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Doctrine in Singapore**

KO Jian Xiang

Adjunct Researcher, Centre for Banking & Finance Law, Faculty of Law, National University of
Singapore

jx87@live.com

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Centre for Banking & Finance Law

Faculty of Law

National University of Singapore

Eu Tong Sen Building

469G Bukit Timah Road

Singapore 259776

Tel: (65) 66013878

Fax: (65) 6779 0979

Email: cbfl@nus.edu.sg

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ABSTRACT:

There are many compelling tax and commercial agency reasons why companies and employees desire deferred payment structures with forfeiture clauses. It is therefore in the public interest that the legal status of such clauses be clarified, with regard to whether they pass muster under the restraint of trade doctrine. Recently, numerous legal issues have arisen which have created doubt as to the nature and operation of such clauses. Firstly, the Singapore Court of Appeal in *Mano Singh*, in adopting legal vesting as a criterion for whether the restraint doctrine should apply, has created an artificial distinction which runs counter to one of the historical rationales of the restraint doctrine – namely, the right of an individual to a livelihood. This should not be followed. Instead, it is submitted that the broader ‘practical effect’ approach in *Stenhouse* as applied in the previous Court of Appeal case of *Man Financial* should be reinstated as being more flexible and consistent with the livelihood rationale. Secondly, this paper also analyses the difficulty of applying various estoppel doctrines as a possible solution to address deferred compensation clauses, while still maintaining consistency with the policy rationales behind the restraint doctrine. Thirdly, the problematic American Employee Choice Doctrine is also examined in some detail. It is argued that its introduction into local jurisprudence would be undesirable as running counter to the underlying economic development rationale of the restraint doctrine. Lastly, in light of such considerations, this paper also explores which practical ‘factors’ contribute to finding reasonableness in the financial industry in particular. Such factors would aid in crafting restraint clauses which are likely to ‘pass muster’ under the current state of the law.

[1.0] Introduction

'Human behavior is messy and unpredictable and unconcerned with convenient symmetries.'¹ This is clearly reflected in the difficulties faced by employers seeking to align employees' interests with those of the firm, especially in the aftermath of the Enron debacle. Since then, Deferred Compensation Schemes and Forfeiture Clauses have grown in popularity as tools to combat the Agency Problem.

On the macro level, this use is desirable as it encourages economic growth and efficiency by reducing managerial rent-seeking behavior. However, if taken too far, Deferred Compensation and Forfeiture Clauses (in the form of Forfeiture-for-Competition clauses) may also inadvertently be abused by firms to discourage competition by tying down human factors of production, which is itself detrimental to economic growth. On the micro level, such abuse might also be unfair to individual employees, whose generally weaker position in the employer-employee dynamic often renders them unable to reject unfair terms which restrict their freedom to trade and earn a livelihood.

It is in this context that the Restraint of Trade Doctrine (the 'restraint doctrine') proves essential, as it provides an important legal framework by which the court may step in to balance these myriad interests in any given situation. This paper therefore seeks to examine and critique recent issues which have arisen in the law's response to Deferred Compensation and Forfeiture Clauses.

¹ Khaled Hosseini, *And the Mountains Echoed*, New York: Riverhead Books, 2013 Print at p90

[1.1] – Why Deferred Compensation?

It is important to understand *why* Deferred Compensation Schemes and Forfeiture Clauses are used by firms and employers in the first place. Hence, a brief overview on the rationales behind deferred compensation will be conducted. Such an examination is also important in order to properly appreciate the potential commercial ramifications which might flow from holding that a Forfeiture Clause is in restraint of trade.

[1.1.1] – The Role of Deferred Compensation: Reduction of the Agency Problem

As first proposed by the famous Jensen and Meckling², Agency Problems arise when the shareholders of a firm (known as the ‘principals’ in this scenario) hire managers (known as the ‘agents’) to run the firm on their behalf. Because Jensen³ assumes humans to be generally motivated by self-interest, Agency Theory posits that such agents (eg, managerial employees) will generally make decisions which benefit themselves – even if such decisions sometimes run counter to the interests of the principals (ie, the shareholders of the firm) in the long term. The agents are often able to do so without detection because as employees they “have the competitive advantage of information within the company over that of the owners (principals)”⁴.

This is well-illustrated by the cautionary tale of Enron, where compensation for energy traders comprised merit-based bonuses (with no ceiling) which were based on the sale and structure of energy derivatives⁵ calculated and awarded at the end of the same year. This

² Michael Jensen and William Meckling, ‘Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure’, *Journal of Financial Economics*, October 1976 Vol. 3 No. 4 pp305-360

³ Michael Jensen, ‘Self-interest, Altruism, Incentives, & Agency Theory’, *Journal of Applied Corporate Finance*, Vol. VII, No. 2 (Summer 1994)

⁴ Beth Arnold and Paul de Lange, ‘Enron: An Examination of Agency Problems’, *Critical Perspectives on Accounting*, Vol. 15 No. 6-7 pp751-765

⁵ C. William Thomas, ‘The Rise and Fall of Enron’, *Today’s CPA*, March/April 2002 issue

encouraged the creation and sale of unsustainable products to “attain ever-increasing profits for short-term gains”⁶, and ultimately contributed to the collapse of the firm.

Thus, while non-deferred compensation (such as a bonus paid out at the end of the same year in which an employee performs well) may incentivize above-average performance during any particular year, such an effect may not necessarily be in the long-term interests of the company. This is because employees may be encouraged to act in a self-interested manner in order to meet short-term performance targets, which may be detrimental to the company in the long run.

Therefore, Deferred Compensation is an important component of middle to senior-level executive compensation in large corporations in reducing the Agency Problem. Deferred compensation schemes (especially in the form of equity or share options only redeemable at a later time) are thus preferred by companies, as they encourage a sense of ownership which aligns the interests of the executive with those of the shareholders of the company in the long-term⁷, since short-term actions like those described in the Enron situation would no longer benefit them.

[1.1.2] – The Role of Forfeiture Clauses in Reducing the Agency Problem

Importantly, Leblanc⁸ argues that such deferral schemes allow employers to conduct an ex-post adjustment of deferred compensation to account for mistakes or misconduct (via a negative bonus clawback, also known as a *malus*) made by such executives – the detrimental effects of which may only manifest or crystallize at a later point in time, after the executive has left the firm. Forfeiture Clauses could thus enable the use of the deferred sums as a ‘surety’ against

⁶ Beth Arnold and Paul de Lange, ‘Enron: An Examination of Agency Problems’, *Critical Perspectives on Accounting*, Vol. 15 No. 6-7 pp751-765

⁷ Joseph Martocchio, ‘Strategic Compensation: A Human Resource Management Approach’ 7th Ed, Pearson Education, 2014 Print at p276

⁸ Richard Leblanc, ‘Aligning Executive Compensation with Risk and Achievement’ (2012) online publication last accessed at <http://www.yorku.ca/rleblanc/Leblancarticle155.pdf>

such misconduct, which would also discourage self-interested behavior detrimental to the firm. In the presence of such claw-back malus provisions, employees are now disincentivised from making short-term, self-interested decisions detrimental to the firm, as the knowledge of future restitution acts to deter such intent. This therefore aids in the reduction of the Agency Problem.

[1.1.3] – Tax Benefits for both Employer and Employee

In addition, from a taxation perspective, International Financial Reporting Standard 2⁹ and International Accounting Standard 19¹⁰ (both of which are applied in Singapore and the US) allow companies to treat such deferred compensation as expenses in the year they are vested, which lowers the amount of taxes to be paid. Such schemes are often beneficial to employees as well, since no income tax needs to be paid for the deferred compensation until the year it is actually vested or received¹¹. This allows employees to ‘smooth over’ their earnings by redeeming compensation (or a portion of it) in less profitable years or even during periods of unemployment such as retirement, since they would fall into a lower income bracket with a lower tax rate; this minimizes the total income tax which must be paid overall.

Such tax benefits are not limited to employers and employees of private companies. In the US, specific legislation contained in the Internal Revenue Code (1986)¹² provide for similar tax advantages not only for private sector firms¹³, but for public-education institutions¹⁴, non-profits¹⁵, as well as state and local government organizations¹⁶ as well.

⁹ International Financial Reporting Standard 2

¹⁰ International Accounting Standard 19

¹¹ Section 10(1) Income Tax Act (Cap 134) (2008)

¹² 26 USC. 2002

¹³ 26 USC. Sec 401(k), 2002

¹⁴ 26 USC. Sec 403(b), 2002

¹⁵ 26 USC. Sec 501(c)(3), 2002

¹⁶ 26 USC. Sec 457(b), 2002

Hence, there are compelling reasons for corporations to favor deferred compensation plans, due to their reduction of the agency problem, as well as the tax savings available to both employer and employee under the various accounting and taxation regimes in Singapore and the US.

[1.1.4] – Relationship with the Restraint of Trade Doctrine

The relationship of Deferred Compensation and Forfeiture Clauses to the restraint doctrine is revealed by how they may be used by employers to limit competition as well. This is most frequently achieved through threatening to forfeit outstanding deferred payments if an employee joins a competitor within a stipulated post-employment duration¹⁷, reveals certain business secrets, or exploits trade connections such as client lists¹⁸ and other client information. In these situations, employees are disincentivised from engaging in such ‘competitive’ behavior for fear of losing a not insubstantial portion of their compensation. This type of Forfeiture Clause has been described by the court¹⁹ as a Forfeiture-for-Competition Clause.

While some of these concerns (such as business secrets and trade connections) are recognised by the law as ‘legitimate interests’²⁰ which may be protected, the *extent* to which they *should* be protectable by Forfeiture Clauses in any given situation is ultimately a policy question for the courts to answer through an application of the restraint doctrine.

In summary, this section has demonstrated how there are many economically beneficial effects from Deferred Compensation and Forfeiture Clauses. However, if abused, they may also be used by employers to unfairly discourage competition in employees, which according to the Restraint Doctrine, may be conversely detrimental to the economy by, inter alia, tying up

¹⁷ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2011] SGHC 241

¹⁸ *JM Finn & Co Ltd v Holliday* [2014] I.R.L.R. 102

¹⁹ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42

²⁰ *Stenhouse Australia Ltd v Phillips* [1974] AC 391; *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026

factors of production. This may also create unfairness to the employees themselves, as will be explained in section [2.0]. Hence, a balance must be struck, and the appropriate forum for considering this is the restraint doctrine.

[2.0] – Analysis: Legal Vesting should not be the Criterion for Applying the Restraint Doctrine

The first recent development in the law in Singapore derives from the Court of Appeal decision of *Mano Singh v Cargill*²¹. A brief summary of the facts has been set out below for convenience:

The eponymous plaintiff was a trader employed by Cargill TSF Asia, which was involved in the Trade and Structured Finance business. In addition to the main employment contract, the plaintiff also entered into an incentive award plan with the Cargill, whereby 50% of the award would be paid in cash. The remainder was to be deferred and paid out over one to three years from the date the award was granted. The incentive award plan contained a provision providing for the forfeiture of the deferred 50% if the employee continued to work within the commodity trading or financial industry within a period of two years from the termination of his employment (the ‘Forfeiture Clause’)²². Subsequently, the plaintiff resigned and setup a competing business. Cargill alleged that he had breached the Forfeiture Clause, and hence was no longer entitled to the remaining undistributed deferred payments. The sum forfeited amounted to US\$1,741,894, and the plaintiff sought a declaration, inter alia, that the Forfeiture Clause was void for being in restraint of trade.

²¹ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42

²² Clause has been reproduced in its entirety in Appendix 1

While acknowledging that both Payment-for-Loyalty clauses (which are legal and valid) and Forfeiture clauses (which it found to be in restraint of trade) may share the similar *practical result* of influencing an employee not to compete, the Court of Appeal held that a “principled distinction”²³ existed based on the differing *methods* used by both types of clauses in achieving this end, which justified classifying the latter, but not the former, as falling within the restraint doctrine.

The Court of Appeal found that Payment-for-Loyalty clauses operate such that an employee is only legally entitled to the payment if the condition-precedent of working for the employer for the stipulated period of time has been met²⁴. Completion of this stated duration hence triggers a *subsequent legal vesting* of the loyalty payment upon the employee, who had no legal entitlement to it prior to this point.

Forfeiture-for-Competition Clauses, in contrast, were analysed as dissipating rights to monies which are “*already vested*”²⁵ in the employee. Such monies are usually performance-based rewards for past work done, such that the employee, having completed the work in question, is entitled to them. Arrangements to disburse the monies in portions over a period of time are merely *modes of distribution*, and do not change the fact that the entire sum has *already been vested* in the employee.

This difference in *legal vesting* was viewed by the Court of Appeal as sufficient to fix Payment-for-Loyalty clauses as being “characterized by incentive”²⁶, because the employee has “hitherto not done anything that entitles him... to such payment”, and has the freedom to decide whether to commit additional time and resources so as to *qualify* for the additional sum. “There is

²³ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42 at [43]

²⁴ *Ibid* at [44]

²⁵ *Ibid*

²⁶ *Ibid* at [45]

therefore no restraint” since the payment functions simply as an *incentive* to entice an employee to continue in employment. A Forfeiture clause however, functions as a *disincentive* by *threatening to take away that which has already been earned*; it is a “sword of Damocles hanging over the Appellant’s head – programmed to fall should the Appellant decide to leave... and join a competitor”²⁷. Therefore, in substance, the court’s analysis was that *the subtraction of vested rights constituted the defining characteristic which stained Forfeiture clauses as being in ‘restraint’ of trade*. It is only after this character of restraint has been identified that the rules of the restraint doctrine would apply, such that the clause would only be valid if it passed the twin tests of reasonableness²⁸ with respect to the employee and the public.

[2.1] – Using Legal Vesting as a Criterion is contrary to the rationales of the Restraint

Doctrine

It is respectfully submitted that legal vesting *should not* apply as a basis for deciding whether a clause falls within the doctrine, as it sends the misleading impression that all clauses framed as Payment-for-Loyalty clauses, or entire performance clauses, will *never* be caught by the doctrine, no matter how ‘chilling’ an effect such a clause might have on the employee’s livelihood or free competition. This would surely be contrary to the policy concerns behind the restraint doctrine.

In order to understand the policy rationales behind the doctrine, a consideration of its history and development is required.

²⁷ *Ibid* at [35]

²⁸ As held by Lord Macnaghten in the seminal case of *Thorsten Nordenfelt (Pauper) v The Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] AC 535 at [565] and approved locally by the Court of Appeal in *Man Financial v Wong Bark Chuan David* [2008] 1 SLR (R) 663

[2.2] – Brief History of the Restraint of Trade Doctrine

The restraint doctrine traces its roots to the period referred to by eminent scholar Michael J Trebilcock²⁹ as the mercantilist era, which stretched from the dawn of the Elizabethan era in 1558 to approximately 1800. This late-medieval period saw the Crown pursuing a policy of national aggrandizement both militarily and economically. To this end, it bequeathed various grants of monopolies to its various supporters³⁰, while seeking to regulate the labor force through the Statute of Artifices (1563) in order to promote certain industries conducive to its military and economic ambitions (such as shipbuilding). Professor Atiyah³¹ argues that the prevailing view in the common law fraternity at the time was that the common law existed to protect the *rights of the individual* from abuse of the Crown and those in authority; a protection that was part of an “ancient constitution” stretching back since time immemorial, that was seen to precede even the signing of the Magna Carta in 1215.

[2.3] – First Rationale of the Restraint Doctrine: Protecting an Individual’s Right to a Livelihood

The cases from this period demonstrate that one of these rights which the courts sought to protect with regards to the individual was the individual’s “right [not to be deprived of] a living”³². Restraints (in the form of monopolies or guild rules) were “against the liberty and freedom of the subject, and are... oppression of young tradesmen, by the old and rich of the same trade, not permitting them to work in their trade freely; and all this is against the common law, and the commonwealth”³³. It is important to note that even at this early stage of its

²⁹ Michael J Trebilcock, ‘The Common Law of Restraint of Trade: A Legal and Economic Analysis’, London: Sweet and Maxwell, 1986 Print at p2

³⁰ *Ibid*, at p3

³¹ Patrick S Atiyah, ‘The Rise and Fall of Freedom of Contract’, Oxford: Clarendon Press, 1979 at pp117-118

³² *Darcy v Allen (The Case of Monopolies)* [1602] Moore K.B 671

³³ *Ipswich Tailors’ Case* [1614] 77 E.R 1218

inception, the restraint doctrine was concerned with an individual's right to make a *livelihood*; ie, the individual's right to work in his trade for "the subsistence of his family" and himself³⁴. The point is painted graphically by Parker CJ's exposition on the hypothetical weaver in the famous case of *Mitchel v Reynolds*³⁵:

"Suppose... a poor weaver [was induced by] some designing fellow [who] should work him up to such a pitch as... to give a bond not to work [as a weaver] again, and afterwards, when the necessity of his family, and the cries of his children, send him to the loom, should take advantage of the forfeiture, and put the bond in suit... I think this such a piece of villainy, as is hard to find a name for"³⁶

This rationale has survived unscathed into the modern day law through the first limb of the twin tests of reasonableness, as enunciated by Lord Macnaughten in the locus classicus case of *Nordenfelt*³⁷. In considering the reasonableness of the restriction with regard to Mr Nordenfelt, the adequacy of the £20,000 compensation given to him was taken into account in rejecting the argument that it would be hardship to him "as he can no longer earn his living at the trade which he has made peculiarly his own"³⁸, and finding that the restraint was reasonable. This modern formulation of the doctrine has been definitively accepted by the Singapore Court of Appeal³⁹.

In addition, the livelihood rationale has been refined to include "assumptions of inequality of bargaining power... in the case of employment contracts"⁴⁰ in the modern era, in recognizing

³⁴ *Ibid*, at pp1219-1220

³⁵ *Mitchell v Reynolds* [1711] 24 ER 347

³⁶ *Ibid*, at p351

³⁷ *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535

³⁸ *Ibid*, at p574

³⁹ In *Man Financial v Wong Bark Chuan David* [2008] 1 SLR (R) 663

⁴⁰ Michael J Trebilcock, 'The Common Law of Restraint of Trade: A Legal and Economic Analysis', London: Sweet and Maxwell, 1986 at p54

that the power balance in an employer-employee relationship is typically more imbalanced in favor of the employer, vis-à-vis the sale of a business where parties are typically on a more even footing. As observed by practitioners Mehigan and Griffiths⁴¹, this was because the contract of employment was traditionally drawn up by employers and signed by employees with little or no negotiation as to its contents. In *Nordenfelt* itself, it was recognised by Lord Macnaughten that:

“...different considerations must apply in cases of apprenticeship... and cases of the sale of business... there is obviously more freedom of contract between buyer and seller than between... an employer and a person seeking employment”⁴²

This inequality means that employees may be “practically compelled to accept any terms the employer may seek to impose, and *often for very inadequate compensation*”⁴³ (emphasis added).

In summary, the historical discussion above shows that the presence of the livelihood rationale is an unbroken thread that has remained since the days of Elizabethan yore. It has survived in the form of the first limb of the reasonableness test, and takes into account the unequal power dynamic in an employer-employee relationship in deciding whether a restraint should be allowed to stand. It is *because* of this livelihood rationale, that adequacy of compensation is an important factor in considering whether an arrangement is ‘reasonable’ for an employee. So where does this summary stand in relation to the Singapore Court of Appeal’s recent

⁴¹ Simon Mehigan and David Griffiths, ‘Restraint of Trade and Business Secrets’, London: Pearson Professional, 3rd Ed 1996 Print at p82

⁴² *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at p566

⁴³ *Fitch v Dewes* [1920] 2 Ch. 159 at p185

development in *Mano Singh*⁴⁴ that there must be legal vesting before the restraint doctrine will apply to a forfeiture clause?

[2.4] – The Requirement of Vesting is Contrary to the Livelihood Rationale

By distinguishing Loyalty payments from Forfeiture-for-Competition clauses through the criteria of legal vesting, and using it as the basis of its finding that the latter clauses are “characterized by restraint”⁴⁵, the court was *effectively* immunizing all agreements structured to withhold legal vesting from being considered in restraint of trade. This is undesirable because such clauses may in *substance* offend against the underlying livelihood rationale, by depriving an employee of adequate compensation during the stipulated period of forbearance from alternative employment.

For example, if an employer were to stipulate that monies would only *vest* in an employee if (a) certain performance targets have been met, *and* (b) he does not compete upon termination of the contract for 2 years, such an arrangement would not attract the restraint doctrine simply because both conditions (a) and (b) are *conditions precedent* which must be fulfilled to trigger vesting. Until the employee has performed in entirety, monies are not vested, and the arrangement will not be “characterized by restraint”⁴⁶ according to the Court of Appeal reasoning. The injustice of the situation becomes readily apparent if, notwithstanding the formal arrangement, the deferred sums are understood by both employer and employee to be *in substance* a significant part of the employee’s remuneration – as is often the case in front-office functions in the Finance industry, such as proprietary trading and investment banking. In such functions, the ‘variable’ component of compensation typically comprises more than, or

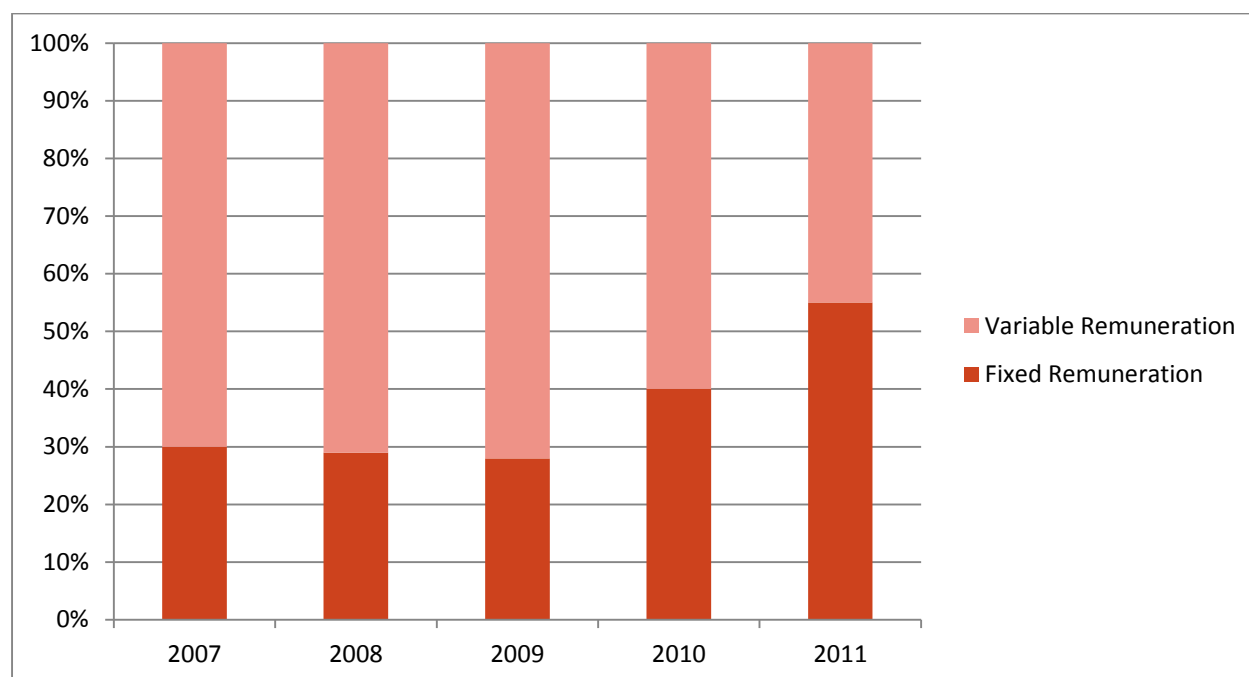
⁴⁴ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42

⁴⁵ At [45]

⁴⁶ *Ibid*

close to half of, employees' take-home pay, as illustrated in Table 1 on the next page⁴⁷. While the best minds in finance often do have a say in negotiating the total *size* of their compensation package, industry norms are such that such terms of vesting are often dictated by employers' human resource considerations and remain beyond the bargaining ability of employees regardless of which employer they approach, which only compounds the problem.

Table 1 – Variable and Fixed Components of Investment Bankers' Remuneration



Thus, it can be seen that the use of the legal vesting criteria is too broad, as it might lead to injustice should employers structure restraint clauses as conditions-*precedent*. *This allows them to avoid the reasonableness scrutiny of the restraint doctrine altogether*, even though the *practical actual* effect of such an arrangement prevents an employee from freely competing by holding a substantial portion of his livelihood hostage. This goes against the livelihood rationale which has been part of the restraint doctrine since the Mercantile era as explained

⁴⁷ McLagan, 'Performance and Remuneration in investment Banking' Published Online (2012), last accessed at www.afme.eu/WorkArea/DownloadAsset.aspx?id=5983

above, and ignores the idea, implicit in the rationale, that employees should be protected due to the power imbalance in the employer-employee dynamic⁴⁸.

In addition, while such an arrangement might be considered *reasonable* if the fixed remuneration were a larger component of the employee's compensation, or if the employee could easily find re-employment that would compensate him for this loss (since there would then be adequate compensation overall which would fulfil the livelihood rationale), there is currently no flexibility for such an evaluation (through the reasonableness tests) since the restraint doctrine would not apply to begin with in this situation.

[2.5] – Proposed Solution: Return to the Test in *Stenhouse v Marshall*

Although the Court of Appeal suggested⁴⁹ that the vesting approach is “no different, in substance, from that in... *Stenhouse*⁵⁰”, it has been shown above in section [2.4] that the former is premised on the *criterion of vesting*, rather than the *substance* of an agreement between employer and employee. The *Stenhouse* test, on the other hand, is much broader in wording, and as set out by Lord Wilberforce in the eponymous case,⁵¹ states that “whether a provision is in restraint of trade [should] be determined by *its practical effect* rather than its form”⁵² (emphasis added) on a case-by-case basis. By necessary implication, these tests are inconsistent since the rigid vesting approach permits preclusion of the application of the restraint doctrine altogether based on the formal criterion of vesting, while the ‘practical effect’ test does not allow this, and leaves room for the restraint doctrine to apply (regardless of how an employer may attempt to structure a forfeiture clause) by examining the *substance* of an arrangement. It

⁴⁸ As recognised by the Singapore Court of Appeal itself in *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [20]

⁴⁹ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42 at [41]

⁵⁰ *Stenhouse Australia Ltd v Marshall Davidson Phillips* [1974] AC 391

⁵¹ *Ibid*

⁵² *Ibid*, per Lord Wilberforce at [402]

is therefore respectfully submitted that a return to the simple and more flexible ‘practical effect’ test in *Stenhouse* is a desirable solution.

Hence, the ‘practical effect’ test would hold that where certain deferred payments are understood by both employer and employee to comprise a substantial part of the latter’s livelihood (as may be determined by either industry expectations or by reference to their proportion vis-à-vis the latter’s ‘fixed’ pay) clauses purporting to forfeit such payments should be construed as being *in substance* in restraint of trade, regardless of the time of legal vesting.

In fairness to the reasoning of the Court of Appeal in *Mano Singh*, it is conceded that Loyalty Payments *generally* do not fall foul of the livelihood rationale of the restraint doctrine. This is because if they are truly intended by employers to be rewards for loyalty, they are unlikely to comprise such a significant sum as to be informally ‘understood’ by the employee to be part of the actual remuneration, such that their loss would affect the employee’s livelihood. However, it should not be the case that *all* arrangements structured as to *mimic the conditions of vesting* in a genuine Loyalty Payment should be treated as avoiding the restraint doctrine. The deceptive convenience of broad ‘safe harbor’ classifications like legal vesting should be eschewed as being susceptible to abuse, and is unsuitable in application for certain industries like Finance as explained above. Thus, it is respectfully submitted that the ‘practical approach’ *Stenhouse* test, as set out above, should be followed as a matter of principle and consistency with the livelihood rationale of the restraint doctrine.

[2.6] – Proposed Solution Draws From Existing Authority

While this solution is similar to the Court of Appeal’s “reasonable expectation” of the parties dicta, which it criticized as being “a *concept... not a doctrine* as such”⁵³, it is submitted that

⁵³ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42 at [57]

the existing ‘practical effect’ approach in *Stenhouse*⁵⁴ is broad enough to include the understanding between the parties as part of its inquiry into the *substance* (ie, the ‘practical effect’) of the arrangement.

On this analysis, since *Stenhouse*⁵⁵ has already been relied on in the prior Court of Appeal decision of *Man Financial v Wong Bark Chuan David*⁵⁶ as well as followed in principle in the High Court decision of *Mano Singh* below⁵⁷, there is no other contrary authority that prevents this solution from being adopted. Once the underlying livelihood rationale of the restraint doctrine is taken into consideration, as explained in detail above, it is apparent that this approach is in fact more doctrinally consistent and should be followed.

Pursuant to this, the earlier cases analysed by the Court of Appeal in *Mano Singh*⁵⁸ which were used to support its vesting approach may also be interpreted according to the ‘practical effect’ analysis explained above. In *Finnegan v J & E Davy*⁵⁹, an employee equity analyst stockbroker’s £65,000 and £140,000 deferred bonuses dwarfed his annual base salary of £40,000. Smyth J’s statement that the plaintiff was “following [his] own money” may be analysed as referring to the informal understanding in reality, based on the huge disparity between the base salary and the bonuses, *that such bonuses were part of the employee’s overall compensation* such that forfeiture would result in a pay far less than what his expertise as an analyst commanded. This would be against the livelihood rationale, and hence the restraint doctrine was applied in considering its reasonableness regardless of whether there was vesting (it was unknown whether there was vesting on the facts).

⁵⁴ *Stenhouse Australia Ltd v Marshall Davidson Phillips* [1974] AC 391

⁵⁵ *Ibid*

⁵⁶ *Man Financial v Wong Bark Chuan David* [2008] 1 SLR (R) 663

⁵⁷ *Mano Vikrant Singh v Cargill TSF Asia* [2011] SGHC 241 at [32]

⁵⁸ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42

⁵⁹ *Finnegan v J & E Davy* [2007] IEHC 18

Similarly, in *Marshall v NM Financial Management*⁶⁰, the employee salesman did not even receive a base salary. Hence, any forfeiture of deferred payment would most certainly affect his subsistence (he would end up with zero compensation) and run contrary to the livelihood rationale. Thus, the restraint doctrine applied in considering whether such a restriction was reasonable, regardless of whether there was vesting.

Lastly, in *Wyatt v Kreglinger*⁶¹, the claimant retired employee's agreement to forfeit retirement bonuses if he worked in the wool trade had the effect of restricting his livelihood; while on the facts there was vesting, it is submitted that even if such monies were not vested in him, the threat of forfeiture had the *practical effect* of preventing him from practicing his livelihood as an export manager such that the restraint doctrine applied in considering whether it was reasonable (eg, it might have been reasonable if the monies were adequate compensation).

Hence, a comprehensive analysis of the authorities used to support the vesting approach shows that they may similarly be interpreted according to the 'practical effect' *Stenhouse* test. There is thus very little reason in the way of existing authority why *Stenhouse* should not be reinstated over the 'vesting' approach.

[3.0] – Analysis: Estoppel – a Viable Solution?

It has been shown above how the current formalistic 'vesting' approach only considers the outer form of an agreement, without being able to thoroughly examine the inner *substance* of the agreement arrived at by the parties. Unfairness to the employee may therefore result, with an unscrupulous employer able to threaten an employee's livelihood by structuring what *in essence* is understood as compensation into a 'Loyalty' payment through control of the vesting

⁶⁰ *Marshall v NM Financial Management Ltd* [1997] 1 W.L.R. 1527

⁶¹ *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793

process, the mischief of which, on the current state of the law, will fall through the safety net of the restraint doctrine. If the proposed solution above is not adopted, what other possible recourse may be available to an employee in such a position?

The Court of Appeal in *Mano Singh*, perhaps in prediction of such possible lacunas, prudently considered in dicta that “there may be other situations... that might nevertheless prompt the court to hold that the doctrine of restraint of trade ought to apply”⁶², and considered various alternative solutions in the event that such a situation not covered by the restraint doctrine were to arise.

[3.1] – Promissory Estoppel

One possibility considered by the Court of Appeal⁶³ (albeit briefly, and in obiter) was the use of a *modified form* of promissory estoppel as an alternative solution to the restraint doctrine, in preventing an employer from forfeiting deferred payments which an employee ‘reasonably expected’ he was entitled to. This possibility flowed from the extra-judicial writing of Lord Steyn⁶⁴, as endorsed locally *in theory* by the Court of Appeal itself in the earlier case of *Tribune Investment v Soosan Trading*⁶⁵:

“...the function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed.”

On this argument, an employer attempting to forfeit deferred payments which an employee ‘reasonably expected’ that he was entitled to would be estopped from doing so by the *existence* of such ‘reasonable expectations’. The court envisioned that “the satisfaction of *the criteria*

⁶² *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42 at [53]

⁶³ *Ibid*, at [57]

⁶⁴ Johan Steyn, ‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’, (1997) 113 LQR 433

⁶⁵ *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [40]

that govern... *equitable (or promissory) estoppel*⁶⁶ (emphases not added) would serve as the test in discovering whether such ‘reasonable expectations’ were present on the facts.

However, it is submitted that this approach is problematic on at least two levels. Firstly, as acknowledged by the Court of Appeal itself⁶⁷, such an expansion of promissory estoppel is merely a *concept*, and lacks the strength of existing *doctrinal* authority. Unless the court is willing to depart from established law and create a new species of estoppel to resolve this injustice to the employee, it is difficult to see how this may be achieved using the existing framework of promissory estoppel, which brings us to the second criticism.

Secondly, such an expansion does not sit well within the existing boundaries of promissory estoppel simply because of the requirement that there must be a clear and unequivocal *representation* by words (as in *Woodhouse v Nigerian Produce*⁶⁸) or conduct (as seen in *Hughes v Metropolitan Railway Co*⁶⁹) emanating from the employer to the employee before estoppel can operate. Since mere silence (in the absence of a duty to speak) generally cannot constitute such a representation⁷⁰, the fact that the inclusion of such deferred compensation clauses is common industry practice means that it is unlikely that any representation that the deferred payment will not be forfeited will be made by an employer at all. In practice, all that would transpire is an employee signing a lengthy standard-form contract with a human resource representative – with no reason for any representation to be made, oral or otherwise, as to any forbearance on the part of the employer from exercising forfeiture.

Hence, the lack of any such representation would likely prevent the elements of promissory estoppel from being fulfilled. It is therefore unlikely, for the reasons stated above, for any kind

⁶⁶ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42 at [57]

⁶⁷ *Ibid*

⁶⁸ *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741

⁶⁹ *Hughes v Metropolitan Railway Co* [1877] 2 App Cas 439

⁷⁰ *QBE Insurance (International) Ltd v Winterthur Insurance (Far East) Pte Ltd* [2005] 1 SLR(R) 711

of 'reasonable expectation' to arise, unless a radical expansion of the doctrine and its constituent elements were to be effected.

[3.2] – Estoppel by Convention

Given the difficulty in finding a representation in such a situation, could the doctrine of estoppel by convention instead be considered? As set out in *Singapore Island Country Club v Hilborne*⁷¹, estoppel by convention does not require any specific representation provided there is (a) a course of dealing between two parties in a contractual relationship⁷², (b) both parties proceeded on the basis of an agreed interpretation of the contract and (c) it is unjust to allow one party to renege on the agreed interpretation. As noted by the authors of *The Law of Contract in Singapore*⁷³, estoppel by convention is premised not on one party's representation but by a *shared assumption* between the parties with regards to a particular interpretation of their contractual rights. Thus, at first glance, the doctrine appears to present a solution to the current problem by being able to overcome the representation hurdle encountered by promissory estoppel.

Unfortunately, on deeper analysis, estoppel by convention may fall short as well. This is because it is ultimately an evidential doctrine intended to aid in the *interpretation* of agreements⁷⁴, rather than to rewrite a bargain. Where a contractual term explicitly states that an employee is not entitled to certain deferred sums unless certain anti-competitive condition precedents are fulfilled, it would be difficult to stretch a doctrine of interpreting evidence in such a way as to effectively obviate the entire clause out of existence to say that the employee, regardless of any fulfilment of the condition precedents, is entitled to payment anyway. Totally

⁷¹ *Singapore Island Country Club v Hilborne* [1996] 3 SLR (R) 418 at [27]

⁷² *Ibid*

⁷³ Andrew Phang Boon Leong et al, 'The Law of Contract in Singapore', Singapore: Academy Publishing (2012) at p250

⁷⁴ *Amalgamated Investment & Property Co v Texas Commerce International Bank* [1982] 1 QB 84

nullifying a clause affecting one of the ‘core’ points in any employment contract – ie, employee’s compensation – is arguably different from saying that certain words in it have been given a particular meaning by the parties based on their shared assumption of the state of affairs. While the latter may be a reasonable outcome based on the court’s interpretation of the parties’ true intentions, to include the former would stretch the doctrine to breaking point since it is difficult to envision a situation where parties, not intending a particular clause (which operation affects the very core of their agreement) to have any effect whatsoever, decide to include that clause in full into a binding contract anyway.

To this end, the case law amply demonstrates that such interpretational wizardry is indeed not the norm in the application of the doctrine. The modern genesis of the doctrine (traced by the well-known *Derham*⁷⁵) was first set out by Lord Denning in *Amalgamated Investment v Texas Commerce*⁷⁶, and it envisions the *interpretation* of particular clauses, rather than their extinguishment or obviation:

“If parties to a contract, by the course of their dealing, put a *particular interpretation on the terms* of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as much as if they had written it down...” [emphasis added in italics]

Thus, the leading cases applying the doctrine in New Zealand⁷⁷, Singapore⁷⁸, and the UK⁷⁹ have done so only in the context of varying the *meaning* of specific terms or phrases in an agreement, and it would be difficult, both conceptually and as a matter of authority, to extend

⁷⁵ Rory Derham, ‘Estoppel by Convention Part 1’, (1997) 71 ALJ 860

⁷⁶ *Amalgamated Investment & Property Co v Texas Commerce International Bank* [1982] 1 QB 84

⁷⁷ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5

⁷⁸ *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2004] SGCA 54, *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2007] SGCA 57, *Singapore Island Country Club v Hilborne* [1996] SGCA 65

⁷⁹ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38

estoppel by convention to totally extinguish an employer's right to withhold deferred compensation should an employee not meet certain anti-competitive condition precedents.

[3.3] – Conclusion on Estoppel

Thus, it has been shown that it is difficult to apply the principles of promissory estoppel and estoppel by convention as solutions to the current situation created by *Mano Singh*⁸⁰ – that employers may, without fear of attracting the restraint doctrine, withhold deferred compensation (which is actually informally 'understood' by the parties to be part of an employee's compensation) on the basis that certain anti-competitive 'condition precedents' have not been fulfilled. This lends urgency to the central thesis of this work – that the proposed *Stenhouse* solution above should be adopted in order to patch this lacuna in the law.

[4.0] – Analysis: The American Employee Choice Doctrine

The Employee Choice Doctrine has attracted some controversy, both locally and in the United States (its jurisdiction of origin). While its exact point of origin remains unclear, one of its early illustrations stems from the Supreme Court of New York case of *Kristt v Whelan*⁸¹, where an employee entered into a pension fund agreement with his employer which provided that any employment in a competing business would result in a forfeiture of his right to payments from the fund. McNally J, in holding that the clause was valid, held that:

The employee, Mr Kristt maintained “the choice of preserving his rights under the trust by refraining from competition... or risking forfeiture of such rights by exercising his right to compete... [thus] [*i*]t is no unreasonable restriction of the liberty of a man to earn his living

⁸⁰ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42

⁸¹ *Kristt v Whelan* [1957] 4 A.D.2d 195

*if he may be relieved of the restriction by forfeiting a contract right or by adhering to the provisions of his contract*⁸² [emphasis added in italics]

Thus, it can be seen that the Employee Choice Doctrine deems Forfeiture-for-Competition clauses to be valid even if they infringed on the ‘liberty of a man to earn his living’ provided his contract gives him a legal choice between competing and not competing. This is emphasized by McLaughlin J’s dicta in *Lucente v International Business Machines Corporation*⁸³ which stated that:

“New York courts will enforce a restrictive covenant *without regard to its reasonableness* if the employee has been *afforded the choice* between not competing (and thereby preserving his benefits) or competing (and thereby risking forfeiture)”. [Emphases added in bold italics]

This doctrine was roundly rejected by the Singapore Court of Appeal in *Mano Singh*⁸⁴, as being a preference for an individual’s freedom to contract over his freedom to trade “without more”⁸⁵. This was found to run counter to the restraint doctrine, which was a “special area of public policy” that evaluated the “*degree of harm done to the freedom to trade*”⁸⁶ by other concerns (such as the freedom to contract) through its application of the twin tests of reasonableness.

It is submitted that the Singapore Court of Appeal was correct in not importing the doctrine into local jurisprudence. Under the American Employee Choice Doctrine, as long as the terms of an employment contract gives an employee a *legally exercisable* choice between competing or staying, the very fact of the employee’s acceptance of and entrance into such an employment

⁸² *Ibid* at p199

⁸³ *Lucente v International Business Machines Corporation* [2002] 310 F 3d 243 (2nd Cir, 2002) at p254

⁸⁴ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42

⁸⁵ *Ibid* at [78]

⁸⁶ *Ibid* at [79]

contract would *per se* exclude the application of the restraint doctrine and the balancing process of the reasonableness enquiry. Even if the terms were so unreasonable (eg, forfeiture of an entire year's commission in a commission-based function) such that the option to leave was in reality merely an illusory 'false choice', the Employee Choice Doctrine would nonetheless operate to uphold and enforce such terms without regard to the degree of harm done to the freedom to trade. This approach hence prioritizes the freedom to contract over the freedom to trade (work) as long as a semblance of legal choice was given in the documentation, indiscriminately ignoring the underlying policy considerations and privileging form over substance. To accept the Employee Choice Doctrine would be contrary to another important historical rationale behind the restraint doctrine as will be explained in the next paragraph – namely, the Economic Development rationale.

[4.1] – Second Rationale of the Restraint Doctrine: Economic Development

Besides the individual's livelihood, the early incarnation of the doctrine was also concerned with macro-economic concerns, such as freeing up factors of production to promote freedom of trade and growth (the 'Economic Development Rationale'). This is seen in Coke CJ's colourful observation in *Ipswich Tailors' Case*⁸⁷ that "the law abhors idleness, the mother of all evil", and may be analysed as reflecting the law's concern with economic growth as a whole, in which the freedom to trade plays an important part. However, such a freedom to trade was not to be unfettered, since the freedom of an individual to contract, and his consequent responsibility to honor such a contract, was also recognised as sacrosanct and advantageous. As argued by Justice Heydon (writing extra-judicially)⁸⁸, this was emphasized heavily by the English courts, particularly in the late 19th century, and this sentiment may be seen in the

⁸⁷ *Ipswich Tailors' Case* [1614] 77 E.R 1218, at p1219

⁸⁸ J D Heydon, 'The Restraint of Trade Doctrine', Australia: LexisNexis 3rd Ed. 2008 Print

famous dictum of Jessel MR in *Printing and Numerical Registering v Sampson*⁸⁹ during what Trebilcock⁹⁰ termed the “laissez-faire” era:

“If there is one thing which... public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily should be held sacred... Therefore [one has] this paramount public policy to consider”.

Thus, on the one hand, sanctity of contract may be argued to facilitate economic activity and growth: an easily re-written bargain would discourage parties from dealing with each other, since there is no certainty that the counter-party would be held to his original promise. On the other hand however, a blanket enforcement of all contractual terms would allow anti-competitive abuse by, inter alia, restraint clauses tying up factors of production which would otherwise be available to market players – which would also be detrimental to economic development.

This tension between the freedom to trade and contract, both of which must be balanced by the court in order to maximize the Economic Development Rationale, may be seen to have continued to the modern day in the form of the second *Nordenfelt*⁹¹ test of reasonableness with regards to the public, who are the beneficiaries of economic development. Importing the Employee Choice Doctrine would therefore *remove that opportunity for balancing* from the hands of the court, with the net result being “simply to privilege the freedom of contract over freedom to trade without more”⁹². Since the potential abuse from *always* privileging freedom of contract (as explained in the preceding paragraph) would be detrimental to economic

⁸⁹ *Printing and Numerical Registering Co v Sampson* [1875] LR 19 Eq 462 at p465

⁹⁰ Michael J Trebilcock, ‘The Common Law of Restraint of Trade: A Legal and Economic Analysis’, London: Sweet and Maxwell, 1986 Print at p2

⁹¹ *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535

⁹² *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42 at [78]

development, and by extension the Economic Development Rationale, it is submitted that the Employee Choice Doctrine should also be rejected on this basis.

Lastly, on a smaller note, there is also much indecision within the doctrine's jurisdictions of origin (ie, the United States) as to whether it should apply⁹³ (a compiled table of the various states' positions on the Employee Choice Doctrine may be found in the Appendix). This lack of consistency suggests that the validity of the Employee Choice Doctrine is itself far from settled, and presents another reason why it should not be introduced into local jurisprudence.

It is for these reasons that the Court of Appeal's rejection of the Employee Choice Doctrine should be seen as correct.

[5.0] – How should Deferred Payments and Forfeiture Clauses be structured in the Finance Industry?

As explored above in section [1.1], there are multiple commercial reasons why banks and companies desire the inclusion of deferred payments and forfeiture clauses, such as the reduction of taxes, as well as to mitigate the agency problem. Thus, in light of *Mano Singh*⁹⁴, how should forfeiture clauses be drafted in order to minimize the risk of invalidation under the restraint doctrine? What interests may be legitimately protected?

[5.1] – Protectable Legitimate Proprietary Interests in the Finance industry

Regardless of the basis of the Singapore Court of Appeal's decision in deciding that forfeiture clauses fall under the restraint doctrine, what is clear is that clauses which take the legal form

⁹³ See Appendix 2 for a compiled table of cases in the United States by state

⁹⁴ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42

of extinguishing a legally vested right are now subject to evaluation under the twin tests of reasonableness. The restraint doctrine and reasonableness inquiry would also apply to more clauses if the ‘practical effect’ test in *Stenhouse* is reinstated, since the proposed test captures the legal *substance* of a restraint clause as opposed to just its legal form, as explained above.

It is trite law that the starting point in the reasonableness inquiry is that “there must be a legitimate proprietary interest which the covenant is intended to protect”⁹⁵. In the context of contracts of employment, the two interests which may be protected are trade secrets and trade connections⁹⁶, and these are examined within the context of the finance industry below.

Trade Secrets in the Finance Industry

As held in the recent case of *Towry v Bennett*⁹⁷, which followed the prior UK Court of Appeal case of *Lansing v Kerr*⁹⁸, information used in a trade or business, the dissemination of which is controlled by the owner, and “would, if disclosed to a competitor, be liable to cause real or significant damage to the owner of the information” will be considered a protectable trade secret. This test encompasses the factors spelt out in *Faccenda Chicken v Fowler*⁹⁹, which was approved by the Singapore Court of Appeal¹⁰⁰, viz: (a) nature of the employment, (b) nature of the information, (c) whether the employer impressed on the employee the confidentiality of the information, and (d) whether the information can be easily isolated from other non-confidential information.

Thus, client lists and client contact details acquired through the employer will be considered trade secrets, as would any information supplied by clients in confidence to the employee in

⁹⁵ *Countryside Assured Financial Services v Deanne Smart* [2004] EWHC 1214

⁹⁶ *Man Financial v Wong Bark Chuan David* [2008] 1 SLR (R) 663 at [81]

⁹⁷ *Towry EJ Ltd v Bennett* [2012] WL 382717 at [405]

⁹⁸ *Lansing Linde Ltd v Kerr* [1991] 1 W.L.R. 251 at p260

⁹⁹ *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at pp137-138

¹⁰⁰ *Man Financial v Wong Bark Chuan David* [2008] 1 SLR (R) 663

his capacity as employee¹⁰¹. As seen in the case law, this may include specific requirements unique to the client's portfolio, investment positions and pricing strategies of the client, as well as client business objectives¹⁰². Such information is frequently encountered in the client-facing Private Wealth Management, Corporate Banking, and Investment Banking functions of banks.

While it is recognised that such information may be protected by the law of confidence, it is submitted that from a practical perspective forfeiture clauses have an added advantage, especially in the event where an injunction comes too late and the employee has become bankrupt after revealing the secret. In this scenario, an employer already has possession of the deferred monies, which (if vested in the employee) are owed as a debt and may be set-off in bankruptcy¹⁰³ against the employee's liability to pay damages for illicitly revealing such secrets.

Alternatively, if such a sum has not yet been vested in the employee, the employer retains ownership of the 'deferred' monies, which may then be used to mitigate any damage caused by the illicit revelation of such secrets. This may be argued to be a considerable advantage considering that the quantum of deferred payments may be significant.

Trade Connections in the Finance Industry

In the context of the Finance industry, it was observed by Maurice Kay LJ in *Beckett Investment v Hall*¹⁰⁴ that

“Any financial services company relies on employees to attract and retain a client base. If those employees who deal directly with clients leave the company and set up on their own

¹⁰¹ As on the facts of *Towry EJ Ltd v Bennett* [2012] WL 382717, which involved an Investment Consultancy

¹⁰² *Ibid*

¹⁰³ Section 88(1) of the Singapore Bankruptcy Act

¹⁰⁴ *Beckett Investment Management group Ltd v. Hall* [2007] I.C.R. 1539 at [1]

account or go to work for a rival company, it is not unnatural that, one way or another, sooner or later, the clients will follow them (although) they have been the clients of the company rather than of its employees...”

Thus, such relationships, although *managed* by employees, in fact *belong to the company*, such that it could be said to have a legitimate proprietary interest to protect.

This covers ‘garden leave’ covenants, as seen in *JM Finn v Holliday*¹⁰⁵ where the stockbroking firm sought to suspend an employee on full pay for one year upon tendering his resignation. It was held that the company had a legitimate interest to protect its client base, and was therefore entitled to a “reasonable period in which to (re)establish relationships” after the employee had tendered his resignation.

[5.2] – Reasonableness: Requirement of Legal Vesting

It is the central thesis of this paper that the requirement of legal vesting should not be used as a criterion for determining whether a forfeiture clause falls within the restraint doctrine. However, if the reasoning in *Mano Singh*¹⁰⁶ is followed in subsequent cases, it would appear that employers should characterize the period of restraint as a condition precedent before the deferred payment will be vested. According to the current law as it stands, this would allow such clauses to escape the application of the restraint doctrine.

[5.3] – Reasonableness in Protecting Client Relationships

Although reasonableness varies greatly depending on the factual matrix at hand, certain recurring factors may be considered when drafting forfeiture clauses which protect *existing*

¹⁰⁵ *JM Finn & Co Ltd v Holliday* [2014] I.R.L.R. 102

¹⁰⁶ *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42

client relationships (which fall under the ‘trade connections’ category) within the Finance services industry.

Considerations in Determining Reasonableness of Duration

It is suggested that the duration of the restraint should be the amount of time it reasonably takes to re-establish a relationship with the client. This may be seen in *JM Finn v Holliday*¹⁰⁷, where it was held that “the Claimant would need a reasonable period in which to establish or attempt to establish relationships between his clients and new investment managers”.

Hence, the frequency of contact with the client should be considered as a relationship may be more easily re-established if there are a higher number of contact hours¹⁰⁸ within a particular duration; the reverse is also likely to be true. In addition, the duration which a client needs in order to have an opportunity to make an assessment of the performance¹⁰⁹ of the new manager should be taken into account.

Lastly, aside from objective measures such as return on investment, it should be noted that demonstrating ‘soft’ attributes such as integrity, reliability and chemistry¹¹⁰ in re-establishing a relationship requires a certain amount of time. This should also be a factor which should be taken into account in deciding whether a given duration is ‘reasonable’ within the context of the restraint doctrine.

¹⁰⁷ *JM Finn & Co Ltd v Holliday* [2014] I.R.L.R. 102; see Appendix 3 for extract

¹⁰⁸ *Ibid* at [68]

¹⁰⁹ *Ibid* at [69]

¹¹⁰ *Ibid* at [70]

Reasonableness of Geographical Area

Given the very small geographical land area of Singapore¹¹¹, as well as the fact that most financial institutions are located within the small area of the Central Business District, it is this author's opinion that it is difficult to justify any area-based restriction as reasonable. Hence, it is submitted that any restraint clause should specify the employer's list of existing clients as that provides a stronger link with the 'legitimate proprietary interest' (ie client relationships) so as to be considered reasonable.

[6.0] – Conclusion

There are many compelling economic reasons why companies and employees desire deferred payment structures with forfeiture clauses. It is therefore in the public interest that the legal status of such clauses be clarified. However, the recent Court of Appeal decision in *Mano Singh*¹¹², in adopting legal vesting as a criterion for whether the restraint doctrine should apply, has created an artificial distinction which runs counter to the historical livelihood rationale of the restraint doctrine. It is respectfully submitted instead that the *Stenhouse*¹¹³ test as applied in the prior case of *Man Financial*¹¹⁴ should be reinstated as being more consistent with the livelihood rationale, especially considering the difficulty of applying various estoppel doctrines. This paper has also analysed the problematic Employee Choice Doctrine in some detail, and shown that any introduction into local jurisprudence would be undesirable as running contrary to the rationales of the restraint doctrine. Given such considerations, the final section has

¹¹¹ As observed in *Man Financial v Wong Bark Chuan David* [2008] 1 SLR (R) 663 at [72]

¹¹² *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] SGCA 42

¹¹³ *Stenhouse Australia Ltd v Marshall Davidson Phillips* [1974] AC 391

¹¹⁴ *Man Financial v Wong Bark Chuan David* [2008] 1 SLR (R) 663

attempted to explore factors which are of relevance in influencing the finding of reasonableness when protecting legitimate interests in the financial industry.

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Appendix 1 – Forfeiture Clause in *Mano Singh v Cargill*¹¹⁵

Individual Incentive Award	Deferred Incentive Percentage and Deferral Period
\$74,999 and below	0% – No Deferred Incentive
\$75,000 – \$199,999	50% of Individual Incentive Award deferred for 1 Fiscal Year from Grant Date
\$200,000 – \$399,999	50% of Individual Incentive Award deferred over 2 Fiscal Years from Grant Date (2 annual payments)
\$400,000 and greater	50% of Individual Incentive Award deferred over 3 Fiscal Years from Grant Date (3 annual payments)

FORFEITURE PROVISIONS

Deferred Incentives that have been awarded but not yet distributed will be forfeited if the Participant (1) is Terminated for Cause, or (2)(a) Separates from Service other than by reason of death or Disability, and (b) continues a career within the financial or commodity trading industry outside of the Company within a period of two years from the date of such Separation from Service (referred to as the ‘Two-Year Non-Compete Period’). Continuance of a career within the financial or commodity trading industry is defined as employment by, consulting with, establishing, or having a substantial ownership interest in any organization, which competes with the Company for employees, customers, clients, market share, or financial/commodity resources or deals.

Deferred Incentives will not be forfeited under the following circumstances:

- A Participant’s death or Disability.
- A Participant who Separates from Service other than for death or Disability and who does not compete within the Two-Year Non-Compete Period.

In the event that a Participant seeks to engage in activity or an employment relationship that may violate the Two-year [*sic*] Non-compete period [*sic*], Participants may seek clarification relative to the acceptability of this relationship from the Business Unit or Platform leader; provided, that the Two-Year Non-Compete Period shall not be waived, or if waived by the Company, such waiver shall not affect the time or form of distribution of any amounts payable under this Plan.

¹¹⁵ Extracted from *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2011] SGHC 241 at [10] – [11]

Appendix 2 – List of States Approving or Rejecting the Employee Choice Doctrine (ECD)¹¹⁶

States Against ECD	Level of Court / Statute	Cases
Maryland	Maryland Court of Appeals	- <i>Food Fair Stores, Inc. v. Greeley</i> , 264 Md. 105, 285 A.2d 632 (1972) - <i>Holloway v Faw, Casson & CO</i> 319 Md. 324, 572 A.2d 510 (1990).
Delaware	Third Circuit applying Delaware Law	- <i>Pollard v. Autotote, Ltd.</i> 852 F.2d 67 (3d Cir. 1988)
Connecticut	Connecticut Supreme Court	- <i>Deming v Nationwide Mutual Insurance Co</i> 279 Conn. 745, 762 (2006)
Oregon	Oregon Supreme Court	- <i>Lavey v Edwards</i> 264 Or. 331, 505 P.2d 342 (1973).
Washington	Washington Supreme Court	- <i>Sheppard v. Blackstock Lumber Co., Inc</i> 85 Wash.2d 929, 540 P.2d 1373 (1975).
Massachusetts	Massachusetts Supreme Court	- <i>Cheney v. Automatic Sprinkler Corp. of America</i> 377 Mass. 141, 385 N.E.2d 961 (1979) - <i>Securitas Security Services USA, Inc. v. Jenkins</i> 16 Mass. L. Rptr. 486, 2003 WL 21781385
California	Statute	- <i>Muggill v. Reuben H. Donnelley Corp</i> 62 Cal.2d 239, 398 P.2d 147, 42 Cal. Rptr. 107 (1965). - California: Cal. Bus. & Prof. Code §16600 (West 2009);
North Dakota	Statute	North Dakota: N.D. Cent. Code §9-08-06 (2009).

States Supporting ECD	Level of court / Statute	Cases
North Carolina	North Carolina Court of Appeals	- <i>Eastern Carolina Internal Medicine, P.A. v. Faidas</i> 149 N.C. App. 940, 564 S.E.2d 53 (2002).
Federal Court 4 th Circuit	Federal Court 4 th Circuit	- <i>Rochester Corp. v. Rochester</i> 450 F.2d 118, 122–23 (4th Cir. 1971).
Eastern District of Pennsylvania	Federal District Court for the Eastern District of Pennsylvania	- <i>Fraser v. Nationwide Mutual Ins. Co</i> 334 F. Supp.2d 755 (E.D. Pa. 2004).
Vancouver		- <i>Johnson v. MPR Associates, Inc</i> 894 F. Supp. 255, 257 (E.D. Va. 1994).
New York	Second Circuit applying New York Law	- <i>Lucente v. IBM</i> 310 F.3d 243, 254 (2d Cir. 2002).
Alabama	Alabama Supreme Court	- <i>Southern Farm Bureau Life Insurance Company v. Mitchell</i> 435 So.2d 745 (Ala. Civ. App. 1983). - <i>Courington v. Birmingham Trust National Bank</i> 347 So.2d 377 (Ala. 1977).

¹¹⁶ Data extracted from *Forfeiture-for-Competition Agreements: An Alternative to Traditional Non-Competition Agreements?* (2010) by Susan Powell, last accessed at: www.fdh.com/news/data/0023/res/id=sa_File1/PDFArtic.pdf

Appendix 3 – Extract from *JM Finn & Co Ltd v Holliday*¹¹⁷

[68] Mr Powell gave largely unchallenged evidence that in his experience it takes a long time to lay and entrench the foundations of a relationship between a new investment manager and his or her clients. This is particularly so when dealing with discretionary portfolio clients. This is because formal contact with such clients only occurs a few times a year. Valuation letters are sent out to such clients twice annually or sometimes quarterly but otherwise contact is typically made at some time between the beginning of the New Year and April when the new tax year starts. These occasions are the best opportunity, according to Mr Powell, for an investment manager to win and maintain a relationship with a discretionary client. It is important not to force a client to meet at a time not of their choosing or when they are reluctant to do so. Otherwise the investment manager appears to be too pushy and to be conducting a hard sell. For this reason, Mr Powell explains that if early attempts at arranging meetings are unsuccessful, it is best to allow the client some space before seeking to rearrange an initial meeting to make arrangements for a follow-up meeting. Even if the first meeting has been held, followed up by sending a confirmatory email which sets out next steps to be followed, Mr Powell explains that it is important to try to cement the relationship with further emails. Most clients would expect some reason for a further meeting or review. For example, a change in market conditions may warrant a change in stock selection and so provide an effective basis for approaching the client for a meeting. Such a change that might trigger a justifiable basis for arranging a meeting or review with the client is unpredictable and cannot reliably be expected to take place in any particular period, whether a six-month or a 12 month period. For that reason, in relation to those clients who do not immediately decide either to stay or leave the Claimant following the departure of an investment manager who has previously dealt with them a reasonably substantial period of time is necessary to seek to establish a new relationship with a new investment manager. Mr Powell explains that this process would prove virtually impossible if Mr Holliday, who had the obvious advantage of an

¹¹⁷ *JM Finn & Co Ltd v Holliday* [2014] I.R.L.R. 102 at [68]-[70]

established relationship with the clients, was simultaneously soliciting such clients on behalf of a new employer or taking steps to undermine the efforts made by the newly appointed investment managers.

[69] The second reason Mr Powell gives to justify the need for a long time to lay and entrench the foundations of the relationship with a new investment manager is that it usually takes significantly longer than six months to make any meaningful assessment of the success of any adjustments to the portfolio that may have been recommended by the investment manager and consequently, it takes longer than six months for the client to make an assessment of the performance of the new manager. There are some clients for whom no adjustment is needed to their portfolio and in such a case it is difficult to assess performance in the absence of any positive activity. Moreover the fact that valuations are only sent out every six months, combined with potential volatility in the market, means that it takes at least a year for the client to see an accurate picture of the success of their portfolio and of the investment manager responsible for it. Mr Powell indicates that this latter point is supported by communications the Claimant has received from some of Mr Holliday's former clients, who have given the Claimant 12 months to demonstrate a good performance before they decide whether to leave with Mr Holliday or to remain on the Claimant's books. Others have stated that they do not wish to move stockbroking firms too often and will remain with the Claimant so long as their portfolio performs well over the next 12 months.

[70] In light of this unchallenged evidence which I accept, it is clear that there are a number of factors that will be relevant to whether a relationship is established between the new investment manager and the client. Some of those factors, such as personal chemistry, are immediate. However others, such as demonstrating integrity, reliability and good performance, invariably take time. Moreover a new investment manager cannot artificially speed up the process of forging the new relationship, for example by having lots of meetings or sending lots of letters within a short period, without running the risk of acting counter-productively. The timing of meetings is to a significant extent dictated by external factors, such as the timing of half yearly valuations or the end of the tax year. Any initial busy

period of wooing as described by Mr Holliday at paragraph 22 of his third witness statement, will in practice have to be conducted over a longer period than the four months he identifies.