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# **SPRINGBOARD INJUNCTIONS: WHAT'S IN A NAME?**

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## Springboard Injunctions: What's in a Name?<sup>1</sup>

### Introduction

1. The purpose of this paper is three-fold:
  - (1) to review recent developments in the court's approach to springboard injunctions;
  - (2) to examine the justification for the interim injunction granted in *Tullett Prebon v BGC*<sup>2</sup> ("*Tullett*"); and
  - (3) to highlight some practical lessons for the future.

### Recent developments in the court's approach to springboard injunctions

2. Even before the *Tullett* case, there was a spate of important recent springboard cases which suggested developments in the court's approach to the grant of such injunctions. Unfortunately, the cases are not all easily reconcilable.
3. There are four aspects to note.

### Meaning

4. What is a springboard injunction? There is no one definition, and the term does not appear in the CPR Glossary (although the term "injunction" does).<sup>3</sup> It is difficult to improve on the description given by Roxburgh J in his classic statement of the springboard doctrine in *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd*, namely that it is an injunction whereby a party is

"placed under a special disability in the field of competition in order to ensure that he does not get an unfair start."<sup>4</sup>

5. There is no magic to the wording of a springboard injunction. It is for the party seeking the relief to draft the Order in a way appropriate to the wrongdoing alleged against the

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<sup>1</sup> Springboard injunctions are discussed at 10.57-10.85 of *Employee Competition: Covenants, Confidentiality, and Garden Leave* (2<sup>nd</sup> ed, 2011).

<sup>2</sup> [2010] IRLR 648.

<sup>3</sup> Section F, CPR Volume 1 ("A court order prohibiting a person from doing something or requiring a person to do something").

<sup>4</sup> [1967] RPC 375, 392.

defendant, and to the protection required by the claimant. The following Orders have been made, on an interim basis:

- (1) restraining a defendant employee from entering into or fulfilling contracts with any persons whose names and addresses appeared on a card index removed by the employee from his employer and who had been contacted by the employee whilst the index or a copy of it was in his possession;<sup>5</sup>
- (2) restraining a defendant company from (i) offering employment or entering into any contract of employment with any employee of whom the defendant became aware, or with whom the defendant held any discussion in relation to potential employment, at any time after it received any confidential information belonging to the claimant, and (ii) inducing any employee of the claimant to terminate his contract of employment with the claimant;<sup>6</sup>
- (3) restraining a defendant company from inviting employees of the claimant to end their employment with the claimant lawfully and to join the defendant when permissible.<sup>7</sup>

### Availability

6. There are, at least, two distinct types of case where springboard relief may be available: where there has been past misuse of confidential information; and where there have been past breaches of contract not consisting in the misuse of confidential information (for example, other breaches of the duty of good faith).

### *Misuse of confidential information*

7. Traditionally, springboard relief has been available to deprive a person of the springboard gained as a result of misuse of confidential information notwithstanding

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<sup>5</sup> *Roger Bullivant Ltd v Ellis* [1987] ICR 464. The injunction was subsequently varied to exclude from its scope contracts in existence but unfulfilled at the date of the court's Order. See, to like effect, *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 (although the injunction was later discharged)

<sup>6</sup> *Siemens VAT v Technologies Ltd*, 19 March 2008 (unreported). This Order was granted until after the full hearing of the application for interim relief.

<sup>7</sup> *Tullett*.

that the information is now in the public domain. The classic example of this is *Terrapin* itself.

8. However, some doubt has been cast on the correctness of this approach by the recent decision of Arnold J in *Vestergaard Frandsen A/S v Bestnet Europe Ltd*.<sup>8</sup>

*Past breaches of contract*

9. There had been (and arguably still is) some doubt as to whether the court has jurisdiction to grant a springboard injunction where the wrongdoing involves a past breach of contract but not the misuse of confidential information. This might arise where an employee has, whilst still in employment prior to joining a competitor, solicited a client to transfer his custom to the employee's future employer.
10. Scott J regarded as highly questionable whether an injunction can ever be justified on the ground that the grant is necessary in order to deprive a contract breaker of the fruits of his breach of contract: *Balston Ltd v Headline Filters Ltd*.<sup>9</sup>
11. However, the weight of authority is now against Scott J: *Midas IT Services v Opus Portfolio Ltd*;<sup>10</sup> *Siemens VAT v Technologies Ltd*;<sup>11</sup> and *UBS Wealth Management (UK) Ltd v Vestra Wealth LLP*.<sup>12</sup> In *UBS*, Openshaw J said:

“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.”<sup>13</sup>

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<sup>8</sup> [2009] EWHC 1456 (Ch), [2010] FSR 2. This is discussed in detail at 10.78-10.84 of *Employee Competition*.

<sup>9</sup> [1987] FSR 330, 341.

<sup>10</sup> 21 December 1999 (unreported).

<sup>11</sup> 19 March 2008 (unreported).

<sup>12</sup> [2008] IRLR 965.

<sup>13</sup> *ibid* para 35.

## Preconditions

12. Before a springboard injunction is granted, the court should take account of the following factors:

- (1) there must be misuse of confidential information, or past breaches of contract either by the defendant or by others with whom he is acting in concert;<sup>14</sup>
- (2) the defendants must have an unfair advantage as a result of the breaches of contract, the unfair advantage must still exist at the time the injunction is sought, and it must be shown it would continue unless restrained;
- (3) there must be a risk of future or further serious economic loss to the previous employer caused by the former employees' unfair advantage;
- (4) the injunction is to protect against future losses, not to punish past breaches;
- (5) the injunction should not last beyond the period for which the advantage may reasonably be expected to continue;
- (6) the seriousness of the breach and the egregiousness of the defendant's conduct cannot have any bearing on the period for which the injunction should be granted – what matters is the effect of the breach upon the claimant in the sense of the extent to which the defendant has gained as illegitimate competitive advantage.<sup>15</sup>

13. By way of illustration:

- (1) the court granted springboard relief in *Bullivant* (12 months); *G Attwood Holdings Ltd v Woodward* (12 months);<sup>16</sup> *Midas*; *Siemens*; and *UBS* (in each of the last three, until speedy trial).
- (2) the court refused springboard relief in *Sun Valley Foods Ltd v Vincent*;<sup>17</sup> *Moneygram International Ltd v Davar*;<sup>18</sup> *SG&R Valuation Service Co LLC v Boudrais*.<sup>19</sup>

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<sup>14</sup> In Openshaw J's words, the breaches must be 'serious': *ibid* para 35.

<sup>15</sup> For points (1)-(4), see *UBS*, *ibid* para 35; for point (5), see *Bullivant*, per Nourse LJ at 475-6, and May LJ at 481; for point (6), see *Sctrack NV v Satamatics Ltd* [2007] EWHC 3003 (Comm), para 68.

<sup>16</sup> [2009] EWHC 1083 (Ch).

## The interim injunction in *Tullett*

14. The interim injunction granted in *Tullett* is intriguing not so much for its novelty but for the explanation for it which was given by Jack J in his judgment following trial.

### Overview of the *Tullett* litigation

15. The dispute in *Tullett* concerned an attempt by BGC to recruit brokers from its rival inter-dealer broker, Tullett Prebon. Tullett sought interim and final injunctions, repayment of bonuses and retention payments from its departing employees, and damages. BGC counterclaimed for damages in respect of three recruited employees who returned to Tullett.

16. Jack J granted interim relief on 2 April 2009, and ordered a speedy trial for July 2009.<sup>20</sup>

17. The trial in fact began on 14 October 2009 and ran until 5 February 2010. Jack J handed down a 130-page post-trial judgment on 18 March 2010, largely upholding Tullett's claims.<sup>21</sup>

18. The Court of Appeal heard BGC's appeal in December 2010, which it dismissed in a judgment given on 22 February 2011.<sup>22</sup>

19. The hearing of Tullett's damages claim is taking place in March 2011.

### The facts

20. Inter-dealer brokers act as intermediaries for banks and other financial institutions. Brokers work in specialist teams or desks. BGC sought to recruit desks of brokers from Tullett by way of a co-ordinated plan in which the central character was Tony Verrier. He was formerly Chief Operating Officer at Tullett's London office before he left and joined BGC as Executive Managing Director on 5 January 2009.

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<sup>17</sup> [2000] FSR 825.

<sup>18</sup> [2003] EWHC 2368 (QB).

<sup>19</sup> [2008] IRLR 770, paras 29-30.

<sup>20</sup> [2009] EWHC 819 (QB).

<sup>21</sup> [2010] IRLR 648.

<sup>22</sup> [2011] EWCA Civ 131.

21. As soon as he joined BGC, Mr Verrier put into action a plan to recruit Tullett brokers. He succeeded in persuading 13 to sign 'forward contracts' with BGC although three later changed their minds and stayed with Tullett (the Tullett Three). A forward contract is essentially an employment contract by which individual brokers agreed to join BGC at future dates when free to do so. BGC provided its recruits with indemnities in anticipation of litigation by Tullett. BGC also agreed to make substantial signing-on payments to the brokers, usually on the basis of half payable on signing with the balance to follow on commencement of employment with BGC.
22. Towards the end of March 2009, brokers resigned from Tullett and claimed that they had been constructively dismissed.

#### The interim injunction granted in April 2009

23. The application for interim relief was issued and served on 25 March 2009, it was heard for a full day on 1 April and judgment was handed down the following day.
24. Tullett filed substantial evidence in support of their application with none in reply by BGC (save a short witness statement dealing with brokers' names and contact details as confidential information).
25. Tullett asserted that BGC had pursued a course of action intended to recruit a large number of Tullett brokers to BGC by unlawful means. The judge considered the unanswered evidence to be strong, providing a strong case for appropriate interim relief pending speedy trial, which he ordered should take place in July 2009.
26. A major issue at the interim stage was whether the respondents should be prevented from inviting employees of Tullett to end their employment with Tullett lawfully and to join BGC when permissible. That is something which ordinarily BGC would be entitled to do. What was said on behalf of Tullett was that by their unlawful actions to date, BGC had secured an improper advantage in the recruitment of Tullett broker employees, and that they should be prevented from using that advantage. The *UBS* case was cited (see para 11 above).
27. The judge accepted that as a matter of law the court where appropriate may prevent the use of an advantage unlawfully gained, sometimes referred to as the 'springboard'

jurisdiction. But he doubted how helpful that expression was in the circumstances of this case.

28. Nevertheless, Jack J granted the injunction sought (see, paragraph 26 above, subject to a restriction as to the meaning of ‘employee’) on the following basis:

“The Respondents’ conduct, as it is set out in the affidavits filed on behalf of the Applicants, shows a cynical disregard for the law and for employees’ duties. By their tactics they are likely to have de-stabilised a substantial part of Tullett Prebon’s workforce. I do not think that the Respondents can complain if pending trial they are prevented from approaching or entering negotiations with employees in respect of whom it may be argued that they have obtained no unfair advantage.”

The interim injunction explained

29. The injunctive relief sought by Tullett at trial was two-fold. First, the defendant brokers should not be entitled to join BGC for 18 months from the first grant of relief on 2 April 2009, so until October 2010. Second, BGC should not be entitled to seek to recruit further from Tullett for that period.<sup>23</sup>
30. In considering this relief, Jack J noted that when interim relief was granted on 2 April 2009 Tullett was facing an attack on its workforce in which desk heads were being used to recruit in breach of their duty to Tullett, and in which it was intended to call out recruits to leave Tullett regardless of whether the recruits were entitled to do so by reason of constructive dismissal. It was, he said, appropriate to injunct BGC to prevent this conduct from continuing, and the only way to achieve that was to bar BGC from recruiting from Tullett in any way.<sup>24</sup>
31. He stated that this course was proposed to him on the basis that BGC had obtained an advantage by its unlawful conduct, and so the principle of ‘springboard relief’ was applicable. He referred to the discussion of the springboard doctrine in *Clerk & Lindsell on Tort*, and to the review of the authorities undertaken by Arnold J in *Vestergaard* (see para 8 above). He also mentioned the division of authority as to whether the springboard

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<sup>23</sup> [2010] IRLR 648, para 213.

<sup>24</sup> *ibid* para 247.

principle can be applied other than when the cause of action is misuse of confidential information, citing *Balston* and *Midas* (see paras 9-11 above).<sup>25</sup>

32. He then explained the rationale for the interim injunction thus:

“It seems to me that here the basis for the interim injunction is better put more simply. BGC was carrying on an unlawful course of conduct against Tullett and Tullett was entitled to an injunction to stop it. It is a kind of *quia timet* injunction. As BGC had shown an intention to recruit unlawfully it was not appropriate simply to injunct unlawful recruitment but all recruitment, because of the risk and likelihood of further unlawful means and the difficulty of detecting them.”<sup>26</sup>

33. The trial judgment should, in the Judge’s view, make clear what is permissible. He did not consider that the ‘destabilisation’ of Tullett could any longer be a factor of real weight.<sup>27</sup>

34. It was appropriate that Tullett should have the protection it did until delivery of the judgment. 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 would curb unlawful recruitment in the future. BGC is a substantial and ostensibly responsible company. The relief against BGC would be continued for 14 days from the delivery of judgment, so the judgment could be absorbed. The injunction would then end.<sup>28</sup>

35. In short, in order to ensure that unlawful recruitment did not take place between the interim hearing and speedy trial, it was necessary to enjoin all lawful recruitment. This reflected the extent of past wrongdoing, the likelihood of its continuation, and the difficulty of detection. Such injunctive relief was no longer necessary following trial given the 12 months that had elapsed since the grant of the interim relief, and the effect of the post-trial judgment.

36. The Order so explained by Jack J appears to achieve much of the benefit of a springboard injunction, but under a different name and not subject to some of the preconditions traditionally associated with springboard relief.

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<sup>25</sup> *ibid* paras 248-9.

<sup>26</sup> *ibid* para 250.

<sup>27</sup> *ibid* para 252.

<sup>28</sup> *ibid* para 253.

## Practical lessons for the future

37. There are a number of practical lessons relating to interim relief, particularly in team move situations, which can be drawn from the recent cases. I want to highlight just three.

### The *Tullett* approach to interim relief is flexible and useful

38. Jack J's explanation for the interim relief granted in *Tullett* does point to a powerful new argument for those seeking interim relief in the future in certain cases (for example, those involving team moves).

39. The following can be said about Jack J's approach to the interim injunction granted:

- (1) It is flexible. It reflects the statutory basis of the court's jurisdiction to grant an injunction (whether interim or final) "in all cases in which it appears to the court to be just and convenient to do so".<sup>29</sup> It is a useful reminder to practitioners, when formulating applications and drafting Orders, to ask questions such as: What is needed in this case? What is the threat? What protection is required? How can that be reflected in an Order of the court? How can we persuade a judge that this Order is just and convenient?
- (2) It is simple. It avoids some of the complexities of springboard relief, such as whether it is available absent misuse of confidential information; whether the defendant has gained a head start by its wrongdoing; and, if so, what is the nature and extent of the head start.
- (3) It is suitable for certain cases. An injunction restraining lawful recruitment, as a means of preventing unlawful recruitment, will only be justifiable where the evidence is strong enough to point to likely future undetectable wrongdoing. This is likely to be easier to demonstrate where the evidence of past wrongdoing is strong, and that wrongdoing is extensive. This is more likely to arise in large team move cases, but may be less appropriate in the case of individuals or small teams leaving. In cases where the *Tullett* approach is inappropriate, springboard relief may still be available and useful.

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<sup>29</sup> Senior Courts Act 1981, section 37(1).

(4) Care should still be taken about the length of the interim relief. Where a speedy trial takes place within 3-6 months (as will often be the case, if there is to be a trial), the exposure of the claimant under its cross-undertaking in damages, whilst real, might be manageable. However, if the trial is delayed, then this exposure increases. In *Tullett*, 12 months elapsed between the grant of the interim relief and the judgment following trial, whilst the interim injunction was in place. The judge decided that an interim injunction for 12 months was justifiable. However, the facts in *Tullett* were strong. In another case, they might be less so as in *Hibben*, with a consequent increased risk to the claimant on the cross-undertaking.

40. The *Tullett* approach is likely to prove useful in future cases. Practitioners should consider whether to formulate and seek relief on the basis of the rationale advanced by Jack J, possibly before and certainly in addition to considering the more traditional form of springboard relief.

#### Springboard relief may still be required at trial

41. In *Tullett*, the claimants sought the continuation of springboard relief after trial, for a total period of 18 months after the grant of interim relief. This was not granted on the basis that 12 months was sufficient, and so the injunction was discharged within 14 days of the delivery of judgment.

42. However, it is important to bear in mind that the start of the speedy trial was delayed, and the trial itself took longer than originally anticipated. What if it had concluded within 6 months? The answer to the question whether a permanent injunction should have been granted at trial might then have been different. On the one hand, it might have been said that the delivery of the judgment was a sufficient deterrent to future wrongdoing by BGC. On the other hand, it might have been appropriate to grant a permanent springboard or similar injunction at trial, in which case it would have been necessary to consider its precise ambit and duration.

43. Where interim relief is granted to prevent competitive activity, a speedy trial will often take place within 3-6 months. It is important not to lose sight of the possibility that continuing injunctive relief of a springboard nature may be necessary post-trial. If that is

sought, careful thought will need to be given to the drafting of the relief, and the evidence needed to justify it.

Ancillary relief may be vital

44. Often so much attention is focussed on the primary relief sought (the prohibitory injunction), that claimants lose sight of the importance of relief ancillary to the main injunction, such as Orders for disclosure and delivery up.
45. Where employees join a competitor, it can often be useful to seek targeted and proportionate Orders for delivery up and disclosure so as to be able to seek to repair the harm that has been done, to prevent or minimise future harm, or to police the principal relief granted.
46. In *Tullett* the claimants sought an order at the interim hearing that BGC should provide them with certain information by affidavit. Jack J held that, in broad terms, Tullett were entitled to information which was required either to assist in giving effect to the injunctive relief, or to assist them in undoing the harm which had been unlawfully done. They were not entitled to information simply to assist them in establishing their claims. He ordered BGC to swear affidavits identifying the Tullett employees approached using Mr Hall, a Tullett desk head as a recruiting sergeant, and also as to the use and circumstances of loss of Mr Hall's blackberry.
47. The leading case now on the exercise of the court's discretion to order early disclosure of competitive recruitment efforts in a team move context is *Aon Ltd v JLT Reinsurance Brokers Ltd*.<sup>30</sup>
48. The claimant obtained interim relief on a without notice basis, which was continued by consent pending speedy trial, restraining breaches of duties. It also obtained, without notice, an order for disclosure by affidavit of the defendants' efforts to recruit the claimant's employees and clients, and to use its confidential information. Prior to the deadline for compliance, the defendants successfully applied to discharge the disclosure order.

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<sup>30</sup> [2010] IRLR 600.

49. Mackay J held:

- (1) There are circumstances 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 question is whether the circumstances were such that it was appropriate to make what is on any view an exceptional order, which should not be made as a matter of course where prohibitory injunctions have also been made.
- (2) In the present case, the claimant could plead its case without this relief. There was no reason to subvert the normal accusatorial basis of litigation into an inquisitorial one, where it was assumed that guilt had been proved and the defendants were obliged to disclose wrongdoing.
- (3) The order sought was very wide and the very antithesis of the focused and proportionate approach that might have made such an application more palatable.
- (4) Damages would be an adequate remedy.
- (5) The claimant could take pragmatic steps to protect the business from future and further loss without the order.
- (6) The disclosure was not necessary to police the other uncontentioned relief that had already been granted.

50. This case provides valuable guidance as to the approach to be adopted when it comes to ancillary relief for disclosure. In considering what disclosure orders to seek, it is important to ask what particular information would be useful, and whether such an order is proportionate. Each case will, of course, turn on its own facts.

**Paul Goulding QC**

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