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RESTRICTIVE COVENANTS IN EMPLOYMENT LAW

When are they enforceable?

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When an employee leaves a company, it is common for the company to try to enforce restrictive covenants and non-compete clauses against the employee. However, under the restraint of trade doctrine, the court will enforce a restrictive covenant only if it goes no further than reasonably necessary to protect a legitimate proprietary interest of the employer.

Over the years, there have been various local and foreign decisions on the enforceability of restrictive covenants. This article reviews the salient principles and highlights some of the practical issues that arise in litigation.

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I. Introduction

1 Much employment litigation takes place over the enforcement of restrictive covenants, which include non-compete[1] clauses and non-solicit[2] clauses. Restrictive

1 Examples include restrictive covenants which restrain an employee from joining a competing business.

2 Examples include restrictive covenants which restrain an employee from soliciting clients or employees of the former employer.

covenants are strictly scrutinised by the courts. The courts will not enforce restrictive covenants unless they (a) protect an employer's legitimate proprietary interests and (b) are no wider than reasonably necessary to achieve such purpose.

2 Most restrictive covenants are quite short in length – many range between six and 12 months. Getting an interim injunction to enforce the restrictive covenant at an interlocutory stage is therefore extremely important to employers. First, the period of the restrictive covenants is likely to expire before the trial of the action. In such cases, the granting of an interim injunction would likely dispose of the entire matter.[3] By the time the restrictive covenant has expired, there would no longer be any utility for the employer to enforce the covenant. Secondly, damages for breach of a restrictive covenant may be difficult to prove at trial – see, for example, *Marken Ltd (Singapore Branch) v Scott Ohanesian*.[4]

3 Hence, the real relief in many cases of breach of restrictive covenants is an injunction, and often at the interlocutory stages.

4 In such circumstances, the courts will examine the merits of such an interlocutory injunction carefully by considering whether the employer would be likely to *succeed* at trial, as opposed to merely considering whether there is a serious issue to be tried. As observed by Staughton LJ in *Lansing Linde Ltd v Kerr*:[5]

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3 This fact was explicitly recognised by the English Court of Appeal in *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251 at 258:

> I do not see that delay caused by congestion in the court's list should be left out of account. This is a practical reality as much as anything else. The very reason for granting interlocutory relief is that a trial cannot take place immediately. Delay for the parties' preparations is necessary; but there is very often also delay before the court can arrange a trial … So if an injunction had been granted by the judge, or is now granted, the likely effect would be to decide the dispute against the defendant for good and all.

4 [2017] SGHC 227 at [39]–[40].

5 [1991] 1 WLR 251 at 258.

> [I]f it will not be possible to hold a trial before the period for which the plaintiff claims to be entitled to an injunction has expired, or substantially expired, it seems to me that justice requires some consideration as to whether the plaintiff would be likely to succeed at a trial. In those circumstances it is not enough to decide merely that there is a serious issue to be tried.

5 In similar vein, the Hong Kong High Court in *BGC Capital Markets (Hong Kong) Ltd v James Priest*[6] ("*BGC v Priest*") held that although in the normal course the test is whether there is a "serious question to be tried", in such cases where there is a real prospect that the restrictive covenant period will have expired before trial, the court will "pay particular regard to the prospects of success at trial".[7]

6 Given the decisive effect of an interlocutory injunction on employment litigation, this article will discuss the various legal and practical issues relating to the grant of such injunctions.

II. Legitimate proprietary interests

7 To successfully enforce a restrictive covenant, the employer must first show that it has a legitimate proprietary interest to be protected. This is a necessary condition; if the employer fails to do so, the restrictive covenant will be unenforceable.[8]

8 The three principal examples of legitimate proprietary interests capable of protection by restrictive covenants are (a) customer connections, (b) a stable trained workforce, and (c) trade secrets.[9]

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6 [2006] HKCU 1837.

7 *BGC Capital Markets (Hong Kong) Ltd v James Priest* [2006] HKCU 1837 at [23]–[24], citing the English case of *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251.

8 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [83], citing *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR (R) 663.

9 *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [58], *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [81] and [121].

A. Customer connections

9 The most common type of legitimate proprietary interest relied on by employers is customer connections. The importance of customer connections as a legitimate proprietary interest has been emphasised in many cases.

10 In *Tan Kok Yong Steve v Itochu Singapore Pte Ltd*[10] ("*Itochu*"), the employee was a cement trader who had developed a strong base of cement customers in Vietnam and other countries on behalf of the employer over a period of four years. The court recognised that, given his significant knowledge and influence over the employer's customers which he had acquired, the employee could easily divert these connections away to himself or a new employer.[11]

11 Customer connections are also considered significant as they usually require considerable expense to foster and maintain.[12] Where this expenditure is paid for by the employer, the employer is entitled to protect them.[13] This was expressly recognised by the English High Court in *Euro Brokers Ltd v Rabey* (in the colourful context of Wimbledon and other expensive sporting events paid for by the employer):[14]

> There is, in my judgment, a customer connection which the plaintiff is entitled to protect. In this context I refer to *GFI Group v Eaglestone* [1994] IRLR 119 ..., where Mr Justice Holland said:
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> > 'First, the defendant is an exceptionally highly paid employee of experience and standing who has had his personal relationships with the plaintiffs' customers carefully and expensively fostered at the plaintiffs'

10 [2018] SGHC 85.

11 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [86]–[87].

12 *GFI Group Inc v Eaglestone* [1994] IRLR 119 at [4]. Holland J stated that a customer connection was "based on trust and empathy between the two individuals" and "fostered by communication ... by the expenditure to the plaintiffs of very substantial sums on achieving mutual socialising".

13 See *GFI Group v Eaglestone* [1994] IRLR 119 at [28], [29] and [32], and *Euro Brokers Ltd v Rabey* [1995] IRLR 206 at [18]–[19].

14 [1995] IRLR 206 at [18]–[19].

> expense. I readily draw an inference that he and that relationship account for a significant amount of the goodwill that accrues to the plaintiffs, goodwill that was the product of expenditure exceeding £300,000 by the plaintiffs over the past year, expenditure that reflects the concept put before me of customer connection.'

Although Mr Rabey was not getting £300,000 a year's-worth of entertainment out of the company, he was getting over £10,000 a year plus the benefit of the various functions, such as Wimbledon and lunches with celebrity speakers and apparently other sporting events with which he entertained his clients at the expense of the company. It seems to me that there is a real customer connection which requires to be protected.

B. A stable, trained workforce

12 The maintenance of a stable and trained workforce is also a legitimate proprietary interest. A strong employee team carries many intangible benefits to a business over and beyond "hard" assets and is a valuable part of the business.

13 As the New South Wales Supreme Court held in *Cactus Imaging Pty Ltd v Glenn Peters*:[15]

> [E]mployees are not property, but, all else being equal, a business with a stable trained workforce will be more attractive to a purchaser and command a higher price than one with a workforce which is unstable, disruptive or poorly trained, just as a loyal and satisfied clientele makes a business more attractive and valuable. In my opinion, staff connection constitutes part of the intangible benefits, which may give a business value over and above the value of the assets employed in it, and thus comprises part of its goodwill. It is amenable to protection by a covenant in a manner similar to customer connection, even in the absence of protectable confidences.

15 [2006] NSWSC 717 at [55].

14 This reasoning was expressly approved by the Singapore Court of Appeal in *Man Financial (S) Pte Ltd v Wong Bark Chuan David*[16] ("*Man Financial*").

C. Trade secrets / Confidential information

15 The employer's trade secrets and confidential information, if disclosed, would be advantageous to the employer's competitors and detrimental to the company. Trade secrets have long been considered to be a legitimate proprietary interest of employers.[17]

16 Some examples of trade secrets and confidential information include pricing parameters and marketing strategies,[18] strategy, commercial business information and tactical plans about the conduct of business operations.[19] In the context of a competitive tender, information on business plans that a company submitted in its bid to the tenderer would also be considered confidential information.[20]

17 It has been held that where there is already a confidentiality clause in the employment contract, the court may determine that the employer's legitimate proprietary interest in confidential information and trade secrets has been adequately protected by such a confidentiality clause, and that a restrictive covenant (in addition to the confidentiality clause) is unnecessary and unenforceable. This was the position the Singapore Court of Appeal took in *Stratech Systems Ltd v Nyam Chiu Shin*[21] ("*Stratech*").

16 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [121].

17 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [81].

18 *Cactus Imaging Pty Ltd v Glenn Peters* [2006] NSWSC 717 at [34].

19 *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995 at [20], [23] and [24].

20 *Express Medicals Ltd v Network Rail Infrastructure Ltd* [2004] EWHC 1185 at [28]–[30].

21 [2005] 2 SLR(R) 579.

18 In *Stratech*, the employer (a computer hardware and software company) tried to justify the imposition of a restrictive covenant on the basis of protection of confidential information alone. However, such information was already protected by a confidentiality provision, and beyond the alleged confidentiality of the information, the employer was unable to demonstrate any legitimate interest to justify the imposition of the restrictive covenant. The Court of Appeal thus held that the restrictive covenant was unenforceable and void:[22]

> However, we were of the view that this evidence did not demonstrate any legitimate interest over and above the protection of confidential information. Also, para 54 of Stratech's Appellant's Case demonstrates that its concern was actually the protection of confidential information and not some other legitimate interest.
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> ...
>
> Bearing in mind that Stratech already had the benefit of cl 8.1 and as Stratech was unable to demonstrate any other legitimate interest that required protection by a restraint of trade clause, we were of the view that the main function of cl 9.4 was indeed to inhibit competition in business.
>
> ...
>
> Accordingly, we were of the view that cl 9.4 was not binding ...

19 However, this position was subsequently doubted. In *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter*[23] ("*CCL*"), Woo Bih Li J commented that the rule in *Stratech* may be "illogical" as confidentiality clauses were often difficult to police,[24] and that in some cases, the best practical protection is a non-compete covenant *in addition* to a confidentiality clause:[25]

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22 *Stratech Systems Ltd v Nyam Chiu Shin* [2005] 2 SLR(R) 579 at [48]–[50].

23 [2013] 2 SLR 193.

24 *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter* [2013] 2 SLR 193 at [89], citing *The Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472, *Turner v Commonwealth & British Minerals Ltd* [2000] IRLR 114, and *Thomas v Farr plc* [2007] EWCA Civ 118.

25 *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter* [2013] 2 SLR 193 at [92].

> The observations in these cases merit consideration by our Court of Appeal. Indeed, one may add that it seems illogical that an employer who does not have the benefit of a confidentiality provision in his employee's contract of employment has a better chance of establishing confidential information as a legitimate interest to protect under an NCC than an employer who has sought to protect his confidential information by the use of dual provisions (*ie*, one specifically to preclude disclosure of such information post-employment and the other to restrict the employee from engaging in a competitive business for a certain duration and within a certain geographical scope).

20 In *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd*[26] ("*Humming Flowers*"), Vinodh Coomaraswamy J also expressed "sympathy for the concerns expressed by Woo J".[27]

21 This issue was revisited in *Powerdrive Pte Ltd v Loh Kin Yong Philip*[28] ("*Powerdrive*"), but the court (Woo J) decided that there was no need to decide the enforceability of the non-compete clause in that case based on *Stratech*.[29]

22 At present, *Stratech* remains good law in Singapore. In *CCL* and *Humming Flowers*, the court acknowledged that it was bound by the Court of Appeal decision in *Stratech*.[30]

23 It is respectfully submitted that Woo J's comments on *Stratech* in *CCL* bear force. It should also be noted that *Stratech* was decided in the context of complex IT data which, owing to their volume and complexity, had to be stored on computer hard disks and CDs. For such information, the court can easily police a breach of the relevant confidentiality clauses by ordering the physical storage media to be delivered up. In *Stratech* itself, the employer managed to account for the lost confidential data

26 [2014] 3 SLR 27.

27 *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [71].

28 *Powerdrive Pte Ltd v Loh Kin Yong Philip* [2018] SGHC 224.

29 *Powerdrive Pte Ltd v Loh Kin Yong Philip* [2018] SGHC 224 at [17]–[23].

30 *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter* [2013] 2 SLR 193 at [93], *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [69].

because it was able to locate the hard disks containing the data with an Anton Piller order.

24 However, in most other cases, the nature of the confidential data may be such that they are difficult to police (for example, if the employee retains some of this data in his memory). In this instance, the best practical protection may still be an enforceable restrictive covenant (like a non-compete clause) to preserve the confidentiality of the information.

25 In *TFS Derivatives Ltd v Morgan*[31] ("*TFS v Morgan*"), the English High Court took a similar view in the context of a non-solicit covenant. The practical difficulty of policing a non-solicit covenant meant that in order to protect the employer's client contacts, the employer had to rely on the non-compete clause to keep a former employee out of the relevant market place for a limited duration.[32]

III. Reasonableness of restrictions: Interests of parties

26 Assuming that the restrictive covenants meet the legitimate proprietary interest criteria as set out above, it must also be proved that the restrictions imposed are reasonable. The test of reasonableness in Singapore has two aspects: (a) reasonable in the interests of the parties, and (b) reasonable in the interests of the public.[33]

27 The reasonableness of a restrictive covenant (in the interests of the parties) may be analysed along three key criteria:[34]

(a) the scope of the activity being restricted (the "Activity Scope");

31 [2004] EWHC 3181 (QB).

32 *TFS Derivatives v Morgan* [2004] EWHC 3181 (QB) at [16] and [84].

33 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [70].

34 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [90].

(b) the geographical extent of the restriction (the "Geographical Scope"); and

(c) the duration of the restriction (the "Temporal Scope").

The burden is on the employer to prove that *each* of these scopes is reasonable.[35] If any *one* of these factors is too wide, the clause may be struck down for being unreasonable.[36]

A. The Activity Scope

28 In *Humming Flowers*, the High Court held:[37]

> Whenever an employer and an employee agree on a restrictive covenant – a covenant intended to restrict the employee's conduct after his employment comes to an end – two competing policies are engaged. The first is the policy of upholding contractual bargains which parties of full age and of sound mind freely enter into. *The second is the policy of protecting a person's fundamental liberty to earn a living, and to do so where and how he chooses.* [emphasis added]

29 The second policy of protecting the employee's livelihood is taken seriously by the courts. Restrictions on the Activity Scope are usually narrowly construed to include only activities that the employee was involved in. The court is unlikely to enforce any blanket ban that prohibits the employee from being involved in activities beyond the specific areas which the employee was involved in when employed by the employer.[38] This is so that the restrictive covenant does not deprive the employee of earning a livelihood.[39]

35 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [90].
36 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [90].
37 *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [33].
38 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [92]–[93], *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36 at [67].
39 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [93].

30 The Activity Scope restriction should not be drafted to encompass too wide an industry. Thus, in *Itochu*, the Activity Scope of the restrictive covenant applied only to the specific commodities (cement) which the *employee had been involved in* when employed by the employer, even though the employer was a global conglomerate which traded in many other commodities apart from cement.

31 The court found that the Activity Scope was reasonable because it only prohibited the employee from trading cement products but did not prevent him from trading other commodities such as coal or wood. During the trial, the employee admitted that he had prior experience in trading wood, before joining the employer. At the time of the trial, he told the court he was a self-employed coal trader. Hence, it could not be said that the restrictive covenant would, if enforced, deprive the employee of his livelihood.[40]

32 Similar reasoning was applied in *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd*[41] ("*PH Hydraulics*"). In that case, the business of the employer was that of designing and manufacturing marine hydraulic and electrical installations. The employee had entered into a restrictive covenant which prohibited the employee from engaging in "any activity or business which competed with the business of the [employer]".

33 The court noted that given the specialised nature of the employer's business in marine hydraulic and electrical installations, the clause "did not amount to a blanket prohibition to work for the marine industry".[42] Moreover, the employee had "transferable skill sets" and an "ability to thrive in different

40 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [93].

41 [2012] 4 SLR 36.

42 *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36 at [67].

industries and in different countries", so the restrictive covenant "would not have a seriously adverse impact on his livelihood".[43]

34 Modern restrictive covenants are usually quite specifically drafted, with express language that limits the restraint to, for example, the goods and services that the employee was concerned with.[44] In some older cases, the restrictive covenants are more widely drafted and may not contain such a limiting provision. Nevertheless, the courts have sought to "read down" such clauses to bring the width of the Activity Scope within an acceptable limit.

35 An example of such "reading down" of a wider clause can be found in *Littlewoods Organisation Ltd v Harris*[45] ("*Littlewoods*"). The employer was a leading business in the United Kingdom engaged in two principal areas: mail orders and retail stores.

36 Mr Harris, the employee, was a mail-order manager in Littlewoods. He was bound by a restrictive covenant which simply sought to prevent him from "[entering] into a contract … with *Great Universal Stores Ltd* or any company *subsidiary* thereto …" [emphasis added].[46]

37 Great Universal Stores was a major rival of Littlewoods in the mail-order business. In addition, Great Universal Stores carried on many other businesses beyond mail orders. It had over 200 or more *subsidiaries* all over the world, carrying on all sorts of businesses.[47]

38 Mr Harris tried to argue that the word "*subsidiary*" in his restrictive covenant made it too wide. For example, it could

43 *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36 at [68].

44 In *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [5], the restraint was limited to goods and services "with which the employee was concerned".

45 [1977] 1 WLR 1472.

46 *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472 at 1473.

47 *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472 at 1482.

prevent him from working in a restaurant in Alice Springs, Australia, if the restaurant was owned by a "subsidiary" of Great Universal Stores,[48] even though he was only working in the mail-order business of Littlewoods in the UK.

39 This argument was rejected by the English Court of Appeal. Lord Denning, delivering the leading judgment, first held that the law must have "regard to the realities of big business".[49] Whilst Great Universal Stores has businesses worldwide, the non-compete clause "should … be limited by relation to its object".[50] He found that the object of the non-compete clause was to protect Littlewoods' mail order business (not retail stores), since Mr Harris was employed within the mail-order business of Littlewoods. Accordingly, the clause was interpreted to mean that Great Universal Stores should not be allowed to employ Mr Harris in their mail order business.[51]

40 Lord Justice Megaw agreed with Lord Denning's interpretative approach. He noted that while Great Universal Stores has many companies which have no connection with mail-order trades, the phrase "any company subsidiary hereto" was to be "properly read" by reference to the relevant circumstances and the nature of the business. Applying this principle, the phrase meant any subsidiary of Great Universal Stores which was concerned in the mail order trade and not just any other subsidiary.[52] Lord Justice Megaw made it clear in his decision that he was not rewriting the contract, but rather was simply interpreting it in the light of the relevant circumstances.[53]

41 However, it is not always the case that the court will always generously "read down" a widely phrased restrictive covenant to save it from being void as the court in *Littlewoods* did.

48 *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472 at 1482.
49 *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472 at 1482.
50 *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472 at 1483.
51 *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472 at 1482–1483.
52 *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472 at 1489–1490.
53 *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472 at 1490.

In modern cases, the courts have taken a more exacting standard on the Activity Scope of restrictive covenants.

42 In *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong*[54] ("*Buckman Laboratories*"), the employee was only involved in the pulp and paper industry whilst employed by the employer. Apart from pulp and paper, the employer was also involved in the chemical business. The restrictive covenant was drafted to restrain the defendant employee from being involved in "any product or service offered by [the plaintiffs]". The employer argued that the restrictive covenant operated only to prevent the defendant from working for their three competitors in the pulp and paper industry.[55]

43 The court (Judith Prakash J) rejected the employer's interpretation of the restrictive covenant as a "benign" one which is "difficult to accept". The court took the view that "if the plaintiffs had only wanted to stop the defendant from working for the three competitors they identified, they could very easily have tailor-made a clause to this effect".[56]

44 The court took the view that on a true construction of the restrictive covenant, the Activity Scope restriction applied to *all* areas of the plaintiff employer's business, including the chemical industry, and not just to the pulp and paper industry.[57] On this ground, amongst others, the court ruled the restrictive covenant to be too extensive and therefore its scope was unreasonably wide.[58]

54 *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205.

55 *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205 at [25].

56 *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205 at [25].

57 *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205 at [25].

58 *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205 at [25].

45 As noted above, modern restrictive covenants are often drafted to be limited to the activities which the employee was "concerned with" [59] or "materially concerned with".[60]

46 Such a limiting phrase has been interpreted to limit the width of the clause to the activities which the employee was materially involved in. An illustration can be found in the case of *BGC v Priest*.[61]

47 In that case, the employees Priest and Yu were formerly employed by BGC Hong Kong (a financial brokerage) on its Asia Emerging Markets ("AEM") Foreign Exchange ("FX") Options Desk, where they dealt with FX Options denominated in *AEM currencies*. BGC HK had another FX Options Desk which dealt with "*G10*" *currencies* (currencies of the group of ten leading developed nations). Priest and Yu only dealt within the "specialist confines" of the AEM FX Options Desk. They did not deal with the G10 currencies.[62]

48 The brokers left to join a competitor. The court held that, on its proper construction, the restrictive covenant (which restrained Priest and Yu from competing with the businesses in which they were "materially involved" with) only covered the AEM Desk, and *not* the G10 Desk.[63]

49 On the other hand, a restrictive covenant which lacks any such limitation to an employee's role within the employer is likely to be struck down. In *ICAP (Hong Kong) Ltd v BGC Securities (Hong Kong) LLC*[64] ("*ICAP v BGC*"), the definition of the word "Business" (which the employee was prohibited from being

59 See the definition of "restricted services" in *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [5].

60 *BGC Capital Markets (Switzerland) LLC v Peter Kevin Rees* [2011] EWHC 2009 (QB) at [100].

61 [2006] HKCU 1837.

62 *BGC Capital Markets (Hong Kong) Ltd v James Priest* HCA 2214/2006 at [5], [30(a)] and [30(d)].

63 *BGC Capital Markets (Hong Kong) Ltd v James Priest* HCA 2214/2006 at [54]–[55].

64 HCA 603/2015.

engaged in) referred to "*any* business" carried on by the employer [emphasis added]. There was no limiting phrase like "materially concerned with". The Hong Kong High Court found that the definition of "Business" could potentially encompass activities far wider than that of the role which the employee was employed to be, and thus struck down the clause.[65]

50 What about activities in which the employee had only *incidental* involvement in? Would such a restrictive covenant – restricting only activities that the employee was "materially concerned with" – be interpreted to restrain the employee from those *incidental* activities as well?

51 This issue arose in *BGC Capital Markets (Switzerland) LLC v Rees*.[66] The employee Mr Rees was a broker employed by the employer BGC (a financial brokerage house) as head of its Swiss francs desk.[67] However, in the course of his employment, Mr Rees had carried out a very small amount of broking in "cable".[68] "Cable" refers to the trade between the currency pairs of US dollar and UK pound sterling.

52 Mr Rees left BGC and worked at the cable desk of a competitor firm. BGC commenced proceedings against Mr Rees for breach of his restrictive covenant. Mr Rees' restrictive covenant restrained him from being involved in a business which is in competition with the business in which Mr Rees was "*materially* concerned with" when he was employed at BGC [emphasis added].[69]

53 Parties were agreed that Swiss francs broking was a prohibited activity within the scope of the restrictive covenant. One of the issues that arose was whether *cable broking* fell within the Activity Scope of the restrictive covenant (as a business

65 *ICAP (Hong Kong) Ltd v BGC Securities (Hong Kong) LLC* HCA 603/2015 at [104]–[105].
66 [2011] EWHC 2009 (QB).
67 *BGC Capital Markets (Switzerland) LLC v Rees* [2011] EWHC 2009 (QB) at [10].
68 *BGC Capital Markets (Switzerland) LLC v Rees* [2011] EWHC 2009 (QB) at [104].
69 *BGC Capital Markets (Switzerland) LLC v Rees* [2011] EWHC 2009 (QB) at [100].

which Mr Rees was "materially concerned" with). The English High Court held that it did not. The minimal nature of his prior incidental business in cable broking meant that he could not be restrained from future economic activity in a competitor's cable broking business.[70]

54 It thus appears that the current position is that a reasonable and enforceable Activity Scope of a restrictive covenant is one that restrains the employee from activities within his material role with the employer, but not activities with which he only had incidental contact. It is respectfully submitted that this position is correct. The interests of both the employer and the employee are balanced and protected. The employer can protect the business areas which the employee had material involvement in, while the employee is not unfairly "penalised" for having incidental involvement in other activities and can in fact be free to pursue them after leaving the employer.

B. Geographical Scope

55 Similar to Activity Scope, the Geographical Scope needs to be reasonable. The High Court in *Buckman Laboratories* has held that a reasonable Geographical Scope is one that is limited to the areas where the employee had actual and significant contact with customers.[71]

56 In *Buckman Laboratories*, the restrictive covenant prevented the employee from working in a wide list of countries, covering most of Asia. The Singapore High Court noted that the employer did not directly assert that it had customers in those countries. All the employer said was that it was trying to "establish a permanent presence" in the same. It thus appeared to the court that what the employer was trying to protect was its

70 *BGC Capital Markets (Switzerland) LLC v Rees* [2011] EWHC 2009 (QB) at [104]–[106].

71 *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] SGHC 17 at [24].

potential business rather than its actual business in those countries. The clause was thus found to be too wide.[72]

57 The same point was made by the High Court in *Humming Flowers*.[73] The employer in that case was a flower business that was a subsidiary of a company called Noel Gifts. The employer itself had no business presence or ongoing business in Malaysia: it had only plans to expand into Malaysia. Yet, the restrictive covenant included Malaysia. The court found that including Malaysia in the geographical restriction was intended to protect the parent company Noel Gifts' interests rather than the employer's own interests, and thus struck down the clause for being unreasonable.

58 Whether a Geographical Scope restriction is reasonable also depends on the circumstances and professions involved.

59 For traditional professions like dentists, who required physical contact with patients and drew their patient pool from the immediate localities of their clinics, location was very important. Patients habitually saw the same professional and might not want to be inconvenienced by travel to a new location.

60 Accordingly, the restrictive covenants for those cases tended to be small "area-based" non-compete clauses, which prevented an employee from opening a rival clinic within a set geographical exclusion zone from the original clinic.

61 Thus, in *Lyons v Multari*[74] (a case involving dentists), the Ontario Court of Appeal observed that the five-mile restriction was not unusual as the case law was "replete" with such examples.[75] The case involved rival dentists practising in the local community of Windsor, in Ontario, Canada. The court held that the plaintiff, a senior dentist who had practised nearly 25 years in Windsor, was entitled to protect his patient

72 *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] SGHC 17 at [24].
73 *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [104].
74 [2000] OJ No 3462.
75 *Lyons v Multari* [2000] OJ No 3462 at [29].

connections against a former colleague who had opened a rival clinic within five miles of the original clinic.[76]

62 In the field of aesthetic medicine, the Singapore Court of Appeal in *CLAAS Medical Centre Pte Ltd v Ng Boon Ching*[77] held that for a particularly successful practitioner who enjoyed a loyal following of "diehard" patients wherever he was located, a restraint which extended to the whole of Singapore was reasonable.[78]

63 On the other end of the spectrum, there are examples of international or even worldwide Geographical Scope restrictions. As the court in *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* observed, "the mere fact that a particular restriction is unlimited in terms of its duration or geographical area will not necessarily lead to the conclusion that it is unreasonable by reference to the interests of the parties".[79]

64 Given the cross-border nature of today's business environment, this observation is particularly relevant. As noted by Kate Brearley and Selwyn Bloch QC in *Employment Covenants and Confidential Information*:[80]

> Until recently, it was unusual for worldwide restrictions in employment contracts to be upheld, but this is no longer the case in the 'global village', where business is often conducted worldwide and information is dispersed worldwide in seconds via the internet.

65 A worldwide geographical restriction was upheld in *Thorsten Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Company Ltd* ("*Nordenfelt*").[81] In that case, the House of Lords

76 *Lyons v Multari* [2000] OJ No 3462 at [26].

77 [2010] 2 SLR 386.

78 *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 at [59].

79 *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 1 SLR 847 at [88], citing *Fitch v Dewes* [1921] 2 AC 158 and *Thorsten Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Company Ltd* (1894) AC 535.

80 Tottel Publishing, 3rd Ed, 2009 at p 336 para 11.45.

81 (1894) AC 535.

upheld an unlimited Geographical Scope restriction because the gun business employer supplied to a "practically unlimited" area of governments all around the world,[82] and so a worldwide restriction was considered absolutely necessary in order to protect the employer's interests.

66 A worldwide non-compete clause was considered in the English High Court decision of *TFS v Morgan*.[83] The employee was an equity derivatives broker of TFS, a derivatives broking house. The restrictive covenant in the case prohibited the ex-employee from conducting any competing business, without specifying the geographical location of that business. In other words, a competing business located anywhere in the world would be caught by the restriction.

67 Interestingly, the court noted that the original geographical restriction (in 1996) of the non-compete clause was three miles from the premises of TFS.[84] In 2001, the geographical restriction of the non-compete clause was extended to ten miles.[85] In 2003, the non-compete clause reached its final form which did not contain any geographical restriction at all.[86]

68 The court did not strike down the clause because of the lack of geographical restriction. Instead, the court upheld the clause because it was of the view that geographic restrictions have "limited relevance" in the modern broking business:[87]

> It is clear, in any event, from this definition clause, that territory, in terms of location, is recognised in the current contract to *have limited relevance to the broking skills of today, applied as they are in global financial markets using the most sophisticated communication technology*. [emphasis added]

82 *Thorsten Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Company Ltd* (1894) AC 535 at 552.
83 [2004] EWHC 3181 (QB) at [85]–[86].
84 *TFS Derivatives Ltd v Morgan* [2004] EWHC 3181 (QB) at [50].
85 *TFS Derivatives Ltd v Morgan* [2004] EWHC 3181 (QB) at [51].
86 *TFS Derivatives Ltd v Morgan* [2004] EWHC 3181 (QB) at [51]–[52].
87 *TFS Derivatives Ltd v Morgan* [2004] EWHC 3181 (QB) at [53].

69 In between the extreme positions (from a restriction that is as narrow as within kilometres of the employer's premises, to a worldwide restriction), Geographical Scope restrictions are often defined by reference to specific countries. This is especially so where the employee has built up a client base in a particular country, for example by being a sales representative or a manager in specific foreign countries.

70 In these cases, a geographical restriction extending to the specific countries in which the employee had significant client contact is likely to be reasonably necessary to protect the employer's legitimate proprietary interests. This is especially so when the customer connections made in overseas countries required a long time to build up. In *Vandashima (Singapore) Pte Ltd v Tiong Sing Lean*,[88] the employer was a distributor of electronic materials. The employee was a manager specifically in charge of the Indonesian market and had built up Indonesian connections and a significant customer base there over a number of years in Indonesia (about five years).[89] Hence, the court upheld an injunction in the terms of the restrictive covenant for Indonesia.[90]

71 Similarly, in *Itochu*, the employee was a cement trader who was the person in charge of the employer's cement markets in, amongst others, Vietnam and the Philippines.[91] The employee had spent four years in those overseas markets and built up a significant client base there. [92] The High Court upheld a geographical restriction that extended to Vietnam and the Philippines.[93]

72 However, a geographical restriction extending to whole countries may be too wide in certain circumstances, particularly

88 [2006] SGHC 132.

89 *Vandashima (Singapore) Pte Ltd v Tiong Sing Lean* [2006] SGHC 132 at [12].

90 *Vandashima (Singapore) Pte Ltd v Tiong Sing Lean* [2006] SGHC 132 at [100].

91 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [8].

92 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [103] and [110].

93 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [95]–[101].

if the relevant countries are huge countries with multiple regional markets.

73 In *Itochu*, the court referred, *obiter*, to countries which span a very large geographical area, such as China and the US which have "many major cities in which commerce and trade are done on a large scale".[94] The court held that it may find difficulty in enforcing restrictive covenants covering large countries like China or the US if the employer "may only conduct business in a few cities",[95] as opposed to the entire country. By way of illustration, an employer that conducts business in San Francisco might not be able to extend its Geographical Scope restriction to include other cities in the US such as New York City, as the US has many regional markets, particularly if the employer has no customer connections in New York City. Thus, it may be more reasonable for the geographical restriction of the restrictive covenant to be restricted to only cities rather than entire countries, although it was reiterated that the reasonableness of a restrictive covenant continues to "depend on the facts of each case".[96] It is submitted that this more iterative approach would be a positive development of the law in better capturing commercial realities.

74 Some restrictive covenants include the word "affiliates" in their restrictive covenants, so that the Geographical Scope restrictions appear to extend not only to the areas where the employer has a business presence in, but also to areas where the employer's *affiliates* have business presences in. Does this necessarily make the restrictive covenant too wide to be enforceable?

75 This is not necessarily so. If the restrictive covenant is defined narrowly enough, such that the employee is only restrained from being involved in areas where he previously had material and significant involvement in whilst employed by the

94 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [101].
95 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [99].
96 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [99]–[101].

employer, it can still be enforceable. In *Itochu*, the fact that the employer had 200 affiliates worldwide did not mean that the restrictive covenant was unreasonably wide. This was because the clause was sufficiently narrowly defined such that the restrictive covenant only applied to restricted businesses that the employee was involved in, sufficiently curtailing the scope of the clause.[97]

76 Even if the clause is not narrowly defined, it is possible that the courts may adopt an interpretative approach to "read down" the meaning of the literal words of the clause. For example, in *Littlewoods*, the Court of Appeal dealt with a restrictive covenant which referred to the employer's "subsidiaries". The court read the clause with reference to the object of the clause, and arrived at the conclusion that the clause only applied to subsidiaries engaged in the same business as that which the employee was involved in.[98] However, as noted above, the generous *Littlewoods* approach may not always be followed, especially in the light of the modern trend towards reading restrictive covenants strictly.[99]

C. Temporal Scope

77 Under Singapore law, an indefinite temporal restriction would be void and unenforceable.[100]

78 Apart from such a situation, every case turns on its facts and temporal restrictions vary in length. A six-month restriction, in the context of financial brokers, has been upheld.[101]

97 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [104].

98 See paras 35–40 above.

99 See the discussion on *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] SGHC 17 at paras 41–44 above.

100 *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 1 SLR 847 at [101].

101 *Tullett Prebon plc v BGC Brokers LP* [2010] EWHC 484 (QB).

79 On some occasions, the courts have upheld restrictive covenants lasting for 12 months.[102] In these cases, the court took into account the fact that the business cycle in relation to the employee's work for the company was 12 months. For example, in *Lonmar Global Risks Ltd v West*[103] ("*Lonmar*"), the work done by the employees (in the insurance industry) was on an annual renewal basis. The court therefore found that any period of restrictive covenant shorter than 12 months "would not have enabled [the employer] to have adequately protected its connections with its clients".[104]

80 In the recent High Court decision of *Powerdrive*[105] (a case involving the industry of training military armour vehicle drivers both on training simulators and on actual vehicles), the court held that a restrictive covenant with a temporal restriction of two years was not enforceable. The court noted that there was no explanation by the employer as to why it used two years as the prohibited duration.[106] Hence, the court found that a two-year restriction was not justified by the employer, was arbitrarily imposed and thus not enforceable.[107]

81 Exceptionally, the Singapore courts have upheld restrictive covenants lasting for two years – for example, in *Itochu*,[108] *Heller Factoring (Singapore) Ltd v Ng Tong Yang*[109] ("*Heller Factoring*") and *PH Hydraulics*.[110]

82 In *Itochu*, the court noted various reasons for why a two year non-compete clause was justified. The employee had four

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102 *Thomas v Farr plc* [2007] EWCA Civ 118 at [50]–[51], *Lonmar Global Risks Ltd v West* [2010] EWHC 2878 (QB) at [53] and *Dawnay Day & Co v De Braconier D'Alphen* [1997] IRLR 285 at [19] and [81].

103 [2010] EWHC 2878 (QB).

104 *Lonmar Global Risks Ltd v West* [2010] EWHC 2878 (QB) at [53].

105 *Powerdrive Ltd v Lok Kin Yong Philip* [2018] SGHC 224.

106 *Powerdrive Ltd v Lok Kin Yong Philip* [2018] SGHC 224 at [47].

107 *Powerdrive Ltd v Lok Kin Yong Philip* [2018] SGHC 224 at [48].

108 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [103].

109 [1993] 1 SLR(R) 495 at [21].

110 *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36 at [67].

years as the person in charge of the employer's cement markets in, *inter alia*, Vietnam and the Philippines.[111] The court found that the employer would require at least two years to allow a replacement employee to try to rebuild those same contacts, and that the trading of cement products was a specialised industry.[112] Accordingly, the court found the two-year duration of the non-compete reasonable.[113]

IV. Restrictions – Reasonable in the interests of the parties

83 As stated earlier, the reasonableness of the restrictive covenant is analysed from two angles.[114]

84 First, the court will consider whether the restrictive covenant is reasonable "as between the parties themselves".[115] So far, this article has been considering this aspect of reasonableness.

85 Second, the court will also separately consider whether the restrictive covenant was reasonable in the interests of the *public*.[116]

86 In considering the interests of the public, the Court of Appeal in *Man Financial* referred to the example of *Thomas Cowan & Co Ltd v Orme*,[117] a case decided by the Singapore High Court in 1961. In that case, the employer operated a fumigation business for ships. There appeared to be very few such businesses in Singapore at that time. The employer sought to rely on a restrictive covenant to stop the employee from operating a similar business. The court held that the employee could not be prevented from doing so. If the employee was restrained from

111 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [103].
112 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [103].
113 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [103].
114 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [74].
115 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [70] and [75].
116 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [74].
117 [1961] MLJ 41.

doing so, this would have given the plaintiffs a "virtual monopoly".[118]

87 Further, the court (F A Chua J) observed that after the employee had started operation (as a competitor), "the charges for ship fumigation have dropped, which is a good thing, but there is no evidence that the standard of fumigation of ships has deteriorated".[119] Thus, it was not reasonable in the public interest to uphold the restrictive covenant.

88 The reasonableness in the interests of the public was also considered in *Itochu*. As noted above, the employer sought to restrain the employee from engaging in the business of cement trading. The High Court considered that even if the employee was prevented from trading in cement products pursuant to the restrictive covenant, suppliers and consumers of cement products would still have "other alternatives available to them"[120] (apart from the employer). The existence of alternatives (and the prospect that a virtual monopoly would not arise) was a salient factor for the court to consider when assessing whether the restrictive covenant is reasonable in the interests of the public.

V. Some practical issues

89 This article will end by discussing some practical issues often encountered in litigation over restrictive covenants.

90 First, cascading restrictive covenant clauses are not favourably viewed by the Singapore courts. Broadly speaking, cascading clauses are clauses that contain a variety of durations, geographical scopes or activity scopes.

118 *Thomas Cowan & Co Ltd v Orme* [1961] MLJ 41 at [41]–[42].

119 *Thomas Cowan & Co Ltd v Orme* [1961] MLJ 41 at [43].

120 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [93].

91 An example of a cascading clause is one which restrains an employee from varying periods as follows:[121]

> Restraint Period means, from the date of termination of your employment:
>
> (a) 15 months;
>
> (b) 13 months;
>
> (c) 12 months.

92 Cascading clauses are engineered specifically to accommodate the "blue pencil" test, in order that the court may strike out provisions which may be unreasonable in scope – for example, unreasonably long durations of restraint – whilst preserving at least one provision which may pass the tests of reasonableness.[122] These clauses appear to have been upheld in New South Wales.[123]

93 In Singapore, however, the courts are reluctant to apply the doctrine of severance to "save" cascading clauses, because an employee would be uncertain as to which cascading restriction binds him at the time of entering the contract. In *Humming Flowers*, the High Court noted that using the blue pencil test in that manner to save cascading clauses may have an "*in terrorem* effect" on employees:[124]

> As I have pointed out, the final limb of the non-solicitation covenant duplicates the scope of the preceding limb but also goes beyond that scope by covering *all* customers of the defendant and not just customers of the defendant during the plaintiff's employment … To that extent, cl 13 contains within it cascading covenants which appear to be calculated to accommodate – or invite – blue pencil severance. But the presence of the final and wider limb in the non-solicitation covenant leaves the vulnerable employee uncertain as to which

121 *Hanna v OAMPS Insurance Brokers Ltd* [2010] NSWCA 267 at [3].

122 *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [31].

123 See the New South Wales Court of Appeal decision in *Hanna v OAMPS Insurance Brokers Ltd* [2010] NSWCA 267, cited in *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [31].

124 *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [197].

> cascading restriction binds him in law until the issue is actually determined by a court. To that extent, it appears to me that the non-solicitation covenant would have an *in terrorem* effect on a reasonable employee in the plaintiff's position. This is precisely the situation that Lord Sumption's *dictum* was designed to deal with. Severing the offending final limb in these circumstances to save the preceding limb would not be 'consistent with the public policy underlying the avoidance of the offending part'.

94 The same concerns were expressed by the High Court in *Buckman Laboratories*:[125]

> I have grave doubts that an invalid clause can be saved in this manner because it would lead to uncertainty. An employee with a contract containing such clauses would have no way of knowing the extent of his obligations under them and would be put in an invidious position regarding his future employment if he ever sought to leave the plaintiffs' employ.

95 Given that the courts are unlikely to uphold cascading clauses, the employer in Singapore will have to make a decision at the point of hiring an employee on the scope of restriction to impose on the employee (if at all). This is not necessarily an unfair or bad requirement, as it creates certainty for both employer and employee.

96 Second, in assessing the reasonableness of the restrictive covenant, the court will generally undertake such an assessment as at the time at which the restrictive covenant was entered into, rather than later (such as the time of litigation).[126]

97 The court is not necessarily limited to assessing the reasonableness of a restrictive covenant by reference to the initial position that the employee occupied at the time of signing. Subsequent prospects for career advancement or promotion, after signing, may be considered when assessing the reasonableness of a restrictive covenant if such promotion

125 *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] SGHC 17 at [27].
126 *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 at [61].

prospects were contemplated by the parties at the time of signing.[127]

98 However, even if there were promotion prospects which were contemplated, a restrictive covenant can still be struck down if it is nevertheless too broad in scope. In the English Court of Appeal decision of *Tillman v Egon Zehnder Ltd*,[128] although the court found there was "some expectation ... that [the employee] would be quickly promoted", the wording of the restrictive covenant was nevertheless found to be too wide to be reasonable (as it prohibited the holding or "interests" or shares in competitors).[129]

99 Third, in assessing the reasonableness of a restrictive covenant, the court may choose to take into account whether the employee received any additional payment or benefit in exchange to agreeing to the restrictive covenant.

100 In *Man Financial*, the Singapore Court of Appeal noted that the employee had received a "not inconsiderable consideration" in return for agreeing to the restrictive covenants. The court held that while this is "not a conclusive factor, it is ... a relevant one and should be taken into account for the purposes of assessing the reasonableness of [the restrictive covenant] as between the parties".[130]

101 Similarly, in *Turner v Commonwealth & British Minerals*,[131] the former employee and employer entered into a severance agreement. The severance agreement stipulated that the employer would pay certain sums in return for the employee

127 *Allan Janes LLP v Johal* [2006] ICR 742 at [38]–[39].

128 [2018] ICR 574.

129 *Tillman v Egon Zehnder Ltd* [2018] ICR 574 at [7], [9] and [25].

130 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [139]–[140], citing J D Heydon, *The Restraint of Trade Doctrine* (Butterworths, 2nd Ed, 1999), *A Buckle & Son Pty Ltd v McAllister* [1986] 4 NSWLR 426 at 432.

131 [2000] IRLR 114.

agreeing to adhere to post-termination restrictive covenants. The English Court of Appeal held:[132]

> In most employer and employee situations no further or specific consideration is paid in order to gain the employee's agreement to be bound by a restrictive covenant, and *it does seem to me that in considering the interests of the parties it is a legitimate factor to take into account that the employees were being paid something extra for the covenant they agreed to sign* but that fact does not relieve the company of the necessity of justifying the restraint. [emphasis added]

102 Fourthly, even if a restrictive covenant is found to be reasonable, valid and enforceable, the court still retains a discretion whether to grant an injunction or not. In *PH Hydraulics*, the court upheld the validity of a two-year restrictive covenant.[133] However, on the facts of the case, the court found that because the *employer* had not acted promptly to protect its rights after discovery breach of restrictive covenant, the *employer* had therefore acquiesced in the *employee's* breach and therefore was barred from enforcing the restrictive covenant against the *employee*.

103 The employee's own conduct will be relevant as well. In *Heller Factoring*, the court drew a distinction between an ex-employee who has threatened to breach the restrictive covenant and one who has not.[134]

104 In *Itochu*, the employee had demonstrated a proclivity to breach his restrictive covenant obligations[135] and a blatant disregard for the same.[136] He had admitted under cross-examination that the employer's former clients were "fair game" for him to deal with after leaving the employer.

132 *Turner v Commonwealth & British Minerals Ltd* [2000] IRLR 114 at 117.

133 *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd* [2012] 4 SLR 36 at [67].

134 *Heller Factoring (Singapore) Ltd v Ng Tong Yang* [1993] 1 SLR(R) 495 at [17].

135 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [109].

136 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [117].

Accordingly, the court found that an injunction should be imposed on him for the operative two-year period.[137]

105 Fifth, if the employee had already spent some prior time on "garden leave" before leaving the employer, *ie*, leave during his notice period, the court may take such periods spent on "garden leave" into account when deciding whether and to what extent an injunction should be granted. For example, this principle was applied in *Tullett Prebon plc v BGC Brokers LP*[138] where the court held that if the time already spent on garden leave provided the employer with all the protection that the employer was entitled to, then the court will decline to enforce any restrictive covenant notwithstanding that it is valid and enforceable.[139]

106 The court may also consider that the period for which the employer is entitled to protection extends beyond the period which is available for garden leave and into the period covered by an enforceable post termination restriction. The court will then exercise its discretion as to the enforcement of the restriction and will enforce the restriction for the whole or such part of the period provided by the terms of the restriction as is appropriate.[140]

107 Finally, the terms of any injunction granted must be sufficiently certain to enable the employee to comply meaningfully with the injunction.

108 In *Buckman Laboratories*,[141] the plaintiffs had sought an injunction against disclosure of confidential information. In their summons, the plaintiffs did not identify the exact types of information covered by the prospective injunction. Instead, the plaintiffs prayed for an injunction that was cast in very wide language, *ie*, that the defendant refrain from "using and/or

137 *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 at [109].
138 [2010] EWHC 484 (QB).
139 *Tullett Prebon plc v BGC Brokers LP* [2010] EWHC 484 (QB) at [224].
140 *Tullett Prebon plc v BGC Brokers LP* [2010] EWHC 484 (QB) at [225].
141 *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] SGHC 17.

disclosing any confidential information acquired by the defendant during the course of his employment by the plaintiffs and/or any trade secrets of the plaintiffs including (but without prejudice to the generality of the foregoing) all planning and other confidential information relating to the nature, conduct, financing, products, services, markets, employees or customers of any business of the plaintiff".[142] The court noted that the plaintiffs had repeated the wording of the confidentiality clause in the employment contract.[143]

109 The court (Prakash J) held that an injunction in such wide terms would stand on its own and not be impliedly restricted to whatever the plaintiffs had identified in their supporting affidavit as information sought to be protected. Such an injunction would be embarrassing and oppressive to the defendant because of its vague and wide scope. The defendant would not know how to comply with it and would face the risk of being cited for contempt of court.[144]

110 Similarly, in the Australian case of *Southern Cross Computer Systems Pty Ltd v Christopher Anthony Palmer*,[145] the plaintiffs sought an order restraining the defendant from, *inter alia*, soliciting any of the plaintiff's customers with a view to obtaining the custom of such customers in the business of the plaintiff's competitor.[146] The Australian court, however, stated that it was not prepared to make such an order without a *list* of the relevant customers being prepared and annexed to an order of court.[147]

142 *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] SGHC 17 at [2].
143 *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] SGHC 17 at [35].
144 *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] SGHC 17 at [35].
145 [2017] VSC 460.
146 *Southern Cross Computer Systems Pty Ltd v Christopher Anthony Palmer* [2017] VSC 460 at [31].
147 *Southern Cross Computer Systems Pty Ltd v Christopher Anthony Palmer* [2017] VSC 460 at [31].

VI. Conclusion

111 The enforceability of restrictive covenants remains a live issue in employment litigation in Singapore. Restrictive covenants pose the risk of depriving the employee of his livelihood or unnecessarily restraining trade. Hence, case law has developed strict requirements surrounding the enforcement of such restrictive covenants.

112 As demonstrated above, Singaporean, English and other Commonwealth judicial authorities have clarified the limbs of analysis in assessing the enforceability of non-compete clauses in restrictive covenants. Nevertheless, whether a restrictive covenant remains valid and enforceable or not continues to turn on the facts of each case. It is important for employers and employees alike to have regard to the considerations set out above when drafting and negotiating restrictive covenants.