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# Briefing Note: Springboard Injunctions

## Introduction

A springboard injunction is a type of injunction that is particularly effective in business protection cases. The principals and procedures applicable to injunctions generally still apply.

This Briefing Note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

**Briefing Note**
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## What is a springboard injunction?

A springboard injunction is a type of injunction designed to remove or limit the advantage or head-start that an employee has gained through unlawful activities, typically through the misuse of the employer's confidential information. The individual is placed "under a special disability" by the injunction in order to "ensure that he does not get an unfair start"[1].

A springboard injunction is unlike any other kind of injunction, because it is not targeted at preventing future unlawful activity but rather its purpose is to restore a level playing field between the parties.

## In what sort of cases will a springboard injunction be granted?

All of the early cases under the springboard doctrine are related to the misuse of confidential information. The classic case in the employment context is that of *Roger Bullivant Ltd v Ellis*[2].

Mr Ellis, Bullivant's Managing Director, left to set up a competing business, taking confidential information with him including a card index with the contact details of Bullivant's contacts, which he used to contact those clients in direct competition. The High Court granted an injunction prohibiting Ellis from entering into or fulfilling any contract made with or through any of the contacts in the card index until judgment or further order. Ellis appealed to the Court of Appeal, arguing that the injunction should not apply to any customers that he was able to make contact with without using the card index. His appeal failed on this point, the court concluding that "having made deliberate and unlawful use of Bullivant's property, he cannot complain if he finds that the eye of the law is unable to distinguish between those whom, had he so chosen, he could have contacted lawfully and those whom he could not".

This kind of argument typically plays out these days in the context of employees who help themselves to their employer's customer database upon departure whilst trying to argue that the information was publicly available via the internet. These arguments are usually given just as short a shrift these days as they were in Bullivant's time. Ellis was more successful in his appeal in relation to the duration of the restraint – of which see section 4 below.

It was initially thought that the springboard doctrine was limited to cases involving the misuse of confidential information after *Scott J* declined to grant an injunction preventing an employee from benefiting from earlier breaches of his duty of fidelity (in this case encouraging the diversion of business

[1] *Terrapin Ltd v Builders Supply Co (Hayes) Ltd and Others [1960] RPC128*. Subsequently approved by Lord Denning MR in *Seager v Copydex Ltd (No 1) [1967] WLR 923*.
[2] *Roger Bullivant Ltd & Others v Ellis & Others [1987] IRLR 491.*

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during employment)[3]. This view was called into question by *Blackburne J*[4] and the issue was effectively put to rest in 2008.

In *UBS Wealth Management (UK) Ltd & Another v Vestro Wealth LLP & Others* [5] *Openshaw J* concluded that springboard relief is not confined to cases involving the abuse of confidential information but can operate to prevent "any future or further serious economic loss to a previous employer caused by former staff members taking an unfair advantage of any serious breaches of their contract of employment". In this case, an injunction until trial was granted preventing the defendants soliciting or dealing with any UBS client (save for those who had already agreed to transfer their business) and from soliciting any UBS employee who had not yet resigned.

An interim springboard injunction was also granted in the seminal team move case of *Tullett Prebon Plc & Others v BGC Brokers LP & Others*[6], although there is some doubt as to whether this was correctly described as a springboard injunction as the purpose of it was to give *Tullett Prebon* the opportunity to consolidate its workforce by restraining *BG Brokers* from any further recruitment of the Claimant's employees, whether lawful or otherwise. This approach was followed in two other team move cases[7].

One of the clearest recent applications of the springboard doctrine came in *QBE Management Services (UK) Ltd v Dymoke & Others*[8] where 3 senior QBE employees had, during their employment and garden leave, covertly planned the resignation of several more employees with a view to moving them and their clients to a rival business, which had been incorporated and financed for this very purpose. Following disclosure, it was established that the staff concerned had used their seniority to poach colleagues, had enjoyed constant access to QBE's confidential information, which they were able to use to secure finance for the new venture, and had solicited customers. They had failed to disclose any of these activities to QBE or to inform them of the potential threat to QBE's business. Even though QBE failed in its application to enforce its post termination restrictions because they were too wide, the High Court nevertheless concluded that there could not be a clearer case for springboard relief and granted an injunction for 12 months from the date of resignation to remedy the head-start the employees had unlawfully gained. The Court also gave some useful guidance on the length of springboard relief – of which see below.

## What must be established to obtain a springboard injunction?

In addition to the general principles applicable to the granting of injunctions, an applicant will need to satisfy a court of the following four matters before springboard relief will be granted:-

- That there has been unlawful behaviour on the part of the former employee/director – typically misuse of confidential information but increasingly other breaches of duty.
- That an unfair competitive advantage over the employer as a result of the unlawful activity has been obtained.
- That the nature and period of the competitive advantage is more than "ephemeral" or "short-term".
- That the advantage still exists at the date the springboard injunction is sought and will continue to have effect unless the relief is granted[9].

[3] *Balston Ltd v Headline Filters Ltd [1987] FSR 330.*
[4] *Midas IT Services v Opus Portfolio Ltd (unreported) 21 December 1999 (Ch D).*
[5] *[2008] EWHC 1974 (QB)*
[6] *[2009] EWHC 819*
[7] *Willis Ltd v Jardine Lloyd Thompson Group plc [2015] EWCA Civ450 ad Dorma UK Ltd v Bateman & Others [2015] EWHC 4142 (QB)*
[8] *[2012] IRLR 458 (HC)*
[9] *Sun Valley Foods Ltd v Vincent [2000] FSR 825*

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In the *Sun Valley Foods* case, *Jonathan Parker J* declined to grant springboard relief because by the time the application was heard any unfair competitive advantage gained by copying a confidential customer database which had been rarely used, had been extinguished.

It is a common error for Claimants to focus upon the gravity of the Defendant's misconduct rather than the effect of the breach and the extent of any illegitimate advantage obtained. See, in particular, the comments of *Flaux J* when he stated that "Logically, the seriousness of the breach and the egregiousness of the Defendant's conduct cannot have any bearing on the period for which the springboard 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 Defendant has gained an illegitimate competitive advantage".[10]

In the context of misuse of confidential information, it is insufficient simply to establish removal of confidential information. It is also necessary to establish use, as mere possession of confidential information will not create a head-start and can be addressed simply by an order for delivery up and a normal confidential information injunction[11].

Finally, the *American Cyanamid* principles should not be overlooked. As *Arnold J* pointed out, the remedy for past misuse of confidential information is a financial one and where appropriate the Claimant can claim a restitutionary remedy, namely an account of profits, which deprives the Defendant of the benefit of his wrongdoing[12]. That said, it is likely to be easier to argue for springboard relief at the interim stage, where the court's role is to best preserve the status quo pending trial, than it will be at trial itself. Given the nature of a springboard injunction, it almost invariably follows "springboard does not last for ever"[13]. This approach was reiterated by the Court of Appeal in Forse & Others v Secarma Ltd[14].

## Duration and Scope of Springboard Relief

The springboard injunction granted by the High Court in the *Roger Bullivant* case, until judgment or further order, should, according to the Court of Appeal only have been granted until trial or for a more limited period. According to *Nourse LJ* a springboard advantage cannot last for ever; the law does not restrain lawful competition and the doctrine seeks to protect the injured and not punish the guilty. He concluded that it was not right for the terms of the injunction to extend beyond the period for which the advantage may reasonably be expected to continue. The Court of Appeal aligned the period of springboard relief with the 12 month non-competition clause in Mr Ellis' contract on the basis that *Bullivant* must have considered that that was the period of restraint necessary for its legitimate needs to be met.

A one-year period of springboard relief was also applied in *Fisher-Karpark Industries Ltd v Nicholls*[15] but this should not be regarded as a benchmark as springboard injunctions are often and, arguably, usually, granted for much shorter periods.

Useful guidance was given in the *QBE* case by *Haddon-Cave J.* This was an unusual example of a springboard injunction granted after trial of the main action. The High Court granted a springboard

[10] *Sectrack NV v Satamatics Ltd [2007] EWHC 2003 (Comm)*
[11] *S G&R Valuation Service Co v Boudrais & Others [2008] EWHC 1340 (QB)*
[12] *Vestergaard Frandsen A/S v Bestnet Europe Ltd [2009] EWHC 1456 (Ch)*
[13] Per Lord Denning MR in *Potters-Ballotini Ltd v Weston-Baker [1997] RPC 202*
[14] [2019] EWCA Civ 215
[15] *[1982] FSR 351*

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injunction to continue for a further 3 months from judgment being 12 months from the date of resignation of the Defendants. The Court applied the following principles:-

- The appropriate measure for the length of springboard relief is the length of time it would have taken the wrongdoer to achieve lawfully what he in fact achieved unlawfully, relative to the Claimant.
- Any advantage must be measured relatively. Wrongful activities can have both a positive and negative effect (benefiting the wrongdoer whilst simultaneously harming the victim – this is particularly so in the case of poaching key staff who then have to be replaced).
- The period of time over which the unlawful activity took place is relevant but not decisive as springboard relief is "kinetic" not "linear".
- In a team move case, for example, there is the advantage of being able to solicit junior employees over whom the Defendants exercise influence whilst their employment is continuing compared with trying to recruit them as a former employee: there is the advantage of stealth and secrecy so that management are unaware and do not take defensive measures but conversely the Defendants may have been able to work more speedily by not having to be covert about their activities.
- The nature and length of the springboard should be fair and just in all the circumstances.

It is incumbent upon the employer to identify the precise period and nature of the competitive advantage and the failure to do so will result in a refusal to grant springboard relief. In particular, the employer must provide evidence as to the length of time it would have taken the Defendants to achieve lawfully what they had achieved unlawfully[16].

The fact that the departing employees have already entered into contracts with third parties is not of itself a bar to the grant of springboard relief[17], although the Court of Appeal accepted that courts should be wary of interfering with the contractual rights of innocent third parties. The doctrine of springboard relief is not therefore confined solely to future contracts.

Delay, in and of itself, can defeat an application for a springboard injunction. In Amob Machinery Ltd v Smith-Hughes & Others, the Claimant applied for an injunction in April 2022 after discovering misuse of confidential information by a former employee in the previous July. By the time judgment was delivered in June 2022 the Defendant had been out of the business for a year and any advantage had long since dissipated. The delay in issuing the application was considered inordinate and the injunction was refused.

## Other considerations

The dangers of asking and getting too much relief for too long are amply demonstrated by the outcome in *Universal Thermosensors Ltd v Hibben*[18] where departing employees unlawfully removed customer lists and pricing matrices with a view to setting up a competing business. They approached and obtained orders from several customers featured in the lists. The Claimant, after retrieving the stolen documents by means of a search order obtained an interim injunction, restraining the Defendants from soliciting or entering into or fulfilling any contract with any person with whom the Defendant had had contact while the customer lists were in their possession.

At trial, however, the court concluded that this order went beyond what was necessary for the proper protection of the Claimant's legitimate rights. The effect of the injunction was to put the Claimant in a

[16] *CEF Holdings Ltd v Mundey [2012] EWHC 1524 (QB)*
[17] *PSM International Plc & Another v Whitehouse & Another [1992] IRLR 279 (CA)*
[18] [1992] 1 WLR 840

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better position than it would have been if there had been no breach of confidence in the first place as its effect was to close down the Defendant's business altogether. As the confidential information was no longer in the Defendant's possession, there was no ongoing advantage at the time the injunction was granted. Any advantage obtained prior to the grant of the injunction could adequately have been met through a claim for damages or an account of profits. The court concluded that by the time the injunction was granted, given the knowledge of *Thermosensors*' customers and contacts, the former employees would have been substantially in the same position as if they had not taken the customer lists.

Consequently, *Thermosensors* were ordered to pay £20,000 to the Defendants under their cross-undertaking in damages. Whilst it is arguable that this decision is unsatisfactory and inconsistent with both the Roger *Bullivant* case and *PSM International* it emphasises the need for caution in obtaining a springboard injunction in terms that may not be able to be maintained at trial.

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