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# **TEAM MOVES: A PRACTICAL GUIDE**

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# WHAT DO WE MEAN BY A 'TEAM MOVE'?

- Essential characteristics
  - Recruitment of a number of employees constituting a business unit
  - By an established business/start up
  - Collusive behaviour between new employer and one or more of the 'team'



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# **THE LEGAL FRAMEWORK**

## IMPLIED DUTY OF FIDELITY

- Implied into every employment contract
- How far it extends depends on the facts
- Will be a breach to recruit colleagues to move
- Will be a breach to misuse confidential information

## FIDUCIARY DUTIES

- A duty of 'single-minded' or 'exclusive' loyalty
- *Arise from and defined by* the contract
- Is there a specific contractual obligation which puts the employee in a position of such trust that equity imposes a duty to act *solely* in the employer's interests?
- Not every employee fixed with a fiduciary duty will owe the same duties

## A DUTY TO DISCLOSE A COMMERCIAL THREAT?

- An employee fiduciary must disclose colleagues' misconduct and his/her own misconduct
- What about 'mere' employees? The implied duty of fidelity may place the employee under similar duties
- Consider including *express* terms requiring disclosure of misconduct

## CONFIDENCE

- The duty of confidence is a facet of the implied duty of fidelity
- Equitable duty of confidence
- If confidential info is imparted to the new employer then it will be fixed with an equitable duty of confidence (so long as it knows the information is confidential)

## **THE TORT OF UNLAWFUL MEANS CONSPIRACY**

- Agreement to achieve an objective which will harm employer
- Intention to achieve that objective by unlawful means (eg. breach of contract)
- ‘Blind eye’ knowledge satisfies the intention requirement
- Use of unlawful means (eg. breach of contract)
- Causing loss to employer



## THE TORT OF INDUCING BREACH OF CONTRACT

- Must be a contract
- Must be a breach of that contract
- D must have induced that breach
- D must have known of the existence of the relevant term which was breached
- ‘Blind eye’ knowledge is sufficient
- D must realise that the conduct induced will result in breach
- C must prove damage

## POST TERMINATION RESTRAINTS ('PTRs')

- Competition
- Dealing with clients
- Soliciting clients
- Poaching staff
- Employing colleagues / working with former team members



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# **HOW TO HANDLE A 'RAID': PRACTICAL STEPS FOR GAMEKEEPERS**

## **DETECTING A TEAM MOVE**

- Interest in T&Cs
- Communications
- Meetings
- Removal of confidential information
- Resignations

## INVESTIGATING SUSPECTED WRONGDOING

- IT/Communications devices
- Preservation of evidence
- Exit interviews
- Encouraging 'turncoats'

## **PUTTING THE RESIGNING EMPLOYEES ON GARDEN LEAVE**

- Resist the temptation to dismiss
- Express garden leave clause?
- If not: Is there an express/implied duty to provide work?
- Alternatively: suspension pending disciplinary investigation

## **STABILISING THE BUSINESS**

- Salary increases
- Retention bonuses
- Promotions
- Recruitment of additional staff
- What (if anything) should be said to the market?

## REMEDIES

- Injunction
  - PTRs
  - Garden leave
  - Springboard relief
  - Confidentiality injunction
  - Orders relating to documents
- Financial remedies



## **REQUESTING 'CONTRACTUAL' UNDERTAKINGS**

- From the resigning employees
- Drawing inferences from refusal
- Value?
- From the new employer

## UNDERTAKINGS TO THE COURT

- Breach amounts to contempt
- Should be sought where:
  - Mere ‘contractual’ undertakings cannot be trusted
  - The injunction application has been issued and Ds wish to avoid a contested application

## INJUNCTION APPLICATIONS

- Explaining delay
- Serious issue to be tried? Is an injunction really necessary?
- Applications without notice:
  - The burden of ‘full and frank’ disclosure
  - If notice is given will it defeat the purpose of seeking the injunction?
  - Is there evidence that the employees may destroy evidence?

## **SPRINGBOARD RELIEF**

- Potentially available where a competitive head-start has been obtained as a result of unlawful acts
- The relief is tailored to deprive Ds of that head-start
- Especially useful where there are no PTRs (or where they are unenforceable)

## INJUNCTION OR FINANCIAL REMEDIES ONLY?

- An injunction may lead to difficulties proving loss & the extent of any competitive head-start
- Might it be better to allow a disloyal team to leave? Depends on the potential impact on the business.
- Is C's business 'sunk below the waterline'? Would an injunction serve any purpose?
- Financial remedies



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# **TACTICS ADOPTED BY POACHERS / MOVERS**

## APPOINTING A HEADHUNTER

- Agree what steps can / cannot be taken (ie. approach employees individually and do not encourage them to speak to each other)
- Document instructions to the headhunter
- Headhunter should keep records of steps taken and the source of information about eg. salary levels

## **USE FORMER EMPLOYEES TO COORDINATE THE TEAM MOVE**

- Current employees cannot act as ‘recruiting sergeant’
- But a former employee who is free of PTRs can...
- ...so long as they do not (i) induce former colleagues to act unlawfully; or (ii) misuse any confidential information



## KNOWLEDGE OF PTRs

- Difficult for new employer to claim ignorance of target employees' T&Cs
- Usually a good idea for the poaching employee to obtain T&Cs
- It will be fixed with knowledge of them, but difficult to formulate a strategy without knowledge of PTRs

## MINIMISING LEAKS

- Keep the number of team members to a minimum
- Keep the 'incubation' period to a minimum
- Limit the information which team members have about the plan
- Restrict written / electronic communication

## DANGER FOR FCA 'APPROVED PERSONS'

- Involvement in an unlawful means conspiracy may result in prohibition from performing any function in relation to regulated activity
- Eg. FSA Decision Notice in relation to one of those involved in the conspiracy in ***Tullett Prebon v BGC***

## LITIGATION TIPS FOR DEFENDANTS

- To fight at the interim injunction stage, or keep Ds' powder dry?
- Should the trial be split? Might it be better to keep up the pressure on C to particularise / prove its alleged losses?
- Pleading the Defence
  - Avoid hostages to fortune
  - Early admissions can focus the dispute on quantum



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# **PITFALLS FOR LAWYERS**

## AVOID BECOMING A CONSPIRATOR

- The line between (i) giving advice and (ii) assisting formulation / execution of ‘the plan’
- ***Tullett***: a cautionary tale
- Drawing the line in practice:
  - Be clear on what is lawful / unlawful
  - Keep records of advice
  - Only act for one of the parties involved
  - Never participate in a meeting / communication with other parties

## PRIVILEGE

- Communications not privileged if the dominant purpose is facilitating a team move
- Common interest privilege
- But beware the scope of conflicts of interest (and parties 'falling out')
- Agree (and document agreement) that common interest privilege applies

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Gavin specialises in employment, partnership and related areas of commercial law. He has a particular interest in business protection disputes and has acted in many complex team move cases, often with an international element. He features prominently in the legal directories and was shortlisted for Employment Silk of the Year by Legal 500 in 2016.

“

*He's a very impressive figure: he inspires confidence and he is very client-friendly and assured. He's very persuasive in his advocacy: he presents his case very logically and always delivers with real confidence and authority.*

”

Legal 500 2017



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The focus of Matthew's High Court practice is business competition: confidential information, restrictive covenants and springboard relief, particularly in a team-move context. He is regularly instructed to make and resist injunction applications.

“

*“An absolute standout junior for injunction work” “Peers commend the strength of his advocacy”*

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