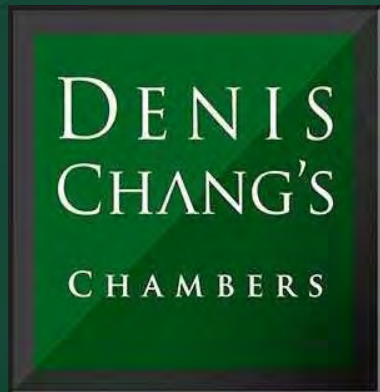




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# Employment Law: Breach of Confidence and Post-Termination Restrictions

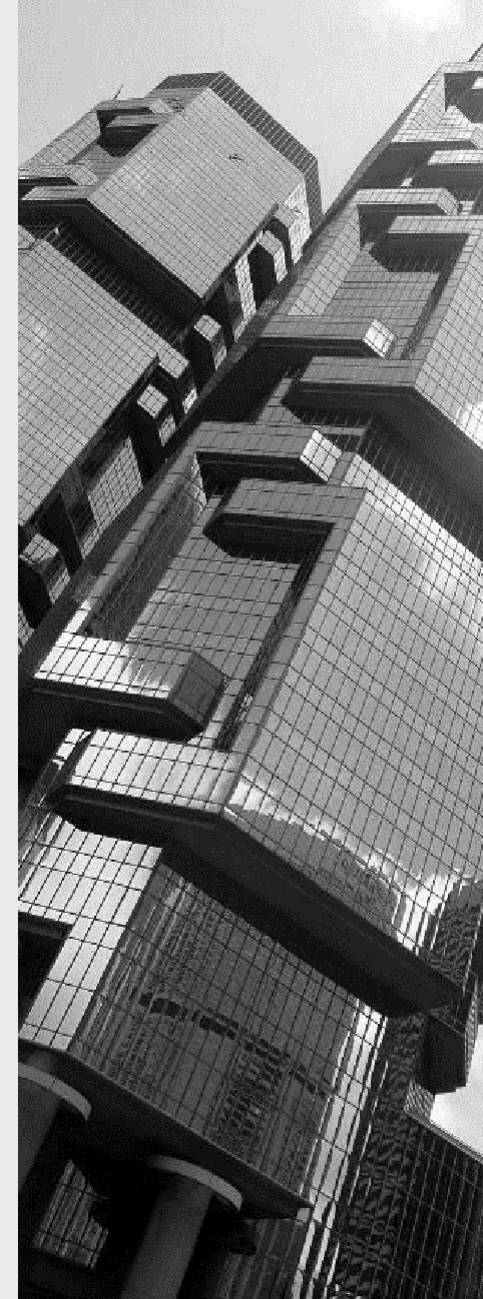


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## The Organisers

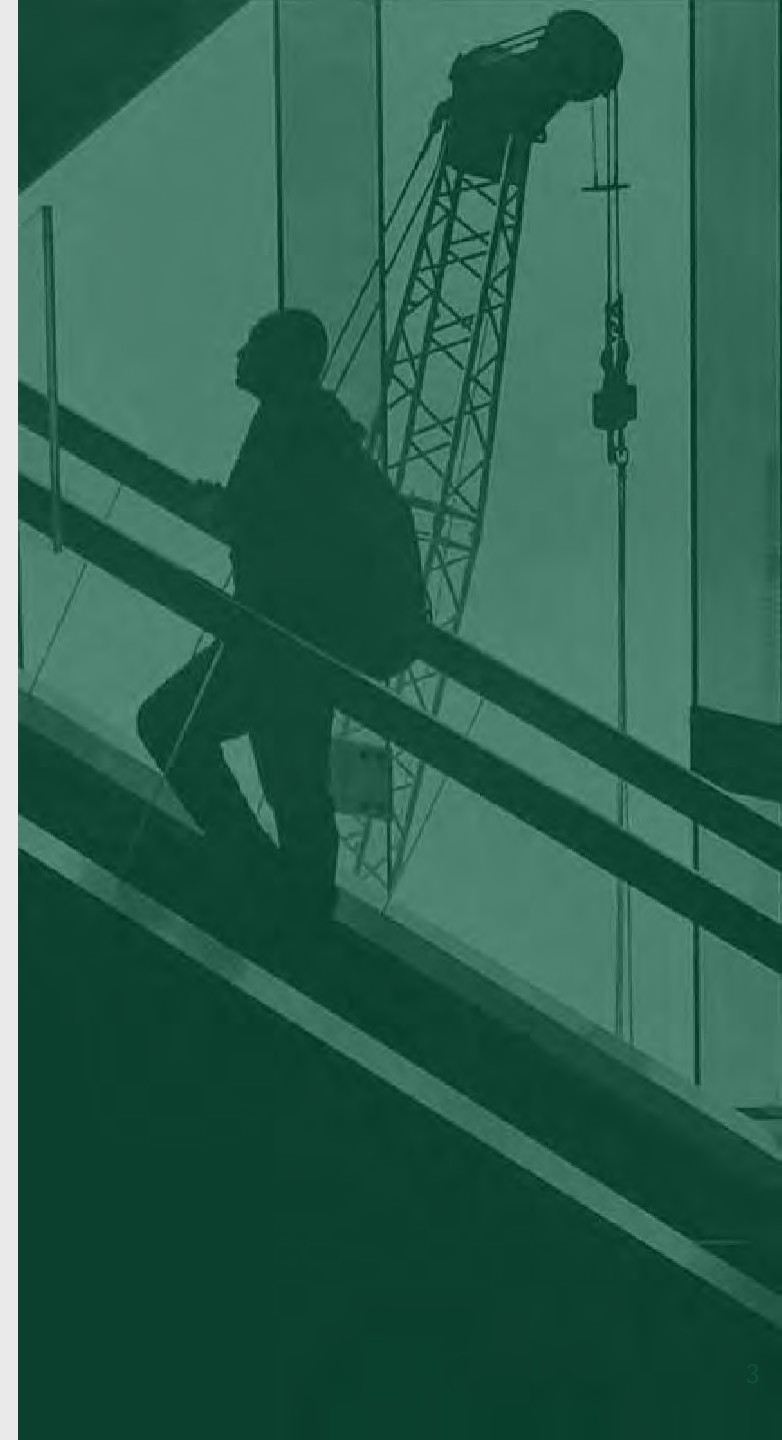
**Hugill & Ip** is a young, independent Hong Kong law firm, established in 2018. Its partners have decades of experience providing bespoke legal advice and exceptional client service to businesses in Hong Kong and internationally. Its solicitors have achieved outstanding results in the most recent editions of international legal guides. They have also been recognised multiple times by for their pro bono service to the community.

**Denis Chang's Chambers** was established in 1978 by a young Denis Chang. DCC is today recognised as a modern and progressive set committed to legal excellence, justice, and the rule of law. It currently has 53 members including 5 silks. The strong portfolio of barristers has collectively and individually contributed not only to the development of DCC, but also towards the legal fabric of the Common Law world and the jurisprudence of Hong Kong.





# Introduction



## Business Risk

Potential threats to business by employees:

- During Employment:
  - ✓ Diverting business
  - ✓ Disclosure of confidential information / trade secrets
  - ✓ Preparatory activity – team moves
- Post-Termination:
  - ✓ Disclosure of confidential information / trade secrets
  - ✓ Employment with a competitor
  - ✓ Solicitation / dealing with customers / clients
  - ✓ Solicitation of employees
  - ✓ Interference with suppliers

## Protection

- Implied Contractual terms and Equitable Duties:
  - ✓ Fidelity
  - ✓ Confidentiality
  - ✓ Fiduciary duties
- Express contractual terms:
  - ✓ Confidentiality
  - ✓ Post-termination restrictions
- Criminal conduct

# Breach of Confidence



## Common Scenarios

- No Confidentiality Covenant in Contract
  - ✓ Over the course of 6 months, several key employees have left employment and LinkedIn now shows they have set up together in competition / joined a competitor.
  - ✓ All work communications are silent on such matters and they used personal emails, WhatsApp etc., to engineer the move.
  - ✓ IT has not detected any large downloads of confidential data.
  - ✓ Some but not all restrictive covenants have lapsed.

# Common Law Causes of Action

- Breach of Confidence:
  - ✓ Confidential information vs Trade Secrets
  - ✓ Need actual use or possession sufficient?
- Duties owed to employer:
  - ✓ Fiduciary Duties vs Fidelity
- Accessory (Secondary) Liabilities:
  - ✓ Inducement of Breaches of Contract
  - ✓ Conspiracy to Injure by Lawful and Unlawful Means
  - ✓ Vicarious Liability of New Employer / Competitor



## Breach of Confidence

- **Coco v AN Clark (Engineers) Ltd. [1969]**
  - ✓ Information must possess the necessary quality of confidentiality;
  - ✓ Information must have been imparted in circumstances importing an obligation of confidence; and
  - ✓ There must be some unauthorised use of such information to the detriment of the party to whom the obligation of confidence originated.

**The obligation not to misuse confidential information is implied into the term of all employment contracts.**

## Breach of Confidence

- Law recognises 3 categories of information,
  - ✓ Public Information
  - ✓ Information that is merely confidential
  - ✓ Trade Secrets
- Law Protects Categories 2 and 3 only
  - ✓ Implied Contractual term to restrain against unlawful use of Category 2 confidential information is limited to the duration of contract only.
  - ✓ Category 3 information can be enforced post-employment against ex employees, **AXA China Asia v Pacific Century Insurance & Ors** [2003]

# Breach of Confidence

## Category 2 Information cannot always be freely used or disclosed even after employment ends

- Post use is not protected but the act of copying or making list of customers, taking documents containing confidential information during employment is actionable, see :
  - ✓ **Robb v Green** [1895] - copying list of names and addresses of customers,
  - ✓ **Universal Thermosensors Ltd. v Hibben** [1992] - employees taking lists of customers' product requirements, prices and contacts during employment for their use in own business during employment.
- Selling acquired knowledge and experience:
  - ✓ **Faccenda Chicken v Fowler [1984] per Neil LJ**  
*"We would wish to leave open, however, for further examination on some other occasion the question whether additional protection should be afforded to an employer where the former employee is not seeking to earn his living by making use of the body of skill, knowledge and experience which he has acquired in the course of his career, but is merely selling to a third party information which he acquired in confidence in the course of his former employment."*

# Breach of Confidence

## Category 2 Information cannot always be freely used or disclosed even after employment ends (cont'd)

- Post-Use is protected even if the information becomes public.
  - ✓ **Force India Formula One Team Ltd. v Aerolab Srl** [2013] - *"It is certainly not a defence [to an allegation of breach of confidence] that the person in breach of confidence could have obtained the information elsewhere if he did not in fact do so."*
  - ✓ **Seager v Copydex (No. 1)** [1967] (per Lord Denning) - *"When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it. It may not be a case for injunction or even for an account, but only for damages, depending on the worth of the confidential information to him in saving him time and trouble."*

# Breach of Confidence

**What is Category 3 Information?** *Axa China Asia v Pacific Century Insurance & Ors* [2003], the Court will consider the following 4 factors:

- ✓ Nature of employment and whether the employee routinely handles confidential information;
- ✓ Nature of information itself, and whether the information is a trade secret or ought to be protected as a trade secret. Non-exhaustive factors to consider include the number of people with access to it, how it is to be used, how important it is to the company, how it was gained.
- ✓ Whether the employer impressed on the employee the confidentiality of the information (i.e. the attitude of the employer).
- ✓ Whether the information can be isolated from such other information which the employee is free to use or disclose. If it cannot be isolated, the Court has given weight against such information being classified as a “trade secret”



# Case Study: Vestergaard Frandsen v Bestnet Europe

- The UK Supreme Court confirmed “an action in breach of confidence is based ultimately on conscience”, and in order for conscience to be affected, the recipient must have agreed or ought to know that such information is confidential. This has been cited but not considered in ***Shenzhen Futaihong Precision Industry Co. Ltd. v BYD Co. Ltd & Ors*** [2018] HKCA 408.
- UK Supreme Court held that conscience can be affected in the following manner:
  - ✓ **Classic case**: involves confidential information being used inconsistently with its confidential nature by a defendant who received it in circumstances where it was known to be confidential, or ought to have been appreciated that it was confidential;
  - ✓ **Subsequent knowledge**: a person may not initially know that information was confidential, but may subsequently be told or appreciates that it is in fact confidential;
  - ✓ **Wilful blindness**: commercially unacceptable conduct in the particular context involved, or acting in reckless disregard of others rights.

# Case Study: Presumption of Breach of Conscience?

## Vestergaard Facts:

- Employee was (G) was a regional sales manager for Europe and South America. She was not involved in technical aspects of product manufacture during her employment with Vestergaard.
- While she was instrumental in the setting up of competitor, Judge made the following findings:
  - ✓ G did not have access to the database containing the trade secrets or knowledge of such trade secret;
  - ✓ G was aware by a later date that the new products being sold by her new company were based on trade secrets, she believed that it originated from her partners research and work at the new company;
  - ✓ By the time G was aware of the allegations, she had not appreciated that the second gen product by her company was conceived with the assistance of the infringing trade secrets;
  - ✓ G was not involved in the production of fraudulent and forged documents regarding development of their second gen product.

## Travel Counsellors Ltd v Trailfinders Ltd [2021]

- English Court of Appeal held that the equitable duty of confidence arises when a person receives information he knows or ought to know is fairly and reasonably regarded as confidential.

- Arnold LJ held:

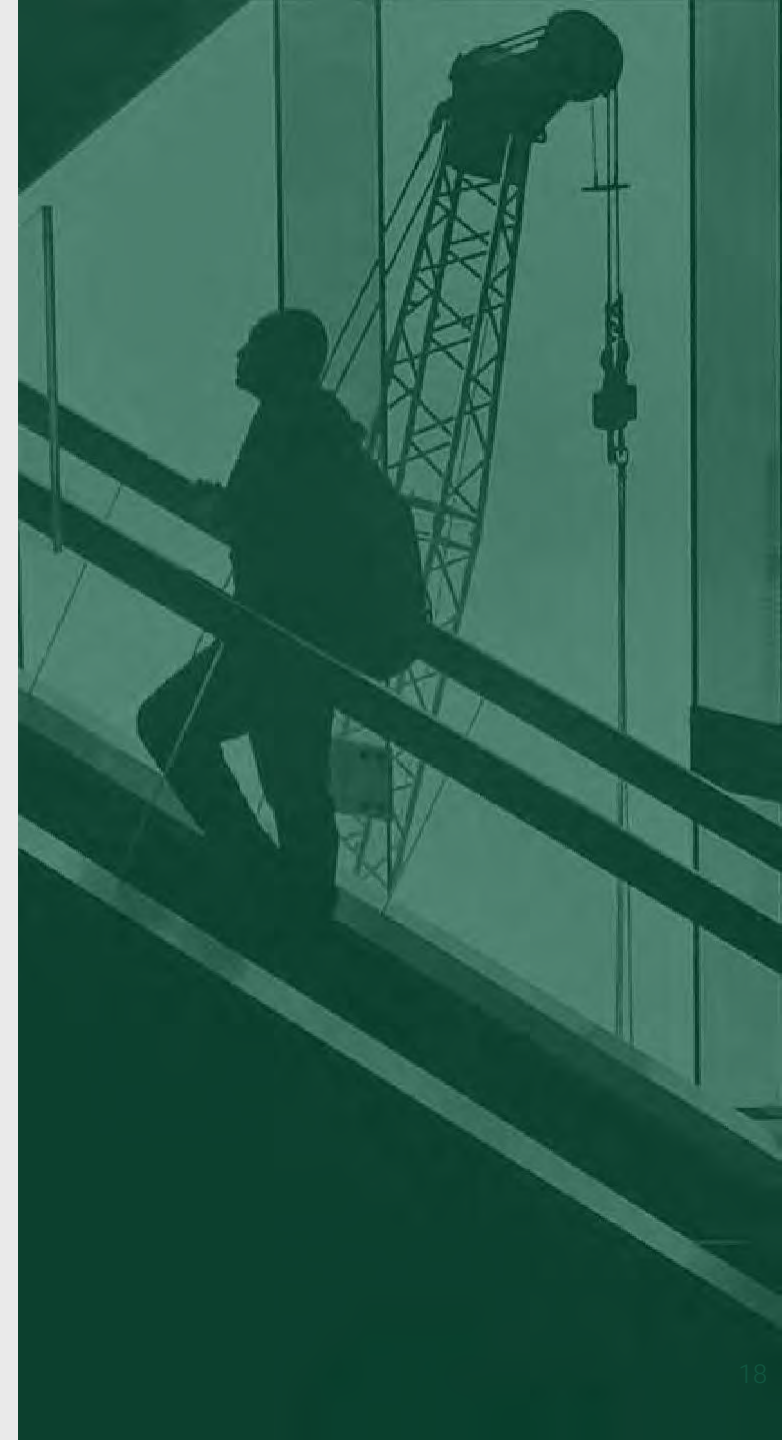
*"Accordingly, in my judgment, if the circumstances are such as to bring it to the notice of a reasonable person in the position of the recipient that the information, or some of it, may be confidential to another, then the reasonable person's response may be to make enquiries. Whether the reasonable person would make enquiries, and if so what enquiries, is inevitably context- and fact-dependent. If the reasonable person would make enquiries, but the recipient abstains from doing so, then an obligation of confidentiality will arise".*

- English Court of Appeal held that the equitable duty of confidence arises when a person receives information he knows or ought to know is fairly and reasonably regarded as confidential.

# Case Law: I-Admin (Singapore) Pte Ltd v Hong Ying Ting & Ors [2020] SGCA 32

- Singapore Court of Appeal held that the basis of the law of confidence is underpinned by equity and focus is therefore on the defendant's conscience.
- In so holding, it set out a modified Coco test as underlined in red.
  - (i) Information must possess the necessary quality of confidentiality;
  - (ii) Information must have been imparted in circumstances importing an obligation of confidence. \ Alternatively, whether the confidential information was accessed or acquired without the knowledge or consent of the owner; and
  - (iii) ~~There must be some unauthorised use~~ if (i) and (ii) are satisfied, there is a presumption of breach of confidence even if there was mere possession without unauthorised use; and
  - (iv) the burden shifts to the defendant to prove that his or its conscience was unaffected, i.e. accidental receipt or use, not aware of confidential nature, strong public interest in disclosure.

# Fiduciary Duty v Fidelity





# Fiduciary Duty v Fidelity

- **Fiduciary Distinguished from Fidelity**

- ✓ Fidelity is implied into an employment contract, requiring the employee to conduct its contractual obligations in good faith. This is similar but different to fiduciary.
- ✓ Under fidelity, employee entitled to look out for himself.
- ✓ *"The distinguishing mark of obligation of a fiduciary, in the context of employment is not merely that the employee owes a duty of loyalty but of single-minded or exclusive loyalty"* **Helmet Integrated Systems Ltd. v Tunnard** [2007]

- **Scope of Fiduciary cannot alter terms of contract**

- ✓ A fiduciary duty arises not necessarily from relationship of contract, but also in situations where equity imposes additional duties in addition to contractual obligations. **University of Nottingham v Fishel and Another** [2000].
- ✓ *"Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken."*

# Fiduciary Duty

- Noble Spirit T/A Life Solutions v Wong Shu Yuen & Anor [2013]

- ✓ Fiduciary duties in employment relationships are often imposed by equity in addition to contractual obligations, and not often by tort. **University of Nottingham v Fishel and Another** [2000].
- ✓ *"By contrast, the essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. ... This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken."*

# Fiduciary Duty

- **Factors to consider to establish Fiduciary Duty?**
  - ✓ Title and Seniority at employer
  - ✓ Job and scope of responsibilities
  - ✓ Degree of autonomy and decision making power
  - ✓ Level of remuneration
  - ✓ Contractual Terms
  - ✓ Any special role or status conferred on employee
    - Business model and reliance on employee
    - Length of service
    - Investment by employer into employee
    - Access to confidential information

**Richard Baker Harrison Limited v Mark Brooks & Ors [2021]**

# Scope of Duties under Fidelity and Fiduciary

Whether a duty arises under fidelity or fiduciary, is all fact sensitive

- However the Courts have recognised some duties arising both under the heads of fidelity and fiduciary: ***Bank of Ireland v Jaffery*** [2012]:
  - ✓ Duty not to make a secret profit
  - ✓ Duty not to divert business opportunities
  - ✓ Duty to disclose emerging commercial threat
  - ✓ Duty to report commercial conflict of interest even if no wrongdoing involved
  - ✓ Duty to report the wrongdoing of others

# Disclosure of Emerging Commercial Threats





# Disclosure of Emerging Commercial Threats

- Entire Team or Desk Moves or Poaching of Key Persons
- **Fidelity**: The answer is may as an implied obligation of good faith and fidelity. It depends on the following factors:-
  - ✓ The express terms contract i.e. in the best interest of the company;
  - ✓ Nature of role and responsibility and seniority of employee;
  - ✓ The circumstances in which they becomes aware;
  - ✓ The type and level of threat of which they are aware; and
  - ✓ The impact of the threat to employer.

## **Imam-Sadeque v Blue bay Asset Management (Services) Limited [2013]**

- ✓ S became aware of a new business competitor during garden leave and did not inform his employer.
- ✓ During garden leave, the the negative obligations imposed on S by the implied duty of fidelity required him to inform his employer of the emerging competitive threat.
- ✓ S was therefore not a "Good Leaver" and lost the vesting of his shares in former employer worth 1.7 million GBP.

# Disclosure of Emerging Commercial Threats

**Fiduciary**: The answer is maybe

- **GHLM Trading Ltd. v Maroo & Ors** [2012]

- ✓ Applying *Item Software (UK) Ltd v Fassihi* (2004), the English High Court held that a duty of good faith by a fiduciary focuses on subjective intentions and can be incumbent therefore to disclose matters other than wrongdoing "*as a single and overriding touchstone*" to act in the best interest of the company and therefore no reason to restrict the disclosure obligation to only matters of misconduct.
- ✓ The test is a subjective one, "did he honestly believe it was in his employer's interest not to disclose" irrespective of whether the threat would actually affect the interest of the employer.

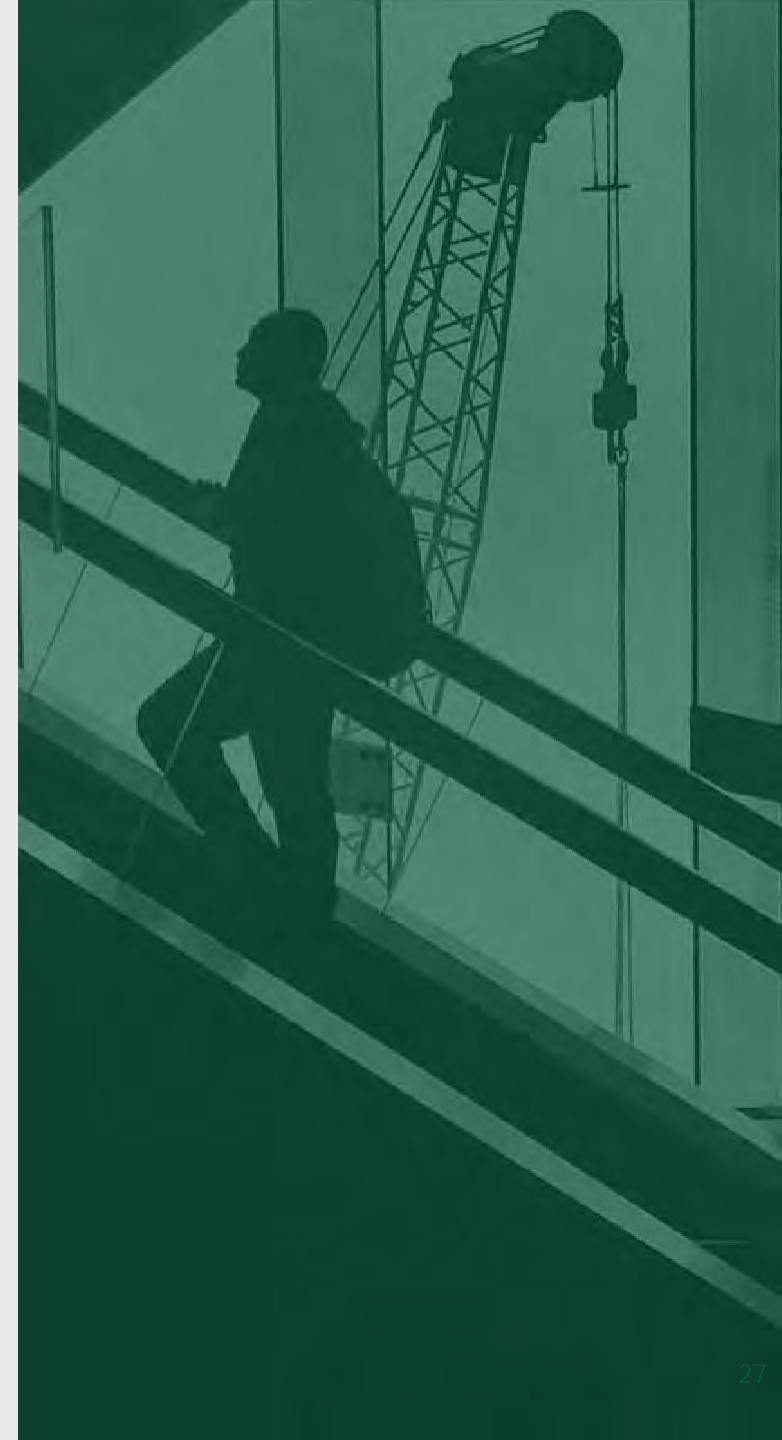
- **Joe Zhixiong Zhou v Saif Partners II LP** [2019]

The *Item Software* and *GHLM Point* was run on appeal but CA refused to consider it based on the *Flywin* principles.

# Duty to Disclose Own Wrongdoing

- No implied obligation to disclose own wrongdoing under duty of fidelity but yes if fiduciary **Item Software (UK) Limited v Fassihi [2004]**
- However, this does not mean that the employee is entitled to mislead or say something that is not true about their own wrongdoing:
  - ✓ **Human Kind Charity v Gittens [2019]**
  - ✓ While no obligation to disclose own wrongdoing, the right to silence in a case concerning wrongdoing with criminal element did not entitle the employee in question to provide misleading information about own wrongdoing.

# Accessory Liability

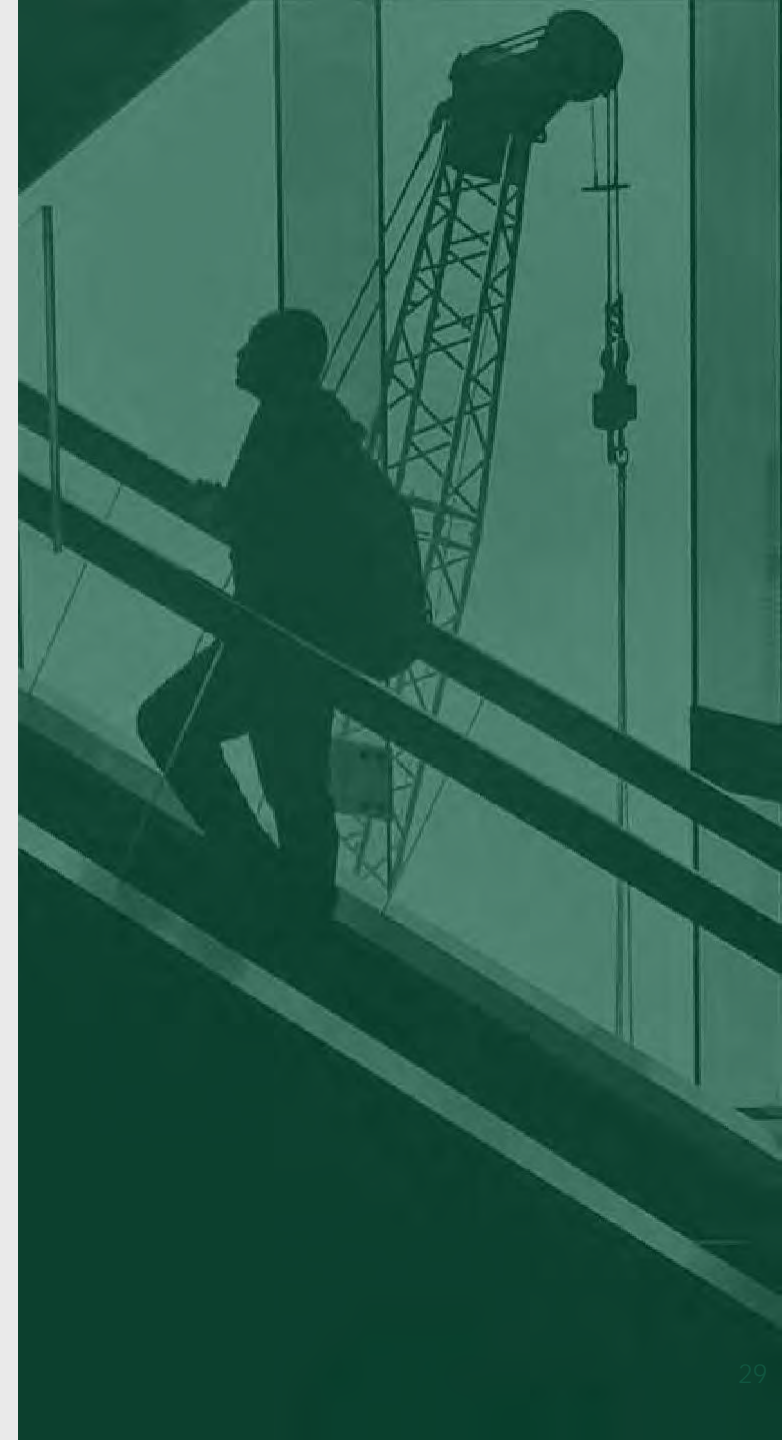


# Accessory Liability

- Useful in team moves when more than one person is poached or committed wrongdoing as well as the competitor in question.
- Common causes of action:
  - ✓ **Dishonest Assistance:** Can only be pleaded if there was a breach of fiduciary duty and the third party dishonestly assisted in that breach.
  - ✓ **Inducement of breaches of contract:** Inducing an employee to breach a confidentiality clause, or to work during gardening period etc. Defendant must have knowledge of that contract, or he was wilfully blind (i.e. recklessly indifferent) to the existence contractual term.
  - ✓ **Conspiracy to injure by lawful or unlawful means:** Most cases will turn on unlawful means conspiracy. Unlawful does not mean criminal, a breach of contract etc. is sufficient to be unlawful.
  - ✓ **Vicarious Liability:** The employer of a former employee who misused category 3 information, may be liable for vicarious liability.



# Post-Termination Restrictions



# Post-Termination Restrictions

- **Non-compete covenants**
  - ✓ Restrictions on a departing employee from working in a similar job position for a competitor of the employer
- **Non-solicitation of employees**
  - ✓ Restrictions on a departing employee from recruiting their former colleagues to join them in their new employment
- **Non-solicitation of customers / clients**
  - ✓ Restrictions on a former employee from soliciting / inducing away clients of the employer
- **Non-dealing with customers / clients**
  - ✓ Restrictions on a former employee from dealing with the clients of the employer
- **Non-interference with suppliers**
  - ✓ Restrictions on a former employee from interfering with the suppliers to the employer

# Post-Termination Restrictions

- Covenants which seek to restrain the rights of employees following employment are generally void and unenforceable
- Exceptions:
  - ✓ Restraint was intended to protect the employers' legitimate interests, such as:
    - confidential proprietary information or trade secrets,
    - customer connections;
    - stability of the workforce
  - ✓ Restraint is reasonable in all the circumstances, both as between the employer and the individual employee and in the public interest.
  - ✓ Consider conduct of the employee prior to termination

# Post-Termination Restrictions

- **Assessing reasonableness:**

- ✓ Duration
- ✓ Geography
- ✓ Scope of business
- ✓ Drafting
- ✓ Ambiguity
- ✓ Financial compensation

- **Blue Pencil**

- **When is 'reasonableness' assessed?**

# Post-Termination Restrictions

- **Duration**

- ✓ “The question is not how long the employee could be expected to enjoy a competitive edge over others seeking the client’s business. It is, rather, what is a reasonable time during which the employer is entitled to protection against solicitation of clients with whom the employee had contact and influence during employment...” **Stenhouse (Australia) Ltd v Phillips** [1974]

- **Geography / ‘Area Covenants’**

- ✓ Localized
- ✓ Country / Region
- ✓ Continent
- ✓ World-wide

# Post-Termination Restrictions

- **Scope of business**

- ✓ Clearly defining scope
- ✓ Tailored to employee
- ✓ Use of recitals

- **Financial compensation**

- **Drafting / Ambiguity**

- ✓ Contra-proferentem
- ✓ Blue Pencil Test



## Case Law: *Tillman v Egon Zehnder Ltd*

The UK Supreme Court confirmed that courts are able to “blue pencil” or sever the unenforceable part of a restrictive covenant, leaving the remaining part enforceable.

It was held that:

the three criteria in determining severability of a post-employment restrictive covenant are:

- ✓ the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains;
- ✓ the remaining terms continue to be supported by adequate consideration; and
- ✓ the removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract.

# Post-Termination Restrictions

## When must a covenant be reasonable?

- ✓ At the time the contract is made, not at the time the employer is seeking to enforce it – **Commercial Plastics Ltd v. Vincent** [1965]
- ✓ *"The question of reasonableness has to be asked at the outset of the contract, looking forwards, as a matter of the covenants meaning and not in light of matters that have subsequently taken place..."* **Coppage v. Safety Net Security Limited** [2013]
- ✓ Reasonable expectation of the parties at the time the contract was entered into may be taken into account – **Lyne-Pirkis v. Jones** [1969]

## Case Law: *BFAM Partners (Hong Kong) Limited v Gareth John Mills & Anor*

The CFI granted an interlocutory (temporary) injunction enforcing a non-compete covenant ("**NCC**") against a former employee.

It was held that:

- ✓ The plaintiff had given sufficient and cogent evidence, with particulars, to identify confidential information which the first defendant (former employee) had access to – and can legitimately claim protection for;
- ✓ Whilst the former employee had no access to confidential information when he first joined the plaintiff, the reasonableness of the NCC was upheld as it was assessed against his later promotion.
- ✓ the Court held that the NCC went no further than was reasonably necessary to protect the plaintiff's legitimate interest.
- ✓ There was no suggestion that the former employee's livelihood would be unjustifiably affected if the injunction was granted.
- ✓ The plaintiff demonstrated better prospects of success than the first defendant on whether the NCC would ultimately be enforceable. The Court also found that granting the injunction carried the lowest risk of injustice, causing the least irremediable prejudice.

# Remedies: Injunctions & Damages



# Damages

- **Basis of Damages for Misuse of Confidential Information**

- ✓ If misused information used directly, profit or royalty with interest - i.e. **General Tire v Firestone Tyre & Rubber Company Ltd** [1975]
- ✓ For misused information used to help develop a product or to speed up the establishment of business, on an assessment of the costs saved by the acceleration or a percentage of royalty profits - **Vestergaard Frandsen A/S) & ors v Bestnet Europe Ltd & ors** [2016]

- **Breach of Fiduciary Duties**

Equitable compensation: **(Pharma Division) Ltd. v Patel** [2019]

- ✓ Plaintiff must establish causal connection between the breach of trust and the loss for which compensation is recoverable i.e. the lost chance due to the diversion of business interest or the chance of retaining individuals.
- ✓ Where no loss is assessed, equitable compensation may not be available, see **Auden McKenzie v Patel** [2019] EWCA Civ 2291

# Damages

- Breach of Fiduciary Duties (cont'd)

- Forfeiture of profit / profit share: **Hosking v Marathon Asset Management LLP [2016]**

- ✓ Equitable compensation assessed at 1.38 mill GBP
    - ✓ Forfeiture of 50% profit share during the period amounted to over 10mill GBP upheld as lawful - public policy reasons require deterrence for breach of fiduciary duties.

- Forfeiture of salary : (**Brandeaux Advisors (UK) Limited v Chadwick**) [2010] / **Bank of Ireland v Jaffery** [2012]

- ✓ In **Jaffery**, Newey J held that it would be disproportionate to disgorge profits and to forfeit bonuses. Plaintiff unable to separate the fact of his dismissal, and the otherwise valuable work he was doing for the bank generally.
  - ✓ In **Gamatronic (UK) Limite v Robert Hamilton** [2017], English High Court refused to strike out claim for salary on the basis that it may be available as a form of equitable compensation rather than forfeiture.

# Damages

- **Breach of Post-Termination Restrictions**

## **Compensatory damages**

- ✓ Compensation for the net loss the employee can establish it has suffered as a result of the employees breach of the post-termination restriction
- ✓ "Past Loss" and "Future Loss"
- ✓ Employer under duty to mitigate

## **Restitutionary / Gain Based Damages**

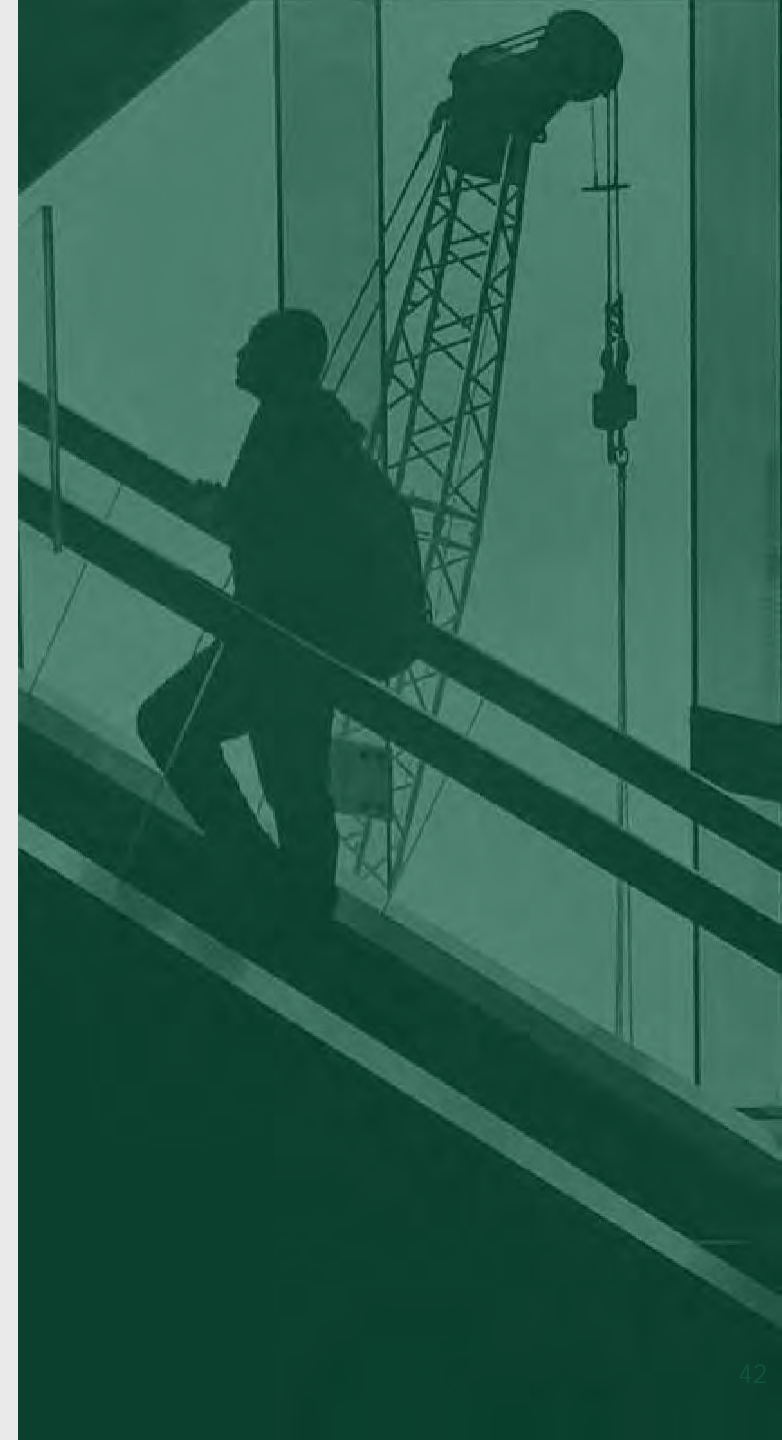
- ✓ Usual rule of damages would be inadequate
- ✓ Damages be compensatory, not punitive

## **Account of Profits**

- ✓ Exceptional cases



Labour Tribunal or High Court?



## Excluded Jurisdiction of the Labour Tribunal?

- ***Lee Yiu Hong v Well In Hotel Supplies Co. Ltd*** [2020]
  - ✓ Claimant was a former employee who was promoted to a sales director. Contract did not include any express confidentiality or restraint of trade clauses. Labour Tribunal awarded employee unpaid commissions withheld by employer due to alleged breaches of duty of fidelity and breaches of confidence subsequently discovered.
  - ✓ On appeal, employer sought to argue that the Presiding Officer failed to consider the allegations of the employer which was within the Court's exclusive jurisdiction as they were contractual causes of action and were effectively counterclaims.
  - ✓ Court held that where a cause of action can be founded in both contract and tort, such claims are outside the Tribunal's jurisdiction by reason of Paragraph 3 of the Schedule to the LTO and therefore the Presiding Officer could not be faulted for not considering those complaints as the LT had no jurisdiction.
- ***C.f Noble Spirit Ktd T/A Life Solutions v Wong Shu Yuen & Anor*** [2013]
  - ✓ the breach of fiduciary as pleaded and breach of confidence as pleaded were on the basis of express or implied terms of the contract, and not on the basis of tort.
  - ✓ Court struck out the proceedings against the employee in question, without prejudice to the employer restarting proceedings in the Labour Tribunal.

Q&A



# The Speakers

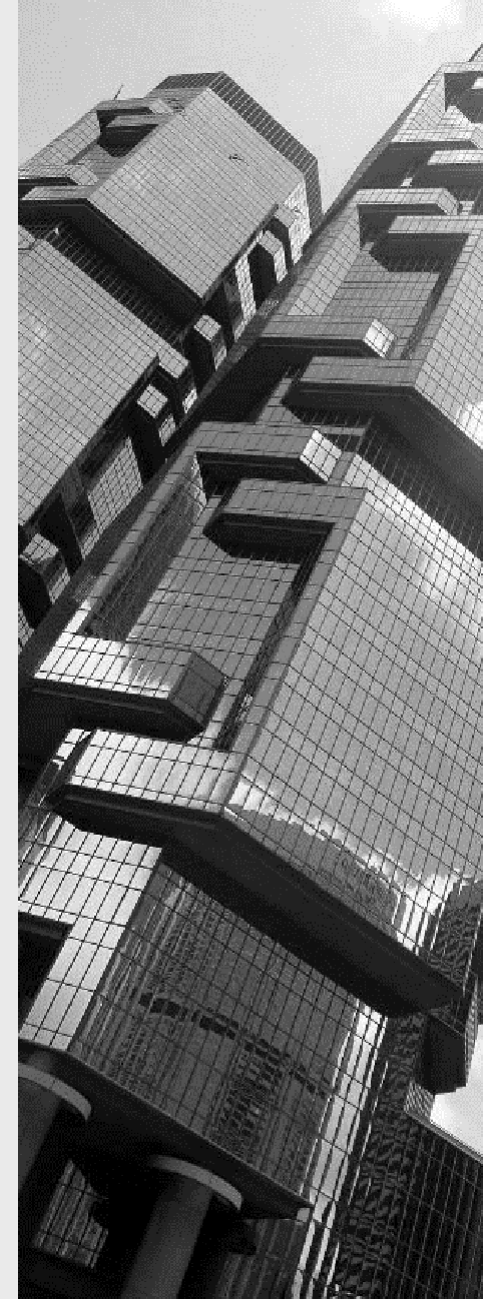
**Adam Hugill** initially qualified in London in 2004, then moved to Hong Kong in 2008 to join a leading local firm and qualified as a solicitor in Hong Kong shortly afterwards.

Adam acts for both employers and employees in connection with a wide range of issues. These include: employee transfers and team moves; corporate transaction support; large-scale and cross-border terminations; protection of trade secrets and confidential information; compensation and benefits; employment of contingent workers and independent contractors; data privacy; shareholder disputes; discrimination; and business immigration.

Adam works with clients – whether employer or employee – on their claims in the Hong Kong Labour Tribunal and in investigations by the Labour Department. He also represents clients in connection with District Court and High Court litigation.

**Earl Deng** read Law at the University of Cambridge, Fitzwilliam College on a Prince Philip Scholarship Bursary and was called to the Hong Kong Bar in 2008, joining Chambers in the same year. Earl has an active civil law practice involving advisory and advocacy work in complex commercial, contractual, chancery, and intellectual property disputes and is known as a specialist advocate for public and administrative law matters and sexual minority rights.

Earl has regularly appeared in all levels of the superior courts in Hong Kong. A selection of his recent cases involve *Silver Universe Ltd v China Times Securities Limited* [2019] HKCFI 153, 834 injunctive and tracing measures to unwind alleged fraudulent share non-recourse loan arrangements; award of aggravated damages for defamatory remarks by an incorporated owner *Tam Heung Man v Incorporated Owners of Lung Poon Yuen* [2019] HKDC 822; and *Navarro Luigi Recasa v The Commissioner of Correctional Services* [2018] 4 HKLRD 38 where a pre-operative transgender prisoner challenged her allocation to a male prison wing and being subject to strip-searches by male prison officers.





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