

Flying the coop



With partners jumping ship right, left and centre, **Clare Murray and Susanne Foster** offer a handy list of what to look out for if it happens at your firm

We have seen a resurgence of team moves in the past six months with many partners, who have weathered the economic storm in their current firm, seeing now as the right time to jump ship.

However, team moves bring with them particular challenges. The obligations usually owed by partners make it difficult for them to effect a team move without the risk of breaching their fiduciary duties as well as express restrictive covenants and garden leave provisions. Fiduciary duties while a partner include a prohibition on soliciting clients and colleagues, on misusing confidential information and on diverting business opportunities to the new firm.

Remedies for breaches can include discretionary injunctive relief or compensation, but, perhaps most significantly, an account of profits earned as a result of fiduciary breaches. Your partnership agreement may also include provisions for forfeiture of capital and outstanding profit share.

Nonetheless, team moves happen all the time and usually for good reasons. There may be certain practical steps you can take to reduce as far as possible the legal and commercial risk of potential claims against you as a team including the (non-exhaustive) suggestions below:

- Be aware of your partnership obligations and make any prospective firm aware of them too.
- Consider asking the new firm for an indemnity against potential costs and liabilities arising from a team move.
- Consider the extent to which your existing firm's conduct may have caused key members to leave.
- Consider how previous team exits have been handled by your firm.
- Be careful not to divulge confidential information to recruiters or any new firm – you will receive extensive information requests to support your business case and need to be careful about your response.
- Avoid speaking to clients and about your departure without your firm's knowledge and be aware of the potential risks of asking clients to be referees.

Recruitment consultants can play a valuable role in the careful management of team moves to seek to minimise the risk of breaches by exiting partners. Make sure you use a consultant who is very experienced in handling team moves and understands the risks for the team, the new firm and for themselves.

Clare Murray and Susanne Foster specialise in partnership and employment law at CM Murray LLP

that Susan and Justin are both entitled to half the equity in the houses, while Justin's £10m shareholding remains untouched. This would give Susan a settlement worth £1.1m made up of the Scottish holiday home and £900,000 cash.

Both Scottish and English law apply a clean break principle to financial provision upon divorce, but it is applied much more enthusiastically in Scotland than it is in England. On one view Susan would be entitled to maintenance for up to three years post-divorce, to allow her to adjust to the loss of Justin's support. However, she is only 38 years old. She is still young and capable of going out to work. More to the point, she has £900,000 in the bank. Her chances of receiving ongoing maintenance in Scotland are slim.

Ordinarily an English couple living in England can only be divorced under English Law. The same goes for a Scots couple in Scotland. However, people move around the UK for all sorts of reasons. There are a significant number of husbands who reside in Scotland with their wives, but who work and live in London from Monday to Friday. If these marriages break down it is possible that divorce could be brought under either English law or Scots law.

Which side are you on?

So, when it comes to advising a client who has the potential to take their divorce under either English or Scots law, it is worth bearing in mind their jurisdictional quirks. Checking whether the client will be favoured or punished by one particular county's laws can become crucial, particularly if the case would produce significant difference in the financial package either side of the border.

If the current jurisdiction is to their advantage, ensure you take steps to preserve this. And if it is to their disadvantage, find out if you can reasonably establish jurisdiction in the more favourable part of the UK. In Justin and Susan's case they last lived together in Scotland, so may well have assumed this was the only jurisdiction open to them. But had the solicitor taken the time to establish Susan's jurisdiction back in London, a settlement in excess of £6.5m could have been obtained, rather than the £1.1m she received under Scots law.

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Finally, Susan took the first step to divorce. Where do they divorce? Scotland or England?

The law provides rules to regulate situations where there are competing divorce proceedings. Often the place the parties last resided together is conclusive in deciding whether the divorce is to be under English or Scots law. Did they last reside together at the summer family get together in Scotland, or the family Christmas in London? Sometimes people set it up to ensure the divorce is under the laws favourable to them, but more often than not they find themselves divorcing under either English law or Scots law by sheer chance.

Hot property

So, what would happen in the case of Justin and Susan with a Scottish divorce? Scots law places a distinct emphasis on the fair sharing of matrimonial property. Matrimonial property is essentially all property acquired as a result of the efforts of the marriage. The emphasis is on the property acquired, which is quite distinct from the wealth created during the marriage. As Justin's shares were inherited, the matrimonial property consists of only the equity in the townhouse and second home.

Fair sharing of matrimonial property is usually achieved by equal sharing. Thus, the starting point when looking at the question of financial provision upon divorce will be