

Group Briefing
September 2019

Springing into act: *Preventing confidential information being used by former employee*

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

In the decision in *Forse and others v Secarma Ltd and others*, the Court of Appeal of England and Wales upheld a High Court decision granting an interim springboard injunction and held that springboard relief must be no greater in scope or duration than is reasonable to remove a defendant's unfair competitive advantage.

WHAT IS A SPRINGBOARD INJUNCTION?

A springboard injunction is designed to cancel out the unlawful advantage, head-start or "springboard" that an employee may gain through the misuse of its former employer's confidential information. A normal confidentiality injunction may not provide sufficient protection for the employer, where the information has already been used and is no longer confidential. Therefore, an employer claiming misuse of confidential information or breach of a restrictive covenant by a former employee may consider applying for relief by way of a springboard injunction. Where granted, the springboard injunction puts the employee under a "special disability" to level the playing field and ensure that he/she does not obtain an unfair competitive advantage.

THE FACTS AND DECISION AT FIRST INSTANCE

Secarma is a cybersecurity business specialising in penetration testing, a

service whereby the security of a client's IT system is tested by being deliberately hacked.

Between March and November 2018, there were 28 resignations from Secarma. Secarma relied on WhatsApp messages in claiming that certain directors of Secarma, while they were bound by their restrictive covenants in favour of Secarma, unlawfully conspired with Mr Child (founder and managing director of Xcina) and Mr Forse (a former manager in Secarma) to poach Secarma's employees, for the purposes of setting up a competing penetration testing business.

At the High Court, Secarma were successful in securing an interim springboard injunction to remain in place until the start of a trial. The injunction prevented the defendants from poaching Secarma employees involved in penetration testing and from engaging with certain clients of Secarma. The defendants appealed to

the Court of Appeal on the grounds that the injunction should have been limited to avoiding future loss only and that a springboard injunction should never be so broad that it punishes the defendant, rather than merely prevents loss of the claimant.

COURT OF APPEAL

In considering the appropriateness of the injunction, the Court of Appeal of England and Wales agreed that the aim of a springboard injunction is not to punish the defendant and, accordingly, the injunction must be no broader than necessary to eliminate the unfair competitive advantage.

The Court referred its decision in *Lansing Linde v Kerr* in considering the perceived strength of each party's case and the length of time for which any unfair advantage derived would be likely to continue. In this regard, the Court was persuaded by evidence that penetration testers were highly skilled, rare in the market and not easily replaceable.

The Court found that the interim injunction was not punitive, but was necessary to hold the position between the parties so that Xcina could not gain any further unfair competitive advantage before detailed consideration of the matter occurred at trial.

The Court stated that, to obtain a springboard injunction, the applicant

must show each of the following:

- » Unlawful activity on the part of the former employee. This can range from unlawful use of the employer's confidential material to breach of restrictive covenants.
- » The former employee has, as a result of this unlawful activity, gained an unfair competitive advantage over the employer.
- » The nature and the period of the competitive advantage are more than short term.
- » The advantage still exists at the date that the springboard injunction is sought and will continue unless the relief sought is granted.
- » Damages would not be an adequate remedy.

SPRINGBOARD INJUNCTIONS AND POST-TERMINATION RESTRAINTS

Akin to a post-termination restrictive covenant, a springboard injunction prevents a former employee from carrying out certain activities (for example, the injunction may prevent them from dealing with the employer's customers). Where there are restrictive covenants already in place, the springboard injunction may be granted in place of covenants that are found to be unenforceable or, where appropriate, to "top up" the covenant period. The Court may look to the duration of any

restrictive covenants, which exist under the contract, as a guideline for the duration of any restraint imposed by the springboard injunction.

ADVICE TO EMPLOYERS

A Court will apply a high test in deciding whether to grant an interim springboard injunction. This is primarily because a successful applicant obtains *substantive* relief, in that, while the interim injunction is in force, the claimant may successfully persuade departing employees to remain or return to employment, they may recruit replacements and restore their competitive position in the market.

Documentary evidence is particularly important when a claimant is seeking to persuade the Court that there is a serious issue to be tried or (whether for claimant or defendant) of the likelihood of success at trial. In this case, both the High Court and Court of Appeal were heavily persuaded by messages on WhatsApp as evidence of the alleged conspiracy.

In terms of persuading the Court as to the reasonable period for which the relief is required, evidence of market conditions, the ability of the company to recruit replacement employees (and the time it would take to do so), along with the length of time it has taken the defendant to secure the advantage it has gained, are factors considered by the Court.

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