ALERTER

Suspicious Minds

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The perils of suing on suspicion, when employee surveillance backfires, and the indemnity costs consequence of putting reputations on trial without an evidential basis: 360 Recruitment v Amos and Barker Ross [2026] EWHC 2295 (KB)

360 is a classic employee competition case in many respects. A high performing employee moves to a competitor, and the original employer fears a loss in business. Suspicion rises, and every interaction is viewed in the most sinister way. Proceedings are commenced against both the departing employee, and his new employer – with the prospect of not only restraining competition but also exerting commercial pressure and accessing deep pockets. Solicitation of clients, poaching employees, misuse of confidential information, diversion of business, breaches of restrictive covenants, procuring breaches of contract, knowing receipt and conspiracy are all alleged. Interim relief is pursued, and a speedy trial is listed. At stake are not only very significant costs, but the reputation of the employee and his new employer: in this case, Mr Amos and Barker Ross.

It is very common in such cases for a claimant to rely, at least in part, on the drawing of inferences, on the basis that the claimant contends it does not have all the facts. However, ***360*** serves as a cautionary tale as to the proper limits of proceeding on a weak and inferential basis, and the high risk a claimant takes in choosing to pursue a speculative claim based on little more than a suspicious mind.

360's suspicions had been fuelled by evidence it had gathered using covert employee surveillance software which it had installed on its employees' devices in "*stealth mode*", which enabled it to monitor in real time, or play back at its leisure, screen recordings of every page viewed and every mouse click. Using this "*bossware*", 360 was able to see Mr Amos's private LinkedIn messages setting up job interviews, and his unguarded exchanges with friends, expressing his views with some bravado.

The Judgment is highly critical of 360's use of such covert monitoring software, describing it as subjecting Mr Amos to "*extensive and intrusive scrutiny*", commenced only on the "*gut feeling*" of a director, and contrary to 360's own policy that any surveillance would be proportionate, relevant to business needs, and not unduly excessive or intrusive. Further, far from assisting 360's case, the fact it had access to such extensive material, and yet was still unable to provide evidence of its claims, was repeatedly relied on in the Judgment as a reason for rejecting the inferences sought.

The defendants were overwhelmingly successful at trial, successfully defending every claim advanced against them, with the sole exception of an "*innocent and purely technical*" breach by Mr Amos of the equitable duty of confidence, resulting in no practical or material prejudice, and likely entitling 360 to nominal damages only. A claim succeeding in nominal damages only is, of course, in reality, a defeat (Marathon Asset Management LLP v Seddon [2017] 479. Every single claim against Barker Ross failed.

Unsurprisingly, the defendants were awarded all of their costs of the litigation, including of the interim injunction stage, when they had voluntarily provided undertakings, without prejudice to the validity of restrictive covenants, which at trial were held to be unenforceable.

Further all of Barker Ross's costs were awarded on an indemnity basis. The costs judgment recognising that "*very serious allegations*" had been made, "*entirely without foundation*" and there was "*no reasonable basis for putting* [Barker Ross's witnesses] *through the ordeal of a trial without being on firmer footing in terms of the evidential basis*". Indemnity costs were justified on

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the basis of the well established principles in Three Rivers DC v Bank of England [2006] 5 Costs LR714 at [25], the recent decision of Nicklin J in Lawrence v Associated Newspapers [2026] EWHC 2207 at [25], and a particular recognition by the Court that "*it was the good name of Barker Ross* [and its witnesses] *which were also on trial*".

The costs outcome in ***360*** stands as a salutary reminder of the potential application of indemnity costs principles in an employee competition case, and the particular need to assess the strength of the evidence when deciding whether to issue against the new employer as well as the departing employee.

ABOUT THE AUTHORS

Kathleen Donnelly KC and Celia Oldham acted for the successful defendants at the liability trial and the costs hearing, instructed by David Vaughan and Katherine Richards of Shakespeare Martineau.



Kathleen Donnelly KC

Kathleen has a wide-ranging commercial practice with particular expertise in group actions, product liability, environmental claims and employment litigation. In her employment practice, she is regularly instructed in employee competition, whistleblowing and discrimination matters. Kathleen has acted in some of the most significant group and multi-party litigation before the English courts, including the Post Office litigation, VW emissions litigation and NEXT equal pay claims. She is known for her meticulous preparation, strategic thinking and powerful advocacy, particularly in cases involving complex factual and technical evidence.

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Celia Oldham

Celia has a commercial litigation practice with a particular focus on group litigation, product liability, environmental law and employment litigation. She has appeared in many high profile group actions including the ongoing Pan-NOx litigation and the River Wye group claim. She was named the Group Litigation and Consumer Junior of the year in 2022 and has been nominated for the same award in 2025 and 2026. In the employment context, Celia's practice has a particular focus on employee competition claims. She is recognised as a much sought-after junior with particular technical ability and experience in high stakes commercial litigation.

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