

**LEGAL UPDATE**

A DREW &amp; NAPIER PUBLICATION

**CASE UPDATE****RESTRAINT OF TRADE CLAUSES IN THE CONTEXT OF A SALE OF BUSINESS***CLAAS Medical Centre Pte Ltd (formerly known as Aesthetics Associates Pte Ltd) v Ng Boon Ching* [2010] SGCA 3**Executive Summary**

The Singapore Court of Appeal has affirmed that Singapore courts will take a more liberal approach when considering restrictive covenants in the context of a sale of business, compared to a situation where such covenants are contained in a contract of employment.

**Background**

Dr Ng Boon Ching (the **"Respondent"**) is a doctor who ran a successful aesthetic medical practice. CLAAS Medical Centre Pte Ltd (the **"Appellant"**) was a company set up by six other doctors, who were its original shareholders. The six other doctors, unlike the Respondent, had no previous experience in aesthetic medicine.

In 2005, the Respondent and the six other doctors entered into a joint venture to acquire and run the Respondent's aesthetic medical practice. As part of the plan, the Respondent subscribed for shares in the Appellant and transferred his clinic business to the Appellant. The Respondent, the six doctors and the Appellant also entered into a shareholders' agreement (the **"Agreement"**) which set out the parties' rights, duties and liabilities in running the business.

Clause 11 of the Agreement provided, among other things, that any shareholder to the Agreement was precluded, for a period of 3 years following the date he ceased to hold shares in the Appellant, from competing with the Appellant (the **"Non-Competition Clause"**).

The Agreement also provided that any party who breached the Non-Competition Clause would have to pay a sum of money as liquidated damages to the Appellant (the **"Liquidated Damages Clause"**). The Respondent agreed to pay \$1 million. The other doctors agreed to pay \$700,000.

Differences arose between the parties, which led to the Respondent selling his shares in the Appellant. In April 2007, just before expiry of the 3-year period referred to in the Non-Competition Clause, he set up his own general and aesthetic medical practice.

The Respondent commenced an action against the Appellant to recover the sum of \$236,500, being loans advanced by him to the Appellant to fund its operational expenses and expansion plans. The Appellant admitted this claim but counterclaimed the sum of \$1 million from the Respondent for breach of the Non-Competition Clause.

The High Court held that the Non-Competition Clause was unenforceable as it was unnecessarily wide and was vitiated by unreasonableness. The Liquidated Damages Clause was also struck down as being a penalty clause. The Appellant appealed.

### The Court of Appeal's decision

The appeal was allowed. The court held that while the Non-Competition Clause was, in a sense unreasonably wide, the unreasonable portion could be severed so as to render the rest of the clause reasonable.

The Liquidated Damages Clause was also upheld. The court held that it was a genuine pre-estimate of the loss which the Appellant would have suffered if the Non-Competition Clause was breached by the Respondent.

#### *The Non-Competition Clause*

In deciding to uphold the Non-Competition Clause, the court took into account the following:

- *Context of the restrictive covenant* | The court emphasised that they were dealing with a restrictive covenant in the context of a sale of a business. A more liberal approach would be taken in such a context as compared to a situation where such a clause is contained in an employment contract. This is because there is likely to be more equality of bargaining power in a sale of business.
- *Existence of a legitimate proprietary interest* | The Non-Competition Clause *per se* was not contrary to public policy as there was a clear proprietary interest to be protected. The Respondent was paid for the sale of his goodwill to the Appellant and should not be permitted to remove parts of this goodwill by resuming practice immediately after leaving the Appellant.
- *Reasonableness of the Non-Competition Clause* | The court felt that the “blanket restriction” against the Respondent engaging in anything that came under the rubric “aesthetic medicine” was clearly wider than necessary to protect the aesthetic medicine business which had been acquired by the Appellant.

The Appellant was entitled to be protected against the possibility that it would lose “diehard customers” of the Respondent in the event that the Respondent resumed medical practice in aesthetic medicine after leaving the Appellant. However, there was no need or justification to prevent the Respondent from engaging in other forms of aesthetic medicine for which he did not have a clientele at the time when he sold the business to the Appellant.

The court was of the view that the first part of the definition of “aesthetic medicine”, which referred to the specific areas of aesthetic medicine practiced by the Respondent and later by the Appellant, constituted the legitimate aspects of goodwill which the Appellant paid for and therefore should be protected.

It applied the doctrine of severance and removed the phrase “and all procedures and treatment as understood by aesthetic medicine”, while upholding the rest of the definition as reasonable.

- *Geographical area covered by the Non-Competition Clause* | In light of the goodwill established by the Respondent with his “diehard patients”, who would follow him wherever he was located, a general restraint over the whole of Singapore was clearly warranted, otherwise the goodwill in aesthetic medicine which the Respondent had sold to the Appellant would be seriously undermined.
- *Period of restraint* | The Respondent had an established reputation in aesthetic medicine. 35% of the revenue-generating patients were the Respondent’s “diehard patients”. There was also evidence to show that the 3 year period of restraint had been proposed by the Respondent. In the circumstances, the 3 year period of restraint was reasonable.

#### *The Liquidated Damages Clause*

The court held that the sum of \$1 million was a genuine pre-estimate of the damages which the Appellant could have suffered on account of the Respondent breaching the Non-Competition Clause.

The fact that the Liquidated Damages Clause prescribed a lower sum of \$700,000 as liquidated damages payable for a similar breach by any of the other doctors further showed that the parties had “carefully considered and calibrated” the liquidated damages payable. The higher amount payable by the Respondent “reflected the greater expertise and goodwill which the Respondent has in the field of aesthetic medicine”.

#### **Comment**

This case illustrates the fact that the Singapore courts will treat non-competition clauses entered into in the context of a commercial or business undertaking differently from those entered into in employment contracts.

The general philosophy behind this approach is that employees, who are often in unequal bargaining positions and may be forced to accept onerous non-competition obligations which may restrict their ability to earn a livelihood, need more protection. Where parties who bargained contractual terms are on an equal footing, the courts would be more willing to enforce the non-competition clause.

The Singapore Court of Appeal has also demonstrated a willingness to uphold non-competition clauses in settlement agreements, where the non-competition clause is part and parcel of a negotiated package (see *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663).

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the litigation and dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors' profiles on our [website](#)), or:

**Indranee Rajah, SC**

Director (Litigation & Dispute Resolution)

T: +65 6531 4100

E: [indranee.rajah@drewnapier.com](mailto:indranee.rajah@drewnapier.com)

*The contents of this update are only intended to provide general information on the subject covered. Nothing in this publication should be treated as specific professional legal advice concerning any particular business, operational or other situations with which you might be faced. Drew & Napier LLC accepts no liability for, and does not guarantee the accuracy of, the information contained in this publication, and does not accept any liability for any loss or damage arising from any reliance thereon.*

## OUR BUSINESS GROUPS AND PRACTICE AREAS

**BANKING/GENERAL FINANCE**

**David Ang**  
T +65 6531 2236  
F +65 6535 4864  
E david.ang@drewnapier.com

**Valerie Kwok**

T +65 6531 2222  
F +65 6535 4864  
E valerie.kwok@drewnapier.com

**Sandy Foo**

T +65 6531 4118  
F +65 6535 4864  
E sandy.foo@drewnapier.com

**BIOMEDICAL SCIENCES**

**Tony Yeo**  
T +65 6531 2512  
F +65 6220 0324  
E tony.yeo@drewnapier.com

**BUILDING & CONSTRUCTION**

**Tan Liam Beng**  
T +65 6531 4139  
F +65 6533 3591  
E liambeng.tan@drewnapier.com

**CAPITAL MARKETS**

**Sin Boon Ann**  
T +65 6531 2206  
F +65 6535 4906  
E boonann.sin@drewnapier.com

**Petrus Huang**

T +65 6531 2208  
F +65 6535 4906  
E petrus.huang@drewnapier.com

**CHINA BUSINESS GROUP**

**David Chin**  
T +65 6531 2304  
F +65 6535 1952  
E david.chin@drewnapier.com

**COMPETITION LAW**

**Cavinder Bull, SC (contentious)**  
T +65 6531 2416  
F +65 6533 3591  
E cavinder.bull@drewnapier.com

**Lim Chong Kin (non-contentious)**

T +65 6531 4110  
F +65 6535 4864  
E chongkin.lim@drewnapier.com

**CORPORATE**

**David Ang**  
T +65 6531 2236  
F +65 6535 4864  
E david.ang@drewnapier.com

**Gary Pryke**

T +65 6531 4104  
F +65 6535 4864  
E gary.pryke@drewnapier.com

**OTHER OFFICES****Drewmarks Patents & Designs (Malaysia) Sdn Bhd**

9th floor  
Bangunan Getah Asli (Menara)  
148 Jalan Ampang  
50450 Kuala Lumpur, Malaysia  
T +603 2162 2522/2162 2529  
F +603 2162 2804  
E drewmark@tm.net.my

**CORPORATE (cont'd)**

**Sin Boon Ann**  
T +65 6531 2206  
F +65 6535 4906  
E boonann.sin@drewnapier.com

**Yeo Wee Kiong**

T +65 6531 2500  
F +65 6535 4864  
E weekiong.yeo@drewnapier.com

**CORPORATE INSOLVENCY & RESTRUCTURING**

**Sushil Nair**  
T +65 6531 2410  
F +65 6533 9029  
E sushil.nair@drewnapier.com

**Manoj Sandrasegara**

T +65 6531 4156  
F +65 6533 9029  
E manoj.sandra@drewnapier.com

**EMPLOYMENT & IMMIGRATION**

**Indranee Rajah, SC**  
T +65 6531 4100  
F +65 6532 7149  
E indranee.rajah@drewnapier.com

**FAMILY & MATRIMONIAL**

**Randolph Khoo**  
T +65 6531 2418  
F +65 6532 7149  
E randolph.khoo@drewnapier.com

**FUND MANAGEMENT, REIT & PRIVATE EQUITY**

**Petrus Huang**  
T +65 6531 2208  
F +65 6535 4906  
E petrus.huang@drewnapier.com

**INSURANCE & REINSURANCE**

**Gary Pryke**  
T +65 6531 4104  
F +65 6535 4864  
E gary.pryke@drewnapier.com

**INTELLECTUAL PROPERTY**

**Dedar Singh Gill**  
T +65 6531 2507  
F +65 6533 0694  
E dedar.singh@drewnapier.com

**Cecilia Girvin**

T +65 6531 2510  
F +65 6533 0694  
E cecilia.girvin@drewnapier.com

**INTERNATIONAL ARBITRATION**

**Davinder Singh, SC**  
T +65 6531 2403  
F +65 6532 7149  
E davinder.singh@drewnapier.com

**Jimmy Yim, SC**

T +65 6531 2504/2505  
F +65 6533 9029  
E jimmy.yim@drewnapier.com

**LITIGATION**

**Davinder Singh, SC**  
T +65 6531 2403  
F +65 6532 7149  
E davinder.singh@drewnapier.com

**Jimmy Yim, SC**

T +65 6531 2504/2505  
F +65 6533 9029  
E jimmy.yim@drewnapier.com

**Indranee Rajah, SC**

T +65 6531 4100  
F +65 6532 7149  
E indranee.rajah@drewnapier.com

**PROJECT FINANCE**

**Gary Pryke**  
T +65 6531 4104  
F +65 6535 4864  
E gary.pryke@drewnapier.com

**Valerie Kwok**

T +65 6531 2222  
F +65 6535 4864  
E valerie.kwok@drewnapier.com

**Sandy Foo**

T +65 6531 4118  
F +65 6535 4864  
E sandy.foo@drewnapier.com

**PROPERTY**

**Zennifa Rahim**  
T +65 6531 2392  
F +65 6535 1952  
E zennifa.rahim@drewnapier.com

**SHIPPING & INT'L TRADE**

**Ian Koh**  
T +65 6531 2436  
F +65 6533 3591  
E ian.koh@drewnapier.com

**TAX & PRIVATE CLIENT SERVICES**

**Ong Sim Ho**  
T +65 6531 2250  
F +65 6535 4864  
E simho.ong@drewnapier.com

**TMT**

**Lim Chong Kin**  
T +65 6531 4110  
F +65 6535 4864  
E chongkin.lim@drewnapier.com

**TRANSNATIONAL & CROSS-BORDER WORK**

**Julian Kwek**  
T +65 6531 2485  
F +65 6533 9029  
E julian.kwek@drewnapier.com

**PT Drewmarks Konsultama**

Correspondence address:  
20 Raffles Place  
#17-00 Ocean Towers  
Singapore 048620  
T +65 6531 2503/6531 2504  
F +65 6533 0694  
E ip@drewnapier.com

**DrewCorp Services Pte Ltd**

20 Raffles Place  
#09-01 Ocean Towers  
Singapore 048620  
ROC No. 200102492H  
T +65 6531 2266  
F +65 6533 1542 / 6533 7649  
E services@drewcorpservices.com