

**SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY
AT HAMILTON**

[2026] SC HAM 97

HAM-A634-25

OPINION OF SHERIFF MICHAEL J HIGGINS

in the cause

BELL BUILDING PROJECTS LIMITED

Pursuers

against

DAVID GILLESPIE

Defender

**Pursuers: Watt
Defender: Vaughan**

HAMILTON, 13 July 2026

The sheriff, having resumed consideration of the debate:

1. Repels the pursuer's first and second pleas-in-law.
2. Reserves consideration of the defender's first plea-in-law on the issue of relevancy to a proof before answer.
3. Upholds the defender's first plea-in-law on the issue of specification to the extent of excluding from probation the following averments and otherwise reserves consideration of same on the issue of specification to a proof before answer:

In condescendence 6

"EF, who works in the Pursuer's Manchester office was contacted by the Legacie Group. EF was asked if she would leave the Pursuer and go to work for the Legacie Group. Believed and averred that the Defender is a good friend of GH, the chief operating officer of Legacie Developments Ltd".

and in condescendence 7: “ ... and EF ...and EF ...”.

4. Reserves consideration of the defender’s seventh plea-in-law to a proof before answer.

5. Assigns a hearing on expenses in relation to the debate on a date to be hereafter advised.

Introduction

[1] The pursuer is a construction company. The defender was employed by the pursuer between 5 March 2019 to 11 April 2025 latterly as an operations or construction manager. He tendered his resignation on 24 January 2025 and left the pursuer’s employment on 11 April 2025. He then started work as an operations manager with Hugh LS McConnell Ltd, which is also a construction company.

[2] Clause 42ii of the defender’s contract of employment with the pursuer was a restrictive covenant which was in the following terms:

“You agree that for a period of 12 months immediately following the termination of your employment, whether on your own behalf or in conjunction with any person, company, business entity or other organisation whatsoever, you will not directly or indirectly... induce, solicit, entice or procure any person who is a Bell Building Projects Ltd employee to leave such employment, where that person is an employee of Bell Building Projects Ltd on the Termination Date”.

[3] In this action the pursuer seeks interdict against the defender from soliciting, enticing or procuring any person who was an employee of the pursuer as at 11 April 2025 to leave their employment together with damages from the defender in respect of loss the pursuer avers they sustained as a result of the defender breaching the restrictive covenant.

[4] The defender denies soliciting, enticing or procuring any person who was an employee of the pursuer as at 11 April 2025 to leave the pursuer’s employment. He also

denies breaching the restrictive covenant and argues that, in any event, the restrictive covenant is unenforceable in law as being too wide in its terms and length.

[5] The case called before me on 23 June 2026 for debate on both parties' preliminary pleas.

[6] The defender led at the debate. His preliminary pleas were to the relevancy and specification of the pursuer's case and the enforceability of the restrictive covenant.

[7] The pursuer's preliminary pleas were to the relevancy and specification of the defender's case.

[8] The debate related to the issues of the specification and relevancy of the parties' respective pleadings relating to the restrictive covenant and its enforceability. I was not addressed on such issues as they relate to the pursuer's claim for damages and so I do not address same in this Opinion.

Submissions

[9] As the defender led at the debate I shall deal firstly with the defender's submissions.

Defender's submissions

[10] The defender's submissions fell into two parts. The first related to the relevancy and specification of each party's case. The second related to the enforceability of the restrictive covenant in the defender's contract of employment.

Relevancy and specification of the pursuer's case

[11] The defender's first plea-in-law is in the following terms: "The pursuer's averments being irrelevant et separatim lacking in specification the action should be dismissed".

[12] In relation to specification, I was referred to MacPhail's *Sheriff Court Practice*

4th Edition at paragraph 9.28 where the learned author states:

"A party's averments in condescence or answers must specify sufficient facts to allow the party to lead all the evidence desired to be lead at the inquiry, and to give the opponent fair notice of what the party hopes to establish in fact ... The defender may seek dismissal of the action upon a plea of lack of specification. That plea finds its proper application in a case where the defender does not know the case against them and objects to being taken by surprise at the proof. ... The degree of specification which will be deemed sufficient for fair notice depends on the particular circumstances of each case ..."

[13] I was referred to the comments of Lord President Cooper in the case of *MacDonald v*

Glasgow Western Hospitals 1954 SC 453 at page 465:

"The plea of lack of specification finds its proper application in a case where a defender does not know the case to be made against him and objects to being taken by surprise at the proof".

[14] This was echoed in *Esso Petroleum Co v Southport Corp* [1956] AC 218 by

Lord Normand at page 238: "The function of pleadings is to give fair notice of the case

which has to be met so that the opposing party may direct his evidence to the issue disclosed by them".

[15] It was submitted that the pursuer's case was entirely dependent on demonstrating that the restrictive covenant had been breached by the defender and if it cannot do so then the pursuer has no case.

[16] The pursuer's case is based upon the pursuer's belief that the defender solicited two of the pursuer's employees and caused them to leave the pursuer's employment and join a competitor and that he attempted to do the same with a third. In that regard the pursuer states the following in condescence 6:

"The Pursuer employed CD as a site manager for 5 years and 11 months. CD tendered his resignation in July 2025. He initially advised the Pursuer that he was leaving the Pursuer to start work with Luddon Construction but later confirmed that he was going to work for Hugh LS McConnell Ltd. The Pursuer employed AB

as a site manager for various periods over the last 20 years and latterly for 4 years and 8 months. AB tendered his resignation in August 2025. AB has confirmed he is going to work for Hugh LS McConnell Ltd. EF, who works in the Pursuer's Manchester office was contacted by the Legacie Group. EF was asked if she would leave the Pursuer and go to work for the Legacie Group. Believed and averred that the Defender is a good friend of GH, the chief operating officer of Legacie Developments Ltd. The Defender's averments in answer are denied except insofar as coinciding herewith".

[17] In condescendence 7 the pursuer states:

"CD, AB and EF were employed by the Pursuer when the Defender ceased working for the Pursuer. Believed and averred that the Defender instigated contact with CD, AB and EF to entice them to leave their employment with the Pursuer in breach of the terms of clause 42 ii of the Defender's Employment Contract".

[18] It was submitted that these two condescendences contain the only averments setting out the factual basis upon which the pursuer says that solicitation by the defender took place. The pursuer's case hinges entirely on what is said in condescendence 7 and amounts to no more than a belief that its employees were solicited by the defender.

[19] In order to succeed in its action, the pursuer must prove that solicitation actually took place but that, on the pursuer's case as pleaded, the pursuer offers no notice to the defender as to when the solicitation took place, where, by what method, by whom or what was said in solicitation. The defender argues that, as a result of this lack of specification, the defender does not have any notice of any of these issues. He does not know what it is he, or someone acting on his behalf, has supposed to have said or done, when, how and to whom, and cannot therefore properly prepare a defence to the case. The pursuer's case amounts to no more than speculation that the defender solicited its employees. This is a clear prejudice to the defender in his attempt to defend the case against him.

[20] The defender argues that, as a result, the pursuer's case is fundamentally lacking in specification and should not be remitted to probation.

[21] Turning to the issue of relevancy, the defender also criticised the pursuer's use of the "Believed and averred" averment in condescendence 7:

"Believed and averred that the Defender instigated contact with CD, AB and EF to entice them to leave their employment with the Pursuer in breach of the terms of clause 42 ii of the Defender's Employment Contract".

[22] I was referred in that regard to *Brown v Redpath & Co Limited* 1963 SLT 219 where, Lord Justice Clerk Thomson said:

"The use of the formula 'believed and averred' is frequent and convenient in our pleading, but its appropriate function is to aver an inference which the user seeks to draw from certain facts; and they are generally facts which are not and cannot be fully known to him. A familiar instance is the narration in a divorce summons for adultery that the parties are averred to have been in loco suspecto as matter of known fact, and thereafter 'it is believed and averred' that they committed adultery. Where a definite averment of facts which a party must establish is necessary, the formula is quite inappropriate".

[23] In this regard I was also referred to the case of *Partnership of Ocean Quest v Finning Limited* 2000 SLT (Sh Ct) 157 where Sheriff Principal Risk said:

"I respectfully agree with the neat summary of the effect of those opinions given by the Lord Ordinary (Osborne) in *Strathmore Group Ltd v Credit Lyonnais* at p 1032K: 'The correct use of this formula ['believed and averred'] was explained in *Brown v Redpath Brown & Co Ltd*. It is one which ought to be used where the pleader is averring, as a matter of inference, a fact which was sought to be inferred from other averments of primary fact."

[24] It was submitted that following this line of authority, there must be sufficient primary facts averred before the party can appropriately make the "believed and averred" averment. There are insufficient averments in condescendence 6 to allow for this averment to be made ie there are insufficient facts averred in condescendence 6 to allow the inference to be drawn that the defender breached the restrictive covenant by soliciting the pursuer's employees. There was no logical link between what is averred in condescendence 6 and what the court is asked to imply in condescendence 7.

Relevancy and specification of defender's own case

[25] The pursuer argues that the defender's averments about the enforceability of the restrictive covenant are irrelevant and lacking in specification.

[26] In that regard, the defender states in answer 4: "The pursuer seeks to restrict the defender for a period of 12 months following termination of his employment. This is unduly long and unreasonable".

[27] The pursuer submits that the defender fails to provide any specification as to why a 12 months' restriction is "unduly long and unreasonable". The defender's averments are therefore not sufficiently specific as to provide the pursuer with fair notice as to what the defender intends to prove and so the pursuer is unable to properly prepare its case for proof in that regard. The defender's case in that regard should not be admitted to probation.

[28] The defender submits that the pursuer is simply wrong in that regard. In answer 4 the defender makes it clear by averments that the defender's case is that the restrictive covenant is too wide in that it does not restrict the category of the pursuer's employees covered and that the period of 12 months' duration is too long. Furthermore, the defender placed calls upon the pursuer to aver how the pursuer's legitimate business interests can justify a period of 12 months' restriction. The pursuer did not answer.

[29] In answer 9 the defender states the following:

"Explained and averred that there is consistently a high level of staff turnover within the construction industry. This is particularly so for staff such as site managers who may move to a different employer following the completion of a project. The defender is aware of at least 15 people having left the employment of the pursuer during 2025. The role of site manager is a fairly junior role and can normally be replaced within around four months".

[30] These averments give the pursuer fair notice of the defender's case that turnover of staff in the construction industry is not a justification for the period of restriction of 12 months.

[31] Additionally, the pursuer is aware that part of the defender's case is that by not restricting the category of employees covered by the restrictive covenant, the terms of same are too wide. The pursuer states in the penultimate sentence of condescendence 4 the following: "It is reasonably necessary to restrict the Defender from soliciting the staff of the Pursuer to prevent the Pursuer from being adversely affected by the loss of key employees".

[32] The defender argues that the use of the word "key" in this sentence is recognition by the pursuer that the restrictive covenant should refer to "key" employees rather than not specifying any category of employee and thus showing a recognition on the part of the pursuer that the restrictive covenant is too wide. The defender submits that, in these circumstances, it would be grossly unfair on the defender to deprive the defender the opportunity to argue this point as to the unenforceability of the restrictive covenant at proof.

[33] Separately, they are relevant to the pursuer's crave for payment of damages where the pursuer avers loss sustained as a result of the defender's alleged solicitation.

[34] The defender submits that furthermore and, in any event, even if all the defender did was to simply aver that the restrictive covenant was too wide, that would not affect the burden of proof being upon the pursuer to establish that it was not.

[35] The pursuer argues that the defender's averments about how the other mentioned employees came to leave the pursuer's employment and start employment with the same new employer as the defender are irrelevant and lacking in specification.

[36] In that respect of the defender's averments about this are plainly relevant as they seek to give an alternative explanation as to why they did so. The defender avers on record

a specific and clear denial of solicitation in that regard so these averments are both relevant and specific and should not be excluded from probation.

[37] The defender therefore argues that his averments attacked by the pursuer are both relevant and specific and should not be excluded from probation.

The enforceability of the restrictive covenant in the defender's contract of employment

[38] The defender's seventh plea in law is in the following terms: "The restrictive covenants being unenforceable, decree of absolvitor should be pronounced".

[39] The defender submitted that contractual restrictive covenants are ex facie unlawful unless they are required to protect the employer's legitimate business interest and extend no further than is reasonably necessary to protect that legitimate business interest. In that regard I was referred to *Sundolitt Limited v Addison* [2017] CSIH 15 and Lord Brodie's comments at para [21]:

"Contractual provisions imposing obligations (covenants, in English terminology) in restraint of trade are prima facie unlawful as contrary to public policy and, accordingly, as it was put by Laddie J in *Countrywide Assured Financial Services Ltd v Smart* [2004] EWHC 1214 (Ch) at para 7, 'to be treated with suspicion'. Accordingly, it is for the party relying on the restraint to establish why it should be upheld. To do that it will have to show (1) that it has a legitimate business interest to protect and (2) that the contractual provision relied upon, properly construed, extends the restraint no further than is reasonably necessary to protect that interest".

[40] It was accepted on behalf of the defender that maintaining a stable workforce can be regarded as a legitimate business interest and an appropriately worded clause could be lawful in in that regard, but the purpose of such a clause cannot be to protect the employer from competition.

[41] It was submitted that, so far as workforce is concerned, whilst the pursuer does make averments about the number of employees and offices it has, the terms of the restrictive

covenant do not restrict the category of the pursuer's employees that the defender cannot solicit to move employer. Additionally, the pursuer has no averments on record as to why it is reasonably necessary to restrict the defender from soliciting any of the pursuer's employees as opposed to certain categories of employees nor any averments as to why it is necessary to do so for the period of 12 months.

[42] I was referred to the comments of Judge Whiteman QC at paragraph 50 in the case of *TSC Europe (UK) Limited v Massey* [1999] ICR 1068:

"In my judgement, clause 10(a)(ii) of the contract of employment has two clear vices. First, it prohibits Mr Massey from soliciting any employee of Aspen or TSC without reference to his or her importance to the business and whether or not he or she has any knowledge or experience in relation to Aspen's technical fields of activity. Secondly, the covenant prohibits Mr Massey from soliciting any such employees even if their employment with Aspen or TSC commenced after Mr Massey left the company. It is the combined effect of these two vices that is critical...For that reason it is no answer to the claim that the restrictive covenant is unreasonable to contend That the prohibition on the solicitation of any employee was reasonable because at the time of the sale 20 of the 21 employees of Aspen were considered by TSC to be crucial to the business of Aspen. Any employee who joined Aspen during the prohibited period after Mr Massey ceased to be an employee of Aspen would be within the prohibition of clause 10(a)(ii), however junior his or her position in the company".

[43] The court in that case held that the restrictive covenant in that case had two vices.

Firstly, it did not differentiate between classes of the employer's employees affected.

Secondly, it included employees who started work with the employer after the other party had left their employment.

[44] I was also referred to the case of *Dawnay, Day & Co Ltd & Another v D'Alphen & others* [1988] 1068. This was a case involving two contractual restrictive covenants, one in a shareholder agreement and the other in a contract of employment. I was referred to the comments of Lord Walker starting at page 117:

"Clause 12.1.1 of each of the service agreements prohibits a manager, for a year after the end of his or her employment, from soliciting anyone who was during the

manager's employment a director or senior employee of Dawnay Securities. Clause 12.1.2 contains a prohibition, for a similar period, against employing or offering employment to any such person. In this area the law is wary of any restriction on a worker's capacity to earn their living as they choose, even if the restriction is imposed indirectly (that is, on a potential employer or recruiter): see *Kores Manufacturing Co. Ltd. v. Kolok Manufacturing Co. Ltd.* [1959] Ch. 109, cited by Dillon L.J. in the *Hanover Insurance* case. In my judgment clause 12.1.2 is indefensible in an employment contract, and I did not understand Lord Irvine seriously to contend otherwise. Clause 12.1.1 is not so obviously indefensible. It avoids the defects of clause 9.1(c) of the shareholders' agreement (the inclusion of all grades of employees, and future employees) though it gives a new hostage to fortune by referring to 'senior' employees. Mr. Elias submits that that is void for uncertainty. I reject that submission. The court is very slow to hold contractual terms void for uncertainty. The meaning of 'senior' can be decided, if necessary, in the light of evidence as to the surrounding circumstances".

[45] In these comments the court recognised as a "defect" in the restrictive covenant "the inclusion of all grades of employees, and future employees". It was submitted that in this case, the restrictive covenant suffers from the same defect and so is defective.

[46] The defender highlighted the use of the word "key" by the pursuer in the penultimate sentence in condescence 4: "It is reasonably necessary to restrict the Defender from soliciting the staff of the Pursuer to prevent the Pursuer from being adversely affected by the loss of key employees".

[47] It was submitted that by using the word "key", the pursuer clearly regards some of its employees as more important than others but the terms of the restrictive covenant does not do so and does not restrict the employees involved in any way. Thus, there is an inconsistency between what is pled and what the restrictive covenant says and a recognition by the pursuer in its pleadings that the clause is defective because it is too wide.

[48] It was submitted by the defender that the 12 months' period of the restrictive covenant is not supported in any way in the pursuer's pleadings whereas it should be. That period itself should be tied to the legitimate business interest that the pursuer seeks to protect by use of the restrictive covenant, but it is not. The pursuer does not explain why

that period was selected or is justified. I was referred to the comments of Sir Christopher Slade in the case of *Office Angels v Rainer-Thomas* [1991] IRLR 214:

“The court cannot say that a covenant in one form affords no more than adequate protection to a covenantee’s relevant legitimate interests if the evidence shows that a covenant in another form, much less far-reaching and less potentially prejudicial to the covenantor, would have afforded adequate protection”.

[49] It was submitted by the defender that this could have been done in this case by restricting the covenant to senior employees of the pursuer that the defender actually dealt with whilst he was in the pursuer’s employment. It does not do so and so is prejudicial to the defender in that it is too wide in its scope and duration.

[50] The defender submits that, as a result, the terms of the restrictive covenant are wider than reasonably necessary to protect any legitimate business interest of the pursuer and is unenforceable. The pursuer’s case relies on an unenforceable contractual provision and is irrelevant.

Pursuer’s submissions

[51] The pursuer’s submissions also fell into two parts. The first related to the relevancy and specification of each party’s case. The second related to the enforceability of the restrictive covenant in the defender’s contract of employment.

Relevancy and specification of the defender’s case

[52] The pursuer’s first and second pleas-in-law are in the following terms:

- “1. The Defender’s averments being irrelevant et separatim lacking in specification, they should be excluded from probation.
2. The Defender’s averments being irrelevant et separatim lacking in specification, decree should be granted as craved”.

[53] The pursuer submits that the defender's averments surrounding the issue of the alleged solicitation by the defender of the pursuer's employees are irrelevant. In that regard, the defender states in answer 6:

" ... in early 2025 CD was actively looking for a new employer. The work he carried out for the pursuer was largely recladding work, which was not his favoured type of work. His work with the pursuer also required him to spend periods of time staying away from home. He engaged recruitment agencies and made enquiries to prospective employers. On or around 17 February 2025 CD sent a copy of his CV to HLSM at its generic email address, info@mcconnell.co.uk, noting that he would be interested in any future work. This resulted in CD meeting with Frank McManus, a divisional director of HLSM, on or around 25 April 2025 and discussing potential employment opportunities. On or around 23 June 2025 CD was offered a job as project manager with HLSM. On or around 20 June 2025 CD was interviewed for a job as project manager for Luddon Construction Limited ('Luddon'). This interview was arranged by RG Setsquare, a recruitment agency specialising in the construction industry. In the days following the interview, CD was offered a job ...".

[54] The pursuer submits that, taken at its highest, it does not follow from these averments that the defender could not still have instigated contact with the employees mentioned to entice them to leave their employment with the pursuer in breach of the restrictive covenant clause. The pursuer submits that these averments are therefore irrelevant and should be excluded from probation.

[55] Also in that regard, the defender states in answer 9:

"Explained and averred that there is consistently a high level of staff turnover within the construction industry. This is particularly so for staff such as site managers who may move to a different employer following the completion of a project. The defender is aware of at least 15 people having left the employment of the pursuer during 2025. The role of site manager is a fairly junior role and can normally be replaced within around four months. As hereinbefore averred, Messrs White and Hamilton both wished to leave the pursuer's employment. CD would have moved to Luddon had he not been offered a job for HLSM. AB would have moved to another employer when an opportunity arose. EF remains employed by the pursuer..."

[56] The pursuer submits that, taken at its highest, it does not follow from these averments as to there being a consistently high turnover of staff within the construction

industry generally, and about the level of turnover of staff at the pursuer specifically, that the defender could not have breached the restrictive covenant. The pursuer submits that these averments are also irrelevant.

Relevancy and specification of the pursuer's own case

[57] The pursuer submits that they have pled a relevant and specific case.

[58] I was referred to paragraph 9.30 of MacPhail where the learned author said the following:

“The defender may seek dismissal of the action upon a plea of lack of specification. That plea finds its proper application in a case where the defender does not know the case against them and objects to being taken by surprise at the proof. It is possible for a condescendence to be relevant, in respect that it states facts sufficient to render the action relevant in law, but to be lacking in specification in respect that it does not give fair notice of all the facts which the pursuer intends to establish. The degree of specification which will be deemed sufficient for fair notice depends on the particular circumstances of each case. Enough specification must be given to enable the other party to identify what is being alleged against them and to prepare their case. Any material dates, times and places which ought reasonably to be known to the pursuer should be specified; but in certain circumstances averments may be sufficiently specific if facts peculiarly within the defender's knowledge cannot be averred because of practical difficulties. When deciding whether the defender has been given fair notice of the pursuer's case the court will consider the matter broadly and will regard a complaint of lack of fair notice as justifiable only if it is likely to result in material prejudice to the defender”.

[59] It was submitted that when considering if the pursuer has pled a case with sufficient specification the court should consider the matter broadly and each case will depend on the specific facts of the case. In this case the pursuer says that they have pled sufficient facts to give the defender fair notice of the case against him.

[60] In relation to the issue of the defender's alleged solicitation of the pursuer's employees, the pursuer states in condescendence 6:

“...The Pursuer employed CD as a site manager for 5 years and 11 months. CD tendered his resignation in July 2025. He initially advised the Pursuer that he

was leaving the Pursuer to start work with Luddon Construction but later confirmed that he was going to work for Hugh LS McConnell Ltd. The Pursuer employed AB as a site manager for various periods over the last 20 years and latterly for 4 years and 8 months. AB tendered his resignation in August 2025. AB has confirmed he is going to work for Hugh LS McConnell Ltd. EF, who works in the Pursuer's Manchester office was contacted by the Legacie Group. EF was asked if she would leave the Pursuer and go to work for the Legacie Group. Believed and averred that the Defender is a good friend of GH, the chief operating officer of Legacie Developments Ltd..."

[61] In addition, the pursuer states in condescendence 7:

"CD, AB and EF were employed by the Pursuer when the Defender ceased working for the Pursuer. Believed and averred that the Defender instigated contact with CD, AB and EF to entice them to leave their employment with the Pursuer in breach of the terms of clause 42 ii of the Defender's Employment Contract".

[62] The pursuer submitted that the facts averred in condescendences 6 and 7, taken together, give the defender fair notice that the pursuer's case against him is that he instigated solicitation of the pursuer's employees into joining the same company that the defender had joined in breach of the restrictive covenant.

[63] The pursuer submits that the "Believed and averred" formula of averment used by them in condescendence 7 is not used as an expression of hope rather than fact. The pursuer submitted that its use was appropriate given that the fact of such solicitation is a material fact within the defender's own knowledge. Moreover, its use in condescendence 7 is supported by the averments of fact in condescendence 6 (that the named employees had both been employed by the pursuer for long periods of time, that they both held in their notice within 1 month of each other and within a few months of the defender leaving and both started work with the same new employer that the defender started with) and from which the defender's solicitation can be reasonably inferred. The pursuer submits these averments, taken together, provide a relevant basis upon which the pursuer is entitled to maintain that the defender did solicit the pursuer's employees to leave their employment.

The pursuer also submits that these averments, taken together provide the defender with sufficient specification about the pursuer's case against him. The pursuer submits that their case is relevant and sufficiently specific.

The enforceability of the restrictive covenant in the defender's contract of employment

[64] The pursuer agreed with the submissions made for the defender that for contractual provisions in restraint of trade to be enforceable, they require to protect a legitimate business interest of the employer protect and extend no further than is reasonably necessary to protect those interests.

[65] In that regard, the pursuer states in condescence 4: "Clause 42 ii seeks inter alia to ensure the stability of the Pursuer's workforce".

[66] The pursuer points out, and this was accepted by the defender in their submissions at debate, that maintaining the stability of a workforce can amount to a legitimate business interest. The pursuer submits that, in that regard, there is therefore no dispute that the interest of the pursuer that the restrictive covenant seeks to protect is a legitimate one.

[67] The pursuer states in condescence 4: "Recruitment in the construction industry is challenging, making the retention of employees, particularly those with experience and expertise, essential".

[68] The defender states in answer 4: "There is consistently a high level of staff turnover in the construction industry".

[69] The pursuer submits that the parties both therefore recognise that there are high levels of staff turnover in the construction industry, and the pursuer submits that, in those circumstances, a restrictive covenant of the scope and length identified in this case, is reasonably necessary to mitigate the impact of high levels of staff turnover.

[70] The pursuer submits that just because the restrictive covenant does not restrict the class of the pursuer's employees covered by same, that does not automatically mean that it is unenforceable.

[71] The pursuer also submits that the restrictive covenant does not render the defender unemployable and does not have any adverse impact on the defender. He could still get work in the construction industry and even with one of the pursuer's competitors so long as he did not breach the restrictive covenant.

[72] The pursuer argued that the case of *Sundolitt Limited v Addison* [2017] CSIH 15, cited by the defender, was a case where the employer sought to exclude the former employee from the particular industry involved. That is not the case here and so that case can be distinguished from this case.

[73] In this regard I was also referred to the case of *Apex Resources Limited v MacDougall and others* [2021] CSOH 40 and in particular to the comments of Lady Wolffe at para [21]:

"Furthermore, in my view, Ms Tyre overstates the effect of the non-compete clause as rendering the former employees 'unemployable'. The non-compete clause does not have this effect. Rather, it is confined to the specific sector of recruitment (in the construction field) in which the pursuer is a specialist provider. Moreover, the non-compete clause operates in a bespoke (not blanket) fashion in respect of each of the former employees, because it is confined to the specific periods (defined as 'the Relevant Period') for which each of the three former employees was employed (the dates of the Relevant Period are different for each of the former employees); and there is the further qualification that he or she was 'directly concerned' in the pursuer's business. The former employees are free to become employed or engaged in any recruitment agency other than one involving placements within the construction industry, or indeed they are free to become employed or engaged in any other field of employment".

[74] The pursuer argued that these comments were relevant because such a recognition that the former employee was not excluded from working in the same field that they worked in whilst employed by the employer should be recognised in this case.

[75] For these reasons the pursuer submits that his case is relevant and sufficiently specific as to give the defender proper notice of the case against him in that regard.

[76] The pursuer submits that, in any event, the issue of the enforceability of the restrictive covenant cannot be determined without the court hearing evidence in the case as it requires the court to consider the facts and circumstances particular to this case as well as on issues such as the state of recruitment in the construction industry and the difficulties faced by employers by high turnover of staff in the industry before doing so. That cannot be done without hearing evidence. In that regard I was referred to the comments of Evans LJ at page 131 of the case of *Dawnay, Day & Co Ltd & another v D'Alphen & others* [1998] ICR 1068:

“For my part, I have some reservation as to whether the validity or otherwise of a non-solicitation covenant of this kind should properly be regarded as a question of law. The authorities to which I have referred above demonstrate that the general principles are clear and that their application depends upon the terms of the undertaking and the factual circumstances in every case”.

Analysis and decision

[77] It is not contentious between the parties that the basic rule of pleadings is that each party must give fair notice to the other of that party's case against the other so that the other party will not be ambushed at proof in having to answer a case he had no advance notice or warning of.

[78] So far as specification is concerned, MacPhail at paragraph 9.28 states:

“A party's averments in condescendence or answers must specify sufficient facts to allow the party to lead all the evidence desired to lead at the inquiry, and to give the opponent fair notice of what the party hopes to establish in fact ...”

[79] In the case of *MacDonald v Glasgow Western Hospitals* 1954 SC 453 at page 465

Lord President Cooper said: “The plea of lack of specification finds its proper place in a case

where a defender does not know the case to be made against him and objects to be taken by surprise at the proof”.

[80] So far as relevancy is concerned, in the case of *Jamieson v Jamieson* 1952 SC (HL) 44,

Lord Normand at page 50 said:

“The true proposition is that an action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer’s averments are proved. The onus is on the defender who moves to have the action dismissed, and there is no onus of the pursuer to show that if he proves his averments he is bound to succeed”.

[81] Faced with a plea to the relevancy of a party’s pleadings, the proper approach for the court to take is to consider whether, on a fair reading of the pleadings, assuming the averments contained therein to be true, that party’s case is bound to fail - *Wilson v Norwich Union Fire Insurance Society Ltd* 1999 SLT 1139 at page 1140H.

[82] MacPhail at paragraph 9.30 states:

“It is possible for a condescendence to be relevant, in respect that it states facts sufficient to render the action relevant in law, but to be lacking in specification in respect that it does not give fair notice of all the facts which the pursuer intends to establish. The degree of specification which will be deemed sufficient for fair notice depends on the particular circumstances of each case”.

[83] What then of each party’s argument of lack of relevance and specification of the other’s case?

The pursuer’s case

[84] I do not think it contentious between the parties that the pursuer’s case is dependent upon the pursuer demonstrating that the defender breached the restrictive covenant in his contract of employment with the pursuer. The pursuer submits that his pleadings give the defender fair notice of that and the facts the pursuer intends to establish to prove that he did so. The defender argues that he does not do so.

[85] The critical averments for the pursuer are contained in condescendences 6 and 7.

[86] In condescendence 6 the pursuer avers that the pursuer's employees CD and AB resigned from their jobs with the pursuer within 1 month of each other and within and within a few months of the defender leaving the pursuer's employment and that they both started work with the same new employer that the defender had joined. The pursuer also avers that the pursuer's employee EF was contacted by the Legacie Group and asked if she would leave the pursuer's employment and go to work with them and that the defender's friend was the chief operating officer of Legacie Developments Ltd.

[87] In condescendence 7 the pursuer "believes and avers" that the defender instigated contact with those people to entice them to leave the pursuer's employment in breach of the restrictive covenant.

[88] The first question is, are these averments sufficient to make the pursuer's case a specific case so that the defender is given fair notice of the case against him and, in terms of *MacDonald v Glasgow Western Hospitals*, will not "be taken by surprise at the proof"?

[89] The second question is, in terms of *Jamieson v Jamieson*, must the pursuer's case necessarily fail even if all the pursuer's averments are proved?

[90] Dealing with the issue of the specification of the pursuer's case, the defender points out that the pursuer has no averments as to when or where the solicitation by or on behalf of the defender is said to have been done, by whom, by what means it was done, what was said or communicated in the solicitation etc. All that the pursuer has averred is that he "believes and avers" that the defender instigated contact with the pursuer's employees to entice them to leave the pursuer's employment. The defender argues that the primary facts averred in condescendence 6 are, in terms of *Brown v Redpath and Partnership of Ocean*

Quest v Finning Limited, insufficient to properly found the belief averred in
condescendence 6.

[91] The pursuer argues that they have made sufficient averments between
condescendences 6 and 7 when, taken together, give the defender fair notice of their case
against him.

[92] The pursuer names the other employees they say the defender solicited to entice
them to leave the pursuer's employment. The pursuer avers the dates of their resignations
which were close in time to each other and the defender leaving the pursuer's employment.
The pursuer avers that two of the three employees involved went to work with the same
company as the defender and that the third was asked if she would join another company
whose chief operating officer the pursuer believes is a friend of the defender. The pursuer
argues that these averments are of facts which are sufficient to allow the court to draw the
inference that the defender had solicited them to do so. Moreover, the detail of the
solicitation by the defender would be within the defender's own knowledge.

[93] I have concluded that, with the exception of those relating to EF in
condescendences 6 and 7, the pursuer's averments are sufficiently specific to give the
defender fair notice of what the case against him is and are such that he would not be taken
by surprise at proof or materially prejudiced by the matter proceeding to proof on those
averments.

[94] The pursuer's case is not without difficulty as a result of the lack of averments as to
how and when the solicitation by the defender is said to have taken place. This may result
in limits being placed on the pursuer as to what evidence in that regard they can be led at
proof. However, I have concluded that, one matter aside, there are sufficient averments by
the pursuer in condescendences 6 and 7 on record to give the defender fair notice of the case

against him and to allow the matter to proceed to proof without the defender being taken by surprise at proof or being materially prejudiced by the matter proceeding to proof on those averments.

[95] That matter aside relates to the pursuer's averments in respect of EF and I shall say more about that later in this Opinion.

[96] In reaching this conclusion I have, as MacPhail says, considered the matter "broadly".

[97] I consider that, on a reasonable and fair reading of the case, it is clear that the pursuer's case is that the defender was employed by them, that his contract of employment contained a restrictive covenant and that he breached that covenant by soliciting employees to leave the pursuer's employment. The terms of the restrictive covenant are narrated in the pleadings by the pursuer. The defender admits that the defender's contract of employment with the pursuer contains such a clause and also admits the terms of the clause. The pursuer names the employees that the defender has said to have solicited to leave their employment. The pursuer avers the details of their working history including the dates of their resignations. The pursuer avers that two of them started working for the same new employer as the defender did upon leaving their employment. I consider that these are quite specific and clear averments. Whilst the pursuer does not aver the precise date, method or terms of the alleged solicitation, I regard the alleged solicitation as a matter within the knowledge of the defender or any person acting on his instructions. In such circumstances the court does not require from the pursuer precision in the pleadings which he cannot achieve for lack of knowledge. The question is whether sufficient factual material is averred to identify the case to be met. The pursuer avers on a "believed and averred" basis that the defender instigated contact with those employees to entice them to leave the

pursuer's employment. I accept the submission that a "believed and averred" averment requires a foundation in primary fact. In this case I consider the pursuer has sufficient averments to put the case that that foundation is found, albeit narrowly, in the averments concerning the timing of the departures of CD and AB, their previous employment with the pursuer, their subsequent employment with the same employer as the defender, and the relatively short interval between those events.

[98] Taken with what the pursuer has pled in condescendence 6, and what I consider could be a reasonable assumption that the detail of any such solicitation would be within the defender's own knowledge, I cannot conclude at debate that no reasonable court could draw the inference that the pursuer seeks to draw ie that the defender did solicit them and so breach the terms of the restrictive covenant.

[99] However, I consider the pursuer's averments relating to EF to be in a different category. The pursuer avers that she was contacted by the Legacie group not the defender. It is not averred that the Legacie Group was acting on behalf of or under instruction of or with the knowledge of the defender. The pursuer avers that EF was asked if she would go to work for the Legacie Group. The person that the pursuer believes and avers is a good friend of the defender is chief operating officer of Legacie Developments Ltd ie not of the Legacie Group. The pursuer has no averments as to the relationship, if any, that exists between the Legacie Group and Legacie Developments Ltd. The pursuer avers that CD and AB actually joined the same new employer as the defender did. The pursuer pleads a factual linkage in that regard. EF did not leave the pursuer's employment. The pursuer avers that she was approached by a third party but the pursuer does not plead that there was any actual connection between that third party and the defender. The distinguishing feature is that, in respect of CD and AB, I consider the pursuer has sufficient averments to

put the case that there is an identifiable factual sequence connecting the defender's departure and their subsequent employment by the same employer as the defender, but no equivalent factual chain is averred by the pursuer in respect of EF.

[100] For these reasons I have concluded that the pursuer's averments in relation to EF should be excluded from probation.

[101] Dealing with the issue of the relevancy of the pursuer's case, in terms of *Jamieson v Jamieson*, must the pursuer's case necessarily fail even if all the pursuer's averments are proved?

[102] The question is not whether the pursuer is likely to succeed, but whether the pursuer must necessarily fail even if all its averments are proved.

[103] I have concluded that it cannot be said that it would.

[104] It is not contentious that the defender's contract of employment with the pursuer's included a restrictive covenant.

[105] The terms of the restrictive covenant are admitted by the defender.

[106] It is admitted that the defender resigned from the pursuer's employment and when he resigned.

[107] It does not appear to be contentious between the parties that CD and AB both resigned from the pursuer's employment shortly after the defender left the pursuer's employment.

[108] It does not appear to be contentious between the parties that, at a point after they left the pursuer's employment, they both began working with the same new employer that the defender joined after leaving the pursuer's employment.

[109] The pursuer avers that it is their belief that the defender instigated contact with them to entice them to leave the pursuer's employment and that the defender is in breach of the said restrictive covenant in doing so.

[110] I consider that, at this point, on a fair reading of the pleadings, it cannot be said that the pursuer's case will necessarily fail even if they prove these averments/matters.

The defender's case

[111] The pursuer argues that the defender's averments in answers 4 are lacking in specification and are irrelevant and so should not be admitted to probation.

[112] The pursuer argues that in answer 4 the defender avers that the period of the restrictive covenant ie 12 months, is unduly long and unreasonable but does not give any specification as to why that is and so no fair notice is given to the pursuer as to the case against it in that regard.

[113] I have concluded that this is not the case. The defender avers that the period of 12 months is too long. I consider that this is a clear and specific averment which gives the pursuer sufficient notice of this part of the defender's case against them. Furthermore, the defender placed calls upon the pursuer to aver how the pursuer's legitimate business interests can justify a period of 12 months' restriction. The pursuer did not answer so an adverse inference could be drawn from that.

[114] The pursuer argues that in answer 4 the defender avers that the terms of the restrictive covenant are so wide and unreasonable as to be unenforceable. However, it does not follow from the pursuer's subsequent averments about the scope and effect of the restrictive covenant that the clause fails to meet the test for enforceability. The pursuer argues that the defender's averments are therefore irrelevant. I disagree. The defender has

averments on record that by not restricting the category of employees covered by the restrictive covenant, the terms of same are too wide.

[115] The pursuer argues that in answer 6 the averments as to how the pursuer's former employees CD and AB came to be in the employment of the same new employer as the defender are irrelevant because, even if they are taken at their highest, it does not follow that the defender could not still have instigated contact with them to entice them to leave the pursuer's employment in breach of his restrictive covenant. These averments are accordingly irrelevant. I disagree. I consider that the defender's averments about this are plainly relevant as they seek to give an alternative explanation as to why these people ended up in the employment of the same new employer as the defender did. The defender avers on record a specific and clear denial of solicitation in that regard so these averments are both relevant and specific and should not be excluded from probation.

[116] The pursuer argues that the defender's averments in answer 9 about the high turnover of staff in the construction industry and about the levels of turnover of the pursuer's staff in particular are irrelevant because they do not bear upon whether the defender could not have breached the terms of the restrictive covenant. I disagree.

In answer 9 the defender makes specific averments about the issue of there being a consistently high level of staff turnover within the construction industry. In my view, these averments give the pursuer fair notice of the defender's case that turnover of staff in the construction industry is a consistent feature of the industry and that it is not a justification for the period of restriction of 12 months.

[117] So far as these arguments relating to relevance are concerned, in terms of *Jamieson v Jamieson*, must the defender's case necessarily fail even if all the defender's averments are proved?

[118] I consider that, at this point, on a fair reading of the pleadings, it cannot be said that the defender's case will necessarily fail even if he proves these averments/matters. The defender's averments concerning the circumstances under which CD and AB came to be employed by the same new employer as the defender are plainly relevant. They provide an alternative explanation for their change of employment relied upon by the pursuer and are directly connected to issues of the alleged breach of the restrictive covenant. Similarly, the defender's averments about staff turnover within the construction industry are relevant to both the enforceability of the restrictive covenant and to the pursuer's claim for damages.

Enforceability of restrictive covenant

[119] The parties agree that for a restrictive covenant to be enforceable the following must be established:

- (i) That it protects the legitimate business interests of the employer; and
- (ii) That it extends the restraint no further than is reasonably necessary to protect that interest.

[120] See *Sundolitt Limited v Addison* [2017] CSIK 15 per Lord Brodie at 21 and *Apex Resources Limited v Ross MacDougall and others* [2021] CSOH 40 at paragraph 12.

[121] The defender argues that the clause in this case is too wide because it prohibits the defender soliciting the pursuer's employees without restriction and because the period of restriction of 12 months is too long.

[122] The pursuer argues that the restrictive covenant is necessary to protect the maintenance and stability of its workforce. In condescendence 4 the pursuer avers: "Recruitment in the construction industry is challenging, making the retention of employees, particularly those with experience and expertise, essential".

[123] In his note of preliminary pleas the defender accepts that the maintaining the stability of a workforce can amount to a legitimate business interest. As I have noted it, this was also accepted by the defender in his submissions during the debate.

[124] It therefore seems to me that, in terms of part (i) of the enforceability test, the pursuer has pled a sufficiently specific case that a “legitimate business interest” has been identified.

In addition, in answer 4 the defender avers: “There is consistently a high level of staff turnover in the construction industry”.

[125] This, in my view, is recognition, at least in part, by the defender of this proposition.

[126] The defender also submits that the period of 12 months’ restriction is too long. The pursuer avers in condescendence 4 the following:

“Explained and averred that the restrictive covenants are enforceable. They are consistent with standard practice in the construction industry. In terms of both scope and duration, the restrictive covenants go no further than is necessary to protect the legitimate business interests of the Pursuer and are proportionate to the position the Defender held as a senior employee within the Pursuer’s business”.

[127] Accordingly, in terms of duration, the pursuer has averments on record that found the reasonableness of the duration in terms of (i) consistency with standard practice in the industry, (ii) protection of a legitimate business interest and (iii) being proportionate to the defender’s role as a senior employee.

[128] It therefore seems to me that, in terms of part (ii) of the enforceability test, the pursuer has pled a sufficiently specific case in relation to the duration of the restrictive covenant.

[129] The defender’s argument identifies a potentially significant difficulty for the pursuer. The covenant is not restricted to senior employees, “key” employees or employees with whom the defender had material dealings.

[130] However, I do not think that, at this point, it can be said that if the pursuer proves all that they offer to prove, that their case is bound to fail.

[131] Having said that, having sufficient averments upon these matters to get the case to proof and actually establishing his case at proof in terms of parts (i) and (ii) of the enforceability test are two different things.

[132] As said in *Apex Resources Limited v Ross MacDougall and others* [2021] CSOH 40 at paragraph 17, whether a restrictive covenant is or is not enforceable depends on the facts and circumstances of each particular case and to the relevant context or field of employment.

[133] In my view, it is not possible for the court to determine the enforceability of the restrictive covenant on the basis of submissions and an examination of the pleadings.

I consider that this question can only be answered by the court after hearing evidence upon matters such as:

- the difficulties, if any, in recruitment in the industry;
- the difficulties, if any, in staff retention in the industry;
- the nature and extent of the defender's role with the pursuer;
- the impact of staff departures in the industry and on the pursuer;
- the customary duration of such restrictions in the industry.

[134] The defender does not simply assert that the clause is unreasonable but has made averments of fact supporting that proposition. In answer 9 the defender states:

“...Explained and averred that there is consistently a high level of staff turnover within the construction industry. This is particularly so for staff such as site managers who may move to a different employer following the completion of a project. The defender is aware of at least 15 people having left the employment of the pursuer during 2025. The role of site manager is a fairly junior role and can normally be replaced within around four months. As hereinbefore averred, Messrs White and Hamilton both wished to leave the pursuer's employment. CD would have moved to Luddon had he not been offered a job for HLSM. AB would have moved to another employer when an opportunity arose....”

[135] In my view, evidence would also need to be led before the court could make any decision on these factual averments by the defender.

[136] Whilst I recognise that the lack of averments by the pursuer as to how and when the solicitation by the defender is said to have taken place is a difficulty for the pursuer, and that this may limit the pursuer in what evidence in that regard it can led at proof, nevertheless, for the above reasons I think the pursuer has sufficient averments on record to allow the matter to proceed to proof and that evidence will require to be led on the matters the pursuer does have averments for, together with the defender's relevant averments, before the court can make any decision on the matters in dispute. In my view, these are matters that can only be resolved by evidence.

[137] I repel the pursuer's first and second pleas-in-law.

[138] I reserve consideration of the defender's first plea-in-law on the issue of relevancy to a proof before answer.

[139] I uphold the defender's first plea-in-law on the issue of specification to the extent of excluding from probation the following averments and otherwise reserves consideration of same on the issue of specification to a proof before answer:

In condescendence 6

"EF, who works in the Pursuer's Manchester office was contacted by the Legacie Group. EF was asked if she would leave the Pursuer and go to work for the Legacie Group. Believed and averred that the Defender is a good friend of GH, the chief operating officer of Legacie Developments Ltd".

and in condescendence 7: " ... and EF ...and EF ..."

[140] I reserve consideration of the defender's seventh plea-in-law to a proof before answer.

[141] I shall assign a hearing on expenses in relation to the debate on a date to be hereafter advised.