

**REMEDIES AVAILABLE TO EMPLOYERS/PROPRIETORS  
AGAINST PRESENT  
AND FORMER EMPLOYEES SEEKING UNLAWFULLY TO  
COMPETE WITH THEM.**

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The conflicting interests protected by the Court.

The desire of the employer/proprietor to protect his business and to be able to sell it on.

The right of all, including former employees, to compete in an open market

The industries where the problems arise.

Largely service industries where the employee has the opportunity of establishing a personal relationship with customers

Who should be named as defendant?

The former employee

His corporate vehicle.

All other shareholders in that corporate vehicle

His financial backer

Causes of action

Breach of covenant

Breach of the implied term of fidelity

Breach of fiduciary duty – applicable where employee is also a director or (perhaps) a very senior employee

Breach of the equitable duty of confidentiality, see *Faccenda Chickens*<sup>1</sup>

The tort of inducing a breach of contract

The tort of conspiracy to injure another's business, see *Lonrho v Fayed*<sup>2</sup>

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<sup>1</sup> *Faccenda Chickens td v Fowler* [1987] Ch 117 (CA)

The pros and cons of dismissing the defendant if he is still employed.

Always desirable not to dismiss as it preserves the implied duty of fidelity and avoid any argument to the effect that any express covenants have been discharged by breach of contract, see *General Billposting v Atkinson*<sup>3</sup>

Similarly, if he is a director do not terminate his directorship – it will continue his fiduciary duty.

Further, while he remains an employee, he will be prevented from using even merely confidential information without the need for an express covenant, see *Faccenda Chickens*

The duty to give full and frank disclosure when applying for without notice injunctions.

This is a very heavy duty. The Advocate has to point out all of the weaknesses in his client's case.

It will include any authorities indicating that a restrictive covenant is too widely drawn, anything that indicates that the Claimant might not be good for his undertaking in damages, anything that goes to his witness's credibility, e.g. criminal convictions.

Sensible for the advocate to prepare in advance a written list of all such matters to be disclosed and this can be served on the Defendant along with his note of the hearing and his skeleton argument when the Order and evidence is served.

Do not forget to apply for a return date and to give notice of it.

The benefits of a search and seize order.

Such Orders are very expensive and can only be sensibly justified in big cases.

Advantage is that merely obtaining such an Order can have the effect of bringing the proceedings to an end.

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<sup>2</sup> Lonrho plc v Fayed [1992] 1 AC 448 (HL)

<sup>3</sup> General Bill Postings Co Ltd v Atkinson [1908] 1 Ch 537 (CA)

This follows from Claimant subsequently obtaining a springboard injunction and a very substantial payment on account of costs. Such orders are likely to be made if the search shows records of substantial pre-resignation trading involving dealings with customers and, say, lists of customers and suppliers, with their prices or rates, lifted straight off the employer's computer.

The availability of an argument that there is a constructive trust and interim proprietary remedies.

Where there has been breach of an equitable duty, e.g. a fiduciary duty or the duty of confidentiality, it is open to Claimant to claim that the entire business of the Defendant or his corporate vehicle is held on constructive trust for him, see *Normalec*<sup>4</sup>.

If an arguable case for this can be shown, then it opens the door for interim proprietary injunctions. The argument is that the Defendant cannot profit from the business because it does not belong to him. He cannot use its assets other than in the course of business. He will have to identify all of the assets and deliver up copies of business records. He will not be entitled to pay himself a salary. He will have to finance his legal costs out of other funds.

The availability of freezing orders.

Mareva injunctions are not common in such cases as it is difficult to establish on cogent evidence an intention to dissipate assets.

If such an order can be properly obtained then it will provide a useful stick with which to beat the Defendant.

Interim prohibitory injunctions, including springboard injunctions.

Can be obtained without a search and seize order and often are.

More likely to obtain an order preventing competition if employee is still employed as there will be no argument as to the lawfulness of any post-employment restriction.

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<sup>4</sup> *Normalec Ltd v Britton* [1983] FSR 318

Springboard injunction may be available in circumstances where express post-employment restrictions are unlawful or where there are none.

Available in cases of misuse of confidential information during employment and, perhaps, for competing whilst employed in breach of the implied term of fidelity.

#### The measure of damages.

Damages always available as a remedy.

Need to involve an experienced forensic accountant at a very early stage.

Claimant can recover loss and sums reasonably expended in seeking to mitigate his loss. This could include the cost of re-advertising or price-cutting.

#### The availability of an account of profits and its benefit, if any, over the remedy of damages.

These are claimed in the alternative and the Claimant will have to elect at some stage.

These are available in constructive trust cases and other cases involving breaches of equitable duties.

Advantage is that the sum can be greater than damages where the Defendant is a better businessman than the Claimant.

#### Costs

These can be used as a weapon to drive the competition out of business.

A stream of substantial payments on account of interim applications can achieve this end.