

SPRING Litigation Comment is a quarterly commentary from SPRING LAW on current cases, legal developments and Court decisions across the private and business sectors.

## Poaching of key staff – Can it be prevented?

In the recent case of *UBS Wealth Management (UK) Ltd and another v Vestra Wealth LLP and others*, the Court considered whether or not to grant a so-called "springboard injunction" where a former UBS employee, a Mr Scott, had set up a rival business to UBS, his former employer, and then coaxed 75 UBS employees from core desks to join him in the following weeks.

There is a general rule that employees are free to leave their employers to set up in competition either individually or as a group. However, there are several potential legal pitfalls to effecting a "team move", particularly;

- if the defection is co-ordinated from within by a group of employees acting secretly, this will usually amount to a breach of the implied contractual duty of fidelity;
- where the employees in question occupy positions of responsibility their actions may constitute implied duties to report the wrongdoing of others to the company; and
- those defecting might take confidential information, e.g. client contact lists, with them which may amount to the tort of conspiracy.

In principle, it is not unlawful to poach a competitor's employees. However, should the competitor's employees assist the poacher whilst themselves still employed - e.g. by helping to persuade staff to leave with them in secret - the poacher may commit the tort of inducing the competitor's employees to breach their contracts, as well as participating in any conspiracy.

Where one or more employees have left their employment and set up in competition with their former employer, that employer will usually seek to rely on restrictive covenants in their contracts

and to restrain the use of any confidential information, particularly client information that the employees may have taken with them. However, this often provides inadequate protection to the employer's business, not least because information cannot be protected if it has ceased to be confidential.

This has led to the development of the springboard injunction which derives from the case of an employee who had stolen a list of his employer's customer contact details before leaving to set up in competition. The Court granted an injunction restraining him for a limited period from doing business with any of the customers on the list. This was granted even though many of those customers' names and addresses were already in the public domain and were not, therefore, confidential information. The springboard injunction is used to prevent an employee (or their new employer) using their earlier wrongdoing as a commercial advantage against their former employer.

In the UBS case, the Court agreed with UBS that the defecting staff, including senior managers, had colluded in secret to persuade staff to leave and co-ordinate the departure of other employees from within, causing the employees to breach their employment contracts, induced others to breach their employment contracts and participated in an unlawful conspiracy.

The Court considered it "inherently unlikely" that whole departments would leave UBS to join Vestra without having discussed the matter amongst them at length beforehand. It was "overwhelmingly likely" that the defectors would have been given assurances that all or nearly all the other

members of their teams were going to defect and take their clients with them, thereby negating the risk of leaving an established organisation for a fledgling rival. It was also overwhelmingly likely that this could only have happened with the "active and knowing encouragement and assistance" of many of the defectors including the four employee defendants. There was also evidence that Mr Scott himself knew what was going on and had encouraged it which, if proved, would make him a party to an unlawful conspiracy.

The court granted an injunction prohibiting the defendants, until judgment at the end of trial;

- doing business with any client of UBS to whom any employee on the poached desks had provided services during the past 12 months (this did not include clients who had terminated their arrangements with UBS before issue of proceedings);
- inducing, encouraging or persuading any such client to transfer business away from UBS;
- soliciting or enticing any existing employee to leave UBS.

Of particular significance is that the Court held nothing could be done to prevent Vestra dealing with clients who had already moved over from UBS before proceedings were issued; they could not be compelled to go back to UBS. However, it pointed out that those clients should not be serviced by former UBS staff in breach of any continuing restrictive covenants – it remains to be seen what effect this has on the relationships between Vestra and its newly acquired clients.