

**LEXIS-NEXIS COMMERCIAL CONTRACTS
MASTERCLASS 2009:**
**PRE-CONTRACTUAL AGREEMENTS, NON-
COMPETITION CLAUSES AND RESTRAINT OF TRADE**



©2009 All Rights Reserved. Trevor George Partnership.

OUTLINE OF ISSUES :

(A) LETTERS OF INTENT & MOUs

(B) RESTRICTIVE COVENANTS / AGREEMENTS:

(I) *NON-DISCLOSURE / CONFIDENTIALITY CLAUSES;*

(II) *NON-SOLICITATION CLAUSES;*

(III) *NON-COMPETITION CLAUSES*

(A) LETTERS OF INTENT & MOUs

(i) *LEGAL PRINCIPLES ON CONSTRUCTION :*

➤ ***Court is not bound by Titles, Labels or Nomenclature ;***

ADDISCOMBE GARDEN ESTATES LTD V. CRABBE [1957] 3 WLR 980 (cited with approval by CA in SIA SIEW HONG & ORS V. LIM GIM CHIAN & ANOR [1995] 3 MLJ 141) :-

*"No doubt it is described as a guarantee. **But in the construction of contracts, the court is not bound by the labels that parties choose to affix onto the particular document.** In all such cases, the duty of the court is clear. And that duty is to construe the documents as a whole and to determine from its language and any other admissible evidence its true nature and purport."*

➤ ***Significance of Preambles, Introductory or Opening Statements;***

KLEINWORT BENSON LTD V. MALAYSIA MINING CORP BHD [1989] 1 All ER 785 per Ralph Gibson LJ :-

*'to ascertain what **common intentions** should be ascribed to the parties from the terms of the documents and the **surrounding circumstances**'*

(ii) **WHETHER 'SUBJECT TO CONTRACT' OR UNCERTAIN;**

KAH MAH THEATRE v. TAN LAY SOON [1994] 1 MLJ 9, SC

AYER HITAM TIN DREDGING v. YC CHIN ENTERPRISE [1994] 2 MLJ 754, SC
held:

"But it is well settled that when an arrangement is made '**subject to contract**' ...or 'subject to the preparation and approval of a formal contract' ...and similar expressions, **it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless, and until a formal contract is exchanged**"

COURTNEY & FAIRBAIRN LTD v. TOLAINI BROTHERS (HOTELS) [1975] 1 WLR 297 per Lord Denning MR:

"... I think we must apply the **general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.** "

CHARLES GRENIER SB v. LAU WING HONG [1997] 1 CLJ 625, FC per Sri Ram JCA:

"**Generally, an agreement to make an agreement does not result in a contract.** It is for the Court, in each case, to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If, however, the Court reaches an opposite conclusion, then there is an enforceable contract."

(iii) **LETTERS OF INTENT;**

TURRIFF CONSTRUCTION LTD v. REGALIA KNITTING MILLS LTD per Justice Kay :

*"As I understand it such a letter is **no more than the expression in writing of a party's present intention to enter into a contract at a future date.** Save in exceptional circumstances it can have no binding effect... A letter of intent would ordinarily have **two characteristics, one, that it will express an intention to enter into a contract in future and, two, it will itself create no liability in regard to that future contract.**"*

AYER HITAM TIN DREDGING v. YC CHIN ENTERPRISE [1994] 2 MLJ 754, SC held:

*"On its true construction, the letter did not constitute a contract binding in law but was only a record of terms which were agreed as a basis for the negotiations of a contract. It was a **Letter of Intent, i.e an expression in writing of a party's present intention to enter into a contract at a future date.**"*

(iv) **MEMORANDUM OF UNDERSTANDING;**

KHEAMHUAT HLDGS v. THE INDIAN ASSOCIATION, PENANG [2006] 2 CLJ 1040, AC;

ABDUL RAHIM v. RAMAKRISHNAN KANDASAMY [1996] 3 CLJ 393, per Justice Visu Sinnadurai :

*"It must also be observed that the memorandum of understanding **contains no specific provision as to the effect of non-compliance** of it by the parties, nor does **it provide that until the specified date, the vendor was under an obligation not to sell the property to a third party.** Further, if the MOU had stated that, in consideration of the vendor promising not to do so, the money paid by the purchaser will be forfeited if the purchaser chooses not to go on with the sale, **no difficulties would have arisen.***

Time and again, the courts have stated that much of these problems may be avoided if only the consequences of either party not proceeding with the contract are expressly spelt out in the initial agreement itself. Despite these words of caution, such problems continue to arise."

(B) RESTRICTIVE COVENANTS / AGREEMENTS

- **Section 25** Contracts Act 1950 : *Agreements void if consideration and objects unlawful in part ;*
 - **Section 26** Contracts Act 1950 : *Agreement without consideration void unless ;*
 - (a) *it is in writing and registered;*
 - (b) *or is a promise to compensate for something done;*
 - (c) *or is a promise to pay a debt barred by limitation law*
 - **Section 28** Contracts Act 1950: *Agreement in restraint of trade void;*
- POLYGRAM RECORDS v. THE SEARCH* [1994] 1 LNS 105, HC
- **Section 30** Contracts Act 1950 : *Agreements void for uncertainty;*

(B) RESTRICTIVE COVENANTS / AGREEMENTS

Section 24 Contracts Act 1950 : What considerations and objects are lawful, and what not :

- (a) it is forbidden by a law;*
- (b) it is of such a nature that, if permitted, it would defeat any law;*
- (c) it is fraudulent;*
- (d) it involves or implies injury to the person or property of another; or*
- (e) the court regards it as immoral, or opposed to public policy.*

THERESA CHONG v. KIN KHOON [1976] 2 MLJ 253, FC

CHUNG KHIAW BANK v. HOTEL RASA SAYANG [1990] 1 MLJ 356, SC

AG FOR HONG KONG v. ZAU YAH WAN CHIK [1995] 3 CLJ 35, AC

SABABUMI (SANDAKAN) v. DATUK YAP PAK LEONG [1998] 3 CLJ 503, SC

(i) **NON-DISCLOSURE / CONFIDENTIALITY CLAUSES :**

➤ **The legal meaning of "Confidential information" ;**

ELECTRO CAD AUST PTY LTD v. MEJATI [1998] 3 CLJ Supp 196, per Justice RKNathan;

"Confidential information" is generally information which is the object of an obligation of confidence and is used to cover all information of a confidential character. This includes... **Trade secrets, Literary and Artistic secrets, Personal secrets and Public and government secrets.."**

LANSING LINDE LTD v. KERR [1991] 1 AER 418, AC held on 'trade secrets':-

"Trade secrets" are not restricted to secret formulae for the manufacture of products but can include highly confidential information of a non-technical or non-scientific nature, **such as customer's names, which if disclosed to a competitor, would cause real or significant harm to the owner and which the owner is entitled to have protected.**

FACCENDA CHICKEN LTD v. FOWLER [1985] FSR 105, 3 Classes of information which an employee may acquire during course of employment (per Justice Goulding);

➤ ***The justification for Non-Disclosure ;***

TERRAPIN LTD v. BUILDERS SUPPLY CO [1960] RPC 128, per Justice Roxburgh :-

*"As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a **springboard for activities detrimental to the person who made** the confidential communication and **springboard it remains, even when all the features have been published or can be ascertained by actual inspection by any member of the public**"*

SVENSON HAIR CENTER v. IRENE C.Z.L per Justice Vincent Ng (now JCA) :-

*"[The injunction presently sought by the Plaintiff is to protect its Confidential Information pertaining to its **customer lists, names and details**, from continuing to be exploited by the Defendant. That this information belongs, in law, to the Plaintiff is beyond doubt, as is the fact that the Defendant has no right to avail herself of the same without the Plaintiff's consent."*

➤ ***The efficacy of Non-Disclosure Clauses / Agreements ;***

FISCAL TECHNOLOGY v. JOHNSON [1991] 23 I.P.R 555, NZ High Court

LIM LEAN HENG v. WAKO MERCHANT BANK (S'PORE) [2004] 3 CLJ 9, AC
per Justice Sri Ram , JCA :-

*"Without going into any detail, suffice if we say that **equity imposes an obligation on the recipient of confidential information not to disclose it. A threat to do so will be restrained by injunction.** A breach of confidentiality is remediable in damages. See Douglas & Ors v. Hello Ltd [2001] 2 All ER 289.*

*But such a breach cannot in our view found an application for cross-examination. It stumbles at the very first step of relevancy. For it can hardly be relevant in an application for a post-judgment Mareva injunction prayed in aid of execution that illegally obtained evidence is sought to be admitted. **If there is a complaint that confidence was breached, the appellants have appropriate remedies available to them. However, cross-examination is not one of those remedies.**"*

(ii) NON-SOLICITATION CLAUSES :

FACCENDA CHICKEN LTD v. FOWLER [1985] FSR 105, per Justice Goulding;

*"In my judgment the **sales information** relied on by Faccenda Chicken Ltd...falls into my second class, and **cannot be protected in the absence of an express restrictive stipulation.** The Defendant being free to compete...and **to solicit its customers,** it is impossible, in my judgment, to say they must not use their own knowledge of the whereabouts and requirements of those customers, the prices they have been paying and the routes by which they are conveniently visited."*

SVENSON HAIR CENTER v. IRENE C.Z.L per Justice Vincent Ng (now JCA) :-

*"I hold that damages will not be an adequate compensation for the Plaintiff in view of the **very nature of the breach of contractual prohibition and confidence,** which make it difficult for the Plaintiff to quantify monetarily its loss of patronage of customers and/or the long term loss and damage to the Bella Beauty Business's business, strategies and competitiveness"*

(iii) NON-COMPETITION CLAUSES :

PERTAMA NITE CLUB v. ROMAN TAM [1981] MLJ 149, HC

STAMFORD COLLEGE GRP v. RAJA ABDULLAH [1991] 2 CLJ 167 (Rep), HC

THOMAS MARSHALL (EXPORTS) v. GUINLE [1978] 3 AER 193, per Megarry VC;

*"The case is not one, of course, in which the company seeks to restrain the defendant from engaging in any competing work, **but one in which the company merely seeks restraints in terms of what I have called the soliciting order and the breach of confidence order**"*

SCHIMDT SCIENTIFIC v. ONG HAN SUAN [1998] 1 CLJ 685, HC

THOMAS MARSHALL (EXPORTS) v. GUINLE [1978] 3 AER 193 :

The duty does not extend after cessation of employment, but may in the case of a directorship.

SVENSON HAIR CENTER v. IRENE C.Z.L per Justice Vincent Ng (now JCA) :-

END

March 2008.

ADDENDUM : SAMPLE CLAUSES

'Non-Disclosure' clause :

"Each party shall keep strictly confidential the negotiations relating to this Deed, the existence of this Deed and its contents, and each party shall not disclose the same to any other person without the prior written consent of the other parties, other than to its holding company, its directors, employees and advisers...on a strictly need to know basis, or when required under applicable laws or regulations..." [JUSTLOGIN PTE LTD v. OCBC LTD [2004] 1 SLR 118]

'Non-Solicitation' clause :

" The Employee agrees, during the subsistence of this Agreement and for a period of 24 months thereafter, that he shall not either on his own account or for any person solicit or entice or endeavor to solicit or entice away from the Employer any of its customers, employees or staff whether or not such person would commit any breach of contract by reason thereof"

'Non-Competition' clause :

"You hereby covenant, agree and undertake to the Company that, for a period of 12 calendar months after termination of your contract of employment with the Company (for whatever reason), you shall refrain from accepting and being retained in employment with, or providing services to (whether for your own account or for the account of any other person), any person, firm, company or organization engaged in, or carrying on, business(es) or service(s) directly in competition with or similar to the businesses of the Company"

"Not at anytime during the period of his appointment or after the termination thereof to disclose any confidential information relating to the affairs of the customers or trade secrets of the Group of which he shall become possessed whilst in the service of the Company under this or any other agreement."

*"During the period of his appointment, he shall not save with the consent in writing of the Company, be directly or indirectly engaged concerned or interested in any other business save that of the Company..." [**THOMAS MARSHALL v. GUINLE** [2004] 1 SLR 118]*

Section 28 Contracts Act 1950 :

"Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extend void.

Exception 1 : One who sells goodwill of a business may agree with the buyer to refrain carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein.

Provided that such limits appear to the court reasonable, regard being had to the nature of the business.

Exception 2 : Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in exception 1.

Exception 3 : Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

-- E N D ---