WHEN EMPLOYEES LEAVE: CONFIDENTIALITY AND NON-COMPETE CLAUSES[*]

I. INTRODUCTION

1. When good employees leave, there is often a risk that they will join a competitor or set up a competing business. If you are the employer, the employment contract might protect your interests through a confidentiality clause preventing the employee from using or disclosing confidential information. It might also have a non-compete clause preventing the employee from competing with the company for a period of time after leaving its employment.

2. But the law recognises that people need to be able to work after they leave an employer. So confidentiality and non-compete clauses will not protect you from all competition by ex-employees. It is important to know what information is protected by your confidentiality clause and what rights you have under your non-compete clause.

II. DISCUSSION

(a) *Confidentiality clause*

3. A confidentiality clause generally requires the employee not to misuse or disclose confidential information, including trade secrets, during or after his employment.[1] For example:[2]

> *The Employee shall not, during his employment or after its termination, use or divulge to any person any trade secret or confidential information which he may receive in the course of his employment except to the extent required for the proper and reasonable performance of his duties in the course of his employment.*

4. Information is confidential if, given industry practice, you as the employer reasonably believe that the release of the information would be harmful to you or advantageous to

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[1] Khattar Wong & Partners with Deborah Barker, *A Guide to Termination of Employment in Singapore* (LexisNexis, 2003) at p 133 and p 143.

[2] *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205 ("***Buckman Laboratories***") at [19]; Khattar Wong & Partners with Barker, *id* at p 144.

others, and that the information is not already in the public domain.[3] Examples of confidential information include secret manufacturing processes, customers' and suppliers' names and addresses, and documents listing prices negotiated with customers and suppliers.[4] Examples of non-confidential information include documents readily available online.[5]

5. It is critical to distinguish between confidential information and general knowledge. A confidentiality clause cannot stop an employee from using general knowledge that he has gained on the job, because that belongs to him, not to the employer.[6] An example of general knowledge is industry knowledge that can be found in published books.[7]

6. Information does not become part of the employee's general knowledge just because he has memorised it.[8] For example, an employee can memorise a list of customers, but it remains confidential information that belongs to the employer.[9]

7. Still, if the information that you wish to protect cannot be easily separated from the employee's general knowledge, a confidentiality clause cannot protect it.[10] Whether the information can be easily separated from the employee's general knowledge depends on the specific facts of the case. Suppose you are in a manufacturing business, and you employ a plastics technologist to coordinate research and development on PVC sheeting for adhesive tape.[11] After leaving the company, the technologist may remember in general terms what technical problems arose, what the solutions were, what experiments were conducted, and whether the results were positive or negative.[12] This information would be difficult to separate from his general

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3 *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227 at 248.

4 *Asia Business Forum Pte Ltd v Long Ai Sin* [2003] 4 SLR(R) 658 ("***Asia Business Forum***") at [10]; *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835 ("***Tang Siew Choy***") at [13], [30]; *Robb v Green* [1895-99] All ER Rep 1053, cited in Ravi Chandran, *Employment Law in Singapore* (5th Ed, LexisNexis, 2017) at [5.38].

5 *Flairis Technology Corporation Ltd v Gan Huan Kee* [2002] SGHC 116 at [90].

6 *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 ("***Herbert Morris***") at 714; *Tang Siew Choy*, *supra* n 4 at [2], quoting *Lock International plc v Beswick* [1989] 3 All ER 373 at 383.

7 See *Asia Business Forum*, *supra* n 4, at [22].

8 *Printers and Finishers Ltd v Holloway* [1964] 3 All ER 731 ("***Printers and Finishers***") at 735.

9 *Ibid*.

10 *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter* [2013] 2 SLR 193 at [84]; *Printers and Finishers*, *supra* n 8 at 736.

11 *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623.

12 *Id*, at 642.

technical knowledge of the production of PVC sheeting for adhesive tape.[13] In such a case, the proper way to protect yourself is through a non-compete clause.[14]

(b) ***Non-compete clause***

8. A non-compete clause restricts the employee's freedom to work in the employer's area of business or for the employer's competitors.[15] For example:[16]

> *The Employee shall not, in Vietnam or Thailand for one year after the termination of his employment with the Company, directly or indirectly be employed or engaged in any capacity in any business which competes with the business of the Company.*

As a starting point, the law recognises the freedom of ex-employees to conduct business.[17] So a non-compete clause is ineffective unless it is a reasonable protection of the employer's legitimate business interests.[18] You will need to consider two issues.

(i) What is your legitimate business interest?

9. First, identify the legitimate interest that the clause protects. If your contract has a confidentiality clause, the non-compete clause is ineffective unless it is justified as a protection of an interest other than confidential information.[19] Apart from confidential information, the other main interest is trade connections with customers and suppliers.[20]

10. For the clause to be justified as a protection of your trade connections with customers, the employee must have personal knowledge of and influence over your customers in order to bring them to his competing business.[21] Each of the following factors would tend to show that the employee does not have much influence:[22]

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13 *Id*, at 641.
14 *Printers and Finishers*, *supra* n 8 at 736; Chandran, *supra* n 4, at [5.45].
15 Khattar Wong & Partners with Barker, *supra* n 1, at p 134.
16 *Ibid*; *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85 ("***Tan Kok Yong Steve***") at [5].
17 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("***Man Financial***") at [70], quoting *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535 at 565; *Herbert Morris*, *supra* n 6, at 701.
18 *Man Financial*, *id* at [71], [79].
19 *Man Financial*, *id* at [92].
20 *Id*, [81].
21 *Id*, [93]; *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 1 SLR 847 ("***Smile Inc***") at [75].
22 *Smile Inc*, *id* at [76]–[77].

- Your company has a strong hold on the customer;
- Switching to a competitor would inconvenience the customer;
- The employee's interactions with the customer are infrequent;
- The employee is junior; and
- The employee's relationship with the customers is not confidential.

11. For example, if customers tend to buy your company's product or service because it is unique, your company has a strong hold on them.[23] So it would be difficult for the employee to influence them to switch to a competitor. In contrast, professionals who have confidential relationships with their clients, such as doctors and accountants, may more easily influence clients to follow them when they leave your company.[24]

12. A similar analysis applies to trade connections with suppliers. For instance, if the employee negotiates with your suppliers and knows special terms in supply contracts that are protected by confidentiality clauses, you will have a legitimate interest in your trade connections.[25]

(ii) Is the clause reasonable?

13. Whether the clause reasonably protects your interest in trade connections depends on (1) what activity it prohibits the employee from doing, (2) how long the prohibition is, and (3) what geographical area the prohibition applies to.

14. First, the clause should only restrict activities that might reasonably affect the trade connections built up by the employee.[26] For example, if your company's business includes the water-treatment chemicals industry but your employee works only in the paper chemicals industry, you cannot prevent him from working in the water-treatment chemicals industry.[27]

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23 Chandran, *supra* n 4, at [3.39].
24 *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [23]–[24].
25 *Brake Brothers Ltd v Ungless* [2004] EWHC 2799 at [21], [29]-[31]; Chandran, *supra* n 4, at [3.44].
26 *HT SRL v Wee Shuo Woon* [2019] SGHC 96 at [80].
27 *Buckman Laboratories*, *supra* n 2, at [4], [25].

15. Second, the duration of the restraint should only be long enough for the danger of interference by the employee to wear away.[28] The time needed for a replacement employee to establish a relationship with customers or suppliers may be relevant.[29] For example, a two-year restraint on a sales manager may be unreasonable if it ought to take only one year for other sales staff to build relationships with your customers.[30]

16. Third, the geographical area covered by the clause should not be broader than the area that the employee is responsible for.[31] For example, a clause is more likely to be reasonable if it restricts competition only in countries or cities where the employee has significant customer contact.[32] Generally, if the clause applies to the whole of Singapore, this is reasonable since Singapore is a small country.[33] But if the employee has worked only in Singapore and the clause prevents him from using his experience in Singapore, the clause may well be unreasonable.[34] In such a case, a geographical restriction of a certain radius around your place of business is more likely to be considered reasonable.[35]

17. Additionally, the clause must be reasonable in the interests of the public.[36] For example, a clause giving the employer a virtual monopoly in Singapore is probably unreasonable because it is against public policy to allow a trade to be monopolised.[37]

III. CONCLUSION

18. The extent to which you can protect your business interests through confidentiality and non-compete clauses depends on the wording of the clauses, the employee's job scope, and the nature of the industry. A confidentiality clause can protect trade secrets and other confidential information that do not form part of the employee's general knowledge. A non-compete clause can protect you from competition only if the clause is a reasonable protection of your business interests. Consequently, when you hire

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28 *Heller Factoring (Singapore) Ltd v Ng Tong Yang* [1993] 1 SLR(R) 495 ("***Heller Factoring***") at [21].
29 *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [116].
30 *Ibid*.
31 See, *eg*, *Tan Kok Yong Steve*, *supra* n 16, at [95].
32 *Buckman Laboratories*, *supra* n 2, at [24].
33 *Heller Factoring supra* n 28, at [22].
34 Khattar Wong & Partners with Barker, *supra* n 1, at pp 138-139.
35 *Ibid*.
36 *Man Financial*, *supra* n 17, at [70], [72].
37 *Thomas Cowan & Co Ltd v Orme* [1961] MLJ 41 at 43.

employees, it is important to have these clauses carefully drafted and tailored to the specific information and interests you wish to protect.
