Dealing with team moves and protecting your business: lessons learnt from a recent case

DENTONS

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On June 14, 2019, the Hong Kong Court of First Instance handed down an interlocutory decision in *McLarens Hong Kong Ltd v. Poon Chi Fai, Corey & Or,* [2019] HKCFI 1550, refusing to grant a springboard injunction sought by McLarens against nine of its former employees and their new employer, a competitor, after a pre-planned team move. Unsurprisingly, the team move was shortly followed by mass exodus of McLarens' customers, who requested that their business be transferred to the tenth defendant, the employees' new employer.

Unfortunately, none of the employees' employment contracts contained any restrictive covenants. In the course of the interlocutory proceedings, it was found that some of the employees had copied and removed vast quantities of McLarens' information and documents, at least some of which were confidential.

Springboard injunctions are commonly used in cases of breach of confidence. This relief is designed as an interim measure to stop a defendant from continuing an unlawful act, where he has obtained a "head start" to the detriment of a plaintiff.

In this case, when McLarens applied for an interlocutory injunction seeking to restrain the nine former employees from competing and soliciting McLarens' customers (which, if granted, would have meant the employees could not work for their new employer for a period of six months), the court declined to grant the injunction. Notably, the employees and the new employer had given a suitable undertaking to the court that was considered to be adequate protection, and the court held that damages were an adequate remedy in this particular case, if McLarens were to prevail at trial in due course.

There are a few key points worth highlighting from this decision:

- As an employer, always consider whether your business is of such a nature that you should put in place appropriate restrictive covenants. There is no standard "one size fits all" restrictive covenant; legal advice should be obtained, and tailor-made restrictive covenants drafted for your business, to ensure they are legally enforceable.
- Not all information is confidential to an employer. In the absence of any specific and legally enforceable restrictive covenant, employees cannot be restrained from reaching out to their contacts, whose contact information is publicly available or is otherwise committed to an employee's memory.
- Springboard injunctions are not appropriate in every case. In a small, competitive market where team moves are common, there is an overwhelming temptation to obtain a springboard injunction where a business has suffered a sudden and devastating loss to its workforce. Where a prospective defendant is willing to give a suitable undertaking, legal advice should be obtained to weigh the pros and cons of whether an injunction is still necessary. In this case, the defendants were awarded 80 percent of their costs for successfully resisting the injunction application.
- Where the court is asked to put an individual out of work for a period of time (in this case, it was six months), the

court will consider and balance the rights of the former employer and that of the employees very carefully. Employees are entitled to terminate their employment contracts by giving proper notice and even if there was some "unfair advantage," such advantage was only "ephemeral" and in this particular case, did not justify a six-month injunction.

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