# Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David
[2007] SGCA 53

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| **Case Number** | : CA 17/2007 |
| **Decision Date** | : 29 November 2007 |
| **Tribunal/Court** | : Court of Appeal |
| **Coram** | : Belinda Ang Saw Ean J; Andrew Phang Boon Leong JA; V K Rajah JA |
| **Counsel Name(s)** | : Alvin Yeo Khirn Hai SC, Andre Francis Maniam, Neo Ling Chien Jaclyn, Ameera Ashraf and Goh Chun Kiat Colin (WongPartnership) for the appellant; Chia Ho Choon, Spring Tan and Lin Shuling Joycelyn (KhattarWong) for the respondent |
| **Parties** | : Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) — Wong Bark Chuan David |

*Contract – Breach – Consequences of breach of non-solicitation clause – Whether employer entitled to terminate contract – Whether employee could enforce claim for compensation under termination agreement*

*Contract – Contractual terms – Conditions – Whether non-solicitation clause intended by parties to be condition such that any breach would entitle employer to terminate contract*

*Contract – Illegality and public policy – Restraint of trade – Agreement containing restrictive covenants – Whether there was prima facie breach of non-solicitation and non-competition clauses – Whether legitimate proprietary interest existing – Whether restrictive covenants reasonable in interests of parties and in interests of public*

*Contract – Illegality and public policy – Restraint of trade – Termination agreement between company and former employee – Whether termination agreement a fresh contract or settlement agreement – Whether doctrine of restraint of trade applying to settlement agreements – Circumstances in which doctrine of restraint of trade would not apply to settlement agreement*

29 November 2007 Judgment reserved.

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

**Introduction**

1 The was an appeal against part of the decision of the trial judge ("the Judge") in *Wong Bark Chuan David v Man Financial (S) Pte Ltd* [2007] 2 SLR 22 ("GD"). Briefly, the Judge granted judgment in favour of Wong Bark Chuan, David ("the respondent") against his former employer, Man Financial (S) Pte Ltd ("the appellant"), in respect of certain benefits under an agreement entered into by the parties ("the Termination Agreement").

2 This judgment clarifies and restates the doctrine of restraint of trade in the context of employment relations. More specifically, it evaluates: (a) whether the doctrine of restraint of trade applies to settlement or compromise agreements; and (b) whether the need to maintain a stable, trained workforce, in a situation where no protectable confidences exist, is a legitimate proprietary interest which warrants the court's protection by way of the doctrine of restraint of trade. We turn first to the facts of the present case.

**The facts**

3 The respondent was the managing director and chief executive officer ("CEO") of the appellant, a brokerage company, since 2 August 1996.

4 In May 2005, the respondent suggested a change of role. He informed Kevin Davis of Man Financial Ltd, a company related to the appellant, that he wished to step down as the appellant's CEO in order to focus on business development in the region.

5 On 13 June 2005, Kevin Davis informed the respondent that he had decided to have someone else replace the respondent as CEO. However, Kevin Davis stated that because it would be difficult for the new CEO to perform his role in the presence of a former CEO, the respondent was to resign with immediate effect. Accordingly, the respondent was placed on "garden leave" from 13 June 2005 ("the Termination Date") to 13 September 2005 while he served out a three-month notice period. The respondent was also handed a proposed termination agreement dated 13 June 2005 ("the Proposed Agreement"). The Proposed Agreement contained, *inter alia*, restrictive covenants on non-solicitation and non-competition for a period of one year from the Termination Date. However, the respondent did not agree to the provisions suggested by the appellant and therefore did not sign the Proposed Agreement immediately.

6 Many rounds of negotiation between the parties as to the contents of the Proposed Agreement soon followed (see, generally, [26]–[38] below). The Termination Agreement was finally executed on 23 June 2005, albeit dated 13 June 2005 (*viz*, the Termination Date). The salient portions of the Termination Agreement were as follows:

> **C. <u>Non-Solicitation and Non-Competition</u>**
>
> C.1. In further consideration of the foregoing, you agree that for a period of seven (7) months from the Termination Date, that is, up to 13 January 2006 you shall not directly or indirectly employ or solicit the employment of (whether as an employee, officer, director, agent or consultant) any person who is or was at any time during the period 13 June 2004 to 13 June 2005 an officer, director, representative or employee of the Company [*ie*, the appellant]. For avoidance of doubt, you shall not be deemed to employ any person unless you are involved or have otherwise provided input into the decision to hire such individual.
>
> ….
>
> C.3. In further consideration of the foregoing, you agree that you will not either directly or indirectly for a period of seven (7) months from the Termination Date, that is up to 13 January 2006, anywhere in the world, organize, own, manage, operate, participate in, render advice to, control, or have an investment or ownership interest in any business that engages in the marketing and/or sale of products, services and/or systems which are in competition with those provided by the Company.
>
> …
>
> **D. <u>Release and Discharge</u>**
>
> D.1. In further consideration of the foregoing, you hereby unconditionally and irrevocably discharge and release the Company, its parent, officers and directors, and their successors and assigns from any and all claims, demands, causes of action, suits, charges, violation and/or liability whatsoever, known or unknown involving any matter arising out of or in any way related, directly or indirectly, to your employment with the Company or the termination thereof other than

your entitlements and benefits under this Termination Agreement.

…

7 Accordingly, under the Termination Agreement, the respondent was prohibited from, *inter alia*, soliciting the employment of certain employees of the appellant (under clause C.1 of the Termination Agreement ("Clause C.1")) and participating in or rendering advice to a competitor for a period of seven months from the Termination Date (under clause C.3 of the Termination Agreement ("Clause C.3")). The respondent was also to receive shares in Man Group plc (the appellant's parent company) and a goodwill payment ("the Compensation") from the appellant provided he did not breach the terms of the Termination Agreement.

8 Sometime in September 2005, before the respondent was due to be paid the Compensation, the appellant was informed that the respondent had solicited the employment of its employees or former employees, namely, one Tricia Ng Geok Tin ("Tricia") and one Tan Siang Hwee ("Siang Hwee"), for a competing company, Refco (S) Pte Ltd ("Refco"). This was contrary to Clause C.1. The appellant was also informed that the respondent had participated in or rendered advice to Refco in breach of Clause C.3. As a consequence, the appellant declined to provide the Compensation. The respondent then sued the appellant for the Compensation. Not surprisingly, the respondent denied having acted in the manner alleged.

**The Judge's findings and decision**

9 On the facts, the Judge essentially found in favour of the appellant, and held that the respondent had solicited the employment of at least two of the appellant's employees (*ie*, Tricia and Siang Hwee) during the period from 13 June 2005 to 13 January 2006 ("the Prohibited Period") and had rendered advice to Refco (see GD at [14]–[141]). However, notwithstanding his finding of fact against the respondent, the Judge found that the respondent was entitled to receive the Compensation.

10 In relation to Clause C.1, the Judge accepted the respondent's interpretation of the provision and held that Clause C.1 applied only if the respondent had solicited the employment of others as an employee, officer, director, agent or consultant of Refco; since the respondent had not done so in any such capacity, he was not *prima facie* in breach of Clause C.1 (see GD at [142]–[143]). In any event, the Judge held that Clause C.1 was invalid and, hence, unenforceable for being an unreasonable restraint of trade (see [12] below).

11 The Judge held that the burden was on the appellant to show the existence of an interest which merited the protection of the court and to demonstrate the reasonableness of the covenants concerned in terms of their not being wider than what was reasonably necessary to protect that interest. Counsel for the appellant at first instance, Mr Andre Maniam ("Mr Maniam"), submitted that the interest which Clause C.1 sought to protect was the maintenance of a stable workforce. In reply, counsel for the respondent, Mr Chia Ho Choon ("Mr Chia"), argued that in Singapore, the maintenance of a stable workforce was not a legitimate interest that could be protected by a restrictive covenant as Singapore was a very small country with limited resources. The Judge did not rule on whether the maintenance of a stable workforce was a legitimate interest meriting protection. However, he stated that even assuming that there was such a legitimate interest, the Termination Agreement did not actually spell out the appellant's interests which required protection (see GD at [165]–[166]). For reasons that will be apparent below, we will have to deal with this particular holding.

12 As to the reasonableness of Clause C.1, the Judge held (see GD at [176]–[183]) that, even if

the appellant had established that it had a legitimate interest to maintain a stable workforce, Clause C.1 was wider than what was reasonably necessary for the following reasons:

(a) Clause C.1 applied to *any* and *every* employee of the appellant without reference to his or her experience or importance.

(b) Clause C.1 applied even to those who had already left the appellant within one year before the Termination Date.

(c) Clause C.1, as it stood, extended even to employees whom the appellant did not want to continue employing.

13 In relation to Clause C.3, the Judge found that the respondent was *prima facie* in breach of the provision (see GD at [127]–[133]). The Judge then considered whether Clause C.3 was invalid as an unreasonable restraint of trade. To that end, Mr Maniam contended that the respondent's access to confidential information was the interest which the appellant was protecting thereunder. However, as in the case of Clause C.1, the Judge found (see GD at [172]) that there was no evidence to prove the respondent's access to confidential information as well as the nature of the alleged confidential information. Accordingly, the Judge found that the appellant had failed to establish any legitimate interest meriting protection under Clause C.3 (see GD at [175]).

14 The Judge was further of the view (see GD at [184]–[191]) that the purpose and scope of Clause C.3 was anti-competition, and listed the following factors which militated against the reasonableness of that provision:

(a) There was no mention in Clause C.3 about the use of confidential information.

(b) Clause C.3 was wide enough even to prohibit the respondent from buying shares in a competitor which was listed on a stock exchange, even though such conduct would not necessarily involve misuse of the appellant's confidential information.

15 Whilst we agree with the Judge's ultimate decision on Clause C.3 (*viz*, that Clause C.3 could not be invoked to disentitle the respondent from claiming the Compensation), we differ, with respect, somewhat from the precise reasoning which he adopted (as set out briefly in the preceding paragraphs). In particular, we do not think that the e-mails and the g-mail set out at GD at [127]–[128] (which were isolated and informal in nature, and which were the grounds upon which the Judge found that there had, *prima facie*, been a breach of Clause C.3) fell within the ambit of Clause C.3. However, we do agree with the Judge that there was insufficient evidence adduced by the appellant to demonstrate an underlying legitimate proprietary interest which Clause C.3 was intended to protect. We are also of the view that Clause C.3 was, in any event, simply far too wide, particularly with regard to the area covered. Further, we are, with respect, unable to agree with his decision with regard to Clause C.1. For reasons which we will elaborate upon in more detail below (at [137]–[142]), we are of the view that Clause C.1 was reasonable. We are also of the view that Clause C.1 was in fact breached on the facts of the present case (see below at [18]).

16 The Judge proceeded to find that the restrictive covenants in the Termination Agreement (*ie*, clauses C.1–C.3 thereof) as well as the respondent's agreement, pursuant to clause D.1 of the Termination Agreement ("Clause D.1"), to discharge and release the appellant from all claims (save for the claims specifically excluded by Clause D.1) constituted the main, though not the sole, consideration for the Compensation (see GD at [214]). The invalidity of Clause C.1 and Clause C.3 did not change the character of the bargain. In the Judge's view, the invalidity of these two restrictive

covenants merely meant that the appellant had obtained less in return for agreeing to provide the Compensation (see GD at [215]). As such, the Judge severed Clause C.1 and Clause C.3 from the Termination Agreement, and ordered the appellant to provide the Compensation to the respondent. We should point out at this juncture that whilst we agree with the Judge in so far as the established principles of law relating to severance are concerned (which we will consider briefly at [126]–[131] below), we do not, with respect, agree with his *application* of those rules and principles to the facts of the present appeal. In particular, we do not agree with the Judge's finding (see GD at [216]–[218]) that Clause C.1 and Clause C.3 did not constitute all, or substantially all, of the consideration for the Compensation (see below at [128]). However, because we found, having regard to the applicable principles of law, that Clause C.1 was a reasonable clause, this issue did not, strictly speaking, arise for decision in the present appeal.

17 On a consideration of all the facts, we accept all the *factual* findings of the Judge (with the exception of the finding that there had, *prima facie*, been a breach of Clause C.3 (see above at [15])). In particular, we affirm the Judge's finding that the respondent had, during the Prohibited Period, solicited at least two of the appellant's employees to work for Refco. However, we *differ*, with respect, from the Judge on one crucial point. As mentioned at [15] above, we are of the view that there *had*, in fact, been a breach of Clause C.1 (which is reproduced above at [6]). In particular, we are of the view that the words in parentheses in that particular clause (*viz*, "whether as an employee, officer, director, agent or consultant") applied not to the capacity in which the respondent acted when soliciting the employment of others, but, rather, the position for which he solicited the latter's employment. Significantly, in our view, the Judge would have arrived at the same conclusion but for the fact that the appellant had, at paragraph 8 of its re-amended defence, stated that the respondent had solicited the employment of the appellant's employees "as an agent or consultant of a company in competition with [the appellant]" (see GD at [143]). At this juncture, it would be apposite to refer to the following observations made by this court in the recent decision of *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 at [81]–[82]:

> 81 The following observation by Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at 710–711, (albeit in the context of the amendment of pleadings), is apposite:
>
> > I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights … *I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy*, and I do not regard such amendment as a matter of favour or of grace. … It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right. [emphasis added]
>
> 82 We are fully in agreement with Bowen LJ. The rules of court practice and procedure exist to provide a convenient framework to facilitate dispute resolution and to serve the ultimate and overriding objective of justice. Such an objective must never be eclipsed by blind or pretended fealty to rules of procedure. On the other hand, a pragmatic approach governed by justice as its overarching aim should not be viewed as a charter to ignore procedural requirements. In the ultimate analysis, each case involving procedural lapses or mishaps must be assessed in its proper factual matrix and calibrated by reference to the paramount rationale of dispensing even handed justice.

18 Even if we adopt what appears to us to be an excessively strict view in so far as adherence to pleadings is concerned, we would nevertheless conclude that the respondent did, in fact, solicit the employment of the appellant's employees as an "agent" of Refco for the purposes of Clause C.1. It is true that, *technically speaking*, the respondent could not, *ex hypothesi*, have been on the payroll of Refco at the material period – at least in so far as the first three months of the Prohibited Period were concerned (since the respondent was on "garden leave" then). However, this itself gives us a clue as to the substance – and, more importantly, the spirit – of Clause C.1. In particular, the clause was not intended by the contracting parties to operate in a vacuum. Furthermore, contracting parties do not enter into agreements which are futile. In the circumstances, therefore, the reasonable inference to draw is that the appellant and the respondent intended Clause C.1 to proscribe any form of soliciting the employment of the appellant's employees *throughout* the Prohibited Period. The fact that the respondent was not, strictly speaking, on the payroll of Refco at the material time should not detract from such a construction as to how the clause was intended to operate. Indeed, the Judge himself acknowledged, at various points in his judgment, that the respondent was in fact soliciting the employment of the employees concerned for Refco (see, for example, GD at [108] and (especially) [113]). We are therefore of the view that the respondent *did*, in fact, breach Clause C.1 by soliciting the employment of those employees.

19 To *summarise*, whilst we agree with the Judge that Clause C.3 did not pass muster under the applicable principles relating to the doctrine of restraint of trade, we find, however (and contrary to the decision of the Judge), that Clause C.1 was, in fact, both applicable on the facts *and* was also reasonable (pursuant to the applicable principles relating to the doctrine of restraint of trade). Hence, the doctrine of severance did not arise for our decision. More importantly, there having been a breach of Clause C.1 by the respondent (see the preceding paragraph), the issue of the legal consequences of that breach arose for our decision. However, during the course of oral submissions before us, yet another issue – this time, a threshold one – arose: Did the doctrine of restraint of trade apply to the Termination Agreement in the first instance? Indeed, given the fact that a number of related issues (in particular, the last-mentioned one) were not, in fact, canvassed before us during the first hearing, we invited further written submissions from the parties and also heard further oral submissions thereon. In the circumstances, it would be helpful, therefore, if we first itemise the main issues which were ultimately crystallised before us for determination before proceeding to set out our decision on each issue, as well as on the appeal as a whole.

**The issues on appeal**

20 The main issues before this court, as eventually delineated by the parties, were as follows:

(a) Does the doctrine of restraint of trade apply to the Termination Agreement?

(b) Assuming that the doctrine of restraint of trade applies to the Termination Agreement, was Clause C.1 reasonable within the applicable principles of that doctrine?

(c) If Clause C.1 was reasonable within the applicable principles of the doctrine of restraint of trade, what were the consequences of a breach of that clause?

**Does the doctrine of restraint of trade apply to the Termination Agreement?**

***Introduction***

2 1 The first – and threshold – legal issue is whether or not the doctrine of restraint of trade applies to the Termination Agreement in the first place.

2 2 Counsel for the appellant, Mr Alvin Yeo SC, sought to argue that the Termination Agreement was, in substance and effect, a settlement agreement, and that the doctrine of restraint of trade did not (as a matter of public policy) apply to settlement agreements. This argument, however, begged the question: Was the Termination Agreement a settlement agreement to begin with?

***Was the Termination Agreement a fresh contract or a settlement agreement?***

2 3 We note, at the outset, that the Termination Agreement was precisely that – an agreement between an employer (here, the appellant) and an employee (here, the respondent) that sought to govern the ending or termination of the contractual employment relationship between them. Put simply, an agreement of this nature would – as was the case here – comprise *fresh or new* terms *vis-à-vis* a *fresh or new* contract that *supplements* the original employment contract between the parties by, as just mentioned, stipulating the legal rights and obligations which will govern the closure of their employment relationship.

2 4 From this perspective, the Termination Agreement was *not* a settlement agreement (the latter being a contract that seeks to compromise existing disputes between the contracting parties). What, though, about the various negotiations – in particular, the correspondence (which will be considered in more detail below) that led to the restraint of trade clauses in the Termination Agreement, which clauses did not hitherto exist in the *original* employment contract between the parties? In our view, the answer lies in the question itself. If, *ex hypothesi*, the restraint of trade clauses did not exist in the original employment contract but constituted terms within the *Termination Agreement* only, then they were, as mentioned in the preceding paragraph, *fresh or new* terms in a *fresh or new* contract. In other words, these clauses were *neither* the subject of a *prior legal dispute* which had been settled, *nor* agreed on to compromise an existing dispute, by way of the Termination Agreement.

25 Indeed, a close perusal of the relevant e-mail correspondence alluded to in the preceding paragraph demonstrates that the Termination Agreement was a *supplementary contract* entered into between the parties to effect closure of their then existing employment relationship. In this regard, looking at the context and the circumstances of the present case (which are set out in detail below), it is our view that the Termination Agreement was not a mere variation of the existing employment contract between the appellant and the respondent, but was, instead, a separate and independent contract in itself. However, to the extent that the Termination Agreement effected closure of the employment relationship between the parties, it can, in substance at least, be construed as *complementing* the parties' then existing employment contract.

26 The starting point of the Termination Agreement was a letter headed "Termination Agreement" from the appellant (signed by one of its directors, Christopher Smith ("Smith")) to the respondent dated 13 June 2005 setting out the terms of the Proposed Agreement.

27 The respondent replied to Smith's letter of 13 June 2005 via an e-mail of the same date. The material portions of the respondent's reply were as follows:

> 1. I have no issue with serving out my full notice period.
>
> 2 . *I trust that, as agreed to earlier today, my bonus for Financial Year 2005, will not be tied in any way to the termination notice period and that it will be duly paid.*
>
> 3 . *As my employment agreement does not in fact provide for any restraint on what I can do after my employment ends, your request for me to accept such restraints for a period of*

*one year is inappropriate.*

As a general rule we should proceed *according to my employment agreement.*

4. You will appreciate that any agreement by me of any formal restrictions to what I can do prejudices my employment prospects after I leave you.

5. ***However, as a gesture of goodwill (in reciprocation of your gesture of goodwill), I am willing to consider a non-solicitation restraint (of both clients and staff) for a period of three months from the termination of my full notice period.***

[emphasis added in italics and bold italics]

28 We pause to note that the respondent's original employment contract with the appellant did not, indeed, contain any covenants in restraint of trade at all. It is clear that by including such covenants in the Proposed Agreement, the appellant was attempting to tie the respondent down for the suggested period of one calendar year. This is not surprising in view of the nature of the appellant's business and (correspondingly) the respondent's employment. We also note that, notwithstanding paragraph 2 of the e-mail set out in the preceding paragraph, one of the terms in the Proposed Agreement, in particular, clause B.1(i) thereof, did in fact state that the appellant would pay the sum of US$1,147,353 to the respondent as his bonus for the financial year 2005 in consideration of, *inter alia*, "[his] serving out [his] Notice Period on leave from the office". (This sum, as we shall see, was later adjusted down to US$1,092,325 in clause A.6 of the Termination Agreement.)

29 It is also interesting to note that in paragraph 5 of his e-mail to the appellant (*ie*, the e-mail reproduced above at [27]), the respondent stated that he was, "as a gesture of goodwill", willing to consider the *non-solicitation* covenants suggested in Smith's letter of 13 June 2005 (*ie*, the letter mentioned at [26] above). This remark by the respondent is significant because those non-solicitation clauses (in particular, Clause C.1) were precisely the terms that lay at the heart of the present appeal. It is equally important to note that the respondent's e-mail shows that there was *no dispute* between the parties over *prior* covenants in the then existing (original) employment contract.

30 Smith then responded (also via e-mail on the same day, *viz*, 13 June 2005) on behalf of the appellant, referring, first, to a revised letter that sought to deal with paragraph 2 of the respondent's e-mail (reproduced above at [27]) with regard to the payment of the bonus for the financial year 2005. Smith also stated:

With regard to your other points we will think about this and come back to you. However, as Kevin [*ie*, Kevin Davis of Man Financial Ltd] suggested this morning, I think that it is best if this is discussed through our lawyers.

31 The respondent responded to the e-mail in the preceding paragraph via an e-mail dated 14 June 2005 (addressed to Smith). The material portions of the respondent's e-mail read as follows:

1. I actually see no need or role for any lawyer in this matter.

2. We should simply proceed as is provided by my contract of employment. A reading of that will show:

2.1 *I have earned and am entitled to my bonus for the previous financial year, FY 05.*

*Accordingly, the payment of this bonus should be unconditional.*

2.2 I need to give three months notice of termination – I have done this and also confirmed that I will serve out the full period of notice, even going on gardening [*sic*] leave for the duration at your request.

3 . *My contract of employment provides for no post employment restraints.* ***Any agreement on this issue is therefore a private agreement to be negotiated between us.*** I have had this confirmed legally already. The lawyers therefore have no role to play except to document ***our agreement****. I have already stated what I am willing to agree to as a gesture of goodwill.* Whilst I see no point in discussing what is a commercial and private issue with or through lawyers, if you so wish for communications with yourselves to be via your lawyers, please have Ameera [Ms Ameera Ashraf, the appellant's lawyer ("Ms Ameera")] contact me directly.

[emphasis added in italics and bold italics]

32 The appellant responded to the respondent's e-mail of 14 June 2005 (*ie*, the e-mail set out in the preceding paragraph) through its lawyer, Ms Ameera, who sent the respondent an e-mail dated 15 June 2005. The material parts of Ms Ameera's e-mail read as follows:

1. Thank you for your email below.

2. You have asserted that you are not obliged to accept the non-solicitation clauses in the Termination Agreement, as these clauses do not form part of your contract of employment. *You will appreciate, having reviewed your contract of employment, that it does not provide for any additional sums to be paid to you upon your resignation.* ***Thus Man Financial (S) Pte Ltd's (the "Company")*** [*viz*, the appellant's] ***offer to make a substantial goodwill payment to you as well as give*** [*sic*] ***you shares which have not as yet vested under the Man Group plc's Coinvestment Schemes, are not benefits that you are entitled to at law. The Company makes this offer in return for your agreement to the terms set out in the Termination Agreement.***

3. The Company, however, notes your offer to consider a clause which provides for non-solicitation of both clients and employees for a period of *three months after* the end of your Notice Period. *Towards achieving an amicable resolution to this matter,* ***in consideration of your agreement to the non-solicitation of both clients and employees for a period of four months*** [underlining in original]***after the end of your Notice Period i.e. until 13 January 2006, the Company will agree to make payment of the benefits set out above at the end of your Notice Period.***

5. [*sic*] We regret to say that, in the interests of achieving a quick resolution to these issues, this is the Company's final offer on the matters above and we trust that you will find this offer reasonable and acceptable. Please consult your solicitors if necessary.

[emphasis added in italics and bold italics]

3 3 The next material piece of correspondence is an e-mail (also dated 15 June 2005) from the respondent's lawyers (the respondent having obtained his own legal representation by then) to the appellant's lawyers. In essence, this piece of correspondence referred to a telephone conversation between the parties' lawyers, in which one of the respondent's lawyers, Mr Quek Li Fei ("Mr Quek"), who was also the writer of this particular e-mail, informed one of the appellant's lawyers (*viz*,

Ms Ameera) that his firm was now acting for the respondent in the matter. Mr Quek's short e-mail also stated:

> As spoken, we are presently taking our client's instructions on your email of even date to our client timed at 12.26pm [*ie*, the e-mail from Ms Ameera to the respondent referred to in the preceding paragraph] as well as on the terms of the draft Termination Agreement and hope to revert to you shortly thereafter.

3 4 In follow-up to the e-mail in the preceding paragraph, Mr Quek sent a further e-mail (also dated 15 June 2005). This piece of correspondence is significant because it enclosed a copy of the Proposed Agreement set out in Smith's letter of 13 June 2005 (see above at [26]), *but with the respondent's manuscript amendments appended thereto*. These amendments (denoted in the following passage by the text which has been struck through and by the bold underlined text) constituted *the respondent's counterproposals*, and included, *inter alia*, proposed amendments to *Clause C.1*, as follows:

> C.1. In further consideration of the foregoing, you agree that for a period of ~~one (1) year~~ **seven (7) months** from the date of this letter, **that is, up to 13 January 2006**[,] you shall not directly or indirectly employ or solicit the employment of (whether as an employee, officer, director, agent or consultant) any person who is or was at any times [*sic*] during ~~this past year~~ **2005 year to date** an officer, director, representative or employee of the Company. For avoidance of doubt, you shall not be deemed to employ any person unless you are involved or have otherwise provided input into the decision to hire such individual.

3 5 Another significant amendment proposed by the respondent was the addition of a new clause B.2, which read as follows:

> All sums expressed to be payable to you in this letter shall be paid by the Company in full and without deduction by or on their respective due dates.

36 Both of these clauses will figure prominently later in this judgment when we deal with the true nature of Clause C.1 in the context of *the consequences of its breach*.

37 Returning to the relevant correspondence between the parties, Mr Quek's second e-mail of 15 June 2005 (see [34] above) was not yet the end of the matter inasmuch as the terms of the Termination Agreement had still not been finalised. Ms Ameera responded (on behalf of the appellant) to Mr Quek via an e-mail dated 17 June 2005 stating that the appellant was "not agreeable" to the respondent's proposed amendments. In reply, Mr Quek sent Ms Ameera an e-mail of the same date basically acknowledging receipt of her e-mail.

38 The appellant and the respondent finally arrived at an agreement, embodied in the Termination Agreement, on 23 June 2005. It is interesting to note, in this regard, that *Clause C.1* in its *finalised* form, whilst slightly different from the version proposed by *the respondent* (which is set out at [34] above), nevertheless incorporated *the respondent's proposed time frame of seven months* as the period of restraint. This *finalised* version of Clause C.1 (which we reproduced earlier at [6]) read as follows:

> C.1. In further consideration of the foregoing, you agree that for a period of seven (7) months from the Termination Date, that is, up to 13 January 2006 you shall not directly or indirectly employ or solicit the employment of (whether as an employee, officer, director, agent or consultant) any person who is or was at any time during the period 13 June 2004 to 13 June 2005

an officer, director, representative or employee of the [appellant]. For avoidance of doubt, you shall not be deemed to employ any person unless you are involved or have otherwise provided input into the decision to hire such individual.

39 Another interesting point to note is that *clause B.2* (in its *finalised* form) of the Termination Agreement ("Clause B.2") was, in fact, *quite different* from the version proposed by *the respondent* (see [35] above), and read as follows:

> B.2. *Save in the event that you breach any of the terms of this Termination Agreement*, the sums set out in B.1(b) above will be paid to you in full and without deduction at the end of the Notice Period, on 13 September 2005. [emphasis added]

40 On a more general level, we should emphasise that *if a particular agreement between existing contracting parties is intended to encompass or embody a settlement or compromise, it would be prudent for the parties concerned to state this clearly in the contract itself. If that is not done*, the court will, as in the *present* case, construe the contract concerned objectively, having regard to the relevant terms in the *context* in which they were arrived at and the substance of the contract. In the final analysis, substance is more important than form. In the present appeal, what is important is the fact that the correspondence set out above points clearly to one thing (and one thing alone): *The very pith and marrow of the Termination Agreement centred on the closure of the existing employment relationship between the appellant and the respondent.* This agreement was *not*, in other words, a contract that sought to compromise or settle *existing disputes* between the parties in respect of *existing covenants or clauses in restraint of trade*. Indeed, in the respondent's own affidavit of evidence-in-chief ("AEIC") at paragraph 20.8, it was clearly acknowledged that the consideration set out in clause B.1 of the Termination Agreement ("Clause B.1") consisted of the covenants which the respondent was to observe during the Prohibited Period. Not surprisingly, Smith's AEIC (at paragraph 8 thereof) reflected a similar acknowledgment.

41 We are therefore of the view that the Termination Agreement in the present appeal was *not*, in substance, a settlement agreement to begin with. It was instead, in substance and effect, *an agreement that was complementary to the original employment contract between the appellant and the respondent*. In the circumstances, all the terms of the Termination Agreement must – in the present appeal at least – therefore be subject to the doctrine of restraint of trade.

4 2 However, since much time was spent on the question of whether or not the doctrine of restraint of trade applies to settlement agreements, we will set out our views on this particular issue, although, in view of our characterisation of the Termination Agreement (as set out in the preceding paragraph), the issue did not, strictly speaking, arise for a direct decision.

***Does the doctrine of restraint of trade apply to settlement agreements?***

*The issue*

4 3 If we assume that the Termination Agreement was a settlement agreement (an assumption that, as we held above, was *not* borne out by the facts of this appeal), would it follow that the doctrine of restraint of trade is therefore *excluded in limine* on the basis that there is a clear public policy in favour of upholding genuine settlement or compromise agreements? By "genuine", we mean a settlement or compromise agreement that is *not* rendered either void or voidable by *vitiating factors*. If, of course, one or more vitiating factors operate, then that settlement or compromise agreement would not be recognised in law.

44 In analysing this issue, there are, *in effect*, *two separate and distinct facets of public policy* to be considered – one relating to the doctrine of restraint of trade, and the other relating to the upholding of genuine settlement or compromise agreements, respectively.

*The public policy underlying the doctrine of restraint of trade*

45 The *first* of the aforesaid aspects of public policy (*viz*, that relating to the doctrine of restraint of trade) is a clearly established one (for convenience of exposition, we refer to it hereafter as "Public Policy 1"). This doctrine is traditionally analysed in contract textbooks under the rubric of "illegality and public policy". More specifically, the doctrine seeks to vindicate the legal right to freedom of trade while balancing, at the same time, the countervailing doctrine of freedom of contract. It remains the law, however, that covenants that fall foul of the doctrine of restraint of trade will (subject to certain conditions) be rendered unenforceable. To that extent, the doctrine endorses (with the requisite balance) the public policy which legally negates attempts to unreasonably proscribe freedom of trade. Whilst we would *not* go so far as to state that the doctrine of restraint of trade *always* applies in *every* contractual context, we note that its application in the context of *employment* is *well established*. Indeed, given the strength of the *rationale* for the application of this doctrine in the employment context, it is, in our view, clear that the doctrine would apply in this particular context *even if* there has been *a compromise* of proceedings (subject to the qualification set out below (especially at [65])). The rationale for this is "the importance of the free flow of expertise in the context of the welfare of the country as a whole: a factor that presumably relates to the public interest" (see *Butterworths Common Law Series: The Law of Contract* (Michael Furmston gen ed) (LexisNexis, 2nd Ed, 2003) ("*Butterworths Common Law Series*") at para 5.117). In other words, an individual's freedom to exercise his skills as an employee as well as the benefit to the wider society that would ensue are, in one sense at least, two equally important sides of the same coin. Indeed, in the leading House of Lords decision of *Herbert Morris, Limited v Saxelby* [1916] 1 AC 688 ("*Herbert Morris*"), Lord Atkinson (citing the judgment of Sir W M James VC in *Leather Cloth Company v Lorsont* (1869–70) LR 9 Eq 345 at 354) emphasised (at 701) that every person should be at liberty to work for himself or herself, and ought not (in principle) to deprive either himself or herself, *or* the State, of his or her labour, skill and talents.

46 And, in the English Court of Appeal decision of *Nagle v Feilden* [1966] 2 QB 633, Lord Denning MR observed thus (at 646):

> [A] man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights or property. Just as the courts will intervene to protect his rights of property, they will also intervene to protect his right to work.

47 All the various reasons which support both the substance as well as the spirit underlying the law on covenants in restraint of trade in the employment context are of universal importance, and hence apply, in our view, in *Singapore* with equal force.

48 It should also be noted that, when comparing restraint of trade covenants in the *employment* context with those in the other well-established scenario where restraint of trade likewise features (*viz*, in the context of *the sale of a business*), the courts scrutinise the covenants in the former context far more strictly. (There are, of course, occasional cases where a hybrid situation might present itself, of which a prominent illustration is the decision of the Judicial Committee of the Privy Council (on appeal from the Court of Appeal of Hong Kong) in *Robin M Bridge v Deacons* [1984] 1 AC 705, where the fact situation bore some resemblance to both the situations just referred to.) As has been observed (see *Butterworths Common Law Series* ([45] *supra*) at para 5.114):

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

*The public policy in favour of upholding genuine settlement or compromise agreements*

49 The *second* facet of public policy mentioned above at [44] (which we will hereafter refer to as "Public Policy 2" for convenience of exposition) raises the question of whether or not, assuming there has been a genuine settlement or compromise agreement *vis-à-vis* disputes over covenants or clauses in restraint of trade in an existing contract, *that* settlement or compromise agreement can be *re-opened* by way of the application of the doctrine of restraint of trade. The key argument that supports a *negative* answer to this question is the clear public policy in favour of upholding "genuine" (as defined at [43] above) settlement or compromise agreements.

50 One possible logical difficulty with adopting such an approach is that covenants in restraint of trade *prima facie* fall within the vitiating factor of illegality and public policy. However, it is arguable that these covenants do not always fall within that category of illegality and public policy which taints a contract in such a legally indelible manner as to render it impossible to uphold. (This is *a fortiori* the case with regard to a contract that is aimed at resolving an existing dispute over a restraint of trade clause in a prior agreement.) In this regard, it has been argued that there can be degrees of illegality (see *Butterworths Common Law Series* at paras 5.10–5.15). Indeed, and more importantly, in the English decision of *Boddington v Lawton* [1994] ICR 478, Sir Donald Nicholls VC (at 490) drew *a distinction between contracts in restraint of trade and other unlawful contracts such as one to commit murder* (see also the analogous argument on the scope of application of the doctrine of severance, albeit with possible modifications with regard to certain common law rules, in *Butterworths Common Law Series* at paras 5.223–5.224). *Further*, it might be argued that since *both* an individual's freedom to work at his trade or profession and the sanctity of a compromise or settlement agreement are centred on *public policy*, the countervailing public policy which is *stronger* ought to prevail. We shall return to this specific difficulty later (at [64]–[68] below).

*Which facet of public policy (if at all) should prevail?*

(a) A preliminary point – when does the doctrine of restraint of trade apply?

51 Put simply, if there is an actual or a potential conflict between Public Policy 1 and Public Policy 2, which (if at all) should prevail?

52 However, before the question in the preceding paragraph can be answered, it must necessarily be assumed that the doctrine of restraint of trade applies in the first instance. In this regard, this particular issue is more apparent than real in most cases before the court because the bulk of these cases deal, in the main, with either an employment situation or the sale of a business, where, as noted at [45] and [48] above, it is clear that the doctrine applies.

53 Indeed, the *only* area where the threshold issue of whether or not this doctrine applies has been raised with any significance is in the context of *solus agreements*. A solus agreement is, in essence, one entered into between an oil company on the one hand and a garage proprietor on the other. The agreement will traditionally contain three covenants entered into by the garage proprietor (or, in the local context, the petrol station proprietor). The first is a "tying" covenant pursuant to which the garage proprietor undertakes to purchase all petrol and other allied petroleum products from the oil company. The second is a "compulsory trading" covenant pursuant to which the garage proprietor agrees to keep the garage (or petrol station) open at all reasonable times. The third is a "continuity" covenant pursuant to which the garage proprietor promises to extract similar undertakings from any potential buyer of his garage business during the period of the solus agreement itself. These three covenants benefit the oil company by enabling it to systematically plan as well as organise its business over a reasonably considerable period of time. The garage proprietor obtains, in return, rebates on the petrol and other products sold; it also often obtains advances of money or loans to aid in the purchase and/or development of the premises concerned.

54 So much by way of background in so far as *solus agreements* are concerned. What is germane for our present purposes is the issue of whether or not, in order for the doctrine of restraint of trade to operate in the context of *solus agreements*, the covenantor (*ie*, the garage proprietor) must give up some freedom or right which it had prior to entering into the solus agreement. A paradigm instance of such a freedom or right would be where the garage premises are *owned* by the covenantor at the time it enters into the covenants in restraint of trade (see, for example, the leading House of Lords decision of *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 ("*Esso Petroleum*")).

5 5 There was, in fact, a difference of opinion in *Esso Petroleum* itself as to whether or not the covenantor had to give up some prior freedom or right before the doctrine of restraint of trade could be invoked. The majority of the House responded to this particular issue in the affirmative, whereas Lord Wilberforce preferred (*id* at 332–333 and 335–336) a more open-ended approach which centred, instead, on trade practice.

5 6 The approach of the majority of the House in *Esso Petroleum* has, in fact, been the subject of rather trenchant criticism by one of the foremost experts on the doctrine of restraint of trade in the Commonwealth (see, generally, J D Heydon, "The Frontiers of the Restraint of Trade Doctrine" (1969) 85 LQR 229 and, by the same author, *The Restraint of Trade Doctrine* (Butterworths, 2nd Ed, 1999) at pp 51–54), with the main argument being that such an approach is based more on form rather than substance and could, therefore, lead to anomalous results.

5 7 Interestingly, in the *Singapore* context, Lim Teong Qwee JC, in the Singapore High Court decision of *Shell Eastern Petroleum (Pte) Ltd v Chuan Hong Auto (Pte) Ltd* [1995] 3 SLR 281, expressed (at 290–291, [20]–[21]), albeit by way of *obiter dicta*, a preference for the broader approach advocated by Lord Wilberforce in *Esso Petroleum* (Lim JC's decision was affirmed on appeal, but without consideration of this particular point: see *Chuan Hong Auto (Pte) Ltd v Shell Eastern Petroleum (Pte) Ltd* [1996] 1 SLR 415). And, for a summary of the position in Australia, where the issue has not been conclusively decided by the case law thus far, see *Butterworths Common Law Series* ([45] *supra*) at para 5.125).

58 It should, however, be noted that this court, in *National Aerated Water Co Pte Ltd v Monarch Co, Inc* [2000] 2 SLR 24 ("*National Aerated Water Co*"), appeared (at [29]) to endorse the approach of the majority in *Esso Petroleum* in the context of a licensing agreement under which the covenantor gave up some freedom in return for the right to produce, distribute and sell bottled carbonated water bearing a certain trade mark. In particular, the court observed (*ibid*) that there had, on the facts,

been a restriction on the freedom of the covenantor to trade or sell any beverage of its choice which fell under the criteria listed in the agreement. However, this appeared to be a passing observation by the court. In any event, it does not impact adversely on the wider question that is germane to the present appeal, *viz*, whether or not the doctrine of restraint of trade applies to situations where there has been a settlement agreement or compromise arrangement. Indeed, the observation in *National Aerated Water Co* itself appears to be rather broad and would tend to suggest that the doctrine of restraint of trade probably applies in *most (or virtually all)* situations. It would appear, therefore, that this particular issue (*ie*, whether the covenantor must give up some pre-existing freedom or right before the doctrine of restraint of trade applies) *remains open* for a definitive ruling in the future.

(b) The *Panayiotou* case

59 Assuming, however, that the doctrine of restraint of trade applies, what would be the effect of a genuine settlement or compromise agreement *vis-à-vis* an existing dispute over a covenant or clause in restraint of trade? Would such an agreement still be subject to scrutiny to ensure that it does not fall foul of the doctrine of restraint of trade, or should Public Policy 2 take precedence instead?

60 In the English High Court decision of *Panayiotou v Sony Music Entertainment (UK) Limited* [1994] EMLR 229 ("*Panayiotou*"), there was a clear endorsement of Public Policy 2 in preference to Public Policy 1. There, Jonathan Parker J held that, notwithstanding the fact that the doctrine of restraint of trade would *ordinarily* apply to covenants or clauses in restraint of trade in *employment contracts*, where such covenants or clauses were *the outcome of settlement or compromise of proceedings*, there was "*a clear public interest* in upholding genuine and proper compromises" [emphasis added] (*id* at 345), and, hence, such covenants or clauses would *not* fall within the ambit of the doctrine of restraint of trade *in the first instance*.

61 There are, in our view, compelling reasons in favour of the approach adopted in *Panayiotou*. If the contracting parties had a dispute over an existing covenant or clause in restraint of trade *and* voluntarily arrived at a settlement or compromise in respect of that particular covenant or clause, why should one party be permitted, in law, to re-open the matter all over again? If, in fact, the dissatisfied party was induced to enter into the settlement or compromise agreement by the other party's utilisation of a vitiating factor, the former could invoke the particular vitiating factor concerned to impugn the settlement or compromise agreement. In the absence of proof of one or more vitiating factors operating on the facts of the case itself, there is no reason, in principle, why a court should allow a dispute which has already been settled or compromised to be re-opened all over again. Significantly, Jonathan Parker J did, in *Panyiotou*, suggest that where the settlement or compromise agreement was entered into in circumstances of extreme inequality which amounted to unconscionable conduct, the conclusion arrived at by the court would be quite different.

6 2 We would add that there is nothing in Public Policy 1 which makes it undesirable to honour settlement or compromise agreements of this nature. The situation would, in our view, be *quite different* if, for example, the parties had entered into a settlement or compromise agreement that sought to outflank a statutory provision or common law rule which quite clearly prevented the parties concerned from contracting out of it. (In this regard, whether or not a particular *statutory provision* prevents the contracting parties from contracting out of it depends on the policy of the statute concerned, which must be clearly expressed *and* which must seek to protect a sufficiently weighty public interest: see, for example, the oft-cited House of Lords decision of *Johnson v Moreton* [1980] AC 37.) In contrast, if there is a genuine difference of opinion as to whether or not such a statutory provision or common law rule applies to the facts of the case in the first instance (see, for example, the English Court of Appeal decision of *Binder v Alachouzos* [1972] 2 QB 151), there would, of course,

be no difficulty in enforcing a settlement or compromise agreement.

6 3 However, in the leading Commonwealth textbook on settlements and compromise (see David Foskett, *The Law and Practice of Compromise* (Sweet & Maxwell, 6th Ed, 2005)), it has been observed (consistent with the rationale canvassed above) thus, at para 4-83:

> The common law approach to covenants in unreasonable restraint of trade *apply* [sic] *to the employer-employee relationship and, in particular, to the position of the employee after the termination of the contract of employment. Any compromise of a dispute between an employer and an employee that offends the principles encompassed within this approach will be unenforceable.* [emphasis added]

64 The above argument appears, in fact, to adopt the view that the public policy inherent in Public Policy 1 is so important that it must perforce always override or trump the public policy inherent in Public Policy 2. However, with respect, that is, as we mentioned earlier at [51], *precisely* the question that has to be answered. To this end, and having regard to the arguments canvassed above at [45]–[62], it is our view that logic, principle and fairness entail that Public Policy 2 ought to override or trump Public Policy 1. However, this is *not* a *blanket* proposition, and it is therefore imperative to delineate *the precise conditions* under which Public Policy 2 will so prevail; to this, we now turn.

*Circumstances in which Public Policy 2 prevails over Public Policy 1*

6 5 In our view, Public Policy 2 overrides or trumps Public Policy 1 only where the following conditions are *cumulatively* met:

(a) the settlement or compromise agreement relates to the settlement or compromise of a *prior dispute over a covenant or clause in restraint of trade* in an *existing contract*; and

(b) the settlement or compromise agreement itself is *not* tainted by one or more *vitiating factors*.

66 We are cognisant of the possible argument that the above conditions cover too narrow a compass. However, we do not agree with this argument. The approach we strike is, in our view, an appropriate conceptual as well as practical balance between Public Policy 1 and Public Policy 2. In our view, the doctrine of restraint of trade ought not to be excluded out of hand whenever there is a settlement or compromise of a dispute over contractual terms *other than* those which relate to an *existing covenant or clause in restraint of trade*. But, reverting to the facts of the present appeal, can it not be argued that there was, in this case, a settlement or compromise that resulted in the covenants in the Termination Agreement? As we have already explained above (at [24]), those covenants were arrived at through negotiations between the appellant and the respondent. More importantly, the Termination Agreement ultimately signed by the parties was *not* a settlement or compromise agreement as such, but was, rather, a *new and distinct* contract altogether (see [25] and [41] above). At the *most literal* level, the toing and froing between the parties might be characterised as "disputes". However, the *substance* of their discussions on the Proposed Agreement (which culminated in the Termination Agreement) constituted no more than the usual disagreements on specific proposed terms that take place between parties negotiating a contract before they ultimately arrive at a final (and legally binding) agreement.

67 In any event, even if the approach we have adopted (*ie*, that Public Policy 2 prevails over Public Policy 1 only if the agreement containing the restraint of trade clause is a settlement or

compromise of a dispute over another earlier (pre-existing) covenant in restraint of trade) is perceived to be somewhat narrow, this is, in our view, not an undesirable outcome, especially given the importance of protecting an employee against unreasonable covenants or clauses in restraint of trade (see, generally, [45]–[48] above). Moreover, our approach does not completely ignore the legal effect of a settlement or compromise agreement (provided it does not, we reiterate, fall foul of one or more vitiating factors).

68 Finally, we observe that the distinction drawn by Mr Chia between the compromise of a dispute over the *validity* of a covenant or clause in restraint of trade on the one hand, which, he argued, was the case in *Panayiotou* ([60] *supra*) (and in which situation Public Policy 2 should take precedence over Public Policy 1), and a compromise that resulted in an *agreement* containing covenants or clauses in restraint of trade, which, he argued, was the case here (and in which situation Public Policy 1 should prevail instead), would have been broadly consistent with the approach adopted in the present appeal save for the fact that the latter situation does *not* constitute *a settlement or compromise* as such, but, instead, constitutes (as explained above at [66]) negotiations which lead to the parties arriving at a *fresh* agreement containing covenants or clauses in restraint of trade.

**Was Clause C.1 reasonable within the applicable principles relating to the doctrine of restraint of trade?**

***The applicable legal principles***

*Two cumulative aspects of reasonableness*

69 The classic statement of the law in this particular area is that of Lord Macnaghten in the House of Lords decision of *Thorsten Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] AC 535 ("*Nordenfelt*"). Indeed, this particular statement of law has not only stood the test of time, but also constitutes, in fact, the legal foundation and starting point in so far as this particular area of the law of contract is concerned.

70 In *Nordenfelt*, Lord Macnaghten observed thus (at 565):

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

71 The effect of the above statement of principle has been summarised as follows (see *Butterworths Common Law Series* ([45] *supra*) at para 5.103):

> Returning to Lord Macnaghten's statement of principle [in *Nordenfelt*] set out earlier, … the foundation of the modern law may be summarised as follows: all covenants in restraint of trade are prima facie void, but may be shown to be valid *if reasonable* in the interests of the *parties and* in the interests of the *public* (in which case a remedy, often in the form of an injunction, may be sought if the covenant concerned is breached). In other words, the foundational concept is now *reasonableness* which, in turn, has two sub-aspects or facets, in that to pass muster, the

clause concerned must first be reasonable in the interests of the *parties and*, secondly, the clause must also be reasonable in the interests of the *public*. It is suggested that this dichotomy is in fact a reflection of the tension … between the need to maintain the individual parties' autonomy (particularly that of the covenantor as embodied under the classic rubric of freedom of contract) and the wider need to protect the public interest. It is, in addition, suggested that within the first ... sub-facet – the interests of the parties – the court has also to take into account a further tension between the need to uphold the free choice of the covenantor and the need to prevent an abuse that is nevertheless insufficient to result in the operation of any factors vitiating the contract itself. The final decision must thus be one that balances the various factors in both the individual as well as public spheres. [emphasis in original; footnotes omitted].

72 In so far as the *application* of the above-mentioned statement of principle is concerned, the following paragraphs from the same work may be usefully noted (see *Butterworths Common Law Series* at paras 5.104–5105):

**5.104** However, the very process of balance means that the specific facts and circumstances of each case become of vital importance. In addition, the actual interpretation of the covenant(s) concerned must be done in *context*, for a literal construction, shorn of the context, could lead, inter alia, to the covenant(s) concerned being unjustifiably struck down. However, the court will always look to the substance rather than the form in which the covenant(s) concerned are couched. And in a related vein, it is clear that the courts will proscribe any indirect attempt to circumvent an otherwise reasonable covenant, utilising (in the main) techniques of construction of the covenant itself. In so far as the burden of proof is concerned, this is on the party seeking to rely upon the covenant. The crucial time for ascertaining whether or not the covenant in question is in fact reasonable (or unreasonable, as the case may be) is the time at which the contract is made.

**5.105** Generally speaking, two particular factors almost invariably arise for reconsideration simply because they are almost always part and parcel of the covenant itself in any event: the factors of *area* on the one hand and *time* on the other. The idea of physical space, therefore, still remains a factor, although it cannot obviously be a controlling one, as was the situation where the distinction between general and partial restraints was concerned. There is, however, no clear formula that would lead to a fairly predictable result. To take the factor of time, for example, it has been held that a covenant that literally fetters forever may be reasonable, having regard to the specific circumstances of the case. Such was the holding of the House of Lords in *Fitch v Dewes* [[1921] 2 AC 158], where a solicitor's clerk at a certain town agreed that, after leaving the employer, he would never practise within seven miles of the town hall. The very small radius of restraint was a significant factor in the decision of the House, not only because the smallness of the town meant that the employer had a real and legitimate interest to protect but also because the covenantor had the rest of the United Kingdom (indeed, the world) in which to practise. No one factor, therefore, is decisive; the court has to examine all the circumstances as a whole and decide accordingly. Some guidelines as to application may, however, be discerned from the case law itself, in particular where established categories are concerned.

[emphasis in original; footnotes omitted]

73 The factors of area and time (mentioned in the passage quoted in the preceding paragraph) are important. In so far as the former factor is concerned, the fact that Singapore is small in physical size might, depending, of course, on the particular factual matrix, well prove to be an important consideration (see also the Singapore High Court decision of *Heller Factoring (Singapore) Ltd v Ng Tong Yang* [1998] 3 SLR 299 ("*Heller Factoring*") at [22]).

74 It is also important to note, at this juncture, that, notwithstanding some initial conflation by which the second aspect of reasonableness (*ie*, that relating to the interests of the public) appeared to be overwhelmed by, and subsumed under, the first (*ie*, reasonableness with reference to the parties' interest) (see, in particular, the English Court of Appeal decision of *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793), the preferable approach at present is to distinguish clearly between these two facets of reasonableness – in particular, to reinstate the idea of reasonableness in the interests of the public as a distinct and substantive factor. In this regard, despite some apparent attempts in England to merge the two limbs of reasonableness (for example, *per* Lord Pearce in *Esso Petroleum* ([54] *supra*) at 324), English law appears, to the best of our knowledge, to still be in a state of flux in so far as this particular issue is concerned. Significantly, perhaps, this is *not* the case in the *Singapore* context. In particular, the seminal Singapore High Court decision of *Thomas Cowan & Co Ltd v Orme* [1961] MLJ 41 ("*Thomas Cowan*") must be noted.

75 In *Thomas Cowan*, the plaintiff employer brought an action against its former employee to restrain him from continuing to commit a breach of covenant relating to the plaintiff's fumigation business. The relevant covenant stipulated (*id* at 41–42) that the defendant employee:

> [o]n leaving the services of the employer for any reason whatsoever either pursuant to this Agreement or on any breach of this Agreement shall not carry on the business of White Ant Exterminator or Fumigator [*ie*, the plaintiff's business] anywhere in the Island of Singapore either by himself or in partnership with others nor shall he take employment with any person, firm or corporation carrying on the business of White Ant Exterminators or Fumigators or any such similar business until the period of three years has expired from the date of the employee leaving the services of the employer.

The defendant later left the plaintiff's service and became a director in a rival company, whereupon the plaintiff brought an action to restrain the defendant from breaching the above covenant. The court held in favour of the defendant. Although the judgment by F A Chua J appears to be a straightforward application of the relevant English principles, a closer analysis of the decision itself demonstrates (if we may say so) a clear understanding of the conceptual as well as substantive differences between the two aspects of reasonableness in Lord Macnaghten's statement of principle in *Nordenfelt* (as reproduced at [70] above). In particular, Chua J first held (at 42) that the covenant set out above was *reasonable* as between *the parties themselves*. He then proceeded to consider, *separately*, the interests of the *public*, and found, in the event, that the covenant, although reasonable as between the parties, was *unreasonable* in so far as the interests of the *public* were concerned. In particular, the learned judge observed thus (at 43):

> It is clear that if the defendant is not allowed to operate the plaintiffs would have a *virtual monopoly* in Singapore as regards the [*sic*] fumigation by hydrogen cyanide and methyl bromide. In fact prior to the defendant's firm coming into existence the plaintiffs were the only firm in Singapore doing fumigation. … [S]ince the defendant's firm commenced business in competition with the plaintiffs, the charges for ship fumigation have dropped, which is a good thing, but there is no evidence that the standard of fumigation of ships has deteriorated. [emphasis added]

76 We take this opportunity to endorse the approach adopted by Chua J in *Thomas Cowan*, which (if we may be permitted to add) was ahead of its time and is still relatively novel even when compared to the present English position (though *cf* the prior English cases of not only *Nordenfelt* ([69] *supra*) itself, but also the House of Lords decision of *McEllistrim v Ballymacelligott Cooperative Agricultural and Dairy Society, Limited* [1919] AC 548 at 562–563, as well as the Commonwealth cases cited in *Butterworths Common Law Series* ([45] *supra*) at para 5.109, to which may usefully be added the Ontario High Court decision of *Sherk v Horwitz* [1972] 2 OR 451; 25 DLR (3d) 675 (affirmed

by the Ontario Court of Appeal in *Sherk v Horwitz* [1973] 1 OR 360; 31 DLR (3d)152, but on other grounds) and the Alberta Court of Queen's Bench decision of *Baker v Lintott* [1981] 2 WWR 385; 25 AR 512 (reversed by the Alberta Court of Appeal in *Baker v Lintott* [1982] 4 WWR 766, but only as to the facts), all of which authorities recognise the distinction between the two aspects of reasonableness set out in *Nordenfelt*).

77 Indeed, as is evident from Lord Macnaghten's statement of principle in *Nordenfelt* itself, the two aspects of reasonableness are clearly distinct, although they complement each other (see also above at [74]). In particular, the second aspect of reasonableness (*ie*, that relating to the public interest) ensures that the impact of local circumstances is also taken into account; this is, in fact, clearly illustrated by the observations of Chua J (as quoted at [75] above).

78 It is also significant to note that *Nordenfelt* was in fact cited to the Court of Appeal of the Straits Settlements (on appeal from Singapore) as early as the turn of the last century (see *John Little & Company, Ltd v Wallace* [1902] SSLR 53, which concerned a covenant in restraint of trade in a n *employment* context), and has been applied since. (See, for example, another relatively early decision of the Straits Settlements High Court, *Pherdzaha Maneekji Framroz v Nowroji Rustamji Mistri* [1932] MLJ 96 ("*Framroz*"); the appeal against that decision was dismissed, with the Straits Settlement Court of Appeal delivering an oral judgment upholding the decision of the court below (*id* at 98).) And, for more recent decisions, see, for example, the Singapore High Court decision of *VSL Prestressing (Australia) Pty Ltd v Mulholland* [1969-1971] SLR 527 ("*VSL Prestressing*"). Indeed, in *VSL Prestressing*, Choor Singh J characterised (at 532, [112]) Lord Macnaghten's statement of principle in *Nordenfelt* as being "laid down in the clearest and most happily selected language". We are of the view that this judicial accolade is, indeed, richly deserved.

*A legitimate proprietary interest*

(a) General principles

79 It has also been clearly established that there cannot be a bare and blatant restriction of the freedom to trade (commonly referred to as a "covenant in gross"): see the oft-cited Privy Council decision of *Vancouver Malt and Sake Brewing Company, Limited v Vancouver Breweries, Limited* [1934] AC 181 (on appeal from the British Columbia Court of Appeal). There must always – and this is a fundamental legal proposition in this particular area of the law – be *a legitimate proprietary interest* which the court will then seek to protect by way of the doctrine of restraint of trade (indeed, in the present case, the Judge found that Clause C.3 was, in effect, a covenant in gross (see above at [13])). However, even where a legitimate proprietary interest is shown, the court will ensure that the covenant in restraint of trade goes *no further than what is necessary* to protect the interest concerned.

80 In the context of the *sale of a business*, the main legitimate proprietary interest is that of goodwill.

81 In the *employment* context, we have already noted that the courts generally adopt a relatively stricter approach towards covenants in restraint of trade (see above at [48]). More specifically, in so far as the issue of a legitimate proprietary interest is concerned, there are generally two main interests which have been identified by the courts as meriting protection in this particular context. As stated in *Butterworths Common Law Series* ([45] *supra*) at para 5.118:

> There are two interests that have been clearly identified in an employment context to merit protection by the courts, provided of course that the requisite proof is forthcoming. Indeed, so

> well-established and significant are these two particular interests that the courts will grant protection even where there is no express covenant ... based on the duty of fidelity owed by the employee to his or her employer; there will, on [*sic*] other words, be implied terms in order that the interest concerned be protected. These two interests are *trade secrets* and *trade connection*, respectively, and have been long-established in the case law: see, for example, the House of Lords decisions of *Mason v Provident Clothing and Supply Co Ltd* [[1913] AC 724] and *Herbert Morris Ltd v Saxelby* [[1916] 1 AC 688]. [emphasis in original; footnotes omitted]

Reference may also be made, in the local context, to *Heller Factoring* ([73] *supra*) at [15].

82 Given that the present appeal relates to the employment context, it would be apposite to consider both of the above-mentioned interests in a little more detail.

(b) Trade secrets in the employment context

83 In so far as *trade secrets* are concerned, the observations by Neill LJ in the English Court of Appeal decision of *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 ("*Faccenda Chicken*") at 137–138, although not directed at an express covenant in restraint of trade as such, are nevertheless apposite in so far as they constitute guidelines that would aid the court in ascertaining whether or not something constitutes a trade secret (or its equivalent). According to Neill LJ, the factors to take into consideration are:

> (a) *The nature of the employment* – where the employee habitually handles confidential information, a higher obligation of confidentiality may be imposed.
>
> (b) *The nature of the information itself* – in this regard, the information concerned must be a trade secret or material which, whilst not properly described as a trade secret as such, is, having regard to all the various circumstances, "of such a highly confidential nature as to require the same protection as a trade secret" (*id* at 137).
>
> (c) *Whether the employer impressed on the employee the confidentiality of the information* – on this point, Neill LJ was of the view that, in order to prevent the use or disclosure of the information in question, it was insufficient for the employer to merely tell the employee that the information was confidential. The employer's attitude towards the information itself had to be considered as well.
>
> (d) *Whether the relevant information can be easily isolated from other information which the employee is free to disclose* – where the information alleged to be confidential is "part of a package" (as Neill LJ put it (*id* at 138)) and the remainder of the package is not confidential, this factor, although not conclusive in itself, can shed light on whether the information in question is truly a trade secret.

84 Where the information concerned is freely available in the marketplace, it, of course, cannot possibly be acquired by the employer as a trade secret (see the Singapore High Court decision of *Medivac International Management Pte Ltd v Moore* [1987] SLR 415 at 421, [15]–[16], where *Faccenda Chicken* was cited and applied).

85 It was also held in *Faccenda Chicken* that where the confidential information in question fell *short* of constituting a trade secret, such information, although not permitted to be disclosed or used by the employee whilst still *within the employ* of the employer, could be disclosed or used *after* the contract of employment came to an end (*id* at 136–137). In our view, the stricter duty imposed

during the period of employment is wholly consistent with the duty of fidelity owed by the employee to the employer whilst in the latter's service (see also [193] below). These principles, it should be noted, have been endorsed in the Singapore context: see, for example, the decision of this court in *Tang Siew Choy v Certact Pte Ltd* [1993] 3 SLR 44 ("*Tang Siew Choy*") at 50, [16].

86 The court in *Faccenda Chicken* further held (*per* Neill LJ at 137) that even the use of an *express* covenant to protect confidential information falling short of a trade secret *after* the contract of employment had come to an end was *not* permitted. Subsequent (and more recent) authorities have cast doubt on this particular proposition (see, for example, the English High Court decisions of *Balston Limited v Headline Filters Limited* [1987] FSR 330, especially at 347–348, and *Systems Reliability Holdings plc v Smith* [1990] IRLR 377 at [64]–[65], as well as the New South Wales Court of Appeal decision of *Wright v Gasweld Pty Ltd* (1991) 20 IPR 481; but *cf Roger Bullivant Ltd v Ellis* [1987] ICR 464 and *Mainmet Holdings plc v Austin* [1991] FSR 538). 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.

87 However, a line must be drawn between a covenant which seeks to protect a legitimate proprietary interest on the one hand and one which merely seeks to prevent the employee in question from exercising his or her own natural skill and talent, even if such skill and talent are acquired by the employee in the course of his or her employment (see also *Framroz* ([78] *supra*) at 97). The courts will not sanction the latter. Much will, therefore, depend on the facts. As Kan Ting Chiu J put it in the Singapore High Court decision of *Asia Business Forum Pte Ltd v Long Ai Sin* [2003] 4 SLR 658 at [18]:

> What are the qualities of a trade secret? A trade secret can be in any form. It can be simple or complex. It can be the result of intense thought and immense effort, or it may be a chance discovery. It is not possible to state comprehensively the necessary make-up of a trade secret.

(The appeal against Kan J's decision in the above case was dismissed: see the editorial note to the Lawnet version (available at http://www.lawnet.com.sg; accessed 21 November 2007) of *Asia Business Forum Pte Ltd v Long Ai Sin* [2004] 2 SLR 173, a decision of the Court of Appeal in related proceedings.)

88 So in the leading House of Lords decision of *Mason v Provident Clothing and Supply Company, Limited* [1913] AC 724, for example, the House held, *inter alia*, that the success of the defendant employee was due, in the main, to his natural gifts as a canvasser, and only secondarily to special training provided by the plaintiff employer. In the circumstances, therefore, no trade secrets were involved as such.

89 In another leading House of Lords decision already referred to, *Herbert Morris* ([45] *supra*), the plaintiff employer was a leading manufacturer of hoisting machinery whilst the defendant employee was its draughtsman. One of the issues concerned the enticement of the plaintiff's customers – another legitimate proprietary interest in the context of employment contracts, which will be dealt with briefly in a moment. What is germane for present purposes is the fact that there were a large number of "E charts" that gave details of manufacture, the strength of the materials used and other miscellaneous facts gained through experience. In addition, there were "L drawings" that comprised tables and plotted graphs indicating the composition and dimensions suitable for specific

jobs. There was also commercially valuable information pertaining to the requirements of existing customers as well as the probable requirements of prospective ones. The plaintiff employer was unsuccessful in seeking to enforce a covenant in restraint of trade against the defendant employee. The House held, *inter alia*, that the plaintiff could not demonstrate the presence of any trade secrets which required protection. In this particular regard, the House found (at 703) that the information in question, although handed out from time to time by the plaintiff to its employees, was ultimately traced and returned to the former. The House also found that it was impossible for any employee to memorise the enormous amount of complex details involved, although he or she might conceivably recollect the general character and principle of the scheme of organisation practised by the plaintiff; such general character and principle could not, however, be considered a trade secret meriting protection under law. Finally, the plaintiff's managing director conceded in evidence that the real object of the plaintiff in imposing the restraint was to preclude competition by the defendant employee after he left the plaintiff's employment (when, in point of fact, the defendant was merely utilising his general skill and knowledge).

90 The situation would be quite different if it were found that the employee in question had clearly assimilated the confidential information concerned: see, for example, the English High Court decision of *Forster and Sons (Limited) v Suggett* (1918) 35 TLR 87. Indeed, much will (as already emphasised above) turn on the precise facts in question (see, for example, the English Court of Appeal decision of *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623, which distinguished *Herbert Morris*, although the court ultimately held that the covenant in restraint of trade was unenforceable).

91 It also follows that any trade secrets or confidential information must be *specifically pleaded*, as a general assertion will obviously not pass muster: see, for example, the decision of this court in *Stratech Systems Ltd v Nyam Chiu Shin* [2005] 2 SLR 579 ("*Stratech*"). There must also be an evidentiary basis that substantiates the allegations by the employer (see, for example, the decision of this court in *Ng Thiam Kiat v Universal Westech (S) Pte Ltd* [1997] 3 SLR 419, especially at [16]).

92 More importantly, *Stratech* reaffirms (at [48]–[49]) the proposition that where the protection of confidential information or trade secrets is already covered by *another* clause in the contract, the covenantee will have to demonstrate that the restraint of trade clause in question covers a legitimate proprietary interest *over and above* the protection of confidential information or trade secrets. Indeed, this proposition is, in our view, a *general* one and would apply equally in the context of other legitimate proprietary interests (for example, that of trade connection, to which we now briefly turn our attention) as well.

(c) Trade connection in the employment context

93 The second proprietary interest that is traditionally recognised as well as protected by the courts in the employment context is that of *trade connection*. It has been clearly established in the case law that there must, in this regard, be *personal knowledge of (and influence over) the customers of the employer* (see, for example, *Herbert Morris* ([45] *supra*)). It has also been clearly established that the courts will not allow employers to achieve by *indirect* means what they cannot otherwise do through direct means: see, for example, the English decisions of *Bull v Pitney-Bowes Ltd* [1967] 1 WLR 273 and *Esso Petroleum* ([54] *supra*) at 300 (*per* Lord Reid), commenting on the English Court of Appeal decision of *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch 108 ("*Kores*"); see also, in this regard, M P Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 15th Ed, 2007) at p 531.

(d) The present appeal – legitimate proprietary interests in the context of non-solicitation clauses

94 The present appeal does *not* – at least, not directly – involve either of the two legitimate proprietary interests traditionally protected within the employment context as briefly described above (*viz*, trade secrets and trade connection). It is important to emphasise, right at the outset, that apart from trade secrets and trade connection, *other* legitimate proprietary interests may also exist and be protected by the courts in this particular context, although they must obviously be legally justified.

95 To return to the facts in the present appeal, what was breached here (*viz*, Clause C.1) was what is traditionally known as a "non-solicitation clause". Non-solicitation clauses can, of course, apply to the solicitation of the former employer's *customers* or employees, or to both. For the avoidance of doubt, when we refer to "non-solicitation clauses" in *the present judgment*, we are referring to clauses directed at solicitation of the former employer's *employees*.

96 The appellant pointed us to precedents which acknowledge such clauses as being both appropriate as well as necessary in the employment context. The reasoning which underlies these cases is that the employer has a legitimate proprietary interest to maintain a stable, trained workforce. The oft-cited decision in this regard is that of the English Court of Appeal in *Ingham v ABC Contract Services Ltd* (12 November 1993, unreported) ("*Ingham*"). In that case, the plaintiff carried on business as a recruitment consultant supplying temporary staff to various businesses. One of the covenants that was considered was a non-solicitation clause under which the employee covenanted not to "solicit or entice or endeavour to solicit or entice away any director, manager or servant of the [plaintiff employer] or any associated company". Leggatt LJ (with whom Russell LJ agreed) observed thus (quoting from the transcript of the judgment in Lexis, available at http://www.lexisnexis.com (accessed 21 November 2007)):

> [The non-solicitation covenant] is intended to prevent the defendant [employee] from poaching the [plaintiff employer's] employees after he has left [the plaintiff's] employment. *[The plaintiff has] a legitimate interest in maintaining a stable, trained work force in what is acknowledged to be a highly competitive business.* That is an interest which the [plaintiff is] entitled to protect against solicitation and enticement by the [d]efendant. [emphasis added]

97 Leggatt LJ's statement of principle in *Ingham* has been endorsed in a number of subsequent cases (and is, in fact, consistent with yet another English High Court decision, *SBJ Stephenson Limited v Keith Anthony Mandy* [2000] FSR 286 ("*SBJ Stephenson Limited*") at 300, although *Ingham* was not expressly cited there). These cases include the (also) English Court of Appeal decision of *Dawnay, Day & Co Ltd v De Braconier D'Alphen* [1997] IRLR 442 ("*Dawnay*"), which affirmed the High Court's decision in *Dawnay, Day & Co Ltd v De Braconier D'Alphen* [1997] IRLR 285, as well as the English High Court decisions of *Alliance Paper Group plc v Prestwich* [1996] IRLR 25 ("*Alliance Paper Group*") and *TSC Europe (UK) Ltd v Massey* [1999] IRLR 22 ("*TSC Europe*").

98 Indeed, from the more general (yet no less important) perspective of justice and fairness, there is no reason in principle why the class of legitimate interests (particularly *vis-à-vis* an established context such as the one under consideration in this appeal, *viz*, the employment context) should be arbitrarily confined. As Evans LJ (with whom Ward and Nourse LJJ agreed) observed in *Dawnay* at [30]:

> In my judgment, far from confining the circumstances in which covenants in restraint of trade may be enforced to certain categories of case[s], and defining those categories strictly, the courts have moved in the opposite direction. The established categories are not rigid, and they are not exclusive. Rather, the covenant may be enforced when the covenantee *has a legitimate interest, of whatever kind, to protect, and* when the covenant is no wider than is necessary to

protect that interest. [emphasis added]

99 It should, however, be noted that there are some (also English Court of Appeal) authorities that take a *contrary* view; for instance, *Hanover Insurance Brokers Ltd v Schapiro* [1994] IRLR 82 ("*Hanover Insurance Brokers*"), where Dillon LJ (with whom Nourse LJ agreed) observed thus (at [15]–16]):

> [T]he difficulties in law in the way of a non-poaching agreement *between employers* are very clearly explained in the decision of the Court in *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch 109. *In particular, the employee has the right to work for the employer he wants to work for if that employer is willing to employ him*. *Moreover*, the restriction as drawn [in *Hanover Insurance Brokers*] would apply to *all employees* of [the employer] *irrespective of expertise or juniority, and* would apply to those who were employees at the time of the solicitation or enticement *even if they had only become employees after all the defendants [the employees] had left [the employer's] service. [The employer] cannot impose a mere covenant against competition on the defendants.* That is why a covenant not to canvass persons who had become *customers* of [the employer] only after the defendants had ceased to be employees of [the employer] would be invalid … *The same* must be the case with *employees*. ...
>
> [Counsel for the employer] submits that an insurance broker depends on its staff and the team will of its staff, and that the goodwill of an insurance broker's business depends on its staff. So in a sense it does, as with any other company, *but that does not make the staff an asset of the company like apples or pears or other stock in trade, nor does it entitle [the employer] to impose a covenant against competition on the [employees]*.
>
> [emphasis added]

100 If necessary, we would (with the exception of perhaps one point discussed at [106]–[110] below) respectfully disagree with the approach adopted by Dillon LJ in *Hanover Insurance Brokers* as set out in the preceding paragraph (which approach was also adopted in the Hong Kong District Court decision of *Emperor Resorts International Limited v Wong Chi Hang* [2004] HKDC 40, where the judge stated at [71] that the law did not regard employees as an asset of the employer and that there was therefore no implied duty on the part of an employee not to poach his former colleagues; for a contrary view, see the passage quoted at [118] below). However, we also note that Dillon LJ relied heavily on the English Court of Appeal's previous decision in *Kores* ([93] *supra*) (see also Philip Sales, "Covenants Restricting Recruitment of Employees and the Doctrine of Restraint of Trade" (1988) 104 LQR 600, especially at 612–614, although it should be noted that this article was published *prior to* the more recent cases referred to above at [96]–[97], which take the *contrary* position that an employer does have a legitimate interest in maintaining a stable, trained workforce). It has been said of *Kores* (*per* Michael Jefferson, *Restraint of Trade* (John Wiley & Sons, 1996) at p 24) that:

> The case may be distinguished as not involving a covenant between employers and employees, and the court's statement on the issue of legitimate proprietary interest is *obiter.* There are indications in more recent cases that employers do have such an interest in the stability of their workforce.

101 We are of the view that *Kores* can, in fact, be distinguished, albeit not for precisely the same reasons as those set out by the learned author in the preceding paragraph. In particular, we do not regard the court in *Kores* as having rejected, out of hand, the need to maintain a stable, trained workforce as a legitimate proprietary interest. On the *contrary*, it appears to us that that court *did*,

*in principle*, accept the existence of such an interest. *However*, the particular clause in *that* case did *not* pass muster because the covenantor sought to protect this interest via an *unacceptable type of clause*. In *Kores*, the agreement in question was entered into between two *employers* in the following terms (*id* at 110):

> In consideration of your agreeing not without our written consent to, at any time, employ any person who, during the then past five years, shall have been a servant of ours, we undertake not, without your written consent, to, at any time, employ any person who, during the then past five years, shall have been a servant of yours.

102 To elaborate, the *substance* of the above clause, although entered into between *employers*, was – in the words of Jenkins LJ, who delivered the judgment of the court – as follows (*Kores* at 125):

> But an employer has *no legitimate interest* in preventing an employee, after leaving his service, from entering the service of a competitor *merely* on the ground that the new employer is a competitor. The danger of the adequacy and stability of his [the covenantor's] complement of employees being impaired through employees leaving his service and entering that of a rival [in *Kores*, the covenantee] is not a danger against which he is entitled to protect himself *by exacting from his employees* covenants that they will not, after leaving his service, enter the service of any competing concern. *If in the present case the plaintiffs* [the covenantor] *had taken a covenant from each of their employees that he would not enter the service of the defendants* [the covenantee] *at any time during the five years next following the termination of his service with the plaintiffs, and the defendants had taken from their employees covenants restraining them in similar terms from entering the employment of the plaintiffs, we should have thought that (save possibly in very exceptional cases involving trade secrets, confidential information and the like) all such covenants would on the face of them be bad as involving a restraint of trade which was unreasonable as between the parties*. [emphasis added]

103 With respect, there is a conundrum of general principle and logic involved in the above holding: If a clause is intended to maintain a stable, trained workforce, how, then, can it be argued that such a clause is a mere device to prevent the employee from entering the service of the new employer *merely* on the ground that the latter is a competitor of the original employer? If, of course, the clause is in fact such a device, it would be tantamount to a bare and blatant restriction of the freedom to trade; it would be a covenant in gross (see [79] above). *However*, such reasoning is circular inasmuch as it *assumes* a (*negative*) answer to what is *still* in issue – namely, whether or not the covenantor/employer does, in fact, have *a legitimate proprietary interest* in maintaining a stable, trained workforce that (in turn) merits protection via a non-solicitation clause which satisfies the twin requirements of reasonableness set out by Lord Macnaghten in *Nordenfelt* (as stated at [70] above). In other words, to *assume* that there is *no* legitimate proprietary interest in maintaining a stable, trained workforce in order to *arrive at the conclusion* that there is, in fact, *no such* legitimate proprietary interest (and, hence, that a covenant aimed at securing a stable, trained workforce is a mere covenant in gross) is, with respect, circular reasoning. Instead, the court must, based on reason and principle, address the *quite distinct* issue of *whether or not* maintaining a stable, trained workforce *ought* to be recognised as *a legitimate proprietary interest*. Indeed, *Kores* itself did not concern a clause which prevented a former employee from soliciting other employees. To the extent that the decision in *Kores* did not address this very important issue directly, it ought not, in our view, to be followed. *Indeed, it is our view that it is precisely because of the reasons just given that the latest English authorities to the contrary* (set out above at [96]–[97]) *ought to be followed instead*.

104 It should also be noted that *Kores* has itself been subject to some criticism inasmuch as

whilst the court purported to focus on the interest of *the parties* (the *first* branch of reasonableness set out by Lord Macnaghten in *Nordenfelt*), the real issue to be decided in that particular case was really whether or not the clause concerned was reasonable in the interests of *the public* (which is the *second* branch of reasonableness set out by Lord Macnaghten in *Nordenfelt*): see *Esso Petroleum* ([54] *supra*) at 300 and 319 (*per* Lord Reid and Lord Hodson, respectively) and *Cheshire, Fifoot and Furmston's Law of Contract* ([93] *supra*) at p 532. It is, in our view, unfortunate that the court in *Kores* merely referred briefly to the issue centring on reasonableness *vis-à-vis* the public interest and decided, ultimately, that it was unnecessary to decide the point (*id* at 127), especially since the court then proceeded to hint that it would have decided this particular point (*ie*, reasonableness in relation to the public interest) in favour of the covenantee as it was "not wholly convinced" (*id* at 128) by the covenantor's argument that such a clause was reasonable in the interests of the *public*.

105 It should equally be noted that a number of *textbooks* appear to adopt a more *neutral* approach than that taken in *Kores* on the question of whether or not the maintenance of a stable, trained workforce is a legitimate proprietary interest which the employer can protect by way of a non-solicitation clause (see, for example, *The Restraint of Trade Doctrine* ([56] *supra*) at p 101 and R A Buckley, *Illegality and Public Policy* (Sweet & Maxwell, 2002) at para 14.14; but *cf* Simon Mehigan & David Griffiths, *Restraint of Trade and Business Secrets: Law and Practice* (FT Law & Tax, 3rd Ed,1996) at para 8.4.3, where *Hanover Insurance Brokers* ([99] *supra*) is preferred and where reference is made to the Hong Kong Court of Appeal decision of *Kao, Lee & Yip v Koo Hoi-yan Donald* [1995] 1 HKLR 248 at 252–253.) These textbooks, however, merely reflect *the state of flux* which the law was in at the time of their publication. The preponderance of authority now appears to be in favour of *recognising* such an interest.

106 However, it must be emphasised that the acceptance of such an interest does *not*, *ipso facto*, render a non-solicitation clause (as defined at [95] above) reasonable. This is because the clause would *still* be subject to the twin tests of reasonableness enunciated by Lord Macnaghten in *Nordenfelt* (see [70] above). To this end, the clause would have to be examined closely, with particular regard to the factual context in which it was made and in which it was supposed to operate. More specifically, do the *categories of employees sought to be covered* by the clause matter? If, for example, a non-solicitation clause covers *all* employees in the company concerned, would the clause be held by the court to be *too wide*? This was, in fact, one of the holdings in *Hanover Insurance Brokers*, where an *additional* reason why the clause in that case did not pass muster was that it did not distinguish between the relative seniority of the employees concerned (*id* at [15]). Indeed, this was also an integral part of the reasoning in the earlier decision of *Kores* ([93] *supra*), which, as we have seen, was heavily relied upon in *Hanover Insurance Brokers*. The same approach was adopted by the English High Court in *TSC Europe* ([97] *supra*), where the court, although endorsing (as we have seen at [97] above) the view in *Ingham* ([96] *supra*) that the maintenance of a stable, trained workforce could constitute a legitimate proprietary interest that could be protected by a covenant in restraint of trade, nevertheless held (at [50]) that the clause in *that* particular case (*ie*, *TSC Europe*) could not pass muster as the protection which it sought to afford the employer was more than what was reasonably necessary to protect the employer's legitimate proprietary interest.

107 The clause in *TSC Europe* covered the solicitation of "*any* employee" [emphasis added]. More specifically, the material part of the clause imposed a restraint on the employee, who promised not to "solicit, procure or induce, or endeavour to procure or induce, *any* employee … to leave his employment with such company" [emphasis added]. Judge Peter Whiteman QC observed (at [50]), with regard to the clause just quoted, as follows:

> In my judgment, [the clause] has *two clear vices. First*, it prohibits [the employee] from soliciting

> any employee [of the employer] … *without reference to his or her importance to the business and whether or not he or she has any knowledge or experience in relation to [the employer's] fields of activity*. *Secondly*, the covenant prohibits [the employee] from soliciting any such employment *even if their employment* with [the employer] *commenced after* [the employee] left the company. It is the combined effect of these two vices that is critical ... [emphasis added]

108 A similar observation has also been made in a textbook already referred to, as follows (see *Restraint of Trade* ([100] *supra*) at pp 23–24):

> Such a [non-solicitation] clause, it is thought, must be restricted to colleagues over whom the employee had influence, and it is suggested that such a clause may well be inappropriate in relation to members of staff whom the employers can easily replace: cleaners may be instanced.

109 It should be noted, however, that the learned author then proceeds to observe thus (*id* at p 24):

> This type of covenant is intended to prevent the employers losing their workforce to a competing firm. It demonstrates that the interests which the employers can protect are not restricted to trade connections and trade secrets. This list of legitimate proprietary interests is not closed.

110 In our view, the *scope (or, more accurately, the categories)* of employees *covered* under a non-solicitation clause goes to the *reasonableness* of the clause concerned, which, in turn, depends on the *precise factual matrix* concerned. No blanket rule ought to be laid down, although we would agree that it would generally be more difficult to justify a non-solicitation clause which covers the solicitation of just "any" employee. In this regard, it may be of significance to note that, in *Ingham* ([96] *supra*) as well as other decisions, there is a reference to a *trained* workforce (see especially, *SBJ Stephenson Limited* ([97] *supra*) at 300). Although the concept of a "trained" workforce is, arguably, a broad one that ought to be construed in the context of the particular factual matrix in question, generally speaking, we would think that if the non-solicitation clause concerned covers employees whose work entails very minimal (or even no) expertise and does not form an integral part of the employer's operations, it would (absent extraordinary circumstances) be extremely difficult for the employer to justify the reasonableness of that particular clause. It must, however, always be remembered that the permutations of possible factual matrices are far too vast and complex to permit of any one overarching legal principle. For example – and taking a modified version of the situation mentioned at [108] above – if an employer runs a cleaning service and his workforce therefore comprises cleaners, there might be a good argument in favour of upholding a non-solicitation clause that relates to cleaners (notwithstanding the relatively low level of skill generally required for that job); in contrast, such an argument might not be persuasive if the cleaners are only one of several categories of employees in an employer's business. *Everything, in the final analysis, depends on the particular factual matrix*.

111 We note too that there has been a suggestion that a non-solicitation clause may *not* be justified by reference *only* to an employer's interest in maintaining a stable, trained workforce. In particular, in the recent New South Wales Supreme Court decision of *Kearney v Crepaldi* [2006] NSWSC 23, McDougall J observed thus at [58] (*vis-à-vis* a factual scenario in which there had been use of confidential information gained by the employee during the course of his employment):

> Those authorities [which included, *inter alia*, *Ingham* ([96] *supra*) , *Dawnay* ([97] *supra*) and *Hanover Insurance Brokers* ([99] *supra*)] ... seem to support the conclusion that a covenant given by an employee to an employer, prohibiting the employee, after termination, from soliciting former fellow employees to join a new business venture, *may not be justified simply by the*

*employer's interest in maintaining a stable trained workforce, but may be justified where the solicitation is based on confidential information which the former employee has concerning the relationship between the other employees and the employer. In other words, it may be justified where the former employee uses (or may use) confidential knowledge gained in the course of the contract of employment to target particular employees and to pitch the terms of offers of employment to them*. I do not intend this to be a comprehensive statement of the circumstances in which such a covenant may be upheld; it is, at most a statement that is sufficient for the purposes of the question for my decision. [emphasis added]

112 There is some support for the position set out in the preceding paragraph in the English context, as can be seen from *Dawnay* ([97] *supra*), where the English Court of Appeal observed thus (at [47]):

The [non-solicitation] clause can be regarded as objectionable because it restricts not only rights of the former employee to recruit staff for his new business, but also the opportunities of the remaining employees to learn about future employment possibilities for themselves. *However, their ability and right to do so through making enquiries of their own, and through advertisements and other channels of communication in the normal way, is not restricted at all. The employer's need for protection arises because the ex-employee may seek to exploit the knowledge which he has gained of [the remaining employees'] particular qualifications, rates of remuneration and so on, which the judge [at first instance] included in his general description of specific confidential information which the managers [the ex-employees in that case] acquired*. [emphasis added]

113 However, there has, in fact, been an even more recent decision (likewise by the New South Wales Supreme Court, *per* Brereton J), *Cactus Imaging Pty Limited v Glenn Peters* [2006] NSWSC 717 ("*Cactus Imaging*"), where a *contrary* approach was taken. Although *Cactus Imaging* is a first instance decision, it contains a comprehensive review of the relevant case law and (more importantly) carefully analyses the relevant arguments before arriving at the conclusion that the maintenance of a stable, trained workforce is indeed a legitimate proprietary interest that the employer is entitled to protect via a non-solicitation clause, *and* that this is so *even in the absence of* protectable confidences. Given the relative uncertainty of the law on this particular issue, we take the opportunity to consider this particular decision in more detail.

114 In *Cactus Imaging*, there were a number of issues before the court. One, which is directly relevant to the present appeal, related to the status of a clause restraining the employee concerned from soliciting employees of the employer following the end of his employment. The clause itself read as follows:

9.1 The employee will not directly or indirectly and whether solely or jointly or as director, manager, agent or servant of any person or corporation, do any of the following acts at anytime during the course of employment and for 12 months thereafter:

…

9.1.3 Solicit, interfere with or endeavour to entice away any employee, consultant or contractor of the employer …

115 As already mentioned, Brereton J embarked on a comprehensive (and, if we may say, extremely helpful) review of the case law from a number of Commonwealth jurisdictions. In the process, a number of important points emerged.

116 First, Brereton J pointed out at [45]) that the observations by Jenkins LJ in *Kores* ([93] *supra*), which we referred to earlier at [102] above, "[did] not address, at least directly, a covenant binding a former employee not to solicit other employees" (see also [103] above).

117 Second, the learned judge referred to the issue of reasonableness – in particular, whether a non-solicitation clause covering all employees (and not merely key personnel) was excessive and, hence, unreasonable (see *Cactus Imaging* at [49], where *TSC Europe* ([97] *supra*) was cited; see also [106] above).

118 Third, and most importantly, Brereton J (at [52]–[57]) set out a series of statements of principles which, because of their significance, merit setting out in full, as follows:

> 5 2 ***The cases appear to have accepted that such covenants*** [*ie*, covenants restraining the non-solicitation of employees] ***are within the restraint of trade doctrine***. In New South Wales this is doubly important because, unless they are restraints of trade, the *Restraints of Trade Act* will not be available to save them to the extent that they are not unreasonable. ***Such a covenant limits or restricts the ability of a trader bound by it to recruit desirable employees. In that way, it affects the entitlement of the covenantor to carry on trade or business in the manner which he or she thinks most desirable in his or her own interests; that is a restraint of trade*** within the formulation stated in *Attorney-General of the Commonwealth of Australia v Adelaide Steamship Company Ltd* [1913] AC 781, 793–4 (Lord Parker of Waddington), and in *Petrofina (Great Britain) Limited v Martin* [1966] Ch 146, 169 (Lord Denning MR), 180 (Diplock LJ). In *Kores v Kolok*, such arrangements were assumed to be within the doctrine. As Sales has pointed out ["Covenants Restricting Recruitment of Employees and the Doctrine of Restraint of Trade" (1988) 104 LQR 600, 607], a business depends for its profitability and competitivity on three factors: (1) its customers and the proceeds of sales to them; (2) its suppliers and the cost of purchases from them; and (3) its staff, and the cost and value of their labour. Restriction on competition in any of those fields may impact on ultimate profitability. ***A prohibition on recruiting desirable staff is, therefore, a restraint of trade***.
>
> 5 3 ***The controversy has been whether the employer has an interest in staff connection recognised by law as legitimate for the purpose of supporting a covenant. The weight of authority favours the view that there is such an interest.*** Traditionally, it has been said that the only reason for supporting a restraint is some *proprietary right* of the employer, either trade connection or trade secrets ...
>
> 5 4 ***The more recent cases*** [*inter alia*, *Dawnay* ([97] *supra*) and *Kearney v Crepaldi* ([111] *supra*)]***have tended to support restraints on recruitment on the basis of protection of confidential information; thus it has been said that an employer may be able to demonstrate a legitimate interest in maintaining a stable trained workforce, at least if the former employee may seek to exploit knowledge gained of the particular qualifications, rates of remuneration and so on pertaining to other employees which is confidential to the employer*** ... Mr Gye [counsel for the defendant employee] submitted that confidential information could not be a sufficient interest to support such a restraint, because it did not permit the inquiry, required by the *Faccenda Chicken* test, as to whether the relevant information was a trade secret, know-how or trivial, only the first of which was entitled to protection. This submission must be rejected, *first* because, as has already been explained, the *Faccenda Chicken* test is not the law in this State; and *secondly* because a restraint on a former employee carrying on business, which unquestionably may be supported by an interest in protection of confidential information ... is open to exactly the same objection.

55 But apart from protection against misuse of confidential information, does an employer have a protectable interest in staff connection – that is, in maintaining a stable trained workforce? The cases denying that there is any such legitimate interest emphasise that an employer does not own the workforce, as if employees were akin to stock-in-trade. ***That is self-evident, but nor does an employer own the customers, who are also not akin to stock-in-trade; yet a connection with customers is unquestionably amenable to protection by covenant. The employees, along with the suppliers and the customers, make up the three relations upon which the profitability of a business depends. The customers are not property, but their connection with the business adds value to the business and is recognised as deserving of protection in the proprietor's legitimate interest. Similarly, employees are not property, but, all else being equal, a business with a stable trained workforce will be more attractive to a purchaser and command a higher price than one with a workforce which is unstable, disruptive or poorly trained, just as a loyal and satisfied clientele makes a business more attractive and valuable. In my opinion, staff connection constitutes part of the intangible benefits, which may give a business value over and above the value of the assets employed in it, and thus comprises part of its goodwill. It is amenable to protection by a covenant in a manner similar to customer connection, even in the absence of protectable confidences***.

5 6 ***In the absence of confidential information, similar considerations inform the reasonableness of such a covenant in respect of its duration as are relevant to the reasonableness of a covenant protecting customer connection***: essentially, how long might the hold of the former employee over the other employees be expected to last before weakening. That will be influenced, *inter alia*, by ***the seniority of the former employee***. There is unlikely to be any influence over employees with whom the former employee did not have contact, except perhaps in the case of senior staff. ***Another consideration is that it is within the capacity of an employer to ensure the stability of its workforce by offering key staff long term contracts of employment, so that solicitation of staff with such contracts would constitute the tort of inducing breach of contract*** … ***It is difficult to see why, as a matter of policy, an employer who wishes to maintain flexibility in its labour force by engaging staff on contracts terminable on relatively short notice on either side, should at the same time be entitled to insist on maintaining stability by a covenant of the type in question here***.

57 In this case, the non-recruitment covenant must be evaluated ***in its whole context***, including the dual interests that it protects, and the other restraints which operate in conjunction with it. …

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

119 In the event, Brereton J held that the clause concerned in that particular case was reasonable. In particular, he found (at [57]) that:

As State Sales Manager, Mr Peters [the employee concerned] gained knowledge about the performance of other sales personnel and was in a position to know their capacities and personalities. *Although the evidence does not establish that he knew their terms of employment, nor their remuneration, which might have been confidential, he was, in effect, the team leader of the state sales team, and as such was in a position to gain and exercise influence over other members of the New South Wales sales team. Moreover, the members of his team would have in their possession the same type of confidential information as I have found Mr Peters had in his. The major risk, against which Cactus* [the employer concerned] *was entitled to guard, was that upon his departure Mr Peters might seek to use his influence, gained in the course of his*

*employment with Cactus, to arrange the defection of his state sales team to a competitor, thus seriously disrupting Cactus' operations, and potentially putting into the hands of a competitor the ability to use confidential information of Cactus, to its detriment. Thus the covenant did not only protect staff connection, but also operated in conjunction with the remainder of cl 9.1 to protect Cactus' confidential information*, in particular its pricing parameters and marketing strategies. [emphasis added]

1 2 0 The learned judge also held that the twelve-month duration of the covenant was not unreasonable in the circumstances, although it should be noted that he utilised (at [59]) s 4(1) of the Restraints of Trade Act 1976 (NSW) to "read down" (as he put it) the clause, confining it only to non-solicitation of the plaintiff's New South Wales sales staff and only to non-solicitation of such staff for the purpose of engaging them in a competing business. This statutory provision is, of course, not applicable in Singapore, where the general principles relating to severance at common law (briefly described at [126]–[131] below) continue to apply.

1 2 1 Leaving aside any statutory modifications, we find the reasoning of Brereton J in *Cactus Imaging* (especially at [55]) persuasive, and therefore take the present opportunity to confirm the proposition that the maintenance of a stable, trained workforce is a legitimate proprietary interest that the employer is entitled to protect via a non-solicitation clause (even in the absence of protectable confidences), provided that clause otherwise passes muster under the twin tests of reasonableness enunciated by Lord Macnaghten in *Nordenfelt* (as set out at [70] above). We should add, however, that this does not mean that the issue of protectable confidences is wholly irrelevant. On the contrary, to the extent that there are no protectable confidences involved, the *reasonableness* of the non-solicitation clause in question will, *ceteris paribus*, be impacted adversely.

1 2 2 It is axiomatic that the law must develop consistently with changes in the wider society which it ultimately serves. However, the courts must also not lose sight of the fact that legal development must balance all interests concerned in order to achieve a just and fair result. To this end, whilst a modern trend in the employment context has been an emphasis on employees' freedom to work for whomever they wish, this trend must also be balanced against the need on the part of employers to ensure that there is no undue disruption to their workforce. If, therefore, employers seek to safeguard their needs in this particular regard via non-solicitation clauses, there is no reason, in principle and logic, why such clauses ought not to be legally enforceable if they are reasonable and if the employees concerned have not agreed to them as a result of the operation of one or more vitiating factors. At bottom, such an approach reflects the same basis upon which the doctrine of restraint of trade, as we know it today, was developed. However, it bears reiterating that everything ultimately depends upon the precise factual matrix before the court. Indeed, the very concept of reasonableness itself – which is central to the doctrine of restraint of trade – necessarily entails a close analysis of the relevant facts.

123 It should also be mentioned that, on occasion at least, this particular interest (*viz*, the need to maintain a stable, trained workforce) might even have an impact upon the other interests which are well established as meriting protection by the courts, *viz*, trade secrets and trade connection, respectively. For example, in *Cactus Imaging* ([113] *supra*), we see the interaction between this particular interest and that of confidential information and/or trade secrets (see also [111]–[112] above). It is also entirely possible that if there is a breach of a non-solicitation clause which results in employees leaving an employer, there might (depending, of course, on the precise facts) be an impact on the employer's trade connection in so far as such employees might themselves be the instruments through which the employer's customers are also tempted to leave in order to transact elsewhere.

124 It is important, however, to reiterate that non-solicitation clauses will not be enforced by the

court without more. To do so would be to wholly disregard the twin tests of reasonableness established in *Nordenfelt* (as set out at [70] above), which, we emphasise, will continue to apply even if it can be demonstrated that there is, in the first instance, a legitimate proprietary interest (such as the need to maintain a stable, trained workforce) that is deserving of protection by a covenant or clause in restraint of trade.

125 We would also add that where there is a breach of a non-solicitation clause, it might be possible (again, depending on the precise facts) to argue that the employee is *simultaneously* guilty of the *tort* of *inducing a breach of contract* by the other employees whom he solicits, the latter being in breach of their respective contracts of employment as a result of solicitation by the covenantor: see, for example, *Stratech* ([91] *supra*), although this tort was not established on the facts of that case).

*Severance*

126 As this particular doctrine did not really arise in the present appeal (although it did in the court below), we will not dwell upon it at any length. (We pause to observe, parenthetically, however, that the doctrine of severance might nevertheless be of some relevance in the context of Clause C.1.) In brief, at the level of general principle, there are two objectives underlying the doctrine of severance, which were neatly encapsulated by Chao Hick Tin JA (as he then was) in *National Aerated Water Co* ([58] *supra*), as follows (at [40]):

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

127 In so far as the *latter* category referred to in the above quotation is concerned, severance occurs, if at all, *within* the clause itself according to what is popularly known as the "blue pencil test". Put simply, in order to apply the doctrine of severance so as to save an otherwise (*prima facie*) offending clause, the court concerned must be able to run, as it were, a "blue pencil" through the offending words in that clause *without altering the meaning of the provision and, of course, without rendering it senseless (whether in a grammatical sense or otherwise)*. In other words, the court will not rewrite the contract for the parties.

128 The *former* category referred to in the above quotation (at [126]) deals, in contrast, with severance of *entire or whole* clauses in a contract. As was noted in the court below, the basic test centres on *whether the objectionable promise (as embodied*, ex hypothesi*, within the clause in question itself) is substantially the whole or the main consideration for the promise sought to be enforced*. If it is the whole or the main consideration, then the doctrine of severance will *not* apply; if not, the doctrine will apply. Everything depends, of course, on the precise factual matrix before the court (in this regard, see, for example, the oft-cited (and contrasting) English decisions of *Goodinson v Goodinson* [1954] 2 QB 118 on the one hand and *Bennett v Bennett* [1952] 1 KB 249 on the other). In the present case, the Judge held, *inter alia*, that Clause C.1 and Clause C.3 did not constitute all, or substantially all, the consideration for the Compensation to be paid under the Termination Agreement (see GD at [216]–[218]). In view of our characterisation of Clause C.1 (at [188] below) as a *condition*, we would, as mentioned earlier at [16], with respect, disagree with the Judge. Briefly put, we find that clauses C.1–C.3 of the Termination Agreement were intended by the parties to constitute the main consideration for the Compensation to be paid under that agreement (see, generally, the analysis below at [182]–[187]).

129 The above (albeit extremely brief) summary encompasses the present English position on the doctrine of severance, which also appears (as, for example, *National Aerated Water Co* demonstrates) to represent *the current Singapore position*. *However*, it should be noted that in the Ontario Superior Court of Justice decision of *Transport North American Express Inc v New Solutions Financial Corp* (2001) 201 DLR (4th) 560, Cullity J delivered a very powerful critique of the blue pencil test (referred to at [127] above). Indeed, the learned judge preferred to *reject* the "blue pencil test" altogether. He stated (at [35]–[36]) as follows:

> The blue-pencil test is, I believe, a relic of a bygone era when the attitude of courts of common law – unassisted by principles of equity – towards the interpretation and enforcement of contracts was more rigid than is the case at the present time. At an early stage in the development of the law relating to illegal promises, severance was held to be justified on the basis of the blue-pencil test alone. … [W]e have moved a long way beyond that mechanical approach. Enforcement may be refused in the exercise of the kind of *discretionary judgment* I have mentioned even where blue-pencil severance is possible.
>
> Despite repeated statements in the cases that the court will not make a new agreement for the parties, that is, of course, exactly what it does whenever severance is permitted …
>
> [emphasis added]

130 It is interesting to note that Cullity J's concept of "discretionary severance" (as set out in the preceding paragraph) was, in fact, *rejected* on appeal by the *majority* of the Ontario Court of Appeal in *Transport North American Express Inc v New Solutions Financial Corp* (2001) 214 DLR (4th) 44 (see also *Butterworths Common Law Series* ([45] *supra*) at para 5.233). However, it is *equally* interesting to note that the *dissenting* judge in the Ontario Court of Appeal, Sharpe JA, whilst recognising the need for caution as well as to recognise the concept of the sanctity of contract, nevertheless *endorsed* the approach adopted by Cullity J above.

131 It would appear, therefore, that this particular issue (*viz*, whether or not the blue pencil test still applies under the second type of severance delineated in the passage quoted at [126] above) has not been settled beyond peradventure even in the Canadian context. However, the doctrine of severance was not (as we noted at [126] above) really before us, still less the present (and more controversial) issue just alluded to. We would, in the circumstances, therefore express no concluded view on it. However, the case just considered is a timely reminder in at least two related respects.

132 First, in an increasingly interconnected world, local courts ought to eschew legal parochialism and look beyond their shores for relevant precedents – particularly where controversial or (as was the case here) potentially outmoded legal doctrines are concerned.

133 Second, local courts must simultaneously recognise that the days of a uniform common law are no longer a given. It is true that in the commercial context, there is more likelihood of (and desirability for) uniformity. However, even in the commercial setting, uniformity should not be taken too far. As the relevant part of s 3(2) of the Application of English Law Act (Cap 7A, 1994 Rev Ed) ("the AELA"), which embodies, in statutory form, principles that have existed from the dawn of the Singapore legal system, puts it:

> The common law shall continue to be in force in Singapore … so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require.

***Our decision on the reasonableness of Clause C.1***

134 It is clear, on the facts of the present proceedings, that the covenants in restraint of trade in the Termination Agreement in general, and Clause C.1 in particular, were all arrived at as part of an agreement which was *prima facie* binding as a matter of law on both parties. Indeed, Mr Chia did not seek to argue that the Termination Agreement was tainted, in any way, by any vitiating factor (including, in particular, duress, undue influence and/or unconscionability). Indeed, it would appear that even if the covenantor (here, the respondent) had entered into the Termination Agreement *voluntarily*, it would not have made a difference to the application of the doctrine of restraint of trade. As Chao JA put it in *National Aerated Water Co* ([58] *supra*) at [31], in determining the reasonableness of a restraint of trade clause:

> I t *does not matter* that the parties have *freely entered into* the restraint as the rule against unreasonable restraint is *based on public policy and may not be excluded by mutual consent*. [emphasis added]

135 In accordance with the principles set out above, Clause C.1 must satisfy the twin tests of reasonableness embodied in the statement of principle of Lord Macnaghten in *Nordenfelt* (as set out at [70] above). It is appropriate, at this juncture, to reiterate Clause C.1 in full, as follows:

> C.1. In further consideration of the foregoing, you agree that for a period of seven (7) months from the Termination Date, that is, up to 13 January 2006 you shall not directly or indirectly employ or solicit the employment of (whether as an employee, officer, director, agent or consultant) any person who is or was at any time during the period 13 June 2004 to 13 June 2005 an officer, director, representative or employee of the [appellant]. For avoidance of doubt, you shall not be deemed to employ any person unless you are involved or have otherwise provided input into the decision to hire such individual.

136 To recapitulate, Clause C.1 must be reasonable not only as between the parties, but also in the interests of the public as well before it will be upheld by the court. The principles relating to the settlement or compromise of disputes in general, and in *Panayiotou* ([60] *supra*) in particular, relate to the second aspect of reasonableness, *viz*, reasonableness in the interests of the public. Put simply, it is in the interests of the public to uphold the validity of covenants in restraint of trade where such covenants are agreed to pursuant to the settlement or compromise of existing disputes. However, there is *also* the *first* aspect of reasonableness that Clause C.1 must satisfy as well. Before proceeding to consider this particular issue, we would pause to observe that although the Judge was of the view that there was no evidence to establish that the maintenance of a stable, trained workforce was a legitimate proprietary interest (as there was, *inter alia*, no evidence on the level of training of the appellant's employees: see GD at [171]), we would respectfully disagree with that conclusion. It is clear from the evidence that the respondent, by virtue of his position and influence whilst in the employ of the appellant, possessed – and, more importantly, utilised – confidential knowledge gained in the course of his employment (in particular, knowledge relating to the relationship between the employees concerned and the appellant) to solicit the employment of those employees. Further, whilst train*ing* is a relevant factor, it is not conclusive. The main focus ought still to be on whether or not there is a legitimate proprietary interest in the employer (here, the appellant) maintaining a stable, trained workforce. Given the nature of the appellant's business, we are of the view that there was indeed such an interest in the present appeal – and this was *a fortiori* the case in the light of the respondent's access to and use of confidential knowledge gained in the course of his employment.

137 Turning, then, to the first aspect of reasonableness, *viz*, reasonableness as between the

parties, it is clear, in our view, that all the terms in the Termination Agreement (of which Clause C.1 was an integral part) were arrived at in earnest and in good faith. Indeed, as we noted above (at [134]), Mr Chia admitted that no vitiating factors (such as duress, undue influence or unconscionability) operated to taint the validity of the Termination Agreement. This must be so as there was no evidence whatsoever to cast any shadow on the validity of this agreement.

138 Furthermore, if one examines the entire context within which the Termination Agreement was arrived at, it is clear that *all* the parties were in fact satisfied with, as it were, the final product. The context consisted of a series of negotiations between the parties (conducted primarily through the e-mail correspondence set out at [27]–[37] above) with a view to ensuring the respondent's smooth exit from the appellant's employment. In particular, the respondent had, initially, pointed out to the appellant that his original employment contract did not contain any covenants in restraint of trade (see [27] above). However, he later agreed to the inclusion of such covenants as a gesture of goodwill. He nevertheless proposed changes to the contents (in particular, the period) of the covenants suggested by the appellant. More specifically, the initial version of Clause C.1 (as drafted by the *appellant*) stated that the restraint therein was to last for *one year*. The *respondent* proposed a period of *seven months* instead – a period that was ultimately agreed to by the appellant. In our view, this is significant. It is certainly not open to the respondent to now argue that the seven-month duration is unreasonable, a point which he conceded during cross-examination by Mr Maniam.

139 We also observe that the respondent received, in return for the covenants undertaken pursuant to the Termination Agreement, a not inconsiderable consideration (as set out in Clause B.1) which he was clearly not entitled to otherwise from a legal point of view. Although the respondent regarded the consideration as insufficient, it is clear, as noted above (at [40]), that the respondent had, in paragraph 20.8 of his AEIC, acknowledged that the consideration set out in Clause B.1 was *in return for* his undertaking to observe the covenants set out in the Termination Agreement during the Prohibited Period. Whilst this is not a conclusive factor, it is, in our view, a relevant one and should be taken into account for the purposes of assessing the reasonableness of Clause C.1 as between the parties. A learned author has suggested that "it is not benefits gained by an employee during employment which justify covenants, but detriments which the employee may cause after departure" (see *The Restraint of Trade Doctrine* ([56] *supra*) at p 102). However, this suggestion was made in the context of a possible argument that (*ibid*):

> [T]here is less justification for the taking of a covenant in restraint of trade when the employee is leaving, without previously having been bound, than when it is taken at the commencement of the employment. 'In the latter case some restrictions on post-employment competition may be justified by the benefit gained or to be gained by the employee through his contract of employment.' [citing *A Buckle & Son Pty Ltd v McAllister* [1986] 4 NSWLR 426 at 432].

140 Even allowing for the fact that the *detriments* which the employee may cause after departure are relevant considerations that ought to be taken into account by the court in determining reasonableness as between the parties, where the employee concerned has *also* been conferred (under a legally binding agreement) *substantial post-employment benefits* (as is the case *vis-à-vis* the relevant terms of the Termination Agreement), this would, in our view, be another relevant factor that could render the covenants concerned reasonable (reference may be made, in this regard, to the observations in the United States Court of Appeals decision of *Amory H Bradford v The New York Times Company* 501 F 2d 51 at 58 (2nd Cir, 1974); but *cf* the approach in *A Buckle & Son Pty Ltd v McAllister* [1986] 4 NSWLR 426, which was cited in *The Restraint of Trade Doctrine* in the preceding paragraph and the position taken by the Judge (see GD at [156])).

141 Turning to a different (albeit related) point, can it be argued that Clause C.1 was still too

wide to be reasonable inasmuch as it covered too broad a category of employees, which was the view adopted by the Judge (see GD at [176]–[179])? The principles applicable to this particular argument were canvassed earlier (at [106]–[110]). As we observed (at [110] above), much will depend on the precise factual matrix concerned. In this regard, Clause C.1 ought not – and cannot – be construed literally, wrenched out of its context. Looked at in *context*, it is clear that Clause C.1 was *not* intended by the appellant and the respondent (who in fact held extremely high positions in the former) to apply to peripheral support staff. Instead, that particular clause was intended to prohibit only the solicitation of the appellant's senior staff, particularly those who were in contact with the respondent during his stint as the managing director and CEO of the appellant. This is, in our view, especially so in the light of the nature of the appellant's business, which centred on financial services. It is also clear that the respondent was in a position to exercise influence over such staff (and, as it turned out, he did exercise such influence). In contrast, it is highly unlikely that the respondent had any influence over peripheral support staff with whom he was not likely, in any event, to have had direct contact.

142 In the circumstances, it is clear, in our view, that Clause C.1 of the Termination Agreement was reasonable as between the parties.

143 There is a further point that applies specifically to Clause C.1 – namely, whether or not Clause C.1 protected a legitimate proprietary interest of the appellant. If it did not, then that clause could not possibly be reasonable as between the parties, and would certainly not be reasonable in the interests of the public.

144 In this regard, as we noted earlier (at [95] above), Clause C.1 was a non-solicitation clause. More importantly, as we likewise pointed out earlier (at [121]–[122]), there is a clear as well as cogent rationale underlying non-solicitation clauses. We will therefore not retraverse ground already covered, save to observe that there *was* a legitimate proprietary interest belonging to the appellant that was in fact protected by Clause C.1 in accordance with the principles set out above (at [121]–[124]).

1 4 5 *If we assume* that the covenants in restraint of trade in the Termination Agreement in general, and Clause C.1 in particular, were agreed to as part of settlement or compromise proceedings (which we in fact found (at [41] above) was *not* the case), the argument in favour of the reasonableness of Clause C.1 would, in our view, be *even stronger*. Interestingly, there would, in such a situation (*ie*, where the restraint of trade provisions in question are part of a settlement or compromise), be an *overlap* between the two aspects of reasonableness embodied in Lord Macnaghten's statement of principle in *Nordenfelt* (see [70] above). Put simply, the context of settlement or compromise, whilst relating (as we have seen at [136] above) directly to the second aspect of reasonableness (*viz*, reasonableness in the interests of *the public*), is *equally* applicable when assessing the reasonableness of Clause C.1 as between the *parties*. We would not go so far as to state that there is an inexorable correlation between these two facets of reasonableness whenever the non-solicitation clause concerned forms part of a settlement or compromise, but it would appear that there will invariably be at least some connection – if not a substantial one (as is the case here).

146 We would also add (and, in this regard, we agree with the Judge) that clause C.4 of the Termination Agreement ("Clause C.4") did not, in our view, contribute anything of substance to the inquiry into the reasonableness or otherwise of the restraint of trade provisions in the agreement in general. Clause C.4 read as follows:

> You [the respondent)] agree that this Paragraph C is reasonable and necessary for the protection

of the [appellant's] interests, and that you have agreed to these clauses in consideration of the amounts to be paid to you as set out in Paragraph B above.

147 A similar clause was before the Singapore High Court in *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 3 SLR 333. In that case, the provision under consideration read as follows:

> 12.6 The Employee expressly acknowledges that the periods of one year in the above restrictions in his clause 12 [which contained various restraint of trade provisions] and the geographical extent of the above restrictions, are reasonably necessary to give adequate protection to the interests of [the plaintiffs] and each Associated Company in the Proprietary Information. Nevertheless, it is recognised that restrictions of this nature may fail for technical reasons. Accordingly, if any of the above restrictions is, either by itself or taken with others, adjudged to be invalid as exceeding of the interests of [the plaintiffs] and its Associated Companies, but would be valid and enforceable if any particular restriction or restrictions were deleted or restricted or limited in a particular manner; or if the period or area thereof were reduced or curtailed; then the said restriction shall apply with such deletions, restrictions, limitations, reductions, curtailments and modifications as may be necessary to make it valid and enforceable.

148 Judith Prakash J expressed the following observations on the above provision, as follows (at [27]):

> The plaintiffs [the employer in that case] appear to have recognised that the restrictive covenants in cll 12.1 and 12.2 were too wide and could not be well-received by a court. *They therefore inserted cl 12.6 in an effort to save some minimum portions of these clauses in the event a court considered parts of them to be invalid. Whilst I have not heard full argument on this issue, I have grave doubts that an invalid clause can be saved in this manner because it would lead to uncertainty.* An employee with a contract containing such clauses would have no way of knowing the extent of his obligations under them and would be put in an invidious position regarding his future employment if he ever sought to leave the plaintiffs' employ. [emphasis added]

149 The above observations were expressed in relation to the specific language of the clause itself (as reproduced at [147] above). We are also of the view that there is a more general – and fundamental – reason why clauses such as this, as well as Clause C.4 in the present appeal, even taken at their highest, do not add anything of substance to the inquiry: Whether or not a covenant in restraint of trade passes legal muster depends on the applicable principles; if the covenant in question would not otherwise pass muster under these principles, it cannot be saved by clauses of this nature. To hold otherwise would be to sanction a covenant in restraint of trade which would otherwise be contrary to public policy (though *cf TSC Europe* ([97] *supra*) at [35]). A moment's reflection would reveal that such a result is legally undesirable and, indeed, untenable.

***Summary of our findings on Clause C.1***

150 For the reasons set out above, we hold, first, that the doctrine of restraint of trade applies to the Termination Agreement, which was not a settlement agreement. In any event, even if the Termination Agreement was a settlement agreement, the doctrine would still apply as, in our view, the doctrine of restraint of trade does apply to settlement agreements in general (subject to the qualification set out at [65] above).

151 Applying the principles embodied in the doctrine of restraint of trade, we find that Clause C.1

was reasonable both in the interests of the parties as well as in the interests of the public. In the premises, Clause C.1 was valid as between the parties. There having been a clear *breach* of Clause C.1 by the respondent, it is now necessary to ascertain the legal consequences which ensued as a result of that breach.

**Consequences of a breach of Clause C.1**

***The applicable legal principles***

*Introduction*

152 The applicable legal principles relating to the consequences of a breach of contract were recently dealt with in some detail by this court in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 ("*RDC Concrete*"), especially at [89]–[112]. We will not retraverse the ground covered in that particular case. An extremely brief summary will suffice for the purposes of the present appeal.

*Situations justifying the innocent party's termination of the contract*

153 As stated in *RDC Concrete*, there are four situations which entitle the innocent party (here, the appellant) to elect to treat the contract as discharged as a result of the other party's (here, the respondent's) breach.

154 The *first* ("Situation 1") is where the contractual term in question clearly and unambiguously states that, should an event or certain events occur, the innocent party would be entitled to terminate the contract (see *RDC Concrete* at [91]).

155 The *second* ("Situation 2") is where the party in breach of contract ("the guilty party"), by its words or conduct, simply *renounces* the contract inasmuch as it clearly conveys to the innocent party that it will not perform its contractual obligations at all (see *RDC Concrete* at [93]).

156 The *third* ("Situation 3(a)") is where the term breached (here, Clause C.1) is a *condition* of the contract. Under what has been termed the "condition-warranty approach", the innocent party is entitled to terminate the contract if the term which is breached is a condition (as opposed to a warranty): see *RDC Concrete* at [97]. The focus here, unlike that in the next situation discussed below, is not so much on the (actual) consequences of the breach, but, rather, on the *nature of the term* breached.

157 The *fourth* ("Situation 3(b)") is where the breach of a term deprives the innocent party of substantially the whole benefit which it was intended to obtain from the contract (see *RDC Concrete* at [99]). (This approach is also commonly termed the "*Hongkong Fir* approach" after the leading English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; see especially *id* at 70.) The focus here, unlike that in Situation 3(a), is not so much on the nature of the term breached, but, rather, on the *nature and consequences of the breach*.

158 Because of the different perspectives adopted in Situation 3(a) and Situation 3(b), respectively (as briefly noted above), which differences might, depending on the precise factual matrix, yield different results when applied to the fact situation, this court in *RDC Concrete* ([152] *supra*) concluded that, as between both the aforementioned situations, the approach in Situation 3(a) should be *applied first*, as follows (*id* at [112]):

> If the term is a *condition*, then the innocent party would be entitled to terminate the contract. *However*, if the term is a *warranty* (instead of a condition), then the court should nevertheless proceed to apply the approach in Situation 3(b) (*viz*, the *Hongkong Fir* approach). [emphasis in original]

*The condition-warranty approach – relevant factors in ascertaining whether or not a given contractual term is a "condition"*

(a) Introduction

159 As *RDC Concrete* did *not* elaborate on an important aspect of the condition-warranty approach embodied in *Situation 3(a)*, namely, what *factors* are relevant in ascertaining whether or not a given contractual term is a *condition*, a consideration of this issue at this juncture is apposite.

160 It is important to note at the outset that there is no magical formula (comprising a certain fixed number of factors or criteria) that would enable a court to ascertain whether or not a given contractual term is a condition. This is not unexpected, given the very nature of the inquiry itself (which would include a countless number of permutations and variations, depending on the respective factual matrices and, more importantly, the intentions of the respective contracting parties themselves). However, as is inherent within the very nature of common law development, certain factors that might (depending, as just mentioned, on the precise factual matrix concerned) *assist* the court in this regard have been developed.

161 At *bottom*, the focus is on *ascertaining the intention of the contracting parties themselves by construing the actual contract itself (including the contractual term concerned) in the light of the surrounding circumstances as a whole* (see the classic exposition on this point by Bowen LJ (as he then was) in the oft-cited English Court of Appeal decision of *Bentson v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 at 281).

(b) The first factor: where a statuteclassifies a specific contractual term as a "condition"

162 The *first* of the established factors mentioned above (at [160]) is *very specific*: Where a *statute* (or, more often, a particular provision within a statute) classifies a specific contractual term as a "condition", then that term will, of course, be a condition.

163 The paradigm model is the Sale of Goods Act 1979 (c 54) (UK) ("the UK Act"), which is applicable in Singapore by virtue of the AELA (see s 4(1) read with Pt II of the First Schedule to the AELA). Indeed, the UK Act has been reprinted in the local context as the Sale of Goods Act (Cap 393, 1994 Rev Ed). This last-mentioned Act is, in fact, the classic statutory embodiment of the condition-warranty approach inasmuch as it classifies various contractual terms as conditions and warranties, respectively.

164 However, as alluded to above (at [162]), this is a very specific factor and would not cover any contractual terms that fall outside the particular ambit of the statute (or statutory provision) concerned.

(c) The second factor: where the contractual term itself expressly states that it is a "condition"

165 The *second* factor is an ostensibly obvious one: Where the contractual term itself *expressly states* that it is a "condition", then that term would generally be held by this court to be a condition.

1 6 6 *However*, we have added the word "ostensibly" because, even in what appear to be very clear-cut situations, there is case law that suggests that the express use of the word "condition" might (on occasion, at least) be insufficient to render that term a condition in law. In this regard, the House of Lords decision of *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 ("*Schuler*") comes readily to mind. In that case, the majority of the House held that, although the word "condition" was expressly utilised, that word was being utilised not as a term of legal art, but, rather, in a lay sense.

167 At first blush, the approach adopted by the majority in *Schuler* is not a wholly untenable one. After all, it is true that the same word (here, "condition") can take on different meanings depending on the context in which it is used. With respect, however, a close analysis of the reasoning of the majority in *Schuler* demonstrates a preoccupation with the *consequences* of the breach of contract in that case, rather than a focus (in accordance with the condition-warranty approach in Situation 3(a)) on the *nature of the term* breached. Indeed, there is a reference by Lord Kilbrandon (who was one of the majority judges) to the "grotesque consequences" (*id* at 272) of holding the term breached to be a "condition" in the strict legal sense of the word.

168 It is our view that the majority of the House in *Schuler* were, *in substance and effect*, applying the *Hongkong Fir* approach instead (which, it will be recalled, falls under Situation 3(b) and, more importantly, relates to the actual *nature and consequences of the breach* instead). Indeed, there is a very powerful (and, in our view, persuasive) dissenting judgment by Lord Wilberforce (see *Schuler* at 262–263), who warned against rewriting, in effect, what was the clear intention of the contracting parties that the term concerned be a "condition" in the strict legal sense of the word (in accordance with the substance and spirit of the condition-warranty approach under Situation 3(a)).

169 Indeed, it might well have been the fact situation in *Schuler* which prompted the majority of the House to adopt what was, in substance and effect, the *Hongkong Fir* approach instead. With respect, however, the intention of the parties (pursuant to the condition-warranty approach) ought to take precedence for, as we pointed out in *RDC Concrete* ([152] *supra*) at [100], although the *Hongkong Fir* approach is conventionally associated with a sense of fairness (in that it allows termination of a contract only if the nature and consequences of the breach are so serious as to deprive the innocent party of substantially the whole of the benefit of the contract which it was intended to obtain from the contract), it is *equally* true that a sense of fairness (albeit from a different perspective) *also* features when the condition-warranty approach is applied inasmuch as it is fair to hold the contracting parties to their original bargain.

170 We also observed in *RDC Concrete* (especially at [110]) that general House of Lords decisions *after Schuler* in fact supported the approach that we adopted in that case (in particular, our stance that the condition-warranty approach in Situation 3(a) should take precedence over the *Hongkong Fir* approach in Situation 3(b) in so far as it ought to be ascertained, first, whether or not the contractual term concerned is a condition): see, for example, *Bunge Corporation, New York v Tradax Export SA, Panama* [1981] 1 WLR 711 ("*Bunge*") and *Torvald Klaveness A/S v Arni Maritime Corporation* [1994] 1 WLR 1465.

(d) The third factor: the availability of a prior precedent

171 The *third* factor is whether a prior precedent is available. An oft-cited illustration in this regard is the English Court of Appeal decision of *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH* [1971] 1 QB 164 ("*The Mihalis Angelos*"), where the court held (at 194, 199–200 and 205–206) that an "expected readiness" clause was a condition on the ground, *inter alia*, that the same conclusion had been reached in by its own previous decision (in *Finnish Government v H Ford &*

*Co, Ltd* (1921) 6 Ll L Rep 188).

172 With respect, reliance on a prior precedent, whilst convenient when viewed from a practical perspective, does not really address the issue of *principle* inasmuch as there would, in our view, still need to be an inquiry as to whether or not the *analysis and reasoning in the prior precedent* passed muster *in principle*. Indeed, this court is, in certain exceptional circumstances, permitted (as the final appellate court) to depart from its own prior decisions pursuant to the criteria set out in this court's *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689. This court is, *a fortiori*, free not to follow prior *English (or other foreign)* decisions if finds the analysis and reasoning therein unpersuasive, or if the prior foreign decision in question is not applicable to the circumstances of Singapore (see, in this last-mentioned regard, s 3(2) of the AELA); alternatively, the prior foreign decision concerned can be subject to the necessary modifications, if so required by the circumstances of Singapore (see, again, s 3(2) of the AELA).

(e) The fourth factor: mercantile transactions

173 The *fourth* factor centres on the importance placed on *certainty and predictability* in the context of *mercantile* transactions. Case law suggests that courts are more likely to classify contractual terms as conditions in this particular context, especially where they relate to *timing* (see, for example, *Bunge* ([170] *supra*) and *The Mihalis Angelos* ([171] *supra*)).

(f) Summary of the relevant factors under the condition-warranty approach

174 The aforementioned factors are important. But, they are not exhaustive and, to use a familiar phrase (albeit in a somewhat different context), the categories of factors are not closed. The actual decision as to whether or not a contractual term is a condition would, indeed, depend very much on the particular factual matrix before the court. It also bears repeating that there is no magical formula. In the final analysis, the focus is on *ascertaining the intention of the contracting parties themselves by construing the actual contract itself (including the contractual term concerned) in the light of the surrounding circumstances as a whole* (see also [161] above).

***Our decision on the facts of this appeal***

175 Applying the principles set out in the preceding part of this judgment, it is immediately clear that Cause C.1 did *not* fall within either Situation 1 (as defined at [154] above) or Situation 2 (as defined at [155] above). This leaves Situation 3(a) and Situation 3(b) to be considered.

176 In so far as Situation 3(a) (defined at [156] above) and Situation 3(b) (defined at [157] above) are concerned, we have already noted that the former ought to be applied first (see, generally, [158] above). Hence, we must first ascertain whether or not Clause C.1 was a *condition*. If it was, then that would be the end to the inquiry inasmuch as the innocent party (here, the appellant) would be entitled to terminate the contract.

177 However, in accordance with the present approach adopted by this court (as elaborated in *RDC Concrete* ([152] *supra*) at [100] and [107]), the approach in Situation 3(b) is *not*, *ipso facto*, dispensed with if Clause C.1 is found *not* to be a *condition* (*ie*, under the condition-warranty approach set out in Situation 3(a), Clause C.1, if held not to be a condition, would *not* thereby *automatically* become a *warranty*). In such a situation, this court would then have to apply the *Hongkong Fir* approach embodied in Situation 3(b).

178 The immediate task at hand, therefore, is to ascertain whether or not Clause C.1 was a

*condition*. To this end, the various factors set out above (at [162]–[173]) may be usefully referred to.

179 It is clear, on the facts of the present appeal, that none of the four factors considered above (at [162]–[173]) applies. However, this does not mean that this court is powerless to determine whether or not Clause C.1 was a condition. As we have emphasised more than once, the task of this court is to ascertain the intention of the contracting parties themselves with regard (in particular) to Clause C.1 by construing the actual contract itself (including Clause C.1) in the light of the surrounding circumstances as a whole. To this end, we found the background circumstances leading up to the conclusion of the Termination Agreement instructive. In particular, we found the relevant correspondence between the contracting parties which led to the finalisation of the Termination Agreement to be of particular assistance since it demonstrated (very clearly, in our view) the intention of the parties *vis-à-vis* the Termination Agreement in general, and Clause C.1 in particular.

180 At this juncture, a fundamental point ought to be noted. It does *not* follow that *every* term in a contract (here, the Termination Agreement) will *necessarily* be accorded the same importance by the contracting parties. What is germane for the purposes of the present appeal is whether or not the appellant and the respondent *intended Clause C.1 specifically* to be of such importance that any breach thereof, regardless of the actual consequences of the breach, would entitle the innocent party (here, the appellant) to terminate the contract.

181 A useful starting point would be to examine the language of Clause C.1 itself. This provision has already been reproduced earlier (at [6], [38] and [135]), but it would be appropriate, for present purposes, to reproduce it once more, as follows:

> C.1. In further consideration of the foregoing, you agree that for a period of seven (7) months from the Termination Date, that is, up to 13 January 2006 you shall not directly or indirectly employ or solicit the employment of (whether as an employee, officer, director, agent or consultant) any person who is or was at any time during the period 13 June 2004 to 13 June 2005 an officer, director, representative or employee of the [appellant]. For avoidance of doubt, you shall not be deemed to employ any person unless you are involved or have otherwise provided input into the decision to hire such individual.

182 As we held above (at [95]), Clause C.1 was a non-solicitation clause. It was also, as the opening words of the clause itself state, part of the consideration furnished by the respondent to the appellant in return for the Compensation which he was to receive under Clause B.1. But, and here is the crux of the present issue, *how important* a term did the appellant and the respondent, as contracting parties, intend Clause C.1 to be?

183 It will be noticed that, in addition to Clause C.1, the respondent also furnished the appellant with consideration in the form of three further clauses (pursuant to sub-clause (b) of Clause B.1), *viz*, clause C.2 of the Termination Agreement ("Clause C.2"), Clause C.3 and Clause D.1, as well as (pursuant to sub-clause (a) of Clause B.1) by serving out his notice period on leave from the office. In return (and this constituted the consideration furnished by the appellant to the respondent), the respondent was to receive from the respondent the Compensation pursuant to Clause B.1 (which is set out in full below to furnish the necessary context):

> B.1. In consideration of you:–
>
> (a) serving out your Notice Period on leave from the office, and

(b) agreeing to the terms and conditions set forth herein, apart from paying you your full salary and allowances during the Notice Period *the [appellant] agrees to pay you:*

(i) 13,014 shares in Man Group plc granted to you under the terms of the Man plc 2002, 2003 and 2004 coinvestment schemes (as at close of business 10 June 2005 valued at approximately US$330,000); and

(ii) a goodwill payment of US$263,000.

[emphasis added]

184 The total value of what the respondent expected to receive under Clause B.1 was approximately S$1m.

185 It will be seen that Clause C.1 was *prima facie* an important term of the Termination Contract. Indeed, it was of equal importance to – and formed part of the same context as – Clause C.2 and Clause C.3, all of which collectively constituted, *quantitatively* at least, the lion's share of the consideration furnished by the respondent to the appellant pursuant to the Termination Agreement.

186 Mr Chia sought to argue that Clause D.1 was also part of the consideration furnished by the respondent. This is a fair point, but not necessarily a sufficient argument in so far as the present issue before this court is concerned. This is because the precise *importance* of *Clause D.1* is *not necessarily* conclusive (or even indicative) of the precise *importance* of *Clause C.1*, which was ultimately the clause that was at issue in this appeal. In other words, even if Clause D.1 was an important term (and, hence, a condition pursuant to the condition-warranty approach), it did *not necessarily* mean that, *inter alia*, *Clause C.1* was *not* a condition. To this end, we need (as mentioned in, *inter alia*, [179] above) to examine the surrounding circumstances leading up to the parties' entry into the Termination Agreement in order to ascertain whether or not these contracting parties *intended* Clause C.1 to be a condition.

187 Before proceeding to do so, however, an important point needs to be noted in relation to *Clause D.1*. As we have explained in some detail earlier in this judgment (at [23]), the focus of the Termination Agreement was on *effecting closure of the employment relationship that hitherto existed between the appellant and the respondent*. In other words, the focus was *not* on *settling* any disputes then existing between the parties as such. If so, then the *purpose* of Clause D.1 might actually be the *opposite* of what Mr Chia argued on behalf of the respondent in the preceding paragraph. In other words, Clause D.1 was *not* intended by the contracting parties to be an *important* term (at least when compared to the *other* clauses, including Clause C.1). It might be construed, instead, as *a general "catch-all"* clause. However, as we have emphasised, the key focus is on whether or not the contracting parties intended Clause C.1 to be a condition.

188 To this end, we turn to the surrounding circumstances referred to earlier in this judgment (at [26]–[38]), *viz*, the various negotiations between the respondent and the appellant prior to the conclusion of the Termination Agreement (of which Clause C.1 was an integral part). These negotiations can be considered as they constituted part of the factual matrix surrounding the Termination Agreement itself (see, for example, the decision of this court in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR 891 at [29]–[37]). They comprised, in fact, as alluded to above, a series of correspondence between the parties. It is clear, in our view, that Clause C.1 was intended by the appellant and the respondent to be a *condition*. It was an integral part of an important cluster of clauses (under clause C of the Termination Agreement ("Clause C")). Indeed,

without complying with the sub-clauses under Clause C, the respondent would be unable to receive the Compensation set out in Clause B.1. So important were the sub-clauses under Clause C that the respondent himself took great pains to ensure that their ambit and scope were acceptable to him. As we saw above (at [38]), the respondent sought – and obtained – a reduction of the period of restraint under, *inter alia*, Clause C.1 from *twelve months to seven months*.

189 We also examine briefly Clause B.2 (reproduced earlier at [39]). For ease of reference and present analysis, it is reproduced again, as follows:

> B.2. *Save in the event that you breach any of the terms of this Termination Agreement*, the sums set out in B.1(b) above will be paid to you in full and without deduction at the end of the Notice Period, on 13 September 2005. [emphasis added]

190 It is significant, in our view, that the italicised words in Clause B.2 were *inserted by the appellant* (*and accepted* by *the respondent*). It is clear that the appellant was not prepared to pay the relevant sums to the respondent without any qualification (which would have been the case had the respondent's original draft of this clause (as set out above at [35]) been accepted). Indeed, the words (in italics) inserted by the appellant make it amply clear that those sums would *not* be paid to the respondent in the event that the respondent breached "any of the terms of this Termination Agreement" (which, of course, included Clause C.1). This is consistent with the general conclusion which we have arrived at to the effect that Clause C.1 was a *condition*.

***Conclusion on the consequences of breach of Clause C.1***

191 In summary, the present appeal concerned a fact situation that fell within neither Situation 1 nor Situation 2 in *RDC Concrete* ([152] *supra*). In so far as Situation 3(a) and Situation 3(b) are concerned, since we have found that the present fact situation fell within *Situation 3(a)* (*ie*, Clause C.1 was a *condition*), there was, consistent with the principles and reasoning enunciated in *RDC Concrete*, which were referred to briefly above at [158], *no need* for us to consider the legal effect of Situation 3(b).

192 In the circumstances, the appellant was, in the light of the respondent's breach of Clause C.1 as well as our finding that that particular clause was a *condition* of the Termination Agreement, *entitled to terminate the contract*. It follows, therefore, that the respondent could *not* enforce his claim for the Compensation under the Termination Agreement.

**The implied duty of good faith and fidelity owed by an employee to an employer at common law**

193 It is trite law that there is an *implied* term in the employer's favour that the employee will serve the employer with good faith and fidelity, and that he or she (the employee) will also use reasonable care and skill in the performance of his or her duties pursuant to the employment contract (see the oft-cited English decisions of *Robb v Green* [1895] 2 QB 315 and *Hivac Limited v Park Royal Scientific Instruments Limited* [1946] Ch 169; reference may also be made, in the local context, to the Singapore High Court decision of *Asiawerks Global Investment Group Pte Ltd v Ismail bin Syed Ahmad* [2004] 1 SLR 234 at [61]).

194 However, given the decision which we arrived at in relation to the consequences following the *breach* of Clause C.1, it was unnecessary for us to consider the issue of whether or not there was also a breach of the implied term referred to in the preceding paragraph.

**Conclusion**

195 To summarise, for the reasons set out above:

(a) We hold that the doctrine of restraint of trade applies to the Termination Agreement in general, and Clause C.1 therein in particular.

(b) We hold that Clause C.1 was reasonable and, hence, valid, having regard to the applicable principles relating to the doctrine of restraint of trade.

(c) We agree with the Judge that there had been a breach of Clause C.1 on the facts of the present case.

(d) We hold that Clause C.1 was in fact a *condition* of the Termination Agreement, which therefore entitled the appellant to terminate the said agreement.

(e) It follows, therefore, that the respondent was not entitled to the Compensation under the Termination Agreement which he sought in the present proceedings.

1 9 6 In the circumstances, the appeal is allowed with costs, and with the usual consequential orders to follow. In so far as the quantum of costs is concerned, having regard to the overall manner in which the various issues were raised and argued, we award the appellant three-quarters of the costs of the appeal. Although we differed from the Judge's ultimate decision in the court below, we affirmed most of his factual and legal findings. In the circumstances, we see no reason to disturb the costs order made by the Judge in the court below, save that the appellant need not reimburse the respondent half of the total hearing fees paid by the respondent. If any further consequential orders are required, the parties have liberty to apply.