High Court grants injunction and enforces six-month non-compete clause against former employee

DENTONS

October 8, 2021

In the recent decision *BFAM Partners (Hong Kong) Ltd v. Gareth John Mills & Segantii Capital Management Limited*,[1] the court granted an injunction to effectively restrain a former employee from continuing to work for a competitor until the expiry of his six-month non-compete restrictive covenant.

Mr Mills was employed as a technology consultant by BFAM, a company that provides fund management services. He specialised in software architecture and security, and was "instrumental in improving the technology infrastructure used to execute BFAM's trading strategies", in terms of helping to develop trading tools to analyse market prices and overseeing the building and development of a cloud platform that hosted and analysed data across BFAM's asset management and investment businesses. He also had access to highly confidential information such as BFAM's investor and client data as well as its performance calculation tool which calculated how BFAM's profit/loss polls were calculated and distributed, and how staff bonuses were awarded.

After approximately two years of working for BFAM, Mr Mills resigned. He was reminded of his post-termination restrictive covenants which included a six-month non-compete clause that prevented him from working for a competitor but, for this, BFAM also agreed to pay him his basic wages for the six-month period. Unbeknown to BFAM, three days after his official last day of employment with BFAM, he began working for Segantii, which the court found to be a competitor of BFAM for the purposes of the injunction application. As agreed, BFAM paid Mr Mills a sum equivalent to his monthly basic salary after termination, but Mr Mills returned the money and the courier package containing the returned cheque named Segantii as the customer of the courier company. It was then revealed that Mr Mills was already working for Segantii, in breach of his non-compete restrictive covenant.

BFAM sued Mr Mills as well as Segantii, and applied to the court for an interlocutory injunction to restrain Mr Mills from working for Segantii until the expiry of his six-month non-compete clause. If granted, the injunction would have effectively disposed of the action because a trial would not take place before the expiry of the six-month period. In fact, by the time BFAM brought the injunction application, there were only three months left of the restrictive covenant.

Both Mr Mills and Segantii contested the injunction application. Their main argument was that the non-compete clause was unenforceable (because it was unreasonable), but all of their arguments were rejected by the court, which found on the evidence that the clause was reasonably necessary to protect BFAM's legitimate interests. In holding so, the court reiterated some key principles governing the enforceability of post-termination restrictive covenants:

- Although the time for ascertaining the reasonableness of a restrictive covenant is the time of making the contract, it is permissible to take into account that employees might be promoted in assessing the reasonableness of the restriction.
- There is a distinction between an employer's confidential information, such as trade secrets or information of a similar nature, and the skill, experience, know-how and general knowledge acquired by an employee as part of his job during the employment. The former is capable of protection but the latter is not. Having said that, even if a

former employer does not remember every piece of complex and sophisticated confidential information precisely, it is not inconceivable that he may still have a general impression of the information and, in this case, the court found that Mr Mills would still know BFAM's compensation structures applicable to the calculation of profit and loss polls of four portfolio managers and the traders in their teams, and their approximate total compensation in broad terms, even if he could not remember the exact figures.

- The presence of other restrictions such as a non-solicitation clause, confidentiality clause and delivery-up of confidential information did not render the non-compete clause unenforceable or unnecessary.

In granting the injunction in favour of BFAM, the court also made an adverse cost order against Segantii, noting that it had submitted extensive affidavit evidence in contesting the injunction application and its submissions were, in fact, purportedly made on behalf of Mr Mills, which caused BFAM to spend additional time and incur additional costs in dealing with the submissions made by Segantii.

This is a welcome decision for employers in Hong Kong, where movement of talent occurs frequently and often without notice, and which can cause catastrophic disruption to businesses. A bespoke, well-drafted set of post-termination restrictive covenants will protect an employer's legitimate business interests and deter breaches by employees and competitors alike.

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1. [2021] HKCFI 2904.

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