

Insights

HK HIGH COURT REFUSES TO ENFORCE A 12-MONTH WORLDWIDE NON-COMPETE COVENANT

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SUMMARY

In *Manulife Financial Asia Limited and Kenneth Joseph Rappold & Others* [2024] HKCFI 989 (date of decision: 5 April 2024), the Hong Kong High Court refused a company's application to enforce a 12-month non-compete clause against its former employee. This case is a good illustration of the factors that the Hong Kong court will take into account when considering whether a non-compete clause should be upheld.

The employee in question had been the Chief Financial Officer, Asia of Manulife Financial Asia Ltd ("Manulife") for around five years until 31 October 2023 when he voluntarily terminated his employment agreement. In around January 2024, the employee sought acknowledgment from Manulife that he could commence employment with Prudential Services Ltd ("Prudential") without breaching the non-compete covenant contained in his employment agreement with Manulife.

The non-compete covenant provided that the employee agreed not to work for a "Competitor" of Manulife in a "Similar Capacity" for a period of 12 months after his employment's voluntary termination. Manulife considered Prudential as its "key competitor", which the employee did not dispute.

Manulife refused to release the employee from the non-compete covenant, and sought an interim-interim injunction pending the substantive determination of its summons for interim injunctive relief to restrain the employee from being employed by Prudential.

COURT'S DECISION

The Court refused to grant an interim-interim injunction to enforce the covenant. In refusing to grant an interim-interim injunction, the Court took into account the following factors:

LACK OF GEOGRAPHICAL LIMITATION

The non-compete covenant had no geographical limitation, which made this a worldwide non-compete covenant in substance.

Manulife's counsel attempted to deal with the lack of geographical limitation by "blue-pencilling" (i.e. deleting) certain phrases in the covenant, and argued that "Similar Capacity" referred only to the Asia Segment (and not other parts of the world).

However, the Court refused to read into the definition of "Similar Capacity" a geographical limitation because such limitation simply and plainly was not there. The Court also emphasized that it was not the function of the Court to redraft a restrictive covenant, nor would the Court imply a term to save an invalid covenant.

12-MONTH NON-COMPETITION RESTRICTION

Manulife was unable to persuade the Court that the 12-month restriction was reasonable or necessary to protect its legitimate business interests, which Manulife argued was to prevent its confidential information held by the employee from being disclosed to a competitor.

The Court pointed out that the "confidential information" alleged by Manulife appeared *"to be lacking in specificity, and are couched in rather broad terms which are of limited assistance to the Court in assessing their alleged confidential nature and potential consequences of misuse"*.

Notably, the Court criticised that Manulife had not adduced evidence to (a) explain the shelf life of each specific category of allegedly confidential information, (b) explain how such a shelf life warranted a 12-month restraint, and (c) articulate how any such confidential information could be used during the 12-month window to the material detriment of Manulife's business.

LACK OF "BACKSTOP"

The Court also noted that the lack of a "temporal backstop" in the non-compete covenant meant that the covenant applied to all of the employee's work throughout his five-year employment with Manulife, rather than just the work which the employee carried out more recently. This reinforced the Court's view that the non-compete covenant was wider than necessarily.

BALANCE OF CONVENIENCE

The Court further compared the possible effect of the injunction on the parties.

The Court was of the view that, if the injunction was granted, there would be far-reaching ramifications on the employee's career prospects which could not be quantified in monetary terms, because the employee would lose his job with Prudential at the age of 54.

On the other hand, Manulife had not demonstrated to the Court an appreciable risk of irreparable damage to its business if the injunction was not granted. In any event, any potential damages

caused to Manulife was mitigated by the confidential covenant and undertaking to which the employee had agreed as part of the proceedings.

TAKEAWAY POINTS

This case is a good reminder that non-compete covenants need to be narrowly and precisely drafted in terms of their geographic scope and duration, and should not be wider than necessary to protect the employer's legitimate business interests.

The burden falls on the employer to establish that a non-compete covenant is reasonable and necessary. To justify the validity of a non-compete covenant, the employer must be able to adduce specific evidence as to how its legitimate business interests (e.g. confidential information) are at risk if the non-compete covenant is not enforceable.

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