CLAAS Medical Centre Pte Ltd (formerly known as Aesthetics Associates Pte Ltd) *v* Ng Boon Ching
[2010] SGCA 3

Case Number	: Civil Appeal No 35 of 2009
Decision Date	: 01 February 2010
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Aqbal Singh and Josephine Chong (Unilegal LLC) for the appellant; Rabi Ahmad s/o M Abdul Ravoof (Rabi Ahmad & Co) for the respondent
Parties	: CLAAS Medical Centre Pte Ltd (formerly known as Aesthetics Associates Pte Ltd) — Ng Boon Ching

Contract – Privity of Contract

Contract – Restraint of Trade

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2009] 3 SLR(R) 78.]

1 February 2010 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

1 Dr Ng Boon Ching ("the Respondent") is a medical practitioner of more than 25 years' standing. CLAAS Medical Centre Pte Ltd ("the Appellant") is a company incorporated on 12 January 2005 which was initially named Aesthetics Associates Pte Ltd. Six general medical practitioners, Dr Wong Weng Hong ("Dr Wong"), Dr Tan Eng Choon Gerard ("Dr Gerard Tan"), Dr Cindy Yang ("Dr Yang"), Dr Liew Kou Chuen ("Dr Liew"), Dr Lim Wee How ("Dr Lim") and Dr Tan Yi Ryh ("Dr Tan"), were the original shareholders of the Appellant. Subsequently (see [6] below), the Respondent also became a shareholder in the Appellant.

2 The Respondent had commenced an action below to seek a refund of a total sum of $236,500 being the balance of outstanding loans owed by the Appellant to the Respondent. The Appellant admitted to this claim but sought to set off the debt against its counterclaim of $1m for breach of a restrictive covenant by the Respondent. This appeal is against that part of the decision of the trial judge ("the Judge") where she dismissed the Appellant's counterclaim.

Background facts

3 The Respondent commenced private practice as a general and family medical practitioner in April 1984 when he established his own clinic known as B C Ng Clinic & Surgery. The Respondent was trained and certified in the use of laser and intense pulsed light machines for medical treatment and surgical procedures. He had also acquired laser and intense pulsed light machines in his clinic. Many patients came to see him for medical treatment and/or surgical procedures involving the use of laser and/or intense pulsed light machines. He was so successful in this area of practice that he decided to concentrate almost entirely on "aesthetic medical practice". He also changed the name of his practice to that of "Dr B C Ng Laser Surgery". In 1993, he relocated his clinic from Midpoint Orchard at Orchard Road to Chinatown Point at New Bridge Road.

4 In 1996, the Respondent set up AHA Centre, a sole proprietorship, which was and is in the business of the import, distribution and sale of aesthetic laser and intense pulsed light machines and skin care products.

5 In the course of his business, the Respondent came to know Dr Lim who was then practising under the style of "Woods Medical Clinic". In 2004, the Respondent learned from Dr Lim that a group of about six doctors (who later became the original shareholders of the Appellant – see [1] above), all of whom had no previous experience in aesthetic medicine, were keen to set up an aesthetic medicine clinic in the Orchard Road or Cairnhill area and that they were also interested in acquiring several laser and/or intense pulsed light machines for that practice.

6 Subsequently, the six doctors decided to interest the Respondent into entering a joint venture with them to assist them in building the aesthetic medical clinic in Cairnhill while he continued to operate his own clinic at Chinatown Point. However, this idea was later abandoned and the six doctors decided instead to focus on the acquisition of the Respondent's clinic as well as his distributorship business, ie, the AHA Centre, ("the plan"). Towards that end, the six doctors incorporated the Appellant in January 2005. The Respondent was amenable to the plan, including becoming a shareholder in the Appellant. Thus, by 28 March 2005, the Respondent had subscribed for and was issued with 100,000 shares in the Appellant while the other six doctors held the remaining 400,000 shares. In other words, the Respondent held 20% of the shareholding in the Appellant while the six doctors collectively held 80% of the shares.

7 As a vehicle for the sale of his practice to the Appellant, the Respondent incorporated BCNG Holdings Pte Ltd ("BCNG Holdings") and transferred his clinic, as well as the distributorship business under AHA Centre, to BCNG Holdings. Both parties negotiated and agreed that the value of BCNG Holdings be fixed at $3.2m.

8 On 6 April 2005, the Respondent, the six doctors and the Appellant duly entered into a Shareholders Agreement ("the April Agreement") which set out the rights, duties and liabilities of all the parties relating to their participation in and the running of BCNG Holdings. In accordance with cl 2.2(b) of the April Agreement, the Respondent sold 60% of his shareholding in BCNG Holdings to the Appellant for $1.92m. As the Appellant had a paid up capital of only $500,000 and the other shareholders did not have $1.92m to pay for the Respondent's 60% shareholding in BCNG Holdings, the Respondent agreed to arrange for a loan of $1.328m from the United Overseas Bank Ltd ("UOB") to the Appellant so that the Appellant could raise the funds. According to cl 5.2 of the April Agreement, the Respondent would use his personal fixed deposit with UOB as the necessary collaterals to secure the loan which UOB was prepared to give to the Appellant.

9 By cl 8.3(a) of the April Agreement, the Appellant was given an option, within two years, to purchase the Respondent's remaining 40% shareholding in BCNG Holdings at an agreed sale price of $1.28m. By cl 8.3(e), if the Appellant did not exercise the option, the Respondent could repurchase the Appellant's 60% shareholding in BCNG Holdings at an agreed price of $700,000. At this point, we would note that, by these provisions, the scheme of things was to compel the Appellant to purchase the Respondent's remaining 40% shareholding in BCNG Holdings, otherwise, the Appellant would suffer a loss of $1,220,000, ie, having paid $1.92m for the 60% shareholding in BCNG Holdings, it would, however, only get back $700,000. By cl 12.1(i), once all the shares in BCNG Holdings were held by only one shareholder, the other shareholders would cease to be bound by the restraint of trade provision in the April Agreement.

10 The April Agreement contained the following restraint of trade covenant in cl 11(a):

(a) All of the parties herein shall for so long as he/she remains a Shareholder and/or a Shareholder of [the Appellant] for a period of three (3) years after he/she shall cease to be a Shareholder of [BCNG Holdings] and/or of [the Appellant], whether by himself/herself and/or jointly or together with any other person(s) and/or body (ies), whether on his/her own account and/or as agent, employee and/or servant, in any capacity whatsoever, directly or indirectly, be prohibited from: -

(i) being engaged and/or interested in any trade and/or business carried on within Singapore which is similar to or in competition and/or conflict (whether directly or indirectly) with the Business of [BCNG Holdings] and/or the practice of Aesthetic Medicine;

(ii) employ, solicit and/or entice away and/or endeavour to employ, solicit and/or entice away any person(s) who is employed by [BCNG Holdings], and/or induce or seek to induce any such person(s) to leave his/her employment with [BCNG Holdings] for any reasons whatsoever;

(iii) solicit the custom of any person and/or body who is a customer of the [BCNG Holdings] and/or divert or seek to divert any customer of the [BCNG Holdings] away from it; and/or

(iv) cause and/or permit any person directly or indirectly under his/her control to do any of the foregoing acts or things.

11 Clause 11(c) provided that each of the six doctors, namely, Dr Lim, Dr Gerard Tan, Dr Tan, Dr Yang, Dr Liew and Dr Wong, would have to pay $700,000 by way of liquidated damages to BCNG Holdings if they breached cl 11(a). Clause 11(d) provided that the Respondent would have to pay BCNG Holdings a sum of $1m as liquidated damages for a breach of cl 11(a).

12 Sometime in November 2005, the Appellant exercised its right to purchase the Respondent's remaining 40% shareholding in BCNG Holdings. Once again, as the Appellant did not have funds, the Respondent agreed to arrange for another loan of $1.28m from UOB. This second loan was again secured against the Respondent's personal fixed deposits with UOB.

13 Clause 8.7 of the April Agreement had provided that upon the Appellant's purchase of the 40% of the shares, all the existing shareholders of the Appellant would enter into and execute a Shareholder's Agreement in the form as annexed to the April Agreement as "Appendix B".

14 Therefore, a Shareholders Agreement dated 15 November 2005 ("the November Agreement")was entered into by the Respondent and the six doctors in the terms of the said "Appendix B". Unlike the April Agreement, the Appellant was *not* a party to the November Agreement. This November Agreement was intended to set out the terms and conditions under which the Respondent and the original six shareholders of the Appellant would participate in the management of the Appellant.

15 A restraint of trade provision similar to the one in the April Agreement was included in the November Agreement. Clause 11 of the November Agreement reads as follows:

11. NON-COMPETITION

(a) All of the parties herein shall for so long as he/she remains a Shareholder [and] for a period of three (3) years after he/she shall cease to be a Shareholder of the [Appellant], whether by himself/herself and/or jointly or together with any other person(s) and/or body (ies), whether on

his/her own account and/or as agent, employee and/or servant, in any capacity whatsoever, directly or indirectly, be prohibited from: -

(i) being engaged and/or interested in any trade and/or business carried on within Singapore which is similar to or in competition and/or conflict (whether directly or indirectly) with the Business of the [Appellant] and/or the practice of Aesthetic Medicine;

(ii) employ, solicit and/or entice away and/or endeavour to employ, solicit and/or entice away any person(s) who is employed by the [Appellant], and/or induce or seek to induce any such person(s) to leave his/her employment with the [Appellant] for any reasons whatsoever;

(iii) solicit the custom of any person and/or body who is a customer of the [Appellant] and/or divert or seek to divert any customer of the [Appellant] away from it; and/or

(iv) cause and/or permit any person directly or indirectly under his/her control to do any of the foregoing acts or things.

(b) In the event that [Dr Gerard Tan], [Dr Tan], [Dr Yang], [Dr Liew], [Dr Lim] and/or [Dr Wong] shall for any reasons breach the terms of this Non-Competition clause, he/she shall be liable to pay to the [Appellant] the sum of S$700,000.00 by way of liquidated damages. It is hereby agreed that the payment of the said liquidated damages shall thereafter exempt the defaulter from the operation of this Clause herein.

(c) In the event that [the Respondent] shall for any reasons breach the terms of this Non-Competition clause, he shall be liable to pay to the [Appellant] the sum of S$1,000,000.00 to the [Appellant] by way of liquidated damages. It is hereby agreed that the payment of the said liquidated damages shall thereafter exempt the defaulter from the operation of this Clause herein.

16 From 16 April 2005, soon after the April Agreement, the Appellant took over the running of the Dr B C Ng Laser Surgery at Chinatown Point. In May 2005, the name of this clinic was changed to BCNG Laser & Medical Aesthetics. In January 2006, the Appellant opened a branch clinic at OUB Centre.

17 Also in January 2006, one Dr Soh Liang Joseph ("Dr Soh") became a shareholder and director of the Appellant. As a result, the Respondent held 23% of the shares in the Appellant, while the rest of the doctors, including Dr Soh, held the remaining 77%. A Supplemental Shareholders Agreement was entered into between the six original shareholders of the Appellant, the Respondent and Dr Soh on 20 January 2006, under which Dr Soh agreed, inter alia, to be bound by the terms and conditions of the November Agreement.

18 As at 22 December 2006, the Respondent had advanced interest-free loans amounting to $286,500 to the Appellant. The loans were to fund its operational expenses and expansion plans. The Appellant had repaid $50,000 of the loans leaving a balance sum of $236,500, which was the subject matter of the action instituted by the Respondent (see [2] above).

19 In the meantime, by the middle of 2006, differences began to surface between the Respondent on the one hand and the original six shareholders and Dr Soh on the other. On 24 August 2006, the Respondent sent an email to the other shareholders of the Appellant informing them that he was looking to sell his entire 23% shareholding in the Appellant. On or about 28 August 2006, the Respondent gave notice to the Board of Directors of the Appellant of his intention to sell his 23%

shareholding in the Appellant and he also stated that the intending purchaser must attend to the release of his fixed deposits with UOB which were used as security for the two loans extended by UOB to the Appellant (see [8] and [12] above). On or about 17 March 2007, the Respondent transferred all his shares in the Appellant to Dr Wong and tendered his resignation as a director of both the Appellant and BCNG Holdings on the same day. The Respondent's last day of work with the Appellant was 21 March 2007.

20 Following the Respondent's departure from the Appellant, on 11 April 2007, Unimedic Pte Ltd ("Unimedic"), a company under the Healthway Medical Group, acquired 499,993 shares, representing 99.9% of the shareholdings in the Appellant from the six doctors and Dr Soh save for seven shares, which were retained by them with each of them holding only one share in the Appellant.

21 The Respondent subsequently set up his own general and aesthetic medical practice in the name of Dr B C Ng Aesthetics at 1 Newton Road, #01-29 Goldhill Plaza, Singapore 308899. This clinic was said to be operational with effect from 7 May 2007. Prior to that, he placed advertisements announcing his departure from BCNG Holdings and plans to set up his own aesthetic medicine clinic.

22 The Respondent sued the Appellant for the return of $236,500 (see [18] above). This claim was admitted by the Appellant who sought to set off this debt against its counterclaim of $1m for breach of cl 11. The Appellant claimed to be entitled to enforce this restrictive covenant against the Respondent pursuant to Section 2(1)(b) of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) ("CRTPA").

The decision below

23 Since the Appellant had admitted to the Respondent's claim for the sum of $236,500, the Judge allowed the claim for that sum. However, she dismissed the Appellant's counterclaim. The Judge's grounds of decision is reported at [2009] 3 SLR(R) 78 ("the GD").

24 In the view of the Judge, the Appellant could not rely on the CRTPA to enforce the restrictive covenant and, therefore, the Appellant had no locus standi to sue the Respondent under the November Agreement. In any case, the Judge was also of the opinion that cl 11 was unenforceable because it was in unreasonable restraint of trade. In her view, cl 11 was drafted in too wide a term as it prohibited the parties from "being engaged and/or interested in any trade and/or business carried on within Singapore" that was similar to the "Business" of the Company and/or the practice of "Aesthetic Medicine". As cl 11 covered any and every type of practice of aesthetic medicine it was wider than reasonably necessary to protect the goodwill sold by the Respondent. Moreover, the restriction of three years was unreasonably long. Therefore, the ambit of cl 11 was unnecessarily wide and vitiated by unreasonableness. Moreover, the Judge held that it was not possible for the court to sever the unreasonable portion of the clause. Finally, she also held that cl 11(c) was not a genuine pre-estimate of the Appellant's loss but constituted a penalty clause and, as such, was unenforceable in accordance with its terms.

Issues in this appeal

25 There are essentially three main issues in this Appeal:

(a) Whether the Appellant is entitled to rely on the CRTPA to enforce cl 11.

(b) Whether cl 11 is enforceable as a restraint of trade clause.

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

Whether the Appellant had *locus standi* to enforce cl 11

26 The Appellant is not a party to the November Agreement. Therefore, it has to rely on the CRTPA to circumvent the privity of contract rule. Section 2 of the CRPTA provides:

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

27 Since the November Agreement did not expressly provide that the Appellant may enforce cl 11, s 2(1)(a) of the CRTPA would not apply. What is clearly relevant for our purpose is s 2(1)(b).

28 Clause 11 bars the parties to the Agreement (ie, the shareholders of the Appellant, namely, the Respondent, the original six doctors and Dr Soh), from engaging in a business in competition with the Appellant. It is clear that the parties to the Agreement intended cl 11 to inure for the benefit of the Appellant. The prescribed liquidated damages would be payable to the Appellant in the event of a breach of cl 11 by any of the parties to it. There is no requirement that benefiting the third party must be the predominant purpose or intent behind the term. However, it must be *a* purpose of the parties. *Prima facie*, s 2(1)(b) is applicable to enable the Appellant to enforce cl 11 because cl 11(c) has expressly stated that the liquidated damages for a breach of the clause are payable to the Appellant.

Rebuttable presumption

29 However, s 2(1)(b) must be read with s 2(2). The latter provision (quoted at [26] above) enables a party to a contract to show that, on a proper construction of the contract, the parties did not intend the terms therein to be enforceable by a third party. Thus, with regard to cl 11, it is open to the Respondent to show that, on a proper construction of the November Agreement, it was not the intention of the parties that the Appellant could enforce cl 11 against any of the parties to the Agreement. It seems to us that what s 2(1)(b) and s 2(2) seek to do is to distinguish between intended and incidental beneficiaries to a contract, with the latter beneficiaries not being entitled to sue under the contract. The burden of proof rests on the party who invokes s 2(2) to show, on a proper construction of the contract, that the parties did not intend the term concerned to be enforceable by the third party.

30 The operation of ss 2(1)(b) and 2(2) is illustrated by the case of *The Laemthong Glory* (No 2), [2005] 1 Lloyd's Rep 688. We should add that the genesis of these two provisions may be found in s 1(1)(b) and s 1(2) of the UK Contracts (Rights of Third Parties) Act, 1999 (c 31) ("UK Act") and thus the English decisions are relevant to the consideration of our provisions. In that case, because the bill of lading relating to the goods which had been carried in a chartered ship had not reached the prospective receiver (A) by the time of the ship's arrival at the contractual destination, the goods were delivered to A against the letter of indemnity ("LOI") issued by A to the charterer (B) which amounted to a contract between A and B. The LOI contained a promise to indemnify "you [B] your servants or agents" in respect of liability which might be incurred by reason of delivery of the goods at A's request without production of the bill of lading. It was held that this promise on its true construction purported to confer a benefit on the shipowner (C) within s 1(1)(b) of the UK Act as C had acted as one of B's "agents" within the meaning of the LOI in delivering the goods to A, and that the promise was enforceable by C against A. A had not discharged the burden imposed on him by s 1(2) of proving that the LOI was not intended by A and B to be enforceable by C.

Whether the presumption has been rebutted

31 While the Judge accepted that cl 11(c) conferred a benefit on the Appellant within the meaning of s 2(1)(b), she found that the presumption was rebutted by the presence of inconsistent terms in the November Agreement (see GD at [37] and [41]). The Judge referred to cl 12.1(ii) of the November Agreement as a term which was inconsistent with an intention on the part of the parties to confer a right upon the Appellant to enforce cl 11. By that clause, the November Agreement could be terminated if all the parties agreed *in writing* to end it. The Judge accepted the Respondent's argument that as cl 12.1(ii) could be invoked by the parties to the Agreement without the concurrence of the Appellant, that provision evinced the parties' intention not to confer the benefit of cl 11 on the Appellant. Another inconsistent term in the Judge's mind was cl 14.5 which prohibited the assignment of rights and benefits under the Agreement without the prior consent in writing of the other parties.

32 However, counsel for the Appellant argued that the Judge erred in her reasoning here. Clause 12.1(ii) merely expressed and qualified (by the requirement of an agreement in writing) the general right of the parties to terminate an agreement they had entered into. This had nothing to do with the question of whether a benefit had been duly conferred upon the third party.

33 In this regard, the first question which we need address is whether the mere fact that the parties had expressly reserved to themselves the right to terminate the contract meant that the presumption that the parties intended the Appellant to be able to enforce the benefits under the contract is rebutted. Here we must refer to s 3 of CRTPA. Section 3(1), 3(2) and 3(3) state:

> 3 – (1) Subject to this section, where a third party has a right under section 2 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter the third party's entitlement under that right, without his consent if —
>
> (*a*) the third party has communicated his assent to the term to the promisor;
>
> (*b*) the promisor is aware that the third party has relied on the term (whether or not the third party has knowledge of its precise terms); or
>
> (*c*) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it (whether or not the third party

has knowledge of its precise terms).

(2) The assent referred to in subsection (1)(*a*) —

(*a*) may be by words or conduct; and

(*b*) if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until it is received by him.

(3) Subsection (1) is subject to any express term of the contract under which —

(*a*) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party; or

(*b*) the consent of the third party is required in circumstances specified in the contract instead of those set out in subsection (1) (*a*), (*b*) and (*c*).

These provisions, by spelling out the circumstances which would restrict the liberty of the contracting parties to rescind or vary their contact, would suggest that the mere fact that a term in the contract permits the parties to terminate it does not *ipso facto* mean that benefits conferred therein on a third party is not intended to be enforced by the third party. Of particular significance is s 3(3) which provides that for the parties to override the rights acquired by the third party pursuant to the latter's assent or reliance, the contract must expressly provide that the parties may rescind or vary the contract without the consent of the third party. If the mere presence of a reservation of a right to the contracting parties to terminate or vary the contract would amount to there being no intention to confer on a named third party a right to sue for the benefits conferred thereunder, then there would not have been any need to have those elaborate provisions in s 3. *Chitty on Contracts* vol 1 (Thomson Reuters (Legal) Limited, 30th Ed, 2008) at para 18-091, states the following:

> Nor is the presumption rebutted merely because in the contract, A and B had reserved the right to rescind or vary the contract: this follows from the provisions with regard to such rescission or variation made in s 2 of the [UK Act].

Section 2 of the UK Act referred to in the passage above is *in pari materia* with s 3 of our CRTPA. Therefore, the Judge erred in coming to the conclusion that the presumption was rebutted by the mere presence of cl 12(1)(ii).

34 We would at this juncture also mention that, in our opinion, this is also an instance where s 3(1)(a) applies, as the terms of the November Agreement were set out as an appendix to the April Agreement and the Appellant was a party to the April Agreement and we cannot see how it could be argued that the Appellant had not assented to what was set out in the November Agreement. It was patently clear that the Appellant had worked out what were to be the terms of the November Agreement and had agreed to them. Since there is no express provision in the November Agreement in terms of what is required under s 3(3), the parties are no longer at liberty to take away the benefits provided in favour of the Appellant under cl 11(c) without the consent of the Appellant.

35 Turning to cl 14.5, which prohibited the assignment of rights and benefits under the Agreement without the prior consent in writing of the other parties, and which provision the Judge took to be a factor in determining that it was not the intention of the parties to confer a right on the Appellant to sue for the benefits prescribed in its favour under cl 11 (see [31] above), we think, with respect, that this view involves the conflation of two different concepts. There is nothing inconsistent or

incompatible between the express conferment of a benefit on a named third party and the restriction on the right of assignment of a contracting party without the consent of the other contracting parties. When the parties by express terms confer a benefit upon a third party, that is not an assignment and has nothing to do with assignment. In this regard, we note that the Judge cited an article by Prof Andrew Burrows, "The Contracts (Rights of Third Parties) Act 1999 and its Implications for Commercial Contracts" [2000] LMCLQ 540, in support of her conclusion that an assignment clause of this kind is an inconsistent term that is sufficient to rebut the presumption of intention to confer upon a named third party a right to sue, see GD at [37]. We should state that Prof Burrows was a member of the Law Commission which submitted a report on reforming the principle of privity in contract law – see Commission Report No 242. To correctly appreciate what Prof Burrows had in mind, it is necessary to examine closely the example given by Prof Burrows:

> So, if money is to be paid by A not to B but to an expressly identified third party C, the presumption is that C has the right to enforce the term. But the presumption can be rebutted … the rebuttal may occur because of other inconsistent terms. For example, the contract may prohibit the assignment to C of B's right to enforce the payment term without A's written consent. That would indicate that the parties did not intend to confer on C an immediate right of enforceability.

36 In this example, Prof Burrows was referring to a situation where, notwithstanding that the contract stated that the money was to be paid by A to C, there was an express provision prohibiting the assignment to C of B's rights to enforce the payment without A's written consent. Obviously with such a provision, a contrary intention is indicated. The contract had expressly provided the condition under which C could have the right to enforce the payment against A. That, in our opinion, is a different situation entirely from the position of the Appellant under the November Agreement. The mere existence of a general provision like cl 14.5 against assignment of a party's rights under the November Agreement does not have the same effect as that referred to in the example given by Prof Burrows. If cl 14.5 had specifically referred to cll 11(b) and 11(c) and stated that the parties not in breach could only sue to recover the specified sums with the written consent of all the parties, or of only the party in default, then that would have been the situation contemplated by Prof Burrows in his example. But cl 14.5 does not so provide. It is a general clause restricting assignment of benefits by individual parties under the contract. As discussed earlier with respect to cl 12, the parties can expressly reserve to themselves the right to vary the contract without the third party's consent. This does not amount to a rebuttal of the presumption. The position is similar for cl 14.5.

37 Section 2(2) requires the court to decide whether on a proper construction of the contract, the parties did not intend the Appellant to have the right to enforce the restrictive covenant. The Judge rightly pointed out at [38] of her GD that in construing the contract, the court should adopt an objective approach to contractual interpretation taking into account the background facts. The mere absence in the contract of an express statement that the third party is to have the right to enforce the term is not a bar to his entitlement under s 2(1) to do so. Neither is such absence an indication of a contrary intention.

38 In this connection, we should also mention that the Judge referred to the preamble of the November Agreement and Dr Gerard's testimony (see GD at [34], [35] and [38]) and came to the conclusion that the objective of the contract was for the protection of the Respondent and the other shareholders in their capacity as individual shareholders, and not for the Appellant as a corporate entity. The Judge emphasised that cl 11 was contained in a shareholders' agreement between the Respondent and the six doctors. The restrictive covenants applied only to shareholders who were parties to the November Agreement or those who have agreed to be bound by the provision when they became shareholders of the Appellant (like in the case of Dr Soh). Clause D of the preamble

read:

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

39 While, in a general sense, the Judge was right to point out that the purpose of the November Agreement was for the protection of the Respondent and the other shareholders, it must not be overlooked that the parties to that Agreement had decided to use a separate corporate entity, the Appellant, to protect their interests. The answers given by lay witnesses like Dr Gerard Tan should, therefore, be taken in their specific context. At some part of his evidence, Dr Gerard Tan would appear to say that the objective of the November Agreement was for the protection of the shareholders of the Appellant, ie, the Respondent and the six doctors. But what benefit is obtained by the Appellant would eventually inure for the benefit of its shareholders. The answers of Dr Gerard Tan should be viewed in this light, and we think that is the correct way of viewing the situation, and the answers given by Dr Gerard Tan in no way suggest that the parties did not intend to vest a right upon the Appellant to recover the sums prescribed in cll 11(b) and 11(c). In short, the fact that the parties' objective of entering into the contract was to benefit themselves, the shareholders of the Appellant, does not rebut the presumption that the parties intended the term to be enforceable by the Appellant, a corporate vehicle they had established to advance and protect their interests. To adopt the other view (ie, following the literal answers given by Dr Gerard Tan) would mean that the parties had entered into an agreement providing for liquidated damages for a breach of the covenant which are neither enforceable by the Appellant nor by the parties (as cl 11(c) does not confer a right to recover the liquidated damages upon the parties), a totally senseless arrangement.

40 Before we move away from this issue, we ought to mention that the Judge seemed, at [38], to think that the fact that the six doctors and Dr Soh ("the seven doctors") sold their shareholdings in the Appellant (except for seven shares) to Unimedic was a material consideration. This was what she said:

> There is no evidence or suggestion that Unimedic became bound by the November Agreement as if it was an original party to the agreement when it purchased shares in [the Appellant]. That being the case, Unimedic has to justify (and there is no evidence on this) how it is entitled to the benefit of the restrictive covenants through an action brought by [the Appellant].

41 We are unable to see how the transfer by the seven doctors of most of their shares in the Appellant should affect the right of the Appellant to the liquidated damages due under cl 11 of the November Agreement. It stands to reason and common sense that Unimedic would have paid for the shares of the seven doctors on the basis of the November Agreement. In other words, Unimedic, as the new owner of the Appellant, except for the seven shares, was entitled to expect the Respondent and the seven doctors to keep to the terms of the November Agreement and not start practice in competition with the Appellant which managed the clinic by the name "Dr B C Ng Laser Surgery". We should at this juncture also add that the Judge, at [39], seemed to think that unless Unimedic should become a party to the November Agreement, like what Dr Soh did, the Appellant could no longer claim the benefits under cl 11(c) on behalf of Unimedic. It is true that when Dr Soh joined the Appellant, there was a novation involving all the parties. On that occasion, that was the way the parties intended to admit Dr Soh as a shareholder of the Appellant. That was a different situation from the present where the seven doctors on their own sold almost all of their shares in the Appellant to Unimedic. There is nothing in the November Agreement which says that the parties to the Agreement could not sell their shares in the Appellant to other parties nor is there any suggestion that the

Articles of Association of the Appellant contained a provision restricting the right of its shareholders to transfer their shares to others. As we have explained above, cl 11(c) of the November Agreement conferred a benefit on the Appellant which it is entitled to enforce. The reasoning of the Judge (at [39] and [40]) showed that she relied on the Supplementary Agreement involving Dr Soh, as well as the assignment by the seven doctors of their shares to Unimedic, to construe that it was not the intention of the parties to confer a right on the Appellant to recover the benefits conferred on it under cl 11(c). These two events, which occurred long after the conclusion of the November Agreement, were not the factual matrix upon which the November Agreement was entered into and could not be relevant to the construction of cl 11(c).

Whether cl 11 was in unreasonable restraint of trade

42 Clause 11 is undoubtedly a restraint of trade covenant. The Court of Appeal has recently summarised the law on restraint of trade clauses in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*"). The case involved an employer-employee relationship but this court had gone further to discuss the entire area of restraint of trade clauses including the situation where there was a sale of a business.

43 The court there cited, at [70], the statement of the law by Lord Macnaghten in the case of *Thorsten Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] AC 535 ("*Nordenfelt*") at 565 as representing the law in this area:

> All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade … may be justified by the special circumstances of a particular case. *It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public*, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time ... [being] in no way injurious to the public. [emphasis in original]

44 Therefore, all covenants in restraint of trade are *prima facie* void. However, they can be held to be valid if the party seeking to rely on the restrictive covenant can show that, firstly, the clause concerned is reasonable in the interests of the *parties and*, secondly, the clause is also reasonable in the interests of the *public*. Additionally, there must be a legitimate proprietary interest to be protected. As was held in *Man Financial*, the court will only enforce the covenant if it goes no further than necessary to protect the legitimate interests. There cannot be a bare and blatant restriction of the freedom to trade – see the Privy Council decision of *Vancouver Malt and Sake Brewing Company, Limited v Vancouver Breweries, Limited* [1934] AC 181 (on appeal from the British Columbia Court of Appeal). Moreover, even where a legitimate proprietary interest is shown, the court will ensure that the covenant in restraint of trade goes *no further than what is necessary* to protect the interest concerned.

45 These being the general principles applicable in this area of the law, we would, however, hasten to add that the courts take a more liberal approach when considering restrictive covenants in the context of a sale of business as compared to the situation where such a clause is contained in a contract of employment. The following quotation from *Man Financial*, at [48], is instructive:

> As has been observed (see *Butterworths Common Law Series* at para 5.114):
>
> > The reasons for this [*ie*, a stricter application of the restraint of trade doctrine in the

employment context] include the following. First, unlike contracts of employment, the purchaser in a sale of business of context in whose favour the covenant is made is buying something tangible, which includes (very importantly) the element of *goodwill* which would be necessarily depreciated if no restrictive covenant were permitted. An employer, on the other hand, would not be deprived of what he has paid for pursuant to the contract of employment (the employee's services) when the employee leaves his employ, although (as shall be seen) there are other legitimate proprietary interests that may merit protection even within this context. ***Secondly, there is likely to be more equality of bargaining power in the case of the sale of a business compared to an employment contract situation; in the latter, there is, more often than not, a disparity in bargaining power between the employer on the one hand and the employee on the other*** .

[emphasis in original in italics and bold italics; emphasis added in underlining]

Not contrary to public policy and legitimate interest to protect

46 We must reiterate at this juncture that we are here concerned with a restrictive covenant imposed in relation to the sale of a medical practice cum business. As would be apparent from the above (see [6] to [8]) there is a clear proprietary interest to be protected. Thus cl 11 *per se* is not contrary to public policy. The rationale for such a covenant was succinctly addressed in Nordenfelt where Lord Herschell LC said, at 548:

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

47 We will now restate the essential circumstances of the present case. The Respondent injected his entire sole-proprietorship firm known as AHA Centre, and medical practice known as Dr B C Ng Laser Surgery, into BCNG Holdings. He also transferred to BCNG Holdings his "book debts, existing pre-paid contracts and treatment packages, stock-in trade, [clientele], patients, goodwill as well as all of the assets belonging to and/or accruing to the sole proprietorship and medical practice" – see cl 2.2(c)(i) of the April Agreement. The Respondent subsequently sold 60% of his shares in BCNG Holdings to the Appellant via the April Agreement. Therefore, the Appellant had a legitimate proprietary interest which it wanted to protect through a similar restrictive covenant in the April Agreement– the goodwill of the business and the medical practice that had been transferred by the Respondent to BCNG Holdings.

48 Cl 11 is in the November Agreement. The execution of the November Agreement was an event contemplated under the April Agreement. Clause 8.7 of the April Agreement had provided that upon the Appellant having purchased the remaining 40% of the shares which the Respondent held in BCNG Holdings, all the existing shareholders of the Appellant would enter into and execute a Shareholder's Agreement in the form as annexed to the April Agreement as "Appendix B". As the Judge rightly found, the November Agreement was a condition of the Appellant's purchase of the Respondent's remaining 40% shareholding in BCNG Holdings. Therefore, it was the clear understanding of all the parties that cl 11 would be the provision that would protect the purchaser's legitimate proprietary interest – the goodwill of the business and the medical practice that was sold by the Respondent to BCNG Holdings,

which is now 100% owned by the Appellant. In short, the Respondent was paid for his goodwill and he should not be permitted to remove parts of the goodwill by resuming practice immediately after leaving the Appellant. A case very much on point is *Robin M Bridge v Deacons* [1984] 1 AC 705.

49 We would end the discussion on this issue by quoting the following passage from Lord Watson in *Nordenfelt* at 552:

> I think it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold.

Whether reasonable in the interests of the parties

50 We now turn to consider the reasonableness of the scope of cl 11. The Judge held that the clause was drafted in very wide terms and prohibited the parties from being engaged and/or interested in any trade and/or business carried on in Singapore that was similar to the "Business" of the Company and/or the practice of "Aesthetic Medicine" in Singapore. The clause covered any and every type of practice of aesthetic medicine and as such, was wider than reasonably necessary to protect the goodwill sold by the Respondent.

"Business of the Appellant" and practice of "Aesthetic Medicine"

51 In this connection it is important to bear in mind that the term "Aesthetic Medicine" is defined in both the April Agreement and November Agreement as "moderately invasive medicine in the process of laser and permanent hair reduction, photorejuvenation by lasers and intense pulsed light machines and such, pigment management by lasers, acne control via special skincare specific to [the Appellant] and [BCNG's] range and lasers, mesotherapy of body and face and all procedures and treatment as understood by aesthetic medicine".

52 Clause 1.1 of the November Agreement defines "Business" as the business of the Appellant as described in cl 3 and such other business as the Appellant may carry on from time to time. Clause 3 of the November Agreement provides that the business of the Appellant shall continue to be in line with its object as set out in its Memorandum of Association. The Memorandum of Association of the Appellant defines the objects of the company really widely. Amongst others, the objects for which the Appellant was established included the carrying on of the business of medical specialists, medical surgeons, medical consultants, importers and exporters or manufacturers of and dealers of in pharmaceutical, medicinal, chemical, industrial and other preparations and articles, and the purchasing or otherwise acquiring and holding and chartering of ships and vessels of all kinds.

53 The Respondent argued that cl 11 therefore subjected the Respondent to a lot of restrictions. He was precluded from practising even as a medical practitioner, nurse, pharmacist etc. The Appellant, however, contended that there was no specific definition of "Business" and cl 3 was merely a statement of intent that the existing business would continue to be in line with the objects set out in its Memorandum of Association. It seems to us that the parties have effectively failed to define the business of the company. Clause 3, however, did prescribe one limiting criterion, ie, the business must be in line with the objects set out in the Appellant's Memorandum of Association. It would be incorrect for the Respondent to look only at the objects of the Appellant to come to the meaning of "business" for the purposes of cl 11. Understandably, the objects of the Appellant was crafted widely so that a business actually undertaken by the Appellant would not be *ultra vires* its objects. The

indisputable fact of the matter is that the only business of the Appellant is that of a holding company, as all its trading and other activities are being carried out by BCNG Holdings. It would be consistent with the intention of the parties to construe the term "Business of the Company" in cl 11 to mean the current business of the company and any business which the Appellant actually embarked upon and which is in line with the objects set out in its Memorandum of Association.

54 As regards the definition of "Aesthetic Medicine" the Judge made the following observations at [71] of her GD:

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

55 As we see it, the problem lies in the last phrase of the definition of "Aesthetic Medicine" which reads "and all procedures and treatment as understood by aesthetic medicine". This blanket restriction against engaging in anything that comes under the rubric "aesthetic medicine" is clearly wider than necessary to protect the aesthetic business that had been acquired by the Appellant. It is clear what was actually sold to the Appellant via BCNG Holdings. By cl 2.2(c)(i) of the April Agreement, the Respondent was to transfer to BCNG Holdings his "book debts, existing pre-paid contracts and treatment packages, stock-in-trade … , [clientele], patients, goodwill as well as all of the assets belonging to and/or accruing to the … sole proprietorship … and medical practice". By cl 2.2(c)(ii), the Respondent was to hand over and fully disclose to the Appellant, "all of the trade secrets, which shall include but not limited to treatment techniques and know-hows, source and suppliers of skin care & aesthetic equipment and products, skin care formulations etc".

56 What the Appellant is entitled to protect is the possibility, and indeed the evidence showed that it was a probability, of the Appellant losing diehard customers of the Respondent to him in the event that he is permitted, and not restrained, to resume medical practice in this area after leaving the Appellant. The Appellant had legitimate proprietary interests which should be protected. However, there is no need, indeed, no justification whatsoever, to prevent the Respondent from engaging in other forms of aesthetic medicine for which he had not developed a clientele when he sold the business/practice to BCNG Holdings and in turn to the Appellant. The specific cases/examples of aesthetic medicine which are given in the definition of aesthetic medicine constituted the legitimate aspects of goodwill which the Appellant had paid for and which should be protected and nothing more:

> … moderately invasive medicine in the process of laser and permanent hair reduction, photorejuvenation by lasers and intense pulsed light machines and such, pigment management by lasers, acne control via special skincare specific to [the Appellant] and [BCNG's] range and lasers, mesotherapy of body and face ...

57 Accordingly, we hold that the very last part of the definition of "aesthetic medicine" is wider than necessary to protect the legitimate interests of the Appellant. We will return to this clause when dealing with the principle of severance – see [68] to [70] below.

Non-Solicitation

58 Clause 11(a)(ii) prohibited the Respondent from soliciting any employee of the Appellant without reference to his or her seniority or importance to the business. It also prohibited the Respondent from

soliciting such employees even if their employment with the Appellant commenced after the Respondent had left the company. At first glance, it seems unreasonable that the Respondent is liable for the said sum of $1m regardless of whether he breaches cl 11a(i) or cl 11(a)(ii). Similarly, it would seem that the Respondent would be liable even if he were to entice a cleaner. However, as emphasised by this Court in *Man Financial* at [141], the court should not read such clauses literally, wrenched out of its context. Very much the same point is made by *Chitty on Contracts* vol 1 (Thomson Reuters (Legal) Limited, 30th Ed, 2008) at para 16-097:

> The courts will attempt to construe a covenant so as to achieve the parties' intention where there has been a "mere want of accuracy of expression" with the consequence that the covenant will be upheld as not being too wide. However, for this principle to apply it must be clear from the contract and the surrounding circumstances what exactly are the terms of the more limited covenant.

Thus, the actual factual matrix is important. As we see it, the main thrust of the restrictions set out under cl 11(a) (see [15] above where this clause is quoted in full) is really that in sub-paragraph (i). All the rest of the restrictions set out in sub-paragraphs (ii) to (iv) of that clause flow from this. There would be no reason for the Respondent, or for that matter any of the seven doctors, to want to entice another doctor or shareholder doctor to leave the Appellant unless he or she has already left the Appellant and has set up a competitive practice or is about to do so, in which event, that person would have breached sub-paragraph (i), besides breaching sub-paragraph (ii). And similarly for sub-paragraphs (iii) and (iv). Although sub-paragraphs (i) to (iv) of cl 11 appear to be listed disjunctively, because of the use of the term "and/or" at the end of sub-paragraph (iii), infringements of sub-paragraphs (ii) to (iv) would in effect only occur if there is also an infringement of sub-paragraph (i). That is the sensible way of reading cl 11(a) and accordingly, the restrictions listed thereunder are reasonable.

Area

59 As regards the question of whether the present restraint which extended to the whole of Singapore was reasonable, we note that the Judge held that such a restraint was necessary since the Respondent had a loyal following of patients wherever he was located. In the light of the goodwill established by the Respondent with those diehard patients, such a general restraint over the whole of Singapore was clearly warranted, otherwise, the goodwill in aesthetic medicine which the Respondent had sold to BCNG Holdings, and in turn to the Appellant, would be seriously undermined. On this point, we agree with the Judge.

Time

60 However, the Judge found that the restriction of three years was unreasonably long. The Respondent has highlighted that following Unimedic's acquisition of the Appellant, the other seven doctors came to be bound under a new and much less restrictive restraint of trade covenant that did not restrict any of them from practising aesthetic medicine on their own, except within a two-kilometre radius of the Appellant's aesthetic medical clinics for a period of two years.

61 In this regard, we would make four comments. First, the reasonableness of a clause is to be judged as at the date the contract was entered into, and not after: see, eg, *Commercial Plastics Ltd v Vincent* [1965] 1 KB 623 at 644 and *Queensland Co-operative Milling Association v Pamag Pty Ltd* (1973) 133 CLR 260 at 281. Second, it must be remembered that the Respondent was not a party to the Unimedic Agreement. The Respondent was not only a medical practitioner of more than 25 years' standing, but also someone with an established reputation in aesthetic medicine. None of the seven

doctors was of that standing and neither did any of them have that kind of goodwill with patients in that area of practice. As indicated in [6] above, the six doctors (not including Dr Soh) had sought him out because he was a leading practitioner in the field. Even the Judge had noted that, "The plaintiff's prominence, seniority and experience in the market for aesthetic medicine is such that it would not be easy to say that a restraint for an appropriate period of time in Singapore would be in any way unreasonable if the original purchasers of his business were to be able to protect their asset." Third, in cross-examination, the Respondent testified that 35% of the revenue generating patients were what he called "diehards", meaning patients who would always choose him as their doctor rather than any other doctor if he was available to them. Fourth, there was evidence that the period of restraint of three years was proposed by the Respondent. It was not something insisted upon by the six doctors who were certainly in no position to insist, as the evidence showed that the Respondent was in a much stronger bargaining position. In the words of the Respondent, "they persuaded me to sell to them". These aforesaid considerations must be borne in mind when considering the reasonableness of the three-year period of restraint, which we find, with respect to the Judge, was not unreasonable.

Whether the liquidated damages of one million dollars was a penalty and therefore unenforceable

62 The Judge held that the liquidated damages in cl 11(c) was a penalty and therefore unenforceable.

63 Where parties stipulate in a contract the sum to be paid in the event of a breach, the contract sum is enforceable if it is a genuine pre-estimate of loss but not if it constitutes a penalty. It is for the party being sued on the agreed sum to show that the term is a penalty. Therefore, the burden is on the Respondent to prove that the term was a penalty.

64 The contracting parties' use of the terms "penalty" and "liquidated damages" is not determinative though they would be relevant indicators of what was intended by the parties. In *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79, Lord Dunedin explained, at 86–87, that the question whether a sum stipulated was a penalty or liquidated damages was a question of construction to be decided "upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not at the time of the breach". He then laid down the following guidelines, at 87, to assist in determining if a clause for payment of a fixed sum was a penalty or a genuine pre-estimate of loss:

(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.

(c) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage".

65 The Respondent argued that the Appellant had failed to show any evidence that the clause was a genuine pre-estimate of loss. The Appellant on the other hand pointed out that the Respondent's testimony shows that his "diehard patients" contributed to 35% of the revenue he generated when he was practising on his own. Since the Respondent's total revenue then per annum amounted to $1.3m to $1.4m, 35% of this would be $445,000 to $490,000 per year. Over 3 years, this would amount to

$1,365,000 to $1,470,000.

66 In *Philips Hong Kong Limited v The Attorney General of Hong Kong* [1993] 1 HKLR 269 ("*Philips Hong Kong*"), the Privy Council observed, at 279:

> Except possibly in the case of situations where one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract, it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss. *Even in such situations so long as the sum payable in the event of non-compliance with the contract is not extravagant, having regard to the range of losses that it could reasonably be anticipated it would have to cover at the time the contract was made, it can still be a genuine pre-estimate of the loss that would be suffered and so a perfectly valid liquidated damage provision*. The use in argument of unlikely illustrations should therefore not assist a party to defect a provision as to liquidated damages. As the Law Commission stated in Working Paper No. 61 (page 30):
>
> > The fact that in certain circumstances a party to a contract might derive a benefit in excess of his loss does not ... outweigh the very definite practical advantages of the present rule upholding a genuine estimate, formed at the time the contract was made of the probable loss.
>
> [emphasis added]

This statement of the law was endorsed by this Court in *Hong Leong Finance Ltd v Tan Gin Huay* [1999] 1 SLR(R) 755.Their Lordships of the Privy Council in *Philips Hong Kong* further added, at 283:

> To conclude otherwise involves making the error of assuming that, because in some hypothetical situation the loss suffered will be less than the sum quantified in accordance with the liquidated damage provision, that provision must be a penalty, at least in the situation in which the minimum payment restriction operates. *It illustrates the danger which is inherent in arguments based on hypothetical situations where it is said that the loss might be less than the sum specified as payable as liquidated damages. Arguments of this nature should not be allowed to divert attention from the correct test as to what is a penalty provision - namely, is it a genuine pre-estimate of what the loss is likely to be? - to the different question, namely, are there possible circumstances where a lesser loss would be suffered?*[emphasis added]

67 Therefore, the question to be considered is not whether there are possible circumstances where a lesser loss would be suffered but whether the sum is so extravagant, having regard to the range of damages which the innocent party was likely to suffer, that it could not constitute a genuine estimate of the damages that he could have suffered. Here, we would reiterate the point made in [58] above that the restriction listed under cl 11(a) should not be read literally wrenched out of its context. We would emphasise that the Respondent had the burden of showing that the specified liquidated sum was so extravagant that it could not constitute a genuine pre-estimate of the damages which the Appellant could suffer on account of him setting up a practice in aesthetic medicine in competition with the Appellant. The Appellant has not adduced any evidence to that effect. On the contrary, as can be seen from [65] above, the sum of $1m could be a genuine pre-estimate of the damages which the Appellant could suffer if the Respondent were to have breached cl 11(a)(i). We would further underscore the fact that cl 11(c) prescribed a lower sum of $700,000 as the liquidated damages payable for a similar breach by any of the seven doctors. This shows that the parties had carefully considered and calibrated the liquidated damages payable and the higher amount

payable by the Respondent reflected the greater expertise and goodwill which the Respondent has in the field of aesthetic medicine.

Whether unreasonable portions can be severed

68 We turn next to consider the principle of severance. Even where a restraint of trade clause is found to be unreasonable, the courts should still consider whether the doctrine of severance could apply so that the reasonable part of the clause can be upheld. In *Man Financial*, this court held at [127]:

> 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. [emphasis in original]

69 The Judge held that the court could run a "blue pencil" through the words "the Business of the Company". However, as discussed earlier (see [52] and [53] above), the words "the Business of the Company" is not unreasonable. Therefore, the court need not run the blue pencil through the words "the Business of the Company".

70 However, on 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.

Conclusion

71 Accordingly, we hold that the Appellant has *locus standi* to enforce cl 11 in the November Agreement. While cl 11 is in a sense unreasonably wide, the unreasonable portion can be severed so as to render it reasonable. In the premises, the appeal is allowed with costs here and below and with the usual consequential orders. There shall be judgment in favour of the Appellant in the sum of $763,500, being the difference between $1m and $236,500.