



Beyond non-competes: Protecting your business from a departing employee

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LEGAL UPDATE

In this Update

In *3D Infosystems Pte Ltd v Voon South Shiong*, the Court awarded an employer substantial damages to be paid by a former senior employee and the competitor that the employee joined, despite finding that the post-termination restrictive covenants were unenforceable.

In light of this case and other current developments relating to non-competition clauses, we discuss various other ways which employers may consider to protect their businesses against dangers posed by departing employees.

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Introduction

In *3D Infosystems Pte Ltd v Voon South Shiong* [2024] SGHC 237, an employer obtained judgment for S\$445,685 against a former senior employee who had left to join a competitor for various breaches of the employment contract, breach of the implied duty of good faith and fidelity and breach of confidence. The Court also ordered both the competitor and the employee to pay a further S\$433,741 in damages for inducing breaches of contract of other employees, and the tort of conspiracy.

This update summarises the case and discusses how employers can protect themselves when employees leave to join a competitor.

Background

Voon South Shiong (“**Voon**”) was a senior employee of 3D Infosystems Pte Ltd (“**3D Infosystems**”), a company involved in the supply, installation and implementation of IT systems. During the course of his employment, Voon had substantial contact with 3D Infosystems’ clients and suppliers, and was heavily involved in the hiring, promotion and remuneration of sales employees.

While still an employee of 3D Infosystems, Voon met with Sng Sheau Huei (“**Sng**”) and discussed setting up a competitor business, Sunway Digital Pte Ltd (“**Sunway Digital**”). He sent detailed business plans to Sng that included details of 3D Infosystems’ employees, client base, and projections of the income from these clients. Voon also disclosed 3D Infosystems’ pricing strategy for certain projects to Sunway Digital, and prepared quotations for Sunway Digital’s use to bid for projects.

Voon subsequently resigned from 3D Infosystems. After leaving 3D Infosystems, using a business that he owned, JMPL, Voon contracted with Sunway Digital to provide business development services. A further 8 employees also left to join Sunway Digital (“**Former Employees**”).

3D Infosystems claimed that Voon was liable for, among other things, breach of the confidentiality, non-competition, non-solicitation and non-conflict clauses in his employment contract, breach of implied duties of good faith and fidelity, and breach of confidence.

In addition, 3D Infosystems claimed that Voon and Sunway Digital induced the Former Employees to breach their contractual confidentiality obligations and that there was a conspiracy in relation to events surrounding Voon’s departure from 3D Infosystems.

High Court's Decision

The Court found that Voon's post-employment non-competition and non-solicitation obligations were unenforceable. The non-competition clause was overly broad because it prohibited Voon from any employment or engagement which "*by the nature of the employment or engagement will be detrimental or may be perceived to be detrimental to the best interest of [3D Infosystems]*", and went beyond what was necessary to protect 3D Infosystems' interest in maintaining its trade connections.

The non-solicitation clause prohibited Voon from soliciting "*any employee*", but Voon's responsibilities were limited to managing sales employees, and there was no evidence that all of 3D Infosystems' employees were integral to its operations or difficult to replace. Therefore, the non-solicitation clause was not reasonable.

However, the Court held Voon liable for breaching his express contractual confidentiality and non-conflict obligations, his implied duties of good faith and fidelity, and breach of confidence.

The Court found that that, while still an employee of 3D Infosystems, Voon prepared and passed confidential information such as business plans, pricing strategy, details of 3D Infosystems' clients and financial information to Sunway Digital, in breach of Voon's confidentiality obligations and such actions were also a breach of confidence. Moreover, as Voon had collaborated with and assisted Sunway Digital's business while he was still an employee of 3D Infosystems, he also breached his non-conflict obligations. These facts also gave rise to a breach of Voon's implied duty of good faith and fidelity.

Sunway Digital was found liable for unlawful means conspiracy because it had worked with Voon to set up Sunway Digital's business by using 3D Infosystems' confidential information, diverting 3D Infosystems' customers and opportunities, and poaching the Former Employees in breach of Voon's obligations to 3D Infosystems.

Commentary

This case is a useful reminder that employees continue to owe a duty of good faith and fidelity to their employers, including not to compete and/or disclose confidential information to competitors, up until the end of their employment. Where an employer believes that confidential information has been divulged by a departing employee, the investigation should start with whether the departing employee has breached his duties in the lead up to his departure.

Where the employment has ended or is coming to an end, it is common for employers to think primarily of non-competition and non-solicitation provisions to protect their business from departing employees. However, this case illustrates that there are other, possibly more effective, ways of protecting an employer's legitimate interests. The reasonableness of post-employment restraints may be circumscribed by other terms in an employment contract. There are cases in which a non-competition restriction was found to not be necessary to protect the employer's legitimate proprietary interests in its trade secrets, trade connections and workforce because those interests were already covered by separate confidentiality obligations, client non-solicitation restrictions, and employee non-solicitation restrictions.

There has also been a recent wave of scrutiny in various jurisdictions around the world, including in the United States and the United Kingdom, about the enforceability of non-competition restrictions.

Non-competes are also receiving attention in Singapore. The Ministry of Manpower and its tripartite partners are finalising a set of guidelines on the inclusion of restrictive clauses in employment contracts.¹ There is already guidance that employers should generally avoid including restraint of trade clauses in employment contracts for lower-paying jobs.²

¹ Ministry of Manpower, "Written Answer to PQ on Regulating Non-Compete Clauses in Employment Contracts" (5 February 2024), www.mom.gov.sg/newsroom/parliament-questions-and-replies/2024/0205-written-answer-to-pq-on-regulating-non-compete-clauses-in-employment-contracts.

² Ministry of Manpower, "Written Answer by Minister for Manpower Dr Tan See Leng to PQ on Inclusion of Restraint of Trade Clauses in Labour Contracts for Non-Top Management Positions" (21 April 2023), www.mom.gov.sg/newsroom/parliament-questions-and-replies/2023/0421-written-answer-to-pq-on-inclusion-of-restraint-of-trade-clauses-in-labour-contracts

These developments sharpen the focus on the suite of contractual protections, both during and post-employment, that employers should consider to guard against the dangers to their businesses arising from employee departures. These protections include –

- Confidentiality.
- Non-dealing restrictions.
- Non-employment restrictions (which prevents a former employee from employing or engaging a company's employees, which might help to mitigate difficulties with proving solicitation).
- Non-conflict obligations (such as the clause in Voon's employment contract).
- Duty of good faith and fidelity.

These clauses do not replicate the effect of a post-termination non-competition provision, but they can be valuable in certain circumstances (e.g. where the enforceability of the non-competition provisions is unclear), and in the context of the ongoing debate about the public policy justification for enforcing non-competes.

Employers should also consider other non-contractual options to mitigate the potential harm that may be caused by a rogue employee joining a competitor. For example, employers may consider:

- restricting access to sensitive, confidential information to company devices;
- terminating access to company systems and confidential information when an employee gives notice of resignation;
- placing the employee on garden leave;
- carrying out forensic analysis of an employee's company devices if there is suspicion that the employee has taken confidential information or provided confidential information to a competitor; and
- informing a competitor of post-employment obligations which the former employee may be bound by.

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