



PUMP COURT

CHAMBERS

**Don't Leave Me This Way ...**  
**business protection after commercial divorce**  
Fergus McCombie



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# Post-termination restrictions (PTRs)

- Contractual terms that subsist for a defined period beyond the employment relationship and restrict the trading freedom of the promisor
- Contrast with obligations during employment / directorship:
  - implied duty of good faith / trust and confidence
  - fiduciary duty / avoiding conflicts of interest / duty to disclose own wrongdoing

# PTRs and enforceability

Purpose identification:

- protection of legitimate business interests eg: goodwill, confidential information, customer connections, stability of the workforce

Reasonableness test:

- covenants must be no wider than necessary to protect legitimate business interests
- reasonable in duration and extent
- consider the industry context
- consider the time at which the covenants were entered into

# The varying species of PTR

PTRs which may be enforceable:

- non-solicitation of clients and customers
- anti-poaching of employees and suppliers
- non-dealing with clients, customers, suppliers
- non-competition

PTRs unenforceable (void) as contrary to public policy:

- “pure” covenants against competition

# Confidentiality

- PTRs are distinct and separate from confidentiality obligations
- Confidentiality obligations may be express
- Implied duty of confidentiality / equitable duty
- PTRs may be the only practical way to police confidentiality

# Trade secrets

- Trade Secrets Directive implemented by the Trade Secrets (Enforcement etc) Regulations 2018
- A trade secret is information which is:
  - (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;*
  - (b) has commercial value because it is secret; and*
  - (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret*

# Use of PTRs

Employment and similar:

- employees and workers
- partners and LLP members

Commercial and corporate contracts:

- franchise agreements
- sale of a company or business
- joint ventures

# Enforcement

- effect of repudiatory breach by employer – *General Billposting v. Atkinson* [1909] AC 118
- the springboard injunction



# Springboard Injunctions

- Typically deployed to protect against impact of misuse of confidential information
- Sought where confidential information has been misused to gain an unfair competitive advantage
- Designed to cancel out the unlawful advantage or head start
- Prohibits further dealing with any customer obtained using confidential information
- Restitutionary in character, not intended to punish for wrongdoing
- *“The wrongdoing may have been in the past, but the question of springboard relief is whether the effect of past wrongdoing continues to confer a present and future benefit on the wrongdoer which the court should prevent.”*

*Willis Ltd and another v Jardine Lloyd Thompson Group plc and others* [2015] EWCA Civ 450

# Springboard Injunctions

- Not limited to confidential information cases
- In an appropriate case, the court could grant a springboard injunction to neutralise an unfair advantage obtained by a person in breach of a legal obligation, and such injunctions were not limited to cases of misuse of confidential information

*Midas IT Services v Opus Portfolio Ltd* (unreported), 21 December 1999  
(Ch D)

# Relationship with PTRs

- Operate in a similar way
- Springboard relief can be obtained where there are PTRs, and where there are not .e.g.
  - Where there were no PTRs at all
  - Where they were held to be unenforceable
  - Where they were of inadequate scope
- *QBE Management Services (UK) Ltd v Dymoke and others* [2012] EWHC 80
- *Dorma UK Ltd v Bateman and others* [2015] EWHC 4142 (QB)

# Springboard Injunctions

## Requirements:

- *American Cyanamid* principles
- Must also show:
  - Unlawful activity on the part of the respondent e.g. misuse of confidential information, breach of contract
  - Respondent has gained an unfair competitive advantage
  - Nature and period of the competitive advantage are more than "ephemeral" or "short term"
  - Advantage still exists at the date that the springboard injunction is sought and will continue unless the relief sought is granted

*Sun Valley Foods Ltd v Vincent and others* [2000] FSR 825