Termination of Employment – When are Restrictive Covenants Enforceable?

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Introduction

It is not uncommon for employees to find themselves subject to restrictive covenants, which are clauses that limit employees' freedom to conduct business following their employment. These clauses may be found in employment contracts executed prior to the employment, as well as separate contracts executed at the conclusion of the employment.

Given the restrictive nature of such clauses, they are enforceable in limited circumstances. Below, we discuss the circumstances in which such clauses may be enforced in Singapore.

Overview

The two-step test for whether restrictive covenants constitute an unreasonable restraint of trade is set out in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("***Man Financial***"):

(a) conducting a preliminary inquiry as to whether or not there is a legitimate proprietary interest to be protected by the restrictive covenant; and

(b) applying the twin tests of reasonableness: (i) whether the restrictive covenant is reasonable by reference to the interests of the parties; and (ii) whether the restrictive covenant is reasonable by reference to the interests of the public.

For a restrictive covenant to be enforceable, all of (a), (b)(i) and (b)(ii) have to be satisfied.

What is a Legitimate Proprietary Interest?

In *Man Financial*, it was said that an employer may not impose a bare and blatant restriction on an ex-employee's freedom to conduct business. Public policy mandates that an individual must not be prevented from exercising his/her natural skill and talent (even if such skill and talent are acquired during his/her employment).

Only a legitimate proprietary interest may be protected. The two main interests are:

(a) Trade secrets. Whether or not something constitutes a trade secret depends on: (i) whether the employee habitually handles confidential information; (ii) whether the information is highly confidential warranting protection as a trade secret; and (iii) whether both employer and employee treated the information as confidential.

If there is already a confidentiality clause protecting these trade secrets, then the restrictive covenant needs to cover a legitimate proprietary interest *over and above* the confidentiality clause (*Stratech Systems Ltd v Nyam Chiu Shin* [2005] 2 SLR 579).

(b) Trade connections. Where an employee has personal knowledge of, and influence over, the employer's trade connections, this may warrant protection. However, the Singapore Courts will also look at whether an employer has institutional control over such trade connections.

In *Man Financial*, it was held that maintaining a stable and trained workforce could be recognised as a legitimate proprietary interest. Depending on the context, non-solicitation clauses may be enforceable to limit an employee from soliciting his/her ex-colleagues.

What is Reasonableness?

Reasonableness of a restrictive covenant is to be determined on a case-by-case basis.

As between the parties, the type of activity restricted, as well as its geographical and temporal elements, ought to be considered in determining reasonableness.

As to the public, there may be public policy factors involved. For instance, in *Thomas Cowan & Co Ltd v Orme* [1961] MLJ 41, it was held that whilst the restrictive covenant was reasonable between the parties, it was not reasonable to enforce the restrictive covenant because doing so will enable a monopoly in the fumigation sector (which was undesirable to the public).

Summary

Our team of lawyers have assisted employers and employees with handling contentious matters on restrictive covenants. Please feel free to reach out us if you require assistance.

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