Jardine Lloyd Thompson Pte Ltd *v* Howden Insurance Brokers (S) Pte Ltd and others [2015] SGHC 202

Case Number	: Suit No 595 of 2015 (Summons No 2937 of 2015)
Decision Date	: 03 August 2015
Tribunal/Court	: High Court
Coram	: Choo Han Teck J
Counsel Name(s)	: Ang Cheng Hock SC, Vincent Leow, Tan Kai Liang and Xu JiaXiong, Daryl (Allen & Gledhill LLP) for plaintiff; Chew Kei Jin, Andre Teo and Lee Ping (Tan Rajah & Cheah) for first defendant; Choo Zheng Xi (Peter Low LLC) for second and fifth defendants; Gan Kam Yuin and Ho Shiao Hong (Bih Li & Lee LLP) for third and fourth defendants; and Adrian Aw Hon Wei (Incisive Law LLC) for sixth defendant.
Parties	: Jardine Lloyd Thompson Pte Ltd — Howden Insurance Brokers (S) Pte Ltd and others

Injunction – interlocutory injunction

Injunction – springboard injunction

3 August 2015 Judgment reserved.

Choo Han Teck J:

1 The plaintiff is part of the Jardine Lloyd Thomson Group. It claims to be the second largest international broker network in the world. The Group has business in 39 countries and has more than 10,000 employees. The plaintiff is suing the defendants in this action because 17 of their employees resigned in April and May this year. Four of them are named as the second, third, fourth and fifth defendants ("the Employee Defendants") respectively. They are alleged to be joining the first defendant, a competitor of the plaintiff. The sixth defendant is the employment agency that purportedly helped the first defendant engage the Employee Defendants.

2 The plaintiff's cause of action is for injunctive relief and damages arising from the tort of conspiracy to injure, breach of contract, and breach of fiduciary duty. The plaintiff alleges that as early as April 2014, the second defendant commenced discussions with Gerard Pennefather ("GP"), the managing partner of the sixth defendant. The plaintiff claims that a year later, the mass resignations began and were completed in two movements. The first took place on 27 and 28 April 2015, and the second a few days commencing 11 May 2015. According to the plaintiff, some of the employees who had resigned told the plaintiff that they had been approached by the sixth defendant.

3 The plaintiff relies on cases such as *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] 2 BCLC 523 and *UBS Wealth Management (UK) Ltd v Vestra Wealth LLP* [2008] IRLR 965 ("*UBS Wealth*") for its case that the Employee Defendants owe a fiduciary duty to the plaintiff to act in the interests of the plaintiff. It claims that the fiduciary obligations include a duty to warn the plaintiff of an impending raid on the plaintiff's employees. Apart from fiduciary duties, the plaintiff asserts that the Employee Defendants also owe contractual duties as employees under their employment contract. These include the general duty of good faith; the duty to devote working time only to the plaintiff's affairs; the duty to not solicit staff from the plaintiff or induce a breach of contract; and the duty of

keeping the plaintiff's proprietary information confidential. Some of the specific duties are also covered in the plaintiff's Employee Handbook. None of the employment contracts of the Employee Defendants contain a restraint of trade clause.

4 The plaintiff alleges that the mass defections were the result of a calculated and coordinated conspiracy that was hatched by all six defendants. It claims that as part of the conspiracy, the Employee Defendants committed the following unlawful acts:

(a) First, a breach of their fiduciary and contractual duties of non-solicitation by encouraging staff to leave the plaintiff and to join either the first defendant or other competitors. The plaintiff further alleges that the second defendant misused his authority, as managing director, by not extending the notice periods for the third and fifth defendants from three to six months to be in line with the rest of the staff.

(b) Second, a breach of their fiduciary and contractual duties of keeping the plaintiff's proprietary information confidential by misusing confidential information such as the internal arrangements of the plaintiff's business and clients and by removing confidential information from the plaintiff. The plaintiff claims that there is a real risk that there will be further breaches of confidentiality.

5 The plaintiff claims that by the wrongful acts of the defendants, it has, or will, suffer irreparable damage. It also claims their conduct enabled the first defendant and the Employee Defendants to gain "an unfair competitive advantage" against it. Mr Ang Cheng Hock, SC submitted on behalf of the plaintiff that unless the Employee Defendants are enjoined, they "will be allowed to use such unfair competitive advantage to "springboard" ahead, causing further irreparable loss to the plaintiff". The plaintiff thus seeks interim injunctions to "neutralise the unfair advantage and restore the competitive positions of the parties".

6 An interim injunction is a temporary measure to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right. Decisions on whether to grant an interim injunction are made at a time when the plaintiff's right or the violation of it, or both, is yet to be determined. It is not the court's duty at this stage of the proceedings to resolve the conflicts of evidence on affidavit pertaining to facts on which the claims of the parties ultimately depend on. Neither is it the court's duty to decide difficult questions of law which call for detailed argument and mature considerations at this point. They are issues to be dealt with at trial. These are the principles in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

7 Looking at the present case, it is clear that there are serious and important issues that will arise at trial. These include the almost intractable conflicts between the rights of a contracting party to a contract, the right of a professional to work, and the rights of a company to prevent competition. Importantly, what constitutes a conspiracy? Such issues involve law and policy.

8 Professional insurance agents and brokers whose careers lay in the service of the insurance industry do not have many options should they wish to leave their employers. Employment agencies such as the sixth defendant serve to connect job seekers and employers. All employees are entitled to leave their employer subject to terms of notice in their employment contract. Naturally, when a large group of employees at a high level leaves, the employer will suffer some detriment and disadvantage but that is part of commercial reality. The employer will have to employ new people and re-build its business. Sometimes they have little difficulty getting new and experienced replacements for those who are leaving or have left; sometimes not.

9 In such circumstances, the employer often has to recruit its new staff from competitors. Nothing exemplifies my views above more than the recent story concerning the plaintiff's parent company in the United Kingdom ("the UK"). In the written grounds of the court in *Willis Ltd and another v Jardine Lloyd Thompson Group Plc and others* [2015] EWCA Civ 450, the English Court of Appeal allowed a short injunction in an action by the plaintiff in that case against the principal defendant, who is the parent company of the plaintiff in the case before me. The defendant parent in the UK purportedly did exactly what the Singapore plaintiff is accusing the defendants of doing – enticing the employees of a rival insurance company to resign en mass.

10 The action of the plaintiff's parent company has no bearing on the plaintiff's case here whatsoever but it serves to illustrate the context in which employees leave one company and join another. Employment agencies like the sixth defendant serve a useful commercial purpose. When they have clients in search of a person with a specified qualification and experience, the agencies may seek him out and even encourage him to leave his employer to join the new one. Does it make any difference whether the employment agency sought one or ten such employees from a single source? That may be an issue at trial – not at the interlocutory stage of proceedings.

11 An interim injunction may be necessary only if damages will not be adequate. On this point, parties sometimes argue that damages are not adequate when they mean that damages will be difficult to quantify; but the two are not the same. In many instances in which general damages are concerned, there are not that many ways that one can determine what a correct or just amount might be. What the court would do is to try and determine an amount that is as fair as possible. And in considering fairness, the court will cast a natural and instinctive glance from the opposing party's position so as to have a clearer and better view of the merits of the interim injunction sought.

12 Returning to the present case, the plaintiff seeks four interim injunctions against the first to fifth defendants until trial for the following purposes:

(a) to prevent the Employee Defendants from joining the first defendant for any business relating to the insurance broking business until trial;

(b) to prevent the first defendant from employing the Employee Defendants;

(c) to prevent the Employee Defendants from disclosing confidential information belonging to the plaintiff; and

(d) to restrain the Employee Defendants from soliciting or inducing other employees from the plaintiff to leave the plaintiff.

13 I start by considering the first and second interim injunctions, which are loosely termed by the parties as "springboard injunctions". The problem with new names for simple legal principles is that a whole lot of space is needed to explain them.

14 The "springboard" injunction was first granted in *Terrapin Ltd v Builders Supply Co (Hayes) Ltd* [1960] RPC 128 ("*Terrapin*"), which did not involve a dispute between employers and employees. Roxburgh J observed at 391 of *Terrapin*:

> … the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published, or can be ascertained by actual inspection by

> any member of the public … It is, in my view, inherent in the principle upon which [*Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203] rests that the possessor of such information must be placed under a special disability in the field of competition in order to ensure that he does not get an unfair start.

15 "Springboard" relief was subsequently granted in employment cases following the decision in *Roger Bullivant Ltd v Ellis* [1987] ICR 464 ("*Bullivant*"). The court observed at 496 of *Bullivant* that the purpose of the relief is to "prevent the defendants from taking unfair advantage of the springboard which [the judge] considered that they must have built up by their misuse of the [confidential] information".

16 "Springboard" relief thus had its origins in cases involving the misuse of confidential information. When the issue of whether the remedy of a "springboard" injunction could or should be extended to cases where there was no misuse of confidential information arose in *Balston Ltd v Headline Filters Ltd* [1987] FSR 330, the court cautioned that doing so will fetter an ex-employee's right to use his skills and experience after leaving his employment even where no such express restrictive covenant exists. Similar sentiments against such an extension were expressed in *CBT Systems UK Ltd v Campopiano* (26 June 1995, Chancery Division, unreported). On the other hand, other English cases such as *Midas IT Services v Opus Portfolio Ltd* (21 December 1999, Chancery Division, unreported), suggest that such an extension is permissible.

17 The English position settled after *UBS Wealth*, in which the court extended the scope of "springboard" relief beyond the realm of confidential information in two brief paragraphs (see [3] and [4] of *UBS Wealth*). The High Court observed at [4]:

> … springboard relief is not confined to cases where former employees threaten to abuse confidential information acquired during the currency of their employment. It is available to prevent any future or further serious economic loss to a previous employer caused by former staff members taking an unfair advantage, an 'unfair start', of any serious breaches of their contract of employment (or if they are acting in concert with others, of any breach by any of those others). …

18 Subsequent English cases followed this expansion: *eg*, *CEF Holdings Ltd and another v Mundey and others* [2012] IRLR 912 ("*CEF Holdings*") and *QBE Management Services (UK) Ltd v Dymoke and others* [2012] IRLR 458 ("*QBE Management*").

19 Counsel for the Employee Defendants referred me to two cases and submitted that not all jurisdictions have followed the same route. One was from the Australian Federal Court and the other was from the Hong Kong High Court. The plaintiffs and defendants in both jurisdictions were directly related to each other; that is, the plaintiff in Australia was related to the plaintiff in Hong Kong, and the defendant in Australia was related to the defendant in Hong Kong. The courts in the two cases in both Hong Kong and Australia declined to extend the "springboard" principle beyond instances of a misuse of confidential information. See: *ICAP Australia Pty Ltd v BGC Partners (Australia) Pty Ltd & Others* [2005] FCA 130; and *ICAP (Hong Kong) Ltd v BGC Securities (Hong Kong) LLC & ORS* [2005] 3 HKC 137 ("*ICAP HK*").

20 This issue does not appear to have been explored in any local case. Having considered the two divergent approaches, I am inclined to follow that taken by the ICAP cases. I agree with the views expressed in the ICAP cases, in particular, those of Stone J in *ICAP HK*. What the learned judge observed at [67] bears reiterating:

It is clear that mere recruitment of employees (which may, or may not, be in breach of contractual post-termination restraints) does not, as least in pure recruitment terms, necessarily promote or produce a competitive advantage, albeit such ultimately may accrue in terms of access to clients or customers. Nor, for that matter, is there anything wrong in a group of employees deciding in concert to depart their existing employer for pastures new – see the observations of Cumming-Bruce LJ in *GD Searle & Co Ltd v Celltech Ltd* [1982] FSR 92 at 101-102:

> The law has always looked with favour upon the efforts of employees to advance themselves, provided that they do not steal or use the secrets of their former employer. In the absence of restrictive covenants, there is nothing in the general law to prevent a number of employees in concert deciding to leave their employer and set themselves up in competition with him. And there is now no rule of law or equity which restrains a competitor from seeking out the servants of another and offering him employment provided he does not thereby procure a breach of the servant's contract of service …

21 A "springboard" injunction is not meant to be maintained indefinitely. It is meant only to be in place for such time as it would take the wrongdoer to achieve lawfully what he was hoping to achieve unlawfully, relative to the plaintiff: *QBE Management* at 285. The appropriate period of time may well have expired before trial, even if the trial is expedited. Due to this peculiar nature of a "springboard" injunction, a court considering whether an interim "springboard" injunction should be granted has to consider beyond the usual *American Cyanamid* principles and perform the unenviable task of assessing the relative strengths of the rival arguments at the interlocutory stage: see *ICAP HK* and *CEF Holdings*. That evaluation would also have been necessary in order to determine the appropriate length of the interim "springboard" injunction if a court decides such an injunction is warranted.

22 I am not satisfied that there is any clear evidence from the affidavits that the Employee Defendants have misused any specific confidential information or that there is any real risk of such misuse to the extent that it warrants the imposition of a "springboard" injunction. Arguably, the plaintiff's strongest point in this regard is that the Employee Defendants have circulated a "Top Clients List" amongst themselves and may possibly share this with the first defendant in breach of confidentiality. Even if it were 'only' an interim "springboard" injunction pending an expedited trial, the Employee Defendants' rights to use their skills and knowledge to seek employment elsewhere will be severely restricted by such an injunction. The plaintiff has not shown that this extreme measure is warranted in the present case, especially in the absence of any express restrictive covenant in the employment agreements. I thus dismiss the plaintiff's application for the first and second interim injunctions.

23 I should add that even if I had agreed with the broader approach of the English courts, I would not have granted an interim "springboard" injunction. In *UBS Wealth*, Openshaw J granted an interim "springboard" injunction after finding that the plaintiff there has "put together a formidable case that there was an unlawful plan to poach both staff and clients". Even at that interlocutory stage, there was clear evidence on affidavit before him in the form of transcripts and telephone conversations which showed that the defendants have acted unlawfully. I do not find that the plaintiff here had put together such a case against the defendants.

24 It appears that the defendants in this case had sought legal advice and the assistance of the sixth defendant, a professional employment agency. Their position is that the sixth defendant had approached them independently and had used its expertise and knowledge in the industry to lawfully poach the right sets of people from the plaintiff. There are some indications that the defendants have, or at least have tried, to proceed in a proper and lawful way. This provides considerable

support for the defendants' submission that they have not breached their non-solicitation contractual obligation. A definitive finding on this is of course an issue for trial.

25 Further, unlike in some cases where "springboard" injunctions have been granted (*eg*, *QBE Management*), there is no allegation or evidence that the Employee Defendants have tried to poach any clients from the plaintiff. As I have found earlier, there does not seem to be sufficient evidence before me that suggests there has been any misuse of confidential information or serious breaches of confidentiality, potential or otherwise. I accept Mr Ang's submission that the Employee Defendants, who were part of the senior management of the plaintiff, owe fiduciary duties of loyalty to it. But even if I were to find that such a fiduciary duty required them to inform the plaintiff of any impending mass defections and that they have breached this duty, I do not think that this warrants the imposition of a "springboard" injunction. In the circumstances, I would not have granted an interim "springboard" injunction even if I am of the view that such injunctions can be imposed outside the realm of the misuse of confidential information. I am not making, at this stage, any definitive or conclusive finding on whether there have been any specific breaches of contractual or fiduciary obligations by the Employee Defendants. I have only found on an overall assessment of the situation that a "springboard injunction" was not warranted.

26 That leaves me to deal with the remaining two interim injunctions: injunctions to prevent the Employee Defendants from disclosing confidential information belonging to the plaintiff, and to restrain the Employee Defendants from soliciting or inducing other employees from the plaintiff to leave the plaintiff.

27 On one analysis, these two injunctions overlap or may even be subsumed by the terms of a "springboard" injunction. But the conventional injunctions exist, and may be granted, independently of a "springboard" injunction. Unlike in the case of the "springboard" injunction, the *American Cyanamid* principles apply to these two interim injunctions. I thus find that it is appropriate to grant both pending an expedited trial.

28 At this stage, there is a serious question to be tried on whether the Employee Defendants have breached their contractual obligations to not solicit other employees from the plaintiff to leave the plaintiff and to not disclose confidential information belonging to the plaintiff. This simply means that the plaintiffs' claim in those two aspects cannot be said to be frivolous or vexatious to such an extent that there is no prospect of succeeding at trial. In dismissing the plaintiff's application for the "springboard" injunctions above, I have made certain observations about the allegations of breaches of these contractual duties. But it must be made clear that the inquiry of whether these are serious issues to be tried is a different one. In the same way, the threshold for these two interim injunctions differs from that for "springboard" injunctions.

29 I accept Mr Ang's submission that damages may not be an adequate remedy for the plaintiff should the plaintiff be found to be correct at trial. Importantly, the Employee Defendants are already bound by their employment agreements to not commit the very acts that the plaintiff is seeking to restrict them from doing pending trial. In other words, the interim injunctions merely require the Employee Defendants to comply with their existing contractual duties. The balance of convenience clearly lies in favour of granting the latter two interim injunctions.

30 For the reasons above, the plaintiff's application succeeds only in part. Its application for the two interim "springboard" injunctions is dismissed. I order an interim injunction against the Employee Defendants to not disclose confidential information belonging to the plaintiff and another interim injunction to restrain them from soliciting or inducing other employees from the plaintiff to leave the plaintiff. I therefore grant an order in terms of prayers 1 and 4, and dismiss prayers 2 and 3 of the

summons.

31 I will hear the question of costs at a later date.