

INTERIM INJUNCTIONS FOR RESTRAINT OF TRADE CLAUSES



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Introduction

1. Many companies treat non-compete and confidentiality clauses in employment contracts as routine boilerplate clauses and do not get them reviewed by lawyers. In this article, we will examine the *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 (the “*MoneySmart Case*”) which looks at the enforceability of such clauses. Merely inserting such clauses does not automatically mean that such clauses are legally enforceable in court. More attention needs to be paid to such clauses and a legal review may be required especially for senior hires.
2. In the *MoneySmart Case*, we see that the employee was the head of IT. As such, when he transitions to the new company, it is likely that he will be using his coding skills (as opposed to trade secret data or customer data) unless the former employer can prove that he used copied code in his new role. This is different from most other similar cases where the person being sued usually brings over customer databases which were copied from his previous employer. In this case, the Court was cognisant that allowing the injunctions against the employee would deprive him of future livelihood.
3. The defendant in the *MoneySmart Case* is an ex-employee of the claimant (MoneySmart). The defendant currently works at a rival company (CAGRS). Both the claimant and CAGRS together hold 95% of the market share in 2022 in online financial product comparison services, a niche market.
4. The defendant is a Russian national who was employed by the claimant as the Head of Technology at MoneySmart’s Bubblegum division. He is presently employed by CAGRS as the Head of Engineering, Insurance.
5. On the basis of two covenants in the employment agreement between the claimant and the defendant, the Court granted two interim injunctions to stop the defendant from working for CAGRS, with a caveat that the interim injunctions must not be enforced until the Court had heard the defendant. The two covenants relate to a non-compete clause (the “**Non-Compete Clause**”) and a confidentiality clause (the “**Confidentiality Clause**”).
6. The Honourable Tan Siong Thye SJ ruled in favour of the defendant and discharged both interim injunctions that were previously granted.

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7. The issues for determination were:-
- (a) whether there is a good arguable case that the Non-Compete Clause is valid and enforceable, and has been breached by the defendant;
 - (b) whether there is a good arguable case that the Confidentiality Clause has been breached or is likely to be breached by the defendant;
 - (c) whether the balance of convenience lies in favour of maintaining the interim injunctions;
 - (d) assuming that there is a case for interim injunctions, whether they should nevertheless be set aside due to the claimant's lack of full and frank disclosure.

Non-Compete Clause

8. The Non-Complete Clause prohibited the defendant from, up to 12 months from the date of termination of the defendant's employment (or a duration to be determined by a court), directly or indirectly engaging with any business or organisation which provides online financial product comparison services in South-East Asia or any other country where the claimant (or associated companies) operates.

Confidentiality Clause

9. The Confidentiality Clause prohibited the defendant from using (other than for the benefit of the claimant) or disclosing all confidential information about the claimant to any third party, without the prior written consent of the claimant.

Decision

Issue 1 – Whether there is a good arguable case that the Non-Compete Clause is valid and enforceable, and has been breached by the defendant

Legitimate Proprietary Interests

10. The claimant's case is that it has legitimate proprietary interests warranting protection by the Non-Compete Clause, namely its confidential information and trade secrets which the defendant had access to during his employment. However, the claimant had to show that the Non-Compete Clause covers a legitimate proprietary interest over and above the Confidentiality Clause, which already sought to protect all confidential information. The Court ruled that the claimant's argument on this was unsustainable [33].

Reasonableness

11. The Court ruled that the Non-Compete Clause was:-
- (a) not reasonable as it was too wide; and
 - (b) that it was not reasonable with respect to the parties or in the interests of the public.

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12. Activity scope – the scope was too wide as the prohibition was not confined to engaging with any business in the same or similar capacity as that in which the defendant was working when employed by the claimant.
13. Geographical Scope – the scope was too wide as it limited the defendant from directly or indirectly engaging with any business or organisation in South-East Asia, instead of just Singapore where the defendant had worked for the claimant.
14. Temporal Scope – the Non-Compete Clause sought to restrict the claimant’s employees and leaves them uncertain as to which cascading restriction binds him/her in law until the issue is determined in a court.

Severance

15. The Court considered the “blue pencil” test, which requires that the Court must be able to say, run a “blue pencil” through the offending words in that clause without altering the meaning of the provision or render it senseless, i.e.:-
 - (a) the unenforceable provision must be capable of being removed without adding to or modifying the wording of what remains, with the remainder continuing to make grammatical sense – the Court provided that it is not possible to amend the scope of prohibited activities in the Non-Compete Clause from a business which provides “online financial product comparison services” to one which provides “digital insurance products”;
 - (b) the remaining contractual terms must continue to be supported by adequate consideration; and
 - (c) the severance must not change the fundamental character of the contract between the parties – the Court ruled that this requirement is not satisfied as the severance would change the fundamental character of the contract.
16. The Court stated in [61] that the courts will not rewrite the contract for the parties. The Court considered policy considerations to prevent abuse on the part of the employer, especially when the employer is in a more advantageous position. The Court emphasised the importance of restraint of trade clauses being drafted in a precise, clear, and unequivocal manner.

Issue 2 – Whether there is a good arguable case that the Confidentiality Clause has been breached or is likely to be breached by the defendant

17. The Court noted that much of the confidential information the defendant had access to, had already been shared publicly by the claimant. The claimant’s business plans and financial results had already been reported in articles that are accessible online by the general public.
18. The Court also noted that the information that the claimant is alleging is confidential and that the defendant had access to the same, was not treated as confidential by the claimant before the proceedings came about. There were no precautions taken by the claimant to maintain

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the confidentiality of the information, i.e. labeling the information as 'confidential' or informing its staff that the information was confidential.

19. For the reasons above, the Court held that the claimant failed to establish that there was a good arguable case that the information was indeed confidential.
20. Further to this, the Court was also not satisfied that there is a good arguable case that the defendant *actually* accessed the information that was told to him to be confidential, due to the lack of proof and the fact that the defendant would not have paid attention to the alleged confidential information that was not pertinent to his work.

Issue 3 – Whether the balance of convenience lies in favour of maintaining the interim injunctions

21. The claimant submitted that damages would not be an adequate remedy because the losses resulted from the alleged breach – specifically, diminished competitiveness and loss of revenue and/or business opportunities – were unquantifiable. The Court rejected the claimant's argument, citing that the issue was not a conceptual difficulty in quantifying the loss, but rather the claimant's uncertainty about the precise extent of its losses.
22. The Court held that it would be difficult to assess the impact on the defendant's future career development as there is a real risk of stagnation of skills which would make the defendant a less marketable employee in the future. As such, the Court held that damages would not be an adequate remedy for the defendant.
23. The Court then examined the scenario where damages might not be a sufficient remedy for both the claimant and the defendant, therefore proceeding to apply the balance of convenience test.
24. The balance of convenience test requires the Court to determine the course of action that would appear to carry the lower risk of injustice if that course should ultimately turn out to be the 'wrong' choice, i.e. which party will suffer less harm or inconvenience if the interim relief is granted or denied (whichever the case may be).
25. Given the critically weak case of the claimant [93], the Court ruled that it would be in the interest of justice not to allow the interim injunctions to continue and become enforceable.

Issue 4 – Whether the interim injunctions should be set aside due to the claimant's lack of full and frank disclosure

26. The Court found that the claimant did not disclose the actual scope of the Non-Compete clause *vis-à-vis* the scope of the interim injunctions sought. In this connection, the Court found that the interim injunctions would be vulnerable to be discharged due to the aforementioned non-disclosure.

Conclusion

27. This decision provides clarity on the legal principles determining whether to grant or maintain interim injunctions. Bare assertions that have not been substantiated with any evidence in

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relation to legitimate proprietary interests or real risk of breach will not be sufficient. It is important to note that when drafting restraint of trade provisions, companies should ensure that the scope of the respective clauses is narrow and fair. Further, when handling confidential information, companies should adopt proper practices to ensure that such information is labelled as 'confidential' and take active precautions to ensure that such confidential information is properly protected.

Key Takeaways

28. It is evident that restraint of trade clauses should not be treated as one-size-fits-all provisions in employment contracts. These clauses require careful crafting to ensure their enforceability, taking into account the specific roles and responsibilities of employees.
29. Employers must ensure that the limits of the non-compete clauses should be carefully calibrated to protect the legitimate interests of the employer and the employer should not draft such clauses so as to hedge its position, e.g. by the use of cascading clauses.
30. Mistaken assumptions about the automatic enforceability of restraint of trade clauses can lead to legal complications and challenges in court. Companies should consider engaging lawyers early to review employment contracts, especially for senior hires.

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