

Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd  
[2014] SGHC 64

**Case Number** : Originating Summons No. 110 of 2012 (Registrar's Appeal (State Courts) No. 2 of 2013 and 5 of 2013)  
**Decision Date** : 08 April 2014  
**Tribunal/Court** : High Court  
**Coram** : Vinodh Coomaraswamy JC (as he then was)  
**Counsel Name(s)** : Mr Tan Tee Jim SC, Mr Freddy Lim and Mr Dharma Sadasivan (Lee & Lee) for the plaintiff; Mr Lok Vi Ming SC, Mr Tan Yee Siong and Mr Alvin Liong (Rodyk & Davidson LLP) for the defendant.  
**Parties** : Lek Gwee Noi — Humming Flowers & Gifts Pte Ltd

*Contract – Illegality and Public Policy – Restraint of Trade*

8 April 2014

**Vinodh Coomaraswamy J:**

**Introduction**

1 For virtually all of her working life, the plaintiff has worked in the flowers, gifts, hampers and wreaths business. In 2008, the defendant acquired the business in which she was employed. After the acquisition, the plaintiff continued to serve as the sales manager of this business without interruption, but now with the defendant as her employer. Her employment agreement [\[note: 1\]](#) contains express post-termination non-competition and non-solicitation covenants.

2 In November 2011, the plaintiff resigned from the defendant's employment. In December 2011, the plaintiff's notice period ended and her employment with the defendant came to an end. Shortly afterwards, she informed it that she intended to set up her own business selling flowers and gifts. [\[note: 2\]](#) The defendant reminded the plaintiff of her non-competition covenant and threatened to sue her if she breached it. [\[note: 3\]](#) In the end, it was the plaintiff who sued the defendant in the Subordinate Courts (as the State Courts were then known), seeking a pre-emptive declaration that the restrictive covenant in her employment agreement is void and unenforceable. [\[note: 4\]](#)

3 The District Judge held that the restrictive covenant was void in part and enforceable in part. Both parties appealed to the High Court. The appeals came before me. After considering the parties' submissions and the evidence, I allowed the plaintiff's appeal and dismissed the defendant's appeal, thereby holding that the restrictive covenant was entirely void and unenforceable. The defendant has now appealed to the Court of Appeal. I therefore set out my reasons for arriving at my decision.

**Background**

4 The plaintiff started working in the business in 1991 when Humming House Tradition ("HHT") employed her as a clerk. The plaintiff was never a partner of HHT: she was merely an employee. HHT was a partnership owned by Mr Lek Sek Kwee ("LSK"), Mr Lek Kwee Chueng ("LKC") and Mdm Yuen Wei Wun ("Mdm Yuen"). LSK and LKC are the plaintiff's older brothers.

5 By 1998, the plaintiff had risen to the position of sales manager in HHT. In 2000, HHT's owners transferred its business to a corporate entity which they also owned: Humming House Flowers and Gifts Pte Ltd ("Humming House"). After the transfer, the plaintiff continued her employment as sales manager of the same business, but as an employee of Humming House rather than of HHT. The plaintiff has never been a shareholder of Humming House. Although it has a similar name, Humming House is not the defendant.

### ***Noel Gifts International Limited***

6 Noel Gifts International Limited ("Noel Gifts") is a company in the same business as HHT and Humming House. Noel Gifts was founded in 1976. It started as a sole proprietorship, later becoming a corporate entity and yet later becoming a public listed company. By 2005, Noel Gifts and Humming House were number one and number two respectively in their common business. [\[note: 5\]](#) Although they were competitors, their strengths lay in different segments of the market. Noel Gifts was (and still is) a market leader amongst Singapore's English-speaking community whereas Humming House was a market leader amongst Singapore's Chinese-speaking community. [\[note: 6\]](#) Humming House was also successful in targeting specific markets (such as the small-to-medium enterprise market) and in the Chinese New Year hamper business. [\[note: 7\]](#)

### ***Noel Gifts' acquisition of Humming House's business***

7 Sometime in 2005, the managing director of Noel Gifts, Mr Alfred Wong ("Wong"), approached LSK to discuss a potential acquisition of Humming House. For Noel Gifts, the commercial rationale was twofold. First, the acquisition would complement Noel Gifts' business and give it a presence in new segments of the market. [\[note: 8\]](#) Second, and most importantly to Noel Gifts, the acquisition would allow it to buy out a competitor. [\[note: 9\]](#) Humming House declined to be acquired.

8 Two years later, it was LSK's turn to approach Wong. He wanted to know if Noel Gifts was still interested in acquiring Humming House. Humming House was then suffering from serious financial and cash flow difficulties as a result of overexpansion. The shareholders of Humming House had given personal guarantees for its debts and were afraid of being held personally liable if Humming House defaulted. [\[note: 10\]](#)

### ***The defendant takes over Humming House's business***

9 Noel Gifts and the shareholders of Humming House eventually agreed on the terms of the acquisition. It was to be structured as an acquisition of Humming House's *business* rather than an acquisition of shares in Humming House. Thus, on 28 December 2007, Noel Gifts incorporated the defendant as a wholly-owned subsidiary of Noel Gifts for the sole purpose of acquiring Humming House's business and then carrying it on.

10 On 7 January 2008, (1) the defendant, (2) Humming House and (3) the shareholders of Humming House entered into a sale and purchase agreement ("the SPA"). Pursuant to the SPA, Humming House sold its business to the defendant for \$1,823,000. [\[note: 11\]](#) The SPA contains non-solicitation and non-competition covenants binding the shareholders of Humming House. The plaintiff, not being a shareholder of Humming House, is not a party to the SPA and is therefore not bound by these covenants.

11 Because Noel Gifts was not acquiring Humming House itself, it required the shareholders of

Humming House to move with Humming House's business to become employees of the defendant as part of the acquisition. It was therefore a condition precedent under the SPA that Humming House's shareholders sign employment contracts with the defendant. [\[note: 12\]](#) Again, because the plaintiff was not a shareholder of Humming House, the transfer of her employment to the defendant was not a condition precedent under the SPA.

### ***The plaintiff is offered employment***

12 Despite this, the defendant clearly did want the plaintiff to move with the business and become its employee. To this end, on the same day the SPA was signed, the defendant handed the plaintiff a draft employment agreement for her to sign. The agreement contained the non-competition and non-solicitation covenants which are the subject-matter of these proceedings. The plaintiff was unwilling to be bound by these restrictive covenants and resisted signing it. Despite this, the plaintiff continued to work without interruption as the sales manager of the acquired business, save that she now rendered her services to the defendant rather than to Humming House. The defendant accepted the plaintiff's services even though she had not signed the agreement. She eventually signed the agreement over six months later, on 25 July 2008. LSK persuaded her to do so. Although her signed employment contract was not a legal requirement of the acquisition, LSK needed her to sign it because of the commercial deal he had struck with Noel Gifts.

13 It is this employment agreement which lies at the heart of this matter.

### ***Terms of the employment agreement***

14 Clause 13 of the plaintiff's employment agreement is the restrictive covenant on which this entire case turns and which the plaintiff asks me to declare void and unenforceable.

15 Clause 13 provides as follows: [\[note: 13\]](#)

13) Upon the termination of the Employee's employment for any cause or by any means whatsoever the employee shall not for a period of 2 years next thereafter undertake or carry on either alone or in partnership nor be employed or interested directly or indirectly in any capacity whatever in the same or similar business as the relevant Company (as hereunder defined), or in any other business carried on by the relevant Company, in Singapore, and Malaysia and any other countries the relevant Company has offices at the date of such termination within the aforesaid areas and shall not during the like period and within the same areas either personally or by Employee's agent or by letters, circulars or advertisements whether on Employee's behalf or on behalf of any other person, firm or company canvass or solicit orders from or in any way interfere with any person, or company who shall at any time during the continuance of the Employee's employment hereunder have been a customer or customers of the relevant Company & for any cause whatever the Employee shall not canvass, solicit or endeavour to take away from the relevant Company the business or any customers or clients who have been customers or clients of the relevant company.

The relevant company shall refer to and include the Company and any or all of such subsidiary, associate or other related companies which the Employee shall have performed duties or carried out work in relation to and for the benefit of any or all of such above companies at any time during the period of nine (9) months prior to the date of termination of employment stated herein.

### ***The plaintiff resigns from the defendant***

16 On 1 November 2011, the plaintiff tendered her resignation from the defendant. The plaintiff's last day in the defendant's employment was 31 December 2011. LSK and LKC resigned from the defendant on the same day.

17 On 3 January 2012, the plaintiff informed the defendant in writing that she intended to set up a business selling flowers and gifts. [\[note: 14\]](#) She invited the defendant to let her know if it had any objections to her doing so by 13 January 2012. It did. On 13 January 2012, the defendant reminded the plaintiff of her obligations under her employment agreement, objected to her plan and threatened to sue her if she breached her restrictive covenant. [\[note: 15\]](#)

## **The plaintiff commences these proceedings**

### ***Procedural history***

18 The plaintiff did not wait to be sued. On 22 March 2012, she commenced these proceedings seeking as the principal relief a declaration that clause 13 of her employment agreement is "void and unenforceable". [\[note: 16\]](#) On 17 May 2012, the defendant applied to convert these proceedings into an action commenced by writ on the basis that there were likely to be substantial disputes of fact between the parties. On 8 June 2012, the District Judge allowed the defendant's application.

19 The plaintiff appealed to the High Court against that decision. I heard that appeal and allowed it, but only after — and only because — counsel for the plaintiff told me that he would proceed in the originating summons on the basis that, to the extent that the defendant disputed any of the *relevant* facts, he would argue that clause 13 was void and unenforceable even if the defendant's account of those disputed facts were true. [\[note: 17\]](#) The narrative at [4]–[17] above and my analysis below takes this position into account.

### ***Decision of the court below***

20 On 6 December 2012, the District Judge determined the plaintiff's principal application. He held: [\[note: 18\]](#)

- (a) The defendant has a legitimate interest in protecting its customer lists, strategic information and other sensitive business information.
- (b) Clause 13 consists of two separate and distinct restraints: (i) a geographical restraint; and (ii) a non-solicitation restraint.
- (c) The geographical restraint is unreasonably wide and therefore void and unenforceable because it operates to bar the plaintiff from employment even in a country in which the plaintiff has never had dealings.
- (d) The non-solicitation restraint, however, is reasonable because it is restricted to the customers of the defendant and the customers of those other companies for which the plaintiff may have worked.
- (e) There was no public interest sufficient to hold the non-solicitation restraint void.

21 The District Judge then applied the doctrine of severance and held that the void geographical restraint could be severed from the non-solicitation restraint, leaving the non-solicitation restraint

valid and enforceable. I now set out clause 13 in the form in which the District Judge held that it was enforceable, with the original underlining omitted and with clause 13's three proscriptions in bold underline:

Upon the termination of the Employee's employment for any cause or by any means whatsoever the employee **shall not** for a period of 2 years next thereafter ~~undertake or carry on either alone or in partnership nor be employed or interested directly or indirectly in any capacity whatever in the same or similar business as the relevant Company (as hereunder defined), or in any other business carried on by the relevant Company, in Singapore, and Malaysia and any other countries the relevant Company has offices at the date of such termination within the aforesaid areas and~~ **shall not** during the like period and within the same areas either personally or by Employee's agent or by letters, circulars or advertisements whether on Employee's behalf or on behalf of any other person, firm or company canvass or solicit orders from or in any way interfere with any person, or company who shall at any time during the continuance of the Employee's employment hereunder have been a customer or customers of the relevant Company & for any cause whatever the Employee **shall not** canvass, solicit or endeavour to take away from the relevant Company the business or any customers or clients who have been customers or clients of the relevant company.

The relevant company shall refer to and include the Company and any or all of such subsidiary, associate or other related companies which the Employee shall have performed duties or carried out work in relation to and for the benefit of any or all of such above companies at any time during the period of nine (9) months prior to the date of termination of employment stated herein.

22 Both parties were dissatisfied with the decision of the District Judge and appealed to the High Court.

### Clause 13: two restrictions rather than three

23 I begin by restating clause 13 shorn of all excess words, with its three proscriptions in bold underline and without the original underlining that appears in it:

Upon the termination of the Employee's employment ... the employee **shall not** for a period of 2 years ... undertake ... nor be employed ... in the same or similar business as the relevant Company ..., or in any other business carried on by the relevant Company, in Singapore, and Malaysia and any other countries the relevant Company has offices at the date of such termination ... and **shall not** during the like period and within the same areas ... canvass or solicit orders from or ... interfere with any person ... who shall ... during ... the Employee's employment ... have been a customer ... of the relevant Company & ... the Employee **shall not** ... endeavour to take away from the relevant Company ... any customer[s] ... who have been customers ... of the relevant company.

The relevant company shall refer to ... the Company and any ... related companies which the Employee shall have performed duties ... in relation to and for the benefit of ... during the ... nine ... months prior to the date of termination of employment ... .

24 Clause 13 is both a legal construct and a grammatical construct. As a grammatical construct, it comprises three clauses connected by the conjunction "and" (double underlined above) and built around the negated modal auxiliary verb "shall" (in bold underline above). The grammatical subject of the first limb and of the third limb is "the Employee". The first and third limbs are therefore independent grammatical clauses. The second limb does not have a grammatical subject and therefore

draws its subject ("the Employee") from the first grammatical clause. It is, to that extent, dependent on the first grammatical clause.

25 Transposed to the facts of this case and paraphrased, each grammatical limb of clause 13 prevents the plaintiff from doing the following things:

(a) First limb: for two years after 31 December 2011, the plaintiff shall not undertake or be employed in the same or similar business as the relevant company, or in any other business carried on by the relevant company in Singapore, Malaysia or any country in which the "relevant company" had offices on 31 December 2011.

(b) Second limb: for the same period and within the same areas, the plaintiff shall not canvass or solicit orders from any person who was a customer of the relevant company while she was employed by the defendant.

(c) Third limb: the plaintiff shall not endeavour to take away from the relevant company any of its customers.

26 I have not in this summary dealt with the concept of the "relevant company." Clause 13 defines that as encompassing (a) the defendant and (b) any subsidiary, associate or other related company of the defendant for which the plaintiff performed duties or carried out work within nine months prior to the date of termination of her employment. I will look at the significance of this definition in more detail at [88] to [98] below.

27 Construing the three grammatical clauses of clause 13 as three legal limbs creates an immediate problem. The third limb, unlike the first two limbs, incorporates no temporal limit and no geographic limit either expressly (like the first limb) or by reference (like the second limb). That construction would make the third limb so limitless as to be unreasonable and void beyond question. I do not, however, construe clause 13 in this way for three reasons.

28 First, this was not the construction of clause 13 that the parties advanced before me. Both parties proceeded on the basis that clause 13 falls into two legal limbs: a non-competition covenant (comprising the first grammatical clause) and a non-solicitation covenant (comprising the second and third grammatical clauses).

29 Second, it appears to me likely that the words incorporating the temporal and geographic limits into the second limb by reference (*ie* "during the like period and within the same areas") are capable as a matter of grammar of extending to the third limb also. This is reinforced by the fact that the subject-matter of the third limb (taking away customers) is an aspect of the second limb (soliciting orders from customers) rather than a distinct restriction by itself (for example, a prohibition on soliciting *employees* as opposed to soliciting *customers*).

30 Third, I find it unlikely that a draftsman conscious of the need in law to impose temporal and geographical limits on the first two limbs so as to make them at least arguably enforceable would then have intended to create a third limb with no such limits and with the inevitable and immediate consequence of its being void. I therefore take the view that this construction is not that intended by the parties even though it is perhaps the most natural meaning of the words as a matter of grammar.

31 I therefore proceed on the basis that clause 13 comprises only two legal limbs imposing only two post-termination restrictions on the plaintiff. Transposed to the facts of this case, the two limbs

provide as follows:

(a) First limb: for two years after 31 December 2011, the plaintiff shall not undertake or be employed in the same or similar business as the relevant company, or in any other business carried on by the relevant company in Singapore, Malaysia or any country in which the "relevant company" had offices on 31 December 2011. I shall refer to the first limb as the non-competition covenant.

(b) Second limb: for the same period and within the same areas, the plaintiff: (i) shall not canvass or solicit orders from any person who was a customer of the relevant company while she was employed by it; and (ii) shall not endeavour to take away from the relevant company any of its customers. I shall refer to the second limb as the non-solicitation covenant.

32 I now move on to consider the law on restrictive covenants in order to identify the questions which I must determine in order to dispose of the plaintiff's application.

### **General approach to restrictive covenants**

#### ***Legitimate interest and reasonableness***

33 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: *Herbert Morris, Limited v Saxelby* [1916] 1 AC 688 at 699 and 701 per Lord Atkinson, approved in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*") at [45].

34 The common law strikes the balance between these two policy imperatives by holding a restrictive covenant to be void unless certain conditions are satisfied. The threshold condition is that the restrictive covenant protects a legitimate interest of the employer. If it does, the restrictive covenant will be enforceable if in addition: (i) it is reasonable in the interests of the parties; and (ii) it is reasonable in the public interest: *Thorsten Nordenfelt (Pauper) v The Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] 1 AC 535 ("*Nordenfelt*") at 565 per Lord Macnaghten; approved in *Man Financial* at [70] and *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 ("*Smile Inc (CA)*") at [19]. The maxim that a court will enforce a restrictive covenant only if it goes no further than necessary to protect a legitimate interest of the employer is not the legal test for enforceability but is the result of applying the legal test summarised above: *Smile Inc (CA)* at [19].

#### ***Employee covenants and sale of business covenants***

35 Restrictive covenants do not appear only in employment contracts. They also appear frequently in contracts for the sale of a business. This case is an example. Not only did the plaintiff's employment agreement contain a restrictive covenant, so too did the SPA under which the owners of Humming House's business sold it to Noel Gifts and the defendant. [\[note: 19\]](#)

36 The law takes a stricter approach to restrictive covenants found in employment contracts than to those found in contracts for the sale of a business: *Man Financial* at [48]. Heydon in *The Restraint of Trade Doctrine* (Butterworths, 2nd Ed, 1999) at pp 68–70 identifies five reasons for this stricter

approach:

- (a) First, employees tend to lack bargaining power as against employers.
- (b) Second, an employee's ability to sell his labour may be his only asset whereas a vendor will have capital in hand from the sale of his business and is better able to sustain himself.
- (c) Third, a business will often be valueless to a purchaser without the vendor's covenant not to compete. In contrast, an employee provides value through his services during the course of his employment whether or not he later competes against his employer.
- (d) Fourth, once an employee accepts a restrictive covenant, the employer's bargaining position during the employment is much increased because the employee's ability to withdraw his services and seek work elsewhere is inhibited.
- (e) Fifth, it is in the public interest for employees to be free to move towards jobs in which they can most effectively use their skills. Restricting that freedom distorts the labour market and diminishes its ability to move employees to where they will do the most good.

Each of these reasons is apparent in the reasoning of the Court of Appeal in *Smile Inc (CA)* at [20].

37 The category into which a restrictive covenant falls determines: (1) the array of legitimate interests of the covenantee which the covenant can protect; and (2) the public policy underlying the avoidance, which in turn shapes the standard applied to evaluate whether the covenant is reasonable. For that reason, the categorisation of a restrictive covenant is often dealt with as a threshold question. That is a convenient approach as a matter of exposition. In many cases it will be easy to categorise a restrictive covenant as either being between employer and employee or as being between vendor and purchaser. In those obvious cases, there is nothing wrong with categorising the clause at the outset of the analysis as an easily-ascertained indicator of the approach to adopt in construing the covenant. But it would in my view be incorrect to elevate categorisation as a matter of law or logic into a threshold question for determining whether a restrictive covenant is enforceable. The true threshold question is not the character in which the covenantee and the covenantor have contracted. The true threshold question always is whether the restrictive covenant is aimed at protecting a legitimate interest of the covenantee as against the covenantor. The question of categorisation determines the array of legitimate interests which a restrictive covenant may protect. The question of categorisation is, therefore, logically subsidiary to that threshold question and not logically prior to it.

38 Millett J (as he then was) made this very point in *Allied Dunbar (Frank Weisinger) Ltd v Weisinger* [1988] IRLR 60 (at 64):

... It is well settled that, in considering the validity of covenants in restraint of trade, very different principles apply where the covenant is taken for the protection of the goodwill of a business sold by the covenantor to the covenantee from those that apply where it is taken by an employer from an employee. ...

...

But in fact I do not think that it is strictly a mere matter of categorisation. *In many cases the situation is not so straightforward, and the covenants serve a dual purpose.* In my judgment, the real questions in every case are, first, what are the interests (for there may be more than one)



which it is legitimate for the covenantee to protect and, secondly, is the protection taken no more than is reasonably necessary to protect those interests respectively? ...

[emphasis added]

39 The fundamental and threshold question, therefore, is always whether the covenantee has a legitimate interest to protect as against the covenantor. Even if a covenant is found in a contract of employment, it is the nature of that interest and how it arises which calibrates the court's approach to enforcing that covenant. This case offers a neat illustration. The shareholders of Humming House caused it as vendor to enter into an agreement for the sale of its business with Noel Gifts and the defendant as purchaser. As an interlocking part of the same overall transaction, these shareholders at the same time entered into personal employment contracts with the defendant (see [11] above). Those employment contracts also contain restrictive covenants. If this case turned on whether *those* restrictive covenants were enforceable, I would have no hesitation in holding that the proprietary interest which the defendant acquired in the assets and business of Humming House in the overall transaction, including in its goodwill, is a legitimate interest for the defendant to protect through restrictive covenants imposed on these employees. That would be the case: (1) even though these covenants are found in employment contracts (and are therefore between employer and employee) and not in the SPA and (2) even though it was Humming House, and not these shareholder/employees, who was the vendor of the business and who received the purchase consideration.

### ***Questions for determination***

40 With those preliminary points of law in mind, I now set out the questions of law which I have to determine in order to dispose of the plaintiff's application:

- (a) Whether clause 13 should be interpreted as a restrictive covenant between employee and employer or as a restrictive covenant between vendor and purchaser.
- (b) Whether the non-competition covenant is directed at protecting a legitimate interest of the defendant and satisfies the twin tests of reasonableness set out above at [34].
- (c) Whether the non-solicitation covenant is directed at protecting a legitimate interest of the defendant and satisfies these twin tests of reasonableness.
- (d) If the whole or a part of the non-competition covenant or of the non-solicitation covenant is void, whether the remainder can be saved by applying the doctrine of severance, either to sever words within a covenant or to sever one covenant from the other.

### **The plaintiff's restrictive covenants**

41 Counsel for the defendant, Mr Lok Vi Ming SC, argued that I should approach the restrictive covenants in the plaintiff's employment agreement as vendor covenants, in the same way as I would have approached the restrictive covenants in the employment agreements of the vendor shareholders of Humming House. He submitted that the transfer of Humming House's business to the defendant and the plaintiff's employment by the defendant were inextricably linked and had to be construed as part of a single transaction. [\[note: 20\]](#) The plaintiff, like the shareholders of Humming House, came to be employed by the defendant only as a result of its acquisition of the business. The entire commercial purpose of these employment contracts was to ensure a "seamless transition" of the business to its new owner.

42 Counsel for the plaintiff, Mr Tan Tee Jim SC, invited me to approach clause 13 as an employee covenant rather than as a vendor covenant. He stressed that: [\[note: 21\]](#)

- (a) the plaintiff was neither a party to the SPA nor even indirectly a vendor of Humming House's business;
- (b) the plaintiff was not involved in the negotiations which led to the SPA; and
- (c) there was no evidence that the plaintiff derived any benefit from the sale of the business by receiving part of the purchase price or any other preferential treatment.

43 I accept Mr Tan's submissions and approach clause 13 as a covenant between employer and employee for the following four reasons.

***The plaintiff was not a shareholder in Humming House***

44 First, the plaintiff was not a shareholder in Humming House. She had no say in the sale of its business or in the terms on which it was sold. Therefore, the plaintiff was entirely unconnected to Humming House's transfer of the proprietary interest in its business to the defendant. She was merely an employee of Humming House who chose to continue her employment with the defendant.

***Acquisition independent of the plaintiff's continued employment***

45 Second, contrary to Mr Lok's submissions, [\[note: 22\]](#) the defendant's purchase of Humming House's business was not dependent on the plaintiff accepting the restrictive covenants in her employment agreement. The SPA did not make it an express — or even an implied — condition precedent to the acquisition that the plaintiff should sign a new employment agreement with the defendant. Equally, the SPA did not require Humming House or its shareholders to procure the plaintiff's entry into a new employment agreement with the defendant. In other words, under the terms of the SPA, the acquisition of the business was to take place *even if* the plaintiff did not sign a new employment agreement with the defendant. That is exactly what happened. The SPA was executed on 7 January 2008. On that date, the plaintiff had not signed a new employment agreement. The sale of the business was nevertheless implemented. This shows that rather than imposing restrictive covenants on the plaintiff directly or indirectly through the acquisition process, the defendant sought to extract these restrictive covenants from the plaintiff voluntarily, by handing her a draft employment agreement on the same day for her to consider and sign. In the event, she did not sign that agreement until July 2008. As a result, the plaintiff provided her services to the defendant until July 2008 with no employment contract. During this period, the defendant was at risk that the plaintiff could withdraw her services at any time upon reasonable notice and, more importantly, could do so with no post-termination restriction on her employment or other activities. I find it unlikely that the defendant would have allowed that state of affairs to arise and to continue for six months if the plaintiff's employment was indeed part and parcel of the overall acquisition.

46 The shareholders of Humming House were treated very differently. It was an express condition precedent under the SPA that they each sign a new employment agreement with the defendant (see [11] above). It is also telling that the restrictive covenants found in the employment contracts of Humming House's shareholders were prepared separately and contained different provisions from those in the plaintiff's employment agreement. This supports the view that the plaintiff's restrictive covenants arose only from her position as an employee and not because she was in a position analogous to a vendor.

### ***Asymmetry of financial rewards***

47 Third, there was clear asymmetry between the financial rewards which Humming House's shareholders derived from the sale and those which the plaintiff did. The purchase consideration for the acquisition accrued directly to Humming House and therefore indirectly to its shareholders. As I have mentioned, the plaintiff was never one of those shareholders. In addition, it was a term of the SPA that the shareholders' new employment contracts provide that they were entitled collectively to 30% of the profits of the defendant. [\[note: 23\]](#) As a result of these provisions, LSK received between \$78,000 and \$131,000 from 2008 to 2011 by way of shared profits. LKC received between \$39,000 and \$73,000 for the same period and on the same basis. [\[note: 24\]](#) The SPA also gave the Humming House shareholders options to purchase shares in the defendant, subject to certain conditions and targets being met. [\[note: 25\]](#) The plaintiff received no such share of profits or options.

48 Indeed, the plaintiff received nothing from the sale of the business other than the ability to continue as an employee, earn a salary, and be eligible for an annual employee's bonus. Under her employment agreement, the plaintiff's basic monthly salary was \$3,110. By November 2011, it had risen to \$3,770. She also received a bonus of "at least 1½ months" salary each year (save for 2011 when she received a two-month bonus). [\[note: 26\]](#) The scale of her financial rewards as compared to the vendors was so different as to be different in kind and to signify a purely employer/employee relationship with the defendant.

### ***Indirect benefit not referable to acquisition***

49 Fourth, I am not satisfied that the plaintiff derived even an indirect or incidental benefit referable to Humming House's sale of its business. [\[note: 27\]](#) Mr Lok argued that she derived a real, albeit indirect, benefit from the sale of the business in the following way. The plaintiff permitted a property which she owned in her sole name to be used as security for loans which LSK had taken. [\[note: 28\]](#) Mr Lok contended that the plaintiff was at risk of losing her property at the time of the acquisition because it was likely that LSK would have defaulted on the loans if the business had not been sold. After the acquisition, that mortgage was fully discharged. On that basis, Mr Lok argued that the plaintiff derived a benefit from the sale of Humming House's business just as much as its shareholders and should be treated as a person in the position of a vendor rather than as a mere employee.

50 On the evidence before me, there is nothing to establish on the balance of probabilities that LSK incurred the debt secured on the plaintiff's property in connection with Humming House's business or that LSK's share of the purchase money is connected to the discharge of the mortgage over the plaintiff's property. Further, even if I were satisfied on these points, the connection between the sale of the business and the discharge of the mortgage over the plaintiff's property was incidental at best. It indicates no more to me than an intention by LSK to use his share of the sale proceeds to benefit the plaintiff as his sister or as an employee of Humming House, but not as a vendor or quasi-vendor of Humming House's business.

### ***The plaintiff has no connection to the goodwill acquired***

51 The real reason that Mr Lok argues that the plaintiff's restrictive covenants should be approached as vendor covenants is because he seeks to argue that it serves to protect the goodwill which the defendant acquired from Humming House from impairment by the plaintiff. According to him, failing to give the defendant that protection would undermine the main commercial driver behind the

acquisition of the business which was the defendant's desire to acquire Humming House's customer base and therefore its goodwill.

52 "Goodwill" is both a legal term of art and an accounting term of art. As a legal term of art, it has been said that it is "the attractive force which brings in custom" and, further, that "goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates": per Lord Macnaghten in *The Commissioners of Inland Revenue v Muller & Co's Margarine, Limited* [1901] 1 AC 217 at 223–224; approved in *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc and another and another appeal* [2014] 1 SLR 911 at [131]. As an accounting term of art, it has a somewhat wider meaning.

53 Goodwill in the legal sense is a species of property and is undoubtedly a legitimate interest which a restrictive covenant may protect. There is no doubt in my mind that the defendant is entitled to use restrictive covenants to secure reasonable protection of the goodwill it acquired from Humming House in the acquisition. That protection, however, is available only as against Humming House and its shareholders, being the parties from whom the goodwill was, directly or ultimately, acquired. It is not only in the parties' private interest that such bargains be upheld. There is also a strong public policy in favour of preventing a vendor of a business from derogating from a bargain it has entered into. As Lord Watson observed in *Nordenfelt* at 552:

... [I]t 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 infeasible right to start a rival concern the day after he sold. ...

54 This public policy rationale, however, has no application to the plaintiff, because (a) the sole relationship between the plaintiff and the defendant was as employee and employer; (b) her sole pre-existing relationship with the business during the time it was owned by Humming House (and before that, by HHT) was also an employee/employer relationship; and (c) the plaintiff came to be employed by the defendant through her voluntary act and not as an obligation under the SPA or in some other way as part of the acquisition.

55 Mr Lok stressed that the defendant paid valuable consideration under the SPA amounting to \$1,823,000 to purchase the business. Of this, \$607,000 was consideration for Humming House's "Customer lists". [\[note: 29\]](#) I accept that that is payment for goodwill both in the wider accounting sense and in the narrower legal sense. However, for the reasons given above, the defendant as a purchaser is not entitled to protect its undeniable proprietary interest in the goodwill of the entire business as against the plaintiff who was neither a vendor nor a quasi-vendor of it.

### ***Restrictive covenants are between employee and employer***

56 All of the foregoing factors indicate to me that, in reality, the defendant's acquisition of Humming House's business was connected to the plaintiff solely in her capacity as an employee. In the absence of any other connection, the plaintiff's restrictive covenants must be approached as covenants between employer and employee and not as covenants between vendor and purchaser. I now turn to analyse the plaintiff's restrictive covenants on the basis that they are between employer and employee.

### **Legitimate interest**

#### ***Legitimate proprietary interest or legitimate interest?***

57 It is sometimes said that a covenantee must be able to identify a legitimate *proprietary* interest to justify a restrictive covenant. This does not mean that the covenantee's legitimate interest must arise from or be related to a right of property: see *Cactus Imaging Pty Limited v Glenn Peters* [2006] NSWSC 717 ("*Cactus Imaging*"), cited with approval in *Man Financial* at [118]. It is true that a restrictive covenant may often be justified as protecting a right of property, particularly a vendor covenant. But a restrictive covenant may equally be justified as protecting a legitimate interest which falls short of being a right of property. That is typical in the employer/employee cases. Thus, for example, the goodwill of a business is property which can be bought and sold together with the business. It is clearly a legitimate proprietary interest capable of being protected by a restrictive covenant as between vendor and purchaser. The goodwill of a business is, at least in part, the cumulative effect of the trade connection which the business has through each of its employees. But the trade connection which a business has through an individual employee is not property in the same way that goodwill is. Nevertheless, an employer is entitled to protect that individual trade connection as against that individual employee by a restrictive covenant. So too, a trade secret is information which is confidential and treated as confidential because of its commercial value to competitors. But information is not property: *Oxford v Moss* (1979) 68 Cr App Rep 183; *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [376]. That is so even if the information is a trade secret or is confidential information akin to a trade secret. But information of this nature is nevertheless a legitimate interest capable of being protected by a restrictive covenant.

### **Typical legitimate interests**

58 The first question therefore is whether the defendant, as employer and not as purchaser, has a legitimate interest which clause 13 is directed at protecting. The list of legitimate interests which can support a restrictive covenant as between employer and employee is not closed: *Man Financial* at [94]. Having said that, there are commonly three legitimate interests which an employer seeks to protect through a restrictive covenant: (a) its interest in protecting trade secrets or confidential information akin to trade secrets; (b) its interest in protecting trade connection (primarily clients or customers but presumably including trade connection with suppliers); and (c) its interest in maintaining a stable, trained workforce: *Man Financial* at [81] and [121].

59 Mr Lok submits that the non-competition covenant in clause 13 serves to protect both the defendant's trade secrets and trade connection. This arises, he says, because she had access to the defendant's trade secrets during her employment. He submits further that both the non-competition covenant and the non-solicitation covenant serve to protect the defendant's trade connection. This arises, he says, because the plaintiff has personal knowledge of and influence over the customer base which the defendant acquired from Humming House.

60 Mr Tan submits as follows:

- (a) In relation to trade secrets, that:
  - (i) the defendant had no trade secrets to protect; alternatively
  - (ii) if it did, that trade secrets could not be a legitimate interest for clause 13 to protect because they were sufficiently protected by other provisions in the employment agreement.
- (b) In relation to trade connection, that:
  - (i) the plaintiff did not have any or sufficient influence over the defendant's customers; alternatively

- (ii) even if the plaintiff had such influence, the defendant had no legitimate interest in her trade connection because these were customers which she had cultivated during her time at Humming House and who had followed her from Humming House to the defendant.

61 Before I consider counsel's submissions, it is useful to describe the defendant's business and the plaintiff's employment in it.

***The defendant's business and the plaintiff's employment in it***

62 The defendant's business is selling gifts, flowers, wreaths and hampers. It is a sophisticated operation. The defendant has no physical retail premises. Instead, it markets its goods and services by distributing physical catalogues by mail, [\[note: 30\]](#) through telemarketing [\[note: 31\]](#) and through a website. Catalogues are mailed to specific and targeted lists of customers. The starting point for these lists is the customer lists which it purchased from Humming House. These lists are updated constantly as a result of tracking customers' spending patterns. Most of the defendant's business is done during the festive season when its loyal customers purchase the defendant's products, presumably in large quantities and consistently from year to year. The defendant also maintains sales accounts for loyal and repeat customers. In fact, part of the defendant's post-acquisition strategy was to ensure that Humming House's customers continued to be served by the same contact person (eg the plaintiff) to provide those customers a "seamless transition from Humming House to the defendant". [\[note: 32\]](#)

63 As sales manager of the defendant, the plaintiff was part of its senior management team. [\[note: 33\]](#) She was in charge of the defendant's sales department. That department is responsible for selling the defendant's gifts, flowers, wreaths and hampers and it accounts for 25% of the defendant's headcount. The plaintiff's role required her to have full access to the defendant's client information, sales data, cost structures and business model. [\[note: 34\]](#) She was in charge of reviewing and updating its list of customers. [\[note: 35\]](#) It was part of the plaintiff's duties to keep this list of customers under lock and key since it is highly sensitive commercial information. [\[note: 36\]](#) More importantly, the plaintiff's job required her to maintain a close relationship with customers transitioned from Humming House. These customers continue to do business with the defendant because of the rapport and personal relationship which the plaintiff built up with them over the years. [\[note: 37\]](#)

***Trade secrets or equally confidential information***

64 The Court of Appeal in *Man Financial* approved a multifactorial approach in considering whether or not information has the necessary quality to constitute a legitimate interest capable of being protected by a restrictive covenant (at [83]). The following factors are relevant:

- (a) The nature of the employment – where the employee habitually handles confidential information, a higher obligation of confidentiality may be imposed.
- (b) The nature of the information itself - in this regard, the information concerned must be a trade secret or material which, whilst not properly described as a trade secret as such, is, having regard to all the various circumstances, "of such a highly confidential nature as to require the same protection as a trade secret"....
- (c) Whether the employer impressed on the employee the confidentiality of the information - ... in order to prevent the use or disclosure of the information in question, it was insufficient for the

employer to merely tell the employee that the information was confidential. The employer's attitude towards the information itself had to be considered as well.

(d) Whether the relevant information can be easily isolated from other information which the employee is free to disclose - where the information alleged to be confidential is "part of a package" ... and the remainder of the package is not confidential, this factor, although not conclusive in itself, can shed light on whether the information in question is truly a trade secret.

[emphasis in original omitted]

65 In light of my description of the nature of the plaintiff's employment at [62] - [63] above, I am satisfied that the plaintiff had access in the course of her employment to confidential information of the defendant which was of commercial significance. This information included the defendant's client information, sales data, cost structures, business model and updated list of customers and targeted customers. Even if this information did not amount to trade secrets in the strict sense of the term, it amounted to confidential information "of such a highly confidential nature as to require the same protection as a trade secret": see above at [64]. Indeed, there is a suggestion that an employer can support a non-competition covenant, subject of course to reasonableness, on the basis of a legitimate interest in protecting confidential information even if that information does not amount to a trade secret or is not akin to a trade secret: *Cactus Imaging* at [54]. That finding would ordinarily suffice to move on to the next stage of the inquiry, which is to examine the reasonableness of the restrictive covenant in the parties' interests and in the public interest.

### ***Effect of an express confidentiality clause***

66 Mr Tan, however, submits that the protection of confidential information is not a sufficient legitimate interest to justify a non-competition covenant in Singapore law. For this submission, he relies on the Court of Appeal's decision in *Stratech Systems Ltd v Nyam Chiu Shin (alias Yan Qiuxin) and others* [2005] 2 SLR(R) 579 ("*Stratech*"). In that case, the Court of Appeal held as part of its *ratio* that where trade secrets or confidential information are protected by other express provisions in an employment agreement, the employer must be able to point to a legitimate interest "over and above" the protection of trade secrets or confidential information in order to justify a restrictive covenant: at [48]–[49]. This proposition was recently reaffirmed in *Man Financial* (at [92]). It was binding on the District Judge and is binding on me.

67 The plaintiff's employment agreement includes wide protection for the defendant's trade secrets and confidential information post-termination. Clause 3 of the agreement binds her to maintain confidentiality during her employment and for two years after that employment ends. During those two years, it proscribes not only disclosure of the defendant's trade secrets and confidential information, it also proscribes use and attempted use of that information to the defendant's detriment. It reads as follows: [\[note: 38\]](#)

3) The Employee shall not except as authorized or required by the Employee's duties reveal to any person, or company any of the trade secrets or confidential operations, processes or dealings or any information concerning the organization, business, finances, transactions or affairs of the Company or any of its subsidiary, associate, and/or other related companies which may come to the Employee's knowledge during the Employee's employment hereunder and shall keep with complete secrecy all confidential information entrusted to the employee and shall not use or attempt to use any such information in any manner which may injure or cause loss either directly or indirectly to the Company, its subsidiary associate and/or other related companies or may likely to do so.



This restriction shall continue to apply for a period of Twenty-Four (24) months after the expiry of this Agreement.

68 Clause 4 of the agreement obliges her to return to the defendant upon the end of her employment any notes or memoranda relating to the business of the defendant. It reads as follows:

[\[note: 39\]](#)

4) The Employee shall not during the continuance of this Agreement make otherwise than reasonably necessary in the course of the employee's work any notes or memoranda relating to any matter within the scope of the business of the Company, its subsidiary, associate and/or other related companies or concerning any of their dealings or affairs nor shall the Employee either during the continuance of this Agreement use or be permitted to use any such notes or memoranda otherwise than is reasonably necessary in the course of the Employee's work, it being the intention of the parties hereto that all such notes or memoranda made be property of the Company and left at its registered office upon the termination of the Employee's employment hereunder.

69 These clauses give the defendant comprehensive protection against the disclosure and use of both trade secrets and of confidential information akin to a trade secret (and indeed even of confidential information which is not akin to a trade secret). *Stratech* binds me to hold, therefore, that protecting trade secrets or confidential information cannot be a sufficient legitimate interest to justify either the non-competition covenant or the non-solicitation covenant. *Stratech* also binds me to hold that the District Judge erred in law in his finding that it was a sufficient legitimate interest (see [20(a)] above).

70 This principle is not without difficulty. Woo Bih Li J recently considered it in *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter and others* [2013] 2 SLR 193 ("CCL"). He reviewed three English cases which recognise that a restrictive covenant can be justified as protecting trade secrets or confidential information even if there are other express clauses in the same contract which do so: *The Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026, *Turner v Commonwealth & British Minerals Ltd* [2000] IRLR 114 and *Thomas v Farr plc* [2007] ICR 932. Woo J observed that the reasoning in these cases is premised on the fact that confidentiality obligations are difficult to police and therefore in some cases the best practical protection may be a restrictive covenant in addition to a contractual obligation to preserve confidentiality. Woo J went on to say (at [92]):

... 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 [a non-competition covenant] 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).

71 Woo J therefore suggested that there may be something in this issue for the Court of Appeal to revisit. I have sympathy for the concerns expressed by Woo J. It is, in part, to allow the Court of Appeal to consider this issue that I granted the defendant leave to appeal to the Court of Appeal.

72 As the protection of trade secrets cannot be a legitimate interest on which to found either the non-competition covenant or the non-solicitation covenant in clause 13, I now turn to consider whether the protection of trade connection can.



### **Trade connection**

73 In order to establish that the employer's trade connection is a sufficient legitimate interest, it must be shown that the employee has personal knowledge of, and influence over, the customers of the employer: *Man Financial* at [93].

74 At first instance in *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 1 SLR 847 ("*Smile Inc (HC)*"), Woo J (at [75]–[77]) elaborated on the factors that the court considers in applying this principle. I summarise the relevant factors as follows:

- (a) the extent of the former employee's knowledge of, and influence over, the customers insofar as it indicates the actual or likely future influence of the former employee over the customers' decision as to where to direct their business. Merely knowing the customers is in itself immaterial unless the former employee can (and is likely to) leverage on that knowledge in some way to gain some degree of influence over them;
- (b) the extent of "institutional hold" and "customer inconvenience". "Institutional hold" refers to the extent that the employer's business thrives on loyalty to the employer and to its brand and reputation rather than on personal relationships with its employees. "Customer inconvenience" refers to the willingness of an employer's customer to inconvenience himself by moving his custom away from the employer and following a departing employee;
- (c) the frequency of the former employee's contact with the customers;
- (d) the place where the former employee makes such contact;
- (e) the seniority of the former employee; and
- (f) the nature of the former employee's relationship with the customers.

75 On the facts of this case, I am satisfied that the defendant has a legitimate interest in protecting its trade connection as against the plaintiff. The plaintiff was the defendant's sales manager, and therefore a senior sales figure in the defendant. She admits that she has established personal relationships and rapport with the defendant's customers, although she does so as part of an argument that she should be free to use these relationships and rapport for her own benefit now that she is no longer employed by the defendant. [\[note: 40\]](#) The defendant's business, like Humming House's, is in large part built on its ability to establish rapport with its customers and to attract repeat custom. I am therefore satisfied that the extent of the plaintiff's knowledge of, and her influence over, the customers of the defendant means that the defendant has a legitimate interest in protecting its trade connection against interference by the plaintiff post-termination. This legitimate interest suffices to support both the non-competition and the non-solicitation covenants, subject of course to the twin tests of reasonableness.

### **Pre-existing trade connection**

76 Mr Tan's alternative submission at this point is that an employer has no legitimate interest in the trade connection of an employee which predates her employment by the employer. For this proposition he relies on the decision of the English Court of Appeal in *M & S Drapers (a firm) v Reynolds* [1957] 1 WLR 9 ("*M & S Drapers*").

77 In *M & S Drapers*, the plaintiff employed the defendant to sell curtains and to collect payment by instalments for the curtains that he sold. Employee and employer did not enter into an employment agreement. The employee had a pre-existing connection with customers of his previous employers and brought these customers to his new employer. Two years after the employment commenced, the parties entered into a written employment agreement which provided that, for a period of five years following its determination, the employee would not solicit the business of anyone who was the employer's customer during the three years immediately preceding the determination of the agreement. The employee left the employer a few months later and sold goods to persons who fell within the restricted scope. The employer sought to restrain the employee from committing further breaches of the agreement.

78 The Court of Appeal held unanimously that the restrictive covenant was void. The *ratio* of Hodson LJ's and Morris LJ's judgment was that a five-year restraint was unreasonably long having regard to the position of the employee. Denning LJ gave a short judgment, which appears to accept this *ratio* by concurring with Hodson LJ and Morris LJ. *Obiter*, however, Denning LJ expressed the view that any restrictive covenant is unreasonable and void if it prevents an employee from soliciting the business of persons with whom he had already formed a trade connection before his current employment. Thus, he said (at 18):

While showing proper reluctance to enforce these [restrictive] covenants, the courts will, however, do so if they are shown to be reasonable as between the parties and as regards the public. In this case I think that the employers might reasonably protect their own trade connexion, that is the connexion which was properly their own as distinct from the connexion which the traveller brought with him. But I do not see why the employers should be able to forbid him to call on the people whom he already knew before he worked for them—the people whom I will call "his customers". His knowledge of these people, and his influence with them, were due to his own efforts or at any rate they were nothing to do with these employers. His goodwill with those customers belonged to him, and cannot reasonably be taken from him by a covenant of this kind. Any other view would mean that, soon after employing him, they could dismiss him—at a fortnight's notice—and then prevent him for five years thereafter from calling on his own customers who had been his long before he entered the employment.

79 On this point, Morris LJ preferred to say, *obiter*, that whether it was reasonable to restrict an employee from soliciting business from customers whom he brought to the employer depended very much on the particular facts of a particular case. Thus, he said (at 17–18):

... [I]t was submitted on behalf of the defendant that, apart from the question of time, the restrictions were too wide in that (a) they would prevent the defendant from calling on those customers whom he had introduced to the employers, and in respect of whom his special knowledge and influence were not gained during his employment by or at the expense of the employers; ...

In the circumstances it becomes unnecessary to express any final view in regard to these contentions. I do not consider that a restriction of the present kind would necessarily be held to be unreasonable merely because it could be shown possibly to extend to one or two cases beyond the range of contemplated protection. But if an employee introduced his friends or his "connexion" as customers, the reasonableness of any restriction that might involve that the employee would after a short time no longer be employed by the employer but yet be debarred from calling on his friends or on those who constituted his own connexion would have to be most carefully considered. Each case must be judged on its own facts in the light of the principles laid down. In the present case the restrictive agreement was not entered into until the defendant

had been employed for over two years. It was submitted that this circumstance, coupled with the fact that the defendant had previously been in the employment of other employers, tended to diminish the weight of consideration (a) to which I have referred above. Though there is some force in this, I consider that in this case it was not reasonable to prevent the defendant from calling on those who formed his own connexion and in regard to whom his knowledge was not acquired during his service with nor at the expense of the employers.

80 I respectfully prefer Morris LJ's approach to Denning LJ's. The reasonableness of any restrictive covenant is very much a factual inquiry. On the facts of *M & S Drapers*, the views of Denning LJ and Morris LJ are understandable: the employee had brought with him to the employer a set of customers with whom he had a long-standing and personal relationship established during his employment with a number of previous employers. His new employer did not bargain for these customers, it did not foster or finance his trade connection with them, nor did it lay claim to these customers by seeking at the outset of the employment to restrict his ability to deal with them post-termination.

81 The present case is quite different. It is true that the plaintiff dealt with this particular set of customers for many years while she was working for Humming House and before that with HHT. But the trade connection which she established with these customers there was fostered by Humming House and HHT. It formed part of HHT's goodwill and then part of Humming House's goodwill. Humming House then transferred that goodwill — of which its trade connection through the plaintiff formed a part — to the defendant. The defendant bargained for and purchased that trade connection as part of its acquisition. Looked at that way, the trade connection with Humming House's customers never "belonged" to the plaintiff even in the loosest sense. That trade connection was Humming House's and went straight from Humming House to the defendant through the acquisition.

82 I should also add that the sole purpose for which the defendant came into existence was to acquire Humming House's goodwill and the trade connection it comprises. Unlike the employer in *M & S Drapers*, the defendant had no customers at all before the plaintiff began to work for it as its sales manager. To hold that the defendant's trade connection with the customers that the plaintiff had dealt with when she worked for Humming House went with the plaintiff when she resigned would be, effectively, to hold that virtually the defendant's entire customer base was not capable of being protected. That, I think, goes too far.

83 In the circumstances, clause 13 is not unreasonable or void either: (i) on the basis that the plaintiff's trade connection was her own (and cannot therefore be a legitimate interest of the defendant to be protected by clause 13); or (ii) on the grounds that, insofar as clause 13 seeks to prevent the plaintiff from soliciting custom from customers with whom she had a relationship pre-existing her employment by the defendant, it is unreasonably wide.

84 I conclude by noting that Mr Tan's alternative submission goes to whether an employer has a legitimate interest in the employee's own trade connection whereas the English Court of Appeal in *M & S Drapers* analysed the issue as one of reasonableness as between the parties. Both approaches, of course, lead to the same substantive result. But I prefer the approach taken in *M & S Drapers*. The extent to which a particular restrictive covenant interferes with an employee's right to solicit business from customers with whom he has an independent trade connection, separate from his employment and separate from his employers, is a factor which goes more naturally to the reasonableness of the clause as between the parties rather than to the threshold question of whether there is a legitimate interest capable of being protected at all.

### **Reasonableness: the non-competition covenant**

85 The parties contest the reasonableness of the non-competition covenant on three fronts: (1) the geographical restriction, (2) the activity restriction and (3) the temporal restriction.

86 For ease of reference, I set out again clause 13 shorn of all unnecessary words, with the three proscriptions in bold underline with the grammatical segmentation in double underline. I have left out the original underlining.

Upon the termination of the Employee's employment ... the employee **shall not** for a period of 2 years ... undertake ... nor be employed ... in the same or similar business as the relevant Company ..., or in any other business carried on by the relevant Company, in Singapore, and Malaysia and any other countries the relevant Company has offices at the date of such termination ... and **shall not** during the like period and within the same areas ... canvass or solicit orders from or ... interfere with any person ... who shall ... during ... the Employee's employment ... have been a customer ... of the relevant Company & ... the Employee **shall not** ... endeavour to take away from the relevant Company ... any customer[s] ... who have been customers ... of the relevant company.

87 The time at which the reasonableness of a restrictive covenant is tested is the time at which it is entered into: *Man Financial* at [72]. Thus, a restrictive covenant must be construed bearing in mind the circumstances which the parties reasonably contemplated at the time they entered into the contract. This principle has both a positive and a negative consequence. The positive consequence is that if a restrictive covenant is reasonable as between the parties bearing in mind those circumstances, it will not become void simply because it could also be construed to cover unlikely situations outside their reasonable contemplation: *National Aerated Water Co Pte Ltd v Monarch Co, Inc* [2000] 1 SLR(R) 74 ("*Kickapoo Joy Juice*") at [37]. The negative consequence, however, is that if a restrictive covenant is unreasonably wide as between the parties bearing in mind those circumstances, it will not be saved simply because the covenantee proposes to breach an aspect of the restrictive covenant which is, in fact, reasonable as between the parties. Thus, in *Kickapoo Joy Juice*, the Court of Appeal held that a restrictive covenant which prohibited the covenantor from using any of the syllables in the phrase "Kickapoo Joy Juice" was unreasonably wide because the restriction encompassed both the words "Joy" and "Juice", which are ordinary words of the English language. It did not matter that the covenantor's actual breach of the restrictive covenant did not use either of those words, but lay in its use of the first syllable of the distinctive word "Kickapoo": at [34]–[38].

### **Relevant company**

88 The activity restriction and the geographical restriction both depend on the definition of "relevant company". I therefore start by analysing that component.

89 Clause 13 defines the term "relevant company" as including the defendant and "any ... related companies which [the plaintiff] shall have performed duties ... in relation to and for the benefit of ... during the ... nine ... months prior to the date of termination of employment ...".

90 The first point I note is that the term used in clause 13 and in the definition is not "a relevant company" but "*the* relevant company". In fact, clause 13 refers consistently and solely to "*the* relevant company" and it does so six times. The use of the definite article could be taken to indicate that clause 13 contemplates only *one* relevant company and a specific relevant company: the defendant. But that would be inconsistent with the clear intention in the definition that the term should encompass a cumulation of relevant companies and therefore more than one company. I therefore say no more about this point.

91 The core concept of the definition of "relevant company" is that of a "related company". Noel Gifts and every one of its subsidiaries is therefore a "related company" of the defendant within the meaning of clause 13 (see s 6 of the Companies Act (Cap 50, 2006 Ed)). This very fact is an immediate indication that the definition of "relevant company" may be far too wide. The plaintiff played no role in Noel Gifts or in the Noel group of companies. There is no evidence that she had access to confidential information of Noel Gifts or of the Noel group. There is no evidence that Noel Gifts or the Noel group had any trade connection with customers through the plaintiff. Indeed, what evidence there is points completely in the opposite direction: the plaintiff's role was confined to the defendant and to its customers alone.

92 Under the definition in clause 13, not every "related company" is a "relevant company". For a related company to become a relevant company, clause 13 requires that the plaintiff "performed duties or carried out work in relation to and for the benefit of" the relevant company in the nine months before her employment ceases. That definition appears to me to be far too wide. It does not require the plaintiff and the related company to be so closely connected as to give rise to a legitimate interest of the related company which ought to be protected in order for that related company to become a "relevant company". For example, the clause does not require the plaintiff to be *employed* by the related company. It suffices that she has "carried out work for it". That causes an immediate problem. If the plaintiff were (say) to be seconded to a company in the Noel group while still employed by the defendant, that subsidiary would immediately become a "relevant company" within the meaning of clause 13. Even worse, if the plaintiff were not seconded to another group company but, in the course of performing her duties to the defendant as its employee, carried out some incidental work in relation to and for the benefit of that other group company, that company would become a "relevant company".

93 It is true that if a restrictive covenant is reasonable as between the parties in light of the circumstances they reasonably contemplate at the time they enter into the contract, it will not become void simply because it could also be construed to cover unlikely situations outside their reasonable contemplation (see [87] above). It is also true that the plaintiff had a history of working in the same business throughout: first for HHT, then Humming House and then for the defendant. The fact remains, though, that clause 1(e) of the plaintiff's employment agreement expressly gave the defendant the right to require the plaintiff to perform services for other companies in the Noel group. Likewise the confidentiality obligation in clause 3 of the agreement covered not only the confidential information of the defendant but also confidential information of the Noel group that the plaintiff might learn in the course of her employment. Further, both of these clauses use the precise phrase which appears in the definition of "relevant company" in clause 13: "subsidiary, associate and/or other related companies" of the defendant. The scenarios I have outlined at [92] above are therefore not fanciful but arise from rights which the defendant expressly reserved to itself under the employment agreement.

94 I therefore turn to consider the activity restriction and the geographical restriction.

### ***Activity restriction***

95 The only legitimate interest which can support the non-competition covenant is the defendant's interest in its trade connection through the plaintiff (see [69] and [75] above). There is no basis for saying that activities prohibited by the non-competition covenant are reasonably necessary in order to protect the defendant's legitimate interest in that trade connection.

96 The non-competition covenant prevents the plaintiff from competing "in the same or similar business as the relevant Company, or in any other business carried on by the relevant Company." Mr

Tan argues that the definition of "relevant company" makes the activity restriction unreasonably wide because it means that the non-competition covenant could prevent the plaintiff from engaging in activities which have nothing to do with her employment simply because the defendant's related companies engage in those activities. [\[note: 41\]](#)

97 I agree with Mr Tan. For the reasons I have set out above, the definition of "relevant company" does not require a past employment relationship between the plaintiff and a "related company" for that company to become a "relevant company." The definition also does not require the plaintiff to provide services directly to the "related company" as long as the work is carried out in relation to and for its benefit. The non-competition covenant would prevent the plaintiff from competing with any of these companies. That goes far beyond what is reasonably necessary to protect the defendant's trade connection.

98 Leaving that aside, the activity restriction means that if the plaintiff were employed by Noel Gifts even in a transitory manner, say by being seconded for a week to their sales team to overcome a temporary manpower shortage, she would thereby be precluded from competing with any business conducted by Noel Gifts whether in the flowers, gifts, hampers and wreaths business or outside that business (eg Noel Gifts' franchising operations). This would be the result even if the plaintiff had no knowledge or influence over customers in these other segments of Noel Gifts' operations.

99 The activity restriction is clearly intended to extend beyond the defendant's core business in circumstances where there is only an incidental connection between the plaintiff and the related company. A blanket ban preventing the plaintiff from competing with any business carried on by those companies is far too wide to preserve the defendant's trade connection with a finite set of customers of whom the plaintiff has knowledge and over whom she has influence. I therefore hold that the activity restriction goes significantly further than is reasonably necessary to protect the defendant's trade connection. Indeed, even if trade secrets and confidential information were to suffice as a legitimate interest, I would hold that the clause goes further than reasonably necessary to protect that interest too. The non-competition covenant is therefore unreasonable as between the parties.

### ***Geographical restriction***

100 The non-competition covenant extends to "Singapore, and Malaysia and any other countries the relevant Company has offices at the date of such termination".

101 Mr Tan contends that this prohibition is unreasonably wide because it includes Malaysia and the plaintiff was responsible only for sales to customers in Singapore. Further, he submits, the geographical restriction prevents the plaintiff from competing in Malaysia even though at the date the parties entered into the employment agreement, the defendant had no business presence in Malaysia. Only Noel Gifts did.

102 In response, Mr Lok argues that it is reasonable that a senior employee of the defendant should be restrained from competing not just against the defendant in Singapore but also against Noel Gifts and its related companies in Malaysia. He also contends that it was reasonable to include Malaysia at the time the employment agreement was signed because the defendant did have plans to expand its business into Malaysia by riding on the infrastructure and network of Noel Gifts.

103 It appears to me that the geographical component of the non-competition covenant was aimed more at protecting Noel Gifts' interests than the defendant's. I accept that the court should take into account the realities of modern business and must not be too inhibited by considerations of corporate personality when construing a restrictive covenant. An example of this approach is *Beckett*

*Investment Management Group Ltd & ors v Glynn Hall & ors* [2007] EWCA Civ 613 at [23] ("*Beckett*") affirming *Stenhouse Australia Ltd v Marshall William Davidson Phillips* [1974] 1 AC 391 at 404D–E. In *Beckett*, two key employees were subject to a covenant restraining them from soliciting the employer's customers post-termination. In fact, the employer was a holding company which did not trade and had no clients. The clients and the trade connection were actually held by a subsidiary, which was the entity to which the employees had provided their services. An injunction was refused at first instance because the court construed the covenant narrowly and held that it was void because the employer had no client connection of its own to protect and therefore no legitimate interest of its own to support the covenant. The English Court of Appeal granted the injunction, construing the restrictive covenant as extending to the clients of the operating subsidiary.

104 That was no doubt a legitimate approach and result on the facts of *Beckett*. In this case, however, the plaintiff was employed by a subsidiary. The holding company brought the subsidiary into existence specifically to carry on the limited business of servicing the subsidiary's own set of (acquired) customers. The plaintiff was specifically hired by the subsidiary to manage only the sales of that limited business. She had no role in Noel Gifts or in the Noel group. The defendant had no business presence or ongoing business in Malaysia: it had only plans to expand into Malaysia. In the circumstances, I hold that including Malaysia in the geographical restriction was intended to protect Noel Gifts' interests rather than the defendant's interests. To that extent, it is unreasonable as between the parties.

105 The result of including Malaysia in the geographical restriction is to make the non-competition covenant unreasonably wide as between the parties in order to protect the defendant's legitimate interest in protecting its trade connection. The non-competition covenant is therefore void as between the parties on this ground also.

106 In light of my conclusion on the activity restriction and the geographical restriction, it is not necessary for me to consider the reasonableness of the temporal scope of the covenant as between the parties or to consider whether the restrictive covenant is reasonable in the public interest.

### **Reasonableness: the non-solicitation covenant**

107 The non-solicitation covenant restrains the plaintiff for two years in Singapore and Malaysia from: (i) canvassing or soliciting orders from any person who was a customer of a relevant company; and (ii) endeavouring to take away from a relevant company the business of *any* of its customers. As was the case with the non-competition covenant, the authority of *Stratech* means that the only legitimate interest which can support the non-solicitation covenant is the defendant's interest in trade connection.

108 The plaintiff contested the reasonableness of the non-solicitation covenant on the same three fronts: (1) the activity restriction; (2) the geographical restriction; and (3) the temporal scope.

### ***The activity restriction***

109 I find that the activity restriction in the non-solicitation covenant is unreasonably wide as between the parties. The problem again is the scope of the definition of "relevant company." Its effect is to extend the non-solicitation covenant to prevent the plaintiff from soliciting orders from customers of other Noel group companies even if her connection with that company was purely incidental and even though the plaintiff may have no trade connection with those customers.

110 Further, limb (ii) of the non-solicitation covenant (see [107] above) as applied to the

defendant prohibited the plaintiff from taking away from the defendant the business of *any* customer of the defendant. This limb therefore covered even those who became customers of the defendant *after* the plaintiff's employment there had ended. The plaintiff could have no conceivable trade connection with those customers for the defendant to protect through the non-solicitation clause. I come back to this at [197] below.

### ***The geographical restriction***

111 I note in passing that there is an ambiguity about the meaning of the words "same areas" in the phrase "within the same areas" in the opening words of the non-solicitation covenant. It could refer to the same areas of *business* as in the non-competition clause (*ie* the same or similar business as the relevant company or any other business carried on by the relevant company). Or it could refer to the same *geographical* areas as provided in the non-competition clause (*ie* Singapore, Malaysia and any other countries in which the relevant company has offices at the date of such termination). The phrase "within the aforesaid areas" raises the same ambiguity and is of no assistance. That prepositional phrase can be deleted without altering the meaning of clause 13 at all, and is therefore completely superfluous. Internal consistency suggests that the parties intended the phrase "within the same areas" to signify a geographical area.

112 On that basis, my observations on the definition of "relevant company" and its effect on the geographical restriction in my discussion above of the non-competition covenant apply equally to the non-solicitation covenant. That definition operates to extend the geographical reach of the non-solicitation covenant beyond that which is reasonably necessary to protect the defendant's trade connection.

### ***The temporal scope***

113 The non-solicitation covenant restrains the plaintiff from soliciting business from the defendant's present and future customers for two years. As far as the defendant's *future* customers are concerned, no period of time could be reasonable since the defendant could not have had any trade connection with these customers through the plaintiff.

114 As regards the customers with whom the defendant does have a trade connection through the plaintiff, two years appears to me to be an unreasonably long time given the legitimate interest to be protected. No restrictive covenant can have as its purpose the naked stifling of competition by the departing employee. Where the legitimate interest in question is trade connection, the purpose of the protection allowed by the law is to prevent the departing employee from relying on his trade connection to draw custom away for a reasonable period of time. The restraint ought not, therefore, to last longer than reasonably necessary to allow the employer the breathing space it needs, free of active interference with its trade connection from the departing employee, to transfer that trade connection to its other employees. Just how long that reasonable period of time is in a particular case depends on the strength and persistence of the trade connection and the time it takes to build and cement a new trade connection. That in turn will depend on the particular industry involved, the life cycle of trade connection in that industry and the role of the departing employee in the employer's business. This will ordinarily be informed by evidence, to the extent that any is available, on what the relevant industry considers reasonable and embodies in its practice.

115 The defendant submits that two years is reasonable for this purpose because: (a) the plaintiff had very close contact with the defendant's customers and has strong influence over them; (b) the defendant's business is highly seasonal, with a one-year cycle; (c) the plaintiff knows the defendant's business strategy for the next five years; and (d) the two-year period tied in with the other



restrictions under the agreement.

116 I do not accept these submissions. First of all, while I accept that the plaintiff has influence over the defendant's customers, that addresses only one side of the analysis. It does not address why the defendant needs two years for its remaining sales staff to build their own trade connection with those customers. The defendant says that its business is seasonal and therefore the defendant's "sales staff could only re-establish contact and rapport with these [seasonal] customers when the particular festive season is approaching". [\[note: 42\]](#) But even so, there is no evidence before me why it should take more than one year to rebuild these connections. The defendant also submits that periodic customers place only one order every two years. [\[note: 43\]](#) Again, it does not seem to me that there is any obstacle to the defendant rebuilding a trade connection with these periodic customers well within that two-year cycle. As for the plaintiff's knowledge of the defendant's business strategy, that knowledge does not support a non-solicitation covenant which is designed to protect trade connection. In any event, to the extent that the business strategy is covered by the confidentiality obligation in clause 3, protecting it cannot be a legitimate interest to support the non-solicitation covenant on the authority of *Stratech*. It is significant that the confidentiality obligation in clause 3 covers not just disclosure of confidential information but also *use* of that information to the detriment of the defendant or a related company. This final point assists the plaintiff rather than the defendant: to the extent that the clause 3 prevents the plaintiff from using as well as disclosing the defendant's confidential information for a two-year period, the non-solicitation covenant for the same two-year period cannot be directed to protecting that as a legitimate interest.

117 For the foregoing reasons, I hold that two years is unreasonably long to prevent the plaintiff from using to her advantage the trade connection which went with her. Given that I have found the non-solicitation covenant to be unreasonable as between the parties, it is not necessary for me to consider whether it is unreasonable in the public interest.

### **Can the objectionable parts be severed?**

118 The District Judge held that what he called the geographical restraint was void as being in restraint of trade but that the non-solicitation restraint was valid. He applied the doctrine of severance to clause 13 in order to sever the geographical restraint from the non-solicitation restraint, thereby saving the latter. I have found both the non-competition covenant and the non-solicitation covenant to be unreasonably wide and therefore void.

119 Two issues now arise:

(a) Whether one covenant in clause 13 can be severed from the other as the District Judge did; and

(b) Whether either covenant can be saved by severing objectionable parts within it.

Analysing these issues requires a consideration of the contractual doctrine of severance.

### ***The doctrine of severance***

120 Broadly speaking, the doctrine of severance is a contractual doctrine of general application which permits a contractual sub-unit which is objectionable on some ground to be excised from an unobjectionable larger contractual unit of which it forms a part, thereby saving the larger unit from being void by reason alone of its collocation with the smaller objectionable unit. It can be applied to sever an entire objectionable provision from a contract, thereby saving the remainder of the contract

from the same objection; or it can be invoked to sever a part of a contractual provision, thereby saving the remainder of that provision from the same objection.

121 Mr Tan submits that the doctrine of severance — at least in the context of employee covenants — is to be construed and applied narrowly and can operate to sever only incidental aspects of a contractual obligation. His submission is that neither covenant can be saved by the doctrine of severance.

122 The Court of Appeal has considered the doctrine of severance as it applies to restrictive covenants in four leading decisions since 2000. They are:

- (a) *Kickapoo Joy Juice*;
- (b) *Man Financial*;
- (c) *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 (“CLAAS”); and
- (d) *Smile Inc (CA)*.

123 Only one of these four cases considers the doctrine of severance in the context of an employee covenant as opposed to a vendor covenant. That case is *Man Financial*. But the discussion there was not necessary for the decision and is therefore *obiter*. I will return to the significance of this point below. In only two of these cases does the Court of Appeal find the doctrine of severance applicable and actually apply it to the restrictive covenant in question. It is therefore only in these two cases that the discussion of the application of the doctrine of severance is *ratio*. These two cases are *Kickapoo Joy Juice* and *CLAAS*.

124 As part of its *ratio* in *CLAAS*, the later of these two cases, the Court of Appeal expressly approved and applied (at [70]) English law on the doctrine of severance as expressed in three English cases: *Attwood v Lamont* [1920] 3 KB 571 (“Attwood”); *T Lucas and Co Ltd v Mitchell* [1974] 1 Ch 129 (“T Lucas”) and *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388 (“Sadler”). I therefore begin with a consideration of *Attwood* and *Sadler* before turning to the quartet of Court of Appeal cases. I consider *T Lucas* also, but later, when I come to consider whether, and if so how, the doctrine of severance applies specifically to *employee covenants*.

## ***Severance in English law***

### *Attwood*

1 2 5 *Attwood* contains one of the earliest formulations of the doctrine of severance. The focus there is on the meaning of what is to be excised and whether it alters the meaning of what remains in degree or in kind. Lord Sterndale MR said (at 577–578):

I think... that it is still the law that a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining.

...

It remains, therefore, to consider whether the covenant in this agreement can be considered as though it contained a number of several covenants each relating to a separate trade. I think it clear that if the severance of a part of the agreement gives it a meaning and object *different in*

*kind and not only in extent*, the different parts of it cannot be said to be independent.

[emphasis added]

126 In the same case Younger LJ held (at 593):

... The learned judges of the Divisional Court, I think, took the view that such severance always was permissible when it could be effectively accomplished by the action of a blue pencil. I do not agree. The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only.

127 The test described in *Attwood* is often called the “blue pencil test” for severance. It permits the deletion of words — and even then, probably only contiguous words — and does not allow the insertion or alteration of words, no matter how slight. That name and that description concentrates on the formal aspect of severance. The substance of severance as conceived in these passages from *Attwood* is the divisibility of the individual promises which the parties have made to each other which, taken together, comprise the parties’ agreement. *Attwood* is authority for the proposition that the doctrine of severance can be applied only if the objectionable promise is, on its proper construction, independent of the remaining promises. If excising the objectionable promise would be to change the meaning of the parties’ agreement to something “different in kind and not only in extent”, the objectionable promise is not properly divisible from the remainder of the contract and the doctrine of severance cannot apply. That is so even if the only change to the wording consists of deletions, as mandated by the blue pencil test, and even if the words which remain have grammatical meaning. That is why Younger LJ disagreed with the Divisional Court’s view that severance is always permissible if a blue pencil can be run through the objectionable words so long as grammatical meaning in the remainder is preserved. Continuing grammatical meaning is a necessary condition for severance, but it is not a sufficient condition (see below at [170]). It is an equally necessary condition for severance that the parties’ agreement be altered in extent but not in kind and, in that sense, *contractual* meaning is preserved.

#### *Two difficulties with Attwood*

128 There are two difficulties with the test set out in *Attwood*. The first is that it considers the doctrine of severance only in terms of excising words within a clause. That is not surprising: that is the context in which the issue was presented to the court. Thus, *Attwood* did not need to consider whether, and if so how, the doctrine of severance can excise an entire clause from a contract. In principle, there ought to be no difference. The divisions between the parties’ substantive promises comprising their agreement may be coincident with the divisions in the units of language they have chosen to embody their substantive promises in written form, but it is not necessarily so. The parties’ written contract may express their agreement by setting out one promise per clause of the contract, more than one promise per clause, more than one clause per promise or any combination of these. As *Attwood* shows, the doctrine of severance turns on the substance of the parties’ promises and not their form. The focus ought throughout to be, therefore, on the severability of the promises and not on the severability of words. The difference between excising words within a clause and excising a whole clause is a matter of form only. Obviously, if an entire clause is excised, the grammatical meaning of what remains is much less an issue because what has been removed is an entire grammatical unit of language. But as *Attwood* shows, it is both the grammatical meaning *and* the contractual meaning of what remains that is the focus of the inquiry and not the grammatical meaning alone.

129 The second difficulty with the approach in *Attwood* is that the question of divisibility of promises is artificial and instrumental (see *Kickapoo Joy Juice* at [41]–[43]). It is also fundamentally circular. It amounts to saying no more than that a contractual promise can be severed if it is severable. One need only look at the result in *Attwood* itself for an illustration of the artificiality. The Divisional Court took the view that the string of prohibited trades set out in the restrictive covenant was in substance several divisible obligations permitting the severance of one without affecting the remainder. The Court of Appeal took the opposing view and held the entire covenant to be void.

### *Sadler*

130 The modern test for severance in English law has its roots in *Attwood* but addresses both of these shortcomings. That test retains the requirement of continuing grammatical sense of what remains after severance, continues to focus on what I have called the contractual meaning of the remainder, but has moved away from the circular question of the divisibility of promises. Further, the test draws no distinction in principle between severing a phrase from a clause and severing a clause from a contract.

131 In *Sadler*, P J Crawford QC, sitting as a deputy judge of the High Court held (at [19]):

... [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".

132 This formulation of the test was approved by the English Court of Appeal in *Beckett*, which preferred it to reliance by the trial judge in *Beckett* on *Attwood*.

### ***Severance in Singapore law***

133 As part of its *ratio* in *CLAAS*, the Court of Appeal approved the principles of the English doctrine of severance as derived from *Attwood*, *T Lucas* and *Sadler* as applied by the trial judge in *CLAAS*. The result is that the doctrine of severance as it is conceived in English law also represents Singapore law. I now consider the quartet of Singapore cases in chronological order to show that these cases have, in effect, applied the *Sadler* propositions or are at the very least not inconsistent with them.

### *Kickapoo Joy Juice* (2000)

134 In *Kickapoo Joy Juice*, Chao Hick Tin JA said (at [40]):

40 The doctrine of severance may be invoked to serve two purposes. The first is to cut out altogether an objectionable promise from a contract leaving the rest of the contract valid and enforceable. Second is to cut down an objectionable promise as to its scope but not to cut it out of the contract altogether. An unreasonably wide restraint of trade clause would be a classical example of a case falling within the second category.

135 I make three points about *Kickapoo Joy Juice*.

136 First, this passage is not intended to be a statement of the *prerequisites* for severance in the same way as *Sadler* set out those prerequisites. Rather, as the passage makes clear, it is a statement of the *purposes* of severance. This is not, therefore, a statement of a test for severing a contractual provision but a description of the two situations in which it can operate.

137 Second, it is significant that Chao JA explains the purposes of severance with regard to "promises". That properly puts the focus on the substance of the issue rather than the form in which it is presented (see [128] above).

138 Finally, this second point is exemplified by the approach which the Court of Appeal actually adopted in *Kickapoo Joy Juice*. It looked at the substance of the covenantee's promise and not the form in which it was expressed. The operative words of the restrictive covenant in question provided that the covenantee shall not "sell... any product... which contains as a part of its name... the term 'Kickapoo Joy Juice' or any syllable or part of [that] term..." (at [23]). This covenant appeared in a single grammatical unit (a sentence) in a single clause of the contract. But that was not the focus of the Court of Appeal's inquiry. Instead, it considered whether the obligation in this single grammatical unit was a single obligation or a composite obligation divisible into three constituent promises — one promise in respect of each of the prohibited three words. The Court of Appeal held that the restriction indeed "could be construed as distinctive and separate restrictions in respect of each of them" (at [45]). It was for this reason that the Court of Appeal held that the two prohibited words "Joy" and "Juice" which made the covenant unreasonably wide could validly be severed from the covenant, saving the remainder of the covenant from being void.

139 Of course, this approach is somewhat different from the approach in *Sadler*. But it appears that *Sadler* was not cited to the Court of Appeal in *Kickapoo Joy Juice*. And the reasoning in *Kickapoo Joy Juice* is entirely consistent with the Court of Appeal's later endorsement of *Sadler* in *CLAAS*. Indeed, one could say that all three *Sadler* requirements were satisfied in *Kickapoo Joy Juice* because, as the Court of Appeal found, the sole true interest of the covenantee in that case was to restrict only the use of the remaining word, "Kickapoo".

#### *Man Financial (2008)*

140 *Man Financial* concerned the validity of two restrictive covenants in a contract between employer and employee. The two covenants appeared in two separate clauses in a contract governing the termination of the employee's employment. At first instance, the trial judge found that both clauses constituted an unreasonable restraint of trade. The trial judge then held that both clauses could be severed from the agreement on the basis that doing so did not change the character of the parties' bargain.

141 On appeal, the Court of Appeal considered the doctrine of severance in the context of employee restrictive covenants. It began by setting out Chao JA's statement in *Kickapoo Joy Juice* (see [134] above) and continued as follows (at [127]–[129]):

127 In so far as the latter category referred to in the above quotation is concerned, severance occurs, if at all, within the clause itself according to what is popularly known as the "blue pencil test". Put simply, in order to apply the doctrine of severance so as to save an otherwise (*prima facie*) offending clause, the court concerned must be able to run, as it were, a "blue pencil" through the offending words in that clause without altering the meaning of the provision and, of course, without rendering it senseless (whether in a grammatical sense or otherwise). In other

words, the court will not rewrite the contract for the parties.

128 The former category... deals, in contrast, with severance of entire or whole clauses in a contract. As was noted in the court below, the basic test centres on whether the objectionable promise (as embodied, *ex hypothesi*, within the clause in question itself) is substantially the whole or the main consideration for the promise sought to be enforced. If it is the whole or the main consideration, then the doctrine of severance will not apply; if not, the doctrine will apply. Everything depends, of course, on the precise factual matrix before the court (in this regard, see, for example, the oft-cited (and contrasting) English decisions of *Goodinson v Goodinson* [1954] 2 QB 118 on the one hand and *Bennett v Bennett* [1952] 1 KB 249 on the other). ...

129 The above (albeit extremely brief) summary encompasses the present English position on the doctrine of severance, which also appears (as, for example, *National Aerated Water Co* demonstrates) to represent the current Singapore position. ...

[emphasis in original omitted]

142 I make five observations on *Man Financial*.

143 First, as the Court of Appeal itself acknowledges, the doctrine of severance did not arise for decision in that case (at [19] and [126]). The passage cited above is therefore *obiter*.

144 Second, as that passage shows, the Court of Appeal in *Man Financial* expressly approves the approach taken in *Kickapoo Joy Juice*. That approach, as I have pointed out above, focuses on the substance of the promises and their divisibility rather than the form of their expression.

145 The third point is a consequence of the second point. Because *Man Financial* approved *Kickapoo Joy Juice*, this passage from *Man Financial* should not be read as moving the focus in the doctrine of severance from the underlying issue of substance (whether the promises can be divided) to an issue of mere form (whether the clause can be amended). In my respectful view, the Court of Appeal's references to "clauses" in this passage are properly understood as a consequence of the particular facts of *Man Financial*, where the court was considering two standalone clauses, each setting out a single restrictive covenant. In that sense, therefore, the clauses presented to the Court of Appeal contained one promise per clause. Reading the references to "clauses" in this context does not, in my respectful view, undermine the authority of *Kickapoo Joy Juice* as placing at the centre of the inquiry in severance on the parties' *promises* rather than the clauses by which those promises are expressed.

146 The fourth point is this: I have said that the doctrine of severance did not arise in *Man Financial*. That is only partly correct. It is true that the Court of Appeal did not consider the *application* of the doctrine of severance in that case. But that is only because the Court of Appeal considered the *applicability* of the doctrine of severance and held it could not apply. The doctrine could not apply because, as the Court of Appeal held, the two restrictive covenants were the main consideration given by the employee for the contract (at [128]). Severing the two clauses would result in an agreement that was no longer supported by consideration. In essence, therefore, the Court of Appeal held that severance was unavailable because the second (and probably also the third) *Sadler* requirements were not met. As a matter of principle and substance, the result on this point would have been the same in *Man Financial* even if the two clauses had been entwined and collocated in a single clause. Running a blue pencil over words within a clause of a contract can equally obliterate the main consideration for the contract.

147 The final point I make on *Man Financial* is about its comment, *obiter*, that what remains after applying the doctrine of severance must be a remaining set of words which has its meaning unaltered and which is not senseless. I deal first with the requirement for the meaning of what remains to be unaltered. Any severance will, of course, alter the meaning of what remains: see *CLAAS* at [70] and see below at [152]. Indeed, the very intention of the doctrine of severance is to alter the meaning of the larger unit by removing an objectionable sub-unit, thereby preventing the larger unit from being objectionable on the same grounds. As the Court of Appeal pointed out in *CLAAS*, if the meaning of the remaining part remains entirely unaltered after the severance, the resulting clause would be just as objectionable as the original clause. I therefore read this reference in *Man Financial* as requiring the meaning of the resulting clause to remain unaltered in what I have called the contractual sense. In other words, not only must the remaining words have grammatical meaning, they must also have contractual meaning in that what remains continues to embody the fundamental basis of the parties' contract including the principal consideration for the contract.

148 I now consider the requirement that the remaining words not be senseless. The doctrine of severance can, of course, be applied only if what results after severance makes grammatical sense. But this statement in *Man Financial* does not mean that grammatical sense is a sufficient condition for severance. It is merely a necessary condition. That is why the Court of Appeal adds the parenthetical "(whether in a grammatical sense *or otherwise*)" [emphasis added] when dealing with senselessness. That is also why the Court of Appeal concludes by saying that the court will not rewrite the parties' contract. Both of these comments recognise that a deletion which yields a grammatically sensible form of words can still yield a contractually senseless outcome and amount to rewriting a contract.

149 To take an extreme example that does not involve a restrictive covenant, assume an employee promises in his written contract of employment to pay his employer "the sum of five thousand dollars upon breach". It would, of course, amount to an impermissible rewriting of the parties' contract to insert the word "hundred" before "thousand". But it would equally amount to an impermissible rewriting of the parties' contract to delete the word "thousand". This is so even though what remains is grammatical and has semantic meaning. This is yet another reason why the true focus in the doctrine of severance must be on whether the severance affects the substance of the parties' promises and not on the grammatical meaning of the particular form of words in the contract, whether before or after the severance.

#### *CLAAS (2010)*

150 The third case in the quartet is *CLAAS*. In *CLAAS*, a doctor sold his aesthetic medicine practice subject to a shareholders' agreement which included a non-competition covenant. The covenant prevented the doctor from competing with the "Business of the [purchaser] and/or the practice of Aesthetic Medicine". The contractual definition of "Aesthetic Medicine" set out a series of specific aesthetic therapies and concluded with the words "...and all procedures and treatment as understood by aesthetic medicine".

151 The trial judge held that the non-competition covenant was unreasonably wide because of the width of the term "Business". She then considered the doctrine of severance. She held, applying *Sadler*, that the non-competition covenant could be saved by the doctrine of severance by deleting the words "Business of the [purchaser] and/or". She further held that the doctrine of severance could in principle apply to cure the width of the definition of "Aesthetic Medicine" without affecting the nature of the anti-competition covenant. But she found herself unable to apply the doctrine of severance to that definition because the doctor failed to suggest what specific aspects of it should be severed: see *Ng Boon Ching v CLAAS Medical Centre Pte Ltd* [2009] 3 SLR(R) 78 at [77]–[82].

152 The Court of Appeal agreed that the non-competition covenant was unreasonably wide but relied solely for this conclusion on the width of the concluding words in the definition of "Aesthetic Medicine". It further held that the doctrine of severance could be applied to sever those concluding words, thereby saving the non-competition covenant from being entirely void. After considering *Man Financial*, the Court of Appeal held (at [70]):

... [O]n the definition of "Aesthetic Medicine", the Judge held that she could not sever any portion and yet not alter the meaning. We find that a little difficult to understand. As we see it, by "not altering the meaning" does not mean that the original version of the clause and the modified clause (after running the blue pencil through) must mean the same. It is illogical to expect the two versions to be the same if the court needs to run the blue pencil through the original clause to excise something objectionable therein. The phrase "not altering the meaning" just means not altering the sense of what remains of the clause after running the blue pencil through. All it means is that the obnoxious portion must be capable of being removed without the necessity of adding to or modifying the wording of what remains: see *Attwood v Lamont* [1920] 3 KB 571 at 593 per Younger LJ; *T Lucas and Co Ltd v Mitchell* [1974] Ch 129 and *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388. In the present case, the words "and all procedures and treatment as understood by aesthetic medicine" can easily be severed from the definition of "Aesthetic Medicine" in the November Agreement and what remains makes perfect sense and is reasonable.

153 It is clear from the Court of Appeal's citation and approval of *Attwood* and *Sadler* in *CLAAS*, as well its decision in *Kickapoo Joy Juice* and *Man Financial*, that its decision in *CLAAS* cannot be read as endorsing a purely grammatical test of severance: a test which focuses only on the grammatical meaning of what remains after the severance and which ignores the divisibility of promises, the requirement for consideration and what I have called the contractual meaning of the remainder. In particular, the trial judge's reliance in *CLAAS* on *Sadler* and the Court of Appeal's endorsement of that shows that the Court of Appeal is considering in this passage only the first of the three *Sadler* requirements and compressing its reasoning on the remaining requirements because those requirements were set out in the judgment of the court below. The essence of the Court of Appeal's decision in *CLAAS*, therefore, is that not only did the definition of "Aesthetic Medicine" continue to make grammatical sense after the severance, but that it was also the case that the shareholders' agreement continued to be supported by adequate consideration (unlike *Man Financial*), and the fundamental character of the shareholders' agreement was unchanged.

#### *Smile Inc (CA) (2012)*

154 The final case in the quartet is *Smile Inc (CA)*. This case concerned the validity of an employee covenant. At first instance and on appeal, it was held that the covenant was an unreasonable restraint of trade because, *inter alia*, it contained no time limit. The doctrine of severance clearly could have no conceivable application because, the defect being an omission, there was nothing for the doctrine to sever or excise from the restrictive covenant (at [31]) and the doctrine does not permit supplying or altering the parties' words even slightly. This is simply the consequence of the fundamental principle of severance that the court will not rewrite the parties' contract.

#### *Conclusion on Singapore law*

155 In Singapore law, therefore, the test of severance is that set out in English law in *Sadler* and approved in *Beckett*. That test was applied by the High Court and endorsed by the Court of Appeal in *CLAAS*. That test has three prerequisites before severance can be undertaken:



- (a) the unenforceable provision must be capable of being removed without adding to or modifying the wording of what remains with the remainder continuing to make grammatical sense;
- (b) the remaining contractual terms must continue to be supported by adequate consideration; and
- (c) the severance must not change the fundamental character of the contract between the parties.

These principles apply whether what is to be severed is a phrase within a clause or an entire clause.

156 Mr Tan submits that while these principles may reflect the doctrine of severance as it applies to contracts generally — and perhaps even to vendor covenants — it does not govern the doctrine of severance as it relates to employee covenants.

### ***Severance of restrictive covenants in employment contracts***

157 Mr Tan founds his submission on a line of English cases starting from the early twentieth century which suggests that the doctrine of severance applies with reduced scope to restrictive covenants between employer and employee. The reason given for the reduced scope is that a liberal doctrine of severance would allow an employer effectively to hold an employee hostage by exacting unreasonably wide restrictive covenants at the outset of the employment, knowing: (a) that the employee would not generally have the wherewithal or fortitude to resist the covenant before, during and after the employment; and (b) that if the employee did mount a challenge and were to succeed, the worst that could happen from the employer's point of view was that the court would cut down the unreasonably wide covenant to what was reasonable. A liberal doctrine of severance would permit, indeed encourage, employers to extract oppressive restrictive covenants and thereby undermine the policy underlying the law striking down restrictive covenants: that of protecting employees as a class against the inequality of bargaining power and inequality of resources they face as against employers as a class.

#### ***Mason (1913)***

158 This concern can be traced back to the speech of Lord Moulton in *Mason v Provident Clothing and Supply Co* [1913] 1 AC 724 ("*Mason*") (at 746–746):

It was suggested in the argument that even if the covenant was, as a whole, too wide, the Court might enforce restrictions which it might consider reasonable (even though they were not expressed in the covenant), provided they were within its ambit. My Lords, I do not doubt that the Court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and *even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause*. It would in my opinion be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master. It is sad to think that in this present case this appellant, whose employment is a comparatively humble one, should have had to go through four Courts before he could free

himself from such unreasonable restraints as this covenant imposes, and the hardship imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, the Court would in the end enable them to obtain everything which they could have obtained by acting reasonably. It is evident that those who drafted this covenant aimed at making it a penal rather than a protective covenant, and that they hoped by means of it to paralyse the earning capabilities of the man if and when he left their service, and were not thinking of what would be a reasonable protection to their business, and having so acted they must take the consequences.

[emphasis added]

159 Mr Tan urges on me especially the words of Lord Moulton italicised in this passage. He submits that I should hold that the whole of clause 13 is unreasonably wide and void because severing either the whole non-competition covenant or the whole non-solicitation covenant or any part of either covenant cannot be said to be, in Lord Moulton's words, excising "something of trivial importance, or merely technical, and not a part of the main purport and substance of the clause".

*Attwood (1920)*

160 These remarks in *Mason* were *obiter* because that was not a case where the doctrine of severance could have been applied in any event. In *Attwood*, where these words were cited, the *ratio* of the Court of Appeal was that the covenant in question was indivisible and therefore not susceptible to severance. It was only in *dicta* that Younger LJ (with whom Atkin LJ agreed) accepted that *if* the covenant were capable of severance, Lord Moulton's *dicta* required the courts to adopt a stricter approach to severance when it came to employee covenants (at 593–594):

... I am of opinion that even if this were not so this case is not one in which any severance, even if otherwise technically permissible, ought to be made. In my view the necessary effect of the application of the principle on which *Mason's Case* and *Morris v. Saxelby* have both been decided has been to render obsolete the cases in which the Courts have severed these restrictive covenants when acting on the view that being *prima facie* valid it was their duty to bind the covenantee to them as far as was permissible. It may well be that these cases are still applicable to covenants between vendor and purchaser... But these authorities do not seem to me to be any longer of assistance in the case of a covenant between employer and employee. To such a covenant I think the statement of Lord Moulton in *Mason's Case* necessarily applies. ...

161 This aspect of Younger LJ's judgment, albeit *obiter*, is taken as authority for the proposition that there are two doctrines of severance in English law, or at least two species of one doctrine: a narrow doctrine which applies to restrictive covenants (and even then only to employee covenants and not to vendor covenants) and a wider doctrine which applies to all other contracts including vendor covenants. The narrower doctrine as conceived by Younger LJ permits the severance of words only in accordance with Lord Moulton's speech in *Mason*. That is the conception of severance urged upon me by Mr Tan.

*T Lucas (1974)*

162 There is Court of Appeal authority in England approving Younger LJ's approach in *Attwood*: see *Routh v Jones* [1947] 1 All ER 758 at 764; *Jenkins v Reid* [1948] 1 All ER 471 at 481. Nevertheless, the weight of modern English authority is that the words of Lord Moulton do not specify a narrower test of severance for employee covenants but were instead intended to emphasise in the context of

that case the principle that the doctrine of severance does not operate to reform or modify the parties' contract beyond the removal of the severed words.

163 One such case is the English Court of Appeal's decision in *T Lucas*. This is the remaining case in the trio of English cases which the Court of Appeal endorsed in *CLAAS*. *T Lucas* involved a single clause in an employment contract comprising two restrictive covenants. One covenant was reasonable and valid and the other was unreasonable and therefore void. At first instance, the judge refused to sever the unreasonable covenant on the authority of *Attwood* and so held the entire clause, including the valid covenant, to be void. The English Court of Appeal reversed the decision. There are three significant points which emerge from the Court of Appeal's judgment.

164 First, the *ratio* of *T Lucas* is as follows, per Russell LJ (at 137):

... [I]f you find two restraints which as a matter of construction are to be regarded as intended by the parties to be separate and severable, and the excision of the unenforceable restraint being capable of being made without other addition or modification, there is no third question, even in master and servant cases.

Russell LJ's reference to a "third question" is a reference to the judgment of Younger LJ in *Attwood* that there is a special additional requirement for severance applicable only in cases involving employee covenants, and even if the court has before it two covenants which are distinct and severable. That additional requirement amounts, in substance though not in form, to the court's residual power in employee covenant cases to decline to enforce what remains even after severance.

165 Russell LJ preferred to read Lord Moulton's *dictum* in the context in which it was spoken in *Mason*, and therefore as a limit on a court's ability to modify the substance of a covenant through the process of construction and not as denying, in a case involving an employee's covenant, the court's power to sever what on a proper construction is a distinct and separate covenant and confining that power to trivial or technical matters. As Russell LJ said (at 136):

... We are far from convinced that Lord Moulton had really in mind a case where the obligations were truly stated as equivalent to separate obligations, as distinct from declaiming against a wider doctrine of severance which has found favour in restraints of trade in other jurisdictions, which wider doctrine involves rather modification than separation or severance; and his reference to the trivial may, therefore, have been a qualified acceptance of modification in cases in which fantastical or fanciful or merely hypothetical possibilities that might arise from the literal language of a restraint have either been ignored by the courts or eliminated as a matter of sensible or realistic construction. ...

166 The second significant point that Russell LJ makes in *T Lucas* is that there is no difference in principle whether the parties choose in their contract to express the two covenants as constituents of one clause or as two separate clauses. Any other approach would undermine the policy underlying avoidance and could give rise to arbitrary results (at 136):

... [Younger LJ's] whole approach, based on policy and the undesirability of permitting a system by which an employer might cow an employee into submission to unenforceable restraints and at the same time, if accused of too wide a claim, successfully assert a narrower, would, it seems to me, be equally applicable to a case in which two restraints were indubitably separate and distinct, being, for example, in two different clauses. Indeed, counsel for the defendant in this case found himself unable to deny that the views expressed must lead logically to that result. After all, once a situation is reached as a matter of construction that two restraints in collocation

are in truth separate and severable, are they not as if they were in separate clauses? ...

167 The final point which emerges from *T Lucas* relates to the point I have made above that what remains after the doctrine of severance is applied must retain grammatical meaning and what I have called contractual meaning. It appears from *T Lucas* that the remaining words do not need to have *semantic* meaning standing alone. Although it is not adverted to in the judgment of Russell LJ, *T Lucas* shows that it is permissible to excise words even if the words which are not excised must continue to be construed with reference to the excised words. Thus, in that case, the excised words contained a definition of the term "any such goods" to which the words which remained after severance referred. The remaining covenant therefore could not stand alone semantically and had to be interpreted by reference to the excised words. Nevertheless, it was held that those words could properly be severed.

#### *Beckett (2007)*

168 In *Beckett*, the English Court of Appeal put it beyond doubt as a matter of English law that there is no separate and narrower doctrine of severance for employer/employee cases. In that case, Kay LJ held that the *Sadler* threefold test for severance is a useful way of approaching severance in the employment context because it is consistent with the preceding English case law and ought therefore to be adopted (at [43]).

#### *Lord Sumption's gloss on the test for severance*

169 The approaches in *Mason* and in *Attwood* on the one hand and in *T Lucas* on the other both have their shortcomings. As Buckley observes in *Illegality and Public Policy* (Sweet and Maxwell, 2nd Ed, 2009) (at para 19.21):

[the *T Lucas* approach] leaves employees without real protection against oppression; while [the *Attwood* approach] is apt to penalise arbitrarily employers who might genuinely have sought, albeit unsuccessfully to confine their restrictions within permissible grounds.

170 One resolution of the tension between *Mason/Attwood* and *T Lucas* is a fourth requirement added to the three *Sadler* requirements by Jonathan Sumption QC (as Lord Sumption then was) in *Marshall v NM Financial Management Ltd* [1995] 4 All ER 785. In that case, Lord Sumption sets out the three *Sadler* propositions before continuing (at 792–793):

The first of these propositions is the 'blue pencil' test which for many years has been accepted as a necessary although not a sufficient condition for severance. The principal modern authority for the second and third propositions is *Chemidus Wavin Ltd v Société pour la Transformation et L'Exploitation des Résines Industrielles SA* [1978] 3 CMLR 514. It is altogether more satisfactory than the more traditional and question-begging statement of the test: whether there is one obligation or more than one. To these three propositions there should perhaps be added a fourth, namely that the severance must be consistent with the public policy underlying the avoidance of the offending part.

171 Lord Sumption's additional requirement charts a middle course between the *Mason/Attwood* approach and the *T Lucas* approach. In truth, it is not so much an additional requirement for severance as a salutary and overarching reminder that the doctrine cannot be applied if the result would be inconsistent with the principles of public policy which mandate avoidance of the excised words.

#### *Conclusion on severance in employment cases*

172 It appears to me that it would create unnecessary fragmentation to recognise two varieties of severance in Singapore law, one applicable to employee covenants and one applicable to all other covenants. Lord Sumption's gloss on *Sadler* is the better way of accommodating within the doctrine of severance the particular policy concerns which result in avoidance a particular class of case, whether on the grounds of illegality, in the context of a vendor covenant or in the context of an employee covenant. The gloss is hardly controversial and so it matters not whether that gloss becomes an additional requirement to the three *Sadler* requirements or is treated as an overarching consideration to be kept in mind throughout the entire severance exercise. This approach is more consistent with the weight of current English and Singapore authority than the approach in *Attwood*. It requires the court always to relate severance to underlying policy. It would come into play when considering artifices devised by the ingenuity of draftsmen specifically to take advantage of the doctrine of severance, for example by devising a series of cascading restrictive covenants: see *Smile Inc (CA)* at [31].

173 Before applying the doctrine of severance to clause 13, I should say a few words about notional severance. Mr Tan made extensive submissions on that issue in support of his proposition that it is Lord Moulton's dictum in *Mason* which continues today to govern severance in employee covenants

### ***Notional severance and Singapore law***

#### *New Solutions (2001 – 2004)*

174 The orthodox English doctrine of severance has been the subject of trenchant criticism in Canada in a case concerning statutory illegality (as opposed to restraint of trade). The facts of the case are relatively straightforward. A lender imposed on a borrower under a loan agreement a rate of interest which was contrary to Canadian legislation prohibiting an effective annual interest rate in excess of 60%. The borrower sought a declaration that the loan agreement contained an interest component that contravened the relevant statutory provision.

175 At first instance Cullity J criticised the "mechanical approach" of the blue pencil test. He also viewed as an artifice and a fiction the insistence that the doctrine of severance did not amount to rewriting the parties' agreement even though that is exactly what happens when words are severed from the parties' contracts (*Transport North American Express Inc v New Solutions Financial Corp* (2001) 200 DLR (4th) 560). Cullity J favoured instead "discretionary severance" or "notional severance", under which the court has a power to amend the parties' agreement to cure illegality while remaining otherwise as close as possible to the intentions of the parties expressed in the agreement. Notional severance as conceived by Cullity J does not confine the court's power to *deleting* the parties' words but permits it also to *alter* the parties' words and even to *insert* entirely new words. He therefore notionally severed the parties' agreement to reflect interest at the statutory maximum of 60% per annum.

176 On appeal, the Ontario Court of Appeal by a majority rejected the concept of "notional" or "discretionary severance" (*Transport North American Express Inc v New Solutions Financial Corp* (2002) 214 DLR (4th) 44). They therefore severed the interest clause entirely. The result was that the lender was entitled to the return of its principal, but not to any interest at all.

177 On further appeal, the Supreme Court of Canada restored Cullity J's decision (*Transport North American Express Inc v New Solutions Financial Corp* [2004] 1 SCR 249). The majority held that the blue pencil test yielded arbitrary results because it permitted only the removal of provisions and

therefore focused on form rather than substance. They therefore acknowledged that it was a fiction that the doctrine of severance did not amount to rewriting the parties' contract and recognised in Canadian law the concept of notional severance. Arbour J (with whom Iacobucci, Major and LeBel JJ agreed) held (at [28]–[33]):

28 The use of the blue-pencil approach to sever one or more provisions from a contract alters the terms of the agreement between the parties. The only agreement that one can say with certainty the parties would have agreed to is the one that they actually entered into. The insistence in the case law that the blue-pencil test derives its validity from refusing to change or add words or provisions to the contract is unconvincing. It is doubtful, for example, that the lenders in cases such as *Thomson, supra*, or *Mira Design, supra*, would have entered into the agreements at issue had they been aware *ex ante* that they would only be entitled to the return of the principal advanced. The change effected by the blue-pencil technique will often fundamentally alter the consideration associated with the bargain and do violence to the intention of the parties. Indeed, in many cases, the application of the blue-pencil approach will provide for an interest-free loan where the parties demonstrated in the agreement a clear intention to charge and pay considerable interest.

29 The blue-pencil test was developed in cases where the courts were considering instruments under seal, where the form of the deed governed and where the intention of the parties was irrelevant. It was therefore important that what remained after severance would be a valid deed:

In the deed form was everything; the actual intention of the parties was immaterial. It was, therefore, natural that in considering the possibility of severance of promises in a deed, the court should be concerned to see that what was left remained a valid deed; there could be no question of implying a promise to take effect if part of the [page268] original bargain was illegal. This is the historical origin of what was later called the 'blue-pencil test'.

(N. S. Marsh, "The Severance of Illegality in Contract" (1948), 64 L.Q.R. 230 and 347, at pp. 351-52)

Historically, courts were not concerned with the intention of the parties. The artificiality of the blue-pencil test arises from the common law constraints imposed on courts unaided by principles of equity.

...

30 ... I am in complete agreement with [Cullity J's] conclusion that when a court employs the blue-pencil test, it is making a new agreement for the parties. Indeed, all forms of severance alter the terms of the original agreement.

...

33 The blue-pencil test is imperfect because it involves mechanically removing illegal provisions from a contract, the effects of which are apt to be somewhat arbitrary. The results may be arbitrary in the sense that they will be dependent upon accidents of drafting and the form of expression of the agreement, rather than the substance of the bargain or consideration involved.

...

178 The criticisms made of the doctrine of severance are well-founded if one considers a strictly formal blue pencil test which permits any deletion that results in the remainder having grammatical

sense only, which does not permit the court to have regard to the substance of the parties' promises, and which ignores the main consideration for the parties' contract. But that is not the doctrine of severance which now obtains in England and in Singapore. The blue pencil test is a necessary but not a sufficient condition for severance (see [170] above). It is true that severance permits only deletions, and that whether or not a covenant-saving deletion is possible is "dependent upon accidents of drafting and the form of expression of the agreement". But it seems to me that that restriction is essential to keep the doctrine of severance within reasonable bounds and to prevent it straying into the territory of the equitable remedy of rectification.

179 A doctrine of notional severance, which permits a thorough and explicit rewriting of the parties' contract, fundamentally defeats the parties' freedom of contract. It is true that the equitable doctrine of rectification also permits a rewriting of the parties' contract. But that rewriting takes place to bring the parties' written instrument into alignment with the parties' actual intention, proved to a very high standard. Notional severance is quite different. Although it makes reference to the parties' intention, it takes place based on an intention which the court imputes to both parties at the urging of one party after a dispute has arisen. To that extent, notional severance amounts to a unilateral variation of the parties' obligations imposed by the court with the benefit of hindsight. Although the dividing line between the remedy of rectification and other devices such as construction for giving effect to the parties' intentions was blurred in *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] 1 AC 1101 (see Richard Buxton, "'Construction' and Rectification after *Chartbrook*" [2010] CLJ 253), there are now indications of an attempt in the English Supreme Court to appreciate and reinstate that valuable distinction: see *Marley v Rawlings and another* [2014] UKSC 2 at [39]–[41] per Lord Neuberger of Abbotsbury. For these reasons, therefore, it seems to me that it is only with great difficulty that the doctrine of notional severance as it is recognised in Canada can be accommodated within our law of contract.

#### *Shafron (2009)*

180 Having acknowledged a doctrine of notional severance in *New Solutions*, the Canadian courts have since held that, on policy grounds, that doctrine can have no application to contracts of employment, relying on Lord Moulton's dicta in *Mason: Morley Shafron v KRG Insurance Brokers (Western) Inc* (2009) 1 SCR 157 ("*Shafron*"). In *Shafron*, the employee sold his insurance agency to the employer, who thereafter employed him under an employment contract. That contract contained a restrictive covenant by which the employee agreed that, for three years after leaving his employer, he would not compete with it within the "Metropolitan City of Vancouver". The employee left the employer but within three years began working for a competitor in Richmond, which is arguably within metropolitan Vancouver. The employer commenced an action to enforce the restrictive covenant.

181 At first instance, the trial judge approached the restrictive covenant as an employee covenant rather than a vendor covenant. He found that the term "Metropolitan City of Vancouver" was neither clear nor certain and, in any event, unreasonably wide. He therefore dismissed the employer's action. The British Columbia Court of Appeal reversed the trial judge and held that the employee had breached his employment contract. While it agreed that the term "Metropolitan City of Vancouver" was ambiguous, it held that it was possible to apply the doctrine of notional severance to substitute the phrase "City of Vancouver, the University of British Columbia Endowment Lands, Richmond and Burnaby" for the phrase "Metropolitan City of Vancouver". The restrictive covenant as notionally severed covered Richmond and was enforceable against the employee.

182 On appeal, however, the Supreme Court of Canada restored the trial judge's decision. It accepted that under Canadian law, there were two types of severance: notional severance and blue pencil severance. However, it held that neither form of severance could be applied. Notional

severance was unavailable for the very policy reasons given by Lord Moulton in *Mason* (at [38]–[41]):

38 First, there is no bright-line test for reasonableness. In the case of a contract that provides for an illegal rate of interest, for example, notional severance has been used to bring the rate down to the legal rate of 60 percent. In [New Solutions], the evidence was that the parties did not intend to enter into an illegal contract, and what must be done to make the contract legal was quite clear. The Court inferred that the parties' original common intention was to charge and pay the highest legal interest rate and notional severance was applied to read down the rate to the highest legal rate.

39 In the case of an unreasonable restrictive covenant, while the parties may not have had the common intention that the covenant be unreasonable, there is no objective bright-line rule that can be applied in all cases to render the covenant reasonable. Applying notional severance in these circumstances simply amounts to the court rewriting the covenant in a manner that it subjectively considers reasonable in each individual case. Such an approach creates uncertainty as to what may be found to be reasonable in any specific case.

40 Second, applying the doctrine of notional severance runs into the problem identified by Lord Moulton in [*Mason v. Provident Clothing and Supply Co.* [1913] AC 724]. It invites the employer to impose an unreasonable restrictive covenant on the employee with the only sanction being that if the covenant is found to be unreasonable, the court will still enforce it to the extent of what might validly have been agreed to.

41 Not only would the use of notional severance change the terms of the covenant from the parties' initial agreement to what the court thinks they should have agreed to, it would also change the risks assumed by the parties. The restrictive covenant is sought by the employer. The obligation is on the employee. Having regard to the generally accepted imbalance of power between employers and employees, to introduce the doctrine of notional severance to read down an unreasonable restrictive covenant to what is reasonable provides no inducement to an employer to ensure the reasonableness of the covenant and inappropriately increases the risk that the employee will be forced to abide by an unreasonable covenant.

183 Blue pencil severance was also unavailable because, relying on Lord Moulton's *dicta*, it was available only to remove words which are clearly severable, trivial and not part of the main purport of the restrictive covenant. In arriving at this conclusion, the Supreme Court of Canada approved and applied the narrow blue pencil test enunciated by Lambert JA in the British Columbia Court of Appeal case of *Canadian American Financial Corp (Canada) Ltd v King* (1989) 60 DLR (4th) 293 (at 305–306):

... [T]he courts will only [apply blue pencil severance to] sever the covenant and expunge a part of it if the obligation that remains can fairly be said to be a sensible and reasonable obligation in itself *and such that the parties would unquestionably have agreed to it without varying any other terms of the contract or otherwise changing the bargain.* ... *It is in that context that reference is made in the cases severing and expunging merely trivial or technical parts of an invalid covenant, which are not part of the main purport of the clause, in order to make it valid.*

...

[emphasis added]

184 It appears, therefore, that the availability of blue pencil severance in Canadian law is nominally determined by the test in *Mason* and *Attwood* but in substance is determined by considering whether what remains is sensible and whether, subjectively speaking, both parties would have unquestionably



agreed to the change, without varying any other terms of the contract if they had been asked at the time of contracting.

### *Smile Inc (CA) comments on Shafron*

185 In *Smile Inc (CA)*, the Court of Appeal took the opportunity to comment *obiter* on *Shafron*. While it did not express any concluded view on the availability of the doctrine in Singapore, it agreed that if the doctrine were available, it should not extend to employment covenants in restraint of trade (at [33]–[35]):

33 ... [W]e are not required to express a concluded view on the applicability of the doctrine of notional severance in Singapore, save to observe that the Supreme Court of Canada subsequently rejected the application of notional severance for restrictive covenants in the employment context in *Shafron v KRG Insurance Brokers (Western) Inc* (2009) 301 DLR (4th) 522 ("*Shafron*").

34 The court in *Shafron* pointed to the following reasons as to why the doctrine of notional severance was inappropriate in the employment context (at [38]–[41]):

[Cited at [178] above.]

35 Although, as already mentioned, we are not required to express a concluded view on the applicability of the doctrine of notional severance in Singapore, the reasons given by the court in *Shafron* ... are persuasive – not only because they are cogent but also because *Shafron* itself is a case that related directly to a covenant in restraint of trade...

[emphasis in original omitted]

186 I have dealt with the doctrine of notional severance only because Mr Tan urged upon me the restrictive approach taken by the Supreme Court of Canada in *Shafron* to severance in employee covenant cases. That approach does not reflect any principle of the common law of general application. It is directed at excluding employee covenant cases from the scope of the doctrine of notional severance. The proper scope of notional severance is a peculiarly Canadian concern. It has no application to Singapore because the doctrine of notional severance is not part of Singapore law and, it would appear, faces significant difficulties in so becoming. Furthermore, to the extent that the restrictive approach in *Shafron* rests on general principles of the doctrine of originating from the speech of Lord Moulton in *Mason*, I have already dealt with why that line of cases is not authority in Singapore for a narrower species of severance in employee covenant cases and why my view is that those particular concerns are best accommodated by Lord Sumption's fourth requirement (see [170] above).

### **Severance of clause 13**

*Can the non-solicitation covenant be saved by severing it from the non-competition covenant?*

187 The District Judge saved the non-solicitation clause by severing words in clause 13 thus:

Upon the termination of the Employee's employment for any cause or by any means whatsoever the employee **shall not** for a period of 2 years next thereafter ~~undertake or carry on either alone or in partnership nor be employed or interested directly or indirectly in any capacity whatever in the same or similar business as the relevant Company (as hereunder defined), or in any other~~

~~business carried on by the relevant Company, in Singapore, and Malaysia and any other countries the relevant Company has offices at the date of such termination within the aforesaid areas and **shall not** during the like period and within the same areas~~ either personally or by Employee's agent or by letters, circulars or advertisements whether on Employee's behalf or on behalf of any other person, firm or company canvass or solicit orders from or in any way interfere with any person, or company who shall at any time during the continuance of the Employee's employment hereunder have been a customer or customers of the relevant Company & for any cause whatever the Employee **shall not** canvass, solicit or endeavour to take away from the relevant Company the business or any customers or clients who have been customers or clients of the relevant company.

The relevant company shall refer to and include the Company and any or all of such subsidiary, associate or other related companies which the Employee shall have performed duties or carried out work in relation to and for the benefit of any or all of such above companies at any time during the period of nine (9) months prior to the date of termination of employment stated herein.

[emphasis added]

188 In my view, the District Judge's severance of clause 13 suffers from two shortcomings.

189 First, the sequence of words which the District Judge felt he could sever from clause 13 is a sequence of words which crosses the boundaries between the constituent promises in clause 13. Those boundaries happen to coincide with the grammatical boundaries. This is not mere pedantry. The effect of the severance is to excise the phrase "during the like period and within the same areas" from the non-solicitation covenant. It just so happens that excising the period of the non-solicitation restraint makes no difference because the severance begins in the middle of the first constituent promise, leaving the words "for a period of two years next thereafter" to govern the non-solicitation clause. But that is mere happenstance. If clause 13 had provided that the non-solicitation clause should endure for three years instead of "for the same period", this severance would undoubtedly have amounted to rewriting the parties' contract, albeit by deletion, because it would substitute a two-year non-solicitation restraint for a three-year non-solicitation restraint. The more serious problem, though, is that by deleting both the geographical restraint ("in Singapore, and Malaysia and any other countries the relevant Company has offices at the date of such termination") *and* the words "within the same areas", he excised the geographical scope of the non-solicitation clause entirely.

190 Second, he justified this excision on the basis that the first part of clause 13 comprised a void "geographical restraint" (see [20(b)] above). The core of any restraint is the prohibited conduct. The core of the first limb of clause 13 is not the geographical area mentioned in it but the prohibition on competition. The core of the second limb is the prohibition on solicitation, but that prohibition is expressed as applying to the *same* geographical area as the earlier limb. So if, as the District Judge held, the "geographical restraint" renders the non-competition covenant void for being unreasonably wide, that defect inevitably undermines and renders void the restraint on solicitation also. The result of his severance is indeed to save the non-solicitation clause, but only because the unreasonably wide geographical restraint has been deleted entirely. That geographical restraint is significant when coupled with the final limb of the non-solicitation covenant which prohibits the plaintiff from taking away the business of any customer, whether she has a trade connection with that customer or not. In short, the result of this severance amounts to rewriting the contract, albeit by deletion rather than insertion.

191 To put all this in the language of *Sadler*, the District Judge's severance satisfied the first limb:

the severed words can be removed without the necessity of adding to or modifying the wording of what remains. But it did not satisfy the third limb: the removal of the severed words here changed the fundamental nature of the parties' contract. It removed entirely the geographical limits of the non-solicitation covenant. It turned the non-solicitation covenant into something "different in kind and not only in extent" (see [127] above).

*Can the non-competition covenant be saved by any sort of severance?*

192 The non-competition covenant cannot be saved either by severing it from the void non-solicitation clause or by excising words internal to the covenant. The non-competition covenant is void because: (a) insofar as it is intended to protect trade secrets or confidential information akin to trade secrets, *Stratech* is authority that that cannot be a sufficient legitimate interest to support it; and (b) insofar as it is intended to protect trade connection, a blanket non-competition obligation is in principle unreasonably wide to protect trade connection. These are fundamental defects which go beyond the manner in which the geographical restriction, activity restriction or temporal scope are expressed. It also goes beyond the fact that the non-competition covenant is collocated in clause 13 with the non-solicitation covenant.

*Can the non-solicitation clause be saved by internal severance*

193 The next question is whether the non-solicitation covenant can be saved by internal severance. By this, I mean severance in English and Singapore law and not notional severance in Canadian law.

194 The short answer is that severance here does not meet any of the three *Sadler* requirements. On the first *Sadler* requirement, the primary difficulty with the non-solicitation covenant is the definition of the "relevant company". There are no words in that definition which can be deleted so as to tighten the criterion by which a related company becomes a relevant company so that that criterion is of reasonable width. Achieving that would require amending or inserting words. That in turn amounts to an explicit rewriting of the parties' contract and is permissible only under a doctrine of notional severance. Furthermore, that definition cannot be deleted in its entirety if the remainder of clause 13 is to continue to make sense. A key concept which clause 13 refers to six times would become wholly undefined.

195 On the second *Sadler* requirement, it appears to me that the principal consideration for the employment agreement was the plaintiff's post-termination obligations and not her in-employment obligations. I note in particular that the plaintiff rendered services to the defendant as employee and was paid a salary for it for six months without any employment contract at all. In those circumstances, the principal purpose of the employment contract cannot have been to regulate the plaintiff's employment: the plaintiff was employed in any event. The principal consideration for the employment contract was the restrictive covenants which the defendant extracted thereby. On that basis, the facts were akin to *Man Financial*.

196 On the final *Sadler* requirement, any tampering with the definition of the "relevant company" would change the fundamental character of the employment agreement. The concept of the "related company" is woven into the very fabric of the employment agreement, not just clause 13. The underlying intention of the defendant, which the plaintiff subjected herself to, was very clearly to bring the plaintiff into the human resources framework of the entire Noel group. Thus, most importantly, the defendant reserved to itself the express right unilaterally to require the plaintiff to perform services for other related companies. Tampering with that aspect of clause 13 would therefore change the fundamental character of the employment agreement.

197 In addition, it appeared to me that the non-solicitation covenant falls foul of Lord Sumption's *dictum* (see [170]) above. I assume now that the final limb of the non-solicitation covenant is severable on the three *Sadler* requirements, thereby saving the preceding limb. 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 (see [110] above). To that extent, clause 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 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."

## Conclusion

198 For the reasons given above, I allowed the plaintiff's appeal in RAS 5 and dismissed the defendant's appeal in RAS 2 with the costs of both appeals to the plaintiff. I also gave the defendant leave to appeal to the Court of Appeal in light of the significant issues of law which arose on the scope of the principle in *Stratech*, the scope of the doctrine of severance in the context of employment contracts and the availability of notional severance.

199 Finally, I thank counsel on both sides for their cogent submissions and helpful assistance on this matter.

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[\[note: 1\]](#) LGN-1, Lek Gwee Noi's 1<sup>st</sup> Affidavit at pp 20-21, 23.

[\[note: 2\]](#) LGN-1; Lek Gwee Noi's 1<sup>st</sup> Affidavit at p 29.

[\[note: 3\]](#) LGN-1; Lek Gwee Noi's 1<sup>st</sup> Affidavit at pp 30-31.

[\[note: 4\]](#) Defendant's Bundle of Documents tab 1.

[\[note: 5\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [15].

[\[note: 6\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [15] and [17].

[\[note: 7\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [17].

[\[note: 8\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [17].

[\[note: 9\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [19] and [31].

[\[note: 10\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [25].

[\[note: 11\]](#) AW-3; Alfred Wong's 1<sup>st</sup> Affidavit at p 54.

[\[note: 12\]](#) Clause 3.1.1A(vi) of the SPA; AW-3; Alfred Wong's 1<sup>st</sup> Affidavit at p 59.

[\[note: 13\]](#) LGN-1, Lek Gwee Noi's 1<sup>st</sup> Affidavit at pp 20-21, 23.

[\[note: 14\]](#) LGN-1; Lek Gwee Noi's 1<sup>st</sup> Affidavit at p 29.

[\[note: 15\]](#) LGN-1; Lek Gwee Noi's 1<sup>st</sup> Affidavit at pp 30-31.

[\[note: 16\]](#) Defendant's Bundle of Documents tab 1.

[\[note: 17\]](#) Notes of Argument, 14 September 2012, page 13, line 5 to 15.

[\[note: 18\]](#) Notes of Argument, 6 December 2012, p 10.

[\[note: 19\]](#) AW-4; Alfred Wong's 1<sup>st</sup> Affidavit at p 54.

[\[note: 20\]](#) Defendant's Written Submissions at [120].

[\[note: 21\]](#) Plaintiff's Written Submissions at [82].

[\[note: 22\]](#) Defendant's Written Submissions at [116].

[\[note: 23\]](#) Clause 6.2 of the SPA; AW-3; Alfred Wong's 1<sup>st</sup> Affidavit at p 67.

[\[note: 24\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [75].

[\[note: 25\]](#) Clause 6.3 of the SPA; AW-3; Alfred Wong's 1<sup>st</sup> Affidavit at p 67.

[\[note: 26\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [78].

[\[note: 27\]](#) Clause 6.2 of the SPA; AW-3; Alfred Wong's 1<sup>st</sup> Affidavit at p 67.

[\[note: 28\]](#) AW-2; Alfred Wong's 1<sup>st</sup> Affidavit at p 40.

[\[note: 29\]](#) Plaintiff's Written Submissions at [114]; Clause 3.1(iii) of the SPA; AW-3; Alfred Wong's 1<sup>st</sup> Affidavit at p 58.

[\[note: 30\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [69].

[\[note: 31\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [48].

[\[note: 32\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [20].

[\[note: 33\]](#) AW-7; Alfred Wong's 1<sup>st</sup> Affidavit at p 150.

[\[note: 34\]](#) Alfred Wong's 3<sup>rd</sup> Affidavit at [37].

[\[note: 35\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [69].

[\[note: 36\]](#) Alfred Wong's 3<sup>rd</sup> Affidavit at [34].

[\[note: 37\]](#) Alfred Wong's 1<sup>st</sup> Affidavit at [73]; Lek Gwee Noi's 2<sup>nd</sup> Affidavit at [23].

[\[note: 38\]](#) LGN-1, Lek Gwee Noi's 1<sup>st</sup> Affidavit at p 20-21, 23.

[\[note: 39\]](#) LGN-1, Lek Gwee Noi's 1<sup>st</sup> Affidavit at pp 20-21, 23.

[\[note: 40\]](#) Lek Gwee Noi's 2<sup>nd</sup> Affidavit at [23].

[\[note: 41\]](#) Plaintiff's Written Submissions at [64].

[\[note: 42\]](#) Defendant's Written Submissions dated 28 May 2013, paragraph 155.

[\[note: 43\]](#) Defendant's Written Submissions dated 28 May 2013, paragraph 156.

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