

Urgent commercial employment injunctions in Lockdown

Daniel Oudkerk QC & Edward Brown

1. The ongoing turbulence has created precisely the circumstances that typically give rise to the need for business protection injunctions. Employers may be firefighting on several fronts and a competitor may sense an opportunity to poach a previously settled team. Reduced revenues means that established teams of employees with strong client relationships may be particularly attractive to competitors. Working from home makes it far more difficult for the company to police employees' access to confidential information increasing the risk of the misuse of trade secrets.
2. If a business is successfully to survive lockdown it will need to protect and retain its key employees, its clients and its trade secrets.
3. We are fortunate in this jurisdiction, that it is still possible to obtain urgent injunctive relief from the English Courts to protect confidential information, clients, teams of employees and to enforce restrictive covenants. This note considers the current approach to applications for such relief and the practical and tactical issues that arise for parties bringing – or facing – such litigation.
4. It is with good reason that the Civil Court listing priorities (as at 17 April 2020) include as Priority 1 – work that must be done – injunctions “*with a real time element...such as post-termination employment restrictions*”. The message that the Civil Courts in England are communicating is not one of business as usual – nothing is as usual at the moment – but, however, that civil courts in England are certainly open for business and will continue to deliver access to justice as an essential service.
5. One could be forgiven for thinking that the challenge of being ‘all in this together’ might result in a (short term) cessation of hostilities in employee competition matters, such as team moves,

restrictive covenant disputes and misuse of confidential information cases. However, that does not appear to be borne out on the ground. The following commercial factors appear to be driving the continuation of these activities:

- 5.1. *Poaching.* An unsettled market provides precisely the circumstances whereby competitors will seek to poach unsettled employees. Obviously the reasons why an employee, or a team, might be unsettled may long pre-date the present situation. However, the current uncertainty provides the conditions to exploit unhappiness. Employers need to think carefully about how to maintain employee morale in these exceptionally challenging times.
- 5.2. *A perceived inability to fight back.* Many companies will currently be exploring survival options. Unlike the English Courts, some jurisdictions are not open for business. In those circumstances, competitors may decide to strike in the hope of achieving a *fait accompli*. Employers will need to take responsive action at a very early stage and in cases where the future of the business is at risk, it is likely to be necessary to go to court sooner rather than later.
- 5.3. *Remote work.* Remote working gives rise to a number of challenges in the employment context. Where unlawful activity is being co-ordinated, it may be much more difficult to detect. There has already been a shift from discreet meetings in public restaurants towards secure messaging services, such as Signal and WhatsApp. The present lockdown arrangements will inevitably make it more difficult for employers to conduct surveillance or other methods of detecting wrongdoing.
- 5.4. *Confidential information.* Employees at home will now often routinely be using confidential information from personal devices, either directly or using remote servers, such as Citrix, to access confidential information elsewhere. The challenge will be to monitor use, and misuse, and to ensure that a sudden move towards remote working does not expose opportunities for misuse that were not previously apparent. That said it is, obviously, difficult to police say the taking of a screenshot at home.

Companies must therefore be prepared to take robust action in the event that a delinquent employee seeks to take advantage of the new working environment.

- 5.5. *International employers and cross-border claims.* The move to decentralised working, possibly across different jurisdictions, presents certain issues for the enforcement of covenants. Given that in some jurisdictions courts are currently closed, careful consideration needs to be given as to which jurisdiction is likely to provide an effective remedy.
6. Employee competition has never been limited to any one sector of the economy. Cases tend to emerge in particular parts of the economy before moving to other sectors. The insurance and financial services sectors are facing a significant shake up, particularly in circumstances where distribution and bonus payments appear to be under pressure. Hedge funds are currently busy as the current financial volatility provides many of them with an opportunity. Major increases in healthcare and other public spending are likely to see opportunities in the recruitment sector and elsewhere. The common theme is likely to be an evolution and adaptation in the tactics used by competitors and, therefore, the steps needed to respond. That will, of course, entail both a commercial strategy and a legal – and litigation - strategy.
7. The fact that an injunction can be still obtained does not, of course, mean that it will be required. Faced with an application the employee or competitor may recognise that undertakings are a sensible compromise. In the absence of undertakings or some other compromise there will need to be an application and a virtual hearing. The practical arrangements for virtual court hearings – conducted over Skype or Zoom - have now become reasonably standard.
8. The specific points that will bear upon commercial employment injunctions include the following:
- 8.1. Business survival now is essential for the future growth to come. Courts are a public service which are there to be used. Employment disputes are high priority cases given the potential to damage upon the ordinary market activity. If an injunction is required

there is no need for reticence by reason of the pressures on society and public services generally.

- 8.2. The investigation of wrong-doing can be more challenging in the current environment particularly, if as is often the case, it has been deliberately concealed. It is therefore important that a party seeking an injunction (and its advisers) begin those investigations at the earliest possible opportunity.
- 8.3. Applications in an urgent, remote-hearing, application are necessarily different. The principles remain the same but with (even) more emphasis on cogent, focussed and proportionate evidence (both in terms of the witness statement and the documentary material to be exhibited). The Court will show patience in terms of the practical challenges facing clients; much less so in terms of poor preparation and the production of unnecessary documents.
- 8.4. The Courts have recognised that allowance needs to be made for the challenges presented by litigating in the current circumstances. However a party seeking an injunction will, of course, still need to move quickly not least because an injunction serves little purpose after the horse has bolted.
- 8.5. The willingness of the Court to be accommodating should not be confused with a more lenient approach to principle. The Courts will be alert to exploitation of the present circumstances by both old employers and new employers.
- 8.6. There is a heightened emphasis on co-operation and common sense between legal teams. Basic issues such as agreeing bundles and authorities are particularly important when the hearing is virtual as it is more difficult to manage late documents or unwieldy PDF bundles.
- 8.7. Urgent injunctions are essential court business. Tactical Applications, even in the context of a speedy trial (which we plan to address in a future Note), may not be. Careful thought needs to be given by the parties in any case as to how to proceed.

9. That English Courts continue offer wide-ranging injunctive relief to employers seeking to protect their legitimate interests is to be welcomed. Carefully targeted applications will remain an important part of the employer's armoury and will serve to lessen the 'insider threat' posed to business as working practices change in the face of these unique and unprecedented challenges.

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DANIEL OUDKERK QC

EDWARD BROWN

doudkerk@essexcourt.com

ebrown@essexcourt.com

ESSEX COURT CHAMBERS
BARRISTERS