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TEAM MOVES
AND
DEFERRED REMUNERATION

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September 2013

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TEAM MOVES AND DEFERRED REMUNERATION

PAUL GOULDING QC[1]

INTRODUCTION

1. Team moves have proved a growth area for employment litigation in recent years. A 'team move' refers to the situation where a number of employees move to work for a new employer within a short period of time. The term covers a variety of situations ranging from the departure of just two employees to the exodus of a substantial part of the workforce.

2. The proliferation of team move cases shows no sign of any let-up. The factual issues are often complex, the legal issues wide-ranging, and the case-law extensive. Recent examples include:

   - Kynixa Ltd v Hynes [2008] EWHC 1495 (QB);
   - UBS Wealth Management UK Ltd v Vestra LLP [2008] EWHC 1974 (QB), [2008] IRLR 965;
   - Tullett Prebon Plc v BGC Brokers LP [2010] EWHC 484 (QB), [2010] IRLR 648 (Jack J); [2011] EWCA Civ 131, [2011] IRLR 420 (CA);
   - Lonmar Global Risks Ltd v West [2010] EWHC 2878 (QB), [2011] IRLR 138;
   - QBE Management Services (UK) Ltd v Dymoke [2012] EWHC 80 (QB), [2012] IRLR 458[2].

3. In contrast, whilst deferred remuneration schemes have been well-established in practice for some time, and have been a focus for policymakers since the financial crisis of 2007-9, they have so far given rise to few decided cases.

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[1] Blackstone Chambers. Editor of *Employee Competition: Covenants, Confidentiality, and Garden Leave* published by OUP (2nd ed, March 2011).

[2] See *Team Moves: Lessons of Recent Cases* by Paul Goulding QC, where these cases are discussed, available on www.blackstonechambers.com

4. Deferred remuneration takes a variety of forms. In general, it involves the award of remuneration to an employee which is not paid until a future date and only if certain conditions are fulfilled. It can take a number of forms, including cash, share options, restricted shares or fund units. The period between award and payment is often referred to as the vesting period. Prior to vesting, awards can be forfeited in the event that the employment is terminated, or in circumstances in which the employee is deemed to be a bad leaver.

5. The purpose of this paper is to consider two recent important cases on team moves, the first of which also decides some crucial issues regarding the law of penalties in relation to deferred remuneration. The two cases are:

- Imam-Sadeque v BlueBay Asset Management (Services) Ltd [2012] EWHC 3511 (QB), [2013] IRLR 344;
- CEF Holdings Ltd v Mundey [2012] EWHC 1524 (QB), [2012] IRLR 912.

6. These cases also contain critical lessons of practice and procedure for lawyers involved in High Court employment litigation of all kinds and not only in the particular field of team moves and deferred remuneration.

IMAM-SADEQUE v BLUEBAY[3]

7. Imam-Sadeque v BlueBay ("BlueBay") is likely to remain the leading case on team moves and deferred remuneration for some time to come[4]. In particular, it provides answers to the following six questions:

(1) When does an employee's preparation for competition amount to a breach of his duty of loyalty?

(2) When does an employee owe a duty to report a competitive threat?

[3] The author appeared, together with Diya Sen Gupta, as counsel for the employer, BlueBay, instructed by Allen & Overy. See *Bonuses, breaches of fidelity and the penalty doctrine* by Diya Sen Gupta and Fahim Rahman, ELA Briefing, June 2013.

[4] A number of cases raising the issue of the enforceability of restrictive covenants in deferred remuneration schemes have been litigated in recent years only to settle before trial.

(3) Is an employee's duty of loyalty attenuated during garden leave?

(4) Is an employee's failure to report a competitive threat excused by a duty of confidentiality owed to his prospective employer?

(5) Does the penalty doctrine apply to a term in a compromise agreement that an employee will be treated as a good leaver if he complies with his duties?

(6) If so, is such a term an unlawful penalty?

The facts of BlueBay

8. The facts are briefly these[5]. Fahim Imam-Sadeque ("FIS") was a senior employee of BlueBay from 1 July 2004 until 31 December 2011. He wanted to leave BlueBay following a meeting on 6 July 2011 at which management raised complaints about his conduct at work, and informed him about the promotion of a colleague.

9. If FIS had resigned, however, this would have had adverse financial consequences for him. His remuneration included being granted shares or fund units, under the terms of bonus plans, which would vest at future dates, including in January and March 2012 at a value of £1.7m ("the 2012 fund units"). If his employment terminated before the vesting dates, his entitlement to the unvested fund units depended upon whether he was a good or bad leaver. If he left voluntarily, he would be a bad leaver and forfeit the right to his unvested fund units.

10. Unknown to BlueBay, soon after the meeting, FIS agreed to join a new start-up asset management company ("Goldbridge") as Head of Sales. BlueBay was prepared for FIS to leave on the terms of a compromise agreement, which was concluded on 22 July 2011. This provided for FIS to conduct a handover and then be on garden leave until 31 December 2011; and for FIS to be treated as a good leaver for the purpose of the vesting of the 2012 fund units provided that he complied with the terms of the compromise agreement and his employment contract ("the good leaver provision"). FIS was on

[5] [1]-[113].

garden leave from 22 August 2011 until the termination of his employment on 31 December 2011, after which he started working for Goldbridge.

11. BlueBay alleged that FIS breached the terms of the compromise agreement and his employment contract between 6 July and 31 December 2011 by assisting Goldbridge in setting up and launching its competitive business, and recruiting another BlueBay employee (Damian Nixon); and, as a result of which, FIS was not entitled to be treated as a good leaver and so was not entitled to the 2012 fund units.

12. FIS brought a claim for the 2012 fund units, denying that they had become forfeit by reason of any breach, and arguing in the alternative that any such forfeiture would be unenforceable as a penalty.

The "competition" issues in BlueBay

(1) When does an employee's preparation for competition amount to a breach of his duty of loyalty?

13. BlueBay argued that FIS was in breach of (i) an express term in his contract of employment that he would (a) act in the best interests of BlueBay at all times, and (b) not be directly or indirectly engaged or concerned in any other business where this was, or was likely to be in conflict with BlueBay's interests (para 4), and (ii) the implied duty of loyalty[6].

14. The judge (Popplewell J) made the following findings:

    (1) The duty of loyalty, which is owed by all employees, is to be distinguished from a fiduciary duty which is additionally owed by some employees, citing Ranson v Customers Systems Plc [2012] IRLR 769. In the employment context, the duty of loyalty is one where each party must have regard to the interests of the other, but not that either must subjugate his interests to those of the other. In contrast, the hallmark of the fiduciary is a *single-minded* duty of loyalty. See [122]-[124].

[6] This is sometimes referred to as the duty of good faith and fidelity, but the more everyday language of the duty of loyalty ([123]) is used throughout this paper. BlueBay also relied on the employee's duty of trust and confidence but the Judge held that this added little to the employee's duty of loyalty: [122].

(2) The judge rejected the submission for FIS that the duty of loyalty required no more, essentially, than that the employee act honestly towards the employer. This has no support in the authorities. An honest but misguided disloyalty is no less a breach than a dishonest one. See [125].

(3) Not all preparation for future competitive activity will be a breach of an employee's duty of loyalty: Helmet Integrated Systems Ltd v Tunnard [2006] EWCA Civ 1735, [2007] IRLR 126, per Moses LJ at [26]-[28]. Having referred to 17 cases cited to him on this point, the judge stated that these provide helpful guidance as to the application of the principles in particular cases; but the precise scope and content of the duty of loyalty, and whether it has been breached, is a question of fact which depends on the particular circumstances of each case. See [126]-[132].

(2) When does an employee owe a duty to report a competitive threat?

15. BlueBay argued that FIS was in breach of his express and implied duties by failing to disclose to BlueBay the competitive threat posed by Goldbridge.

16. As to the duty to disclose a competitive threat, the judge held at [133]:

(1) The duty of loyalty may require an employee to report to his employer a competitive threat of which he becomes aware, irrespective of whether he or any fellow employees are involved in that competitive threat. So too may an express term to act in the best interests of the company.

(2) Whether it does so is again fact sensitive, and will depend upon the terms of his contract of employment, the nature of his role and responsibilities, the nature of the threat, and the circumstances in which he becomes aware of it.

(3) A senior manager who becomes aware of a competitive threat to an aspect of the business for which he is responsible will normally come under such a duty, whereas a junior employee without such responsibility would not.

17. The judge found that there were five matters of importance which formed the context in which the scope and content of FIS's duty of loyalty in relation to the launch of Goldbridge fell to be judged.

(1) The express term of the contract of employment was restrictive[7]. They contained words of considerable breadth, which reflected FIS's seniority and concomitant responsibility. They left very little room for any activity which might potentially threaten BlueBay's interests. See [135].

(2) Goldbridge was to be a direct competitor of BlueBay, targeting similar clients and offering similar products. FIS's express and implied duties were applicable to activity which assists a business to compete in the future. Goldbridge was a competitive threat from the moment that it became a serious and viable project. See [136]-[137].

(3) FIS was a senior employee of BlueBay and highly remunerated. The scope of the duty imposed on someone at high managerial level in a multi-million pound business will involve a heavy burden not to do anything which might result in damage to the interests of that business. See [138].

(4) FIS's senior role was in an aspect of the business which was of very considerable importance to the success and profitability of BlueBay, as it would be to Goldbridge. See [139].

(5) FIS was in a position to exert influence on the structure and operational implementation of Goldbridge's business plans. See [140].

(3) <u>Is an employee's duty of loyalty attenuated during garden leave?</u>

18. It was submitted for FIS that his obligations were significantly attenuated when he was on garden leave. Reliance was placed on the observations of Maurice Kay LJ in <u>Tullett Prebon</u>[8] at [41]:

> "In his helpful book *Employee Competition: Covenants, Confidentiality and Garden Leave* (OUP), Mr Paul Goulding QC suggests (at para

[7] See para 13 above.
[8] See para 2 above.

4.111) that…as had been previously indicated in *Balston v Headline Filters Ltd* (1987) FSR 330, 'the duty of fidelity or good faith may be attenuated during the period of garden leave depending on the factual circumstances'. I think this is the correct analysis of a garden leave case…"

19. As to this submission for the employee, the judge held:

(1) The scope of FIS's duties with which this case was concerned did not change in any relevant respect when he went on garden leave. One reason was that the contract provided expressly that the contractual terms applied during garden leave, and this applied to the express term at para 4 and the implied duty of loyalty. See [143].

(2) To some extent it is right to say that the content of the duty of fidelity is attenuated when an employee is put on garden leave: he is relieved of the duty to carry out the work activities for which he was employed, and owes no duty to pursue those activities loyally, or indeed at all. But the same cannot be said of the obligations which are imposed by the duty of fidelity and are of relevance in this case, which are obligations to refrain from acting in a particular way. Such negative obligations remain part of his duties for so long as he is employed. See [144]-[145].

(3) Maurice Kay LJ's comment that the duty of fidelity *may* be attenuated during garden leave "depending on the factual circumstances" emphasises that whether and to what extent it is attenuated is once more dependent on the particular factual circumstances in which the question arises. See [146].

(4) <u>Is an employee's failure to report a competitive threat excused by a duty of confidentiality owed to his prospective employer?</u>

20. It was also submitted for the employee that any duty to report to BlueBay on Goldbridge competitive activity which might otherwise exist could not be part of FIS's duty of loyalty, in circumstances where he had signed a non-disclosure agreement with Goldbridge. FIS had signed such an agreement at

his first meeting with Goldbridge on 13 July before discussing the start-up in any detail, or his potential job with it.

21. The judge rejected this submission. If a senior employee, who is seeking to join what he knows to be a potential rival, learns of a competitive threat from that source, of which he would otherwise be under a duty to warn his employer, he cannot relieve himself of that obligation by virtue of having entered into a contractual duty towards the rival not to fulfil it. It is not unusual for parties to undertake mutually inconsistent obligations. The existence of one does not excuse non-performance of the other. See [148].

Conclusions on the "competition" issues in BlueBay

22. The judge reached the following conclusion on the content of the employee's duties vis-à-vis Goldbridge activity:

(1) The express term of the contract of employment, and the implied duty of loyalty, each required the employee not, prior to the termination of his employment (including the period on garden leave) to provide any assistance to Goldbridge in setting up and launching its business, save by (a) agreeing that he would join Goldbridge thereafter and negotiating the terms on which he would do so, and (b) making and cooperating in the legal, administrative and regulatory arrangements necessary to enable him to do so. See [150].

(2) The duty of loyalty also required the employee to tell BlueBay that Goldbridge intended to launch a start-up competitive business; that it had the necessary funding, resources, staff and infrastructure in place to do so; and that it intended to launch on 3 October. See [151].

23. On the facts, the judge found that the employee was in breach of his express and implied duties to BlueBay before the termination of his employment in the following respects:

(1) He was involved in substantial discussions with Goldbridge about specific aspects of the proposed business, in order to assist in setting up

the venture and prepare it for its launch, and provided assistance in relation to the announcement of its launch. See [153]-[158].

(2) He failed to disclose to BlueBay the Goldbridge project from 18 July 2011 at the latest, when he discussed the business plan with Goldbridge. He failed to tell BlueBay that Goldbridge intended to launch a start-up competitor; that it had the necessary funding, resources, staff and infrastructure in place to do so; and that it intended to launch on 3 October. See [159]-[160].

(3) He assisted in Goldbridge's recruitment of a fellow BlueBay employee. See [163]-[171].

(4) He sent the draft compromise agreement, BlueBay employee handbook and bonus plans to Goldbridge, which was a breach of his confidentiality obligations. See [178]-[179].

24. The effect of FIS's actions was as follows:

(1) FIS was in repudiatory breach of the compromise agreement in failing to carry out his duties properly prior to going on garden leave, and in breaching his contract whilst on garden leave. See [182].

(2) The result of these breaches was that the provision of the compromise agreement, by which FIS would be deemed to be a good leaver for the purpose of the vesting of his 2012 fund units, never came into effect because he did not comply with the conditions for them to do so, namely compliance with his legal obligations. See [183]-[184].

25. It followed that FIS's claim failed unless the provisions which precluded the good leaver provision being operative were to be ignored by reason of the doctrine of penalty.

The "penalty" issues in BlueBay

26. It was argued for the employee that the provisions of the compromise agreement, which made the good leaver provision conditional upon performance of the terms of the compromise agreement and the contract of

employment, were unenforceable by reason of the penalty doctrine. The argument was as follows:

(1) The effect of the bonus plans which governed the 2012 fund units was that once they had been awarded to FIS as restricted shares, they were transferred to the nominee to hold on behalf of FIS for his benefit. FIS would be entitled to have the legal title transferred to him by the nominee on the vesting date unless they had been forfeited on his leaving BlueBay or on notice of resignation because he was a bad leaver or, at BlueBay's discretion, had breached any of his obligations under the plan. Accordingly at the date of the compromise agreement, FIS had a beneficial interest in the 2012 fund units, and a contingent contractual right to the legal interest in them, each of which would be subject to forfeiture in the event he left BlueBay prior to the vesting dates in January and March 2012 as a bad leaver.

(2) Although the form of the compromise agreement was to make the continued entitlement to these existing rights dependent upon performance of contractual obligations, in substance what it provided for was the forfeiture of these existing valuable rights upon any breach.

(3) As such, the forfeiture provision was designed to act 'in terrorem'. It applied upon any breach, however trivial, and therefore could not be a genuine pre-estimate of loss. It was penal and unenforceable.

27. The judge considered the nature of the penalty doctrine as explained in the authorities. In its simplest form the penalty doctrine applies to render unenforceable a term in a contract by which a contract breaker is required to pay a sum upon breach which is to be regarded as a penalty. But the doctrine is not confined in its application to terms requiring the payment of money by the contract breaker. It is established that it can equally apply to a provision which requires the contract breaker to transfer property or money's worth. It also extends to terms which provide that the contract breaker is to forfeit sums to which he is entitled, or would otherwise have been entitled, from the innocent party. See [187]-[188].

28. What is objectionable is a clause whose predominant function is to deter breach in contradistinction to any function it has by way of compensation. The fact that the provision will have some coercive effect in encouraging performance of the contract is not sufficient to render it unenforceable. See [189].

29. Because the doctrine is an interference with freedom of contract, its application is not to be expanded more widely than its current limits. See [191].

30. Further, the twofold categorisation of deterrence or compensation is not a rigid test to be applied in all cases. There are clauses which may operate on breach, but fall into neither category, and may be commercially justifiable. See [193]-[196].

31. Two aspects relevant to the question of commercial justification are worth emphasising. The first is that it will be easier to justify a provision for the payment of a single sum, or equivalent, upon breach where the loss which might foreseeably be caused by breach may be difficult to quantify or prove; or where it may not be recoverable in law because, for example, it is too remote; or where financial recompense cannot fully compensate for such loss. See [197]-[198].

32. The second aspect of commercial justification which requires emphasis is that the court must take account of all the terms of the bargain, and of the circumstances of the contracting parties. The court should be reluctant to hold that there is no commercial justification for a term which has been freely negotiated by sophisticated parties with equal bargaining power and access to legal advice. See [199].

33. With these considerations in mind, the judge adopted the following as a succinct statement of the penalty doctrine. A penalty clause is a clause which, without commercial justification, provides for payment or forfeiture of a sum of money, or transfer of property by one party to the other, in the event of a breach of contract, the clause being designed to secure performance of the

contract rather than to compensate the payee for the loss occasioned through the breach. See [202].

(5) <u>Does the penalty doctrine apply to a term in a compromise agreement that an employee will be treated as a good leaver if he complies with his duties?</u>

34. The judge concluded that, looking at the provisions of the compromise agreement as a matter of substance, there were two separate and independent reasons why they did not attract the application of the penalty doctrine.

    (1) The first was that nothing in the compromise agreement caused FIS to lose the benefit of the 2012 fund units upon breach of the compromise agreement. The forfeiture of the 2012 fund units occurred by reason of his being a bad leaver under the terms of the bonus plans when he left on 31 December 2011. The compromise agreement conferred a conditional benefit in relation to FIS's interest in the units which never accrued because he failed to fulfil the condition, namely performance of the agreement. See [205]-[209].

    (2) Secondly, even if forfeiture were to be treated as occurring by reason of breach of the compromise agreement, what was forfeit were contingent future interests in the 2012 fund units. These were not to be treated as equivalent to the payment of a money sum by FIS upon breach so as to come within the doctrine. There is a distinction between contingent rights and accrued rights, and the doctrine does not apply, and is not to be extended, to the former. See [210]-[221].

35. For these reasons, the penalty doctrine had no application in this case.

(6) <u>If so, is such a term an unlawful penalty?</u>

36. The judge went on to consider if (contrary to his conclusion on (5) above) the penalty doctrine was applicable in principle, whether the 'forfeiture' provisions of the compromise agreement were penal so as to be unenforceable.

37. The judge took the following factors into account:

(1) The compromise agreement was freely negotiated by sophisticated parties of comparable bargaining power.

(2) The compromise agreement contained a variety of rights and obligations which individually had a commercial justification for one or other or both sides.

(3) It was by no means fanciful to suppose that the financial consequences for BlueBay of hypothetical breaches by FIS might exceed the value of the 2012 fund units. This was not, therefore, a case in which it could be said that the value of the rights forfeited exceeded the greatest loss which could conceivably be suffered from the breach. Moreover the true loss to BlueBay from such activity might be impossible to establish and for BlueBay to recover by a damages claim; and such a claim would in any event likely be difficult and expensive to seek to prove, involving further uncompensatable loss by having to have management time and resources devoted to it.

(4) A further consideration was the commercial objective of the bonus plans themselves. The bonus plans operated by BlueBay were in accordance with industry practice and regulatory requirements.

Conclusions on the "penalty" issues in BlueBay

38. Accordingly, the judge found that the penalty doctrine was inapplicable to the terms of the compromise agreement; further, had the judge found the penalty doctrine were applicable in principle, he would not have regarded the provisions of the compromise agreement as penal so as to be unenforceable.

Lessons of BlueBay

39. BlueBay is important for a number of reasons:

(1) It illustrates the nature of an employee's duties, during garden leave, not to assist a competitor, even one that has not yet actively started to trade.

(2) It highlights circumstances in which an employee owes a duty to inform his employer about a competitive threat, even where the employee learns about it through the process of applying for, and obtaining, a job with the competitor.

(3) It demonstrates the value of efforts to obtain specific disclosure not only from the defendant but also from third parties. Much of the narrative in BlueBay was reconstructed by examination of mobile telephone calls and texts revealed by the phone records of third parties as well as those of the defendant.

(4) It considers in depth the nature of the penalty doctrine, and whether a provision whereby an employee will be treated as a good leaver for the purpose of deferred remuneration, provided that he complies with his contractual obligations to his employer, is penal and unenforceable.

CEF HOLDINGS v MUNDEY

40. CEF Holdings v Mundey ("CEF") is another recent team move case with important lessons for all practitioners. The decision is a useful illustration of the court's approach to the enforcement of restrictive covenants of relatively short duration (6 months), and to the availability of springboard relief in team move cases. However, its greatest significance lies in the strict view taken by the judge to compliance with procedural requirements when making an application for interim relief.

41. The following particular questions are addressed in the judgment of Silber J[9]:

(1) What is the test for an interim injunction to enforce a 6-months covenant?

(2) When is a non-poaching covenant enforceable?

(3) When is a non-competition covenant enforceable?

(4) When will springboard relief be granted?

[9] The judge also considered whether the English court had jurisdiction regarding the claims against defendants based in Scotland: [135]-[173]. That issue is not considered in this paper.

(5) When does the duty of full and frank disclosure apply, and what is it?

(6) When can an application for injunction be made without notice?

The facts of CEF

42. The claimants ("CEF") operated domestically and worldwide as a wholesaler and manufacturer of electronic components. It had approximately 3,000 employees, 400 outlets and further operations around the world.

43. 19 defendants were CEF employees, divided between the more senior "general manager defendants", and the more junior "subordinate defendants". In April 2012, the general manager defendants were appointed as directors of another business, "Yesss Electrical", which did not intend to trade in the UK until September 2012. The subordinate defendants resigned from DEF and moved to Yesss Electrical.

44. In April 2012, CEF applied for interim relief. It gave most of the defendants' solicitors informal notice of the application only on the afternoon before the hearing and the papers adduced by it were very substantial. One counsel attended on behalf of the individual defendants.

45. CEF alleged that the defendants, and in particular the general manager defendants, had conspired together to harm CEF's business by unlawful means, and that they had been parties to conspiracies which had the specific purpose of targeting CEF staff in order to occasion harm to its business. CEF alleged that Yesss Electrical had been set up to compete directly with it in the UK.

46. At the without notice hearing, Collins J made orders restraining the defendants from inducing CEF's employees to leave or breach their contractual obligations. The application came back before Silber J with full representation and argument on all sides.

The issues in CEF

(1) What is the test for an interim injunction to enforce a 6-months covenant?

47. The restrictive covenants ran for 6 months, and CEF sought springboard relief for the same period. The judge considered it unlikely that a speedy trial could be held, and judgment handed down, before the time that the period of restraint would have expired or almost expired.

48. In those circumstances, the *American Cyanamid* test was not applicable. That test involved asking whether there was a serious issue to be tried and, if so, where the balance of convenience lay pending trial. This test tends to favour applicants for injunctive relief rather than respondents.

49. Instead it was necessary to consider in respect of the claims for an injunctions whether it was more likely than not that CEF would succeed at trial. See [25]-[30].

(2) When is a non-poaching covenant enforceable?

50. The judge summarised the legal principles applicable to the enforceability of a covenant against poaching or soliciting employees, which are uncontroversial, at [31]-[36]:

(1) A restrictive covenant is void as an unlawful restraint of trade unless the employer can show that it goes no further than is reasonably necessary to protect his legitimate business interests.

(2) There must be some subject-matter which an employer can legitimately protect by a legitimate covenant.

(3) The court cannot say that a covenant in one form affords no more than adequate protection to a covenantee's relevant legitimate interest if the evidence shows that a covenant in another form, much less far-reaching and less potentially prejudicial would have afforded adequate protection.

(4) The correct approach is for the court to consider (i) what the covenant means, (ii) whether the employer has shown that they have legitimate

business interests requiring protection, and (iii) whether the covenant is no wider than reasonably necessary for the protection of those interests.

51. In the present case, the non-poaching covenant was unenforceable on grounds that ([37]-[59]):

(1) The defendants would not know who they could or could not recruit since the covenant applied to all of CEF's 3,000 employees. Thus, any injunction would fall foul of the cardinal rule that it must be capable of being framed with sufficient precision so as to enable a person enjoined to know what it is he is to be prevented from doing: [43].

(2) It was too wide because it was not limited to employees with whom the defendant had contact during his employment.

(3) There was no comparable covenant in the contracts of more senior employees, which called into question whether it was necessary to protect CEF's interests.

(4) The contention that CEF's employees were difficult to replace, and so needed to be protected from poaching by a restrictive covenant, was undermined by the fact that they only had to give one month's notice when resigning.

(5) A less far-reaching covenant would have been adequate to protect CEF's interests in the stability of its workforce.

(3) <u>When is a non-competition covenant enforceable</u>?

52. The non-competition covenant was unreasonable on the following grounds ([60]-[67]):

(1) Since customer loyalty was at the heart of CEF's case, this could be adequately protected by a customer non-solicitation covenant.

(2) Whilst CEF relied on confidential information to justify the non-competition covenant, something less intrusive could have been used

such as a clear covenant setting out what is confidential together with a prohibition against using this material.

(3) It prevented an employee from having "any interest" in a competing company, such as owning even one share of a publicly quoted company.

(4) There was no geographical limitation to the injunction sought.

(5) The more senior general managers did not have a non-competition covenant in their contracts, therefore casting doubt on CEF's need for such protection.

(6) The meaning of the covenant, and hence any injunction granted, was unclear in a number of respects (such as whether selling certain types of components was prohibited).

(4) When will springboard relief be granted?

53. CEF sought a springboard injunction to restrain the individual defendants from working for Yesss Electrical for a period of 6 months. The basis of the relief sought was that the general manager defendants had acted as recruiting sergeants for Yesss and unlawfully solicited CEF's employees to transfer their allegiance to Yesss with the consequence that Yesss had gained an unlawful head start.

54. The principles governing the grant of springboard relief were summarised in QBE Management (UK) Ltd v Dymoke [2012] EWHC 80 (QB), [2012] IRLR 458 at [239]-[247], and applied in CEF at [72] and [128], as follows:

(1) Where a person has obtained a 'head start' as a result of unlawful acts, the court has power to grant an injunction which restrains the wrongdoer, so as to deprive him of the fruits of his unlawful acts. This is often known as 'springboard' relief.

(2) The purpose of a 'springboard' order is to prevent the defendants from taking unfair advantage of the springboard which they have built up by their wrongdoing.

(3) 'Springboard' relief is not confined to cases of breach of confidence. It can be granted in relation to breaches of contractual and fiduciary duties, and flows from a wider principle that the court may grant an injunction to deprive a wrongdoer of the unlawful advantage derived from his wrongdoing.

(4) 'Springboard' relief must be sought and obtained at a time when any unlawful advantage is still being enjoyed by the wrongdoer.

(5) 'Springboard' relief should have the aim simply of restoring the parties to the competitive position they each set out to occupy and would have occupied but for the defendants' misconduct. It is not fair and just if it has a much more far-reaching effect than this, such as driving the defendant out of business.

(6) 'Springboard' relief will not be granted where a monetary award would have provided an adequate remedy to the claimant for the wrong done to it.

(7) 'Springboard' relief is not intended to punish the defendant for wrongdoing. It is merely to provide fair and just protection for unlawful harm on an interim basis. What is fair and just in any particular circumstances will be measured by (i) the effect of the unlawful acts on the claimant; and (ii) the extent to which the defendant has gained an illegitimate competitive advantage. The seriousness or egregiousness of the particular breach has no bearing on the period for which the injunction should be granted.

(8) The burden is on the claimant to spell out the precise nature and period of the competitive advantage. An 'ephemeral' and 'short-term' advantage will not be sufficient.

55. The judge noted that the tort of conspiracy is a serious tort which requires clear evidence. He concluded on this point that at its highest, the case for CEF was based on suspicion, and there was insufficient evidence to support a

conspiracy or other wrongful conduct needed for springboard relief. See [74]-[126].

56. He went on to find that CEF had not discharged the burden of showing the precise nature and period of any competitive advantage which the defendants acquired as a result of their alleged wrongdoing, or that any unlawful advantage was continuing. In any event, a monetary award was likely to provide a suitable remedy. See [127]-[134].

(5) <u>When does the duty of full and frank disclosure apply, and what is it?</u>

57. One of the most basic principles of English law is the golden rule that when a party makes an application for injunctive relief on a without notice basis, it has a duty to investigate facts and legal issues fairly so as to present the evidence and submissions to the court in the knowledge that the judge does not have the benefit of submissions on factual and legal issues from the party sought to be restrained. See [174]-[178].

58. The judge rejected CEF's argument that it was excused from its duty of full and frank disclosure because counsel for the defendants appeared at the first hearing at short notice and made very brief representations to the judge. CPR Practice Direction 25A, para 2.2 provides:

> "The application notice and evidence in support must be served as soon as practicable after issue and in any event not less than 3 days before the court is due to hear the application."

59. The judge continued at [181]:

> "The purpose of this requirement imposed on an applicant for an injunction of giving 'not less than 3 days notice' is to allow the respondents to the application adequate time in which to consider the applicant's case on both factual and legal issues and also to enable them to be properly prepared so as not only to be able to address all relevant issues of fact and of law, but also to be able to adduce all relevant evidence and to make full submissions on all legal and factual issues. In other words, the period of three clear days is the

minimum period specified to ensure that proper legal and factual submissions of the respondent can be put before the court so as to represent their interests."

60. So the position is that the duty of the applicant who makes an application with less than the prescribed period of notice to give full and frank disclosure continues even when the opposing party is represented on short notice. He is absolved from this duty *only* in respect of those legal and factual matters to which that other person has drawn the court's attention. See [183].

61. This meant that CEF's obligation was to ensure that it drew the court's attention to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed. There were a number of instances of serious non-disclosure, none of which was deliberate, but which led the judge to conclude that the order made by Collins J should be discharged (save in respect of delivery up). See [198]-[230].

(6) <u>When can an application for injunction be made without notice?</u>

62. Generally a without notice injunction should be granted only in circumstances where to give notice would enable the defendant to take steps to defeat the purpose of the injunction, such as in the case of many search or freezing injunctions, or where there is some exceptional urgency, which means literally there is no time to give notice. See [235].

63. The judge concluded that CEF was not justified in making the initial application to Collins J without proper notice. See [236]-[250].

<u>Lessons of CEF</u>

64. The judge himself identified what he described as "some serious issues to be learnt" from this case at [255], which include:

> "(a) remembering that without notice applications should only be granted in very limited circumstances, which are where to give notice would enable the defendant to take steps to defeat the purpose of the injunction, such as in the case of many search or freezing injunctions,

or where there is some exceptional urgency, which means literally there is no time to give notice (see, for example, *National Commercial Bank Jamaica Ltd v Olint Corporation Ltd* (Practice Note) [2009] 1 WLR 1405);

(b) appreciating that in every application for an injunction sought without any or any proper notice, it is prudent to include a statement supported by facts explaining fully and honestly why proper notice could not have been given. A bland statement that the defendant might do something if warned is unlikely to satisfy this requirement without some particulars in support;

(c) Every witness statement made in support of an application for an injunction made without any or any proper notice should contain a statement setting out the duty to give full and frank disclosure perhaps along the lines set out by Bingham and Mummery LJJ in paragraphs 176 and 177 above and then indicating how that duty has been complied with; and

Any application for an injunction must be based on facts and as Tugendhat J said in the *Caterpillar* case [2011] EWHC 3154 (QB); [2012] All ER (D) 17 (Feb) 'mere suspicion is not enough'."

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