IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 85

Suit No 1364 of 2016

Between

TAN KOK YONG STEVE

… *Plaintiff*

And

ITOCHU SINGAPORE PTE LTD

… *Defendant*

ORAL JUDGMENT

[Contract] — [formation]
[Contract] — [contractual terms] — [implied terms]
[Contract] — [illegality and public policy] — [restraint of trade]

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v
Itochu Singapore Pte Ltd

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10 April 2018 Judgment reserved.

Tan Siong Thye J:

Introduction

1 The plaintiff, Tan Kok Yong Steve ("the Plaintiff") claims against his ex-employer, Itochu Singapore Pte Ltd ("the Defendant"), for a sum of $79,345. This is the severance package that was promised to the Plaintiff by the Defendant in return for the Plaintiff's resignation from the company ("the Severance Package"). The Defendant does not deny that it offered the Severance Package to the Plaintiff but it argues that this was an *ex gratia* payment which was revoked as the Plaintiff had breached the non-competition undertaking in the employment agreement.

2 The Defendant has also brought a counterclaim against the Plaintiff for an injunction to restrain the Plaintiff from engaging in any business which competes with the Defendant in respect of cement, clinker and other related

cementitious products (collectively, "Cement Products") in Vietnam, Bangladesh and the Philippines, for a period of two years after 30 June 2016. The Defendant further counterclaims for damages in addition to or in lieu of the injunction. The basis for the Defendant's counterclaim is the Plaintiff's alleged breach of a "Non-Competition and Non-Solicitation Undertaking" that he had entered into as part of the terms of his employment ("the Non-Competition Undertaking").

Facts

The parties

3 The Plaintiff was an employee of the Defendant from 1 October 2012 to 30 June 2016. Prior to working for the Defendant, he worked as a trader dealing in wood products for five years. Apart from wood products, he also ventured into trading in other commodities such as coal and iron ore and he was active in emerging markets such as Vietnam, Cambodia and Indonesia.[1]

4 The Defendant is the Singapore incorporated subsidiary of an international conglomerate of commodity trading companies with its headquarters in Japan.[2]

The relevant terms of the Plaintiff's employment agreement with the Defendant

5 The Plaintiff was employed by the Defendant on 1 October 2012, pursuant to an appointment letter dated 25 September 2012. He was also issued the Defendant's Company Staff Handbook. The appointment letter and the Company Staff Handbook collectively contained the terms of his employment

1 Agreed Statement of Facts ("ASOF"), para 1.

2 ASOF, para 2.

agreement ("the Employment Agreement"). Pursuant to the terms of the Employment Agreement, the Plaintiff also entered into the Non-Competition Undertaking.[3] The salient terms of the Non-Competition Undertaking are as follows:[4]

> 1. **Non-Competition**
>
> The Employee hereby agrees and undertakes that during the Employment and for a period of 2 years (Two Years) after termination of the Employment, the Employee will not, without the Employer's prior written consent, directly or indirectly, whether for the Employee's own account or for the account of any other party, be employed or engaged in any capacity or otherwise be interested in or involved with any company or business which competes with the Employer and/or any Affiliate in respect of Restricted Goods or Restricted Services within the Restricted Area.
>
> …
>
> **"Restricted Area"**
>
> means the area (geographical or otherwise) constituting the market of the Employer and that of any Affiliate for the Restricted Goods and Restricted Services;
>
> **"Restricted Goods"**
>
> means any product competitive with any product sold or supplied by the Employer and/or any Affiliate with which the Employee was concerned during the period of 12 months immediately preceding the date of termination of the Employment;
>
> **"Restricted Services"**
>
> means any services competitive with any of the services sold or supplied by the Employer and/or any Affiliate with which the Employee was concerned during the period of 12 months immediately preceding the date of termination of the Employment.

The scope of the Plaintiff's employment with the Defendant

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3 ASOF, para 3.

4 Agreed Bundle of Documents, Volume 1 ("1AB"), pp 10 and 12.

6 While the Plaintiff was working for the Defendant he was specifically assigned to handle the Defendant's cement trade. This involved trading in Cement Products with various foreign counterparties in the region.[5] Throughout his employment, the Plaintiff reported to Iwata Tomofumi ("DW2"), who was the section manager of the Defendant's cement portfolio.[6]

7 The Defendant's cement section is a regional hub for trades in Cement Products. Each cement trader takes responsibility for one or more countries in the region as the person-in-charge. Additionally, the marketing and sales of the Cement Products are supported by the various country affiliates of the Defendant. For example, if the Defendant intended to sell Cement Products to a Filipino buyer, the Itochu Manila office ("Itochu Manila") would help to arrange for a meeting between the person-in-charge from the Defendant and the key personnel from the Filipino buyer.

8 The Plaintiff was tasked to handle the business leads and deals for Cement Products in Vietnam, the Philippines and Bangladesh as the person-in-charge of those countries.[7]

The Plaintiff's cement trade in Bangladesh

9 One month after joining the Defendant, the Plaintiff was sent to the Defendant's office in Dhaka, Bangladesh ("Itochu Dhaka") to attend a conference. During this visit, the Plaintiff was also introduced to the Bangladeshi customers as the liaison person.[8]

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5 ASOF, para 4.

6 ASOF, para 4.

7 NE, 27 February 2018, p 60:5–60:7.

8 NE, 27 February 2018, p 24:25–25:4.

10 The Plaintiff successfully restarted the supply of clinker to Bangladesh, after the Defendant's two-year absence in dealing in that product.[9] At the material time, Itochu Dhaka was only a representative office which did not carry out sales in its own account. Therefore, the Plaintiff was the main person-in-charge for the Defendant's trades in Bangladesh.[10]

11 The Plaintiff dealt with several major Bangladeshi buyers of Cement Products, such as Akij Cement and Madina Cement.[11] In addition , the Plaintiff was also in charge of Cement Products sales to other smaller Bangladeshi buyers. The last recorded trades of Cement Products to Bangladeshi counterparties which the Plaintiff was in charge of were in May 2015.[12] These trades were for clinker supplied by DIC Investment and Trading Joint Stock Holding Company ("DIC"), a Vietnamese supplier of Cement Products, and purchased by Olympic Cement Limited, Gazi Cement Mills Ltd, Eastern Cement Industries Ltd, Metrocem Cement Ltd, Anwar Cement Ltd and Heidelbergcement Bangladesh Ltd.[13]

The Plaintiff's cement trade in Vietnam

12 At the end of 2012, the Defendant's office in Ho Chi Minh City, Vietnam ("Itochu HCMC") introduced the Plaintiff to several prospective suppliers of clinker in Vietnam, including DIC. By March 2014, the Plaintiff had, on behalf of the Defendant, established trade cooperation with DIC as the Defendant's Vietnamese supplier of clinker.[14] At this time, the Plaintiff had also

9 NE, 27 February 2018, p 24:3–24:21.

10 NE, 27 February 2018, p 74:11–74:22.

11 NE, 27 February 2018, p 25:2–25:6.

12 NE, 27 February 2018, pp 39:1–40:31.

13 Agreed Bundle of Documents, Volume 2 ("2AB"), pp 17–22.

14 1AB, p 80; NE, 27 February 2018, pp 26:27–27:15.

established trade cooperation with other clinker suppliers in Vietnam, such as Vissai Cement ("Vissai") and Phuc Son.[15]

13 In February 2016, the Plaintiff arranged for DIC and Vissai to meet the representatives of Big Boss Cement ("Big Boss"), a Filipino buyer of Cement Products.[16] The Plaintiff also convinced the Managing Director of Vissai to accompany him to Manila to meet the representatives from Big Boss as well as Eagle Cement, another Filipino buyer of Cement Products ("the Manila Meeting").[17] This Manila Meeting was the cause of some unhappiness between the Plaintiff and DW2, which I shall elaborate on below.

14 The Plaintiff's last recorded trade of Cement Products with a Vietnamese counterparty was in March 2016. This trade was for gypsum, supplied by Al Rawas Mining in Oman and purchased by DIC.[18]

The Plaintiff's cement trade in the Philippines

15 In the Philippines, the Plaintiff's cement trade was with Big Boss and Eagle Cement. In and around late 2015 and early 2016, the Plaintiff together with a representative from Itochu Manila, met with the representatives from Big Boss.

16 As I have alluded to above, the Plaintiff arranged for Big Boss and Eagle Cement to meet with Vissai and DIC, the Vietnamese suppliers. This culminated in the Manila Meeting between representatives from Vissai and Big Boss.[19] The

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15 1AB, p 80; NE, 27 February 2018, pp 26:27–27:15.

16 NE, 27 February 2018, pp 56:19–57:31.

17 1AB, p 123.

18 2AB, p 27.

19 1AB, p 125.

Plaintiff had initially intended to attend the Manila Meeting personally. But the Defendant had imposed a travel ban on the Plaintiff. The reasons for this ban will be elaborated on below. Hence, the Plaintiff was not allowed to attend the Manila Meeting.[20]

17 In the emails that the Plaintiff subsequently sent to his superiors requesting permission to attend the Manila Meeting, the Plaintiff stated that he should be the one to attend the meeting given that the business discussions were started by him. He also stated that he was "most familiar with all parties and details".[21] He acknowledged that this meeting concerned "overall company interests, including long term new business for both [Manila] and HCMC branch office" and it was therefore in the Defendant's interests for him to attend.[22]

18 The last recorded trade of Cement Products by the Plaintiff that involved a Filipino counterparty was in November 2015. This trade was for clinker supplied by DIC and purchased by Eagle Cement.[23]

The breakdown in the relationship between the Plaintiff and the Defendant

19 In early 2016, the relationship between the Plaintiff and the Defendant began to deteriorate.[24] On 29 February 2016, the Plaintiff was issued with a letter of warning containing details of his transgressions ("the Letter of Warning"), such as:[25]

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20 1AB, p 124.

21 1AB, p 124.

22 NE, 27 February 2018, p 69:17–69:28.

23 2AB, p 26.

24 ASOF, para 5.

25 1AB, p 112.

(a) purchasing gifts for external parties in January without the approval of his manager;

(b) arranging for delivery of gypsum in the month of January from Oman to Vietnam without the approval of his manager; and

(c) arranging for Iranian samples to be delivered to Vietnam without complying with export control rules and without the approval of his manager.

As a consequence of his transgressions, the Plaintiff's business trips and entertainment expenses were suspended indefinitely.

20 In early June 2016, DW2 met with the Defendant's Group Chief Operating Officer, Hajime Tamanyu ("DW3"), to discuss the Plaintiff's disciplinary problems. DW2 and DW3 agreed that the Plaintiff's employment be terminated by the end of June 2016.

The cessation of the Plaintiff's employment with the Defendant

21 DW3 instructed the General Manager of the Defendant's Human Resource and General Affairs Department ("Human Resource Department), Yeo Joon Sen ("DW1"), to speak to the Plaintiff about the Defendant's decision to end the Plaintiff's employment by the end of June 2016.[26]

22 On 23 June 2016, DW1 met with the Plaintiff to inform the Plaintiff that his employment with the Defendant would be terminated after 30 June 2016.[27] At this meeting, DW1 also informed the Plaintiff that if he resigned he would

[26] Hajime Tamanyu's Affidavit, para 7; Yeo Joon Sen's Affidavit ("Yeo's Affidavit"), para 6.

[27] NE, 28 February 2018, p 20:1–20:6.

be given the Severance Package.[28] DW1 explained the components of the Severance Package to the Plaintiff but did not specify the exact amounts that the Plaintiff would be entitled to.[29]

23 The next day, on 24 June 2016, the Plaintiff contacted DW1 to ask if the Non-Competition Undertaking could be waived.[30] DW1 informed him that he would have to check with DW3 and DW2. DW1 conveyed the Plaintiff's request to DW3 and DW2. They refused to accede to the request. On 27 June 2016, DW1 informed the Plaintiff that the Defendant intended to continue enforcing the Non-Competition Undertaking.[31]

24 On 30 June 2016, at 9.30 am, DW1 told the Plaintiff that he would have to decide whether or not he would resign by 12 noon that day.[32] Soon thereafter the Plaintiff met a representative from the Singapore Manual and Mercantile Workers' Union ("the Union"), Andy Lim, as well as the Defendant's Union representative, Alice Yeo, regarding his termination by the Defendant.[33] The Plaintiff did not call Andy Lim and Alice Yeo to testify in court. After this meeting with the Union representatives, the Plaintiff decided to resign in order to benefit from the Severance Package.[34]

25 On that same day, the Plaintiff submitted his letter of resignation ("the Letter of Resignation") which was to take "immediate effect from 1 July

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28 NE, 28 February 2018, p 20:15–20:19.

29 NE, 28 February 2018, p 21:15–21:18; pp 21:28–22:25.

30 ASOF, para 5.

31 ASOF, para 5.

32 NE, 28 February 2018, pp 24:21–25:8.

33 NE, 27 February 2018, p 153:2–153:8.

34 NE, 27 February 2018, p 152:14–152:17.

onwards".[35] In response, the Defendant issued a letter to the Plaintiff dated 30 June 2016 ("the Confirmation Letter"). The Confirmation Letter accepted the Plaintiff's Letter of Resignation, and also contained details of the Severance Package. The material parts of the Confirmation Letter are as follows:[36]

> Your letter of resignation dated **30 June 2016** is accepted with much regret.
>
> On mutual agreement the company has decided to an early release. Your last day of service is on 30 June 2016.
>
> *We wish to confirm the following*:
>
> You will be paid:
>
> a. The salary for 1 – 30 June 2016 (which was paid on 24 June 2016)
>
> b. One month salary in lieu of notice
>
> *c. Ex-gratia payment of 3.70 months' basic salary*
>
> d. Pro-rated Annual Wage Supplement (AWS) for the year 2016
>
> e. Annual leave balance as at 30 June 2016
>
> f. Variable bonus of 6.33 months
>
> (Basic Salary x 3.55 months) x [(0.75 (BC Rating) x 0.7) + (2.14 (Dept Ratio) x 0.3)] x 1.4 + S$3,700
>
> The total amount payable to you after deduction of deductible CPF shall be paid to you no later than 25 July 2016.
>
> [emphasis added in italics]

26 Upon receipt of the Defendant's letter on 30 June 2016, the Plaintiff physically vacated the premises of the Defendant that same day and his employment with the Defendant had officially come to an end.[37]

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35 1AB, p 321.

36 1AB, p 322.

37 Tan Kok Yong Steve's Affidavit ("Steve's Affidavit"), para 34.

The Plaintiff's short-lived employment with DIC after leaving the Defendant

27 A day later, on 1 July 2016, the Plaintiff was appointed as the exclusive agent of DIC for the export of Cement Products from Vietnam to the Philippines.[38] The Plaintiff's letter of employment with DIC stated that he would "act on behalf of the company in negotiating the terms and conditions with any potential buyers or traders for sales of clinker, cement and related cementitious products to the Philippines."[39] On 11 July 2016, DIC, with the consent of the Plaintiff, sent an email to the Defendant informing them of DIC's employment of the Plaintiff as the exclusive agent for the export of Cement Products from Vietnam to the Philippines.[40] The Defendant protested and DIC terminated the Plaintiff's employment on 26 July 2016.[41]

28 The Defendant adduced evidence which showed that after leaving the Defendant, the Plaintiff had also acted as agent for Vissai in dealing with Big Boss.[42] In this capacity, he had attempted to set up a meeting between Vissai and Big Boss in Manila to discuss a potential business deal between the parties.

29 The Plaintiff also admitted that in November 2016 he had set up a company known as Changfa Trading Pte Ltd ("Changfa").[43] Through Changfa, the Plaintiff had taken steps to trade in Cement Products with cement companies in Vietnam, such as Longson Cement.[44]

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38 1AB, p 332.

39 1AB, p 332.

40 1AB, p 334.

41 1AB, p 337.

42 1AB, p 333.

43 NE, 27 February 2018, p 134:4–134:8.

44 NE, 27 February 2018, p 136:16–136:19; pp 137:2–138:8.

The parties' cases

The Plaintiff's claim for the Severance Package

The Plaintiff's case

30 The Plaintiff's case is that there was a valid agreement concluded between the parties on 30 June 2016 when the Plaintiff tendered his resignation and the Defendant sent the Confirmation Letter in response. The Plaintiff argues that the Severance Package was in exchange for the Plaintiff's resignation, and that constituted valid consideration. On the issue of certainty, the Plaintiff argues that while the exact amounts for the Severance Package had not yet been fixed when it was first raised by DW1 on 23 June 2016 these were finalised in the Defendant's letter dated 30 June 2016. The Plaintiff further argues that compliance with the Non-Competition Undertaking was not an express or implied condition of the agreement for the Severance Package.

The Defendant's case

31 On the Plaintiff's claim for the Severance Package, the Defendant argues that the Severance Package was an *ex gratia* goodwill payment. It was not a valid agreement that could be enforced. Alternatively, the Defendant submits that even if there were a purported valid agreement for the payment of the Severance Package, it is void for uncertainty and/or lack of consideration. Furthermore, the Defendant submits that even if there was a valid and enforceable agreement between the parties, there was an express or implied condition that the Plaintiff must comply with the Non-Competition Undertaking.

The Non-Competition Undertaking in the Defendant's counterclaim

32 The parties agree that if the Non-Competition Undertaking is found to be valid and enforceable, the Plaintiff has breached it as he sought employment with DIC a day after his resignation from the Defendant. However, the Plaintiff disputes the validity of the Non-Competition Undertaking.

The Defendant's case

33 The Defendant argues that the Non-Competition Undertaking is no more restrictive than is reasonably necessary to protect the Defendant's proprietary interests. First, it serves to protect the Defendant's trade connections and customers, which constitute a legitimate interest. Second, the activity, geographical and temporal scopes of the Non-Competition Undertaking are not unnecessarily wide despite the inclusion of the Defendant's "affiliates". This is because the "Restricted Area", Restricted Goods" and "Restricted Services" are prescribed and limited by the scope of the Plaintiff's work "during the period of 12 months immediately preceding the date of termination of the Employment". It is for this reason that the Defendant argues that the Non-Competition Undertaking is only limited to Cement Products in Vietnam, Bangladesh and the Philippines. The Defendant submits that the temporal scope of two years for the Non-Competition Undertaking is also reasonable as it would require about two years for an officer to build up the trade connections in the Cement industry.

34 The Defendant further submits that if the Non-Competition Undertaking is found to be valid, an injunction should be ordered against the Plaintiff to ensure that he abides by the terms of the Non-Competition Undertaking. Further, damages in addition to, or in lieu of, the injunction should also be awarded for breach of the Non-Competition Undertaking.

The Plaintiff's case

35 The Plaintiff argues that he did not have any trade connections due to his lack of influence over the Defendant's customers as he could not make any decisions on his own without seeking his superior's final approval. The Plaintiff also argues that since the Defendant has more than 200 affiliates worldwide, the inclusion of the Defendant's "affiliates" within the scope of the Non-Competition Undertaking renders it unnecessarily and unreasonably wide. Finally, the Plaintiff submits that the boundaries of the Non-Competition Undertaking are too vague and imprecise which unfairly prejudices the Plaintiff who is bound by it.

Issues for determination

36 The Plaintiff's claim and the Defendant's counterclaim neatly outline the two major issues that have to be determined. The first relates to the enforceability of the Severance Package and the second relates to the validity of the Non-Competition Undertaking.

Issues that relate to the Plaintiff's claim - the enforceability of the Severance Package

37 The issues relating to the enforceability of the Severance Package are:

(a) whether the Severance Package was a valid contract between the parties;

(b) whether the Severance Package was backed by consideration;

(c) whether the Severance Package was uncertain and hence unenforceable; and

(d) whether compliance with the Non-Competition Undertaking was an express or implied condition precedent before the Plaintiff was entitled to the Severance Package.

Issues that relate to the Defendant's counterclaim – the validity of the Non-Competition Undertaking

38 The issues relating to the validity of the Non-Competition Undertaking are:

(e) whether there was a legitimate interest for the Defendant to protect;

(f) whether the scope of the Non-Competition Undertaking was reasonable, with reference to the activity, geographical and temporal scopes; and

(g) assuming that the Non-Competition Undertaking is found to be valid, what is the appropriate remedy that should be granted.

My decision on the Plaintiff's claim for the Severance Package

Issue (a): whether the Severance Package was a valid contract between the parties

39 For the Plaintiff to succeed in his claim, he must show that there was a valid contract between the parties for the payment of the Severance Package.[45] The Defendant argues that there is no evidence to show that on 30 June 2016 DW1 had made an offer to the Plaintiff, and that DW1 did not have any intention to create legal relations.[46] Furthermore, the Defendant argues that there was no

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45 Defendant's Closing Submissions, para 88.

46 Defendant's Closing Submissions, para 91.

consideration to give rise to a valid contract.

40 To ascertain whether there was a valid contract between the Plaintiff and the Defendant for the Severance Package we have to examine the circumstances before and leading to the offer of the Severance Package by the Defendant on 30 June 2016. The Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") instructively stated at [53] that in ascertaining if an agreement has been reached, the courts will look at the whole course of negotiations between parties. This examination of the course of negotiations should still be effected in accordance with the concepts of offer and acceptance (*Gay Choon Ing* at [63]). Similarly, in the present case, this court must have regard to the whole course of negotiations between the parties to ascertain whether there had indeed been a contract formed. Therefore, it would not be correct to confine the search for evidence of a contract to 30 June 2016 as was the contention of the Defendant. It has to start from 23 June 2016 when DW1 first offered the Plaintiff the Severance Package in exchange for his resignation.

41 In my view, the meeting between DW1 and the Plaintiff on 23 June 2016 was of epochal significance in determining whether there was an agreement between the parties for the Severance Package. The event on 23 June 2016 as narrated by the Plaintiff that he was offered the Severance Package in exchange for his resignation would be a death knell to the Defendant's arguments that there was no agreement if the court accepts the Plaintiff's version. That was why the Defendant in its closing submissions side-stepped the meeting on 23 June 2016 and focused heavily on the events of 30 June 2016.

42 Regarding the meeting on 23 June 2016, I noticed that in DW1's affidavit of evidence-in-chief ("AEIC") he merely stated: "On 23 June 2016, I

met with Steve. I informed Steve that Itochu has plans to end Steve's employment by the end of the month."[47]

43 In DW1's AEIC on this meeting of 23 June 2016, he was reticent on his offer of the Severance Package to the Plaintiff in exchange for his resignation. The details of the Severance Package only came out reluctantly from DW1 during his cross-examination. DW1 also attempted to be vague in this aspect of his testimony:[48]

> Q: Now this suggestion came from you that basically the company could consider a severance package if he handed in his resignation?
>
> A: I can't remember who brought up this subject, it could be him, it could be me but there was discussion on this subject.
>
> Q: Now it's my instructions and I'm suggesting to you that it was probably you who brought this up and told him. Would you agree?
>
> A: I would not agree to that because I could not remember.
>
> Q: But it is possible you could have said this?
>
> A: I would not disagree to that –
>
> …
>
> Q: I see. Now did you discuss further what this severance package would be with Mr Steve Tan?
>
> A: It could include like what I think some of the components that was indicated in the letter that was given to him.
>
> Q: So you did speak to him regarding payment of pro-rated annual wage supplement, AWS?
>
> A: On that day itself, on 23rd of June, I could not remember whether did we discuss in – this component that was – the – the possibility of this component.
>
> Q: What about the annual leave balance as of 30th June 2016?

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47 Yeo's Affidavit, para 7.

48 NE, 28 February 2018, pp 20:23–20:31, 21:15–21:24, 22:28–22:30.

> A: It could – it could have been mentioned.
>
> …
>
> Q: And this was dependent on him resigning as opposed to being terminated. If he resigned, there's this package available.
>
> A: This was the – the option that he has.

44 It is also interesting to note that the Defendant's counsel did not cross-examine the Plaintiff at all about the meeting on 23 June 2016. The rule in *Browne v Dunn* [1894] 6 R 67, as explained in *Phipson on Evidence* (Hodge M. Malek gen ed) (Sweet & Maxwell, 18th ed, 2013) at paras 12–35, states:

> As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share… *If he asks no questions he will generally be taken to accept the witness' account*… [emphasis added]

This definition of the rule in *Browne v Dunn* has been endorsed in the context of civil proceedings by the English Court of Appeal in *Deepak Fertilizers & Petrochemicals Ltd v Davy McKee (UK) London Ltd* [2002] EWCA Civ 1396. It has also been applied locally in *Wama Binte Buang v Martin Lee and Another* [1993] SGHC 231.

45 The Plaintiff, at para 25 of his AEIC, mentioned that DW1 offered him the Severance Package in exchange for his resignation during the meeting on 23 June 2016. The Defendant's counsel's failure to cross-examine the Plaintiff regarding the meeting on the 23 June 2016 and failure to put the Defendant's case to the Plaintiff indicate that the Defendant accepted the Plaintiff's version of the event on 23 June 2016.

46 For these reasons, I am satisfied that on 23 June 2016 DW1 first offered the Severance Package to the Plaintiff in exchange for the latter's resignation.

47 Next, I shall examine whether the offer on 23 June 2016 was a valid offer. The Defendant has relied on the definition of an offer in *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 2 SLR(R) 440, as cited in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 03.023. It states:

> An offer … is an expression of willingness to contract made with *the intention (actual or apparent)* that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed. [emphasis added]

DW1 had first broached the topic of the termination of the Plaintiff's employment at the meeting on 23 June 2016. DW1 told the Plaintiff that his employment with the Defendant would cease by the end of June 2016. In the course of the trial, DW1 admitted that he conveyed to the Plaintiff that the Severance Package would only be available if the Plaintiff were to resign. Conversely, the Severance Package would not be offered if the Plaintiff's employment was terminated by the Defendant. This was in response to the question that I had posed to DW1 as follows:[49]

> Court: … Now, counsel is asking that if he was terminated, there would be no severance package. If he resigned on his own, there will be a severance package, is that how it was conveyed to him?
>
> Witness: Yes, Your Honour.

Furthermore, DW1 explained the various components in the Severance Package although he did not quantify the monetary value of these components, as this would not seem necessary at the first meeting. Given DW1's position as the General Manager of the Defendant's Human Resource Department, it must have been *apparent* to the Plaintiff that this was a serious offer made by the Defendant. DW1 must have obtained approval from the senior management of

[49] NE, 28 February 2018, p 23:6–23:10.

the Defendant to offer the Plaintiff the Severance Package before he met the Plaintiff on 23 June 2016. In other words, the Plaintiff was reasonably entitled to believe that should he resign, he would receive the Severance Package from the Defendant. Moreover, given the Plaintiff's deteriorating relationship with the Defendant, it would not have been unexpected that his employment was indeed coming to an end.

48 Therefore, in the circumstances, I find that there was a valid offer made by DW1 on behalf of the Defendant on 23 June 2016. It is important to note that the Plaintiff was only eligible for the Severance Package if he resigned but not if he was terminated.

49 Next, I shall consider whether there was a corresponding acceptance of this offer by the Plaintiff. The Defendant has harped on the fact that the Plaintiff was not able to produce the email which he allegedly sent to DW1, purporting to accept the offer.[50] Therefore, the Defendant argues that even if there was an offer, there is no evidence of an acceptance and hence no contract. However, the contemporaneous documents (namely, the Letter of Resignation and the Confirmation Letter both dated 30 June 2016) show that there was a valid acceptance.

50 Acceptance, as defined in *Gay Choon Ing* at [47], is "a final and unqualified expression of assent to the terms of an offer." In the Letter of Resignation, the Plaintiff makes clear his intention to resign from the Defendant with "immediate effect starting from 1 July 2016". This undoubtedly represented the "final and unqualified expression of assent" to the Defendant's offer made on 23 June 2016. On the same day *ie*, 30 June 2016, DW1 sent the Plaintiff the Confirmation Letter. The Defendant stated unequivocally that it

[50] Defendant's Closing Submissions, para 92(3)(c).

accepted the Plaintiff's resignation, and that it also agreed to the Plaintiff's early release. The Confirmation Letter also "confirm[ed]" the various components of the Severance Package as mentioned by DW1 in his meeting with the Plaintiff on 23 June 2016. The Confirmation Letter had further specified formulas for each component of the Severance Package which could be used to derive its monetary value. Lastly, the Confirmation Letter stated that payment to the Plaintiff would be made before 25 July 2016.

51 The Defendant has relied on *Lim Seng Choon David v Global Maritime Holdings Ltd and another and another suit* [2018] SGHC 25 ("*Global Maritime*") to argue that there was no oral agreement between the parties. In that case, the plaintiff was asked by his employer to retire early. The plaintiff alleged that in exchange for his early retirement, there was an oral agreement between him and his employers for certain sums to be paid to him. Choo Han Teck J held at [11] that there was no oral agreement between the parties, on the ground that there was no evidence to show that the parties themselves had believed that an agreement had been reached between them. In Choo J's view, the contemporaneous documents merely showed that the parties were still in the stage of negotiations. He also pointed out at [7] that the draft agreement which the plaintiff sought to rely on was silent as to the terms of the alleged oral agreement pleaded by the plaintiff.

52 The facts in the present case significantly differ from that in *Maritime Global*. As I have held above, the contemporaneous documents, namely the Letter of Resignation and the Confirmation Letter, are consistent with DW1's evidence that he had informed the Plaintiff about the Severance Package. There was no indication that this was merely the subject of negotiations and hence would not be binding on the parties. The Confirmation Letter had expressly stated the components of the Severance Package and the method to arrive at the

monetary value of each component which the Plaintiff is currently seeking to claim. Accordingly, *Maritime Global* can be distinguished from the present case.

53 For the above reasons the answer to this issue must be that there was a valid offer from the Defendant to the Plaintiff, that if he resigns he would be given a Severance Package and this was accepted on 30 June 2016. The Confirmation Letter formalised and sealed the agreement between the parties.

Issue (b): whether the Severance Package was backed by consideration

54 It is trite law that for an agreement to be enforceable, it must be backed by consideration. The Plaintiff argues that the Defendant's payment of the Severance Package was in exchange for his resignation and therefore that constituted valid consideration. The Defendant makes two arguments against this: first, that the Plaintiff's resignation was not requested by the Defendant; and second, that the Plaintiff's resignation was of no benefit to the Defendant.

55 The Defendant's contention does not hold water. DW1 categorically testified that the Plaintiff would only be given the Severance Package if he resigned. It is clear to me that the payment of the Severance Package was always conditional upon the Plaintiff's resignation as opposed to him being terminated by the Defendant. This is evident from DW1's own testimony, as well as the fact that the components of the Severance Package were confirmed by the Defendant immediately after the Plaintiff tendered his resignation. Therefore, it is crystal clear that the Severance Package was backed by valid consideration.

Whether the request came from the promisor

56 The Defendant argues that since it had not requested the Plaintiff to resign, his resignation cannot constitute valid consideration. In *Gay Choon Ing* at [17], the Court of Appeal stated that an act or a promise will only constitute valid consideration if it has been requested by the promisor. The case of *Combe v Combe* [1951] 2 KB 215 is commonly used to illustrate this principle. There, a wife tried to sue her ex-husband for the breach of a promise to pay her maintenance. She claimed that the consideration that she had given in exchange for this promise was her forbearance to apply to the court for a maintenance order. It was held that this did not constitute valid consideration because it was not her ex-husband who had asked her to refrain from applying for maintenance. Rather, this was done of her own volition. Therefore, the corollary of this principle is that an act or promise cannot constitute valid consideration if it was of the promisee's own volition.

57 This argument is only valid if PW1 had not offered the Plaintiff the Severance Package in exchange for his resignation. It is clear to me that DW1, on behalf of the Defendant, was the "promisor" who promised the Plaintiff payment of the Severance Package in exchange for the Plaintiff's resignation. In other words, the Plaintiff had resigned *because* he was promised the Severance Package, and it cannot be said that he had resigned of his own volition. Hence, the Defendant's argument that the request did not come from the promisor fails.

58 The Defendant sought to rely on the Court of Appeal's decision in *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 ("*Beyonics*"). In that case, the terms of employment of the company stated that either party would be able to terminate employment

by giving six months' notice. The appellant tendered his resignation, but requested that the notice period be abridged to about three months. He was thereafter paid a sum of money representing three months of his salary upon his resignation from the company. The question that the Court had to consider was whether this payment was pursuant to a valid agreement supported by consideration.

59 The appellant argued that the consideration was in the form of his accepting a lower amount of salary in lieu of full notice, which would have been six months' worth of salary, and also his giving up of any claims against the company. On the salary in lieu of notice, the Court held that if it was *the company* that had wanted the appellant to leave early and forgo the salary he would have earned during the six-month notice period, then his acceptance of the lower amount of three months' worth of salary would have been valid consideration. However, it was the *appellant himself* that had requested the abridged notice period, and accordingly it was not the company that had requested the appellant to accept the lower amount in lieu of notice. On the point of the appellant giving up his claims against the company, the court held that the company had not requested the appellant to forbear from suing it, and hence that too was not valid consideration.

60 In the present case the Defendant argues that the request for the waiver of the notice period had come from the Plaintiff and not the Defendant, and therefore it was not valid consideration.[51] This argument is misconceived because the Plaintiff is relying on his resignation, and not the waiver of the notice period, as the consideration for the Severance Package. As I have held above, I am completely convinced that the Plaintiff had resigned because of the

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51 Defendant's Closing Submissions, para 109.

Severance Package that he was offered by the Defendant on 23 June 2016. Moreover, DW2 and DW3 wanted the Plaintiff to leave the Defendant's employment by the end of June 2016 and DW1 was tasked to carry out this instruction. Accordingly, *Beyonics* does not assist the Defendant in the present case.

Whether there was any benefit to the Defendant

61 The Defendant argues that because it was entitled to terminate the Plaintiff's employment without the need to give any reasons, there was no need for it to request the Plaintiff to resign. Indeed, the Defendant's Company Staff Handbook states that either party may terminate the employment at any time by giving the required notice, without assigning any reason for such termination.[52] Accordingly, the Defendant contends that it did not receive any benefit from the Plaintiff's resignation because it was something that the Defendant was already entitled to. Therefore, the Plaintiff's resignation could not be regarded as valuable consideration.

62 The Defendant's argument assumes that there is no difference between terminating an employee and an employee resigning because it leads to the same eventual outcome *ie*, that the employee's employment at the company will come to an end. However, it is undisputed that the Plaintiff would only receive the Severance Package if he resigns and he would get nothing upon termination by the Defendant. This indicates that from the perspective of the Defendant, there must be a difference between termination and resignation.

63 The Defendant alleges that the Severance Package was a gesture of goodwill to the Plaintiff. This would have been an attractive submission if the

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52 Yeo's Affidavit, p 28.

Plaintiff had been a model employee who was leaving the Defendant on good terms. However, the Plaintiff had been issued with the Letter of Warning, and his disagreements with DW2 were well documented. Furthermore, the Defendant had already decided to terminate the Plaintiff's employment by the end of June 2016. There was no reason why this "goodwill" should have been extended to him, as opposed to simply terminating his employment. Clearly, there must have been some benefit to the Defendant if they could incentivise the Plaintiff to resign by paying him the Severance Package.

64 In my view, the benefit to the Defendant from the Plaintiff's resignation was the avoidance of having to deal with the Union. DW1 must have known about the Union involvement as he is the General Manager of the Defendant's Human Resource Department. If the Defendant had elected to terminate the Plaintiff, it would have had to expend time and resources to provide an explanation to the Union. This was especially so given that the meeting on 23 June 2016 indicated that the Plaintiff might not accept the termination willingly without creating a fuss. Thus, even if the Defendant had legitimate reasons to justify the termination of the Plaintiff, resources would still have to be expended to assuage the Union. However, if the Plaintiff were to resign, the Defendant would be able to avoid all this hassle. The Plaintiff's departure would then be uneventful and the Union would not be involved. This was the most expedient way of severing the Plaintiff's employment, and hence provided a valuable and meaningful benefit to the Defendant.

65 The evidence shows that the Plaintiff had already informed the Union representative Andy Lim that the Defendant intended to terminate his employment, which he felt was unreasonable. It is also undisputed that there was a meeting between the Plaintiff, Andy Lim and Alice Yeo, the Union representative in the Defendant, prior to the Plaintiff tendering his resignation.

It is, therefore, reasonable to assume that the Union would have been fully apprised of the Plaintiff's circumstances. Hence DW1's pre-emptive strategy of offering the Plaintiff the Severance Package for his resignation on 23 June 2016 had paid dividends as it had warded off the Union's intervention. DW1 must have known from his vast experience as the General Manager of the Defendant's Human Resource Department that this would be a wise and hassle-free approach to ceasing the Plaintiff's employment.

66 In the circumstances, I find that the Plaintiff's resignation constituted valuable consideration for the Severance Package. Therefore, the agreement does not fail for lack of consideration as contended by the Defendant.

Issue (c): whether the Severance Package was uncertain and hence unenforceable

67 The Defendant also argues that even if there was an agreement between the parties for the payment of the Severance Package, that agreement would be void for uncertainty. The Defendant relies primarily on the fact that DW1 had never discussed "any figures, or even a range of possible figures" with the Plaintiff.[53] Therefore, this is akin to an agreement to agree and hence is unenforceable.

68 While it cannot be denied that certainty of terms is an essential requirement for the enforceability of contracts, the answer to what is "sufficiently certain" is often a matter of degree, and the courts generally do not expect contracts to be drafted with utmost certainty. In particular, it is stated in *The Law of Contract in Singapore* at para 03.156 that a contract will not be rendered "uncertain even though there is a term to be determined in the future,

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53 Defendant's Closing Submissions, p 38.

provided that the contract itself provides the means for ascertainment of that term." An example of such a "means for ascertainment" can be found in *Brown v Gould and others* [1972] 1 Ch 53, which involved a lease agreement containing an option to renew the lease. The contract did not provide any figures for what the new rent would be upon renewal, but it stated that:

> … rent to be fixed having regard to the market value of the premises at the time of exercising this option taking into account to the advantage of the tenant any increased value of such premises attributable to structural improvements made by the tenant …

The landlord tried to argue that the option was unenforceable for uncertainty. However, the Court held that the option was valid and enforceable since the formula stated in the lease was sufficiently certain to guide the appointed valuer in coming up with a figure, and subsequently for the Court to make a determination.

69 I find the principle stated above to be directly applicable to the present case. Even though DW1 had not discussed the figures of the various components in the Severance Package with the Plaintiff at the meeting on 23 June 2016, the Confirmation Letter specifies the formula to ascertain the monetary sum of each component to be paid. The components of the Severance Package are listed in the Confirmation Letter (see [25] above). Items a, b, c and e are self-explanatory and are sufficiently certain. As for the "Annual Wage Supplement" in item d, it is defined in section C3 of the Defendant's Company Staff Handbook and is thus also sufficiently certain.[54] Finally, there is a specific formula provided for the calculation of the "Variable bonus of 6.33 months" in item f, which is also a sufficiently certain mechanism for ascertaining the eventual figure. All things considered, the Confirmation Letter which forms part of the contract, does

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54 1AB, p 30.

provide a method to ascertain the eventual figure to be paid under the Severance Package, and therefore the agreement does not fail for uncertainty as contended by the Defendant.

70 The Defendant has cited *Harwinder Singh s/o Geja Singh v Wong Lok Yung Michael and another* [2015] 4 SLR 69 ("*Harwinder Singh*"), where the Court rejected a claim for a "lump sum" payment due under an alleged oral agreement because it was too uncertain. However, in that case, the Court found at [20] that not only were essential details missing from the purported agreement, there was also no mechanism with which to ascertain these details. Therefore, *Harwinder Singh* can be distinguished from the present case, on the basis that the Confirmation Letter does provide for a mechanism to ascertain the eventual sums to be paid under the Severance Package.

Issue (d): whether compliance with the Non-Competition Undertaking was an express or implied condition precedent for the Plaintiff to be entitled to the Severance Package

71 The Defendant contends that even if the Severance Package was pursuant to a valid and enforceable contract, there was an express or implied condition precedent that the Plaintiff had to comply with the Non-Competition Undertaking in order for him to be entitled to the Severance Package. Notwithstanding the issues pertaining to the *validity* of the Non-Competition Undertaking, I shall first consider whether compliance with the Non-Competition Undertaking was indeed a condition precedent for the Plaintiff to be entitled to the Severance Package.

72 The Plaintiff had raised the issue of the Non-Competition Undertaking on 24 June 2016. He had explicitly requested DW1 for a waiver of the Non-Competition Undertaking prior to tendering his resignation. This request was

escalated to DW2 and DW3 who rejected the request. On 27 June 2016 DW1 informed the Plaintiff of the rejection. Therefore, this was a live issue at that time and it would have been open to the Defendant to expressly insert a term into the Confirmation Letter stating that any breach of the Non-Competition Undertaking would disentitle the Plaintiff from the Severance Package. I wish to reiterate that the Confirmation Letter was prepared by the Defendant. However, the Defendant chose not to do so. When DW1 was questioned about why the Defendant had not expressly included this term into the Confirmation Letter, he admitted that there was no necessity to do so because the Non-Competition Undertaking was already a part of the Plaintiff's original Employment Agreement. Therefore, if the parties had intended for compliance with the Non-Competition Undertaking to be an express condition precedent of the contract, the Defendant would have stated so in the Confirmation Letter, which is notably silent on this issue.

73 Alternatively, the Defendant argues that it was an *implied term* of the contract that the Plaintiff would only be entitled to the Severance Package if he complied with his obligations under the Non-Competition Undertaking. The Defendant submits that such a term would meet the "business efficacy" and "officious bystander" tests.[55]

74 In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [101], the Court of Appeal laid out the three-step process for determining if a term can be implied by fact:

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55 Defendant's Closing Submissions, para 118.

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

75 I do not think that the term sought to be implied *ie*, that compliance with the Non-Competition Undertaking is a condition precedent to the payment of the Severance Package, satisfies the "business efficacy" and "officious bystander" tests. As I have held above, the Severance Package was offered to the Plaintiff in exchange for his resignation because it would allow the Defendant to avoid the hassle of having to deal with the Union. The Defendant's interests in preventing the Plaintiff from competing with it, on the other hand, were provided for and protected by the Non-Competition Undertaking. These represented two distinct sets of obligations under two separate contracts that could exist independently. There was no necessity for the Non-Competition Undertaking to be implied as a condition precedent to the Severance Package in order to give it business efficacy.

76 The circumstances surrounding the severance agreement also do not give rise to an implied term as it was not obvious to any bystander that the parties must have impliedly agreed to this condition. Furthermore, the sole purpose of the Severance Package was to incentivise the Plaintiff to resign. Thus the Non-Competition Undertaking was not intended to form a part of the Contract for the payment of the Severance Package.

77 The Defendant cites *John While Springs (S) Pte Ltd and another v Goh Sai Chuah Justin and others* [2004] 3 SLR(R) 596 ("*John While Springs*") at [7] which states that "[n]o reasonable employer would have offered a bonus to a cheating employee", as an indication that the term sought to be implied satisfies the officious bystander test. In *John While Springs*, bonuses that had been paid to the defendant employees were ordered to be refunded back to the plaintiff employer, because these employees had breached their fiduciary duties. Choo Han Teck J held at [7] that a "bonus is generally a payment fashioned as a reward as well as an incentive". This suggests to me that a "bonus" is more akin to an *ex gratia* payment that is given out of the goodwill of the company.

78 However, as I have held above, the Severance Package was offered in exchange for the Plaintiff's resignation because it would bring some benefit to the company in not having to deal with the Union. It was therefore made pursuant to a valid and enforceable agreement, unlike the bonuses that were considered in *John While Springs*. Given that the Plaintiff has kept to his end of the bargain *ie*, to resign, the Defendant cannot deprive him of the Severance Package because he has breached his obligations under the Non-Competition Undertaking, which is a separate contract.

79 Therefore, I find that compliance with the Non-Competition Undertaking was not an express or implied condition precedent for the payment of the Severance Package.

Summary on the Plaintiff's claim for the Severance Package

80 In summary, I am of the view that the course of negotiations between the Plaintiff and DW1 started on 23 June 2016 and ended on 30 June 2016. It shows that the parties had entered into an agreement for payment of the

Severance Package in exchange for the Plaintiff's resignation. This agreement was backed by valuable consideration, and was also sufficiently certain. Furthermore, there was no express or implied condition precedent in the contract that requires compliance with the Non-Competition Undertaking.

81 Accordingly, I allow the Plaintiff's claim for the Severance Package, save for item c listed in the Confirmation Letter. This is because the Defendant had expressly stated that this was an *ex gratia* payment. "*Ex gratia*" is defined in P. G. Osborn, *Osborn's Concise Law Dictionary* (Sweet & Maxwell, 5th Ed, 1964) at p 128 to be "[a]s of favour". Therefore, the Defendant could elect at its sole discretion whether or not to pay it to the Plaintiff. I would like to add that if the Defendant had intended the whole Severance Package to be an *ex gratia* goodwill payment it would have indicated so in the Confirmation Letter. After all, the Confirmation Letter was drafted entirely by DW1. But the Defendant only identified the payment of 3.7 months' basic salary as *ex gratia* payment. Therefore, the total sum payable by the Defendant to the Plaintiff pursuant to the Severance Package is $53,419.

My decision on the Defendant's counterclaim - the validity of the Non-Competition Undertaking

82 I shall now deal with the Defendant's counterclaim. At the outset, I would state that the Plaintiff accepts that if the Non-Competition Undertaking was found to be valid and enforceable, his employment with DIC soon after leaving the Defendant would be sufficient to constitute a breach. Therefore, I shall now consider whether the Non-Competition Undertaking, which is a covenant for the restraint of trade, is valid and enforceable.

Issue (e): whether the Defendant had a legitimate interest to protect

83 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*") the Court of Appeal stated at [79] that "there cannot be a bare and blatant restriction of the freedom to trade" and there must be a "*legitimate proprietary interest* which the court will then seek to protect by way of the doctrine of restraint of trade" [emphasis in original]. Therefore, the first issue I have to consider is whether or not the Defendant had a legitimate proprietary interest which it sought to protect via the Non-Competition Undertaking.

84 In this regard the Defendant has identified "client and trade connections" as the legitimate proprietary interest that it seeks to protect with the Non-Competition Undertaking. It cites *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 ("*Humming Flowers*") at [75] which states:

> On the facts of this case, I am satisfied that *the defendant has a legitimate interest in protecting its trade connection as against the plaintiff*. The plaintiff was the defendant's sales manager, and therefore a senior sales figure in the defendant. She admits that *she has established personal relationships and rapport with the defendant's customers* … The defendant's business … is in large part built on its ability to establish rapport with its customers and to attract repeat custom. I am therefore satisfied that *the extent of the plaintiff's knowledge of, and her influence over, the customers of the defendant means that the defendant has a legitimate interest in protecting its trade connection* against interference by the plaintiff post-termination. [emphasis added]

85 I find *Humming Flowers* to be on all fours with the present case. The Plaintiff's role was to be the "person-in-charge" for the Defendant's Cement Products business in Vietnam, Bangladesh and the Philippines. Essentially, his job was to build rapport with these customers and establish trade connections on behalf of the Defendant.

86 During the trial, the Plaintiff sought to downplay the connections that he had with the cement buyers and suppliers in these countries, by stating that he could not make decisions without approval from the Defendant's management. This does not mean he did not have trade and client connections when he was working for the Defendant. In fact, the evidence shows that he had developed a strong base of customers in the Cement Products trade. First, the contemporaneous evidence of the Plaintiff's email correspondence with DW2 on the Manila Meeting shows that he believed himself to be the person most familiar with "all the parties and details" (see [17] above). The Plaintiff also claimed that he was the one who had started the discussions between the parties. Second, it is evident that the Plaintiff had significant influence and standing with customers, given that he was able to convince the Managing Director of Vissai to accompany him to Manila to meet with representatives from Big Boss. Third, it was undisputed that the Plaintiff had bought expensive gifts for his customers, and also arranged for free samples to be sent to them, all on the Defendant's account. Fourth, the Plaintiff's familiarity and relationship with DIC as a result of his prior dealings when he was with the Defendant enabled him to secure an employment with them a day after leaving the Defendant.

87 Given the Plaintiff's knowledge and influence over the customers in Vietnam, Bangladesh and the Philippines, he could have easily diverted business away from the Defendant to himself or his new employer. Therefore, as was the case in *Humming Flowers*, I find that the Defendant had a legitimate interest in protecting its trade connections by way of the Non-Competition Undertaking from interference by the Plaintiff post-resignation.

Issue (f): whether the scope of the Non-Competition Undertaking was reasonable

88 Having found that the Defendant has a legitimate proprietary interest to protect by way of the Non-Competition Undertaking, I now turn to assess whether the scope of the Non-Competition Undertaking was reasonable.

89 In *Man Financial* at [75], the Court of Appeal stated that the test for reasonableness in Singapore has two aspects. First, the court would consider whether the restrictive covenant was "*reasonable* as between *the parties themselves*" [emphasis in original]. Second, the court would then turn to consider separately whether the restrictive covenant was reasonable in the interests of the public. With regard to the second aspect of reasonableness relating to the interests of the public, the Court stated at [77] that this would ensure the impact of local circumstances is taken into account in determining the reasonableness of the restrictive covenant. To illustrate, the Court of Appeal cited *Thomas Cowan & Co Ltd v Orme* [1961] MLJ 41, where it was held at [43] that if the defendant was not allowed to operate, this would have given the plaintiffs a virtual monopoly in Singapore. F A Chua J further observed that since the defendant had started operations, prices had fallen while service standards had not, and this was beneficial to consumers. Therefore, Chua J found that it was not reasonable in the public interest to uphold the restrictive covenant in that case.

90 Having laid out the test for reasonableness, I now turn to examine the Non-Competition Undertaking itself. The Defendant has elected to analyse the reasonableness of the Non-Competition Undertaking by dividing it into three parts, *ie*, the activity scope, the geographical scope and the temporal scope. I agree with this method of analysis, but would add that in order for the Non-

Competition Undertaking to satisfy the test of reasonableness, all three scopes would have to be reasonable.

Activity scope

91 Beginning first with the activity scope, the Non-Competition Undertaking prohibits employees of the Defendant from dealing in "Restricted Goods" and "Restricted Services". "Restricted Goods" and "Restricted Services" are defined as products and services that the employee was involved with during the 12 months immediately preceding the date of termination of his employment. In the Plaintiff's case, it is clear that these "Restricted Goods" and "Restricted Services" are the products and services relating to Cement Products which the Plaintiff had been trading in during his time with the Defendant. While employed by the Defendant, the Plaintiff was engaged in the cement section. Furthermore, the documentary evidence shows that in March 2016, the Plaintiff was involved in a trade for gypsum. In November 2015, the Plaintiff was involved in a trade for clinker. These trades had taken place within the 12 months preceding the end of the Plaintiff's employment on 30 June 2016. Therefore, it cannot be disputed that the Cement Products, in particular gypsum and clinker, and the related services provided in the trading of these products, would be considered as "Restricted Goods" and "Restricted Services" for the Plaintiff.

92 In *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd and another* [2012] 4 SLR 36 ("*PH Hydraulics*"), Tay Yong Kwang J (as he then was) held at [67] that a restrictive covenant preventing the defendant from engaging in the design and manufacture of marine hydraulic and electrical installations was reasonable. This is because the activity sought to be restricted was the specific area of business that the

defendant employee had been involved with, and the restrictive covenant "did not amount to a blanket prohibition to work for the marine industry".

93 Similarly, in the present case, the Non-Competition Undertaking seeks only to prevent the Plaintiff from engaging in the same area of business that he was involved in while he was employed by the Defendant. It does not impose a blanket ban on the Plaintiff against all forms of commodity trading that the Defendant was involved in. Indeed, at the beginning of the trial the Plaintiff told the court that he was currently self-employed as a coal trader. The Plaintiff also admitted to having prior experience in trading wood products. He is not prevented from trading in these other commodities by the Non-Competition Undertaking although the Defendant was also involved in these trades and more. Therefore, it cannot be said that the Defendant is depriving him of his livelihood. Thus, I find that the activity scope of the Non-Competition Undertaking was reasonable as between the parties. Even if the Plaintiff were prevented from trading in Cement Products, this would not damage the public interest given that suppliers and consumers of such Cement Products would still have other alternatives available to them. The Plaintiff is also not prohibited from engaging in the Cement Product trade in Singapore. Therefore, I consider the activity scope of the Non-Competition Undertaking to be reasonable in the interests of the public.

Geographical scope

94 The next issue is the geographical scope. The Non-Competition Undertaking prohibits employees from dealing in the "Restricted Area". This is defined as the area constituting the market of the Defendant and its affiliates for the "Restricted Goods" and "Restricted Services". Reading the definition of "Restricted Area", "Restricted Goods" and "Restricted Services" together, this

means that the Plaintiff is prevented from dealing in the countries which he had been involved with during the 12 months preceding the last day of his employment. While the Plaintiff has been involved in trades to Oman, Indonesia and other countries, the Defendant is contending that the "Restricted Area" for the Plaintiff is confined only to Bangladesh, Vietnam and the Philippines.

95 I accept that the Plaintiff had been involved in trades to Vietnam and the Philippines in the 12 months preceding the date of his resignation from the Defendant. In March 2016, he handled a trade of gypsum from Oman to Vietnam. Technically, Oman would appear to have come under the "Restricted Area" if it was one of the Defendant's markets. However, Oman is not pleaded in the Defendant's counterclaim. In November 2015, the Plaintiff handled a trade of clinker from Vietnam to the Philippines. Therefore, Vietnam and the Philippines would fall under the "Restricted Area" in the Non-Competition Undertaking.

96 However, the Defendant's contention that Bangladesh falls within the "Restricted Area" cannot be justified as it fails to satisfy the burden of proof that Bangladesh was a "Restricted Area" within the 12-month period. The documentary evidence before the court in the form of the delivery memos shows that the last trade the Plaintiff handled involving Bangladesh was in May 2015. This would be outside of the 12-month period as specified in the Non-Competition Undertaking. This is also corroborated by the Plaintiff's statement that DW2 had restricted the Plaintiff's dealings in Bangladesh.[56] Therefore, in my view, the "Restricted Area" for the Plaintiff should only be confined to Vietnam and the Philippines.

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[56] Steve's Affidavit, para 16.

97 In *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205 ("*Buckman*"), Judith Prakash J (as she then was) held at [24] that a reasonable restrictive covenant would have limited the restriction to countries in which the employee had actual and significant customer contacts. On the facts of *Buckman*, the geographical scope of the restrictive covenant included countries where the defendant employee had never done any work, and was never exposed to any of the customers. Therefore, this was one factor for Prakash J's holding that the restrictive covenant was an unreasonable restraint of trade.

98 In the present case, however, it has been established that the Plaintiff did have actual and significant customer contacts in Vietnam and the Philippines. In fact, he was able to arrange for a meeting between Vietnamese suppliers and Filipino buyers of Cement Products. Therefore, I find the geographical scope of the Non-Competition Undertaking to be reasonable as between the parties. Similarly, because this restriction would not adversely impact competition in each of these markets, I also find it to be reasonable in the interests of the public.

99 As a final point on the reasonableness of the geographical scope, I note that for some very big countries which span across a very large geographical area, it may be unreasonable to restrict activity in the entire country when the company may only conduct business in a few cities. In that light, I had queried counsel for the Defendant on whether it was unreasonable for the Non-Competition Undertaking to cover the entirety of Vietnam and the Philippines, when the Defendant mainly did business in Ho Chi Minh City and Manila.

100 In response, the Defendant cited the English High Court case of *Kerchiss v Colora Printing* [1960] RPC 235 at 241, which stated that it is sufficient for the ex-employee to have sufficient goodwill in the prohibited countries. The

court does not require the employer to prove sales in every part of the prohibited countries. This seems consonant with the practice of geographical boundaries most commonly being demarcated along state lines. Therefore, even though the Plaintiff was dealing mainly with customers who operated in specific cities, it is reasonable for the Non-Competition Undertaking to restrict activity in Vietnam and the Philippines as the cement trade of the Defendant is conducted in the cities of these countries.

101 However, if the prohibited country is very big, such as China and the United States of America which have many major cities in which commerce and trade are done on a large scale, the situation may be different and the issue of reasonableness will be put to the test if the Non-Competition Undertaking is to cover the whole of such country. At the end of the day it is not one size fits all. The issue of reasonableness on the geographical coverage for the Non-Competition Undertaking will have to depend on the facts of each case.

Temporal scope

102 The Non-Competition Undertaking restricts employees from being involved in "Restricted Goods" and "Restricted Services" in the "Restricted Area" for a period of two years. The Defendant has cited a number of local cases where restrictive covenants with a temporal scope of two years have been upheld. One such case is *Heller Factoring (Singapore) Ltd v Ng Tong Yang* [1993] 1 SLR(R) 495 ("*Heller Factoring*"), which stated at [21] that "[t]he period of restraint should only be long enough for the danger of interference by the ex-employee to wear away." In *PH Hydraulics* the Court similarly upheld a two-year restrictive covenant. One of the factors cited at [67] was that the industry in question was a highly specialised one, as was the case in *Heller Factoring*.

103 In the present case, the Defendant has argued that the two-year restriction is necessary because it takes time to build up customer connections in the Cement Products industry. It pointed out that the Plaintiff took about four years to build up his customer connections, and the Defendant would require at least two years to allow the Plaintiff's replacement to try and rebuild those same contacts, without any interference from the Plaintiff. Indeed, if the Plaintiff was not prohibited from dealing in these products which he has become familiar with, it would be difficult for a newcomer to the market to build up his own customer connections. Furthermore, I note that the present case involves the trading of Cement Products, which is a specialised industry. Therefore, having regard to the purpose of the Non-Competition Undertaking, a temporal scope of two years is in my view reasonable.

104 For completeness, I shall deal with a point which I had queried parties on. This pertained to the inclusion of the Defendant's affiliates (amounting to about 200 worldwide) within the scope of the Non-Competition Undertaking and whether or not this rendered the Non-Competition Undertaking overly wide and hence unreasonable. In this regard I am satisfied that on a proper construction of the Non-Competition Undertaking, the definitions of "Restricted Goods", "Restricted Services" and "Restricted Area" serve to curtail the seemingly far-ranging scope brought about by the inclusion of the term "affiliates". I would also note that the restrictive covenant in *PH Hydraulics*, which the Court in that case had found to be reasonable, also prohibited employees from engaging in the business of the employer *and its associated companies*. Therefore, the mere inclusion of the term "affiliates" does not render the Non-Competition Undertaking unreasonably wide.

Summary on the validity of the Non-Competition Undertaking

105 In summary, I find that the activity scope, geographical scope and temporal scope of the Non-Competition Undertaking to be reasonable as between the parties and is not against the public interest. Additionally, it serves to protect the Defendant's trade connections, which is a legitimate proprietary interest. Therefore, I find the Non-Competition Undertaking to be valid and enforceable.

Issue (g): what is the appropriate remedy that should be granted to the Defendant in light of the Plaintiff's breach of the Non-Competition Undertaking

106 The Plaintiff accepts that if the Non-Competition Undertaking is valid, he has breached it by virtue of his employment with DIC, a company that deals with Cement Products in Vietnam, one day after his resignation. This clearly falls afoul of the activity scope, geographical scope and temporal scope of the Non-Competition Undertaking. Therefore, the next issue for me to consider is the appropriate remedy to grant the Defendant.

Injunction

107 The primary relief sought by the Defendant is an injunction on the specific terms, as set out in the Non-Competition Undertaking, to be imposed on the Plaintiff until 29 June 2018.

108 The High Court case of *Heller Factoring* provides some guidance as to what the court should consider in determining whether to grant an injunction to enforce a restrictive covenant. The Court in that case drew a distinction between an ex-employee who has threatened to breach the restrictive covenant and one who has not. The Court observed at [17] that the defendant had issued a tacit

assertion of entitlement and threatened to poach the plaintiffs' customers. The defendant regarded the factoring business as a free and competitive one, and to him it was "fair game" to poach the plaintiffs' customers by using their proprietary information. Given the defendant's proclivity for breaching the restrictive covenant, the Court held that an injunction would be warranted so as to better enforce it.

109 In the present case, the Plaintiff has demonstrated this same proclivity to breach his obligations under the Non-Competition Undertaking. First, he was appointed as the exclusive agent of DIC one day after his resignation from the Defendant. Second, he acted as agent for Vissai and again set up a meeting between Vissai and Big Boss. Third, he attempted to establish connections with other Vietnamese cement companies such as Longson Cement through his corporate vessel of Changfa which he had set up when he left the Defendant. All of these actions had taken place well within the two-year restriction period that was imposed on him by the Non-Competition Undertaking. The Plaintiff also admitted under cross-examination that since he knew Eagle Cement personally, it was "fair game" for him to deal with them after leaving the Defendant. Under these circumstances, I am of the view that an injunction should also be imposed on the Plaintiff, according to the terms as set out in the Non-Competition Undertaking. This injunction would be to restrain the Plaintiff from dealing in Cement Products in Vietnam and the Philippines from the date of my order to 29 June 2018 as the operative two-year period under the Non-Competition Undertaking runs from 30 June 2016 to 29 June 2018.

110 I am satisfied that the imposition of an injunction to restrict the Plaintiff from dealing in Cement Products in Vietnam and the Philippines for a period of two years would not be so severe as to deprive him of his livelihood. As I have alluded to above, the Plaintiff is still free to trade in other commodities which

he is familiar with. The Plaintiff could also choose to trade in Cement Products in non-restricted countries. Indeed, he has demonstrated his ability to deal in different commodities such as wood and coal, and he has even had some dealings in Cement Products in Oman and Indonesia where the Non-Competition Undertaking does not apply. He could also trade in Cement Products in Singapore. Therefore, this buttresses my decision to impose the injunction on the Plaintiff that will take effect from the date of my order to 29 June 2018.

Damages for breach of the Non-Competition Undertaking

111 The Defendant has also claimed, as part of its relief for the Plaintiff's breach of the Non-Competition Undertaking, damages in addition to the injunction.

112 I shall address the methods for computation of damages that were suggested by the Defendant. The first of which is the approach adopted in *Merlin Financial Consultants v Cooper* [2014] IRLR 610 ("*Merlin*"). In that case, the Court calculated damages for the breach of a non-compete clause by considering the actual revenue figures of the business generated by the defendant employee in the year preceding the end of his employment. The Court then applied the appropriate discount rates to this past figure and projected two years into the future, on the basis that this would have been the amount that the plaintiff employer would have made had the defendant not breached his non-compete clause.

113 In *Merlin*, there was evidence to show that the defendant's departure and subsequent breach of the non-compete clause was a direct cause of the plaintiff losing its customers. At [74], it was stated that the plaintiff had written to a few

of its leaving customers inviting them to stay, but they had replied saying that they had been with the defendant for a number of years and would prefer to stay with him. Therefore, the method that was applied by the Court in *Merlin* was a means of quantifying a loss that had been proven to be *causally connected* to the breach of the defendant. Notably, such a causal connection is absent on the facts of the present case. Therefore, I do not find the approach taken in *Merlin* to be directly applicable here.

114 Alternatively, the Defendant argues that damages can be assessed based on "Wrotham Park Damages", a term which was popularised by the case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798. In that case, the defendant's land was subject to a restrictive covenant which provided that the defendant could only build on the land with the claimant's consent. In breach of this covenant, the defendant built 14 houses on the land without the claimant's consent. The claimant applied for a mandatory injunction for the houses to be demolished. However, the Court declined to grant the mandatory injunction on the basis that it would be socially wasteful to demolish the houses. Therefore, the Court awarded damages in lieu of the injunction calculated on the basis of the sum that would have hypothetically been demanded by the claimant in exchange for relaxing the covenant. Hence, Wrotham Park Damages are calculated on the basis of a hypothetical bargain between parties for the price to be charged in exchange for the relaxation of a restrictive covenant.

115 While I note that the applicability of Wrotham Park Damages in Singapore law has been affirmed by the High Court in *Clearlab SG Pte Ltd v Ting Chong Chai and others* [2015] 1 SLR 163 ("*Clearlab*") at [335], I am of the view that the present case is not an appropriate one for the award of such damages. First, even though Wrotham Park Damages is based on the hypothetical bargain between the parties, no evidence has been placed before

the court as to what sum the Defendant would have accepted in exchange for waiving the Non-Competition Undertaking. Therefore, it would be straying too far into the realm of speculation for the court to simply pluck a number from thin air and use that as the measure of damages. Second, Wrotham Park Damages are typically awarded in lieu of a mandatory injunction. Given that I have decided to grant the injunction sought by the Defendant, it would not be appropriate for me to also award Wrotham Park Damages, as that would be akin to allowing double recovery. Hence, I would also decline to grant Wrotham Park Damages as an alternative to the approach in *Merlin*.

116 Given that I have decided to grant the injunction that was sought, it would appear that there is no need for me to consider the issue of damages. However, the period of restriction under the Non-Competition Undertaking began on 30 June 2016 and was meant to last to 29 June 2018. As at the time of the trial, we were already in the middle of the first quarter of 2018. Therefore, given that no injunction was granted before the court order, it would be fair to consider whether damages should be awarded during that period, and if so, in what quantum. The burden is on the Defendant to satisfy that it had suffered damages or losses as a result of the Plaintiff's breach of the Non-Competition Undertaking. The Defendant has failed to produce any evidence to show the nexus between the Plaintiff's breach of the Non-Competition Undertaking and the loss, if any, suffered by the Defendant. Counsel for the Defendant admitted during the oral closing submissions that he was unable to establish that the losses were attributable to the Plaintiff:[57]

> Court: So do we have evidence? That's what I mean.
>
> Tay: Sir, I need to be candid. We have evidence of a drop in business.

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57 NE, 9 March 2018, p 90:6–90:9.

> Court: Yes. But—
>
> Tay: But I can't show a one-for-one match.

In my view, this "drop in business" could be attributed to a number of factors. It could have been due to an economic downturn, changing business cycles or any number of other factors. Additionally, customers may choose to come and go for a variety of reasons. Without actual evidence to show that it was the Plaintiff's breach that had directly led to the Defendant's customers taking their business elsewhere and hence the drop in business, I could not attribute the loss suffered by the Defendant to the Plaintiff.

117 However, I acknowledge that the Plaintiff has breached the Non-Competition Undertaking and he has demonstrated a blatant disregard for the restrictions that have been placed on him. Therefore, in addition to the grant of the injunction, I would order nominal damages of $1,000 to be paid by the Plaintiff to the Defendant.

Summary

118 In summary, I allow the Plaintiff's claim as the contemporaneous evidence shows that the parties had entered into a binding contract for the Severance Package to be paid to the Plaintiff in exchange for his resignation. The Non-Competition Undertaking was not an express or implied condition precedent for the payment of the Severance Package. These were two independent contracts and there was no reason for the obligations under each of them to be fused.

119 However, one of the components of the Severance Package was labelled "*ex gratia*" and hence cannot be strictly enforced by the Plaintiff.

120 I also allow the Defendant's counterclaim as I find the Non-Competition Undertaking to be reasonable and not unnecessarily wide. It serves to protect the Defendant's trade connections which in my view is a legitimate proprietary interest. Therefore, by taking up employment with a Vietnamese cement company a mere day after his resignation, the Plaintiff has undoubtedly breached the Non-Competition Undertaking.

Conclusion

121 For the aforesaid reasons, I would allow the Plaintiff's claim in part, to the sum of $53,419. I would also allow the Defendant's counterclaim for an injunction to restrict the Plaintiff from dealing in Cement Products in Vietnam and the Philippines up to 29 June 2018. Additionally, nominal damages in the sum of $1,000 are to be offset from the sum due from the Defendant to the Plaintiff.

122 I shall now deal with the issue of costs. As the Plaintiff has succeeded in his claim he is entitled to costs. The Defendant has also succeeded in his counterclaim and thus is entitled to costs as well. The respective costs are to be taxed if not agreed by the parties.

Tan Siong Thye
Judge

Mansurhusain Akbar Hussein and Remesha Chandran Pillai (Jacob Mansur & Pillai) for the plaintiff;
Tay Yong Seng and Ang Ann Liang (Allen & Gledhill LLP) for the defendant.
