

Bolt Burdon Commercial Enews – 9 February 2007

Who is the Competition?

It is a frequent occurrence that a Director decides to leave a company to become involved in a competing business. However, the out-going Director needs to take care that, in doing so, he is not in breach of his fiduciary duties to the company he is leaving - this will include him carrying out his duty to report the setting up of the competitor to the employing company.

If the Director does such acts as openly approaching the company's biggest competitor that will clearly amount to a breach.

But must the Director have *actually* started to compete before his acts can amount to a breach of duty? This is all a matter of degree. Simply deciding to set up a competing business at some point ahead and discussing it with friends/family would not necessarily amount to a breach. Similarly, consulting lawyers and other professionals will not always be inconsistent with a Director's fiduciary duties. In practice, there is a wide range of activity and decision making between the 2 ends of the spectrum and it will be fact sensitive in each individual case.

In a recent court case, the court said that it would be too rigid to say that, once a Director has irrevocably decided to engage in the future in a competing business, and taken preparatory steps without disclosing his intentions to the company, he must resign. What could amount to preparatory action would include identifying premises for the new business or negotiating and agreeing terms of employment with a new company. Conversely, there would be a clear breach if the Director started secretly competing with the company for equipment and staff. However, it is a fine line and the mere fact that the Director is not already competing will not necessarily protect him from any legal action.

A Director is free to resign his Directorship at any time, and so no longer be bound by his fiduciary duties. If you are considering setting up in competition, we would urge you to seek advice beforehand so that you do not end up at the wrong end of a costly litigation case.

If you have any questions about this subject then please feel free to contact Marcella Cox on marcellacox@boltburdon.co.uk or Ryan Mowat on ryanmowat@boltburdon.co.uk or by telephone on 020 7288 4700 to the Commercial Litigation Department. Alternatively, visit our website at www.boltburdon.co.uk

© Bolt Burdon Solicitors, 16 Theberton Street, Islington, London N1 0QX, Tel 020 7288 4700. Regulated by the Law Society. Authorised and regulated by the Financial Services Authority.
To stop receiving Commercial Client News, please reply stating 'unsubscribe'