# Wong Bark Chuan David v Man Financial (S) Pte Ltd
# [2007] SGHC 5

**Case Number** : Suit 706/2005

**Decision Date** : 18 January 2007

**Tribunal/Court** : High Court

**Coram** : Woo Bih Li J

**Counsel Name(s)** : Chia Ho Choon and Spring Tan (KhattarWong) for the plaintiff; Andre Maniam, Ameera Ashraf, Jaclyn Neo and Wong Baochen (Wong Partnership) for the defendant

**Parties** : Wong Bark Chuan David — Man Financial (S) Pte Ltd

*Contract – Illegality and public policy – Restraint of trade – Term of termination agreement between company and former employee that former employee would receive compensation for compliance with terms of agreement – Agreement containing restrictive covenants – Whether former employee entitled to compensation even if restrictive covenants found to be invalid – Whether compliance with restrictive covenants constituting sole consideration for compensation under agreement – Whether allegation giving rise to such issue must first be pleaded*

*Contract – Illegality and public policy – Restraint of trade – Termination agreement concluded between company and former employee – Agreement containing restrictive covenants – Whether restrictive covenants amounting to restraint of trade and therefore invalid*

18 January 2007 Judgment reserved.

**Woo Bih Li J:**

**Introduction**

1 The plaintiff, Wong Bark Chuan, David ("Mr Wong") was the managing director and chief executive officer ("CEO") of the defendant Man Financial (S) Pte Ltd ("MF") which provided brokerage services. On 13 June 2005, he was asked to resign and placed on garden leave for three months from 13 June 2005 to 13 September 2005 while he served out a 3-month notice period. Mr Wong and MF then entered into an agreement regarding the termination of his employment. The terms therefore were contained in a termination agreement (in the form of a letter) dated 13 June 2005 ("the TA") which he accepted on 23 June 2005. The TA contained provisions on non-solicitation and non-competition for a period of 7 months up to 13 January 2006. Under the TA, Mr Wong was to receive certain benefits on 13 September 2005 provided he was not in breach of any of the terms of the TA. The benefits were:

(a) 13,014 shares in Man Group plc and

(b) US$263,000.

I will refer to them collectively as "the Compensation".

2 MF alleged that Mr Wong had breached paragraphs C.1 and C.3 of the TA by soliciting the employment of employees or former employees of MF and by participating or rendering advice to a competitor, Refco (S) Pte Ltd ("Refco"). Therefore, MF declined to pay the Compensation.

3 Consequently, Mr Wong commenced this action to claim the Compensation. Although MF relied

only on breaches of paragraphs C.1 and C.3 of the TA to defend its position, I set out below paragraphs B.1 and B.2, C.1 to C.4 and D.1 as they have some bearing on the issues or arguments:

**B. Payment on Termination**

B.1. In consideration of you:-

(a) serving out your Notice Period on leave from the office, and

(b) agreeing to the terms and conditions set forth herein, apart from paying you your full salary and allowances during the Notice Period the Company agrees to pay you:

(i) 13,014 shares in Man Group plc granted to you under the terms of the Man Group plc 2002, 2003 and 2004 coinvestment schemes (as at close of business 10 June 2005 valued at approximately US$330,000); and

(ii) a goodwill payment of US$263,000.

B.2. Save in the event that you breach any of the terms of this Termination Agreement, the sums set out in B.1(b) above will be paid to you in full and without deduction at the end of the Notice Period, on 13 September 2005.

**C. Non-Solicitation and Non-Competition**

C.1. In further consideration of the foregoing, you agree that for a period of seven (7) months from the Termination Date, that is, up to 13 January 2006 you shall not directly or indirectly employ or solicit the employment of (whether as an employee, officer, director, agent or consultant) any person who is or was at any time during the period 13 June 2004 to 13 June 2005 an officer, director, representative or employee of the Company. For avoidance of doubt, you shall not be deemed to employ any person unless you are involved or have otherwise provided input into the decision to hire such individual.

C.2. In further consideration of the foregoing, you agree that for a period of seven (7) months from the Termination Date, that is, up to 13 January 2006, you shall not directly or indirectly either for yourself or for any other business in person, solicit, call upon, attempt to solicit or attempt to call upon any party who is or was at any time during the period 13 June 2004 to 13 June 2005 a client of the Company and you will not accept any business from such clients of the Company for yourself or for any employer during such period. The said restriction shall apply anywhere in the world, and for products and services in direct competition with products and services offered by the Company.

C.3. In further consideration of the foregoing, you agree that you will not either directly or indirectly for a period of seven (7) months from the Termination Date, that is up to 13 January 2006, anywhere in the world, organize, own, manage, operate, participate in, render advice to, control, or have an investment or ownership interest in any business that engages in the marketing and/or sale of products, services and/or systems which are in competition with those provided by the Company.

C.4. You agree that this Paragraph C is reasonable and necessary for the protection of the Company's interests, and that you have agreed to these clauses in consideration of the amounts to be paid to you as set out in Paragraph B above.

**D. Release and Discharge**

In further consideration of the foregoing, you hereby unconditionally and irrevocably discharge and release the Company, its parent, officers and directors, and their successors and assigns from any and all claims, demands, causes of action, suits, charges, violation and/or liability whatsoever, known or unknown involving any matter arising out of or in any way related, directly or indirectly, to your employment with the Company or the termination thereof other than your entitlements and benefits under this Termination Agreement.

**The Issues**

4 The issues are:

(a) whether Mr Wong had solicited the employment of various employees or former employees of MF to work in Refco,

(b) whether Mr Wong had participated in or rendered advice to Refco,

(c) if (a) and/or (b) applies, whether Mr Wong was prima facie in breach of paragraphs C.1 and/or C.3,

(d) if so, whether paragraphs C.1 and/or C.3 was invalid for being in unreasonable restraint of trade,

(e) if paragraphs C.1 and/or C.3 was invalid, whether Mr Wong would still be entitled to the Compensation, and whether the allegation giving rise to this issue must first be pleaded,

(f) whether the requirement in paragraph B.2 that Mr Wong must not be in breach of any of the terms in the TA to be entitled to the Compensation was an unenforceable penalty.

***Whether Mr Wong had solicited the employment of various employees or former employees to work in Refco***

5 MF asserted that Mr Wong had solicited the employment of Tricia Ng Geok Tin and Tan Siang Hwee who were MF's employees during the prohibited period of 13 June 2005 to 13 January 2006, as well as the employment of 11 others who had left MF before or during the prohibited period.

6 From the affidavit of evidence-in-chief ("AEIC") of Mr Lai Eng Keat, as clarified and amended by his oral evidence, I set out below the names of those other 11 persons and particulars of the dates of their resignations from MF, the dates of letters of offer to each of them from Refco, their last dates with MF and the dates they commenced employment with Refco:

| | **Date of resignation** | **Date of letters of offers from Refco** | **Date left Man Financial** | **Date commenced employment at Refco** |
|---|---|---|---|---|
| | | | | |

| | | | | |
|---|---|---|---|---|
| Fennie Lim ("Fennie") | Left before 13 June 2005 | 4 Aug 2005 | 30 Jun 2005 | 16 Aug 2005 |
| Woon Keng Hua also known as Dickson Woon ("Dickson") | 20 Jun 2005 | 30 Jun 2005 | 8 Jul 2005 | 11 Jul 2005 |
| Joey Sim ("Joey") | 20 Jun 2005 | 30 Jun 2005 | 31 Jul 2005 | 16 Aug 2005 |
| Diana Sim ("Diana") | 20 Jun 2005 | 1 Jul 2005 | 6 Aug 2005 | 16 Aug 2005 |
| David Tan | 21 Jun 2005 | 12 Jul 2005 | 20 Sept 2005 | 21 Sept 2005 |
| Malcolm Yeo ("Malcolm") | 22 Jun 2005 | 16 Jun 2005 | 21 Jul 2005 | 25 Jul 2005 |
| June Lim ("June") | 23 Jun 2005 | 5 Aug 2005 | 28 Jun 2005 | 16 Aug 2005 |
| Voo Tung Heng ("Voo") | 27 Jun 2005 | 5 Jul 2005 | 26 Jul 2005 | 27 Jul 2005 |
| Seet Choon Seng also known as Dennis Seet ("Dennis") | 1 Jul 2005 | 28 Jun 2005 | 15 Aug 2005 | 16 Aug 2005 |
| Jacob Djaja ("Jacob") | 23 Aug 2005 | 18 Jul 2005 | 2 Sept 2005 | 5 Sept 2005 |
| Vincent Quah ("Vincent") | 24 Aug 2005 | 22 Aug 2005 | 24 Sept 2005 | 26 Sept 2005 |

7 I also set out the names of the witnesses for Mr Wong and for MF:

PW1 Mr Wong, the plaintiff.

PW2 Dickson. He was a vice president and chief dealer of MF's Foreign Exchange desk before

he moved to Refco. At the time of the trial he was no longer with Refco but was a senior dealer at Philip Futures Pte Ltd.

PW3 Voo. He was vice president responsible for the development of the foreign exchange business of MF before he moved to Refco. At the time of the trial he was no longer with Refco but was an associate at DBS Vickers Securities Online (S) Pte Ltd.

PW4 June. She had held various positions in MF before she joined Refco. At the time of the trial she was a homemaker.

PW5 Jacob. He was an independent account executive at MF and then at Refco meaning that he was servicing his own clients. At the time of the trial he was an independent account executive with OCBC Securities Private Limited.

PW6 Dennis. He was at one time the chief operating officer ("COO") and the de facto deputy CEO of MF. In early 2004, he moved out of the COO role to assume direct responsibility for business units including general brokerage, equities and Taiwan. However, he continued to assist Mr Wong with management on an ad hoc basis. He left MF for Refco but at the time of the trial he was unemployed.

DW1 Lai Eng Keat ("Eng Keat"). He was working with Mr Wong at MF and at the time of the trial he was the Deputy CEO and COO of MF.

DW2 Seow Hock Hin ("Hock Hin"). He was at all material times a senior vice president at Refco.

DW3 Tricia Ng Geok Tin ("Tricia"). She was at all material times working at MF. At the time of the trial she was a vice president of MF.

DW4 Tan Siang Hwee ("Siang Hwee"). She was also at all material times working at MF. At the time of the trial she was also a vice president of MF.

DW5 Daniel Yeo Chin Tuan ("Daniel"). He was working in MF and took over as CEO of MF from Mr Wong. He was still holding that position at the time of trial.

8 Christopher John Robert Smith who was the Chairman and COO of Man Financial Ltd at all material times also executed an AEIC. His attendance for cross-examination was not required and his AEIC was admitted with the leave of the court. The lead counsel for Mr Wong was Mr Chia Ho Choon. The lead counsel for MF was Mr Andre Maniam.

9 Mr Wong's evidence was that although he had had discussions with Tan Hup Thye ("Hup Thye") who was the Managing Director and CEO of Refco about the possibility of his joining Refco before the TA was entered into, Mr Wong had no further intention of joining Refco after the TA was entered into even though he was entitled to join them after the period of restraint. It was also Mr Wong's evidence that after the TA was signed, he did not explore further with Hup Thye about the idea of his joining Refco. Neither did Mr Wong discuss with Hup Thye, or Dennis, about the eventual employment of the 11 people mentioned above or of Tricia and Siang Hwee.

10 MF's position was that after Mr Wong entered into the TA, Mr Wong had had a consensus with Hup Thye that he (Mr Wong) and various persons employed by MF would join Refco. Mr Wong would be joining Refco after the period of restraint but the others would join first. To this end, Mr Wong

had, during the period of restraint, solicited directly or indirectly the employment of the 11 people, or some of them, as well as that of Tricia and Siang Hwee. I should also mention that it was common ground that none of the 11 people was under any restraint not to join a competitor or not to solicit the employment of employees or former employees of MF for a competitor. Accordingly, for example, Dennis himself was not prohibited from soliciting the employment of such employees or former employees. However, MF's position was that where Dennis did solicit the employment of such persons, this was pursuant to the consensus which Mr Wong had had with Hup Thye.

11 I would add that, ironically perhaps, Refco was acquired by MF in December 2005. Therefore, even if Mr Wong was to join Refco after the period of restraint, he did not do so eventually. At the time of the trial he remained unemployed. As for Hup Thye, he left Refco after it was acquired by MF. Neither side called him to give evidence. I will deal first with the allegations about Mr Wong's solicitation directly or indirectly of Tricia, Siang Hwee and then the 11 people.

12 It is useful to understand the relationship between Mr Wong and some of the people mentioned. Some of MF's witnesses referred to Mr Wong's "team" at MF whereas Mr Wong's position was that as the CEO, every one of the staff was working under him and he had no "team" as such. Siang Hwee's evidence was that by Mr Wong's "team" she meant those who were close to him socially ie those who attended dinners and lunches with him socially and/or who went on tours with him (NE 921). Siang Hwee also listed those who were close to Mr Wong in the following order with those who were closer to him nearer the top end of the list (NE 929):

Joey

Diana

Dennis

Jacob

Dickson

David Tan/Siang Hwee

Voo

Malcolm

June

Vincent

Fennie

Joey, Diana and Dennis were closest to Mr Wong. I should mention that although Joey and Diana share the same surname, they are not related to each other. Siang Hwee considered herself to be quite close to Mr Wong but this was disputed. She said Tricia was closer to Mr Wong than she was (NE 931). It was not disputed that Tricia was close to Mr Wong.

13 It was evident to me that there were some employees of MF who were closer to Mr Wong than others. I should mention that although Mr Wong had said that he was not close to Dickson, Voo, Malcolm and June, he also said he considered them as friends. I accept Siang Hwee's list as set out

above which was not really in dispute except for herself.

*Tricia*

14 As I have mentioned, Tricia was close to Mr Wong.

15 She said that on the night of 12 June 2005 ie just before Mr Wong was put on garden leave on 13 June 2005, Mr Wong had sent her a short text message ("SMS") saying that there would be a new boss the next day. She called him to find out what he meant and he said she would find out who the new boss was the next day and that he had already made plans. He also said he would tell her more about his plans later. Mr Wong did not deny that he had sent such an SMS nor the fact of a telephone conversation with her thereafter. However, he denied the substance of the telephone conversation as alleged by her.

16 Tricia said that the next day she learned that Daniel had taken over Mr Wong as managing director of MF. Several colleagues whom she perceived to be close to Mr Wong resigned in the next few months.

17 On 21 June 2005, Tricia had dinner with Mr Wong, Joey and Diana at Corduroy & Finch. The day before, on 20 June 2005, both Joey and Diana had tendered their resignations from MF but were still in the employ of MF until 31 July and 6 August 2005 respectively. Tricia said that at the dinner, Mr Wong said something about if he were to go somewhere and he punched a figure of 5,000 in his handphone to indicate a proposal of a $5,000 salary to her and asked her if it was okay with her. She smiled back at him but did not reply. Mr Wong did not deny the occasion of the dinner but denied that he had mentioned if he were to go somewhere or punched in the figure of 5,000 or asked her if it was okay with her.

18 On 21 July 2005, Tricia met with Dennis at Starbucks at Philip Street. Dennis had tendered his resignation from MF on 1 July 2005 and was serving his notice until 15 August 2005. He commenced employment with Refco on 16 August 2005. According to Tricia, Dennis asked her to meet him on 21 July 2005. He told her he would be joining Refco, offered her a job there with a salary of $5,000 per month and asked her to prepare her resume and hand it to him before he went on leave. She simply replied, "Okay".

19 Dennis's version was different. He alleged that it was Tricia who had asked him to meet her on 21 July 2005. She had been reporting directly to him for the securities business in a dealing and administrative capacity. At the meeting, she asked him about his plans and asked if he was joining Refco. As he had been working with her for many years and after she promised to keep the conversation confidential, he told her he was joining Refco. Dennis alleged that Tricia indicated she was not sure where she stood with the new CEO of MF and asked if he thought that Refco would be a better place to work in. He jokingly asked her if she would prefer to stay put at MF so that if MF closed its securities business she might get retrenchment benefits. This was his way of hinting that he did not want her at Refco. Dennis also said that he knew about Tricia's inability to work with June and Joey. Joey had already received a job offer from Refco then and June was likely to join Refco. Dennis said that June and Joey, being graduates with marketing experience, were suitable for the task of developing and managing the securities and contract for difference businesses at Refco whereas Tricia was basically a dealer servicing house clients without marketing experience or clients of her own other than relatives and friends. He did tell Tricia that she could send her resume directly to Refco if she wished but clarified that it would not be to work with his team.

20 According to Tricia, Dennis then sent her an SMS on 25 July 2005 to ask her for her resume

again. Dennis, however, said he could not recall having done so.

21 According to Tricia, there was another telephone discussion with Mr Wong which she thought had occurred in early August 2005. He had called her, but his phone number was not displayed on her mobile phone, to say that Refco had a full dealing licence and could deal with retail clients. Mr Wong had also said he was with Hup Thye. Mr Wong said if she was interested in knowing more he could clarify with Hup Thye there and then. Tricia said she told him she was busy and would call him back but did not do so. She said she did not know how to give him a negative response to his approaches. On the other hand, Mr Wong denied such a conversation.

22 Tricia said that in August 2005, she bumped into David Tan and joined him for coffee at Starbucks at Philip Street. David Tan had mentioned to her that Mr Wong was "cracking his head" to see how to get his team at MF over to Refco. David Tan was not called by Mr Wong to give evidence on this allegation but Mr Chia criticized the reliability of Tricia's evidence on this point as I shall elaborate later.

23 Tricia asserted that on or about 23 August 2005, she met up with Dennis, again at his request, this time for lunch at Tea Spa at Caltex House. During lunch, Dennis again tried to persuade her to join Refco. As she was not keen to leave MF she told him she would consider moving some time next year. She did not hear from Dennis again. Dennis disagreed that he had initiated the lunch meeting. He said Tricia was still his broker and as they were talking they agreed to have lunch that day. Paragraphs 40 and 41 of his AEIC stated.

> **MY LUNCH MEETING WITH TRICIA NG ON 23 AUGUST 2005**
>
> 40. … On account of our earlier meeting in July 2005, I personally met with Tricia Ng to explain why it was not feasible for her to join me at REFCO and, quite importantly, why I preferred to talk about it only now and not earlier (when we met in July 2005).
>
> 41. We met for lunch on 23 August 2005. During the course of lunch, I told Tricia Ng that I did not feel it appropriate for me to talk about my plans at REFCO when we met earlier in July 2005 as I had not joined REFCO then. I told Tricia Ng that REFCO had offered employment to June Lim and Joey Sim as they were no longer in MAN's employment and were looking for jobs. I further told her that there was nothing personal about my decision as it was based solely on June Lim and Joey Sim being available and also capable of developing and managing both the securities and the CFD business. As I was aware of ill-feelings between Tricia Ng and June Lim, I apologised to her if I had disappointed her in any way. As I anticipated that June Lim and Joey Sim would be approaching certain securities clients of MAN whom they were also servicing at MAN, I took the opportunity to ask Tricia Ng not to take it personally if June Lim or Joey Sim should approach any of such clients as such was the nature of the business. She said that she understood the situation.

24 I come now to events between 31 August and 16 September 2005. Tricia asserted that on 31 August 2005, she had received a call from Mr Wong at night. After asking her if she was alone, he informed her that he understood she was not joining the team at Refco yet. After she confirmed that, he told her that if she did not join the team at Refco, they would start competing for her clients and would charge as low as 25 basis points, meaning 0.25%, as commission. He told her this would cause her sales volume to be lowered by half. Tricia was very upset. She thought it was unfair for her former colleagues to try and poach her clients. She informed Mr Wong that she would like another week to consider as her daughter was sick and she herself was not feeling well. He agreed. However, on or about 1 September 2005, Tricia received calls from some of her clients asking her about a letter

they had received from Refco which was signed by Joey. She was shocked and upset as she had informed Mr Wong that she would get back to him in a week's time. She called some other clients who also said they had received similar letters. She complained to Eng Keat about the attempts to poach her clients. On or about 6 September 2005, she had lunch with Daniel. She was still upset. She told Daniel what had transpired and that Mr Wong and Dennis had approached her on several occasions to join Refco.

25 On 7 September 2005, MF's solicitors, Wong Partnership, sent a letter to Mr Wong alleging that he had breached various provisions in the TA by soliciting or attempting to solicit the employment of several of MF's employees on behalf of a competitor.

26 Tricia alleged that on the night of 7 September 2005, Mr Wong had called her to ask whether she had told anyone that he had called her. She told him "No" as she did not want to upset him.

27 On 9 September 2005, Mr Wong replied to Wong Partnership to dispute that he had breached the TA.

28 According to Tricia, Eng Keat approached her on or about 9 September 2005 to ask her about her conversation with Mr Wong (which she had allegedly already informed Daniel about). He asked her to put her version in black and white which she did. Her undated letter addressed to Daniel, was Exhibit D1.

29 On 13 September 2005, Wong Partnership wrote again to Mr Wong. This time their letter mentioned specifically the conversation he had allegedly had with Tricia on or about 31 August 2005.

30 Tricia alleged that on the same day, ie 13 September 2005, Mr Wong called her from a number that was not his usual number and was unfamiliar to her. He asked her whether her phone was tapped. She was surprised and said "No". He asked her why she said "those things" and said he had treated her as a friend and only wanted to retire. He asked whether MF had coerced her into saying he tried to solicit her employment and she denied this. After a while, Mr Wong said he would hang up since she did not want to say anything to him but suggested that she call him if she wanted to tell him anything.

31 On 16 September 2005, Mr Wong replied to Wong Partnership to deny that he had solicited Tricia's employment. He also said in that letter that he would respond more fully after he heard directly from Tricia.

32 Mr Wong did not deny the fact that he had had a telephone discussion with Tricia in the night of 31 August 2005. However, he denied her version of the substance of the conversation saying that it was friendly banter on various topics including topics which he had exchanged emails with her earlier on the same day. Mr Wong also did not deny the telephone conversation with Tricia on 7 September 2005 but again he disagreed with her version of the substance of the conversation. Mr Wong asserted that he had asked Tricia whether she was aware of any employee of MF alleging that he had approached that person to join a competitor. She said she had no such knowledge. As for the alleged telephone discussion with Tricia on 13 September 2005, Mr Wong denied that he had spoken to her then.

33 Mr Wong's position was that there was no reason why he should approach Tricia and that Dennis did not even want her. In addition to Dennis' reasons, see [19] above, Mr Wong said that the key businesses of MF then were businesses other than securities business which was a barely profitable and marginal business contributing about 2% only to MF's operating profit. Mr Wong said

there were more capable producers in MF whom he knew well but did not attempt to persuade to join Refco. On the other hand, I note that there was also evidence as to why he and/or Dennis might have wanted her to join Refco. First, Tricia was handling the accounts of Mr Wong and of Dennis at MF. They must have been happy for her to do so. Secondly, she was the most senior person in MF manning MF's securities desk. Indeed, at the time when Dennis left MF, she was the only one manning that desk. If she went over to Refco, that would have been a loss to MF although Dennis sought to deny this. Thirdly, although Dennis said he was already getting Joey and June for his team, June did not have a licence to deal in securities at the time and it was not suggested that her role would be confined to marketing. June only obtained her licence on 4 November 2005. It would have made sense for Dennis to get Tricia provided she would agree to join Refco. Furthermore, it was June's evidence that after she tendered her resignation on 23 June 2005 from MF, she made a courtesy telephone call on Dennis in early July 2005. When she asked, Dennis informed her he was joining Refco and he told her that if she was interested, she could apply to join Refco which she eventually did. From June's evidence on this point, it was not Dennis who had sought her out to join Refco. True, Dennis and June suggested that Tricia could not work with Joey and June herself had difficulties working with Tricia. However, neither Mr Wong nor Dennis suggested that that was the primary reason why Tricia would not have been welcome to join Refco.

34 The fact that the securities business was a small part of MF's business, as well as a small part of Refco's business, is neither here nor there as that could be an area of growth. On balance, I do not accept that there was no reason to solicit Tricia's employment for Refco. The next question is whether Mr Wong had approached Tricia to join Refco.

35 I accept that there were aspects of Tricia's evidence which appeared unsatisfactory. They cast doubts initially on her credibility and the truth of her primary allegation that Mr Wong had approached her to join Refco. I need only mention some of these aspects.

36 For example, in the course of the trial, Tricia mentioned that during the dinner of 21 June 2005 at Corduroy & Finch, Mr Wong had punched in the figure of "5000" and asked her if this was acceptable to her. This would be the first attempt by him to solicit her employment, yet that incident was not mentioned in her AEIC.

37 Secondly, there was evidence from SingTel Mobile that Mr Wong's caller number non-display service for two mobile numbers which he had subscribed for had been terminated since 29 July 2005. Notwithstanding this, she maintained that his call which did not display his number, when he was allegedly with Hup Thye, was made in early August 2005.

38 Thirdly, she denied she was insecure about her job at MF and thus she said she did not mention any job insecurity to Dennis at the meeting with him of 21 July 2005, as he had alleged. Yet, she herself said that on 13 June 2005, when the appointment of a new CEO at MF was announced and Mr Wong had began his garden leave, both Joey and Diana were asked to go on leave but luckily she was not asked to do so as well.

39 Fourthly, as regards Tricia's discussion with David Tan in early August 2005, Tricia said that David Tan had told her that Mr Wong was "cracking his head" as to how to get his team at MF over to Refco. When asked who this team was, she said it was David Tan and Dickson. However the evidence showed that before August 2005, David Tan and Dickson had already resigned from MF and had received letters of offers from Refco. When such evidence was brought to Tricia's attention, she said David Tan meant that Mr Wong had been "cracking his head" earlier in June and July 2005 and not at the time of her discussion with David Tan.

40 Fifthly, it is not disputed that after Tricia had found out about Joey's letters to her clients notwithstanding that Mr Wong had allegedly agreed to wait one week, there was an exchange of SMSes between Tricia and Mr Wong on 9 September 2005 on casual matters like whether she was going on vacation. If Mr Wong had reneged on his agreement about waiting a week, Tricia should have been unhappy with him and yet she was content to carry on communicating with him as though nothing had happened.

41 Sixthly, Tricia denied that she was shown a copy of any of Wong Partnership's letters to Mr Wong until she took the witness stand but Eng Keat's evidence was that he showed Tricia the letter of 13 September 2005 as MF needed to find out more from her and to let her know that MF was taking legal action. To me, Eng Keat was probably correct and Tricia was incorrect on this point.

42 However, there were also other aspects of the evidence before me which suggested that she was telling the truth on her primary allegation. I now deal with these aspects and Mr Chia's submissions thereon.

43 First, as mentioned, it was not disputed that Mr Wong had called Tricia in the night of 31 August 2005. She asserted, without challenge, that that night she was at her mother's home when her daughter had taken ill. To ensure that her daughter reached a clinic in time, she had got her mother to bring her daughter to the clinic while she went home to obtain her daughter's birth certificate to register her daughter at the clinic. It was at that time that Mr Wong called her. As mentioned, the dispute in evidence was as regards the substance of that conversation which lasted 6 minutes 7 seconds. Mr Chia submitted that it was inconceivable that Mr Wong would threaten Tricia that night about soliciting her clients when earlier that day, there was an exchange of emails between them on casual matters with a friendly tone. I do not agree with this submission. A friendly tone earlier in the day does not exclude a less than friendly tone later in the night.

44 Mr Chia also submitted that if Tricia was right about the substance of the conversation, it would not have taken 6 minutes 7 seconds. The conversation would have been a much shorter one since it appeared from Tricia's version to be one-sided and since Tricia was busy looking for the birth certificate of her daughter. It seems to me that the shoe was on the other foot. Mr Wong and Tricia had already had an exchange of emails earlier that day on casual matters. What was the purpose of calling her at night to repeat the casual discussion? Furthermore, if they were really talking about casual matters that night and given that Tricia was busy looking for the birth certificate and her daughter was ill, it would have been more likely that she would have asked to cut the conversation much shorter than 6 minutes if they were engaged in discussing about casual matters only. Indeed she intimated that she had to get back to Mr Wong. In my view, this tallies with a situation whereby she was busy looking for the birth certificate and then finding it and leaving home, and also finding it difficult to say "No" to Mr Wong. I am of the view that Mr Wong must have spent some time to try and persuade her to join Refco coupled with the threat.

45 Mr Chia also submitted that Tricia's undated statement to Daniel, Exhibit D1, contained less details than her AEIC but I am not inclined to give much weight to this submission. Even if her statement was drafted with assistance from others, it may have been done rather quickly to provide Daniel with a statement. It was not so surprising that the AEIC would contain more details even though it still did not mention the incident of the dinner of 21 June 2005, see [17] above.

46 Mr Chia also submitted that it was unbelievable that Mr Wong would have agreed to give Tricia a week to consider and then renege on his agreement the next day by allowing Joey to send the letters to Tricia's clients. I do not see why such a situation is unbelievable. Mr Wong could have simply changed his mind or perhaps he was non-committal when Tricia said she would revert in a

week's time but she understood him to have agreed to wait.

47 What is more significant, in my view, is that it was not disputed that Tricia was upset by Joey's letters to her clients. I wondered why she was so upset given that she must have known or heard about colleagues leaving MF and joining Refco. Surely the competition could not have come as such a surprise to her. On this point, another piece of evidence is significant. In paragraph 41 of Dennis' AEIC, which I set out in [23] above, he said that at the second meeting he had had with Tricia, on 23 August 2005, he had taken the opportunity to ask Tricia not to take it personally if June or Joey should approach her clients as such was the nature of the business and Tricia had said she understood. If Dennis' version was correct, Tricia would not have been upset on 1 September 2005 after she learned about Joey's letters. Was she upset simply because Joey had written to her clients instead of speaking to them? In my view, what really caused her to be upset was not so much the mere fact of the competition from Joey's letters but that she thought that Mr Wong had agreed to give her a week to get back to him. She said a few times that one moment they approached her (to join Refco) and another moment they were approaching her clients (see NE 801, 802, 824). She was confused. She was asking herself what was going on (NE 823, 824). True, when Tricia complained to Eng Keat on 1 September 2005, she only mentioned Joey's letters and not Mr Wong's 31 August 2005 conversation with her. Initially, I wondered why she did not mention that conversation if that, together with Joey's letters, was what caused her to be so upset. However, it seems to me that she did not then mention the conversation with Mr Wong because at that time she still did not want to reveal that she had been approached to join Refco. It was only a few days later, on or about 6 September 2005, when she was still troubled and Daniel spoke to her that she made this revelation.

48 Why then did Tricia continue to exchange casual SMSes with Mr Wong on 9 September 2005 if she had been played out by him? I believe she still looked up to him and did not want to sever ties with him. Indeed she was probably feeling guilty about mentioning Mr Wong's attempt to solicit her employment to Daniel on or about 6 September 2005 and later to Eng Keat on or about 9 September 2005. That is why on 7 September 2005, when Mr Wong called her after the first letter from Wong Partnership, she did not question him as to why he had not waited the one week for her response.

49 I come now to other significant aspects of the evidence regarding Mr Wong's solicitation of Tricia.

50 It will be recalled that after Wong Partnership's first letter of 7 September 2005, Mr Wong had called Tricia that same day to find out more, although again he and Tricia disagreed on the substance of that conversation. Mr Wong replied to Wong Partnership on 8 September 2005 and on 13 September 2005, Wong Partnership sent a second letter to Mr Wong. It was this second letter that mentioned his solicitation of Tricia specifically whereas the first letter did not mention anyone in particular. What was Mr Wong's response to this second letter from Wong Partnership? Tricia's evidence was that he called her that same night to remonstrate with her. He, on the other hand, denied calling her. His reason for not calling her was that he realised then that she had not told him the truth on 7 September 2005 when she said she did not know of any employees of MF who had alleged solicitation by him (NE 129).

51 I consider Mr Wong's evidence on this point to be troubling. He had left MF in unpleasant circumstances but Tricia was still close to him. Since Wong Partnership's second letter had mentioned Tricia as the source of MF's subsequent allegation against Mr Wong, why should he assume that MF was telling the truth? They could just have been trying to deny him the Compensation, as he subsequently suggested or there could have been a miscommunication between Tricia and MF. If he did not do what he had been accused of, the natural response would have been for him to call Tricia to tell her that her name had been mentioned and to ask her what she had told MF, if anything.

Indeed, in his reply dated 16 September 2005 to Wong Partnership, he had said he would respond more fully after he heard directly from Tricia, see [31] above. This aspect of his reply is telling. It reinforces my view that it would have been only natural for him to check with Tricia on Wong Partnership's second letter just as he had called her after he received their first letter. Yet, he said he did not speak to her after he received the second letter.

52 There is another aspect of the evidence regarding the call to Tricia on 13 September 2005 which is also damaging for Mr Wong. Tricia's phone records show that there was indeed a call to her that day from a number that she was unfamiliar with. That number was 659XXX9789. According to Mr Wong, that was Joey's second number. Joey's first number, which Tricia was familiar with, was 9XXX3740.

53 If Tricia's version is correct, it would mean that Mr Wong had used Joey's phone to call Tricia on 13 September 2005. Yet, in the context of Mr Wong's evidence vis-à-vis Siang Hwee, Mr Wong had asserted that he was never in the habit of using other people's mobile phones as he carried two mobile phones and also spare batteries, see para 42 of his AEIC. Jacob also confirmed that Mr Wong carried two mobile phones and spare batteries in paragraph 18 of his AEIC, also in the context of evidence vis-à-vis Siang Hwee. I assumed that such assertions would also apply vis-à-vis the disputed call to Tricia. However, if Mr Wong's position was that he never used either of Joey's phones to call anyone, it would have been a simple matter for him to call Joey as a witness to corroborate this and, more importantly, also to give evidence as to who had called Tricia using Joey's mobile phone that significant day. It was unlikely, although not impossible, to be Joey herself as she was the one who had signed off on the letters sent to Tricia's clients. There might have been an innocent explanation but Joey was not called to explain. No satisfactory reason was given for his omission to call Joey. I should mention that although Tricia's phone records were disclosed only after the close of Mr Wong's case, Mr Chia could still have applied to call Joey as a witness, and if necessary, to recall Mr Wong as a witness. No such application was made. On the other hand, Mr Chia did apply to recall Tricia, which application was granted by me, when Mr Wong also subsequently tendered evidence about his own phone records.

54 I draw an adverse inference against Mr Wong for his omission to call Joey. Joey was a material witness on this point and, as I shall elaborate later, on a second point regarding a call made to Siang Hwee on Joey's mobile phone as well as on a third point regarding emails which Joey had copied to Mr Wong.

55 Mr Chia had sought to attack Tricia's evidence about the call on 13 September 2005 being from an unfamiliar number by pointing out that actually the call on 7 September 2005, the existence of which was conceded by Mr Wong, was also from an unfamiliar number ie. 6XXX1106. This was from Mr Wong's office at a wine shop at Merchant Square. Yet Tricia had not alluded to this as an unfamiliar number. I do not think Tricia's omission to note that this too was an unfamiliar number affects her evidence that the call on 13 September 2005 was from an unfamiliar number. It was not disputed that both numbers were unfamiliar to her. She might not have noticed at the time she took the call on 7 September 2005 that it was from an unfamiliar number. She was not cross-examined on her supposed omission to note that this was an unfamiliar number too.

56 Mr Chia also submitted that while Tricia took the trouble subsequently, but before the trial, to call 100 to find out the location of the fixed line 6XXX1106, after she had obtained her telephone records, she apparently did not try to check the identity of the subscriber of 659XXX9789. I am of the view that this submission is neither here nor there. Mr Chia did not ask her whether she had in fact tried to obtain more information about that number 659XXX9789 or whether she had a reason for not trying to obtain more information. It may have been that Tricia did attempt to obtain more

information from 100 but got no further information as that was a mobile number or Tricia did not ask 100 for more information about the mobile number because she believed it was untraceable through 100. In any event, as I mentioned, it was not disputed that both numbers were unfamiliar to Tricia, whether she had sought to find out more or not later.

57 I would add that I also prefer Tricia's evidence to Dennis' on the allegation whether he had solicited her employment. I reiterate that Dennis himself was not precluded from doing so but if he lied about it, it would suggest that he did so to support Mr Wong's own lie about the primary allegation and whether Mr Wong had had the consensus with Hup Thye as suggested by MF.

58 Let me backtrack on the chronology and summarise some of the evidence. It is undisputed that Dennis met Tricia at Starbucks at Philip Street on 21 July 2005. Dennis denied he had approached Tricia to join his team. Instead he asserted that he indicated he did not want her for his team. However, he did suggest that she could still send her resume to Refco if she wished. Tricia alleged that on 25 July 2005, Dennis sent her an SMS to remind her about the resume. Dennis' evidence on this point was unsatisfactory. It vacillated between not being able to recollect if he had sent such an SMS to denying that he did. Eventually, he appeared to maintain that he could not recollect doing so, see [20] above. As Mr Maniam submitted, if Dennis truly did not want Tricia, he would have been certain that he had not subsequently sent her such an SMS. By then, he had tendered his resignation from MF and was serving out his notice. He would have been busy making his own plans rather than sending a reminder to her about her resume, when he did not want her.

59 However, Mr Chia submitted that if Dennis had really offered Tricia a monthly salary of $5,000 in that meeting, as Tricia had alleged, it was inconceivable that he would have insisted on having her resume since the offer had already been made. I do not agree that it is inconceivable for Dennis to have offered Tricia a job and also asked her for her resume. The latter could be an administrative requirement at Refco.

60 Furthermore, if Dennis really did not want Tricia in his team, why did he meet with her a second time on 23 August 2005 at Tea Spa at Caltex House? By then he had joined Refco on or about 16 August 2005. As Mr Maniam submitted, Dennis would have been busy setting up his operations there. I do not accept Dennis' explanation that he met Tricia because he felt he had to explain to Tricia why it was not feasible for her to join him at Refco. She is not someone he wanted and he had already signalled this to her at their first meeting. I am of the view that his reason was his attempt to explain why he would see Tricia again on 23 August 2005. I do not accept his explanation.

61 I have already mentioned in [47] above Dennis' version that he had alerted Tricia that Joey or June would be likely to approach her clients and she said she would understand. I do not believe Dennis' evidence that he told Tricia this or about her response. If his evidence was true, she would not have been subsequently upset by Joey's letters to clients she was servicing, as I have mentioned. I find that, on 23 August 2005, Dennis was still trying to persuade Tricia to join Refco.

62 There was also evidence from Tricia and Jacob about their discussions in respect of her primary allegation about Mr Wong's solicitation as well as on Jacob's own solicitation of Tricia to join Refco. In the light of the evidence I have discussed, it is not necessary for me to dwell on Tricia's and Jacob's evidence on such discussions. Suffice it for me to say that I do not accept Jacob's evidence where his evidence disagrees with Tricia on the primary allegation.

63 Mr Chia submitted that the other witnesses for Mr Wong were independent witnesses whereas those for MF were not as they were working for MF. I do not agree that Mr Wong's other witnesses ie, Dickson, Voo, June, Jacob and Dennis were independent witnesses. They had worked with

Mr Wong in MF and were either close to him or on friendly terms with him. They were part of the group of people who went to work at Refco. Dennis was also closer to Mr Wong than other witnesses. However, I am not suggesting that every aspect of their evidence is to be disbelieved but merely that they were not the independent witnesses that Mr Chia was asserting. I would add that the witnesses for Mr Wong, except perhaps June, might have been prepared to help him partly because they too might have been implicated in his actions even though they might not have been aware of the full details of his restrictive covenants.

64 As for Tricia, why would she lie about Mr Wong's solicitation of her employment? In his AEIC Mr Wong said that he had learned from June that Tricia was unhappy with him for having relieved her in the last quarter of 2004 of a certain role at MF. However, Tricia and Mr Wong were still close after that event. Mr Wong himself did not assert that their relationship had deteriorated after that event.

65 Mr Wong also suggested that perhaps Tricia was attempting to distance herself from him, and Dennis, as she was friendly with both of them while they were at MF and also to ingratiate herself with MF in the face of increasing competition that threatened her business and her job.

66 Yet, none of these reasons were suggested to Tricia while she was being cross-examined. Moreover, there was no suggestion that when Tricia first informed Daniel about Mr Wong's solicitation, she was aware of the details of his restrictive covenants, even if she was aware that he was generally under a non-compete restraint. She did not appear to be aware of the consequences of what she was telling Daniel. It was also not suggested to Daniel or Eng Keat that MF had pressured Tricia to come up with something to implicate Mr Wong.

67 I conclude that Tricia was telling the truth about her primary allegation that Mr Wong had solicited her employment.

*Siang Hwee*

68 I come now to Siang Hwee's primary allegation that Mr Wong had solicited her employment too.

69 According to Siang Hwee, Mr Wong had called her on or about the day he was put on garden leave on 13 June 2005. She said he had used Diana Sim's handphone and informed her that if she went somewhere else she would receive the same benefits in the new company as from MF. He also assured her that he would take care of "everybody" and "would not leave anyone in a lurch".

70 Siang Hwee also alleged that around end June 2005, Dennis spoke to her and asked her to join "them" which she understood to mean Mr Wong and Dennis because she had learned from her superior Andrew Lu ("Andrew") in MF that Mr Wong and Dennis had had discussions with Hup Thye about joining Refco. Siang Hwee said she would consider but if Andrew left MF she would follow suit and if she did she would want another colleague, Chua Ee Ting, to join her.

71 Siang Hwee said that thereafter she received SMSes from Dennis persuading her to join Refco.

72 On or about 1 July 2005, Siang Hwee received a telephone call from Joey's mobile phone. When she answered the call she was surprised to hear Mr Wong's voice. He asked her for her current salary and explained that he was assisting Dennis to gather information.

73 Around end of June or the beginning of July 2005, Dennis approached Siang Hwee and asked her to join him and Dickson for coffee at Corduroy & Finch. This meeting was on 2 July 2005. When she arrived, she was surprised to see that Dennis and Dickson were not alone. There were others present,

ie Mr Wong, Diana, Joey, Malcolm and Voo. Siang Hwee said that Dennis and Dickson sat on each side of her and sought to persuade her to join Refco. When she could not commit to this, Mr Wong joined in the conversation and also tried to persuade her to join Refco. She was reluctant to commit to joining Refco but also did not want to offend Mr Wong by declining. She asked for time to consider the matter.

74 Voo gave her a lift home. She said she told him that she was concerned that if she did not join Refco, Mr Wong might get upset and Voo told her not to worry for reasons I need not elaborate on.

75 Siang Hwee said that after this meeting she met with Dennis twice, one at Starbucks and then at Tea Spa. He sought again to persuade her to join Refco but she was not ready to do so. She elaborated that she had at one time agreed to join but changed her mind. She also said that she was prepared to consider joining Refco because it was her understanding that Mr Wong would head the team that was joining Refco.

76 The position for Mr Wong was as follows. He denied calling Siang Hwee on or about 13 June 2005 as she had alleged. He also denied using anyone's phone to do so as he carried two mobile phones and spare batteries. Mr Wong further denied he had called Siang Hwee, at end June or at all, using Joey's or Diana's phone to ask Siang Hwee for her current salary for Dennis. There was no reason for him to ask Siang Hwee about her current salary as Dennis knew her salary at MF or could have obtained the information himself.

77 Dennis denied calling Siang Hwee or sending her SMSes before the meeting on 2 July 2005 to ask her to join Refco. As for the gathering on 2 July 2005, Dennis said that as a number of colleagues recently left MF under unfortunate circumstances, he decided to organise a lunch for them. I should reiterate that his own resignation was tendered on 1 July 2005. Dennis said that as he was busy he had asked Diana (who had tendered her resignation on 20 June 2005) to arrange the gathering and it was Diana who asked him if she could include Siang Hwee. Dennis was happy to include Siang Hwee and left it to Diana to contact Siang Hwee. That is how, according to him, Siang Hwee was involved in the gathering. According to Mr Wong, Dickson and Voo, they were each informed by Diana about the gathering.

78 Dennis and Dickson denied having approached Siang Hwee at the gathering to join Refco. Mr Wong denied he had sat near to or spoken to Siang Hwee to join Refco along the lines she had alleged. Dennis, Dickson and Voo supported Mr Wong's evidence. Voo further denied that during the drive home after the gathering, Siang Hwee had talked to him about Mr Wong wanting her to join Refco. Mr Wong also said that he did mention at the gathering, before Siang Hwee arrived, that he had entered into an agreement with MF not to compete against them. He, Dickson and Voo said that prior to Siang Hwee's arrival, there was no discussion in that gathering as to where any of those present were going after leaving MF. Dennis said he could not remember if this was raised but he said there was no discussion at all about Refco before Siang Hwee arrived (NE 442). Dennis also denied he had met with Siang Hwee twice, once at Starbucks and a second time at Tea Spa, after the 2 July 2005 gathering. Dickson added that after Siang Hwee arrived she asked him if he had found a job and he told her he was joining Refco. She asked who else was likely to join Refco and he said he did not know although in fact he knew by then that Dennis was going to join Refco. His reason for not disclosing this information to Siang Hwee was that he had taken the gathering as just a lunch and he did not want to complicate matters further.

79 As for the alleged discussion during the drive home after the gathering on 2 July 2005, Voo denied that there was any conversation during the drive about Mr Wong's attempt to persuade Siang Hwee to join Refco.

80 I come again to Mr Wong's relationship with Siang Hwee and whether there was any reason why he and Dennis might want Siang Hwee to join Refco.

81 Although Mr Wong accepted that he was on good terms with Siang Hwee socially, he said he was not close to her and he considered her performance to be poor (NE 108). He accepted that he, Dennis, Diana and Siang Hwee had gone to Phuket on holiday together but said that it was Diana who asked Siang Hwee to go along. Mr Wong and Dennis said that although Siang Hwee was at one time on a team at MF handling the Taiwan business, there was no reason to have wanted to bring her over even if Mr Wong was moving over to Refco. Dennis said that Refco already had a well-established business presence in Taiwan and his scope for Taiwan business while at Refco was therefore limited. Besides, he was already getting Fennie to help him with the Taiwan business, if any at all.

82 Both David and Dennis said that Siang Hwee was not a good team leader or player and she had alienated others at MF. On the latter point, June corroborated their evidence. I accept that Siang Hwee did not get along well with some others. However, I considered other factors as well.

83 As regards the evidence that Dennis' scope for Taiwan business at Refco was limited, Dennis admitted that he had sent Joey and June to meet clients in Taiwan after all three of them had joined Refco. He said that every business was a priority for him. Furthermore, although Dennis was suggesting that he preferred to have Fennie, rather than Siang Hwee, to seek whatever Taiwanese business was available, he said that at MF, it was Siang Hwee, and not Fennie, who was sent once to Taiwan to visit clients. In my view, Dennis had deliberately down- played the Taiwan business and Siang Hwee's role so as to support the argument that Siang Hwee was not wanted at Refco.

84 There was also another reason why Mr Wong and/or Dennis might have wanted Siang Hwee to move to Refco. She was reporting to Andrew at MF but Andrew was himself having some problems with Taiwanese authorities. If he was not allowed to do any related business in Taiwan, it would have been a blow to MF if she left for Refco. This point is reinforced by what Mr Wong himself said in his Skype chat with Siang Hwee on 2 August 2005. I reproduce the material part which states:

> "davidbcwong:
>
> if andrew will be out of action for a while, i suppose u will either head up the Taiwan business or report to a new boss?
>
> Siang Hwee:
>
> i dun think I can head up the taiwan business…kind of difficult…reporting to a new boss is more likely but then again I may not really want to do that…
>
> davidbcwong:
>
> take a break! let the bosses sort things out for u – ha! for sure they will need u.. : ) "

When Mr Wong was asked in cross-examination whether he meant the comment "for sure they will need u", he said he did (NE 113).

85 The Skype chat also revealed another interesting point. Mr Wong had said that if Andrew was out of action for a while, Siang Hwee would either head MF's Taiwan business or report to a new boss. In cross-examination, he said he did not mean the remark about her heading MF's Taiwan business as sarcasm. When he was asked whether he had thought Siang Hwee might be appointed

head of MF's Taiwan business, he initially said he would not know and then conceded that this was unlikely (NE 113 to 114). If, as Mr Wong was suggesting at the trial, Siang Hwee's work performance had been poor, why would he suggest in the Skype chat that she might be head of MF's Taiwan business if Andrew could no longer be the head? Either her work performance was not as poor as he wanted the court to believe or he was being insincere in his remark about her possibly becoming the head or a bit of both. I am of the view that it was a bit of both.

86 I am not persuaded that there was no reason to solicit Siang Hwee's employment. However, again, the next question is whether Mr Wong had approached Siang Hwee to join Refco.

87 Mr Chia submitted that there were unsatisfactory aspects of Siang Hwee's evidence which cast doubts on her credibility and the truth of her primary allegation that Mr Wong had solicited her employment.

88 For example, Mr Chia said that in her AEIC, Siang Hwee had said that the first call from Mr Wong on or about 13 June 2005 was when he was using Joey's mobile phone and later when Mr Wong was asking Siang Hwee about her salary, Mr Wong was alleged to have used Diana's mobile phone. Yet, at trial, Siang Hwee changed her evidence to the first call being from Diana's mobile phone and the other call being from Joey's mobile phone.

89 Secondly, Mr Chia submitted that in paragraph 14 of Siang Hwee's AEIC, she said that when she answered the phone on the occasion when Mr Wong asked her for her salary, she was surprised to hear Mr Wong's voice. Yet, in her oral evidence-in-chief, Siang Hwee said that when she answered the phone, Joey's voice was on the other end and Joey said, "Someone wants to speak to you". Then Joey passed the phone to Mr Wong (NE 897/898).

90 In cross-examination, Siang Hwee changed her evidence to say that Joey asked her whether she could go somewhere convenient to talk and Siang Hwee said she would return the call which she then did. It was during the return call that Mr Wong spoke to Siang Hwee.

91 Thirdly, Mr Chia submitted that paragraph 14 of Siang Hwee's AEIC did not assert that Mr Wong had solicited her employment "for Refco". Yet, in cross-examination, Siang Hwee said that when he was talking to her then, he had mentioned the prospects of her joining Refco (NE 936 to 938). Mr Chia submitted that based on Siang Hwee's AEIC, the first time that Mr Wong had suggested that Siang Hwee join Refco was during the gathering on 2 July 2005. Yet, in cross-examination, she was suggesting that prior thereto when he asked her about her salary, "Refco" was already mentioned.

92 Fourthly, Mr Chia submitted that as Dennis was still in the office of MF, Dennis could have himself found out Siang Hwee's salary. Siang Hwee had herself described the inquiry by Mr Wong as "weird" (NE 939). Siang Hwee's response was that she believed that Mr Wong wanted the information for himself.

93 Fifthly, Mr Chia submitted that paragraph 10 of Siang Hwee's AEIC asserted that "after" Dennis' resignation, he spoke to Siang Hwee about joining "them" but in oral evidence, Siang Hwee said this was around end June 2005 when Dennis was going to resign.

94 Sixthly, Mr Chia submitted that in the further and better particulars of MF's defence dated 17 May 2006, it was alleged that Siang Hwee was invited for the lunch gathering at Corduroy & Finch by Dennis and Dickson and in paragraph 8c of the Re-Amended Defence, it was alleged that Dennis and Dickson arranged to meet Siang Hwee at Corduroy & Finch. However, in paragraph 15 of her AEIC, Siang Hwee asserted that it was Dennis who asked her to join him and Dickson for lunch.

Indeed, the reference to "lunch" was subsequently also changed by Siang Hwee orally to a meeting for "coffee".

95 Seventhly, Mr Chia submitted that Siang Hwee's phone records showed that she had had a telephone conversation with Diana on 1 July 2005, the day before the gathering and although Siang Hwee was close to Diana, Siang Hwee still asserted that Diana did not inform her that she (Diana) would be at the gathering.

96 Eightly, it was put to Dennis during cross-examination that according to Siang Hwee, there was some change in the seating arrangement at the gathering at Corduroy & Finch and, at some point in time, he and Dickson were seated beside Siang Hwee. Yet, when Siang Hwee eventually gave evidence, she said that once she sat down after her arrival, there was no further movement. Indeed, Mr Maniam had informed me, before Siang Hwee gave evidence, that Siang Hwee's position was that it was Diana and Joey who were initially seated beside her before changes were made and Dickson and Voo sat next to her (NE 516).

97 Ninthly, Mr Chia pointed out that paragraph 24 of Siang Hwee's AEIC had stated that in or around August 2005, "but in any event after 15 August 2005", she had met Dennis twice, first at Starbucks, then at Tea Spa. However, Siang Hwee again amended her evidence and deleted reference to "but in any event after 15 August 2005". Mr Chia submitted that Siang Hwee had amended her evidence because she had asserted that the meetings were arranged by SMSes but her telephone records subsequently showed only one phone call between Dennis and her and no SMSes between 16 August 2005 to 30 September 2005.

98 Tenthly, Mr Chia submitted that Siang Hwee had said that she had already told the management of MF, before 17 May 2006 (being the date of certain further and better particulars of MF's Amended Defence were filed) details of Mr Wong's solicitation including the two calls on mobile phones of others, but these two calls were not reflected in the further and better particulars. However, I should mention that they were reflected twelve days later in the Re-Amended Defence at paragraph 8(b) thereof, although at that time, Siang Hwee had still not yet corrected the identity of the persons whose mobile phones were used.

99 Mr Chia also had another submission. Although Siang Hwee said she had also informed Andrew about Mr Wong's approach even after Mr Wong's call on or about 13 June 2005, Andrew was not called by MF to corroborate such evidence even though he was still working for MF at the time of the trial. It was also Siang Hwee's evidence, in paragraph 9 of her AEIC, that Andrew had told her, before Dennis had resigned, that Dennis and Mr Wong had already entered into discussions with Hup Thye. Siang Hwee also elaborated in oral evidence that Andrew had told her that Mr Wong had asked him to join Refco before Mr Wong left. She informed MF's management of this (NE 948/949). Yet, Andrew was still not called to give evidence. On the other hand, Mr Maniam submitted that it was not necessary to call Andrew as a witness. Andrew had no personal knowledge about the solicitation of Siang Hwee who was already included as a witness. As for Mr Wong's discussions with Hup Thye before 13 June 2005, Mr Wong had admitted to such discussions. I note that Mr Chia did not establish from Siang Hwee when Andrew had purportedly been approached by Mr Wong to join Refco. It was possible that this approach had been before 13 June 2005. Also, MF's complaint was not that Mr Wong had approached Andrew, but Siang Hwee and others. I do not consider Andrew to be a material witness.

100 I agree that Siang Hwee's evidence on the details about her primary allegation was unsatisfactory in various aspects but not to the extent which Mr Chia was suggesting. For example, I do not fault Siang Hwee's mix up as to whose mobile phone Mr Wong had used to call her. Eng Keat

had said in paragraph 52 of his AEIC that he learned from Tricia in May 2006 that Siang Hwee might have been approached by Mr Wong to join Refco. He then spoke to Siang Hwee about this. So it was about eight months from September 2005, when Tricia first mentioned about her own solicitation, that Siang Hwee was asked to recollect events relating to Mr Wong's solicitation of her (Siang Hwee's) employment.

101 While there were unsatisfactory aspects about Siang Hwee's evidence, there was also evidence to suggest that she was telling the truth about her primary allegation.

102 As I have mentioned, Dennis and Mr Wong had down-played the Taiwan business and Siang Hwee's role and her work performance.

103 Secondly, it was significant to me that Mr Wong omitted to call Diana, who was close to him, to give evidence. She was a witness who could shed light on various points, for example,

(a) Whether Diana had ever allowed Mr Wong to use her mobile phone to call Siang Hwee. The same point applies to Joey who was also not called to give evidence as to whether she had ever allowed Mr Wong to use her mobile phone to call Siang Hwee.

(b) Whether it was Diana who suggested that Siang Hwee attend the gathering at Corduroy & Finch on 2 July 2005. On this point, I note that even if she was the one who had called Mr Wong, Dickson and Voo to invite them, on Dennis' behalf, to that gathering, as alleged by each of these persons and Dennis, this did not necessarily mean that she had suggested that Siang Hwee be included.

No satisfactory reason was given by Mr Wong for not calling Diana or Joey as a witness. I do not think it is sufficient for Mr Chia to submit that Diana and Joey were not employed by Mr Wong. Mr Wong managed to call other witnesses who were not as close to him as Diana and Joey were.

104 Thirdly, as regards the gathering on 2 July 2005, I find it unbelievable that prior to Siang Hwee's arrival, there was no discussion at the gathering as to what the respective attendees were going to do. By 2 July 2005, the attendees had either just left MF or tendered their resignation from MF. As I have said, Dennis himself had just tendered his resignation on 1 July 2005. Surely, the discussions would not only be about their departure from MF but also what they were each going to do. Mr Chia submitted that it was not surprising that there was no such discussion since Mr Wong had said at the beginning of the gathering that he had agreed to a non-compete obligation. I do not agree with this submission. If Mr Wong had said that, it might be understandable if no one else asked him what he was going to do since the others might have thought it was a sensitive topic for him and also because he was their boss in MF. However, there could not be any constraint about their talking among themselves about their own plans. I do not believe there was no such discussion. I find that there were discussions at the gathering about joining Refco and Mr Wong had participated in these discussions. In my view, the evidence from Mr Wong's witnesses about an absence of such discussions was an attempt to avoid implicating Mr Wong.

105 Fourthly, in addition, why did Dickson tell Siang Hwee that he did not know who else was joining Refco when he knew then that Dennis was? He said it was just a lunch and he did not want to complicate matters further but there should be no complication if there was nothing wrong with Dennis or others joining Refco.

106 Fifthly, although Siang Hwee was not an independent witness, why would she lie about her former boss? Paragraph 39 of the opening statement for Mr Wong said that her performance at MF

was so inadequate that Mr Wong and Dennis had to remove her as head of a trading floor team and assign her to a reduced dealing and customer liaison role. Accordingly she too had an axe to grind with Mr Wong and Dennis. Also, in view of her work performance, her position at MF might be unstable and there might be a need for her to justify her existence at MF. Yet, as in the case of Tricia, these suggestions were not made to Siang Hwee and, as I have indicated above, I do not accept that her work performance was as poor as Mr Wong wanted me to believe.

107 Sixthly, as I shall elaborate later, I am of the view that contrary to what Mr Wong had asserted, he did have plans to join Refco after the restraint period.

108 On a balance of probabilities, I conclude that Mr Wong did solicit Siang Hwee's employment for Refco. In the circumstances, it is not necessary for me to deal further with Voo's evidence vis-à-vis Siang Hwee except to say that I accept Siang Hwee's evidence to Voo's as regards their conversation on the way home after the 2 July 2005 gathering. Mr Maniam had also sought to rely on Hock Hin's evidence as to how he had contacted Siang Hwee on Dennis' request to join Refco. However, as I am satisfied that Mr Maniam has established the primary allegation without the need to refer to Hock Hin's evidence, I need say no more about it.

*The other eleven persons*

109 There was no direct evidence that Mr Wong had solicited the employment of the other 11 persons I have mentioned for Refco. For those few who had given evidence for Mr Wong, each of them denied that Mr Wong had solicited his/her employment. Dennis said that, except for Malcolm and Jacob, the employment of all the members of his team at Refco was agreed to between Hup Thye and him. He had recommended the rest of the team to Hup Thye (see his AEIC paragraphs 15 and 11 and NE 414). The question then is whether Dennis was working alone or with Mr Wong when he recommended various persons to Refco.

110 It was not disputed that Dennis had worked closely with Mr Wong and was a close friend of Mr Wong (NE 401). However, Dennis denied any involvement by Mr Wong in Dennis' move or of others to Refco. He said that on 12 June 2005, Mr Wong did send a short message to say that there would be a new CEO the next day (NE 424). There was a short discussion between Mr Wong and him on 13 June 2005 during which Mr Wong mentioned he was under a termination agreement with a non-compete provision. According to Dennis, there was no discussion between Mr Wong and him about the plans of either for the future until after Dennis tendered his resignation on 1 July 2005 and before Dennis joined Refco on 15 August 2005. During that period, Mr Wong was informed that Dennis and others were joining Refco although it was not clear from Dennis' evidence as to who informed Mr Wong (NE 410).

111 Dennis also said that he worked closely with Hup Thye at Refco and if there was an oral understanding between Mr Wong and Hup Thye that Mr Wong would join Refco after the period of restraint, Hup Thye would have told him about it. Also, when Dennis was asked whether Hup Thye had told him that he (Hup Thye) had discussed with Mr Wong, albeit before 13 June 2005, about the possibility of Mr Wong joining Refco, Dennis said Hup Thye had not told him this. Dennis even went so far as to refuse to accept that Mr Wong had had such a discussion with Hup Thye even if Mr Wong admitted to having such a discussion in his AEIC. I find this response of Dennis to be telling because Mr Wong himself had admitted to having such a discussion in para 24 of his AEIC.

112 I do not accept Mr Wong's evidence that after he signed the TA, he merely told Hup Thye about the non-compete provision and had not explored further with Hup Thye about the possibility of his joining Refco after the restraint period. Such a discussion would only have been natural given the fact

that Hup Thye and he were already discussing the prospect of his joining Refco.

113 I also do not accept Dennis' evidence that there was no discussion between him and Mr Wong about their future plans until after Dennis had tendered his resignation on 1 July 2005. Mr Wong's evidence was that he had learned that Dennis, Diana and Joey were going to join Refco in or about the week of 20 June 2005 (NE 89). In any event, Dennis and Mr Wong were close to each other and it was unlikely that Dennis would have waited until his resignation to tell Mr Wong. Also, given my findings in respect of Tricia and Siang Hwee, I find that Mr Wong did have plans to join Refco after the period of restraint but he was not wise enough to wait till then to become involved in personnel or other issues. I find that besides soliciting the employment of Tricia and Siang Hwee directly, he did discuss with Dennis on the employment of some of the others who left Refco such as Joey and Diana who were very close to him. For present purposes, it is not necessary for me to make a finding as to just how many of the other 11 persons he had specifically discussed with Dennis to bring over to Refco. It is also not necessary for me to discuss the evidence of Hock Hin which Mr Maniam also relied on to try and establish the alleged consensus between Hup Thye and Mr Wong.

**Whether Mr Wong participated in or rendered advice to Refco**

114 Probably because MF had acquired Refco, MF learned that Mr Wong had sent various emails relating to purchases or sales of securities and emails on administrative matters to various parties at Refco. MF asserted that in doing so, Mr Wong had breached paragraph C.3 of the TA in that he had participated in or rendered advice to employees of Refco.

115 I will first deal with Mr Wong's emails relating to purchases or sales of securities in three periods.

116 Between 25 August 2005 to 4 September 2005, Mr Wong sent six emails to Dennis and others like Jacob, Voo, Malcolm, June, Joey, Dickson and Diana at their personal email addresses or Refco email addresses. For example:

(a) His email of 25 August 2005 mentioned that a counter, Sembawang Kimtrans, was an undervalued marine logistics company.

(b) His email of 30 August 2005 to Dennis stated that the Indonesian rupiah was slumping and that hopefully it would not trigger a crisis of sorts.

(c) His email of 4 September 2005 mentioned that there was a growing opinion that there would be an oil shock due to Hurricane Katrina and Mr Wong added "go easy on your holdings in equities and others…".

117 The second period related actually to Mr Wong's email to June of 5 September 2005 with comments on internet plays and June thanking Mr Wong for his tip.

118 The third period is from 10 November 2005 to 22 November 2005 when Mr Wong was sending reports on equities to persons like Joey and Diana, Jacob, June and Dennis and also giving responses to comments from June on a counter known as Chuan Hup.

119 Mr Wong suggested that all such communication should be treated as communication between broker and client. However, as Mr Maniam pointed out, Mr Wong's account with Refco was not opened until 5 September 2005. Accordingly, prior thereto, he was not a client of Refco. I would add that although Jacob was in charge of his account at Refco, Joey was the one servicing his account there and June did not obtain her dealer's licence until 4 November 2005. So, communication with June

before 4 November 2005 could not be construed simply as broker and client communication. Besides, aside from Jacob, Joey and June, and perhaps Dennis who was overall in charge of that team at Refco, the others were not involved with his account at Refco. So communication with them could not be explained on the basis of being broker and client communication.

120 Mr Wong also suggested that his emails were sent to friends for their personal trading. He alluded to a gathering at Brewerkz at Riverside Point with former colleagues of MF between 16 to 22 August 2005. He said he was asked if he could let them know what he was trading in and he sent the emails in question thereafter. However, Mr Maniam submitted that his emails were not restricted only to those at that gathering. They were also sent to others who were not at the gathering like June and Jacob. Mr Wong had also said he was not close to Dickson, Voo, Malcolm and June but I note that he still considered them as friends (NE 138).

121 Mr Wong also said that previously he had sent emails to MF staff while he was with MF. There was one dated 14 January 2004 in which he recommended the purchase of a counter known as Miyoshi. Another was dated 13 May 2005 to a smaller group of persons in MF whereby he remarked that he should have given the IPO of a counter known as LongCheer a miss. There were also other instances when he emailed a very good friend Norman Sim of Canadian Imperial Bank of Commerce ("CIBC"), which is not itself a broker, between 3 to 25 August 2005 with news about CIBC and with a recommendation to buy a counter known as Biotreat. He had also sent emails to Celine Bay of DBS Vickers. Mr Maniam said that while MF had not relied on such emails to Norman Sim and Celine Bay as constituting breaches of para C.3, they would have amounted to breaches. On the other hand, Mr Wong had relied on such other emails to show that it was not unusual for him to exchange information with his brokers or friends.

122 MF's position was that Mr Wong was prohibited by paragraph C.3 from discussing equities or any other related matter with friends who worked in other brokerages and this would cover advice given on purely social occasions like when Mr Wong was attending a dinner with friends. However, paragraph C.3 would not prohibit him from discussing the same with his own stockbroker.

123 I note that any breach by Mr Wong of paragraph C.3 would have disentitled him to any payment of the Compensation. The provision referred to the participation in or the rendering of advice to any competing business. It did not prohibit discussions with friends who were working in a competing business, although I accept that businesses are run or operated by individuals, and friends who receive remarks or advice may in turn use them for their businesses. Even then, it seems to me that the parties had not envisaged that Mr Wong was to be prohibited from discussing, for example, equities with friends who worked in other brokerages so long as such discussions were on a casual basis. I accept that the purpose of his emails over the three periods where he made recommendations on the purchase, or sale, of shares was for the personal trade of the individuals to whom he sent the emails. Although the information flow was one-sided, as Mr Maniam put it, and the addressees might have used his recommendations for their business or learned from his inputs that is not enough to constitute participation in or the rendering of advice for the purpose of paragraph C.3. Indeed, as Mr Maniam acknowledged, some of the addressees were still with MF when they received some of the earlier emails.

124 This view of mine also applies to:

(a) his emails of 30 August 2005 to Dennis when he mentioned his hope that the slumping of the Indonesian rupiah would not trigger a crisis of sorts with regional implications, and

(b) his email of 4 September 2005 to various persons about an oil shock due to Katrina and

going easy "on your holdings in equities and others".

There was some argument about his reference to "and others" in his email of 4 September 2005. Mr Maniam suggested that Mr Wong was, by including these two words, also giving advice on, say, foreign exchange trades for the purpose of para C.3. I am of the view that while those two words demonstrated that his remarks were not restricted to equities, they were nevertheless casual remarks which did not constitute the giving of advice for the purpose of para C.3.

125 As for the times when Mr Wong forwarded research reports, this would be even less likely to constitute advice or participation in the business of a competitor. There was no advice as he was not adding his input. I also do not think he can be said to be participating in Refco's business simply because he had forwarded research reports, which were not difficult to obtain, even though June or Joey might include information from such reports in their own write-up. If a lay person were to forward such reports to his friends in the brokerage industry, can it be said that he was participating in the brokers' business? I would think not. The conclusion is the same even though Mr Wong was previously working in that industry.

126 Mr Maniam also noted that at one point of time, Mr Wong had requested from various addressees their personal email addresses. He submitted that this suggested that Mr Wong knew that he should not be sending the emails which MF were complaining of. Yet, not all the addressees provided Mr Wong with their personal email addresses in response and he continued to send the emails nevertheless. Therefore, I do not place any weight on this submission.

*Emails on trading statements and on Refco*

127 I come now to a different category of emails. On 15 September 2005, Mr Wong sent an email to Dennis to complain that he could not understand the securities trading statements he had received and that the print was not easily readable. That email ended with the comment that he was sure Dennis would be hearing more from the securities trading clients and there was probably nothing that Dennis could do about it. In another email the same day, Mr Wong said :

> "Thought I should let you know as I'm sure other clients may well be commenting on the statements.
>
> Try reading the statements yourself – ha! – especially the part regarding stock and portfolio valuations… and, by the way, was surprised to find out that certain stocks were accorded 100% valuation – didn't think that even DBS or SIA, let alone the likes of Asia Environment and DMX would merit 100%! I'm not complaining though!
>
> Just a kay-poh, perhaps…ha!"

128 On another occasion, the Chicago Mercantile Exchange ("CME") had issued a press statement on Refco on or about 13 October 2005. This was followed by a gmail on 14 October 2005 from Dennis to futures clients of Refco, including Mr Wong, forwarding the statement from CME. Mr Wong responded to Dennis also on 14 October 2005 saying:

> "The statement does not address securities clients and that can be very worrying for them (myself included).
>
> Given that the securities business in Singapore is housed in the same entity as the futures business, you may wish to expeditiously disabuse your clients of unnecessary worries?

Just a friendly advice…"

129 I accept that the first email by Mr Wong on 15 September 2005 about the incomprehensibility and unreadability of the statements were comments by him as a client reading his own statement notwithstanding his comment at the end thereof that Dennis would be hearing more from the securities trading clients.

130 As regards Mr Wong's second email of 15 September 2005 regarding Refco's collateral valuation of shares, Mr Wong explained that there appeared to be an anomaly in his own statement of account whereby non-blue chip stocks were assigned 100% collateral value when blue-chip stocks were not even assigned full collateral value by other brokerages. It made him wonder if there was actually an error on his statement regarding his stock portfolio. I do not accept this explanation which is not what his email stated. In my view he was not querying whether there was an error in his statement but advising Refco, through Dennis, that they should not be giving 100% collateral valuation even for blue-chip stocks.

131 As for Mr Wong's comments on 14 October 2005, Mr Wong explained that on Friday 7 October 2005, there were news reports of an accounting scandal at Refco. On 10 October 2005 more details of the scandal emerged leading to a financial crisis and a crisis of confidence for the Refco group. Mr Wong said that, as a client, he was anxious about Refco's continuing insolvency. Therefore, when he received Dennis' gmail forwarding CME's statement he was distressed as the statement addressed the futures (derivatives) business to some extent but not the securities business and hence securities clients like himself. Mr Wong asserted that his response to Dennis was his way of saying that he (Mr Wong) needed more assurance as a client and the reference to "just a friendly advice" was Mr Wong's way of telling Dennis that Mr Wong needed better assurance quickly as a client. As Dennis did not get back to him expeditiously with anything else, Mr Wong decided to withdraw his funds from Refco that same day.

132 I do not accept Mr Wong's explanation on this point. I am of the view that whether he had heard further from Dennis or not, he had decided to withdraw his funds from Refco that day. I do not believe that a further statement of assurance from Dennis for securities clients would have made the difference to someone like Mr Wong who was capable of assessing the situation for himself. In my view, Mr Wong was not asking for a statement of assurance for himself. He was advising Refco, through Dennis, as to what they should do to address the concerns of securities clients generally.

133 Although the comments of Mr Wong on 15 September 2005 regarding 100% valuation and on 14 October 2005 regarding a statement of assurance for securities clients were given ex-gratia, I am of the view that they had crossed the casual line in that they amounted to advice he was giving to Refco.

*Emails from Joey which were copied to Mr Wong or to herself*

134 I come now to emails which Joey copied to Mr Wong or to herself.

135 On 8 and 9 September 2005, Joey had sent three emails to Dennis on various administrative matters which she was experiencing frustration over. They covered limited access to clients' statements, approval limits for trades and differential interest spreads. Joey had blind copied these three emails to Mr Wong so that even Dennis did not know she had done so. One of the emails contained confidential information about the trading limits of two other clients and Mr Wong.

136 Mr Maniam accepted that the mere fact that these emails were copied to Mr Wong did not

constitute breaches of paragraph C.3. He, however, submitted that they supported the inference, on the totality of the evidence, that Mr Wong was rendering advice to the team at Refco and participating in their business and that Mr Wong was in fact supposed to join Refco later (DCS 480 and NE 163).

137 Mr Wong stressed that there was no reply from him to Joey on these emails. Also, other than these three emails, there was no evidence of any other email from Joey to him on administrative matters.

138 Mr Wong said that the background to these emails were provided to him by Joey or by Dennis. Mr Wong said that the three emails were sent to him as a client to explain that circumstances beyond Joey's control were preventing her from permitting him to commence trade with Refco. However, he agreed that such emails on internal matters should not have been sent to him and he said he told her so (NE 162).

139 I do not accept Mr Wong's explanation. If the emails were only to explain the delay in allowing him to commence trading, they would have been sent to other clients as well. The fact that they were not and that they were blind copied to Mr Wong prima facie suggested that Joey was complaining to Mr Wong about the difficulties she perceived she was having with Dennis. As there is no evidence that Mr Wong responded to these emails beyond querying about them, they did not in themselves constitute breaches of paragraph C.3, as Mr Maniam accepted. However, I agree that, on the totality of the evidence, they suggested that Mr Wong was going to join Refco later, contrary to his denial. This reinforces my view, expressed at [113], that Mr Wong was going to join Refco after the restraint period.

140 There might have been an innocent explanation but it was for Joey to explain why she had sent the emails to him. However, he did not call her to give evidence.

141 As for the emails which Joey blind copied to herself also on administrative matters, I make no finding about them since there was no evidence that she later forwarded them to Mr Wong.

**Whether Mr Wong was prima facie in breach of paragraphs C.1 and C.3**

142 In view of my findings that Mr Wong had solicited the employment of Tricia and Siang Hwee and some others, it would seem that Mr Wong was prima facie in breach of paragraph C.1, leaving aside the doctrine of restraint of trade for the time being. However, Mr Chia submitted that paragraph C.1 applied only if Mr Wong had solicited the employment of others as an employee, officer, director, agent or consultant of Refco. Since Mr Wong had not done so in any such capacity, paragraph C.1 did not apply. The material part of paragraph C.1 in relation to this submission stated:

> "… you shall not directly or indirectly employ or solicit the employment of (*whether as an employee, officer, director, agent or consultant)* any person who is or was … an officer, director, representative or employee of the Company".
>
> [emphasis added]

143 On the other hand, Mr Maniam submitted that the words I have highlighted did not apply to the capacity in which Mr Wong acted but rather the position for which he was soliciting the employment of others. I was inclined to agree with Mr Maniam on this point but, unfortunately for MF, its Re-Amended Defence states at [8] that Mr Wong had solicited the employment of MF's employees "as an agent or consultant of a company in competition with [MF]". I am of the view that MF have

committed themselves to a narrower interpretation and since there is no suggestion on the evidence that Mr Wong did what he did as an agent or consultant of Refco, it follows that he would not be in breach of paragraph C.1.

144 As for paragraph C.3, Mr Chia submitted that Mr Wong must have participated in or rendered advice in his capacity as a CEO of a competitor, since that was his former position in MF, before paragraph C.3 would apply. I do not accept this submission as there is no hint of such an interpretation in the provision. Also, I do not think that the parties had intended such a restrictive interpretation.

145 Mr Chia also submitted that as payment of the Compensation was to be made on 13 September 2005 under paragraph B.2 of the TA, all conduct of Mr Wong after 13 September 2005 would be irrelevant to Mr Wong's entitlement to the Compensation. If such conduct fell within the restrictive covenants in question, it was for MF to claim damages but not to withhold payment of the Compensation.

146 Mr Maniam submitted that this assertion was not pleaded by Mr Wong and was in any event incorrect. The Re-Amended Reply states at [8]:

> 8. Further or alternatively on the construction of clause C.3 of the Termination Agreement, the Plaintiff avers that such email correspondence referred to in paragraph 8A of the Re-Amended Defence did not constitute a breach of the Termination Agreement.

147 Although that paragraph does not specifically state the assertion being advocated by Mr Chia, I am of the view that it is wide enough to cover the assertion. However, although paragraph B.2 should have provided for payment of the Compensation within a reasonable period after 13 January 2006, instead of being payable on 13 September 2005, I am of the view that the intention of the parties and the effect of paragraph B.2 was that Mr Wong should not be paid the Compensation if he ran afoul of the restrictive covenants in question within the restraint period. If he had received the Compensation and committed breaches thereafter, he would prima facie have to repay the Compensation.

**Were paragraphs C.1 and C.3 valid?**

148 Mr Chia submitted that paragraphs C.1 and C.3 were invalid, and hence unenforceable, for being unreasonable restraints of trade while he accepted that paragraph C.2 was valid. This caused Mr Maniam to submit that such a concession was in itself "some" concession as to the validity of paragraphs C.1 and C.3 (DCS para 514). It seems to me that either there was a concession in respect of paragraphs C.1 and C.3 or not. The reference to "some" concession was neither here nor there. It seems to me that Mr Chia had conceded the validity of paragraph C.2 only because there was no allegation of a breach thereof. Mr Chia might also have wanted to provide some consideration for MF's promise to pay the Compensation but that is a separate point which I shall deal with later. Suffice it for me to say at present that the concession in respect of paragraph C2 does not amount to a concession in respect of paragraphs C.1 or C.3.

149 As for paragraph C.4 of the TA, it stated that Mr Wong had agreed that paragraph C was reasonable and necessary for the protection of MF's interests. Mr Maniam submitted that paragraph C.4 was the best evidence of the reasonableness of the restraints not only as a matter of contract but because as the CEO of MF for some nine years, Mr Wong was uniquely placed to assess what was reasonable and necessary for the protection of MF's interests.

150 However, case law authorities demonstrate that the fact that Mr Wong had agreed, at the time of the TA, that the restrictive covenants in paragraph C were reasonable does not, in itself, preclude him subsequently from taking the position that they were unreasonable. In a sense, paragraph C.4 merely expresses what is already implied i.e. that when Mr Wong signed the TA with the restrictive covenants, he acknowledged that they were reasonable to protect MF's interests.

151 In *TSC Europe (UK) Ltd v Massey* [1999] 1 RLR 22 ("*TSC*"), there was a provision in which the employee agreed that the restrictive covenants were not greater than was reasonable and necessary for the protection of the interests of the employer. Yet, the court concluded that the restrictive covenant in question was an unreasonable restraint of trade.

152 In *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 3 SLR 333 ("*Buckman*"), there was also a similar provision under which the employee acknowledged that the restrictive covenants were reasonably necessary to give adequate protection to the interests of the employer. Yet the court was tentatively of the view, in the context of an injunction application, that the restrictive covenant in question was too wide.

153 In *National Aerated Water Co Pte Ltd v Monarch Co Inc* [2000] 2 SLR 24 ("*National Aerated Water*"), the Court of Appeal said, at para 31:

> "It does not matter that the parties have freely entered into the restraint as the rule against unreasonable restraint is based on public policy and may not be excluded by mutual consent"

154 I would add that although Mr Wong was advised by solicitors, the background evidence indicates that before he had instructed solicitors, he was already prepared to agree to the restrictive covenants in principle in order to obtain the Compensation. Indeed, he had not initially wanted to involve solicitors. It was at MF's insistence that the TA was concluded through solicitors. Mr Wong's prior negotiations on the scope of the restrictive covenants appeared to focus on the duration thereof, ie whether it should be one year or three months after the end of his garden leave. Eventually the parties agreed to four months after the end of his garden leave. As his garden leave was for three months, the total duration of the restrictive covenants from the commencement of garden leave, and the date of the TA, was seven months. His solicitors' involvement appeared to be restricted to commenting on drafting points. In any event, the mere fact that he was represented by solicitors again does not relieve MF from its obligation to justify the restrictive covenants. Thus, in *Turner v Commonwealth & British Minerals Ltd* [2000] 1 RLR 114 ("*Turner*") Waller LJ said at [19] that the fact that the employees were advised by lawyers and that there was no inequality of bargaining position was a factor which the employer could pray in aid to justify the restraint "but again that does not relieve the company from its obligation to justify the restraint".

155 In *TSC*, the court concluded that the restrictive covenant in question was an unreasonable restraint of trade even though the parties were represented by solicitors in negotiations.

156 I should also mention that the restrictive covenants were contained not in a typical contract of employment at a time when an employee was being employed but in a termination agreement when Mr Wong was leaving MF. He was to receive additional benefits, ie the Compensation thereunder. It may be suggested that in view of this, the court should not view the restrictive covenants as strictly as it might otherwise do if such covenants were found in an employment contract. Nevertheless if the general principle, as stated by Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt & Co* [1894] AC 535 and by Chan Sek Keong J (as he then was) in *Asia Polyurethane Mfg Pte Ltd v Woon Sow Ling* [1990] SLR 407, is not to stifle an individual's liberty to carry on trading or to be employed, and also not to restrain competition, unless the restraints are reasonable, then I see no reason why the

court's approach in one situation should be less strict than in another. In *Turner*, Waller LJ said at [19] that:

> "in considering the interests of the parties it is a legitimate factor to take into account that the employees were being paid something extra for the covenant they agreed to sign but that fact does not relieve the company of the necessity of justifying the restraint".

It seems to me that a restraint provision is no less reasonable or unreasonable, as the case may be, whether it is found in an employment contract or in an agreement to terminate an employment and whether or not the employee received something extra for his covenant. I reiterate what the Court of Appeal said in *National Aerated Water* that the rule against unreasonable restraint is based on public policy and may not be excluded by mutual consent.

157 In *Heller Factoring (Singapore) Pte Ltd v Ng Tong Yang* [1998] 3 SLR 299 ("*Heller*"), G. P. Selvam JC (as he then was) summarised the law with the following propositions:

- First, courts will hold an agreement of an employee not to serve his employer's competitors as valid and enforceable provided that it satisfies the test of reasonableness. If a clause is valid in all ordinary circumstances which can have been contemplated by the parties, it is equally valid notwithstanding that it might cover circumstances which are so 'extravagant', 'fantastical', 'unlikely or improbable' that they must have been entirely outside the contemplation of the parties. Courts in such cases are not dealing with sematics or metaphysics but reality: see *Home Counties Dairies Ltd v Skilton* [1970] 1 WLR 526 at p 536.

- Further, an agreement of this kind must be read in the context of the business in relation to which the covenant is entered into and the relationship between the parties: see *Home Counties Dairies Ltd v Skilton and Marion White Ltd v Francis* [1972] 1 WLR 1423.

- Second, the employer must show that the true purpose of the clause is the protection of some business interests of the employer – say trade secrets, confidential information and goodwill. Customer list and connection is an established item of proprietary goodwill. See *Chappell v Griffith* (1885) 53 LT 459, *Inland Revenue Commissioner v Muller & Co Magarine Ltd* [1901] AC 217, *Bollinger v Costa Brava Wine Co Ltd (No 3)* [1960] Ch 262 and *Bridge v Deacons* [1984] AC 705. Stated in a different form, a clause intended to protect an employer against use by the former employee of confidential information but also against the ex-employee drawing away the employer's customers will be upheld. A covenant may lawfully prohibit the employee from accepting a position with one of the employer's competitors so as to be likely to destroy the employer's trade connections by misuse of his acquaintance with the employers' customers or clients will be upheld: See *Chitty on Contract* (26th Ed) paras 1205 and 1206.

- Thirdly, in considering the validity and enforceability of a clause of this kind all the facts must be taken into consideration. One of the important considerations is the position of the employee, and the connection and access the employee had to clients and confidential information.

- Finally, it is for the employer who seeks to enforce such a covenant against an employee to show that it is reasonable in the interests of the parties and in particular that it is designed for the protection of some proprietary interest owned by the employer for which the restraint is reasonably necessary. *Chitty on Contracts* (26th Ed) para 1203.

158 *Cheshire, Fifoot and Furmston's Law of Contract* Second Singapore and Malaysian Edition,

1998, ("*Cheshire*") states at p 704:

> It has already been seen that a restraint imposed upon a servant is never reasonable, unless there is some proprietary interest owned by the master which requires protection. The only matters in respect to which he can be said to possess such an interest are his trade secrets, if any, and his business connexion.

159 Mr Chia relied on the last sentence of this passage to submit that only trade secrets and business connections may be the subject of covenants in restraint of trade. However, the doctrine of restraint of trade is by no means static as *Cheshire* acknowledges at p 703. Again, in *National Aerated Water*, the Court of Appeal said at [28]:

> In *Esso Petroleum,* supra, at p 337, Lord Wilberforce, after reviewing the case law on the subject recognised that while contracts which were found to be in restraint of trade might be categorised, the categories could never be closed. …

160 In *Heller,* Selvam JC had apparently accepted that confidential information which does not constitute trade secret may legitimately be the subject of a restrictive covenant imposed on an employee.

161 Furthermore, while *Cheshire* refers to some "proprietary" interest and *Heller* refers to both "business" and "proprietary" interests, I suggest that such descriptions are not intended to limit the interests which may be the subject of restrictive covenants from employees.

162 For example, another category, ie the maintenance of a stable workforce, has been suggested as a legitimate interest susceptible of protection by a restrictive covenant from an employee. *Restrictive Covenants under Common* and *Competitive Law* by Alexandra Kamerling and Christopher Osman, Fourth Edition, 2004, states at p 128:

> **8.4 The existence of an interest which merits protection**
>
> The employer will be required to show that the restraint protects a valid interest: see *Herbert Morris Ltd v Saxelby* [1916] 1 A.C. 688 "a proprietary right". There are generally three possible valid interests on which he may rely; special trade connections, business secrets and the maintenance of a stable workforce. He is entitled to protect all of these: see *Herbert Morris, Attword v Lamont* [1920] 3 K.B. 571, *Alliance Paper Group plc v Prestwick* [1996] I.R.L.R. 25 and *Dawney; Day & Co Ltd v De Braconier D'Alphen* [1997] I.R.L.R. 442, CA.
>
> **8.4.3 The employer's interest in maintaining the stability of his workforce**
>
> It is common in employment contracts to see a restriction which seeks to prevent the employee from, for a certain period, soliciting or employing or working with former colleagues. Until relatively recently, apart from indirectly in *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1957] 1 W.L.R. 1012 CA there was no firm authority on the question as to whether such clauses could be valid. Advisers were divided in their views as to whether an employer could possess an interest which merited protection by such a clause. Those who supported the existence of such an interest usually advised that the clauses should be targeted at specific staff levels and should not be applicable to all former colleagues. In *Hanover Insurance Brokers Ltd v Shapiro* [1994] I.R.L.R. 82, CA the plaintiff's cross appeal was solely concerned with this point. The court held that the employer does not have an interest in maintaining the stability of his workforce which merits protection no matter how well targeted. The basis for this view was that "… the employee

has the right to work for the employer he wants to work for if that employer is willing to employ him" (Dillon L.J.). The employer must instead seek covenants directly from that employee. However, the weight of opinion since *Hanover* has supported the proposition that an employer does have a legitimate interest in maintaining the stability of the workforce. Shortly after *Hanover* a different division of the Court of Appeal (without referring to the case and a few days before it was reported) held that an employer does have a legitimate interest in maintaining a stable, trained workforce in what was accepted in that case to be a highly competitive business (*Ingham v ABC Contract Services* December 12, 1993 [unreported]). Shortly after Judge Levy in *Alliance Paper Group plc v Prestwich* [1996] I.R.L.R. 25, in a case involving a managing director, who was also the vendor of the business in which he was employed, seeking to enforce the restriction followed *Ingham* and held that a no-poaching covenant in the service agreement was enforceable and this, notwithstanding, that the restriction focused upon those who fell into the somewhat vague category of being employed "in a senior capacity". Then in *Dawnay*, *Day & Co Ltd v De Braconier D'Alphen* [1997] I.R.L.R. 442 the Court of Appeal in context of considering a no-poaching provisions in a shareholders agreement and in contracts of employment, held that an employer's interest in maintaining a stable, trained workforce is one which can be properly protected within the limits of reasonableness by means of a non-solicitation covenant although it did not follow that this would always be the case. The employer's need for protection arose because the ex-employee might seek to exploit the knowledge that he had gained of the employees' qualifications, rates of pay and so on. In that case the managers had acquired confidential information of that kind and the court considered that a one-year restriction was justified. Again the reference to "senior employee" in the covenant was held not to be uncertain and therefore the provision was enforceable. *TSC Europe (UK) Ltd v Massey* [1999] I.R.L.R. 22 and *SBJ Stephenson Ltd v Mandy* [2000] I.R.L.R. 233 ("SBJ") are further examples of circumstances where covenants against poaching employees were held to be enforceable. It therefore seems that, whatever the uncertainty arising from *Hanover*, with the passage of time the legitimacy of the interest of an employer as a basis for this type of covenant has been accepted and the issues for the future will be the reasonableness of a particular covenant's scope in any particular set of circumstances.

163 I should mention that, contrary to the suggestion in the above text, the particular covenant against solicitation of other employees in *TSC* was in fact held not to be enforceable.

164 Mr Chia argued that for Singapore the maintenance of a stable workforce is not a legitimate interest that may be protected by a restrictive covenant as Singapore is a very small country with limited resources. To allow such protection in principle might aggravate problems associated with low birth rate, an aging population and heavy reliance on foreign talent. The maintenance of a stable workforce should be achieved through free and fair competition and the provision of good wages and condition of employment.

165 However, even assuming, for the time being, that the maintenance of a stable workforce is in Singapore a legitimate interest that may be protected by a restrictive covenant, MF's position on the enforceability of paragraphs C.1 and C.3 suffered from a number of deficiencies.

166 The TA does not actually state the interests of MF which require protection. MF's pleadings also do not assert the interests of MF which paragraphs C.1 and C.3 were to protect. While this is not fatal because the allegations of unreasonableness and of unenforceability etc arose only in Mr Wong's Re-Amended Reply and there is an implied joinder of issue thereon, it was still incumbent on MF to assert by way of evidence the interest that was to be protected by each covenant as well as the facts which would demonstrate the reasonableness of each covenant ie that each was not wider than was reasonably necessary to protect that interest. Unfortunately for MF, there was nothing in its

evidence on either of these points.

167 Mr Maniam sought to address this deficiency by submitting that no question was asked of MF's witnesses about the interest of MF which merited protection by each covenant or about the reasonableness of each covenant. He also submitted that it was not even put to any of MF's witnesses that the covenants were unreasonable and unenforceable so that he/she could at least comment (see DCS paragraph 507). I do not accept these submissions. The point about the unreasonableness and unenforceability of the covenants was already taken in Mr Wong's Re-Amended Reply. The burden was on MF to establish the interests to be protected and the reasonableness of the covenants and not the other way around. I would add that it is not for witnesses to comment on the reasonableness of a covenant. As is stated in *Cheshire* at p. 702 and 703:

> "Evidence is indeed admissible to prove the special circumstances which are alleged to justify the restriction… But evidence that a witness considers the restraint to be reasonable is inadmissible for that is the very question which the court alone can decide". See also *Chitty on Contracts*, 29th Ed, 2004 volume 1 at para 16-096.

168 However, Mr Maniam submitted that from an authority which Mr Chia was relying on, ie *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] 1 Ch 108, the onus of showing that a restraint of trade is injurious to the public interest lay on the party alleging it to be as such. While Mr Maniam was not wrong, what the court there actually said at p 120 was:

> "The onus of showing that a contract in restraint of trade is reasonable as between the parties lies upon the party alleging it to be such: see *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd*, per Lord Haldane. The onus of showing that a contract in restraint of trade is injurious to the public interest similarly lies on the party alleging it to be such …."

169 The opening statement and closing submission for MF also sought to address the deficiency. Paragraph 50 of the opening statement for MF which was repeated in paragraph 562 of the closing submission for MF states:

> 50. First, the Defendants had a legitimate interest in preventing the Plaintiff, who was their Managing Director (for almost 10 years) and exercised influence over the employees and clients, from soliciting the employment of their employees and from competing with the Defendants for a period of time. Furthermore, as Managing Director, the Plaintiff was in a position with access to highly confidential information, which could be used to the detriment of the Defendants: see *Heller Factoring (Singapore) Pte Ltd v Ng Tong Yang* [1998] 3 SLR 299 (DBA Tab 5).

170 I am afraid that such general statements do not assist MF much. In *Stratech Systems Ltd v Nyam Chiu Shin (alias Yan Qiuxin) and others* [2005] 2 SLR 579, the Court of Appeal had stressed the importance of properly establishing some legitimate interest to be protected by a covenant in restraint of trade.

171 As regards paragraph C.1 of the TA, Mr Wong might well be in a position to influence employees of MF to leave and join a competitor but that is not the point which is what legitimate interest MF was seeking to protect by that provision. While other paragraphs of the closing submission for MF stated expressly that the interest to be protected was the maintenance of a stable workforce, there was no evidence to establish that this was a legitimate interest of MF's requiring protection. In cases where such a provision was upheld, such as *SBJ Stephenson Ltd v Mandy* [2000] I.R.L.R. 233, evidence was given about the training both for the broking staff and support staff.

172 As regards paragraph C.3 of the TA, Mr Maniam appeared to be suggesting that Mr Wong's access to confidential information was the interest which MF was protecting thereunder. However, again, there was no evidence to establish that Mr Wong had had access to confidential information and the nature of the confidential information. Mr Maniam's reference to *Heller* did not assist because in that case, evidence was given about the fact of access to confidential information and the nature of the confidential information.

173 Notwithstanding the absence of evidence, or perhaps because of such absence, Mr Maniam ran his arguments in another way. He submitted that since it was admittedly legitimate to restrain Mr Wong directly from soliciting clients of MF under paragraph C.2 of the TA, it could not be objectionable to restrain him from soliciting employees or from his providing advice etc to a competitor under paragraphs C.1 and C.3. I do not agree with such a submission as each provision was different. Also, paragraph C.2 was not disputed because there was no allegation of breach thereof. If such an allegation had been made, MF's case about the validity of paragraph C.2 might have suffered the same fate as its case for paragraphs C.1 and C.3.

174 Mr Maniam submitted that it would undermine paragraph C.2 if Mr Wong was free to solicit MF's employees who in turn might solicit MF's clients. He also submitted that it would similarly undermine paragraph C.2 if Mr Wong was free to compete against MF which in turn might lead to MF later losing their clients to Mr Wong. He stressed that the brokerage business is a highly competitive business. I find these submissions to be telling. They demonstrate that MF's focus was to prevent competition. The submissions did not even suggest that the identities and particulars of the clients were confidential information. Even if such a suggestion had been made, there was again no evidence on it. Submissions were being made in the place of much needed evidence.

175 I find that MF has failed to establish a legitimate interest for protection under paragraph C.1 or paragraph C.3. That being the case, the reasonableness of these paragraphs was academic but as submissions were made thereon, I will address this point as well.

176 I will deal with paragraph C.1 first. In my view, there are various factors suggesting that paragraph C.1 was wider than was reasonably necessary even if MF established that it had a legitimate interest to maintain a stable workforce.

177 First, the provision applied to any and every employee of MF without reference to his experience or importance. This was one of the two vices which Judge Peter Whiteman QC noted in *TSC*. Thus, as Mr Chia submitted, Mr Wong was also precluded from soliciting the employment of a cleaner, an office boy or a clerical officer.

178 Secondly, the prohibition applied even to those who had already left MF within one year before the TA was signed on 13 June 2005. How could such a provision assist MF to maintain its current workforce, ie current as at 13 June 2005? In *TSC*, the covenant precluded the covenantor from soliciting the employment of any employee who had joined the employer after the covenantor had left. Judge Whiteman considered this to be the second of two clear vices of the covenant there. He found the combined effect of the two vices critical. While the covenant there which constituted the second vice was different from the second factor I have mentioned, it seems to me that the same principle applies.

179 There is a third factor militating against the reasonableness of paragraph C.1 which was not raised in *TSC*. As it stood, the covenant before me would also extend to any past employee within one year prior to 13 June 2005 and any current employee as at 13 June 2005 even if MF had not wished to retain the services of that employee ie even if MF wanted to let that employee go. For

example, Fennie was retrenched by MF within one year before 13 June 2005. There was no suggestion that MF wanted her back. Yet MF's position was that Mr Wong was precluded by paragraph C.1 from soliciting her employment. There was also evidence from other witnesses like Dickson and Voo who said they were asked by MF to leave after 13 June 2005. While MF did not admit that Dickson was asked to leave, MF's Daniel admitted that Voo was. Yet, even for Voo, it was MF's position that paragraph C.1 precluded Mr Wong from soliciting Voo's employment after Voo was asked to leave and the employment of other employees who might also have been asked to leave. Mr Maniam submitted that the thrust of MF's position was not so much that Mr Wong had caused various employees to leave MF but that he had solicited their employment for a competitor. In my view such a submission does not help MF. Its legitimate interest, in the context of paragraph C.1, was supposed to maintain a stable workforce. In that context, it can have no legitimate complaint if Mr Wong did not cause such employees to leave and indeed if MF itself did not even want to retain them. One would have thought that it might be an extravagant interpretation to suggest that paragraph C.1 extended to employees whom MF did not want to employ and that therefore paragraph C.1 should not be interpreted to cover such a situation. Yet, that interpretation was advocated by MF itself.

180 This third factor is also telling. It reinforces my view that the purpose and scope of paragraph C.1 was anti-competition and not the maintenance of a stable workforce. It might have been different if the purpose of paragraph C.1 was to prevent Mr Wong from exploiting confidential information which MF's employees possessed but Mr Maniam did not advance this argument which was in any event also not supported by the evidence.

181 To address the second factor, Mr Maniam suggested that I could sever part of paragraph C.1 to delete the reference to any person who was at any time an employee during the one year prior to 13 June 2005. The terms he suggested for the proposed deletion would have rendered paragraph C.1 grammatically incorrect but, assuming the terms of the proposed deletion were tweaked to achieve his intention, it would still not assist MF much. Mr Maniam submitted that if the second factor was addressed, that would leave only one of the two vices mentioned in *TSC* remaining. This submission did not take into account the third factor I have mentioned. Even leaving aside the third factor for the time being, I do not read *TSC* to suggest that the restraint there would have been acceptable if only one of the vices remained. When Judge Whiteman QC mentioned in [57] that other restrictive covenants were upheld in *Dawnay*, *Day & Co Ltd v De Braconier D'Alphen* [1997] I.R.L.R. 285 and [1997] I.R.L.R. 442, he noted that they did not suffer from either of the two vices he had identified.

182 Coming back to the first factor before me, Mr Maniam submitted that he was not asking the court to re-write the provision by adding the word "senior" before "employee". Rather, he was asking the court to construe the provision so as not to apply to staff like a cleaner, an office boy or a clerical staff. As I have stated, the provision on its face applies to any employee. I cannot construe its meaning so that it applies to employees other than a cleaner, an office boy or a clerical staff just because that will suit MF's purpose for litigation.

183 Furthermore, the third factor would still render paragraph C.1 too wide and unreasonable.

184 I will now deal with the question whether paragraph C.3 was reasonable. As mentioned, Mr Maniam had suggested it was reasonable because Mr Wong had access to highly confidential information. However, the following factors militate against the reasonableness of that provision.

185 First, there was no mention in paragraph C.3 about the use of confidential information. In other words, paragraph C.3 was to apply whether Mr Wong was using confidential information or not.

186 Secondly, Mr Wong's ownership or investment in a competitor would not necessarily mean that

he would be misusing MF's confidential information. Paragraph C.3 was wide enough even to prohibit him from buying shares in a competitor which is listed on a stock exchange.

187 Mr Chia submitted that other factors also suggested that paragraph C.3 was unreasonable. He submitted that if Mr Wong was to render advice to that part of a business which had nothing to do with brokerage, Mr Wong would still be caught if the business had a discrete brokerage arm which was in competition with MF. I do not agree. I think that is an interpretation which neither side had in mind and is an extravagant interpretation.

188 Mr Chia also submitted that because there was no geographical limitation in paragraph C.3, the provision was too wide, relying on *Buckman.* That was a case involving an injunction application and not a trial. Clauses 12.2.1 and 12.2.2 therein stated:

> 12.2 During the period of one year from the Termination Date, the Employee shall not (except with [the plaintiffs'] prior written approval) render services as an employee, consultant, director, partner or in any other way directly or indirectly for any Competitor.
>
> 12.2.1 in Taiwan, Hong Kong, Philippines, Brunei, Malaysia, Singapore, Thailand, Vietnam, Burma, People's Republic of China, Nepal, Indonesia, Bangladesh, India, Pakistan, Sri Lanka;
>
> 12.2.2 in Kampuchea, Laos, Afghanistan, Iran, Saudi Arabia, Kuwait, Qatar, United Arab Emirates, Oman;

At paragraph 24, Prakash J stated:

> 24 Even if I have interpreted the interest to be protected too widely, there is another difficulty which the plaintiffs will face in establishing that the restraint imposed is reasonable. The geographical area covered by the clause is extensive. In effect, it prevents the defendant from working for any competitor company in most of Asia. Among the countries where the defendant cannot work are Kampuchea, Laos, Afghanistan, Iran, Saudi Arabia, Kuwait, Qatar, United Emirates and Oman. The plaintiffs do not directly assert that they have customers in those countries. What they say is that they are trying to 'establish a permanent presence' in the same. It would appear that what they are trying to protect is their potential business rather than their actual business in those countries. Further, the defendant appears to have done most of his work for the plaintiffs in Singapore. Whilst the plaintiffs do assert that he visited customers outside this country, from Mr Dalton's affidavit it appears that such visits were only to customers in Indonesia. It was the defendant himself who stated that he had also visited factories in Singapore, Malaysia, Taiwan, China, Pakistan and Thailand. Even on this basis, it appears that the defendant was not, in the course of his employment, exposed to the plaintiffs' customers in the Philippines, Brunei, Vietnam, Nepal, Bangladesh, India, Pakistan and Sri Lanka and yet by cl 12.2.1 the plaintiffs seek to prevent him from working in any of these countries without regard to whether he had had prior contact with the customers there or not. A more reasonable clause would have limited the restriction to countries in which the defendant had actual and significant customer contact.

189 It seems to me that even if the provision there was limited to countries in which the employee had had actual and significant customer contact, it might still have been too wide in that a provision restraining the employee from contacting existing customers of the plaintiff would have been sufficient. In any event, in MF's case, paragraph C.2 already prohibited Mr Wong from contacting clients of MF. Therefore, that would not be the interest which MF was seeking to protect under paragraph C.3. Accordingly the issue is not so much whether the geographical location is too wide but

again that paragraph C.3 protected no legitimate interest.

190 Mr Maniam suggested that paragraph C.3 could be severed by deleting references to ownership and investment therein. However, even if this could be done, it would address only the second factor mentioned in [186] but not the first factor mentioned in [185].

191 I am of the view that the purpose and scope of paragraph C.3 was anti-competition. This is reinforced by the fact that MF did not allege that Mr Wong had used confidential information in any of the emails complained of. Their complaint was simply that he was helping a competitor.

192 Mr Maniam stressed that the period of restraint was only four months after the end of Mr Wong's garden leave. This applied to both C.1 and C.3. Mr Chia did not suggest that four months per se was too long although he submitted that the absence of geographical limitation in paragraph C.3 was unreasonable. In *Turner,* Waller LJ said at [18]:

> Thus to enforce the covenant at all the company would have to establish proprietary rights in the nature of trade connection or in the nature of trade secrets. I should emphasise that because those are the matters which they are legitimately entitled to protect it does not follow that clause 5.6 must be unreasonable because covenants restraining the use of confidential information or the canvassing of trade connections could be, and indeed in this case were, imposed. It has been recognised in many cases that because there are serious difficulties in identifying precisely what is or what is not confidential information, and who may or may not have been a customer during the period of an employee's service, a restraint against competing which is reasonable in time and space will not only be enforceable but the most satisfactory form of restraint.

193 I am of the view that the last sentence of the above paragraph is too wide. It must not be forgotten that it is first for the employer to establish a legitimate interest to be protected. Indeed, that is acknowledged in the first sentence of the above paragraph. Accordingly, it is not sufficient for an employer to say that since the restraint is reasonable in time and space, it should be upheld.

194 It seems to me that more thought should be given by those who draft covenants in restraint of trade as to the interest which an employer seeks to protect. Also, if such an interest is already protected by a provision, then a wider provision protecting the same interest may well be struck down, although I accept that this is not always necessarily so.

195 Mr Maniam also submitted that paragraphs C.1, C.2 and C.3 largely reiterated the duties Mr Wong was already under as an employee during his garden leave. Furthermore, Mr Wong's conduct which MF was complaining of had occurred during his garden leave. This is an interesting argument but that was not the way MF had pleaded its case. MF had not pleaded the duties of Mr Wong qua employee and the breach of such duties. MF had also not pleaded that the Compensation was payable if:

> (a) for the first three months from 13 June 2005 to 12 September 2005, Mr Wong had complied with his duties qua employee and also complied with the restrictive covenants in paragraph C, and
>
> (b) for the next four months from 13 September 2005 to 12 January 2006, Mr Wong had complied with the restrictive covenants.

Accordingly, I do not think Mr Maniam can rely on the said argument.

**Whether Mr Wong would be entitled to the Compensation since paragraphs C.1 and C.3 were void**

196 I come now to another interesting point. Mr Maniam submitted that if paragraphs C.1 and C.3 were void then Mr Wong cannot claim the Compensation that was furnished in consideration of the restrictive covenants as a whole. However, this was not pleaded by MF after Mr Wong's Re-Amended Reply was filed.

197 Mr Maniam submitted that it was not necessary to do so because under O 18 r 14(2)(a) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), there is an implied joinder of issue on the pleading last served at the close of pleadings. According to Mr Maniam, Mr Wong's contention in his Re-Amended Reply was "to that effect that if [paragraphs] C.1 and C.3 are void, he should be (sic) receive the [Compensation] which were offered in consideration for the restraints" and MF was joining issue with that (see paragraph 594 of the closing submission for MF).

198 The Statement of Claim asserted paragraphs B.1(b) and B.2 of the TA and MF's obligation to pay the Compensation. The Re-Amended Defence set out paragraphs A.2, A.3, B.1, B.2, C.1 to C.4 of the TA. It asserted that Mr Wong was in breach of paragraphs C.1 and C.3 of the TA. The Re-Amended Reply denied the factual allegations constituting the breaches and denied any breach of paragraphs C.1 or C.3. Paragraph 9 of the Re-Amended Reply asserted that paragraphs C.1 and C.3 were wider than was necessary to protect MF's interest and were unreasonable, invalid and unenforceable. Paragraph 10 thereof asserted that MF provided no value in exchange for the restrictive covenants in paragraphs C.1 and C.3. What is the implied joinder of issue under Order 18 Rule 14(2) (a)? It seems to me that the implied joinder of issue was that MF disputed that the restrictive covenants were wider than necessary and MF disputed that it had provided no value in exchange for paragraphs C.1 and C.3. However, the Re-Amended Reply did not make any assertion about the existence or adequacy of consideration from Mr Wong to MF as opposed to consideration from MF to Mr Wong. In my view, there was no issue about consideration from Mr Wong to MF for MF to impliedly join in.

199 Mr Maniam's second argument relied on Order 18 rule 4 which states that, "No pleading subsequent to a reply… shall be served except with leave of the Court". It seems to me that this argument does not take the matter any further. The crux of the issue is whether the matter had to be pleaded. If so, leave would have been granted to file and serve a rejoinder. If not, the absence of a rejoinder is not fatal for MF.

200 Mr Maniam's third argument was that this issue was a pure point of law which need not be pleaded. This submission was premised on the general proposition that points of law may, but need not, be pleaded. That proposition appears to be supported by Order 18 Rules 7 and 11. Rule 7 states that every pleading "must contain, and contain only, a statement in a summary form of the material facts… but not the evidence by which those facts are to be proved…". Rule 11 states that:

> "A party may by his pleading raise any point of law".

In my view, the emphasis in Rule 7 on the pleading of facts is to distinguish fact from evidence. The distinction is not between fact and law as some may assume. The reference to the pleading of law is in Rule 11.

201 We also have Order 18 Rule 8 (1) which states:

> "A party must in any pleading subsequent to a statement of claim plead specifically any matter,

for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality –

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

202 Rule 8 (1) refers to any "matter". It does not in terms distinguish between fact and law. So even if the point taken for MF is one purely of law, it might seem to be caught under Rule 8 (1) (a) because Mr Maniam alleged it would make Mr Wong's claim not maintainable for failure of consideration. That point might also be caught under Rule 8 (1) (b) as a matter which, if not specifically pleaded, might take the opposite party by surprise, notwithstanding that the point was eventually mentioned in the opening statement for MF.

203 On the other hand, case law seems to suggest that pure points of law still need not be pleaded, see for example, *Banner Investments Pte Ltd v Hoe Seng Metal Fabrication & Engineers (S) Pte Ltd* [1997] 1 SLR 461 ("*Banner*") and *Development Bank of Singapore Ltd v Bok Chee Seng Construction Pte Ltd* [2002] 3 SLR 547. However, I should point out that, as far as I am aware, there is no reported decision which deals specifically with the question whether "matter" in Rule 8 (1), or its equivalent, also covers pure points of law provided they fall within the sub-categories of (a) and (b).

204 Even assuming that Rule 8 (1) does not extend to pure points of law, it was not disputed that an issue which raises questions of fact and law must be pleaded. This was reiterated in *Banner* and also in *New Civilbuild Pte Ltd v Guobena Sdn Bhd & anor* [2000] 2 SLR 378. Such a requirement is all the more so if the issue of mixed fact and law is caught under Rule 8 (1) (a) and/or (b).

205 In my view, the issue raised by Mr Maniam was one of fact and law.What Mr Maniam was really asserting was that the Compensation was promised in exchange solely or mainly for the restrictive covenants in paragraphs C.1 to C.3. That was a fact that must be pleaded. The legal consequence if two of the three restrictive covenants were found to be invalid need not be pleaded. I reiterate that paragraph 3 of MF's Re-Amended Defence did set out paragraphs A.2, A.3, B.1, B.2 and C.1 to C.4 of the TA. It also stated that MF would rely on the full terms of the TA. However, it is not sufficient simply to plead or refer to the terms of the TA because the terms in the TA do not quite make the assertion that Mr Maniam was advocating.

206 Paragraph B.1 of the TA stated that the Compensation was given in consideration of (a) Mr Wong's serving out the notice period and (b) agreeing to the terms and conditions "set forth herein". It did not state that the Compensation was given in consideration only or mainly for the restrictive covenants stated in paragraph C of the TA. What other terms did Mr Wong agree to under the TA in exchange for the Compensation? Under paragraph D.1, see again [3] above, he agreed to discharge and release MF from all claims known or unknown, other than his benefits under the TA. There is no corresponding discharge and release by MF of claims against Mr Wong. Under paragraph E.1, Mr Wong also agreed to return MF's property.

207 While it may be argued that the serving out of the notice period and the return of MF's property were not matters which could validly amount to consideration for the Compensation as they were pre-existing obligations of Mr Wong, the discharge and release under paragraph D.1 was not a pre-existing obligation. Furthermore, the point is that MF was obliged to assert as a fact that the sole or main consideration for the Compensation was the restrictive covenants, leaving legal arguments aside.

208 *Singapore Court Practice 2006* by Jeffrey Pinsler states at para 18/8/13:

> **Cases in which unspecific pleas have been allowed**. The requirement of r 8 is that pleas within the scope of para (1)(a)-(c) must be specific. However, the courts have not always applied this condition strictly. See *Superintendent of Lands and Surveys (4th Div) v Hamit bin Matusin* [1994] 3 MLJ 185 (defendants allowed to challenge plaintiff's claim to have acquired native customary rights even though they did not plead defences to this claim); *Re Mana Seena Veeran, deceased* [1975-1977] SLR 372, [1976] 1 MLJ 1 (defence of revocation considered even though not pleaded).
>
> Also note the following observations in relation to r 8 (per Gopal Ram JCA in *Boustead Trading* [*1985*] *v Arab-Malaysian Merchant Bank* [1995] 3 MLJ 331):
>
> > where a party has failed to set out the material facts in his pleading, but there is occasioned no surprise to his opponent, a court may, in the interests of justice, permit the point to be taken.
> >
> > …
> >
> > … Although the court may allow a defence to be raised even if the material facts have not been sufficiently pleaded (see *Re Robinson's Settlement, Gant v Hobbs* (para 18/8/4) and *Boustead Trading* (1985) *v Arab-Malaysian Merchant Bank* (above)) – if the opposing party is not surprised or otherwise prejudiced – a too liberal exercise of such a discretion based on the assumption (rather than the reality) of due notice may well compromise the fundamental purpose of the pleading system, which is that parties must be cognisant of the issues to be raised at trial. Also see *Rosita bte Baharom (an infant) v Sabedin bin Salleh* [1993] 1 MLJ 393, at 396; *Ang Koon Kau v Lau Piang Ngong* [1984] 2 MLJ 277, at 278; *Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124; *Pengiran Othman Shah bin Pengiran Mohd Yusoff v Karambunai Resorts* [1996] 1 MLJ 309, at 321; *Seven Seas Supply v Rajoo* [1966] 1 MLJ 71, at 73.

209 The above passages suggest that the court retains a discretionary jurisdiction to allow Mr Maniam to raise the point if Mr Wong is not surprised or otherwise prejudiced. I note that [62] of the opening statement for MF did mention that if paragraphs C.1 and C.3 were invalid, then Mr Wong could not claim the Compensation to be paid for those covenants. To that extent, Mr Wong was not caught by surprise by the time the trial was underway but he would still have been unaware of the point until MF's opening statement was served.

210 Moreover, Mr Chia submitted that Mr Wong had been prejudiced as he had not pleaded alternative claims for pro-rated bonus for financial year 2006 or for a higher bonus for financial year 2005 or made his claim for the shares based on a different cause of action.

211 Mr Maniam sought to show that there was clearly no basis for Mr Wong to make such claims but I was unable to conclude that there was clearly no such basis. Accordingly, Mr Wong would have been entitled to try to pursue other claims and/or present claims on alternative causes of action. In the circumstances, I am of the view that it is not safe for me to conclude that Mr Wong was not prejudiced.

212 Even if I were to conclude that Mr Wong was neither surprised nor prejudiced, the exercise of the jurisdiction in favour of MF should be sparingly exercised and all the more so if the point "must" be pleaded under Rule 18 (1) (a) and/or (b). The prudent thing for MF to do would have been to apply to

file a subsequent pleading. It did not do so even after it was aware of the point. In the circumstances, I am of the view that I should not exercise any such discretionary jurisdiction in favour of MF.

213 However, for completeness, I will express my views on the substantive point raised by Mr Maniam. *Restrictive Covenants under Common and Competitive Law* Fourth Edition, 2004 states at p 44:

> **3.5 Severance**
>
> There are two different uses of the word severance.
>
> The first concerns whether the offending covenant can be cut out altogether from the contract – leaving an entire contract behind: see *Alec Lobb Garages Ltd v Total Oil (Great Britain) Ltd* [1985] 1 All E.R. 303 and *Stenhouse Australia Ltd v Phillips* [1974] A.C. 391. Thus, in some cases where the covenant is all, or substantially all, the consideration, a consequence of a finding of unreasonableness is to strike down the whole contract. However, even if the covenantee would not have entered the agreement without the covenant, the contract may not be invalidated as a whole if there is consideration independent of the covenant: see *Vancouver Malt & Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] A.C. 181 and *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* [1975] A.C. 561. The ultimate question for the court is whether the absence of the covenant changes the contract in character from the original.
>
> The second approach is to consider whether an objectionable part of a covenant can be severed so as to leave an enforceable obligation. This is the approach most commonly discussed in restraint of trade cases.

214 As I have mentioned, the restrictive covenants were not stated in the TA to be the sole or the main consideration for the Compensation. On the face of the various provisions, there were other promises by Mr Wong in exchange for the Compensation. However, as I have intimated, Mr Wong's promises to serve out the notice period of three months (and being paid for that duration) and to return MF's property were pre-existing obligations. In my view, the restrictive covenants and Mr Wong's agreement to discharge and release MF from all claims constituted the true consideration for the Compensation. However, I agree that the restrictive covenants constituted the main, though not the sole, consideration for the Compensation.

215 Does the invalidity of paragraphs C.1 and C.3 change the character of the bargain? On the other hand, a bargain to have three restrictive covenants and a release and discharge is not the same as one restrictive covenant and a release and discharge. However, I am of the view that that does not change the character of the bargain. It just means that MF had gotten less for the Compensation.

216 Did the restrictive covenants in paragraphs C.1 and C.3 constitute all, or substantially all, the consideration for the Compensation? I do not think so. Seen from Mr Wong's perspective, what did he get in exchange for his promises under paragraphs C.2 and D.1? The result might be different if all the covenants in paragraphs C.1 to C.3 were invalid but that is not the situation before me. At this stage, I would mention that Mr Maniam made a submission that if the restrictive covenants in C.1 and C.3 were invalid then those in paragraph C.2 would also be invalid. It seems to me that it was implicit in MF's Re-Amended Defence that it was taking the position that all those three provisions were valid. Throughout the trial, MF's position was not otherwise and, as I have mentioned, Mr Chia accepted that paragraph C.2 was valid. In other words, both sides proceeded on the basis that that provision was valid. In the circumstances, I am of the view that it was not open to Mr Maniam to make a

contrary submission although it was premised on a certain outcome.

217 I also consider that when MF sought to impose the restrictive covenants, they would probably have been aware of the risk that some, if not all, of such covenants might be eventually held to be invalid. They were represented by solicitors. Accordingly, it ought to have been in MF's contemplation that there was a risk that some parts of a restrictive covenant and some or all of the covenants in their entirety might be struck down. It was for MF to structure the TA to take into account such a risk. While there was a provision in paragraph B.2 stating indirectly that any non-compliance of the terms of the TA would disentitle Mr Wong to the Compensation, there was no provision stating that the Compensation would not be payable if any of the covenants in paragraphs C.1 to C.3 was held to be invalid.

218 I conclude that paragraphs C.1 and C.3 did not constitute all, or substantially all, of the consideration for the Compensation and Mr Maniam's argument thereon must fail.

**Penalty**

219 Mr Chia also submitted that the requirement in paragraph B.2 that Mr Wong must not be in breach of any of the terms of the TA to receive the Compensation constituted an unenforceable penalty in law. I do not agree with this submission. All the provision did was to make every promise of Mr Wong given in exchange for the Compensation a condition the breach of which would prima facie allow MF to refuse payment.

**Summary**

220 I grant judgment in favour of Mr Wong. I will hear parties on the exact terms thereof and on the issue of costs and any other consequential relief.