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INTERIM INJUNCTIONS IN RESTRAINT OF TRADE CASES

American Cyanamid or *RGA Holdings*: a proposed framework

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Through a discussion of two High Court decisions issued in 2024 – *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 and *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 – this article examines the framework for granting interim injunctions in restraint of trade cases. It discusses the applicability of, and the relationship between, the *American Cyanamid* test and the *RGA Holdings* test in the court's determination of whether to grant such injunctions. This article further highlights the divergence in the two High Court decisions and sets out a proposed approach for future cases.

Yixin Edith **CHEN**
LLB (National University of Singapore);
Lecturer, Singapore University of Social Sciences;
Consultant, Tan Rajah & Cheah.

YEO Chuan Tat
LLB (National University of Singapore), LLM (Columbia);
Senior Lecturer, Singapore University of Social Sciences;
Counsel, Breakpoint LLC.

I. Introduction

1 Employers often insert and rely on contractual post-employment restraints, such as non-competition and non-solicitation clauses, to protect their interests when employees leave them. When ex-employees act in purported contravention of these contractual restraints, employers can apply to the court for interim relief pending the disposition of the matter.

2 Two High Court decisions issued in 2024 – *Shopee Singapore Pte Ltd v Lim Teck Yong*[1] ("*Shopee*") and *MoneySmart Singapore Pte Ltd v Artem Musienko*[2] ("*MoneySmart*") – addressed such applications for interim relief.

3 In both cases, the applications for interim injunctions, to enforce the post-employment restraints,[3] were ultimately refused. In reaching its decision, the court in each case provided guidance as to the applicable test for the grant of an interim injunction to enforce such restraint of trade clauses ("ROT Interim Injunction Test"). As part of this analysis, both cases also applied the substantive test in assessing the enforceability of restraint of trade clauses.

4 The focus of this paper is on the former, *ie*, the ROT Interim Injunction Tests adopted in *Shopee* and *MoneySmart*. An examination of this aspect of the decisions is apposite, as the two decisions appear to diverge in material aspects. There is therefore some uncertainty in this area of the law. Additionally, this is an issue of practical importance. The interim injunction is a powerful weapon which the employer has against an ex-employee where the latter is alleged to have breached his/her restraint of trade clauses. Where the injunction is granted, the employer will be in a strong bargaining position in subsequent negotiations. Indeed, a successful interim injunction application could lead to the matter ultimately not proceeding to trial after the injunction is ordered, thus effectively disposing of the matter.[4] In such circumstances, the interim injunction application could very well constitute the main contest between the parties. This is especially the case if the contractual post-termination restraint period is a relatively short period, like six or 12 months, and it may not be possible to hold a trial before the expiry of that contractual restraint period.

1 [2024] SGHC 29.
2 [2024] SGHC 94.
3 Following the nomenclature used in *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29, such contractual post-employment restraints shall be termed as "restraint of trade clauses" in this article.
4 This is the authors' experience in a number of cases. It may be a matter worthy of further empirical investigation.

II. Overview – brief facts and key issues

A. Brief facts

5 In view of the article's focus on the ROT Interim Injunction Test, the key facts in *Shopee* and *MoneySmart* can be briefly stated:

(a) In each of the cases, an ex-employee (*ie*, the respondent in the interim application) had left his old employer (*ie*, the applicant in the interim application). The respondent-employee then joined a new employer.[5]

(b) The applicant-employers in both cases claimed that the respondent-employees had acted in breach of non-competition clauses by accepting employment from the new employers.[6] The applicant-employers therefore applied for interim injunctions to ensure compliance with the non-competition clauses.

(c) The applicant-employers also sought injunctions in respect of non-solicitation and/or confidentiality clauses.[7] These clauses, along with non-competition clauses, are commonly found in employment agreements. They are also frequently invoked in such interim injunction applications.[8]

6 The other relevant facts will be referred to as they arise in the discussion below.

5 See *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [1] and *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [1].

6 See *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [2] and [34]–[42] and *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [17].

7 See *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [72] (non-solicitation obligations) and [77]–[81] (confidentiality obligations). See also *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [65]–[86] (confidentiality obligations).

8 For example, *3D Networks Singapore Pte Ltd v Voon South Shiong* [2023] 4 SLR 396 and *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163.

B. Key issues

7 In deciding whether to grant the applications, *Shopee* and *MoneySmart* referenced two tests:

(a) The first was the general test governing the grant of interim injunctions as set out in *American Cyanamid Co v Ethicon* Ltd[9] ("*American Cyanamid*").[10]

(i) First, there must be a serious question to be tried, *ie*, "unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought".[11]

(ii) Next, the balance of convenience lies in favour of granting the interlocutory relief sought ("Balance of Convenience analysis").[12] There are in turn two parts to this second stage:

(A) Adequacy of damages: Here, the court considers two hypothetical situations, (I) and (II) below.

(I) If the injunction is not granted but the applicant succeeds at trial, whether damages would be an adequate remedy and the respondent is financially able to pay.

9 [1975] AC 396.

10 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [17] and [21]; *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [19]. In the analysis that follows, the two decisions engaged with the *American Cyanamid* test to different extents.

11 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 408.

12 This second stage of the *American Cyanamid* test is referred to as "Balance of Convenience analysis" to distinguish it from the weighing of conveniences (also termed – as a consideration of the balance of convenience in the literature) which takes place within this second stage, but after an assessment of the adequacy of damages. See the main text which follows.

If so, the injunction should normally not be granted. Where damages will not be an adequate remedy (or the respondent not in a position to satisfy an award of damages), the court proceeds to consider the following hypothetical situation.

(II) If the injunction is granted and the respondent succeeds at trial, whether the applicant's undertaking as to damages will adequately compensate the respondent for losses sustained owing to the grant of the injunction. If it would, an injunction would normally be granted.

(III) Where damages would not be an adequate remedy for both the applicant and the respondent in the above hypotheticals (or where there is doubt in this regard), the court proceeds to the next part of the analysis.

(B) Weighing of the conveniences: The court considers where the balance of convenience lies. It will take into account all relevant matters, which will vary from case to case.[13]

13 The *American Cyanamid* test is "founded on the fundamental principle that 'the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong at trial in the sense of granting relief to a party who fails to establish his rights at the trial, or of failing to grant relief to a party who succeeds at the trial.'": *RGA Holdings International Inc v Loh Choon Phing Robin* [2017] 2 SLR 997 at [28]. The court adopts such an approach as the court is usually unable to clearly assess the merits of the matter at the time the injunction application is made (generally early in the proceedings); further, any such assessment would be based only on affidavit evidence: *RGA Holdings International Inc v Loh Choon Phing Robin* [2017] 2 SLR 997 at [28].

(b) The second test was that applied in the Court of Appeal decision of *RGA Holdings International Inc v Loh Choon Phing Robin*[14] ("*RGA Holdings*"), pursuant to which, "[w]hen a defendant is about to breach, or has already breached, a negative covenant in a contract, an interim prohibitory injunction will readily be granted to restrain a prospective breach or a further breach, as the case may be".[15] In such a situation, the court does not apply the *American Cyanamid* test. Instead, the court will readily grant the interim prohibitory injunction unless the respondent is able to establish special circumstances why the court should exercise its discretion not to do so.[16] In other words, to succeed in the application, the applicant must show that the following limbs of the test are satisfied:

(i) first, the respondent is about to breach, or has already breached, a negative covenant; and

(ii) second, assuming the foregoing is established, that there are no exceptional circumstances justifying the court to exercise its discretion to refuse granting the application.[17]

8 In the light of the two tests, *Shopee* and *MoneySmart* addressed the following key issues, the answers to which determined the ROT Interim Injunction Test adopted in each case:

(a) While restraint of trade clauses is a species of negative covenants, the *RGA Holdings* case did not specifically involve restraint of trade clauses. Should the *RGA Holdings* test apply to interim applications seeking to enforce such clauses? ("Applicability Issue")

14 [2017] 2 SLR 997.

15 *RGA Holdings International Inc v Loh Choon Phing Robin* [2017] 2 SLR 997 at [32].

16 *RGA Holdings International Inc v Loh Choon Phing Robin* [2017] 2 SLR 997 at [32(c)], read with [47].

17 For example, the application may be refused if it may cause hardship that is oppressive to the respondent: *RGA Holdings International Inc v Loh Choon Phing Robin* [2017] 2 SLR 997 at [32(c)]. This would require the demonstration of "hardship over and above that which results from having to observe the contract": *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [22].

(b) If the former is answered in the affirmative, what is the relationship or interplay between the *American Cyanamid* test and the *RGA Holdings* test, as applied to restraint of trade clauses? ("Relation Issue"). It is this relationship that will determine the appropriate ROT Interim Injunction Test.

9 The following paragraphs[18] address these issues in turn. For each issue, *Shopee*'s and *MoneySmart*'s positions on that issue are first set out. An analysis of the decisions will then follow.

10 As a preview of what is to come in the article:

(a) Both *Shopee* and *MoneySmart* accepted the general applicability of the *RGA Holdings* test to restraint of trade cases. The authors respectfully agree with this position.

(b) *Shopee* and *MoneySmart* appear to have reached different positions on the Relation Issue.[19] The result is that there are differences between the ROT Interim Injunction Tests propounded in the two decisions. It will explain why, when properly interpreted, the approach in *Shopee* is to be preferred.

III. The Applicability Issue

A. Shopee *and* MoneySmart – *consistency*

11 In *Shopee*, the respondent-employee argued that the *RGA Holdings* test does not apply to interim applications seeking to enforce restraint of trade clauses, as such clauses were *prima facie* invalid owing to public policy reasons.[20]

12 The court disagreed with this submission. Amongst other things, the court referred to the statement in *RGA Holdings* that the *RGA Holdings* test was one which "applie[d] to restrain all

18 See paras 11–35 below.
19 See paras 21–28 below.
20 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [26] and [27].

manner of breaches of negative contractual obligations".[21] The court took the view that the test should therefore also extend to restraint of trade clauses as these were negative contractual obligations.

13 The court also took the position that, the public policy that restraint of trade clauses were *prima facie* invalid was given effect when one was assessing whether the clauses were enforceable (the first limb of the *RGA Holdings* test), rather than through the blanket inapplicability of the *RGA Holdings* test to restraint of trade clauses.[22]

14 *MoneySmart* referred to *Shopee*'s holding in respect of the Applicability Issue.[23] It is clear *MoneySmart* adopted a similar position on the Applicability Issue.[24]

B. Analysis

15 *Shopee* and *MoneySmart* are therefore consistent on the Applicability Issue – the *RGA Holdings* test is applicable to restraint of trade clauses.

16 However, certain statements by the English Court of Appeal in *Vefa Ibrahim Araci v Kieren Fallon*[25] ("*Araci*") (a decision which was referenced in *RGA Holdings*)[26] may cast doubt on this position. *Araci* was cited in *RGA Holdings* to support the position that the *RGA Holdings* test was generally applicable to negative covenants and was not confined to negative covenants pertaining

21 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [27], referring to *RGA Holdings International Inc v Loh Choon Phing Robin* [2017] 2 SLR 997 at [40].

22 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [28].

23 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [22].

24 See, *eg*, *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 ("*MoneySmart*") at [22], [25]–[26] and subsequent analysis. Although *MoneySmart* then amalgamated the *RGA Holdings* test with the *American Cyanamid* test: see para 24 below.

25 [2011] EWCA Civ 668.

26 *RGA Holdings International Inc v Loh Choon Phing Robin* [2017] 2 SLR 997 ("*RGA Holdings*") at [40]. *RGA Holdings*' reference to *Vefa Ibrahim Araci v Kieren Fallon* [2011] EWCA Civ 668 was also highlighted in *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [27].

to land (as the High Court decision in *RGA Holdings* had held that the test only applied to such covenants).[27]

17 In *Araci*, the claimant, a racehorse owner, had brought an action against the defendant, a jockey. The parties had a written agreement whereby the claimant retained the defendant to ride a horse known as "Native Khan" whenever requested over a period of a year. Specifically, there was a clause in which the defendant agreed not to ride other horses during the period he had been retained to ride Native Khan. The defendant had been retained to ride Native Khan on 4 June 2011 but informed the claimant on 30 May 2011 that he would not ride Native Khan. It transpired that the defendant had agreed to ride a rival horse on the day he was retained to ride Native Khan. The claimant applied for and was granted an injunction to restrain the defendant from acting in breach of the negative covenant. In its judgment, the English Court of Appeal accepted the principle that, where there is a clear or uncontested breach of a negative covenant, an injunction to restrain the breach may be granted as a matter of course and the Balance of Convenience analysis does not apply. The grant of the injunction is however subject to the court's discretion, and "may be refused if it is oppressive to the defendant or [causes] him particular hardship, although it would not be oppressive merely because [it would be] burdensome or [if there would be] little prejudice to the claimant".[28]

18 Pertinently, in *Araci*, Jackson LJ noted as follows:[29]

> Where the defendant is proposing to act in clear breach of a negative covenant, in other words to do something which he has promised not to do, *there must be special circumstances (e.g. restraint of trade contrary to public policy) before the court will exercise its discretion to refuse an injunction.* [emphasis added]

19 Elias LJ agreed with Jackson LJ that discretion should not have been exercised in that case to refuse the issuance of

27 *RGA Holdings International Inc v Loh Choon Phing Robin* [2017] 2 SLR 997 at [40].
28 *Vefa Ibrahim Araci v Kieren Fallon* [2011] EWCA Civ 668 at [33], referring to the lower court's judgment.
29 *Vefa Ibrahim Araci v Kieren Fallon* [2011] EWCA Civ 668 at [39].

the injunction. In doing so, Elias LJ noted that "[t]his is not a case where the agreement being enforced operates in unlawful restraint of trade or is otherwise contrary to public policy".[30]

20 The aforementioned statements may be construed to support the position that the *RGA Holdings* test should not apply (or at least, apply with equal force), where the negative covenant sought to be enforced concerns restraint of trade.[31] After all, there is a key distinction between restraint of trade clauses and other negative covenants generally, being that the former are *prima facie* invalid. However, in our view, *Araci* does not expressly support this position (that the *RGA Holdings* test does not apply to restraint of trade clauses).

(a) First, the above statements relating to restraint of trade clauses were *obiter*. The High Court judge's observation that *Araci* was "not in the context of an employment case"[32] was not challenged on appeal; indeed, the parties expressly agreed that restraint of trade was not relevant in the circumstances of the case.[33]

(b) Second, upon a close reading of the above statements, it may be said that Jackson LJ and Elias LJ were in fact implicitly endorsing the applicability of the *RGA Holdings* test to restraint of trade clauses. The judges were commenting on the effect of restraint of trade considerations in the context of the court's assessment as to whether to exercise its *discretion* to refuse the injunction, *ie*, the second limb of the *RGA Holdings* test.[34] This indicates that the *RGA Holdings* test is generally applicable even to restraint of trade clauses but that restraint of trade principles may be relevant to the exercise of discretion on whether to allow or refuse an injunction.

30 *Vefa Ibrahim Araci v Kieren Fallon* [2011] EWCA Civ 668 at [74].

31 The authors are grateful to Mr Michael Ng (Senior Lecturer, SUSS School of Law) for highlighting the passages in *Vefa Ibrahim Araci v Kieren Fallon* [2011] EWCA Civ 668 and for bringing this potential argument to the authors' attention.

32 See cited passage from the High Court decision: *Vefa Ibrahim Araci v Kieren Fallon* [2011] EWCA Civ 668 at [55].

33 *Vefa Ibrahim Araci v Kieren Fallon* [2011] EWCA Civ 668 at [56].

34 Recall the *RGA Holdings* test summarised at para 7(b) above.

(c) Third, recognising the applicability of the *RGA Holdings* test to restraint of trade clauses, as it does to other negative covenants, is sound in principle. The rationale for the test may be discerned from the following passage by Megarry J in *Hampstead & Suburban Properties Ltd v Diomedous*[35] ("*Hampstead*"), as cited in *Araci*:[36]

> Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the convenantor [*sic*] promptly begins to do what he has promised not to do, then in the absence of special circumstances, it seems to me that the sooner he is compelled to keep his promise the better … I see no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligations until the trial …

As elaborated in the following sub-paragraph, there is good reason why the rationale above should similarly apply to injunction applications to enforce restraint of trade clauses.

(d) Critically, in so far as restraint of trade clauses are *prima facie* invalid due to public policy considerations and arguably should not be readily enforced by way of an interim prohibitory injunction, the authors submit that this concern is adequately addressed in the first limb of the *RGA Holdings* test.[37] The appropriate threshold for establishing that the respondent-employee had breached, or is about to breach, the restraint of trade clause, is key in this regard.[38] On this note, it bears emphasising that there are two aspects when assessing whether the respondent-employee had breached the restraint of clause: (i) the validity of the restraint of trade clause; and (ii) whether the employee had conducted himself/herself in a manner inconsistent with the restraint. For the purposes of the discussion here, it suffices to say that

35 [1969] 1 Ch 248.
36 *Vefa Ibrahim Araci v Kieren Fallon* [2011] EWCA Civ 668 at [37].
37 It may be noted that this is consistent with *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29: see para 13 above and the accompanying footnote reference.
38 This threshold is discussed at paras 30–35 below.

the authors' view is that the threshold must necessarily be high. Requiring a high threshold will address the *prima facie* invalidity of the restraint of trade clauses and serve to assuage the public policy concerns associated with such clauses. It will also serve to justify dispensation with the weighing of conveniences required as part of the *American Cyanamid* test.

IV. The Relation Issue – relationship between the *American Cyanamid* test and the *RGA Holdings* test, as applied to restraint of trade cases

A. Shopee – *an interweaving of aspects of the two tests?*

21 Having found that the *RGA Holdings* test was applicable to restraint of trade clauses, the *Shopee* decision then touched on the relationship between that test and the *American Cyanamid* test (*ie*, the Relation Issue).

22 On this Relation Issue:

(a) The court noted that the first limb of the *RGA Holdings* test required the applicant-employer to show that the respondent was about to breach, or had already breached, a negative covenant. Amongst other things, this would require showing that the restraint of trade clause was valid and enforceable.[39]

(b) The court then noted that, in circumstances:[40]

> [w]here an applicant is unable to show that there is a serious question that the restraint of trade clause is valid and enforceable,[41] it is highly doubtful that the applicant could show that the respondent has breached or is about to breach the negative covenant.

(c) In view of the foregoing, the court noted the "closely interwoven" nature between: (i) the applicability

39 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [29].
40 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [29].
41 This is a reference to the first stage of the *American Cyanamid* test: see para 7(a) above.

of the *RGA Holdings* Test to a particular case; and (ii) whether there was a serious question to be tried that the restrictive covenant was valid and enforceable.[42] The reason for this conclusion therefore appeared to be because both the first limb of the *RGA Holdings* test and the first stage of the *American Cyanamid* test required an assessment of the validity of the restraint of trade clause.

(d) On the facts of *Shopee*, the court found that there was no serious question to be tried, both in respect of the validity of the restraint of trade clauses, and of a breach or prospective breach by the respondent-employee.[43] As a consequence, the court concluded that it could not be said that the first limb of the *RGA Holdings* test had been fulfilled.[44]

23 However, *Shopee* did not go on to further articulate or explain the precise relationship between the two tests. Importantly, *Shopee* did not elaborate on why a failure to meet the "serious question to be tried" standard in the *American Cyanamid* test will mean that "it is highly doubtful" that the first limb of the *RGA Holdings* test could be satisfied.

B. MoneySmart – *an amalgamation of the two tests*

24 While *MoneySmart* appeared to follow the approach laid down in *Shopee*,[45] an approach which *MoneySmart* termed a "composite test",[46] a key divergence was that *MoneySmart*

42 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [29].
43 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [71], [75], [76] and [82].
44 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 ("*Shopee*") at [76]. However, as the court in *Shopee* recognised the threshold to show "a serious question to be tried" was low, the court proceeded to discuss whether the applicant-employer could succeed in its injunction application based on the *American Cyanamid* test, assuming this low threshold had been met. The court held that the Balance of Convenience analysis (the second stage of the *American Cyanamid* test) also did not support the grant of the injunction: *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [84] *ff*.
45 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [25].
46 This composite test appeared to incorporate various principles, including: (a) the *American Cyanamid* test; (b) the *RGA Holdings* test; and (c) the substantive test when assessing the validity of restraint of trade clauses.
(cont'd on the next page)

had made an express finding that the standard to be applied in the first limb of the *RGA Holdings* test should be that of "a good arguable case".[47] Following this finding, *MoneySmart* then amalgamated the *American Cyanamid* test and the *RGA Holdings* test into a unitary test as its ROT Interim Injunction Test in respect of the non-compete clause:

> (a) First, *MoneySmart* considered "[w]hether there is a good arguable case[48] that the Non-Compete Clause[49] is valid and enforceable, and has been breached by the defendant".[50] It is observed that:
>
> > (i) The "serious question to be tried" threshold was not referenced and applied when the court was assessing whether the non-compete clause was valid.
> >
> > (ii) *MoneySmart* carried out its analysis by reference to "a good arguable case" standard,[51] and found that there was no good arguable case that the non-compete clause was valid and enforceable.[52] In this regard, it is well established that "a serious question to be tried" is a lower threshold as compared to "a good arguable case".[53]

The substantive test draws on the applicable test laid down in, amongst other cases, *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663. As mentioned in para 4 above, the focus of this article is not on this substantive test.

47 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [22]. *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29, on the other hand, was silent on this point.

48 The court had, in *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [21] and [22], already determined (unfortunately without much analysis) that the threshold for the first limb of the *RGA Holdings* test was that the applicant must show "a good arguable case that the negative covenant had been breached or is likely to be breached".

49 This Non-Compete Clause is defined and set out at in *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [10].

50 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [26].

51 As noted in n 47 and the accompanying main text, the court had determined this as the applicable threshold for the first limb of the *RGA Holdings* test.

52 See, *eg*, *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [64] and [101].

53 See, *eg*, *Goodwill Enterprise (Malaysia) Sdn Bhd v CT Nominees Ltd* [1996] 1 SLR(R) 330 which referred to the standard of "serious question to be tried" as a lower standard than "good arguable case", and *Cosmetic Care Asia Ltd v Sri*

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MoneySmart did not appear to regard and apply the *American Cyanamid* test as a distinct test requiring only "a serious question to be tried".

(b) Assuming the claimant had proven a good arguable case that the non-compete clause was valid and had been (or was likely to be) breached – which the court did assume at [87] – the next step would have been the second limb of the *RGA Holdings* test:

(i) first, the respondent is about to breach, or has already breached, a negative covenant; and

(ii) *second, assuming the foregoing is established, that there are no exceptional circumstances justifying the court to exercise its discretion to refuse granting the application.*

(c) However, *MoneySmart* did not expressly consider the second step of the RGA test. Instead, *MoneySmart* considered the question of "whether the balance of convenience lies in favour of maintaining the interim injunctions".[54] It is respectfully submitted that the Balance of Convenience analysis is appropriate only as part of the *American Cyanamid* test; it has no place in the *RGA Holdings* test.[55] The authors therefore submit that in doing so, *MoneySmart* had applied a test that incorporated parts of the *American Cyanamid* test and the *RGA Holdings* test, given that its overarching test contained elements from each of these tests.

Linarti Sasmito [2021] SGHC 157. These cases involved applications for leave to serve outside jurisdiction, for which "a good arguable case" is the relevant threshold for various requirements in the applicable test when the court determines whether to grant leave. This is of note, as *MoneySmart Singapore Pte Ltd v Artem Muskienko* [2024] SGHC 94 adopted "a good arguable case" threshold for the first limb of the *RGA Holdings* test by reference to the Court of Appeal decision, *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226, a case which also involved an application for leave to serve outside of jurisdiction: see also paras 31–32 below.

54 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [87] *ff*.

55 It is clear that the court was not considering the conveniences as part of the second limb of the *RGA Holdings* test. Amongst other things, the test which the court applied was the classical consideration of adequacy of damages/weighing of conveniences, which forms the second stage of the *American Cyanamid* test.

25 Upon an application of this amalgamated test in *MoneySmart*, the court in *MoneySmart* found that: (a) there was no good arguable case that the non-compete clause was valid;[56] and (b) even assuming that there was a good arguable case, the Balance of Convenience analysis militated against maintaining the interim injunctions.[57]

C. Analysis

26 *MoneySmart* cited *Shopee* when formulating its position on the Relation Issue. However, the authors' view is that, properly interpreted, the two decisions adopted different positions on the Relation Issue (and, therefore, in their ROT Interim Injunction Tests).

27 In the paragraphs that follow, the authors' view of *Shopee*'s holding on the Relation Issue will be explained to distinguish it from *MoneySmart*'s amalgamated test. Next, reasons as to why *Shopee*'s position is to be preferred will be set out. Finally, a key issue unresolved in *Shopee*, which relates to the applicable threshold in respect of the first limb of the *RGA Holdings* test, will be addressed.

(1) Proposed reading of Shopee's *holding on the Relation Issue*

28 The authors interpret the following to be *Shopee*'s views on the Relation Issue:

(a) *Shopee* recognised that "a serious question to be tried" under the *American Cyanamid* test was a low threshold.[58]

(b) Accordingly, where the applicant-employer fails to establish that there is a serious question to be tried that the respondent-employee had breached the restraint of trade clauses (which includes demonstrating the validity of the clauses), it follows that the threshold for

56 See n 52 above.
57 See, *eg*, *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [94] and [103].
58 See *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [17(a)].

the first limb of the *RGA Holdings* test is not met (as the threshold for the first limb of the *RGA Holdings* test would be a higher one).

(c) The foregoing was what *Shopee* meant when it stated that:[59]

> Where an applicant is unable to show that there is a serious question that the restraint of trade clause is valid and enforceable, it is highly doubtful that the applicant could show that the respondent has breached or is about to breach the negative covenant.

(d) It would also place the court's ruling at [76] in its proper context. The court had stated that, as the applicant-employer had not managed to show that there were serious questions to be tried, it could not find that the restraint of trade clauses in that case had been or were about to be breached.

(e) The *American Cyanamid* test and the *RGA Holdings* test are therefore "closely interwoven"[60] in this limited manner. One is required to make some form of assessment of the merits or strengths of the applicant-employer's case, whether pursuant to the first stage of the *American Cyanamid* test or the first limb of the *RGA Holdings* test.[61] Where it is determined that the applicant-employer has failed to meet the *American Cyanamid* "a serious question to be tried" threshold, it is also likely that the first limb of the *RGA Holdings* test is not fulfilled.

(f) It is important to note that *Shopee* therefore still recognised the *American Cyanamid* test and the *RGA Holdings* test as distinct tests.

59 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [29].
60 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [29].
61 It bears emphasising that, on both tests, there are two key aspects when assessing whether the respondent-employee had breached the restraint of clause: (a) the validity of the restraint of trade clause; and (b) whether the employee had conducted himself/herself in a manner inconsistent with the restraint.

(2) Shopee's *position vs* MoneySmart's *position*

29 In the light of the above analysis, *Shopee*'s position is different from *MoneySmart*'s amalgamated test. The authors submit that *Shopee*'s is the better approach, for the following reasons:

(a) The Court of Appeal held in *Reed Exhibitions Pte Ltd v Khoo Yak Chuan Thomas*[62] ("*Reed Exhibitions*") that the *American Cyanamid* test applied to restraint of trade cases. *Moneysmart* propounded a single amalgamated test incorporating the elements of both the *American Cyanamid* test and the *RGA Holdings* test. In contrast, by continuing to recognise the applicability of the *American Cyanamid* test as a distinct basis for granting the interim injunction, *Shopee* is arguably more consistent with *Reed Exhibitions* by retaining the *American Cyanamid* test as a separate test.

(b) The *American Cyanamid* test and the *RGA Holdings* test possess different elements as they reflect different situations or justifications in which it would be just to grant an interim injunction.[63] Amalgamating the two tests would arguably efface at least one appropriate basis for the grant of interim injunctions to enforce restraint of trade clauses.

(c) Applicants for injunctions may be posed a more challenging task in view of *Moneysmart*'s combination of elements of the two tests in *American Cyanamid* and *RGA Holdings* (the consequence being that these elements serve as cumulative requirements to be fulfilled before an injunction would be granted).[64] As noted above, the Balance of Convenience analysis only applies if the *American Cyanamid* test is applied; whereas for *RGA Holdings,* the court does not look at balance of convenience, but only at

62 [1995] 3 SLR(R) 383, cited by *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [17].

63 The rationale of the *American Cyanamid* test is set out at n 13 above, while that of the *RGA Holdings* test is found at para 20(c) above.

64 For example, the higher "a good arguable case" threshold which the court believed applies to the *RGA Holdings* test, with the Balance of Convenience analysis from the *American Cyanamid* test.

exceptional circumstances for why an injunction should be refused.

(3) The RGA Holdings test – *clarifications on the first limb*

30 There is another aspect of the *RGA Holdings* test which has not been addressed in detail.[65] This is the relevant threshold which the applicant-employer needs to fulfil in respect of the first limb of the *RGA Holdings* test, *ie*, the standard by which the applicant-employer has to demonstrate that the respondent-employee has breached, or is about to breach, the restraint of trade clause.

31 On this issue, and as noted above, *MoneySmart* held that the applicable threshold was "a good arguable case".[66] For this proposition, *MoneySmart* relied on the Court of Appeal decision, *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV*[67] ("*Oro Negro*").

32 It is unclear on a reading of *Oro Negro* whether it definitively or expressly held "a good arguable case" to be the threshold for the first limb of the *RGA Holdings* test. While passages in *Oro Negro* to which *MoneySmart* referred[68] do lend some support for this position, the following ought to be kept in mind when considering *Oro Negro*, as they may impact on *Oro Negro*'s precedential value on this issue:

(a) The Court of Appeal did not expressly hold that "a good arguable case" was the applicable threshold for the first limb of the *RGA Holdings* test.

(b) It did not appear from the *Oro Negro* judgment that this was an issue which was fully argued before the court.

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65 There may be other points in respect of the *RGA Holdings* test that are worthy of further consideration, *eg*, whether it should be limited to breaches of contractual negative covenants. These are beyond the scope of this article.

66 See, *eg*, *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [21] and [22].

67 [2020] 1 SLR 226.

68 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [101]–[103]: see *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [21].

(c) When applying the *RGA Holdings* test, the Court of Appeal did mention that there was "a good arguable case" that the respondents (to the injunction application) had breached certain negative covenants. However, this was in the context that the court had earlier applied that standard when determining whether leave to serve outside the jurisdiction was justified in that case.[69] It is well established that "a good arguable case" is the relevant threshold for various requirements in the applicable test for that leave issue.[70] Having found that there was a good arguable case that the respondents had breached the negative covenants when discussing the leave issue, the Court of Appeal – on the interim injunction issue – simply repeated this finding before concluding that the interim injunctions ought to be granted pursuant to the *RGA Holdings* test. This lends further support to the position that the Court of Appeal may not have in fact carried out a conclusive analysis on the applicable threshold for the first limb of the *RGA Holdings* test.

33 Regardless of *Oro Negro*'s position on this issue, the authors' view is that "a good arguable case" may not be the appropriate threshold for the first limb of the *RGA Holdings* test. "A good arguable case" standard was explained in the following terms in *Cosmetic Care Asia Ltd v Sri Linarti Sasmito*:[71]

> In *MAN Diesel & Turbo SE and another v IM Skaugen SE and another* [2020] 1 SLR 327 …, the Court of Appeal observed that, in order to establish a 'good arguable case' … a plaintiff need only show that it had 'the better of the argument', as opposed to a 'much better argument', which would be 'imposing too high a standard of proof'. The threshold of a 'good arguable case' requires 'more than a mere *prima facie* case, but is lower than that of a balance of probabilities' …

69 See, *eg*, *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [54]–[76].

70 The elements of the relevant test were set out in *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [54].

71 [2021] SGHC 157 at [30].

34 This may be too low a threshold for the first limb of the *RGA Holdings* test. The authors would instead propose adopting the standard of "a plain and uncontested breach of a clear covenant" stated in the English cases.[72] On the authors' interpretation, this standard could in turn be broken down into the following elements: (a) there is a "clear covenant"; and (ii) there has been "a plain and uncontested breach" thereof. In other words, there should be a clear case that the restraint of trade clause is valid, and the incident of breach should be plain and uncontested.

35 The reason for adopting a higher standard is because, at this stage of the proceedings, the court is generally not in a position to resolve contested issues of fact, or mixed issues of law and fact.[73] Accordingly, a plain and clear case – both with respect to the validity of the restraint of trade clause and the incidents of breach – should exist before the court dispenses with the Balance of Convenience analysis required by the *American Cyanamid* test.[74] Having this high threshold at the first stage of the *RGA Holdings* test may also cohere better with the rationale for the *RGA Holdings* test (as articulated in *Hampstead*),[75] including addressing the public policy concerns associated with restraint of trade clauses, before enforcing them pursuant to the *RGA Holdings* test (assuming that there are no exceptional circumstances justifying otherwise).

V. Summary – the appropriate ROT Interim Injunction Test

36 Before setting out the appropriate ROT Interim Injunction Test, an alternative argument in favour of retaining only

72 *Araci v Kieren Fallon* [2011] EWCA Civ 668 at [33] and [37], with the latter paragraph citing *Hampstead & Suburban Properties Ltd v Diomedous* [1969] 1 Ch 248. There is also support for this position in *RGA Holdings International Inc v Loh Choon Phing Robin* [2017] 2 SLR 997 at [42]: "the court should, where possible, uphold contractual bargains (provided of course that there has been or will be *a clear breach* of a negative covenant" [emphasis added].

73 See n 13 above.

74 As far as the authors are aware, there is presently little judicial pronouncement or guidance as to what such a clear case requires. It follows from a plain reading of the phrase that it is a high threshold.

75 See para 20(c) above.

the *American Cyanamid* test for restraint of trade cases will be explored.

37 On this point, it is considered whether the *American Cyanamid* test is necessarily fulfilled in situations where the *RGA Holdings* test will be satisfied. If so, then perhaps only the *American Cyanamid* test could be retained, as this would not lead to practical differences. There may be some value in adopting an economical approach in this regard.[76]

38 The authors' view is that, in many cases where the *RGA Holdings* test is satisfied, it is likely that the *American Cyanamid* test would also be met. However, there remains at least a category of cases where there may be divergent outcomes. The authors' tentative view is therefore that it would remain preferable to retain both tests as distinct bases. This is explained as follows:

> (a) The authors believe that, in respect of a significant number of cases involving employment restraint of trade clauses, the contractual period of restraint may expire by the time the case is heard for trial.[77] In such circumstances, the authorities suggest that a closer examination of the merits is warranted, when one applies the *American Cyanamid* test.[78] Where the merits of the case heavily favour the applicant-employer (as must be the

76 For example, to avoid potential confusion, or to streamline arguments and decisions. However, an overall evaluation of the merits of such an approach – assuming the *American Cyanamid* test and *RGA Holdings* test will lead to similar results in circumstances where the *RGA Holdings* test will be satisfied – remains to be carried out. This matter has not been considered in depth in this article.

77 See para 4 above.

78 For example, *P14 Medical Ltd v Mahon* [2020] EWHC 1823 (QB) and *Lansing Linde Ltd v Kerr* [1990] 1 WLR 251. In particular, the English Court of Appeal in *Lansing Linde v Kerr* [1991] 1 WLR 251 recognised at 258 (Staughton LJ):

> If it will not be possible to hold a trial before the period for which the plaintiff claims to be entitled to an injunction has expired, or substantially expired, it seems to me that justice requires some consideration as to whether the plaintiff would be likely to succeed at a trial. In those circumstances it is not enough to decide merely that there is a serious issue to be tried. The assertion of such an issue should not operate as a lettre de cachet, by which the defendant is prevented from doing that which, as it later turns out, he has a perfect right to do, for the whole or substantially the whole of the period in question. On a wider view of the balance of convenience it may still be right to impose

(cont'd on the next page)

position if it satisfies the *RGA Holdings* test of a plain and uncontested breach of a clear covenant), and where the case concerns restraints which the respondent-employee had freely agreed to, it is submitted that the balance of convenience would lean strongly in favour of the grant of the injunction.

(b) However, there may be a key divergence in outcomes, owing to the presence of the adequacy of damages inquiry in the *American Cyanamid* test. Technically, the court does not carry out a broad weighing of the conveniences until it is determined that damages is not an adequate remedy for both the applicant-employer and the respondent-employee.[79] Where the adequacy of damages inquiry results in a dismissal of the interim injunction application,[80] the court may not reach the stage at which it considers the factors set out in the preceding paragraph. This may lead to a divergence in outcomes between the application of the *RGA Holdings* test and the *American Cyanamid* test, even in circumstances where the *RGA Holdings* test is fulfilled. In other words, the applicant-employer may succeed in the *RGA Holdings* test despite damages being an adequate remedy.

39 In view of the foregoing, a summary of the appropriate ROT Interim Injunction Test is as follows:

such a restraint, but not unless there has been some assessment of the plaintiff's prospects of success.

79 See para 7(a) above.

80 The question of the adequacy of damages is necessarily dependent on the facts of the specific case. Having said that, it appears from *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 and *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 that employers will, in a significant number of cases, find the adequacy of damages inquiry challenging: (a) the court will carefully scrutinise the employer's assertions that damages are inadequate (in both cases, the court did not agree with the employer's submissions on the adequacy of damages); and (b) the impact on the employee's future career development if the injunction were granted is one potential factor the court will consider in assessing the adequacy of damages for the employee – in both cases, this consideration tended to favour the employee.

(a) The *American Cyanamid* test and the *RGA Holdings* test should remain as two distinct juridical bases for the grant of an interim injunction.

(b) If the case involves negative covenants and restraint of trade, the *RGA Holdings* test should apply.

(c) Where the *RGA Holdings* test applies, the court should consider, as the threshold for the first limb of the test, a plain and uncontested breach of the restraint of trade clause.

(d) If the applicant-employer is unable to meet the *RGA Holdings* test, then the applicant-employer can still try to meet the *American Cyanamid* test as an alternative.

(e) There is overlap between the *American* Cya*namid* test and the *RGA Holdings* test, as both require an assessment of the merits of the applicant-employer's case. Having said that, this overlap is limited. Where an applicant fails to meet the *American Cyanamid* "a serious question be tried" threshold, it should follow that the applicant will also fail the *RGA Holdings* test. The converse – that fulfilling the "serious question to be tried" threshold means that one has met the first limb of the *RGA Holdings* test – is not necessarily true, because the threshold to be crossed for the first limb of the *RGA Holdings* test is higher than the "serious question to be tried" threshold under the *American Cyanamid* test.[81]

(f) In view of the aforementioned overlap, it is proposed that the court adopt the following analytical framework in applying the ROT Interim Injunction Test. The court should first assess the merits of the applicant-employer's case, keeping in mind the two distinct thresholds of the *RGA Holdings* test and the *American Cyanamid* test. The court's subsequent analysis will depend on its assessment of the strength of the merits:

81 This would be so if the threshold were a "plain and uncontested breach", as the authors have argued above. However, even if a good arguable case threshold is applicable (as the authors have expressed above), a similar conclusion applies.

(i) *RGA Holdings* test: If the court finds that the first limb of the *RGA Holdings* test is satisfied (which, on the authors' analysis, "a plain and uncontested breach" of the restraint of trade clause has to be shown), the court should then proceed to the second limb of the *RGA Holdings* test. If the second limb is satisfied, the injunction ought to be granted.

(ii) If the first limb of the *RGA Holdings* test is not met (or in circumstances where the second limb of the *RGA Holdings* test is not satisfied), the court can still determine whether the *American Cyanamid* test applies as an alternative.

(iii) *American Cyanamid* test: if the court determines in the first stage of the *American Cyanamid* test that there is "a serious question to be tried", the court should then proceed to the second stage of the *American Cyanamid* test, *ie*, the Balance of Convenience analysis.

(iv) If neither the *RGA Holdings test* nor the *American Cyanamid* test is met, it should dismiss the application.