Cross Reference

[B.66] See also **Restrictive Agreements** below.

Key Points to Remember:

- There is no legal principle requiring exclusivity of employment. However, any secondary employment must not conflict with an employee's duty of fidelity to his or her employer.
- An employer is not precluded from offering employment on terms that limit an employee from taking up secondary employment although it is unlikely that a court would uphold a requirement that amounts to an unreasonable restraint of trade.

3. Restrictive Agreements

Summary

[B.67] It is not uncommon for employers to restrict the way in which employees and former employees use property, including information, belonging to the employer. Such restrictions normally take the form of a contractual obligation agreed to by an employee. Employers also frequently attempt to contractually restrain employees from maintaining contact with, or having access to, the employer's clients, customers and even employees after the employment has ended. Some employers go further by contractually precluding a former employee from working for competitors for a certain period. All of the above restrictions are commonly referred to as 'restraint of trade' clauses.

While the law permits an employer to protect itself against misuse of property belonging to the employer eg trade lists and confidential information, the law treats as *prima facie* unenforceable any attempt on the part of an employer to protect itself against mere competition.

Case note: In *Centaline Property Agency Limited v Lai Yin Yee, Karen*, District Court, Civil Action No 5854 of 2005, two employees working for Centaline commence employment with a competitor. Centaline issued proceedings to enforce the terms of a six months' non-competition agreement that the employees had earlier signed. The court acknowledged

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that in deciding whether or not to issue a more limited injunction it needed to consider not only whether there was a serious question to be tried, it also needed to take into account whether Centaline had demonstrated a reasonably good prospect of succeeding at trial.

After holding that the injunction that Centaline sought was far wider than was reasonably necessary the court limited the injunction to apply to restrict the former employees in engaging in sales activities relating to residential (but not commercial properties) in the Tuen Mun area.

Agreements Restricting Employment

[B.68] It is very common for employers to attempt to restrict the manner in which employees are employed after their employment is terminated. Contractual terms that restrict the manner of employment with third parties are commonly

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referred to as agreements in restraint of trade. The general term 'restrictive agreements' will be used here.

Restrictive agreement must be reasonable

A restrictive agreement between an employer and an employee are generally unenforceable unless such an agreement applies to some tangible subject matter that belongs to the employer and any such restraint is regarded by a court as both reasonable between the parties and reasonable by reference to the public interest. The onus of proving whether a term is reasonable rests with the person relying on the restraint.

Case-note: In *Home Essentials (HK) Ltd v John McLennan*, District Court, Civil Action No 7954 of 2002 & 943 of 2003 the question arose whether an employee had obtained his employer's consent to continue and develop his own business concurrently with his employment. The court found that the employer had consented to permit the employee to continue his own business on the condition that such activities did not adversely interfere with his employment duties. After finding that there was no evidence to suggest that the employee's business activities had in fact interfered with his employment the court concluded that the employee was not in breach of any fiduciary duties that he owed his employer.

Example 1

Restrictive agreement must apply to some tangible interest belonging to the employer

Paul Tse is employed on a part-time basis with Dragontail Co Ltd for 10 hours per week. Under the terms of his employment, Paul is prohibited from taking up secondary employment. In the event of Dragontail attempting to enforce such a restrictive agreement against Paul, it is likely that a court would query whether the employer had any tangible or genuine interest to protect. In the absence of finding such an interest a court would be highly unlikely to uphold such an agreement as being legally binding.

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Protected interest must belong to

There is a fundamental issue which is usually addressed by the courts before the question of reasonableness of a

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restrictive agreement is considered. A term restricting employment is enforceable only if it protects an interest that can either be regarded as belonging to the employer or in respect of which the employer can be considered to have sufficient interest. As a general rule, such a proprietary interest will normally include property in the form of trade secrets or recognised customer connections, but not mere competition. Terms that expressly restrain employees or former employees from enticing, soliciting or employing employees currently employed or formerly employed by an employer are usually only enforceable in the event of a court being satisfied that such employees might have access to (and misuse) trade secrets or customer connections.

Case-note: In *Midland Business Management Limited v Ng Pe Lok*, District Court, Civil Action No 6120 of 2005, four former employees of Midland took up appointments with Centaline which was a competitor. The four employees were subject to a non-competition agreement that required them not to take up appointments with a competitor for a period of six months following the termination of their appointments.

The relevant clause provided:

> "在因任何原因終止後的六個月內，僱員在事先未得主的書面同意下，不得直接或間接於指定地區擔任任何地產代理的董事、合夥人、負責人、經理、管理人、代理人或顧問，並從事僱員於此服務合約終止前六個月內之相同或類似工作，或者接受上述業務的聘用、或者參與上述業務或與上述業務有利益關係，或者 [the 'Preamble']：
>
> (a) 在指定地區所涵蓋的任何部份的物業銷售或租賃交易方面，在香港招攬、交易或從事任何地產代理業務 ['Sub-clause (a)'] 和／或；

Midland sought an injunction to prevent the former employees from working with Centaline on the following terms:

(a) directly or indirectly being engaged as director, partner, person-in-charge, manager, management personnel, agent or consultant in Centaline or such other estate agency business located in the Restricted Districts to carry on any activities of real estate agency business in respect of the sale and purchase or leasing of the Properties; and

(b) accepting employment from, participating in the business of and/or being interested in the business of Centaline or such other estate agency business located in the Restricted Districts the business of which involves the sale and purchase or leasing of the Properties.

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As a preliminary issue the court considered the burden of proof by observing:

> 13. [the non-competition clause] only has life for the following 6 Months. Since the Terminations became effective in September/October 2005, any restraint covenant under Clause 8.4 (even if valid and enforceable) will at best only have effect until late-March or mid-April 2006. It will not be possible to hold a trial before such period, so any granting of the interlocutory injunctive reliefs sought by the Plaintiff is likely to effectively decide the dispute finally.
>
> 14. In the circumstances, Mr Pow SC and Ms Tam agree that justice requires there be some consideration as to whether the Plaintiff will likely succeed at the trial. It is not enough to decide merely there is a serious question to be tried. I can do no better than to refer to the judgment of Chu J in Fortune Realty Company Ltd v Chan Hiu Yeung Dick HCA1582/2001 (unreported, 21 and 24 May 2001), which dealt with *inter alia* an application for interlocutory injunction to enforce the terms of a 6-months' restraint covenant under an employment contract between an estate agent and an estate agency company as follows:
>
>> 'I accept that, generally speaking, the principles of the *American Cyanamid* case are applicable to cases of interlocutory injunctions in restraint of trade in as much as they apply to other cases of interlocutory injunction : *Lawrence David Ltd v Ashton* [1991] 1 All ER 385. In the present case, however, it is plain that the six months period of restraint will have expired before the action is tried. This being the case, the granting or refusal of the interlocutory injunction will effectively dispose of the action in that it is very probable that the parties may not proceed further with the case after the interlocutory stage. In such circumstances, it is proper that the court should have regard to the prospects of the plaintiff succeeding in the action: *NWL Ltd v Woods* [1979] 1 WLR 1294, *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418. But it is to be noted that the court is not to embark upon a mini-trial on the affidavits. All that is required is "some assessment" of the plaintiff's prospects of success and it is for the judge to control the extent of such assessment: *Lansing Lind Ltd v Kerr* at p.258c. ...'
>
> 15. Chu J also said that at the interlocutory stage the court should only form a tentative view on the evidence and legal arguments. 'Indeed I ought to be extremely slow to come to any firm conclusion on the merits of the case. It is therefore sufficient for me to sum up by saying that [in the case before Chu J] not only has the plaintiff shown that there is a serious question to be tried, but it has also demonstrated that there is a reasonably good prospect of its succeeding at the trial.'

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The court concluded that the non-competition clause was not enforceable (as written) by reason that its terms were far from clear and definite.

In determining whether the court had the power to rewrite (ie 'blue-pencil') the non-competition clause to make it more clear and definite the court observed:

> 57. *Blue-pencil test* The blue-pencil test is succinctly stated by P J Crawford QC in *Sadler v Imperial Life Assurance Co of Canada* [1988] IRLR 388, 391–392 as follows:
>
> > 'In my judgment, the combined effect of those authorities is that a contract which contains an unenforceable provision nevertheless remains effective after the removal or severance of that provision if the following conditions are satisfied:
> >
> > 1. The unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains.
> > 2. The remaining terms continue to be supported by adequate consideration.
> > 3. The removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all.'
>
> 58. When severance is applied, the purpose and effect is to remove the offending part of the restraint covenant (which makes the covenant too wide) and to leave the remaining part to be enforced. But the court will not rewrite a restraint covenant to enable the parties, as Ms Tam puts it, to lick it into shape nor to alter the nature and sense of the agreement.
>
> 59. Ms Tam points out that in *Mason v Provident Clothing and Supply Company, Limited* [1913] AC 724, 745, Lord Moulton said as follows:
>
> '... I do not doubt that the Court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not part of the main purport and substance of the clause. It would in my opinion be pessimi exempli if, when an employer had extracted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the

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back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master ....'

60. Similar sentiments were expressed by Dillon LJ in *Provident Financial Group plc & Anor v Hayward* [1989] 3 All ER 298, 303:

'... But counsel for the defendant persists that ... it is not possible to have a wide term in the agreement which the court will whittle down so as to enforce as much of it as the court thinks right. Of course that is correct where you have in the service agreement a contract restraining the employee after termination of his agreement from operating in a particular line of activity within a specified geographical area or over a prohibited period of restriction. If it is held that the area that has been chosen by the employer or the period of restriction are too wide or too long, the court will reject the whole clause as void and will not enforce whatever maximum shorter or smaller field of restriction the court thinks would have been permissible if the parties had made such an agreement.'

Midland sought to argue that Clause 8.6 which provided:

在此服務合約雙方均認為本條款所載明的限制在任何情況下均合理時，雙方同意並聲明：

如果為了保護僱主的合法權益，上述限制因超出在所有情況下均合理的範圍而被令致無效，但是如果部份措辭被刪除或期限（如果有）被縮短或者相關活動範圍或地區範圍被縮小而使之有效，上述限制應與使之有效的修訂一起使用。每項限制應分別對待，而且互相獨立。

ought to enable the court to undertake a blue-pencil exercise more easily. In response the court observed:

71. Mr Pow SC [for the employer] submits that the process of severance may be assisted by a clause that allows deletions where the covenant is too wide (*Hinton & Higgs (UK) Ltd v Murphy & Anor* [1989] IRLR 519). In that case, clause 15 of the employees' contract provided that '[the] restrictions contained in clause 14 are considered reasonable by the parties, but in any event that any such restriction shall be found to be void would be valid if some part thereof were deleted or the period of application reduced, such restrictions shall apply with such modifications as may be necessary to make them valid or effective'. Lord Dervaird in the Outer House of the Court of Session held as follows at p 520:

'The second part, however, contemplates that the parties will abide by a result which may be effected by the deletion of some unreasonable part of the contract, rendering the contract as a whole reasonable. It has often been said that

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the courts will not make contracts for the parties. Here, however, ... the parties have agreed in advance they will accept as continuing to bind them such part of the arrangements which they have made as the court finds by deletion only to be alterations which permit the restriction to be regarded as reasonable ... I do not see why the court should refuse to perform that role ... of selecting that version of [the contract] which the parties have made inter alia with each other and enabling the bargain so modified to stand. ...'

72. Jefferson, Restraint of Trade, p 148 stated that if read literally the words in the clause in the *Hinton & Higgs (UK) Ltd* case (supra) could go very far, so it must be construed in the context in which they were issued. In that case the court severed the words 'previous or' to limit the clause to present clients. The severance clause permitted the court to modify the clause by deletion, but did not permit the court to modify the area, time or scope of the business to be protected. The learned author was of the view that Lord Dervaird's statement in the *Hinton & Higgs (UK) Ltd* case (supra) must be read in this context. Lord Dervaird himself also said he did not reach a concluded decision on this matter. The learned author went on to say that '[in] England the law is not yet laid down. It is suggested that since at the commencement of employment (or at any other time when the clause was inserted) the employee does not know the time or the area or both, the covenant is void for uncertainty'.

73. But despite the uncertainty of the law on the validity of a severance clause, Mr Pow SC submits that Clause 8.6 does not take the matter outside the confines of the *Hinton & Higgs (UK) Ltd* case (supra) or the blue-pencil test. He argues that Clause 8.6 anticipates the possible need to preserve the 1st and 2nd Prohibitions by removing Sub-clause (a). Clause 8.6 *prima facie* allows 3 steps (ie '部分措辭被刪除', '期限（如果有）被縮短' or '相關活動範圍及地區範圍被縮小') to be taken to make the restraint in Clause 8.4 effective, but since the Plaintiff presently only seeks to delete Sub-clause (a), only the step of '部分措辭被刪除' is relevant. Mr Pow SC therefore suggests that the effect of Clause 8.6 in the present circumstances is similar to running a blue pencil through Sub-clause (a) under the common law. However, in light of my conclusions on the applicability of the blue-pencil test, Clause 8.6 does not take the matter any further for the Plaintiff.

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Case-note: In *Midland Business Management Ltd v. Cheng Chi Ming*, District Court, Civil Action No. 4137 of 2005, a group of estate agents were employed by Midland in a real estate agency that was located in Mei Foo. The agents were subject to a non-competition clause that provided that for six months after their employment with Midland terminated they would not take up employment with any other real estate agency in Mei Foo. On 30 June 2005 a group of agents resigned from Midland and commenced working for Kingswood real estate agency in Mei Foo.

Midland applied for an injunction to prohibit the agents from working as real estate agents in Mei Foo at any time prior to 29 December 2005. During the hearing of the application the court quoted a statement made on behalf of Midland to the effect that:

> "the estate agency business in Hong Kong depends heavily on information relating to properties available for sale or lease. The success of an agency such as the plaintiff depends on having a sophisticated database of information, such as client details and prices of recent transactions in each of the areas in Hong Kong. The plaintiff has invested substantial sums in acquiring and maintaining a computerised information management system in order to collect, analyse and share valuable information between the plaintiff's staff. Although not every piece of information in the database may be secret, the collection, pooling and co-relation of such information into usable form requires a significant amount of time and expense, and the finished product is extremely valuable and highly confidential and is a trade secret."

The court granted an injunction holding that Midland had demonstrated that it had sufficient proprietary interest in its data base. Rather curiously the court did not make any findings concerning how Midland's data base would be misused by the agents after they had left Midland.

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Example 2

Non-proprietary interest not protectable

Faster Container Services Co Hong Kong Ltd requires all employees to agree to the following:

> 'Employees agree and undertake that upon termination of their employment with FCSC Hong Kong Ltd, they shall not, for a period of two years thereafter, directly or indirectly, engage in any business which is similar to, or directly

> compete with, the business of this company (eg a FCSC Hong Kong Ltd organisation).'
>
> As competition is not regarded as capable of being owned, such an interest (ie reducing competition) is not one that is protectable. Such a term as used in this example would be unlikely to be held enforceable by a court.

Case note: In *Landscope Real Estate Services Limited v Ming Chi Hong, Steve*, Court of First Instance, Civil Action No 819 of 2006, Landscope sought an injunction to restraining a former employee from:

(1) being engaged by any competitor;
(2) disclosing confidential information relating to Landscope to any competitor;
(3) soliciting any clients of Landscope.

Injunction to prevent former employee being engaged by any competitor: Landscope claimed that about one year prior to the employee's employment terminating he had orally agreed not to join any competitor for one year after leaving Landscope. The court refused to issue an injunction on this ground by reason that the court was not satisfied that such an undertaking had been given by the employee. The court further held that even if such an undertaking had been given, it was unenforceable as an unreasonable restraint of trade both in terms of excessive duration, excessive geographical scope and excessive scope of prohibited employment.

Injunction to prevent former employee from disclosing confidential information relating to Landscope: The court refused to issue an injunction to prevent the former employee from disclosing confidential information relating to Landscope to the competitor by reason that there was insufficient evidence as to whether the information was equivalent to a trade secret as detailed in *Toto Toys Ltd v Lee Man Shu and Others* HCA 2600/2004.

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