

Team moves and Poaching Alistair McGregor QC

1. LIMITS ON THE GRANT OF SPRINGBOARD RELIEF
- 1.1 It is obvious that once the court is prepared to grant springboard relief outside the realm of breaches of confidence, a serious threat to freedom of trade will emerge.
- 1.2 In Midas (unreported, 21st December 1999 Chancery) the Judge considered freedom of trade to be a crucial factor in determining the scope of the springboard relief he was prepared to grant (as distinct from the much wider order that the claimant as seeking):

“To remove Opus altogether from the race even if only to trial in two to three months time, in order to give Midas an opportunity to re-establish itself in TT’s eyes seems, on what I have seen of the evidence ... to be an excessive response and an illegitimate restraint on Opus’ freedom to compete ...

I am persuaded that a small measure of limited further protection is justified namely an injunction restraining Opus pending trial or further order in the meantime from entering into a binding agreement with TT [in relation to the marketing of the relevant software] ... I can see no justification for this limited restraint lasting longer than six months from ... the 31st October 1999.” (pp 19, 20 & 21)

- 1.3 The Judge, accordingly, left the two rivals for the contract in the ring together but ordered one not to land the knock-out punch until the other had got its breath back.
- 1.4 The Orders made in the Siemens and Vestra cases, on the other hand, were of a completely different magnitude. In the former case the defendant was prohibited from taking into employment or taking further steps to recruit some 120 Siemens employees (the full complement of its staff) although this was only until a full hearing of the application in question. In the latter case the Judge ordered until a speedy trial or further Order that the defendants be restrained from soliciting or dealing with any client of the claimants (apart from those who had already indicated a desire to transfer their business from the claimant) and from soliciting or enticing away from the claimant any of its employees who had not yet resigned their employments. The Judge added as against

certain individual defendants injunctions to enforce their post-termination contractual restraints.

- 1.5 Plainly these kinds of orders bring springboard relief into collision with hitherto cherished notions of freedom of trade.
- 1.6 Even before the handcuffs of breach of confidence were removed from springboard relief, judges expressed concerns about interference with trade: see Roger Bullivant Ltd v Ellis [1987] ICR p 464 at p 476G-H, & p 477 D-F.
- 1.7 How, then, can the collision between public policy on freedom of trade and the need to protect claimants against unfair competition by springboard relief be managed so as to produce the least injury to public policy?

2. SUGGESTED LIMITS

- 2.1 It is submitted that it is possible to set out a number of fundamental rules about springboard relief which together will limit the impact of such relief upon legitimate competition. These “Golden Rules” are gleaned from a number of reported and unreported cases.

2.2 “The Golden Rules”

- (a) A claimant must first satisfy the Court (see below) that there has been wrongdoing which has conferred on those proposed to be injuncted an unfair advantage “the unfair start” (see Vestra per Openshaw J at paragraph 4).
- (b) Next the claimant must satisfy the court that the unfair advantage subsists as at the date on which the court is asked to grant springboard relief and is expected to continue thereafter (Sun Valley Foods Ltd v Vincent [2000] FSR 825 at p 834 per Jonathan Parker J).

- (c) Next the claimant must satisfy the court that the continuing unfair advantage will result in the claimant suffering future or further serious economic loss (Vestra supra).
- (d) The springboard relief sought must be proportionate (Midas supra) which means the court must have regard to the following matters at least:
 - (i) Is the springboard relief necessary in the light of other protection which may be available to the claimant? For example the defendant or defendants may be subject to valid contractual restrictive covenants which would offer adequate protection or the defendants may be willing to offer undertakings which would provide such protection (see Moneygram International Ltd v Davar & Others 2003 EWHC 2368(QB) per Gray J at para 36).
 - (ii) The injunction should not have the effect of putting the claimant into a better position than they would have been in had there been no wrongdoing (Universal Thermosensors Ltd v Hibben [1992] 1 WLR 840 per Nicholls VC at 855A).
 - (iii) The injunction sought should not have the effect of punishing the defendant for his wrongdoing. The purpose of springboard relief is to protect the victim, not to punish the guilty (Bullivant (supra) per Nourse LJ at 476G).

2.3 If these rules are followed then springboard relief should not operate to stifle legitimate competition, only unfair competition.

2.4 It is worth observing that a distillation of the Golden Rules produces a close analogy to at least part of the restraint of trade doctrine itself:

- (i) is there a legitimate interest to protect?
- (ii) is the covenant no more than adequate to protect that interest?

3. OBTAINING AN INTERIM SPRINGBOARD INJUNCTION: Evidence and the test to be applied

3.1 Having set out the “Golden Rules” it is a blinding glimpse of the obvious that the evidence required to obtain interim springboard relief is evidence that will satisfy the court on each aspect of those rules.

3.2 More difficult, and more interesting perhaps, is the test that the court will apply.

3.3 In *Midas*, it is clear that the Judge was applying ordinary American Cyanamid principles. There was an arguable case of breaches of duty by an individual to which the defendant was a knowing party. Although:

“I am bound, however, to say that I regard the evidence of Opus’ involvement to be at best very slender and almost entirely inferential” (Midas supra per Blackburne J pp 10-11).

The Judge, however, also applied the *Films Rover Ltd v Cannon Film Sales Ltd* principle enunciated in that case by Hoffman J:

“A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ in the sense that I have described” [1987] 1 WLR 670 at p 680.

3.4 The problem in many springboard cases is that either course of granting or withholding interim relief: “carries with it the risk of the injured party suffering a measure of unquantifiable loss” (Midas supra at p 20). It is unsurprising, therefore, that in springboard cases the courts have shown a tendency to apply more stringent tests than the American Cyanamid approach.

3.5 There is the obvious problem that the court may consider that a springboard injunction is justified but may equally consider that a comparatively short injunction period suffices. If that period is sufficiently short then it may not be possible to hold even a speedy trial

before it has elapsed. In that event the interim application will be, in substance, determinative of the main issue between the parties. In such cases a merely arguable case will not do. The court will apply the test in Lansing Linde v Kerr [1991] 1 WLR 251:

“it seems to me that justice requires some consideration as to whether the plaintiff would be likely to succeed at a trial. In these circumstances it is not enough to decide merely that there is a serious issue to be tried. The assertion of such an issue should not operate as a *lettre de cachet*, by which the defendant is prevented from doing that which, as it later turns out, he has a perfect right to do, for the whole or substantially the whole of the period in question. On a wider view of the balance of convenience it may still be right to impose such a restraint, but not unless there has been some assessment of the Plaintiff’s prospects of success. I would emphasise ‘some assessment’ because the courts constantly seek to discourage prolonged interlocutory battles on affidavit evidence ... where an assessment of the prospects of success is required, it is for the judge to control its extent” (per Staughton LJ supra p 258A-D).

This approach was taken by the Judge in the Sun Valley Foods case (supra pp 832-33).

3.6 But, even where a speedy trial is possible before the period of an interim springboard injunction elapses or is substantially over, the court has preferred the Lansing Linde test: see Vestra (supra) paragraphs 6, 24 and 35).

3.7 The Judge in the Sun Valley Foods case went so far, having reviewed the evidence, as to hold:

“In all the circumstances, I would have concluded that it required a very strong prima facie case for continuing springboard relief to tip the balance of convenience in favour of granting such relief, and that, absent a strong prima facie case, the balance of convenience tipped firmly in favour of refusing such relief” (supra at p 839, my emphasis).

3.8 On the other hand, in a more recent case: Sctrack NV v Satamatics Ltd & Leemans [2007] EWHC 3003 (Comm), Flaux J applied American Cyanamid principles when continuing a springboard injunction.

3.9 It remains to be seen whether special and higher tests than American Cyanamid will be adopted in all springboard cases and what these tests will be. For the present the

prudent course is to assume that a claimant will have to do better than a merely arguable case.

4. THE LENGTH OF THE SPRINGBOARD INJUNCTION

- 4.1 Of course the answer to this question is that it is fact sensitive in every case but it may be of use to explore the different bases advanced in springboard cases for fixing a particular period.

The nature and egregiousness of the breaches

- 4.2 This should not form any guide as to the period of the injunction. What matters is not the immorality of the defendant but the impact his actions have actually had:

“I agree with Mr Lowenstein that, logically, the seriousness of the breach and the egregiousness of the Defendants’ conduct cannot have any bearing on the period for which the injunction should be granted. What matters is the effect of the breach of confidence upon the Claimant in the sense of the extent to which the First Defendant has gained an illegitimate competitive advantage” per Flaux J Sectrack (supra at para 68).

Any attempt by a court to use an injunction to signal its disapproval of a defendant’s conduct fringes the Golden Rule that springboard relief is protective not punitive.

- 4.3 Equally it cannot be right to measure the length of springboard relief on the basis of the length of time that a defendant has been in breach or has plotted, for example, a poaching raid before his activities are discovered. Again, it is the impact of the breaches or of the plot in gaining an unfair headstart that matters. It may be that a claimant only discovers the wrongdoing at a time when the illegitimate headstart has completely unfolded, in which case he will not obtain a springboard injunction (see Universal Thermosensors supra). If the period it would have taken to do legitimately what was done illegitimately has elapsed, then springboard relief puts the claimant in a better position than he would have been in if no wrongdoing had been committed.

4.4 Contractual restraints as a guide: It is true that in the Bullivant case the Court of Appeal used a twelve month non-dealing covenant in one of the defendants' employment contracts as the measure of the maximum length of any springboard relief to which the plaintiff was entitled. Restrictive covenants are not, however, a sure guide to the length of springboard relief. First, the springboard relief may be wider than the ambit of the covenant and for that reason ought in principle to be shorter in duration to avoid an unjustifiable restraint on trade. Secondly, a defendant may have no contractual restraints. Thirdly, a defendant may have contractual restraints which are shorter than the period necessary to wipe out an illicit headstart. Finally, in Bullivant the court assumed without argument that the contractual restraint was valid both as to ambit and duration. That will not always be the case and springboard injunction applications should not spawn satellite litigation about the restraint of trade doctrine.

4.5 It is submitted that the true test in every case should be simply how long is the illegitimate headstart? It may be that that question can be answered in most cases by working out how long it would take for a defendant to achieve by lawful means what he has achieved illegitimately. In some cases, however, it may be appropriate to pose the question: how long will it take for the claimant to "catch up" with the defendant's unfair headstart?

5. PRACTICAL CONSIDERATIONS

These will be discussed at the conference.

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