Blackstone CHAMBERS

Essex Court Chambers

TEAM MOVES

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INTRODUCTION

What is a team move?

1. A 'team move' is the expression used to describe the situation in which a number of employees of one employer move to work for a new employer, in contrast to the departure of a single employee or the departure of more than one employee for separate reasons.

2. The term can cover a wide variety of situations from the departure of two employees to the loss of a substantial part of the workforce, in which the word "team" risks understatement. For example in UBS v Vestra [2008] EWHC 1974 (QB), [2008] IRLR 965 a total of 75 employees left UBS to join Vestra, and in Thomas v Farr plc [2007] IRLR 419 (CA)[3] 17 employees defected to Acumus, in addition to Mr Thomas himself (the former Managing Director), out of a workforce of between 40-50 staff. The common thread in these situations is not so much the team, in the sense of an organised grouping[4] of employees, but the fact that the move of the group of employees to the new employer is actually or allegedly co-ordinated as a whole.

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[1] Blackstone Chambers. Editor of *Employee Competition: Covenants, Confidentiality, and Garden Leave* published by OUP (2nd ed, March 2011). Occasional papers, updating the contents of *Employee Competition*, will appear on the Blackstone Chambers website at www.blackstonechambers.com

[2] Essex Court Chambers.

[3] See also first instance decision, Farr plc v Thomas [2006] EWHC 2510 (QB).

[4] To borrow an expression from TUPE.

3. It is easy to appreciate from the examples of UBS v Vestra and Thomas v Farr that the impact on the old employer can be commercially very significant[5]. For the new employer, subject to the cost and legal risk, it may gain in effect an already established and functioning business. The current economic climate is likely to increase the prevalence of team moves. Furthermore, in a number of sectors, the relevant market is mature with little difference between competitors. There may accordingly be limited scope for a company to grow its business save by taking a part of someone else's, and with it (for example) an established set of customer connections and experienced personnel to service them.

4. From a legal and practical perspective, a team move also throws up a number of interesting issues that tend to be more complicated than in the case of the departure of a single employee. These present problems for those advising about team moves as much as for those responding to them.

A typical team move scenario

5. Imagine a small team with members at different levels of seniority. Perhaps they are in the financial services industry, selling a financial product to an established customer base. The core members of the team may have worked together for several years. The most senior person in the team is likely to have a significant personal influence over the more junior members of the team.

6. There may or may not be warning signs visible to the old employer. Frequently, these are ignored until it is too late. One person will leave first, often by resigning, rather than by alleging constructive dismissal. It is often, but not necessarily the case, that this will be the most senior person in the team. Shortly afterwards, other team members start to announce their intention to leave. But are their departures part of a concerted plan, or are the individuals simply acting on their own initiative, based on friendship or their own financial self interest in following a colleague to a new employer?

[5] Indeed in the Thomas v Farr case, Farr was so badly affected by the loss of staff that it was unable to call any relevant witnesses at trial who had first hand knowledge of Mr Thomas' day to day activities, as they had all left to join its competitor Acumus.

7. In almost all cases, there will be a threatened or actual application for interim relief by the old employer. It will often be the case that these are dealt with by giving suitable undertakings, although since the stakes tend to be higher in team move cases than in the case of individual departures, there is probably a greater tendency to have a contested hearing of some kind even at the interim stage.

8. If the matter cannot be resolved by mediation or negotiation, the parties face the prospect of a relatively long and expensive trial. There are likely to be multiple parties and many witnesses. The issues of quantum may be particularly contentious. The cost risk in this type of case is significantly larger than in normal garden leave or post-termination restriction cases.

Issues that commonly arise

9. Many legal and practical issues are thrown up in team move cases that either do not arise in single employee cases or which are of a different order of magnitude. Typical issues include:

   (1) What kinds of contractual restrictions are most effective to prevent team moves?

   (2) What steps are permitted in seeking to retain employees who are threatening to leave?

   (3) What is the scope of contractual and/or fiduciary duties in this context? What can employees do before they are likely to be held to be in breach of these duties?

   (4) What are the difficulties in proving a breach of any contractual or fiduciary duty or in showing that there has been a conspiracy?

   (5) What remedies are available and how are these tailored to meet the particular features of team moves?

TULLETT PREBON v BGC

10. The case of Tullett Prebon v BGC provides a vivid illustration of the kind of factual and legal issues which can arise in a team move case[6].

Overview

11. The dispute concerned the 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.

12. Jack J granted interim relief on 2 April 2009, and ordered a speedy trial for July 2009.

13. 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.

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

15. The hearing of Tullett's damages claim is listed to start on 14 March 2011.

The facts

16. 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 coordinated 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. A key desk which BGC sought to recruit was Tullett's Forward Cable Desk, the Head of which was James Hall.

[6] For another recent example of a team move case, see Lonmar Global Risks Ltd v West [2011] IRLR 138, in which an application for permission to appeal was dismissed on 1 March 2011.

17. As soon as he joined BGC, 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.

18. Towards the end of March 2009, brokers resigned from Tullett and claimed that they had been constructively dismissed.

The decision of Jack J following the interim hearing: [2009] EWHC 819 (QB)

19. The application for interim relief was issued and served on 25 March 2009, heard for a full day on 1 April and judgment was handed down the following day.

20. The applicants filed substantial evidence in support of their application with none in reply by the respondents (save a short witness statement dealing with brokers' names and contact details as confidential information).

21. The applicants asserted that the respondents had pursued a course of action intended to recruit a large number of Tullett Prebon 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.

22. The following interesting points emerge from the interim relief judgment.

(1) 'Springboard' injunction: [13]-[16].

23. A major issue was whether the respondents should be prevented from inviting an employee of Tullett to end his 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. UBS v Vestra was cited.

24. 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.

25. Nevertheless, Jack J granted the injunction sought (see, paragraph 23 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."

(2) Disclosure of recruitment efforts: [18]-[19]

26. Tullett also sought an order that the respondents should provide them with certain information by affidavit. Jack J held that, in broad terms, Tullett were entitled to information which is 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.

27. 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 [2010] IRLR 600.

28. 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.

29. 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 uncontentious relief that had already been granted.

The decision of Jack J following the trial: [2010] EWHC 484 (QB), [2010] IRLR 648

30. Even though Jack J had envisaged, at the interim relief hearing, that the speedy trial would commence in July 2009, in fact it commenced on 14 October 2009 and concluded on 5 February 2010. The trial was limited to liability, relief by way of injunctions and claims for repayment of sums

previously paid by Tullett to its brokers; the hearing on damages is shortly to take place.

31. By the time of the trial, the parties lined up as follows:

(1) the Tullett claimants - 3 Tullett companies;

(2) the BGC defendants- 2 BGC companies and Shaun Lynn (BGC's President and senior officer in Europe) (D1, 2, 4);

(3) Tony Verrier - Tullett's former COO and now BGC's Executive MD (D3);

(4) 10 individual broker defendants (D5-14).

32. Tullett brought claims of inducement of breach of contract, unlawful means conspiracy, and misuse of confidential information. The defendants denied wrongdoing, and contended that the individual broker defendants had been constructively dismissed. BGC also counterclaimed that Tullett had induced the Tullett Three to breach their forward contracts with BGC and return to Tullett.

33. The Judge made detailed factual findings, and a number of important statements of legal principle, a selection of which are highlighted below.

(1) The duties of a desk head

34. A desk head is often a key figure in the financial services sector. He is responsible for managing the desk; strong bonds of loyalty can exist between the members of the desk and its head. Whilst the position is unique, some of the characteristics of the role find echoes in positions of seniority and responsibility elsewhere in business.

35. Jack J made a number of findings as to the duties owed by a desk head:

(1) There is nothing wrong in a desk head responding to a third party's approach to recruit himself. If his contract stipulates that he should report

that approach to his employer, he is obliged to do so. Such a provision does not operate in restraint of trade: [67].

(2) While the desk head may see his obligation to his desk as being to get the best for them, his duty in law as desk head 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].

(3) The desk head must not do anything to assist the recruitment of his desk. Information may or may not be categorised in law as confidential. But where he 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], [140].

(4) The information which Mr Verrier carried in his head 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 he inevitably carried with him and could not put out of mind in carrying on lawful recruiting activity on behalf of a new employer: [157].

(2) Constructive dismissal

36. The individual broker defendants argued that they had been constructively dismissed by Tullett. They relied on a variety of factors, including meetings with individual brokers at which Tullett gave 'whiteboard presentations', showing the advantages of employment with Tullett over the disadvantages of employment with BGC. Tullett also told brokers that if they did not perform their contracts with Tullett they would be sued: [63(97)]. The constructive dismissal claims were dismissed.

37. As to the constructive dismissal claims, Jack J found:

(1) An employer's breach of the duty of trust and confidence can be used to justify an employee's 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]-[80].

(2) In considering what gravity of conduct by the employer is required, it is helpful to say that it must be such as so to damage the employee's trust in his employer, that he should not be expected to continue to work for the employer. Conduct which is mildly or moderately objectionable will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough: [81].

(3) It was tentatively suggested in RDF Media Group Plc v Clements [2008] IRLR 207 at [140] that where an employee was himself in repudiatory breach of his contract of employment he could not accept a breach by his employer to bring the contract to an end. The ordinary position is 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 the contract. The conduct of the employee (in the RDF situation) may be relevant in this way. Whether the employer's conduct has sufficiently damaged the trust and confidence which the employee has in him is to be objectively judged in all the circumstances. The circumstances will include the employee's own conduct to the extent that it is relevant to that question: [83]-[85].

(3) Conspiracy and Inducing Breach of Contract

38. Tullett alleged that BGC and named individuals conspired to injure Tullett by unlawful means, and also induced Tullett's employees to breach their contracts of employment. The unlawful means for the purpose of the conspiracy was alleged to be the inducement of breach of contracts. The real issue in this part of the case was whether BGC and individual defendants induced Tullett employees to breach their contracts in circumstances where those employees unsuccessfully claimed that they were constructively dismissed and, hence, entitled to leave.

39. In upholding these claims, Jack J held:

(1) BGC took legal advice as to the brokers' claims for constructive dismissal but did not waive that advice. It was sensible for BGC to take advice so it could judge the risks it might be taking by asking the brokers to leave. But no further deduction could be made: [178].

(2) Tullett did not have to show that BGC positively intended that the brokers should be in breach of their contracts with Tullett when they left. Lesser states of mind will do, including being 'indifferent to whether it is a breach or not'. That fitted the present case. The intention of the defendants was that the brokers should leave whether or not they had good grounds for claiming constructive dismissal. BGC had no honest belief that the outcome would not involve a breach of contract: [179].

40. Three Tullett brokers who signed forward contracts with BGC were persuaded by Tullett to return to Tullett before taking up their employment with BGC. BGC claimed that Tullett thereby induced the Tullett Three to breach their contracts with BGC. Tullett argued that the employees were constructively dismissed by BGC and so entitled to terminate their forward contracts.

41. In dismissing BGC's inducement to breach of contract claim, Jack J held:

(1) BGC owed the recruited Tullett brokers a duty of trust and confidence even though the brokers were not yet in BGC's employment: [200].

(2) BGC's conduct showed a cynical disregard for the law and for employees' duties. A person can have no trust or confidence in an employer who has recruited him in such a manner, and should not be obliged to serve him. The Tullett Three were entitled to treat their obligation to join BGC when free to do so, as ended: [205].

(3) While Tullett induced the Tullett Three to end their contracts with BGC, the Tullett Three were entitled to do so; that is, Tullett induced them to do

something which they were entitled to do. Tullett was, therefore, not liable for inducement of breach of contract: [206].

(4) Injunctions

42. The injunctive relief sought by Tullett was twofold. 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: [213].

43. Each of the defendant brokers' contracts with Tullett contained a garden leave clause, and 6-month post-termination restrictive covenants: [215]-[216].

44. As to these claims, Jack J held:

(1) 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 where the circumstances are such that it should not: [224].

(2) 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. 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[7]: [225].

[7] This seemed to the judge to be the correct approach, but it was not that agreed between the parties in a note. That suggested that the covenant should be enforced for the whole of its period with the balance being made up by garden leave. This approach terminates the contract and starts the covenant running before the contractual termination date, for which the judge considered there was no justification: [225].

(3) It was appropriate for the reasonable protection of Tullett's trading connections that the four departing members of the forward cable desk be held on garden leave for 12 months where that was available: [234].

(4) Where a restrictive covenant takes no account of the possibility of garden leave it is not thereby made unreasonable. For (as stated in (2) above) in deciding whether to give effect to the covenant, and the extent to which it should be given effect, the court will take account of garden leave. Any necessary adjustment is built in by the law: [237].

(5) A non-competition covenant was reasonable in principle because non-solicitation and non-dealing covenants are notoriously difficult to enforce so as to protect trade connections: [238].

(6) A 6-month period for the restrictive covenants was no more than was reasonable in this business given the importance of broker/trader relationships: [239].

(7) As for 'springboard' relief, 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: [250].

(8) 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: [253].

(5) <u>Forward contracts, indemnities and sign-on payments</u>

45. Jack J also made a number of important findings:

(1) There is nothing unlawful in the use of forward contracts to recruit employees: [142]. However, see Hooper LJ's reservation on this point in the Court of Appeal: [2011] EWCA Civ 131 at [58]-[60]:

> " Although it is not necessary to resolve this issue for the purposes of this appeal, I would not wish it to be thought that I necessarily agree that the terms of the forward contracts and associated agreements of the kind used in this case are compatible with the employee's duties to Tullett."

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

(3) The use of indemnities is not in itself unlawful, but indemnities 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. Second, the indemnity is likely to have a provision rendering its operation conditional on the company giving prior approval to steps taken by the employee. While this does not enable the recruiting company to tell the employee what to do, it comes close to it: [142].

(4) 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: [142].

(5) The provisions for the repayment of signing or retention payments where the employee does not serve out the full term are not provisions in restraint of trade. They do not affect the employees' ability to work after leaving: [267].

(6) The provision for repayment is not here a term which has anything to do with compensation for breach. The employee is given a large additional sum of money if he continues working for the company and does not give notice before the date when the minimum term ends (and when he is then

entitled to give notice). If he does not do so, he has to give it back. The law relating to penalties is wholly inapplicable: [269].

The decision of the Court of Appeal: [2011] EWCA Civ 131

46. BGC appealed on two grounds: (1) the rejection of the defendant brokers' constructive dismissal claims, and (2) the dismissal of BGC's counterclaim that Tullett induced the Tullett Three to breach their forward contracts with BGC and return to the Tullett fold.

(1) Constructive dismissal

47. BGC made a factual challenge to the Judge's conclusion that there was no breach by Tullett of the implied duty of trust and confidence. This was dismissed, Maurice Kay LJ noting that the question whether or not there has been a breach of the duty of trust and confidence is a question of fact for the tribunal of fact: [19].

48. BGC also made a legal challenge. It argued that the test for breach of the duty of trust and confidence is objective (whether objectively considered, Tullett's conduct amounted to a breach), whereas the Judge applied a subjective test (finding that Tullett's conduct was 'not intended' to attack the relationship between Tullett and the brokers, but was intended to strengthen it).

49. The Court of Appeal rejected this argument: [22]-[29]. All the circumstances must be taken into account in an objective assessment of the intention of the contract breaker. Reliance was placed on the approach of Etherton LJ in Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 at [63]:

> "This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed as such by a reasonable person."

50. In Malik, the breach did not arise from the way in which the employer treated its employees but from the way in which it conducted its business in general.

The present case was concerned with the specific dynamics between employer and employees, not with the indirect effect of corporate behaviour on employees.

51. The issue here was repudiatory breach in circumstances where the objectively assessed intention of the alleged contract-breaker towards the employees was of paramount importance.

(2) BGC's counterclaim of inducement to breach the forward contracts

52. The Judge concluded that BGC breached the duty of trust and confidence implied into the forward contracts by the manner in which it conducted its recruitment of Tullett employees.

53. The case for BGC on appeal was that the duty of trust and confidence was not to be implied into the forward contracts which were not contracts of employment in any sense that necessitated such an implication. The Court of Appeal disagreed with this analysis: [37]-[47].

54. Maurice Kay LJ considered the position before the actual commencement of employment but at a time of detailed contractual regulation between the parties. While the relationship at that time is not purely and simply one of employment, depending on the context, obligations of trust and confidence can arise as appropriate, taking account of the circumstances: [41].

DUTIES

Contractual duties

55. The starting point is the express terms of the contract of employment. In the case of executives and senior employees, these are likely to contain terms of relevance to a team move situation, such express terms of loyalty, exclusive services, and for the protection of confidential information[8]. There are also likely to be post-termination restrictions, perhaps including non-poaching clauses.

[8] Somewhat unusually in Tullett Prebon, these included an express duty to disclose an approach from a competitor.

56. Implied terms or duties are nevertheless of importance in most team move cases. The relevant implied duties are:

(1) trust and confidence;

(2) the duty of fidelity, sometimes called the duty of loyalty or duty of good faith;

(3) a duty or duties of disclosure.

Duty of fidelity

57. In terms of what a departing employee can and cannot do, the implied term of trust and confidence adds little to the implied duty of fidelity and the focus here will be on the latter. Some general words of warning are apposite. The duty of fidelity is to be distinguished from a fiduciary duty[9]. Its application is highly fact specific and it is sometimes difficult to draw general principles from the reported cases.

58. What is the duty of fidelity? A useful summary of its formulation is in the Court of Appeal judgment in Helmet Integrated Systems Ltd v Tunnard [2007] IRLR 126 at [26] (per Moses LJ):

> "There is no dispute but that Mr Tunnard owed a duty of fidelity which required him as employee to be loyal to his employer and to act in the best interests of HISL. An employee must act with good faith towards his employer (see eg Robb v Green [1895] 2 QB 315 at 317). An employee must receive and obey the instructions of his employer, and devote his time and talents to his employer's business. But whilst he must not compete with his employer during the course of his employment, the duty of fidelity imposes no inhibition on his competing against his former employer once he has left."

59. The duty may be said to be based on what a person of honesty would consider honest or dishonest. Key components are *loyalty* and *acting in the best interests of an employer*.

60. The following are examples of conduct that has been found to be a breach of the implied duty:

[9] See paragraph 85 below.

(1) Copying or memorising confidential information: Robb v Green [1895] 2 QB 315 (CA). See also Brandeaux Advisers (UK) Ltd v Chadwick [2011] IRLR 224 at para.16. Of course, it all depends on what is confidential (see below);

(2) Competing during employment: e.g. Marshall v Industrial Systems & Control Ltd [1992] IRLR 294 (EAT). Mr Marshall (the Managing Director) had formed a plan with another important manager to try and persuade another employee to join them in order to deprive the company, of their best client and concrete arrangements had been made to obtain the business from the client;

(3) Soliciting customers of the employer for a future competitive business: Wessex Dairies Ltd v Smith [1935] 2 KB 80 (CA);

(4) Diverting business opportunities during employment: Sanders v Parry [1967] 1 WLR 753. Note that, in this case, it was held to be a breach even though the Judge apparently accepted that the approach to the employee had been initiated by the client: see p.765B-E;

(5) Preparing to compete may be a breach. This is highly fact sensitive. Examples can be found on either side of the line: cf Lancashire Fires Ltd v SA Lyons & Co Ltd [1997] IRLR 113 (CA) (breach: employee bought equipment, rented premises, misused confidential information, and entered into an agreement with a potential client to supply once in business); Ward Evans Financial Services v Fox [2002] IRLR 120 (CA) (breach: employee set up company for future competition); Balston v Headline Filters [1987] FSR 300 (no breach: premises leased and new company incorporated for future competition); Laughton and Hawley v Bapp Industrial Supplies Ltd [1986] IRLR 245 (no breach: two employees wrote to suppliers asking for product lists, price lists and terms)

(6) Recruiting or persuading other employees to leave: e.g. Sanders v Parry; British Midland Tool v Midland International Tooling [2003] 2 BCLC 523; Tullett Prebon; cf the remarks of Cumming Bruce LJ to the contrary in

Searle v Celltech [1982] FSR 92 (CA). Note also that (again depending on the precise circumstances), merely informing another employee that one is leaving to join a competitor without encouraging them to leave as well may not be a breach: Lonmar Global Risks v West [2011] IRLR 138 at [185].

(7) Failing to respond truthfully to questions could in certain circumstances amount to a breach, but the issue is again highly fact sensitive. See for example, Fulham Football Club v Tigana [2004] All ER (D) 212, affirmed [2005] EWCA Civ 895. Although there is no authority on the point, not being truthful about the search for or offer of alternative employment might not amount to a breach of the implied duty.

61. It is worth bearing in mind two things that are clearly not breaches of the implied term:

(1) It is not a breach to seek out new employment, nor is there anything wrong with responding to an approach from a new employer, including meeting them or making and discussing plans to join them (provided that no confidential information of the current employer is misused);

(2) In the absence of an express term, neither is there any requirement of an employee to disclose either an approach or that he or she is looking for a new job[10]. See also Tullett as referred to at paragraph 45(4) above.

62. When does the implied duty of fidelity cease? At the termination of employment (save for the ongoing duty with regard to confidential information). However, the position appears to be that putting an employee on garden leave (in circumstances in which they will have no further actual involvement with the employer) might terminate or diminish the duty of fidelity, notwithstanding that the contract of employment continues in force: see Symbian v Christensen, unreported 8 May 2000, Scott VC as discussed by Maurice Kay LJ in Tullett (CA) at [39]-[41].

[10] Note that, in relation to disclosure, it may amount to a breach of fiduciary duty.

Disclosure duties

63. There is a developing body of case law in relation to implied contractual duties of disclosure, particularly in the context of team moves. The decisions are highly fact sensitive.

64. It is also open to question whether these are actually separate duties, or whether they might fit within a portmanteau duty of fidelity. Rather than rely on more implied terms, it might be thought to be better to ask the question in any given case, whether an employee's failure to disclose a matter to his old employer amounted to a breach of the duty of fidelity. This is consistent with the observation of Lord Greene MR in Hivac Ltd v Park Royal Scientific Instruments Ltd [1946] 1 Ch 169 (CA), in which he considered it indisputable that an employee owes a duty of fidelity to his employer, but thought that the practical difficulty in any given case, "is to find exactly how far that rather vague duty of fidelity extends"[11]. See also Sanders v Parry at p.764A-E.

65. The continuing evolution of such duties as contractual duties is complicated and inextricably intertwined with the cases on whether or not there are similar fiduciary duties. A comprehensive discussion of the case law is not attempted here, but a full account can be found in c2 of *Employee Competition: Covenants, Confidentiality, and Garden Leave*.

66. In essence, the current state of the law appears to be as follows:

(1) The general rule is that there is no duty on an employee to report his own misconduct: e.g. Bell v Lever Bros [1932] AC 161. See also University of Nottingham v Fishel [2000] ICR 1462 (QB);

(2) There is no general duty on an employee to report the misconduct of other employees: Sybron v Rochem [198] ICR 801 (CA).

67. However, the circumstances of the particular case may dictate that such a contractual obligation is to be implied. So, for example, notwithstanding their

[11] It was also the approach of Arden LJ in Item Software (UK) Ltd v Fassihi [2005] ICR 450 (CA) in relation to the same question as regards fiduciary duties: see [41]-[44].

statement of the general proposition, the Court of Appeal in Sybron upheld the first instance judgment that Mr Roques' position as European zone controller of a subsidiary of Sybron was such that he was under a duty to disclose the misconduct of his fellow employees (notwithstanding that such disclosure would inevitably disclose his own misconduct).

68. The apogee of the implied disclosure duty in the team move situation is perhaps the case of Kynixa Ltd v Hynes, Preston & Smith [2008] EWHC 1495 (QB). The claimant provided rehabilitation and case management services for people injured at work or in road accidents. The first defendant was a director and Chief Operating Officer of the claimant; the second defendant was Head of Business Development and an extremely important employee; the third defendant was employed as Relationship Manager.

69. The three defendants all left to join a competitor. There came a point in time when all three knew that the competitor's aim was to recruit them all if it could: [217]. The real issue for the judge was what each employee should have disclosed to the claimant once it had become clear to them that there was a real possibility that each would join the competitor: [221].

70. The judge found that the first and second defendants were in breach of their fiduciary duty in failing to disclose the competitor's approach to them individually and the approach to the other: [262], [273]-[275].

71. The third defendant did not owe fiduciary duties. However, the judge found that once the third defendant knew of the fact that approaches had been made to the other defendants as well as herself, her duty of fidelity was such that she should have informed the claimant of the approaches: [283].

72. However, in Tullett Prebon at first instance, Jack J. found the decision of no particular assistance and thought that it was a decision on its particular facts: [68][12]. Furthermore, in Lonmar Global Risks v West, Hickinbottom J. also thought that the case was confined to its facts and did not agree that it was authority for a broad disclosure duty. He also said that he would not be

[12] The point was not the subject of the appeal to the Court of Appeal.

minded to follow it: [156]. Whether it will be followed in future cases remains to be seen.

Fiduciary duties

73. When one or more of the team that moves owes fiduciary duties to the old employer, there is a very high likelihood that such duties may be infringed by the move.

Who owes fiduciary duties and when do they arise?

74. The simplest situation is where one or more of the team are officers of the employer (assuming it is a company), typically company directors (or shadow directors). In which case the duties are codified in ss.170-177 of the Companies Act 2006.

75. In essence, the key relevant duties in the context of team moves are:

(1) A duty to act within the powers conferred by the company's constitution (i.e. its articles of association): s.171;

(2) A duty to promote the success of the company: s.172;

(3) A duty to avoid conflicts of interest: s.175;

(4) A duty not to accept benefits from third parties: s.176.

76. However, depending on the circumstances, courts have been willing to find that employees who are not directors may also owe fiduciary duties to their employer. It is this possibility that is of particular interest to the student of team moves. An example of this is University of Nottingham v Fishel [2000] ICR 1462 (QB).

77. Mr Fishel was employed by Nottingham University as a clinical embryologist and as full-time scientific director of its infertility clinic. He undertook work at overseas private clinics for remuneration, without obtaining consent in accordance with the appropriate procedures and in breach of his contract of employment. He also sent embryologists, employed by the university and

under his supervision, to work at the overseas clinics, in breach of their contracts of employment making his own arrangement as to remuneration with them. Hence, he directly profited from the overseas work done by the embryologists under his supervision. The university brought an action against him for damages and an account of profits.

78. In relation to his undertaking overseas work on his own account, Elias J. found that Mr Fishel did not owe any fiduciary duties in relation to this work and insofar as he had acted in breach of his contract of employment, the university had suffered no loss.

79. However, in relation to his sending other embryologists (who were under his supervision and were supposed to be working for the interests of the university) to do overseas work, he was subject to and had breached a fiduciary duty to avoid a potential conflict between his own interests and those of the university. It is important to appreciate that Mr Fishel was not found to be a 'fiduciary' or to owe the full range of fiduciary duties that a company director might owe. The imposition of the duty was confined within narrow limits as the specific facts of the situation required.

80. The classic exposition of the circumstances in which a fiduciary duty may be imposed was set out by Elias J in Fishel, for example at p.1491E-H:

> "..the essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place an employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed upon the employee are conferred by the employer himself. The employee's freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee's decision making powers. This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; and it is

circumscribed because equity cannot alter the terms of the contract validly undertaken..."

81. The approach in Fishel was accepted as authoritative by the Court of Appeal in Helmet Integrated Systems Limited v Tunnard [2006] EWCA Civ 1735; [2007] IRLR 126, at [37] per Moses LJ[13].

82. Fiduciary duties are onerous and will not lightly be imposed on an employee who is not a company director. This is made clear in the discussion in Fishel. See also Ferris J. in ABK Limited v Foxwell [2002] EWHC 9 (Ch) at [73] when discussing employees who are not directors:

"The importation of fiduciary duties into an essentially commercial relationship is something which may occasionally be done, [but] a great deal of caution needs to be exercised in doing it". [14]

83. It is difficult to be definite about the circumstances in which a mere employee will be found to owe fiduciary duties. The following principles can be derived from the authorities (apart from the generally cautious approach to imposing such duties on an employee at all):

(1) "..in determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer." Fishel p.1493E-F

(2) It is necessary to have regard to all the relevant circumstances: Fishel p.1493F;

(3) The starting point is the terms of the contract of employment: Lonmar Global Risks at [190];

(4) Are there contractual terms or duties that show that the employee has placed himself in the position set out in the extract from Fishel above? That was the case for Mr Fishel in relation to the overseas work he obtained for the other embryologists. Similarly, amongst Mr Tunnard's duties set out in his job specification was the duty "to advise on

[13] See also PMC Holdings Limited v Smith (unreported, 23 April 2002), at [5], per Burton J.
[14] See also Norberg v Wynrib (1992) DLR (4th) 449 at page 481.

competitor activity". Therefore the Court of Appeal held "with some diffidence" that Mr Tunnard was under a fiduciary duty to deploy any information he obtained about third party competitor activity exclusively in the interests of his employer, who would be dependent upon him to pass on this information: [42]-[45];

(5) Despite the apparent suggestion of Peter Smith J. in Pook, it is not simply a question of being a senior member of management: i.e. senior status per se does not mean that an employee is subject to fiduciary duties, although this may be a relevant circumstance. In fact, it is suggested that a close reading of Pook [66] shows that Peter Smith J. proceeded from the basis of the implied contractual duties he had found to exist by reason of Mr Pook's senior management position, i.e. the starting point was also the contract of employment;

(6) The mere fact that his work as a salesman (with no management responsibility) was largely unsupervised, was not enough to make Mr Niel Mee (the Second Defendant in Lonmar Global Risks) subject to the specific fiduciary duties alleged in that case: Lonmar Global Risks [191];

(7) Where someone has acted effectively as a director, they are likely to owe the fiduciary duties of a director. That was the position of Mr Simmons in Shepherds Investments.

What fiduciary duties might arise?

84. Even if an employee is found to owe a fiduciary duty or duties, it will be important for the court (and therefore the party seeking to rely on the duty) to identify precisely what duty is owed and in what respect. In this context, the duties that are likely to be of most application are:

(1) The duty of good faith;

(2) The no conflict rule: i.e. the duty to avoid conflicts of interest unless these are authorised;

(3) The no profit rule: i.e. the duty not to make unauthorised personal gains from one's position as a fiduciary;

(4) The duty or duties of disclosure.

85. What is the difference between the contractual duty of fidelity and the fiduciary duty of good faith? The orthodox view is that[15]:

> "the hallmark of a fiduciary duty is a requirement that a person pursues the interests of another at the expense of his own: but an employment relationship does not in itself require an employee to pursue his employer's interests at the expense of his own."

per Hickinbottom J in Lonmar Global Risks v West at [151]. See also Tunnard at [33].

86. Similarly, in Crowson Fabrics Ltd v Rider [2007] EWHC 2942 (Ch); [2008] IRLR 288, Peter Smith J held that:

> "The difference between the duty of fidelity and the fiduciary duty is that the latter must act solely or exclusively in the interest of his employer and that it is easier for an employer to establish that activities in preparation for competition were themselves in breach of fiduciary obligation (Helmet paragraph 33)."

Impact of fiduciary duties

87. Where a fiduciary duty or duties arise, the impact on any team move situation can be significant. The duty of good faith, for example, is much more onerous than the contractual duty of fidelity. Hence, it will be correspondingly easier for an employer seeking a remedy in relation to a team move to show that there has been a breach of such a duty than the contractual duty. It is partly for this reason that courts are reluctant to impose them on employees who are not directors[16].

[15] Not everyone agrees that there is a distinction. For an alternative view, see *The [Fiduciary] Duty of Fidelity* by Prof. Robert Flannigan (2008) 124 LQR 274.
[16] See Lonmar Global Risks at [152].

88. The following are examples of the much more difficult position that those subject to fiduciary duties find themselves in as compared to those who merely owe contractual duties:

(1) In order to avoid a breach of the duty of good faith and/or no conflict rule, it is necessary to give notice of termination from the moment an irrevocable intention to compete has been formed: Shepherds Investments v Walters [2007] IRLR 110[17] and British Midland Tool v Midland International Tooling [2003] 2 BCLC 523. These cases take a different approach to the older case of Balston Ltd v Headline Filters Ltd [1990] FSR 385, and appear to represent the current approach of the courts. The cases were all discussed in Tunnard and the Court of Appeal did not question the correctness of the later decisions. On the other hand, they did not say that Balston was wrong. The issue is one that is again highly dependent on the precise facts. When precisely the moment comes when an employee has formed such an irrevocable intention is obviously fact specific. For example, the mere fact that someone is negotiating with a new employer does not indicate that they have finally decided to leave.

(2) There is a duty of a person who owes the fiduciary duty of good faith to disclose their own misconduct: Item Software v Fassihi. The Court of Appeal found this was an incident of the duty of good faith and not a separate and independent duty. See also the first instance decisions in British Midland Tool and Tesco Stores Ltd v Pook [2004] IRLR 618.

(3) It follows by parity of reasoning that such a person would also be under a fiduciary duty to report on the misconduct of others.

(4) This leads to the wider duty to report on information of interest to the employer. It seems likely that a person who owes a fiduciary duty of good faith will be obliged to make much more extensive reports to his or employer about potential competitive activity or matters that might bear

[17] Etherton J. also held that in effect the same applied to the contractual duty of fidelity. However, this was obiter (as he found that all of the individual defendants owed fiduciary duties). Furthermore, with respect, this appears to elide the fiduciary duty of good faith with the contractual duty of fidelity, which is inconsistent with the prevailing weight of authority.

on a possible team move. This could include knowledge of the fact of approaches to team members, what the response if any had been to such approaches, and even in appropriate circumstances whether the team was unsettled and vulnerable to attack. See also paragraph 35(2) above. However, the principle is not without limit: see, for example, Tunnard [46]-[51].

Equitable duty of confidence

89. An employee is also typically subject to an equitable duty not to disclose or misuse the confidential information of his employer. This may arise as an incident of the implied contractual duty of fidelity or as a duty imposed by equity on a person who receives confidential information from another in circumstances imparting an obligation to keep it confidential.

90. The obligation persists after the termination of the contract of employment: e.g. Faccenda Chicken v Fowler [1987] Ch 117 (CA). This makes it enormously important in restricting the activity of departing employees after they have left. This applies equally in the context of team moves. However, a general discussion of the duty of confidence is beyond the scope of this paper.

91. Of interest in the current context is the relationship of the duty of confidence to the contractual duty of fidelity. Clearly the misuse of confidential information in breach of the equitable duty is almost certain to be a breach of the duty of fidelity. The problem with reliance on the duty of confidence is that it is contingent upon the information having the necessary character of confidentiality. This is frequently a hotly contested issue. Client information may well be confidential, but other information may not be.

92. However, in a typical team move case, the employee who is 'leading' the move is likely to be using and disclosing valuable information at least about other members of the team whilst still employed. For example, what other team members do, how they are organised, what their contractual terms and remuneration terms are. This might or might not be confidential enough to attract the protection of the equitable duty. However, it is likely to be easier in

practice to demonstrate that the use or disclosure of such information is a breach of the duty of fidelity if it occurred during employment whether or not the information is confidential enough to attract the equitable duty: see for example Tullett first instance judgment at [69], [140] and [157] - paragraphs 35(3) and (4) above.

93. There are of course ways in which a new employer can legitimately obtain information about the remuneration of employees in the team. It can ask them. But in order to do this it would need to approach them individually. Whilst this is possible in principle, in practice any such approaches are often the result of prior breaches of the duty of fidelity or the fiduciary duty of good faith by the 'lead' departing employee.

REMEDIES

Interim remedies

94. Obviously, it may be possible to obtain interim injunctive relief to enforce garden leave, post-termination restrictions and prevent the use or disclosure of confidential information in breach of the equitable duty of confidence as appropriate. Such relief is no different in the team move scenario than with the departure of single employees.

95. Of more interest is the use of so-called 'springboard' injunctions in team moves. The original purpose of a springboard injunction was to cancel out the head start that a person who had misappropriated or misused confidential information would have as a result of misusing or taking such information. It follows from this that any such injunction will be of a limited duration: Roger Bullivant Ltd v Ellis [1987] ICR 464; [1987] IRLR 491.

96. The use of springboard injunctions is well established in cases of departing employees. However, in Tullett Prebon, Jack J was asked by Tullett to grant an interim injunction that in effect provided springboard relief to prevent BGC from inviting an employee of Tullett to end his employment with Tullett lawfully and to join BGC when permissible. Although the Judge did not find the label 'springboard' to be very helpful, he nevertheless granted the

injunction: see paragraphs 23-25 above. This was not the subject of the appeal to the Court of Appeal.

97. The decision of Jack J is not particularly surprising given that the power of the court to grant an interim injunction to hold the ring between parties is an infinitely flexible one. There are several previous cases that show the willingness of the courts to extend the springboard doctrine beyond the situation in which confidential information has been misused: see, for example, Midas IT Services v Opus Portfolio Ltd (unreported, 21 December 1999); UBS v Vestra. A much more reticent approach was taken by Arnold J in Vestergaard Frandsen A/S v Bestnet Europe Ltd [2009] EWHC 1456 (Ch). He surveyed carefully all the relevant case law at the time and concluded that there were differences in the approach of earlier cases suggesting that it was not clear whether or not the court could grant an injunction based on past misuse of confidential information. He nevertheless also concluded that in the context of an interim remedy, it might be appropriate to grant such relief, subject to a cross-undertaking in damages.

98. Insofar as there was any conflict in the previous authorities in relation to the granting of such injunctive relief, it has not been resolved by the Court of Appeal (or Jack J) in Tullett Prebon. It is suggested that the decision of Jack J is simply an example of the flexibility of the equitable jurisdiction of the court to preserve the status quo pending trial.

Final remedies

(1) Repayment of wages

99. A question that often arises in breach of duty of fidelity cases is: *Can we have our money back*? In other words, the old employer seeks repayment of wages paid during period that employee was acting in breach of duty. Such a claim failed in Brandeaux Advisers (UK) Ltd v Chadwick [2011] IRLR 224, see [46]-[57], in essence because whilst the judge accepted that if the employee had disclosed her own misconduct, she would have been dismissed summarily,

no loss was in fact shown and the company had the benefit of her work until her actual dismissal.

(2) Injunction

100. In Tullett Prebon Jack J was asked to extend the duration of the interim injunction preventing BGC from recruiting Tullett employees as a final injunction. He refused to do so on the basis that whilst the original grant of an interim injunction had been appropriate, that was enough [253]: see paragraphs 44(7) and (8) above. He did not rule on whether or not he could have granted such final relief if he had decided that further protection was still required. The matter was not considered by the Court of Appeal.

(3) Damages/account of profits

101. Is there any loss? If not or if it will be difficult to prove what the loss is, the old employer is likely to consider seeking an account of profits. Although this can be sought in the alternative to damages (and both can be pleaded), they cannot both be awarded. At some time prior to trial on remedies, the claiming party will have to elect between one or the other remedy. It is also important to appreciate that an account is only normally available where there has been a breach of fiduciary duty. Whilst it is possible to get an account of profits where there has only been a breach of contract, this is an exceptional remedy: A-G v Blake [2001] 1 AC 268 (HL) at p.285D-H.

102. The nature of any damages claim will vary from case to case. It is important for the old employer to be realistic in its assessment of loss, which may be far from easy to prove. For example, where there has been an extensive period of injunction (or undertakings), it is frequently the case that the level of any damages is not very large if the injunction has been effective. Similarly in team move cases, it may sometimes be the case that the departure of more junior members of the team who may not be client facing or business producing, but whose role is to service the more senior members of the team, might actually save the old employer money rather than cause a loss to the business. This may occur when the circumstances are such that the departure

of the more senior members has left the junior members with no or little work to do and made them a cost to the old employer.

103. The usual type of damages claim is for loss of profit. However, in team move cases, it may be possible to quantify the loss in other ways. Such an approach may be useful in mediation. For example, where the effect of the move is essentially to allow the new employer to obtain a part of the old employer’s business, it may be appropriate to approach the quantification of loss by reference to what it would have cost the new employer to buy that part of the business from the old employer.

TEAM MOVE COVENANTS

104. A team move covenant is a particular form of post-termination restrictive covenant. Its aim is to prevent, in effect, the transfer of a team from one business to a competitor. The business which loses the team is likely to suffer damage to its reputation, and acute difficulties in replacing the lost staff and in providing a service to its client base. In contrast, the rival acquires an established team, with a proven track record of working together and the increased likelihood of attracting established clients.

Form and content of team move covenants

105. Team move covenants have begun to appear in a variety of contracts, including partnership or LLP agreements relating to solicitors' and accountants' practices. Thus far, their form and content has been highly varied[18].

106. By way of illustration, team move covenants have included the following restrictions (for a time-limited period):

(1) A shall not be engaged in a competing business with B where B's termination has occurred within 12 months before or after A's termination;

[18] Sample team move covenants can be found in Appendices 7 and 8 of *Employee Competition*.

(2) A shall not be engaged in a competing business with B where the departures of A and B were coordinated;

(3) A shall not be engaged in a competing business in conjunction or cooperation with B where B was a member of the same team as A and which during a prior specified period provided the same service;

(4) A, who is engaged in a competing business with B whose departure was coordinated with A's departure, shall not deal with any client with whom A or B had dealings during a prior specified period.

This list is not intended to be exhaustive as to the forms a team move covenant might take but is indicative of what has been adopted in practice.

107. Nevertheless, the fact that no consistent pattern has yet emerged in terms of the form and content of team move covenants does, perhaps, illustrate the lack of a single clear objective and the difficulty of drafting a covenant to meet the objectives which are held. A number of common themes appear: that more than one employee is employed by the competing business; that the departure of the employees was coordinated or, at least, occurred within a specified period of each other.

<u>Enforceability of team move covenants</u>

108. There is, as yet, no authoritative court ruling on the enforceability of team move covenants. The relevant principles are those applicable to other restrictive covenants including construction, legitimate interests, and reasonableness.

Construction

109. Team move covenants are not always easy to construe. This might be because of the lack of a clear aim or the existence of convoluted aims. Depending on the particular aim in question, it is likely to be necessary to define the connection between the team members concerned. Does the connection relate to the work they previously undertook together (eg as former team

members), or to the connection between their departures (and, if so, whether as to timing or manner), or to some other common element? Does the prohibited activity relate to what they might do in conjunction with each other (eg working together as a team), or by reference to each other (eg soliciting clients with whom a connected employee had previously dealt). All of these elements present the draftsman with considerable challenges, and any adviser and court with potential problems of construction.

110. A point related to construction concerns the risk of uncertain terminology. A clause may be void for uncertainty, albeit this is a conclusion a court is generally reluctant to reach. But, where a covenant refers to the departures of employees being "co-ordinated", what does this mean? Does it mean co-ordinated by the individuals themselves, or by the prospective employer? And, if by themselves, is this satisfied by the employees discussing their dissatisfaction with their current employment, or their desire generally to move on, or must it include an element of co-ordination in relation to the new employer, or the timing of their resignation, or the manner of their departure, or all of the above?

Legitimate interests

111. As far as concerns the legitimate interests sought to be served by a team move covenant, workforce stability might be high up the list. However, an objection to this could be that workforce stability could be equally well protected by restrictions against poaching other employees whether prior to departure (in which case such poaching would be contrary to the duty of good faith) or following departure (in which case a reasonable covenant against employee poaching would be effective) but in a less draconian manner.

112. Some have argued that the legitimate interest served by a team move covenant is the goodwill of the business which would be particularly damaged by a team departure. However, it might be doubted whether goodwill is a legitimate interest in the context of such a restrictive covenant, which then takes on the appearance of an impermissible restraint against

competition *per se*, albeit such an interest is legitimate in the context of a business sale covenant.

Reasonableness

113. When it comes to reasonableness, as always, the precise drafting will be crucial. In general, the narrower and less restrictive the covenant is, the more likely it is to be reasonable. However, team move covenants are perhaps particularly susceptible to failure on grounds of unreasonableness. For example, where what is prevented is that two fellow employees should leave and join the same rival employer, is this not unreasonable if their departures are unrelated, or prompted by the same unreasonable behaviour by their current employer, or the result of independent approaches from the rival? If it is said that this objection is overcome by introducing a requirement of co-ordination between their departures, apart from the problems of defining this term alluded to above, why should an employer be prevented from recruiting more than one employee from a rival at the same time?

114. These problems are not necessarily insurmountable but they do cast some real doubt on the enforceability of team move covenants in many situations. As with all covenants, but perhaps especially with this novel type of covenant, careful thought must be given to the aims of the covenant, the terms adopted and the precise limitations on the restrictions involved when drafting and seeking to enforce them.

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