



In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2011: No. 35

**IN THE MATTER OF AN INJUNCTION APPLICATION FOR ‘SPRINGBOARD’
RELIEF**

RULING

(In Chambers)

Date of Hearing: March 6, 2012

Date of Ruling: March 9, 2012

Mr. Jeffrey Elkinson and Mr. Scott Pearman, Conyers Dill & Pearman, for the Plaintiff

Mr. Mark Pettingill, Charter Chambers, for the Defendants

Background

1. On February 2, 2012, following an ex parte on notice hearing which the Defendants did not attend, I granted an interim injunction (“the Injunction”):
 - (1) restraining the Defendants from using or disseminating confidential information belonging to the 1st-4th Defendants’ former employer, the Plaintiff;

- (2) preserving and ordering the delivery up of confidential information;
 - (3) restraining the 1st- 4th Defendants from soliciting the Plaintiff's employees or clients;
 - (4) restraining the 3rd Defendant from competing with the Plaintiff;
 - (5) restraining the 5th Defendant from commencing business and the 1st – 4th Defendants from engaging in any act in furtherance of the business of the 5th Defendant (the so-called "Springboard" relief);
 - (6) restraining the Defendants from disclosing the allegations made against the Plaintiff and/or its principal.
2. The Injunction was granted on the grounds that there was a serious issue to be tried in relation to the Plaintiff's complaints based on the central thesis that 1st – 4th Defendants had conspired to cause tortious damage to the Plaintiff through spreading false rumours about the trading practices of the Plaintiff and setting up a competing business, in breach of restrictive covenants by which they were contractually bound. It was disclosed that the Defendants might contend that they were constructively dismissed and that the Plaintiff had repudiated the relevant contracts of employment.
3. On the first *inter partes* hearing of the Injunction application, the Defendants did not seek to set aside the injunction altogether. They offered an undertaking not to retain or use any confidential information and not to solicit any of the Plaintiff's clients or staff as at the date of the termination of the 1st- 4th Defendants' employment (November 7, 2011). And, relying upon extensive evidence filed in response to the Injunction application, they sought to vary the scope of the Injunction to permit the Defendants to commence through the vehicle of the 5th Defendant on the grounds that the balance of convenience lay in favour of this pre-trial disposition.
4. The balance of convenience appears to me to turn on an assessment of (a) the likely consequences flowing from two alternative scenarios, and (b) the comparative merits of each side's case. Firstly, the Plaintiff contends that it would suffer irreparable harm if the Defendants were permitted to start a competing business and they succeeded at trial in showing that such business was commenced as part of a tortious conspiracy and in breach of restrictive covenants operating in favour of the Plaintiff. Secondly, the Defendants contend, in effect, that they would suffer irreparable harm in terms of a lost business opportunity if they succeed at trial in demonstrating that (a) the Plaintiff did

constructively dismiss the four former employees, and (b) no tortious conspiracy occurred.

Relevant legal principles

The burden of proof

5. The Plaintiff bears the burden of proving its claims in contract and tort. However, the Defendant bears the burden of proving the facts and matters said to constitute constructive dismissal. This is the statutory position (Employment Act 2000, section 38(3)). It appears to me to be (implicitly) the position at common law as well: see e.g. *Interpetrol Bermuda Ltd.-v-Levin* [1987] Bda LR 18 (Court of Appeal for Bermuda). The 1st – 4th Defendants will have to establish by way of counterclaim the fundamental breach of contract alleged against the Plaintiff to be discharged from the restrictive covenants upon which the Plaintiff relies.
6. The evidence may therefore be viewed from the starting assumptions that (a) the Plaintiff must establish, most significantly, the tortious conspiracy which it alleges, and (b) the Defendants must establish the misconduct which they contend both occurred and constituted a fundamental breach of contract.

Principles applicable to the grant of “springboard” relief

7. This Court has not, to my knowledge, previously considered granting “springboard” relief pending trial to prevent former employees conferring a competitive advantage on a competing business through the misuse of their former employer’s confidential information. Such relief is potentially intrusive to the extent that it seeks to restrain former employees from operating a business which they have formed (or propose to form) after leaving their former employment.
8. The Plaintiff’s counsel at the ex parte hearing relied upon the decision of Openshaw J in *UBS Wealth Management UK Ltd. –v- Vestra Wealth LLP* [2008] EWHC 1974 (QB) as authority for the applicable principles. I find the following passages from the August 4, 2008 judgment in that case to be instructive:

“ 1.In this action the claimants, UBS Wealth Management (UK) Limited (“UBS”) and UBS AG London Branch (“UBS AG”) seek an injunction for springboard relief against the defendants pending a speedy trial, which cannot now take place until the beginning of next term in early October. The case came before me listed as a matter of urgency in the interim

application court on Friday. I heard argument all day, and I adjourned judgment over the weekend to give me a little time to reflect.

2. The jurisdiction to grant springboard relief is derived from the case of Roger Bullivant v Ellis [1987] ICR 464, which was a case based upon the unlawful use of confidential information wrongly taken by an employee, which he sought to use for the benefit of a competitor to the detriment of his former employer. The purpose of injunctive relief was said by Nourse LJ at page 476G:

‘To prevent the defendants from taking unfair advantage of the springboard which [the judge] considered that they must have built up by their misuse of the information.’

3. There is some discussion in the authorities as to whether springboard relief is limited to cases where there is a misuse of confidential information. Such a limitation was expressly rejected in Midas IT Services v Opus Portfolio Limited, an unreported decision of Blackburne J made on 21st December 1999, although it seems to have been accepted by Scott J in Balston Limited and Another v Headline Filters Limited and Another [1987] FSR 330 at 340. In the twenty years which have passed since that case, it seems to me that the law has developed; and I see no reason in principle by which it should be so limited.

4. In my judgment, springboard relief is not confined to cases where former employees threaten to abuse confidential information acquired during the currency of their employment. It is available to prevent any future or further serious economic loss to a previous employer caused by former staff members taking an unfair advantage, an "unfair start", of any serious breaches of their contract of employment (or if they are acting in concert with others, of any breach by any of those others). That unfair advantage must still exist at the time that the injunction is sought, and it must be shown that it would continue unless restrained. I accept that injunctions are to protect against and to prevent future and further losses and must not be used merely to punish past breaches of contract.

5. Valuable guidance as to how the court should proceed when faced with stark conflicts of evidence is given by the judgment of Staughton LJ in Lansing Linde Ltd v Kerr [1991] 1 WLR 251 at 258A-D:

‘If it will not be possible to hold a trial before the period for which the plaintiff claims to be entitled to an injunction has expired, or substantially expired, it seems to me that justice requires some consideration as to whether the plaintiff would be likely to succeed at a trial. In those circumstances it is not enough to decide merely that there is a serious issue to be tried. The assertion of such an

issue should not operate as a lettre de cachet, by which the defendant is prevented from doing that which, as it later turns out, he has a perfect right to do, for the whole or substantially the whole of the period in question. On a wider view of the balance of convenience it may still be right to impose such a restraint, but not unless there has been some assessment of the plaintiff's prospects of success. I would emphasise 'some assessment', because the courts constantly seek to discourage prolonged interlocutory battles on affidavit evidence. I do not doubt that Lord Diplock, in enunciating the American Cyanamid doctrine, had in mind what its effect would be in that respect. Where an assessment of the prospects of success is required, it is for the judge to control its extent.'

6. In an interim application of this kind, all that I can do is to form the best view that I can of the relative strengths of the rival arguments as I must now attempt to do. I need briefly to set out the background...

*15. I accept, of course, that the public interest requires that those with skill and enterprise are entitled to deploy their talents so as to generate wealth and employment for themselves and others. Our market economy is based on the encouragement and protection of fair competition. Such a right has been recognised many times, perhaps most clearly in the judgment of Cumming-Bruce LJ in *G.D. Searle & Co. v Celltech Ltd* [1982] FSR 92 at page 99:*

'The court seeks to uphold the obligation of free contracting parties to a contract of service to honour their contractual obligations. On the other hand, the court seeks to respect the rights of servants to advance in their chosen trade and profession, and in this connection to promote their own private interest by changing their employment, and also to promote the public interest by better use of the servants' personal aptitudes, experience and skill.'

At page 101:

'The picture that emerges is the market for labour in operation for the benefit of the employees and of the public, but in the short term, naturally to the disadvantage of the employer who loses in the competitive bargaining process. The usual procedure by which a business protects itself from competition for its employees is a restrictive covenant; that is conspicuous by its absence in the relevant contracts. If there were such covenants, the employee could invite the court to avoid them if on accepted principles of

law they were unreasonable in their width or their duration ... The law has always looked with favour upon the efforts of employees to advance themselves, provided that they do not steal or use the secrets of their former employer. In the absence of restrictive covenants, there is nothing in the general law to prevent a number of employees in concert deciding to leave their employer and set themselves up in competition with him'...

35.... I am firmly of the view that the claimants have put together a formidable case that there was an unlawful plan to poach both staff and clients from UBS, that that plan was formulated and actively managed by Mr. Scott, and it was at every stage assisted and encouraged by senior staff, including each of these defendants. This is not, as Mr. Sutcliffe QC for Mr. Scott and Vestra contends, lawful competition dressed up as an unlawful conspiracy. It is, in my judgment, far more likely to be an unlawful conspiracy dressed up as lawful competition.”

9. I find that the Plaintiff is only entitled to a continuation of its “springboard” relief if the Court, having carefully assessed the affidavit evidence on both sides is satisfied that what occurred is more likely to have been an unlawful conspiracy. In considering where the balance of convenience lies, the Court must take into account (together with the traditional principles applicable to interim injunctions):
- (a) the impact of any applicable restrictive covenants;
 - (b) the economic freedom rights of the Defendants; and
 - (c) the comparative risks of damage pending trial.

The balance of convenience

The strength of the Plaintiff’s conspiracy claim

10. The Plaintiff’s tort claim is clearly arguable although largely circumstantial. It is self-evident that the 1st – 4th Defendants ‘conspired’ in a non-legal sense to leave together and set up shop together. It is less clear, in light of the Defendants’ evidence and the undertakings they have offered, that they have (a) acted tortuously, or (b) solicited or plan to solicit clients and/or other employees of the Plaintiff in breach of their express and/or implied duties of loyalty.
11. More significantly still, although the Plaintiff has offered plausible responses to the Defendants’ yet to be formally pleaded case on constructive dismissal, the Defendants have filed expert evidence which it is impossible for the Court at this stage to dismiss out of hand.

12. The strength of the Plaintiff's conspiracy claim is not by itself sufficiently strong to justify the continuance of the "springboard" relief portion of the Injunction. The commercial context in which the parties operate is replete with subtleties which make it impossible to form firm preliminary views of the merits of the contending positions at this stage.

Restrictive covenants and the right to compete

13. In light of the Defendants' undertakings not to use any confidential information and not to solicit any of the Plaintiff's clients and staff as at November 7, 2011, and accepting there remain to be resolved residual evidential disputes as to precisely what has and may be done by the Defendants in this regard, the non-solicitation covenants are in my judgment of limited significance. The broad impression given by the documentary evidence is that the former employees have taken legal advice and (subject to one possible exception considered below) are unlikely to have committed crude and blatant legal breaches which can easily be proven in court.

14. Mr. Pettingill focused his attack on the Injunction's interference with his clients' economic rights. In this regard the crucial question is the extent of any covenants restricting the Defendants' right to compete. The contracts of employment placed before the Court at the ex parte stage contained "Non-Competition" clauses for the duration of the employees' employment and for such period as the Plaintiff determined (within 30 days after termination) not exceeding one year in respect of each of the 1st - 4th Defendants. Employer and employee could each have terminated the contracts on three months' notice. An important distinction in terms of contract wording is that the 3rd Defendant's contract contains a non-competition clause which does not require the employer to invoke it within a 30 day period. The Plaintiff conceded that the 30 day notice had not been given to the other Defendants.

15. It was common ground that only the 3rd Defendant was bound by a one year non-competition clause unless the constructive dismissal claim is upheld. As regards the other Defendants, the Plaintiff was required to rely on the tortious conspiracy claim alone to justify the continuance of "springboard" relief. Having regard to the fact that the 3rd Defendant will bear the burden of proving that he is not bound by the restrictive covenant, the existence of this clause operates to some extent in favour of restraining him from potentially competing with the Plaintiff in breach of the clause until it lapses on or about November 7, 2012.

Damage

16. The Plaintiff's counsel submitted that unless the Injunction remained in full effect, there would be a continuing risk of irreparable damage. The spectre placed before the Court at the ex parte hearing was a wave of redemptions due to a combination of (a) reputational damage intentionally inflicted on the Plaintiff by the Defendants, and (b) solicitation by the Defendants of the Plaintiff's clients. The evidence filed by the Defendants, together with their non-solicitation undertakings, allays the Court's concerns to a material extent. Mr. Pettingill pointed out, without contradiction, that one or more of the Defendants are still investors of the Plaintiff. It seems improbable that the Defendants will deliberately inflict serious commercial damage on the Plaintiff if they are permitted to pursue their new business interests.
17. Indeed, the contrary might well be the case; forced to leave Bermuda, the individual Defendants might well be more inclined to consider that "all bets are off". Allowed to pursue their new venture in a relatively small and interconnected business environment, they might more readily perceive the fine lines which divide acceptably vigorous competition and unacceptable 'all-out' corporate 'war'.
18. On balance I am unable to find, in light of the material now before the Court, that the risk of irreparable harm being caused by virtue of the Defendants establishing a competing fund is a serious one.

Alleged breach of the Order

19. On the other hand Mr. Elkinson submitted that the Plaintiff had expert evidence which demonstrated that the 4th Defendant had, after receiving notice of the Injunction, erased data from a flash-drive before returning it to the Plaintiff. This is a potentially serious matter which I would propose to deal with in the following way if the Plaintiff wishes a formal determination of the issue.
20. If the allegation is disputed, I would direct that the issue be tried as a preliminary issue forthwith. If the Plaintiff proved a breach of the Injunction following a contested hearing, a punitive costs order would likely be made.
21. It is not possible at this juncture for the Court to treat this allegation as having been proved; nor would it in my judgment be appropriate to decline the Defendants any relief in respect of the Injunction until the allegation is formally determined.

Summary on balance of convenience

22. The Plaintiff's case on conspiracy does not appear sufficiently strong at this stage to warrant the continuance of "springboard" relief against those Defendants who are not subject to contractual non-competition obligations.
23. The position of the 3rd Defendant is somewhat different; he bears the burden of proving that he is not subject to a one year non-competition covenant, one-third of which has already expired. It is not possible to say at this stage that the prospects of his success are any greater than the Plaintiff's likelihood of succeeding against the 3rd Defendant.
24. However, it seems to me that the prejudice he would suffer as an individual would be greater (should the springboard relief be continued and the 3rd Defendant succeed at trial) than the prejudice the Plaintiff would suffer should it succeed at trial after the springboard relief has been refused. I take into account in particular:
 - (a) my primary decision to modify the Injunction so as to remove the "springboard" relief as against the 1st, 2nd, 4th and 5th Defendants, which substantially reduces the significance of the 3rd Defendant's distinctive position as far as the risk of prejudice to the Plaintiff is concerned;
 - (b) the public policy importance of adopting a more generous approach to allowing individuals to enjoy their economic freedom rights and a narrower approach to covenants in restraint of trade; and
 - (c) the fact that one-third of the non-competition period applicable to the 3rd Defendant has already expired.

Conclusion

25. I will hear counsel as to the form of Order required to give effect to this Ruling and as to costs. It may be simpler and more consistent with the effect of the decision explained above (and despite the undertakings offered by the Defendants) to merely modify the Injunction to discharge or delete paragraph (7) ("Springboard Relief").
26. If the Plaintiff wishes to pursue the allegation that the 4th Defendant breached the Injunction by deleting a file on the Plaintiff's UBS stick before returning it, that issue should be tried as a preliminary issue as soon as possible.

27. If there is to be a trial of the deleted file issue, costs should logically be reserved until after the determination of this issue. If this issue is not pursued, my provisional view is that the costs of the application for the Injunction should be reserved to the trial judge as an additional encouragement to the Defendants to comply in the interim with the modified Injunction and/or any corresponding undertakings which they may give.

Dated this 9th day of March, 2012

KAWALEY J