THE ENFORCEABILITY OF A FORFEITURE-FOR-COMPETITION CLAUSE IN AN EMPLOYMENT CONTRACT

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A recent Singapore Court of Appeal decision in Mano Vikrant Singh v Cargill TSF Asia Pte Ltd SGCA 42, overturned the Singapore High Court's decision in Mano Vikrant Singh v Cargill TSF Asia Pte Ltd SGHC 241, and held that the restraint of trade doctrine applies to a forfeiture provision which forfeits an employee's benefits when the employee is found to be competing against the employer.

This article discusses the landmark decision by the Court of Appeal with respect to the forfeiture provision and the restraint of trade doctrine.

Facts

The Appellant, Mano Vikrant Singh ("**Mr Singh**") was an employee of the Respondent, Cargill TSF Asia Pte Ltd ("**Cargill TSF**"). In 2007, the parties entered into an Employment Contract and a Non-Compete Agreement where Mr Singh agreed not to compete with Cargill TSF for one year after termination of his employment. Clause 3 of the Non-Compete Agreement provided:

1. *Competition and Solicitation Restrictions. Employee agrees that during Employee's employment with CTSF or any other company within Cargill's TSF Business Unit, and for a period of one year immediately following the termination of Employee's employment with CTSF or any other company within Cargill's TSF Business Unit, regardless of the reason for termination, Employee will not:*

    (a) as a partner, officer, employee, director, stockholder, proprietor, other equity owner, contractor, consultant, representative or agent engage in the business of creating, marketing or delivering, directly or indirectly, structured trade and non-trade financial products that are similar to TSF Products and Services in countries where Cargill's TSF Business Unit creates or markets structured trade or nontrade financial products.
    (b) as a partner, officer, employee, director, stockholder, proprietor, other equity owner, contractor, consultant, representative, or agent employ or attempt to employ, directly or indirectly, any of Cargill's TSF Business Unit employees on behalf of any other entity engaged in the business of creating, marketing or delivering structured trade or non-trade financial products that are similar to TSF Products and Services in countries where Cargill's TSF Business Unit creates or markets structured trade or nontrade financial products.

The Non-Compete Agreement was found to be a reasonable restraint and thus enforceable by the High Court. The Court of Appeal agreed with this finding.

At the end of each financial year, Cargill TSF awarded its key senior staff, including Mr Singh, an Incentive Award in which 50% of the amount was paid out in cash and the other 50% was deferred and paid out in stages. The key senior staff were given a set of "Terms and Conditions of Incentive Award" containing a

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forfeiture provision stating that the deferred incentives will be forfeited if the employee continues a career within the financial or commodity trading industry outside of Cargill TSF within a period of two years from the employee's resignation ("**Two-Year Non-Compete Period**").

When Mr Singh resigned from Cargill TSF, he was informed he would receive his deferred incentives within 60 days after the expiry of the Two-Year Non-Compete Period. Mr Singh engaged in a competing business of financial and commodities trading using a company he had incorporated prior to his resignation.

At the end of the Two-Year Non-Compete Period, Cargill TSF requested that Mr Singh sign a statutory declaration confirming he had fulfilled the conditions of the forfeiture provision before releasing the deferred incentives. Mr Singh refused to sign the declaration as he had competed in the same business as Cargill TSF during the Two-Year Non-Compete Period. Mr Singh applied to the Court for a declaration that the forfeiture provision was void for being a restraint of trade clause and that he was entitled to the deferred incentives.

In the High Court, the trial judge held that Mr Singh was not entitled to the deferred incentives as the restraint of trade doctrine did not apply to the forfeiture provision. The trial judge also held that even if the forfeiture provision was subject to the restraint of trade doctrine, he would have found the forfeiture clause to be unenforceable as the restraint was unreasonable in the following ways: (1) the duration was wider than necessary as the Two Year Non-Compete Period was longer than the one-year period in the Non-Compete Agreement; (2) there was no geographical limit in the forfeiture provision; and (3) the ambit of the restraint in the forfeiture provision was not limited to Cargill TSF's business and was wider than necessary.

The Court of Appeal decision

In the appeal, Mr Singh conceded he had competed against Cargill TSF during the Two Year Non-Compete Period but argued the forfeiture provision was unenforceable as it was a restraint of trade.

The Court of Appeal decided the High Court judge had wrongly held that a Forfeiture-for Competition clause was enforceable on the basis that it was similar to a Payment-for-Loyalty clause since both clauses provided a financial disincentive against the competition.

The Court of Appeal drew a distinction between Forfeiture-for-Competition clauses and Payment-for-Loyalty clauses. It was found that Forfeiture-for-Competition clauses provide for situations where the employee's benefits have already vested in the employee as a legal entitlement. In contrast, when the benefits have not vested in the employee, the clause is a Payment-for-Loyalty clause.
In the Court of Appeal's view, the Forfeiture provision restrained Mr Singh from leaving Cargill TSF to join a competitor, as it threatened to forfeit a substantial financial reward which was already vested in him. Mr Singh did not have a real choice of whether he wanted to continue working for Cargill TSF or forgo the deferred incentive.

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Therefore, the Court of Appeal held the forfeiture provision was a restraint and the doctrine of restraint of trade would apply. In that regard, the Court emphasised that the forfeiture provision would still be enforceable if it protected a legitimate interest of the employer and is deemed reasonable in the interests of the parties and of the public. The Court of Appeal recognized that while the Forfeiture-for Competition clause may be a contractual arrangement made by the parties, the restraint of trade contained in such clauses may potentially be void if it is found to violate the public policy in preserving the freedom to trade.

However, a typical Payment-for-Loyalty clause is not subject to the restraint of trade doctrine. The Court of Appeal found such clauses to provide employees with an additional payment for continuing in the employment of the employer. There is no restraint as nothing has vested in the employee. The employee is also free to choose whether he or she would like to continue in the employment of the employer to be entitled to such a loyalty payment. Thus, Payment-for-Loyalty clauses are generally enforceable and not subject to the consideration of reasonableness within the principles of Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David 1 SLR(R) 663.

Conclusion

The Court of Appeal's decision, in this case, is one with several commercial implications on companies and employers. In structuring employees' compensation and reward plans, employers should note the differences between a Payment-for-Loyalty clause and a Forfeiture-for-Competition clause. Employers should also note that the timing of the vesting of such benefits makes a difference in the court's determination of whether the clause is a Payment-for-Loyalty clause or a Forfeiture-for Competition clause. Therefore, employers should communicate the rationale and the timing of the employees' entitlement to the financial rewards clearly to their employees. This is especially important since the enforceability of a Forfeiture-for-Competition clause is subject to greater challenge as compared to a Payment-for-Loyalty clause.

For employers who wish to include a Forfeiture-for-Competition provision in employment contracts, they should ensure that the forfeiture provision protects a legitimate interest and is reasonable in all aspects including time, geographical limit and the ambit of restricted activities so that the clause will not be void for violating the restraint of trade doctrine.

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