

# Restrictive Covenants and Team Moves – Key Legal Obligations and Risks

Firms wishing to grow their teams or expand their practice offering frequently find that organic growth may not realise the required results quickly enough. The most obvious alternative is to take on a lateral hire, either with or without a team following. A team move invariably raises a number of additional issues and areas of risk for the hiring firm to consider before progressing with the hire. This briefing looks at some of the relevant practical and legal issues in navigating this process.

## Obligations whilst a Partner

Partners (which for the purposes of this article includes reference to an LLP member, unless otherwise specified) owe an express duty of good faith and certain implied duties to their existing firm (and possibly also to fellow LLP members or partners). They may also be subject to so-called fiduciary duties depending on their position with the firm, which essentially oblige them to act in the best interests of the firm, rather than their own. Any solicitation of colleagues (be it their peers or more junior employees) to join a team move by a partner will constitute a breach of these obligations.

Whilst a partner is free to look for a new role, they should not engage in this process during normal working hours when they are committed to providing their services to their existing firm. They should also not use firm property, including firm mobile devices and laptops to look for a new role. Their current firm may conduct searches of their devices and work email and diaries, if it suspects

untoward activity, particularly if it suspects a team move. There is also a risk that private devices could be searched if matters become litigious.

A partner will also owe an ongoing duty of confidentiality, which obliges them not to disclose confidential firm and client information to third parties, which would include a recruiter or headhunter and any potential new firm.

In reality when considering any potential lateral hire, a prospective firm will want to know what colleagues or clients they might bring, how much these are likely to bill and what the partner and, if relevant, team billings are. A common request is for a business plan covering much of this type of information.

Accordingly, in practical terms, it is very difficult to navigate an exit or a team move without coming into conflict with these express and implied contractual duties. Care needs to be exercised and risks assessed as to the possible repercussions of any actions that are likely to give rise to breaches of these duties.

## Obligations following Departure from the Firm: Restrictive Covenants

Restrictive covenants will invariably apply after the departure date and the typical restrictive covenants to be found in many LLP deeds or Partnership agreements include the following:-

- non-compete - seeking to prevent a partner from joining a competitor firm;

- non-solicitation and non-dealing with clients - seeking to prevent a partner from approaching clients or acting for them; and
- non-poaching of colleagues - seeking to prevent a partner from recruiting colleagues

For employees, restrictive covenants can typically last no longer than a maximum of twelve months following exit (and any period of garden leave during the notice period will usually be set off against the period of restriction). This is not the case for partners and LLP members where covenants can be much longer in duration. There may also be so-called 'waiting room' clauses to consider, restricting partners from leaving a firm if a certain number of fellow partners have left within a prescribed period.

The leading authority on partnership restrictive covenants remains *Bridge v Deacons*, a Hong Kong case from 1984, in which a 5 year non-solicitation of clients covenant was upheld. It is commonly accepted amongst many partnership practitioners that *Bridge v Deacons* is ready to be overturned, particularly so in relation to LLP members as opposed to partners in a general partnership. However, until such time as a new Court decision comes along, *Bridge v Deacons* remains an authoritative case. Whilst there would be little expectation of having a 5 year covenant upheld now, a lengthy partnership covenant still presents a real risk.

### The Key Risks

In terms of the possible key legal remedies, the former firm could apply for an injunction to seek to prevent contractual or covenant breaches as well as issuing a damages or account of profit claim, depending on the circumstances.

For a partner potentially acting in breach of their contractual obligations, including fiduciary duties, or restrictive covenants, their profit share and any capital in the former firm may be at risk. Accordingly, when a partner is planning a move which is likely to place them in breach of their obligations and any restrictions, they may well request an indemnity from the firm they are likely to join. The indemnity may cover any legal costs or exposure to a damages or account of profit claim, as well as any capital or profit share. The risk for the new firm in providing an indemnity is that this could provide evidence against them of inducing a breach, potentially placing the new firm

at greater risk of being joined in any proceedings. If an indemnity is provided, care should therefore be exercised in the drafting.

Many partnership and LLP deeds provide for any dispute to be resolved by way of alternative dispute resolution, most commonly by way of mediation and arbitration, although injunctive relief in the High Court is still possible notwithstanding. However, most former firms will not wish to publicise a high profile departure or team move further by litigating and arbitration can provide a more discreet alternative. In practical terms, it may also be possible to negotiate a reduction or release from covenants between firms, particularly where there may be the prospect of future work being introduced between firms or some form of co-operation.

### For further information, please contact:



**Bettina Bender**

Partner, Employment  
T: 020 7593 5045  
E: [bbender@wslaw.co.uk](mailto:bbender@wslaw.co.uk)