, as it was his case that the demand was made of Tamika Williams.

**The Proceedings**

[13] The trial of both these claims took place between the 6th - 8th of February 2013. Mr. Rudolph Davis, a director and shareholder of Allied, Mr. Donald Williams and Mr. Hartman Fletcher were called by Allied to give evidence on its behalf. Mr. John Barnes gave evidence in relation to the consolidated claims. The parties had prior to the trial filed skeleton arguments and submitted a number of authorities. After all of the evidence was completed, I ordered that Allied and Mr. Donald Williams, file and serve written closing submissions and any further authorities to be relied upon by the 1st March 2013. Mr. Barnes was ordered to file closing submissions and authorities by the 8th March 2013. Mrs. Mayhew was then given until 15th March 2013 to file and serve a reply, if so advised, limited to the authorities and points of law raised by Mr. Samuels. These submissions and authorities were duly filed by Counsel and I wish to express my appreciation of the clarity and comprehensiveness of these submissions.

**Resolution of the Issues**

[14] One of the striking features of this case is that it highlights the consequences when parties decide to enter into negotiations without the benefit of legal advice. Now the parties find themselves having to resort to the Courts, which may perhaps have been averted if proper formal legal advice was sought. The following are the issues which now have to be resolved:

a. Who were the parties to the agreement to purchase Mr. Barnes' shares in Allied?

b. What were the terms of the agreement between the parties consequent on Mr. Barnes' separation from Allied? In particular,

    i. Was it expressly agreed that Mr. Barnes would not solicit the clients of Allied?

    ii. Did the letter of March 14, 2011 evidence the terms agreed between the relevant parties?

    iii. Was it expressly agreed that the sum of $2 million would be withheld from the price of the shares as protection from loss of contracts?

c. If there was an agreement/covenant not to solicit, is it enforceable?

d. In the absence of an express agreement/covenant not to solicit, was it an implied term of the agreement relating to the sale of his shares, that Mr. Barnes would not solicit the clients of Allied?

e. Whether any party breached any of the terms agreed?

f. If there was a breach, what if any remedy is available to the "innocent: party"?

**a. Who were the parties to the agreement to purchase Mr. Barnes' shares?**

[15] In Mr. Williams' witness statement he indicated that Mr. Barnes in his resignation letter dated January 6th, 2011, offered his shares in Allied for purchase to, him Mr. Williams as Chairman or anyone else who was interested. According to Mr. Williams, he entered into negotiations for the purchase of the shares on behalf of Allied. This would suggest that it was Allied that was actually purchasing the shares from Mr. Barnes. However, in my view, the evidence does not support the drawing of such a conclusion. It is undisputed that when Mr. Barnes was ready to transfer the shares, he was directed by Mr. Williams to transfer his shares to Tamika Williams, the daughter of Mr. Williams. Neither Mr. Williams nor Mr. Barnes gave any evidence that Tamika Williams was to be a nominee for the Company and that she was holding the shares on account of that. Nor was this indicated on the share transfer form. Mr. Barnes in his witness statement said that the sum of $8,000,000 was paid via a personal cheque drawn on the personal account of Karen and Donald Williams and a manager's cheque. Mrs. Mayhew in her cross-examination of Mr. Barnes seems to be suggesting that perhaps this amount was a loan to Allied, as the purchase of Mr. Barnes shares would have arisen after Allied would have made its budget. Mr. Barnes however dismissed this suggestion. I am not satisfied that the $8 Million represents a loan to the company. There is no reference to it being so in the pleadings of Allied or of Mr. Williams, nor in Mr. Williams' witness statement. One would have expected such matters to have been expressly pleaded and or stated as part of the facts relied upon by Allied and Mr. Williams.

[16] For Allied to have resolved and authorized Mr. Williams to act on its behalf in the purchase of its shares from Mr. Barnes, there would have to have been some kind of decision taken by the Board of Directors to do so. There was no reference to such authority given by the Board in either Mr. Williams' or Mr. Rudolph Davis' respective witness statements.

[17] Section 58(4) of the Companies Act 2004 provides that where a Company wishes to make payments for the purchase of its own shares, the Directors of the company must file a statutory declaration setting out certain information. Section 60 of the Companies Act also requires notice of the Company's purchase of its own shares to

be sent to shareholders. There was also no evidence that Mr. Barnes shares were non-assignable or that the company was obliged to purchase Mr. Barnes' shares as dealt with in section 59 of the Companies Act. Neither a declaration from the directors nor a notice to the shareholder was tendered into evidence to validate or provide support for Mr. Williams' contention that he acted on behalf of the company in purchasing Mr. Barnes' shares.

[18] On a balance of probabilities, the evidence in my judgment suggests that Mr. Williams and Mr. Barnes entered into an agreement to purchase the shares of Mr. Barnes. This was a private contract between the two men and not one that was made or negotiated by Mr. Williams on behalf of Allied. Even though in Allied's pleadings, it was being asserted that there was a separation agreement that was concluded between the parties, if there was any separation agreement between Allied and Mr. Barnes, that would have been an entirely different matter from the agreement between Mr. Williams and Mr. Barnes' to purchase Mr. Barnes' shares.

**b.(i) What were the terms of the agreement between the parties consequent on Mr. Barnes' separation from Allied? Was it expressly agreed that Mr. Barnes would not solicit the clients of Allied? Did Mr. Williams and Mr. Barnes agree to any term regarding the purchase of Mr. Barnes' shares?**

[19] It is Mr. Barnes' case that he and Mr. Williams agreed to a purchase of his shares without any conditions or terms. It is also Mr. Barnes' case that there was no separation agreement between himself and Allied. Mr. Williams in his witness statement indicated that he was concerned that after Mr. Barnes left he would immediately begin to solicit Allied's clients or compete directly with Allied. Mr. Williams said that this was of particular concern to him, in light of Mr. Barnes offering his shares for sale. He further stated that if Mr. Barnes was allowed to solicit Allied's clients, it would be tantamount to him selling one thing today and taking it back the next day, which in his view would be unfair. In purchasing the shares, Mr.Williams claims that he wanted to make sure that the value of the shares was maintained and that nothing

would be done by Mr. Barnes to affect this. According to Mr. Williams' *viva voce* evidence, "***it is the practise of the industry and everywhere else that when you sell a product to someone, you expect to benefit before that person can reclaim it***."

[20] The issue of the non-solicitation of Allied's clients was a very important issue, according to Mr. Williams. At paragraph 21 of his Witness Statement Mr. Williams in his evidence stated that he was concerned that after leaving Allied, Mr. Barnes would solicit Allied's clients, given that he had a senior position in Allied and was a shareholder. Further, that Mr. Barnes was well acquainted with Allied's customers and trade connections. Mr. Williams continues that "I expressed my concern to him openly and he advised that he was not going into the security industry because he was tired of it and needed a break so I need not worry." Mr. Williams in cross-examination said that Mr. Barnes repeated these same sentiments at the farewell function that was held for him. Mr. Williams conceded to Counsel that he did not mention this in his witness statement although it could be a big part of his case that Mr. Barnes said he would be taking a break from the security business. Then Mr. Williams also claimed that when Mr. Barnes went to work with Securi Pro that would also be in breach of what they had verbally agreed, although he did not mention this in the March 14 letter. Mr. Davis, a Director and shareholder in Allied also in his witness statement and cross-examination stated that Mr. Barnes told him during a discussion after his resignation that he would be taking a three month break after he left Allied and that he did not intend to go back into the security industry.

[21] I found Mr. Hartman Fletcher to be a credible and forthright witness. He is a Zone Manager employed to Allied. He told the Court that he felt very uncomfortable being in Court given his relationship with Mr. Williams and Mr. Barnes. He met Mr. Williams from as far back as 1969 when he joined the army, in his words, "at the age of 18 years old. Mr. Williams was my instructor so he helped to develop who I am today, and of course he is my employer for the past fourteen years plus". He stated that he met Mr. Barnes when he joined Allied in 1998 and both of them and their respective families are close friends. His evidence was that Mr. Barnes told him that after leaving Allied, he would take some time off, take some rest and evaluate the situation before he made

any decision on what he was going to do. He also stated that Mr. Barnes repeated these intentions as to his future activities at a farewell function that Mr. Fletcher attended.

[22] Mr. Barnes however, on being cross-examined, indicated that he did not tell the audience at the function that he was not going back into the security industry, but told them only that he was going to take a break.

[23] In the recent decision of Brown Q.C., sitting as a deputy judge of the English Queen's Bench Division, **Baldwins( Ashby) Ltd. v. Maidstone** [2011] EWHC B12, cited by Mrs. Mayhew, the court had to consider, as I do in the present case, the issues of credibility, truthfulness and bona fides in order to resolve some of the main issues joined. At paragraph 45, the learned judge made observations which I have found useful. He stated:

> ***45. Where does the truth lie here as to the Defendant's intentions? Where there are discrepancies between witness evidence and between it and contemporaneous documentation, courts follow the classic guidance provided in the dissenting speech of Lord Pearce in the House of Lords in Onassis v. Vergottis [1968] 2 Lloyds 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 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 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. [emphasis added] 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.***

[24] I believe that Mr. Barnes did indicate to all the witnesses called on behalf of Allied that he would be taking a break. Whether or not he expressly said that he would not be going back into the security industry for some period, there was a clear implication that he was taking a break from the security industry. But I do not find that there was anything which Mr. Barnes stated from which it could have reasonably been understood that Mr. Barnes break was intended to be for an indefinite period of time. I also find that Mr. Barnes' motivation in telling Mr. Williams that he was going to take a break may well have been to quell any fears that Mr. Williams had regarding him soliciting the clients of Allied or in any way competing with Allied for business. It is my view that the issue of non-solicitation of Allied's clients was a very important issue to Mr. Williams, so the fact of Mr. Barnes saying he would be taking a break, was not just informative information and cannot be seen in isolation or without context. I find as a fact that Mr. Williams and Mr. Barnes did discuss the subject of what were Mr. Barnes' plans after leaving Allied and that it was orally agreed that Mr. Barnes would not solicit any of Allied's clients. It is my view that Mr. Williams was initially lulled, for want of a better term, into complacency, and in keeping with the long standing friendship and relationship of trust between the men, he did not ensure that there was any express written agreement between them. However, I am of the view and find as a fact that he

did secure Mr. Barnes' oral agreement or assurance that he would not solicit or attempt to obtain any of Allied's contracts for the period of 12 months from April 1 2011 to May 1 2012. There was however no agreement that Mr. Barnes would not during that period return to work in the security industry.

**b. (ii) Did the letter of March 14 2011 evidence the agreement between the parties? Was it expressly agreed that the sum of $2 million would be withheld from the price of the shares as protection from loss of contracts?**

[25] Part of Allied's and Mr. Williams' case rest on a March 14th letter, which according to them, is evidence of the terms of the separation agreement entered into between Allied and Mr. Barnes. The letter reads as follows:

> ***March 14, 2011***
>
> ***John Barnes***
> ***Managing Director***
> ***Allied Protection Limited***
> ***West Ivy Crescent***
> ***Kingston 5***
>
> ***Dear John,***
> ***This confirms with regret, the acceptance of your resignation from the company as of March 31.***
> ***Also, your expression of offer to the Shareholders the purchasing of your shares. We agreed that your shares would be sold to Tamika Williams at a cost of Ten Million Dollars ($10,000,000.00).***
>
| | | |
|---|---|---|
| ***Transaction Cost*** | | |
| ***Transfer Tax 4%*** | ***=*** | ***$400,000.00*** |
| ***Stamp Duty ½ %*** | ***=*** | ***$ 50,000.00*** |
| ***Accounting fees*** | ***=*** | ***$ 17,000.00*** |
| ***Total*** | | ***$467,000.00*** |

***Balance Nine Million, Five Hundred and Thirty Three*** *(Thousand)* ***Dollars ($9,533,000.00).***

***In addition, Two Million Dollars ($2,000,000.00) of the sum involved will be held in abeyance as protection to the company from loss of account over the next twelve (12) months. If there is no significant loss of contracts, the sum will be paid to you in increments of Five Hundred Thousand Dollars ($500,000.00) as follows:***
***June 30, 2011***
***September 30, 2011***
***December 30, 2011***
***March 31, 2012***

***You also resolve not to solicit or attempt to obtain any of the company's contracts by direct or indirect approach within the period of twelve (12) months from April 1, 2011 to May 1, 2012.***

***Enclosed are two (2) cheques totalling Seven Million Five Hundred and Thirty Three [thousand] Dollars ($ 7, 533, 000.00) to satisfy the subject matter.***

***Yours Sincerely,***
***Allied Protection Limited***
***Donald Williams***
***Chairman***

***Encl.***
***Copy: Mrs. Gloria Williams***

[26] This letter was delivered by Mr. Williams on the same date to Mr. Barnes. It is curious that this letter came some weeks after Mr. Barnes tendered his resignation.

Now, in Allied's pleadings in its Amended Particulars of Claim, it alleges several things that were negotiated and agreed on between the parties. These include:

a. The purchase of Mr. Barnes' shareholding by Allied for the sum of $10,000,000.00
b. The withholding of the sum of $2 Million from the $10,000,000.00 aforesaid as a protection of loss of accounts over the 12 months following Mr. Barnes resignation which if payable would be paid in increments of $500,000.
c. The payment of $2 million as gratuity
d. A payment of $5 million to facilitate the transfer of firearm licenses from Mr. Barnes to another director of the Claimant
e. That Mr. Barnes agreed with Allied not to solicit or attempt to obtain any of the Company's contracts by direct or indirect approach within the period of twelve months from April 1, 2011 to May 1, 2012.

[27] It will be noticed that this letter did not deal with some of the terms that were allegedly negotiated and agreed. The letter also speaks to the shares being "sold" to Tamika Williams, which differs fundamentally from what is pleaded by Mr. Williams and Allied. Secondly, when Counsel Mr. Samuels asked Mr. Williams, who represented "we" when he used "we agreed" in the letter, he said that meant Mr. Barnes and the rest of the Directors. Again this response is very porous as there is nothing in Mr. Williams' witness statement which supports this. There is nothing from the evidence which suggests that the other directors of the company were involved in any way with the purchase of the shares or agreed that the shares be transferred to Tamika Williams. It was strictly between Mr. Williams and Mr. Barnes. As a matter of fact when Mr. Davis, a director of Allied was asked whether he knew of Mr. Barnes having any agreement/contract not to solicit, his response was that "***I know of an agreement. I was not there when that agreement was made. But as Director I was made aware."*** This statement supports the conclusion reached earlier that the agreement for the purchase of the shares was really between Mr. Williams and Mr. Barnes and the

other directors were simply made aware of it. In my judgment, save for the aspect of the letter that speaks to non-solicitation, the letter of March 14 2011 does not evidence the agreement, or contain the terms of anything previously agreed orally between the parties in relation to Mr. Barnes' separation from Allied.

[28] When this letter was presented to Mr. Barnes, his evidence was that he immediately told Mr. Williams that he did not agree to the withholding of the $2 Million as that was not what he agreed to. He said that he did not respond to the letter but immediately contacted his Attorneys. In a letter dated April 4th, 2011 Mr. Barnes' Attorney made a demand for the $ 2 Million. The letter reads as follows:

> ***Allied Protection Limited***
> ***.....***
>
> ***Attention: Mr. Donald Williams***
>
> ***Dear Sirs,***
> ***Re: Sale of Shares in Allied Protection Limited***
> ***John Barnes to Tamika Williams***
> ***Kindly be advised that we represent John Barnes who has, upon resignation from your Company, entered into an agreement for the sale of his shares to Tamika Williams.***
>
> ***The sale price is confirmed at $ 10,000,000.00. It is now stands that there is a shortfall of $2, 000,000.00 left to be paid.***
>
> ***We write to demand payment within fourteen (14) days of the date hereto from Tamika Williams failing which, immediately upon the expiration of the period herein, we will be forced to file an action to recover the amount due to our client plus interest and legal costs.***
> ***We anticipate your early settlement.***

***Yours faithfully,***

***KNIGHT, JUNOR & SAMUELS***

***Per.....***

***Bert S. Samuels***

[29] Even though this letter makes no specific reference to the March 14 2011 letter, Mr. Barnes states that he had given that letter to his Attorneys and this April 4th letter was written pursuant to his instructions about the March letter. I note that the April 4 letter does not make any reference to the non-solicitation clause. I also note by contrast, that in his cross-examination, whilst Mr. Barnes was from the start vehement that he protested to Mr. Williams right away that he had no agreement about the withholding of the $2 Million (and he repeated this a number of times), I cannot trace where he specifically states that he told Mr. Williams that he had not agreed to any non-solicition of Allied's clients.

[30] As it relates to the retention of the $ 2 million from the purchase price, I do not believe that Mr. Barnes agreed to this or any portion of the purchase price being retained. From Mr. Williams' evidence, when the issue of the transfer of the firearms which were in the name of Mr. Barnes came up, Mr. Barnes was adamant that he would not transfer the firearms until he was paid the sum of $5 million. Further, that it was not until he was paid that amount that he did transfer the firearms. I do not believe that Mr. Barnes would have transferred the shares to Tamika Williams, if there was any prior attempt to deprive him of the full purchase price. Having seen him in the witness box, and assessed his demeanour, and against the entirety of the evidence, I cannot see him agreeing to that. When Mr. Williams presented the March 14th, 2011 letter to him that referred to the withholding of the $2 million, Mr. Barnes when cross-examined indicated that he immediately told Mr. Williams that he disagreed with that provision and demanded the remaining portion. This is consistent with Mr. Barnes evidence in his witness statement. This was clearly something new that was now being presented to Mr. Barnes. In an attempt to persuade Mr. Barnes to accept what in my view really amounts to an attempted variation of the original oral agreement, Mr. Williams made reference to the prior sale of Allied's sister company United Alarms to Hawkeye, where

a similar clause was inserted. Mr. Barnes in his evidence in cross-examination acknowledged that he was familiar with that sale and the particular clause, but he stated that at no time prior to that letter did he mention or discuss that transaction during the course of his negotiations for the sale of his shares. This appears credible, because based on Mr. Williams' evidence in his witness statement it was on the occasion of handing the March letter to Mr. Barnes that this situation of the former sale was raised, and not before.

[31] In my view the whole circumstances surrounding the March letter should be viewed cautiously, especially when one considers the period of time which had passed between Mr. Barnes' resignation and the time the letter was delivered to him. Mr. Williams did not write the letter immediately after the alleged agreement was arrived at. This would have been the time when the details would be most fresh in his mind. In like fashion as Lord Pearce commented in the **Onassis** case, I am driven to pose the question; Is Mr. Williams speaking the truth? Or is his recollection of what was agreed orally over two months ago, accurately recalled by him when he came to pen the letter? Has Mr. Williams' recollection of the alleged agreement been subsequently altered by wishful thinking, or is he a person who, thinking he is morally in the right, conjured up a right that did not exist? I am of the view that the letter was written by Mr. Williams to try and get Mr. Barnes into some formal written agreement in relation to the soliciting, as he was suspicious of Mr. Barnes and believed that Mr. Barnes would probably not stick to the position he had advanced. That position was that he would be taking a break, the clear implication being that he would not immediately be rejoining the security industry. More fundamentally, in my judgment, the letter also represents a unilateral variation by Mr. Williams in respect of the agreement to purchase the shares. The inclusion of the retention of the $2 million to my mind was not previously agreed and Mr. Williams was simply hoping that Mr. Barnes would have agreed and signed off on these new terms. That did not happen.

[32] I note also that the March 14 letter penned by Mr. Williams, curiously, was only copied to his wife and fellow director Mrs. Gloria Williams. Yet the same letterhead upon which the letter was written specifies, in addition to the Williamses and Mr. Barnes, the

names of two other persons as directors; Mr. Rudolph Davis and Mr. Leo Williams. In cross-examination, Mr. Samuels asked Mr. Williams who it is that made up the "we" in the second paragraph of the letter. Mr. Williams' response was that that meant Mr. Barnes and the rest of the directors. It is odd that the letter should be copied only to Mr. Williams' wife, and not to the other directors. This further supports the position that the agreement as to the shares was in Mr. Williams' personal capacity and not on behalf of the company.

[33] I accept Mr. Barnes' evidence that the matter of the transfer of the firearms came up from before his actual resignation, sometime in the latter part of 2010, when the relationship between himself and Mr. Williams/ Allied had already become strained, and that he considered it "a final straw" in the breakdown of that relationship. I note that in paragraph 19 of his witness statement Mr. Williams does say that sometime in November 2010, Mr. Barnes advised him that he was contemplating leaving Allied. At paragraph 27 when Mr. Williams speaks of the incident regarding the firearms he does not say when this occurred. Further, the letter of March 14 does not refer to the firearms transfer at all, thus suggesting this occurred sometime before.

[34] I believe Mr. Barnes when he states that he immediately upon receipt of the letter dated March 14 2011 and the cheques enclosed in it, made a demand of Mr. Williams for the balance outstanding. I note that in the agreed bundle, there is a letter dated April 7th 2011 from Mr. Peter De Pass, Attorney-at-Law, written in response to Mr. Barnes' Attorneys' letter dated 4th April 2011. That letter is very interesting, and I cannot trace anywhere in Allied or in Mr. Williams' case where there has been an attempt to address or explain the contents of this letter. Mr. Williams did however in his witness statement at paragraph 8 say that Mr. Barnes had agreed to pay for the 20% shares in Allied Protection Systems and Sales Limited but that he never did pay for them. The letter, which is addressed to Mr. Samuels, Attorney-at-Law, reads as follows:

***Re : Claim by John Barnes against Allied Protection Limited***

***I act for and on behalf of Allied and Tamika Williams and am in receipt of your letter dated 4th April in relation to the captioned which has been handed to me for a response.***

***Our client agrees that a balance of $2 M is due to your client in respect of his shareholding in Allied but that any payment to him of that sum is subject to:***

***a) The payment by Mr. Barnes of $ 4 million for his 9% shareholding in Allied. Mr. Barnes is yet to pay for those shares despite repeated requests by Mr. Donald Williams, Chairman of Allied. Enclosed herewith is our client's invoice to yours for those shares.***

***b) The terms of the separation agreement between your client and Allied as contained in a letter from Allied to your client dated March 14th 2011...The letter of 14th March was in response to your clients resignation letter of January 6th 2011. Your client had offered his resignation, and his shareholding in Allied for sale in the letter.***

***We are also instructed to advise you that your client is in breach of the terms of the said letter dated March 14th, 2011 in that he is directly soliciting clients of Allied since the termination of his employment with Allied.***

***Our client will be instituting legal proceeding to prevent any further breach by your client of the terms of its agreement with yours***

***.....***

[35] Although much of what Mr. Barnes has to say in paragraph 15 of his witness statement really seems to be argument rather than strictly statement of fact, I think that what is stated there is logical and the reasoning commends itself to me. After stating that this letter was surprising to him, Mr. Barnes stated that he did not owe Mr. Williams

or Allied any money for shares on the incorporation of Allied. Further, that if he had owed Mr. Williams any sums, then that would have caused the agreed price to have been significantly less to account for the debt allegedly outstanding for shares, and that this position was a "recent fabrication". The contents of this letter to my mind throw further doubt on the veracity of Mr. Williams' claim that the letter of March 14 2011, in particular, the clause about withholding 2 Million dollars represented what had been agreed. If such a sum (i.e. the $ 4 Million) had really been outstanding from Mr. Barnes, in the first place, that would logically have been a feature in the initial negotiations for the purchase price. If this was really the position, it would be incredible that the March 14 2011 letter could have failed to refer to this substantial sum allegedly outstanding. Something just does not add up in relation to Allied's claim as to what was agreed with Mr. Barnes.

[36] In his witness statement at paragraph 28, Mr. Williams states that on the 30th of March he wrote to Mr. Barnes again enclosing cheques totalling $2,343,349.91, comprising the sum of $343,349.91 and $2,000,000.00 "as a gratuity for our appreciation for his service over the years". This letter was never exhibited. However, it seems strange to me that Allied would have been paying over this gratuity of $2 Million dollars, whilst at the same time withholding $2 Million dollars for the alleged share purchase to deal with possible future loss of contracts. This is further proof that it is Mr. Williams who was really the purchaser of Mr. Barnes' shares and not Allied.

[37] Mrs. Mayhew in her closing submissions argued that when Mr. Barnes cashed the cheques that were enclosed in the March 15th letter, he was deemed to accept the terms of the letter as representing the agreement between the parties. She relied on the English Court of Appeal's decision in ***Stour Valley Builders v Stuart (1993) WL 964283*** to support this point. In that case the Plaintiff had sent the Defendants a revised invoice for £ 10,163 for building work they had done on the Defendants' home. The Defendant offered to settle for £ 8,471 sending a cheque for that amount in full and final settlement. The Plaintiff kept and cashed the cheque, but had told the Defendants by telephone that the cheque could not be accepted in full and final settlement. Lloyd LJ in that case held that "***Cashing a cheque is always strong evidence of acceptance,***

***especially if it is not accompanied by immediate rejection of the offer. Retention of the cheque without rejection is also strong evidence of acceptance depending on the length of delay. But neither of these factors are conclusive; and it would, I think, be artificial to draw a hard and fast line between the cases where the payment is accompanied by immediate rejection of the offer and cases where the objection comes within a day or a few days***." In the **Stour Valley** case, the delay in rejecting the offer was brief, although it occurred after encashment of a cheque sent in purported full and final settlement. The Court at first instance found as a fact that there was no agreement between the parties to accept the cheque in full and final settlement of the claim. In holding that there was no basis upon which to disturb the trial judge's findings, Lloyd L.J stated :

> ***It follows that it was for the assistant recorder in this case to decide on the facts of the case whether Mr. Pinnegar accepted Mr. Stuart's offer so as to create accord and satisfaction....***
>
> ***In the present case, the assistant recorder did not regard the delay as long. He asked himself the question whether the plaintiffs' conduct caused the defendants to think that the money was taken in satisfaction of the claim. That was the correct question. Although he accepted Mr. Stuart's evidence that Mr. Stuart learnt from the building society that the cheque had been cleared before Mr. Pinnegar rang up, nevertheless he answered the question which he proposed in the negative. There was evidence on which he could form that view. He had the advantage of hearing the parties in the witness box, which we have not....***
>
> (my emphasis)

[38] I accept the evidence of Mr. Barnes that when the March 14th letter was presented to him, he immediately rejected the provision that dealt with the retention of the $2 Million as this was not originally agreed between himself and Mr. Williams. In his cross-examination, Mr. Williams stated he asked Mr. Barnes to sign a copy of the letter

but that Mr. Barnes did not sign the letter. He went on to state that Mr. Barnes gave him a reason why he did not sign the letter. According to Mr. Williams, Mr. Barnes stated that he would not sign the letter because they had been friends for thirty years and that they did not need Attorneys. According to Mr. Williams, Mr. Barnes said he agreed with what was in the letter and that what was in the letter was expected and normal practice in the industry. Mr. Williams claims he did not consider it important for Mr. Barnes to sign because they had trusted each other in matters of this sort up to that point. Mr. Williams admits however, that he did not put all of that in his witness statement. Mr. Williams also stated that it is he who first suggested the 2 Million dollars to Mr. Barnes. He says he didn't say "we agreed" in the letter when he was talking about the non-solicitation of clients as he had done when he spoke of the sale of the shares, because "once we agreed, we agreed continually". In addition, that he did not have "a legal mind". I was impressed with the demeanour of Mr. Barnes and he seemed very constant and consistent in his answers. I do not think that he was shaken in cross-examination, quite unlike Mr. Williams. I accept that save for the non-solicitation term, the letter of March 14 2011 did not represent what had been agreed between Mr. Barnes and Mr. Williams, or Mr. Barnes and Allied. I find as a fact that Mr. Barnes did not by his overall conduct, including the encashment of the cheques, accept the terms of the March 14 2011 letter from Mr. Williams as representing the agreement between them. Nor did his conduct cause Mr. Williams to think that the money was taken and the cheques negotiated because Mr. Barnes was agreeing to the withholding terms. Quite the contrary; Mr. Barnes protested immediately about the short payment and did not sign the letter. In my judgment, by cashing the cheque for the $ 8 Million, Mr. Barnes was not at all relinquishing the remaining $2 Million or agreeing to the terms upon which it was purportedly withheld and nor could Mr. Williams have so understood him to be.

[39] Having found that there was express agreement between Mr. Barnes and Mr. Williams that Mr. Barnes would not solicit the clients of Allied, it is necessary for me to deal with the issue raised by Mr. Samuels on behalf of Mr. Barnes of whether the non-solicitation term would be enforceable. It was argued on behalf of Mr. Barnes that such a term would amount to a restraint of Mr. Barnes' trade and would be unenforceable.

**(c) RESTRAINT OF TRADE-IS THE CONVENANT/AGREEMENT NOT TO SOLICIT ENFORCEABLE?**

[40] Covenants in restraint of trade are generally considered contrary to public policy. However, the cases also establish that if the restraint is reasonable in reference to the legitimate interests of the party concerned, and is not injurious to the public, it may be held enforceable.

[41] For a restraint to be reasonable in the interests of the parties, it must afford no more than adequate protection to the party in whose favour it is imposed: **Morris v. Saxelby** [1916] A.C. 688.

[42] Non-solicitation clauses are often used in employment agreements to prevent a key employee from competing with the employer's business after leaving the company. These clauses are also commonly found in share purchase/ sale agreements. In those situations, the purpose of the clause is to protect and ensure that the departing shareholder does nothing that would undermine the value of the goodwill of the company, for which the person purchasing the shares would be paying for. The distinction is important because restraint of trade convenants entered into between vendors and purchasers are treated with less disfavour than those entered into between master and servant. See **Morris v. Saxelby** [1916] A.C. 691, cited by Mr. Samuels, and **Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co. Ltd (1894) A.C. 535, Altwood v Lamont [1920] 3 K.B. 571** and **North Western Salt Company v Electrolytic Alkali Co. Ltd [1914] A.C. 461.**

[43] Even in the business context, however, of a sale of shares, if a covenant goes further than reasonably necessary to protect a legitimate interest, it will be held void and not enforced- **Nordenfelt**.

[44] The questions therefore regarding the covenant not to solicit are (1) what are the interests that it is legitimate to protect? And (2) Is the protection taken no more than is reasonably necessary to protect those interests?

[45] I do not find that there was any ordinary relationship of Master and Servant between Mr. Barnes and Allied. Mr. Barnes in his evidence stated that he considered himself at all times a part owner of Allied. In his witness statement, Mr. Williams indicated that when Allied was formed after the merger, a decision was taken by the Board of Directors, including Mr. Barnes, to keep directors' salaries at a minimum and at the end of each quarter depending on the profit realized, a director's fee would be paid out accordingly, thereby allowing for a more liquid cash flow.

[46] The interests that it seems legitimate to protect in this case appear to me to be that of a vendor-purchaser covenant between Mr. Barnes and Mr. Williams, with Mr. Barnes as Managing Director, rather than a Master-Servant restraint of trade covenant between Allied and Mr. Barnes. It is also to be noted that there is no claim by Allied against Mr. Barnes as a director or for any breach of fiduciary duties in that regard.

[47] Mr. Barnes was Managing Director for 9 years for Allied Protection Systems & Sales Limited, before it was merged with United Protection and Allied Protection Systems and Sales Limited to form Allied. At Allied, Mr. Barnes worked for another 9 years as Managing Director before he resigned in January 2011. In that capacity, he would have been exposed to Allied's customers and trade connections. He would have had confidential and sensitive information about Allied, for example, its customers, rates and charge strategies. More significantly, Mr. Barnes was a vendor of shares in Allied and in respect of the business of which he considered himself part-owner. These contracts that Allied had were very important in determining the value of the Company and were used by Mr. Barnes as a bench mark to arrive a sale price for this shares. Mr. Williams would therefore have a legitimate interest in wanting to protect and retain the clients of Allied and the non-solicitation term would no doubt be a reasonable way to achieve that protection.

[48] Indeed, Mr. Barnes was asked by Counsel, Mrs. Mayhew about the factors that were taken into consideration when the parties were trying to agree to a purchase price for his shares. Mr. Barnes indicated that he had a very good idea of what the value of the company was and consequently what the value of his shareholding would be. He further went on to say that in arriving at the purchase price, he would have taken the

quantity and quality of Allied's contracts into account, because ultimately the value of the company would be based on the number and quality of its contracts. Mrs. Mayhew's submitted in her closing submission, that on Mr. Barnes own evidence, there seems to be a nexus between the price paid for the shares and the contracts which the Company had. She submitted that it would be reasonable to conclude that the issue of the non-solicitation of Allied's clients by Mr. Barnes would have been discussed between the two men and an agreement reached.

[49]] In ***Alec Lobb Limited v Total Oil (Great Britain) Ltd [1985] 1 WLR 173 (CA***), the court pointed out that when the question of reasonableness is being looked at, the quantum of the consideration may be part of the overall assessment. The parties had agreed that the price to be paid for the shares is $10,000,000.00. Mr. Williams in investing time and money in getting these shares would therefore want to capitalise on his investment, particularly in ensuring that nothing is done by the seller that would affect adversely the status quo of the company in which the shares are being sought. Lord McNaughten in ***Trego v Hunt*** [1895-1899] All E.R. Rep 804, which was cited by Mrs. Mayhew in her closing submissions, at page 814 reasoned that

> ***"A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; <u>there is an implied covenant on the sale of goodwill that the vendor does not solicit the customer he has parted with; it would be a fraud on the contract to do so.</u> These, as it seems to me, are the different turns and glimpses of a proposition that I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then recapture the subject of sale, to decoy it away or call it back before the purchaser had time to attach it to himself and make it his very own".***
>
> ( my emphasis)

**(d) <u>Was it an implied term of the agreement relating to the sale of shares that Mr. Barnes would not solicit the clients of Allied?</u>**

[50] The decision in **<u>Trego v. Hunt</u>** has been applied many times, and was referred to in the recent English Court of Appeal's decision in **<u>Baldwins (Ashby) Ltd. v.</u>**

**Maidstone** [2011] E.W.H.C. B12, cited by Mrs. Mayhew. The case establishes that whether there was or was not an express agreement by Mr. Barnes not to solicit Allied's clients, it would be an implied term of the agreement for the sale of his shares to Mr. Williams that he would not solicit Allied's clients within a reasonable period after the sale.

[51] It would seem that the principles apply whether it is the sale of shares in the whole business that is the subject of the agreement or whether it is a portion of the shares of the business, such as is the situation in the present case where Mr. Barnes as Managing Director was selling his not insignificant, 9% portion of the shares in Allied. See Halsbury's Laws of England, 4th edition, Vol. 47 paragraph 24, footnote 1, **Nordenfelt** and **Connors Bros. v. Connors** [1940] 4 All. E.R. 179

[52] The particular non-solicitation term agreed to is not in my view unnecessarily wide. As Mrs. Mayhew points out in her written submissions, and as I have found, it did not limit Mr. Barnes ability to work in the security industry on leaving Allied. It also did not preclude him from setting up a rival company or seeking clients for himself. It was suitably limited in scope and time, in so far as it simply sought to restrict Mr. Barnes from soliciting the clients of Allied for a period of 12 months. It is therefore in my view enforceable. Even if there was no express agreement about the non-solicitation or the period of 12 months, as stated above, there would be an implied term not to solicit for a reasonable time and I think in the circumstances 12 months would appear to be a reasonable time. I should add, that even if I am wrong and that it is in fact a covenant in restraint of trade between Allied and Mr. Barnes as employer-employee, as well as, or instead of an agreement having to do with the sale of the shares, the term is reasonable in the interests of the parties and enforceable.

**(e) Did Mr. Barnes breach the terms of the agreement by soliciting Allied's Clients?**

[53] Mrs. Mayhew in her submission provided the Webster's Dictionary definition of what "solicit" means. It was defined as "to make petition to; to approach with a request or plea, to urge (as one's cause) strongly; to entice or lure especially into evil; or to try to

obtain by usually urgent request or pleas." In the decision of ***Baldwins (Ashby) Limited v. Maidstone***, after the Judge there reviewed the authorities, he reasoned that solicitation/soliciting must evince a specific purpose/intention and must involve some direct or targeted behaviour on the part of the person who it is being alleged is guilty of such conduct.

[54] Mr. Williams evidence is that shortly after Mr. Barnes left the company, he started receiving calls from several clients, including long standing ones enquiring whether Allied was going out of business. According to Mr. Williams, these clients informed him that the reason for their concern was that Mr. Barnes was requesting them to give to him their contracts as he was joining his brother's company. None of these representatives to whom Mr. Williams referred were called to give evidence or provided a witness statement which supports these allegations. According to Mr. Williams notwithstanding his attempts to reassure these clients, in the ensuing months, several contracts were lost to Securi Pro Limited. Although several paragraphs or portions of Mr. Williams' witness statement were struck out by consent, paragraph 31 where these matters were stated was not. However, these are obviously hearsay statements that relate to critical aspects of Allied's case, and I attach no weight to them. There was no explanation or reason given as to why none of the alleged clients or security guards were called to give evidence on the matters alleged.

[55] Mr. Williams indicated that Allied received several letters in which Clients terminated their services. Mr. Williams evidence was that some of the clients who terminated their services, they had no issues with them prior to their services, so their termination came as a surprise. Again Mr. Williams attributed this to the actions of Mr. Barnes. This was confirmed by Mr. Hartman Fletcher, a very candid witness, who indicated that in the zone in which he had supervisory control, several contracts were lost to Securi Pro Limited.

[57] According to Mr. Fletcher, in the security industry, when one Security Company is to taken over from another Security Company, there is what is called a handing over process. His evidence was that, on several occasions in which there was a handing

over procedure to Securi Pro, Mr. Barnes and another ex-employee of Allied, Mr. Eugene Marshall was on site for the process.

[57] Testimony was also given by Mr. Williams of an encounter between himself and Mr. Barnes while at Salada Food Offices, a client of Allied. Mr. Williams said that he and Mr. Barnes got into a heated exchange about Mr. Barnes being there.

[58] Mr. Williams alleges too that Mr. Barnes tried to encourage persons in senior positions to leave Allied and join him at Securi Pro, which he described as an indirect attempt at destroying Allied's trade connections. He referred to Mr. Eugene Marshall as being one such person who left Allied and joined Mr. Barnes at Securi Pro. In his evidence Mr. Williams also said that he was aware that Mr. Barnes approached Mr. Fletcher to leave Allied and join him at Securi Pro, but Mr. Fletcher refused. However strangely, this was neither raised nor confirmed first-hand when Mr. Fletcher gave his oral evidence and despite Mr. Fletcher having been summoned to Court to give evidence on behalf of Allied. Whilst I appreciate the sensitivities of the situation, I have to act on the evidence and thus I attach no weight to this hearsay, self-serving assertion by Mr. Williams.

[59] Mr. Williams in his evidence outlined that in the security industry, there are some clients who do not wish for their guards to be rotated and so if the guards were to switch to another company, it is likely that the contract with Allied would be at risk. Mr. Williams indicated that Mr. Barnes tried to encourage the guards to switch to Securi Pro, which amounted to an attempt by him to indirectly try to solicit Allied's clients.

[60] It does appear suspicious and coincidental that on Mr. Barnes leaving Allied and thereafter becoming affiliated with Securi Pro, several contracts were lost by Allied to Securi Pro. It is Mr. Williams' case that Mr. Barnes had something to do with this. However, I am not satisfied that on a balance of probabilities, Mr. Williams has established that the loss of clients to Securi Pro was consequent on Mr. Barnes direct or indirect involvement. Mr. Fletcher in his evidence indicated that the nature of the security business is such that from time to time you lose and gain assignments. He said that whilst there must be a reason for everything, sometimes you are not made aware or

privy to the reason as to why a contract/client was lost. Mr. Fletcher also indicated that security guards do leave security companies and go to others, as to why they did so; he indicated that he was unable to give a specific reason.

[61] From the cases, solicitation involves both intent and conduct. Mr. Williams has not offered any evidence which demonstrates that Mr. Barnes actually made attempts or actually enticed the clients of Allied. Those persons that were said to have been approached by Mr. Barnes, no witness statements or other evidence was offered to support this contention. Both Mr. Fletcher and Mr. Williams seem to agree that Mr. Barnes enjoys a respectable position in the security industry and clearly he must have, if Mr. Williams had him serving as Managing Director for close to 18 years. Mr. Barnes in his own statement indicated that on him leaving Ranger Security to join what was then Allied Protection Systems and Services Limited, several clients who engaged the services of Ranger, on his departure, terminated their services with Ranger and employed that of Allied Protection. It is interesting to note that some of these same clients, who left Ranger to join Allied Protection Systems, were the same clients that left Allied to join Securi Pro where Mr. Barnes now is. Mr. Barnes clearly had a following that was willing to move with him, wherever he went. The fact that Mr. Barnes left Allied and went to Securi Pro cannot be seen as an attempt by him to siphon off Allied's clients without more. As regards the leaving of guards to go and work with Securi Pro, it was Mr. Fletcher's evidence in cross-examination that although he saw a guard who formerly worked for Allied at the handing over exercise from Allied to Securi Pro in relation to Edgechem, and that guard remained on duty after Allied had handed over, he cannot say what was the reason why the guard left Allied or joined Securi Pro. I do not find anything in the evidence to suggest that Mr. Barnes approached overtly or covertly, any of the persons who left Allied and join Securi Pro, consequently I cannot find that Mr. Barnes was guilty of soliciting Allied's clients. I note also that whereas in **Baldwins** ( paragraph 57) the Court heard evidence that the Claimant was losing clients to the rival company after the defendant had joined that company, and which had almost never happened before, I cannot trace any evidence that Allied had not lost contracts to Securi Pro before, or that it had lost to a noticeably lower degree. In addition, as set out in Counsels' Closing Submissions on behalf of Mr. Barnes, after Mr. Barnes left, Allied

lost a number of contracts and over ten went to other security companies apart from Securi Pro.

[62] The critical importance of calling witnesses such as the actual clients, or producing evidence from which it can reasonably be inferred that there was an intention to target and solicit clients is made manifest in **Baldwin v. Maidstone**. In that case there was substantial written documentation and emails for the Court to look at and assess in deciding where the truth lay. The claim there was for damages for breach of a covenant of a share sale agreement whereby the defendant sold his accountancy business to the claimants for approximately one million pounds sterling. The claimant alleged that the defendant breached a three year covenant in the agreement protecting the goodwill in the company by "canvassing, soliciting or endeavouring to entice away" his former clients to a firm where he commenced employment within the three year period. At paragraph 3 of the judgment, Judge Simon Brown Q.C. states:

> ***3. The Defendant accepts that a few of his former clients followed him to Charnwoods, where he legitimately commenced practising, but strenuously denies that he 'canvassed, solicited or enticed' them away. He, and indeed they, contend that it was their own independent decisions to move their custom for the various reasons given by them in their witness evidence, as summarised in the Defendant's closing notes which have been duly taken into account as part of the following judicial forensic analysis of the evidence.***

[63] Then at paragraphs 15 and 16, 21, 23-26, 62-64, and 66 of this most instructive judgment, the learned judge states the following:

> ***15. As stated by Lord Hershell in Trego v. Hunt [supra] on page 20: " It must be treated as settled that whenever the goodwill of a business is sold the vendor does not, by reason only of that sale, come under a restriction not to carry on a competing business." Hence, in the instant case the Defendant was perfectly entitled to compete for business with the claimants in the area and to undertake***

***work for his previous clients if they solicited him to do so without his importuning them.***

***16. However, the express terms of the clause prohibit him from "soliciting" them. ...***

***.....***

***21. In Equico Equipment Finance Ltd. vv. Enright Employment Relations Authority, the Member of the Authority usefully rehearsed Sweeney and English law about the meaning of "solicitation" (and "enticement away") in this context up to that point:***

***.....***

***"[31] It matters not who initiates the contact. The question of whether solicitation occurs depends upon the substance of what passes between parties once they are in contact with each other. There is solicitation of a client by a former employee if the former employee in substance conveys the message that the former employee is willing to deal with the client and, by whatever means, encourages the client to do so. [32] In my view "canvass" is synonymous with soliciting. Both words involve an approach to customers with a view to appropriating the customer's business or custom. I consider a degree of "influence" is required. There must be an active component and a positive intention."***

***.....***

***23. As described in Employee Competition (2nd Edition), para. 5.255, questions posed such as these are instructive: " Does the conduct evidence a specific purpose and intention to obtain orders from customers? Where it is his contact initiative with a customer, does he do something more than merely inform the customer of his departure?"***

***24. Restrictive Covenants under Common and Competition Law (6th edition), paragraph 3.4.1, the customer approach "must involve some direct or targeted behaviour."***

***25. These different wordings chime with the authoritative specific and direct appeal test in Trego v. Hunt.***

***26. Therefore a general advertisement to the world about availability of custom at a new firm or a specific notification to a client of departure from one firm to another does not cross the borderline; any activity or behaviour beyond would.***

……

***62. This factual background in the context of my finding as to the intentions of the Defendant and Charmswood tends to infer that some soliciting of custom was being undertaken, although it is quite understandable that clients would want to follow their trusted tax accountant. The onus here is upon the Claimant to prove that the customer approach involved "some direct and targeted behaviour by Mr. Maidstone.***

***63. Obviously, the Claimant was not privy to any of this being deliberately kept in the dark about client dealings by Mr. Maidstone. I have already found Mr. Maidstone not to be a witness of truth as to his intentions and view his evidence upon what he actually did with the gravest of suspicion. He is therefore at best an unreliable witness and in that regard I have found Mr. Barnett too is unreliable, particularly as his firm had a strong motivation of gain and was not bound by the clause as Mr. Maidstone was.***

***64 Therefore I hoped to rely upon the objective evidence of the clients themselves to provide the answers as to whether or not they had been solicited by Mr. Maidstone to move from Baldwins.***

> ***However, my confidence in doing this was eroded by Mr. Maidstone's personal involvement in orchestrating the production of their witness statements when such evidence is supposed to be in the witnesses own words and production normally undertaken by solicitor acting on behalf of the party producing the witness and as officers of the court. (Practice Direction 32-Evidence). It also emerged that he had involvement in the composition of some of their correspondence.***
>
> .....
>
> ***66. In my judgment, this manipulative behaviour on the part of Mr. Maidstone was reprehensible and it casts grave doubts upon his case and the reliability of the demonstrably partisan witnesses he brought to court to support it. Where nothing can be directly proved by the Claimant because it was not privy to dealings between the Defendant, Charnwoods and these witnesses as clients, adverse inferences are entitled to be drawn and the court duly does so hereafter in evaluating his evidence and of the witnesses he brought to court to support his case in.***

[64] In the instant case, Allied and Mr. Williams have not provided a sufficient evidential basis upon which I could draw adverse inferences against Mr. Barnes that Mr. Barnes solicited the clients of Allied. Nor have I found him to be an unreliable witness, exhibiting reprehensible behaviour, such that I could accept that where Mr. Williams was not privy to contact situations between Allied's clients and Mr. Barnes, I could draw adverse inferences that Mr. Barnes was soliciting in these dealings. The fact that Mr. Barnes was seen by Mr. Williams at Salada Foods does not prove solicitation. At most it proves contact. There is no proof of any direct and targeted behaviour on the part of Mr. Barnes to solicit Salada, who in any event did not switch over to Securi Pro. The same reasoning applies in relation to the guard at Edgechem who left and went to work with Securipro. Former clients were free to take their business to where Mr. Barnes now worked so long as it was not Mr. Barnes who solicited them.

**(e) Did Mr. Williams breach the terms of the agreement with Mr. Barnes to purchase his shares?**

[65] Since I have found that there was no agreement about the retention of the 2 Million, Mr. Williams has no proper basis upon which to withhold payout to Mr. Barnes of the sum of $2 million.

**(f) If there was a breach, what if any remedy is available to the innocent party?**

[66] Mr. Williams is therefore in breach of the agreement and Mr. Barnes is entitled to be paid the sum of $2Million together with interest. Although Mr. Barnes has made a claim for commercial interest, no evidence was presented as to commercial rates applicable. I think in the circumstances it would be just to award interest at the rate applicable on judgment debts.

[67] There will therefore be judgment as follows:-

(a) In respect of Claim No. 2011 CD00029, Judgment for the Defendant John Barnes against the Claimant Allied with costs to Mr. Barnes to be taxed if not agreed.

(b) In respect of Claim No. 2011 HCV 07746 – John Barnes v Donald Williams – there will be judgment for the Claimant John Barnes against the Defendant Donald Williams for damages for breach of contract in the sum of $2 Million, with interest at the rate of 6% per annum from the 14th March 2011 to 23rd July 2013, with costs to be taxed if not agreed.