Mano Vikrant Singh *v* Cargill TSF Asia Pte Ltd
[2011] SGHC 241

Case Number : Originating Summons No 103 of 2011

Decision Date : 08 November 2011

Tribunal/Court : High Court

Coram : Steven Chong J

Counsel Name(s) : Philip Jeyaretnam SC, Mark Seah and Germaine Tan (Rodyk & Davidson LLP) for the plaintiff; Blossom Hing, Kimberley Leng, Justin Kwek and Mohan Gopalan (Drew & Napier LLC) for the defendant.

Parties : Mano Vikrant Singh — Cargill TSF Asia Pte Ltd

Contract – Illegality and Public Policy – Restraint of Trade

8 November 2011 Judgment reserved.

Steven Chong J:

Introduction

1 Clauses in employment contracts which prohibit an employee from working for a competitor upon termination of employment must be shown to be reasonable to be enforceable. This principle of law was founded on public policy considerations to promote the free flow of expertise in the interests of the individual and society. Over the years, in certain trades, industries or professions, employees have come to wield considerable power in negotiating favourable terms of employment. Quite often, because of their skill and hence their mobility, they have a *choice* not to accept terms in their employment contracts. Employers have also evolved their remuneration packages to provide financial incentives for employees to remain with them and equally for financial disincentives not to leave them or to join a competitor. When such an employee leaves the employer, he again has the choice to join a competitor and if he chooses to compete, the only consequence is a financial disincentive, for example, the forfeiture of a deferred bonus. In such cases, is the public policy consideration in promoting the free flow of skill offended?

2 This case presents an interesting issue for determination which hitherto has not been judicially decided in Singapore though a number of previous decisions on restraint of trade clauses are relevant in arriving at my decision. The present case concerns the issue of whether a clause in an employee incentive award plan (*as distinct* from the employment contract) which forfeits deferred incentive payments in the event that the employee competes with his employer is in *substance* a restraint of trade. In a number of English and Australian cases, the courts have treated such clauses as amounting in *substance* to a restraint of trade. The treatment of such clauses in the United States is divided. However, there is also a body of case law upholding provisions in employment contracts that forfeit deferred bonuses when the employee leaves the employer *regardless* of whether the employee proceeds to compete with the employer. In those decisions, such clauses are not regarded as in restraint of trade. Is there a rational reason why in the former, the clauses are regarded as in restraint of trade but not in the latter especially when in the latter group of cases, the effect on the employee would appear to be more far reaching in that the deferred bonus is forfeited when the employee leaves his employment irrespective whether the employee joins a competitor or otherwise? This judgment will examine these two groups of cases with the view to rationalising the basis for the

distinction, if any, and to provide more certainty to employees and employers when negotiating such deferred incentive plans.

Facts

Parties to the dispute

3 Cargill TSF Asia Pte Ltd ("the defendant") is part of the Cargill group of companies ("the Cargill Group"). [note: 1] The Cargill Group provides food, agricultural, risk management, financial and industrial products and services around the world. [note: 2] The defendant is part of the Cargill Group's Trade and Structured Finance ("TSF") business. [note: 3]

4 According to the defendant, the TSF business involved leveraging on trade flows between countries to customise cross-border financing solutions for trade related financing. The defendant referred to these customised solutions as "Structured Solutions". [note: 4] The defendant claimed that a Structured Solution involved considerable teamwork between the defendant's employees and its tax and legal advisors. [note: 5] The work product of a Structured Solution is a document known as a "Product Approval Form" ("PAF"). [note: 6] The defendant claimed that a PAF is "a unique, confidential and proprietary 'how-to-do' manual setting out all the pertinent information on a Structured Solution". [note: 7] It also identified the risks associated with the Structured Solution. [note: 8]

5 According to the defendant, Mano Vikrant Singh ("the plaintiff") first joined the Cargill Group in 1992 as a trader and analyst in its Emerging Markets Department. [note: 9] In 1998, he was assigned to work as an analyst and trader with Cargill Asia Pacific Ltd ("CAPL"). [note: 10] He resigned in 1999 [note: 11] and rejoined the Cargill Group in 2002 [note: 12] and was employed by Cargill Financial Services Corp ("Cargill FSC") as its TSF business co-ordinator. In between, the plaintiff joined another company which was also involved in trade and structured financial products. [note: 13] In November 2003, he was assigned to work in Singapore as CAPL's TSF Innovation Co-ordinator. In April 2007, the plaintiff moved over to the defendant as a senior trader, a position he held until he resigned on 27 November 2008. I should mention that the plaintiff had deposed that he was initially employed by Cargill FSC in 2001. [note: 14] Prior to that, he claimed that he was running his own business involving the buying and selling of trade receivables. [note: 15] This difference in the plaintiff's employment history is, however, immaterial to the issues before me.

6 The plaintiff's position in the defendant was described as "Senior Trader (Corporate Band – Senior Advisor)". [note: 16] The precise role of the plaintiff in the defendant was initially contested by the parties:

(a) According to the plaintiff, he was primarily involved in trading financial instruments which arose from the commodity trading activities of the defendant. His role was to deal with the defendant's structured trade and non-trade financial products. [note: 17] He also carried on a "third-party business" ("the Third Party Business"). [note: 18] The plaintiff claims that the Third Party Business was his "existing business" which he brought over to Cargill FSC when he first joined it in 2001. [note: 19]

(b) According to the defendant, the plaintiff served as an "originator" and a "structurer" of the

defendant's Structured Solutions. [note: 20] As an originator, the plaintiff would identify and meet potential and/or existing trading partners and financial institutions to participate in the defendant's Structured Solutions. [note: 21] As a structurer, the plaintiff would strategise and create Structured Solutions to maximise profits from a trade flow. [note: 22]

In the course of the oral arguments, the plaintiff's counsel, Mr Philip Jeyaretnam SC ("Mr Jeyaretnam SC") accepted, for the purpose of the present proceedings, that the plaintiff's role in the defendant's TSF business was as an "initiator" (*sic*) or "structurer". [note: 23]

The contractual framework

7 The main contract between the parties was an employment contract set out in a letter from the defendant to the plaintiff dated 28 March 2007, which was accepted by the plaintiff on 30 March 2007 ("the Employment Contract"). [note: 24] It is only necessary to highlight one clause in the Employment Contract. Clause 12 of the Employment Contract provides as follows: [note: 25]

> **12. OTHER OCCUPATION**
>
> You shall not at any time during your employment hold any other job without the Company's written consent.

8 The plaintiff also entered into an agreement not to compete with the defendant on 30 March 2007 ("the Non-Compete Agreement"). It is a requirement for all employees to execute the Non-Compete Agreement. Under clause 3 of the Non-Compete Agreement, the plaintiff agreed, *inter alia*, not to compete with the defendant for a period of one year immediately following his termination with the defendant: [note: 26]

> 3. **Competition and Solicitation Restrictions.** Employee [*ie*, the plaintiff] agrees that during Employee's employment with CTSF [*ie*, the defendant] or any other company within Cargill's TSF Business Unit, and *for a period of one year* immediately following the termination of Employee's employment with CTSF or any other company within Cargill's TSF Business Unit, regardless of the reason for termination, Employee will not:
>
> (a) as a partner, officer, employee, director, stockholder, proprietor, other equity owner, contractor, consultant, representative or agent engage in the business of creating, marketing or delivering, directly or indirectly, structured trade and non-trade financial products that are similar to TSF Products and Services in countries where Cargill's TSF Business Unit creates or markets structured trade or non-trade financial products.
>
> (b) as a partner, officer, employee, director, stockholder, proprietor, other equity owner, contractor, consultant, representative, or agent employ or attempt to employ, directly or indirectly, any of Cargill's TSF Business Unit employees on behalf of any other entity engaged in the business of creating, marketing or delivering structured trade or non-trade financial products that are similar to TSF Products and Services in countries where Cargill's TSF Business Unit creates or markets structured trade or non-trade financial products.
>
> [emphasis added]

9 The Non-Compete Agreement (which was entered into contemporaneously with the Employment Contract) is a classic restraint of trade clause that *prohibits* the plaintiff from directly or indirectly

competing with the Cargill Group's TSF business for a period of one year following his termination of employment. It is pertinent to note that the Non-Compete Agreement is *not* the subject matter of the present dispute.

10 The defendant also had an individual incentive award plan ("the Incentive Award Plan"). The terms and conditions of the Incentive Award Plan ("the Incentive Award Plan T&Cs") provided that individual incentive awards were "discretionary based on individual, team and business unit results". [note: 27] The Incentive Award Plan T&Cs provided that 50% of the individual incentive award would be paid out as a cash award ("the Cash Payments") and the remaining amount would be paid out as a deferred incentive ("the Deferred Incentive Payments"). Unlike the Non-Compete Agreement, it was not obligatory for the plaintiff to accept the Incentive Award Plan T&Cs but the Deferred Incentive Payments would not be processed unless it is signed by the plaintiff. [note: 28] Deferred Incentive Payments were paid out over one to three fiscal years from the date when the individual incentive award was granted. The duration of the deferral depended on the amount of the individual incentive award. The following table in the Incentive Award Plan T&Cs determined the duration and extent of the deferral: [note: 29]

Individual Incentive Award	**Deferred Incentive Percentage and Deferral Period**
$74,999 and below	0% – No Deferred Incentive
$75,000 – $199,999	50% of Individual Incentive Award deferred for 1 Fiscal Year from Grant Date
$200,000 – $399,999	50% of Individual Incentive Award deferred over 2 Fiscal Years from Grant Date (2 annual payments)
$400,000 and greater	50% of Individual Incentive Award deferred over 3 Fiscal Years from Grant Date (3 annual payments)

The Incentive Award Plan T&Cs also provided that interest was payable on the Deferred Incentive Payments at the one-year USD LIBOR (*ie*, the London Interbank Offered Rate) plus one percent. Interest would be compounded annually. [note: 30]

11 Importantly, the Incentive Award Plan T&Cs contained a provision that purported to forfeit the Deferred Incentive Payments in certain circumstances ("the Forfeiture Provision"): [note: 31]

> FORFEITURE PROVISIONS
>
> Deferred Incentives that have been awarded but not yet distributed will be forfeited if the Participant (1) is Terminated for Cause, or (2)(a) Separates from Service other than by reason of death or Disability, and (b) continues a career within the financial or commodity trading industry outside of the Company *within a period of two years from the date of such Separation from Service (referred to as the "Two-Year Non-Compete Period"*). Continuance of a career within the financial or commodity trading industry is defined as employment by, consulting with, establishing, or having a substantial ownership interest in any organization, which competes with the Company for employees, customers, clients, market share, or financial/commodity resources or deals.
>
> Deferred Incentives will not be forfeited under the following circumstances:

· A Participant's death or Disability.

· A Participant who Separates from Service other than for death or Disability and who does not compete within the Two-Year Non-Compete Period.

In the event that a Participant seeks to engage in activity or an employment relationship that may violate the Two-year [*sic*] Non-compete period [*sic*], Participants may seek clarification relative to the acceptability of this relationship from the Business Unit or Platform leader; provided, that the Two-Year Non-Compete Period shall not be waived, or if waived by the Company, such waiver shall not affect the time or form of distribution of any amounts payable under this Plan.

[emphasis added]

Incentive payments

12 On 20 July 2007, the defendant sent the plaintiff an internal memorandum [note: 32] in which it was stated that the plaintiff was awarded a bonus of US$400,000 for the 2006/2007 financial year, of which US$200,000 was to be paid in cash. The remaining US$200,000 was to be deferred for a period of three years. In accordance with the Incentive Award Plan T&Cs, part of the remaining US$200,000 was paid in 2008. As at June 2008, US$141,894 remained outstanding on the deferred component of the plaintiff's bonus for the 2006/2007 financial year. [note: 33]

13 Similarly, on 24 July 2008, the defendant sent the plaintiff an internal memorandum. [note: 34] The internal memorandum stated that the plaintiff was awarded a bonus of US$3,200,000 for the 2007/2008 financial year, of which US$1,600,000 was to be paid in cash. The remaining US$1,600,000 was to be deferred for a period of three years. The plaintiff has not received any part of the remaining US$1,600,000.

14 As of 9 February 2011, the amount of outstanding Deferred Incentive Payments remaining on the plaintiff's account was US$1,741,894 excluding accrued interest. [note: 35]

The plaintiff's resignation and his involvement in Xangbo Global Markets Pte Ltd

15 On 24 July 2007, the plaintiff incorporated a company known as Xangbo Management Pte Ltd. [note: 36] Its name was later changed to Xangbo Global Markets Pte Ltd ("Xangbo"). The parties initially disputed the nature of Xangbo's business and the precise date when Xangbo began operations.

16 On 4 November 2008, the plaintiff gave notice of his resignation. The defendant accepted the plaintiff's resignation on 27 November 2008. [note: 37] The defendant claimed that the plaintiff in setting up a competing business in Xangbo had breached the Forfeiture Provision and hence was not entitled to the balance Deferred Incentive Payments.

Originating Summons No 103 of 2011

17 The plaintiff brought this action, Originating Summons No 103 of 2011 ("OS 103/2011"), to seek the following relief: [note: 38]

(a) A declaration that the Forfeiture Provision is void and an order that the Forfeiture Provision be severed from the Incentive Award Plan T&Cs.

(b) Payment of the sum of US$1,741,894.

(c) Contractual interest on the above sum.

Application to convert OS 103/2011 into a writ action

18 The defendant had applied to convert OS 103/2011 into a writ action ("the conversion application") on the ground that there are substantial disputes of fact material to the resolution of OS 103/2011. As explained above, initially there were disputes about the precise role of the plaintiff within the defendant and the nature of the TSF business. However in the course of the oral arguments during the conversion application, Mr Jeyaretnam SC made the following concessions:

(a) The plaintiff, in setting up Xangbo, had acted in breach of the Forfeiture Provision.

(b) The defendant's TSF business is non-generic, *ie*, proprietary.

(c) The defendant's TSF business involved financial institutions and trading partners all over the world.

(d) The plaintiff's role in the defendant's TSF business was as an "initiator" or "structurer".

19 Arising from the above concessions, Mr Jeyaretnam SC accepted that the plaintiff's claim for the sum of US$1,741,894 was sought *solely* as a consequence of his prayer for a declaration that the Forfeiture Provision is void and severable. Mr Jeyaretnam SC further accepted that if that prayer is dismissed, this action should likewise be dismissed in its entirety. [note: 39] Mr Jeyaretnam SC also conceded that, for the purpose of this action, any factual disputes are to be resolved in favour of the defendant provided that the defendant has some evidential basis to support its allegations. Without the above concessions by the plaintiff, it would not have been appropriate to determine the dispute by way of OS 103/2011. Given the concessions by the plaintiff, the defendant's application to convert OS 103/2011 into a writ action was rendered moot and on that basis, I proceeded to hear OS 103/2011 which ultimately centres on the legal effect of the Forfeiture Provision.

Issues

20 From the above summary, the following discrete questions of law arise for this court's determination:

(a) Is the Forfeiture Provision in substance a restraint of trade?

(b) If so, is the restraint imposed by the Forfeiture Provision reasonable and if not, can it be severed from the Incentive Award Plan T&Cs?

(c) Are the Deferred Incentive Payments nevertheless not payable because the obligation to make those payments is not supported by any consideration?

Is the Forfeiture Provision a restraint of trade clause?

21 At the outset, it would be useful to explain the three types of clauses that will feature in this

decision. The common denominator of the three clauses is that they all arguably *appear* to provide for some form of restriction on competing with the employer following the termination of employment.

(a) The first type of clause features a promise by the employee not to compete with his employer ("Traditional ROT Clauses"). Clause 3 of the Non-Compete Agreement is a Traditional ROT Clause (see [8], above).

(b) The second type of clause involves the forfeiture of certain benefits if the employee competes with his employer ("Forfeiture-for-Competition Clauses"). The Forfeiture Provision is a Forfeiture-for-Competition Clause.

(c) The third type of clause forfeits benefits if the employee resigns ("Payment-for-Loyalty Clauses"). Payment-for-Loyalty Clauses provide for the forfeiture of benefits *even if* the employee *does not compete* with the employer upon his resignation.

22 As will be apparent when the authorities are examined below, while Forfeiture-for-Competition Clauses are largely treated in the same vein as Traditional ROT Clauses, the same is not true in the case of Payment-for-Loyalty Clauses. Since the development of the doctrine of restraint of trade was founded on public policy considerations, it might be apposite to begin the analysis by revisiting the *raison d'être* for the doctrine in order to understand whether there is a rational reason why public policy considerations would be engaged in the case of Forfeiture-for-Competition Clauses but not Payment-for-Loyalty Clauses.

The genesis of the restraint of trade doctrine

23 A concise description of the genesis and historical development of the doctrine may be found in Edwin Peel, *Treitel: The Law of Contract*, (Sweet & Maxwell, 13th Ed, 2011) ("*Treitel*") at paras 11-062–11-063, where the author explains that the doctrine once held that contracts in restraint of trade were wholly void; in time, however, courts began to uphold restraints of trade if they were reasonable:

> Contracts which prevent or regulate business competition were ***at one time regarded as invariably void*** ; and persons who made them were even threatened with imprisonment. But it came to be recognised that this ***inflexible attitude might defeat its own ends*** . A ***master might be reluctant to employ and train apprentices*** if he could not to some extent restrain them from competing with him after the end of their apprenticeship. And a trader might be unable to sell the business he had built up if he could not bind himself not to compete with the purchaser. The courts therefore began to uphold contracts in restraint of trade, and in 1711 the subject was reviewed in *Mitchel v Reynolds*. The effect of that case, as interpreted in later decisions, was that a ***restraint was prima facie valid if it was supported by adequate consideration and was not general*** — i.e. did not extend over the whole Kingdom.
>
> … Since then, the law has changed in three respects. First, restraints are no longer prima facie valid; they are prima facie void but can be justified if they are reasonable and not contrary to the public interest. Secondly, it is no longer essential that the consideration should be adequate, "though … the quantum of the consideration may enter into the question of the reasonableness of the agreement". Thirdly, the rule that a restraint must not be general no longer applies. …
>
> [emphasis added in bold italics]

The public policy underlying the restraint of trade doctrine

24 The Court of Appeal 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*") considered the public policy underlying the restraint of trade doctrine. The Court of Appeal held that the doctrine seeks to vindicate the right to *freedom of trade*, while balancing the *freedom of contract* (*Man Financial* at [45]). In the employment context, the policy underlying the doctrine is the interest of the individual *and* the state in the free flow of expertise (*ibid*.). It would be useful to set out the relevant paragraph in *Man Financial*:

> *The public policy underlying the doctrine of restraint of trade*
>
> 45 The *first* of the aforesaid aspects of public policy (*viz*, that relating to the doctrine of restraint of trade) is a clearly established one (for convenience of exposition, we refer to it hereafter as "Public Policy 1"). This doctrine is traditionally analysed in contract textbooks under the rubric of "illegality and public policy". More specifically, the doctrine seeks to vindicate the legal right to freedom of trade while balancing, at the same time, the countervailing doctrine of freedom of contract. It remains the law, however, that covenants that fall foul of the doctrine of restraint of trade will (subject to certain conditions) be rendered unenforceable. To that extent, the doctrine endorses (with the requisite balance) the public policy which legally negates attempts to unreasonably proscribe freedom of trade. Whilst we would *not* go so far as to state that the doctrine of restraint of trade *always* applies in *every* contractual context, we note that its application in the context of *employment* is *well established*. Indeed, given the strength of the *rationale* for the application of this doctrine in the employment context, it is, in our view, clear that the doctrine would apply in this particular context *even if* there has been *a compromise* of proceedings (subject to the qualification set out below (especially at [65])). The rationale for this is "the importance of the free flow of expertise in the context of the welfare of the country as a whole: a factor that presumably relates to the public interest" (see *Butterworths Common Law Series: The Law of Contract* (Michael Furmston gen ed) (LexisNexis, 2nd Ed, 2003) ("*Butterworths Common Law Series*") at para 5.117). In other words, an individual's freedom to exercise his skills as an employee as well as the benefit to the wider society that would ensue are, in one sense at least, two equally important sides of the same coin. Indeed, in the leading House of Lords decision of *Herbert Morris, Limited v Saxelby* [1916] 1 AC 688 ("*Herbert Morris*"), Lord Atkinson (citing the judgment of Sir W M James VC in *Leather Cloth Company v Lorsont* (1869) LR 9 Eq 345 at 354) emphasised (at 701) that every person should be at liberty to work for himself or herself, and ought not (in principle) to deprive either himself or herself, *or* the State, of his or her labour, skill and talents.
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> [emphasis in original]

25 Another statement of the policy which aptly captures the balance that the doctrine seeks to strike may be found in a passage in *Leather Cloth Company v Lorsont* (1869) LR 9 Eq 345 at 354 which Lord Atkinson in *Herbert Morris, Limited v Saxelby* [1916] 1 AC 688 at 701 referred to and which was, in turn, cited by the Court of Appeal in *Man Financial* in the paragraph reproduced above:

> … Public policy requires that ***every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into*** . On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, ***he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser*** . In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate,

and, therefore, enables him to enter into any stipulation however restrictive it is, provided that restriction in the judgment of the Court is ***not unreasonable*** , having regard to the subject matter of the contract.

[emphasis added in bold italics]

The above extract acknowledges that restraints can be both advantageous and disadvantageous. Restraints are useful because they make the services of the party sought to be restrained more marketable. At the same time, restraints are detrimental to both the individual concerned and the state because the free movement of skills is curtailed. In order to strike a balance between these competing tensions, the doctrine provides that restraints are valid so long as they are reasonable.

Cases from the UK and Australia on Forfeiture-for-Competition Clauses

26 There can be no doubt that on the face of the Forfeiture Provision, it does not *directly* purport to prohibit the plaintiff from joining a competitor. However, Mr Jeyaretnam SC's principal submission is that the Forfeiture Provision is *in substance* a restraint of trade clause. In support, he relies on a series of decisions concerning Forfeiture-for-Competition Clauses. The reasoning underlying these decisions is that, as a matter of substance, there is no basis for distinguishing between Traditional ROT Clauses and Forfeiture-for-Competition Clauses (see *Marshall v N M Financial Management Ltd* [1997] 1 WLR 1527 [note: 40] ("*Marshall*") at 1533B–C citing *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793 [note: 41] ("*Wyatt*"); *Wyatt* at 806–807 (*per* Scrutton LJ), 808 (*per* Greer LJ) and 809 (*per* Slesser LJ); *Bull v Pitney-Bowes Ltd* [1967] 1 WLR 273 [note: 42] ("*Pitney-Bowes*") at 282D (no basis for making such a distinction from the perspective of the public and the rationale for the doctrine of restraint of trade); *Stenhouse Australia Ltd v Marshall William Davidson Phillips* [1974] WLR 134 [note: 43] ("*Stenhouse*") at 140H (*per* Lord Wilberforce: whether a provision is in restraint of trade is to be determined by its practical effect rather than its form); *Finnegan v J & E Davy* [2007] IEHC 18 ("*Finnegan*") [note: 44] (whether the clause is a restraint of trade is to be determined by its substance and effect and not merely its form); *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388 [note: 45] ("*Sadler*") (the effect of the provision is that the employee has to give up some freedom which he would otherwise have had)).

27 It is important to bear in mind that the mere fact that a particular clause is found to be in restraint of trade does not *ipso facto* render it to be unlawful or void. If it is determined to be in restraint of trade, the employer is required to justify its reasonableness. In the present case, the defendant's primary submission is that the Forfeiture Provision is not in restraint of trade to begin with and therefore there is no requirement to demonstrate its reasonableness. It was common ground between the parties that if the court accepts this principal argument that the Forfeiture Provision is not in restraint of trade, the plaintiff's claim fails in its entirety leading to the dismissal of OS 103/2011. Alternatively, if it is construed to be in restraint of trade, the defendant seeks to justify its reasonableness.

28 I turn now to closely consider the UK and Australian authorities cited by the plaintiff.

29 The very first decision where a similar forfeiture provision was considered is *Wyatt*. The year was 1933. In that case, the employer, on retirement of the employee, wrote to the employee to grant him a gratuitous pension payable by monthly instalments on condition that he does not enter into the wool trade in competition with the employer. The pension was paid to the employee for the next 10 years and thereafter it ceased because the employer decided to reduce its "overhead expenses". The

employee then sued the employer. One member of the court, Scrutton LJ, found that the employer had made a gratuitous promise which did not give rise to any legal obligation. The other judges (Greer and Slesser LJJ) *assumed* that the promise to pay the pension amounted to an enforceable agreement because counsel for the employer was not asked by the judges to address the court on whether the promise was gratuitous. All three members of the court were in agreement, however, that the agreement was void as being in restraint of trade. It was in this context that Scrutton LJ observed (at 807) that:

> … Now this agreement, stated in the most favourable form for the plaintiff, namely *a stipulation by the employer that he will pay the plaintiff so much a year if the plaintiff does not enter into the wool trade for the rest of his life in any part of the country or world, appears to me to be a contract in restraint of trade which is unenforceable just as much as a contract by the employee not to trade in the wool trade for the rest of his life in any part of the world*, and that the country is thereby being deprived without any legitimate justification of the services of a man of sixty years of age who is quite competent to enter into business, because he is given leave to enter into any kind of business other than the wool trade. …
>
> [emphasis added]

3 0 *Wyatt* is unusual in that it was the employer and *not* the employee who had sought to invalidate the promise as in restraint of trade. It is interesting to note that the effect of the ruling was adverse to the employee in that it excused the employer from paying the pension. *Wyatt* was strongly criticised for failing to recognise that the employee was in fact free to enter the wool trade and that the restraint was voluntary in the sense that the employee restrained himself in order to receive a benefit from the pension. This criticism was contemporaneously reported in the Law Quarterly Review ((1933) 49 LQR 465 at 466):

> … It must be noted that the agreement, as construed by the Court, was not one by which the plaintiff bound himself not to enter the wool trade for a limited or unlimited time; he merely agreed not to compete as long as he accepted the pension. His liberty of action was completely unfettered, for, at any moment, he might refuse the pension and return to the trade. Why then did the Court hold that the agreement was against public policy? The reason is stated as follows by Slesser LJ at p 809: 'It seems to me that to say to a man that he should be deprived of a benefit if he fails to restrain himself from entering into a particular trade, when such restraint would be a general restraint, is just as much contrary to public policy and deprives the public of his services as much as if he made an express covenant not to enter that trade.' The learned Lord Justice adds: 'In such matters it is well to go back to principle, and the principle is nowhere better stated than by Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt, etc Co* [1894] AC 535, 565, where he says this: "All interference with individual liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and therefore void."' No one can doubt that this is a correct statement of the law, but how is it applicable to the present case? What interference with individual liberty is there if the pensioner is at any time free to enter the trade on giving up the pension? *The restraint at best is a voluntary one, for the only interference with liberty is that the promisee 'restrains himself' (a somewhat peculiar phrase) because of the greater benefit to be got from the pension*
>
> [emphasis added]

31 Thereafter, this area of the law remained somewhat dormant for the next three decades until a similar issue arose for determination in *Pitney-Bowes.* In that case, the employee had made compulsory contributions to a pension scheme for a number of years. Later the scheme was changed

whereby all employees were entitled to pension upon retirement without having to pay any further contributions. However, it was a term of the new pension scheme that the employee would lose his rights and benefits to the scheme if he were engaged in any activity that was in competition with the employer. Thesiger J held (at 282H) that he was bound by the decision in *Wyatt*. Further he found that the criticisms which were directed at *Wyatt* in 1933 "were based on conditions of employment and of the economy (within the jurisdiction of this court) which no longer prevail."

32 I should add that *Pitney-Bowes* was cited with approval by the Court of Appeal in *Man Financial* for the proposition that "the courts will not allow employers to achieve by *indirect* means what they cannot otherwise do through direct means" [emphasis in original] (see *Man Financial* at [93]). This uncontroversial proposition stems from the indisputable rule that the inquiry as to whether a clause operates in restraint of trade is to be examined by reference to substance and not form. This was eloquently articulated by the Privy Council in *Stenhouse* (at 140H) where Lord Wilberforce observed:

> … Whether a particular provision operates in restraint of trade is to be determined not by the form the stipulation wears, but, as the statement of the question itself shows, by its effect in practice. …

33 I turn now to consider the decision in *Stenhouse* which provides a useful illustration as to when a clause which does not directly prohibit the freedom of an employee to join a competitor could, in substance, be construed as a restraint of trade. In *Stenhouse*, the Managing Director of an insurance broking company entered into an agreement with the company when he left its employment. Clause 4 of the agreement provided that the Managing Director would not for a period of five years solicit insurance business from the company's clients. Clause 5 provided that in the event that any client of the company should within a period of five years, place insurance business so that the Managing Director received or became entitled to receive directly or indirectly any financial benefit from the placing of such business, then he agreed to pay to the company a one-half share of the gross commission he received in respect of the transaction. The provision in dispute was not, therefore, a Forfeiture-for-Competition Clause. The Privy Council rejected the company's argument that clause 5 was merely a provision of payment of monies pursuant to a profit sharing agreement. Significantly, the Privy Council (at 141A) offered some guidance as to when a clause which on its face may not appear to be in restraint of trade could in substance be construed as one:

> … The clause in question here contains no direct covenant to abstain from any kind of competition or business, but the question to be answered is whether, in effect, *it is likely to cause the employee to refuse business which otherwise he would take: or, looking at it in another way, whether the existence of this provision would diminish his prospects of employment*. …
>
> [emphasis added]

34 Next, the defendant also submitted that the English Court of Appeal in *Marshall* held "that a contract which made payments of commissions earned by a self employed agent, payable post termination of an agreement, conditional on, *inter alia*, the agent not competing within a year of the termination, was in restraint of trade". This is strictly incorrect. The decision was on appeal from the ruling of Jonathan Sumption QC sitting as a deputy High Court Judge. Millett LJ in *Marshall* specifically observed (at 1530E):

> In relation to renewal commission the deputy judge held as follows. (1) Clause 10(g)(i) is in unreasonable restraint of trade and is void. There is no appeal from this ruling. …

It was therefore the English High Court's decision in *Marshall* (see *Marshall v N M Financial Management* [1995] 1 WLR 1461 ("*Marshall (HC)*") which is more relevant for present purposes.

35 In *Marshall*, the employee was a self-employed sales agent engaged in selling life insurance and pension policies. A term of his contract provided that after termination, the employee should continue to receive commission in respect of premium payments made by investors he had previously introduced to the company but payment of such commission was, however, stated to be conditional on, *inter alia*, the employee not within one year of such termination becoming an independent intermediary or being employed by any organisation which was in competition with the company. Sumption QC relied on *Wyatt* and found the clause to be in restraint of trade (see *Marshall (HC)* at 1465):

> I do not think that there can be any doubt that proviso (i) is a restraint of trade. It has been well established since the decision of the Court of Appeal in *Wyatt v. Kreglinger and Fernau* [1933] 1 K.B. 793 that there is no relevant difference between a contract that a person will not carry on a particular trade and a contract that if he does not do so he will receive some benefit to which he would not otherwise be entitled. Proviso (i) is a financial incentive to the agent not to carry on business in the specified fields. It is therefore unlawful unless it is justified as being reasonable in the interests of the parties and in that of the public.

With respect, the above reasoning, which assumed the correctness of *Wyatt*, does not add anything further to the remarks made in *Wyatt.*

36 Finally, the decision in *Sadler* likewise does not provide any further guidance on the issue before me. In *Sadler*, the employee was an insurance agent who was remunerated on a commission basis payable in respect of premiums paid during the first ten years of the policy on a reducing basis. It was a term of the contract of employment that post-termination commission would not be payable to the employee if he should enter into a contract of employment with another company involved in the selling of insurance. The employee admittedly breached it when he joined a competitor upon leaving the employment of the company. The company refused to pay the post-termination commission and the employee sued the company claiming that the contractual term constituted an unlawful restraint of trade. The company in response claimed that the clause did not deprive the employee of any freedom to join a competitor. In allowing the claim, the English High Court found the decisions in *Wyatt* and *Pitney-Bowes* to be "impossible to distinguish" and, consequently, the financial incentive to limit the employee's activities was found to be in restraint of trade.

37 From the review of the cases relied on by the plaintiff, it is apparent that, apart from *Stenhouse*, they can be traced to the observations made in *Wyatt* which the subsequent cases found either to be binding or impossible to distinguish. While it is true that this court is not bound by *Wyatt*, it is equally true that if the reasoning in *Wyatt* is indeed sound, it is not incorrect for the subsequent cases to have regarded it as "impossible to distinguish". My task is to evaluate from all persuasive sources whether the reasoning in *Wyatt* resonates with the public policy that the restraint of trade doctrine was designed to protect.

United States cases on Forfeiture-for-Competition Clauses

38 As I had observed earlier, the legal position in the United States on this issue is divided. Predictably, each party referred me to decisions which supported their respective cases.

39 The first case from the United States cited by the plaintiff is *Jeffrey A Z Hilligoss v Cargill Incorporated et al* 2001 Minn App LEXIS 1017. As the title of the case suggests, this decision

involved the defendant's parent company in the United States, Cargill Incorporated ("Cargill Inc"). An employee of Cargill Inc was terminated. The employee sued, *inter alia*, for the unpaid amount of his deferred bonuses. The relevant contract between the employee and Cargill Inc contained a provision similar to the Forfeiture Provision. Cargill Inc alleged that the employee was not entitled to the unpaid amount because he was terminated for cause and he competed with Cargill Inc. The jury found against Cargill Inc. Cargill Inc filed post-trial motions for judgment notwithstanding the verdict and, alternatively, for a new trial. The court dismissed the post-trial motions. Cargill Inc appealed, seeking, *inter alia*, a new trial because the District Court erred in excluding evidence of competition. The Court of Appeals of Minnesota held that the District Court did not err in this regard because the termination letter stated that the employee would not be paid the unpaid amount of his deferred bonus because he was terminated for cause and not because the employee competed against Cargill Inc. More significantly, another reason why the District Court did not err was that the non-competition clause was overly broad. It did not matter that the provision was in the nature of a forfeiture rather than a prohibition (citing *Ralph S Harris v Myron R Bolin (as Trustee of M R Bolin Advertising Public Relations Agency Inc Profit Sharing Trust) and others* 310 Minn 391 ("*Harris*")). The decision of the Court of Appeals was appealed to the Supreme Court of Minnesota (see *Jeffrey A Z Hilligoss v Cargill, Incorporated* 649 NW2d 142). The judgment of the Supreme Court of Minnesota dealt with different issues. It did not consider whether the Forfeiture Provision was "overly broad". This decision is therefore not helpful to the key issue before me.

40 I turn next to *Harris*. In this case, an employee of an advertising firm was entitled to share in profits. Part of his share of profits was vested. The profit sharing plan provided that the vested portion of his profits would be forfeited, at the trustee's discretion, if he left the firm and joined a competitor. The employee left the firm and the trustee forfeited his vested share of profits. The employee sued. The Supreme Court of Minnesota held that the District Court correctly found that the forfeiture provision in the plan was an illegal restraint of trade (*Harris* at 395). The court referred to an Illinois decision and a federal decision (*Rochester Corporation v Rochester* (1971) 450 F2d 118 ("*Rochester*")) which upheld forfeiture clauses. It disagreed with those cases because they were "not consistent with the posture [the Supreme Court of Minnesota] has taken in enforcing only reasonable employee covenants not to compete" (*Harris* at 394). The Supreme Court of Minnesota also referred, in a footnote, to the reasoning in *Rochester* in which a distinction was drawn between Traditional ROT Clauses and Forfeiture-for-Competition Clauses. The Supreme Court of Minnesota found however, that the "purpose of both arrangements are the same" and hence they could only be enforced if they were reasonable (*Harris* at footnote 3). This reasoning is reminiscent of the reasoning in the English cases that Forfeiture-for-Competition Clauses are, in substance, restraints of trade.

41 In his reply skeletal arguments, Mr Jeyaretnam SC referred to several additional United States cases. In *Amory H Bradford v The New York Times Company* (1974) 501 F2d 51, the United States Court of Appeals for the Second Circuit (a federal appellate court applying New York state law) applied the restraint of trade doctrine to a Forfeiture-for-Competition Clause in an incentive plan. The incentive plan provided for the distribution of shares in the company in 10 equal annual instalments. In the event of a breach, the company had the sole discretion to discontinue further instalments. The court reasoned that the relevant provision was a restraint of trade because it limited the employee's employment opportunities. The court did not accept the "employee choice" doctrine because of New York's "strong public policy". In any case, the court considered that the clause could not be characterised as one which gave the employee a choice of alternative performance. The clause was held to be a restraint of trade with a provision for liquidated damages in the form of a forfeiture in the event of a breach.

42 The next case referred to in the plaintiff's reply skeletal arguments is *John J Cheney v Automatic Sprinkler Corporation of America* (1979) 377 Mass 141 ("*John J Cheney*") where the

Supreme Judicial Court of Massachusetts applied the restraint of trade doctrine to a Forfeiture-for-Competition Clause in a compensation plan. The compensation plan deferred a portion of the employee's incentive payments for a period of four years. The deferred portions would be forfeited if the employee left the company to, *inter alia*, compete with it. The court noted that the "majority view" in the US was that Forfeiture-for-Competition Clauses are enforceable "without regard to the reasonableness of the restraint". The court nevertheless held that the restraint of trade doctrine was applicable because of an imbalance in the bargaining positions of parties to such agreements. This imbalance was particularly true on the facts of the case because the Forfeiture-for-Competition Clause was present in an annual agreement which was presented to the employee annually. The employee's option was to either sign the agreement *or terminate his employment*. I pause here to note that there is no evidence in the present case that the plaintiff was presented with such a quandary. In fact, the evidence before me suggested that the plaintiff had the option not to sign the Incentive Award Plan T&Cs and yet could continue in the defendant's employment. [note: 46] Furthermore, according to the defendant, an employee who refused to sign the Incentive Award Plan T&Cs would still receive the Cash Payments (*ie*, the portion of the Incentive Award Plan which is paid out upfront in cash – see [10], above). [note: 47]

43 In *Diane P Deming v Nationwide Mutual Insurance Company et al and other matters* (2006) 279 Conn 745 ("*Diane P Deming*"), one of the issues that the Supreme Court of Connecticut had to consider was whether the restraint of trade doctrine applied to a Forfeiture-for-Competition Clause which forfeited deferred compensation if the employee competed with the employer. The court noted that the "majority view" is that such forfeiture provisions are not restraints of trade (*Diane P Deming* at 762). The majority view reasons that the employee is not prohibited from competing. Instead, the employee is merely denied the right to participate in a plan if he competed. Therefore, the employee and the public are not deprived of the employee's skills. However, a "significant minority" of jurisdictions take the view that such provisions are restraints of trade because the effect of the provisions is to present a "powerful deterrent" to the employee's right to compete (*Diane P Deming* at 763). The court concluded that the provision "does not differ meaningfully from a covenant not to compete". Although the provision is not directly a restraint of trade, the consequences of the forfeiture "enkindle[s] a restraining influence, albeit in a subtle fashion" (*Diane P Deming* at 768 citing *Almers v South Carolina National Bank of Charleston* 265 SC 51).

44 In *Food Fair Stores, Inc et al v Greeley* (1972) 264 Md 105 ("*Food Fair Stores*"), the Court of Appeals of Maryland had to consider whether a Forfeiture-for-Competition Clause which forfeited retirement benefits was a restraint of trade. The court held that the clause was a restraint of trade. The court reasoned that whether the restraint is in an employment contract, backed by legal sanctions, or by way of a forfeiture of pension benefits, the employee is made to suffer economic loss should he breach the restrictive covenant (see *Food Fair Stores* at 116).

45 In *Lavey v Edwards et al and other matters* (1973) 264 Ore 331 ("*Lavey*"), the Supreme Court of Oregon applied the restraint of trade doctrine to a Forfeiture-for-Competition Clause which forfeited pension contributions by the employer in the event that the employee competed. The reasons for the application of the doctrine are not clear from the judgment. The court focused on a different issue: *viz*, whether such clauses are void *per se* or whether a test of reasonableness should be applied (the trial court had held that the clauses were void as a matter of law; the Supreme Court of Oregon remitted the case for the court to consider whether the clause was reasonable).

46 In *Richard C Pollard v Autotote Ltd* (1988) 852 F2d 67 ("*Richard C Pollard*"), the United States Court of Appeals for the Second Circuit (a federal appellate court applying Delaware state law) had to consider whether a Forfeiture-for-Competition Clause which forfeited deferred management incentive

payments in the event of competition was enforceable. The trial court had granted summary judgment in favour of the employer. Since there was no Delaware case law on point, the court had to predict what a Delaware court would have done in construing such a Forfeiture-for-Competition Clause. The court held that Delaware courts would subject such clauses to a reasonableness standard. Delaware courts would have applied the reasonableness standard to covenants not to compete. Since covenants not to compete are similar to Forfeiture-for-Competition Clauses (because both types of clauses restrict the employee's freedom to choose alternative employment), the court held that Delaware courts would have also subjected Forfeiture-for-Competition Clauses to the same standard (*Richard C Pollard* at 71). Since it was not clear whether the Forfeiture-for-Competition Clause was reasonable, the court reversed the grant of summary judgment and remitted the matter for a trial.

47 In *Securitas Security Services USA, Inc v Kenneth Jenkins* (2003) 16 Mass L Rep 486, the Superior Court of Massachusetts held that under Massachusetts law, courts must apply a reasonableness standard to Forfeiture-for-Competition Clauses. The court did not, however, engage in any discussion as to why the restraint of trade doctrine applies to such clauses.

48 The final United States case that the plaintiff referred me to was *Gene W Sheppard v Blackstock Lumber Company Inc* (1975) 85 Wn2d 929 ("*Gene W Sheppard*"), where the Supreme Court of Washington had to determine the enforceability of a Forfeiture-for-Competition Clause which forfeited an employee's undrawn share in a profit-sharing retirement plan in the event that he competed with the employer. The trial court granted the employer summary judgment. The court held that a reasonableness test applied because the clause had an "inhibitive influence on an employee's decision whether to accept a new job" (*Gene W Sheppard* at 932). The court also noted that the new employment would, oftentimes, not compensate the employee for his loss of benefits (*ibid*). The court remitted the matter for a trial in the lower courts.

49 I turn now to the United States cases cited by the defendant. The first is *Richard Fraser d/b/a R A Fraser Agency and another v Nationwide Mutual Insurance Co et al* (2004) 334 F Supp 2d 755 ("*Richard Fraser*") where the District Court for the Eastern District of Pennsylvania (a federal court) had to consider whether a Forfeiture-for-Competition Clause which forfeited an insurance agent's deferred compensation due to his competition with his former employer was a restraint of trade under Pennsylvania law. The court reasoned that the clause allowed the agent to *choose* whether to compete. As a "rational actor", the agent must have weighed the costs and benefits of each option (*Richard Fraser* at 760). As will be seen, this reasoning is often repeated in the United States cases cited by the defendant. I shall refer to this reasoning as "the Employee Choice Rationale".

50 The next case cited by the defendant is *John W Johnson v MPR Associates Inc* (1994) 894 F Supp 255 ("*John W Johnson*") which concerned a provision in an employee stock transfer agreement under which employees received shares in their employer. The stock transfer agreement contained a Forfeiture-for-Competition Clause which required the employee to tender his shares if he joined a competitor. The District Court for the Eastern District of Virginia (a federal court) held that the provision was *not* a restraint of trade. The court reasoned that the provision only denied the employee of a benefit. The provision did not prohibit competition (*John W Johnson* at 257, citing *Rochester*). This is another way of saying that the employee had a choice to compete, albeit that the choice carried with it a denial of a benefit. The court's reasoning is therefore, in substance, an application of the Employee Choice Rationale.

51 In *Milton J Kristt (Individually and as a Representative under a Deed of Trust) v John J Whelan et al (as Trustees under a Deed of Trust)* (1957) 4 AD2d 195 ("*Milton J Kristt*"), a company set up a trust. The plaintiff, an employee, was given an interest in the trust. The trust deed was amended to provide that the trustees, upon the request of the company, were to forfeit the interest of a

beneficiary if that beneficiary competed with the company. The plaintiff terminated his employment with the company and competed with it. His trust interests were then forfeited. The Supreme Court of New York Appellate Division (this is an intermediate court) held that the amendment to the trust was not contrary to public policy and did not restrain competition. The employee was not barred from competing. He had a choice (*Milton J Kristt* at 199). This is another application of the Employee Choice Rationale.

52 Finally, in *Rochester*, a decision referred to in *Harris* (see [40], above), the Court of Appeals for the Fourth Circuit (a federal appellate court) had to consider whether a provision in a retirement plan which forfeited pension benefits if the employee competed was a restraint of trade under Virginia law. The court held that the forfeiture was *not* a restraint of trade because the employee was not prohibited from competing. He was merely denied the right to participate in the retirement plan (*Rochester* at 123). Again, this is, in substance, an application of the Employee Choice Rationale.

53 The following points have emerged from my analysis of the relevant United States cases:

(a) The cases holding that the restraint of trade doctrine applies to Forfeiture-for-Competition Clauses generally apply the English reasoning that the clauses are, in substance, restraints of trade because their effect is the curtailment of competition (see *Harris*, *Diane P Deming, Food Fair Stores*, *Richard C Pollard* and *Gene W Sheppard*). One case, *John J Cheney* (see [42] above), refers to the imbalance in bargaining power between employer and employee as a justification for the application of the doctrine. I note, however, that this reasoning seems to have been prompted by the particularly harsh circumstances in that case: the employee had to either accept the agreement containing the Forfeiture-for-Competition Clause or terminate his employment. As I have noted above (see [42]), there is no evidence that the plaintiff faced a similar situation in this case.

(b) The cases that determined that the doctrine does not apply typically adopt the Employee Choice Rationale, *viz*, that the employee has a choice in determining whether he wants to compete and, as a rational actor, is presumed to have weighed the costs and benefits of competing with his former employer.

54 To conclude this discussion on the position in the United States, I should say that the *majority view* in the United States is that the restraint of trade doctrine does *not* apply to Forfeiture-for-Competition Clauses, as one of the leading treatises on contract law in the United States notes (*Corbin on Contracts* vol 15 (LexisNexis, 2003) ("*Corbin on Contracts*") at §80.25):

Conditions in Restraint of Competition

In contrast to conditions applying to a covenant not to compete that a court must judge by the reasonableness standard, conditions not applying to a covenant not to compete need not be tested by a reasonableness analysis, though there may be anticompetitive effect. A typical scenario is as follows: A sells the business to B, receiving $100,000 in cash and also B's promise to pay to A an annuity of $5,000 as long as A forbears to open a business in competition. A has made no promise of any kind, neither a promise not to open a business nor a promise to pay money conditional on such an opening. Yet the transaction has a restraining influence. B's promise of an annuity, conditional on forbearance to open a business, tends to restrain A from competition.

Given this restraining effect, one might expect courts to analyze these arrangements as restraints on competition, which must be reasonable to be enforced. *The majority of courts*

addressing the issue, however, automatically uphold anticompetitive conditions in this context without regard to reasonableness, applying an employee-choice doctrine. In the typical scenario, an employer provides a *deferred compensation plan* for certain employees. An employee covered by the plan receives deferred compensation in accordance with the plan unless that employee competes against the employer in some specified way. If the employee participates in prohibited activity, that employee forfeits the deferred compensation. In cases involving this scenario, courts refuse to subject the arrangement to a reasonableness analysis because the forfeiture does not prevent the employee from competing. Rather, the employee has the choice of competing or keeping the deferred compensation benefits. *As one court has stated: "The provision for forfeiture here involved did not bar plaintiff from other employment. He had the choice of preserving his rights under the trust by refraining from competition with [his employer] … or risk forfeiture of such rights by exercising his right to compete with [the employer]."* While some courts note that these conditions are part of a compensation or pension plan rather than a part of an employment agreement and thus courts should treat them differently, one court has admitted that the "divestiture provision in the Plan operates as a short term (six month) covenant not to compete."

[emphasis added]

In fact, some of the cases I have referred to above have also noted that the majority position in the United States is that the restraint of trade doctrine does *not* apply to Forfeiture-for-Competition Clauses (see *John J Cheney*, above at [42] and *Diane P Deming*, above at [43]).

Academic views and commentary

55 The leading textbooks on English contract law do not question the correctness of the view in cases such as *Wyatt* and *Pitney-Bowes* that the Forfeiture-for-Competition Clauses are restraints of trade (see *Butterworths Common Law Series: The Law of Contract* (Michael Furmston gen ed) (LexisNexis, 4th Ed, 2010) ("*Butterworths*") at para 5.12 ("…the courts will not allow employers to achieve by *indirect* means what they could not otherwise have obtained by direct means"; citing *Pitney-Bowes*); *Treitel* at para 11-083 ("[t]he restraint of trade doctrine may apply where the terms of the contract provide a party with a financial incentive not to compete, even though he makes no actual promise to do so…"; citing *Wyatt*); and M.P. Furmston (ed) *Chesire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 15th Ed, 2006) at p 531 ("[t]he courts are astute to prevent an employer from obtaining by indirect means a protection against competition that would not be available to him by an express contract with his employee"; citing *Pitney-Bowes*)). It should be noted that *Chitty on Contracts* (Sweet & Maxwell, 30th Ed, 2008) and Sir Jack Beatson *et al, Anson's Law of Contract* (Oxford University Press, 29th Ed, 2010) do not expressly consider whether Forfeiture-for-Competition Clauses are restraints of trade although both treatises cite *Wyatt*.

56 I should mention that there are articles from the UK which support the view that Forfeiture-for-Competition Clauses are, in substance, restraints of trade (Stephen A Smith, "Reconstructing Restraint of Trade" (1995) 15 Oxford Journal of Legal Studies 565 at 568 and K L Koh, "Pension Funds and Restraint of Trade" (1967) 30 Modern Law Review 587 at 589).

The Court's analysis

57 From the above review of the cases from the various jurisdictions as well as academic commentaries, it appears to me that my decision would ultimately depend on whether I regard the Forfeiture Provision as in substance a restraint of trade or whether I am persuaded by the Employee Choice Rationale. In addressing the issue of whether the Forfeiture Provision was in substance a

restraint of trade, it is crucial not to lose sight of the public policy considerations which engendered the doctrine in the first place.

58 On its face, Forfeiture-for-Competition Clauses do not *prohibit* the employee from competing with the employer. Instead they operate as a *financial disincentive* for the employee to compete after he leaves the employer. If the plaintiff decides to compete upon leaving the employment of the defendant with full knowledge of the financial disincentive, *ie*, the forfeiture of his Deferred Incentive Award, then he would have made a calculated business decision that he would nonetheless be better off financially working for a competitor. In other words, he would have evaluated the detriment of losing the deferred bonus against the gain in joining the competitor. As aptly observed in the case cited in the extract from *Corbin on Contracts* reproduced above (see [54] above) the plaintiff had the choice of preserving his rights under the Incentive Award Plan by refraining from competition with the defendant or risk forfeiture of his deferred bonus by exercising his right to compete. It seems to me that there is no compelling public policy that requires the court to intervene to hold the Forfeiture Provision as in restraint of trade when in truth there was no restraint in form or substance to speak of. The plaintiff was completely at liberty to compete with the defendant and had in fact done so when he set up a competing business in Xangbo. There is therefore no question of society being deprived of his skill and competency which is the cornerstone behind the restraint of trade doctrine. I should add that a similar argument was raised and apparently rejected in *Finnegan* (a case cited by the plaintiff – see [26], above) where the employer sought to unilaterally and retrospectively amend the employee's entitlement to bonus by deferring the payment of a substantial portion of the bonus provided the employee did not in the meantime join a competitor. The right to defer the payment was challenged on the basis that the amendment had no legal effect since the employee was not given any notice and alternatively it operated as an unreasonable restraint of trade. Smyth J made several factual findings, in particular that the employee had a legitimate and reasonable expectation to bonus payments depending on the performance of the company and the employee and, more importantly, that the employee had *not* agreed to the deferral of the bonus payments. It was argued by the company that the deferral payments were primarily an "economic disincentive or discouragement from leaving, or put positively, providing an economic incentive to stay with the Defendant company." The argument was however rejected by Smyth J (at p 8 of the LexisNexis transcript) where he remarked:

> … I am unable to accept this submission.
>
> In my judgment there was, on the evidence, n*o genuine proprietary interest of Davys that required the imposition of the provision imposed upon the Plaintiff*. Costelloe J. (as he then was) said in John Orr Ltd. -v- Orr [1987] ILRM702 as follows:-
>
> > "All restraints of trade in the absence of special justifying circumstances are contrary to public policy and are therefore void. A restraint may be justified if it is reasonable in the interests of the contracting parties and in the interests of the public. The onus of showing that a restraint is reasonable between the parties rests on the person alleging that it is so. Greater freedom of contract is allowable in a covenant entered into between a seller and a buyer of a business than in the case of one entered into between an employer and an employee. A covenant against competition entered into by the seller of a business which is reasonably necessary to protect the business sold is valid and enforceable. A covenant by an employee not to compete may also be valid and enforceable if it is reasonably necessary to protect some proprietary interest of the covenantee such as may exist in a trade connection or trade secrets. The Court may in certain circumstances enforce a covenant in restraint of trade even though taken as a whole the covenant exceeds what was reasonable while the severance of the void parts from the valid parts."

[emphasis added]

59 From the judgment, it was not entirely clear why the argument was rejected by Smyth J. In the next paragraph of his judgment, he proceeded to find that there was no proprietary interest which justified protection. To the extent that the submission was rejected on the basis that there was no proprietary interest to be protected, with respect, I am unable to follow the reasoning since the issue as to the presence or absence of a proprietary interest only comes into play *after* the clause has been found to be in restraint of trade. In my view, a finding that there was no genuine proprietary interest that required protection has no bearing to the *prior* question as to whether the deferred payment was merely an economic incentive to stay with the company. Having said that, it might well be that the finding on the absence of any proprietary interest was unrelated to the rejection of the submission and if so, then it is unclear to me why it was rejected. Ultimately the decision was undoubtedly correct in that the employee had not agreed to the deferred payment scheme which was found to have been unilaterally and retrospectively imposed on the employee. Smyth J recognised (at p 6 of the LexisNexis transcript) that the position might well be different if the employee had agreed to the deferred payment scheme:

> … In *Horkulak* [*ie*,*Horkulak v Cantor Fitzgerald International* [2005] 1 CR 402] the particular bonus scheme had a number of features that may be common in some respects to the Defendant's bonus scheme. In particular, the Cantor Fitzgerald scheme (as did the Defendant's) contained a proviso that the employee continued to be employed at the payment date of the bonus, which was deferred for a period after its determination. *In my judgment this is clearly distinguishable from the instant case because Horkulak's contract was (a) in writing and (b) the term was known to him and it was known to him from the outset.*
>
> [emphasis added]

60 The Forfeiture Provision, in my view, merely contractually defines when the plaintiff loses his entitlement to the Deferred Incentive Payments. Adopting the test laid down in *Stenhouse*, the Forfeiture Provision was not likely to cause the plaintiff "*to refuse business which otherwise he would take*" or, "*would diminish his prospects of employment*" (see [33] above). Unlike the employee in *Finnegan*, the plaintiff specifically agreed to abide by the terms of the Incentive Award Plan T&Cs. He had a *choice* not to accept the Incentive Award Plan T&Cs which is separate and distinct from the Employment Contract and had a *further choice* having agreed to the Incentive Award Plan T&Cs to compete with the defendant after leaving the defendant's employment. The only consequence from the exercise of his choice to compete is that he has to be held to his bargain in forgoing his Deferred Incentive Payments. In the words of counsel for the defendant, Ms Blossom Hing ("Ms Hing"), the plaintiff simply cannot "have his cake and eat it too." Employees such as the plaintiff would presumably have acted rationally by weighing the benefit of competitive employment against the cost of forfeiture.

61 It is imperative not to lose sight that the doctrine of restraint of trade entails a balancing exercise between two competing rights, *ie*, freedom of trade and freedom of contract (see [24], above). To hold the Forfeiture Provision as in substance a restraint of trade would attach unjustifiable weight to the right of freedom of trade at the expense of the equally important countervailing right of freedom of contract. Employers also deserve some protection from opportunistic employees. Just to be clear, there is nothing wrong for an employee to be opportunistic. By the same token, there is nothing wrong in the employer forfeiting the deferred bonus in accordance with the contract when the employee, acting in his self-interest, exercises his right to pursue new and better opportunities.

62 Further, it is not unreasonable to expect highly qualified employees like the plaintiff to negotiate

with their new employers to compensate them for the loss of such deferred bonus as a condition for joining them. Although this point does not arise in this case because the plaintiff had set up a competing business instead of joining a competitor, it is nonetheless a relevant factor to bear in mind when deciding whether the public policy considerations are engaged in the first place. This was in fact specifically highlighted in *Hairman v FileNET Corporation Pty Ltd* [2001] NSWIRComm 318 ("*Hairman*") (which is discussed below at [68]) where the New South Wales Industrial Relations Commission observed at [129] that "the loss of such an inducement can even enable an employee headhunted by another employer, to negotiate more favourable terms in the new employment". If the new employer is prepared to do so then there would be no loss to the employee. But if the new employer is not prepared to do so and yet the employee elects to exercise his right to compete by joining the competitor, then he should bear the full financial consequences of his informed decision. There is nothing inherently unfair with such an outcome. Accordingly, I hold that the Forfeiture Provision was neither in form nor in substance in restraint of trade.

63 I should add for completeness that the amount of deferred bonus to be forfeited is not relevant to the inquiry whether the Forfeiture Provision was in restraint of trade. In this case, the outstanding Deferred Incentive Payment is US$1,741,894 which is a substantial sum. The amount would, however, be a relevant consideration in determining its reasonableness if it was found to be in restraint of trade.

64 In arriving at my decision that the Forfeiture Provision was not in restraint of trade, I am also persuaded by decisions on Payment-for-Loyalty Clauses that ruled that they are not in restraint of trade. I now turn my attention to examine those decisions.

Payment-for-Loyalty Clauses

65 Payment-for-Loyalty Clauses have consistently been upheld by the courts in the UK and Australia as not being in restraint of trade. It is relevant to point out that the validity of such clauses was challenged on those occasions on the premise that such clauses were in substance in restraint of trade. However, on every such challenge, the courts have consistently rejected the argument. On the other hand, in the cases concerning Forfeiture-for-Competition Clauses, the cases involving Payment-for-Loyalty Clauses were not cited in aid of the argument that such clauses (*ie*, Forfeiture-for-Competition Clauses) were not in restraint of trade.

66 The reasoning behind the courts' decisions upholding Payment-for-Loyalty Clauses can be gleaned from the following cases. In *Peninsula Business Services Ltd v Sweeney* (2003) EAT/1096/02/SM ("*Peninsula*"), it was an express term of the employment contract that sales representatives would only be paid their commission at the end of the calendar month when the commission payment would normally become payable and provided that the sales representative is still in the employment of the company at the end of the calendar month when the commission would normally become payable. The UK Employment Tribunal found, *inter alia*, that the clause amounted to a restraint of trade. On appeal by the company, the UK Employment Appeal Tribunal disagreed and held at [42] and [44]:

> 42 … We do not consider it seriously arguable that the commission penalty that Mr Sweeney [*ie*, the sales representative] suffered on resignation arose under a contractual term involving an unlawful restraint of trade. *His employment contract did not impose any restraint on him as to whom he might work for, or what he might do, after leaving Peninsula*...
>
> ...

44 … We hold that nothing in section B was void as being in restraint of trade.

[emphasis added]

67 Similarly in *Tullet Prebon plc and others v BGC Brokers LP and others* [2010] EWHC 484, the court was asked to rule whether a contractual provision which required the brokers to return retention payments when the brokers left the employment within a certain period of time was in restraint of trade. The court in refusing to treat such provisions as in restraint of trade observed at [267]:

The provisions which provide for the repayment of signing or retention payments where the employee does not serve out the full term are not provisions in restraint of trade. *They do not affect the employees' ability to work after leaving.* They are substantial sums paid to highly paid employees as a reward for loyalty.

[emphasis added]

68 I turn now to two Australian authorities considering Payment-for-Loyalty Clauses. The first is *Hairman*, which is not, strictly, a case on restraint of trade. In *Hairman*, the employee's remuneration comprised a mix of salary as well as commission payments under a sales incentive plan. Like the present case, the sales incentive plan was updated annually and the employee was required to accept the terms in writing which would entitle the employee to receive 55 per cent of the commission upon booking of the order and the balance 45 per cent upon payment by the customer provided the employee remained in employment. In *Hairman*, the employee who left the employment sought to recover the balance 45 per cent commission by challenging the sales incentive plan as being unfair under s 106 of the Industrial Relations Act 1996 (No 17 of 1996) (NSW) ("the NSW Act"). One of the arguments raised by the employee was that the commission scheme was unfair because it had the effect of restraining employees from leaving employment (see *Hairman* at [49]). Again, like the present case, the employee received part payment of the commission, *ie*, the 55 per cent commission upon booking the order. The New South Wales Industrial Relations Commission found that the clause which forfeited the balance commission upon resignation was not a restraint. It is not clear from the commission's opinion whether this was an argument that the clause was a restraint *of trade* attracting the application of the *restraint of trade doctrine* or a *general argument* that the clause was unfair because it restrained the employee. The following passage from *Hairman* at [128]–[129] is, however, worth noting:

128 While it was complained that the result was that the scheme acted as a restraint on employees leaving the respondent's employ, the fact is that restraints are commonplace in employment and other kinds of relationships. Remuneration itself is often structured so as to include attraction and retention payments, as well as payment for the actual work performed. Other conditions also often contain such elements. The decision of the Full Court in *Westfield Limited & Anor v Helprin* (unreported; Cahill VP, Hungerford and Schmidt JJ; 23 March 1997) was an example of such an approach, in that case adopted in connection with an option scheme. Another common and even more direct approach to achieving similar ends, is those agreements which provide for a fixed term contract of employment.

129 Designing a remuneration package with retention of employees as one aim is not inherently unfair, indeed it is commonplace and to the advantage of many employees, who thereby gain access to advantageous conditions, otherwise not available to them. An inducement provided by an employment contract to remain in employment for a time, does not preclude an employee resigning, if he or she wishes. As in this case, the loss of such an inducement can even enable an

employee headhunted by another employer, to negotiate more favourable terms in the new employment.

69 In the second Australian authority cited by Ms Hing, however, it is clear that the New South Wales Industrial Relations Commission was concerned with an argument that the clause in question was a restraint *of trade*, albeit that the argument was, again, made in the context of an application for relief under s 106 of the NSW Act on the ground that the relevant contract of employment was unfair. In *Rick Lloyd v Commonwealth Bank of Australia Ltd* [2006] NSWIRComm 129 ("*Lloyd*"), the commission was faced with the forfeiture of a deferred bonus upon the employee's resignation from employment. One of the arguments raised by the employee was that the forfeiture was in restraint of trade (see *Lloyd* at [56]). In rejecting the reliance on the restraint of trade doctrine, the court attached significance to the fact that the employee was paid a substantial portion of his performance based bonus upon completion of the review and that he was fully aware of the financial consequences to the deferred bonus upon resignation. The commission therefore arrived at the conclusion that such an arrangement did not have a coercive effect or fetter on the employee's ability to find alternative work in the same industry (see *Lloyd* at [101]–[103]):

> 101 In the present circumstances the actual clause the subject of the allegation of restraint concerns the conditions of the bonus scheme imported into the contracts of employment or arrangement dealing with the payment of deferred performance-based bonuses, namely continued satisfactory performance and continued employment. Whether that clause constituted a restraint falls to be decided by reference to the particular circumstances applicable to both parties.
>
> 102 These circumstances reveal that the applicant was not precluded from seeking employment with ABN Amro. There was no evidence led during the course of proceedings which might suggest that the position at ABN Amro did not entail skills and responsibility commensurate with the applicant's position at the respondent bank. The new position also paid a comparable salary. *The applicant was aware at all times of the likely consequences of resignation*. It was commonplace for an employee to forfeit unvested components of a bonus in the event of resignation as attested to by Mr McAuley in his affidavit. The respondent's retention policy was, and is, also commonplace within the banking and finance industry and known and understood as such by the applicant. Notwithstanding that a significant proportion of the applicant's performance-based bonuses stood to be forfeited in the event of resignation the applicant was remunerated by means of his fixed salary. In addition the applicant consistently received in excess of half of his performance based bonuses immediately upon completion of his yearly performance reviews. This factor alone substantially mitigates the impact of any binding or coercive effect that the conditions attaching to the payment of the deferred bonuses may have otherwise had on the applicant.
>
> 103 Based on the circumstances applicable to the applicant's situation I have some doubt that the offending clause as characterised constituted a restraint of trade. *It is difficult to see how, in all the circumstances the clause had a coercive effect on the applicant or acted as a fetter on his ability to seek and obtain other employment within the same industry*. Even if it were to be construed as a restraint of trade I would nevertheless find, based on the same circumstances as outlined above, that the clause was reasonable: see *Prudential Assurance Co v Rodrigues* at 57.
>
> [emphasis added]

70 It is apparent that in order for an employee to receive and retain a bonus under a Payment-for-Loyalty Clause, the employee would not be able to work for anyone else and that must necessarily include a competitor. In that sense as argued by Ms Hing, Payment-for-Loyalty Clauses have a more

overreaching effect than Forfeiture-for-Competition Clauses. Viewed in this context, it can be said that *in substance*, Payment-for-Loyalty Clauses are similar to Forfeiture-for-Competition Clauses. The reason why Payment-for-Loyalty Clauses are not construed as in restraint of trade is simply because they do not *in substance* deprive the employee of his right to work for a competitor. All it does is to provide a financial disincentive to an employee if he chooses to breach the condition in the Payment-for-Loyalty Clauses. As there is *in substance* no difference between the two types of clauses, in my view, there can be no rational justification to treat Forfeiture-for-Competition Clauses any differently from Payment-for-Loyalty Clauses.

71 In arriving at my decision, I did consider the point that Forfeiture-for-Competition Clauses appear to be targeted at the employee joining a competitor whereas Payment-for-Loyalty Clauses appear to promote the employee's loyalty and retention as its main objective. However in my view, it would be naive to believe that Payment-for-Loyalty Clauses are not directed to prevent employees from joining competitors. After all, the principal purpose in promoting retention and loyalty is to ensure that the employees do not join the competitor by remaining in its employment.

72 In response to the cases considering Payment-for-Loyalty Clauses, Mr Jeyaretnam SC made three submissions. First, they do not appear to have been "rigorously challenged". That is a matter of opinion. Admittedly, the decisions on Payment-for-Loyalty Clauses that Ms Hing referred me to were not decisions of apex courts. One thing is however clear. At least the validity of Payment-for-Loyalty Clauses was tested against the restraint of trade doctrine. However in the case of Forfeiture-for-Competition Clauses, the decisions upholding the validity of Payment-for-Loyalty Clauses do not appear to have been considered or even cited. Secondly, the time between the declaration of bonus and the payment in cases involving Payment-for-Loyalty Clauses is typically short. This point is neither here nor there. It would be relevant in the inquiry as to its reasonableness after it has been determined to be in restraint of trade. Thirdly, Forfeiture-for-Competition Clauses are even worse than Payment-for-Loyalty Clauses in that "if the employee remains employed, with his bonus deferred, at least he continues to be economically productive." I do not quite understand this argument. An employee who is subjected to a Payment-for-Loyalty Clause can also be economically productive if he remains employed except that he or she would forfeit the deferred bonus upon resignation unlike the case under a Forfeiture-for-Competition Clause. However it cannot be seriously contended that a Forfeiture-for-Competition Clause is more restrictive than a Payment-for-Loyalty Clause. A Payment-for-Loyalty Clause provides for forfeiture regardless of whether the employee competes. In any case, the issue is not which of the two clauses is worse or better than the other but whether the public policy considerations relating to the restraint of trade doctrine are engaged in either Payment-for-Loyalty Clauses or Forfeiture-for-Competition Clauses. I have found that it did not apply to either of the clauses.

73 In the light of my decision that the Forfeiture Provision was not in restraint of trade, it would follow from Mr Jeyaretnam SC's concession that OS 103/2011 should be dismissed in its entirety. As such there is strictly no necessity for me to consider the remaining issues on the reasonableness of the Forfeiture Provision or whether the Deferred Incentive Payments were supported by any consideration independent of the alleged restraint of trade. However since full submissions were made by both parties, I shall express my views on these two issues in case I am wrong on the main issue.

Is the Forfeiture Provision reasonable

74 It is well established that in determining whether the clause in restraint of trade is reasonable, the clause must be shown to be reasonable in the interests of the parties *and* in the interests of the public (see *Man Financial* at [70] citing the decision of the House of Lords in *Thorsten Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] AC 535 at 565). In applying

this principle, the court will have regard to, in particular, the geographical scope or area of the restraint and the duration of the restraint (see *Man Financial* at [73]). Furthermore, the employer must have a *legitimate proprietary interest* that it seeks to protect by having a restraint of trade (see *Man Financial* at [79]). There are two interests that may legitimately be protected in an employment context, *viz*, trade secrets and trade connections (see *Man Financial* at [81] citing an earlier edition of *Butterworths*).

75 It was common ground between the parties that the defendant bore the burden to prove that the Forfeiture Provision was reasonable in the event that it was found to be in restraint of trade.

76 Had I determined the Forfeiture Provision to be, in substance, in restraint of trade, I would have found it to be unreasonable and hence unenforceable. As Mr Jeyaretnam SC has accepted that the defendant's TSF business is non-generic, *ie*, proprietary and involved financial institutions and trading partners all over the world, it cannot be disputed that the defendant has a legitimate proprietary interest to protect. I do not, however, think that the extent of the restraint is reasonable for the following reasons. First, the Forfeiture Provision is wider than necessary in terms of duration. The Non-Compete Agreement restrains trade for only one year while the Forfeiture Provision covers a period of two years. There is no compelling reason why the defendant's legitimate proprietary interest requires protection beyond the period for which it already receives protection under the Non-Compete Agreement. Secondly, the Forfeiture Provision has no geographical limit whereas the restriction under the Non-Compete Agreement is limited to countries in which the defendant has an actual place of business. Finally, the Forfeiture Provision covers employment by and consulting with any organisation which competes for employees, customers, clients, market share or financial/commodity resources and deals. It is therefore not limited to the TSF business and hence is wider than necessary to safeguard the defendant's legitimate proprietary interest.

77 I was therefore not persuaded by the defendant's submissions that the two-year restriction under the Forfeiture Provision ought to be upheld. Ms Hing emphasised that it did not prohibit the plaintiff from competing and that it was not imposed as a condition for employment. Accordingly, the plaintiff had "full bargaining power" and consequently had a choice. These were effectively the same arguments that were made to displace the application of the restraint of trade doctrine to the Forfeiture Provision. It did not address the issue why it was wider than necessary to protect the defendant's TSF business and in particular why the period of restriction was longer than that provided under the Non-Compete Agreement.

78 In the present case, had I found to the contrary that the Forfeiture Provision was in restraint of trade, I would have severed it from the Incentive Award Plan without the need to invoke the "blue-pencil test" as it was a standalone clause which did not affect the other provisions. Would its severance render the Incentive Award Plan unenforceable for lack of consideration? I determined it to the negative as explained below.

Are the Deferred Incentive Payments supported by any consideration

79 The defendant relies on *Wyatt*, *Pitney-Bowes*, *Sadler* and *Marshall* for the proposition that a promise to provide a benefit made conditional on the observance of a restraint of trade will not be enforceable if the restraint is found to be invalid provided that the *only* consideration for the promise was the restraint of trade. [note: 48]

80 On the facts, the defendant submits that it promised to pay the Deferred Incentive Payments only in consideration for the plaintiff's observance of the condition that he did not compete for the stipulated period. [note: 49] The defendant argues that the Incentive Award Plan T&Cs *only* governed

the payment of the Deferred Incentive Payments and *not* the Cash Payments. This is evidenced by the fact that the Cash Payments were always paid *before* the plaintiff signed the Incentive Award Plan T&Cs. [note: 50]

81 In response, the plaintiff argues that the main consideration for the payments under the Incentive Award Plan was his hard work and good performance and not the condition in the Forfeiture Provision that he was not to compete. The Incentive Award Plan T&Cs provide that the awards are "discretionary based on individual, team and business results". [note: 51] The plaintiff also points out that the Incentive Award Plan also comprised Cash Payments which were paid regardless of non-competition. The consideration for the Cash Payments cannot be different from the consideration for the Deferred Incentive Payments since they are both part of the same plan. [note: 52]

82 The parties are in agreement that a promise to provide a benefit is unenforceable if its only consideration is an invalid restraint of trade. The proposition is well established and was in fact restated by the Court of Appeal in *Man Financial* as part of its description of the doctrine of severance (*Man Financial* at [126] and [128]):

> 126 As this particular doctrine [*ie*, severance] did not really arise in the present appeal (although it did in the court below), we will not dwell upon it at any length. (We pause to observe, parenthetically, however, that the doctrine of severance might nevertheless be of some relevance in the context of Clause C.1.) In brief, at the level of general principle, there are two objectives underlying the doctrine of severance, which were neatly encapsulated by Chao Hick Tin JA (as he then was) in *National Aerated Water Co* ([58] *supra*), as follows (at [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. [The] [s]econd 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.
>
> …
>
> 128 The former category referred to in the above quotation (at [126]) 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). In the present case, the Judge held, *inter alia*, that Clause C.1 and Clause C.3 did not constitute all, or substantially all, the consideration for the Compensation to be paid under the Termination Agreement (see GD ([1] *supra*) at [216]-[218]). In view of our characterisation of Clause C.1 (at [188] below) as a *condition*, we would, as mentioned earlier at [16], with respect, disagree with the Judge. Briefly put, we find that cll C.1-C.3 of the Termination Agreement were intended by the parties to constitute the main consideration for the Compensation to be paid under that agreement (see, generally, the analysis below at [182]-[187]).
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> [emphasis in original omitted; emphasis added in bold italics]

83 The question therefore is whether the Forfeiture Provision formed substantially the whole or the main consideration for the Deferred Incentive Payments.

84 In my view, the Forfeiture Provision is not the whole or the main consideration for the Deferred Incentive Payments. As the plaintiff argues, the Incentive Award Plan T&Cs state that the incentive payments are "based on individual, team and business unit results". Given that this is the express basis for the whole Incentive Award Plan, it may be deduced that a substantial part of the consideration for incentive payments is the performance of the individual employee, his team and his business unit. The Forfeiture Provision may have formed a part of the consideration for the Deferred Incentive Payments but it certainly cannot be said to be substantially the whole or the main consideration given the basis of the Incentive Award Plan.

Conclusion

85 This has been a very challenging decision for me to reach. In the process, I was greatly assisted by the well-researched and focussed submissions by both Mr Jeyaretnam SC and Ms Hing to whom I would like to express my gratitude. I am sure this is not the last word on this important issue of employment law and no doubt the employment market would welcome a definitive decision by the Court of Appeal.

86 In the result, OS 103/2011 is dismissed with costs and such costs shall include the costs for the conversion application since that application would have been allowed if not for the sensible concessions made by Mr Jeyaretnam SC in order for me to hear and dispose of OS 103/2011. I fix the costs at $30,000 inclusive of disbursements to be paid forthwith by the plaintiff to the defendant.

[note: 1] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [7].

[note: 2] *Ibid*.

[note: 3] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [8].

[note: 4] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [9]–[10], [16].

[note: 5] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [32]–[33].

[note: 6] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [33].

[note: 7] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [34].

[note: 8] *Ibid*.

[note: 9] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [46]..

[note: 10] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [47]..

[note: 11] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [48].

[note: 12] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [51].

[note: 13] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [48]..

[note: 14] Plaintiff's Affidavit affirmed on 9 February 2011 at [5].

[note: 15] *Ibid*.

[note: 16] Plaintiff's Affidavit affirmed on 9 February 2011 at p 31 (exhibit MVS-2).

[note: 17] Plaintiff's Affidavit affirmed on 9 February 2011 at [12].

[note: 18] *Ibid.*

[note: 19] Plaintiff's Affidavit affirmed on 9 February 2011 at [5].

[note: 20] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [58].

[note: 21] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [22].

[note: 22] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [23].

[note: 23] Minute Sheet of Steven Chong J dated 2 August 2011 at p 1.

[note: 24] Plaintiff's Affidavit affirmed on 9 February 2011 at p 31 (exhibit MVS-2).

[note: 25] Plaintiff's Affidavit affirmed on 9 February 2011 at p 34 (exhibit MVS-2).

[note: 26] Plaintiff's Affidavit affirmed on 9 February 2011 at pp 37–38 (exhibit MVS-2).

[note: 27] Plaintiff's Affidavit affirmed on 9 February 2011 at p 46 (exhibit MVS-4).

[note: 28] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [41]–[42].

[note: 29] Plaintiff's Affidavit affirmed on 9 February 2011 at p 46 (exhibit MVS-4).

[note: 30] *Ibid* (see the clause with the header "Interest Rate Applied to Deferred Incentive").

[note: 31] Plaintiff's Affidavit affirmed on 9 February 2011 at pp 46–47 (exhibit MVS-4).

[note: 32] Plaintiff's Affidavit affirmed on 9 February 2011 at p 50 (exhibit MVS-5).

[note: 33] Plaintiff's Affidavit affirmed on 9 February 2011 at [20].

[note: 34] Plaintiff's Affidavit affirmed on 9 February 2011 at p 55 (exhibit MVS-7).

[note: 35] Plaintiff's Affidavit affirmed on 9 February 2011 at [23].

[note: 36] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at p 62 (ACRA search on Xangbo Global Markets Pte Ltd).

[note: 37] Plaintiff's Affidavit affirmed on 9 February 2011 at [31].

[note: 38] Originating Summons No 103 of 2011.

[note: 39] Minute Sheet of Steven Chong J dated 2 August 2011 at p 1.

[note: 40] Plaintiff's Bundle of Authorities ("PBOA") at Tab 11.

[note: 41] PBOA at Tab 16.

[note: 42] PBOA at Tab 2.

[note: 43] PBOA at Tab 13.

[note: 44] PBOA at Tab 5.

[note: 45] PBOA at Tab 12.

[note: 46] Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 at [41].

[note: 47] *Ibid*.

[note: 48] Defendant's Submissions (Part B: The OS Application) at [141]–[162].

[note: 49] Defendant's Submissions (Part B: The OS Application) at [163].

[note: 50] Defendant's Submissions (Part B: The OS Application) at [164]–[169].

[note: 51] Plaintiff's Submissions on the Restraint of Trade Issue at [65].

[note: 52] Plaintiff's Submissions on the Restraint of Trade Issue at [66].