EMPLOYEE COMPETITION: RECENT CASES

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INTRODUCTION

1. The topics covered in this paper are considered in detail in the book *Employee Competition: Covenants, Confidentiality, and Garden Leave*.[1] The book examines the law and practice relating to competition by employees, directors, partners and others. This paper examines recent key cases in this area.

DUTIES[2]

2. Two recent cases consider the nature and extent of an employee's contractual and fiduciary duties of loyalty.

Cook v MSHK Ltd [2009] IRLR 838

3. What can an employee legitimately do to prepare for future competition whilst remaining in his current employment? This question has been considered in a number of cases over the years, some of the more important of which include:

- *Balston Ltd v Headline Filters Ltd* [1990] FSR 385 (Falconer J);
- *Lancashire Fires Ltd v S A Lyons & Co Ltd* [1997] IRLR 113 (CA);
- *CMS Dolphin v Simonet* [2001] 2 BCLC 84 (Lawrence Collins J);
- *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] 2 BCLC 523 (Hart J);
- *Item Software (UK) Ltd v Fassihi* [2005] ICR 450, [2004] IRLR 928 (CA);
- *Shepherds Investments Ltd v Walters*[2007] IRLR 110 (Etherton J);
- *Helmet Integrated Systems Ltd v Tunnard* [2007] IRLR 126 (CA);

[1] Goulding (ed), published in March 2007 by Oxford University Press, written by members of Blackstone Chambers and Olswang Solicitors (hereafter *Employee Competition*). More details can be found at http://www.oup.com/uk/catalogue/?ci=9780199208623. For previous papers discussing recent cases in this area, see www.blackstonechambers.com
[2] See, further, *Employee Competition*, chapter 2.

- *Kynixa Ltd v Hynes* [2008] EWHC 1495 (QB) (Wyn Williams J);
- *Foster Bryant Surveying Ltd v Bryant* [2007] IRLR 425 (CA).

These recent cases demonstrate, in the words of the editor of the IRLR, "that this has become a fluid area of the law".

4. The issue arose in *Cook v MSHK*, although the Court of Appeal was not required to consider it in any depth on a summary judgment application.

5. Mr Cook resigned from his senior position at the Ministry of Sound in order to join another record label, Warner Music UK Ltd. In proceedings commenced by MSHK, it was alleged, amongst other things, that Mr Cook failed to inform the claimants that he had a settled intention to compete with them.

6. For Mr Cook, it was argued (para 66) that such a duty was non-existent, reliance being placed on *Searle v Celltech* [1982] FSR 92; *Framlington Group v Anderson* [1995] 1 BCLC 475; *Saatchi & Saatchi v Saatchi* 13 Feb 1995, unrep; and *Helmet v Tunnard* (above).

7. For MSHK, it was submitted (para 69) that, as a fiduciary, Mr Cook was obliged to ensure that his self-interest and duty to MSHK did not come into conflict; that he was faced with such a conflict as soon as he formed a settled intention to compete with them at Warner; and that he could only resolve it by a prompt resignation: *British Midland Tool* (above); and *Shepherds Investments v Walters* (above).

8. For the purpose of the summary judgment application, Rimer LJ (with whom the other members of the Court agreed) assumed (para 70), without deciding, that MSHK was correct that once any so-called "settled intention" to compete was formed, Mr Cook had a duty to disclose it to MSHK; and that any omission to do so was a breach of the implied term of trust and confidence.

9. However, the Court decided that the employer had, in the knowledge of a number of the alleged repudiatory breaches of contract, affirmed the

contract by making clear to Mr Cook over a number of weeks that it expected him to work out his notice, without intimating to him that disciplinary proceedings would follow (which they did) and without any express reservation of rights.

10. The judgment of Rimer LJ contains a useful, albeit brief, summary of the principles relevant to affirmation of employment contracts, by reference to *Cantor Fitzgerald v Bird* [2002] IRLR 867 ("essentially the legal embodiment of the everyday concept of letting bygones be bygones" per McCombe J) and *Cox Toner v Crook* [1981] IRLR 443. Rimer LJ stated (para 65):

> "an innocent party, faced with a repudiation of the contract by the other contracting party, has an option to affirm the contract and treat it as continuing or to accept the repudiation and treat itself as discharged from further obligations under it. If he affirms it, that affirmation is irrevocable and he cannot thereafter claim to treat the contract as discharged. Mere delay will not amount to affirmation, but if prolonged it may be evidence of an implied affirmation. If the innocent party calls on the guilty one to perform the contract further, he will normally be taken to have affirmed the contract since his conduct is consistent only with the continued existence of the contractual obligation.

Fish v Dresdner Kleinwort Ltd [2009] IRLR 1035

11. The subject of bankers' bonuses has become highly topical since the onset of the credit crisis and the bailout of banks by governments. In *Fish v Dresdner Kleinwort*, the court was called on to consider whether fiduciary or contractual duties of loyalty required a senior banker to forego his contractual entitlement to a bonus and severance payment in circumstances where his employer had sustained losses on an unforeseen scale and received government financial support.

12. The claimants were formerly senior employees of Dresdner Kleinwort, the investment banking division of Dresdner Bank. They had acted as members of the executive committee of Dresdner Kleinwort which had delegated to it responsibility for management of the business. In 2008, Commerzbank agreed to buy Dresdner Bank from its parent, Allianz SE.

13. In the summer of 2008, following concern that key employees would leave Dresdner, the claimants received letters which guaranteed specific bonus

payments for the 2008 year provided certain conditions were met (which, at the time of the claims, had been met). Later in 2008, compromise agreements were entered into between Dresdner and the claimants which provided for severance payments to be made to the claimants upon the termination of their employment following the acquisition. The bonus and severance payments promised to the claimants totalled €12.6m.

14. However, in early 2009, it transpired that Dresdner Kleinwort had made a loss of €6.47bn in 2008. In addition, Commerzbank was the beneficiary of significant financial support from the German government. Following Commerzbank's acquisition of Dresdner Bank, it was decided that the claimants should not be paid their bonus payments, and that the severance payments should be reduced, in light of the huge financial losses suffered by Dresdner Kleinwort.

15. The claimants sued for these sums, and applied for summary judgment. It was not said on behalf of the defendants that their undertakings to pay the bonuses and severance monies were not supported by consideration. It was not said they were ultra vires. It was not said that the claimants had acted in breach of their contracts by reason of the way in which they fulfilled their management functions.

16. For the defendants, it was said that Dresdner Kleinwort suffered the financial disaster at a time when the claimants were members or acted as members of the executive committee responsible for its management and that the disaster was not appreciated when the payments were agreed. It was said that in these circumstances it was the duty of the claimants to give up what would otherwise be their rights. The primary issue on the applications for summary judgment was whether that defence has any foundation in law.

17. The defence was advanced on the basis of two different, though here connected, sets of legal principles: those relating to the duties of fiduciaries and those relating to the duty of good faith and trust and confidence which is an implied term of the contract of employment. The claimants accepted,

for the purpose of the summary judgment applications, that they were fiduciaries.

18. Jack J reviewed the leading authorities. He considered Millett LJ's judgment in *Bristol and West Building Society v Mothew* [1998] Ch 1, and his statement that the "distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary" (para 26). He reviewed Elias J's decision in *Nottingham University v Fishel* [2000] IRLR 471, which identified the circumstances in which an employee can owe fiduciary, in addition to contractual, duties (para 29). Jack J drew particular attention to Elias J's citation of the judgment of Mason J in the High Court of Australia in *Hospital Products Ltd v United States Surgical Corporation* [1984] 156 CLR 41 that the "fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with and conforms to, them." He considered *Malik v BCCI* [1997] IRLR 462 and *Johnson v Unisys Ltd* [2001] IRLR 279, in which Lord Steyn described the implied obligation of trust and confidence as "an overarching obligation implied by law as an incident of the contract of employment" (para 34).

19. Jack J accepted that this is a developing and evolving area of law. However, he concluded that the defence had no reasonable prospect of success. Here, the defendants sought to take away the whole of the benefit which they promised. The obligation on the claimants to act in the best interests of the company was not a provision that could be used to cut down the express provisions of the agreement for payment of bonus and severance pay. Its effect was that provided the employee continued to act in the best interests of the company, he would get those monies. It was not that if it ceased to be in the best interests of the company to pay those monies, he would not get them.

CONFIDENTIAL INFORMATION[3]

20. One of the difficulties faced by a party bringing a claim of misuse of confidential information lies in the need to persuade a court that the information which it seeks to protect is truly confidential.

21. This can give rise to a number of dilemmas:

- Does the claimant have to disclose documents containing confidential information?
- What safeguards can be put in place to prevent the further dissemination of disclosed confidential documents?
- Can the defendant interview the claimant's employees or ex-employees as potential witnesses?
- If so, are those employees bound by a duty to their employer or ex-employer not to disclose confidential information, or is that duty waived for the purpose of the proceedings?

22. Some of these important, practical issues have been subject to recent judicial scrutiny.

Porton Capital Technology Funds v 3M UK Holdings Ltd [2010] EWHC 114 (Comm)

23. This dispute arose out of the terms of a share purchase agreement. The claimants (investment funds) sold shares in a company (Acolyte) to the defendants (3M). The defendants agreed to pay the claimants an "earn out" payment based on product sales and agreed to develop and market the product in question (medical technology for detecting MRSA in hospitals). The dispute concerned the adequacy of 3M's steps to market the product.

24. Two applications, in particular, arose for preliminary determination by the court:

[3] See, further, *Employee Competition*, chapter 3.

- the defendants' application for a "confidentiality club" in relation to its disclosure of confidential documents; and

- the claimants' application to be able to interview two ex-employees of the defendants as potential witnesses with those individuals being released from their confidentiality obligations towards their ex-employers.

The confidentiality club

25. A confidentiality club is a well-established mechanism designed to safeguard confidential information contained in documents which have to be disclosed in litigation. In essence, the club consists of nominated members who alone are entitled to view the disclosed documents, often on terms as to location, return of documents etc.

26. In *Porton*, the defendants sought the establishment of a confidentiality club which, whilst initially agreed, was subsequently resisted by the claimants largely, it seems, due to the dispute as to the terms of the claimants' access to ex-employees of the defendants.

27. Christopher Clarke J granted the confidentiality club application. He explained (para 43) that confidentiality club orders are the exception rather than the rule. Nevertheless the court will make such an order if the justice of the case demands. The party seeking the order needs to show that the legal restrictions on the use of documents obtained on disclosure are insufficient.

28. The order made provided for members of the club to be the receiving party's solicitors and counsel and anyone responsible for instructing solicitors together with any witness whom the receiving party intended to call to give factual or expert evidence and any person assisting such an expert.

29. It is also not uncommon:

- to require individuals to sign confidentiality undertakings before being shown the documents;

- (sometimes) to limit inspection of the documents so that it takes place only at the offices of the receiving party's solicitors, and to disallow the removal from those offices of any notes made about the documents (save perhaps in the case of counsel);

- to require the return of the documents at the conclusion of the proceedings;

- to agree to disapply CPR 31.22(1)(a), which provides that the restriction on use of disclosed documents shall not apply where the document has been read to or by the court, or referred to, at a hearing which has been held in public;

- to request the court to sit in private when considering the confidential information at a hearing.

<u>The confidentiality obligations of prospective witnesses</u>

30. The claimants wanted to interview two ex-employees of the defendants, as prospective witnesses, they being bound by post-employment confidentiality covenants preventing them from disclosing confidential information.

31. The claimants' solicitors requested the defendants' solicitors to confirm that they did not object to the claimants approaching the two individuals for the purpose of the proceedings and would release them from any extant confidentiality restrictions arising out of their employment agreements for the purpose of the provision of information to the claimant's solicitors in relation to the proceedings. The defendants' solicitors replied that they did not object to the individuals being contacted for that purpose, but that the defendants would not waive the confidentiality provisions, and the claimants should not encourage or assist any breach of them.

32. The individuals were content to speak to the claimants' solicitors subject to the issue of confidentiality being resolved.

33. In the circumstances, the claimants sought orders from the court permitting them to discuss the substantive issues in the proceedings with the individuals without those individuals thereby being in breach of their confidentiality obligations.

34. The Judge reviewed certain principles which he described as well established (para 18). There is no property in a witness. C sues D. C may approach and speak to an individual (W) employed or formerly employed by D to provide information and, if necessary, to give evidence on his behalf. W has a free choice as to whether or not to assist C, although he may be compellable to give evidence at trial. But he may not lawfully give to C, nor may C legitimately seek, information which W owes a duty to D to keep confidential and which it would be a breach of his duty to give to C. This rule is not without exception. If W is called to give evidence C may ask him any question relevant to the dispute, other than one which seeks to obtain information which is both privileged and confidential, and, subject to any judicial discretion, he will be both entitled and bound to answer it.

35. Does the position change because there has been disclosure in proceedings of documents containing confidential information. The answer is no. The Judge did not accept that the effect of disclosure is in any way to alter any duty of confidence owed by (say) an employee or former employee (save that compliance with the obligations of disclosure would, obviously, not be a breach of duty) (para 28).

36. Subject to any special order of the Court the receiving party is entitled to use the documents disclosed for the purpose of the action. He may show the documents to a potential witness or provider of relevant information. But that does not mean that the witness is absolved from any duty of confidence he may owe to an opposing party (or anyone else). Fulfilment of that duty may preclude him from answering some of the questions that may be asked of him. The fact that the disclosing party has been compelled to disclose the documents to the receiving party does not alter that duty.

GARDEN LEAVE[4]

37. The concept of garden leave emerged from a trilogy of cases in the late 1980s and early 1990s: *Evening Standard Ltd v Henderson* [1987] ICR 588 (CA); *Provident Financial Group plc v Hayward* [1989] ICR 161 (CA); and *GFI Group Inc v Eaglestone* [1994] IRLR 119.

38. The ability to require an employee to stay away from work (in particular, clients, colleagues and confidential information), yet remain loyal to the employer by not working for a rival, for the duration of an employee's notice period is a powerful weapon in an employer's armoury.

39. The pendulum then appeared to swing marginally in the employee's favour. This was achieved by the necessity, in the majority of cases, of an express clause in the contract (a "garden leave clause") entitling the employer to provide no work to the employee, in absence of which the requirement to stay at home would amount to a repudiatory breach of the right to work thereby entitling the employee to terminate the contract and join a rival employer straightaway: *William Hill Organisation Ltd v Tucker* [1999] ICR 291, [1998] IRLR 31 (CA).

40. Two recent cases suggest that the pendulum has swung back in the employer's direction by entitling on employer to place an employee on garden leave notwithstanding the absence of a garden leave clause in the contract in circumstances where the employee is in breach of his duty of loyalty.

SG&R Valuation Service Co LLC v Boudrais [2008] IRLR 770

41. Senior employees resigned, giving the required three months' notice. The employer discovered evidence of wrongdoing on their part including the misappropriation of confidential information, plans to divert business opportunities to a competitor, and solicitation of other employees to join that competitor (some emails entitled "Project Chaos" give a flavour of their conduct).

[4] See, further, *Employee Competition*, chapter 4.

42. The employer placed the employees on garden leave despite the fact that the contract did not contain a garden leave clause. The employees thereupon resigned, asserting a repudiation of their contracts by the imposition of garden leave, and sought to join the competitor with immediate effect. The employer applied for an interim injunction restraining the employees from working for the competitor until expiry of their notice periods.

43. The issue which arose for determination was whether the employees could be compelled to spend their notice periods on garden leave in absence of a garden leave clause in their contracts.

44. Cranston J began by outlining the approach adopted in the relevant authorities (para 18). They ask the question: under the contract of employment is there a right of an employee to work? If employees do not have that right to work, then they can be sent home and given no work, even though the contract continues. If they have the right to work, however, the subsequent question to ask is: in what, if any, circumstances does the employer have the right nonetheless to require them to stay away from work?

45. The judge referred to "the seminal case" on the right to work of *Collier v Sunday Referee Publishing Co* [1940] KB 647 (citing Asquith J's memorable "Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out") (para 19).

46. He then turned to the leading decision in modern times of *William Hill* (above). The test there laid down is to ask whether the bargain between the employer and the employee is such that there is a right to work, in other words, whether the obligation of the employer is not confined to payment of the agreed remuneration, but also includes the obligation to provide work. The factors taken into account in the *William Hill* case in assisting the construction of the employment contract were the unique nature of the employee's role, the skills involved in his job and whether those skills would atrophy through lack of use, and the provisions of the particular contract of employment (para 20).

47. There was a right to work in this case. The judge relied on three factors: the defendants' work is specialised requiring the regular exercise of significant skills; the defendants occupied high positions within the claimant; and they had a right to a bonus, and would be adversely affected by the inability to earn it.

48. Having decided there was a right to work, the judge then asked whether that meant that employers must always provide work and can never keep the employee away from it. It did not. The right to work is not an unqualified right. It turns on whether the employee is ready and willing to work. Cranston J summarised the position as follows (para 24):

> "Employees who have a right to work have that right subject to the qualification that they have not, as a result of some prior breach of contract or other duty, demonstrated in a serious way that they are not ready or willing to work, or, to put it another way, that they have not rendered it impossible or reasonably impracticable for the employer to provide work. The breach of contract or other duty must constitute wrongdoing, by reason of which they will profit or potentially profit. In such circumstances, there is no obligation on the employer to provide work, although the contract of employment is ongoing."

49. In this case, the employees exhibited behaviour which demonstrated that they were not ready and willing to work in accordance with their contract of employment. There was reasonable and proper cause for the claimant to make its demand that they remain at home. There was no breach of contract by the employer in doing so.

Standard Life Health Care Ltd v Gorman [2010] IRLR 233

50. In the recent case of *Standard Life v Gorman*, the Court of Appeal rejected the submission that Cranston J's analysis in *Boudrais* was wrong; on the contrary, the Court endorsed his approach.

51. The defendants were agents who sold insurance for Standard Life, being paid on a commission basis. They resigned to join a competitor, Secure Health, as associated company of AXA. None of the defendants gave the required notice.

52. Standard Life held the agents to their notice periods, suspended them without remuneration, and applied for an interim injunction restraining them from working for anybody other than Standard Life for the duration of their notice periods. A judge granted the injunction, and the defendants' appeal was dismissed.

53. In his review of the authorities, Waller LJ noted that in neither *William Hill* nor *Evening Standard* was it suggested that the employee was in breach of his duty of loyalty (other than by failing to give proper notice of termination). The judge considered the question of whether obligations were interdependent to be important. There will be cases where it is necessary to analyse whether the obligation to pay, for example, and the obligation to provide work, is an interdependent obligation, ie one which only arises if the employee or the other party to the contract is fulfilling his obligations under the contract. He put it this way (para 20):

> "One is concerned first to interpret the contract and see where the obligations lie, and who has the obligations and at what stage, and in particular whether obligations are interdependent."

54. Waller LJ concluded that it was strongly arguable that the obligation in this case to provide work in circumstances where the agents had broken their duties of good faith had ceased to exist. Even where the employer has decided not to accept that conduct as a repudiation, it was strongly arguable that the obligation to continue to supply work no longer continued. This was for two reasons. First, on the basis of an express right to suspend in the event of a breach by the agent of the terms of the agreement. Secondly, on the basis of Cranston J's analysis in *Boudrais*. As to the latter, he said (para 27):

> "It seems to me strongly arguable that in the circumstances of a case such as this, where the employer discovers that the employee has been in serious breach of duty and in breach of his duty of good faith, and then discovers that the employee is tied effectively to a rival already, and as here registered as an agent of a rival, then the employer has, even if he keeps the contract alive, no obligation to provide work; that obligation to provide work being interdependent with the obligation of the employee to act loyally."

55. Indeed, Standard Life was not required to undertake to pay the agents as a condition of the garden leave injunction since this was not required by the terms of the contract where the agent was suspended, and also having regard to the fact that the defendants were being paid by their new employer during this period.

56. Longmore and Jacob LJJ agreed with Waller LJ. Longmore LJ (with whom Jacob LJ also agreed) endorsed Cranston J's approach in *Boudrais* in the following passage (para 33):

> "it must in my view be at least arguable that Cranston J was right to conclude in the employment context...that an employee who has a right to work has that right subject to the qualification that he has not as a result of some prior breach of contract or other duty demonstrated in a serious way that he is not ready or willing to work, or that he has not rendered it impossible or reasonably impracticable for the employer to provide work."

RESTRICTIVE COVENANTS[5]

57. The world of football has given rise to some interesting litigation in this field over the years, principally in relation to the ability to place football managers on garden leave: for example, *Crystal Palace FC (2000) Ltd v Bruce* [2002] SLR 81.

58. The affairs of Newcastle FC have given rise to a recent ruling on the enforceability of a non-competition covenant in the contract of former manager, Kevin Keegan.

Keegan v Newcastle United Football Company Ltd [2010] IRLR 94

59. Newcastle FC operated what was known as "the continental model", under which the club had a director of football, Dennis Wise, who had a seat on the board and to whom the manager would report. Mr Wise telephoned Mr Keegan and told him that he had a great player for the club to sign: Ignacio Gonzalez. Although Mr Keegan made it very clear that he very strongly objected to the signing of Mr Gonzalez, the club proceeded with the deal, signing the player on loan with an option to purchase. Mr Keegan

[5] See, further, *Employee Competition*, chapter 5.

considered that he, as manager, should have the final say over transfers, and resigned.

60. Mr Keegan commenced arbitration proceedings before the Premier League Managers' Arbitration Tribunal, claiming constructive dismissal. The tribunal (Philip Havers QC, Lord Pannick QC, Kenneth Merrett) decided that it was a term of the contract that Mr Keegan would have the final say as to transfers into the club, and that the club's actions amounted to a fundamental breach of contract, amounting to constructive dismissal.

61. The issue relating to the restrictive covenant arose in the following way. There were clauses of the contract between Mr Keegan and the club which provided as follows:

- if the club terminated the agreement other than for cause, it would pay Mr Keegan £2m;
- this payment in lieu was a genuine pre-estimate of the damages that Mr Keegan may suffer as a result of termination of employment;
- in consideration of such payment, Mr Keegan agreed not to work nor be employed in any capacity for any other UK Premier League football club for a period of six months from the date of termination.

62. It was argued for Mr Keegan that:

- the liquidated damages clause was a penalty and unenforceable;
- alternatively, that the restrictive covenant was unenforceable as an unreasonable restraint of trade and that, since this was inextricably linked to the liquidated damages clause, the latter was for that reason also unenforceable; and
- Mr Keegan was entitled to recover loss of approximately £24m (including stigma damages).

63. The tribunal rejected these arguments. The liquidated damages clause was a genuine pre-estimate of loss and not a penalty.

64. As to the restrictive covenant, it was argued for Mr Keegan that it would prevent him from working or being employed for such a club *in any capacity*, for example, carrying out journalistic, administrative or corporate hospitality work for any such club. The tribunal had two answers to that submission. First, it considered the prospect of Mr Keegan accepting work for another Premier League club in such a capacity (rather than as the manager, coach or director of football) to be more theoretical than real.

65. Secondly, it did not consider such a restriction to be unreasonable. Mr Keegan may have been of value to another Premier League club to the detriment of Newcastle Utd in some capacity other than as manager, coach or director of football and he would have taken with him his knowledge of the club, its players, their salaries, details of their contracts and their position at the club (for example, whether they were unsettled or not) all of which might have been of value to the other club. Even his association in some capacity with another club may have given that club a boost which might be reflected by the performance of the team on the pitch (para 48).

66. The tribunal also noted that the restriction applied only to working for or being employed by any other UK Premier League club (and thus excluded foreign clubs, Championship clubs and international teams) and that it applied only for six months. Moreover, the restriction did not prevent Mr Keegan from looking for another job as a UK Premier League club manager during those six months, only from taking up such employment. Accordingly, he would have been fully entitled to enter into negotiations to take up such a position provided that his employment with such other club did not begin until after the six months had expired (para 49).

INJUNCTIONS[6]

67. Team moves have become a familiar aspect of employment litigation in recent years. These occur where more than one employee, often several, resign at or around the same time to join a competitor. Such resignations are often preceded by collaboration between the resigning employees, and the

[6] See, further, *Employee Competition*, chapter 9.

prospective employer, as to the fact, manner and timing of their resignations.

68. Team moves have given rise to a search for remedies designed to ameliorate the perceived damage to employers from such a mass exodus. Employers have attempted to delay the date when the departing employers can start work for their new employer by means of springboard injunctions. In addition, employers have sought to obtain as much information as they can about the planning of the team move by means of disclosure orders. Two recent cases illustrate the potential and pitfalls of applications for these kinds of relief.

Springboard injunctions: Tullett Prebon Plc v BGC Brokers LP [2009] EWHC 819 (QB)

69. The inter-dealer broker Tullett Prebon brought proceedings against its rival, BGC, alleging that the defendants pursued a course intended to recruit a large number of Tullett's broker employees by unlawful means. It was said that 13 Tullett employees had taken forward contracts with BGC, and at least 96 employees had been approached on behalf of BGC.

70. Tullett applied for, and were granted, an interim springboard injunction. The effect was to prevent BGC from inviting an employee of Tullett to end his employment lawfully and to join BGC when permissible. That is something which ordinarily BGC would be entitled to do.

71. What was said on behalf of Tullett was that by their unlawful actions BGC had secured an improper advantage in the recruitment of Tullett's broker employees, and that they should be prevented from using that advantage. Reliance was placed on *UBS Wealth Management (UK) Ltd v Vestra Wealth LLP* [2008] IRLR 965, in which Openshaw J, in granting an interim springboard injunction, stated (para 4):

> "In my judgment, springboard relief is not confined to cases where former employees threaten to abuse confidential information acquired during the currency of their employment. It is available to prevent any future or further serious economic loss to a previous employer caused by former staff members taking an unfair advantage, an "unfair start", of any serious

breaches of their contract of employment (or if they are acting in concert with others, of any breach by any of those others). That unfair advantage must still exist at the time that the injunction is sought, and it must be shown that it would continue unless restrained. I accept that injunctions are to protect against and to prevent future and further losses and must not be used merely to punish past breaches of contract."

72. In *Tullett Prebon v BGC*, Jack J concluded that the defendants' conduct, as set out in the claimant's unanswered affidavits at the interim hearing, showed a cynical disregard for the law and for employees' duties. By their tactics they were likely to have destabilised a substantial part of Tullett Prebon's workforce.

73. The judge did not think that the defendants could complain if pending trial (which he considered could take place within 2 months) they were prevented from approaching or entering negotiations with employees in respect of whom it may be argued they had obtained no unfair advantage. He considered a springboard injunction to be necessary to prevent the defendants taking further advantage of the situation which they had improperly created.

74. The case went to full trial in November 2009, and the post-trial judgment of Jack J, delivered in March 2010, is considered further below.

Disclosure orders: Aon Ltd v JLT Reinsurance Brokers Ltd [2009] EWHC 3448 (QB)

75. By disclosure orders in this context is meant an order requiring a defendant to disclose (often on affidavit) details relating to the team move including discussions between employees and the prospective employer, together with production of relevant documentation. Such an order is often sought, at an early stage of proceedings, in addition to other relief, such as a springboard injunction or injunction against misuse of confidential information.

76. It can be a useful measure which assists employers in discovering the extent of the risk to their business and in taking appropriate steps to protect the business, for example by persuading other employees and clients to remain loyal despite the defections. However, it can involve an unjustifiable and

premature attempt to obtain extensive details of the defendants' conduct at a time when the claimant has not even pleaded its case.

<u>Background and arguments</u>

77. In *Aon v JLT*, 16 of the claimant's staff resigned to join a competitor. The claimant obtained a without notice injunction for delivery up of documents, restraints against future wrongdoing, and an order for disclosure on affidavit of details of the defendants' activities in relation to the resignations. Compliance with the latter part of the order was not required until after the return date, and was the subject of a contested application before Mackay J. Springboard relief was refused on the without notice application, and not pursued on the return date.

78. The application was wide-ranging (para 11). It extended, in summary, to an order for affidavits from an officer of the competitor and individual defendants (being employees who had resigned from the claimant) giving full particulars of:

- the recruitment or attempted recruitment of employees;
- the solicitation of any client or prospective client; and
- any disclosure or use of any confidential information;

and exhibiting to such affidavits all relevant documents.

79. Three reasons were advanced by the claimant as to why the order was both necessary and appropriate (para 12):

- to enable the claimant to plead its case;
- so that the claimant could take pragmatic steps to repair the damage already done and to prevent more staff from leaving; and
- to police the other interim relief it had obtained until trial.

80. The defendants opposed the continuance of the disclosure order, arguing in summary that:

- it was excessively wide;
- there was material non-disclosure on the without notice application; and
- it amounted to an application for an interim mandatory injunction which required the court to have a higher degree of assurance as to the likely success of the claim than the *American Cyanamid* hurdle of a serious issue in accordance with well-established authority: *Zockoll Group Ltd v Mercury Communications Ltd* [1998] FSR 354.

81. The judge considered the jurisdiction to make the order, the relevant authorities and the exercise of his discretion.

Jurisdiction to make the order

82. Mackay J considered the jurisdictional basis for such an order in para 17. He began by noting that the statutory basis for all interim injunctions is found in section 37 of the Supreme Court Act 1981, which empowers judges to make them "in cases in which it appears to the court to be just and convenient to do so". There is great and obvious width to this power.

83. The overriding objective of the CPR requires the court to deal with cases justly and to do so in the way that is economic in the use of court time and in terms of costs.

84. CPR 25(1) contains a non-exhaustive list of interim remedies but the order sought in this case does not feature on that list.

85. CPR 31.16 deals with pre-action disclosure orders against likely parties requiring them to disclose documents if that is desirable to dispose fairly of the proceedings and assist the dispute to be resolved or save costs: *Hutchinson 3G UK Ltd v O2 UK Ltd* [2008] EWHC 55 (Comm) (as to the exercise of discretion, see [63]).

86. CPR 18 deals with orders for further information. It is trite law that there should under this provision be limited and focused requests confined to what is necessary and proportionate so as to avoid disproportionate expense: *King v Telegraph Group Ltd* [2005] 1 WLR 2282 per Brooke LJ at [63].

Relevant authorities

87. The Judge considered relevant authorities at paras 18-24. He began with what he called the trite proposition that applications such as this are fact sensitive. The assistance therefore to be derived from decisions in other cases is limited except where clear statements of principle can be discerned.

88. Interim disclosure has been ordered in connection with freezing orders, and search and seizure orders. However, in the case of the latter the Court of Appeal has said that they must not be used as an excuse for not setting out the claimant's case in a traditional accusatorial way merely "in order to see what sort of charges they can make": *Hytrac Conveyors Ltd v Conveyors International Ltd* [1983] 1 WLR 44 at 47H; *Black v Sumitomo Corporation* [2002] 1 WLR 1562 per Rix LJ at [55].

89. In *Intelsec Systems v Grech-Cini* [2000] 1 WLR 1190, a limited interim disclosure order was made which was principally triggered by the passing off aspects of the claim, albeit there was a second basis for it in breach of the duty of loyalty. The rationale there was to correct the misrepresentations which had been sown in the minds of the claimant's clients that the defendants had been entitled to approach them as they had.

90. Having referred to other authorities, none of which the judge found of great assistance, he concluded para 24):

> "I do not doubt, and nor has it really been strenuously argued by the defendants, that there are no circumstances and there is no case in which disclosure of this general type can be ordered where it is appropriate to do so in the exercise of the court's discretion. The issue for me is whether the circumstances here are such that it is appropriate to make what is on any view an exceptional and not a routine order, one which should not be made as a matter of course where prohibitory injunctions of the type found elsewhere in this proposed order are to be found."

Discretion

91. The judge considered the following factors to be relevant to the exercise of his discretion:

- **The inability of the claimant to plead a case without this relief**. Given the 24 witness statements already exchanged, the exhibited documents and the claimant's two skeleton arguments, there was already a case against the defendants which could be pleaded. The judge saw no reason to subvert the normal accusatorial basis of our litigation, where the horse precedes the cart, into an inquisitorial one starting from an assumption that guilt has been proved, and saying to the defendants "Tell us everything you and others have done which was wrong."

- **The width of the order sought**. The order sought amounted to an order for standard disclosure in full in a non-pleaded case. It was the very antithesis of the focused and proportionate approach that might have made such an application more palatable.

- **The saving of costs**. The judge did not think this would be the result of his granting the order.

- **The adequacy of damages as a remedy**. It is not the same thing to say damages may be difficult to prove as to say that damages are an inadequate remedy. Examples of how damages can be calculated in cases of this nature are to be found in *British Midland Tool Ltd v Midland International Tool Ltd* [2003] 2 BCLC 523 and *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840.

- **The need to take pragmatic steps to protect the business from future and further loss**. There were steps that the claimant could already take with a view to binding employees and clients to them.

- **The need to police the order**. The relief already granted and proposed to be continued to trial was powerful, specific and would be widely known about by relevant staff and clients. The existing protection until trial was adequate in the circumstances.

92. The judge refused to make the order sought.

TEAM MOVES[7]

93. Reference has already been made in paras 69-74 above to *Tullett Prebon v BGC*. Jack J granted interim injunctions in this "team move" case involving the recruitment by BGC of brokers employed by Tullett Prebon.

94. In March 2010, Jack J gave a lengthy judgment following trial: [2010] EWHC 484 (QB). By the date of the delivery of this judgment, by reason of the interim injunctions a number of employees had been not working pending the resolution of their position, and BGC had been restrained from recruiting Tullett's employees, for a little under 12 months: [26].

95. Jack J held that [275]:

- The claims of the defendant brokers that they were constructively dismissed by Tullett failed.

- Tullett's claims against BGC for conspiracy and inducing breach of contract succeeded.

- The appropriate periods for relief by way of injunction varied between 8 months and approximately 12 months.

- Tullett's claims against broker defendants for conspiracy failed but for recovery of signing payments and bonus succeeded.

96. In addition to the above, Jack J made a number of findings and observations which are likely to be of general significance in this area of the law. A number of these are briefly mentioned below.

97. As far as a desk head in the inter-dealer broker world is concerned:

- If his contract obliges him to report an approach made to recruit him (ie. the desk head) to his employer, he is obliged to do so and the provision does not operate in restraint of trade: [67].

[7] See, further, *Employee Competition*, paras 2.262-2.293 and 8.32-8.36.

- Where it is sought to recruit other desk members as well, the desk head's duty in law is to act in the interest of his employer and not that of the desk. His employer's interest is to prevent the recruitment of the desk. He is obliged to inform his employer that the rival company is seeking to recruit the desk: [68].

- Information may or may not be categorised as confidential. But where the desk head provides information which he knows is requested for the purpose of furthering the recruitment, this is a breach of his duty to his employer: [69].

98. As to constructive dismissal:

- A breach by the employer of the term of mutual trust and confidence can be used to justify the employee leaving, whether or not he left because of it. So if an employer asserts that the employee should not have left, the employee may show that he was entitled to leave because of the employer's conduct, regardless of why he in fact left: [78].

- The approach in *RDF Media v Clements*, that an employee in breach of the trust and confidence term cannot bring the contract to an end by accepting his employer's breach of the same term, was not followed. Jack J appeared to prefer what he described as the ordinary position namely that, if there is a breach of contract by one party which entitles the other to terminate the contract but he does not do so, then the contract both remains in being and may be terminated by the first party if the second party has himself committed a repudiatory breach of contract: [83]-[86].

99. As to the means used to recruit employees from a rival:

- There is nothing unlawful in the use of forward contracts (ie. contracts with a start date in the future, sometimes well into the future) to recruit employees: [142(a)].

- The use of sign-on payments is not in itself unlawful, even where part of the payment is payable on signing rather than on taking up the employment: [142(b)].

- The use of indemnities is not in itself unlawful, but they carry two dangers. A recruit who has an indemnity is more likely to break, or run the risk of breaking, his existing contract if he is covered by an indemnity. Secondly, the requirement for the recruiter's approval before the employee takes steps in connection with the indemnity (a common provision) comes close to enabling the recruiting company to tell the employee what to do: [142(c)].

- Concealment of approaches is not in itself unlawful, but it may be the first step towards an early exit strategy of an accumulation of recruits. Further, where the recruit's contract with his employer requires him to report an approach, encouraging the employee not to do so in knowledge of the term, will be inducing a breach of contract and tortious: [142(d)].

100. As to confidential information:

- The information which an employee of BGC carried in his head from having worked at Tullett, such as the ability of brokers, the earnings of desks, the remuneration of brokers, was not confidential information which Tullett was entitled to protect. This was information falling short of trade secrets, which the employee inevitably carried with him and could not put out of mind in carrying on lawful recruiting activity on behalf of a new employer: [157].

101. As to inducement of breach of contract:

- A recruiting employer who encourages employees to leave their current employer on the ground of constructive dismissal, may be liable for inducing a breach of contract.

- It is not necessary to show that a recruiting employer positively intended that employees should breach their contracts when they left;

"indifference" to whether it is a breach or not (which may be equated to the absence of an honest belief that there will not be a breach) is sufficient: [179].

102. As to injunctive relief in a case involving garden leave and post termination restrictions:

- Where the court considers that the period for which the employer is entitled to protection ends during the time for which the employee may be on garden leave, it will enforce the garden leave provision for that period, and will decline to enforce any enforceable post termination restriction. It will decline the latter because the employer will have already got all the protection he is entitled to, and the court has a discretion not to enforce an enforceable post termination restriction or covenant where the circumstances are such that it should not: [224].

- The court may consider that the period for which the employer is entitled to protection extends beyond the period which is available for garden leave and into the period covered by an enforceable post termination restriction or covenant. The court will then exercise its discretion as to the enforcement of the restriction and will enforce the restriction for the whole or such part of the period provided by the terms of the restriction as is appropriate: [225].

103. As to springboard relief (which Tullett sought for a total of 18 months thereby extending beyond the trial by 6 months):

- The basis of the interim injunction (preventing BGC from recruiting Tullett's employees pending trial) was that BGC was carrying on an unlawful course of conduct against Tullett and Tullett was entitled to an injunction to stop it. As BGC had shown an intention to recruit unlawfully it was not appropriate simply to injunct unlawful recruitment, because of the risk and likelihood of further unlawful means and the difficulty of detecting them): [250].

- There was no justification for any further substantial extension of the relief. The court must assume that the exposure of BGC's conduct as set out in the judgment will curb unlawful recruitment in the future: [253].

104. As to provisions for the repayment of signing or retention payments where the employee does not serve out the full terms:

- These are not provisions in restraint of trade. They do not affect the employees' ability to work after leaving: [267].

- The law relating to penalties is inapplicable since the provision for repayment has nothing to do with compensation for breach: [269].

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