Centre for Creative Leadership (CCL) Pte Ltd *v* Byrne Roger Peter and others [2013] SGHC 4

Case Number : Suit No 25 of 2011/Q

Decision Date : 11 January 2013

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Andre Maniam SC, Wendy Lin and Chang Qi-Yang (WongPartnership LLP) for the plaintiff; Tan Chau Yee and Laila Jaffar (Harry Elias Partnership LLP) for the first defendant; Indranee Rajah SC, Daniel Soo and Liang Hanting (Drew & Napier LLC) for the second and third defendants.

Parties : Centre for Creative Leadership (CCL) Pte Ltd — Byrne Roger Peter and others

Contract – Illegality and Public Policy – Restraint of Trade

Contract – Consideration – Promissory Estoppel

Contract – Remedies – Damages

11 January 2013 Judgment reserved.

Woo Bih Li J:

Introduction

1 Suit No 25 of 2011 is an action commenced by the Centre for Creative Leadership (CCL) Pte Ltd ("CCL APAC") against two of its former employees, Roger Peter Byrne ("Mr Byrne") and Michael Jenkins ("Mr Jenkins") for breach of a restraint of trade covenant which, in the present case, is a non-compete covenant ("NCC") in their respective employment agreements with CCL APAC. CCL APAC is also suing Roffey Park Institute Ltd ("Roffey Park") for inducement of Mr Byrne's and Mr Jenkins' breach of the NCC in their employment agreements. In addition, CCL APAC is suing Mr Jenkins for breach of his fiduciary duties if he did inform Mr Byrne that the NCC in his employment agreement was not enforceable. [note: 1] I should add that CCL APAC initially commenced this action against Mr Byrne and Roffey Park only. It then obtained an order on 4 July 2011 in Summons No 2481 of 2011 to join Mr Jenkins as a defendant in the action. [note: 2]

2 On 23 February 2012, Lee Seiu Kin J heard Registrar's Appeal No 8 of 2012, which was an appeal against the learned Assistant Registrar's decision to order bifurcation of the trial in Summons No 5441 of 2011. Lee J ordered a trial of the following preliminary issues of law under O 33 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"):

(a) Whether the NCC in Mr Byrne's and Mr Jenkins' employment agreements with CCL APAC is enforceable?

(b) Whether CCL APAC's case of "loss of chance" as pleaded in its Further and Better Particulars of the Statement of Claim served pursuant to a request by the solicitors for Roffey Park dated 31 March 2011 and filed on 14 April 2011, may be struck off? On 11 July 2012, I granted CCL APAC's application to amend some of the particulars on the loss and damage

suffered, including those in respect of loss of chance. The amended particulars were filed on 11 July 2012 ("FNBP of SOC Amendment No 1"). However, the defendants maintain that even on these amended pleadings, CCL APAC's case on "loss of chance" should still be struck out.

3 The trial before me concerns the two preliminary issues of law set out at [2] as well as an issue of estoppel, which relates to issue [2(a)], arising from certain alleged representations that I will elaborate on later.

4 The following witnesses testified on behalf of CCL APAC during the trial:

(a) Paul Draeger ("Mr Draeger"), the Vice-President and Chief Talent Office of Centre for Creative Leadership ("CCL US"), the parent company of CCL APAC; [note: 3]

(b) John R Ryan ("Mr Ryan"), the President of CCL US; [note: 4]

(c) Sureish Devandra Nathan ("Mr Nathan"), CCL APAC's present Managing Director; and

(d) Jennifer Ruth Maxson Ford ("Ms Ford"), CCL US' Global Integration Manager who was seconded to CCL APAC from June 2003 to June 2006 [note: 5] to assist Mr Jenkins as Operations-Manager, Singapore in the start-up of CCL APAC's operations. [note: 6]

CCL APAC also filed an affidavit by Lily Kelly-Radford, who was the Executive Vice-President of CCL US from 1998 to 2008, but as she was unable to testify during the trial, her affidavit was not admitted into evidence.

5 The witnesses for the defendants were:

(a) The first defendant, Mr Byrne;

(b) The third defendant, Mr Jenkins; and

(c) Shakander Singh s/o Dharam Singh or Shakander Singh Chahal ("Mr Singh"), CCL APAC's Financial Controller from 5 March 2005 to 30 June 2010.

Background

The parties

6 CCL APAC is a company incorporated in Singapore in 2003 [note: 7] and is engaged in the business of, *inter alia*, conducting research, producing publications and providing leadership development and training programmes. CCL APAC is a wholly-owned subsidiary and the Asia-Pacific headquarters of CCL US, a company established in the United States of America ("US") since 1971. [note: 8]

7 The CCL organisation ("CCL") provides the following programmes and services to organisations around the world:

(a) Leadership assessment and diagnostic tools for the purpose of development;

(b) Open-enrolment programmes (*ie*, public or off-the-shelf programmes) for multiple clients in

a single session ("public programmes");

(c) Customised programmes (*ie*, programmes tailored to meet specific needs and leadership development objectives of a client) through single or multi-phased sessions ("customised programmes"); and

(d) Coaching. [note: 9]

8 Mr Jenkins was employed on 1 August 2003 [note: 10] as CCL APAC's Managing Director to head its operations in Singapore [note: 11] and build awareness of the CCL brand in Singapore. CCL US had previously seconded one of its employees, Dr Meena Wilson ("Dr Wilson"), to assist in the start-up of CCL APAC in Singapore, including overseeing the training of the first cohort of adjunct faculty. [note: 12] After the start-up process was complete, CCL APAC employed Mr Jenkins as Managing Director. [note: 13] He was subsequently promoted to Vice-President of CCL US' Asia-Pacific business in 2007. [note: 14] Mr Jenkins tendered his resignation from CCL APAC on 12 November 2008. [note: 15] His last day with CCL APAC was 31 March 2009. [note: 16] Mr Nathan joined CCL APAC as its Managing Director on 25 February 2009. [note: 17]

9 Mr Byrne was initially employed by CCL APAC on a part-time basis as an adjunct faculty and coach in mid-2005. [note: 18] Mr Byrne was later employed full-time as CCL APAC's Business Development/Conversion Faculty [note: 19] pursuant to an employment agreement between CCL APAC and Mr Byrne dated 31 August 2006. [note: 20] Although Mr Byrne's formal commencement date for his full-time position with CCL APAC was 11 September 2006, [note: 21] he had apparently started working for CCL APAC about a week before 11 September 2006. [note: 22] His last day with CCL APAC was on 29 May 2009 (according to Mr Byrne) or 1 June 2009 (according to CCL APAC). [note: 23]

10 The second defendant, Roffey Park, is a registered charity and limited company [note: 24] incorporated in the United Kingdom ("UK") in 1946. Roffey Park is an educational institute which develops training and research programmes in the fields of leadership and management, personal and organisational development and human resources. [note: 25] Mr Jenkins joined Roffey Park as its Chief Executive Officer on or around 1 April 2009. [note: 26] Roffey Park incorporated a wholly-owned subsidiary in Singapore, Roffey Park Asia Pte Ltd, on 23 July 2010. [note: 27]

11 After leaving CCL APAC, Mr Byrne also joined Roffey Park [note: 28] pursuant to an agreement signed on 1 August 2009 (enclosed in a letter under Roffey Park's letterhead dated 1 September 2009 to Mr Byrne). [note: 29] However, it appeared that as early as 26 June 2009, Mr Byrne held himself out as a prospective representative of Roffey Park (see below, at [79]). [note: 30] At the time CCL APAC commenced this suit, Mr Byrne was a director of Roffey Park, and was Roffey Park's representative in Singapore and/or Asia Pacific. [note: 31] He left Roffey Park around October 2011. [note: 32]

Mr Jenkins' and Mr Byrne's role in CCL APAC

Mr Jenkins

12 According to Mr Draeger, Mr Jenkins was responsible for creating the business strategy and

operational plans to build CCL APAC's operations and building a team of staff to operate the business. [note: 33] Given the size of CCL APAC when he was employed, Mr Jenkins was also expected to take an active role in business development, by sourcing (whether individually or with a team) for business and client prospects, following up on "leads", performing needs analysis for clients, collaborating with CCL APAC's faculty to design programmes to meet those needs, developing a pricing scheme for programmes and developing additional opportunities for ongoing engagement with CCL APAC's clients. [note: 34]

13 Mr Jenkins, on the other hand, stated that his role as Managing Director did not include having direct contact with "[CCL APAC's] clients for the purpose of any functional tendering process or any programme-related planning, administration or delivery". [note: 35] Mr Jenkins also stated that he seldom met clients or potential clients unless it was to support CCL APAC's marketing efforts, such as meeting and greeting participants at CCL APAC's public relations events or hosting clients at CCL APAC's offices. He was primarily responsible for building up the CCL brand and generating awareness of leadership education in the Asia-Pacific region. [note: 36] He made high-level decisions about CCL APAC's strategy in consultation with CCL US and led the public relations effort for CCL APAC. In relation to business development, he would discuss and develop CCL APAC's business strategy with the faculty, business development, finance and support administration staff. [note: 37]

Mr Byrne

14 According to CCL APAC, Mr Byrne was responsible for driving CCL APAC's business development and training programmes in the Asia-Pacific region, managing client relations for CCL APAC, consulting with CCL APAC's clients on their leadership development needs and collaborating with CCL APAC's faculty to design programmes to meet those needs. Mr Byrne was also responsible for determining the pricing of CCL APAC's programmes, responding to customers, facilitating and/or conducting public leadership development and training programmes, and conducting marketing seminars and workshops where CCL APAC's research material would be shared with its clients or potential clients. [note: 38]

15 Mr Byrne, on the other hand, stated that his role as Business Development/Conversion Faculty was to "close new business, rather than to seek it". [note: 39] He assisted Carolyn Chan ("Ms Chan"), Director of Business Development at CCL APAC, with technical discussions on programme design in relation to customised programmes. [note: 40] Ms Chan, Maria Chow ("Ms Chow"), Dr Luke Novelli ("Dr Novelli") and Mr Singh handled the business development aspect in relation to customised programmes, as opposed to public programmes. [note: 41] It is also undisputed that Mr Byrne consulted with CCL APAC's clients on their leadership development needs and collaborated with CCL APAC's faculty to design programmes to meet these needs. [note: 42]

16 As faculty, Mr Byrne would also help to design and develop programme content and teach. Mr Byrne stated that he only assisted the then lead faculty, [note: 43] Dr Novelli, twice in facilitating one of CCL APAC's public programmes and about once or twice on some customised programmes, but was never the lead facilitator. [note: 44]

The NCC

17 The NCC in Mr Byrne's [note: 45] and Mr Jenkins' [note: 46] employment agreement with CCL APAC provided that:

NON-COMPETE COVENANT:

Employee covenants and agrees that for a period of one (1) year after the termination of this Agreement for any reason, Employee will not, individually or as an agent, employee, owner, officer, director, executive, consultant, stockholder, partner, or otherwise, within any city in which an office of any client or potential clients of the Company [*ie* CCL APAC] or its parent organization [*ie* CCL US] to whom he has generated, designed, or delivered a Company or parent company program or other service is located:

Solicit, attempt to solicit, or assist in soliciting the delivery of programs or services competitive with any of the programs or services Employee has generated, designed, delivered or provided on behalf of the Company or its parent organization, from any of the Company or parent organization clients to whom Employee has generated, designed, delivered or provided programs or other services on behalf of the Company or parent organization under this Agreement (hereinafter the "Base Clients"),

This subparagraph shall not be construed to prohibit Employee from selling or attempting to sell to the Base Clients any programs or services which do not compete in any way with the Company or its parent organization's Business;

...

18 Mr Byrne's [note: 47] and Mr Jenkins' [note: 48] employment agreement are governed by the laws of Singapore. According to Mr Draeger, the NCC was drafted with the advice from legal counsel in Singapore on its enforceability. [note: 49]

19 Generally speaking, employees of CCL in the US do not have employment contracts and are not bound by an NCC. Mr Draeger explained that each state in the US has different employment laws such that an NCC may be unenforceable or more difficult to enforce in some states than in others. Furthermore, employees would move across states. Hence CCL decided to adopt the same position for all such employees, *ie* not to impose any NCC on them. [note: 50] Mr Ryan is the only employee in the US with an NCC but which is worded differently from the NCC applicable to employees of CCL APAC. [note: 51]

20 There is also no NCC for employees of CCL in Europe. Mr Draeger explained that compensation has to be given for the enforcement of NCC in Europe and it was not vital for CCL to incur that expense just for this purpose. [note: 52]

Programmes for CSC

21 One of CCL APAC's main clients in Singapore was the Civil Service College ("CSC"). CCL APAC claimed that Mr Jenkins and Mr Byrne were involved in generating, designing, delivering and/or providing a number of programmes to CSC when they were with CCL APAC (elaborated upon below at [28]).

22 After Mr Byrne and Mr Jenkins left CCL APAC, CSC continued to run programmes delivered by CCL APAC, including the Senior Management Programme ("SMP") in 2009. CSC also awarded two additional runs of the Leadership Development Programme ("LDP") to CCL APAC sometime in late 2009. CCL APAC also ran the 2009 Ministry of Health Holdings Healthcare Family Leadership and Policy Perspectives Programme. [note: 53]

23 During a meeting in August 2009, CSC informed Mr Jenkins that it intended to offer a new course for middle management officers in 2010, tentatively known as the Essentials in Leadership Programme ("ELP"). Roffey Park decided to develop and design a programme to tender for the ELP and commenced discussions with CSC to learn more about the leadership development requirements which CSC wanted to address through the ELP. [note: 54]

24 On 17 February 2010, CSC sought tenders for three programs, the ELP which was now renamed to the Management Development Course ("2010 MDC") [note: 55], the SMP for 2010 ("2010 SMP") and the Leaders in Administration Programme for 2010 ("2010 LAP") through the Singapore government's internet procurement portal, GeBIZ. [note: 56] Four companies, namely, CCL APAC, Roffey Park, Impact International and Oliver Wyman were invited to submit tenders for the three programmes. [note: 57] CCL APAC and Roffey Park submitted bids for all three programmes. The outcome of the bids for the three programmes was that: [note: 58]

(a) CSC awarded the 2010 MDC to Roffey Park;

(b) CSC awarded the 2010 SMP to Impact International; and

(c) CSC did not award the 2010 LAP to any bidder.

Case for CCL APAC

25 CCL APAC's case is that the NCC protects against disclosure of confidential information and also protects trade connections generated by its former employees with "Base Clients" as defined in the NCC.

26 CCL APAC claimed that Mr Byrne and Mr Jenkins had access to trade secrets, confidential or proprietary information and/or intellectual property belonging to CCL APAC and/or CCL US, including but not limited to: [note: 59]

(a) Lists and particulars of CCL APAC's and CCL US' customers or prospective customers and the individual contacts of such customers or prospective customers;

(b) Research material, programme designs, assessment instrument and their application, methods of instruction including methods of training programme facilitators, created by CCL APAC or CCL US, forming part of the databases of CCL APAC or CCL US;

(c) Details of CCL APAC's pricing scheme which differ for various programmes and categories of customers;

(d) Details of CCL APAC's agreements with its customers, including the negotiations leading up to the final agreement and the contract price of the agreement;

(e) Confidential information regarding current leadership development requirements, strategies and initiatives of CCL APAC's clients in the Asia-Pacific region;

(f) Details of the customised design of various leadership training and development programmes specifically created for each of CCL APAC's clients in the Asia-Pacific region;

(g) Information as to the reasons for the success (or lack thereof) of each of CCL APAC's programmes;

(h) CCL APAC's client relationship management data systems, which contain information on, *inter alia*, the preferences of CCL APAC's clients and potential clients; and

(i) Information about CCL APAC's business strategy and growth plans.

27 CCL APAC pleaded that it had provided the SMP to CSC from 2007 to 2009. [note: 60] CCL APAC also participated in the Leaders in Administration Programme ("LAP") in 2008 and assisted CSC in 2009 in generating and designing the LAP (following from the findings of the "Lessons of Experience" research project jointly undertaken by CCL APAC and CSC in 2007 and 2008). [note: 61] CCL APAC also pleaded that the Management Development Course ("the MDC") was similar to or a derivation from a programme (that was eventually named the LDP) in its objectives [note: 62] and participant profile, being high potential officers in their late 20s to mid-30s with middle management or supervisory experience. [note: 63] The MDC was also competitive with the public Leadership Development Programme ("Public LDP") which CCL APAC provided to other clients within the Singapore government including but not limited to the Ministry of Trade and Industry. The participants in the Public LDP and MDC were similar, being high potential officers presently holding Senior Assistant Director/Deputy Director or equivalent responsibilities in various public sector agencies, and both programmes had similar objectives. [note: 64]

28 CCL APAC claimed that Mr Byrne and Mr Jenkins generated, designed, delivered and/or provided to CSC programmes that were competitive with its own programmes for the 2010 SMP, 2010 LAP and the 2010 MDC. It claimed the following:

(a) In relation to the SMP:

(i) Mr Byrne was involved in the generation, design, delivery and/or provision of the SMP in 2008 and 2009 to CSC. Mr Byrne was CCL APAC's main contact with CSC, and led discussions with CSC in 2008 on continuing the run of the SMP provided to CSC in 2007 and modifications that should be made to the SMP for 2008. Mr Byrne worked with CSC to put together a team within CCL APAC which would best suit CSC's objectives; [note: 65]

(ii) Mr Bryne continued to be CCL APAC's main contact with CSC for the provision of the SMP to CSC in 2009, including explaining the pricing of CCL APAC's proposal for the SMP in 2009, prior to the termination of his employment with CCL APAC. [note: 66] Mr Byrne also put together a team within CCL APAC which would best suit CSC's objectives.

(iii) Mr Jenkins built and maintained client relations with CSC and marketed CCL APAC's programmes, including the SMP to CSC. [note: 67]

(b) In relation to the LAP:

(i) Mr Byrne and Mr Jenkins were involved in CCL APAC's presentation of the findings of the "Lessons of Experience" research in the LAP conducted in 2008. [note: 68]

(ii) Mr Byrne had also assisted in the research and presentation of the findings [note: 69]

of the "Lessons of Experience" research in 2009. [note: 70] He put together a team to meet CSC's needs in this regard and was part of the team that initiated CCL APAC's draft design for the LAP in 2009. [note: 71]

(iii) Mr Jenkins also co-presented the findings of the "Lessons of Experience" research with Dr Wilson, CCL APAC's then Director for Research.

(c) In relation to the MDC:

(i) Mr Byrne had assisted in generating, designing, delivering and/or providing the LDP to CSC for 2008 and 2009. [note: 72] Mr Byrne attended a briefing conducted by CSC on the LDP in April 2008 and assisted in the design of CCL APAC's proposal for the LDP. Mr Byrne also explained the structure and pricing of CCL APAC's proposal for the LDP for 2008 to CSC. Mr Byrne was involved in a similar capacity for CCL APAC's tender for the LDP for 2009. [note: 73]

(ii) Mr Byrne was also involved in generating, designing, delivering and/or providing the LDP in 2008 and 2009. [note: 74]

(iii) Mr Jenkins was involved in generating, designing, delivering and/or providing the LDP from 2008 to 31 March 2009. [note: 75] Mr Jenkins built and maintained client relations with CSC and marketed programmes including the LDP to CSC. [note: 76] Mr Jenkins also attended meetings to discuss the design and CCL APC's provision of the LDP for 2008 to CSC. [note: 77]

(iv) Mr Jenkins was involved in generating, designing, delivering and/or providing the Public LDP from 2007 to 31 March 2009. [note: 78] Mr Jenkins built and maintained relations with parties to whom CCL APAC provided, was providing and/or intended to provide the Public LDP and marketed programmes including the Public LDP to CSC from 2007 to 31 March 2009. [note: 79]

29 CCL APAC pleaded that Mr Byrne and Mr Jenkins breached the NCC because during the period of contractual restraint, they solicited, attempted to solicit or assisted in soliciting, on Roffey Park's behalf, the delivery of programmes or services which were competitive with those which they had respectively generated, designed, delivered or provided on behalf of CCL APAC to Base Clients, including CSC. [note: 80]

30 CCL APAC claimed that it suffered loss as a result of Mr Byrne's and Mr Jenkins' breaches of the NCC. [note: 81] The particulars of CCL APAC's loss will be set out at Issue 3 (see below, at [173]).

Case for Mr Byrne

31 Mr Byrne disputed that some of the information set out at [26] was confidential information. In particular, he alleged that:

(a) He had general access similar to all CCL APAC employees to the lists and particulars of CCL APAC's and CCL US' customers or prospective customers. [note: 82]

(b) CCL APAC's research materials were freely accessible by the public. CCL APAC's assessment instruments and their application and methods of instructions were not unique to CCL

APAC. [note: 83]

(c) CCL APAC's pricing scheme was available to and accessible by all CCL APAC staff. [note: 84]

(d) The details of CCL APAC's agreements with its customers, negotiations, final agreement and contract price were commonly available to and accessible by all senior managers and business development staff of CCL APAC. Contract pricing was derived using a commonly available and pre-determined pricing structure proportional to publicly published prices. [note: 85]

(e) It was common for clients and potential clients to talk to potential providers about their leadership development requirements. [note: 86]

(f) Mr Byrne only had details of "high level designs as shown in proposals" which were freely available to all employees. The details of customised designs for the various programmes were generated, designed and delivered by the specific programme designers and facilitators. [note: 87]

(g) Information on the success (or lack thereof) of CCL APAC's programmes was openly shared by CCL APAC staff with each other. [note: 88]

(h) Mr Byrne was not aware of any client relationship management data system of CCL APAC. [note: 89]

(i) Information on CCL APAC's business strategy and growth plans was openly shared by CCL APAC's staff with each other. [note: 90]

32 In relation to the programmes that CCL APAC alleged were competitive with those that Mr Byrne had generated, designed, delivered and/or provided to CSC during his employment with CCL APAC:

(a) Mr Byrne denied his alleged involvement in the SMP for 2008 and 2009. Mr Byrne claimed that the SMP was designed and developed by other staff of CCL APAC. [note: 91]

(b) Mr Byrne denied his alleged involvement in the LAP for 2009 and the "Lessons for Experience" research. Mr Byrne claimed that CCL APAC did not assist CSC in generating, designing or delivering the LAP for 2009. Dr Wilson presented the findings of the "Lessons for Experience" research in October 2008. He was not involved in generating, designing or delivering this presentation.

(c) Mr Byrne denied his alleged involvement in the LDP and the Public LDP [note: 92] but also pleaded that the MDC was not similar or a derivative from the LDP provided to CSC in 2008, 2009 and 2010, [note: 93] or the Public LDP that he delivered in 2008 and 2009. [note: 94]

33 Mr Byrne pleaded that the NCC was unenforceable as against him as it was too vague in the scope of activities that he was prohibited from engaging in, and its duration was longer and its geographical area of coverage was wider than reasonably necessary for the protection of CCL APAC's legitimate interests. [note: 95]

34 Mr Byrne also pleaded that CCL APAC was estopped from enforcing the NCC. Shortly before he signed his employment agreement with CCL APAC in September 2006, [note: 96] Mr Jenkins, who was

then CCL APAC's Vice-President, told him that the NCC:

(a) was not enforceable,

(b) was just there to deter people, and

(c) was not deemed to be enforceable even in the US

(a) ("the Three Representations"). [note: 97]

Mr Jenkins also told him that he was not the only employee of CCL APAC who had raised this concern and received this information. Mr Jenkins also told him that according to Mr Draeger, "the NCC was unenforceable and intended as a deterrent" and that rather than CCL APAC removing the NCC, Mr Jenkins "should simply reassure potential employees not to worry about it". [note: 98] Mr Byrne acted in reliance on Mr Jenkins' representation and signed his employment agreement.

Case for Mr Jenkins and Roffey Park

35 As Roffey Park's defence in relation to the issues before me is generally similar to Mr Jenkins' defence, I will focus on Mr Jenkins' pleadings.

36 Mr Jenkins admitted that he had access to the information listed at [26(a)], [26(c)]–[26(f)] and [26(i)] but denied that the information was confidential information or constituted trade secrets. [note: 99] Mr Jenkins did not admit that the information in [26(b)] and [26(g)] was confidential. In relation to [26(f)], he claimed that he did not generate, design or deliver the programmes. He denied that he had access to the information at [26(h)] and that this information was confidential or constituted a trade secret. [note: 100]

37 In relation to the programmes that CCL APAC alleged were competitive with those that he had generated, designed, delivered or provided to CSC during his employment with CCL APAC:

(a) Mr Jenkins denied that he generated, designed, delivered or provided the SMP. [note: 101]

(b) In relation to the LAP, Mr Jenkins denied that CCL APAC generated or designed the LAP. CSC requested that Dr Wilson present the findings of the "Lessons of Experience" research, and Mr Jenkins was involved in the presentation only because Dr Wilson's intended co-presenter could not attend. [note: 102]

(c) Mr Jenkins denied that he generated, designed, delivered or provided the LDP. The LDP had different objectives and content and different target audiences from the MDC. [note: 103]

(d) Mr Jenkins denied that he generated, designed, delivered or provided the Public LDP. In addition, the MDC was an in-house programme that was not competitive with the Public LDP. [note: 104]

38 Mr Jenkins pleaded that the NCC was in restraint of trade and void. The NCC was too vague in the scope of activities that he was prohibited from engaging in and the duration and scope of geographical area in the NCC was wider than reasonably necessary for the protection of CCL APAC's legitimate interest. [note: 105]

39 Both Roffey Park and Mr Jenkins pleaded that in any case CCL APAC was estopped from enforcing the NCC as against Mr Byrne (but not Mr Jenkins [note: 106]) because Mr Draeger had informed Mr Jenkins of the Three Representations. Mr Jenkins had in turn passed this information to Mr Byrne who relied on the information before signing his employment agreement which contained the NCC. [note: 107] The defendants were relying on promissory estoppel.

40 Mr Jenkins denied that any loss was caused to CCL APAC as a result of the alleged breach of the NCC. [note: 108] He claimed that CSC must have considered various factors in deciding to award the tender for the MDC programme to Roffey Park, including but not limited to: [note: 109]

(a) CSC's own impression of Roffey Park, made through their evaluation visit to the UK in August 2009; [note: 110]

(b) The merits of the proposals through CSC's normal evaluation and tender process;

(c) CCL APAC's performance in delivering programmes to CSC, including the LAP, the SMP and the LDP in 2008 to 2009; and

(d) CCL APAC's working relationship with CSC in 2009, especially after Mr Byrne departed.

Issues before this court

41 There are three issues before me.

42 The first issue ("Issue 1") is whether the NCC is enforceable, and in answering this issue, it must be determined whether:

(a) CCL APAC had a legitimate interest to protect by the NCC;

(b) the NCC was reasonable with reference to the parties' interests; and

(c) the NCC was reasonable with reference to the public interest (*Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 ("*Smile CA*") at [19]).

All three questions must be answered in the positive for CCL APAC to succeed on Issue 1 (*Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 1 SLR 847 ("*Smile HC*") at [67]).

43 The second issue ("Issue 2") is whether CCL APAC is estopped from relying on the NCC as against Mr Byrne. It must be determined whether:

(a) there was a clear and unequivocal representation to Mr Byrne by CCL APAC's agent (Mr Jenkins in this case) that the NCC was unenforceable;

(b) Mr Byrne acted in reliance on this representation; and

(c) Mr Byrne suffered detriment, or whether it would be inequitable for CCL APAC to go back on its representation.

44 Although Mr Jenkins was not relying on estoppel to argue that the NCC in his employment agreement was unenforceable against him, the issue as to whether Mr Jenkins made the Three

Representations to Mr Byrne is relevant to the issue of whether Mr Jenkins breached his fiduciary duties to CCL APAC. CCL APAC denied that Mr Draeger made the Three Representations to Mr Jenkins, [note: 111] and pleaded that if Mr Jenkins had made the Three Representations to Mr Byrne, he would have breached his fiduciary duties to CCL APAC. [note: 112]

45 The third issue ("Issue 3") is whether CCL APAC's case on loss of chance as pleaded in the FNBP of SOC Amendment No 1 (and set out below at [173]) should be struck out.

Issue 1: Whether the NCC is enforceable?

46 The applicable principles on the validity of restraint of trade covenants have been canvassed in the Singapore Court of Appeal case of *Man Financial (S) Ptd Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*"), and will be stated briefly in my judgment. All restraint of trade covenants are *prima facie* void (*Man Financial* at [69] affirming *Thorsten Nordenfelt (pauper) v The Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] AC 535 at 565; *Smile HC* at [66]). However, they may be upheld if the restriction (on trade) is reasonable, *ie*, with reference to the interests of the parties concerned and reasonable in reference to the interests of the public. These two aspects of reasonableness are distinct (*Man Financial* at [77]; *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 at [44]).

Whether CCL APAC had any legitimate interest to protect

47 It is established that there cannot be a bare and blatant restriction of the freedom to trade. There must always be a legitimate proprietary interest, over and above the mere protection of the employer from competition. The restrictive covenant must not go further than what is necessary to protect the interest concerned (*Man Financial* at [79]).

48 Mr Andre Maniam, SC ("Mr Maniam"), counsel for CCL APAC, took the point that the defences did not allege that CCL APAC had no legitimate interest to protect by way of the NCC. Instead, the defendants alleged that the NCC was too vague, and its duration and geographical scope were wider than reasonably necessary to protect CCL APAC's legitimate interests. Accordingly, Mr Maniam submitted that it was not open to the defendants to allege that CCL APAC had no legitimate interest to protect.

49 I am of the view that this is a valid submission and, for that reason alone, the defendants were not entitled to make that allegation. Nevertheless, in case I am wrong and as some time was spent on this allegation at trial and in submissions, I will deal with it in my judgment.

50 I would also mention that the defendants sought to rely on the fact that CCL US' employees in other jurisdictions, generally speaking, were not bound by any NCC. The defendants' case was that this showed that CCL US did not have a legitimate interest to protect and neither did CCL APAC. It would also be unfair to hold employees of CCL APAC to the NCC especially when there were instances of employees from CCL US coming to work in Singapore on an *ad hoc* or temporary basis and the latter were not bound by any NCC.

51 I am of the view that this argument does not carry much weight. Mr Draeger had explained why employees of CCL US in other jurisdictions did not have such a provision. His explanation was not challenged. The absence of an NCC for such employees was not necessarily because of an absence of a legitimate interest to protect which would be protected under Singapore law.

52 Mr Tan Chau Yee ("Mr Tan"), counsel for Mr Byrne, argued that the NCC was too wide because

it was found in the employment agreements of all employees of CCL APAC (except for a few in which the NCC was apparently inadvertently left out). He relied on *Hanover Insurance Brokers Ltd v Schapiro* (1994) IRLR 82 ("*Hanover*") at [15], which was cited with approval in *Man Financial* at [106].

53 I agree with Mr Maniam that Mr Tan had misapplied *Hanover*. The passage which Mr Tan was relying on was in respect of a covenant against soliciting or poaching of any employee of the former employer irrespective of expertise or juniority. It was in that context that Dillon LJ in *Hanover* suggested that the covenant was too wide. It was in a similar context that *Man Financial* cited *Hanover* with approval.

54 I am of the view that if CCL APAC has a legitimate interest to protect *vis-à-vis* Mr Jenkins and Mr Byrne, this does not change just because it might not have a legitimate interest to protect *vis-a-vis* employees who are more junior than those two men.

55 There are generally two main interests which have been identified by courts as meriting protection in the context of covenants in restraint of trade: trade secrets and trade connection (*Man Financial* at [81]). The court will construe the contractual wording of the restraint of trade covenant and the surrounding circumstances to ascertain the interest intended to be protected (*Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205 at [22]).

Trade connection

(1) The law

56 It is well-established that the employee must have personal knowledge of (and influence over) the customers of the employer for the employer to claim that an NCC is necessary to protect trade connection (see *Man Financial* at [93] and *Smile HC* at [75]; *Herbert Morris, Limited v Saxelby* [1916] 1 AC 688 at 709).

57 While the extent of the knowledge of, and influence over the customer is a relevant fact, knowledge is immaterial unless it can and is likely to be leveraged in some way by the employee to gain some degree of influence (see *Smile HC* at [75]; *S W Strange Ltd v Mann* [1965] 1 WLR 629 at 641).

58 Apart from knowledge of the employer's customers, there are several other factors which are relevant to the issue of influence (see also the endorsement in *Smile HC* (at [76]) of *Arthur Murray Dance Studios of Cleveland, Inc v Witter* (1952) 105 NE 2d 685 where Hooper J identified two such factors: (a) "employer's hold" (or "institutional hold"); and (b) customer inconvenience). J D Heydon in *The Restraint of Trade Doctrine* (Butterworths, 2nd Ed, 1999) ("Heydon") at pp 93 and 96 also identified several factors which are relevant to the question of influence: (a) the frequency of contact; (b) the place where contacts are made; (c) the seniority of the employee; (d) the nature of the employee's relationship with the customers; and (e) the nature of the goods and services provided. Heydon also noted at p 92 that:

> [i]t is not enough for the employee to simply have *contact with the customers*, or to have access to lists of customers. There must be some element in the employee-customer relationship which causes customers to rely on the employee and to regard the employees as the business to the exclusion of the employer. [emphasis in original]

59 In some cases, however, the courts have upheld covenants prohibiting the employee from soliciting customers of the employers despite the fact that the employee never had personal

knowledge of these customers. In *Gilford Motor Company, Limited v Horne* [1933] Ch 935 ("*Gilford*"), the former managing director was connected to the company from its incorporation and found to be of "primary importance in the business that was carried on by the company" (*Gilford* at 938 and 952). His contract contained a covenant prohibiting him from soliciting persons who were customers of the company or in the habit of dealing with the company during his employment at any time after termination of his employment and engaging in a business similar to that of the company for a period of five years within a 3-mile radius from any premises where the business of the company was carried on. He subsequently set up a business and solicited persons who were customers of the company during his employment with the company. Farwell J was of the opinion that the covenant was too wide to be enforceable because it extended to customers with whom the defendant had no contact at all, including persons who came from time to time to the company to purchase goods. On appeal, the Chancery Division disagreed with Farwell J. Lord Hanworth MR held at 959–960 that:

> ... this covenant was, as in the many scores of cases in which such covenants have been upheld in these Courts, necessary for the protection of the plaintiff company's business; it operated after the determination of the employment and in respect of persons of whom the defendant himself would have the best knowledge, for he was the managing director of the company... this is a covenant which was required for the purpose of reasonably protecting the company's business. It does not go so far as to cover customers who become customers after the managing director has left, and it was a covenant entered into by him with full knowledge of what he was doing, and ... who were the persons included in that phrase...

60 *Gilford* was distinguished by the English Court of Appeal in *M & S Drapers (a Firm) v Reynolds* [1957] 1 WLR 9 ("*M & S Drapers*") in relation to a covenant restraining a collector and salesman from soliciting persons inscribed in his employer's books as customers. The employer in *M & S Drapers* sought to rely on *Gilford* but Hodson LJ held in *M & S Drapers* at 13 that:

> The first task of the court, it has been said, in these cases is to ascertain the nature of the master's business and of the servant's employment. The managing director is not regarded in the same light as the traveller or canvasser.

Lord Denning LJ agreed with Hodson LJ's treatment of *Gilford* (see *M & S Drapers* at 19).

61 In *Spink (Bournemouth), Limited v Spink* [1936] 1 Ch 544 ("*Spink*"), the court upheld a covenant restraining a former director from carrying on the business of the company for five years within a ten-mile radius. The director was in fact the founding partner of the business who was subsequently appointed as permanent director (together with his brother, another founding partner) and joint-manager with his brother.

62 In my view, *Gilford*, *M & S Drapers* and *Spink* do not stand for the general proposition that the employee's seniority in the company or the fact that an employee held a directorship position is determinative of the enforceability of a restraint of trade covenant. This is especially if the employee never had any contact with customers. The courts in *Gilford* and *Spink*, in arriving at their decision, could have been influenced by the fact that the former directors in those cases were with the company since incorporation and customers could thus "regard the employees as the business to the exclusion of the employer" (Heydon at p 92).

63 In relation to sales representatives, it appears that the courts are more willing to recognise that such an employee would be able to exercise a certain measure of influence over the employer's customers (see *G W Plowman v Ash* [1964] 1 WLR 568; *Mills v Dunham* [1891] 1 Ch 576 ("*Mills*"); Heydon at pp 94–95).

(2) Legitimate interest in relation to Mr Jenkins

64 Ms Indranee Rajah, SC ("Ms Rajah"), counsel for Roffey Park and Mr Jenkins, submitted that Mr Jenkins' duties and responsibilities did not "engender the degree of client relationships that would require protection by a restrictive covenant". [note: 113]

65 As stated at [13], Mr Jenkins' evidence was that he did not have frequent and close contact with clients. When CCL APAC first established a relationship with a potential client, he would meet the potential client together with a senior faculty member to introduce the CCL brand and its philosophy of leadership training. An assigned faculty member would then conduct the subsequent design and feedback meetings with clients, and design and deliver the programmes. Mr Jenkins would not be involved in those meetings. [note: 114] Mr Jenkins would also meet and speak with clients at events and functions as CCL APAC's Managing Director and help to co-host occasional half-day or one-day gatherings (or "taster events") which were meant to provide potential clients with a snapshot of CCL's research and methodology. [note: 115]

66 Mr Jenkins also stated that the CCL APAC's clients "identify [CCL APAC] with its stable of faculty, programmes and reputation, not with the Managing Director". [note: 116] According to him, the faculty have the most personal contact with the clients and their employees. Clients want faculty with established reputation or who have published relevant research to design and deliver their programmes. [note: 117] Ms Rajah also submitted that CCL APAC's clients take into account other factors in awarding tenders including: [note: 118]

(a) the reputation of the organisation;

(b) what the clients have been provided with and the willingness of the vendor to devote its resources towards meeting the client's needs and customising programmes; [note: 119]

(c) the representative of the organisation; and

(d) the quality of the faculty.

67 Mr Jenkins also emphasised that CCL APAC had an "institutional relationship" with its clients, and as long as the programmes continued to be relevant and useful to the clients, CCL APAC would not lose its clients even if there were personnel changes in CCL APAC. [note: 120] In addition, CCL APAC's structure militated against a single employee being able to develop and leverage on a client relationship so as to take the client with him or her post-employment. Mr Jenkins also stated that for institutional clients, such as government entities, tender processes are carefully monitored and have rigorous controls to prevent any influence by specific individuals. [note: 121] The selection panel would consist of senior members of the client's management who would seldom be the same persons who met CCL APAC's representatives to discuss their leadership development needs. [note: 122]

68 While I accept that the content of the programme and quality of the faculty are important to CCL APAC's clients, I am not inclined to find that there was no trade connection which would constitute a legitimate interest that CCL APAC would want to protect by the NCC *vis-à-vis* Mr Jenkins.

69 An important factor in this case was that Mr Jenkins was the founding director of CCL APAC who was responsible for building awareness of the CCL brand in Singapore from its early years. Prior to

Mr Byrne being hired on a full-time basis from August/September 2006, CCL APAC's business development team only had Ms Chan (who was employed in 2004) and Jane Koo (who was employed in 2006) to assist in business development. I accept that Mr Jenkins would have had to handle a significant amount of business development, especially before Ms Chan, Mr Byrne and Jane Koo were employed by CCL APAC, and his role would have involved establishing long-term business relationships with clients.

70 Mr Draeger stated that when Mr Jenkins was first employed by CCL APAC, given the size of CCL APAC at that time, Mr Jenkins would have had to do a significant amount of "client-facing". [note: 123] Mr Jenkins also agreed, during cross-examination, that he made a "big contribution" in the business development of CCL APAC in helping to land significant contracts. [note: 124] Given the relationships that Mr Jenkins would have developed, CCL APAC had an interest in ensuring that Mr Jenkins did not take these relationships to a competitor. [note: 125]

71 While I accept that CCL APAC enjoys an institutional relationship with its clients and that multiple stakeholders were engaged with the clients, I am of the view that these facts do not mean that Mr Jenkins has no trade connection for CCL APAC to protect.

72 I conclude that Mr Jenkins would be able to and did acquire personal knowledge and did exercise some degree of influence over CCL APAC's clients that was enough to constitute a legitimate interest for the NCC to protect.

(3) Existence of legitimate interest in relation to Mr Byrne

73 I also conclude that notwithstanding CCL APAC's institutional relationship with clients and the use of multiple stakeholders, CCL APAC had a legitimate interest in protecting trade connection by imposing the NCC on Mr Byrne.

74 As Mr Nathan explained, a Business Development Director ("BDD") such as Mr Byrne is the "main contact point" for the client and manages the client's relationship with CCL APAC. [note: 126] He explained that the BDD would first understand the client's needs for a leadership development initiative through open tender briefing or phone call or meeting with the client. The BDD would then consult a faculty member on how the client's needs could be addressed. The faculty would then prepare a proposal which the BDD would integrate into his proposal for the client detailing the client's needs and objectives, proposed solutions and terms and conditions. There would be follow-up sessions with the client in relation to the proposal, attended by the BDD with or without faculty members to clarify the client's needs. If the client accepts the proposal, the BDD would then finalise the design of the programme with an assigned faculty. These activities would involve close contact and interaction with clients that would enable trade connection to be generated on CCL APAC's behalf.

75 Mr Tan argued that although Mr Byrne interacted with CCL APAC's clients, these interactions did not involve "extensive and highly personal information". Mr Tan also argued that CCL APAC's clients chose their service provider based on the quality of products offered and not their relationship with CCL APAC's employees. [note: 127] In addition, the choice of service provider is made by members of the client's senior management and not the client's representative who would have interacted with CCL APAC's employees.

76 Mr Byrne also emphasised that the faculty member designated to work on CCL APAC's proposals for the specific client is involved in the follow-up meetings and conference calls with the client. [note:

[128] Clients frequently requested to communicate with the faculty member at an early stage to ensure that they were comfortable with the choice of faculty. [note: 129] However, this does not mean that Mr Byrne did not play an important role in developing relationships with CCL APAC's clients. Mr Draeger stated that while the assigned faculty member would be able to provide analysis and insight on programmes, the BDD is responsible for all other aspects of the relationship including addressing clients' queries.

77 I conclude that Mr Byrne did acquire personal knowledge and influence over CCL APAC's clients given the nature of his role in CCL APAC.

78 In an email dated 22 July 2008 to Mr Jenkins and Ms Sabine van Craen, another CCL APAC staff, Mr Byrne himself described his business development role as "highly consultative" and "one of long term engagement for which personal and product credibility are paramount". [note: 130]

79 The evidence also reveals that Mr Byrne had established a close and positive relationship with CSC. Mr Byrne sent an email dated 1 June 2009 to Paul Lim, a representative of CSC who worked with Mr Byrne to develop CCL APAC's programmes for CSC, copied to other personnel from CSC. Mr Byrne informed them in this email that he was leaving CCL APAC, and that this was "all the more regretful given the sheer breadth and depth of my engagements with you all and the huge opportunities for the future". [note: 131] In another email from Mr Byrne to Mr Jenkins dated 26 June 2009, with the subject "Re Paul and CSC", Mr Byrne recounted his conversation with Paul Lim and stated that Paul Lim was "genuinely pleased that I will represent Roffey Park". He also stated: [note: 132]

> ...
>
> In looking at partners, he is always mindful of the local presence and commitment, so was enthusiastic about the seriousness of Roffey Park to establish a strong presence here. From my experience of him, he will keep his options open and look at who would best represent his interests, but also values the relationship...and he voiced that he and his team only this week had said what a pity that I am not working with them...he kind of said his team miss me...how sweet and very flattering!
>
> ...

80 Mr Byrne was also in a position to acquire personal knowledge of CSC's preferences in terms of programme requirements. In an email dated 18 February 2010 from Mr Byrne to Laura McLellan-Crew (who was in Roffey Park's administration) and Sharon Brockway (a consultant or facilitator at Roffey Park), [note: 133] Mr Byrne stated: [note: 134]

> Sharon,
>
> I think you and I can work on the SMP tender as well. It is 3 days and part of that will probably be presented with or by Paul Lim as they include their own 360 in the process...I worked on the last 3 years tenders for this (CCL ran that last 3 years) so can tell you what was done before – and how it went. Budget previously was around US$40K, so around S$55–S$60k. ...

Trade secrets and confidential information

81 CCL APAC claimed that the NCC also prevents disclosure of its confidential information. It did not suggest that the NCC was intended to protect its trade secrets.

82 The law recognises that employers have a legitimate interest in protecting trade secrets through restraint of trade covenants. Cross J in *Printers & Finishers Ltd v Holloway and Others* [1965] 1 WLR 1 at 5 defined trade secrets as information which "can fairly be regarded as a separate part of the employee's stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of his old employer and not his own to do as he likes with". Trade secrets are not the same as confidential information. The learned authors of *Illegality and Public Policy* (Thomson Reuters (Legal) Limited, 2nd Ed, 2009) at para 12.05 explained that confidential information may include, for example, documentation on proposed commercial developments while trade secrets are confined to "more technical matters".

83 In determining whether information constitutes a trade secret or its equivalent, the Court of Appeal in *Man Financial* at [83] affirmed the guidelines set out in *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 ("*Faccenda Chicken*") at 137–138.

84 It is crucial that the trade secret or confidential information sought to be protected is separable from publicly available information, the employee's skills and experience and general practice of the trade (see Heydon at p 76; *Man Financial* at [84]). It has been said that business methods and practices may not constitute trade secrets, but may be considered confidential information. Information can be recognised as confidential or amount to a trade secret even if it is a result of the employer's effort on materials available to the public "[by] the fact that the maker... has used his brains and thus produced a result which can only be produced by somebody who goes through the process" (see Heydon at p 72 citing *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413).

85 Some controversy has arisen as to whether confidential information which does not constitute a trade secret can be protected by a restraint of trade covenant post-employment. The English Court of Appeal in *Faccenda Chicken* held (at 136–137) that "sales information" including customer lists, requirements of customers, prices charged to them and dates of delivery constituted confidential information (not amounting to a trade secret) which could not be disclosed or used by the employee during his employment, but could be disclosed or used after the contract of employment was terminated. The Singapore Court of Appeal in *Man Financial* at [86] noted that the courts in subsequent cases have cast doubt on these views in *Faccenda Chicken* and observed (at [86]) that:

> ... In Singapore, there has been no detailed analysis of the difference in views just outlined. The answer may well lie in the *approach* that is adopted. If one is of the view that full rein should be given to the concept of freedom of contract, an express (as opposed to an implied) covenant ought to be held to be sufficient to prevent either the disclosure or use of the confidential information. If, on the other hand, one adopts the view that it is the *status* of the information concerned that is the critical factor, then the use or disclosure of such information should be allowed after the employment contract comes to an end, as that is when the duty of fidelity owed by the employee to his or her employer simultaneously terminates as well.
>
> [emphasis in original]

86 For present purposes, I will assume that the NCC may be used to protect an employer's confidential information. However, there is another clause in Mr Jenkins' [note: 135] and Mr Byrne's [note: 136] employment agreements that protects CCL APAC's confidential information ("Confidentiality Clause"). I set out the clause in Mr Byrne's employment agreement from which Mr Jenkins' does not materially differ:

PROPRIETARY KNOWLEDGE & CONFIDENTIALITY

Employee recognises that during the term of this Agreement, he may be provided confidential or proprietary information or trade secrets belonging to the Company or its parent organization, its clients, or program participants. These items include, without limitations: the Company or its parent organization's client identities and lists, inventions, processes, formulas and plans; the Company or its parent organization's program designs, methods of instruction and training, methods of providing feedback, and computer program and software; personal data and information concerning program participants; and information about the operations, plans, organizational needs, and processes involved in the Company or its parent organization's businesses, all of which are valuable to the Company or its parent organization, its clients, and program participants, and essential to the Company or its parent organization's business, which is international in scope. Employee agrees that he will not, without the prior written consent of the Company, use, disseminate or disclose, other than to an authorized employee of the Company or its parent organization, any confidential or proprietary information or trade secrets made known to him or her by the Company or its parent organization, its officers, or employees, or learned by him while providing services under this Agreement.

Promptly following the termination of this Agreement for any reason, Employee shall not continue to represent the Company without prior written permission of the Company. It is understood that confidential information and trade secrets do not include knowledge, skills or information which is common to the trade or profession of Employee, information already known to Employee at the time it was obtained from the Company or its parent organization, information which becomes publicly known through no wrongful act of Employee, or is rightfully received by Employee from a third party without restriction.

87 The Court of Appeal has affirmed in *Man Financial* at [92] and *Stratech Systems Ltd v Nyam Chiu Shin (alias Yan Qiuxin) and others* [2005] 2 SLR(R) 579 ("*Stratech*") at [48]–[49] that where there is another clause in the employment agreement that pertains to the protection of confidential information or trade secrets, the employer has to show that an NCC protects a legitimate proprietary interest "*over and above* the protection of confidential information or trade secrets" [emphasis in original] (*Man Financial* at [92]).

88 Mr Maniam sought to dispute this proposition by relying on the case of *The Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026 ("*Littlewoods*") which he argued was not considered by the Court of Appeal in *Stratech*. [note: 137] In *Littlewoods*, the defendant was a former executive director of the plaintiff company, a giant in the mail order business. The defendant played an important part in the compilation of the mail order catalogues and had access to the pricing policies of the company. He had a provision in his employment contract stating that he could not be directly or indirectly engaged in the business of Great Universal Stores, a competitor of the plaintiff, for twelve months after the termination of his contract. There was apparently also a confidentiality clause in his contract (*Littlewoods* at 1043). The defendant resigned from the plaintiff and joined Great Universal Stores. Lord Denning MR, who was in the majority, held that this clause protected a legitimate interest of the plaintiff, being confidential information (*Littlewoods* at 1033):

It is thus established that ***an employer can stipulate for protection against having his confidential information passed on to a rival in trade.*** But experience has shown that ***it is not satisfactory to have simply a covenant against disclosing confidential information*** . The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. ***The difficulties are such that the only***

practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period. That appears from judgment of Cross J in *Printers and Finishers Ltd v Holloway*:

> 'Although the law will not enforce a covenant directed against competition by an ex-employee it will enforce a covenant reasonably necessary to protect trade secrets... If [the managing director] is right in thinking that there are features in [the plaintiffs'] process which can fairly be regarded as trade secrets and which [their] employees would inevitably carry away with them in their heads, then the proper way of the plaintiff to protect themselves would be by exacting covenants from their employees restricting their field of activity after they have left their employment, not by asking the court to extend the general equitable doctrine to prevent breaking confidence beyond reasonable bounds.'

[emphasis added in bold italics]

8 9 *Littlewoods* has been followed in *Turner v Commonwealth & British Minerals Ltd* [2000] IRLR 114 ("*Turner*") and *Thomas v Farr plc* [2007] ICR 932 ("*Thomas*"). In both *Turner* and *Thomas*, the employee was subject to non-solicitation clauses or non-compete clauses in addition to confidentiality clauses. The courts recognised that covenants restraining competition could protect trade secrets notwithstanding that there was also a confidentiality clause in these contracts. The reasoning in these cases appears to be premised on the argument that confidentiality clauses are difficult to police.

90 In *Turner*, Waller LJ held at [18] that:

> ... it does not follow that clause 5.6 must be unreasonable because covenants restraining the use of confidential information or the canvassing of trade connections could be, and indeed in this case were, imposed. It has been recognised in many case that because there are serious difficulties in identifying precisely what is or what is not confidential information, and who may or may not have been a customer during the period of an employee's service, a restraint against competing which is reasonable in time and space will not only be enforceable but the most satisfactory form of restraint. ...

91 In *Thomas*, Toulson LJ (whom Scott Baker LJ and Chadwick LJ agreed with) stated at [41] and [42] of his judgment, that:

> 41 In order to establish that the inclusion of a non-competition clause in an employment contract was reasonably necessary for the protection of the employer's interest in confidential information, the first matter which the employer obviously needs to establish is that at the time of the contract the nature of the proposed employment was such as would expose the employee to information of the kind capable of protection beyond the term of the contract (i.e. trade secrets or other information of equivalent confidentiality). ...
>
> 42 Provided that the employer overcomes that hurdle, it is no argument against a restrictive covenant that it may be very difficult for either the employer or the employee to know where exactly the line may lie between information which remains confidential after the end of the employment and the information which does not. The fact that the distinction can be very hard to draw may support the reasonableness of a non-competition clause. As was observed by Lord Denning MR in *Littlewoods Organisation v Harris* [1977] 1 WLR 1472, 1479, and by Waller LJ in *Turner v Commonwealth & British Minerals Limited* [2000] IRLR 114, para 18, ***it is because there may be serious difficulties in identifying precisely what is or what is not confidential***

information that a non-competition clause may be the most satisfactory form of restraint, provided that it is reasonable in time and space.

[emphasis added in bold italics]

92 The observations in these cases merit consideration by our Court of Appeal. Indeed, one may add that it seems illogical that an employer who does not have the benefit of a confidentiality provision in his employee's contract of employment has a better chance of establishing confidential information as a legitimate interest to protect under an NCC than an employer who has sought to protect his confidential information by the use of dual provisions (*ie*, one specifically to preclude disclosure of such information post-employment and the other to restrict the employee from engaging in a competitive business for a certain duration and within a certain geographical scope).

93 In the meantime, I am bound by the views of our Court of Appeal which would mean that because of the existence of the Confidentiality Clause, CCL APAC would have had to establish some legitimate interest, other than confidential information, to protect by way of the NCC. I have concluded that it has succeeded in establishing this in view of the trade connection interest.

94 In the circumstances, it is unnecessary for me to elaborate on the various categories of confidential information which CCL APAC had raised to justify the validity of the NCC.

Reasonableness

The law

95 In ascertaining the reasonableness of a restraint of trade covenant, the court in *Mills* held at 590 that "where a clause is ambiguous a construction which will make it valid is to be preferred to one which will make it void".

96 However, this canon of construction has sometimes been used by courts to arrive at controversial outcomes. In *Littlewoods*, the covenant which stated, *inter alia*, that the former executive director shall not, for twelve months after termination of his employment with the plaintiff, "[e]nter into a Contract of Service or other Agreement of a like nature with Great Universal Stores Limited *or any company subsidiary thereto*..." [emphasis added in italics]. Great Universal Stores Ltd ("Great Universal Stores") had many companies, of which many had businesses outside the United Kingdom and were not involved in the mail order trade. In considering whether the words "any companies subsidiary thereto" rendered the covenant unenforceable, Megaw LJ held (at 1043) that:

> ... 'Any company subsidiary thereto' means any subsidiary which at any relevant moment of time during the period covered by the covenant is concerned wholly or partly in the mail order business carried on in the United Kingdom.

Denning LJ agreed, holding (at 1037) that limiting words should be read into the clause to limit it to the part of the business that the plaintiff was reasonably entitled to protection. Thus the clause was, in Denning LJ's view, limited to "such part of the business of the [Great Universal Stores] group as operates within the United Kingdom" (*Littlewoods* at 1037). Browne LJ dissented, holding that the clause clearly prevented the defendant from entering into the service of any subsidiary of Great Universal Stores in any of their manifold activities in any part of the world. Despite Megaw LJ's view that the interpretation he adopted did not amount to a rewriting of the contract, this view is, with respect, doubtful.

97 In contrast to the majority in *Littlewoods*, the High Court of Australia in *Butt v Long* (1953) 88 CLR 476 ("*Butt v Long*") took a more cautious approach in considering whether the contractual wording was indeed ambiguous and deserving of a restrictive interpretation. Dixon CJ in *Butt v Long* held at 487 that:

> ... If an evident ambiguity appears from its text it may be proper to take into account the law relating to the validity of covenants in restraint of trade in resolving the ambiguity, but a restrictive interpretation of general words is not to be adopted simply to save a covenant or agreement from invalidity. ...

Fullagar J also expressed at 490–491 that:

> ... The question of the kind of business, the carrying on of which is prohibited by the contract, is a separate and distinct question from the question of the area within which the prohibition is to operate. So far as the former question is concerned, it is, I think, legitimate, in order to determine the scope of the expression 'the business of a trans-shipping agent', to have regard to the nature of the business in fact being carried on at the time of the making of the contract. ... But, when we come to the second question, the fact that the business was being carried on in a particular locality cannot be used to justify reading into the contract a limitation as to the local operation of the prohibition when no such limitation is expressed. The locality of the business in fact carried on can warrant no further inference than that, if the parties had thought of the matter, they would or might have imposed *some* local limitation on the prohibition. What they would or might have thought a sufficient local limitation can be matter only for speculation. ...
>
> [emphasis in original]

98 I agree with the approach taken in *Butt v Long*. As Evershed LJ in *Electric Transmission Ltd v Dannenberg* (1949) RPC 183 held at 188:

> the court is not... inclined by benevolence of interpretation to give such provisions a restricted meaning so as to save them from invalidity, if upon a natural reading of the language, it appears that the employer has sought to extract unreasonably wide covenants.

Application

99 Mr Tan helpfully broke up the NCC in Annex A of his closing submissions which made it easier to read and understand the NCC. Using his Annex A as a guide, I set out the NCC as follows:

> Employee covenants and agrees that
>
> (A) for a period of one (1) year after the termination of this Agreement for any reason, — ***Restricted Duration***
>
> Employee will not, individually, or as an agent, employee, owner, officer, director, executive, consultant, stockholder, partner or otherwise,
>
> (B) within any city in which an office of any client or potential clients of the Company or its parent organization to whom he has generated, designed or delivered a Company or parent company program or other service is located: — ***Restricted Geographical Scope***

(C) Solicit, attempt to solicit or assist in soliciting the delivery of programs or services competitive with any of the programs or services Employee has generated, designed, delivered or provided on behalf of the Company or its parent organization, ***Restricted Activity***

(D) from any of the Company or parent organization clients to whom Employee has generated, designed, delivered or provided programs or other services on behalf of the Company or parent organization under this Agreement (hereinafter the "Base Clients"), ***Restricted Persons***

This subparagraph shall not be construed to prohibit Employee from selling or attempting to sell to the Base Clients any programs or services which do not compete in any way with the Company or its parent organization's Business.

100 In submitting that the NCC was too wide, Ms Rajah compared the NCC with one found in Mr Jenkins' employment agreement with Roffey Park, specifically, clause 13. Clause 13 had various restrictive covenants but the relevant one was clause 13(2) which stated: [note: 138]

13. Restrictive Covenants

...

Following the termination of your employment you shall not:

...

2) for a period of six months solicit or deal with any person, firm or organisation who was, within the period of one year prior to the termination of your employment, a customer or supplier of Roffey Park provided that this restriction shall only apply to customers or suppliers with whom you have had personal dealings or direct management responsibilities and who are not an existing customer or supplier of your new employer

...

101 Ms Rajah suggested that clause 13(2) was not as wide as the NCC in the CCL APAC agreement. On the other hand, Mr Maniam argued that the relevant Roffey Park restrictive covenant was wider than the CCL APAC one in some ways. For example, there was no geographical restriction in the former which also restricted any dealing with the relevant client and not just the generation, design, delivery or provision of competitive programmes.

102 I need only say that a comparison of the two was helpful but was not determinative.

103 As mentioned at [48] above, the defences alleged only that the NCC was too vague and its duration and geographical scope were too wide. Yet in submissions, Mr Tan and Ms Rajah sought to attack the scope of the NCC in other aspects, for example, the scope of the restricted activity, as well. I am of the view that they were not entitled to raise other aspects of attack but, again, in case I am wrong on this point, I will address the other aspects as well.

104 After considering the parties' submissions, I am of the view that the NCC was wider than

reasonably necessary to protect CCL APAC's legitimate interests.

(1) Restricted Duration

105 Ms Rajah and Mr Tan argued that the duration of the prohibition in the NCC was longer than necessary because CCL APAC had failed to provide any rational or reasonable basis why the duration of the NCC was for one year. [note: 139] However, Ms Rajah and Mr Tan did not actually say what a reasonable duration would have been. Naturally, Mr Jenkins, as Chief Executive Officer of Roffey Park, had to accept, for the time being, that the relevant provision of his employment agreement with Roffey Park (*ie*, clause 13) was reasonable, thereby suggesting that in his view, six months was a reasonable duration. On the other hand, Mr Jenkins did also accept the NCC in its entirety when he signed his employment agreement with CCL APAC, although that in itself does not preclude him from now asserting that the NCC in his CCL APAC agreement was an unreasonable restraint of trade.

106 Mr Draeger said that CCL APAC picked a duration between three months and 18 months, the latter duration being considered to be too long to be enforceable. [note: 140]

107 Mr Ryan said that the one year duration was adopted because the client contracts are usually yearly contracts. [note: 141]

108 Mr Maniam also relied on Mr Jenkins' evidence that the amount of time for a tender is between one to four weeks and the award of the contract could be done within six weeks, but in some cases, up to a year. [note: 142] Mr Maniam submitted that since the price in a competitive tender should not be disclosed to competitors, and since a tender process may not be concluded till a year later, such information should remain confidential for more than a year.

109 Yet, no such reason was given by the witnesses for CCL APAC. Indeed, its price in a competitive tender could be captured by the Confidentiality Clause already and there would be no difficulty establishing that that would be confidential information. Furthermore, from the scanty evidence from CCL APAC, it did not seem that the fear of disclosure of confidential information was the reason for the duration of one year for the NCC.

110 In so far as Mr Maniam cited cases in which a one-year restraint was upheld, this did not assist CCL APAC much as such cases were fact specific.

111 From one perspective, a one year restraint might not appear to be too long a restraint. However, the burden was on CCL APAC to persuade the court that this duration was not unreasonable. CCL APAC seemed to have just plucked a figure from the air and that will not do.

112 In the circumstances, I am of the view that it has not discharged its burden on this point and the duration was unreasonable with reference to the parties' interests.

(2) Restricted geographical scope

113 Ms Rajah and Mr Tan also criticised the geographical scope of the NCC as too wide. Mr Draeger confirmed under cross-examination that the NCC prevented a former employee from soliciting business from a client in any city even where CCL APAC or CCL US had no office of its own in that city. [note: 143] For example, if an employee generated a programme for a client in Frankfurt and the client also had an office in Munich, the employee would be prohibited from soliciting the delivery of competitive programmes to the client's office in Munich even if the employee had never dealt with the client's

Munich office before. [note: 144]

114 *Prima facie*, the geographical scope of the NCC seemed too wide. However, Mr Maniam sought to justify its apparent width by the following arguments. In the above example, he suggested that the client contact might move from the client's Frankfurt office to the client's Munich office, hence the need to prevent solicitation from any office in any city where the client might be situated. [note: 145] He also submitted that referrals could be made from one office of a client to another office even if the client contact remained in Frankfurt and CCL APAC was entitled to prevent solicitation of that referral in so far as it involves the delivery of competitive programmes. [note: 146]

115 Significantly, the above arguments were not offered in evidence by any of CCL APAC's witnesses.

116 As regards the argument that a client contact might move from one office to another, it is obvious that the contact may also not move within the one year duration after termination of the employee's service. Secondly, the prohibition was not aimed only at preventing a former employee from contacting the client contact but was much wider than that. It precluded the former employee from attempting to deliver a competitive programme to any other office of the client even if the employee did not seek assistance from his contact. This point also applies to Mr Maniam's argument that referrals could easily be made by the client contact.

117 It is also clear that if a former employee had delivered a programme to a client's Singapore office, he would be precluded within one year post-employment from attempting to deliver a competitive programme to the client's office in, say, Vladivostok even if there was no intention by CCL APAC or CCL US to deliver a leadership programme to that office at the relevant time. Mr Maniam argued that if CCL APAC and CCL US had no interest in delivering programmes to the client's office in Vladivostok, a former employee would not be regarded as having offered programmes competitive with CCL APAC's or CCL US' business if he did so. [note: 147] I do not find this argument persuasive. As the NCC stood, it precluded a former employee from delivering competitive programmes to the client's Vladivostok office for the duration of the prohibition, whether or not CCL APAC or CCL US intended to deliver a similar programme there.

118 In so far as Mr Maniam argued that the geographical scope was not too wide because a client contact in one office may move to another office of the same client or make referrals to another office of the same client, I note that unlike the NCC in Mr Jenkins' employment agreement with Roffey Park, the NCC in the CCL APAC agreement was not restricted to a client whom the former employee dealt with within a period of one year prior to the termination of his employment. Thus, if the former employee had delivered a programme to a client, say, six years before his termination, the former employee was still precluded from delivering a competitive programme to that client or to any other office which that client had in the world for the relevant duration post employment. This in turn also indirectly suggested that the geographical scope was too wide.

119 Although Mr Maniam pointed out that (a) the restraint was in respect of competitive programmes only, *ie*, leadership development programmes, and that this still left an employee with a large range of other endeavours and that (b) the restraint was in respect of Base Clients only, these arguments still did not adequately address the issue about the width of the geographical scope.

120 Mr Maniam relied on *Koops Martin v Dean Reeves* [2006] NSWSC 449 ("*Koops Martin*") in which the Supreme Court of New South Wales held at [86] that "[w]here a restraint prohibits solicitation of specific customers or classes of customers, no area limitation is generally required". [note: 148] In my

view, this statement by the court in *Koops Martin* cannot be a matter of general proposition and does not advance the case of CCL APAC much.

121 In my view, the geographical scope of the NCC was too wide to be reasonable with reference to the parties' interests.

(3) Restricted activity

122 CCL APAC's position, as explained by Mr Draeger during cross-examination, was that the reference to competitive programmes in the NCC meant any "programme targeted at leaders". [note: 149]

123 Ms Rajah and Mr Tan criticised the use of the word "competitive" in the NCC. Mr Tan argued that this was in contrast to the FNBP of SOC Amendment No 1 at para 4(b) in which CCL APAC provided particulars to the effect that a programme is competitive where the target participant group and the objectives of the programmes were similar. [note: 150] Both Ms Rajah and Mr Tan argued that CCL APAC's definition of "competitive" was unreasonably wide as it prevented a former employee who had generated, designed, delivered or provided, say, programme X to a client from generating, designing, delivering or providing another programme, say, programme Y to that client even if CCL APAC did not have a programme Y of their own. [note: 151]

124 Mr Maniam, on the other hand, submitted that the NCC left open "a large range of endeavour" including "selling any leadership programs/ services which does not compete with those programs / services which Mr Jenkins and Mr Byrne had dealt with whilst in CCL APAC". [note: 152] Mr Maniam claimed that "leadership development merely forms *part of* the available talent management / human-resource type work generally" [emphasis in original]. [note: 153]

125 I do not agree with Ms Rajah and Mr Tan that the term "competitive" programmes *per se* rendered the NCC unreasonably wide with reference to the parties' interests. The term has to be read in the context of the NCC as a whole, which restricted a former employee from generating, designing, delivering or providing a leadership development programme to *Base Clients*, and if the persons that former employees were restricted from approaching were not unreasonably wide, the restricted activity *per se* was not too wide.

(4) Restricted persons

126 Ms Rajah submitted that the restriction in relation to Base Clients in the NCC was too wide. According to Ms Rajah, the words "generated, designed, delivered or provided programs or other services" were too broad; these words could extend to a situation where an employee had helped to design a programme but did not meet with the client. [note: 154] CCL APAC's position on the definition of the terms, as explained by Mr Draeger during cross-examination, was that:

(a) "generated" relates to steps taken in the sales and development process, and would include situations where the employee generates interest in CCL APAC's programmes; [note: 155]

(b) "designed" relates to the process of engaging the client to understand their organisational needs, analysing their needs, assembling a solution and evaluating the implementation of the programme, in the context of customised programmes; [note: 156]

(c) "delivered" relates to the facilitation of learning and development goals; [note: 157] and

(d) "provided" is an encompassing term which includes the process of creating and delivering the programme to the client. [note: 158]

127 It seems to me that the words "generated" and "designed" were not limited in the way that Mr Draeger described. These words did extend to employees who had no interaction with the client and had been simply instructed on what to include in a proposal for a leadership development programme for a client. Thus, I find that "generated, designed, delivered or provided programs or other services" was wider than necessary to protect CCL APAC's interests.

128 Ms Rajah also submitted that the NCC extended not just to CCL APAC's clients but to CCL US' clients, and this was unreasonably wide because CCL has clients all over the US and elsewhere in the world. [note: 159] I do not think this criticism is persuasive, given that the prohibition on solicitation of CCL US' clients was limited to those that Mr Jenkins and Mr Byrne had generated, designed, delivered or provided programmes to.

129 Ms Rajah also criticised the inclusion of "potential clients" of both CCL APAC and CCL US in the NCC. [note: 160] Ms Rajah argued that a potential client would be someone who was not yet CCL APAC's client and to whom programmes have not been provided to, and this was wider than necessary to protect CCL APAC's interests. [note: 161] Mr Maniam, on the other hand, argued that the NCC only extended to clients of CCL APAC and CCL US (whether actual or potential) who Mr Byrne and Mr Jenkins had "'*generated, designed or delivered*' a CCL / CCL APAC program / service to" [emphasis in original]. [note: 162]

130 Although Mr Maniam has a point, I have found that the definition of "Base Client", and in particular, its extension to clients to whom the employee had generated, designed, delivered or provided programmes or other services, but have no actual interaction with, was unreasonably wide. In addition, as I have alluded to at [118], the NCC prohibited a former employee who delivered a programme to CCL APAC's or CCL US' client say, six years before termination, from delivering competitive programmes to that client even if he no longer has (due to, for example, the effluxion of time) personal knowledge and influence over that client. I am thus of the view that the scope of the NCC in relation to restricted persons was too wide to be reasonable with reference to the parties' interest.

Doctrine of severance

131 The Court of Appeal in *Man Financial* at [127] held that the court, in applying the doctrine of severance to a restraint of trade clause, must be able to run a "blue pencil" through the offending words "*without altering the meaning of the provision and, of course, without rendering it senseless (whether in a grammatical sense or otherwise)*" [emphasis in original]. The court will not rewrite the contract for the parties (*Man Financial* at [127]).

132 Mr Maniam submitted that in the context of the NCC, the court may adopt the blue-pencil test to sever reference to CCL US if its inclusion was to give the NCC too wide a scope. [note: 163]

133 As intimated above, the problem for CCL APAC is much more than that and the blue pencil test would not save the NCC. The NCC is too wide with reference to the parties' interests for reasons I have stated. It is not necessary for me to consider the public interest. To sever the NCC such as to

make it valid would require a rewriting of the contract between the parties.

Issue 2: Is CCL APAC estopped from enforcing the NCC against Mr Byrne?

134 As mentioned above at [43], the defendants were relying on an estoppel. Specifically, they relied on promissory estoppel to preclude CCL APAC from enforcing the NCC. A party that seeks to raise the plea of promissory estoppel must show that:

(a) there was a promise or representation that is clear and unequivocal by one party to a legal relationship to the other (*Ng Teck Sim Colin and another v Hat Holdings Pte Ltd and another* [2010] 4 SLR 840 at [53]; *Woodhouse AC Israel Cocoa Ltd SA and Another v Nigerian Produce Marketing Co Ltd* [1972] 1 AC 741 at 755; see also Sean Wilken QC and Karim Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) ("Wilken and Ghaly") at para 8.03);

(b) the representee acted in reliance on the representation or promise; and

(c) there was detriment (or more accurately, that it would be inequitable for the representor to go back on his representation).

(See generally, *Lam Chi Kin David v Deutsche Bank AG* [2010] 2 SLR 896 at [50]; Piers Feltham *et al*, *Spencer Bower*,*The Law Relating to Estoppel by Representation* (LexisNexis, 4th Ed, 2004) ("Spencer Bower") at pp 449–486; Wilken and Ghaly at paras 8.39, 8.44–8.45.)

Whether the alleged representations were made by Mr Draeger

135 The defendants alleged that Mr Draeger made the Three Representations to Mr Jenkins and the first time he did so was in May/June 2004 and the second time was on or before 11 September 2006. Mr Jenkins in turn made the Three Representations to Mr Byrne before Mr Byrne signed his employment agreement with CCL APAC on 11 September 2006 which was the commencement date of his employment under the agreement he signed.

136 It was also alleged that Mr Draeger had informed Mr Jenkins that Mr Byrne was not the only employee of CCL APAC to have raised a concern about the NCC and that rather than remove the NCC, Mr Jenkins should simply reassure potential employees not to worry about it. [note: 164]

137 I find that the defendants have failed to establish that Mr Draeger made the Three Representations. I also find that they have failed to establish that Mr Jenkins made the Three Representations to Mr Byrne before Mr Byrne signed his employment agreement with CCL APAC.

Mr Draeger's evidence

138 Mr Draeger stated that his first "rigorous conversation" with Mr Jenkins regarding the NCC was around July 2004 when CCL APAC was looking to employ Ms Chan and Ms Chow [note: 165] to assist Mr Jenkins in his work. [note: 166] Mr Draeger prepared Ms Chan's and Ms Chow's draft employment agreements, which contained the NCC. [note: 167] He left Mr Jenkins and Ms Ford to review the draft employment agreements with Ms Chan and Ms Chow.

139 Mr Draeger stated in his first Affidavit of Evidence-in-Chief ("AEIC") filed on 30 April 2012 that "[d]uring [Mr Jenkins'] / [Ms Ford's] negotiations with [Ms Chan], [Ms Chan] indicated that that she

would like to amend the [NCC] to a clause which would require CCL APAC to compensate [Ms Chan] the number of months' salary equivalent to the number of months that the [NCC] was exercised against her (if any)". [note: 168] Ms Chan sent an email dated 20 July 2004 to Mr Jenkins asking if he "might consider a slight amendment [to the NCC], along the lines of a proposed new clause" attached. [note: 169] Ms Chan's proposed clause stated: [note: 170]

> ... The Company acknowledges that the Employee's main means of livelihood is in the generation and development of key client relationships in Asia and as such cannot be denied reasonable means of livelihood. For this reason, in the event the Company exercises its rights under clause [ ] upon termination of this Agreement for any reason, the Company shall pay the Employee one (1) year's salary as compensation. If the "Period of Non-competition" by the Employee is reduced by the Company for any reasons whatsoever, the Company shall pay the Employee a sum equivalent to the number of months' salary representing the Period of Non-competition by the Employee. ...

140 Ms Chan's request was conveyed to Mr Draeger for consideration and approval. Mr Draeger stated that he made clear to Mr Jenkins and Ms Ford that CCL APAC was not agreeable to Ms Chan's proposed clause. Mr Draeger referred to an email dated 21 July 2004 which he had sent to Ms Ford and copied to Mr Jenkins. [note: 171] The email had an attachment setting out Ms Chan's proposed clause and his response. Mr Draeger's response in the attachment was that: [note: 172]

> I am sorry, but this clause that Carolyn proposes is not going to be viable for CCL. We are not proposing that we would incrementally compensate for a non-compete period with the fairly narrow scope (in our opinion) that we are putting around our non-compete. The scope of our non-compete agreement is confined to programs that would compete with ours and to clients that she has been engaged with in her service with CCL. Since we do leadership training, it is a pretty confined space of competition. There is a vast repertoire of HR "stuff" (including executive placement – Carolyn's current niche) outside of leadership training that would compete with our products and services to provide Carolyn with the means of livelihood. Michael, if I can help in this explanation, I am more than happy to do so. It is not our intent to preclude Carolyn from engaging with clients that she comes to know in the service of CCL. We just don't want her to have the latitude of competing with us in our small niche of leadership development for a year.

Mr Draeger's reference to "CCL" in this email was actually a reference to CCL APAC. Ms Chan eventually accepted her employment contract with no amendment. [note: 173] Mr Draeger stated that given his response to Ms Chan's request in July 2004, it was inconceivable that he would have informed Mr Jenkins of a contrary position in May/June 2004. [note: 174] Mr Draeger stated that he did not make the Three Representations to Mr Jenkins at all. [note: 175]

141 During cross-examination, Mr Draeger stated that he did not believe that he discussed the NCC with Mr Jenkins before July 2004. He also did not recall a meeting with Mr Jenkins in or about May/June 2004 in Greensboro, North Carolina ("Greensboro"), [note: 176] the meeting where the Three Representations were allegedly first made, according to Mr Jenkins (see below, at [144]).

Mr Jenkins' evidence

142 There were a number of inconsistencies in the pleadings (including the Further and Better Particulars) of Roffey Park and Mr Jenkins and in Mr Jenkins' evidence as to when the Three Representations were made by Mr Draeger to him.

143 When Roffey Park first filed its defence on 17 March 2011, it pleaded at para 7(a) that Mr Draeger made the Three Representations to Mr Jenkins in or about 2006 when Mr Jenkins had informed Mr Draeger that a number of potential employees had raised concerns about the NCC.

144 Yet when Roffey Park filed Further and Better Particulars on 15 April 2011 in respect of its defence, it asserted that the Three Representations were made twice, not once. The first time was in or about May/June 2004 at a meeting at CCL US' headquarters in Greensboro, and the second time during a telephone conversation in or about August 2006 when Mr Jenkins was at CCL APAC's office in Singapore and Mr Draeger was at CCL US' headquarters.

145 When Roffey Park filed its Defence (Amendment No 1) on 19 July 2011 (perhaps in response to an amended Statement of Claim) it did not take the trouble to amend its defence to coincide with the Further and Better Particulars furnished on 15 April 2011.

146 As was previously stated (at [1]), an order was made on 4 July 2011 to join Mr Jenkins as a defendant. He was represented by the same solicitors who represented Roffey Park and filed his first defence on 27 July 2011, eight days after Roffey Park had filed its Defence (Amendment No 1). He too asserted at para 7(a) that the Three Representations were made on or about 2006 without mentioning the meeting in Greensboro in May/June 2004 although the Further and Better Particulars furnished on 15 April 2011 by Roffey Park about that meeting must have come from him.

147 Furthermore, there was no amendment of this part of his defence when his Defence (Amendment No 1) was filed on 30 November 2011.

148 When Mr Jenkins executed his first AEIC of 27 April 2012, he still referred to 2006 as the only relevant date. [note: 177] He also suggested that the first two representations (see above, at [34(a)] and [34(b)]) were made explicitly and that he understood that the NCC had never been enforced in the US. [note: 178] In any event, he did not say in his first AEIC that he had repeated the Three Representations to Mr Bryne.

149 In Mr Jenkins' second AEIC of 15 May 2012, he then mentioned that he had discussed Ms Chan's reservations about the NCC with Mr Draeger in 2004 at Greensboro. Mr Draeger responded by making the Three Representations to him and asked him to obtain Ms Chan's consent to the NCC on that basis. However, after he had spoken to Ms Chan, she was still uncomfortable about the NCC and she sent an email dated 20 July 2004 to propose a clause in place of the NCC (as set out at [139]). The email was forwarded by Ms Ford to Mr Draeger, who replied to Ms Ford on 21 July 2004 and copied his reply to Mr Jenkins. [note: 179] Mr Draeger's reply (as set out at [140]) was to disagree with Ms Chan's proposal for any compensation.

150 In Mr Jenkins' second AEIC, he also stated that in or about March 2005, CCL APAC was trying to employ Mr Singh as a Financial Controller and to handle human resource and administrative matters. Mr Singh also asked Mr Jenkins about the NCC and Mr Jenkins informed him about what Mr Draeger had said (about the Three Representations). [note: 180]

151 Mr Jenkins also said in his second AEIC that Mr Byrne queried about the NCC in 2006 before he signed his own employment agreement and he told Mr Byrne about the Three Representations. Mr Jenkins said he told Mr Byrne not to worry about the NCC and Mr Byrne later returned the employment agreement (presumably, after signing it). Mr Jenkins said he called Mr Draeger after his conversation with Mr Byrne to tell him that a number of potential employees had raised concerns about the NCC and Mr Draeger told him to reassure them about the NCC. [note: 181]

152 When Mr Jenkins was cross-examined as to why he had not mentioned the 2004 meeting in his first AEIC of 27 April 2012, he said that at the time he signed his first AEIC, he believed that the Three Representations were made by Mr Draeger in 2006 because that was when Mr Byrne joined CCL APAC. [note: 182] This explanation was not credible given that the Further and Better Particulars of Roffey Park's Defence filed on 15 April 2011, *ie*, one year earlier, had already referred to the 2004 meeting.

153 When Mr Maniam questioned Mr Jenkins on the date of his meeting with Mr Draeger in Greensboro in 2004, he stated that it was likely to be in May 2004 as CCL's management team meetings were normally held at that time. [note: 183] This was not consistent with the sequence of events stated in Mr Jenkins' second AEIC, given that CCL APAC only looked to engage Ms Chan in June 2004. [note: 184] Mr Jenkins admitted that it was possible that the meeting with Mr Draeger in Greensboro was in June, but "maybe a little bit of the end of May" and "little bit beginning of July". [note: 185] Mr Jenkins could not confirm when his discussion with Ms Chan on her draft employment agreement took place. [note: 186]

Mr Byrne's evidence

154 Mr Byrne stated in his first AEIC of 26 April 2012 that in the process of signing his employment agreement, he noted the NCC. [note: 187] He said during cross-examination that he had received the first draft of his employment agreement on 22 August 2006, and another draft on 31 August 2006 (which he later signed). [note: 188] He also said that he had first noticed the NCC on 11 September 2006. [note: 189] As mentioned above, this was the commencement date of his employment under his employment agreement with CCL APAC dated 31 August 2006. Mr Byrne was worried that the NCC might prevent him from using the skills and knowledge that he had acquired over the years if he decided to leave CCL APAC at any point.

155 On the morning of 11 September 2006, [note: 190] Mr Byrne conferred with Ms Chan who told him that she too had concerns about the clause and had raised them with CCL APAC prior to signing her employment agreement. Ms Chan advised Mr Byrne to speak to Mr Jenkins about the NCC. [note: 191] I would mention that Ms Chan did not give any evidence for any of the defendants.

156 Mr Byrne spoke to Mr Jenkins later that morning of 11 September 2006. [note: 192] Mr Jenkins informed Mr Byrne that some other employees had also raised concerns with the NCC. Mr Jenkins stated that he had previously checked with CCL's headquarters and Mr Draeger had advised him that the NCC "was not enforceable and was not deemed to be enforceable even in the United States, and that it was there only as a scare tactic towards employees". Mr Jenkins told Mr Byrne not to worry about the NCC. [note: 193] Ms Chan confirmed with Mr Byrne that she had been told the same by Mr Jenkins. [note: 194] Having felt "some pressure to move ahead as [he] had already started employment with [CCL APAC]" and also having felt reassured by what was told to him, Mr Byrne returned a signed copy of his employment contract with CCL APAC to Mr Jenkins. [note: 195] He signed his employment contract on 11 September 2006. [note: 196]

157 Mr Jenkins' evidence was that he could not remember the date on which he discussed the enforceability of the NCC with Mr Byrne but that it would likely have been some time after 31 August 2006 but before 11 September 2006. [note: 197]

Mr Singh's evidence

158 Mr Singh said in his AEIC of 16 May 2012 that he had approached Mr Jenkins about the NCC before he signed his employment agreement with CCL APAC in 2005. Mr Jenkins told him that the management of CCL US had informed him that the NCC was a standard clause and would not be enforced. In Mr Singh's role as Financial Controller, he had helped to draft agreements for other employees of CCL APAC which also contained the NCC as he was using an existing template (which he thought was based on CCL US' template [note: 198]). However he was under no doubt that CCL APAC would not enforce the NCC.

159 In cross-examination, Mr Singh said that Mr Jenkins was a long-time friend. He and Mr Jenkins were colleagues at INSEAD Executive Education Asia in 2000. [note: 199]

160 He also said that he had in fact informed all senior employees of CCL APAC, including Mr Byrne, that the NCC was not enforceable. [note: 200]

My findings

161 The defendants' case was that (a) Mr Draeger did make the Three Representations to Mr Jenkins in 2004 and in 2006, (b) Mr Jenkins did repeat them to Mr Byrne before he signed his employment agreement, and (c) Mr Byrne did rely on them before he signed the agreement. Yet, it was strange that the meeting of 2004 was "overlooked" on so many occasions as set out above at [143], [145], [147]–[148].

162 This suggests that the reference to the meeting of 2004 was a convenient afterthought by the defendants.

163 There was even stronger evidence against the defendants' allegation that Mr Draeger did make the Three Representations.

164 Mr Jenkins' second AEIC stated that the Three Representations were made before Ms Chan sent her email dated 20 July 2004 and before Mr Draeger sent his email dated 21 July 2004. [note: 201] If, in fact, Mr Draeger had made the representations to Mr Jenkins before Mr Draeger's email dated 21 July 2004, why was it that the tone and contents of that email suggested that CCL APAC was taking the NCC seriously and might well enforce it and why was it that Mr Jenkins raised no surprise at this apparently contradictory email?

165 In any event, the point is that Mr Draeger's email was not consistent with the allegation about the Three Representations.

166 Furthermore, if the NCC was to deter the employees of CCL APAC soliciting Base Clients with competitive programmes, there would be no reason for Mr Draeger to tell Mr Jenkins to inform employees who asked about the NCC that it was only for deterrence and not intended to be enforced. That would undermine the very purpose of the NCC.

167 As regards Mr Singh's evidence, I do not accept that he was as independent a witness as Ms Rajah suggested. As he himself said, Mr Jenkins was his long time friend.

168 His evidence that he had told all senior employees, including Mr Byrne, that the NCC was not

enforceable came as a big surprise especially since Mr Byrne did not claim that Mr Singh also told him that the NCC was unenforceable. [note: 202]

169 Furthermore, it must be remembered that CCL had drawn a distinction between CCL APAC's and CCL US' employees. The latter did not have employment agreements for most of its employees, let alone an NCC provision. If the latter was prepared to proceed without any deterrence for its employees, why would it require CCL APAC to insert the NCC just to deter its own employees but without any intention to enforce? It was unlikely that CCL APAC was going to all this trouble just to deter its employees when its parent company saw no need even to attempt any deterrence.

170 In the circumstances, I conclude that Mr Draeger did not make the Three Representations, whether in the terms as alleged or in substantially the same terms as alleged by the defendants. Since Mr Draeger did not make the Three Representations, it is unlikely that Mr Jenkins would make them on his own accord to Mr Byrne. I thus find that Mr Jenkins did not make those representations to Mr Byrne.

Whether Mr Byrne would have been precluded from asserting promissory estoppel as a matter of law

171 In view of my conclusion as stated in [170] above, it is not necessary for me to decide on a number of legal issues which would have arisen from Mr Byrne's plea of promissory estoppel. However, I would mention them in the light of their importance.

172 The first legal issue would have been whether s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act") would have precluded Mr Byrne from relying on promissory estoppel. If Mr Byrne was not so precluded, a second legal issue would have been whether there must be an existing legal or contractual relationship between the promisee and the promisor before a promissory estoppel may arise. A third legal issue would be whether an entire agreement clause, if properly worded, would be effective in precluding reliance on promissory estoppel. Another issue, which would be more of a factual one, would be whether the entire agreement provision in Mr Bryne's employment agreement with CCL APAC would have been wide enough to preclude his reliance on promissory estoppel.

Issue 3: Whether CCL APAC's pleaded case on loss of chance may be struck out?

173 The pleaded case of CCL APAC on its loss and damage as reflected in FNBP of SOC (Amendment No 1) was as follows:

(a) The defendants' conduct and breaches reduced CCL APAC's chances of being awarded the 2010 MDC; and

(b) By reason of the defendants' conduct and breaches, the 2010 MDC was awarded to Roffey Park, and:

(i) but for the award of the 2010 MDC to Roffey Park, CCL APAC would have been awarded the tenders for the following programmes, which were instead awarded to Roffey Park:

(A) CSC's LDP for 2011 ("2011 LDP");

(B) The 2011 EDB Firefly Leadership Development Programme;

(C) The 2011 Ministry of Health Healthcare Family Leadership and Policy Perspectives Programme;

(ii) Further and/or alternatively, CCL APAC's chances of being awarded the programmes in sub-paragraph (i) above were reduced.

(a) (All references to programmes include the renewal options contained therein.)

174 As can be seen, CCL APAC's claim for loss was in respect of four programmes:

(a) the 2010 MDC;

(b) the 2011 LDP;

(c) the 2011 EDB Firefly Leadership Development Programme; and

(d) the 2011 Ministry of Health Healthcare Family Leadership and Policy Perspectives Programme.

175 Its claim for the 2010 MDC was that the defendants' conduct reduced its chances of being awarded that programme. In other words, it did not allege that the defendants' conduct did in fact cause it not to be awarded that programme.

176 As regards the other three programmes, CCL APAC alleged that but for the award of the 2010 MDC to Roffey Park, it would have been awarded the other three programmes which were instead awarded to Roffey Park. This part of its claim is not to be decided by me at this stage. As an alternative claim, CCL APAC alleged that its chances of being awarded the other three programmes were reduced because the 2010 MDC was awarded to Roffey Park. This is similar to its claim for a reduction in its chances of being awarded the 2010 MDC.

177 The claim of CCL APAC on loss of chance therefore pertained only to the reduction of its chances of being awarded the 2010 MDC and its alternative claim of a reduction of its chances of being awarded the other three programmes.

178 I am of the view that such a claim may be maintained and accordingly should not be struck off.

179 The crux of the submissions of Mr Tan and Ms Rajah was that this was not a case in which CCL APAC did not have a chance to tender for any of the four programmes. It did tender for each of them but was unsuccessful. Therefore, they submitted that CCL APAC must establish that it would have been awarded the four programmes but for the defendants' conduct. This is not a case where CCL APAC can proceed on the basis of a loss of chance type of claim as CCL APAC was not completely deprived of the chance to tender for the programmes.

180 On the other hand, Mr Maniam argued that CCL APAC had lost the chance to compete without unfair exploitation by Mr Jenkins or Mr Byrne of the relationship which they had developed with CSC and/or of the confidential information which they had access to whilst in the employment of CCL APAC. Accordingly, CCL APAC was not obliged to establish that it would have been awarded each and

every one of the four programmes but for such conduct. It only had to establish that it had lost the chance to be awarded the programmes. It was sufficient for it to establish that it had a real or substantial chance which was not speculative.

181 It seemed to me that the attempt by CCL APAC to characterise its loss as a loss of chance to compete without unfair exploitation did not change the true nature of its claim which was that it was claiming that its prospect of being awarded each of the programmes was reduced because of the conduct complained of.

182 Much argument was also made by the parties as to whether the question of causation was one of historical fact or an answer to a hypothetical question. Mr Tan and Ms Rajah argued that it was the former so that CCL APAC had to establish that it would have been awarded the four programmes but for the conduct complained of while Mr Maniam argued that it was the latter so that CCL APAC only had to establish that it had a real or substantial chance rather than a speculative one of being awarded the four programmes. Each side relied on many cases, some of which were cited by both parties for opposing propositions.

183 In *Davis (AP) (suing as widow and administratrix of the estate of Kenneth Stanley Davies, decd) v Taylor* [1974] AC 207 ("*Davies*"), the plaintiff's husband was killed in a road accident caused by the defendant's negligence. They were childless. She had deserted him five weeks before his death and thereafter, he learned about her adultery with a fellow employee. He tried to effect reconciliation with her but she refused. Shortly before his death, he had instructed his solicitor to institute divorce proceedings.

184 The plaintiff made a claim as widow and administratrix of the husband's estate. Her claim for dependency failed because the court of first instance found that she had not proved that reconciliation with her husband was more probable than not.

185 I now cite some well-known passages from the judgment of Lord Reid in the House of Lords where he said in *Davies* at 213:

> But here we are not and could not be seeking a decision either that the wife would or that she would not have returned to her husband. You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent.: sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51 per cent. and a probability of 49 per cent.
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> ...
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> If the balance of probability were the proper test what is to happen in the two cases which I have supposed of a 60 per cent. and a 40 per cent. probability. The 40 per cent. case will get nothing but what about the 60 per cent. case. Is it to get a full award on the basis that it has been proved that the wife would have returned to her husband? That would be the logical result. I can see no ground at all for saying that the 40 per cent. case fails altogether but the 60 per cent. case gets 100 per cent. But it would be almost absurd to say that the 40 per cent. case gets nothing while the 60 per cent. case award is scaled down to that proportion of what the award would have been if the spouses had been living together. That would be applying two different rules to the two cases. So I reject the balance of probability test in this case.

The House of Lords found that while the plaintiff could arguably make a claim for loss of chance, she had not shown any significant chance or probability of reconciliation with her husband before his death.

186 Next I come to *Spring v Guardian Assurance PLC and Others* [1995] 2 AC 296 ("*Spring*"). In that case, an employer had negligently given its employee a bad reference and consequently his prospective employer refused to appoint him to a certain position. Lord Lowry said at 327:

> Once the duty of care is held to exist and the defendants' negligence is proved, the plaintiff only has to show that by reason of that negligence he has lost a reasonable chance of employment (which would have to be evaluated) and has thereby sustained loss: *McGregor on Damages*, 14th ed. (1980), pp. 198–202, paras. 276–278 and *Chaplin v. Hicks* [1911] 2 K.B. 786. He does not have to prove that, but for the negligent reference, Scottish Amicable *would* have employed him. ...
>
> [emphasis in original]

187 I should mention that the remarks of Lord Lowry were made *obiter* and the legal issues in *Spring* were not the same as those before me.

188 I now come to *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602 ("*Allied Maples*"). There the defendant solicitors had acted for the plaintiff buyers of a property. They negligently allowed the deletion of a warranty from the draft contract. Subsequently, liability arose and the plaintiff could not sue the seller in view of the deletion and sued the defendants instead. Stuart-Smith LJ considered what was necessary to be established as a matter of causation. He mentioned three types of situations and, for present purposes, I need only mention the third type ("the Category 3 test") of which he said, at 1611:

> (3) In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on balance of probability, as Mr. Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?
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> Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr. Jackson's submission is wrong and the second alternative is correct.

189 Stuart-Smith LJ's analysis was cited with approval by the Court of Appeal in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and another* [2005] 1 SLR(R) 661. The majority judgment delivered by Chao Hick Tin JA cited at [136] the Category 3 test and analysis with approval and the minority judgment of Yong Pung How CJ cited at [47] and [48] all the three tests also with approval. The majority and minority parted company on the evaluation of the facts but not on this aspect of the law.

190 The tripartite framework was endorsed again by the Court of Appeal in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR(R) 460 at [147] and in *Auston International Group Ltd v Ng Swee Hua* [2009] 4 SLR(R) 628 at [38].

191 I come now to two decisions. The first is by Lightman J of the High Court in *Bank of Credit and*

Commerce International SA (in liquidation) v Ali and others (No 2) [1999] 4 All ER 83 ("*BCCI HC*") and the other by the Court of Appeal in *Bank of Credit and Commerce International SA (in liquidation) v Ali and others (No 2)* [2002] 3 All ER 750 ("*BCCI CA*"). I will refer to the bank involved as "BCCI".

192 The facts in that case are set out in the headnote of the law report for *BCCI CA*. It states:

> When the respondent bank collapsed in 1991, it was discovered that it had been conducting a dishonest and corrupt business for many years. That discovery was widely publicised. Subsequently, several hundred former employees of the bank, who had lost their jobs as a result of its collapse and had failed to find further employment, brought claims for damages against it. They contended that the dishonest conduct of the bank's business had constituted a breach of the implied term of trust and confidence in their employment contracts, and that, by placing a stigma on them, the breach had been the cause of their failure to find further employment. Five of the claims, including those of the two appellants, were tried as test cases. After considering expert and statistical evidence, the judge concluded that there was no general prejudice against former employees of the bank; rejected the contention that loss or damage should necessarily be assumed or inferred; and held that the attitude of a prospective employer had to be proved in every particular case. In the appellants' cases, he found that there were compelling reasons why they had remained unemployed, and that stigma was not one of them. He therefore dismissed their claims. ...

193 Lightman J cited the tripartite framework of Stuart-Smith LJ with approval at [66] and [67]. He applied the third situation in the case of future applications for jobs. However, as regards past adverse decisions by prospective employers, he considered two alternatives. He said at [67] and [70] that:

> 67. ... More difficulty exists as to what approach is required in the case of past adverse decisions by prospective employers. The two alternatives are: (1) to consider the hypothetical situation of each of such applications having proceeded in the absence of stigma, and decide whether such applications had a real prospect of success and (if so) whether stigma deprived the applications of that prospect of success; or (2) to examine the historical facts in respect of those applications and determine whether stigma was in fact a cause of the adverse decision. I have found this question difficult...
>
> ...
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> 70. As a matter of principle the litmus test must be: is it possible for the court to decide whether as a matter of historical fact the claimant would have obtained the advantage or avoided the detriment in question in the absence of the wrongdoing of the defendant? Two situations may arise. (1) The wrongdoing may be such that this exercise is impossible. The anticipated advantage or loss may have depended on the outcome of a decision on the merits by the third party which the wrongful act precluded from ever being made eg the judgment on the plaintiff's charms in a beauty contest from which she was wrongfully excluded (as in *Chaplin v Hicks*) or the trial by the court of the merits of a claim in damages which cannot take place because the claim has become statute barred by reason of the negligence of solicitors (as in *Kitchen v Royal Air Force Association* [1958] 2 All ER 241, [1958] 1 WLR 563). To meet that special situation the law allows the claimant to prove loss in the form of the deprivation of a real chance of success in the hypothetical situation that such a decision on the merits had been made. (2) The wrongdoing may be such that, whilst the relevant decision-making process was completed and a decision made on the merits, by reason of the wrongdoing the decision-maker may have taken into account matters which (but for the wrongdoing) he would not have done. In

that case it is possible (albeit it may be difficult) to investigate as a matter of historical fact what, if any, part the matters in question played in the decision-making. Where this is the situation the claimant must prove that the matters in question were a cause of the absence of a decision in his favour.

194 Lightman J then considered some cases and said at [76]:

> 76. Applying these principles, in the case of any past application which a prospective employer refused to consider on the merits because of stigma, the correct approach is to decide whether stigma thereby caused the Employee to lose a real or measurable chance of his application being successful. But in the case of all past applications which were considered on their merits (albeit these merits may have included stigma) and were not excluded from consideration by reason of stigma, the correct approach is to decide whether stigma was an effective (sole or concurrent) cause of the application not succeeding. ...

195 Lightman J concluded that for past applications which were considered on their merits, the employees had failed to prove that stigma was an effective cause of their unsuccessful applications. Alternatively, the employees had failed to establish that the stigma had a real or substantial effect on their past job applications (see *BCCI HC* at [76] and [270]). Likewise, for future job applications, Lightman J was of the view that in general, no applicant for a job could be said to have a real or measurable chance of obtaining the job applied for in respect of every and any application (see *BCCI HC* at [81]).

196 Not surprisingly, Mr Tan and Ms Rajah relied on [70] and [76] of Lightman J's judgment in *BCCI HC*.

197 In *BCCI CA*, Robert Walker LJ disagreed with the two different categories drawn by Lightman J in respect of past applications. Walker LJ said at [88] and [91]:

> [88] In my respectful view the judge was wrong in discerning any real difference in principle between his two categories. I consider that in all these cases there is a single question: but for the defendant's breach of duty, what would the third party have done (and what would have been the outcome for the claimant)? This question is necessarily hypothetical because the breach of duty has sent the actual course of events down a different turning. The court may sometimes be able to answer the hypothetical question with a high degree of confidence and some precision. In other cases it may have to take a broad view on a number of imponderables. But the sharp distinction between 'no decision' and a (flawed) 'decision made on the merits' cannot in my view be supported either on principle or on authority. ...
>
> ...
>
> [91] That was the position of most of those made redundant by BCCI's liquidators. It is clear from the evidence that they reacted in different ways to their predicament. Some were resentful and negative about seeking new employment. Some were overambitious (or simply unrealistic) in applying for posts for which they were insufficiently qualified. A large number of them did avail themselves of the services of Coutts' Career Consultants Ltd (Coutts) and many of them were successful in obtaining a job within a reasonably short time. But in every case the question to be answered was whether stigma from a jobseeker's previous employment with BCCI had (i) a real (or substantial) effect and (ii) if so, how great an effect on his obtaining employment. ...

198 I pause here to address a submission which Mr Tan made in respect of the last sentence of

[91] of Walker LJ's judgment. [note: 203] Mr Tan submitted that the last sentence meant that the learned judge was applying the normal test for causation and not the Category 3 test of Stuart-Smith LJ in *Allied Maples*, *ie*, not the loss of chance test. In the light of this, Mr Tan also submitted that [88] of Walker LJ's judgment stating that the question is "necessarily hypothetical", for both categories of cases mentioned by Lightman J, also did not mean that Walker LJ was applying the Category 3 test. [note: 204]

199 I am of the view that Mr Tan had misconstrued the last sentence of [91] of Walker LJ's judgment and then applied the misconstruction to [88] thereof. In my view, Walker LJ at [88] was clearly applying the Category 3 test as was the case in [91]. The reference in [91] to the phrase "a real or substantial effect" is a reference to the substantial chance, as opposed to a speculative chance, mentioned by Stuart-Smith LJ in the Category 3 test. The phrase does not mean that the employees had to establish that they would have obtained employment on a balance of probabilities but for the alleged stigma.

200 Ms Rajah also cited that the second sentence of [88] of Walker LJ's judgment supported her arguments. [note: 205] That sentence reads: "I consider that in all these cases there is a single question: but for the defendant's breach of duty, what would the third party have done (and what would have been the outcome for the claimant)?" She submitted that this sentence meant that the correct test was what the third party would have done "but for" the breach and not the "loss of a chance" test. I do not agree with her interpretation. The next sentence in [88] states that the "question is necessarily hypothetical". It will also be recalled that Walker LJ saw no distinction between Lightman J's two categories. In my view, Walker LJ was adopting the Category 3 test for the two categories of cases.

201 As for Pill LJ in *BCCI CA*, he stated at [12] that he agreed with Walker LJ's views at [88], and that Lightman J adopted an over-elaborate approach to the correct test to be applied for causation. However, Pill LJ also said at [24] and [25] that "the loss of a chance" test did not apply in this case:

> [24] I do not consider that the judge was obliged to apply the loss of a chance principle in the present case. It is a useful tool for applying the general principle, that it is for the claimant to prove causation, in circumstances in which the consequences of the breach cannot easily be determined because it is impossible or extremely difficult to reconstruct events on the basis that there had been no breach.
>
> [25] In the present cases it may be said that it cannot be known with certainty what would have happened if the appellants had applied for jobs without having the alleged stigma of previous employment by BCCI. The relevance of that alleged stigma to the events in question was, however, analysed in the most detailed and comprehensive way at the trial. The effect, if any, upon their employment prospects of the appellants having previously been employed by a corrupt employer was capable of analysis and was thoroughly analysed. Upon the judge's findings, to which it will be necessary to refer in some detail, he was not obliged to assess the loss of a chance; he found on the evidence that stigma played no part in the failure to obtain employment. Had there been evidence in *Kitchen*'s case that the claim against the original wrongdoer had no chance of success or in the *Allied Maples* case that the vendor would in no circumstances have renegotiated, the judges in those cases need not have applied the loss of a chance principle as they did.

202 Mr Tan relied on the first sentence of *BCCI CA* at [24] and argued that Pill LJ was of the view that the Category 3 test should not be applied in the BCCI case. [note: 206] Ms Rajah also emphasized

that sentence. [note: 207] Yet I note that this view was expressed by Pill LJ because the evidence allowed Lightman J to conclude that stigma played no part in the plaintiffs' failure to obtain employment. Indeed, Pill LJ went on to say in the second sentence of *BCCI CA* at [24] that the loss of a chance principle is a useful tool where the consequences of the breach cannot easily be determined. This suggests that if there were still to be a trial and evidence may or may not come from CSC on whether and how the conduct complained of played a part in its decision, one would have to wait to see how the overall evidence pans out before concluding that the loss of a chance claim fails.

203 Jonathan Parker LJ was the third member of the Court of Appeal. He said at [97] and [98]:

> [97] Where the financial loss alleged takes the form of, or includes, loss of a chance, causation of damage is not to be confused with assessment of damage. On ordinary principles, causation must be proved on the balance of probabilities. In the instant case, either the stigma was an effective cause of the alleged loss or it was not (see *Nestle v National Westminster Bank plc* [1994] 1 All ER 118 at 141, [1993] 1 WLR 1260 at 1283–1284 per Leggatt LJ, a passage quoted by the judge [1999] 4 All ER 83 at 111, [1999] IRLR 508 at 521 (para 69)). There is no room for any half-way house in relation to causation: no room, that is to say, for any percentage calculation to reflect the chance (possibility) that the stigma may have been an effective cause of the alleged loss.
>
> [98] Where causation is proved, the court may, if and to the extent that it is appropriate to do so on the facts of the particular case, assess the resulting loss by adopting a percentage figure to reflect loss of a chance. Such an approach to the assessment of damage is likely to be appropriate in relation to future events, and it may, depending on the facts of the particular case, be appropriate in relation to past events ...

204 It seems to me that the approach of Parker LJ appears to run counter to the observation of Lord Reid in *Davies* where Lord Reid discussed about a 60 per cent and a 40 per cent probability and he cautioned about applying two different rules. Indeed no counsel before me appeared to have adopted the approach of Parker LJ as such although he is cited, for example, by Mr Tan as agreeing with Pill LJ that the "normal test of causation" applies. [note: 208] In the case before me, the battle lines are drawn between whether CCL APAC must establish that it would have been awarded the four programmes but for the defendants' conduct or whether it only had to establish that it had a real or substantial chance of being awarded the four programmes but for the defendants' conduct.

205 As mentioned above, Mr Tan and Ms Rajah stressed that this was not an instance of CCL APAC being completely deprived of its chance to tender for each of the four programmes. It did submit its tender. Therefore this was not truly a loss of chance type of case. It was also submitted that this was not a situation of an answer to a hypothetical question but rather an analysis of a historical fact because CCL APAC did submit its tender and CSC did render its decision. Mr Tan and Ms Rajah relied on [70] of *BCCI HC*. [note: 209]

206 In my view, the following two illustrations may assist. Suppose a building contractor intends to submit a tender for a project. However its consultant negligently informs it that the closing date for submission of tenders is a date later than the actual closing date. Consequently, the building contractor misses the actual closing date and, upon realising this, does not submit any tender.

207 In the second illustration, the consultant provides various information to the contractor to be used for the submission of its tender. However, some of the information supplied is incorrect. The

contractor submits its tender using the incorrect information which is material to the developer. The developer eventually awards the contract to a competitor.

208 If Mr Tan's and Ms Rajah's distinction were valid, it would mean that the loss of chance approach is the correct one for the first illustration since the contractor did not even submit its tender but is not the correct approach for the second illustration since the contractor did submit its tender.

209 I do not think that such a distinction is valid. As Walker LJ said in *BCCI CA* at [88], the sharp distinction between no decision and a flawed decision (by CSC) cannot be supported. In the second illustration above, the decision of the developer not to award the contract to the plaintiff contractor would be a flawed one since it is based on a flawed tender.

210 Using Lightman J's approach one may suggest that it is possible (albeit it may be difficult) to investigate as a matter of historical fact what part the conduct of Mr Bryne and of Mr Jenkins played in the decisions by CSC to award the four programmes to Roffey Park. On the other hand, Walker LJ was of the view that the question is necessarily hypothetical even though the court may sometimes be able to answer the hypothetical question with a high degree of confidence. I agree with Walker LJ's view.

211 It seems to me that while the part that Mr Bryne and Mr Jenkins played in the decisions by CSC may be said to be a historical fact (in the sense of being past in time), it is not necessarily the same thing to ask what CSC would have decided if Mr Bryne and Mr Jenkins played no part at all. These two aspects are not simply opposite sides of the same coin although the roles these two men played may assist to answer the question what the CSC would have decided without their participation. However, the answer may not be obvious especially if these two men were not the only men in Roffey Park who helped to put together and present Roffey Park's tenders to CSC. In my view, what CSC would have decided, if not for the involvement of these two men, is a hypothetical question even though it may be answered with some degree of confidence, depending on the evidence.

212 Ms Rajah also argued that CCL APAC's alleged real and substantial chance of obtaining the 2010 MDC is of no value if it can be proven that the conduct of Mr Jenkins and Mr Bryne had no effect on the mind of CSC [note: 210]. It seems to me that this argument misses the point. If there were a trial and there is evidence to show that the conduct in question had no effect, that merely demonstrates that CCL APAC had no real or substantial chance of obtaining the 2010 MDC (or any of the other programmes in question). In other words, CCL APAC would have failed to establish the real or substantial chance under the loss of a chance test. That is different from saying that that test is obviously inapplicable in the first place. Indeed, Mr Maniam did not suggest that if the evidence demonstrated that the conduct had no effect on CSC's decisions, CCL APAC would still be able to succeed under this type of claim.

213 I should add that I do not accept Ms Rajah's argument [note: 211] that a claim for a loss of chance has no application to events that are past in time.

214 There is one other aspect I would like to touch upon as it may be of assistance in general to litigants. Mr Maniam suggested that it was still open to the defendants to show at trial by adducing evidence that CCL APAC had no chance of being awarded the 2010 MDC programme. [note: 212]

215 That submission may suggest that the evidential burden is on the defendants to establish this. My tentative view is that that suggestion is not correct. As a starting point, it is for a plaintiff to

prove the loss and damage it suffered and not for a defendant to disprove it. If, for example, neither side chooses to call a relevant representative from CSC to give evidence (assuming that the claim were still to proceed to trial) it may be that the trial judge should draw an adverse inference against the plaintiff since the legal and evidential burden is on the plaintiff to adduce sufficient evidence to establish that it has a real or substantial chance of being awarded the four programmes. It seems to me that a rationale for allowing a claim for loss of chance to be made is that it is at times impossible or impractical to call evidence as to what the third party would have done. Where such evidence is available, a plaintiff in a loss of chance claim should not have the option of refusing to call such evidence without any adverse consequence just because it believes it has a lower threshold to cross.

216 In *BCCI HC*, Lightman J observed that the plaintiffs did not adduce evidence from the third party employers. While I agree with the observation of Pill LJ in *BCCI CA* at [16] and [44] that it is not always necessary to call the third party to give evidence, I would suggest that this is not a case where CCL APAC can safely say that it is not necessary to call the third party to give evidence. I am also suggesting that an adverse inference should be drawn against CCL APAC if it declines to call such evidence.

217 It may well be that CSC may be unwilling, or even annoyed, that it is being dragged into litigation which it considers to be none of its own business. It may even be more than annoyed at being made to explain and elaborate on how it would have decided to award the programmes if the two men played no role in the matter. While business considerations may deter CCL APAC from calling a relevant representative from CSC as a witness, such considerations may also apply to the defendants. CCL APAC bears the legal and evidential burden of proving its loss.

218 It should be for CCL APAC to choose which is more important to it, *ie*, to make the claim and present the best evidence available or not to make the claim and avoid annoying its client or prospective client.

219 As Lightman J held in *BCCI HC* at [80], the decision in *Chaplin v Hicks* [1911] 2 KB 786 does not offer a free pass so that the loss of practically any chance will be sufficient to found a claim to recoverable loss.

Summary

220 As I have ruled against the enforceability of the NCC, CCL APAC will not be able to proceed with its claim even though its claim for loss of chance in respect of the reduced prospects of success would have been a valid head of claim.

221 I will hear the parties on costs in respect of the preliminary issues and on any consequential orders to be made.

222 I thank counsel for their assistance.

[note: 1] Plaintiff's ("Pf") Opening Statement dd 29/6/2012, para 1

[note: 2] ORC 3068/2011

[note: 3] Mr Draeger's 1st affidavit of 30/4/2012 ("Mr Draeger's first AEIC"), para 1

[note: 4] Mr Ryan's affidavit of 25/5/2012, para 1

[note: 5] Ms Ford's 1st affidavit of 3/8/2012 ("Ms Ford's AEIC"), para 1

[note: 6] Ms Ford's AEIC, para 1

[note: 7] Pf's Lead Counsel Statement, point III(2) of Part Two

[note: 8] Statement of Claim (Amendment No 2) ("SOC") dd 11/7/2012; Pf's Opening Statement dd 29/6/2012, para 6

[note: 9] Mr Nathan's 7th affidavit, ("Mr Nathan's first AEIC"), para 8

[note: 10] Mr Jenkins' 9th affidavit of 27/4/2012 ("Mr Jenkins' first AEIC"), para 1

[note: 11] Mr Draeger's 1st AEIC, para 8

[note: 12] Mr Draeger's 1st AEIC, para 7

[note: 13] Mr Draeger's 1st AEIC, paras 8 and 17

[note: 14] Mr Jenkins' first AEIC, para 12

[note: 15] Mr Jenkins' Defence (Amendment No 1) ("3Df's Defence"), para 15(b)

[note: 16] SOC, para 2A

[note: 17] Mr Nathan's first AEIC of 30/4/2012, para 3

[note: 18] Mr Byrne's 8th affidavit of 26/4/2012 ("Mr Byrne's first AEIC"), paras 18 and 19

[note: 19] Mr Byrne's first AEIC, para 20; 5AB, p 2413

[note: 20] SOC, para 2A; Mr Byrne's Defence (Amendment No 2) ("1Df's Defence"), para 4

[note: 21] Transcript, 11/9/2012, p 10, lines 24; commencement date on contract also 11/9/2006 see 5AB, p 2413

[note: 22] Transcript, 11/9/2012, p 10, lines 23–28

[note: 23] Transcript, 11/9/2012, p 38, lines 7–10; 1Df's Defence, para 4

[note: 24] Roffey Park's Defence (Amendment No 2) ("2Df's Defence"), para 4

[note: 25] 2Df's Defence, para 4

[note: 26] SOC, para 5

[note: 27] SOC, para 4

[note: 28] 1Df's Defence, para 23; Pf's Lead Counsel Statement, Part Two, point III(16)

[note: 29] 5AB, pp 2485–2500

[note: 30] 3AB, p 1332; see also 3AB, pp 1353–1354

[note: 31] SOC, para 5

[note: 32] Transcript, 11/9/2012, p 6, lines 27–29

[note: 33] Mr Draeger's first AEIC, para 17

[note: 34] Mr Draeger's first AEIC, para 19

[note: 35] Mr Jenkins' first AEIC, para 5

[note: 36] Mr Jenkins' first AEIC, paras 12 and 85

[note: 37] Mr Jenkins' first AEIC, para 87

[note: 38] SOC, para 2

[note: 39] Mr Byrne's first AEIC, para 33

[note: 40] Mr Byrne's first AEIC, para 30

[note: 41] Mr Byrne's first AEIC, para 31

[note: 42] SOC, para 2(iii); 1Df Defence, para 7

[note: 43] Mr Byrne's first AEIC, paras 32 and 35

[note: 44] Mr Byrne's first AEIC, para 32

[note: 45] 5AB, p 2415

[note: 46] 5AB, p 2325

[note: 47] 5AB, p 2417

[note: 48] 5AB, p 2327

[note: 49] Transcript, 9/7/2012, p 25, lines 25–27

[note: 50] Transcript, 9/7/2012, p 12, lines 11–20

[note: 51] Transcript, 9/7/2012, p 7, lines 1–6

[note: 52] Transcript, 9/7/2012, p 8, lines 13–25

[note: 53] Mr Byrne's 9th affidavit of 24/5/2012 ("Mr Byrne's second AEIC"), para 26

[note: 54] 3Df's Defence, para 12(a) and (b)

[note: 55] 3Df's Defence, para 12(c)(i)

[note: 56] SOC, para 12; 3Df's Defence, para 12(c)

[note: 57] FNBP pursuant to request dated 31/3/2011 by Pf, p 3

[note: 58] 3Df's Defence, para 16

[note: 59] SOC, para 3

[note: 60] SOC, para 13(i)

[note: 61] SOC, para 13(ii)

[note: 62] FNBP to request dated 31/3/2011 by 2Df (Amendment No 1), para 3(a)

[note: 63] SOC, para 13(iii); FNBP to request dated 31/3/2011 by 2Df (Amendment No 1), para 3(a)

[note: 64] SOC, para 13(iv); FNBP to request dated 31/3/2011 by 2Df (Amendment No 1), para 4

[note: 65] SOC, para 13(i); FNBP to request dated 31/3/2011 by 2Df (Amendment No 1), para 1

[note: 66] FNBP to request dated 31/3/2011 by 2Df (Amendment No 1), para 1(a)

[note: 67] FNBP to request dated 27/7/2011 by 3rd Df, para 3(a)

[note: 68] SOC, para 13(ii)

[note: 69] FNBP to request dated 31/3/2011 by 2Df (Amendment No 1), para 2(a)

[note: 70] SOC, para 13(ii)

[note: 71] FNBP to request dated 31/3/2011 by 2Df (Amendment No 1), para 2(a)

[note: 72] SOC, para 13(iii)

[note: 73] FNBP to request dated 31/3/2011 by 2Df (Amendment No 1), para 3(b)

[note: 74] SOC, para 13(iv)

[note: 75] SOC para 13(iii)

[note: 76] FNBP to request dated 27/7/2011 by 3Df, para 4(a)

[note: 77] FNBP to request dated 27/7/2011 by 3Df, para 4(a)

[note: 78] SOC, para 13(iv)

[note: 79] FNBP to request dated 27/7/2011 by 3Df, para 5(a)

[note: 80] SOC, para 11

[note: 81] SOC, para 19; FNBP to request dated 31/3/2011 (Amendment No 1), para 6

[note: 82] 1Df's Defence, para 13

[note: 83] 1Df's Defence, para 14

[note: 84] 1Df's Defence, para 15

[note: 85] 1Df's Defence, para 16

[note: 86] 1Df's Defence, para 17

[note: 87] 1Df's Defence, para 18

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[note: 89] 1Df's Defence, para 20

[note: 90] 1Df's Defence, para 21

[note: 91] 1Df's Defence, para 33

[note: 92] 1Df's Defence, para 32

[note: 93] 3Df's Defence, para 13(c)

[note: 94] 1Df's Defence, paras 35 and 36

[note: 95] 1Df's Defence, para 25

[note: 96] 1Df's Defence, para 27

[note: 97] 1Df's Defence, para 27

[note: 98] 1Df's Defence, para 27

[note: 99] 3Df's Defence, para 3

[note: 100] 3Df's Defence, para 3

[note: 101] 3Df's Defence, para 13(a)

[note: 102] 3Df's Defence, para 13(b)

[note: 103] 3Df's Defence, para 13(c)

[note: 104] 3Df's Defence, para 13(d)

[note: 105] 3Df's Defence, para 7A

[note: 106] 3Df's Defence, para 7

[note: 107] 3Df's Defence, para 7

[note: 108] 3Df's Defence, para 19

[note: 109] 3Df's Defence para 19

[note: 110] 3Df's Defence para 15(h)

[note: 111] SOC, paras 26 and 28

[note: 112] SOC, para 28

[note: 113] 2Df and 3Df's closing submissions, para 17

[note: 114] Mr Jenkins' first AEIC, para 91

[note: 115] Mr Jenkins' first AEIC, para 92

[note: 116] Mr Jenkins' first AEIC, para 111

[note: 117] Mr Jenkins' first AEIC, paras 55–56

[note: 118] 2Df and 3Df's closing submissions, para 36; see also Mr Jenkins' first AEIC, para 55

[note: 119] Mr Jenkins' first AEIC, para 58; Transcript, 11/7/2012, p 5-6

[note: 120] Mr Jenkins' first AEIC, paras 83–84

[note: 121] Mr Jenkins' first AEIC, para 62

[note: 122] Mr Jenkins' first AEIC, para 66

[note: 123] Pf's closing submissions, para 39(e)

[note: 124] Pf's closing submissions, para 36, Transcript, 17/9/2012, p 38, lines 18–31, p 39, lines 1–2

[note: 125] Mr Draeger's first AEIC, para 21

[note: 126] Mr Nathan's first AEIC, para 14

[note: 127] 1Df's closing submissions, para 79

[note: 128] Mr Byrne's second AEIC, para 10

[note: 129] Mr Byrne's second AEIC, para 11

[note: 130] Pf's closing submissions, para 47(d); Pf's 2nd Supplemental Bundle of Documents Vol 1, p 118

[note: 131] 3AB, p 1315

[note: 132] 3AB, p 1332

[note: 133] Transcript, 11/9/2012, p 38, lines 19–25

[note: 134] 4AB, p 1804

[note: 135] 5AB, p 2326

[note: 136] 5AB, p 2415

[note: 137] Pf's closing submissions, para 76

[note: 138] Exhibit P 5, p 3; Transcript, 17/9/2012, p 61

[note: 139] 2Df and 3Df's closing submissions, para 90; 1Df's closing submissions, para 116

[note: 140] Transcript, 9/7/2012, p 25, lines 28-31

[note: 141] Transcript, 9/7/2012, p 68, lines 9-14

[note: 142] Transcript, 9/7/2012, p 72

[note: 143] Transcript, 9/7/2012, p 17, lines 28–30

[note: 144] Transcript, 9/7/2012, p 18, lines 17–21; 2Df and 3Df's closing submissions, para 86; 1Df's closing submissions, para 107

[note: 145] Pf's closing submissions, para 138(c)

[note: 146] Pf's reply submissions, para 97(a)

[note: 147] Pf's reply submissions, para 97(c)

[note: 148] Pf's closing submissions, para 136

[note: 149] Transcript, 9/7/2012, p 32, lines 7–21

[note: 150] 1Df's closing submissions, para 103

[note: 151] 1Df's closing submissions, para 97; 2Df's closing submissions, para 79

[note: 152] Pf's closing submissions, para 116

[note: 153] Pf's closing submissions, para 117; Transcript, 11/9/2012, p 9 lines 1–6

[note: 154] 2Df and 3Df's reply submissions, para 97(b)(iii)

[note: 155] Transcript, 9/7/2012, p 21, lines 25–32; 9/7/2012, p 22, lines 1–5

[note: 156] Transcript, 9/7/2012, p 23, lines 26–32; 9/7/2012, p 24, lines 1–8

[note: 157] Transcript, 9/7/2012, p 24, line 32, p 25, lines 1–4

[note: 158] Transcript, 9/7/2012, p 25, lines 14–16

[note: 159] 2Df and 3Df's reply submissions, para 102(c)

[note: 160] 2Df and 3Df's closing submissions, para 74

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[note: 162] Pf's closing submissions, para 117(d)

[note: 163] Pf's closing submissions, para 124

[note: 164] 1Df's Defence, at para 27

[note: 165] Transcript, 10/7/2012, p 19, lines 29–30; Mr Draeger's first AEIC, para 44

[note: 166] Mr Draeger's first AEIC, para 24

[note: 167] Mr Draeger's first AEIC, para 26

[note: 168] Mr Draeger's first AEIC, para 27

[note: 169] 5AB, p 2357

[note: 170] 5AB, p 2358

[note: 171] 5AB, p 2356

[note: 172] 5AB, p 2358; Mr Draeger's first AEIC, paras 28–29

[note: 173] Mr Draeger's first AEIC, para 30

[note: 174] Mr Draeger's first AEIC, para 45; Transcript, 10 July 2012, p 23, lines 4–6

[note: 175] Mr Draeger's first AEIC, para 43

[note: 176] Transcript, 10/7/2012, p 19, lines 21–26

[note: 177] Mr Jenkins' first AEIC, para 102

[note: 178] Mr Jenkins' first AEIC, para 103

[note: 179] Mr Jenkins' second AEIC, paras 4, and 28–32

[note: 180] Mr Jenkins' second AEIC, para 35

[note: 181] Mr Jenkins' second AEIC, paras 36 and 39

[note: 182] Transcript, 17/9/2012, p 26 lines 2–32; p 27, lines 1–2

[note: 183] Transcript, 17/9/2012, p 40, lines 6–9

[note: 184] Transcript, 17/9/2012, p 41, lines 9–24

[note: 185] Transcript, 17/9/2012, p 41, lines 9–24

[note: 186] Transcript, 17/9/2012, p 42

[note: 187] Mr Byrne's first AEIC, para 22

[note: 188] Transcript, 11/9/2012, p 10, lines 15–17

[note: 189] Transcript, 11/9/2012, p 11, lines 20-23

[note: 190] Transcript, 11/9/2012, p 11, lines 5–10

[note: 191] Mr Byrne's first AEIC, para 25

[note: 192] Transcript, 11/9/2012, p 11, lines 11–14

[note: 193] Mr Byrne's first AEIC, para 26

[note: 194] Mr Byrne's first AEIC, para 27

[note: 195] Mr Byrne's first AEIC, para 28

[note: 196] Transcript, 11/9/2012, p 11, lines 1–4

[note: 197] Transcript, 17/9/2012, p 47, lines 7–15

[note: 198] Transcript, 12/9/2012, p 26, lines 10–19

[note: 199] Transcript, 12/9/2012, p 33, lines 1–5

[note: 200] Transcript, 12/9/2012, p 26, lines 2–832; p 27, lines 1–2; p 31, lines 1–31

[note: 201] Mr Jenkins' second AEIC, paras 30-33

[note: 202] Transcript, 12/9/2012, p 32, lines 1–6

[note: 203] 1Df's reply submissions, para 109

[note: 204] 1Df's reply submissions, para 111

[note: 205] 2Df and 3DF's closing submissions, para 198

[note: 206] 1Df's reply submissions, para 112

[note: 207] 2Df and 3Df's closing submissions, para 197

[note: 208] 1Df's reply submissions, para 113

[note: 209] 2Df and 3Df's closing submissions, para 193

[note: 210] 2Df and 3Df's closing submissions, paras 231–235

[note: 211] 2Df and 3Df's closing submissions, paras 173–177

[note: 212] Pf's closing submissions, para 323(e)