Smile Inc Dental Surgeons Pte Ltd *v* Lui Andrew Stewart
[2011] SGHC 266

Case Number : Suit No 847 of 2009

Decision Date : 16 December 2011

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Aqbal Singh s/o Kuldip Singh (Pinnacle Law LLC) for the plaintiff; Wong Siew Hong and Teh Ee-Von (Infinitus Law Corporation) for the defendant.

Parties : Smile Inc Dental Surgeons Pte Ltd — Lui Andrew Stewart

Employment Law

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 145 of 2011 was dismissed by the Court of Appeal on 31 July 2012. See [2012] SGCA 39.]

16 December 2011

Woo Bih Li J:

Introduction

1 This is an action by Smile Inc Dental Surgeons Pte Ltd ("Smile") against its former employee, Dr Andrew Stewart Lui ("Dr Lui"), for breaches of express and implied terms of Dr Lui's employment contract.

2 As a result of an agreement between the parties on a reduced list of issues, only two persons gave evidence for Smile: Dr Ernest Rex Tan Sek Ho ("Dr Tan") and his wife Chong Mo-Ai Grace ("Ms Chong"). Dr Lui elected to make a submission of no case to answer after the close of the case for Smile and not to adduce any evidence for his case.

3 After considering submissions, I dismissed the action by Smile with costs to be paid to Dr Lui. Smile has filed an appeal to the Court of Appeal.

4 The facts or allegations I set out below come mainly from Dr Tan.

Background

5 Smile was incorporated in Singapore in March 1997 by Dr Tan and Ms Chong. Since inception, Dr Tan and Ms Chong have been equal shareholders in, and the only directors of, Smile. Dr Tan is a practising dentist and is also a specialist prosthodontist certified by the Singapore Dental Council. Prosthodontics is a dental specialisation in reconstructive and cosmetic dentistry. Ms Chong is not a practising dentist. She is the Managing Director of Smile.

6 Smile opened its first dental clinic in a shopping mall known as "Suntec City" ("the Suntec Clinic") in October 1997. It was the first dental clinic in Singapore to provide a procedure known as "Britesmile Laser Teeth Whitening". Dr Tan explained that this procedure was the first technology (back in 1997) which enabled patients to whiten their teeth in one sitting in one hour on the dentist's

chair [note: 1]. Dr Tan bought the rights of distributorship for this procedure for the whole of Asia and brought the first machine for this procedure in Asia back to Singapore in 1997.

7 Smile opened its second dental clinic at "Forum the Shopping Mall" ("the Forum Clinic") in September 1998 after securing a covenant from the landlord, Hermill Investments Pte Ltd ("Hermill"), that the Forum Clinic would be the only dental clinic in the shopping mall. The Forum Clinic was the "first and only full-fledged children and family-themed dental practice in Singapore" (see para 26 of Dr Tan's Affidavit of Evidence-in-Chief ("AEIC")). This was in line with Hermill's positioning of the Forum shopping mall as a children-themed mall.

8 The Suntec Clinic was located within the central business district while the Forum Clinic was located along Orchard Road, which is the main shopping belt in Singapore. Dr Tan stated (at para 41 of his AEIC) that Smile's "Forum Clinic clientele comprises mainly locals/expatriates/tourists who are of the upper middle to high income families that reside around or frequent the Orchard and Tanglin vicinity".

9 Dr Lui is an Australian citizen. In 2003, he approached Smile to explore the possibility of employment with the latter. He informed Dr Tan and Ms Chong that he was dissatisfied with his then employment as an associate dentist at a dental practice in Great World City due to its lack of "profile and visibility". His remuneration with that practice was contingent on the number of patients he treated. He complained that that practice did not attract sufficient patients to make it worth his while to remain employed there.

10 Dr Tan and Ms Chong were impressed with Dr Lui. They felt that "he had the personality, skills and aptitude to relate to patients", and he struck them as a dentist with "good chair-side manners" (see para 35 of Dr Tan's AEIC).

11 Dr Lui had several discussions with Smile about his employment prospects. During this time, Dr Lui held an Employment Pass and was living in a rented apartment. Dr Lui informed Dr Tan and Ms Chong that his mother was living in Melbourne, Australia, and that he eventually planned to return to Melbourne to look after her (see para 36 of Dr Tan's AEIC). He claimed that he had no plans to apply for Permanent Resident status as he did not intend to settle down in Singapore for the long run.

12 In one of the discussions, Dr Lui asked whether Smile was looking for a partner or an associate dentist. Dr Tan and Ms Chong replied that they were only looking for an associate dentist, and Dr Lui indicated his agreement to this.

13 Initially, the draft employment contract stipulated that Dr Lui's minimum term of employment was five years. Dr Lui managed to get this reduced to three years. According to Dr Tan and Ms Chong, Dr Lui gave them the impression that he would only stay and practise in Singapore for a short term. As such, it was "completely inconceivable" to them when the contract was entered into that Dr Lui "would seek to practice elsewhere in Singapore" after his employment with Smile ended (see para 39 of Dr Tan's AEIC). They believed that he would return to Australia to practise.

14 The employment contract was signed by the parties on 31 July 2003 ("the Contract"). Clause 7 of the Contract provided that Dr Lui's remuneration as an "associate dental surgeon" was to be 40% of the net professional fees collected each month. Dr Lui commenced work with Smile on 1 September 2003. In his first two years of working for Smile, Dr Lui practiced both in the Suntec Clinic and the Forum Clinic. However, with effect from July 2005 Dr Lui was assigned by Smile to work full-time at the Forum Clinic.

15 Smile set up a third clinic at One Raffles Quay ("the ORQ Clinic") in 2005.

16 Dr Tan stated (at para 47 of his AEIC) that, at the end of 2004, the Ministry of Health ("the MOH") relaxed the advertising guidelines for the medical and dental professions. Smile subsequently embarked on a substantial advertising and marketing effort to increase the awareness and profile of its brand name as well as the profile of the Forum Clinic.

17 A "large light box signage" was erected on the external facade of the Forum shopping mall facing Cuscaden Road from 9 February 2007 to 8 September 2010 in order to raise awareness of the Forum Clinic in the area.

18 From October 2007 to August 2008, Smile ran a series of advertisements in "Motherhood Magazine" that specifically promoted the Forum Clinic and the dentists practicing there, including Dr Lui. Smile also ran a series of "Question and Answer" articles in "Motherhood Magazine" and "Ma Ma Bao Bei" (a Mandarin-language child and family magazine) to increase the profile of its individual dentists, including Dr Lui. For instance, Dr Lui was featured in the October 2007 and February 2008 issues of "Motherhood Magazine", and the December 2008 issue of "Ma Ma Bao Bei".

19 On 7 January 2009, Dr Lui incorporated Dental Essence Pte Ltd ("Dental Essence") and was the sole director and shareholder thereof while he was still employed by Smile. On or about 25 February 2009, Dr Lui entered into a one-year tenancy agreement for premises at 127 Tanglin Road, Tudor Court, Singapore 247922 ("Tudor Court") on behalf of Dental Essence. This location was within five minutes' walk from the Forum Clinic. On the same day (*ie*, 25 February 2009), Dr Lui also gave written notice of his resignation to Smile. Despite the three months' notice period which Dr Lui was obliged to give to Smile pursuant to Clause 20 of the Contract, Smile agreed on 31 March 2009 that Dr Lui's last day of work with Smile would be 18 April 2009. On 14 May 2009, Dental Essence obtained a licence from the MOH to operate a dental clinic, and it began operations the next day, *ie*, 15 May 2009.

20 According to Dr Tan, sometime in March 2009 Dr Lui committed to renovation works of Dental Essence's premises amounting to about $60,000 [note: 2]. On 19 March 2009, Dr Gareth Pearson ("Dr Pearson"), a former employee of Smile, joined Dental Essence as a shareholder and a dentist. About one year earlier, in March 2008, Dr Pearson had given Smile six months' notice that he intended to stop working in September 2008 for an indefinite period because he was leaving Singapore. Dr Pearson was a part-time dentist employed by Smile and was based primarily at the Forum Clinic. Dr Lui and Dr Pearson together accounted for 80% of the Forum Clinic's patient pool [note: 3].

21 After Dr Lui's departure from the Forum Clinic, the Forum Clinic experienced a decrease in monthly revenue. Although the clinic's monthly revenue was about $116,000 in April 2009 (which was the month in which Dr Lui left Smile's employment), this dropped to about $52,000 by September 2009. This was a drop of about 55%. On 8 October 2009, Smile commenced this action against Dr Lui. By this time, Smile had received requests from numerous patients for their dental records. It later found out that many of these patients became patients of Dental Essence.

22 The monthly revenue of the Forum Clinic continued to dwindle, and Smile eventually closed the Forum Clinic on 15 September 2010, which was the same day when the Forum Clinic's licence expired.

23 In January 2011, this action was bifurcated upon application by Dr Lui.

The case for Smile

24 Smile relied on two broad categories of causes of action. First, Smile alleged that Dr Lui had

breached various express provisions in the Contract which restricted Dr Lui from undertaking certain activities.

25 Secondly, Smile also alleged that Dr Lui had breached implied terms of the Contract which provided that Dr Lui owed certain implied duties.

26 As regards the express provisions, Smile's first allegation (at paras 21 and 22 of its Statement of Claim (Amendment No 2) ("the SOC (No 2)")) was that Dr Lui had breached Clause 24 of the Contract because the latter was practising as a dentist at Dental Essence's clinic at Tudor Court, which was within three kilometres of Smile's Forum Clinic. Clause 24 of the Contract was as follows:

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

For convenience, I will refer to Clause 24 as the "Radial Clause". There was no time limit in this clause.

27 Smile's second allegation (at paras 23 to 26 of the SOC (No 2)) was that Dr Lui had breached Clause 23 and/or Clause 25 of the Contract by, *inter alia*, conducting consultations with, examining and/or treating Smile's patients after he left Smile's employment. After discovery, Smile found out that 716 patients of Dental Essence were treated by Dr Lui on at least one occasion while he was employed by Smile at the Forum Clinic. However, it was not clear when all the 716 patients eventually migrated to Dental Essence.

28 Clauses 23 and 25 of the Contract were as follows:

> 23. Upon leaving The Practice, Dr. Lui will not seek to damage or injure The Practice's reputation or to canvass, solicit or procure any of The Practice's patients for himself or any other persons.
>
> ...
>
> 25. In the event that Dr. Lui leaves (whether resignation or dismissal) The Practice, existing and new corporate and non-corporate contracts, as well as existing and new patients, shall remain with The Practice. Patient data and records, office data and records and computer software programmes and data shall remain the property of The Practice, and such records, in full or in part, shall not be copied manually, electronically or otherwise be removed from the Practice.

For convenience, I will refer to Clauses 23 and 25 as "the Non-Solicitation Clause" and "the Non-Dealing Clause" respectively. Both clauses did not contain any time limit or geographical limit.

29 As regards the implied terms and duties, Smile relied on the following implied terms:

(a) Dr Lui owed a duty of good faith and fidelity to Smile;

(b) Dr Lui owed a duty to act honestly and with reasonable diligence in the discharge of his duties;

(c) Dr Lui owed a duty to act in good faith and in the best interests of Smile;

(d) Dr Lui owed a duty not to act so as to place himself in a position in which his personal interests would or did conflict with those of Smile; and

(e) Dr Lui owed a duty to disclose his interest in any transactions involving Smile.

30 Smile claimed that these implied duties were breached by Dr Lui by reason of the following acts or omissions while he was still employed by Smile:

(a) Dr Lui incorporated Dental Essence on 7 January 2009;

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

(c) Dr Lui fitted out the said premises of Dental Essence;

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

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

(f) Dr Lui failed to inform Smile of all or any of the foregoing matters; and

(g) Dr Lui failed to obtain Smile's consent to the setting up of Dental Essence.

I noted that, in the SOC (No 2), Smile relied on the facts pleaded in support of the alleged breaches of the Radial Clause, Non-Solicitation Clause and Non-Dealing Clause (see [26]–[27] above) as also constituting breaches of the said implied terms (see para 27(1) of the SOC (No 2)). However, in its revised opening statement Smile did not mention these facts as a further basis for the alleged breach of Dr Lui's implied duties (see para 10 of Schedule "B" to Smile's Supplemental (Revised) Opening Statement filed on 20 September 2011).

31 The substantive remedies which Smile claimed were as follows [note: 4] :

(a) damages, including damages pursuant to Clause 18 of the Contract; and alternatively

(b) an account of profits.

32 For completeness, I would mention that Smile's pleadings originally contained prayers for the following reliefs:

(a) An injunction restraining Dr Lui from practising at Tudor Court and elsewhere within three kilometres from the Suntec Clinic, the Forum Clinic and the ORQ Clinic; and

(b) An injunction restraining Dr Lui from dealing with Smile's patients (whether by conducting consultations with, examining and/or treating Smile's patients).

Smile was no longer seeking the said injunctions in the SOC (No 2).

33 I should also mention that the SOC (No 2) contained a separate claim (at paras 17 and 18) for breaches of Clauses 14 and/or 16 of the Contract by reason of the fact that Dr Lui became a director

and shareholder of Dental Essence on 7 January 2009, which was when he was still an employee of Smile. However, this claim was not pursued any further and it was not mentioned in Smile's revised opening statement or its closing submissions. Accordingly, I need not say any more about Clauses 14 and 16 of the Contract.

Dr Lui's submission of no case to answer

34 As mentioned above, Dr Lui elected to make a submission of no case to answer and not to call any evidence at the close of the case for Smile. This was on 26 September 2011. The principles governing the effect of such a submission are well-established and can be summarised as follows:

(a) The result of an election by Dr Lui to make a submission of no case to answer is that the court is left with only Smile's version of the story. If there is some *prima facie* evidence (*ie*, evidence which is not unsatisfactory and not unreliable) that supports the essential elements of Smile's claim, the court should accept such evidence: see *Bansal Hemant Govindprasad and another v Central Bank of India* [2003] 2 SLR(R) 33 ("*Govindprasad*") at [10], [11] and [16].

(b) Even if there is some *prima facie* evidence that supports the essential elements of Smile's claim (*ie*, if limb (a) has been satisfied), the court must still consider whether that claim has been established *in law*: see *Govindprasad* at [11].

35 I should elaborate that Dr Lui's election did not mean that I was obliged to accept every allegation by Smile. For example, if Dr Tan gave evidence on a disputed conversation between Dr Lui and himself, then in the absence of evidence from Dr Lui, I should accept Dr Tan's evidence unless his evidence was itself unsatisfactory or unreliable. The disputed conversation would be a matter within the personal knowledge of Dr Tan and Dr Lui. However, if Dr Tan gave evidence on an allegation pertaining to his own intention which was not disclosed to Dr Lui, then the absence of evidence from Dr Lui on this point was neutral since he would have had no personal knowledge of that intention. In a third example, if Dr Tan gave his personal opinion on what a provision in the Contract meant, the absence of any opinion by way of evidence from Dr Lui was again neutral. Dr Tan's opinion would not be an expert opinion. Dr Lui would still be entitled to advance his case on the interpretation of that provision through submissions from his counsel.

36 Counsel for Smile was Mr Aqbal Singh ("Mr Singh"). The lead counsel for Dr Lui was Mr Wong Siew Hong ("Mr Wong").

The issues before the court

37 As regards the express provisions, the main issues before me concerned the Radial Clause, the Non-Solicitation Clause and the Non-Dealing Clause (collectively, "the Restrictive Covenants"). They required the following questions to be considered:

(a) What was the correct interpretation of each of the Restrictive Covenants;

(b) Whether Dr Lui had breached any of the Restrictive Covenants; and

(c) If so, whether the Restrictive Covenant which was breached was void as being contrary to the public policy against covenants in restraint of trade.

38 The issue concerning the alleged implied terms of the Contract required the following questions to be considered:

(a) Whether the terms which were pleaded by Smile should be implied into the Contract; and

(b) If the terms should be implied into the Contract, whether Dr Lui had breached any of those terms by reason of the pleaded acts.

Issue 1: The Restrictive Covenants

The principles governing the interpretation of the Restrictive Covenants

39 In *Clarke v Newland* [1991] 1 All ER 397 at 402F–G, Neill LJ summarised the applicable principles of interpretation on this area of the law:

(a) The question of construction should be approached in the first instance without regard to the question of legality or illegality;

(b) The clause should be construed with reference to the object sought to be obtained; and

(c) The clause should be construed in its context and in the light of the factual matrix at the time when the agreement was made.

40 The second and third principles are trite law, and it is really only the first principle which is material for present purposes: that the same principles are to be applied to the construction of a clause which is impugned on the ground of being an unlawful restraint of trade as in the construction of any other written term (see also *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613 at [11]). This is the more accurate interpretation of the following statement of Salmon LJ in *Home Counties Dairies Ltd and another v Skilton and another* [1970] 1 WLR 526 ("*Home Counties*") at 536C:

If a clause is valid in all ordinary circumstances which can have been contemplated by the parties, *it is equally valid notwithstanding that it might cover circumstances which are so "extravagant," fantastical," "unlikely or improbable"* that they must have been entirely outside the contemplation of the parties.

[emphasis added]

This statement was quoted with approval by GP Selvam J in *Heller Factoring (Singapore) Ltd v Ng Tong Yang* [1993] 1 SLR(R) 495 ("*Heller Factoring*") at [15(a)]. Salmon LJ's remarks should not be read literally, because it is clear from the other sections of his judgment that he was merely reiterating that if some circumstances "must have been entirely outside the contemplation of the parties", then they would not constitute part of the legal meaning of the clause and would, therefore, be legally irrelevant: see, for instance, *Home Counties* at 535D–H. This understanding of *Home Counties* is in fact implicit in *National Aerated Water Co Pte Ltd v Monarch Co, Inc* [2000] 1 SLR(R) 74 at [37]–[38], and in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*") at [141].

Whether Dr Lui was in breach of the Restrictive Covenants

The Radial Clause

41 The first part of the Radial Clause (see [26] above) plainly prohibited Dr Lui from practising within three kilometres from the Suntec Clinic and the Forum Clinic. The only conduct of Dr Lui

complained of in respect of this clause was the fact that he was practising as a dentist at Tudor Court, which was well within three kilometres from the Forum Clinic. This was admitted in Dr Lui's pleadings (see para 16 of the Defence (Amendment No 2)). I therefore find that Dr Lui was in breach of the Radial Clause.

42 The part of the Radial Clause which referred to "any other new ... practices that have been set up before and during his cessation of work" was ambiguous. However, it was unnecessary to consider this phrase because this part of the Radial Clause was not in issue: the Forum Clinic existed at the time the Contract was entered into. Even if this second part of the clause was unreasonable in reference to the interests of the parties and/or the interests of the public, it could be severed without affecting the first part of the clause.

The Non-Solicitation Clause

43 As noted earlier (see [27] above), Smile claimed that Dr Lui had breached the Non-Solicitation Clause because he had, *inter alia*, conducted consultations with, examined and/or treated 716 patients at Dental Essence who had previously been patients of Smile. For convenience, I will refer to the activities of conducting consultations, examinations and/or the treatment of patients simply as the treatment of patients. This was the only act pleaded in support of this claim. While the use of the words "*inter alia*" might have allowed Smile to refer to some other act of Dr Lui done within the treatment room of Dental Essence, it did not allow Smile to refer to other acts done outside.

44 However, in his AEIC, Dr Tan stated (at para 121) that when Smile conducted a "Google search" in January 2010 with the keywords "smileinc.com.sg" and "smileinc", Dental Essence and Dr Lui appeared at the top of the list of search results. Dr Tan also stated (at para 123) that Dr Lui had disclosed during discovery that the latter had placed advertisements on "Google Ad Words" and "Yahoo", which included purchases of the following keywords: "forum dentist", "forum the shopping mall", "forum galleria dentist", "forum shopping centre dentist", "dentist at forum shopping centre", "dentist at forum galleria" and "forum mall dentist". This was presumably why the search in January 2010 produced the results it did. Dr Tan believed that Dr Lui was trying to capitalise on the reputation of Smile's brand and in particular that of the Forum Clinic. He was apparently relying on this conduct of Dr Lui as evidence of solicitation.

45 Apart from the purchase of keywords on "Google Ad Words" and "Yahoo", Dr Tan also relied on a testimonial by one Carolyn Strover in the August 2009 issue of the magazine "Expat Living" as another example of solicitation by Dr Lui. [note: 5]

46 As these two instances were not pleaded, I was of the view that Smile was precluded from relying on them in addition to the sole reason it had pleaded.

47 As regards the sole reason for the allegation about the breach of the Non-Solicitation Clause, I was of the view that the mere fact that Dr Lui was treating patients at Dental Essence who had previously been patients of Smile was insufficient to establish that he had sought to canvass, solicit or procure them to be his patients at Dental Essence. There is a distinction between solicitation and mere dealing.

48 In *Austin Knight (UK) Ltd v Hinds* [1994] FSR 52 ("*Austin Knight*"), Vinelott J observed (at 58–59):

> In her evidence in support of this application Miss Pickering lists five former customers of AK(UK) whom, she says, were approached by Miss Hinds. Miss Hinds' evidence is that she was

unemployed for two months after she had been unexpectedly made redundant. *She telephoned her main customers with whom she had dealt to tell them that she had been made redundant. She did not want them to hear of her dismissal from others and possibly infer mistakenly that she had been dismissed for misconduct or incompetence. At that time she had no prospects of new employment and could not therefore be said to be soliciting their custom*. They all had her home telephone number and later, when she found a post with another company, operating in the same field, *they approached her and asked whether she could continue to handle their accounts*. She identifies two of the five customers instanced by Miss Pickering as customers who approached her in this way, *two others are bodies, a Regional Health Authority and a City Council, who are required by statute to invite offers for work of this kind by tender, and her present employers were amongst those invited to tender*. There is direct evidence from the two customers who approached her direct which supports her evidence. Mr. Griffiths nonetheless submitted that by submitting an offer or making a presentation to a former customer, even one *who had approached her or her employers, or who put out work for tender*, amounted either to soliciting or endeavouring to entice away the customer. That is not I think, comprehended in the usual meaning of soliciting, and as regards endeavouring to entice a customer away, if Mr. Griffiths' submission were well founded *the covenant would amount to a covenant not to deal* with customers of AK(UK), even customers with whom Miss Hinds had never dealt while an employee of AK(UK) and with whose relationship with AK(UK) she was wholly unaware.

[emphasis added]

49 True, it might have been logical to infer that not all the 716 patients had simply come across the premises of Dental Essence by chance while walking in the vicinity of Tudor Court. Some might have learned about Dental Essence from other patients of Dental Essence or from advertisements of Dental Essence. A third possibility might have been that Dr Lui had indeed directly approached some of these patients to persuade them to use the services of Dental Essence.

50 If some of the patients had learned about Dental Essence from other patients of Dental Essence, there was no breach of the Non-Solicitation Clause.

51 If they had learned about Dental Essence from advertisements of Dental Essence, it was incumbent on Smile to plead the advertisements in question and how such advertisements breached the Non-Solicitation Clause. As mentioned above, the two instances which Dr Tan sought to rely on in his AEIC were not pleaded.

52 As for the last possibility, there was no allegation that Dr Lui had directly approached some of these patients to persuade them to use the services of Dental Essence.

53 I found that Dr Lui did not breach the Non-Solicitation Clause.

The Non-Dealing Clause

54 The alleged breach of the Non-Dealing Clause flowed from the same fact which Smile relied upon in relation to the Non-Solicitation Clause (see [43] above), *ie*, that 716 patients of Dental Essence were previously patients of Dr Lui at the Forum Clinic.

55 Dr Tan was of the view that this clause meant that if patients whom Dr Lui had previously treated while working for Smile came to Dental Essence's clinic, Dr Lui was under an obligation to turn them away, *ie*, to refuse to accept and treat them as patients and to refer them back to Smile. He also seemed to be of the view that the scope of this clause covered both persons who were patients

at the time of the termination of Dr Lui's employment with Smile, and persons who subsequently became patients of Smile. During cross-examination, Dr Tan stated as follows [note: 6] :

> Q: Dr Tan, is it your case that under clause 25, if *any* patient were to come to see Dr Lui, Dr Lui must first check with his patient, "*Have you ever been treated by Smile? If yes, I cannot treat you*"?
>
> A: Yes.
>
> Q: Where does it say so, Dr Tan?
>
> A: "Existing and new patients", the second line of clause 25, shall remain with the practice. In my mind I think Dr Lui has a duty to refrain from treating them, especially when it is five minutes walk away, and he has a duty to try and persuade them to continue to seek treatment at Smile.
>
> ...
>
> [emphasis added]

56 However, Mr Singh suggested that all that Smile had to establish on the facts of this action was that Dr Lui was prohibited from treating any person who was a patient of Smile at the time when he left its employment. [note: 7]

57 In the closing submissions for Smile, Mr Singh appeared to assume that the meaning of the Non-Dealing Clause was clear in that it did preclude Dr Lui from treating any person who was a patient of Smile (at the time when Dr Lui left Smile).

58 On the other hand, Mr Wong submitted that the Non-Dealing Clause precluded Dr Lui from dealing with the records of the patients and not the patients themselves.

59 Mr Singh was relying on the phrase "as well as existing and new patients" in the first sentence of the Non-Dealing Clause for his contention. Yet the phrase before that referred to "existing and new corporate and non-corporate *contracts*" [emphasis added]. The sentence after the first sentence also referred to "Patient data and records, office data and records ..." which was to remain the property of Smile.

60 The Non-Dealing Clause must be considered in totality. I have set it out at [28] above.

61 I was inclined to the view that Mr Wong's submission was persuasive. The reference to "existing and new patients", when considered in context, seemed to have been a reference to the records of the patients, whether non-existing or existing at the time when Dr Lui left Smile. The purpose of the first sentence of the Non-Dealing Clause would then be to state that all patient records were to remain physically with Smile. This was then emphasized in a different manner in the second sentence by the statement that such data remained the property of Smile and was not to be copied or removed from Smile.

62 Furthermore, Dr Tan's opinion on the meaning of the clause was self-serving. If there was any ambiguity in the interpretation of the clause, then the *contra proferentem* rule might have meant that it should be construed against the person who drafted the Contract. As that person would be someone from Smile, that rule might then have meant that Mr Wong's submission should prevail.

63 However, I was precluded from accepting Mr Wong's submission because of para 11 of the Defence (Amendment No 2). In that paragraph, Dr Lui averred that Clauses 24 and 25 (the latter being the Non-Dealing Clause) "are in form and in substance restraint of trade clauses or restrictive covenants. The Plaintiffs' [*sic*] attempt to claim for protection from competition through the inclusion of Clauses 24 and 25 ... are [*sic*] unjust and illegitimate. Clauses 24 and 25 ... are onerous, oppressive, unreasonable and are void as against public policy."

64 This demonstrated that Dr Lui had, at the time of the relevant pleading, accepted that the Non-Dealing Clause extended to the patients themselves and was not confined merely to their records. Hence, the averment about restraint of trade and public policy. Given that this averment had been made, it was incumbent on Dr Lui to state clearly at some other point in his pleading that this was merely an *alternative* argument and that he *also* took the position that the scope of the Non-Dealing Clause did not extend to the patients themselves. This was not done.

65 In the circumstances, I was obliged to adopt the interpretation advanced for Smile and to conclude that Dr Lui did breach the Non-Dealing Clause.

Whether the Restrictive Covenants were void as being contrary to the public policy against the restraint of trade

The applicable legal principles

66 In the leading Singapore case of *Man Financial* (at [40] above), the Court of Appeal stated the relevant legal principles in the following terms:

(a) The legal foundation and starting point is Lord Macnaghten's statement in *Thorsten Nordenfelt (Pauper) v The Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] AC 535 ("*Nordenfelt*") at 565. The only justification for a restraint of trade is if the restriction is *reasonable*, *ie*, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public. See *Man Financial* at [70].

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

6 7 *Man Financial* also clarified the relationship between, on the one hand, the twin tests of reasonableness enunciated by Lord Macnaghten in *Nordenfelt*, and, on the other hand, the *legal* requirement that there must be a legitimate proprietary interest of the employer which was protected by the restrictive covenant. When considering whether the maintenance of a stable and trained workforce could, in principle, constitute a legitimate proprietary interest, the court remarked (at [106], and further at [121] and [124]) that a positive answer to that question would not *ipso facto* render the restrictive covenant valid (*ie*, not void for being contrary to public policy), because the relevant clause would still be subject to the twin tests of reasonableness. In other words, the test is three-fold and all three limbs have to be satisfied:

(a) Is there a legitimate proprietary interest to be protected?

(b) Is the restrictive covenant reasonable in reference to the interests of the parties?

(c) Is the restrictive covenant reasonable in reference to the interests of the public?

68 However, it is not entirely clear from *Man Financial* whether there is a distinction between, on the one hand, the test of whether the restrictive covenant went "*further than what is necessary* to protect the interest concerned" [emphasis added] (see [66(b)] above), and, on the other hand, the twin tests of *reasonableness* as laid down in *Nordenfelt* (see [66(a)] above). It appears from the case-law that the courts have not treated both as being distinct (and cumulative) tests. In *Vancouver Malt and Sake Brewing Company, Limited v Vancouver Breweries, Limited* [1934] AC 181, Lord MacMillan stated (at 190):

> ... [S]o far as their Lordships are aware there is no case in the English Law Reports, and certainly none was cited at the bar, in which a bare covenant not to compete has been upheld. The covenants restrictive of competition which have been sustained have all been ancillary to some main transaction, contract, or arrangement, and have been found justified because they were *reasonably necessary* to render that transaction, contract or arrangement effective...
>
> [emphasis added]

69 Similarly, in *Herbert Morris, Limited v Saxelby* [1916] AC 688 ("*Herbert Morris*") Lord Parker stated (at 710):

> In fact the reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—*reasonably necessary*. ...
>
> [emphasis added]

70 I was of the view that there is no substantive distinction between the two formulations.

71 Finally, the crucial time for ascertaining whether or not the restrictive covenant in question is in fact reasonable is the time at which the contract is made: see *Man Financial* at [72]. This means that the reasonableness of the restriction must be judged in the light of facts and circumstances as they were at that time, although the parties' reasonable expectations as to what might happen thereafter are also relevant: see also *TSC Europe (UK) Ltd v Massey* [1999] IRLR 22.

72 In the present case, it was not disputed that the Restrictive Covenants were in fact covenants in restraint of trade. Yet, for reasons unknown to me, para 11 of the Defence (Amendment No 2) challenged the validity only of the Radial Clause and the Non-Dealing Clause but not that of the Non-Solicitation Clause. This was apparently not an oversight as I recollected Mr Wong informing me (perhaps while counsel were in chambers) that Dr Lui was challenging only the scope of the Non-Solicitation Clause and was not challenging its validity even if I were to agree with Smile on the scope of that clause. Yet, surprisingly, Mr Wong's closing submissions raised the issue about the validity of the Non-Solicitation Clause together with the rest of the Restrictive Covenants. It was too late for Mr Wong to do that. Nevertheless, some of the views I express below on some aspects of the issue of validity would in effect apply to all the Restrictive Covenants.

73 The doctrine of restraint of trade applies to render any provision in restraint of trade *prima facie* void. Accordingly, the questions which I had to consider were as follows:

(a) whether Smile had a legitimate proprietary interest which was sought to be protected by the Radial Clause and the Non-Dealing Clause;

(b) whether these Restrictive Covenants were reasonable in reference to the interests of the parties; and

(c) whether these Restrictive Covenants were reasonable in reference to the interests of the public.

Legitimate proprietary interest

74 As the court in *Man Financial* affirmed (at [81]), there are two main types of interests which have been categorised as legitimate proprietary interests in the employment context: (a) trade secrets; and (b) trade connections. Only (b) was in issue. In this regard, it is well-established that there must be personal knowledge of (and influence over) the customers of the employer: see *Man Financial* at [93] and *Herbert Morris* at 702, 709.

75 However, the mere existence of such personal knowledge and influence will not always be sufficient to establish a legitimate proprietary interest on the part of the employer. In *Herbert Morris*, Lord Parker of Waddington explained (at 709):

> I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain *such personal knowledge of and influence over the customers of his employer... as would enable him, if competition were allowed, to take advantage of his employer's trade connection...*
>
> [emphasis added]

In other words, the extent of the knowledge of, and influence over, the customers is also a relevant factor. This is also established in the case-law: see *Heller Factoring* at [15(c)], *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205 at [24]. However, I would add that this factor is relevant only insofar as it indicates the influence (or likely influence) of the employee over the customers. In itself, knowledge is immaterial unless it can and is likely to be leveraged in some way by the employee to gain some degree of influence. This customer-centred approach was clearly explained by Stamp J in *S W Strange Ltd v Mann* [1965] 1 WLR 629 at 641F:

> The defendant had a knowledge of the plaintiff's customers and of their creditworthiness which was no doubt of great value to the plaintiff but there is nothing to show that it was of value to the customer or would in the least degree encourage a customer to deal with him [*ie*, the defendant] as an individual or as an employee in a rival firm.

76 Apart from knowledge of the employer's customers, there are several other factors which are relevant to the issue of influence. In *Arthur Murray Dance Studios of Cleveland*, *Inc v Witter* (1952) 105 NE 2d 685, Hooper J identified two such factors: (a) "employer's hold" (or "institutional hold"); and (b) customer inconvenience. He explained these two factors as follows:

> Now why can't the elevator operator and the apartment caretaker automatically take the tenant with him? There are two main reasons, for which we would like to coin the phrases 'employer's hold' (or 'institutional hold') and 'customer inconvenience.' A customer may like an employee, but how far he is willing to inconvenience himself and suffer because he likes him is a different matter. Because he likes the elevator operator, will he break his lease and incur damages? Will he

endure the trouble of packing, moving, re-establishing? And the expense? Will he sacrifice the advantage of customers being accustomed to do business with him at his present stand? Will he leave an advantageous location he likes and follow to a disadvantageous one he dislikes? How far will he follow? Two buildings away? Two miles away?

If two teachers exchange colleges, do their students automatically exchange colleges? If the deans of the Harvard and Yale law schools exchanged chairs it might be very unflattering to see how few, if any, of their students would try to follow them. As every school knows there is such a thing as an 'institutional hold' that may be greater than the hold of one teacher, such as the hold it exercises through such things as loyalty, tradition, reputation, the campus, classmates, friends, fraternity brothers, other teachers and the girl who wears one's fraternity pin.

77 J D Heydon, *The Restraint of Trade Doctrine* (Butterworths, 1999, 2nd Ed) at 93 also identified several additional factors which are relevant to the question of influence: (a) the frequency of contact; (b) the place where contacts are made; (c) the seniority of the employee; and (d) the nature of the employee's relationship with the customers.

78 I turn now to the facts of this case. Smile's position was that all the Restrictive Covenants were intended to protect its patient pool. Dr Tan stated (at para 22 of his AEIC) that he had spent considerable time, money and effort into positioning Smile "as a well known premium dental service provider offering cutting-edge dental treatments". Dr Tan had trademarked the names of Smile's procedures, established its clinics in prime locations, and designed those clinics with lifestyle-based themes and concepts in mind. This approach enabled Smile "to build up a strong customer base". Dr Tan elaborated during cross-examination [note: 8] :

Q: What was the benefit to Smile of such an arrangement with [Dr Pearson]? Meaning that you would keep the chair in a state of disuse and so on. What is the benefit?

A: The benefit is that he will continue seeing his own patients and the patient -- the relationship with the doctor is maintained, as well as the continuity of the treatment. *In dentistry continuity is very important because when you finish a procedure you want to -- the patient will feel very comfortable if the same dentist follows up on his treatment. And the rapport is also maintained between the doctor and the patient*.

...

A: ... The radial clause was put in because we felt that was the only way to protect *our patient pool. In every dental practice, that is the life blood of the clinic*.

[emphasis added]

79 Mr Wong argued that Dr Tan's evidence demonstrated that no legitimate proprietary interest was being protected by the Restrictive Covenants [note: 9] . What Dr Tan was seeking to protect was Smile's patient pool and that meant that the sole purpose of the Restrictive Covenants was to exclude competition from Dr Lui rather than to protect any legitimate proprietary interest. I did not think that that was the correct approach. The purpose of most, if not all, restraint of trade provisions in the employment context is precisely to protect the employer from competition by an employee should the employee leave his employer. The nature and extent of the protection depends on the terms of each individual provision. Therefore, the fact that a provision seeks to exclude competition to some extent does not necessarily mean that an employer has no legitimate proprietary interest to protect. It is because of such exclusion that the court then has to apply the three-fold test

mentioned above at [67], one aspect of which is whether there is a legitimate proprietary interest to be protected. In other words, does the employer have a legitimate proprietary interest to protect by excluding competition or is he excluding competition *per se*? It may be that a restraint of trade provision has a dual purpose as I shall elaborate below when considering the Radial Clause.

80 In *Routh v Jones* [1947] 1 All ER 179, Evershed J stated (at 181E–H) as follows:

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

81 In *Campbell, Imrie and Shankland v Park* [1954] 2 DLR 170, a decision of the British Columbia Supreme Court, Wilson J remarked (at [10]):

> ... The chartered accountant is also an expert and consultant in regard to income taxation and has come to occupy, *vis-à-vis* his client, a relation almost as confidential as that of a solicitor. *Therefore, the personal element is a very important factor in this profession; the client having bared, if not his soul, at least his records, to an accountant, has established a confidential relationship which he will not lightly change because, for one thing, a change involves making the same sort of revelations to another person new and strange to him*. ...
>
> [emphasis added]

82 In *Robin M Bridge v Deacons (A Firm)* [1984] 1 AC 705, the Privy Council said (at 719H–720A):

> ... [T]he relationship of solicitor and client is not unique in being confidential; the relationships of medical men with their patients and of many other professional men with their clients are also confidential. If there were a general rule that they could not bind themselves not to act for former clients of the firm after they had retired from a partnership, the results would be very far reaching. ...

83 The above three cases suggest that, generally speaking, an employer of a general medical practitioner, a chartered accountant or a solicitor would have a legitimate proprietary interest to be protected by a restrictive covenant.

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

imposed on such an employee would not be inappropriate although whether the covenant is reasonable would depend on the facts.

85 What then of a professional like Dr Lui who is a general dental practitioner ("GDP")? No direct evidence was given as to how he obtained his patients while practising with Smile, and the frequency, nature and extent of the interaction between him and the patients. Nevertheless, I was of the view that I was entitled to take judicial notice of or infer the following:

(a) As Dr Lui started off as an employee of Smile, most of his patients would be that of the clinic where he practised rather than his own. In other words, his own relatives or friends would form a small portion of the patients he treated. Indeed, the reason why he left the other clinic at Great World City was because of insufficient patients.

(b) Most of the patients who came to the Forum Clinic would have done so mainly because of the recommendation of other patients and/or the location of the clinic. While the advertisements taken out by Smile might have caught the attention of some patients, the location of the clinic would usually be a greater influence than advertisements for persons seeking general dental services as opposed to specialist services. It is true that some patients who sought specialist services from, say, Dr Tan himself might subsequently have sought general dental services from the Forum Clinic. However, again, in the absence of more evidence, this would be less of a reason than recommendations and/or the location of the clinic.

(c) Dr Lui's contact time with the patients would usually be short. Once he began the dental treatment, he would be doing the talking and not the patient.

(d) Most patients would have seen Dr Lui twice a year for the usual dental check-up and treatment. A patient might have made one or two more visits in a year for treatment for more difficult conditions.

(e) A patient of a GDP would be likely to make an appointment with that particular GDP for the next session if the patient was satisfied with the services of the GDP. The patient would be likely to have some attachment to that GDP over time.

86 The employer's or institutional hold of Smile on the patients who sought general dental services at the Forum Clinic would usually not be strong. A patient who was happy with Dr Lui's services would quite easily switch to a competing clinic which Dr Lui practised at if that clinic was almost equally convenient to the patient and if the charges for both clinics were comparable.

87 All things considered, it seemed to me that it would be too far-reaching to conclude that, generally speaking, an employer of a GDP would not have a legitimate proprietary interest to be protected. In the absence of evidence that might have persuaded me otherwise, I therefore concluded that Smile did have such an interest to be protected.

Reasonableness in reference to the interests of the parties

(1) The Radial Clause

88 In the abstract, the mere fact that a particular restriction is unlimited in terms of its duration or geographical area will not necessarily lead to the conclusion that it is unreasonable by reference to the interests of the parties: see, *eg*, *Fitch v Dewes* [1921] 2 AC 158 and *Nordenfelt*, respectively. Although the Radial Clause is unlimited as to time, its geographical area is limited because it extends

to three kilometres from the Suntec Clinic and the Forum Clinic and from any new clinic set up by Smile before Dr Lui left.

89 In *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] IRLR 214 ("*Office Angels*"), Sir Christopher Slade (delivering the judgment of the English Court of Appeal) stated:

> A covenant which prohibits wholly the carrying on of business by a former employee in a specified area for a specified time will always be approached with caution by the court, since it amounts to a covenant against competition...
>
> ...
>
> In the present case, however, *the plaintiff's clients... are in general readily identifiable*. An area restriction against competition is not required for the protection of any trade secrets or confidential information...
>
> ... [W]hile the locality of an employment agency's office at a particular part of the City of London (near one of the stations) may well assist it to attract and retain the goodwill of temporary workers, the *orders of employers are placed over the telephone* and, *in general, it would be of no concern to them* whether an employment agency office was situated inside or just outside the kilometre circle...
>
> On the other hand, clause 4.5(b), if valid, would impose an *important and onerous restriction* on the defendants since it would prevent them during the restricted period from opening a place of business as an employment agency *anywhere in the kilometre circle*,*which includes the greater part of the City of London*. Accordingly, *while affording valuable protection to the plaintiff against general competition (in respect of which, as such, it is not entitled to protection) the provision would do little to protect the legitimate interest in respect of which it is entitled to protection*...
>
> Even if this view were wrong, the plaintiff cannot, in my judgment, show that the covenant in clause 4.5(b) is no wider than is necessary for the protection of [its] trade connection without satisfying the Court that there is a *real functional correspondence between the kilometre circle circumscribed by the restriction and the area particularly associated with the Bow Lane branch* [which was where the defendants worked].
>
> [emphasis added]

90 During cross-examination, Dr Tan testified that he thought that the Radial Clause was reasonable [note: 10] :

> Q: ... I would put to you, Dr Tan, that [the Radial Clause] is unreasonable?
>
> A: I disagree...
>
> Three kilometres is not big. Singapore, three kilometres he can practice anywhere outside. He can practice at Holland village, Bukit Timah, Sentosa, Thompson, Serangoon Gardens, East Coast, Kat[o]ng, these are all very affluent English speaking expat communities as well. All these areas he can go and practice.
>
> *Singapore is small. The distance and transportation system is so good his patients can access him. I think for his patients the rapport is so strong, him being the sole dentist in Forum, they*

can easily find him. All he needs to do is get the word out there, "I am practicing now in Holland Village", and all his patients will find him. In fact some of them live in Holland village. *So he does not need to do all that, and open up five minutes away from me and start practice down there*.

[emphasis added]

91 Dr Tan's evidence assumed that the Radial Clause precluded Dr Lui from practising within a three-kilometre radius from the Forum Clinic only. However, the terms of the Radial Clause were wider than that. They precluded Dr Lui from practising within a three-kilometre radius from the Suntec Clinic and from the Forum Clinic and from any other new Smile clinic that might have been set up before Dr Lui left. That would include the ORQ Clinic. So, if a Smile clinic had been set up around Holland Village before Dr Lui left, then Dr Lui would also not have been able to practise in the vicinity of Holland Village even if he had never practised at Smile's Holland Village clinic.

92 Why should Smile be entitled to prevent Dr Lui from practising within a three-kilometre radius from every Smile clinic if he never practised at the other Smile clinics or had stopped practising there more than, say, two years before he left? The application of the three-kilometre radius to every Smile clinic was too wide and was unreasonable as between Smile and Dr Lui.

93 Nevertheless, I assumed that I could sever parts of the Radial Clause so that it was confined to a three-kilometre radius from the Forum Clinic only.

94 Even then, the evidence of Dr Tan undermined his credibility somewhat. If Dr Lui's *former* patients (*ie*, patients whom he had treated while working for Smile) could easily find him even if he set up outside the three-kilometre exclusion zone, and they were likely to do so given the strong rapport he had formed with them, then why have the Radial Clause in the first place? If Dr Tan was right, the Radial Clause would serve no useful purpose for Smile while imposing an onerous obligation on Dr Lui. Dr Tan must have known that location was an important factor. The further away Dr Lui's new clinic was, the more inconvenient it would be for patients of the Forum Clinic to switch to Dr Lui.

95 It seemed to me that the three-kilometre exclusion zone had a dual purpose. The first was to make it less convenient for Dr Lui's former patients from using his services at his new clinic which would be outside the three-kilometre radius. The second was to make it impossible for Dr Lui to compete for new patients in the same vicinity as the Forum Clinic, *ie*, (a) persons who were treated by others at the Forum Clinic and (b) persons who had never been treated at the Forum Clinic.

96 I was of the view that the second purpose could not form part of the protection of the "patient pool" *qua* legitimate proprietary interest. In order to be recognised as a legitimate proprietary interest, the scope of the patient pool which was sought to be protected must be limited to Dr Lui's former patients. To the extent that Smile was attempting to prevent Dr Lui from competing for other patients in the same vicinity, such an attempt was to prevent competition *per se*. It was unreasonable.

97 A further factor which was in favour of Dr Lui was the fact that the duration of the restriction was unlimited. Smile alleged that Dr Lui was a foreigner on an Employment Pass who represented at the outset that he intended to return to Australia after a few years. The question of Dr Lui practising in Singapore did not arise at any point in Dr Tan's or Ms Chong's minds. Furthermore, Dr Lui himself negotiated the term of his employment downwards from five years to three years as he was supposedly intending to return to Australia. According to Dr Tan, it would not have been Smile's intention to subject Dr Lui to an indefinite restriction had it known that Dr Lui was going to practise in Singapore after his employment with it ended [note: 11] :

Q: Dr Lui cannot practice any form of dentistry within the 3-kilometre radius?

A: Yes. Can I add to this? It is because when Dr Lui and I and Smile entered an agreement he clearly stated he would go back to Australia to practice, which is why the time limit was never an issue. *Had he said he was going to open a practice in Singapore, we would have renegotiated the radial clause time limit and I would have given him a time limit, maybe two, three years. That is how we handle the dentists who are going to work in Singapore. All the Singaporean dentists have a 2-kilometre radius as well as a two-year limit on the radial clause*.

Q: *If Dr Lui had told you when he was negotiating with you about this contract that he was going back to Australia, wouldn't you agree there is absolutely no need for [the Radial Clause]? He wouldn't be in Singapore*.

...

A: Disagree.

Q: I put it to you that it makes no sense to have clause 24 if Dr Lui was going back to Australia at the end of his contract.

A: ... *No it makes sense to have [the Radial Clause] because I do not have an agreement in another clause that says "I am definitely going back to Australia at the end of my contract". If I had that clause to protect me I would not need [the Radial Clause]*.

[emphasis added]

98 Dr Lui did not give any evidence to rebut Dr Tan's allegation that Dr Lui had said, at the time the Contract was signed, that he would go back to Australia to practise after he completed his stint with Smile in Singapore. While there was some evidence that Smile had sponsored Dr Lui's application for permanent residence later, it was not clear when this was done. Apparently, it was done some time after the Contract had been entered into. I accepted Dr Tan's evidence as to what Dr Lui had said to him. However, that did not mean that I should necessarily accept Dr Tan's suggestion that he was not thinking of restricting Dr Lui from competing in Singapore because the question of Dr Lui practising in Singapore did not arise in Dr Tan's mind at all.

99 As can be seen from the evidence of Dr Tan quoted above at [90], Dr Tan himself stated that it made sense to have the Radial Clause because there was no provision in the Contract precluding Dr Lui from practising elsewhere in Singapore (outside the three-kilometre radius) after he left Smile. Indeed, the very terms of the Radial Clause as well as those of the other Restrictive Covenants took into account the possibility of Dr Lui practising elsewhere in Singapore.

100 Therefore, at the time the Contract was entered into, Smile did provide for the possibility of Dr Lui practising elsewhere in Singapore. Whether Dr Lui practised in Singapore immediately or sometime after he left Smile, he would be caught by the Radial Clause.

101 I was of the view that the absence of any time limit for the Radial Clause was unreasonable. According to Dr Tan's own evidence during cross-examination, the rapport that a GDP has with his patient will wear out, although he said it takes at least two to three years before it wears out [note: 12].

102 I was of the view that the absence of a time limit was not an oversight. Smile wanted as much protection from competition as it thought it could get its employee to agree with. It probably did not realise, at the time the Contract was signed, that the wider the scope of a covenant in restraint of trade the more likely it would be struck down as being an unreasonable restraint of trade.

103 Dr Tan sought to rely on contracts which Smile has with three local GDPs, *ie*, Dr Yeo Boon Keng Alvin, Dr Lee Kong Fei Frank and Dr Tsao Sun Paul to demonstrate that the absence of a time limit for Dr Lui's restrictive covenants was reasonable. These three contracts were entered into between 18 December 2009 and 9 March 2011. In these contracts, the exclusion zone was two kilometres from a Smile clinic and there was a time limit of two years. He referred to these contracts to suggest that had he known that Dr Lui wanted to practise in Singapore, he would have incorporated a time limit in the Radial Clause too. I did not buy his suggestion.

104 As I have mentioned, the very purpose of the Radial Clause was to restrict Dr Lui from competing with Smile should he ever practise in Singapore. In my view, the absence of a time limit was an attempt to get as much protection from competition as Dr Lui might agree with.

105 It seemed to me that the incorporation of a time limit in the radial clauses of the contracts for the local GDPs stemmed from Smile's realisation, after the dispute with Dr Lui had arisen, that a radial clause might not withstand the court's scrutiny if it did not have a time limt.

106 Likewise, Smile probably realised that if the geographical scope of a radial clause was too wide, the clause might not be upheld. I noted that the radius of the radial clause for the local GDPs was two kilometres and not three kilometres like it was for Dr Lui. I was of the view that the reduction of the radius was Smile's attempt to have a better chance of success should such a clause be challenged.

107 I add the following observation. Other GDPs employed by Smile before 2009 had different geographical exclusion zones or different time limits for the radial or other restrictive covenants. Notwithstanding Dr Tan's attempts to try and explain the differences to show that Smile was trying to be reasonable with its professional employees, I was of the view that the discrepancies illustrated again that Smile was trying to get maximum protection for itself against competition and only reduced the scope of the protection it had sought when a particular employee requested for it and not before.

108 I need mention only two of the pre-2009 contracts by way of illustration.

109 The first was an employment contract between Dr Tim Riesz ("Dr Riesz") and Smile dated 22 May 2008, which was about five years after the date of the Contract with Dr Lui. Dr Riesz's contract also had restrictive covenants. Clause 22 thereof was the equivalent of the Radial Clause. Interestingly, the engrossed copy of Dr Riesz's contract provided for a five-kilometre radius from any of the Smile clinics. If Smile genuinely believed that the three kilometre radius (as found in the Contract) was reasonable in 2003, why did it seek to extend the radius in 2008 for Dr Riesz's contract? No explanation was given by Dr Tan. Indeed, he did not say that the reference to a wider radius was a mistake. On the contrary, he said that he himself would have preferred the larger radius of five kilometres but as Dr Riesz preferred a smaller radius, Smile accommodated Dr Reisz and changed the distance accordingly. [note: 13]

110 Likewise, there was initially no time limit in Clause 22 of the engrossed copy of Dr Riesz's contract but, at his request, a time limit of three years was inserted.

111 The second illustration was an employment contract between Dr Paul Wong Shaun Yang

("Dr Wong") and Smile dated 5 June 2008, about two weeks after the date of the contract with Dr Riesz. Clause 22 thereof was the equivalent of the Radial Clause. However, in the case of Dr Wong's contract, the engrossed copy provided for an eight-kilometre radius, not three or five kilometres. This suggested that Smile was hoping to get as wide a protection as it could get. According to Dr Tan's evidence, the radius was amended to three kilometres at Dr Wong's request [note: 14].

112 However, Mr Singh made another argument in order to save the Radial Clause. He submitted that I should read down the clause "in order to do justice between the parties" (see para 52 of his closing submissions). He referred to the judgment of Cullity J in the Ontario case of *Transport North American Express Inc v New Solutions Financial Corp* (2001) 200 DLR (4th) 560 ("*TNAE*") whose reasoning was endorsed by the minority judgment of Sharpe JA in the Ontario Court of Appeal (see *Transport North American Express Inc v New Solutions Financial Corp* (2002) 214 DLR (4th) 44 ("*TNAE (CA)*").

113 He also relied on: (a) the decision of Lai Siu Chiu J in *Vandashima (Singapore) Pte Ltd and another v Tiong Sing Lean and another* [2006] SGHC 132 ("*Vandashima*"); (b) *GW Plowman & Son, Ltd v Ash* [1964] 2 All ER 10 ("*Plowman*"); and (c) *Home Counties* (see [40] above) (see his Opening Statement at para 129 and closing submissions at para 52).

114 I will deal with the four cases in chronological order.

115 *Plowman* and *Home Counties* did not assist Smile. In those two cases, the courts interpreted the relevant provision in a narrower manner than the literal interpretation thereof bearing in mind the context of the trade of the employer in question. They were not cases in which the interpretation was clear but the court read down the provision in order to save it.

116 *Vandashima* also did not assist Smile. It was not a case in which the scope of a restrictive covenant was in issue. Lai J granted, *inter alia*, an injunction against a defendant and confined it to Indonesia as that was where the relevant plaintiff had developed its business.

117 In *TNAE*, Cullity J expressed the view that the blue-pencil type of severance was a relic of a bygone area. Using discretionary severance, he struck out a contractual provision which would have led to payment of interest at a rate higher than that stipulated by statute. Instead, he enforced a promise to pay interest at a lower rate. His approach was endorsed by the minority judgment of Sharpe JA in *TNAE (CA)*. Sharpe JA described his approach as a reading down of the contractual provision. However, the majority of the Court of Appeal rejected his approach.

118 As mentioned above, that case did not involve a covenant in restraint of trade but a provision on the interest rate payable by a borrower which effectively provided for a rate that turned out to be higher than that allowed by statute. The considerations there were entirely different.

119 In *Man Financial*, the Court of Appeal declined to express any conclusion on the discretionary severance approach since the doctrine of severance was not before it (see *Man Financial* at [126] to [131]).

120 However, it was useful to bear in mind that in *Man Financial* at [48], the Court of Appeal reiterated that the courts scrutinise covenants in restraint of trade in the employment context far more strictly. One of the reasons for this approach is that employers are likely to have more bargaining power than employees. I would add that employers are more likely to be the ones who

draft or cause the employment agreement to be drafted and, unfortunately, in some cases employees do not even read the terms carefully. Even if they do, their bargaining power is usually weaker, as was recognised by the Court of Appeal.

121 It is one thing to construe a restraint of trade provision more narrowly because of the context and background facts and in so doing to save it from being struck down as being unreasonable. It is another thing to have reached a conclusion on the correct construction but then to try and read it down so as to save it.

122 Generally speaking, I do not favour the discretionary severance approach for employment contracts. If employers want to protect their trade connections or pool of clients, customers or patients then they would do well to draft a reasonable restraint of trade provision rather than to try and get the maximum protection which their employees will agree to. The discretionary severance approach will only encourage employers to try their luck by initially imposing the maximum protection they can get an employee to agree to and then to rely on a reading down of the provision when confronted with the likelihood of an unfavourable result in court. Moreover, not every employee will have the courage or resources to resist the threats of an employer to comply with a restraint of trade provision.

123 Furthermore, Smile did not plead nor did Mr Singh submit as to just how far the Radial Clause should be read down. For example, should the Radial Clause be read to impose a two-year or three-year time limit when none was expressly imposed? Should the Radial Clause also be read so as not to apply to patients whom Dr Lui had never treated while in Smile's employment?

124 In all the circumstances, I was of the view that there was no reason to try and read down the Radial Clause to save it. It was void for being an unreasonable restraint of trade.

(2) The Non-Solicitation Clause

125 I found that there was no breach (as pleaded) of the Non-Solicitation Clause (see [53] above. I have also mentioned (see [72] above) that the validity of the Non-Solicitation Clause was not challenged. For completeness, I mention briefly my views on its validity if Dr Lui had breached the Non-Solicitation Clause and had challenged its validity.

126 The Non-Solicitation Clause precluded Dr Lui from soliciting any of Smile's patients from any of the clinics of Smile. Why should Dr Lui be precluded from soliciting patients from the Forum Clinic or any other clinic of Smile whom he had never treated before, just because they were patients of one of the other practitioners of Smile? This point was not addressed by Dr Tan. Also, there was no time limit in this provision as well. Why should the prohibition against solicitation of patients last forever given that Dr Lui's influence would diminish over time (see [101] above)? In my view, the Non-Solicitation Clause was unreasonable.

127 I also saw no reason to read down the Non-Solicitation Clause. I would have concluded that it was void if its validity was in issue.

(3) The Non-Dealing Clause

128 Assuming that the Non-Dealing Clause applied to Smile's patients and not just to Smile's patient records, I was of the view that the reference to "new patients" referred not to those who became Smile's patients after Dr Lui left Smile but to those who became Smile's patients from the time when Dr Lui started work until Dr Lui's last day with Smile. The "existing" patients would be those who were

already patients of Smile before he joined Smile.

129 The Non-Dealing Clause would be even more onerous than the Non-Solicitation Clause because Dr Lui would be precluded under the former from treating patients of Smile even if he did not solicit their patronage.

130 The reasons for rejecting the Non-Solicitation Clause also applied to the Non-Dealing Clause.

131 There were other difficulties with the Non-Dealing Clause as well as the Non-Solicitation Clause. In *Jenkins v Reid* [1948] 1 All ER 471 at 481F–H, Romer J stated:

> ...[I]t seems to me that the whole thing is so hopelessly vague that it would be almost impossible for the plaintiff or anybody else to know whether or not she was breaking her covenant, and for this reason. I think "patients of the practice" there means patients at any time, ie, persons who may at any time during the plaintiff's lifetime after the termination of the partnership be treated as patients of the practice. Counsel for the defendant says that that is not too vague because nobody should be regarded properly as being a patient unless he was a regular patient, but, even so, *I do not know how the plaintiff would know whether such and such a person was or was not a patient of the partnership. Supposing that somebody came under her professionally and she enquired whether that person was or had been a patient of Dr Reid and the person said: "Oh well, two or three years ago I had influenza and Dr Reid attended me, but I have not seen him since," would he be a patient, and should he be treated as a patient, of the practice? For that person substitute one in the same circumstances who five years ago was a patient. Can the plaintiff safely advise or treat that person?* ...
>
> [emphasis added]

132 Mr Singh cited *Koops Martin* (at [84] above) for the proposition (at [83]–[84]) that a restriction on "dealing" *simpliciter* could be justified because (a) it removed the difficulty of proof of actual solicitation, and (b) where the former employee's connections with the employer's customers were especially powerful such that the customers would follow the employee unsolicited, an anti-solicitation restriction would be insufficient to protect the employer's customer connections. Insofar as a restriction on "dealing" removed the difficulty of proof of solicitation, this was undoubtedly true. However, it was important to note that the non-dealing restriction in *Koops Martin* lasted for 12 months, whereas the Non-Dealing Clause was unlimited in duration.

133 In the circumstances, I was of the view that the Non-Dealing Clause was also unreasonable as between the parties. I saw no reason to read it down. It was void.

Reasonableness in reference to the interests of the public

134 As I found that Smile's claim of breach of all three Restrictive Covenants could be dismissed for lack of reasonableness in reference to the interests of the parties, it was unnecessary to consider whether they were reasonable in reference to the interests of the public.

Issue 2: The implied terms

135 As I noted earlier (see [29] above), Smile's main case also included a claim that various terms were to be implied into the Contract, and that these terms were breached by Dr Lui. Interestingly, Mr Singh put the implied terms, not the express Restrictive Covenants, in the forefront of his closing submissions. The implied terms could essentially be divided into two categories of obligations:

(a) A duty of good faith and fidelity; and

(b) Fiduciary duties.

136 Briefly, the facts which Smile relied upon as giving rise to breaches of such implied terms were as follows (see also [30] above):

(a) The incorporation of Dental Essence on 7 January 2009;

(b) The signing of a tenancy agreement of premises in Tudor Court on 25 February 2009;

(c) The fitting out of the said premises;

(d) The discussions and negotiations between Dr Lui and Dr Pearson which resulted in Dr Pearson becoming a shareholder, director and dentist of Dental Essence;

(e) Dr Lui's application for a licence from the MOH to practice dentistry with Dental Essence;

(f) Dr Lui's failure to inform Smile of these matters; and

(g) Dr Lui's failure to obtain Smile's consent to the setting up of Dental Essence.

Smile also seemed to plead that these duties were also breached by reason of the fact that 716 patients whom Dr Lui had previously treated at the Forum Clinic were now patients of Dental Essence.

Duty of good faith and fidelity

137 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: see *Man Financial* at [193]. However, this alone did not assist Smile because it still had to establish that the conduct of Dr Lui breached the term.

138 Dr Lui did not dispute that he took the steps alleged and that he took these steps while he was still employed by Smile. As regards his discussions and negotiations with Dr Pearson, this allegedly took place when Dr Pearson was no longer an employee of Smile although Dr Lui himself was still an employee (see [169] below).

139 Dr Lui's defence was that, aside from the Restrictive Covenants, he was entitled to compete with Smile after he ceased to be its employee. The steps he had taken were preparatory steps for this competition and as such did not constitute a breach or breaches of the implied term of good faith and fidelity.

140 Smile's position was that even if such steps could be described as preparatory, Dr Lui had breached the said implied term.

141 Mr Singh and Mr Wong cited various English and Singapore authorities to support their respective clients' positions. I will refer to the main ones cited in chronological order.

1 4 2 *Robb v Green* [1895] 2 QB 1 ("*Robb*") is significant for the oft-cited passage from the judgment of Hawkins J (at 15):

> ... In what I have said I do not intend to convey that while the contract of service exists a person intending to enter into business for himself may not do anything by way of preparation,

provided only that he does not, when serving his master, fraudulently undermine him by breaking the confidence reposed in him. For instance, he may legitimately canvass, issue his circulars, have his place of business in readiness, hire his servants, &c. Each case must depend on its own circumstances.

143 That was a case where the employee was intending to compete with his employer after he left the employment. As can be seen in context, Hawkins J was of the view that an employee may take preparatory steps not just to enter into business but to compete with his employer. An employee may, for example, prepare a place for his business and employ others in such preparation, although each case depends on its own facts.

144 In *Sanders v Parry* [1967] 1 WLR 753 ("*Sanders*") the defendant was employed by the plaintiff as an assistant solicitor. In the course of his work, he got to know one Tully, an important client of the plaintiff. While he was still employed by the plaintiff, he and Tully agreed that he would leave the plaintiff's employment and set up his own practice, whereupon Tully would transfer his legal work to him. The plaintiff learned about this when the defendant handed him a letter from Tully setting out what had been agreed. Havers J concluded that even if the agreement had not been initiated by the defendant he was in breach of the implied term to serve with good faith and fidelity. He said (at 765B–H):

> The next point that arises is this. If it was not initiated by the defendant, but during the subsistence of his agreement with the plaintiff, he accepted the offer made by Tully, was that a breach of the agreement? Now in my view there was a duty on the defendant at all times during the subsistence of that agreement to protect his master's interests, especially to do his best to retain Mr. Tully as a client of his master, and in regard to the letter to which I have already referred, there was a duty on the defendant to look after and protect Tully's interests on behalf of his principal, the plaintiff. Now, in accepting this offer the defendant was not protecting his master's interests. He made no effort to try and retain Mr. Tully as a client of his master. The defendant was placing himself in a position in which there was a conflict of interests between him and his principal and he was looking after his own interests to the detriment of his master's interests. He was knowingly, deliberately and secretly acting, setting out to do something which would inevitably inflict great harm on his principal.
>
> There being a duty on the defendant to protect the interests of his principal, if Tully had expressed any dissatisfaction as to the position, then the defendant should have gone to the plaintiff, his principal, to give him an opportunity to find out any grievance which Mr. Tully thought he had. It may well be there was a misunderstanding in Tully's mind about this Penman affair, and if he had gone to the plaintiff about this there might well have been an opportunity for him and Tully to have sorted it out and of clearing up the misunderstanding. I think it was accurately described by counsel for the plaintiff as a "conspiracy of silence" between the defendant and Tully. The defendant said that if he disclosed the existence of this agreement at once to his principal he would betray Tully's confidence, and so he was silent in the interests of Tully and to his principal's detriment. It apparently never occurred to the defendant that while he was still employed by the plaintiff he could not discuss any offer Mr. Tully made; he could not possibly do that until his agreement with the plaintiff was terminated. I am satisfied that in accepting the offer, by such conduct the defendant was guilty of breach of duty in regard to the agreement implied therein by law that the defendant would serve the plaintiff with good faith and fidelity.

145 Mr Singh pointed out that in *Pacific Autocom Enterprise Pte Ltd v Chia Wah Siang* [2004] 3 SLR(R) 73 at [70], Prakash J had cited the second paragraph quoted above from *Sanders* with

approval. Even so, I had my reservations on the validity of such observations in *Sanders*.

146 First, I would mention that the reference by Havers J in *Sanders* to a conflict of interest *per se* between an employee and his employer may cause confusion if it is not properly understood. An employer may be tempted to argue that if an employee formulates an intention to leave his employment, that in itself is a conflict of interest as it is not in the interest of the employer for the employee to leave. *A fortiori* if the employee intends to leave and join a competitor or to set up his own business to compete. This is all the more so if the employee acts on that intention by taking preparatory steps to advance his intention, for example, by taking a tenancy of premises to start his own business.

147 However, *Robb* and other cases which I shall come to show that an employee may form an intention to leave or set up in competition with his employer and take preparatory steps towards that goal. In the latter case (*ie*, where the employee takes preparatory steps), such steps may be permissible in law. They do not necessarily constitute a conflict of interest in law which requires an employee to tell his employer of his plans to leave or to refrain from taking those preparatory steps.

148 Secondly, one may distinguish *Sanders* on the basis that the assistant solicitor there had reached the agreement with a client whom he was supposed to service on the plaintiff's behalf. Nevertheless, it seemed to me that to require the assistant to disclose any discussions with Tully would be to betray Tully's confidence especially if it was Tully who made an unsolicited proposal to the assistant. Yet, Havers J rejected that very point which was taken on behalf of the assistant. It seemed to me that too much emphasis was placed on an employee's duty to his employer and too little on his duty to the client whom he served. I am certain that a client would be shocked to learn that if he suggested to an employee (of the firm or company servicing him) to start his own business or to move to a competitor with support from the client, that employee would be obliged to disclose the suggestion to his employer.

149 However, I need say no more for the time being because, in any event, those are not the facts before me. There is no evidence that Dr Lui received any suggestion or support from any patient to set up Dental Essence before he left Smile.

150 I also did not accept that *Sanders* is authority for the wider proposition that, generally speaking, an employee must disclose his intention to compete with his employer once that intention is formed or to disclose preparatory steps whatever those steps may be. If it was such an authority then I would respectfully disagree with it.

151 In *Laughton and Hawley v Bapp Industrial Supplies Ltd* [1986] ICR 634 ("*Laughton*"), certain employees wrote to some of the suppliers of their employer to inform them that they intended to start business on their own and to ask for details of the suppliers' products. An industrial tribunal found that the employees had breached their implied duty of loyalty. The employees' appeal to the Employment Appeal Tribunal ("the EAT") was successful. The EAT was of the view that the letters were no more than an inquiry as to prices and that an intention to compete expressed in the letters was no breach of such a duty.

152 The next case involved a claim by Balston Limited ("Balston") against one Mr Head and his company Headline Filters Limited ("Headline") which was named as the first defendant with Mr Head as the second defendant.

153 Balston was in the business of manufacturing glass microfiber filter tubes. Mr Head was employed by Balston in 1969. He was successful there and after some promotions, he became its

deputy managing director in 1985. However, on 17 March 1986, he tendered a notice of his resignation as employee. Mr Head agreed with Balston that his notice would expire on 11 July 1986. On 16 April 1986, Mr Head also resigned as a director of Balston. It was agreed that he no longer needed to attend at work during the remainder of his notice period, *ie*, up to 11 July 1986, although Balston alleged that Mr Head was still supposed to be available till then if his services were required.

154 On 25 April 1986, Mr Head acquired a company. He changed its name to the name of the first defendant. From 25 April to 11 July 1986, Mr Head prepared Headline for commencement of business after 11 July 1986 in the manufacture of microfiber filter tubes. He took a lease for such a business and ordered materials for the manufacturing process. He also arranged for persons to be employed by Headline.

155 More importantly, Mr Head had dealings with a customer of Balston. The customer was Clifford Edwards Limited ("CEL") whose initiative had led to Balston commencing the manufacture of filter tubes.

156 In April 1986, Balston had apparently informed CEL's Mr Baker that it would raise its price for a certain type of microfiber filter tubes from £29 a box to £126 a box. After 1 May 1986, Mr Baker telephoned Mr Head to express his horror at the increase in price. Apparently, Mr Baker was not aware that Mr Head had given notice of his resignation as an employee. Mr Head informed Mr Baker of this in the telephone conversation and made it known that he was prepared to supply microfiber filter tubes to CEL at the price of £29 a box. CEL was prepared to wait till 11 July to place an order.

157 Soon after 11 July 1986, Balston learned about the business which Mr Head was undertaking through Headline and commenced an action against both. One of Balston's contentions was that between 16 April and 11 July 1986, Mr Head had prepared Headline to compete on 11 July and that his activities during that period were breaches of duties he had owed to Balston. It was submitted for Balston that Mr Head should not be allowed to reap the benefit of the three-month old illegitimate preparation for competition and that he should be deprived of the benefit of that springboard. In particular, Balston complained about the telephone conversation when Mr Head told Mr Baker that he was prepared to supply CEL with microfiber filter tubes at the lower price.

158 Balston applied for an interlocutory injunction pending trial to restrain Mr Head, *inter alia*, from reaping the benefit of the springboard. The application was heard by Scott J whose judgment was reported as *Balston Limited & another v Headline Filters Limited & another* [1987] FSR 330 ("*Balston (No 1*)"). Scott J said (at 340) that he was unimpressed by Balston's springboard argument. He did not think it was wrong for Mr Head to acquire Headline, obtain a lease of premises for it and order materials in preparation for the commencement of business after Mr Head ceased to be employed by Balston.

159 Scott J was more concerned about Mr Head's encouragement of Mr Baker and CEL. He considered that it was arguable that Mr Head was in breach of his duty of fidelity assuming that that duty survived till 11 July 1986, but on the facts before him he declined to grant an interlocutory injunction based on that claim.

160 The trial of the action was eventually heard by Falconer J. The case is reported as *Balston Limited & another v Headline Filters Limited & another* [1990] FSR 385 ("*Balston (No 2*)").

161 Falconer J proceeded on the basis that Mr Head had ceased to be a director of Balston from 18 April 1986 although he was still an employee until 11 July 1986. He divided the complaints about Mr Head's activities between two periods: (a) before 18 April 1986; and (b) between 18 April 1986

and 11 July 1986.

162 Apparently, prior to 18 April 1986, Mr Head had consulted accountants about setting up his own company and, on their advice, he had prepared a five year plan and a cash flow plan for a possible business manufacturing filter tubes for his consultation with them. On 14 March 1986, he had also signed a lease of premises for a new business. However, Falconer J accepted Mr Head's evidence that at the time of the signing of the agreement for the lease, Mr Head was uncertain as to whether he was going to be a dealer or a manufacturer of filter tubes. The latter would have been in competition with the business of Balston as a manufacturer of microfibre filter tubes.

163 After 18 April 1986, Mr Head had had the telephone conversation with Mr Baker already referred to above. This conversation apparently took place on 2 May 1986. On 8 May 1986, Mr Head visited Mr Baker at CEL's premises and it was agreed then that CEL would place an order with Headline for filter tubes to be delivered from 14 July 1986.

164 Falconer J decided that Mr Head did not breach his fiduciary duty as a director or his duty of good faith and fidelity as an employee by his intention to compete or his omission to disclose his intention to compete or by taking the preparatory steps mentioned above prior to 18 April 1986. However, he concluded that Mr Head's visit to CEL on 8 May 1986 and the agreement to supply CEL with filter tubes was wrongful even though such supply would commence only after 11 July 1986. He found Mr Head to be in active competition from 8 May 1986 onwards and this was in breach of his duty of good faith and fidelity.

165 Falconer J also found that Mr Head was in breach of that duty (*ie*, the duty of good faith and fidelity) when he approached an employee of Balston (through another person) to work for him while he himself (Mr Head) was still employed by Balston. However, Mr Head was not in breach of that duty by entering into similar discussions with another employee of Balston after that employee had left Balston (see page 417 of the law report).

166 I refer to part of the judgment of Falconer J to elaborate on the point I made earlier (at [147] above) that the principle about avoiding a conflict of interest does not preclude an employee (or a director) from forming an intention to compete with his employer and, generally speaking, from taking preparatory steps to do so.

167 Falconer J said (at p 412):

> In the statement of the overriding principle by Roskill J. in the *I.D.C.* case, namely "that a man must not be allowed to put himself in a position in which his fiduciary duty and his interests conflict," the conflict contemplated must be one with a specific interest of the company (or other body or person) to whom the fiduciary duty is owed, as, for example, a maturing business opportunity, as in *Canaero*, or the plaintiff's interest in the contract secured by the defendant in the *I.D.C.* case, or a contract falling within the first class of contracts in Lord Blanesburgh's dichotomy in *Bell v Lever* (page 194), or the use of some property or confidential information of the company which has come to a director as such (Lord Blanesburgh's qualification of his second class). In my judgment *an intention by a director of a company to set up business in competition* with the company after his directorship has ceased *is not to be regarded as a conflicting interest within the context of the principle*, having regard to the rules of public policy as to restraint of trade, *nor is the taking of any preliminary steps to investigate or forward that intention so long as there is no actual competitive activity*, such as, for instance, competitive tendering or actual trading, while he remains a director.

It follows, in my judgment, that Mr. Head was not in breach of his fiduciary duty owed to Balston as a director of the company in not disclosing to Balston his intention to set up a business in competition, whether as a dealer in filter products or as a manufacturer of micro-fibre tubes or in taking such steps as he did to forward that intention prior to 18 April 1986.

[emphasis added]

168 Although Falconer J was referring to a director's fiduciary duty not to place himself in a position of conflict, that part of his judgment applies *a fortiori* to an employee's duty of good faith and fidelity which is a less onerous duty than a fiduciary one.

169 Also, Smile's pleaded case in respect of Dr Lui's discussions with Dr Pearson was that such discussions took place from in or about January 2009 to the time when Dr Lui left Smile (see para 27 of the SOC (No 2)). This period was after the time when Dr Pearson had left Smile. *Balston (No 2)* was authority for the proposition that Dr Lui was not in breach of his duty of good faith and fidelity for discussing with Dr Pearson about the latter's participation in Dental Essence even though Dr Lui himself was still employed by Smile. It seemed to me that *Robb* was another authority for that proposition. It did not matter whether Dr Pearson joined Dental Essence as an employee, shareholder or director, or any combination thereof.

170 The next case was *Lancashire Fires Limited v SA Lyons & Company Limited and others* [1996] FSR 629 ("*Lancashire*"). The decisions of the court of first instance and the Court of Appeal are reported in the same law report.

171 In that case, the plaintiff, Lancashire Fires Limited ("LF"), was a leading manufacturer of decorative gas fires and related products. The managing director was Jim Wright ("Jim"). The second defendant was his younger brother Arthur Wright ("Arthur"). Arthur was employed by LF as a new projects manager from September 1992. In November 1993, two directors of a major Canadian company whom I shall refer to as "Lennox" visited LF's factory and had preliminary discussions with LF about the possibility of LF manufacturing gas fires for Lennox. However, LF did not have the capacity to do so and informed them accordingly in a letter dated 9 December 1993 written by Jim.

172 Arthur had met the two directors of Lennox briefly during their visit. His relationship with Jim had deteriorated since about July 1993 and he had been thinking about improving certain methods of production used in the ceramic industry. At the time of the visit of the directors of Lennox in November 1993, Arthur was thinking of setting up on his own. In December 1993, Arthur had begun to buy pieces of equipment which he thought he might need. In January 1994, he contacted Lennox (after Jim's letter of 9 December 2003) to ask for financial assistance for research and development of a prototype automated plant. He visited Lennox in Canada during a short holiday. This resulted in an agreement dated 8 (or 11) February 1994 under which Lennox agreed to provide an interest-free loan of up to £12,000 in stages. The loan was to be made to the first defendant.

173 S A Lyons & Co was the trading name used by Arthur. Clause 5 of the agreement read: "Lyons will enter into a mutually accepted agreement to sell to Lennox on an exclusive basis in North America, ceramic components relating to the decorative gas fire industry".

174 After the agreement with Lennox had been reached, Arthur acquired more equipment and rented premises at Albert Mill in Great Harwood which was within 15 minutes' drive from LF. He spent his spare time improving the premises and developing some equipment.

175 Eventually Jim learned about Arthur's plans and LF issued a writ seeking an injunction and other

relief.

176 As regards the duty of fidelity Carnwath J referred to various cases including *Robb*, *Sanders* and *Balston (No 2)*. He said (at 650):

> Thus, the distinction is between preliminary steps by way of preparation, and "actual competitive activity". The dividing line is crossed if the employee puts himself in a position of conflict of interest between his own interest and his duties as an employee.

177 As mentioned above at [146], the reference to a conflict of interest *per se* may cause confusion. As I have elaborated at [147] and [167]–[168] above, the mere possibility of the existence of a conflict of interest does not in itself preclude an employee from forming an intention to compete or from taking preparatory steps to compete with his employer after he leaves the employment, so long as those steps remain preparatory and do not cross into the territory of being actual competitive activity. So long as that does not occur, the employee's intentions and steps taken towards his objectives will not constitute an interest *which conflicts with his duties to his employer*. The reason why there is no conflict of interest is simply because the extent of the employee's duties, properly understood, does not overlap with the preparatory steps which the employee is taking.

178 Carnwath J found the agreement with Lennox to be of critical importance even though it was an agreement to agree. He noted that it was not simply a financing agreement with a disinterested party like a bank. Indeed, LF's counsel accepted that a simple financing agreement would not constitute a breach of the duty of fidelity. Carnwath J said (at 653):

> ... What matters is that he did pursue the project, pursuant to the agreement, and he took advantage of the finance for that purpose. He did so while still employed with Lancashire Fires. In my view this clearly put him a position of conflict. His job with Lancashire Fires was, among other things, to participate actively in the development of new projects, and the refinement of the process. His activity with S.A. Lyons was directed to the same end, with a view to competition with Lancashire Fires. I conclude that between the date of the agreement on February 11 and his departure from Lancashire Fires he was in breach of his duty of fidelity.

179 In the Court of Appeal, Sir Thomas Bingham MR cited the above passage with approval. He went on to say (at 679):

> Applying these principles and having regard to Arthur Wright's position in the plaintiff, the judge was in our view plainly right to conclude that there was a breach of the duty of fidelity. Arthur Wright was not simply seeking employment with a competitor or taking preliminary steps to set up his own business. His activities at Albert Mill and his dealings with Lennox, already described, placed him well on the wrong side of the line. Indeed, any employee with technical knowledge and experience can expect to have his spare time activities in the field in which his employers operate carefully scrutinised in this context.

180 Therefore, Carnwath J appeared to base his conclusion, that there was a breach of duty, on the agreement which Arthur had entered into with Lennox and not on the preliminary steps which Arthur had taken. Unfortunately, the Court of Appeal was not equally clear about the basis for its conclusion that there was such a breach. It was possible that they too would not have concluded that Arthur was in breach of his duty of fidelity if he had not entered into the agreement with Lennox and had only leased premises and acquired equipment in anticipation of his new business.

181 Mr Singh referred to Norman Selwyn, *Selwyn's Law of Employment* (Oxford University Press,

2011, 16th Ed) at para 19.4 to show that that textbook had cited *Lancashire* for the proposition that renting and equipping premises for a competing business are clearly competing activities which will amount to a breach of the duty of faithful service.

182 I did not agree that *Lancashire* was authority for such a proposition. As already discussed, Arthur did more than just the taking of preliminary steps. While he was still an employee of LF, he entered into an agreement with Lennox. The latter was the basis for the decision of Carnwath J and, in my view, also the decision of the Court of Appeal.

183 In *Universal Westech (S) Pte Ltd v Ng Thiam Kiat* [1996] 3 SLR(R) 429 ("*Universal Westech*"), the plaintiff had alleged breach of fiduciary duties by certain employees. At [54] to [56], Kan J referred to three cases:

(a) *Balston (No 1)* in which Scott J said he was unimpressed by the springboard argument;

(b) Laughton; and

(c) The American case of *Metal & Salvage Association Inc v Michael Siegel* 503 NYS 2d 26 where the Supreme Court of New York Appellate Division said (at p 27) that:

> [S]o long as the defendants did not use plaintiff's time, facilities or proprietary secrets to build a competing business, there was no illegality in the secret incorporation of (the company) prior to their departure.

184 Kan J noted (at [57]) that:

> A common feature in these cases is that the employees took steps to prepare to compete with their employers, but did not compete with them before they left. ...

185 On the facts before him, Kan J found that the defendants had progressed beyond the preparatory stage.

186 Although it was not surprising for Mr Wong to rely on *Universal Westech*, Mr Singh countered that the same case actually went against Dr Lui's position. He referred to para [53] of the judgment which stated:

> In the case of the second defendant, although he did not participate directly in the business of the third defendant, he had engaged in competition with the plaintiff before he resigned. He did that when he became director of the company so that he and the first defendant can make up the minimum two directors and when his name was used in the effort to secure business for the third defendant from the plaintiff's principals.

187 However, in my view, Kan J concluded that the second defendant there was in fact engaged in competition with the plaintiff not just because of one act but a combination of two acts. The second defendant there did not only become a director of a competing company. He also allowed his name to be used in an effort to secure business from one of the plaintiff's principals. The latter point was not merely an elaboration of the former point.

188 In [48]–[49] of the judgment, the judge had pointed out that the second defendant's name was used in a letter sent by the first defendant to one of the plaintiff's principals, Tech Spray, to solicit its support.

189 When one recollects what Kan J subsequently said at [57] which I cited above at [184], it is quite evident that the judge was of the view that preparatory steps before actual competition were permissible.

190 I should also refer to the judgment of the Court of Appeal in *Ng Thiam Kiat and others v Universal Westech (S) Pte Ltd and another appeal* [1997] 2 SLR(R) 439. The Court of Appeal said (at [12]) that Kan J had found that the second defendant had breached his duty of fidelity by becoming a director of the third defendant whilst he was still employed by the plaintiffs. As I have elaborated above, that was not all that the second defendant did. Indeed, the Court of Appeal specifically alluded (at [23]) to the letter which the first defendant had written (to Tech Spray) in which the second defendant's name was used to solicit support from Tech Spray.

191 I should mention that while Kan J referred to the breach by the second defendant as being a breach of his fiduciary duty, the Court of Appeal described that defendant's duty as one of fidelity. I will say more on this later (see [226] below).

192 In *Thomas & Betts (S.E. Asia) Pte Ltd v Ou Tin Joon* and another [1998] SGHC 57 ("*Thomas*"), the plaintiff alleged, *inter alia*, that the first defendant (who was its former managing director) had breached his implied duty of good faith and fidelity by making preparations to compete with the plaintiff in anticipation of the termination of his employment with the plaintiff.

193 Lai Siu Chiu J struck out certain paragraphs of the statement of claim pertaining to the breach of that implied duty. She said (at [20]) that mere preparatory acts to compete were insufficient to constitute a breach of the implied duty of good faith and fidelity. For example, an employee was free to apply for a position with a competitor or to find premises to set up a future rival business (citing *GD Searle & Co Ltd v Celltech Ltd* [1982] FSR 92).

194 In *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] 2 BCLC 523 ("*BMT*"), Hart J was of the view (at [85]) that at its widest, *Balston (No 2)* only meant that a director need not disclose *his own* intention to compete. It did not deal with the question of whether the director was obliged to disclose the intentions to compete of other directors or employees. Hart J was of the view (at [89]) that a director is under a duty to report actual or threatened competitive activity where the activity involves others even if the director was also involved in the same activity. Indeed, he also appeared to have been of the view that a director should resign immediately after he has decided to engage in a competing business if he did not wish to disclose his own intention to compete with his company. He said (at [89]):

> ... A director who wishes to engage in a competing business and not to disclose his intentions to the company ought, in my judgment, to resign his office as soon as his intention has been irrevocably formed and he has launched himself in the actual taking of preparatory steps. Although this might seem inconsistent with the wide statement of principle in *Balston*, it is not inconsistent with the decision in that case on its particular facts: as already noted (see paragraph above) the intention to compete does not appear to have been formed prior to the resignation as a director.

195 Mr Singh submitted that *BMT* and other cases on directors' duties also applied to Dr Lui even though he was not a director of Smile.

196 In *Shepherds Investments Ltd and another v Walters and others* [2007] 2 BCLC 202 ("*Shepherds*"), two companies made claims against various defendants including two former directors and employees (Mr Walters and Mr Hindle) and a defendant ("Mr Simmons") who was a former employee and who was also alleged to have been a de facto director of the first claimant.

197 Etherton J said (at [105]–[108]):

> 105 As the most recent in the line of relevant authority, *British Midland Tool* is binding upon me, unless I am satisfied that it is plainly wrong. Far from considering that the decision is wrong, I respectfully consider that both the decision and reasoning of Hart J in that case were correct and, in so far as there is any conflict between them and the decision and reasoning of Falconer J in *Balston*, the approach of Hart J is to be preferred.
>
> 106 In my judgment it is plain that the necessary starting point of the analysis is that it is the fiduciary duty of a director to act in good faith in the best interests of the company (*Item Software* at paragraph [41]), that is to say 'to do his best to promote its interests and to act with complete good faith towards it', and not to place himself in a position in which his own interests conflict with those of the company (*British Midland Tool* at paragraph [81] and *CMS Dolphin Ltd v Simmonet* [2001] 2 BCLC 704 at paragraph [84]).
>
> 107 It is difficult to see any legitimate basis for the 'trumping' of those duties by 'rules of public policy as to restraint of trade' as suggested by Falconer J in *Balston* (at 412). There is no reference to any such principle in any of the relevant cases prior to *Balston*, such as *Robb v Green, Wessex Dairies v Smith* [1935] 2 KB 801, *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 Ch 169, and *Laughton v Bapp Industrial Supplies Ltd* [1986] IRLR 245. Hart J in *British Midland Tool* rejected any such principle. He said, at para [89] of his judgment:
>
> > 'It does not, furthermore, seem to me that the public policy of favouring competitive business activity should lead to a different conclusion. A director is free to resign his directorship at any time notwithstanding the damage that the resignation may itself cause the company: see *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 at [95] per Lawrence Collins J. By resigning his directorship he will put an end to his fiduciary obligations to the company so far as concerns any future activity by himself (provided that it does not involve the exploitation of confidential information or business opportunities available to him by virtue of his directorship).
>
> 108 What the cases show, and the parties before me agree, is that the precise point at which preparations for the establishment of a competing business by a director become unlawful will turn on the actual facts of any particular case. In each case, the touchstone for what, on the one hand, is permissible, and what, on the other hand, is impermissible unless consent is obtained from the company or employer after full disclosure, is what, in the case of a director, will be in breach of the fiduciary duties to which I have referred or, in the case of an employee, will be in breach of the obligation of fidelity. It is obvious, for example, that merely making a decision to set up a competing business at some point in the future and discussing such an idea with friends and family would not of themselves be in conflict with the best interests of the company and the employer. The consulting of lawyers and other professionals may, depending on all the circumstances, equally be consistent with a director's fiduciary duties and the employee's obligation of loyalty. At the other end of the spectrum, it is plain that soliciting customers of the company and the employer or the actual carrying on of trade by a competing business would be in breach of the duties of the director and the obligations of the employee. It is the wide range of activity and decision-making between the two ends of the spectrum which will be fact sensitive

in every case.

In that context, Hart J may have been too prescriptive in saying, at para [89] *of his judgment, that the director must resign once he has irrevocably formed the intention to engage in the future in a competing business and, without disclosing his intentions to the company, takes any preparatory steps.* On the facts of *British Midland Tool*, Hart J was plainly justified in concluding, (in para [90] of his judgment) that the preparatory steps had gone beyond what was consistent with the directors' fiduciary duty in circumstances where the directors were aware that a determined attempt was being made by a potential competitor to poach the company's workforce and they did nothing to discourage, and at worst actively promoted, the success of that process, whereas their duty to the company required them to take active steps to thwart the process.

[emphasis added]

198 He also said (at [127]–[129] and [131]):

127 In the light of all those matters, I am quite clear that from 12 August 2003 not only had the individual defendants formed the irrevocable intention to establish a business which they knew would fairly be regarded by Financial and Investments as a competitor to the business carried on by SSF, but they continued to take steps to bring into existence that rival business, contrary to what they knew were the best interests of Financial and Investments, and without the consent of those companies to do so after full disclosure of all material facts, and so in breach of their respective fiduciary duties and their obligation of fidelity. That conflict between the duties owed by the Individual defendants to Financial (in the case of Mr Walters and Mr Hindle) and Investments (in the case of Mr Simmons), on the one hand, and the personal and private interests of the individual defendants, on the other hand, in the promotion of the new and rival business is exemplified by Mr *Simmons' acknowledgement, in cross-examination, that he found it difficult to promote 'the Shepherds product' when developing the 'new product'*.

128 Further, irrespective of whether, by virtue of *Balston Ltd v Headline Filters Ltd* [1990] FSR 385 and contrary to my view, there was no obligation to disclose their own individual 'preparatory' activity, I am bound by *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466, [2003] 2 BCLC 523 to hold that each of the individual defendants was obliged, by 12 August 2003 at the latest, to disclose to Financial or Investments, as the case may be, the actual and threatened activity of the others to set up the competing business. If and so far as is necessary, like Hart J in *British Midland Tool*, I would distinguish *Balston* on the facts on the ground that the intention to compete in *Balston* does not appear to have been formed in that case prior to the resignation of the second defendant as a director. The principle that it is the duty of a director to inform the company of any actual or threatened activity of another, whether or not he himself is involved, which damages the interests of the company, and whether or not that activity would in itself constitute a breach by anyone of any relevant duty owed to the company, is part of the core reasoning and decision in *British Midland Tool*, which I must follow.

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

...

131 Mr Kempster submitted, by reference to the decided cases, that the steps taken by Mr Simmons prior to his resignation never constituted, for the purposes of an employee's obligation of loyalty, more than lawful preparatory steps since nothing was done which had an immediate impact on Investments. I reject that submission. By the time Mr Simmons resigned the individual defendants had not only made a firm decision to set up a competing business, *but they were well advanced in the development of a rival and, in their view, superior investment 'product'.* Not only was that a matter of which, on the defendants' own evidence, Financial and Investments would have wanted to know, but, on Mr Simmons' own admission in cross-examination, he felt it difficult to promote SSF's TLPs when he was developing that competing product. *What he was doing did in fact interfere with his duty to serve his employer faithfully and honestly to the best of his abilities*. *In the circumstances, the fact, as Mr Kempster emphasised, that at the date of Mr Simmons' resignation there was still a great amount to be done to establish the business of Assured and PSL is not a critical factor.*

[emphasis added]

199 It seemed to me that Etherton J decided in *Shepherds* that there was a breach by Mr Simmons of the duty of fidelity because:

(a) the defendants had made a firm decision to set up a competing business;

(b) they were well advanced in the development of a rival and, in their view, superior product; and

(c) Mr Simmons admitted that he felt it difficult to promote an investment product of a company in the same group as the claimants when he was developing a competing product.

200 I come now to a case in which Helmet Integrated Systems Limited claimed against Mitchell Tunnard, a salesman, for breach of various duties. In that case, the claimant manufactured protective helmets for fire-fighters and other emergency service personnel. In 2001, Mr Tunnard had conceived a general idea for a new modular helmet for fire-fighters and made preparations to set up in competition with the claimant. In August 2001, he approached a designer (who was the third defendant). In September 2001, he applied for a government grant. After he was awarded the grant, he gave the designer a design specification and examples of existing helmets including a helmet manufactured by the claimant which was then the leading helmet in the claimant's range of such products. Two months after leaving the claimant, Mr Tunnard incorporated the second defendant.

201 Mr Wong relied on the decision of the court of first instance (see *Helmet Integrated Systems Limited v Mitchell Tunnard* [2006] FSR 41 ("*Helmet*")). On the other hand, Mr Singh placed much emphasis on the decision of the Court of Appeal in that case (see *Helmet Integrated Systems Ltd v Tunnard and others* [2007] IRLR 126 ("*Helmet (CA*")). I will refer first to the former and then the latter.

202 In the court of first instance, Judge Fysh QC paid particular attention to *University of Nottingham v Fishel* [2000] ICR 1462 ("*Nottingham*") as regards instances where an employee may also have fiduciary obligations. He said (at [57] and [58]):

57 I have found this authority of particular assistance since when it comes to employees (as opposed to directors), one sometimes finds in the authorities a loose use of the words "trust", "confidence", "good faith" and above all, of "loyalty" in discussion relating to both fiduciary obligations and the common law duty of fidelity. Elias J. for example, defines "loyalty" as the duty

to act in the interests of another. Often I have to conclude from the authorities that the (usually) grossly dishonest behaviour of the ex-employee in such decisions (such as the taking of bribes and the sabotaging of valuable contracts) has driven the conclusion, rather than the application of discrete legal principles.

58 The question of intention to set up in competition with an employer should perhaps be mentioned separately. It is settled law that even in the case of a true fiduciary, an intention to set up in future business is not to be regarded as something which places the employee in potential conflict with his employer. There is thus no obligation upon the employee to inform his employers of this intention even if the person involved was a sales director like Mr Korny. This is in keeping with the University of Notts case. In 1990, in the *Balston v Headline Filters Ltd* (No. 2) case above at 412 (a case involving a director), Falconer J., having reviewed the authorities, put it thus:

> "In my judgment, the intention by a director of a company to set up business in competition with the company after his directorship has ceased is not to be regarded as a conflicting interest within the context of the principle, having regard to the rules of public policy as to restraint of trade, nor is the taking of any preliminary steps to investigate or forward that intention so long as there is no actual competitive activity, such as for instance, competitive tendering or active trading while he remains a director."

203 As regards the duty of fidelity, Judge Fysh QC referred to the judgment of Hawkins J in *Robb* (which I have cited above at [142]).

204 He then said (at [61]):

> A number of other authorities were in fact drawn to my attention in this connection including *Balston v Headline Filters Ltd (No 2)*, above at 412 ff and *Bell v Lever Bros Ltd* [1932] A.C. 164 upon which it (and the other authorities) draw. Not surprisingly, acts of preparation before departure are not actionable; there is no breach of the duty of good faith and fidelity on the part of an employee to decide to set up in competition with his employer and take preliminary steps to do so: *Balston* above at 413. The law does not require a working lacuna between jobs and recognises the social utility to an employee and to the community of the acquisition of expertise and knowledge from his employment. This obviously applies even to an employee whose job it is to promote sales and to report on competitive activity. To do otherwise would I consider result in such an employee being either locked in corporate bondage or unable to get a running start were he to leave. Either way, this would be against public policy. I was also referred to *Hivac Ltd v Park Royal Scientific Instruments*, above and to *Lancashire Fires Ltd v SA Lyons & Co Ltd* [1996] F.S.R. 629 in this connection but they do not take the matter further. It seems to me that to succeed under this head, the claimant must show actual competition or misuse of particular and valuable information (*a fortiori* confidential information) in his possession which should properly be regarded as being his employer's and not his.

205 The Court of Appeal decided that Mr Tunnard was under no obligation, be it fiduciary or otherwise, to inform his employer about his activities in preparation for competition with it after he left its employment. They also found that Mr Tunnard did not owe any relevant fiduciary obligation.

206 Mr Singh relied on parts of the judgment delivered by Moses LJ (at [28]–[29] and [31]). For a better understanding, I set out [28] to [31] and the first sentence of [32]:

> **The legitimacy of preparatory activity**

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

29 Mr Tunnard relied on the dicta of Hawkins J. in *Robb* (q.v. above). In *Balston Ltd v Headline Filters Ltd* (No. 2) [1990] F.S.R. 385 a former director who set up a rival factory and had taken a lease on future business premises and formed a company for his activity was held by Falconer J. (at 412) neither to have breached his duty of good faith nor his fiduciary duty; he had merely taken preliminary steps to investigate the viability of his plan and to advance his intention.

30 But, as Mr Stafford Q.C. on behalf of HISL has demonstrated, there are cases which show that the mere fact that activities during the course of employment may be described as "preparatory" will not necessarily be dispositive of the issue as to whether the employee acted in breach of his obligations to his employer. Hart J. in *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] 2 B.C.L.C. 523 decided that a director who has irrevocably formed an intention to engage in a competing business and has taken preparatory steps cannot rely upon the public interest in favouring competitive business as an answer to allegations of breach of fiduciary duty. He can only put an end to his fiduciary obligation by resigning his directorship. Until he has done so, preparatory steps taken in pursuance of an irrevocable intention to compete would generally amount to a breach of his fiduciary obligations as director.

31 This approach was followed by Etherton J. in *Shepherds Investment Ltd v Walters* [2006] EWHC 836 (Ch).5. He held that when former directors and employee set up a competing business, diverting business opportunities and misusing confidential information, they had acted in breach not only of their fiduciary obligations but their implied obligation of fidelity the moment that they procured the services of attorneys in the Cayman Islands to set up the rival business. On the facts of that case, he held that a former employee was also in breach of obligations as a fiduciary, whether or not he was to be regarded as a director, and that he was in breach of his duty of fidelity. The case affords an example, on its facts, of work of preparation which constituted breaches of both the implied duty of fidelity and fiduciary duties.

32 I agree that it is insufficient merely to cloak activities with legitimacy by describing them as preparatory. ...

207 Moses LJ also said at [51]:

For these reasons I am in agreement with the judge that HISL has failed to establish any breach, either of an obligation of fidelity or as a fiduciary. But I should emphasise that my reasons are different to those expressed by the judge. No doubt this has arisen because of the change of emphasis in the way HISL's case has been presented. The reason why Mr Tunnard did not breach any fiduciary obligation was because his own preparatory activity could not legitimately be described as "competitor activity" in the context of his employment as a salesman and his right to prepare for competition once he had left employment as a salesman. However, the mere fact that his activities were preparatory was not, in my judgment, a sufficient answer to HISL's claim. Mr Tunnard's activities may well be described as reasonable and necessary acts of preparation for departure (see the judgment at [62]). But that of itself does not determine whether they

amounted to a breach either of an obligation of fidelity or an obligation as fiduciary. Many activities might be described as reasonable and necessary for the purposes of future competition but that does not assist in deciding whether they were in breach of either obligation. The true reason, as I see it, why Mr Tunnard's activities did not amount to a breach of any obligation to HISL lies in the fact that HISL had not restricted the freedom which Mr Tunnard had to prepare for future competition on his departure. I would dismiss the appeal.

208 The point that Mr Singh was emphasizing was that even preparatory steps to compete may result in a breach by an employee of his duty of good faith and fidelity. He also implied that the Court of Appeal in *Helmet (CA)* had preferred *BMT* and *Shepherds* to *Balston (No 2).*

209 As regards the latter point, I was of the view that the Court of Appeal did not prefer those two cases to *Balston (No 2).* Moses LJ was merely saying that there were cases in which preparatory steps were held to fall on the wrong side of the line. In my view, those two cases could be distinguished on the basis that the steps there went beyond usual preparatory steps such as setting up a company, taking a lease of premises and acquiring equipment to compete.

210 More importantly, while Moses LJ said that it was not sufficient for a defendant to describe activities as being preparatory in order to avoid liability, he did not go so far as to say that, generally speaking, preparatory steps would be wrongful. That would be a quantum leap. What then were the activities that Smile was relying on as constituting a breach of the duty of good faith and fidelity by Dr Lui? These have been set out above (at [30] and also [136]).

211 It was quite clear to me that Dr Lui was not in breach of the implied duty of good faith and fidelity by engaging in those activities (see, for example, *Robb*, *Balston (No 2)*, Judge Fysh QC's judgment in *Helmet* and the judgment of the Court of Appeal in *Helmet (CA)*, as well as *Universal Westech* and *Thomas*).

212 I did not agree with any suggestion in *BMT* and/or *Shepherds* that, a director has to disclose his intention to compete (and in any event Dr Lui was not a director).

213 I also did not agree with any suggestion that once an intention to compete is formed, a director (or even an employee) cannot as a matter of law take mere preparatory steps to compete such as the leasing of premises and equipping the same.

214 In para 17 of Mr Singh's closing submissions, he stressed that the competing clinic of Dental Essence was a mere five minutes' walk away from the Forum Clinic. He also submitted that Dr Lui and Dr Pearson had together consistently accounted for about 80% of the patients at the Forum Clinic from 2003 onwards and had much influence and rapport with their patients. He submitted that it was foreseeable and inevitable that the concerted action of Dr Lui and Dr Pearson would lead to the demise of the Forum Clinic. In my view, these allegations were irrelevant. The fact that Dental Essence would become and/or had become a very effective competitor did not transform a non-duty to disclose to a duty to disclose or a permitted act to a wrongful one.

Fiduciary duties

215 Three of the implied terms which were pleaded by Smile in the SOC (No 2) (see [29] above), *viz*, the third, fourth and fifth terms, seemed to indicate that Dr Lui allegedly owed fiduciary duties to Smile. For convenience, these three terms are set out below:

(a) The defendant owed a duty to act in good faith *and in the best interests of the plaintiff*;

(b) The defendant owed a duty not to act so as to place himself in a position in which his personal interests would or did conflict with those of the plaintiff; and

(c) The defendant owed a duty to disclose his interest in any transactions involving the plaintiff.

216 However, Smile did not mention these three implied terms in the list of issues which it tendered on 20 September 2011 (see Schedule "B" of Smile's Supplemental (Revised) Opening Statement). The only implied duties which were mentioned in the list were "implied duties of good faith and fidelity".

217 In his closing submissions, Mr Singh returned once again to the theme of fiduciary duties. Apart from his arguments based on the alleged breach of the implied duty of good faith and fidelity, his alternative argument was that Dr Lui's "fidelity obligations had the requisite dimension of being of a fiduciary nature" [note: 15].

218 Mr Singh cited the decision of Elias J in *Nottingham* as well as *Cobbetts LLP and Lee Crowder (A Firm) v Mark Reginald Stuart Hodge* [2009] EWHC 786 ("*Cobbetts*") as authority for the proposition that an individual employee may, in certain circumstances, owe specific fiduciary obligations arising from the nature and scope of his work. That much is certainly true, although this alone did not assist Smile much because Mr Singh still had to persuade me, first, that Dr Lui owed fiduciary duties on the facts before me, and, secondly, that he had breached these duties.

219 In para 37 of Mr Singh's closing submissions, he referred to that part of Elias J's judgment in *Nottingham* (at 1489) where the learned judge referred to an article by Lord Millett: "Equity's Place in the Law of Commerce" (1998) 114 LQR 214. In that article, Lord Millett referred to three categories of relationships in considering when fiduciary obligations may arise. The first two had no application in *Nottingham*. The third category identified by Lord Millett, and described by him as the most important, was as follows:

> [it] is the relationship of trust and confidence, which arises whenever one party undertakes to act in the interests of another or places himself in a position where he is obliged to act in the interests of another. The core obligation of a fiduciary of this kind is the obligation of loyalty.

220 Mr Singh suggested that if there is a relationship of trust and confidence between an employer and his employee, as would be the case for Smile and Dr Lui, the employee will have specific fiduciary obligations. He emphasized that there was certainly such a relationship between Dr Lui and the patients he treated at Smile.

221 I was of the view that even if I were to infer that there was a relationship of trust and confidence between those patients and Dr Lui, this did not in itself impose any fiduciary duty on Dr Lui to Smile. It was significant that Mr Singh also did not say what specific fiduciary obligation would be created by reason of that relationship.

222 As regards the point about a relationship of trust and confidence between Smile and Dr Lui, I would first point out that a relationship of trust and confidence does not necessarily give rise to any specific fiduciary duty. The third relationship referred to by Lord Millett does not necessarily lead to that conclusion if one were to read the rest of Elias J's judgment after he referred to Lord Millett's article. Indeed, Elias J said (at 1493):

> Accordingly, in analysing the employment cases in this field, ***care must be taken not automatically to equate the duties of good faith and loyalty, or trust and confidence, with fiduciary obligations.*** Very often in such cases the court has simply been concerned with the question whether the employee's conduct has been such as to justify summary dismissal, and there has been no need to decide whether the duties infringed, properly analysed, are contractual or fiduciary obligations. As a consequence, the two are sometimes wrongly treated as identical: see *Neary v Dean of Westminster* [1999] I.R.L.R. 288, 290 where the mutual duty of trust and confidence was described as constituting a "*fiduciary relationship*." Accordingly, in determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached as Lord Upjohn commented in *Phipps v. Boardman* [1967] 2 A.C. 46, 127: "Having defined the scope of [the] duties one must see whether he has committed some breach thereof and by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises." ...
>
> [emphasis in original in italics; emphasis added in bold italics]

223 In so far as Mr Singh also relied, at para 41 of his closing submissions, on [95] of the judgment of Floyd J in *Cobbetts* which referred to the fact that the defendant there was placed in a position of trust and responsibility, I was of the view that that was only one of the factors, amongst others, which led Floyd J to conclude that the defendant owed fiduciary duties not to place himself in a conflict of duty and interest and not to make any secret profit while carrying out his responsibilities.

224 Mr Singh also cited *Samsung Semiconductor Europe Ltd v Docherty* [2011] SLT 806 ("*Samsung*") in which the solicitors for the pursuer summarised various key propositions from *Nottingham* which were not disputed by his opponent. It is not necessary for me to set out those propositions. Suffice it for me to say that they did not take the case of Smile on the existence of a fiduciary duty any further.

225 I was of the view that nothing in *Nottingham*, *Cobbetts* or *Samsung* was authority for the proposition that a relationship of trust and confidence between an employer and employee would necessarily give rise to a fiduciary duty on the part of the employee. Indeed, as mentioned above, *Nottingham* was authority for a different approach, *ie*, that such a relationship did not automatically give rise to fiduciary duties.

226 Mr Singh, however, also relied on Kan J's judgment in *Universal Westech* (see [183] above) and the Court of Appeal's judgment in the same case. In that case, the second defendant was a sales manager (*ie*, an employee), and not a director. Mr Singh pointed out at para 109 of his closing submissions that Kan J had referred to the second defendant's breach as being a breach of a fiduciary duty whereas the Court of Appeal had described it as a duty of fidelity. He submitted that the interchangeability of the phrases "fiduciary duty" and "duty of fidelity" demonstrated that the latter was the genus and the former the species. I did not agree with this analysis. It seemed to me that counsel before Kan J probably did not draw a distinction between the two duties and referred to a fiduciary duty when they ought to have referred to a duty of fidelity. This led to Kan J doing likewise. The Court of Appeal probably realised the conflation and correctly referred to a duty of fidelity. The two are not interchangeable and neither is a fiduciary duty a species of a duty of fidelity.

227 Mr Singh also submitted at para 44 of his closing submissions that Dr Lui had rapport and

influence over the patients he had treated at the Forum Clinic. Dr Lui was the principal fee earner. He bravely submitted that Dr Lui's "fidelity obligations had the requisite dimension of being of a fiduciary nature". Dr Lui was a "senior employee" of Smile. Dr Lui was at all material times well aware of Smile's concerns about protecting their business connection with their patients.

228 Mr Singh also highlighted at para 45 of his closing submissions that Dr Lui had misled Smile by stating that he would be returning to Australia when he left Smile's employment when he knew that this was untrue from the time he signed the tenancy agreement for Dental Essence on 25 February 2009. He said that Smile was lulled into a false sense of security and took no measures to protect its patient pool. He submitted that Smile had consented to Dr Lui's early release from the three-month notice period because it was unaware of his intention to compete.

229 While I was prepared to accept the last point, I did not accept that Smile took no measures to protect its patient pool. The Restrictive Covenants already discussed above show that Smile did attempt to protect its patient pool. True, Smile could have declined Dr Lui's request for early release or asked him to go on garden leave but there was no discrete claim for the early release. I reserve further comment on the validity of garden leave, which is used by employers to take an employee out of circulation before the employee commences competition with the employer.

230 In my view, there was no fiduciary duty on the part of Dr Lui to refrain from taking any of the positive steps complained of or to disclose any of such steps or his intention to compete or to seek consent from Smile. It was not pleaded that Dr Lui had received any confidential information, or that he had accepted bribes, or that he was entrusted with property of Smile: see *Nottingham* at 1490–1491. What were the duties undertaken by Dr Lui? Leaving the Restrictive Covenants aside, he had impliedly undertaken a duty of good faith and fidelity. In so doing, had he placed himself in a position where he must subjugate his interests to that of Smile? As I have found earlier, the duty of fidelity does not preclude employees from forming an intention to compete or from taking preparatory steps towards that objective. It must follow that Dr Lui had not placed himself in such a position. I did not agree that there was something special about Dr Lui's employment by Smile which gave rise to fiduciary duties owed to it. Dr Lui was merely an associate dentist. Unlike the defendant in *Cobbetts* (see [95] of the judgment), Dr Lui was not obliged actively to find new patients for Smile. Similarly, unlike the defendant in *Nottingham* (see 1498) Dr Lui was not placed by Smile in a position of power such that he could direct Smile's other staff to advance his personal interests to the detriment of Smile's interests. While it was true that Dr Lui had some influence and rapport with the patients he treated, this concern of Smile's could have been addressed by reasonable restrictive covenants. If such restrictive covenants had existed, then Smile would be in a position to protect (to some extent) their patient pool. In that light, I was not convinced that there was any reason to impose any fiduciary duty on Dr Lui. As I have found that there was no fiduciary duty on Dr Lui's part, it was unnecessary for me to decide whether Dr Lui was in breach of any such duty.

Conclusion

231 For the reasons above, I dismissed Smile's action with costs.

[note: 1] Notes of Evidence ("NE"), 21 September 2011, pp 59-60

[note: 2] NE, 22 September 2011, p 15 ln 5-9

[note: 3] NE, 22 September 2011, p 15 ln 22-25

[note: 4] SOC (No 2), pp 14-15

[note: 5] Dr Tan's AEIC, paras 147-148

[note: 6] NE, 21 September 2011, pp 110-111

[note: 7] NE, 21 September 2011, p 16 ln 17-19

[note: 8] NE, 21 September 2011, pp 38-39

[note: 9] Defendant's Written Submissions, para 46

[note: 10] NE, 21 September 2011, pp 97-98

[note: 11] NE, 21 September 2011, pp 83-84

[note: 12] NE, 21 September 2011, pp 80-81

[note: 13] NE, 21 September 2011 pp 46 and 47

[note: 14] NE, 21 September 2011 pp 47-49

[note: 15] Plaintiff's closing submissions, para 44