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Employee Injunctions: Recent Cases on Protecting Confidential Information

Rebecca Jackson

Rebecca Jackson
Senior Associate – Commercial Dispute Resolution Group
Walker Morris

Biography

Rebecca Jackson is a Senior Associate in Walker Morris' (https://www.walkermorris.co.uk) Commercial Dispute Resolution Group (CDR Group), having joined the Firm in 2011. Rebecca initially worked within the Construction and Engineering Group where she covered a broad range of matters in relation to all forms of dispute resolution, including adjudications, High Court construction, engineering and commercial litigation disputes, professional negligence, defective works and contractual disputes.

Since joining the CDR Group, Rebecca has gained experience in advising in high value and complex litigation and has also gained significant trial and mediation experience in respect of multi-party litigation (Rendlesham Estates Plc and others v Barr Limited [2014] EWHC 3968). Whilst in the CDR Group, Rebecca has continued to broaden her exposure to a variety of work assisting on matters for clients from multiple industries and also for High Net Worth individuals and property owners.

In addition to Rebecca's litigation experience, Rebecca has been selected by various clients to undertake secondments within their business, including working for a major FTSE 250 company which specialises in renewable energy and a global contract research organization group specialising in drug development. Rebecca's experience provides her with a commercial insight which, when paired with her hard work and commitment, enables her to seek the best outcome for the client.

Keywords Employee injunctions, Confidential information, Restrictive covenant, Post-termination restriction, Employment contract
Paper type Research, Opinion

Abstract

For many employers, confidential information, customer connections and a pool of skilled employees are fundamental to the success of their business. In a post-Covid world, where employers need to capitalize on every asset and protect against avoidable threats more than ever before, this is a particularly 'hot topic'. Applications for injunctions to protect confidential information are increasingly hitting the courts – a trend that is expected to continue, and in this article the author highlights some recent employee injunction cases and offers practical advice for employers.

Introduction – Injunctions against [former] employees

During or following termination of their employment, employees or former employees often have the ability to take advantage of confidential information, strategic plans, customer/client details or other important information relating to their employer's business – often to benefit a rival business. It is therefore common

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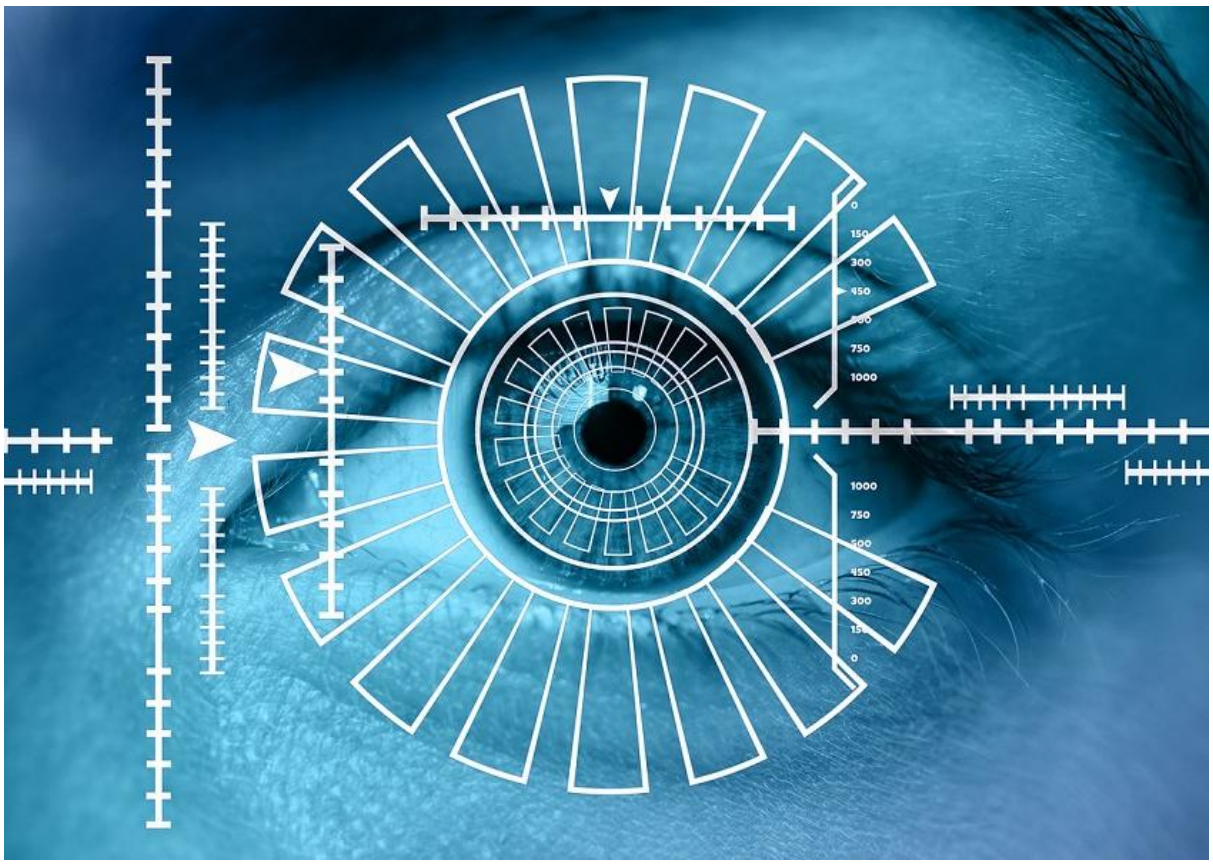
for employers to include, in the contract of employment, various express contractual terms with a view to preventing employees from disclosing confidential information, competing, soliciting clients and poaching employees. Such provisions are often referred to as restrictive covenants or post-termination clauses.

In the event of a breach or suspected breach of confidentiality or restrictive covenant, one of the most significant and effective options employers can take is to seek an injunction via court proceedings – but what does that involve?



Fundamental principles – contemporary context

Two cases from the end of 2020 demonstrate the fundamental principles underpinning injunction applications of which employers should be aware – but in an up-to-the-minute context.

The claimant in Gemini Europe Ltd v Sawyer[1] was part of a group of companies dealing in cryptocurrencies. It had engaged the defendant as its Managing Director. The employment contract included a non-compete clause preventing the defendant, for nine months post-termination, from holding a position in any business which was, or was about to be[2], in competition with the claimant.

After just a few months the defendant gave notice of his intention to leave to become the global manager of a company dealing in Bitstamp crypto-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currency. Following the defendant's notice period and termination of the employment, the claimant issued court proceedings for an injunction to enforce the non-compete clause, and gave a cross-undertaking in damages[3].

The case demonstrated that an [ex-]employee injunction – like other forms of injunction – will be determined by reference to what are known as the American Cyanamid principles[4]. The guidelines consider:

- whether there is a serious, arguable case to be tried;
- whether damages would be adequate as a remedy;
- the "balance of convenience" (for instance, which party would suffer the greatest prejudice were an injunction to be granted or not to be granted); and
- whether the status quo should be maintained pending an ultimate full trial.

In addition, an [ex-]employee injunction – like other forms of injunction – is an equitable remedy. That means it is a remedy that is underpinned by fundamental fairness and awarded by the court at its discretion, as opposed to a legal remedy that is available as of right to a successful claimant. When exercising its discretion, the court will apply certain key principles of equity, including:

- the equitable maxim of clean hands. That is, anyone looking to equity for a remedy must be free of wrong doing him/herself;
- equity will not suffer a wrong to be without a remedy. Where fairness requires, a remedy will be provided even if one does not exist by right at law; and
- the doctrine of 'laches' (delay). Delay can cause unfairness in itself and so an equitable claim may be barred if it is not brought within a timely manner.

In this case the court held that the claim was not vexatious or frivolous and there was a serious issue to be tried, including whether damages would be an adequate remedy and where the balance of convenience lay. Importantly, the court also held that, whilst the employer had not issued proceedings until after the defendant's notice period had expired and the employment had terminated, that was not, in the circumstances, an unreasonable delay. (On the facts of this case it was not clear at the time the defendant gave notice that he would act in breach of contract and so it may actually have been premature for the claimant to issue proceedings at that time.)

Other findings of interest include: the court's acknowledgement that an employer is entitled to protect confidential information; the defendant had been a significant, pivotal employee exposed to information which would enable a competitor better to compete in the cryptocurrency market; and the claimant's cross-undertaking in damages was sufficient protection for the defendant (because he and his new company could not complain about the enforcement of a non-compete clause of which they had both been aware).


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As a result, an injunction was awarded to enforce the quite significant nine month restrictive covenant.

In Zoll Medical UK Ltd v Trebilcock[5] the claimant discovered, following termination of the defendant's (its UK Operations Manager) employment, that the defendant had e-mailed confidential and commercially sensitive information to himself personally and to a company incorporated by him. The defendant accepted that he was in personal possession of the claimant's business, financial and strategic plans, commercial terms with business partners, customer lists and contact information and employment terms and staff details. The defendant argued, however, that he had taken the information to support a whistleblowing claim that he was pursuing against the claimant in the employment tribunal.

Applying the American Cyanamid guidelines and equitable principles the court held that there was no doubt a serious issue to be tried. An injunction would be granted because the whistleblowing proceedings did not justify the transfer of confidential information for his own retention. Damages would not be an adequate remedy for the claimant in this case, and in any event there was no information as to whether the defendant could satisfy any financial award made against him.

The court made delivery-up and deletion orders in respect of the confidential information held by the defendant, as well an information order requiring the defendant to provide an account of his use of the information. All such orders were said to be proportionate in nature and scope in the circumstances and, importantly, did not prevent him making any disclosures as a whistleblower.

What are the practical takeaways for employers?

There are various practical tips that are likely to assist employers in the event of a [suspected] breach of confidentiality or restrictive covenant. For example:

- Commence an investigation, including seek specialist advice[6], at the earliest possible stage.
- Obtain evidence as to the factual circumstances surrounding any breach/ potential breach and as to damage/likely damage.
- Consider whether information or undertakings should be requested from the employee or any new employer. (The new employer's knowledge of the non-compete clause weighed heavily in the claimant's favour in Gemini Europe.)
- Where necessary and appropriate, seek an injunction and/or damages via court proceedings. Acting fast and coming with 'clean hands' will often be essential in injunction applications.
- Employment contracts should be reviewed periodically, in particular in the event of promotions of employees, to ensure that their provisions are enforceable and offer the best possible protection for employers. Check that the terms – in particular the length – of any restrictive covenants are


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appropriate to the individual employee/role, and make sure that the drafting covers new/start-up as well as existing competitors.

- Company monitoring policies and appropriate supervision should be in place to avoid breaches occurring or going unnoticed.

- Staff training, IT systems, document retention policies and the implementation of appropriate policies and procedures, can be crucial when it comes to the urgent, efficient and effective conduct of investigations, the collection and preservation of evidence and the mitigation of any damage/loss.

In conclusion

Recent case law, on the whole, has indicated a willingness on the part of the courts to acknowledge the importance to employers of restrictive covenants, and the value of injunctions, as opposed to damages, as a remedy. Zoll Medical, in particular, is encouraging as it clarifies that, even where a defendant [ex-]employee might have a seemingly meritorious reason for taking confidential information (such as whistleblowing/ongoing separate proceedings), that will not necessarily justify breaching restrictive covenants and therefore should not necessarily be tolerated.

Our team of specialist lawyers are experienced in successfully advising employers through the entire process of business protection – from drafting enforceable restrictive covenants through to negotiating settlements and conducting court proceedings and obtaining injunctions and damages where appropriate. For more information please do not hesitate to contact me. For additional details on the theme of this article see our recent webinar at https://www.walkermorris.co.uk/publications/webinar-recording-stopping-departing-employees-taking-confidential-information-and-competing/

Reference

1 [2020] 11 WLUK 254
2 presumably this clause was intended to capture new ventures/start-ups, as well as existing competitors. This is likely to be increasingly relevant in light of the UK Government's stated intentions to boost innovation and entrepreneurialism to support post-Covid economic recovery.
3 that is, an undertaking to compensate the defendant if it is ultimately decided that the injunction should not have been awarded
4 American Cyanamid Co (No 1) v Ethicon Ltd [1975] UKHL 1
5 [2020] 12 WLUK 192
6 Apart from providing advice on merits and strategy, the involvement of a legal specialist should ensure that the employer's overall position remains protected, and in particular that legal privilege applies, from the outset.