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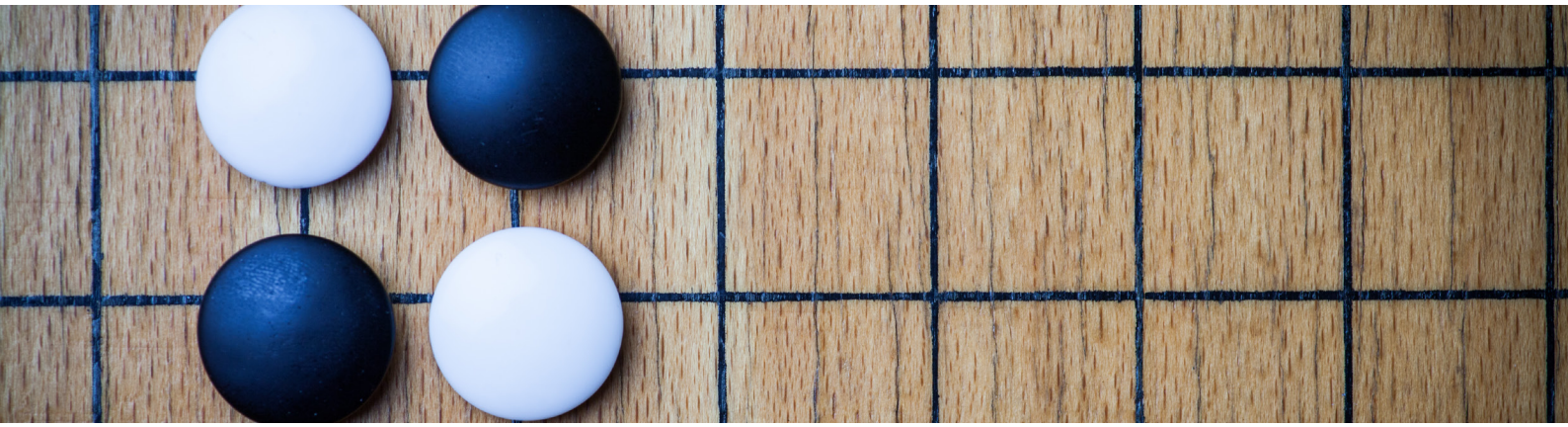

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Dealing with Team Moves and the Scope of Springboard Injunctions: The McLarens Hong Kong case

Setting the Scene

This practice note considers the applicable legal principles in respect of an application for a springboard injunction as well as key takeaways for employers seeking to protect their businesses when key employees depart.

What is a springboard injunction?

A springboard injunction is a type of prohibitive injunction. In general terms, if granted, it prohibits competitive activity by cancelling out any unlawful head start gained as a result of unlawful conduct.

Most commonly, it is applied for where a former employee has gained a head start by misusing confidential information belonging to its former employer.

Springboard injunctions are usually granted for until a specified date, or until trial after a final judgment by the Court.

McLarens case

In *McLarens Hong Kong Ltd v Poon Chi Fai Corey* [2019] 3 HKLRD 403, the Court considered the scope of an application for a springboard injunction sought by the plaintiff, McLarens ("McLarens") against its nine former employees ("Employees") and their new employer Charles Taylor ("New Employer").

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Facts

McLarens and New Employer are both loss adjustor firms.

On 3 March 2019, the Employees terminated their employment contracts by promising to make payment in lieu of notice. The next day, the Employees joined the New Employer.

There is no dispute that there were no post termination restrictive covenants ("PTRs") in the Employees' employment contracts with McLarens. It followed that there was nothing preventing the Employees from working for a new employer, or even a competitor, if they chose to do so.

However, in response, McLarens sought a springboard injunction on the grounds that it alleged that the Employees planned an *en masse* exodus from McLarens, that the Employees wrongfully obtained vast amount of confidential information and/or trade secrets from McLarens and the New Employer is a party to the conspiracy to injure McLarens.

At the first hearing on 29 March 2019, the Court declined to make injunctive orders against the Employees or the New Employer. The Court determined that the formal Undertakings in relation to the alleged confidential information and/or trade secrets, which were readily offered by the Employees, would be sufficient to ring fence the parties' interests.

By consent, the Undertakings were slightly adjusted on 26 April 2019 which were to last until the substantive hearing on 3 June 2019. Given the expiry of the Undertakings, the Employees and the New Employer offered to give a set of modified undertakings to McLarens until trial or further order of the Court ("Modified Undertakings"). This was accepted by McLarens. The remaining issue in dispute at the substantive hearing was whether in addition to the Modified Undertakings, springboard injunctions should be granted against the Employees to restrain them from engaging in any meaningful employment for a period of six months, notwithstanding that their employment contracts with McLarens did not contain any enforceable PTRs.

Analysis

The Court adopted the legal principles of the English case of QBE Management Services (UK) Ltd v Dymoke & Others [2012] IRLR 458, summarised as follows:-

1) First, where a person has obtained a 'head start' as a result of unlawful acts, the court has the power to grant an injunction which restrains the wrongdoer, so as to deprive him of the fruits of his unlawful acts.

2) Second, the purpose of a springboard order is to prevent the wrongdoer from taking unfair advantage of his/her unlawful acts.

3) Third, springboard relief is not confined to cases of breach of confidence. It is available to prevent any future or further economic loss to a previous employer caused by former staff members taking an unfair advantage and/or 'unfair start', as a result of a serious breach of their contract of employment. 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.

4) Fourth, springboard relief must be sought and obtained at a time when any unlawful advantage is still being enjoyed by the wrongdoer.

5) Fifth, springboard relief should have the aim of simply restoring the parties to the competitive position they would occupy but for the wrongdoer's conduct. However, it is not fair and just if it has a much more far-reaching effect than this.

6) Sixth, springboard relief will not be granted where a monetary award would have provided an adequate remedy to the claimant for the wrong done to it.

7) Seventh, springboard relief is not intended to punish the wrongdoer. It is merely to provide fair and just protection for unlawful harm, on an interim basis.

8) Eighth, the burden is on the claimant to spell out the precise nature and period of the competitive advantage. An 'ephemeral' and 'short-term' advantage will not be sufficient.

Having applied those principles, the Court in Hong Kong refused to grant the springboard injunction sought by McLarens. In coming to its decision, the Court *inter alia* found: -

1) McLarens had failed to establish a causal link between the procuring of the alleged confidential information and its use for gaining an unfair advantage.

2) There is nothing to prevent the Employees leaving McLarens and joining the New Employer. DHCJ Wong SC held "*Given the fact that the 1st to 9th defendants were entitled to terminate their employment contracts with the plaintiff by serving a proper notice and, in particular, in the absence of any enforceable restrictive covenants from soliciting, the ease which the plaintiff's employees could leave the plaintiff to join the 10th defendant, I am not persuaded that the plaintiff has discharged its burden of proof that the defendants have built a springboard by reason of the failure to inform the plaintiff of the en masse exodus.*"

3) In any event, even if there was any unfair advantage, such advantage can only be an 'ephemeral' and 'short-term' one and cannot justify the six-month injunction sought by McLarens. The Court held that McLaren's failed to show with cogent evidence why a period of six months restriction was justified.

4) The Court went on to find that, even if it was wrong and McLarens did discharge its burden to spell out the precise nature and period of competitive advantage, there is no evidence that any unlawful advantage is still being enjoyed by the Employees, particularly as McLarens had the protection and benefit of the Modified Undertakings. There was no evidence of continuing misuse of the alleged confidential information.

5) Insofar as McLarens' submission that the Employees had memorised some of the alleged confidential information was concerned, as a matter of law, the Employee cannot be restrained from using what they have remembered or learnt in the course of their employment with McLarens, in their new jobs with the New Employer.

6) The Court then went further and held that even if it was wrong on all the arguments advanced by McLarens, damages were an adequate remedy in this case and therefore, it is not appropriate to grant any springboard relief.

7) Finally, the Court stressed that there are no PTRs in the Employees' contracts and a springboard injunction will not be granted as a substitute to assist an ex-employer who has not troubled to include PTRs in the employment contract to protect its alleged confidential information.

In dismissing McLarens' application, the Court also made a costs order against McLarens to pay 80% of the Employees' and the New Employer's costs of the hearing.

Key takeaways for employers

The McLarens case highlights the risks of seeking a springboard injunction for employers and the consequences of failing to have proper PTRs in place.

High hurdle for springboard injunction: In order to successfully seek a springboard injunction against former employees, employers have a high hurdle to overcome. Where a former employee is willing to provide sensible undertakings, it is prudent for employers to seek robust legal advice before pursuing an application for springboard injunction. This is particularly important for avoiding unnecessary cost consequences.

PTRs: The McLarens case is a reminder for employers to consider whether appropriate PTRs should be incorporated in employment contracts, and if so, for which employees. Employers should seek legal advice when drafting such PTRs as they may be unenforceable if found to be unreasonable.

Confidential information: Not every piece of information that an employee becomes aware of in the course of employment is considered confidential and/or amounts to a trade secret. It may be helpful for employers to consider whether to impose contractual restrictions on information they seek to protect within the employee's contract of employment.

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For further information, please contact our Partner, Andrea Randall and our Senior Associate, Felda Yeung who acted for the Employees in successfully resisting the springboard injunction sought by McLarens.

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