

RECENT DEVELOPMENTS IN RESTRICTIVE COVENANT LITIGATION

English Law's Continued Support for Employers?

[2025] SAL Prac 34

This article compares recent decisions of the English and Singapore Courts on topical issues arising in restrictive covenant litigation, including: the public interest criterion when considering the enforceability of restrictive employment covenants; varying approaches to the doctrine of separate corporate personality in the context of restrictive covenants; the threshold of proving that damages will not be an adequate remedy; the approach to the penalty clause jurisdiction when dealing with employee share schemes; and, finally, resisting costs orders following an interim injunction application to enforce restrictive covenants.

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I. Introduction

1 Restrictive employment covenants have had renewed political interest in recent years on both sides of the Atlantic. In the US, following the lead of States with long-standing bans, such as California, the Federal Trade Commission took steps to ban non-competes nationally in April 2024.¹ In the UK, the

1 Federal Trade Commission, "Non-Compete Clause Rule" (16 CFR Part 910, RIN 3084-AB74) <https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf> (accessed 29 October 2025). The ban on non-competes was to take
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previous Sunak ministry announced its intention to limit the length of non-compete clauses by primary legislation in May 2023.² However, this proposal did not appear before the end of the previous Parliament, and it remains to be seen whether the Starmer ministry will revive the policy. In February 2024, the Singapore Government also announced its intention to release guidelines on non-competes.³

2 How the above regulatory and legislative changes will play out (and whether they should) is beyond the scope of this article. The focus of this article is on five practical issues relevant to practitioners in England and, for comparative law purposes, litigators in Singapore. Those topics are: (a) the dilution of an express public interest criterion when considering the enforceability of restrictive employment covenants under English law; (b) English law's relaxed approach to the doctrine of separate corporate personality in the context of employment restrictive covenants; (c) the low threshold of proving that damages will not be an adequate remedy; and (d) English law's strict approach to the penalty clause jurisdiction when dealing with employee share schemes. Finally, this article looks at one area which appears to be more employee-friendly under English law: resisting costs orders following an interim injunction application to enforce restrictive covenants. This article also identifies key pitfalls for practitioners currently litigating restrictive covenant cases governed by English law. The authors'

effect on 4 September 2024, however on 20 August 2024, a federal judge in Texas issued a nationwide injunction blocking it from going into effect: see *Ryan LLC v Federal Trade Commission* No. 24-10951 (5th Cir, 2024). On 5 September 2025, the Federal Trade Commission took steps to dismiss its appeal, as a result of which the rule will not go into effect: Federal Trade Commission, "Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule" (5 September 2025) <<https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-files-accede-vacatur-non-compete-clause-rule>> (accessed 29 October 2025).

- 2 GOV.UK, "Smarter Regulation to Grow the Economy" (10 May 2023) <<https://www.gov.uk/government/publications/smarter-regulation-to-grow-the-economy/smarter-regulation-to-grow-the-economy#reforming-regulations-to-reduce-burdens>> (accessed 29 October 2025).
- 3 Ministry of Manpower, "Non-Competition Clauses in Employment Contracts" (29 February 2024) <<https://www.mom.gov.sg/newsroom/parliament-questions-and-replies/2024/0229-non-competition-clauses-in-employment-contracts>> (accessed 29 October 2025).

survey concludes that English common law continues to show a significant degree of latitude to an employer when seeking to enforce restrictive covenants, which might be said to go against the prevailing political trend to restrict their scope ever further.

II. Differences between the English and Singapore covenant enforceability tests

3 *TFS Derivatives Ltd v Morgan*⁴ (“TFS”) is frequently cited as the leading statement by the Court of Appeal on the English test for the enforceability of restrictive covenants, namely:

- (a) what the covenant means when properly construed;
- (b) whether the former employers have shown on the evidence that they have legitimate business interests requiring protection; and
- (c) once the existence of legitimate interest(s) has been established, the covenant must be shown to be no wider than is reasonably necessary for the protection of the interest(s).

4 In relation to the last requirement, reasonable necessity is to be assessed from the perspective of reasonable persons in the position of the parties as at the date of the contract, having regard to the contractual provisions as a whole.

5 The criterion which is missing from the *TFS* test is any express outward, public-facing consideration of what is reasonable. Although still ostensibly a part of English law, the interests of the public at large in assessing the reasonableness of a covenant have been relatively downplayed in recent English cases: see, *eg*, *Quantum Actuarial LLP v Quantum Advisory Ltd*,⁵ where the Court of Appeal, although referring to the possible impact of the bargain on third parties and the public more generally as requiring careful judicial scrutiny, focused almost

4 [2005] IRLR 246 at [36]–[38].

5 [2022] 1 All ER (Comm) 473 at [62]–[65], *per* Carr LJ.

exclusively on reasonableness by reference to the interests of the parties.⁶

6 The Singapore courts arguably take a different approach, although the extent of that difference might be open to some debate. In particular, the Singapore High Court in *MoneySmart Singapore Pte Ltd v Artem Musienko*⁷ adopted a two-stage test: (a) whether the clause protects a legitimate interest of the employer; and (b) whether the clause is reasonable in the interest of the parties *and* reasonable in the public interest. The court went on to explain that whether the clause is reasonable in the interest of the parties is multi-factorial and involves considering (i) the contractual context (*eg*, pre-contractual negotiations); (ii) post-employment benefits; and (iii) the potential detriment that the employee may cause as a result of their departure.⁸

7 The express reference to what is reasonable in the public interest shifts the court's focus to wider considerations beyond the bipartite relationship currently in vogue under English law in *TFS*, instead echoing English cases from the late 19th century.⁹ A helpful example of where the Singapore High Court has considered the public interest criterion is *Thomas Cowan & Co Ltd v Orme*.¹⁰ The employer operated a fumigation business for

6 A further example is *Tom James UK Ltd v Max Potter* [2025] EWHC 2873 (KB) concerning a young employee of an English subsidiary of a US tailoring company, where this criterion received no separate consideration by the court: at [55].

7 [2024] SGHC 94 at [23].

8 *MoneySmart Singapore Pte Ltd v Artem Musienko* [2024] SGHC 94 at [137] and [139]–[140]; see also *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [33]–[34].

9 See, *eg*, *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 565, *per* Lord Macnaghten:

... restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.

10 [1961] MLJ 41 at 43. The authors credit Tay Yong Seng, Ang Ann Liang & Alyssa P'ng, "Restrictive Covenants in Employment Law: When are They Enforceable?" [2018] SAL Prac 17 at paras 86–87, for citing this authority and their explanation of the facts.

ships, and there were few such businesses in Singapore. The High Court held that the employee could not be prevented from operating a similar business despite the existence of restrictive covenants. If the employee had been constrained from competing, a “virtual monopoly” would exist,¹¹ and similarly there was evidence before the court that charges for ship fumigation had dropped while the standard of the fumigation service provided had been maintained.

8 It might be argued that the *TFS* test is malleable enough to bring in public-facing considerations, and there seems to be at a minimum a recognition that the interests of the public at large are potentially relevant. For example, (a) a company will not have a legitimate interest to protect in just preventing pure competition, there must be something more tangible to protect (typically confidential information or investments made by the employer to build up an employee’s lasting client base);¹² and (b) whether a restriction is reasonably necessary to protect a legitimate interest may change over time and with political sentiments. On the latter point, one can find support in the UK Supreme Court’s leading judgment in *Egon Zehnder v Tillman*,¹³ where Lord Wilson explained that the restrictive covenant jurisdiction is one of the oldest facets of the common law with authorities stretching back as far as *Dyer’s case* in the 14th century.¹⁴ English common law’s approach initially was to hold that *all* restraints of trade were presumed void. Yet, by the end of the 19th century, a more nuanced approach (adjusting to recognise that the doctrine against restraint of trade could positively inhibit trade as well require updating with the

11 Of course, the common law rule against monopolies is also of extremely long-standing origin: *Edward Darcy Esquire v Thomas Allin of London Haberdasher* (1602) 74 ER 1131, which in turn drew upon Eastern Roman legal principles set out in the time of the Emperors Justinian and Zeno.

12 As explained by Lord Wilberforce in *Stenhouse Australia Ltd v Phillips* [1974] AC 391 at 400F:

... the employer’s claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his purposes, even though he, the employee, may have contributed to its creation.

13 [2020] AC 154.

14 *Egon Zehnder v Tillman* [2020] AC 154 at [23], citing *Dyer’s case* (1414) 2 Hen 5.

changing nature of commerce and society) was taken where an employer had a legitimate interest to protect.¹⁵ It appears that the modern formulation has lost some of the original guiding principle, namely (in Lord Wilson’s words) being formulated by “a nation which has ascribed central importance to the freedom of all of us to work – in the interests both of the self-sufficiency of ourselves and our families and of our common prosperity”.¹⁶ Where a restrictive covenant acts purely to protect the interests of an employer at the cost of allowing an employee to compete, that can be at the expense of the common prosperity by (for example) resulting in monopolistic markets, let alone the costs of atrophying skills for the employee concerned.

9 However, the three-stage test of *TFS* is otherwise well entrenched in English law and questions of “public interest” appear to largely have been relegated to statements of high principle, rather than operating as a supplementary restriction on the enforceability of covenants. Singapore, by contrast, has seemingly adopted a less employer-friendly approach, with express consideration of the public interest as an additional and explicit factor in the court’s assessment of reasonableness.

III. Separate corporate personality and restrictive covenants

10 The doctrine of separate corporate personality is well entrenched in English law, as reflected in the seminal case of *Salomon v A Salomon and Co Ltd*.¹⁷ A spate of recent UK Supreme Court and Privy Council decisions has reaffirmed the relevant principles going back to *Foss v Harbottle*.¹⁸ The first and most important principle is known as the “proper plaintiff” rule, *ie*, where a wrong has been done to a company, only the company,

15 *Egon Zehnder v Tillman* [2020] AC 154 at [26]–[27].

16 *Egon Zehnder v Tillman* [2020] AC 154 at [22]. See *Tom James UK Ltd v Max Potter* [2025] EWHC 2873 (KB) where Ritchie J began his summary of the law at [54] by remarking, “[i]n the English and Welsh free-market, capitalist economy, trade is encouraged and restraint of trade is discouraged, unless it is justified”.

17 [1897] AC 22.

18 (1843) 2 Hare 461.

not an individual shareholder, can take action.¹⁹ A breach by a director or by the board of directors of a duty which is owed to the company is a wrong done to the company – only the company has a remedy for that breach. However, how this doctrine applies to cases involving restrictive covenants has had far less appellate attention.

11 In modern commercial life, it is commonplace for senior employees to enter into employment contracts with their local direct employer, who is typically a subsidiary of a group holding company. More senior employees will be given shares or equity in the group holding company as compensation for performance of the business. Those share agreements usually contain restrictive covenants: non-competes, non-dealing and non-solicitation clauses. This structure can, however, throw up difficult issues where an individual subsequently leaves and allegations of competition in breach of a restrictive covenant arise. In particular: Can a group holding company, A, enforce a restrictive covenant in an agreement with its former employee, B, where B has no restrictive covenant agreement with A's operating subsidiary company, C?

12 The leading English authority is the Court of Appeal's judgment in *Beckett Investment Management Group Ltd v Hall*²⁰ ("Beckett"). The lead claimant ("C1") was a group company that carried on a business providing financial services. C1 brought an action against two former financial advisers who agreed to restrictive covenants with the C1. Beckett Financial Services Ltd was C1's financial advice and services arm, and Beckett Asset Management Ltd was a separate subsidiary providing investment advice and management services.²¹ The relevant employment contract was with C1 and contained a 12-month non-solicitation clause. An issue of construction arose on the meaning of "the company" which was undefined within the clause.²² Maurice Kay LJ concluded that C1 had a legitimate interest to protect,

19 See *Marex Financial Ltd v Sevilleja* [2021] AC 39 and *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2024] UKPC 36.

20 [2007] ICR 1539.

21 *Beckett Investment Management Group Ltd v Hall* [2007] ICR 1539 at [2].

22 *Beckett Investment Management Group Ltd v Hall* [2007] ICR 1539 at [8]–[9].

notwithstanding that C1 itself had never provided a service to the business's clients.²³ In doing so, Kay LJ relied upon the *dictum* of Lord Wilberforce in *Stenhouse Australia Ltd v Phillips*²⁴ (“*Stenhouse*”) where Lord Wilberforce remarked that subsidiary companies that were “mere agencies or instrumentalities” by which a company integrated its business could be legitimately protected.²⁵ The reasoning emphasised the factual or economic reality of the group business as a going concern. In *Beckett*, the Court of Appeal thus overturned the first instance judge because the latter had been inhibited by a purist approach to corporate personality.²⁶ Indeed, Kay LJ cited with approval Lord Denning MR's view that “the law today has regard to the realities of big business. It takes the group as being one concern under one supreme control”.²⁷ Thus, in this specific context, *Stenhouse* was considered sufficient to reject any formal separate corporate personality that would render a group company's covenants unenforceable.

13 While the reasoning in *Beckett* is perfectly fine to follow, (a) the holding that the group company had a legitimate interest to protect sits unevenly with orthodox principles of English company law; and (b) in *Stenhouse*, it was a question of fact (as Lord Wilberforce explained) that “the business of the *Stenhouse* Group was controlled and co-ordinated by the appellant company, and all funds generated by each of the companies *were received by the appellant*” [emphasis added].²⁸ A parent company, as a separate legal entity, may benefit from the protection of the restrictive covenant while (legally speaking) it might not suffer direct economic harm if there is competition (it never contracted with the business's clients in the first place).

23 *Beckett Investment Management Group Ltd v Hall* [2007] ICR 1539 at [23].

24 [1974] AC 391.

25 *Stenhouse Australia Ltd v Phillips* [1974] AC 391 at 404. Lord Wilberforce in turn rested his view on *Henry Leatham & Sons Ltd v Johnstone-White* [1907] 1 Ch 189 (Ch D) and *Henry Leatham & Sons Ltd v Johnstone-White* [1907] 1 Ch 322 (CA). Lord Wilberforce explained that in that case, an agreement was with one company of a group, and that one company had a limited business, whereas the restraint was expressed in far wider terms extending to the area covered by the operations of the group as a whole.

26 *Beckett Investment Management Group Ltd v Hall* [2007] ICR 1539 at [18].

27 *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472 at 1482.

28 *Stenhouse Ltd v Phillips* [1974] AC 391 at 404D.

14 While *Stenhouse* could be rationalised on the basis that the loss was in fact suffered by the parent company, extending that principle further as suggested by *Beckett* to a group holding company with whom clients do not contract appears unprincipled. In any event, in neither case was there a clear explanation why it was appropriate doctrinally to depart from orthodox principles to allow the group company to protect its interest where it had no direct clients (or, on the other side of the coin, to permit the subsidiary to have the benefit from a restrictive covenant to which it is not a party). Three counter examples from other areas of English law underscore that orthodox approach to separate corporate personality: (a) that the group company is a mere shareholder in the subsidiary, and thus any loss to the group is “reflective” of the subsidiary’s loss and only the subsidiary should, on orthodox principles, be the proper claimant;²⁹ (b) the very high threshold of piercing the corporate veil;³⁰ and (c) the strict approach when considering the scope of freezing orders and how their provisions apply to an individual who is the sole shareholder and director of a company that holds separate assets.³¹ Each calls into question Lord Denning’s view which supported *Beckett*.

15 More fundamentally, *Beckett* also did not consider an earlier Court of Appeal authority which touched upon similar issues: *Gerber Garment Technology Inc v Lectra Systems Ltd*³² (“*Gerber*”). *Gerber* was principally a patents case. A substantial portion of the losses claimed by the plaintiff were suffered by subsidiary companies incorporated in the UK and Belgium, in which it held all the shares: The plaintiff was itself part of a large international group. The majority view (*ie*, Hobhouse and Hutchinson LJ) was to reject the judge’s decision that it was “self-evident” that a dollar lost to a subsidiary reduced a parent’s shareholding by a like amount. The majority explained that there was no such evidential rule or rebuttable presumption.

29 *Marex Financial Ltd v Sevilleja* [2021] AC 39.

30 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415.

31 See the discussion in *Civiello v Brodahl* [2024] EWHC 707 (Comm) at [23]–[26], *per* Foxton J; see also Steven Gee KC, “Taking an Axe to the Standard Freezing Injunction” [2024] 43(3) *Common Law Quarterly* 184.

32 [1997] RPC 443.

The majority affirmed that the parent company had to prove its own specific loss. This supported the otherwise narrow approach English law takes to separate corporate personality.

16 Hobhouse LJ's reasoning focused heavily upon *Salomon v A Salomon and Co Ltd*³³ and *Foss v Harbottle*.³⁴ Hobhouse LJ reiterated that, "[t]he root principle which must be adhered to is that each company is a separate legal entity. The property of one is not the property of another. The plaintiff must prove its own financial loss in its own pocket and quantify it".³⁵ The proper approach was for expert accountancy evidence to be adduced as to loss suffered in the group company's shareholding, including in terms of reduced income from dividends.³⁶ Accordingly, damages awarded to the parent company were reduced from circa US\$1.65m to circa US\$411,000. Staughton LJ (dissenting) expressed concerns about how this might be assessed, and considered there to be a rebuttable presumption that a loss to a subsidiary equates with that of a parent company.

17 Given *Gerber* reiterated the orthodox evidential burden on a parent company to prove its loss, there is an apparent tension with *Beckett* in relaxing the strict approach to separate corporate personality: Where the subsidiary entity is the one with whom clients of the business contract, then any competition by a leaving employee would be a loss suffered to the subsidiary and not the group company. Therefore, strictly speaking, the group company has no direct interest to protect.

18 However, unless and until *Beckett* is reviewed by the UK Supreme Court, it represents the current state of English law on the direct point concerning restrictive covenants. Nor has it (perhaps yet) been seriously argued or considered whether *Beckett* was *per incuriam*, and the point would appear difficult given the reliance on Lord Wilberforce's view in *Stenhouse*. *Beckett* is therefore certainly employer friendly. That said,

33 [1897] AC 22.

34 (1843) 2 Hare 461.

35 *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 479.

36 *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 483, *per* Hutchinson LJ.

employers should always take steps to ensure that their contracts are “back-to-back”, *ie*, uniform in the terms of restrictive covenants in contracts between both the group company and an employee, and the subsidiary entity and an employee. This is also particularly important where the relevant employer intends to have a similar dispute resolution provision, *eg*, conforming arbitration agreements.

19 Finally, the above principles have also not been considered more fully alongside the contract law doctrine known as “transferred loss”. This principle applies where the known objective of a transaction is to benefit a third party and the anticipated effect of a breach of duty would be to cause loss to that third party. The leading English authority is *Swynson Ltd v Lowick Rose LLP*³⁷ (“*Swynson*”). As reiterated by Lord Sumption in *Swynson*, it is an exception to the fundamental principle of the law of obligations that only the contracting parties may bring claims for their own damages. The principle of transferred loss arises where a contracting party seeks to recover the third party’s loss, and to give effect to the transaction and to avoid a “legal black hole”,³⁸ where in the anticipated course of events the only party entitled to recover would be different from the only party which could be treated as suffering loss. If the third party has a direct right of action for the same loss, the principle has no application.

20 On the facts in *Swynson*, it was common ground that the defendant accountants had negligently failed to identify problems in a company’s finances whom they had audited. However, the principle did not apply because it was no part of the object of the engagement of the accountants or any other aspect of the 2006 transaction to benefit Mr Hunt (owner of the claimant company). Mr Hunt’s losses had arisen out of a subsequent refinancing in December 2008, which had nothing to do with the defendant accountants and did not arise out of their breach of duty.

21 Furthermore, the fact that a claimant and a third party who suffers the loss are part of the same group of companies is of

37 [2018] AC 313.

38 *Swynson Ltd v Lowick Rose LLP* [2018] AC 313 at 324.

limited relevance. While Lord Clyde in *Alfred McAlpine Construction Ltd v Panatown Ltd*³⁹ noted that the principle of transferred loss “is most likely to arise in the context of the domestic affairs of a family group or the commercial affairs of a group of companies”,⁴⁰ whether the test will be satisfied remains a question of fact. In two recent cases involving group companies, the principle was not applied.⁴¹ Drafters of shareholder management deeds therefore need to take great care when making it clear whether there is an intention to benefit any loss which may be suffered by a subsidiary. It is frequently part of standard terms to include a clause preventing third parties from suing upon the contract, eg, stating that: “Nothing in this contract confers or is intended to confer any right to enforce any of its terms on any person who is not a party to it” or excluding operation of the Contracts (Rights of Third Parties) Act 1999. However, such a clause is likely, as established in *Dr Jones Yeovil Ltd v The Stepping Stone Group Ltd*,⁴² to exclude the known third-party requirement being satisfied.

22 Two further practical points arise:

(a) First, if the contract by its clear terms is only intended to create rights between the parent company and the employee, and yet the parent company does not in fact contract with any clients and thereby cannot suffer a loss in response to competition, it is difficult to see how, as a matter of principle, the parent company could or should be entitled to rely upon the principle of transferred loss to make good its claim.

(b) Second, this also emphasises the importance of ensuring an employee enters into a back-to-back contract with the subsidiary company, giving the subsidiary entity direct rights of action as against the employee. There would be no “black hole” in that situation and the doctrine of transferred loss would not need to be relied upon. And while the proper claimant in that situation

39 [2001] 1 AC 518.

40 *McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 at 535–536.

41 *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596; *Palmali Shipping SA v Litasco SA* [2020] EWHC 2581 (Comm).

42 [2020] EWHC 2308 (TCC).

would be the subsidiary as the entity which suffers loss, for good order and ensuring that all the affected parties are properly before the court or tribunal, joinder of the parent company to the proceedings would be eminently sensible.

IV. Proof of damage and whether damages will not be an adequate remedy

23 Another area where English law is particularly favourable to an employer seeking an interim injunction is the requirement of showing that damages will *not* be an adequate remedy. This is typically an easy threshold for an employer to meet. A flavour of why this is so can be found in the Court of Appeal’s recent statement of principle in *Veriton Advisors (UK Partners) LLP v Jump Trading International Ltd*,⁴³ namely: “Restraint of trade litigation in the employment context frequently gives rise to real urgency, where enforcement of the restrictive covenant is necessary to avoid uncompensatable damage being suffered.”⁴⁴ Recently also in *Boydell v NZP Ltd*,⁴⁵ the inadequacy of damages if an injunction was not granted was said by the Court of Appeal to be “entirely obvious”.⁴⁶

24 The underlying principle, put shortly, is that an urgent injunction is required to prevent ongoing or highly likely competitive steps or other wrongdoing by a departing employee, which will leave a company facing losses which are difficult to quantify. Damages are “inadequate” on that basis – and therefore an interim injunction becomes the appropriate relief.

25 There is, however, a whiff of a legal fiction being deployed in the Court of Appeal’s description of such damage as being “uncompensatable”. A company is typically well placed to understand the value of an individual client to its business. For

43 [2023] EWCA Civ 701 at [35].

44 *Veriton Advisors (UK Partners) LLP v Jump Trading International Ltd* [2023] EWCA Civ 701 at [35].

45 [2023] EWCA Civ 373.

46 *Boydell v NZP Ltd* [2023] EWCA Civ 373 at [38].

larger businesses this may give rise to a symbiotic relationship, whereby the client gives yearly or even monthly forecasts as to the level of demand so that the business is able to ensure manufacture of a certain good or to provide a long-term service. There will be relatively regular calculations of the financial year EBITDA. The loss of a major customer can be factored into such calculations, and a *prima facie* loss thereby calculated. This is no different from the exercise which courts frequently undertake with regard to share sale and purchase agreements, where an unhappy buyer of a company sues for breach of warranty. The quantum valuation in such cases is typically undertaken on an EBITDA basis⁴⁷ – and can be ascertained by calibrating differing demand levels from individual clients, or complete loss of custom. Because employee restrictive covenants are usually drafted with respect to “material clients”, these are almost always going to be the most significant to the employer’s business, and with whom the employer has intimate economic familiarity.

26 However, applicant employers for a restrictive covenant injunction are not frequently obliged at an interlocutory stage to even set out their *prima facie* losses – the pleading or evidence will simply say that the damage will be particularised in due course. This low threshold was recently reiterated by the English Court of Appeal: *Derma Med Ltd v Ally*⁴⁸ (“*Derma Med*”) concerned a “high profile aesthetics practitioner” who provided Botox and other cosmetic filler services.⁴⁹ The defendant and his wife set up a business in 2017 supplying such services. In 2022, the couple sold the business for over £5m cash. As part of the consideration of the *Derma Med Ltd*’s sale, the couple entered non-competes that were to last until 24 March 2024.⁵⁰ The High Court had initially refused to grant an injunction because damages *would* be an adequate remedy to the claimants.⁵¹ That holding was rejected by the Court of Appeal.

47 See, eg, *MDW Holdings Ltd v Norvill* [2024] 4 WLR 33.

48 [2024] EWCA Civ 175.

49 *Derma Med Ltd v Ally* [2024] EWCA Civ 175 at [1].

50 *Derma Med Ltd v Ally* [2024] EWCA Civ 175 at [7]–[8].

51 *Derma Med Ltd v Ally* [2024] EWCA Civ 175 at [70].

27 Males LJ's reasoning in *Derma Med* centred on two judgments particularly favourable for an injunction applicant, *Sunrise Brokers LLP v Rodgers*⁵² ("Sunrise") and *D v P*.⁵³ First, in *Sunrise*, the Court of Appeal expressed the view that, even where it is possible to identify clients who have transferred their business, there may be real issues about causation, the period for which losses are attributable to an employee's breach, and "intangible but real losses to the employer's reputation".⁵⁴ The last point is a surprising one for commercial litigators: Reputation losses are not frequently awarded on orthodox contractual principles.⁵⁵

28 In *D v P*,⁵⁶ the Court of Appeal relied on earlier authorities which suggested that negative covenants can be enforced without proof of damage (albeit an injunction remains a discretionary remedy). This is also the general approach taken to negative covenants in Singapore.⁵⁷ Lord Cairns LC's judgment in *Doherty v Allman*⁵⁸ is particularly pithy, namely:

If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves.

29 However, at least two points are notable in respect of Lord Cairns LC's view.

52 [2014] EWCA Civ 1373.

53 [2016] EWCA Civ 87 at [15].

54 [2014] EWCA Civ 1373 at [53]. Nevertheless, the Court of Appeal kept it open for a party to argue that damages might be an adequate remedy on the facts, making reference to *Phoenix Partners Group LLP v Asoyag* [2010] EWHC 846 (QB) as an example of such a situation.

55 See *Chitty on Contracts* (Sweet & Maxwell, 35th Ed, 2024) at para 30–168.

56 [2016] EWCA Civ 87.

57 See *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [65]–[66].

58 (1878) 3 App Cas 709 at 720.

(a) First, his *dictum* has been superseded by the fact that the guiding framework for an employment injunction is based principally on the question of balance of convenience, following *American Cyanamid Co v Ethicon Ltd*⁵⁹ (“*American Cyanamid*”). However, the application of *American Cyanamid* is frequently tempered in an employment context by the fact that the court will look at the apparent underlying merits in the exercise of its discretion because, in practice, the result of granting the injunction will in effect be to conclude the litigation.⁶⁰

(b) Second, there is an assumption that the parties have complete freedom of contract in entering into the bargain with the covenant. In short, the restrictive covenant is something which the employee has freely accepted “for valuable consideration” and with “their eyes open”. However, that assumption is questionable in modern commercial life, particularly for junior employees and those who do not obtain legal advice on the effect of restrictive covenants. Where an employer does not seek to indemnify an employee for the cost of obtaining independent advice, it is questionable that a bargain between equal contracting parties has been struck.

30 Nonetheless, after citing the above, Sir Colin Rimer in *D v P*⁶¹ added that the basic principle justifying the court’s intervention is that contracting parties should ordinarily be held to their bargain, which is typically all that an injunction applicant seeks.⁶²

31 *Derma Med* therefore appears to be a firm steer from the Court of Appeal against taking a more searching approach to the question of adequacy of damages. In short, no additional weight was given to the first instance judge’s familiarity with the evidence, nor were any of the points above regarding the ability

59 [1975] AC 396. See *Boydell v NZP Ltd* [2023] EWCA Civ 373 at [14], reiterating the *American Cyanamid* test.

60 See *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251.

61 [2016] EWCA Civ 87.

62 *D v P* [2016] EWCA Civ 87 at [17].

of a business to estimate the impact on quantum arising from employee competition considered. Modern English courts will therefore be expected to follow, in general, the employer-friendly principles established in *Sunrise* and *D v P*.

V. Penalty clause jurisdiction when dealing with employee bonus or commission schemes

32 Beyond just the question of competition, another area of significant focus for senior employees will be shares obtained throughout the cycle of their employment. So-called “good” versus “bad” leaver provisions are well known to litigators in this area: An employee who leaves and competes will often be contractually deemed to be a “bad” leaver, and provisions in their employment contract or a shareholders’ agreement with the parent company typically require the employee to transfer their shares in the company for nominal consideration.

33 Recent English cases appear to show a particularly favourable approach to an employer when seeking to uphold these provisions; and they will not readily be struck down as unenforceable penalties.

34 A recent helpful guide is the High Court’s judgment in *Lee v GSquare Capital II LP*⁶³ (“*Lee*”). This was an application to strike out or alternatively obtain reverse summary judgment by the defendant company, a distance-selling and online pharmacy. In brief summary, the former employer transferred the claimant employee’s shares in the company, valued at some £8m, for just £1, on the basis that the employee who had been made redundant, had competed during the 18-month period when his post-termination restrictions ran and had thus been designated as a “Very Bad Leaver”.⁶⁴ The employee disputed whether he was in breach of the restrictive covenants, but the strike out application raised an issue of law as to the enforceability of these provisions (assuming, for these purposes, he had competed). The High Court took as its starting point the UK Supreme Court’s judgment in

63 [2023] EWHC 3017 (Ch).

64 *Lee v GSquare Capital II LP* [2023] EWHC 3017 (Ch) at [16].

*Cavendish Square Holdings BV v Makdessi*⁶⁵ (“*Cavendish*”). In that case, although the Supreme Court unanimously held that the particular clauses in issue (cll 5.1 and 5.6)⁶⁶ were not penalties, their Lordships’ respective reasoning differed. There were three camps:

(a) Lords Neuberger and Sumption (with whom Lord Carnwath agreed) considered the clauses to be *primary obligations*, and thus ones to which the penalty jurisdiction did not arise.

(b) Lord Hodge (with whom Lords Toulson and Clarke agreed) considered that the clauses might not be primary obligations, due to there being “considerable scope for abuse” and rather he considered they were secondary obligations.

(c) Lord Mance as the seventh member of the court described cl 5.6 as having the effect of “reshaping” the parties’ primary obligations, but not lending a clear view to either of the two other camps.

35 The High Court in *Lee* reasoned that because the trigger for the acquisition of Lee’s shares was him becoming a “Leaver”, and that arose in various situations, it had in principle nothing to do with a breach of contract. Because the obligation to transfer did not arise on default, but rather on an employee becoming a “Leaver”, on the proper construction of the relevant article,

65 [2016] AC 1172.

66 Clause 5.1: “If a seller becomes a defaulting shareholder [which is defined as including ‘a seller who is in breach of clause 11.2’] he shall not be entitled to receive the interim payment and/or the final payment which would other than for his having become a defaulting shareholder have been paid to him and [Cavendish]’s obligations to make such payment shall cease.”

Clause 5.6: “Each seller hereby grants an option to [Cavendish] pursuant to which, in the event that such seller becomes a defaulting shareholder, [Cavendish] may require such seller to sell to [Cavendish] all ... of the shares held by that seller (the defaulting shareholder shares). [Cavendish] shall buy and such seller shall sell ... the defaulting shareholder shares ... within 30 days of receipt by such seller of a notice from [Cavendish] exercising such option in consideration for the payment by [Cavendish] to such seller of the defaulting shareholder option price [defined as ‘an amount equal to the [NAV] on the date that the relevant seller becomes a defaulting shareholder multiplied by [the percentage which represents the proportion of the total shares the relevant seller holds].’”

the requirement to transfer shares was a primary obligation with relevant price adjustment mechanisms. The penalty doctrine was thus not engaged at all. Although the reasoning of the judge was entirely consistent with the approach taken by Lords Neuberger and Sumption in *Cavendish*, the distinction between a clause which falls to be construed as a primary obligation (where in practice the only occasion for its operation is a breach of contract) and a secondary obligation remains somewhat illusory. This may in due course lead to some potential divergence with Singapore law. The Singapore Court of Appeal in *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd*⁶⁷ expressly decided not to adopt *Cavendish*. Nonetheless it noted⁶⁸ that the court would have reached the same result as the UK Supreme Court in the first appeal by an ordinary application of the rules in *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd*,⁶⁹ which still represents the law in Singapore; see also the Singapore High Court decision of *BGC Partners (Singapore) Ltd v Sumit Grover*⁷⁰ where the court held that:

... the doctrine of penalty only applies to secondary obligations triggered by a breach of contract ... In the present case, it is clear that the obligation (of the employee) to repay the loans (to the employer) under the Loan Agreements is a primary obligation. The loans become repayable upon the occurrence of the stipulated events, including the event that the defendant ceases to be a partner. The cessation of the defendant's partnership is a condition that triggers the repayment, not a breach of a primary obligation that in turn triggers a secondary obligation to repay the loans.

36 The decision in *Lee* is certainly favourable to employers who have drafted similar provisions, typically in a management deed or shareholders' agreement with senior employees. There would be only limited scope for an employee to argue that *Lee* turned on the facts and mis-applied *Cavendish*. However, there is also a difficult question of whether, and how, the relief from forfeiture doctrine would apply on the facts (which was not considered in *Lee*). Lastly, it is noted that *Lee* sits alongside other

67 [2021] 1 SLR 631.

68 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 at [179].

69 [1915] AC 79.

70 [2024] SGHC 206 at [105].

recent decisions helpful to employers including *Steel v Spencer Road LLP*⁷¹ where contractual provisions that permit an employer to claw back a discretionary bonus were held not to engage the doctrine of restraint of trade.

37 *Lee* also raises an interesting issue as to the interplay between restrictive covenant clauses and the right of the employer to reacquire shares for nominal (or significantly reduced) consideration. There is often a significant dispute as to the question of whether the employee did in fact breach the relevant restrictive covenants so as to be classified as a “Bad Leaver”. Indeed, clauses sometimes even give the employer a discretion in deciding what type of leaver an employee is. The relevant clauses in *Lee* were drafted in such a way that the company was not required to be correct when classifying the type of leaver an employee was: *Lee* sought to argue, unsuccessfully, that there was a requirement that the employer accurately identify the type of leaver *Lee* was, otherwise the notice classifying him would be invalid. However, it raises the question of whether the employee can apply for an injunction to stop the employer from reacquiring shares based on an erroneous or unreasonable assessment of the type of leaver the employee was. In most cases, the answer will be no: Damages are likely to be an adequate remedy, so the balance of convenience test under *American Cyanamid* is not likely to be satisfied. But it is possible to envisage situations where this might not be the case, *eg*, where the employer is in straitened financial circumstances, or if there are circumstances which make the valuation of the shares particularly difficult.

71 *Steel v Spencer Road LLP* [2023] EWHC 2492 (Ch). There, the relevant clauses provided: cl 7.7 “In the event that the Employee serves or receives notice of termination of his contract of employment, the Company shall be entitled to: (a) Recover any Discretionary Bonus payments made to the Employee during the three month period preceding the deemed date of service of that notice” and cl 7.13 “All sums that the Company seeks to recover from the Employee shall be recoverable as a debt”.

VI. The employee strikes back: costs of an interim injunction

38 In restrictive covenant litigation, costs can be extremely important. An interim hearing is the first, and often only, skirmish between an employee and their former employer. As a matter of English procedure, the general costs rule is “loser pays”: An employee who loses and does not have significant assets of their own may be bankrupted by costs incurred by a former employer when seeking an injunction. In practice, single-day applications for an injunction before the High Court can have costs that well exceed £50,000–100,000. Equally, an employer who needs to be advised on whether to seek an interim injunction should be able to know the likelihood of whether they will obtain the costs of doing so from the former employee.

39 The present state of English law is that, subject to the general point that all costs orders are ultimately discretionary,⁷² it should be difficult for an employer to generally obtain all of their costs even if it is successful in obtaining an interim injunction.

40 The starting point is the Court of Appeal’s judgment in *Desquenne et Giral UK Ltd v Richardson*⁷³ (“*Desquenne*”). This case concerned the commercial manager of a railway track laying business, and in particular a six-month non-competition clause to protect confidential information.⁷⁴ The injunction defendant (Richardson) was ordered at first instance to pay costs of £16,000. Richardson’s counsel had sought to persuade the first instance judge that the statement of costs by the employer had been produced too late and the judge noted there were strong arguments both ways. Before the Court of Appeal, counsel for the

72 Civil Procedure Rules (SI 1998 No 3132) (UK) rr 44.2–44.3; see also *Melford Capital Partners (Holdings) LLP v Wingfield Digby* [2021] 1 WLR 1553 at [32].

73 [2001] FSR 1.

74 *Desquenne et Giral UK Ltd v Richardson* [2001] FSR 1 at [3]. The covenant provided:

Whilst this agreement remains in force and for a period of six months after its termination you will not in any capacity without the Company’s prior written consent be directly or indirectly engaged, concerned or interested in any other Company, business or occupation within the United Kingdom which competes with the business of the Company as then carried on.

employer (a certain Bean QC – now Lord Justice) relied upon the much-cited *dictum* of Balcombe LJ in *Lawrence David Ltd v Ashton*⁷⁵ that:

... a defendant who has entered into a contractual restraint, which is sought to be enforced, should seriously consider, when the matter first comes before the court, offering an appropriate undertaking until the hearing of the action, provided that a speedy hearing of the action can then be fixed and the plaintiff is likely to be able to pay any damages on his cross-undertaking. It is only if a speedy trial should not be possible that it would then be necessary to have a contest on the interlocutory application.

41 The Court of Appeal in *Desquenne* overturned the first instance judge. Morritt LJ gave three reasons for doing so.⁷⁶

(a) First, he observed that in ordering the injunction the judge analysed the case through the prism of the balance of convenience test, *ie*, to hold the ring until the dispute between the parties could be properly decided at trial: Accordingly, “[i]t is inconsistent with an order such as that, that there should be successful or unsuccessful parties”.⁷⁷ The language of a party being successful mattered because that is the touchstone of r 44 relating to costs in the Civil Procedure Rules.⁷⁸

(b) The second point made by Morritt LJ was a variation of the first: There had been no successful or unsuccessful party at the stage of the interim hearing and so the judge had been incorrect to make an order where costs were payable by one party to another.

(c) Morritt LJ’s third point was that the judge had erred in law in referring to a general rule that the court will make a summary assessment of costs – there was no such general rule and the judge had conflated whether to make the order for costs in principle with the process of summary assessment of costs so as to ascertain the

75 [1989] ICR 123 at 135.

76 *Desquenne et Giral UK Ltd v Richardson* [2001] FSR 1 at [12]–[14].

77 *Desquenne et Giral UK Ltd v Richardson* [2001] FSR 1 at [12].

78 SI 1998 No 3132 (UK).

quantum that would fall within it (where the general practice had favoured summary assessment).

42 Morritt LJ added for good value that the *dictum* from *Lawrence David Ltd v Ashton*⁷⁹ did not have a bearing on the issue of costs.⁸⁰

43 The reasoning in *Desquenne* was later reconsidered in two cases: *Picnic at Ascot Inc v Dergis*⁸¹ (“*Picnic at Ascot*”) and recently by the Court of Appeal in *Melford Capital Partners (Holdings) LLP v Wingfield Digby*⁸² (“*Melford*”). *Melford* should now be the relevant starting point for any English practitioner in this field; for that reason, it is focused upon here.

44 The facts of *Melford* can be shortly stated: The claimant sought an injunction restraining the use of confidential information, relating to a laptop which had access to cloud storage. Mr Digby, the defendant, had returned the laptop to the claimant but the laptop had been placed in a locked bag.⁸³ On the return date, the first instance judge (Birss J) continued the injunction until trial and ordered Digby to pay circa. £160,000 in costs (including Digby’s own costs, this amounted to some £277,000⁸⁴ in costs liability). As part of his reasoning in ordering costs, Birss J’s view was that because *Desquenne* and *Picnic at Ascot* had been made shortly after the Civil Procedure Rules⁸⁵ came into force, they had been overtaken by a modern approach and, in any event, costs were a matter for the court’s discretion. Because the claimant employer had succeeded in having the injunction continued, Birss J concluded it was to that extent “successful”.⁸⁶

79 [1989] ICR 123.

80 *Desquenne et Giral UK Ltd v Richardson* [2001] FSR 1 at [15].

81 [2001] FSR 2.

82 [2021] 1 WLR 1553. See also *The White Book: Civil Procedure* vol I at para 44.2.15.1.

83 *Melford Capital Partners (Holdings) LLP v Wingfield Digby* [2021] 1 WLR 1553 at [30].

84 *Melford Capital Partners (Holdings) LLP v Wingfield Digby* [2021] 1 WLR 1553 at [50].

85 SI 1998 No 3132 (UK).

86 *Melford Capital Partners (Holdings) LLP v Wingfield Digby* [2021] 1 WLR 1553 at [31].

45 The Court of Appeal reversed Birss J. In a joint judgment, Lewison and McCombe LJJ founded their decision on the principles from *Desquenne*. The Court of Appeal explained that there is a “normal rule emerging from *Desquenne*” that in hotly disputed cases, costs should be reserved to the trial judge.⁸⁷ English law was accurately stated by *The White Book: Civil Procedure*,⁸⁸ namely:⁸⁹

Where an interim injunction is granted the court will normally reserve the costs of the application until the determination of the substantive issue (*Desquenne* ...) However, the court’s hands are not tied and if special factors are present an order for costs may be made and those costs summarily assessed (*Picnic at Ascot*) ...

46 Lewison and McCombe LJJ therefore added that the quest for a “successful” and “unsuccessful” party in such a case involving an interim injunction is “usually fruitless”.⁹⁰

47 *Melford* leaves open the difficult question of what the “special factors” are that suggest an order of costs should be made and summarily assessed at the interim stage. What *Melford* helpfully shows is that the Court of Appeal did not consider such special factors were present on those facts, *eg*, the seriousness of the alleged conduct without more is not sufficient to be a special factor. Even where an injunction defendant employee has offered an undertaking (but without prejudice to their right to contest the merits), that should not make the case special.⁹¹ However, the converse may not be true: An injunction defendant who unreasonably refuses to offer undertakings to comply with *prima facie* enforceable restrictive covenants until an expedited trial may be at risk of an adverse costs order in light of Balcombe LJ’s guidance in *Lawrence David Ltd v Ashton*⁹² that a defendant should consider offering an appropriate undertaking in such

87 *Melford Capital Partners (Holdings) LLP v Wingfield Digby* [2021] 1 WLR 1553 at [49]–[50].

88 (Sweet & Maxwell, 2020) at para 44.6.1.

89 *Melford Capital Partners (Holdings) LLP v Wingfield Digby* [2021] 1 WLR 1553 at [35].

90 *Melford Capital Partners (Holdings) LLP v Wingfield Digby* [2021] 1 WLR 1553 at [39].

91 *Melford Capital Partners (Holdings) LLP v Wingfield Digby* [2021] 1 WLR 1553 at [42].

92 [1989] ICR 123.

circumstances (although, it remains open to the employee to argue that the *dictum* does not apply following Morritt LJ's ruling in *Desquenne*).

48 Lewison and McCombe LJJ further added that there were policy reasons why it would be helpful for parties to make sensible arrangements knowing that costs are likely to be reserved.⁹³ That is now extremely important for an employer to consider prior to initiating any application for an interim injunction.

49 The Court of Appeal's final point appears to the present authors to be a good one. Not reserving costs can create adverse incentives on an employer, particularly in a context where the emotions between the parties are likely to be particularly fraught. In short, an employer should not be able to use the costs consequences of an interim injunction as a proverbial bat with which to harm a former employee. To that extent, English case law has sought to protect employees in this area as far as possible.

VII. Conclusion

50 For the reasons discussed above:

- (a) Given the ostensible differences between the English law and Singapore law tests for enforceability of restrictive covenants, drafters of commercial employment contracts – particularly at the employee shareholder level – should carefully consider what system of law should govern those agreements.
- (b) Care will need to be taken when ensuring both group companies and subsidiaries have enforceable contracts as against senior employees.
- (c) Recent developments in English law continue to show broad support for employers seeking to protect their interests where employees leave and breach

93 *Melford Capital Partners (Holdings) LLP v Wingfield Digby* [2021] 1 WLR 1553 at [50].

restrictive covenant clauses. That change is not all in one direction (as the jurisprudence on costs shows and which an employer will need to consider strongly before commencing an application for interim relief).

(d) However, the English Court of Appeal has reaffirmed the core basis of seeking interim relief to enforce a restrictive covenant where – almost inevitably – damages will not be an adequate remedy, therefore detailed work on quantum will not generally be needed upfront when an employer seeks interim relief.