

LEGALUPDATE

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CASE UPDATE**SINGAPORE COURT OF APPEAL RESTATES PRINCIPLES RELATING TO RESTRAINT OF TRADE CLAUSES*****Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2007] SGCA 53****Executive Summary**

The Singapore Court of Appeal has upheld the validity of a non-solicitation of employees clause (the “**Non-Solicitation Clause**”) in an employee’s termination contract -- a move that partially reverses the earlier decision of the Singapore High Court in *Wong Bark Chuan, David v Man Financial (S) Pte Ltd* [2007] 2 SLR 22. The earlier High Court decision was examined in Drew & Napier LLC’s Legal Update dated 29 January 2007. Our previous update may be accessed [here](#).

The Court of Appeal upheld the Non-Solicitation Clause because it satisfied the tests of protecting a legitimate business interest, and being reasonable both in the interests of the parties and the public.

The Court of Appeal, however, concurred with the High Court’s decision not to uphold the employee’s non-competition covenant (the “**Non-Competition Clause**”) because the company had failed to show that the Non-Competition Clause protected a legitimate proprietary interest, and it was also unreasonable as its scope was too wide.

Existence of a Legitimate Proprietary Interest

Prior to this decision, the validity of clauses prohibiting solicitation of employees was an open question because it was not clear if they protected a business interest recognised by law.

In an important move, the Singapore Court of Appeal has now ruled that the maintenance of a stable and trained workforce is a legitimate proprietary interest that can be protected by a non-solicitation clause. This is a significant development because the existence of a legitimate proprietary interest deemed worthy of protection by the courts is a pre-condition to the validity of a restrictive covenant.

It was held, on the facts, that the employee, by virtue of his position and influence as Chief Executive Officer of the company, possessed confidential knowledge acquired in the course of his employment that enabled him to solicit the employment of other employees after his departure.

However, the existence of a legitimate business interest is not enough. The employer must go on to show that the restrictive covenant is reasonable in the interests of the parties and the public.

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The Non-Solicitation Clause

The Court of Appeal held that the Non-Solicitation Clause was reasonable, taking into account the following factors:

- *Benefit of negotiations:* The fact that the Non-Solicitation Clause had been negotiated at length with the benefit of legal advice weighed heavily with the court. It was material that both parties had considered carefully, and had been satisfied with, the final terms of the contract before it was signed. It was therefore not open to the employee to now argue that the duration of the restraint under the Non-Solicitation Clause was unreasonable.
- *Breadth of the restraint:* The court held that the Non-Solicitation Clause was reasonable in scope because the clause, taken in *context*, was intended to prohibit only the solicitation of the company's senior staff, particularly those who had been in contact with the employee during his tenure as Chief Executive Officer. It was not intended to apply to peripheral support staff with whom he was not likely to have had direct contact.
- *Consideration:* The employee had received consideration in the form of substantial post-employment benefits (to which he would not otherwise have been legally entitled) in return for undertaking the restrictive covenants in the contract. This was a relevant consideration to be taken into account when assessing the reasonableness of the restrictive covenants.

The Non-Competition Clause

In contrast, the Court of Appeal declined to uphold the Non-Competition Clause, agreeing with the High Court that there was insufficient evidence to demonstrate that the Non-Competition Clause protected an underlying legitimate proprietary interest.

The business interest the company had asserted that the Non-Competition Clause sought to protect was the misuse of highly confidential information. However, the clause made no reference to the use of confidential information, which meant that the Non-Competition Clause was intended to apply irrespective of whether the employee had used confidential information.

The High Court further noted that there was already another clause which prohibited the employee from contacting clients of the company. This would protect the trade connections and would not be the "legitimate proprietary interest" which the company was seeking to protect under the Non-Competition Clause.

The Court of Appeal also agreed with the High Court judge that the Non-Competition Clause was "*far too wide*", particularly with regard to the area covered. The clause was so broad as to even prohibit the employee from purchasing shares in a competitor listed on a stock exchange.

Restraint of Trade Clauses in Settlement Agreements

The Court of Appeal also clarified that restrictive covenants contained in a settlement agreement will be upheld if the settlement agreement relates to the settlement of a prior dispute over a covenant in restraint of trade in an existing contract and is not tainted by one or more vitiating factors.

Comment

This case reaffirms that there is no “one size fits all” restrictive covenant. Each case depends on its own facts. To be valid, a restrictive covenant must protect a legitimate business interest and be reasonable. The issue of reasonableness cannot be addressed by using any formulaic “cookie cutter” approach. The court will, in each case, examine all the circumstances as a whole in determining reasonableness.

In practical terms, what this means is that restrictive covenants must be customised for specific industries. Employers who enter into contracts with restrictive covenants should, at the outset, ascertain what is no more than reasonably necessary to protect its legitimate business interests.

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:

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