Ng Boon Ching v Claas Medical Centre Pte Ltd
[2009] SGHC 54

Case Number : Suit 745/2007

Decision Date : 02 March 2009

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Rabi Ahmad s/o M Abdul Ravoof (Rabi Ahmad & Co) for the plaintiff; Josephine Chong and Aqbal Singh (UniLegal LLC) for the defendant

Parties : Ng Boon Ching — Claas Medical Centre Pte Ltd

Contract – Illegality and public policy – Restraint of trade – Agreement containing restrictive covenants – Determination of reasonability of restraint by court – Considerations of protection of goodwill sold through sale of business – Whether there was prima facie breach of non-competition clause – Whether legitimate proprietary interest existing – Whether restrictive covenants reasonable in interests of parties and in interests of public

Contract – Privity of contract – Contracts (Right of Third Parties) Act (Cap 53B, 2002 Rev Ed) – Defendant not party to November Agreement – Whether defendant could rely on s 2 Contracts (Rights of Third Parties) Act

Contract – Restraint of trade – Severance – Whether severance of unenforceable portion possible – Whether severance altered meaning of restrictive covenant

2 March 2009 Judgment reserved

Belinda Ang Saw Ean J:

1 In this action, the plaintiff, Dr Ng Boon Ching, is suing the defendant, Claas Medical Centre Pte Ltd ("Claas") for the total sum of $236,500 being the balance of outstanding loans owed by Claas. This claim is admitted by Claas who seeks to set off the debt against its counterclaim of $1m for breach of cl 11 of the Shareholders Agreement dated 15 November 2005 ("November Agreement"). The defendant therefore in its counterclaim seeks judgment for the sum of $763,500.

2 Clause 11 is described as a non-competition clause. It is observed at the outset that cl 11 is contained within a shareholders' agreement. I will refer to the parties to the November Agreement as "the original shareholders" or "the original parties". The original parties to the November Agreement were the plaintiff and six other doctors, namely, Drs Gerard Tan, Wong Weng Hong, Tan Yi Ryh, Cindy Yang, Liew Kou Chuen and Lim Wee How ("the six doctors"). By cl 11, the original parties were precluded for a period of three years, following the date when any one shareholder ceased to hold shares in Claas from, *inter alia,* competing with Claas; soliciting or dealing with its customers or, soliciting or enticing its employees. In default, the offending party has to pay liquidated damages to Claas. In the case of the plaintiff, he promised to pay $1m as liquidated damages. The others agreed to pay as liquidated damages the sum of $700,000.

3 It is not in dispute that in April 2007, just before the expiry of the period stipulated in the restrictive covenant relied upon by the defendant, the plaintiff set up his own general and aesthetic medical practice in the name of Dr B C Ng Aesthetics at No. 1 Newton Road, #01-29 Goldhill Plaza, Singapore 308899. The clinic was said to be operational with effect from 7 May 2007.

Background facts

4 The details of the background facts leading to this dispute are straightforward and they are gathered from the testimonies and closing submissions of both sides.

5 The plaintiff is a medical practitioner of more than 25 years standing. In April 1984, he started his clinic known as B C Ng Clinic and Surgery. He later diversified his practice to include the practice of aesthetic medicine. His clinic was later renamed Dr. B C Ng Laser Surgery. In 1993, he relocated his clinic to Chinatown Point.

6 The plaintiff was also the sole proprietor of AHA Centre which he started in 1996. AHA Centre is in the business of import, distribution and sale of aesthetic laser and intense pulsed light machines and skin care products. Dr Ng sold new and used laser and intense pulsed light machines to medical practitioners whom he also trained in the use of such machines. It was through this distributorship business that the plaintiff got to know Dr Lim Wee How ("Dr Lim") of Woods Medical Clinic.

7 In 2004, the plaintiff learned from Dr Lim that a group of six general medical practitioners were keen to set up an aesthetic medicine clinic in the Orchard Road or Cairnhill area and they were interested in acquiring several laser and/or intense pulsed light machines. After some initial hesitation, the plaintiff eventually met with Dr Wong Weng Hong ("Dr Wong"), Dr Gerard Tan and Dr Cindy Yang ("Dr Yang") to discuss their interest in acquiring various types of laser and intense pulsed light machines for their newly incorporated company known as Aesthetics Associates Pte Ltd, the former name of the defendant.

8 The discussions took a different turn when the six doctors decided to interest the plaintiff into entering into a joint venture with them. This led to the plaintiff becoming a shareholder of Claas by acquiring 20% of the paid up capital of Claas. The six other doctors invested $400,000 into Claas and collectively held the remaining 80% of the equity of the company. The plan back then was for the plaintiff to assist the six doctors in building a medical clinic in the Cairnhill area, while continuing to run his clinic at Chinatown Point.

9 The plan changed once again as the six doctors decided not to set up an aesthetic medical clinic in the Cairnhill area. The negotiations focused on the acquisition of the plaintiff's clinic at Chinatown Point and his distributorship business under AHA Centre. On or about 14 March 2005, the plaintiff incorporated BCNG Holdings Pte Ltd ("BCNG Holdings") and transferred the clinic at Chinatown Point as well as the distributorship business under AHA Centre to BCNG Holdings. Both parties negotiated and agreed, *inter alia*, that:

a) The value of BCNG Holdings was fixed at $3.2m;

b) The plaintiff would sell 60% of his shareholding in BCNG Holdings to Claas for $1.92m;

c) As Claas had a paid up capital of $500,000 and the other shareholders did not have $1.92m to purchase the plaintiff's 60% shareholding, the plaintiff agreed to arrange for a loan of $1.328m from United Overseas Bank Ltd ("UOB") so that Claas could raise the funds;

d) The plaintiff agreed to provide the necessary collaterals by securing the loan against his personal fixed deposit of $600,000 with UOB ("the first fixed deposit").

10 The plaintiff and the six doctors duly entered into a Shareholders Agreement on 6 April 2005("the April Agreement"). This April Agreement governed the rights, duties and liabilities of all the parties in relation to their participation in the running of BCNG Holdings. Notably, Claas was a party to this April Agreement. The terms provided, *inter alia,* for:

a) The plaintiff's guarantee that the Chinatown Point clinic would achieve an annual net profit (before tax) of $192,000 for two years commencing from 16 April 2005;

b) The plaintiff's guarantee that there would be a total gross turnover of $1.4m from his clinical work at the Chinatown Point clinic within the two year period;

c) The other shareholders' guarantee that there would be a total gross turnover of $120,000 from their clinic work at the Chinatown Point clinic for the first six months from 16 April 2005 to 15 October 2005;

d) In the event the other shareholders decided to expand BCNG Holdings' operation beyond the clinic at Chinatown Point, the plaintiff would be released from the aforementioned guarantees; and

e) A restraint of trade provision (Cl 11)[note: 1].

11 By cl 8.3(a) of the April Agreement, Claas was given an option of two years to purchase the plaintiff's remaining 40% shareholding in BCNG Holdings at an agreed sale price of $1.28m. In the event Claas did not exercise the option, the plaintiff could purchase the defendant's 60% shareholding in BCNG Holdings at an agreed price of $700,000. Once all the shares in BCNG Holdings were held by only one shareholder, the other shareholders would cease to be bound by the restraint of trade provision (see cl 12.1(i) of the April Agreement).

12 Following the defendant's acquisition of the plaintiff's 60% shareholding in BCNG Holdings, the plaintiff began to train the other shareholders in aesthetic medicine and surgical procedures. By 16 April 2005, some of them began to practise aesthetic medicine at the Chinatown Point clinic.

13 Seven months later, the six doctors decided to proceed with the acquisition of the plaintiff's remaining 40% shareholding in BCNG Holdings. Once again, as they did not have funds, the plaintiff agreed to arrange for a loan of $1.28m ("the second loan") from UOB. This second loan was secured against the plaintiff's personal fixed deposit of $600,000 with UOB ("the second fixed deposit"). The plaintiff had initially agreed to pledge it for a period of one year but that was changed to a period of three years with effect from 15 November 2005.

14 After Claas successfully acquired the plaintiff's entire shareholding in BCNG Holdings, pursuant to cl 8.7 of the April Agreement, another Shareholders Agreement dated 15 November 2005 ("the November Agreement") was entered into by the plaintiff and the six doctors. It is pertinent to note that unlike the April Agreement to which Claas was a party to, Claas was *not* a party to the November Agreement. This November Agreement was intended to set out the terms and conditions in which the seven original shareholders would participate in Claas. In particular, the November Agreement recorded the administrative and managerial, financial and other arrangements agreed between them in relation to their participation in Claas, and the manner in which the affairs of Claas were to be conducted. A restraint of trade provision similar to the one in the April Agreement was included.

15 From 16 April 2005, Claas took over the running of the clinic at Chinatown Point. In May 2005, the clinic name was changed to BCNG Laser & Medical Aesthetics. In January 2006, Claas opened a branch clinic at OUB Centre ("the OUB Centre clinic").

16 On or about 20 January 2006, a Supplemental Shareholders Agreement was entered into between the seven original shareholders of Claas and Dr Joseph Soh. That was when Dr Soh acquired

some shares in Claas. By that Supplemental Shareholders Agreement, Dr Soh agreed, *inter alia*, to be bound by the terms and conditions of the November Agreement. There was thus not only a change in the composition of shareholders, the shareholding structure also changed. The plaintiff's shareholding in Claas increased to 23% and the six doctors and Dr Soh held 77% of the paid up capital of Claas.

17 By the middle of 2006, differences began to surface between the plaintiff and the other original shareholders including Dr Soh. It is not necessary to go into the areas of disagreement but suffice it to say, the seeds were sown for the plaintiff's subsequent decision to exit the company. In July 2006, Dr Wong and Dr Lim indicated their intention to sell their shares in Claas. On 24 August 2006, the plaintiff sent an email to the other shareholders of Claas informing them that he was looking to sell his entire 23% shareholding in Claas. On or about 28 August 2006, the plaintiff gave notice to the Board of Directors of Claas of his intention to sell his 23% shareholding in Claas and he also stated that the intending purchaser must attend to the release of his $1.2m fixed deposits (*i.e.* the first fixed deposit and the second fixed deposit). On or about 29 August 2006, the plaintiff's email to the other shareholders informed them of his decision to withdraw his permission for the clinic to use as its hotline mobile telephone number 96151515 and www.bcng.com.sg as its website.

18 On or about 16 September 2006, Dr Wong sent an email to Dr Ng informing him that Healthway Medical Group ("HMG") was keen on acquiring his 23% shareholding in Claas as well as the shares of the other shareholders. Furthermore, HMG would be able to attend to the release of the $1.2m fixed deposits. On or about 18 September 2006, the plaintiff and Dr Wong met to discuss HMG's intended acquisition of Claas and to the release of his $1.2m fixed deposits. Negotiations were also ongoing between a Mr Fan Kow Hin ("Mr Fan") of HMG and the other shareholders. On or about 18 September 2006, Dr Gerard Tan sent an email to Mr Fan confirming their understanding relating to HMG and/or Universal Healthway's acquisition of the entire shareholding of Claas which, *inter alia*, involved HMG and/or Universal Heathway buying over the plaintiff's 23% shareholding in Claas and attending to the release of his $1.2m fixed deposits. On or about 23 September 2006, Mr Fan emailed to Dr Gerard Tan the proposed Memorandum of Understanding ("the MOU") on HMG and/or Universal Healthway's acquisition of Claas. As it transpired, the plaintiff ended up selling his stake to Dr Wong. The plaintiff was ordered in OS No. 1972 of 2006/Q to sell his entire shareholding in Claas comprising 115,000 shares to Dr Wong at $0.34 per share based on the valuation obtained from independent valuers. On or about 17 March 2007, the plaintiff transferred all his Claas shares to Dr Wong. He resigned as a director of Claas and BCNG Holdings on the same day. Whilst the plaintiff was thereafter still interested in working with Claas, he was not happy with the new working conditions on offer. On 21 March 2007, he left BCNG Holdings.

19 Following the plaintiff's departure from Claas, on 11 April 2007, Unimedic Pte Ltd ("Unimedic"), a company under the HMC umbrella, acquired 499,993 shares representing 99.9% of the shareholdings in Claas from the six doctors and Dr Soh save for seven shares still registered in their respective names.

20 As at 22 December 2006, the plaintiff had advanced interest-free loans amounting to $286,500 to Claas. The loans were to fund its operational expenses and expansion plans. In addition to interest-free loans advanced to Claas, the plaintiff had at the request of the Board of Directors of Claas also given personal guarantees in connection with the several other loans that Claas and AHA Centre had obtained from UOB, Hong Leong Finance Ltd and Standard Chartered Bank. Claas repaid $50,000 of the loans leaving a balance sum of $236,500. Claas had also not attended to the release of the $1.2m fixed deposits and discharge of the aforementioned guarantees.

21 As stated, just before the expiry of the restrictive covenant relied upon by the defendant, the plaintiff set up his own general and aesthetic medical practice in the name of Dr B C Ng Aesthetics. Prior to that, he placed advertisements announcing his departure from BCNG Holdings and plans to set

up his aesthetic medicine clinic.

The issues

22 Having regard to the evidence that I have heard and the submissions made by counsel there are four principal issues between the parties. I set them out in the order that seems to be the most logical.

1. Does the defendant fall within s 2 of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed)?

2. Has the plaintiff been discharged or released from cl 11 by reason of the termination of the November Agreement?

3. Is cl 11 an enforceable restraint on the plaintiff's trade? In this inquiry, three conventional sub-issues arise: They are:

(a) Is cl 11 supported by consideration?

(b) Is cl 11 unenforceable as being in restraint of trade?

(c) If cl 11 is in part unenforceable as being an unreasonable restraint of trade, can and should the unreasonable restriction be severed from the remainder of the paragraph?

4. Does cl 11(c) constitute a penalty or is it enforceable as a genuine pre-estimate of the defendant's damages?

Issue I – Does the defendant fall within s 2 of the Contracts (Rights of Third Parties) Act

23 The first issue is whether the defendant can sue on the November Agreement to enforce the non-competition provision in cl 11 by relying upon the terms of the Contracts (Rights of Third Parties) Act, which came into effect on 1 January 2002. The Act creates an exception to the privity of contract rule and the rule that consideration must move from the promisee.

24 The defendant has to establish its right to sue as it was not a party to the November Agreement unlike the earlier April Agreement executed on 6 April 2005 where the defendant was a contracting party together with the same individuals who signed the November Agreement. A finding in favour of the plaintiff on this crucial threshold question will swiftly and effectively end the litigation.

25 Counsel for the defendant, Ms Josephine Chong, explained that the two agreements "formed one package together with the sale and purchase of the business" for a total of $3.2m. She further explained that under the April Agreement, the plaintiff agreed to transfer 60% of his shares in BCNG Holdings, the special purpose vehicle incorporated by the plaintiff for the sale of his practice and distributorship business in AHA Centre to Claas. The sale of his 60% shareholding in BCNG Holdings to Claas was for a sum of $1.92m. The April Agreement was not only the sale and purchase agreement, it doubled up as a shareholders' agreement to govern the relationship of the shareholders of BCNG Holdings, namely the plaintiff (40%) and Claas (60%). Under the April Agreement, all seven doctors (including the plaintiff) as original shareholders of Claas also agreed not to compete with BCNG Holdings for a period of three years after he/she ceased to be a shareholder of Claas. Claas as a corporate shareholder of BCNG Holdings also bound itself in the same manner. The original shareholders promised to pay liquidated damages to BCNG Holdings for his/her breach of the non-

competition clause.

26 It is the defendant's case that the option in cll 8.3(a) and 8.3(e) of the April Agreement imposed an obligation on Claas to buy the plaintiff's remaining 40% stake in BCNG Holdings because if it did not exercise the option within the stipulated time, the plaintiff had the right to take over from Claas, its 60% shareholding in BCNG Holdings at a discounted price of $700,000 as compared to $1.92m paid by Claas for the same block of shares (see cl 8.3(e) of the April Agreement). After Claas acquired the plaintiff's remaining 40% shareholding in BCNG Holdings, by cl 8.7 of the April Agreement "all of the existing shareholders of Claas" were contractually bound to execute a Shareholders Agreement relating to Claas in the form of the draft agreement annexed to the April Agreement as Appendix B. As to why Claas was not a named party to the November Agreement, Ms Chong confirmed that the second agreement was meant to govern the relationship of the six doctors and the plaintiff as shareholders of Claas who would by then own 100% of BCNG Holdings.

27 Specifically, cl 11 of the November Agreement prohibits the shareholders of Claas from, amongst other things, engaging in business in competition, whether directly or indirectly, with the "Business of the Company" and/or the practice of "Aesthetic Medicine". The words "Business of the Company" and "Aesthetic Medicine" are defined in the November Agreement. Clause 11 reads as follows:

> 11. NON-COMPETITION
>
> (a) All of the parties herein shall for so long as he/she remains a Shareholder [and] for a period of three (3) years after he/she shall cease to be a Shareholder of the Company, whether by himself/herself and/or jointly or together with any other person(s) and/or body (ies), whether on his/her own account and/or as agent, employee and/or servant, in any capacity whatsoever, directly or indirectly, be prohibited from: -
>
> (i) being engaged and/or interested in any trade and/or business carried on within Singapore which is similar to or in competition and/or conflict (whether directly or indirectly) with the Business of the Company and/or the practice of Aesthetic Medicine;
>
> (ii) employ, solicit and/or entice away and/or endeavour to employ, solicit and/or entice away any person(s) who is employed by the Company, and/or induce or seek to induce any such person(s) to leave his/her employment with the Company for any reasons whatsoever;
>
> (iii) solicit the custom of any person and/or body who is a customer of the Company and/or divert or seek to divert any customer of the Company away from it; and/or
>
> (iv) cause and/or permit any person directly or indirectly under his/her control to do any of the foregoing acts or things.
>
> (b) In the event that Gerard, Tan, Cindy, Liew, Lim and/or Wong shall for any reasons breach the terms of this Non-Competition clause, he/she shall be liable to pay to the Company the sum of S$700,000.00 by way of liquidated damages. It is hereby agreed that the payment of the said liquidated damages shall thereafter exempt the defaulter from the operation of this Clause herein.
>
> (c) In the event that Ng shall for any reasons breach the terms of this Non-Competition clause, he shall be liable to pay to the Company the sum of S$1,000,000.00 to the Company by way of liquidated damages. It is hereby agreed that the payment of the said liquidated damages shall thereafter exempt the defaulter from the operation of this Clause herein.

28 The defendant asserts that even though it was not a contracting party, it is entitled to rely on sub-ss (1)(a) and (b) of s 2 of the Contracts (Rights of Third Parties) Act. Section 2 provides:

> (1) Subject to the provisions of this Act, a person who is not a party to a contract (referred to in this Act as a third party) may, in his own right, enforce a term of the contract if –
>
> (a) the contract expressly provides that he may; or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(b) shall not apply if, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the third party.
>
> (3) The third party shall be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.
>
> …

29 Plainly, sub-s (1)(a) of s 2 does not apply because the November Agreement did not expressly provide that Claas may enforce the terms of cl 11 (a) and (c) directly against the plaintiff. The issues before me are:

> (1) Whether cl 11(c) purports to confer a benefit on Claas within sub-s (1)(b) of s 2 ; and if so
>
> (2) Whether sub-s (1)(b) is inapplicable because of sub-s (2) of s 2 since on a proper construction of the November Agreement it appears that the parties did not intend the term to be enforceable by Claas.

30 For sub-s 1(b) of s 2 to apply, sub-s (3) of s 2 has also to be satisfied. That subsection requires the third party to be expressly identified in the contract by name, as a member of a class or as answering a particular description but it need not be in existence when the contract is entered into. In this case, sub-s (3) is satisfied because Claas is referred to in cl 11 as the "Company". Payment of liquidated damages under cl 11(b) and cl 11 (c) leaves no doubt as to the identity of the party to whom payment is to be made and as to the amount to be paid. Ms Chong submits that as Claas paid for the business and goodwill of BCNG Holdings it was the party who would suffer loss in the event of a breach of the non-competition clause. It is pretty clear, and I so hold that the effect of the terms of cl 11 (c) purports to confer a payment benefit on Claas within sub-s 1(b) of s 2.

31 That is not the end of the matter for sub-s (2) of s 2 must also be considered. Subsection 1(b) of s 2 is inapplicable if, on a proper construction of the contract, it appears that the parties did not intend third party enforcement. In other words, as Colman J in *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2004] 1 Lloyd's Rep 38 explained, if the contract is neutral on this question, sub-s (2) does not affect the application of sub-s 1(b). Colman J in his judgment referred to Professor Andrew Burrow's article for guidance. Professor Burrows was a member of the Law Commission and he helpfully explained in his article published in [2000] LMCLQ 540 the purpose and background of the Law Commission's recommendations in relation to sub-s (2). He wrote in [2000] LMCLQ 540 at 544:

> The second test therefore uses a rebuttable presumption of intention. In doing so, it copies the New Zealand Contracts (Privity) Act 1982, s 4, which has used the same approach. It is this rebuttable presumption that provides the essential balance between sufficient certainty for

> contracting parties and the flexibility required for the reform to deal fairly with a huge range of different situations. The presumption is based on the idea that, if you ask yourself, "When is it that parties are likely to have intended to confer rights on a third party to enforce a term, albeit that they have not expressly conferred that right", the answer will be; "Where the term purports to confer a benefit on an expressly identified third party." That then sets up the presumption. But the presumption can be rebutted if, as a matter of ordinary contractual interpretation, there is something else indicating that the parties did not intend such a right to be given.

32 Counsel for the plaintiff, Mr Rabi Ahmad, contends that, on the proper construction of the November Agreement, the parties did not intend cl 11 to be enforceable by Claas and, accordingly, sub-s (1)(b) is inapplicable because of sub-s (2) of s 2. He argues that the objective of the November Agreement was only for the protection of the contracting parties as borne out by the absence of rights vested in Claas by its terms. In support of his contention, he relies on the following points.

33 First, the November Agreement superseded the April Agreement. By cl 2.1, the terms and conditions capable of surviving termination of the April Agreement were to remain binding on the parties to the November Agreement but not Claas who was not party to November Agreement. Clause 14.10 expands on cl 2.1 to say that if any term that survived the termination of the April Agreement contradicted the terms of the November Agreement, the latter terms were to prevail.

34 Second, the preamble to the November Agreement is a useful pointer in support of the plaintiff's construction. Clause D of the preamble reads:

> This Agreement sets out the terms and conditions under which the Shareholders (as defined below) will participate in the Company and records the financial, administrative, managerial and other arrangements agreed between them in relation to their participation in the Company, and the manner in which the affairs of the Company are to be conducted.

35 The November Agreement was to formally set out the expectations and obligations of the existing shareholders to the venture. Claas by then had taken over the entire business of BCNG Holdings. In contrast, Dr Gerard Tan said in cross-examination that cl 11 was a "pledge" amongst the shareholders of Claas. Coupled with that was his admission in cross-examination that liquidated damages of $1m under cl 11(c) was to compensate the other shareholders of Claas, *i.e.* himself, Dr Wong, Dr Tan Yi Ryh, Dr Lim, Dr Liew Kou Chuen and Dr Yang. That admission, so the argument develops, is clear evidence that the parties to the November Agreement did not intend cl 11 to be enforceable by Claas as it was for the benefit of the shareholders.

36 Third, is the presence of inconsistent terms such as cl 12.1(ii). By that clause, the November Agreement may be terminated if all the parties agree in writing to end it. The plaintiff submits that cl 12.1(ii) may be invoked without the concurrence of Claas and that clause evidences the parties' intention not to confer the benefit of cl 11 on Claas.

37 Of the three points made by Mr Rabi, his strongest point, objectively speaking, is the third one. I agree with Mr Rabi that cl 12.1(ii) is an inconsistent term. It is an inconsistent term capable of rebutting the presumption of intention. Another inconsistent term, in my view, is cl 14.5. It prohibits the assignment of rights and benefits under the November Agreement without the prior consent in writing of the other parties. In other words, with the consent of the parties, the shareholders could assign to a third party the benefit of liquidated damages conferred upon Claas. An assignment clause of this kind was given by Professor Burrows as an example of an inconsistent term that is sufficient to rebut the presumption of intention.

38 I come to Dr Gerard Tan's testimony that the objective of the November Agreement was for the protection of the plaintiff and the other shareholders in their capacity as individual shareholders, and not for Claas as a corporate entity. Dr Gerard Tan's evidence is admissible as it aids the construction of the contract. The terms of the agreement support the contention that the restrictive covenant could only be relied upon by the contracting shareholders. In construing the contract, the court adopts an objective approach to contractual interpretation taking into account the background facts. The background to the execution of the November Agreement was well known to everybody concerned and it must be remembered that cl 11 was contained in a shareholders' agreement between the plaintiff and the six doctors. Dr Soh was bound by the terms and enjoyed the benefits thereof by virtue of the Supplemental Shareholders Agreement dated 20 January 2006. It cannot be disputed that the November Agreement was still in existence at the time Unimedic bought 499,993 shares in Claas. There is no evidence or suggestion that Unimedic became bound by the November Agreement as if it was an original party to the agreement when it purchased shares in Claas. That being the case, Unimedic has to justify (and there is no evidence on this) how it is entitled to the benefit of the restrictive covenants through an action brought by Claas.

39 It seems to me that the restrictive covenants sought to be impugned apply only to shareholders who were parties to the November Agreement or those who have agreed to be bound by the provision when they bought shares like in the case of Dr Soh who signed the Supplemental Shareholders Agreement with the seven original shareholders on 20 January 2006. Clause D of the preamble is quite clear as to the intent of the November Agreement *vis-à-vis* the seven original shareholders. It is also clear that any new shareholder would have to agree to be subject to the terms of the November Agreement and there is provision in cl 8.4 for the purchaser to sign a deed. Clause 8.4 even made it a condition precedent to the transfer of shares to the purchaser that the purchaser agrees to be bound by the terms of the November Agreement. Given the requirement for a deed to be signed, no implied term can be read that the benefit and burden might pass to persons *i.e.* purchasers who were not the original contracting parties but whose relationship shared certain essential characteristics with the one that subsisted between the original parties.

40 In my view, a right in contract to claim liquidated damages under cl 11(b) or cl 11(c) for breach of cl 11(a) can only be relied upon by the shareholders against another to recover liquidated damages for his or her breach if *all* were bound by the November Agreement. I must also add that I have not been referred to any authority where the doctrine of restraint of trade has been successfully relied upon in relation to a contract by someone other than an "innocent" party thereto. On the facts, Unimedic, the majority shareholder of Claas was never a party to the November Agreement. As such, the underlying precondition to the right to claim the payment benefit in cl 11(c) was not satisfied. The presumption of intention is clearly rebutted.

41 Accordingly, sub-s 1(b) of s 2 is inapplicable because of by sub-s (2) of s 2. I hold that the defendant has no *locus standi* to sue the plaintiff under the November Agreement, and the counterclaim on that threshold point is dismissed with costs. As the plea of set off has failed there will be judgment for the plaintiff in the sum of $236,500 together with interest at the rate of 5.33% per annum from the date of the Writ to date of judgment and costs.

42 This conclusion effectively disposes of the counterclaim for the reasons given. But for the sake of completeness, I will shortly state my conclusions on the other points which were advanced by the parties. Suffice it to say, for the reasons below, cl 11(a) is unenforceable and as the defendant's claim falls to be considered by reference to that clause, it fails because the clause is unenforceable. The claim for liquidated damages, if the defendant had one, does not arise. But as I heard arguments on it, I should set out my conclusions.

43 Before I examine cl 11, I propose to clear the second issue which is a short point.

Issue 2 – Termination of the November agreement

44 The plea is that the plaintiff has been discharged or released from the obligations under cl 11 as the November Agreement had been terminated by reason of cll 12.1(i), 12.1(iv) and 12.2(ii). Clause 12.1 provides:

> This Agreement shall continue in full force and effect until:
>
> (i) all the Shares in the Company are held by only one (1) Shareholder; …
>
> (iv) the date of a merger or consolidation by the Company whereupon all the Shareholders of the Company become shareholders of the successor acquiring company.

Clause 12.2(ii) provides:

> A Shareholder who ceases to be a Shareholder in the Company prior to the termination of this Agreement shall cease to be bound by the terms of this Agreement, save as otherwise provided herein by this Clause.

45 The plaintiff contends that he has ceased to be a shareholder of Claas with effect from 17 March 2007 upon the transfer of all his shares in Claas to Dr Wong. In addition, the six doctors and Dr Soh became the shareholders of Universal Healthway Pte Ltd, the parent company of Unimedic. The plaintiff argues that for all intents and purposes the shareholding structure of Claas had changed and the November Agreement came to an end by virtue of cl 12.1(iv). Consequently, Claas could no longer enforce the restraint of trade provision.

46 As Ms Chong rightly pointed out, cl 12.2(ii) does not assist the plaintiff on the facts of this case. Clause 12.2(ii) is triggered and the November Agreement comes to an end if any one of the five events in cl 12.1 occurs. Ms Chong submits that there is no evidence to support the argument of a purported merger or consolidation contemplated by cl 12.1(iv). The identity of the acquiring company was not named by the plaintiff and the plaintiff has not established that *all* the shareholders of Claas have become the shareholders of the "successor or acquiring" company. By the same token, the event provided in cl 12.1(i) had not occurred. Ms Chong points out that as seven shares remained in the names of the other shareholders, the event listed in cl 12.1(i) had not occurred.

47 In response, the plaintiff contends that the non transfer of seven shares was a sham arrangement. If anything the seven shares were held on trust for shareholders, and as such, the events in cl 12.1(i) and cl 12.1(iv) had occurred. I agree with Ms Chong that there is no evidence in support of the alleged sham arrangement. The seven shares in the respective names of the six doctors and Dr Soh are in the public records of Claas and in the prospectus on the listing of Healthway Medical Group. I agree with Ms Chong that the existence of an option to purchase the remaining seven shares militates against any inference of an existing trust. Dr Tan explained that the seven shares were not sold in order to preserve the claim for breach of cl 11. Ms Chong maintains that there is nothing wrong to retain the seven shares in order to preserve a pending right to sue. I do not think that a significant reduction in the number of shares held by the other shareholders of Claas of itself is an event within the meaning of cl 12.1(i). The short point is that the seven shareholders did not relinquish all their shares in Claas. The plaintiff merely speculates that the seven shares are beneficially owned by Unimedic.

48 Similarly, cl 12.1(iv) is directed at all the shares in Claas. The plaintiff, as it is his burden, has to establish on the evidence before me that the seven shareholders indeed became shareholders of the successor or acquiring company. It is evident from the prospectus of Healthway Medical Corporation that Dr Gerard Tan and his colleagues sold their shares in Claas and in exchange obtained shares in Healthway Medical Corporation. This point on cl 12.1(iv) was somewhat half-heartedly put forward by the plaintiff. Counsel for the plaintiff did not cross-examine on this aspect of the assertion. I got the impression at the trial and from the closing submissions that the plaintiff was not pressing this point seriously. In the circumstances I find that the burden has not been discharged.

Issue 3- Is cl 11 an enforceable restraint on the plaintiff's trade?

49 In respect of this third issue, the usual conventional arguments were raised before me. I propose to deal with the first sub-issue which is on consideration fairly briefly. The other sub-issues require more extended consideration.

Consideration

50 The plaintiff's pleaded case is that the November Agreement was not supported by consideration. In support of this point the plaintiff referred to *Essen System Builders (S) Pte Ltd v Chew Boon Hee* [1997] 1 SLR 671 ("*Essen System"*). The defendant submits that this case is not analogous to *Essen System* as that decision involved an extreme case where the profit guarantees exceeded the amount paid to the seller for goodwill.

51 I have no hesitation in finding that the covenants entered into by the plaintiff in the November Agreement were supported by consideration. The plaintiff received a total of $3.2 m for the shares in BCNG Holdings which he sold to Claas. The restrictive covenant was already in the draft annexed to the April Agreement and upon purchase of the plaintiff's remaining 40% shareholding in BCNG Holdings, the plaintiff and the six doctors agreed to execute the November Agreement. This was clearly the position as far as the seven original shareholders and Dr Soh were concerned but not in the case of Unimedic.

The Law on restraint of trade

52 It cannot be seriously disputed that cl 11 is a covenant in restraint of trade. Accordingly, it will be enforceable if (i) there is an interest meriting protection; (ii) the restraint is reasonable; and (iii) it is not contrary to the public interest. Andrew Phang JA in delivering the judgment of the Court of Appeal in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR 663 ("*Man Financial*") pointed out at 683 that when comparing restraint of trade covenants in the employment context with those in the other well-established scenario where restraint of trade likewise feature, namely in the context of the sale of a business, the courts scrutinise the covenants in the former context far more strictly. The rationale is that unlike contracts of employment, the purchaser in a sale of business is buying something tangible which includes the element of goodwill which would be necessarily depreciated if no restrictive covenant were permitted. Secondly, there is likely to be more equality of bargaining power in the case of the sale of a business compared to an employment contract situation. See Butterworth Common Series at para 5.114 referred in *Man Financial* at [48]. Andrew Phang JA also noted at [80] that in the sale of business, the main legitimate proprietary interest is that of goodwill.

53 Sir Christopher Slade in *Office Angels v Rainer-Thomas* [1991] IRLR 214 restated the principles as follows:

(1) If the court is to uphold the validity of any covenant in restraint of trade, the covenantee must show that the covenant is both reasonable in the interests of the contracting parties and reasonable in the interests of the public. See, for example, *Herbert Morris v Saxelby* [1916] AC 688 at 707 per Lord Parker of Waddington.

(2) A distinction is however to be drawn between (a) a covenant against competition entered into by a vendor with the purchaser of the goodwill of a business, which will be upheld as necessary to protect the subject matter of the sale, provided that it is confined to the areas within which competition on the part of the vendor would be likely to injure the purchaser in the enjoyment of the goodwill he has bought, and (b) a covenant between master and servant designed to prevent competition by the servant with the master after the termination of his contract of service: see for example, *Kores Manufacturing Co Ltd v Kolok Manufacturing Ltd* [1959] Ch 109 at p 118 per Jenkin LJ

In a later paragraph, he said:

As Lord Parker stressed in *Herbert Morris Ltd v Saxelby*, *supra,* at p 707, for any covenant in restraint of trade to be treated as reasonable in the interests of the parties, "it must afford *no more than adequate protection to the benefit of the party in whose favour it is imposed*" [Lord Parker's emphasis].

54 To reiterate, the court will enforce the covenant only if it goes no further than is reasonably necessary to protect the legitimate proprietary interest in the goodwill. Finally, a covenant should be assessed for its validity at the date upon which the contract was made.

Competing Interests- parties' and public interest

55 With that short introduction of the legal principles, I return to the salient facts of the present case for the consideration as to whether the defendants had a legitimate business interest requiring protection in relation to the sale of the plaintiff's business. The court will treat cl 11 as void unless the restraint can be shown to be reasonable in the interests of the parties.

56 However, the onus of showing that the restraint is against the public interest is on the party avoiding the enforcement *ie* the plaintiff in this case. In this case, it cannot be that a non-competition clause in the context of a sale of business is contrary to public interest having regard to the authorities cited above. In *Nordenfelt v Maxim Nordenfelt* [1894] AC 535, Lord Herschell LC said at 548:

I think that a covenant entered into in connection with the sale of a goodwill of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser. It has been recognised in more than one case that it is to the advantage of the public that there should be free scope for the sale of the goodwill of the business or calling. These were cases of partial restraint. But it seems to me that if there be occupations where a sale of the goodwill would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy which countervail the disadvantage which would arise if the goodwill were in such cases rendered unsaleable.

57 At p 552, Lord Watson observed:

I think it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be

efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold. Accordingly, it has been determined judicially that in cases where the purchaser for his own protection obtains an obligation restraining the seller from competing with him within the bounds which having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy and is there fore capable of being enforced.

58 Lord Macnaghten observed at 565 that it had been found over the course of time that the parties were themselves better judges of what made for a proper and useful contract than the court. Continuing at 566, he said:

> To a certain extent different considerations must apply in cases of apprenticeship and cases of that sort, on the one hand, and cases of the sale of a business or dissolution of partnership on the other. A man is bound an apprentice because he wishes to learn a trade and to practice it. A man may sell because he is getting too old for the strain and worry of business or because he wishes for some other reason to retire from business altogether. Then there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment.

59 In *Herbert Morris Ltd v Saxelby* [1916] AC 688, Lord Atkinson at 701 said;

> … public policy requires that when a man has by skill or by any other means obtained something which he wants to sell he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. … These considerations in themselves differentiate in my opinion the case of the sale of goodwill from the case of master and servant or employer and employee. … The possibility of such competition would necessarily depreciate the value of the goodwill. The covenant excluding it necessarily enhances that value, and presumably the price demanded and paid, and therefore all those restrictions on trading are permissible which are necessary at once to secure that the vendor shall get the highest price for what he has to sell and the purchaser shall get all that he has paid for.

60 It is right as a matter of reality and substance to regard the legitimate interests of the shareholders and Claas which it has the real interest of so protecting as being one. As Harman J said in *Systems Reliability Holdings plc v Smith* [1990] IRLR 377 at 383:

> Indeed, it seems to me most undesirable to put too much stress upon the form in which the business is carried on. … The fact that a business is carried on by a partnership or a limited company … does not truly affect in my view the substance of the relations. … The underlying business and the people who work in it remain the substance of the transaction.

Those words resonate in the present case.

61 I will come back to the point on the identity of the current shareholders in a moment. In answer to the question of legitimate interest, one obvious background fact on the issue of interest is the April Agreement. That is the appropriate starting point to consider the circumstances under which the November Agreement came to be executed. By the April Agreement, the plaintiff under cl 2.2(c) injected into the plaintiff's company, BCNG Holdings, his entire sole-proprietorship firm known as AHA Centre and medical practice known as Dr B C Ng Laser Surgery. By cl 2.2(c)(i), the plaintiff was to

transfer to BCNG Holdings his "book debts, existing pre-paid contracts and treatment packages, stock-in trade, clientele, patients, goodwill as well as all of the assets belonging to and/or accruing to the [sole proprietorship] and medical practice." By cl 2.2(c)(iii), the plaintiff was to grant an irrevocable licence to BCNG Holdings to use and/or otherwise deal in his registered Trademark known as "BCNG" and registered with the registrar of Trade Marks as Trade Mark No T 99/05525G. Claas in turn acquired the shares in BCNG Holdings for $3.2m. Under the April Agreement, two guarantees were provided by the plaintiff in cl 9.8 and cl 9.9(a). The April Agreement contained the same non-competition clause as cl 11 of the November Agreement.

62 The other important point is that the April and November Agreements are inter-connected in that the November Agreement was a condition of the sale of the plaintiff's shares in BCNG Holdings. I accept Ms Chong's submission that the November Agreement was a condition of the purchase of the plaintiff's remaining 40% shareholding in BCNG Holdings. The November Agreement is exactly in the same terms as the draft annexed to the April Agreement and referred to in cl 8.7 of the April Agreement. Within the November Agreement itself, there were counter-promises between the contracting parties.

63 The context in which the restrictive covenants in the November Agreement were entered into is indisputable. The goodwill attached to the business of aesthetic medicine transferred by the plaintiff to BCNG Holdings and whose shares were then sold by the plaintiff to Claas. It is appropriate to regard the restrictive covenants in the present case as taken for the protection of the goodwill of the business sold through the medium of a share sale.

64 One significant factor in this sub-issue on the interest of the parties must necessarily concern Unimedic who was not a party to the covenant and as such would not have in relation to the November Agreement a legitimate interest or, indeed, any interest at all which would be protected by cl 11. The major shareholder has not agreed to be bound by the terms of the November Agreement so as to be entitled to the benefit of the restrictive covenants.

Reasonableness

65 The next and crucial question is as to the reasonableness of cl 11 between the parties. The onus is on the defendant to establish its reasonableness. I have to consider the reasonableness of the covenant as a whole in the context of the November Agreement and in its factual matrix. The court will examine the goodwill of the business in question to decide if a restraint is reasonable and whether it is more than adequate for the protection of the legitimate interests of the parties to the November Agreement. It is settled law that the reasonableness of any contractual restraint of trade must be judged in the light of facts and circumstances as they were at the time when the contract was entered into although the parties' reasonable expectations are to be taken into account: See *Shell UK v Lostock Garage* [1976] 1 WLR 1187.

66 The defendant argues that the terms of cl 11 were reasonable as they protected the business and interest in the joint venture of aesthetic medicine. The clause only prohibits activities which are in competition and/or in conflict with the defendant's business in aesthetic medicine. The plaintiff would be able to practise as a general family medical practitioner as opposed to practising aesthetic medicine procedures such as mesotherapy in his clinic at Goldhill Plaza.

67 In response, the plaintiff says that the terms of cl 11 are too wide as they prevent him from not just practising in any form and manner but also from practising as "a general practitioner, a nurse, pharmacists, druggist" even though Claas did not engage in any such trade or profession. The non-competition clause was said to restrict him from using his own special knowledge, skill and what he

called "feel" factor that is important in the practice of aesthetic medicine. Mr Rabi also challenges the geographical scope of cl 11 which applies to the whole of Singapore as being too wide. The other line of attack is that the restriction period of three years is unreasonably long.

68 There is no dispute about the nature of the defendant's business in aesthetic medicine and the market in which it operates. As stated, protectable goodwill is that which attaches to the business which the plaintiff as vendor had sold. The interest to protect was the goodwill of the business set out in cl 2.2 of the April Agreement and the plaintiff's affidavit of evidence-in-chief. That, in my view, is the aesthetic medicine business that is entitled to be protected. The plaintiff was on the evidence aware that what was restricted under cl 11 was the practice of aesthetic medicine that could compete with the defendant's business.

69 However, in my view, cl 11 is drafted in very wide terms. Clause 11 states that the parties "whether … directly or indirectly, be prohibited from … being engaged and/or interested in any trade and/or business carried on within Singapore which is similar to or in competition and/or conflict (whether directly or indirectly) with the Business of the Company and/or the practice of Aesthetic Medicine".

70 "Aesthetic Medicine" is defined in both the April Agreement and November Agreement as "moderately invasive medicine in the process of laser and permanent hair reduction, photorejuvenation by lasers and intense pulsed light machines and such, pigment management by lasers, acne control by special skincare specific to CLAAS and [BCNG's] range and lasers, mesotherapy of body and face and all procedures and treatment as understood by aesthetic medicine". On the other hand, "Business" of the Company is defined in cl 1.1 of the November Agreement (see [79] below). Clause 11 relates to the non-competition of any trade and/or business carried on in Singapore that is similar to the "Business" of the Company and/or the practice of "Aesthetic Medicine" in Singapore. The words suggest that the interest to be protected is the defendant's interest in the joint venture of aesthetic medicine and prohibiting activities which compete with its business.

71 Dr Gerard Tan admitted that the definition of "Aesthetic Medicine" is wider than necessary to protect the shareholders' interest as well as that of Claas and he also agreed that it included other aesthetic medical procedures that Claas did not provide currently. Clause 11 seems to cover any and every type of practice of aesthetic medicine and as such it is wider than reasonably necessary to protect the goodwill sold by the plaintiff.

72 Clause 11(a) (i) restricts the persons to whom it applies from carrying on either directly or indirectly any business which competes with the business of the defendant; it stops the shareholder concerned from being interested in any such business and, in the context of this case, it restricts the plaintiff in the practice of medicine. The phrase "engaged and/or interested in any trade and/or business" is apt to cover employees of that business but it also covers a wider category of persons than that. Again by way of observation, in general, cl 11(a)(i) also restrains the persons to whom it applies from being engaged in any activity in a competing business even though the activity in which the person is engaged may bear little relation to the activity in which the person was engaged when he or she was with the company.

73 Clause 11 (a) (ii) prohibits the plaintiff from soliciting any employee of Claas without reference to his or her seniority or importance to the business. It also prohibits the plaintiff from soliciting such employees even if their employment with Claas commenced after the plaintiff left the company.

74 As for the geographical scope, the defendant has two clinics, one at Chinatown Point and the other at OUB Centre. The plaintiff points out that there was no restriction on distance by reference

to location and the covenant covered the whole of Singapore. In response, the defendant argues, and I agree, that there is ample evidence of the plaintiff's ability to attract patients wherever he chooses to be located in Singapore. Of significance is his testimony that his diehard patients would seek him out and follow him. It must be remembered that the sale included the plaintiff's patient lists. Patients of a practice are one of the elements of the goodwill of the practice and that goodwill is of the practice rather than of the doctor concerned. In this case, goodwill is meant to be, I take it, the tendency of patients whom the doctors have treated to continue to resort to that practice for further treatment. That goodwill remains one of the assets of the business. In that regard, a restraint covering the whole of Singapore, which is geographically a small market in any event, was necessary.

75 On any basis, time restriction is an important aspect of the reasonable protection of the defendant's legitimate business interest. However, the restriction of three years is unreasonably long. The plaintiff's prominence, seniority and experience in the market for aesthetic medicine is such that it would not be easy to say that a restraint for an appropriate period of time in Singapore would be in any way unreasonable if the original purchasers of his business were to be able to protect their asset. But no evidence was led on this aspect of the matter. For instance, to have the prospect of retaining the patient base, the defendant would have to recruit, organise, train and obtain suitable replacement. There is no specific evidence on this. I note Dr Gerard Tan's testimony that Claas had recruited a plastic surgeon after the plaintiff left the clinic. I do not think that a restriction of three years is reasonable.

76 In the circumstances, cl 11 is of an ambit which is unnecessarily wide and it is vitiated by unreasonableness. Clause 11 is more than reasonably necessary to protect the legitimate interests of the defendant and is accordingly an unreasonable restraint of trade.

Severance of unreasonable restriction

77 The next sub-issue is as to whether severance of at least the unreasonable part of the restriction in cl 11 is possible so as to leave behind valid restraint and that even if it is allowed, whether it would alter the nature of the covenant. It must be remembered that a threefold test has to be applied. The court in *Sadler v Imperial Life Assurance Company of Canada Ltd* [1988] IRLR 388 at [19] stated:

> … a contract which contains an unenforceable provision nevertheless remains effective after the removal or severance of that provision if the following conditions are satisfied:
>
> 1. The unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains.
>
> 2. The remaining terms continue to be supported by adequate consideration.
>
> 3. The removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all.'

78 The defendant argues that the clause only prohibits activities which are *in competition* with the Company's business. Ms Chong submits (albeit very briefly) that this is a case where the blue pencil test ought to be applied as doing so would not alter the nature of the covenant in any way and would merely eliminate a clearly divisible portion of the contract. However, counsel does not indicate exactly which *part* of the covenant could be severed.

79 Applying the threefold test to cl 11, the removal of the words "Business of the Company

and/or" from the restraint of trade clause may be feasible without modifying the meaning of the clause. "Business" has been defined at cl 1.1 of the November Agreement as follows:

> "Business" means the business of the Company as described in Clause 3, and such other business as the Company may carry on from time to time.

80 Turning to cl 3 of the November Agreement, it states that:

> The Business of the Company shall continue to be in line with its objects as set out in the Memorandum of Association of the Company.

81 Following this, turning to look at the Memorandum of Association of the Company[note: 2] ("MOA"), cl 3 of the MOA is drafted very widely, covering "the business of medical specialists, medical surgeons, medical consultants, medical practitioners, general nursing, pharmacists, chemists, druggists …".

82 The court could run a 'blue pencil' through the words "the Business of the Company and/or" without adding to or modifying the remaining language. The remaining restriction continues to be supported by consideration. The severed part does not change the character of the surviving part to the extent that the character of the contract becomes "not the sort of contract that the parties entered into at all". However, severance must involve consideration of the ambit of the other restraints imposed by the paragraph *i.e.* the opening paragraph of cl 11 (a) which is in wide terms. It stops the plaintiff from being associated with the practice of aesthetic medicine not only as a practising practitioner but in any other capacity. Furthermore, the definition of "Aesthetic Medicine" is in wide terms and the defendant has not indicated what type of aesthetic medicine and surgical procedures are to be blue pencilled. There is also cl 11(a)(ii) which cannot be severed without satisfying the three conditions above.

Issue 4: Does cl 11.3 constitute a penalty or is it enforceable as a genuine pre-estimate of the defendant's damages

83 I reached the view that the restraint in cl 11(a) is excessive and unreasonable and hence unenforceable. But one may take into account the provisions of cl 11(c) in considering the enforceability of cl 11(a). Clause 11(c) is, on its face, a powerful deterrent to the plaintiff acting in breach of cl 11(a). But cl 11(c) can be triggered from a breach of cl 11(a)(ii). In that regard, I consider it to be a penalty clause and as such unenforceable. If it is right to take cl 11(c) into account, it provides an additional reason for holding cl 11(a) to be an unreasonable restraint of trade.

84 Coming back to the essential question of whether cl 11(c) was a genuine pre-estimate of the defendant's loss, this question is to be determined objectively. At common law the damages suffered by the defendant as a result of the plaintiff's breach of cl 11(a) leading to a loss of a patient would be measured by the plaintiff's loss of profit it would have earned from that patient if the plaintiff had not broken his contract. Clause 11(c) would operate in relation to a single patient as well as in relation to a number. I have also stated that cl 11(c) is triggered once there is a breach of cl 11(a)(ii). In the circumstances, I consider cl 11 (c) to be a penalty clause and as such unenforceable in accordance with its terms.

Conclusion and result

85 I now recapitulate on the third and fourth issues. First, for the reasons stated, cl 11 (a) is unenforceable and as the defendant's claim falls to be considered by reference to that clause, it fails

because the clause is unenforceable. Second, the claim for liquidated damages does not arise but if the defendant had a claim, the liquidated damages clause fails. I consider cl 11 (c) to be a penalty clause and as such unenforceable in accordance with its terms.

86 Accordingly, there will be judgment for the plaintiff in the sum of $236,500 together with interest at the rate of 5.33% per annum from the date of the Writ to date of judgment and costs. The defendant's counterclaim is dismissed with costs.

[note: 1]Appellant's Agreed Bundle of Documents ("AB") Vol 1, p 83 to 84.

[note: 2]1AB15.