Smile Inc Dental Surgeons Pte Ltd *v* Lui Andrew Stewart
[2012] SGCA 39

Case Number	: Civil Appeal No 145 of 2011
Decision Date	: 31 July 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Aqbal Singh (Pinnacle Law LLC) for the appellant; Wong Siew Hong and Teh Ee-von (Infinitus Law Corporation) for the respondent.
Parties	: Smile Inc Dental Surgeons Pte Ltd — Lui Andrew Stewart

Employment Law – restraint of trade – duty of good faith and fidelity

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 1 SLR 847.]

31 July 2012 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 The present appeal is against the decision of the High Court judge ("the Judge") in *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 1 SLR 847 ("the Judgment"). In summary, the Judge dismissed the action by Smile Inc Dental Surgeons Pte Ltd ("the Appellant"), against its former employee, Dr Andrew Stewart Lui ("the Respondent"), for alleged breaches of certain restrictive covenants in his employment contract ("the Employment Contract"), and of his duty of good faith and fidelity as an employee. In the process of arriving at his decision, the Judge also held that the Respondent did not owe any fiduciary duties to the Appellant.

2 This judgment concerns the doctrine of restraint of trade in the employment context, and, in particular, clarifies the scope of the doctrine of the duty of good faith and fidelity owed by employees to their respective employers. It also considers the ambit of acceptable conduct by employees in engaging in preparatory activities to compete with their employers whilst still in the latter's employment. We begin by examining the factual backdrop against which this dispute arises.

Facts

3 In July 2003, the Respondent was employed as an associate dental surgeon by the Appellant. The Respondent was assigned to work full-time at the Appellant's clinic at Forum the Shopping Mall ("the Forum Clinic") with effect from July 2005. [note: 1]

4 The Employment Contract contained the following restrictive covenants in Clauses 23 to 25, as follows: [note: 2]

> 23. Upon leaving The Practice, Dr. Lui will not seek to damage or injure The Practice's reputation or to canvass, solicit or procure any of The Practice's patients for himself or any other persons.

24. In the event that Dr. Lui leaves (whether resignation or dismissal) The Practice, Dr. Lui shall not practice within a 3 kilometre radius distance from the Smile Inc. Dental Surgeons practices at Suntec City Mall and from Forum The Shopping Mall, and a 3 kilometre radius from any other new Smile Inc. Dental Surgeons practices that have been set up before and during his cessation of work at The Practice.

25. In the event that Dr. Lui leaves (whether resignation or dismissal) The Practice, existing and new corporate and non-corporate contracts, as well as existing and new patients, shall remain with The Practice. Patient data and records, office data and records and computer software programmes and data shall remain the property of The Practice, and such records, in full or in part, shall not be copied manually, electronically or otherwise be removed from the Practice.

5 For convenience, we adopt the Judge's references and refer to cll 23, 24 and 25 as the "Non-Solicitation Clause", the "Radial Clause" and "the Non-Dealing Clause", respectively (collectively, "the Restrictive Covenants").

6 The Respondent and Dr Gareth Pearson ("Dr Pearson"), another dentist based primarily at the Forum Clinic, accounted for 80% of the Forum Clinic's patient pool. In March 2008, Dr Pearson gave notice to the Appellant that he intended to stop working for it in September 2008. [note: 3]

7 On 7 January 2009, the Respondent incorporated Dental Essence Pte Ltd ("Dental Essence") while he was still employed by the Appellant. On 25 February 2009, the Respondent entered into a one-year tenancy agreement on behalf of Dental Essence for premises within a five minute walk from the Forum Clinic. On the same day, the Respondent also gave written notice of his resignation to the Appellant. In March 2009, the Respondent committed to renovation works of Dental Essence's premises and Dr Pearson joined Dental Essence as a shareholder and a dentist on 19 March 2009. [note: 4]

8 The Appellant agreed that the Respondent's last day of work would be 18 April 2009. [note: 5] After the Respondent's departure from the Forum clinic, it experienced a significant decrease in its monthly revenue. By this time, the Appellant had received requests from numerous patients for their dental records. The Appellant later discovered that many of these patients had become patients of Dental Essence. [note: 6] The Appellant commenced an action against the Respondent on 8 October 2009 and closed the Forum Clinic in September 2010.

9 The Appellant's argument was a double-pronged one: first, that the Respondent had breached the *express terms* in the Employment Contract, *ie*, the Restrictive Covenants; and secondly, or in the alternative, that the Respondent had breached the *implied term* of the duty of good faith and fidelity as an employee. At the close of the Appellant's case at the trial stage, the Respondent elected to make a submission of no case to answer and therefore did not tender any evidence.

The Judge's findings and decision

10 On the facts, the Judge found that the Respondent had breached the Radial and Non-Dealing Clauses. As there was no evidence of solicitation by the Respondent, he held that there was no breach of the Non-Solicitation Clause (see [41]–[65] of the Judgment).

11 The Judge, however, found that the Restrictive Covenants were in unreasonable restraint of trade and therefore void and unenforceable, essentially (albeit not only) because they were all unlimited in duration (see [88]–[133] of the Judgment).

12 Finally, in a comprehensive and meticulous examination of the relevant case law, the Judge held, first, on the facts that the Respondent had not breached his duty of good faith and fidelity to the Appellant; and, secondly, that the Respondent did not owe any fiduciary duties to the Appellant (at [137]–[230] of the Judgment).

13 By way of an overview, considering all the facts and available evidence, we are of the view that the Judge's factual finding that there was no breach of the Non-Solicitation Clause was correct (there was no cross-appeal by the Respondent against the finding as to the breach of the Radial and Non-Dealing Clauses). Further, we agree with the Judge's findings that the Restrictive Covenants were in unreasonable restraint of trade and therefore void and unenforceable because they were unlimited in duration. Finally, we accept the Judge's findings that, on the facts, there was no breach of the Respondent's duty of fidelity and that he did not owe any fiduciary duties to the Appellant. We now proceed to elaborate on the reasons for arriving at our decision with regard to each of the aforementioned issues.

14 Before proceeding to do so, however, we would note – by way of a preliminary observation – that, although the Appellant did also attempt to argue that the Judge's enunciation as well as application of the legal principles relating to the submission by a defendant of no case to answer was wrong, we find no merit whatsoever in the arguments (which constituted, in the main, a futile exercise in unnecessary semantics).

The issues on appeal

15 The crucial issues before this court were as follows:

(a) Whether or not the Restrictive Covenants are in unreasonable restraint of trade and therefore void and unenforceable.

(b) Whether or not the Restrictive Covenants can be read down to provide for a time limitation, so as to render them reasonable and therefore enforceable.

(c) Whether or not the Respondent, in his capacity as an associate dentist, owed fiduciary duties to the Appellant.

(d) Whether or not the Respondent's actions, *viz*, to form a competing business against the Appellant while still in the Appellant's employ, were in breach of his duty of good faith and fidelity to the Appellant.

The Express Terms: the Restrictive Covenants

Whether the Non-Solicitation Clause was breached

16 As we noted above (at [10]), the Judge found that the Respondent had breached the Radial Clause and Non-Dealing Clause. Neither party has made submissions in their respective cases controverting those findings of fact.

17 In so far as the Non-Solicitation Clause is concerned, the Judge found that there was no evidence that the Respondent solicited the Appellant's patients (see [43]–[53] of the Judgment). There was some suggestion by the Appellant that the Respondent had purchased advertisements on "Google Ad Words" and "Yahoo", which included purchases of the following keywords: "forum dentist", "forum the shopping mall", "forum galleria dentist", "forum shopping centre dentist", "dentist at forum

shopping centre", "dentist at forum galleria" and "forum mall dentist" – which suggested, in turn, some form of solicitation. Further, the Appellant relied on a testimonial by one Carolyn Strover in the August 2009 issue of the magazine "Expat Living" as another example of solicitation. [note: 7] We agree, however, with the Judge's finding that all this was not pleaded in the Statement of Claim ("SOC") and therefore these material facts, even if made out, cannot be admitted as evidence.

18 The only evidence the Appellant has proffered in this regard is the fact that Dental Essence has a very similar price list to the Appellant's own price list, and that a significant number of the Appellant's patients have requested for their dental records. [note: 8] This evidence alone, even if unrebutted, is not, in our view, sufficient to establish solicitation by the Respondent.

Whether the Restrictive Covenants are in unreasonable restraint of trade

19 The legal test as to whether a restrictive covenant is in unreasonable restraint of trade is well settled. In the decision of this court 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*"), it was observed as follows: the court first conducts a preliminary inquiry as to whether or not there was a legitimate proprietary interest to be protected by the restrictive covenant, over and above the mere protection of the employer from competition by way of a bare and blatant restriction of the freedom to trade (at [79]; see also the decision of this court in *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 ("*CLAAS*") at [44]). If the answer is in the affirmative, then the court applies the twin tests of reasonableness enunciated by Lord Macnaghten in the seminal House of Lords decision of *Thorsten Nordenfelt (Pauper) v The Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] AC 535 ("*Nordenfelt*") at 565 (see *Man Financial* at [70]): first, is the restrictive covenant reasonable in reference to the interests of the parties; and, secondly, is the restrictive covenant reasonable in reference to the interests of the public? It should also be noted that the court will enforce the covenant only if it goes no further than necessary to protect the legitimate proprietary interest(s) concerned (see also *CLAAS* at [44]). By way of clarification of some observations made in the court below (see the Judgment at [68]–[70]), this last-mentioned proposition should not be viewed as being coterminous with the twin tests of reasonableness but, rather, as an *application* of those tests to the facts of the case concerned on the assumption that there is a legitimate proprietary interest meriting protection in principle in the first place.

20 It should be noted, however, that the courts adopt a stricter approach when considering restrictive covenants in the context of a contract of employment as compared to the situation where such a clause is contained in a contract for the sale of a business, not only because of the differing nature of the legitimate proprietary interest to be protected but also because of the greater inequality of bargaining power in an employment context. In this regard, it was observed in *Man Financial* (at [48]), as follows:

> ... As has been observed (see *Butterworths Common Law Series* at para 5.114):
>
> > The reasons for this [*ie*, a stricter application of the restraint of trade doctrine in the employment context] include the following. First, unlike contracts of employment, the purchaser in a sale of business of context in whose favour the covenant is made is buying something tangible, which includes (very importantly) the element of *goodwill* which would be necessarily depreciated if no restrictive covenant were permitted. An employer, on the other hand, would not be deprived of what he has paid for pursuant to the contract of employment (the employee's services) when the employee leaves his employ, although (as shall be seen) there are other legitimate proprietary interests that may merit protection even within this context. ***Secondly, there is likely to be more equality of bargaining power in the case***

of the sale of a business compared to an employment contract situation; in the latter, there is, more often than not, a disparity in bargaining power between the employer on the one hand and the employee on the other.

[emphasis in original in italics; Court of Appeal's emphasis in *Man Financial* in bold italics; emphasis added in underlining]

21 Apart from the differences set out in the preceding paragraph, there is also a public policy reason in construing restrictive covenants more strictly in the employment context. As Lord Atkinson observed in the leading House of Lords decision of *Herbert Morris, Ltd v Saxelby* [1916] 1 AC 688 (at 701):

> The principle is this: *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 ... [t]hese considerations in themselves differentiate, in my opinion, the case of the sale of goodwill from the case of master and servant or employer and employee. [emphasis added]

Legitimate Proprietary Interest

22 The case law demonstrates that a legitimate proprietary interest exists in the context of medical practitioners in the form of "special and intimate knowledge of the patients of the business". In the English High Court decision of *Routh v Jones* [1947] 1 All ER 179 (affirmed on appeal in *Routh v Jones* [1947] 1 All ER 758), a case cited by the Judge (at [80] of the Judgment), Evershed J observed (at 181E-H) as follows:

> It is, in my judgment, clear that *the character of a general medical practice is such that one who is employed therein (as was the defendant) as a medical assistant, necessarily acquires such a special and intimate knowledge of the patients* of the business *that the employers, in a contract of service with the servant, are entitled to protect themselves against unfair competition on the servant's part*. *In other words, that in such a case there exists a subject-matter of contract or a proprietary interest properly entitled to protection* ... And I refer again to the language of Lord Birkenhead LC applied to the case of a solicitor's business, in *Fitch v Dewes*. He said ([1921] 2 AC 158, at p 164):
>
> > Such a business depends upon the existence of goodwill; *upon the association and the intimacy which exist between him who carries on that business and the clients of the firm, and intimacy founded upon many complex considerations not easily to be defined, but very easily to be understood*.
>
> [emphasis added]

23 Similarly, in *Koops Martin v Dean Reeves* [2006] NSWSC 449, the New South Wales Supreme Court stated (at [35]) that "a particular solicitor, accountant or doctor with whom a client deals may well, from the perspective of the client, be for all practical purposes the person whose advice they seek and thus the persona of the firm".

24 It is clear therefore that there is a legitimate proprietary interest in the goodwill generated by the practice of medical practitioners (including dental practitioners), solicitors and accountants which might be protected by reasonably worded restrictive covenants.

25 We pause here to critically analyse the Judge's observations at [85] of the Judgment, where he observed, in his analysis of whether there was a legitimate proprietary interest, as follows:

> What then of a professional like Dr Lui who is a general dental practitioner ("GDP")? No direct evidence was given as to how he obtained his patients while practising with Smile, and the frequency, nature and extent of the interaction between him and the patients. Nevertheless, *I was of the view that I was entitled to take judicial notice of or infer the following*:
>
> (a) As Dr Lui started off as an employee of Smile, most of his patients would be that of the clinic where he practised rather than his own. In other words, his own relatives or friends would form a small portion of the patients he treated. Indeed, the reason why he left the other clinic at Great World City was because of insufficient patients.
>
> (b) Most of the patients who came to the Forum Clinic would have done so mainly because of the recommendation of other patients and/or the location of the clinic. While the advertisements taken out by Smile might have caught the attention of some patients, the location of the clinic would usually be a greater influence than advertisements for persons seeking general dental services as opposed to specialist services. It is true that some patients who sought specialist services from, say, Dr Tan himself might subsequently have sought general dental services from the Forum Clinic. However, again, in the absence of more evidence, this would be less of a reason than recommendations and/or the location of the clinic.
>
> (c) Dr Lui's contact time with the patients would usually be short. Once he began the dental treatment, he would be doing the talking and not the patient.
>
> (d) Most patients would have seen Dr Lui twice a year for the usual dental check-up and treatment. A patient might have made one or two more visits in a year for treatment for more difficult conditions.
>
> (e) A patient of a GDP would be likely to make an appointment with that particular GDP for the next session if the patient was satisfied with the services of the GDP. The patient would be likely to have some attachment to that GDP over time.
>
> [emphasis added]

26 We respectfully disagree with the Judge's employment of the device of judicial notice in arriving at the above findings of fact. In the Singapore High Court decision of *Zheng Yu Shan v Lian Beng Construction (1988) Pte Ltd* [2009] 2 SLR(R) 587, V K Rajah JA explained (at [27]) that one category of facts of which judicial notice may be taken "consists of facts which are so notorious or so clearly established that they are beyond the subject of reasonable dispute". He further cautioned that "the discretion to take judicial notice of a particular fact should always be exercised with judicious caution" and that "[i]t is not the judge's own personal or peculiar knowledge *vis-à-vis* a particular fact that is determinative of whether judicial notice should be taken" (at [29]). We agree.

27 Applying the principles set out in the preceding paragraph, the findings of fact as to the bulk of the Respondent's clientele at the commencement of his practice at Forum Clinic, the reasons why

patients would attend treatment at the Forum Clinic (and that advertisements wielded little influence), and the contact time of the Respondent with his patients ought not to have been the subject of judicial notice. They were not publicly notorious facts such as, for example, the appreciation of the Thai baht between 2002 and 2007 (see the Singapore High Court decision of *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2007] SGHC 50). We would, in fact, caution against the liberal use of the device of judicial notice; as has been observed by the Supreme Court of Canada in *R v Find* [2001] 1 SCR 863 (at [48]), "[f]acts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination". The incontrovertibility of such facts must be such that the two requirements just cited may be safely dispensed with. We find that the facts which were taken judicial notice of by the court below are not so incontrovertible.

28 Nevertheless, we find that, even discounting the Judge's employment of judicial notice of the said facts, and taking the Appellant's evidence at its highest (that its "extensive, aggressive and expensive advertising and promotional campaigns were the main or principal factor that accounted for the patient pool of the Forum Clinic"), [note: 9] there would have been no difference in the outcome of the present case. This is because, at best, the fact that the Appellant's advertising campaigns were the primary factor behind its patient pool only goes toward establishing a legitimate proprietary interest to be protected. And, as we found above at [24] (as did the Judge at [87] of the Judgment), there is such a legitimate proprietary interest that ought to be protected in any event.

Reasonableness as between the Parties

29 The Restrictive Covenants do not provide for any fixed duration of operation. A restraint of trade that operates for an *indefinite* period of time is (absent the most exceptional circumstances, which are not present in this case) necessarily void and unenforceable. In the English Court of Appeal decision of *Sir W C Leng & Co, Limited v Andrews* [1909] 1 Ch 763, an employment contract between a newspaper and junior reporter did not permit the junior reporter, post-employment, from "either on his own account or in co-partnership with any other person, [to] be connected, as proprietor, employee, or otherwise, with any other newspaper business carried on in Sheffield or within a radius of twenty miles from the town hall thereof". There was no time limit as to the restraint of trade. The court struck down the clause as being void and unenforceable. In particular, Farwell LJ stated (at 774) that:

> In my opinion clause 8 is absolutely bad throughout, and no sound reason having been given for making it continue during the whole duration of the defendant's life, that alone, in my judgment, makes the restriction on the face of it unreasonable.

30 The absence of a time limit alone in this particular case renders the Restrictive Covenants unreasonable as between the parties, and therefore, void and unenforceable. Following from that finding, we need not decide as to the reasonableness of the Restrictive Covenants with regard to the interest of the public, since we have already found that the Restrictive Covenants are unreasonable as between the parties. We should add that we also agree with the other reasons given by the Judge as to why the Restrictive Covenants are unreasonable as between the parties (see generally the Judgment at [88]–[133]).

Whether the court can read down the Restrictive Covenants

Doctrines of Severance

31 In *Man Financial*, it was confirmed that the law in Singapore recognises two forms of severance of contractual terms: (a) severance of entire or whole clauses in a contract; and (b) severance via

the "blue pencil test" (see *Man Financial* at [126]–[131]). It was accepted by counsel for the Appellant, Mr Aqbal Singh ("Mr Singh"), that severance *via* the "blue pencil test" could not be effected for the Restrictive Covenants, since there was no time limit expressed in the contractual terms at all; in other words, there was nothing to strike out in the first place. We pause to observe that the phenomenon of "cascading clauses", *ie*, restrictive covenants that provide for a variety of durations or geographical scopes, has taken root in Australia, and such clauses have been held to be valid by the New South Wales Court of Appeal decision in *Hanna v OAMPS Insurance Brokers Ltd* [2010] NSWCA 267 (affirming the New South Wales Supreme Court decision in *OAMPS Insurance Brokers Ltd v Peter Hanna* [2010] NSWSC 781). Such cascading clauses are engineered specifically to accommodate the "blue pencil" test, in order that the court may strike out provisions for, for example, unreasonably long durations of restraint, whilst preserving the restrictive covenant concerned if at least one of the durations passes the tests of reasonableness.

32 In *Man Financial*, some brief observations on the doctrine of "discretionary severance" or "notional severance" as adopted by the Ontario Superior Court of Justice in *Transport North American Express Inc v New Solutions Financial Corp* (2001) 214 DLR (4th) 44 ("*New Solutions*") and the majority of the Supreme Court of Canada in *Transport North American Express Inc v New Solutions Financial Corp* [2004] 1 SCR 249 ("*New Solutions (SCC)*") (*contra* the Ontario Court of Appeal decision in *Transport North American Express Inc v New Solutions Financial Corp* (2001) 214 DLR (4th) 44 (where the majority of the court *refused* to endorse the doctrine of notional severance); collectively, "the *New Solutions* cases") were proffered, as follows (at [129]–[131]):

> 1 2 9 *However*, it should be noted that in the Ontario Superior Court of Justice decision of *Transport North American Express Inc v New Solutions Financial Corp* (2001) 201 DLR (4th) 560, Cullity J delivered a very powerful critique of the blue pencil test (referred to at [127] above). Indeed, the learned judge preferred to *reject* the "blue pencil test" altogether. He stated (at [35]-[36]) as follows:
>
> > The blue-pencil test is, I believe a relic of a bygone era when the attitude of courts of common law – unassisted by principles of equity – towards the interpretation and enforcement of contracts was more rigid than is the case at the present time. At an early stage in the development of the law relating to illegal promises, severance was held to be justified on the basis of the blue-pencil test alone. ... [W]e have moved a long way beyond that mechanical approach. Enforcement may be refused in the exercise of the kind of *discretionary judgment* I have mentioned even where blue-pencil severance is possible.
> >
> > Despite repeated statements in the cases that the court will not make a new agreement for the parties, that is, of course, exactly what it does whenever severance is permitted ...
> >
> > [emphasis added]
>
> 130 It is interesting to note that Cullity J's concept of "discretionary severance" (as set out in the preceding paragraph) was, in fact, *rejected* on appeal by the *majority* of the Ontario Court of Appeal in *Transport North American Express Inc v New Solutions Financial Corp* (2001) 214 DLR (4th) 44 (see also *Butterworths Common Law Series* ([45] above) at para 5.233). However, it is *equally* interesting to note that the *dissenting* judge in the Ontario Court of Appeal, Sharpe JA, whilst recognising the need for caution as well as to recognise the concept of the sanctity of contract, nevertheless *endorsed* the approach adopted by Cullity J above.
>
> 131 It would appear, therefore, that this particular issue (*viz*, whether or not the blue pencil test still applies under the second type of severance delineated in the passage quoted at [126]

above) has not been settled beyond peradventure even in the Canadian context. However, the doctrine of severance was not (as we noted at [126] above) really before us, still less the present (and more controversial) issue just alluded to. We would, in the circumstances, therefore express no concluded view on it.

[emphasis in original]

33 Mr Singh conceded – in the context of the present appeal – that since "blue pencil" severance could not be effected for the Restrictive Covenants, that was the end of the matter. As such, we are not required to express a concluded view on the applicability of the doctrine of notional severance in Singapore, save to observe that the Supreme Court of Canada subsequently rejected the application of notional severance for restrictive covenants in the employment context in *Shafron v KRG Insurance Brokers (Western) Inc.*, (2009) 301 DLR (4th) 522 ("*Shafron*").

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

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

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

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

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

[emphasis added]

35 Although, as already mentioned, we are not required to express a concluded view on the applicability of the doctrine of notional severance in Singapore, the reasons given by the court in

Shafron (as set out in the preceding paragraph) are persuasive – not only because they are cogent but also because *Shafron* itself is a case that related directly to a covenant in restraint of trade (and, on this last-mentioned distinction, see G H L Fridman, *The Law of Contract in Canada* (6th Ed, Carswell, 2011) at pp 412–413; reference may also be made to Gillian Demeyere, "Developments in Employment Law: *Shafron v KRG Insurance Brokers (Western) Inc.*" (2010) 53 Supreme Court Law Review (2d) 235). Indeed (as alluded to in *Shafron* itself), the *New Solutions* cases were concerned with a somewhat different situation, *ie*, whether or not the agreed interest rate set out in the relevant contract (which accidentally infringed the maximum interest rate provision of s 347 of the Canadian Criminal Code) could be read down via the doctrine of notional severance so as to enable the lender to recover the maximum legal rate of interest (see also the interesting comments on the Canadian Supreme Court decision by two of the foremost contract scholars in Canada in Stephen Waddams, "Illegal Contracts, Severance and Public Policy" (2005) 42 Canadian Business LJ 278 and Jacob S Ziegel, "Is Notional Severance the Right Solution for Section 347's Ills?" (2005) 42 Canadian Business LJ 282). The individual justice of the case probably prompted the judges concerned to apply the doctrine of notional severance (interestingly, perhaps, even the majority of the minority of the judges in the Canadian Supreme Court were prepared to endorse the doctrine of notional severance in different circumstances). However, we must also be careful to ensure that hard cases (such as the situation which existed in the *New Solutions* cases) do not make bad law. What is clear is that these various arguments – and perhaps others as well – would need to be canvassed when the issue of the applicability of the doctrine of notional severance arises directly for decision before the Singapore courts in the future.

Contractual Interpretation via Extrinsic Evidence

36 The main argument by Mr Singh in favour of varying, or reading down, the Restrictive Covenants is based, instead, on s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"):

> **Exclusion of evidence of oral agreement**
>
> **94**. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions...

37 Specifically, Mr Singh relies on proviso (*f*) to s 94 of the EA, which provides that "any fact may be proved which shows in what manner the language of a document is related to existing facts". In the decision of this court in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*"), it was explained (at [132]) that "[t]he extrinsic evidence in question is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context". This contextual approach to contractual interpretation permits the admission of extrinsic evidence to aid contractual interpretation even where there is no ambiguity in the contract (see *Zurich Insurance* at [114]).

38 In the written Appellant's Case, Mr Singh relied on *Zurich Insurance* to suggest that: [note: 10]

> [T]he Employment Agreement was negotiated and concluded in the context of the Respondent leaving Singapore within a time horizon of six years as envisaged by the Employment Agreement. In the absence of such a context, there was ample unrebutted evidence before the Court that the Appellant would have specified a time limit of 2 to 3 years.

39 This argument, taken at its highest, provides for the Restrictive Covenants to operate within a time limit of 2 to 3 years, which the Appellant would have specified if the Respondent had made known his subsequent intention to remain in Singapore. We cannot accept this argument for the following reasons.

40 First, this argument, which relates to the Appellant's subjective, undisclosed intention, ignores the following admonition by this court in *Zurich Insurance* (at [125]):

> However, it must always be borne in mind that the purpose of interpretation is to give effect to the intention of the parties *as objectively ascertained*. Objective ascertainment of the parties' intentions (known as "the objective principle") is the cornerstone of the theory of contract and permeates our entire approach to contractual interpretation. [emphasis in original]

41 Similarly, this Court in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR(R) 891 ("*Sandar Aung*") stated (at [29]) that:

> [E]ven if the plain language of the contract appears otherwise clear, the construction consequently placed on such language should not be inconsistent with the context in which the contract was entered into if this context is clear or even obvious, *since the context and circumstances in which the contract was made would reflect the intention of the parties when they entered into the contract and utilised the (contractual) language they did*. [emphasis added]

42 While it was held in *Zurich Insurance* (at [50]) that declarations of subjective intent and evidence of prior negotiations are admissible for the purpose of giving meaning to terms which have been determined to be latently ambiguous (*ie*, ambiguity which becomes apparent only when the language is applied to the factual situation), in the context of this appeal, the subjective intention of the Appellant was not held at the time when the parties entered into the contract, nor was it a shared intention held by both parties. There is a distinction between (a) the *shared intention of both parties* (objectively ascertained) that was expressed during negotiations or by conduct before or after they entered into the contract; and (b) what *one party would have intended in a hypothetical situation* had he been appraised of certain facts, and where this hypothetical intention was never disclosed to the other party. We would *not* be ascertaining the *shared intention of both parties* by reading down the scope of the Restrictive Covenants to operate for 2 to 3 years, but would, rather, be upholding the Appellant's *hypothetical intention in a different situation*.

43 Secondly, it was made clear in *Zurich Insurance* (at [132]) that extrinsic evidence must make reference to a "clear and obvious context". In other words, the context must allow the court to objectively ascertain a clearly defined or definable intention held by both parties with respect to how the contractual term in question should be interpreted. In the cases where the courts have read down the scope of contractual terms, the relevant factual contexts were sufficiently clear and obvious such that the court could ascertain the clearly defined intention of the parties.

44 In *Sandar Aung*, the appellant's mother ("the Patient") was admitted to the respondent hospital ("the Hospital") to undergo an angioplasty. The appellant signed an undertaking with the respondent hospital to be jointly and severally liable with the Patient for "all charges, expenses and liabilities incurred by and on behalf of the Patient" (at [7]). Unfortunately, unanticipated complications in the Patient's recovery after surgery resulted in a medical bill that far exceeded the amount presented in the Estimate. The court explained (at [37]) that "the factual matrix *clearly demonstrated* that the ambit and scope of the contract between the appellant and the [Hospital] was confined to the angioplasty procedure" [emphasis added].

45 Similarly, in the Singapore Court of Appeal decision of *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195 ("*Singtel v Starhub*"), by a contract dated 16 June 1995 ("the NLA"), the appellant ("SingTel") and the respondent ("SCV") entered into an agreement for the lease of optical fibres and underground ducts for the purposes of cable television roll-out in Singapore. It later transpired that SCV had been "tapping" transmission infrastructure to convey signals to locations not permitted by the agreement. SingTel sued SCV for breach of the NLA and the issue was whether or not Singtel's loss of revenue could be recovered because one of the contractual clauses provided that neither party would be liable for (see *Singtel v Starhub* at [102]):

> ... any indirect, incidental, consequential, or special damages (including, without limitation, damages for harm to business, lost revenues, or lost profits) regardless of the form of action or whether such Party had reason to know of such damages ...

46 The court read down the clause (set out at the end of the preceding paragraph), interpreting it (at [55]) as covering only the use of the leased facilities to provide services to permitted locations, instead of extending to "tapping" to provide signals to locations not permitted under the agreement, which was an act clearly not within the parties' contemplation when they entered into the contract. The court thus held that the clause "must be restricted to the particular circumstances the parties had in mind at the time they entered into the NLA".

47 Unlike the situations referred to above, the language of the Restrictive Covenants is clear. Put simply, there is no ambiguity – latent or otherwise. As already mentioned above (at [42]), what the Appellant is seeking to do here is to introduce – in a *unilateral as well as subjective* manner – its own hypothetical intention in order to effectively *re-write* the contract in its favour. The context of a contract – as *Zurich Insurance* underscores – is of the first importance. However, it is simply a tool (albeit an important one) to aid the court in the process of interpreting a contract; it does *not* constitute a malleable tool to arbitrarily re-write the contract in favour of one of the parties. Indeed, in the words of this court in *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [81]: "[T]he court will not rewrite the contract for the parties based on its own sense of the justice of the case".

48 We conclude our analysis of this particular issue by observing that what the Appellant was seeking to achieve was similar (if not identical) in *substance* to that which it could not achieve through the doctrine of notional severance (which, as we have noted, it did not seek to rely upon in the present appeal). This is yet another reason why the Appellant's argument on this issue cannot succeed and simultaneously illustrates the symmetry and coherence in both the substance as well as application of various doctrines of the common law.

The implied term of the duty of good faith and fidelity

49 As we made clear in *Man Financial* (at [193]):

> It is trite law that there is an *implied* term in the employer's favour that the employee will serve the employer with good faith and fidelity, and that he or she (the employee) will also use reasonable care and skill in the performance of his or her duties pursuant to the employment contract. [emphasis in original]

50 Whilst this proposition of law is an ostensibly simple one, there appeared, unfortunately, to have been some blurring of the lines between the duty of good faith and fidelity on the one hand and a fiduciary duty on the other, which was noted in the court below (see the Judgment, especially at [226]). In our view, there is indeed a distinction between the two duties – a distinction to which our

attention now turns.

The distinction between a fiduciary duty and the duty of good faith and fidelity

51 It is clear that both the duty of good faith and fidelity and fiduciary duty may arise from the same employer-employee relationship. However, it must be borne in mind that the bases of these duties are entirely different.

52 In the English High Court decision of *Nottingham University v Fishel* [2000] IRLR 471 ("*Nottingham University*"), for example, the defendant was a clinical embryologist employed by the plaintiff as an academic staff member, as well as a scientific director of the latter's in vitro fertilisation unit. The defendant did outside work without consent from the plaintiff and the plaintiff sued for an account of profits based on breach of the alleged fiduciary duty owed by the defendant. Elias J made the following pertinent observations (at [86]–[97]):

> 86 [T]here has been a tendency to describe someone as a fiduciary simply as a means of enabling the courts to impose the equitable remedies ...
>
> 87 It is important to recognise that the mere fact that Dr Fishel is an employee does not mean that he owes the range of fiduciary duties referred to above. It is true that in *Blake* Lord Woolf ... said that the employer – employee relationship is a fiduciary one. But plainly the court was not thereby intending to indicate that the whole range of fiduciary obligations was engaged in every employment relationship. This would be revolutionary indeed, transforming the contract of employment beyond all recognition and transmuting contractual duties into fiduciary ones. In my opinion, the court was merely indicating that circumstances may arise in the context of an employment relationship, or arising out of it, which, when they occur, will place the employee in the position of a fiduciary.
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> ...
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> 90 [T]he essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. The employee's freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee's decision-making powers.
>
> 91 This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken. ....
>
> 92 The problem of identifying the scope of any fiduciary duties arising out of the relationship is particularly acute in the case of employees. This is because of the use of potentially ambiguous terminology in describing an employee's obligations, which use may prove a trap for the unwary.

> There are many cases which have recognised the existence of the employee's duty of good faith, or loyalty, or the mutual duty of trust and confidence – concepts which tend to shade into one another.
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> ....
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> 96 Accordingly, in analysing the employment cases in this field, care must be taken not automatically to equate the duties of good faith and loyalty, or trust and confidence, with fiduciary obligations. Very often in such cases the court has simply been concerned with the question whether the employee's conduct has been such as to justify summary dismissal, and there has been no need to decide whether the duties infringed, properly analysed, are contractual or fiduciary obligations. As a consequence, the two are sometimes wrongly treated as identical ...
>
> 97 Accordingly, in determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached...

53 In that case, Elias J held that in so far as the defendant's own work outside was concerned, he could not have been considered a fiduciary even though his position was akin to that of a senior employee with the title of director. Similarly, in *Nagase Singapore Pte Ltd v Ching Kai Huat* [2007] 3 SLR(R) 265, the Singapore High Court found that the employees concerned did not owe a special duty of "single minded or exclusive loyalty" to the employers even though they "were members of the middle management of the plaintiff" and they had "authority to negotiate contracts on behalf of the company or to authorise the payment of invoices" (at [29]). In the Court of Appeal of British Columbia decision of *Mitchell v Paxton Forest Products Inc* [2002] BCCA 532, a sales manager whose responsibilities included developing and maintaining the defendant's customer base, marketing its products, setting prices, negotiating terms of sale and dealing with defendant's suppliers was not considered a fiduciary. Newbury JA stated (at [6]):

> I would tend, if pressed, to say Mr. Mitchell was not "senior management", since he was not entrusted with powers and influence which could materially affect the company's interests. He had managerial responsibilities with regard to sales, but could not approve a purchase over $1,000, had only one clerk reporting to him and could not hire or fire employees.

54 This is in contradistinction to the oft-cited Canadian Supreme Court decision of *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3rd) 371, where a president and executive vice-president of a company were held to be fiduciaries of the company. Laskin J stated (at 381):

> They were "top management" and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a larger, more exacting duty which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer of its directors.

55 Applying the principles set out above to the present appeal in general and to the context of the Employment Contract between the Appellant and Respondent in particular, the Respondent was not in a position where he owed fiduciary duties to the Appellant. He was merely an associate dental surgeon who had not been entrusted with the authority to make any management decisions for the

Appellant. Neither was he permitted to make corporate decisions binding the Appellant, unlike the cases in which "senior management" was involved. On the contrary, under the terms of the Employment Contract, the Respondent was obliged to "work at any of the Practices operated by Smile Inc. Dental Surgeons Pte. Ltd. at the instructions of the Directors" and the Respondent also undertook that he "shall be responsible and take instructions from the Directors and shall carry out duties as may be assigned to him". [note: 11]

Whether the implied term of the duty of good faith and fidelity may be superseded by an express term setting out duties of the employee

56 As a preliminary matter, it is essential to set out the symbiosis between the *express terms*, *ie*, the relevant restrictive covenants on the one hand, and the *implied term* of the employee's duty of good faith and fidelity on the other. The genesis of both species of obligations is the employment contract itself. First, each obligation becomes alive at different timeframes: the *implied term* of the duty of good faith and fidelity generally governs the employee's conduct *vis-à-vis* his employer *during his course of employment*, whilst the *express* restrictive covenants generally govern the employee's conduct post-employment to protect the former employer's legitimate proprietary interests for a reasonable period of time and within a reasonable geographical and demographic scope. Secondly, the content of each obligation is different: the restrictive covenants expressly set out the prohibited post-employment activities (dealing or soliciting customers and other employees) whilst the content of the duty of good faith and fidelity is generally governed by the common law.

57 In summary, the *express* restrictive covenants on the one hand and the *implied term* of the duty of good faith and fidelity on the other are clearly distinct with regard to *when, and how, each obligation operates* to govern the employee's conduct. There is, generally speaking, no overlap between the two species of obligations. There may, however, be situations where a restrictive covenant might *also* refer *expressly* to the employee's conduct *during* the course of his or her employment – in which case such an *express* provision would *supersede* the *implied* term relating to the duty of good faith and fidelity.

58 The case before us presents a variation on the situation referred to at the end of the preceding paragraph inasmuch as the Employment Contract *also* contains a *separate and independent* (as well as *express*) *term* which seeks to govern the Respondent's conduct *during his course of employment*, thus taking the place traditionally occupied by the implied term of the duty of good faith and fidelity. That term is Cl 16 of the Employment Contract, which reads as follows:

> During the period of employment, [the Respondent] must not carry on or be engaged in any other medical/dental practice, or give any medical/dental advice for reward on his own account or in partnership or association with any other medical/dental practitioner(s) or company.

59 Clause 16 is an *express* term which clearly provides for prohibited activities concerning the Respondent's relationship with the Appellant *qua* employer, as well as with regard to potential competitive activities during the course of the Respondent's employment. The question before us (which was put before the parties during oral submissions before this court), then, is whether or not Cl 16, being an *express* contractual term, supersedes or overrides any implied contractual term of the duty of good faith and fidelity. In our view, that question must be answered in the *affirmative*.

60 It is trite law that an implied term cannot contradict an express term of the contract (see, for example, the Singapore High Court decision of *Loh Siok Wah v American International Assurance Co Ltd* [1998] 2 SLR(R) 245 at [29] ("*Loh Siok Wah*")).

61 Turning, then, to Cl 16, this clause *expressly* provides for the scope of prohibited activities during the Respondent's course of employment: essentially, the Respondent may not carry on or engage in any form of medical or dental practice apart from his work with the Appellant. In the circumstances, it is clear, in our view, that the Respondent was *not* in breach of Cl 16. None of the Respondent's acts complained of could be considered as *carrying on* or *engaging* in another medical or dental practice. Indeed, he could not because he did not obtain a license from the Ministry of Health until the effective termination of his employment. *In any event*, the resolution of this particular issue is not critical because, as explained below (at [62] *et seq*), *even assuming* that an *implied* duty of good faith and fidelity was owed by the Respondent to the Appellant, we find that that duty had *not* been breached by the Respondent. Let us elaborate.

Whether the Respondent's actions constituted a breach of the duty of good faith and fidelity

62 In its Statement of Claim ("SOC"), [note: 12] the Appellant alleged that the Respondent had breached the duty of good faith and fidelity owed to the Appellant by taking the following steps, during his course of employment, to form a competing business against the Appellant:

(a) The Respondent incorporated Dental Essence on 7 January 2009;

(b) The Respondent, for and on behalf of Dental Essence, signed a tenancy agreement for the premises of Dental Essence in Tudor Court on 25 February 2009;

(c) The Respondent fitted out the said premises of Dental Essence;

(d) The Respondent had discussions/negotiations with Dr Pearson which resulted in Dr Pearson becoming a shareholder and director of Dental Essence, with a view to Dr Pearson working as a dentist at Dental Essence;

(e) The Respondent applied for a licence from the MOH to practice dentistry with Dental Essence;

(f) The Respondent failed to inform the Appellant of all or any of the foregoing matters; and

(g) The Respondent failed to obtain the Appellant's consent to the setting up of Dental Essence.

63 The Appellant also relied on a number of English decisions which it argued supported its case to the effect that the Respondent had breached his duty of good faith and fidelity; these included *Robb v Green* [1895] 2 QB 315 ("*Robb*"); *Wessex Diaries Limited v Smith* [1935] 2 KB 80 ("*Wessex Diaries*"); *Hivac Limited v Park Royal Scientific Instruments Limited* [1946] Ch 169 ("*Hivac*"); *Sanders v Parry* [1967] 1 WLR 753 ("*Sanders*"); *Laughton & Hawley v BAPP Industrial Supplies Ltd* [1986] ICR 634 ("*Laughton*"); *Helmet Integrated Systems Ltd v Tunnard* [2007] FSR 16 ("*Helmet*"); *Cobbetts LLP and Lee Crowder v Mark Reginald Stuart Hodge* [2009] EWHC 786 (Ch) ("*Cobbetts*"); *British Midland Tool v Midland International Tooling Ltd* [2003] 2 BCLC 523 ("*British Midland Tool*") ; *Shepherds Investments Ltd v Walters* [2007] FSR 15 ("*Shepherds Investments*"); and *Nottingham University*; as well as the Scottish decision of *Samsung Semiconductor Europe Ltd v Docherty* [2011] SLT 806 ("*Samsung Semiconductor*"). It should, however, be noted that some of these decisions (for example, *Nottingham University*; *Helmet*; *Cobbetts* and *Samsung Semiconductor*) were cited and/or also cited in the context of an alleged breach of fiduciary duty by the Respondent – an issue which we have already dealt with in the preceding part of this judgment.

64 In the seminal English Court of Appeal decision of *Robb*, for example, the defendant employee surreptitiously copied a list of the plaintiff employer's customers from the latter's order-book, for the purpose of getting hold of the plaintiff's customers and inducing them to transfer their business to him after he had left the plaintiff's service. Lord Esher MR stated (at 316) that:

> The question is whether such conduct was not what any person of ordinary honesty would look upon as dishonest conduct towards his employer and a dereliction from the duty which the defendant owed to his employer to act towards him with good faith.

Not surprisingly, the court answered the above question in the affirmative.

65 The crucial question of law in this appeal is whether or not taking *preparatory steps* to compete with a former employer forms a breach an employee's implied duty of good faith and fidelity. It is now well-established by the case law that the mere taking of such preparatory steps will *not* constitute a breach of the implied duty of good faith and fidelity on the part of the employee concerned. This principle is, in fact, succinctly stated in a leading textbook on employment law, as follows (see Norman Selwyn, *Selwyn's Law of Employment* (16th Ed, Oxford University Press, 2010 at paras 19.2 and 19.5 (reference may also be made to a similar proposition at *id*, para 10.55)):

> 19.2 The mere fact that the employee is seeking employment with a competitor is not, by itself, a breach of the duty of fidelity, in the absence of any evidence that the employee is wrongfully seeking to disclose confidential information or trade secrets ... [A]n employee who is about to leave his employment may attempt to make preparatory steps, either during his working hours, or in his own time, to prepare himself for future employment.
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> ...
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> 19.5 As a general principle, an employee's duty of fidelity does not prevent him from competing with a former employer once he has left his employment, and the freedom to do so carries with it the freedom to prepare for future activities that the employee intends to pursue once he has left his employment (*Helmet Integrated Systems Ltd v Tunnard* ...). But preparatory activities undertaken by directors or senior employees are more likely to constitute breaches of fidelity and fiduciary duties (*Shepherds Investment Ltd v Walters*). In any particular case, it will be necessary to identify the particular duties undertaken by the employee and to ask whether, in all the circumstances, he has placed himself in a position where he must act solely in the interests of his employer (*Nottingham University v Fishel* ...).

66 Indeed, the legal principle set out in the preceding paragraph (*ie*, that mere preparatory steps are insufficient to breach the implied duty of good faith and fidelity) was common ground between the parties. Although the Appellant appeared to question this principle by stating that its enunciation by Hawkins J in *Robb* was only effected at first instance (reported in *Robb v Green* [1895] 2 QB 1), it was not disapproved of on appeal. In any event, it is now too well-established in the case law to be thrown aside by such a sidewind – and, in our view, a non-existent one at that. We also note that the Appellant has – correctly, in our view – clearly accepted this particular principle in its written case. [note: 13]

67 The case law also clearly demonstrates that whether or not steps taken by an employee can be considered as preparatory to future competition (which is permissible), or instead constitute actual competitive activity (which is *not* permissible), turns on the *facts* of each particular case. Looked at in this light, the mere citation by the Appellant of case law authorities *per se* (see above at [63]) is, with respect, neither here nor there (although, for the sake of completeness, reference will be made

below to these (as well as other) cases). What is of *signal importance* is *whether or not*, on the *facts* of *this particular appeal*, the Respondent had merely taken *preparatory steps*. If mere preparatory steps had been taken, there would have been *no* breach of the Respondent's implied duty of good faith and fidelity; on the contrary, if more than mere preparatory steps had been taken, then there *would* have been a breach of this duty.

68 In *Helmet*, for example, Moses LJ stated thus (at [28]):

> The battle between employer and former employee, who has entered into competition with his former employer, is often concerned with where the line is to be drawn between legitimate preparation for future competition and competitive activity undertaken before the employee has left. This case has proved no exception. But in deciding on which side of the line Mr Tunnard's activities fall, it is important not to be beguiled into thinking that the mere fact that activities are preparatory to future competition will conclude the issue in a former employee's favour. The authorities establish that no such clear line can be drawn between that which is legitimate and that which breaches an employee's obligations.

69 And, in *Shepherds Investments*, Etherton J stated as follows (at [108]):

> What the cases show, and the parties before me agree, is that the precise point at which preparations for the establishment of a competing business by a director become unlawful will turn on the actual facts of any particular case. In each case, the touchstone for what, on the one hand, is permissible, and what, on the other hand, is impermissible unless consent is obtained from the company or employer after full disclosure, is what, in the case of a director, will be in breach of the fiduciary duties to which I have referred or, in the case of an employee, will be in breach of the obligation of fidelity. It is obvious, for example, that merely making a decision to set up a competing business at some point in the future and discussing such an idea with friends and family would not of themselves be in conflict with the best interests of the company and the employer. The consulting of lawyers and other professionals may, depending on all the circumstances, equally be consistent with a director's fiduciary duties and the employee's obligation of loyalty. At the other end of the spectrum, it is plain that soliciting customers of the company and the employer or the actual carrying on of trade by a competing business would be in breach of the duties of the director and the obligations of the employee. It is the wide range of activity and decision making between the two ends of the spectrum which will be fact sensitive in every case.

70 It is clear, therefore, that whether or not a certain course of conduct constitutes a breach of the duty of good faith and fidelity cannot – because of the signal importance of the *facts*– be ascertained in a mechanistic fashion, but instead requires a nuanced and close analysis of the entire factual matrix. Although it is rare for any two cases to be identical in relation to the material facts, a closer examination of the case law is nevertheless helpful inasmuch as it illustrates which acts have been found to form actual competitive activity, so as to breach the duty of good faith and fidelity. A sample of such case law illustrations includes the following:

(a) *Pacific Autocom Enterprise Pte Ltd v Chia Wah Siang* [2004] 3 SLR(R) 73 (Singapore High Court): An employee actively procuring the breakdown of the relationship between the employer and the employer's principal, as well as accepting the offer of employment from the principal to be in competition with the employer, instead of seeking to help the employer retain the principal and salvage the relationship.

(b) *Hivac* (English Court of Appeal): Employees engaged in highly skilled work but, in their

spare time, doing similar work for a company in direct competition with their employer, and persuading other employees to work for the competitor.

(c) *Wessex Dairies Limited v Smith* [1935] 2 KB 80 (English Court of Appeal) ("*Wessex Dairies*"): The employee, whilst still in the service of his employer, solicited the employer's customers to transfer their custom to himself after his employment with the employer was terminated.

(d) *Sanders* (English High Court): The defendant employee, whilst an assistant solicitor of the plaintiff solicitor, entered into an agreement with one of the plaintiff's important clients, with the result that the defendant would leave the plaintiff's employ and set up his own practice – at which time the client concerned would transfer all his legal work from the plaintiff to the defendant). The defendant also persuaded one of the plaintiff's secretaries to join him. Both acts were held to be breaches. It is also noted that the entry into an agreement is sufficient to constitute more than just a preparatory act – a proposition that is both logical as well as commonsensical.

(e) *Balston Limited v Headline Filters Limited* [1990] FSR 385 (English High Court): An employee acquiring a company engaging in a competing business, soliciting a fellow employee to join the said company, and entering into an agreement to supply a customer of his employer with filter tubes (a business in direct competition with his employer).

(f) *Lancashire Fires Limited v S A Lyons & Company Limited* [1996] FSR 629 ("*Lancashire Fires*") (English Court of Appeal): An employee incorporating a company, obtaining a loan (via the company he incorporated) from the plaintiff company's potential customer to develop his own business. Employee then leasing premises, purchasing equipment; and entering (again, via the company he incorporated) into a preliminary agreement (an agreement to agree) to sell ceramic components to the aforementioned customer on an exclusive basis (a business in direct competition with that of his employer).

71 On the other hand, the following cases provide illustrations of acts which constitute merely preparatory activity that cannot therefore be considered breaches of the duty of good faith and fidelity:

(a) *Laughton* (English Employment Appeal Tribunal): Employees writing to some of their employer's suppliers to inform them that they intended to start business on their own and to ask for details of those suppliers' products.

(b) *Balston*: Although the employee's actual competitive activity (see [70(e)] above) was in breach, the following preparatory steps were found to be permissible: forming an intention to start a competing business, consulting accountants and lawyers on the viability of the said business, approaching a bank for financing, and agreeing to a lease of premises.

(c) *Helmet* (English Patents County Court): A salesman conceiving an idea for a new product (a firefighter's helmet) in the same business as his employer, engaging an industrial designer, applying for a government grant for his business and after obtaining the grant, giving the designer a design specification and examples of existing helmets including his employer's product. It is significant that, in arriving at its decision, the court noted that the employee had not entered into any agreements with competitors or even potential competitors (*contra*, for example, *Sanders* and *Lancashire Fires* (referred to above at [70(d)] and [70(f))], respectively)).

72 The Appellant sought (particularly in oral submissions before this court) to impress upon us that a "consistent principle" (what we term "the Irrevocable Intention Test") could be distilled from the two cases of *British Midland Tool* and *Shepherds Investments*, respectively, *viz*, that: [note: 14]

> If an employee or director embarks on preparatory activities in the course of his employment involving the *implementation of an irrevocable plan to compete with his employer that, on the facts of the particular case, could reasonably jeopardise his employer's commercial interests*, without disclosing the same to his employer and obtaining his employer's consent, then he has breached his duty of good faith and fidelity. [emphasis in original]

73 The Appellant sought to persuade us that *British Midland Tool* and *Shepherds Investments*, in which the courts found a breach of duty, were indistinguishable from the present factual matrix, and, remaining faithful to the Irrevocable Intention Test, should lead us to conclude that the Respondent was similarly in breach of his duty of good faith and fidelity. It is therefore necessary to embark upon a granular examination of the respective factual matrices that contextualised the formulation of the Irrevocable Intention Test, and explain how we came to disagree with the Appellant's submissions.

74 In *British Midland Tool*, the employer brought an action against four former directors for, *inter alia*, breach of fiduciary duty and the duty of good faith and fidelity. The four directors had set up a rival business, copied certain sensitive information from their employer for use in the rival business, enticed some other employees to join them, and approached existing customers to transfer their patronage to the rival business.

75 In holding the former directors liable, Hart J appeared to propound a very broad prohibition against potentially competitive behaviour, as follows (at [89]):

> A director who wishes to engage in a competing business and not to disclose his intentions to the company ought, in my judgment, to resign his office as soon as his intention has been irrevocably formed and he has launched himself in the actual taking of preparatory steps.

76 The Appellant has argued that a similar standard should apply to the Respondent, *ie*, that the Respondent should have disclosed his intentions to compete with the Appellant. However, we are not persuaded by this argument. The crucial question is: What was the duty that was breached in *British Midland Tool*? The duty to disclose in *British Midland Tool* was held to be based upon a director's fiduciary duties, not an employee's duty of good faith and fidelity. Indeed, Hart J makes it quite clear that (at [94]):

> The employee's duty of fidelity to his employer, although in some respects similar in content to the director's fiduciary duty to the company and although it is itself sometimes described as a fiduciary duty ... is by no means identical. Importantly it does not include, in the usual case, any prohibition as such on being in a position where his duty as employee and his self-interest may conflict.

77 *British Midland Tool* is, therefore, good authority centring on the fiduciary duty of a director, to act loyally and in the best interests of his principal, and not put himself in a position of conflict between his principal's interests and his self-interest. These are considerations that do not apply with equal force in an employee-employer relationship, which is the situation in the present case.

78 We now turn to *Shepherds Investments* and explain why the Appellant's invocation of the case did not successfully persuade us as to his position. The first rather significant point, in our view, is that the factual matrices in both cases were quite different. In *Shepherds Investments*, two of the

defendant employees were directors whilst the third was a *de facto* director, all of whom had made plans to set up a competing business, and the competing business was well advanced in the development of a rival and superior investment product. Further, under cross-examination, the *de facto* director had admitted to finding it difficult to promote an investment product of a company in the same group as his employer when he was developing a competing product. The court in *Shepherds Investments* found that the steps taken by, *inter alia*, the *de facto* director were in breach of his fiduciary duties. Interestingly (and this was emphasised strongly by Mr Singh), Etherton J observed (at [129]) that:

> Finally, on this aspect of the case, I should record for completeness that, even if, contrary to my view, Mr Simmons was a mere employee owing no fiduciary duties to Investments, I nevertheless conclude that his conduct between August 12, 2003 and his resignation on September 21, 2003 was such as to breach his employee's duty of good faith and fidelity.

79 Whilst Mr Singh strongly urged us to do so, we did not find that simple remark by Etherton J to be conclusive. First, the observation by Etherton J must be weighed against the backdrop of the factual matrix in *Shepherds Investments*, which we described above. The facts which resulted in liability for the directors in *Shepherds Investments* are by no means analogous to the steps taken by the Respondent in this case. Indeed, not all the steps listed in the SOC were taken during the Respondent's employment with the Appellant, which ended on 18 April 2009. The relevant steps were:

(a) Incorporating Dental Essence on 7 January 2009;

(b) Signing a tenancy agreement for the premises of Dental Essence in Tudor Court on 25 February 2009;

(c) Fitting out the said premises of Dental Essence;

(d) Having discussions with Dr Pearson which resulted in Dr Pearson becoming a shareholder and director of Dental Essence on 19 March 2009; and

(e) Not informing the Appellant nor seeking the Appellant's consent of the Respondent's steps to set up a competing business.

80 These steps fall into the category of mere preparatory steps which do not amount to actual competitive activity. Mere incorporation of the company or seeking a former fellow employee to join the competing company is not in breach of the duty of good faith and fidelity. In the English Court of Appeal decision of *G E Searle & Co Ltd v Celltech Ltd* [1982] FSR 92, Cumming-Bruce LJ observed (at 101–102) that:

> The law has always looked with favour upon the efforts of employees to advance themselves, provided they do not use or steal the secrets of their former employer. In the absence of restrictive covenants, there is nothing in the general law to prevent a number of employees in concert deciding to leave their employer and set themselves up in competition with him.

81 Indeed, the Respondent had only obtained a licence from the Ministry of Health on 14 May 2009, to take effect on 15 May 2009. This was almost a month after his employment with the Appellant had ceased. The only acts that the Appellant may validly rely upon, therefore, were merely the incorporation of the competing business, the leasing and fitting out of business premises, and discussions with another former employee to join the competing business. These acts fall cleanly within the limits of permissible preparatory activity. We would point out, however, that the situation

would have been clearly different if the Respondent had obtained a licence from the Ministry of Health and had, in his free time, treated patients under the auspices of Dental Essence, in direct competition with the Appellant (as was the situation in *Hivac*), or was engaged in active solicitation of his patients when he was under the employ of the Appellant (as was the situation in *Wessex Dairies* and *Balston*). No evidence of such impermissible behaviour is before us and we cannot see how the preparatory acts of the Respondent can be considered as a breach of the duty of good faith and fidelity.

82 Secondly, however, Etherton J's observation must be considered against his legal analysis of *Shepherds Investments*: The learned judge was essentially deciding on an issue relating to the breach of directors' fiduciary duties. He was not engaged in a granular analysis of the duty of good faith and fidelity. We do not think that Etherton J was making an immutable statement that a director's fiduciary duty is interchangeable with or identical to an employee's duty of good faith and fidelity; and we would disagree with such a proposition in any event for the reasons already set out above (at [51]–[55]).

Conclusion

83 For the reasons set out above, the appeal is dismissed with costs. The usual consequential orders will apply.

[note: 1] Affidavit of Evidence-in-Chief ("AEIC") of Dr Ernest Rex Tan, dated 27 July 2011 ("Dr Tan's AEIC") at paras 44 and 46.

[note: 2] Respondent's Core Bundle of Documents ("RCB") at pp 14–16.

[note: 3] Dr Tan's AEIC at paras 116–117.

[note: 4] Dr Tan's AEIC at paras 65, 112–120.

[note: 5] Dr Tan's AEIC at paras 83–84.

[note: 6] Dr Tan's AEIC at paras 131–146.

[note: 7] Appellant's Case ("AC") at para 418.

[note: 8] Dr Tan's AEIC at paras 127–149.

[note: 9] AC at para 94.

[note: 10] AC at para 396.

[note: 11] RCB at 14 (cll 2 and 3).

[note: 12] Appellant's Core Bundle ("ACB") vol II at para 27.

[note: 13] AC at para 168.

[note: 14] AC at para 197.