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Team Moves: The High Court Decides!

A recent first instance decision of the High Court of Hong Kong has commented on a number of important issues relating to team moves, and in particular team moves involving brokers. The Court made some key findings in relation to the extent of the duty of fidelity and fiduciary duties; the application of provisions of the Employment Ordinance governing payment in lieu of notice for employees on foreign contracts; the decision in *HSBC plc v Wallace*; and the enforceability of post-termination restraints in Hong Kong.

In *Cantor Fitzgerald v. Boyer & Ors* (High Court of Hong Kong, First Instance, Justice Reyes, 29 February 2012) Cantor Fitzgerald failed to win damages against four senior employees who left the Hong Kong office of its brokerage to join Hong Kong based investment bank Mansion House Financial Holdings Limited (now Reorient Financial Markets Limited).

Cantor Fitzgerald had instituted proceedings against the highly regarded former employees (three brokers and one chief economist and strategist) alleging, amongst other claims, breaches of employment contracts and fiduciary duties in connection with their departure.

In dismissing those claims, the Court addressed a number of key legal points which are discussed below:

Failing to disclose an intention to resign and approaches by a competitor

Cantor Fitzgerald claimed, among other things, that certain of the employees were under a duty to disclose their intention to resign and the fact that they had been approached by a competitor.

The Court clarified that the starting point must be that an employee is free to work (or not work) for a given employer. In light of that principle, the Court questioned what purpose was to be achieved by imposing a general duty in law to disclose approaches by competitors or an intention to leave. Accordingly, the Court did not agree that a duty of fidelity or fiduciary obligation required such disclosure. Such obligation can only arise from the express terms in an employment contract; further even, in cases where there is such an express term, it will be difficult to establish damage consequent upon the breach of the obligation.

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Although two of the employees did have an express 'kiss-and-tell' clause in their contracts (requiring them to inform Cantor Fitzgerald if they were approached by a "competitor") the trial judge found that there had been no breach. The Court found the expression "competitor" in the relevant clause vague, and as such, the clause was construed against Cantor Fitzgerald. Further, the Court struggled to see how at its inception Mansion House could be regarded as a "competitor" of a long-established brokerage such as Cantor Fitzgerald.

Governing law and payment in lieu of notice

The most senior employee, Mr Boyer, had been seconded from Cantor Fitzgerald Europe to Cantor HK. Mr Boyer's contract of employment with CFE was silent as to whether he could terminate by way of payment in lieu of notice. The contract was governed by English law. However, under his secondment letter to Cantor HK, any "*mandatory employment law of Hong Kong*" would apply despite the choice of English law in the contract.

When he resigned on 30 May 2011, Mr Boyer indicated that he wished to make a payment in lieu of notice. Payment in lieu of notice by an employee is permissible under Hong Kong law (sections 6 and 7 of the Employment Ordinance ("EO")), but not under English law in the circumstances. Accordingly, the Court had to examine whether sections 6 ad 7 of the EO would apply to an employee who works in Hong Kong, but who is employed under a contract governed by a law other than that of Hong Kong.

Mr Boyer contended that sections 6 and 7 of the EO were "*mandatory provisions of Hong Kong employment law*" which, by reason of his secondment letter, overrode the term of his contract which stated that English law applied. In support of this argument, he cited to section 70 of the EO, which nullifies any term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred on an employee by the EO (i.e. the rights conferred by sections 6 and 7).

Citing *HSBC Bank plc v. Wallace*, Cantor Fitzgerald argued that Mr Boyer was bona fide employed under English law. As the choice of law had been made in good faith, there was no reason to apply Hong Kong law (including the EO) to override the express terms relating to the termination of Boyer's employment.

Rejecting this argument, the Court agreed with the defendants: sections 6 and 7 of the EO formed part of the "mandatory employment laws of Hong Kong" binding on Cantor Fitzgerald, and thus overrode the express election of English law to be the governing law of the contract. Accordingly the Court concluded that the Mr Boyer's employment was effectively terminated on 30 May 2011 (being the date of his resignation and offer to make payment in lieu of notice to Cantor Fitzgerald).

The time for giving notice

The Court's judgment also provides useful guidance on the timing for the giving of notice of termination. The contracts for two of the employees

expressly provided for a narrow window for giving notice: notice to terminate had to be given "…*on any date within the last two (2) weeks of the final month of a Renewal Period"*. Such notice would then terminate the employment on "…*the expiry of 3 months from the latest date notice could be given"*. The trial judge concluded from this that the appropriate period of notice was 3 months (the period of notice acknowledged in each employee's contract). However, citing section 6 of the EO the Court ruled that notice could be given by either employer or employee "*at any time"* and accordingly the employees were not constrained by the narrow window for the giving of notice specified in their employment contracts.

The enforceability of post termination restraints

The Court was also called upon to consider whether, and if so to what extent, the restrictive covenants in the employees' contracts should be enforced. The Court stated that the covenant preventing the brokers from poaching certain Cantor Fitzgerald group employees for a period of 12 months after termination was unenforceable. While asserting that the clause could in theory be reasonable for the protection of the Cantor Fitzgerald's legitimate interests, the period of 12 months was found to be unreasonable on the basis that there was no cogent evidence justifying such a long period of time.

Similarly a "team moves" covenant preventing Mr Boyer from commencing employment with certain classes of persons in "*a business… in competition*" with Cantor Fitzgerald for 12 months post-termination was also found to be unenforceable on the basis that there was ambiguity as to precisely what constitutes "*a business in competition*", and again there was no evidence to justify a 12 month restriction period.

In addition the Court, by way of *obiter*, also struggled to see how a 6 month non-dealing clause could be justifiable as no more than reasonably necessary given the extraordinary width of the clause in question.

Procuring others to resign and acting in concert

Cantor Fitzgerald argued that the employees had been in breach of their obligations by procuring the others to resign and by acting in concert to leave. Specifically, Cantor suggested that prior to their resignations, each of the employees was fully aware that the others were negotiating to join Mansion House; that each of the employees instructed the same law firm to act on their behalf in negotiating their contracts; that the draft contract for each employee was very similar to the others; that amendments made to the draft contract of one of the employees, Mr Boyer, were incorporated into the other three employees' drafts; and that interviews conducted by a search firm were not bona fide – but were merely a "smoke screen" for what was happening behind the scenes.

While each employee knew prior to his resignation that each other employee was thinking of leaving Cantor Fitzgerald, the Court found that there was nothing to suggest that any employee persuaded or encouraged another employee to resign. On the contrary, the evidence suggested that the

employees made up their own minds, separately. The Court pointed to the statement made by one of the employees in cross-examination that the employees acted "*independently in the sense that we are all making up our own decision whether to leave Cantor Fitzgerald or not*".

The Court was of the view that the employees all chose to use the same solicitors merely for convenience. Similarly, the fact that the contracts were identical was likely the result of the employees dealing with the same counterparty, Mansion House. Further, the Court submitted that there was no evidence to suggest that the interviews conducted by headhunters were nothing '*other than genuine',* and in so doing, the Court rejected as fanciful Cantor Fitzgerald's contention that the interviews were merely a smoke screen.

Lessons for employers: putting the judgment into practice

In light of the judgment, there are some take-away lessons for employers:

- Employers should review their employment contracts to ensure that their post termination restraints: (i) are sufficiently clear and unambiguous with any terms giving rise to potential uncertainty being defined carefully; and (ii) go no further than is reasonably necessary to protect its legitimate business interests. In particular employers should question whether they could produce real and cogent evidence to support the reasonableness of these clauses in Court, as in the absence of this evidence the restraints may be found to be unenforceable.
- One of the key aspects of the case is the finding by the Court that sections 6 and 7 of the EO operated to protect an employee who was employed under a contract governed by English law. The judgment illustrates that employers will be prevented from attempting to get around the protections afforded by the EO to employees working in Hong Kong by simply choosing a foreign law. Employers should therefore tread cautiously when looking to apply an identical governing law clause to employees globally.
- Engaging the services of a recruitment consultant to assist at arm's length with the recruitment process remains highly advisable when recruiting a team, as does complying with the firm's standard recruitment procedures.
- Employment contracts that specify a fixed window period for the giving of notice should be re-examined, as such clauses are unlikely to be enforceable as they conflict directly with section 6 of the EO which allows for notice to be given by either employer or employee "at any time".
- Employers should review any 'kiss-and-tell' clauses in their employment contracts to ensure terms like 'competitor' are tightly drafted and defined appropriately as any vagueness in the wording may result in the clause being construed against the employer. Further,

it is important to recognise that establishing damage consequent upon a breach of a 'kiss-and-tell' clause is likely to be problematic.

- Finally, the case is a timely reminder of the difficulties that the previous employer faces in establishing loss of profit or damage arising from a team move. In this case, the Court found the evidence supporting Cantor Fitzgerald's alleged damage as neither reliable nor compelling and concluded that even had the employees been found in breach, it would have struggled to quantify damage at a figure other than a nominal one.

Linklaters Employment & Incentives acted for Mansion House. The decision has been appealed. We will update you on the result of that appeal as soon as a decision is to hand.

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