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LEGAL FOCUS

High Court refuses to enforce a 12-month non-compete covenant against former Manulife employee

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In the recent case of *Manulife v Kenneth Rappold* [1], the employee ("Mr Rappold"), represented by Lewis Silkin, successfully defended an application for injunctive relief to enforce a 12-month non-competition covenant (the "NCC").

Background

Mr Rappold was Manulife's Chief Financial Officer, Asia, from January 2018 to October 2023. He relinquished his CFO duties in August 2023 and left Manulife in October 2023. In December 2023, Prudential offered Mr Rappold the position of Chief Transformation Officer which he accepted. He informed Manulife of the same in January 2024.

Manulife stated it would not accept Mr Rappold joining Prudential before the NCC expired, notwithstanding his repeated offer of an undertaking to be bound by the confidentiality covenant in his employment contract ("**Undertaking**"). Manulife stated it would apply for interim-interim injunctive relief in the event that he joined Prudential, which Manulife did on 26 March 2024.

The NCC provided that:
"You agree that you will not at any time during your employment with the Company and for a period of 12 months following a voluntary termination of your employment, be employed in a Similar Capacity by a Competitor, own more than 10% of the equity in a Competitor or act as a director or consultant or advisor to, any Competitor without the Company or Manulife's prior written consent.

"Similar Capacity" means the same or similar position, or having the same or similar responsibilities, accountabilities and duties that you have or had in connection with your employment with the Company or Manulife.

A "Competitor" is any person or company engaged in or planning to engage in business that: (1) is the same or similar to the business of, in whole or in part, to those the Company or Manulife and its affiliates and subsidiaries, including without limitation providing financial protection, wealth management, asset management and other financial products and services; or (2) involves the selling or offering of products, processes, programs, or services that are the same or similar, in whole or in part, to those of the Company or Manulife and its affiliates and subsidiaries or that were under active consideration by the Company or Manulife and its affiliates and subsidiaries during your employment with the Company and which have not been abandoned in writing by the Company or Manulife and its affiliates or subsidiaries."

Key Takeaways for Employers

- A non-competition covenant should always be no wider than necessary to protect legitimate business interests. An employer should ensure it has specific and cogent evidence to justify the covenant's duration, geographical scope and temporal backstop.
- Where there are other post-termination covenants protecting the employer, such as confidentiality and non-solicitation clauses, the employer would need to demonstrate a non-compete covenant is still necessary.
- An employer who wants to enforce a non-compete covenant should act quickly. Where employers suspect an agreement cannot be reached, they should give the employee an ultimatum and apply for injunctive relief without delay absent any satisfactory response.

[1] *Manulife Financial Asia Limited v Kenneth Joseph Rappold & ors* [2024] HKCFI 989

[2] *BFAM Partners (Hong Kong) Ltd v Gareth John Mills and Segantii Capital Management Ltd [2021] HKCFI 2904*

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The Decision

In considering the enforceability of the NCC, the Court took account of the following factors:

1. The NCC contained no geographical limitation. The NCC was clearly a worldwide covenant which Manulife failed to justify.

2. No evidence had been adduced by Manulife to justify the duration of the NCC. Manulife not only failed to identify the confidential information which it claimed Mr Rappold carried around in his head but also failed to state the life cycle of the alleged confidential information.

3. The NCC lacked a *"temporal backstop"* and applied to all work done by Mr Rappold throughout his 5-year employment with Manulife.

Balance of Convenience

4. The risk of Mr Rappold losing the new job if the injunction was granted was not fanciful and the ramifications on Mr Rappold could not be quantified in monetary terms. In contrast, Manulife failed to demonstrate an appreciable risk of irreparable damage to its business given Mr Rappold's Undertaking.

Delay

5. Mr Rappold informed Manulife on 22 February 2024 that the Undertaking was a final attempt to resolve the matter without the need for proceedings. There was delay on Manulife's part in failing to make an application for injunctive relief until the end of March 2024.

Interestingly, Manulife in its arguments placed heavy reliance on the case of *BFAM v Gareth Mills* [2], in which the Court granted an injunction against a former C-suite employee, Mr Mills, prohibiting him from joining a competitor of BFAM after his departure therefrom in enforcement of a 6-months' non-competition covenant. Mr Mills was unsuccessful in persuading the Court that the evidence adduced by BFAM had failed to pinpoint what confidential information he supposedly carried in his head and the life cycle of any confidential information. His complaint of delay on BFAM's part for not seeking injunctive relief at the earliest available opportunity was also rejected by the Court. This goes to show that cases involving the enforcement of non-compete covenants are highly fact-sensitive.

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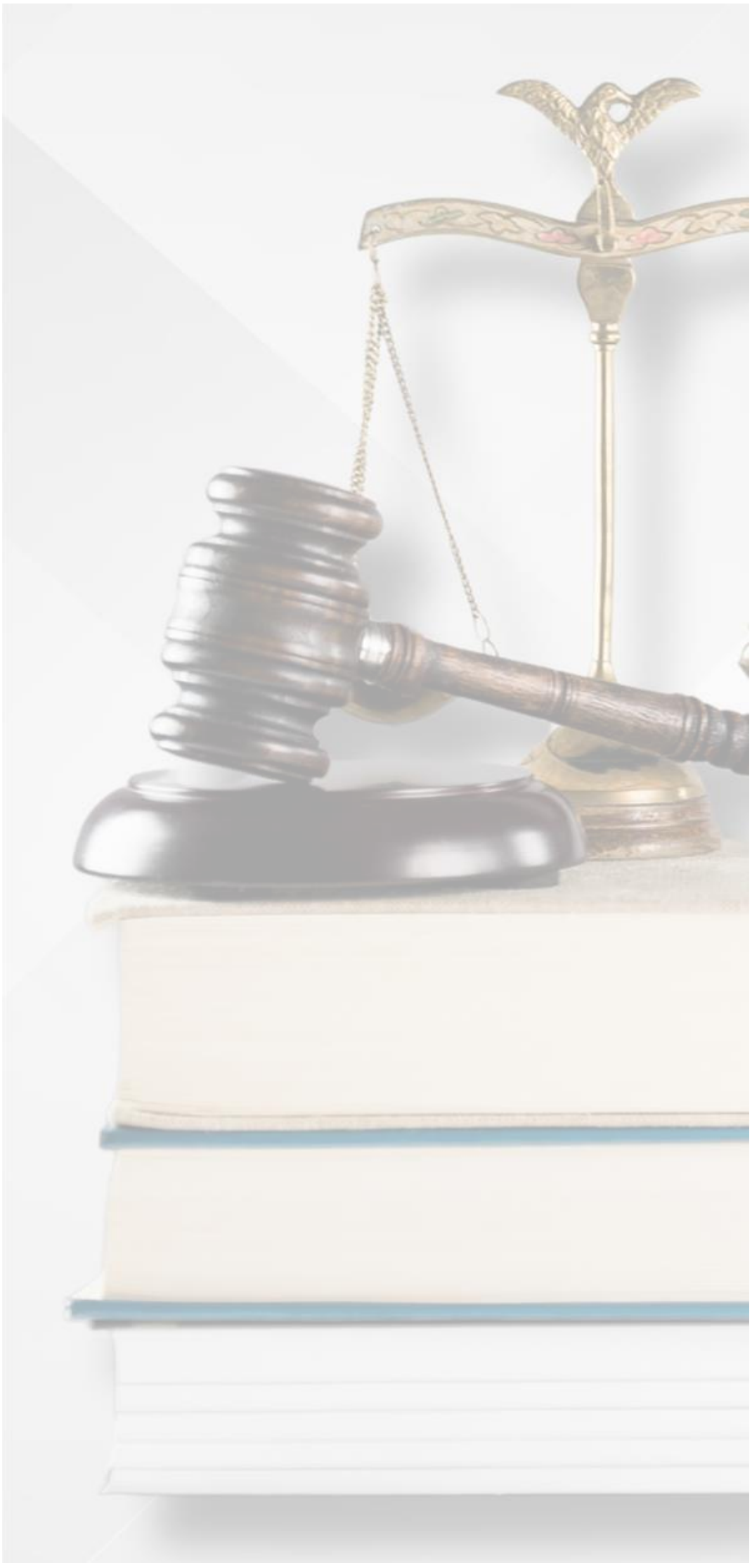

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