

## Employment Legal Update

### Team Moves: Lessons for poachers and gamekeepers

The recent High Court case of *QBE Management Services (UK) Limited v Dymoke and Others* concerned a group of employees (led by three key individuals) leaving together to set up a competing business. It provides a helpful summary of the legal principles which will apply in a team move situation. We summarise these below and make some practical suggestions about how to handle a team move, whether you are looking to hire a team or if you are faced with losing one.

#### What is a team move?

A team move consists of more than one employee leaving their employer to set up in competition, or join a competitor. In practice, team moves nearly always involve breaches by employees of their express or implied terms of employment, in particular the duty of fidelity. For example, misuse of confidential information and solicitation of colleagues or clients (or both). If senior employees are involved, they may also be in breach of fiduciary duties.

#### Duties of disclosure

It is not a breach of the implied duty of fidelity for an employee not to inform their employer if they themselves intend to leave and enter into competition. It will, however, be a breach if an employee actively misleads their employer as to their intentions or fails to disclose breaches by colleagues. For example, if they are aware that a colleague is soliciting staff for a team move. The position will also be different if the employee's contract contains express disclosure obligations.

The Judge in the QBE case found that the most senior departing employee was a fiduciary. As such, aside from his duty of fidelity as an employee, he owed a positive duty to inform QBE of any activity which may damage

its interests. In these circumstances, he should have informed his superiors when he was approached by his number two with the idea of the team move out of QBE. He was also found to be in breach of an express provision in his contract requiring him to keep his employer informed of all affairs concerning the QBE group.

There may also be circumstances in which employees who are not fiduciaries but are sufficiently senior will be under an implied obligation to disclose a threatened team move if they become aware of one.

#### Solicitation

An interesting issue which arose in the QBE case was whether a senior employee can be solicited by a more junior colleague. There, the most senior employee involved in the team move was initially solicited by his number two. The defendants argued that it was not necessarily a breach of contract for a more junior employee to solicit a more senior employee. Whilst the Judge acknowledged that it is normally the more senior person soliciting the junior, he rejected the suggestion that unlawful solicitation can only occur in that way.

#### “Springboard” injunctions

In many team move scenarios, it will be difficult to prove what financial losses have been caused by the breaches of contract. In recent cases, therefore, employers faced with departing teams have claimed “springboard” injunctions as an alternative remedy. A springboard injunction prevents an employee from taking advantage of an unfair competitive headstart obtained through unlawful activity.

In the QBE case, the team leaders solicited each other and various other employees whilst still employed by QBE. They also solicited broker clients and misappropriated QBE confidential information for the purposes of their business plan. In these circumstances, it was held that their activities had placed them in a position

to launch their rival business far earlier than would have been the case if they had acted lawfully. As a result a springboard injunction preventing any launch or preparatory activity was granted until 28 April 2012.

Given that the team leaders would otherwise have been free under their contracts to start work at the end of October 2011, one can see that a springboard injunction is a powerful remedy.

## Recommendations

The QBE case confirms that achieving a team move, without there being breaches of contract, will be difficult to do. A carefully planned strategy will be vital before any action is taken. Here are some golden rules to bear in mind, including some for employers faced with a departing team.

### *Golden rules if hiring a team*

- Plan a strategy before making the first approach
- Make approaches to individual employees, not to groups
- Check their employment contracts to see what duties they have (eg disclosure duties)
- Do not disclose details about others you are approaching (in case you trigger an obligation to disclose a threat to the business)
- Do not discuss their colleagues, or their employer's confidential information
- Make sure that employees understand their legal obligations to their existing employer. Consider asking them to confirm this in writing, or offering to pay for legal advice

### *Golden rules if losing a team*

- Act quickly. Delay may be fatal to an injunction application
- Investigate early (forensic IT searches etc)
- Interview relevant employees once relevant data has been secured (avoid tipping them off)
- Avoid knee jerk reactions when employees resign. Consider the tactical use of garden leave to split the team up and allow you to focus on those you may be able to persuade to stay
- Beware of aggressive tactics to avoid any arguments that you have breached the implied duty of trust and confidence which may allow employees to leave and argue they are no longer bound by contractual covenants
- If you do manage to "turn" any employees, find out if they have signed a new contract. Consider how to deal with any claim that they are in breach of this contract

[Mayer Brown International LLP represented QBE in the case of *QBE v Dymoke & Others*]

### ***Christopher Fisher***

+44 20 3130 3724

CFisher@mayerbrown.com

### ***Karen Stewart***

+44 20 3130 3150

KStewart@mayerbrown.com

---

Mayer Brown is a global legal services organisation advising many of the world's largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

OFFICE LOCATIONS AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, Washington DC  
ASIA: Bangkok, Beijing, Guangzhou, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai, Singapore  
EUROPE: Brussels, Düsseldorf, Frankfurt, London, Paris  
TAUIL & CHEQUER ADOGADOS in association with Mayer Brown LLP: São Paulo, Rio de Janeiro  
ALLIANCE LAW FIRM: Spain (Ramón & Cajal)

Please visit our web site for comprehensive contact information for all Mayer Brown offices. [www.mayerbrown.com](http://www.mayerbrown.com)

Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe-Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorised and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown JSM, a Hong Kong partnership and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

© 2012. The Mayer Brown Practices. All rights reserved.