



# LITTLETON

## **Employment Injunctions: Strategies, Tactics & Pitfalls**

**Mohinderpal Sethi QC**

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- *Frequently acts for some of the biggest clients in the financial services industry. He is particularly knowledgeable about restrictive covenants and specialises in complex international business protection litigation in the context of restraint of trade and team moves.*
- **Strengths:** *Thorough, well prepared and very good with clients. An impressive court advocate who is very good with judges. An excellent choice, particularly if you want someone who is strong on tactics and strategy.*
- **Recent work:** *Appeared for Sayyed Hussain, a senior energy broker, in the first ever restrictive covenant and confidentiality injunction heard before the Dubai International Financial Centre courts.*
- *Instructed by Willis Towers Watson with regard to the enforcement of post-sale restrictive covenants arising from the claimant's purchase of a majority stake in Miller Insurance Services.*

Chambers &amp; Partners 2020

- *Very proactive with excellent experience of employee competition work. A fearless advocate but one with court instincts.*

Legal 500 2020

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*He frequently acts for some of the biggest clients in the financial services industry. He is particularly knowledgeable about restrictive covenants and specialises in complex international business protection litigation in the context of restraint of trade and team moves. A phenomenally clever and very skilled advocate who is good at pulling rabbits out of hats when necessary.*

Chambers UK 2019

*He is an absolute pleasure to work with and is always on top of the detail.*

Legal 500 2019

*Stands out for his top-tier work in commercial employment, equality and partnership disputes. Respondents describe him as “a very skilled and persuasive barrister”.*

Who's Who Legal 2019

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# What this session will cover

- The legal framework
- Practical client care issues
- Pre-application tactics
- Making the application
- Resisting the application
- Preparing for a speedy trial
- Settlement

# Injunctions – legal framework

- Enforcing duties during garden leave
- Enforcing post-termination restrictive covenants
  - Non-competition
  - Non-dealing/soliciting customers, clients, candidates, suppliers
  - Non-poaching key employees
  - Non-team move clause?
- Enforcing confidentiality covenant/preventing breaches of confidence

# Court's approach to garden leave

- Injunction to keep the contract alive and to hold the employee to his notice period
- Is an express clause needed?
- Advantages over restrictive covenants – more flexible as to duration and scope. Construed at date of injunction.
- Interrelationship with restrictive covenants – express 'set off' provisions
- If no legitimate interest then rely on breach of implied term of trust and confidence
- Effect on duty of good faith during garden leave



# Court's approach to covenants

- Prima facie void and unenforceable on public policy grounds
- **Construction** at date of contract: what does the covenant mean when properly construed?
- **Legitimate interest:** are there legitimate commercial interests requiring protection?
- **Reasonableness:** does the covenant go no wider than is reasonably necessary in order to protect those interests?
- **Breach:** Is there a serious issue that D has/will infringe?
- **Discretion:** whether to enforce at date of application

# No wider than reasonably necessary

- Role occupied by employee – access to confidential information, contact with customers, seniority and influence over key employees
- Limitations by reference to recent customer contact or involvement with particular product/services
- Correspondence between business of employer carried on by employee and business activities protected by covenant
- Duration, geographical scope and connection with protectable interest
- Existence of an express garden leave clause
- Whether a less severe restriction would suffice



# Court's approach to confidentiality

- Without an express clause:
  - During employment, trade secrets and confidential information are protected
  - Post-termination, only trade secrets are protected
- With an express term, may be possible to protect confidential information pre- and post-termination if information clearly defined
- If employer repudiates contract, it can still rely on the equitable obligation of confidence

# Equitable obligation of confidence

- Necessary quality of confidence (eg inaccessibility)
- Imparted in circumstances importing obligation of confidence (objective/subjective test?)
- Unauthorised use (can be to detriment of owner)

# Pre-application considerations

- When employee breaches/threatens to breach:
  - Obtain relevant information/evidence
  - Make key decisions
  - Decide on a clear litigation strategy based on the key decisions

# Gathering background information

- Is the employee still employed by employer?
- What were the circumstances of his departure?
- What post-termination restrictive covenants are there?
- What is the client's perception of what the employee can do after leaving?
- What is the notice period?
- Is employee paid variable remuneration?
- What approach has client taken to similar departures?
- Can employee be put on garden leave?
- Speak to clients and other employees

# Search for relevant documents

- Contract of employment and non-employment contracts containing covenants. Staff handbook, code of conduct, confidentiality agreements
- IT searches of emails, text, Blackberry and Bloomberg messages, recorded telephone calls, records of movements through security doors. Need reasonable cause to carry out searches. Avoid breaching trust and confidence entitling employees to claim constructive dismissal. May risk breaching DPA 1998, Regulation of Investigatory Powers Act 1998, Computer Misuse Act 1990. Searches should be proportionate. Express data protection policy enabling searches by employer. Who owns the Linked-in account? Forensic investigators should create image of the system. Get express terms.
- Exit interviews: Ask resigning employees about their plans for the future. Were they approached by a competitor? How? Fiduciary employees owe duty to spill the beans. Turncoats?

# Making key decisions

- Should the employee be:
  - Suspended pending disciplinary investigation
  - Summarily dismissed for gross misconduct
  - Dismissed but with pay in lieu of notice
  - Dismissed with normal working notice/specified duties/garden leave
- Threaten/commence proceedings against:
  - departing employee and/or
  - new employer?
- What damage limitation steps can be taken to protect employer's:
  - trade secrets and confidential information
  - customer/trade connections
  - Workforce stability

# Managing client expectations

- Do employee's activities pose a real threat to commercial interests?
- Is there clear evidence of breach?
- Must not delay
- Open letter to:
  - departing employee seeking reaffirmation of restrictions and undertakings
  - new employer putting them on actual notice of restrictions and seeking non-inducement undertakings
- Written contractual undertakings or undertakings to the Court?
- Dangers of shooting from the hip in pre-action correspondence
- Dangers of asking for too much



# Types of injunction order

- Interim or permanent
- Mandatory or prohibitory
- Confidentiality
- Springboard
- Preservation, detention or inspection of property
- Delivery up
- Imaging
- Destruction
- Other interim relief CPR 25.1 (eg, freezing injunction, search orders)

# Notice – 3 options

- Standard case – 3 clear days' notice
- Applications on short/informal notice
- Applications without notice where:
  - Exceptional urgency
  - Overriding objective is best served
  - Nb. Heightened duty of disclosure and to assist the court
  - Freezing injunction and search orders

# Timing of Application

- Has C delayed?
- Has D offered suitable undertakings – contractual or to the Court?
- How much time is left to run on the covenant?
- Will the Court apply the standard American Cyanamid approach or a higher standard?
- When can a speedy trial be realistically listed?

# Making the application

- Claim form and appropriate court fee
- Application notice
- Draft order and directions for speedy trial
- Supporting witness statement
- Cross-undertaking in damages – is C good for the money?
- Check the court lists and judge availability
- Urgent cases or hearing during vacation– need for certification CPR39 BPD2

# Witness evidence:

- Explain the business itself
- Explain the legitimate business interests:
  - Client relationship
  - Confidentiality
  - Stability of workforce
- Explaining the employment relationship
- Set out the wrongdoing - the dangers of hyperbole
- Justifying the relief sought (American Cyanamid)
- Cross-undertaking in damages
- What do to about unlawfully obtained information (admissible if sufficiently probative, but counter-attack?)
- Privileged material

# Protecting confidential information in disclosable documents

- Minimum necessary departure from the principle of open justice
- Avoid specifying documents containing confidential information in statements of case
  - anonymise in witness statement
- File a confidential schedule attached to statement of case and seal it under CPR 5.4C(4)
- Redact irrelevant confidential information
- Signed confidentiality ring/club agreement for unredacted confidential information. Limit inspection to parties' offices
- Obtain other side's agreement not to read out. Otherwise ask court to have short period of hearing in private.
- Apply to restrict use of disclosed documents referred to in court under CPR 31.22
- Apply for private hearing under CPR 39.2(3)(c) where publicity would damage confidentiality
- Persuade judge not to refer to confidential information in judgment

# Interim injunctions

- Standard approach – American Cyanamid:
  - Is there a serious issue to be tried as to C's entitlement to a final injunction at trial? – low threshold
  - Will damages be an inadequate remedy for C and D?
  - Does the balance of convenience/hardship lie in favour of granting the interim injunction?
  - Maintenance of the status quo
  - Any clear view the court may reach as to the relative strength of the parties' cases
- Court may depart from standard approach where limited period left to run on the restrictive covenant



# Settlement

- CPR Part 36
- ADR
- Damages (including Wrotham Park)/account of profits
- Costs
- Undertakings – contractual or to the Court?
- Sanctions for contempt of court include imprisonment, fine and sequestration of assets

# Questions

Feel free to:

- Bounce ideas off me or discuss issues as and when they arise: [MoSethiQC@littletonchambers.co.uk](mailto:MoSethiQC@littletonchambers.co.uk)
- Connect with me on LinkedIn
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