

A Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon

B HIGH COURT (KUALA LUMPUR) — SUIT NO S5–22–404 OF 1997
ABDUL MALIK ISHAK J
25 FEBRUARY 2010

C *Civil Procedure — Injunction — Employee utilising and disclosing confidential information to competitors — Employee damaging employer's reputation and enticing away employees and customers — Whether damages sufficient remedy for employer*

D *Contract — Breach — Damages — Exemplary damages — Whether defendant's conduct tainted by malice, fraud, cruelty and insolence — Whether defendant profiting from breaches — Whether defendant utilising trade secrets to detriment of plaintiff*

E *Contract — Restraint of trade — Validity of restraint of trade clause — Whether restraint of trade clause valid and enforceable — Whether restraint permissible to prevent misuse of trade secrets or business connexion — Whether reasonable to extend restraint across globe — Whether restraint of trade clause reasonable — Whether s 28 of the Contracts Act 1950 to be considered flexibly and with regard to commercial reality — Contracts Act 1950 s 28*

G *Evidence — Adverse inference — Failure of plaintiff to call certain witness to support plaintiff's evidence — Existence of documentary evidence and admission by defendant supporting plaintiff's evidence — Whether adverse inference drawn — Evidence Act 1950 s 114(g)*

H *Labour Law — Employment — Employee's duty — Duty of fidelity and good faith — Confidential information and trade secrets — Confidential information in form of list of customers, cost prices, specific needs and requirements of customers — Employee utilising and revealing confidential information to employer's competitor — Whether employee in breach*

I *Tort — Breach of confidence — Disclosure of confidential information and/or trade secrets of ex-employer — Whether exemplary damages could be awarded to employer*

Tort — Nuisance — Unlawful interference with trade — Influencing employees to leave — Divulging confidential information to competitors — Whether damaging employer's reputation or business — Whether unlawful interference established

A

Madam Tan ('PW1'), the general manager of the plaintiff by way of a letter of offer of appointment dated 21 August 1995 offered to the defendant the position of marketing manager of the plaintiff. The defendant accepted that job offer and signed an acceptance pledging his loyalty to the plaintiff. By way of another letter dated 30 July 1996 addressed to the defendant, PW1 confirmed the defendant's appointment and again the defendant pledged his loyalty to the plaintiff. Clause 7 of the letter provided that the defendant was not permitted whilst in the employment of the plaintiff to engage in any private business which could tantamount to any conflict of interest. Clauses 8 and 9 provided that the defendant had to, at all times, ensure confidentiality of the plaintiff's proprietary and other confidential information. Such information was to remain as the property of the plaintiff and cannot be divulged to any outside party. Clause 10 provided that upon the defendant's resignation, he shall not be engaged in work or own the same trade as the plaintiff company in Malaysia, Singapore, Thailand, Indonesia, Philippines and Taiwan for an immediate period of three years from the date of resignation. During his tenure of employment with the plaintiff, the defendant met the plaintiff's competitors with the intention of divulging confidential information to the plaintiff's competitors. The defendant had also approached almost all of the plaintiff's employees with the intention of convincing them to cease employment with the plaintiff and to join the defendant's company in the future. On 5 August 1997, the defendant resigned and joined the plaintiff's competitor, Alpha Mould Sdn Bhd ('Alpha'). The defendant continued to approach the plaintiff's employees to convince them to leave. As a result, five of the plaintiff's employees joined the defendant. Before the defendant resigned, he informed the plaintiff's customers that all or nearly all of the plaintiff's employees had or were about to leave the plaintiff and join the defendant's company. The plaintiff thus sued claiming for an injunction and damages for loss of forecasted profits. The plaintiff's causes of action against the defendant hinged on breach of contract, breach of confidence and for unlawful interference with plaintiff's trade. The defendant, inter alia, contended that the letter of offer contravened s 28 of the Contracts Act 1950 ('the Act'). The defendant also argued that the plaintiff failed to call certain of plaintiff's customers to corroborate and support PW1's testimony and thus s 114(g) of the Evidence Act 1950 ('EA') should be invoked against the plaintiff.

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Held, allowing the plaintiff's claim with costs:

- (1) By enticing, encouraging and influencing the plaintiff's employees to leave the employment of the plaintiff to join Alpha while the defendant

- A** was still in the employment of the plaintiff, the defendant had acted in conflict and was therefore guilty of breach of contract. The defendant himself did not dispute that he took 50% of the staff strength of the plaintiff to Alpha when he joined Alpha (see para 53).
- B** (2) The defendant had utilised the plaintiff's list of customers by pinching the plaintiff's customers. This was done by the defendant notwithstanding the injunctive court order dated 6 October 1997 which expressly prohibited the defendant from pinching the plaintiff's customers. At the subsequent contempt proceedings, the learned judge had warned the defendant that he was to cease contravening the court order but the defendant continued to defy the court order (see paras 57 & 59).
- C**
- D** (3) Confidential information would also cover information relating to customers, cost prices together with the specific needs and requirements of customers. The defendant had access to all these and he did not deny them. The irresistible inference could be drawn that the defendant was guilty of revealing and utilising the confidential secrets of the plaintiff when the defendant joined Alpha. This amounted to breaching cll 8 and 9 of the letter of offer (see para 83).
- E** (4) Section 114(g) of the EA could not be invoked against the plaintiff because there was a letter from Alpha showing Alpha's list of customers ('exh D23') that supported PW1's evidence that the defendant pinched the plaintiff's customers. The defendant had also admitted that he had secured 12 of the plaintiff's customers as reflected in exh D23. That admission put an end to the s 114(g) submission (see paras 88–89).
- F**
- G** (5) The express duty imposed by a contract of employment to maintain confidence is at its peak while the employment is continuing. But that does not give the employee the right to disseminate confidential information belonging to the employer after the employee has left the employment (see para 95).
- H** (6) The defendant had committed the tort of unlawful interference with the plaintiff's trade for the following reasons: (a) by encouraging and/or influencing the plaintiff's employees to leave the employment of the plaintiff; (b) by failing to keep all information obtained in the course of his employment confidential; (c) by divulging the plaintiff's confidential information to the plaintiff's competitor; and (d) by misrepresenting to the plaintiff's customers with the sole aim of damaging the plaintiff's reputation and/or business (see para 106).
- I** (7) Restraint is permissible if it is fashioned in such a way as to prevent a misuse of trade secrets or business connexion. In what form the restraint of trade is to be incorporated is irrelevant. What is relevant is the contents of that restraint. The restraint may be contained in an

agreement or in a letter. The geographical area of the restraint must be viewed in the context of the ease of travel and the character of the business that is under scrutiny. And in the world where companies operate globally, it would be reasonable to extend the restraint across the globe (see paras 116–117 & 119).

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(8) The restraint of trade clause in this case as agreed by the defendant was not draconian and was not in breach of the rules of natural justice. Based on the facts of this case, the restraint of trade clause was reasonable (see para 123).

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(9) In considering s 28 of the Act, there must be some measure of flexibility. The commercial reality of the matter dictates this kind of approach. Regard must always be had to the nature of the business conducted by the employer. The test of reasonableness must be applied in construing a restraint of trade clause (see para 126).

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(10) Whenever the defendant's conduct is sufficiently outrageous to merit punishment in situations where the defendant's conduct discloses malice, fraud, cruelty, insolence or the like, then exemplary damages would be granted. The defendant had profited from the breaches in the present case. The plaintiff's trade secrets had been utilised by the defendant to the detriment of the plaintiff (see paras 138, 140 & 153).

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(11) In cases of trade secrets and confidential information, damages will not be an adequate remedy because it is always difficult to quantify them. If the plaintiff can show that there exists a real risk of future injury, the plaintiff would be granted a permanent injunction (see para 154).

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[Bahasa Malaysia summary]

Puan Tan ('PW1'), pengurus besar plaintif melalui surat tawaran pelantikan bertarikh 21 Ogos 1995 telah menawarkan kepada defendan jawatan pengurus pemasaran plaintif. Defendan telah menerima tawaran pekerjaan itu dan telah menurunkan tandatangan penerimaan dan memberi jaminan kesetiannya kepada plaintif. Melalui surat lain bertarikh 30 Julai 1996 yang dialamatkan kepada defendan, PW1 telah mengesahkan pelantikan defendan dan sekali lagi defendan memberi jaminan kesetiannya kepada plaintif. Fasal 7 kepada surat itu memperuntukkan bahawa semasa bekerja untuk plaintif, defendan tidak dibenarkan berurusan dalam apa-apa perniagaan persendirian yang boleh dianggap sebagai percanggahan kepentingan. Fasal-fasal 8 dan 9 memperuntukkan bahawa defendan hendaklah pada setiap masa matan memastikan kerahsiaan tentang ketuanpunyaan plaintif dan maklumat sulit lain. Maklumat sebegini hendaklah kekal sebagai harta plaintif dan tidak boleh didedahkan kepada mana-mana pihak luar. Fasal 10 memperuntukkan bahawa setelah peletakan jawatan defendan, dia tidak boleh dilantik untuk bekerja atau memiliki perniagaan sama seperti syarikat plaintif di Malaysia, Singapura, Thailand, Indonesia, Filipina dan Taiwan untuk tempoh tiga

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A tahun sejurus selepas tarikh peletakan jawatan itu. Sepanjang tempoh pekerjaannya dengan plaintif, defendan telah berjumpa dengan pesaing-pesaing plaintif dengan niat untuk mendedahkan maklumat sulit kepada pesaing-pesaing plaintif. Defendan juga telah berjumpa dengan hampir kesemua pekerja plaintif dengan niat meyakinkan mereka untuk

B berhenti bekerja dengan plaintif dan untuk bekerja dengan syarikat defendan di masa hadapan. Pada 5 Ogos 1997, defendan telah meletak jawatan dan bekerja dengan pesaing plaintif, Alpha Mould Sdn Bhd ('Alpha'). Defendan masih berjumpa dengan pekerja-pekerja plaintif untuk meyakinkan mereka untuk berhenti. Akibatnya, lima daripada pekerja plaintif telah bekerja

C dengan defendan. Sebelum defendan meletakkan jawatan, dia telah memberitahu pelanggan-pelanggan plaintif bahawa semua atau hampir kesemua pekerja plaintif telah atau akan meninggalkan plaintif dan bekerja untuk syarikat defendan. Plaintif dengan itu telah menyaman dengan menuntut injunksi dan ganti rugi untuk kerugian ramalan keuntungan.

D Kausa-kausa tindakan plaintif terhadap defendan bergantung kepada pelanggaran kontrak, pelanggaran pecah amanah dan kerana campur tangan yang menyalahi undang-undang dengan perniagaan plaintif. Defendan, antara lain, berhujah bahawa surat tawaran itu bertentangan dengan s 28 Akta Kontrak 1950 ('Akta'). Defendan juga berhujah bahawa plaintif telah gagal untuk memanggil pelanggan-pelanggan tertentu plaintif untuk menyokong testimoni PW1 dan oleh itu s 114(g) Akta Keterangan 1950 ('AK') hendaklah digunakan terhadap plaintif.

F **Diputuskan**, membenarkan tuntutan plaintif dengan kos:

- (1) Dengan menarik, menggalakkan dan meyakinkan pekerja-pekerja plaintif untuk meninggalkan pekerjaan dengan plaintif untuk bekerja dengan Alpha sewaktu defendan masih bekerja untuk plaintif, defendan telah bertindak secara bercanggah dan dengan itu adalah bersalah kerana melanggar kontrak. Defendan sendiri tidak mempertikaikan yang dia telah mengambil 50% daripada kekuatan tenaga kerja plaintif ke Alpha apabila dia bekerja dengan Alpha (lihat perenggan 53).
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- (2) Defendan telah menggunakan senarai pelanggan-pelanggan plaintif dengan mencuri pelanggan-pelanggan plaintif. Ini telah dilakukan oleh defendan meskipun perintah injunksi mahkamah bertarikh 6 Oktober 1997 dengan jelas melarang defendan mencuri pelanggan-pelanggan plaintif. Dalam prosiding penghinaan seterusnya, hakim yang bijaksana telah memberi amaran kepada defendan agar dia berhenti melanggar perintah mahkamah tetapi defendan terus mengingkari perintah mahkamah itu (lihat perenggan 57 & 59).
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- (3) Maklumat rahsia juga meliputi maklumat berkaitan pelanggan-pelanggan, harga kos bersama dengan keperluan spesifik pelanggan-pelanggan. Defendan mempunyai hak terhadap semua yang

- berikut dan dia tidak menafikannya. Inferens yang tidak dapat dibendung yang boleh dibuat adalah bahawa defendan bersalah kerana mendedahkan dan menggunakan rahsia-rahsia sulit plaintif apabila defendan bekerja dengan Alpha. Ini membentuk pelanggaran fasal-fasal 8 dan 9 kepada surat tawaran (lihat perenggan 83). A
- (4) Seksyen 114(g) AK tidak boleh digunakan terhadap plaintif kerana terdapat surat dari Alpha yang menunjukkan senarai pelanggan Alpha ('eksh D23') yang menyokong keterangan PW1 bahawa defendan telah mencuri pelanggan-pelanggan plaintif. Defendan juga mengakui bahawa dia telah mendapat 12 pelanggan plaintif sepertimana yang digambarkan dalam eksh D23. Pengakuan itu telah melemahkan penghujahan s 114(g) (lihat perenggan 88–89). B C
- (5) Kewajipan nyata yang dikenakan oleh kontrak pekerjaan untuk mengekalkan kerahsiaan adalah amat penting sewaktu masih lagi dalam pekerjaan itu. Namun ini tidak memberikan pekerja itu hak untuk menyebarkan maklumat kerahsiaan milik majikan selepas pekerja itu meninggalkan pekerjaan tersebut (lihat perenggan 95). D
- (6) Defendan telah melakukan tort kerana campur tangan yang menyalahi undang-undang dengan perniagaan plaintif untuk sebab-sebab berikut: (a) dengan menggalakkan dan/atau meyakinkan pekerja-pekerja plaintif untuk meninggalkan pekerjaan dengan plaintif; (b) dengan kegagalan untuk menyimpan rahsia tentang semua maklumat yang diperolehi sepanjang pekerjaannya; (c) dengan mendedahkan maklumat sulit plaintif kepada pesaing plaintif; dan (d) dengan membuat tanggapan salah kepada pesaing-pesaing plaintif tentang tujuan utama menjejaskan reputasi dan/atau perniagaan plaintif (lihat perenggan 106). E F
- (7) Sekatan dibenarkan jika ia dibentuk untuk melarang penyalahgunaan rahsia perniagaan atau hubungan perniagaan. Dalam bentuk apa sekatan perniagaan itu dibuat adalah tidak relevan. Apa yang relevan adalah kandungan sekatan itu. Sekatan itu boleh terkandung dalam perjanjian atau dalam surat. Kawasan geografi sekatan itu hendaklah dilihat dalam konteks untuk memudahkan perjalanan dan sifat perniagaan yang dikawal rapi. Dan di dunia yang mana syarikat-syarikat beroperasi secara global, adalah munasabah untuk memperluaskan sekatan itu ke seluruh dunia (lihat perenggan 116–117 & 119). G H
- (8) Fasal sekatan perniagaan dalam kes ini seperti yang dipersetujui oleh defendan tidak melampaui masa dan tidak melanggar rukun keadilan asasi. Berdasarkan fakta kes ini, fasal sekatan perniagaan adalah munasabah (lihat perenggan 123). I
- (9) Dalam mengambilkira s 28 Akta, perlulah ada langkah kefleksibelan. Hakikat sebenar komersial tentang perkara itu menentukan pendekatan

- A sebegini. Perhatian hendaklah sentiasa wujud terhadap sifat perniagaan yang dilaksanakan oleh majikan. Ujian kemunasabahan hendaklah terpakai apabila mentafsirkan fasal sekatan perniagaan (lihat perenggan 126).
- B (10) Apabila perbuatan defendan amat melampau untuk mewajarkan hukuman dalam keadaan di mana perbuatan defendan menunjukkan niat jahat, fraud, kekejaman, perangai kurang ajar atau yang seperti dengannya, maka ganti rugi tauladan boleh diberikan. Defendan telah memperoleh keuntungan daripada pelanggaran tersebut dalam kes ini,
- C Rahsia-rahsia perniagaan plaintif telah digunakan oleh defendan sehingga menjejaskan plaintif (lihat perenggan 138, 140 & 153).
- D (11) Dalam kes-kes rahsia perniagaan dan maklumat sulit, ganti rugi bukan remedi yang mencukupi kerana ia sukar untuk dikira. Sekiranya plaintif boleh menunjukkan bahawa wujud risiko sebenar kerugian di masa hadapan, plaintif boleh diberikan injunksi kekal (lihat perenggan 154).]

Notes

- For a case on disclosure of confidential information and/or trade secrets of ex-employer, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 18.
- E For a case on validity of restraint of trade clause, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 4892.
- For cases on adverse inference in general, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 145–269.
- F For cases on damages, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2644–2670.
- For cases on employee's duty, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1015–1023.
- For cases on injunction in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2860–3583.
- G For cases on nuisance in general, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1543–1587.

Cases referred to

- H *ABN-AMRO Bank Bhd v Ismail bin Mydinsah (trading as Ismy Classic)* [2004] 7 MLJ 30, HC (refd)
- AF Colverd & Co Ltd v Anglo Overseas Transport Co Ltd and Pope & Sons* [1961] 2 Lloyd's Rep 352 (refd)
- ALP (Plant-Hire) Ltd (In Liquidation) v Wade & Anor* [1979] 1 WLR 697, CA (refd)
- I *Associated Newspapers Group Ltd & Ors v Wade & Ors* [1979] 1 WLR 697, CA (refd)
- Attorney General v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, HL (refd)

- Attorney-General v Observer Ltd & Ors; Attorney-General v Times Newspapers Ltd & Anor* [1990] 1 AC 109, HL (folld) **A**
- Bank of Credit and Commerce International SA v Ali & Ors* [2002] 1 AC 251, HL (refd)
- Barclays Bank plc v Schwartz* [1995] TLR 452, CA (refd)
- Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants* [1987] IRLR 3 (refd) **B**
- Bents Brewery Co Ltd & Ors v Luke Hogan* [1945] 2 All ER 570 (refd)
- Blay v Pollard and Morris* [1930] 1 KB 628, CA (refd)
- Boots Co Ltd & Ors v Wade & Anor* [1979] 1 WLR 697, CA (refd)
- BPM Holdings Ltd & Anor v Wade* [1979] 1 WLR 697, CA (refd) **C**
- Caribonum Co Ltd v Le Couch* (1913) 109 LT 587 (refd)
- Cassell & Co Ltd v Broome & Anor* [1972] AC 1027, HL (refd)
- CBS Songs Ltd & Ors v Amstrad Consumer Electronics Plc & Anor* [1988] 1 AC 1013, HL (refd)
- Certact Pte Ltd v Tang Siew Choy & Ors* [1991] 4 CLJ (Rep) 716, HC (refd) **D**
- Commercial Plastics Ltd v Vincent* [1965] 1 QB 623; [1964] 3 All ER 546, CA (refd)
- Compagnie de Commerce et Commission, SARL v Parkinson Stove Co Ltd* [1953] 2 Lloyd's Rep 487, CA (refd)
- Conway (Pauper) v Wade* [1909] AC 506, HL (refd) **E**
- Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805; [1951] 1 All ER 631, CA (refd)
- Days Medical Aids Ltd v (1) Pihsiang Machinery Manufacturing Co Ltd (2) Pihsiang Wu (Also known as Donald P H Wu) (3) Chiang Ching-Ming Wu (Also Known As Jenny Wu)* [2004] EWHC 44, QBD (refd) **F**
- E Underwood & Son Ltd v Barker* [1899] 1 Ch 300, CA (refd)
- Eso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, HL (refd)
- Ex parte Island Records Ltd & Ors; Sub nom Island Records Ltd & Ors v Corkindale* [1978] Ch 122, CA (refd) **G**
- Faccenda Chicken Ltd v Fowler & Ors; Fowler v Faccenda Chicken Ltd* [1987] 1 Ch 117, CA (refd)
- Financings Ltd v Stimson* [1962] 3 All ER 386; [1962] 1 WLR 1184, CA (refd)
- Forster & Sons (Ltd) v Suggett* (1918) 35 TLR 87 (refd) **H**
- Franchi v Franchi* [1967] RPC 149 (refd)
- Grantham Journal Co Ltd v Wade* [1979] 1 WLR 697, CA (refd)
- Gilford Motor Co Ltd v Horne & Anor* [1933] Ch 935, CA (refd)
- Goldson v Goldman* [1914] 2 Ch 603, Ch D (folld)
- GWK Ltd & Ors v Dunlop Rubber Co Ltd* (1926) 42 TLR 376 (refd) **I**
- Hagg v Darley* (1878) 47 LJ Ch 567 (refd)
- Haynes v Doman* [1899] 2 Ch 13, CA (refd)
- Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, HL (refd)
- Howatson v Webb* [1908] 1 Ch 1, CA (refd)

- A** *Hua Khiow Steamship Co Ltd, The v Chop Guan Hin* [1930] 1 MC 175; [1930] 1 JLR 33 (refd)
IPC Magazines Ltd & Anor v Wade [1979] 1 WLR 697, CA (refd)
JH Saphir (Merchants) Ltd v AL Zissimos & Anor (Trading as Cyprus Soil Products Co) [1960] 1 Lloyd's Rep 490 (refd)
- B** *Jones v Fabbi et al, Jones v Fleck et al* (1973) 37 DLR (3d) 27 (refd)
Lamson Pneumatic Tube Co v Phillips (1904) 91 LT 363 (refd)
Lennon v News Group Newspapers Ltd And Twist [1978] FSR 573 (refd)
L'Estrange v F Graucob, Ltd [1934] 2 KB 394, KBD (refd)
Levison & Anor v Patent Steam Carpet Cleaning Co Ltd [1978] QB 69; [1977] 3 All ER 498, CA (refd)
- C** *Lonrho Plc v Fayed & Ors* [1990] 2 QB 479, CA (refd)
Lord Advocate v The Scotsman Publications Ltd & Ors [1990] 1 AC 812, HL (refd)
Merkur Island Shipping Corp v Laughton & Ors [1983] 2 AC 570, HL (refd)
- D** *Midland News Association Ltd & Ors v Wade* [1979] 1 WLR 697, CA (refd)
Morris & Ors v The Crown Office [1970] 2 QB 114; [1970] 1 All ER 1079, CA (refd)
Newark Advertiser Co Ltd v Wade & Anor [1979] 1 WLR 697, CA (refd)
Normalec Ltd v Britton [1983] FSR 318 (refd)
- E** *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461, HL (refd)
Nottinghamshire Area Health Authority (Teaching) v Wade & Ors [1979] 1 WLR 697, CA (refd)
O Mustad & Son v S Allcock & Co, Ltd And Dosen [1963] 3 All ER 416, HL (refd)
- F** *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1964] 1 WLR 96, Ch D (refd)
Reid and Sigrist Ltd v Moss and Mechanism Ltd (1932) 49 RPC 461 (refd)
Rookes v Barnard & Ors [1964] AC 1129, HL (refd)
- G** *Routh & Anor v Jones* [1947] 1 All ER 179, Ch D (refd)
Saltman Engineering Co Ltd & Ors v Campbell Engineering Co Ltd [1963] 3 All ER 413, CA (refd)
Sanders v Parry [1967] 1 WLR 753 (refd)
Severn Trent Water Authority v National Graphical Association & Ors [1979] 1 WLR 697, CA (refd)
- H** *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632; [1998] 1 CLJ 685, HC (refd)
Stephens v Avery & Ors [1988] 2 WLR 1280, Ch D (refd)
Stevenson Jordan And Harrison, Ltd v MacDonald and Evans [1952] 1 TLR 101 (refd)
- I** *Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling* [2008] 7 MLJ 903; [2008] 8 CLJ 386, HC (refd)
Taha bin Ali v Haji Abdul Waheed [1997] MLJU 263; [1997] 1 LNS 306, HC (refd)

Tan Bok Seong @ Tan Leong Tian v Sin Bee Seng & Co (Port Weld) Sdn Bhd & Ors [1995] MLJU 384; [1995] 4 BLJ 362, HC (refd) A

Tipping v Clarke (1843) 2 Hare 383 (refd)

Trust Houses Forte Ltd v Wade & Anor [1979] 1 WLR 697, CA (refd)

Van Camp Chocolates Ltd v Aulsebrooks Ltd [1984] 1 NZLR 354, CA (refd) B

W & J Linney Ltd v Wade [1979] 1 WLR 697, CA (refd)

Walker Watton Hanson (A Firm) v Wade & Anor [1979] 1 WLR 697, CA (refd)

Westminster Press Ltd v Wade [1979] 1 WLR 697, CA (refd) C

Legislation referred to

Companies Act 1965

Contracts Act 1950 ss 1(2), 28, Exception 1, 2, 3

Evidence Act 1950 s 114(g)

Trade Disputes Act 1906 D

Walter Pereira (Kamarudin & Partners) for the plaintiff.

Jason Singh (Jason Singh & Rakan-Rakan) for the defendant.

Abdul Malik Ishak J (now JCA): E

INTRODUCTION

[1] The plaintiff is a company incorporated in Malaysia under the Companies Act 1965 with its registered address in Selangor. F

[2] The defendant is an individual residing at Kepong Baru, Kuala Lumpur and, at all material times, was the marketing manager of the plaintiff. G

[3] In this civil suit, the plaintiff is claiming against the defendant:

(a) general damages;

(b) aggravated damages;

(c) exemplary damages; H

(d) an order for an injunction that the defendant by himself, his agent and/or servant be restrained from doing any act which could damage the reputation of the plaintiff and from encouraging/influencing the plaintiff's employees to leave the employment of the plaintiff; I

(e) costs; and

(f) any other reliefs which are deemed fit and proper by this honourable court.

A [4] The defendant in his statement of defence prays that the plaintiff's claim be struck out with costs.

B [5] The plaintiff called five witnesses while the defendant called two witnesses in support of his defence. The defendant himself gave evidence in the witness box.

THE FACTS OF THE CASE

C [6] Madam Tan Sing Hong ('PW1'), the general manager of the plaintiff by way of a letter styled as an offer of appointment dated 21 August 1995 offered to the defendant the position of marketing manager of the plaintiff upon the terms and conditions set out in that letter of offer (see pp 1–4 of bundle 'B' marked as exh P1).

D [7] On 21 August 1995, the defendant accepted that job offer and he signed by way of an acceptance pledging his loyalty to the plaintiff in the following words (see exh P1 at p 4 of bundle 'B'):

E I hereby understand and accept the foregoing terms and conditions of employment and undertake to devote the whole of my energies, attention and time to develop and extending the business of the Company and shall in all matters act loyally and faithfully to the Company. As such I shall not engage, be interested or concerned
F either directly or indirectly as principal, agent, employee or otherwise in any other services or business whatsoever in the same trade or receive commission, profit or remunerations of any kind without first obtaining written consent from the Company. I will commence work on *August 23, 1995*.

G [8] By way of a letter dated 30 July 1996 (see pp 5–6 of bundle 'B' marked as exh 'P2') addressed to the defendant, PW1 confirmed the appointment of the defendant as the marketing manager of the plaintiff. Again, the defendant pledged his loyalty to the plaintiff in these words (see exh P2 at p 6 of bundle
H 'B'):

I I hereby understand and accept the foregoing terms and conditions of confirmation and undertake to devote the whole of my energies, attention and time to develop and extending the business of the Company and shall in all matters act loyally and faithfully to the Company. As such I shall not engage, be interested or concerned either directly or indirectly as principal, agent, employee or otherwise in any other service or business whatsoever in the same trade or receive commissions, profit or remunerations of any kind without first obtaining written permission from the Company.

[9] The crucial terms of the defendant's employment were incorporated in the letter of offer as seen in exh P1. Clause 7 of exh P1 was worded in this way: A

7 You are to comply with all the rules and regulations of the Company whether expressed or implied, for the time being in force and those that may be issued from time to time. Particularly you are not permitted whilst in the employment of the Company to engage in any private business which could tantamount to any conflict of interest. B

[10] Clause 8 of exh P1 was fashioned in this way: C

8 You shall at all times conduct yourself in a manner befitting your status in the Company. As an employee of the Company, you shall at all times ensure confidentiality of the Company proprietary and other confidential information whether such information is directly or indirectly within your knowledge. Such information which shall continue to remain as the property of the Company and shall not be divulged to any third party without the expressed authority of the management. D

[11] Clause 9 of exh P1 was drafted in this manner: E

9 All information learned or obtained in the course of work in the Company shall be deemed to be strictly confidential. No such information shall be divulged to any outside party.

[12] While cl 10 of exh P1 was worded like this: F

10 Upon your resignation before or after being confirmed, you shall not be engaged in work or own the same trade as the Company in Malaysia, Singapore, Thailand, Indonesia, Philippines and Taiwan for an immediate period of three years from the date of resignation. G

[13] Contracts may be formed in the following ways:

(a) by a document, just like the letter of offer in the present case, which indicates that each party is to become bound on adding his signature to it and, like the present case, the first to sign makes an offer (*Financings Ltd v Stimson* [1962] 3 All ER 386; [1962] 1 WLR 1184 (CA)), and the second to sign accepts (*Financings Ltd v Stimson*); and H

(b) one party may proffer a written document as his offer, just like the present case, and the other party accepts the offer by signing on the written document (*Howatson v Webb* [1908] 1 Ch 1 (CA); *Blay v Pollard and Morris* [1930] 1 KB 628 (CA); *L'Estrange v F Graucob, Ltd* [1934] 2 KB 394; *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] I

A 1 KB 805; [1951] 1 All ER 631 (CA); *Compagnie de Commerce et Commission, SARL v Parkinson Stove Co Ltd* [1953] 2 Lloyd's Rep 487 (CA); and *JH Saphir (Merchants) Ltd v AL Zissimos & Anor (Trading as Cyprus Soil Products Co)* [1960] 1 Lloyd's Rep 490).

B [14] It is the general rule that when a person accepts an offer made in a written document by signing and delivering that document, that person is bound by all the terms of that document, irrespective of whether he has read them (*L'Estrange v F Graucob, Ltd*; *JH Saphir (Merchants) Ltd v AL Zissimos & Anor (Trading as Cyprus Soil Products Co)*; *AF Colverd & Co Ltd v Anglo Overseas Transport Co Ltd and Pope & Sons* [1961] 2 Lloyd's Rep 352; *Levison & Anor v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69; [1977] 3 All ER 498 (CA); and *Barclays Bank plc v Schwartz* [1995] TLR 452 (CA)).

D [15] During the defendant's tenure of employment with the plaintiff, the defendant met the plaintiff's competitors with the intention of divulging confidential information to the plaintiff's competitors.

E [16] The defendant had also approached almost all of the plaintiff's employees with the intention of convincing them to cease employment with the plaintiff and to join the defendant's company in the future.

F [17] On 5 August 1997, the defendant tendered his resignation to the plaintiff and joined the plaintiff's competitor by the name of Alpha Mould Sdn Bhd ('Alpha'). That letter of resignation was marked as exh P3 and it can be seen at p 7 of bundle 'B' and it was worded as follows:

G With regard to this morning conversation with Miss Tan (General Manager) regarding the above said matter, I hereby resign from Worldwide Rota Dies Sdn Bhd as Marketing Manager with immediate effect from 5th August, 1997 and thereby will be helping out until the 15th August, 1997.

H As agreed by Miss Tan during the conversation that I need not have to give 3 months notice as required but can leave with immediate effect (5th August, 1997) without any condition. I hope my resignation will not in anyway inconvenience you and thank you for giving me the opportunity to serve the company for the past two years.

Thank you and Regards.

Yours faithfully

I Sgd Illegible

RONALD ONG

[18] The defendant failed, neglected and/or refused to perform his duties during his employment with the plaintiff to the satisfaction of PW1. The defendant too has breached the terms and conditions as stipulated in the letter of offer (exh P1). A

[19] The defendant continued to approach the plaintiff's employees with the intention of convincing them to leave the employment of the plaintiff and join the defendant. This was done primarily with the view of decimating the human resource structure of the plaintiff. As a result, five of the plaintiff's employees left the plaintiff and joined the defendant. B
C

[20] Sometime on 4 August 1997, before the defendant resigned, the defendant informed the plaintiff's customers that all or nearly all of the plaintiff's employees had or were about to leave the plaintiff and join or were about to join the defendant's company. This was done with the intention of destroying the plaintiff's business and reputation for the benefit of the defendant or the defendant's company. D

[21] As a direct result of the defendant's actions, the plaintiff suffered substantial losses and damages. E

[22] The defendant admitted that he was employed as a marketing manager on 21 August 1995 with the plaintiff and resigned on 5 August 1997 after nearly two years of employment and thereafter the defendant joined Alpha on 20 August 1997 which led to the plaintiff initiating an injunction and a civil suit to claim damages from the defendant for loss of forecasted profits as a result of the defendant's departure and allegedly using the plaintiff's trade secrets for the benefit of the defendant's new employer Alpha. F
G

[23] In the statement of claim, the plaintiff pleaded, inter alia, as follows:

- (a) that PW1 received complaints from customers that services provided by the plaintiff were not attended to by the defendant; H
- (b) that the defendant informed PW1 that he wanted to start a new business;
- (c) that the defendant admitted that complaints lodged by customers were not attended to and that the defendant met with the plaintiff's competitors; I
- (d) that the defendant purportedly met with the plaintiff's competitors to disclose confidential information, trade secrets, plans and strategies of the plaintiff with the intention of causing losses and damages;

- A** (e) that the defendant approached almost all the plaintiff's employees to join Alpha — the defendant's new company, and the defendant also offered the plaintiff's employees three times more salary, shareholding and profit sharing;
- B** (f) that the defendant told all the plaintiff's customers that all the plaintiff's employees had left the plaintiff and joined the defendant's company; and
- (g) that the defendant had breached the letter of offer as per exh P1 particularly cll 9 and 10.
- C** [24] For all these reasons, the plaintiff claimed for general damages, aggravated damages, exemplary damages, injunction and costs.
- D** [25] The defendant denied all of the plaintiff's allegations and pleaded his defence along these lines:
- (a) the defendant was in Johor Bahru setting up the plaintiff's business and therefore he was not responsible for the problems in the plaintiff's company located in Kuala Lumpur;
- E** (b) the defendant denied that there were problems when PW1 was in the United States of America;
- (c) the defendant contended that he was doing the same type of business like the plaintiff since 1987 before working for the plaintiff and the defendant also contended that the business the defendant was setting up would not compete with the plaintiff;
- F** (d) the defendant contended that the plaintiff employed the defendant for the purpose of obtaining the defendant's assistance, experience and expertise in the business;
- G** (e) the defendant was not privy to any confidential information except in the field of marketing where the defendant was quite verse in that field even before working for the plaintiff; and
- H** (f) the defendant contended that the letter of offer in exh P1 contravened s 28 of the Contracts Act 1950.

ANALYSIS

- I** [26] The plaintiff's causes of action against the defendant hinged on:
- (a) for breach of contract;
- (b) for breach of confidence; and
- (c) for unlawful interference with the plaintiff's trade.

[27] The first cause of action is contractual in nature while the other two are grounded in tort. A

BREACH OF CONTRACT

[28] When a party without lawful excuse fails or refuses to perform what is due from him under the contract or performs defectively or incapacitates himself from performing then it can be said that the contract has been breached. In a breach of contract, the injured party has the right to sue for damages. B
C

[29] The sum awarded for breach of contract is usually calculated so as to compensate the injured party rather than to allow the injured party to recover any profit made by the party in breach. Thus, if the injured party has suffered no loss, the damages awarded will be nominal. In *Attorney General v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, the House of Lords has indicated that very exceptionally recovery of the profit of the party in breach is possible. D

[30] It was the stand of the plaintiff that the defendant had breached the terms and conditions of his contract of employment encapsulated in the letter of offer in exh P1. It must be emphasised that the defendant had read and understood the contents of the letter of offer before accepting the position as the marketing manager by signing that letter of offer on 21 August 1995. The defendant too had accepted the confirmation letter of the plaintiff dated 30 July 1996 as reflected in exh P2. All these facts were not denied by the defendant when he was cross-examined. E
F

[31] PW1, the managing director of the plaintiff, had testified that she was informed by Mr Lau Hock Leng ('PW2'), who was a staff of the plaintiff, that the defendant had approached and enticed most of the plaintiff's workers from the bottom level right up to the top level to join the defendant at Alpha where they would be paid generously and be entitled to profit sharing. According to PW1 this was done by the defendant during his employment with the plaintiff. It seemed that the defendant had succeeded in enticing 12 of the plaintiff's workers to join Alpha. G
H

[32] In examination-in-chief, PW1 made reference to the clauses in the letter of offer in exh P1. This was what she said (see pp 12–13 of the notes of evidence): I

At clauses 7, 8, 9 and 10 it clearly spelt out that the employee should conduct himself or herself in a manner benefiting his or her status in the company. All information learned or obtained in the course of work shall be strictly confidential.

- A** No such information shall be divulged to any outside party. Upon his resignation he shall not be engaged in work or own the same trade as the company in Malaysia and SEA countries. And this has been signed and agreed by the defendant at page 4 of bundle 'B'.
- B** Further at page 5 of bundle 'B' on his confirmation letter i.e. exhibit 'P2', it has been stressed again at para 3 the following:
- You hereby fully understand and adhere to clauses (9) and (10) of the appointment letter dated August 23, 1996.
- C** At page 6 of bundle 'B'-P2', the defendant has confirmed and understood and accepted the foregoing terms and conditions and confirmed that he would devote the whole of his energy to devote and expand the company and shall in all matters act loyally and faithfully to the company.
- D** In the letter it is also stated that as such he shall not engage, be interested or concerned either directly or indirectly as principal, agent, employee or otherwise in any other services or business without first obtaining written permission from the company and he signed out.
- E** [33] In 1997, PW1 went to the United States of America and this was what she said in examination-in-chief (see pp 13–14 of the notes of evidence):
- Right after I came back from America in June 1997, after one month away in America whilst looking for another laser machine to expand our company as our business is going all the way up whereby we require more automation, machineries to cope up with the work because we were working under tremendous stress due to lay offs of manpower as it was a boom time in Malaysia as well. Our workforce should be 40 head counts but we were working under 25. Meaning staff have to do multi tasking. That is why I was away for one month in America to source for more advanced and speedy auto machines to solve the labour problems as well as for our business expansion.
- F**
- G** And the defendant was the most senior staff in my company was instructed by me to take good care of the business operations as well as the marketing during my absence.
- H** In short, he was representing me on my behalf. However, when I called from the US, I would hear from my staff that customers have been complaining for late delivery and bad services as there was no follow up and the defendant was hard to be found.
- I** [34] In examination-in-chief, PW1 said that she confronted the defendant and the confrontation went like this (see p 14 of the notes of evidence):
- And his action had misled me into believing in him and further trusting him with more information of my company's expansion plan and I had warned him in this meeting that:

Look we have an agreement and contract you have signed and that is why I trust you with the top company information that is the costing company sheet that I had given you before my departure whereby you are the only one who has that information. Please don't bite the fingers that had fed you before.

A

[35] PW1 received a telephone call from PW2, a few days after the defendant left the plaintiff, and that telephone conversation was recorded in the notes of evidence at the examination-in-chief stage (see pp 15–16 of the notes of evidence):

B

A few days after the defendant left our company at midnight, I received a call from my staff Mr Lau talking in a shivering tone asking for my forgiveness and calming me down not to be angry if he is going to tell the truth. I assured him that I would not be angry and he told me that he together with a few of my staff that they had shared together found out that the defendant had approached and enticed most of the workers from the very bottom to the top level to have them to join him and pay them very handsome money as well as profit sharing. But they found out that why everybody was approached and from the very general worker to the top and I asked them why they did not join them as they were paid so far. They said that was something wrong. If he does not have the intention of crippling our company that is to close down my company he would not want everyone to leave my company. And he would very well sack us before the confirmation and it will then be too late for our company because by then my company would be closed and so they refused to join the defendant. I further asked Mr Lau whether the defendant knew that we all have contracts and bonds with the company and the defendant told him don't worry should the company take any legal action against you all costs will be covered by the defendant or the defendant's company. Straight away after my conversation with Mr Lau I called up the defendant at midnight 2.00 am and I told the defendant that this was the second time I was hearing that he was opening a company against us and I told him: 'Please don't do it' and 'don't go into the trap of Mr Yang which is the defendant's present employer'.

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[36] PW1 further said this in her examination-in-chief (see pp 17–18 of the notes of evidence):

- (1) In June 1997 the defendant during my absence and he was acting on my behalf he has taken advantage to instigate and entice the plaintiff's staff which is still under our employment.
- (2) In July 1997 the defendant incorporated Alpha Laser Rota Mould Sdn Bhd while he was still under my employment.
- (3) In August 1997 after the defendant left our company he went all out to approach and steal our customers away.

H

I

After what he had done— which was a breach of trust and a breach of contract we then take an injunction to stop him from doing.

Bundle 'B' shown especially page 9 thereof and she says:

A Yes, this is the injunction order I spoke of.

Walter

Pray that page 9 to page 11 of bundle 'B' be marked as 'P4'.

B *Jason*

No objection.

Mahkamah

Allowed accordingly.

C

[37] Continuing with her examination-in-chief, PW1 spoke about the defendant bad mouthing the plaintiff and, in regard to the contempt proceedings, PW1 had this to say at pp 18–19 of the notes of evidence:

D

At page 10 of bundle 'B' — P4 shows that the defendant was forbidden from doing certain acts.

However, the defendant still go round bad-mouthing our company that is why we had an affidavit confirming that he had continued bad-mouthing our company.

E

Enclosure 12 of the file shown to the witness and she said:

The affidavit was filed for the contempt proceeding purpose. A contempt proceeding was initiated in this court by the plaintiff's company. At the contempt proceeding the Judge was very unhappy that the defendant had contempt the court and had warned him and the Judge said that if he continued doing it the Judge would not hesitate to put the defendant in jail for not less than 6 months.

F

G

[38] PW2, the assistant manager of the plaintiff, testified that he was approached by the defendant during the defendant's employment with the plaintiff and was offered employment with a new company. PW2 testified that he was approached by the defendant together with three other key employees of the plaintiff. According to PW2, he did not accept the defendant's offer.

H

[39] PW2 elaborated further. He testified that the three other personnel of the plaintiff that were approached by the defendant were Henry Wong Kin Loy ('PW3'), Sim Thiam Lim ('PW5') and Charlie Cheah. According to PW2, the defendant left the employment of the plaintiff approximately within two months of making the said offer to PW2 to join Alpha.

I

[40] PW3's witness statement in exh P12 makes for an interesting reading material. PW3 was the then executive assistant to PW1. PW3 testified that the defendant had approached PW3 before the defendant left the

employment of the plaintiff to join a new company that the defendant was setting up which was in the same line of business as the plaintiff. According to PW3, the defendant induced him with, inter alia, offers of profit sharing. Upon the inducement of the defendant, PW3 left the employment of the plaintiff and took up employment with Alpha. When PW3 was offered the position at Alpha it was conditional that PW3 would not leave the plaintiff immediately but rather that PW3 would join Alpha later. PW3 testified that when he joined Alpha, he met at least half of the workforce of the plaintiff working with Alpha. According to PW3, at least 11 ex-employees of the plaintiff were working with Alpha.

A

B

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[41] It would be ideal to reproduce the witness statement of PW3. I shall do so now:

Can you explain the meetings between you and the Defendant, if any?

D

The Defendant approached me sometime before he left the Plaintiff in 1997 and told me that he met one Mr Yap who is going to start or finance a new company manufacturing rotary dies which is the same nature of business as the Plaintiff.

The Defendant represented to me that he would be in charge of the company and have total control in every aspect of the business of this new company.

E

Did you inquire about who this Mr Yap is?

When I inquired who this Mr Yap was, the Defendant replied that he would be the financier of the new company but would not get involved in the day-to-day running of the company.

F

Did the Defendant do anything?

The Defendant tried to entice me into joining this new company by saying that unlike Ms Tan Sing Hong of the Plaintiff, Mr Yap would share profits with the employees. The Defendant said that it would be very difficult to get an increment in the Plaintiff company.

G

I was hesitant with the Defendant as I had only been with the Plaintiff company for less than 2 months and only in administration. The Defendant then revealed to me that since I was Ms Tan Sing Hong's assistant, my departure from the Plaintiff would disrupt her operations.

Notwithstanding this, I was offered a position with Alpha Laser Sdn Bhd although I was not a skilled employee. I never met the said Mr Yap. I resigned on 7/11/1997 from the Plaintiff company and on the inducement of the Defendant joined Alpha Laser Sdn Bhd.

H

Describe the work force or working environment in Alpha Laser Sdn Bhd?

I

When I joined Alpha Laser Sdn Bhd in Puchong, I met my ex-colleagues from the Plaintiff. There were at least 11 ex-employees of the Plaintiff in Alpha Laser Sdn Bhd ie almost half the staff strength of the Plaintiff were now with Alpha Laser Sdn Bhd. Another ex-employee, a knife setter, joined in December 1997 but resigned in January 1998.

- A** The Defendant told me when I was with Alpha Laser Sdn Bhd that 3 clients of the Plaintiff ie Cheong Ming Paper Sdn, Amcor Sdn Bhd and Goulene Paper Sdn Bhd did not like Ms Tan Sing Hong claiming she was arrogant. The Defendant said that these companies will support Alpha Laser Sdn Bhd.
- Did the Defendant say anything else?
- B** The Defendant also said that Muda Pasific Sdn Bhd of Johore claimed that Ms Tan incompetent. In fact, it was the Defendant while being with the Plaintiff handled the Plaintiff's job for Muda Pasific Sdn Bhd wherein the Defendant performed very unsatisfactory but attributes the same to Ms Tan of the Plaintiff. The Defendant also said that the Plaintiff was technically not competent. Alpha Laser Sdn Bhd misled Muda Pasific Sdn Bhd and got the business from Muda Pasific Sdn Bhd at the expense of the Plaintiff. The Plaintiff suffered even further as Muda Pasific Sdn Bhd gave no new business/contact to the Plaintiff.
- C** During my employment with Alpha Laser Sdn Bhd, I once overheard in the office, the Defendant say that he has informed customers of the Plaintiff that all key people have joined him (the Defendant) and that there are no more staff in the Plaintiff company.
- D** I was asked by the Defendant to join Alpha Laser Sdn Bhd but I was instructed by the Defendant to get as much information on the Plaintiff before I left the Plaintiff and joined Alpha Laser Sdn Bhd. In effect, I was asked to be a spy for Alpha Laser Sdn Bhd and to report on the activities of the Plaintiff to the Defendant.
- E** Did you adhere to the instructions of the Defendant and Alpha Laser Sdn Bhd, that is to be a spy for them?
- F** I did leak out information to the Defendant and Alpha Laser Sdn Bhd. I realized I have been used, and refused to commit any further acts of corporate espionage as instructed by the Defendant and Alpha Laser Sdn Bhd. The Defendant and Alpha Laser Sdn Bhd seeing that I had no further use for them forced me to resign under the pretext of cost-cutting of high overheads and that the company (Alpha Laser Sdn Bhd) is to re-locate which they did.
- G** The Defendant and Alpha Laser Sdn Bhd during my employment with Alpha Laser Sdn Bhd aggressively induced the staff of the Plaintiff to breach their contract by resigning without notice and join the Defendant at Alpha Laser Sdn Bhd.
- Did the Defendant ever pay or compensate the ex-employees of the Plaintiff for their breach of contract with the Plaintiff?
- H** In my presence, the Defendant assured that ex-employees of the Plaintiff that any claim against them by the Plaintiff for breach of contract would be paid by Mr Yap of Alpha Laser Sdn Bhd. Alpha Laser Sdn Bhd did pay for the compensation sought by the Plaintiff in at least 2 cases.
- I** The Defendant's conduct to obstruct or interfere or damage the Plaintiff's business and reputation becomes more apparent when he slandered the name of Ms Tan Sing Hong of the Plaintiff by saying, sometime in September 1999, that Ms Tan can 'sell the sample maker machine systems to Sime Rengo Packaging Sdn Bhd in Subang as Ms Tan goes out with the General Manager of the company after office hours. So she will clinch the deal'.

I verily believe that the Defendant at all material times conducted himself in a manner intended to damage the business of the Plaintiff in the hope of securing the business for himself at Alpha Laser Sdn Bhd. **A**

[42] When PW3 gave his evidence at the examination-in-chief stage, the following exchange took place (see pp 8–9 of the notes of evidence): **B**

Q: The plaintiff attempted to serve a subpoena on you but failed to serve in 2001. Can you explain why there was difficulty in serving the subpoena?

A: I was avoiding the subpoena because first of all I would be avoiding unnecessary inconvenience to myself but more importantly I decided if I can, not to get involved because while I was employed by Alpha Laser and it was during the first hearing of this case, the defendant went back to the office of Alpha Laser and commented that Lau Hock Leng of the plaintiff's company talked too much and he is thinking of getting somebody to break his leg. Furthermore, since I read in the papers of so many peoples' legs been broken and so many people are being shot at, so I fear that it would happen to me especially when the defendant has threatened Lau Hock Leng. Now, if I am shot dead for speaking the truth so be it. **C**
D

[43] But no police report was lodged by PW3. Be that as it may, PW3 continued in his examination-in-chief (see p 9 of the notes of evidence): **E**

Q: Can you name the 11 ex-employees of the plaintiff that joined the defendant's company or the company that was set up by the defendant?

A: From the driver, a Malay boy by the name of Shabudin, sales personnel by the name of Ng and Peter Pan, drafting personnel Chang Mee Rin (f) and another girl by the name of Irene, laser department Mervin and Leong, production personnel by the name of Hamidi, Ah Hai and Yusaimmi, myself admin and there was one more knife setter who joined for one odd month and I have forgotten his name. **F**

[44] It was put to PW3 under cross-examination that he was enticed by the plaintiff's company to give false evidence. PW3 replied in the negative. **G**

[45] PW3 by letter dated 10 June 2000 addressed to the defendant tendered his letter of resignation together with the terms and conditions of his resignation. The letter of resignation marked as exh P13A was worded in this way: **H**

I tender herewith my resignation as an Admin Executive wef 29.06.2000.

Terms and conditions of resignation as agreed by the company and myself are found in the enclosed attachments. **I**

[46] And the terms and conditions of PW3's resignation can be seen in exh P13B and it was worded like this:

- A** (1) COMPENSATION - 4 (per) months' salary.
(2) MODE OF PAYMENT-
- (a) 1st payment on 29-06-2000 for June salary plus 2 (two) months' compensation.
- B** (b) 2nd payment on 31st July, 2000 for balance of 2 (two) months' compensation.
(3) I shall not join another company in the same trade for the next 3 (three) months.
- C** Signed and accepted by:
Sgd Illegible
ALPHA LASER ROTAMOULD SDN BHD
(Co No 440400-M)
- D** B1-12 (Upper Ground Floor)
KL Industrial Park, Batu 5,
Jalan Kelang Lama,
- E** 58200 Kuala Lumpur.

F [47] Indeed PW3 was paid a compensation of four months' salary when he resigned which amounted to RM10,000 and this can be ascertained by looking at the salary slips for the months of June 2000 and July 2000 marked as exhs P14A and P14B respectively.

G [48] PW5 was the former design department supervisor of the plaintiff at the material time. His witness statement can be seen in exh P16. In answer to a question about any dealings which PW5 had with the defendant, PW5 answered it in this way (see p 2 of the exh P16):

H I went to USA with the Plaintiff's Managing Director Ms Tan Sing Hong on a business trip sometime in May/June 1997. Sometime after I returned from my trip, the defendant and two other persons met me at Pearl Point International Hotel at Jalan Kelang Lama.

At this meeting, the Defendant asked me whether I was interested in joining his company. He offered me a higher salary and the promise of a better future at his company.

I I told him that I still had a contract with the Plaintiff, at which the Defendant replied that his new boss will pay for all legal matters arising from my breaching the employment contract with the Plaintiff. He told me not to worry about the employment contract that I have.

I did not reply to his offer.

After about one week, he began to call me at my home. He called me about 3 or 4 times for an answer.

A

Finally, I declined to accept his offer and told him so.

Personally, I was under immense pressure by the Defendant to accept his offer that I even was fearful of going to work as I might be confronted by him.

B

The Defendant resigned and left the Plaintiff in early August 1997.

[49] Rozliaiani bin Sedil Othman ('PW4') gave evidence for the plaintiff. PW4 relied totally on his affidavit as his examination-in-chief and that affidavit of his was duly marked as exh P15. PW4 deposed his affidavit in his capacity as the art-room supervisor of Sime Rengo Packaging Sdn Bhd with an address at No 135, Batu 31/4, Jalan Tampoi, 81200 Johor Bahru. PW4 said that on 4 November 1997 at 2.44 pm, he received a telephone call from the defendant who enquired as to why PW4 did not support the defendant and give him business. The defendant told PW4 that all the plaintiff's clients supported the defendant and gave the defendant business transactions except Sime Rengo Packaging Sdn Bhd. The defendant also told PW4 that Sime Rengo Packaging Pte Ltd (Singapore) also supported him. PW4 told the defendant that, at all times, Sime Rengo Packaging Sdn Bhd were the clients of the plaintiff and that the defendant was trying to divert business of Sime Rengo Packaging Sdn Bhd to the defendant or the defendant's company. PW4 narrated further. He said that in the month of September 1997, the defendant visited him and told him that many if not all of the plaintiff's employees have left the plaintiff. He said that the defendant had admitted that the defendant was instrumental in enticing all of the plaintiff's employees in Singapore and in Malaysia to work with the defendant or the defendant's company in Singapore and in Malaysia. The reason given by the defendant for doing what he did was that the plaintiff did not pay its workers' bonuses for the last two years. The defendant also told PW4 that the plaintiff did not pay any commission to the defendant and the plaintiff had increased the defendant's salary by RM20 only and the plaintiff still owed the defendant the commission. PW4 was advised to say by the plaintiff's management that the plaintiff had obtained an injunction from the High Court at Kuala Lumpur on 6 October 1997 injunctioning the defendant from disturbing or enticing the plaintiff's customers to the defendant or to any other company unless the plaintiff's customers willingly and on their own accord contact the defendant. PW4 stated that he did not contact the defendant. It was the defendant who contacted PW4.

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[50] PW4 was cross-examined. In his cross-examination he denied that the manager of Sime Rengo Packaging Sdn Bhd by the name of Karim Kok Abdullah had directed him to see the defendant. PW4 also denied that it was Karim Kok Abdullah who requested the defendant to see PW4. However, PW4 admitted that he knew the defendant but not that close. It was put to

I

- A** PW4 that PW4 received gift from the plaintiff to come to court to give evidence and PW4 disagreed with this suggestion. PW4 also disagreed that his evidence was given on the direction of the plaintiff. PW4 denied that he was rewarded to come to Kuala Lumpur from Johor Bahru to give evidence.
- B** [51] Under re-examination, PW4 said that he affirmed the affidavit in exh P15 on 6 November 1997 and he was able to recall events that happened on 4 November 1997. PW4 said that after the defendant had telephoned him, the defendant met him personally. Thereafter, the defendant went to see Karim Kok Abdullah. Lastly, PW4 denied that he was financially induced to come to court to give evidence for the plaintiff.
- C**
- D** [52] Thus far, the evidence of PW1, PW2, PW3 and PW5 showed that the defendant whilst being in the employment of the plaintiff had encouraged and/or influenced the plaintiff's employees to leave the employment of the plaintiff and join the defendant.
- E** [53] It is my judgment that by enticing, encouraging and influencing the employees of the plaintiff to leave the employment of the plaintiff to join Alpha while the defendant was still in the employment of the plaintiff, the defendant had acted in conflict and was therefore guilty of breach of contract. The defendant himself did not dispute that he took 50% of the staff strength of the plaintiff to Alpha when he joined Alpha.
- F** [54] PW4's evidence was a classic example of the defendant's attempt at securing a business contract from the plaintiff's client. Fortunately for the plaintiff, Sime Rengo Packaging Sdn Bhd remained faithful to the plaintiff. But this was shortlived. Exhibit D23 showed that on 25 September 1997, the defendant succeeded in enticing Sime Rengo Packaging Sdn Bhd to Alpha.
- G** [55] Without a doubt the defendant acquired confidential information of the plaintiff particularly the list of the plaintiff's client and the plaintiff's costing sheet and he then divulged that confidential information to the plaintiff's competitors including Alpha which was the defendant's subsequent company. The plaintiff utilised the confidential information to Alpha's benefit and to the detriment of the plaintiff.
- H**
- I** [56] PW1's evidence showed that before PW1 left for the United States of America in 1997, PW1 entrusted to the defendant, who was the second most senior staff after PW1, with the plaintiff's costing sheet. Taking advantage of these prized information, the defendant effectively took steps to start a price war with the plaintiff when the defendant left the plaintiff.

[57] PW1 testified that the defendant had utilised the plaintiff's list of customers by pinching the plaintiff's customers. This was done by the defendant notwithstanding the court order dated 6 October 1997 which expressly prohibited the defendant from pinching the plaintiff's customers. The court order dated 6 October 1997 can be seen at pp 9–10 of bundle 'B' which was an agreed bundle and it was worded as such:

ATAS PERMOHONAN pihak plaintif yang dinamakan di atas DAN SETELAH MEMBACA Saman Dalam Kamar bertarikh 11 haribulan September, 1997 serta Afidavit-Afidavit Tan Sing Hong yang diikrarkan pada 10 haribulan September, 1997 dan 1 haribulan Oktober, 1997 dan Afidavit Jawapan Ronald Ong Cheow Joon yang diikrarkan pada 3 haribulan Oktober, 1997 DAN SETELAH MENDENGAR Encik Walter Pereira Peguam bagi pihak Plaintif dan Encik Ho Kee Tong Peguam bagi pihak Defendan dan Plaintif mengaku untuk mematuhi dengan apa-apa perintah yang dibuat oleh Mahkamah atau Hakim tentang ganti rugi kiranya Mahkamah atau Hakim berpendapat selepas itu yang Defendan, Ronald Ong Cheow Joon telah ditanggunggi apa-apa disebabkan perintah ini yang Plaintif perlu bayar.

ADALAH DIPERINTAHKAN bahawa satu injunksi dengan ini dikeluarkan terhadap defendan untuk menghalang defendan samada oleh defendan sendiri dan/atau oleh pengkhidmat defendan dan/atau ejen defendan daripada:

- (a) menyatakan kata-kata kepada pihak-pihak ketiga bahawa semua pekerja Plaintif telah meninggalkan dan/atau meletak jawatan daripada syarikat Plaintif dan bahawa syarikat Plaintif tidak berniaga lagi;
- (b) kemukakan maklumat, rancangan-ancangan, strategi-strategi sulit Plaintif yang diperolehi semasa Defendan bekerja di firma Plaintif;
- (c) memberitahu sesiapa butir-butir akaun Plaintif, dan
- (d) mengganggu, atau menarik pelanggan Plaintif kepada syarikat Defendan atau mana-mana syarikat lain melainkan jikalau pelanggan-pelanggan pada atau sebelum Defendan meletak jawatan dengan Plaintif, dengan relanya menghubungi Defendan.

[58] It was an injunctive order and the defendant clearly breached that order blatantly. This prompted the plaintiff to file an application for contempt against the defendant for contravening the court order dated 6 October 1997. The court has the means to enforce its own order. In the words of Lord Denning MR in *Morris & Ors v The Crown Office* [1970] 2 QB 114 at p 122; [1970] 1 All ER 1079 at p 1081 (CA):

To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power — a power instantly to imprison a person without trial — but it is a necessary power.

A [59] At the contempt proceedings, the learned judge warned the defendant that he was to cease contravening the court order dated 6 October 1997. But the defendant continued to defy the court order and this can be seen in the letter dated 19 November 1997 which the plaintiff wrote to its solicitors marked as exh P5 which was worded in this way:

B RE: IN THE CASE OF RONALD ONG CHEOW JOON

We refer to the above case and would appreciate your advice on the following:

- C** (1) What is the current status after the filing of the affidavit against Ronald Ong for contempt of court.
- D** (2) During an exhibition (Corrugated Asia 97/Converting Machinery Asia 97) held in Singapore World Trade Centre from 12th to 15th November 1997, Ronald Ong exhibited their products under Alpha Laser Rota Mould Sdn Bhd and went outwardly and publicly to approach and entice my customers during this exhibition. A recent example is that of my customer KYM Beranang, where the sales manager Mr Chew advised me that they were approached and quoted for products and Ronald Ong then requested that they let him secure the orders for the quotes that he sent to them earlier.

E It is very obvious that Ronald is ignoring the order entirely and is going aggressively to approach and entice my customers, thereby causing damage and losses to our business.

We would like to know what action you will take to protect our interests and to stop this person from causing further damage to our business.

Please let us have your prompt reply by return fax.

F [60] It must be borne in mind that the plaintiff invested in rotary dies cut mould or also known as rotary cutting dies. According to PW1, the defendant used to work in Singapore for Columbia Laser Dies which dealt with flat laser cutting dies. This was what PW1 said at pp 5–6 of the notes of evidence during her examination-in-chief:

G To the best of my knowledge when the defendant came to my office to talk about the possibility of working for the plaintiff's company he told me that he was working for Kudos Sdn Bhd which is a company where he was doing flat laser cutting dies and serving a few customers in Malaysia, namely, Memory Lane and one or two more smaller companies. The defendant also told me that he was working in Singapore for Columbia Laser Dies for the business that is flat laser cutting dies before he worked for Kudos Sdn Bhd.

H [61] PW1 also differentiated between a flat laser cutting dies and a rotary dies cut mould. This was what she said in her examination-in-chief at pp 6–7 of the notes of evidence:

I My Lord, flat laser cutting dies is a conventional tool for a die cutting machine. And there is another type of cutting dies and it is called rotary dies.

In simple language flat laser cutting dies means:

Flat is very flat according to scale one to one. In a rotary which is not flat and not according to scale one to one that is where the formula and the technology has to come in in order to produce a rotary dies. It is easy to make a flat dies but it is difficult to make a rotary dies.

A flat die is a very straight cutting dies where many people can produce because it requires very small capital to start up one and these dies will be sold to the packaging company meaning people who produce carton boxes. However, when the carton is too big or the quantity is too much then the customer has to think of buying rotary dies to cope with this need. Because a rotary die can run in much bigger carton at a speed that is 5 to 10 times faster and the life span is also ten times longer and obviously the cost of these rotary dies may also cost 10 times more. Customers will require a skilful rotary die makers to produce good quality rotary dies to achieve the three benefits i.e. can accommodate much bigger carton, runs 5 to 10 times faster, and with a life time of 10 times greater. Before my company was established in Singapore in 1993 there is none in South East Asia (SEA). In other words before our presence in the market there is only a handful in the entire SEA having this machine to run the rotary dies. Being the pioneer, my company took the risk in investing in rotary die cut mould. I now say that rotary die cut mould is the same name as rotary cutting die.

[62] We have the scenario where the plaintiff was the pioneer in South East Asia in producing rotary cut dies and had cultivated a group of customers in using rotary cut dies. The plaintiff's capital investment and technology in the rotary cut dies business was considered very substantial. It was for this reason that the letter of offer in exh P1 spelt out the confidentiality clause and trade restriction clause from the bottom right up to the management level.

[63] As illustrated, the defendant before joining the employment of the plaintiff had a background experience of flat laser cut dies business which was the conventional tool for a die cutting machine as opposed to the rotary dies. This was also admitted by the defendant during his cross-examination. The defendant testified during cross-examination that he did not have any experience in supplying rotary dies prior to joining the plaintiff. The rotary dies were more difficult to make than the flat dies. According to PW1, the rotary dies was confined to a niche market and it was a highly specialised product and that one must be highly skilful in order to produce these kind of products. According to PW1, the plaintiff had invested substantial amounts in developing these rotary dies.

[64] It was submitted on behalf of the defendant that whether it was a flat laser cutting dies or a rotary dies cut mould, the end result would be the same. It would produce carton boxes.

- A** [65] PW1 further testified that prior to the defendant's employment with the plaintiff, the defendant had no product knowledge and list of clients for the corrugated industry for rotary dies. According to PW1, in handling the rotary cut dies business, the party must know of the customer's requirement and also the right material to apply. It is this specialised knowledge that the
- B** defendant did not have before joining the plaintiff. As a marketing manager of the plaintiff, the defendant must know the products which he was selling and how those products were made. It is my judgment that the defendant acquired the knowledge of making carton boxes using the plaintiff's method of rotary dies cut mould while working with the plaintiff.
- C**
- [66] There was evidence to show that PW1 provided the defendant with the pricing formula on quotation before PW1 left for the United States of America and that was considered to be confidential information of the
- D** highest order. Even though the defendant was doing quotation before PW1 left for the United States of America yet the defendant did not know how exactly PW1 priced the product until a quotation sheet was given to the defendant by the plaintiff. The quotation sheet was considered by PW1 as the trade secret of the plaintiff's pricing to the customers. The quotation sheet was the plaintiff's costing sheet.
- E**
- [67] According to PW1, the expression 'confidential information' in the rotary cut dies business applied to:
- F** (a) the specifications and formulas that should be applied to each and every customer;
- (b) the right material to apply in order to get the accurate output;
- (c) the customer's list;
- G** (d) the pricing; and
- (e) the design.
- H** [68] It was submitted on behalf of the plaintiff that the defendant had utilised confidential information belonging to the plaintiff for the defendant's own benefit. When the defendant was still working with the plaintiff, the defendant was busy starting a new company manufacturing rotary dies which was the same business as the plaintiff. The testimony of PW3 showed just that. According to PW3 after he was asked to join the defendant's company, he was instructed to obtain as much information about the plaintiff before
- I** joining the defendant's company. In reality what this amounted to was this. That PW3 was asked by the defendant to spy on the plaintiff for the benefit of Alpha. It is akin to an industrial espionage.

[69] According to PW3 when he reported for work at Alpha he was introduced to a man by the name of Mr Yap who was the financier of Alpha and concurrently in charge of Alpha. According to PW3, Mr Yap would reduce Alpha's prices in order to make things difficult for the plaintiff. Clearly this could only be done if Alpha had knowledge of the plaintiff's costing sheet which was provided to Alpha by the defendant. PW3 further testified that he was asked to stay back during his employment with the plaintiff so that PW3 could monitor the plaintiff's customers daily orders as well as to obtain machine specifications for the rotary cut dies. PW3 did what he was told to do by the defendant. PW3 began monitoring the daily orders of the plaintiff's customers and verbally informed the defendant when the defendant telephoned PW3. And upon the instructions of the defendant, PW3 caused copies of the plaintiff's confidential documents to be made for the benefit of the defendant.

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[70] As demonstrated the evidence of PW4 showed the defendant's attempt to divert business given by Sime Rengo Packaging Sdn Bhd to the plaintiff to Alpha. It was quite obvious that what the defendant did was in direct contravention of the injunction order dated 6 October 1997 that was obtained by the plaintiff. It must be emphasised that any breach of a court order would carry dire consequences for the contemnor.

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[71] Under cross-examination, the defendant admitted that he joined Alpha in August 1997 and at that time Alpha had no customer base background. The defendant also admitted that he managed to secure 12 customers of the plaintiff as reflected in exh D23 which can be seen at pp 10–11 of bundle 'C'. It can readily be surmised that the defendant had utilised the plaintiff's list of customers in order to pinch the 12 customers. It must be recalled to mind that the plaintiff was the main player in the rotary dies industry and once the defendant had access to the plaintiff's list of customers and the customer's representatives, the defendant had the upper hand and the defendant approached the plaintiff's customers for the purpose of securing business and to undercut the plaintiff.

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[72] It was the plaintiff's submission that when the defendant joined Alpha as a sales director, the defendant had sent quotations to the customers of the plaintiff at a lower price in order to lure away the plaintiff's customers. The defendant obtained the confidential information when he was working with the plaintiff. And the confidential information pertained to the list of customers and the quotation list of the plaintiff. Surprisingly, when it was put to the defendant during cross-examination that the defendant joined Alpha with the knowledge of the plaintiff's customers and with the knowledge of the pricing imposed by the plaintiff, that the defendant had lured the

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A plaintiff's customers to the defendant and that the defendant had undercut the pricing of the plaintiff, the defendant did not deny all these suggestions.

[73] The defendant as an employee of the plaintiff owed a duty of fidelity to his employer, namely, the plaintiff. An express duty of fidelity may be imposed by a contract of employment (*Reid and Sigrist Ltd v Moss and Mechanism Ltd* (1932) 49 RPC 461) and, in the context of this case, the letter of offer imposed that duty of fidelity to the defendant.

C [74] According to the case of *Tipping v Clarke* (1843) 2 Hare 383, the right of an employer to restrain an employee or ex-employee from divulging confidential information to others is well established. And the employer can also restrain the employee from making use of the confidential information for his own benefit (*Normalec Limited v Britton* [1983] FSR 318).

D [75] A whole gamut of confidential information in the possession of an employee has been protected. In determining whether such information can be regarded as confidential, it has been held that 'what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process' (*Saltman Engineering Co Ltd & Ors v Campbell Engineering Co Ltd* [1963] 3 All ER 413 at p 415 (CA), per Lord Greene MR). So when the recipient makes use of the information, the recipient avoids doing the work notwithstanding that the recipient is capable of doing it.

F [76] All these principles of law when applied to the facts of the present case, the defendant would be hard pressed to wriggle himself out of the predicament in which he is in.

G [77] RK Nathan JC (later J) in *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632; [1998] 1 CLJ 685 at p 644 (MLJ); pp 691–692 (CLJ) had this to say in regard to the breach of duty of fidelity and good faith:

H The plaintiff contends that the defendants had breached their duty of fidelity and good faith while in the employment of the plaintiff by taking away and making copies of the confidential information and/or trade secrets of the plaintiff. I find that this duty of good faith or fidelity does not just require that the employee refrains from misuse or from disclosing information whilst still in the employment of the plaintiff. To my mind, there is also an implied duty that prohibits the employee from using any confidential information obtained during his employment, without the employer's consent, for his own or someone else's use after the employment contract ends. Thus, it is a breach of the fidelity clause and the implied duty to remove a customer list or to deliberately set out to memorise the said list with the intention of using it later, even though any use or disclosure

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is confined to the post-employment period. In such a case the eventual exploitation of the information is considered to be no more than an extension of the original breach of good faith and fidelity. In *Robb v Green* [1895] 2 QB 315 the Court of Appeal held that the employee was in breach of an implied term of the contract of service in making copies of his employer's list of customers' names and addresses, with the intention of using it for the purpose of soliciting orders from them after he had left his employer's service and set up a similar business on his own account.

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Lord Esher MR said at pp 316, 317:

... the question is whether such conduct was not what any person of ordinary honesty would look upon as dishonest conduct towards his employer and a dereliction from the duty which the defendant owed to his employer to act towards him with good faith. I think the judge was perfectly justified in holding that such conduct was a breach of the trust reposed in the defendant as the servant of the plaintiff in his business. The question arises whether such conduct is a breach of contract. That depends upon the question whether in a contract of service the court can imply a stipulation that the servant will act with good faith towards his master. In this case it is said that the contract of service was in writing; but there is nothing in the express terms of the contract that contradicts such an implication. I think that in a contract of service the court must imply such a stipulation as I have mentioned, because it is a thing which must necessarily have been in view of both parties when they entered into the contract.

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I am in total agreement with the passage quoted. It is not possible to envisage that a master would have reposed upon his servant confidential material nor put him into a position of confidence to enable that servant to use it against him or in competition with him.

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[78] Continuing at the same page and spilling over to p 645 (MLJ); p 693 (CLJ) of the report, His Lordship had this to say:

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I find that the defendants herein had used, divulged and/or disclosed confidential information and/or trade secrets of the plaintiff. In *Seager v Copydex Ltd* [1967] 2 All ER 416 Lord Denning MR did not even want to consider the question of an implied contract; he however relied on equity. He said at p 417:

The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent.

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In *Coco v AN Clark (Engineers) Ltd (No 2)* [1969] RPC 41 Megarry J held that in order to succeed in an action for breach of confidence the plaintiff must establish to the satisfaction of the court three elements, namely:

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- (a) that the information which the plaintiff is seeking to protect is of a confidential nature;

- A** (b) that the information in question was communicated in circumstances importing an obligation of confidence; and
(c) that there must be an unauthorised use of that information to the detriment of the party communicating it.
- B** From the facts adduced I have no hesitation in holding that the plaintiff has satisfied me in respect of all three elements as against all the defendants. Hence, the defendants herein, who came into possession of confidential information, knowing it to be such, come under a duty not to take unfair advantage of it or to make use of it to the prejudice of him who gave it without obtaining his consent. The fifth defendant to whom the information has been wrongfully
- C** revealed also comes under a duty of confidence to the original confider, that is, the plaintiff in this case. It is therefore necessary to grant the equitable relief of an injunction against the fifth defendant as well as against the rest of the defendants.
- D** [79] And at p 648 (MLJ); p 696 (CLJ) of the report, His Lordship rightly said as follows:

It is my judgment that trade secrets are not limited to manufacturing processes or secret formulae but extend to information relating to the list of names and
- E** addresses of the customers and suppliers, specific questions sent to the customers, costs prices, specific needs and requirements of the customers and status of the ongoing negotiation with the customers.
- F** [80] Vincent Ng J (later JCA) in *Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling* [2008] 7 MLJ 903 at pp 913–916; [2008] 8 CLJ 386 at pp 397–399, made the following findings and elucidated the law in these apt terms:
- G** [10] In my judgment, the confidentiality of the said confidential information (which includes customer lists and details) could not be seriously disputed as this has been expressly mentioned in cl 7.01(ii) of the employment agreement. And, it must be recognised that particulars such as customer’s names, lists and details have also been judicially recognised as being confidential in nature, and wrongful utilisation of such particulars warrants injunctive protection. Some cases on point
- H** are *Faccenda Chicken Ltd v Fowler & Ors*; *Fowler v Faccenda Chicken Ltd* [1986] 1 All ER 617 (CA) (*‘Faccenda Chicken’*); *Thomas Marshall (Exports) Ltd v Guinle* [1978] 3 All ER 193 (*‘Thomas Marshall’*). In *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632; [1998] 1 CLJ 685 even the ‘list of names and address of customers and suppliers’ were classified as trade secrets.
- I** [11] Obviously, the plaintiff’s customer’s names, lists and details could not become part of the defendant’s ‘own skill, knowledge and business experience’ as the defendant had submitted. It is pertinent to note that the plaintiff has, prima facie, shown in Penny’s affidavit that the defendant had taken possession of the plaintiff’s customer treatment cards during the period of her termination notice. Although this is a finding which this court may arrive at only after a full trial, it nonetheless

raises the serious issue of whether the defendant had, by such conduct, breached her duty of good faith owed to the plaintiff. Neill LJ in the *Faccenda Chicken* made the following dicta which is apposite to the instant case:

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the duty of good faith will be broken if an employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately memorises such a list, even though, except in special circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer.

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[12] The above dicta in *Faccenda Chicken* clearly lays down the law, which is equally applicable in Malaysia, that there is generally no restriction to an ex-employee competing with his/her ex-employer by canvassing or doing business with the latter's former customers. This is certainly in line with general principles which allows competition and is consonant with s 28 of the Contracts Act 1950. Save for an agreement not to carry on business of which the goodwill is also sold, or between partners prior to dissolution or during continuance of partnership, s 28 provides that: 'Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.' Notwithstanding this provision, what is in my view not permissible, is for such competition to be pursued by wrongfully utilising the confidential information, eg, list of customers belonging to the ex-employer; and the courts have been vigilant to protect the employer's interest in this regard. In *Thomas Marshall* the rationale for the court granting an interlocutory injunction to restrain 'disclosure' but not 'usage' of such information was explained thus:

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The court would also grant an injunction restraining the disclosure of the company's confidential information and trade secrets but since the term 'disclosure' used in the agreement did not extend to 'use' the court would not grant an injunction restraining the use of such information.

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[13] It is of vital importance to note that in *Thomas Marshall* the impugned agreement did not incorporate clauses such as cll 7.01(ii) and 7.02(ii) in the case at hand.

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[14] The law of confidentiality in the context of relationship between employer and employee, and of restrictive covenants has been set out in *Faccenda Chicken* as follows:

(a) Where the parties are, or have been, linked by a contract of employment, the obligations of the employee are to be determined by the contract between him and his employer: cf *Vokes Ltd v Heather* (1945) 62 RPC 135 at p 141.

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(b) In the absence of any express term, the obligations of the employee in respect of the use and disclosure of information are the subject of implied terms.

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(c) While the employee remains in the employment of the employer the obligations are included in the implied term which imposes a duty of good faith or fidelity on the employee. For the purpose of the present appeal it is

- A not necessary to consider the precise limits of this implied term, but it may be noted: (a) that the extent of the duty of good faith will vary according to the nature of the contract (see *Vokes Ltd v Heather*); (b) that the duty of good faith will be broken if an employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately
- B memorises such a list, even though, except in special circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer (see *Robb v Green* [1895] 2 QB 315; [1895-9] All ER Rep 1053 and *Wessex Dairies Ltd v Smith* [1935] 2 KB 80; [1935] All ER Rep 75).
- C (d) The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae (see *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239), or designs or special methods of construction (see *Reid Sigrist Ltd v Moss Mechanism* (1932) 49 RPC 461), and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret.
- D
- E (e) In order to determine whether any particular item of information falls within the implied term so as to prevent its use or disclosure by an employee after his employment has ceased, it is necessary to consider all the circumstances of the case. We are satisfied that the following matters are among those to which attention must be paid. (a) The nature of the employment. Thus employment in a capacity where 'confidential' material is habitually handled may impose a high obligation of confidentiality
- F because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally. (b) The nature of the information itself. In our judgment the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly described as a trade secret, is in all the circumstances of such a
- G highly confidential nature as to require the same protection as a trade secret *eo nomine*. The restrictive covenant cases demonstrate that a covenant will not be upheld on the basis of the status of the information which might be disclosed by the former employee if he is not restrained unless it can be regarded as a trade secret or the equivalent of a trade secret: see for example
- H *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at p 701; [1916-17] All ER Rep 305 at p 317 per Lord Parker and *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026 at p 1037; [1977] 1 WLR 1472 at p 1484 per Megaw LJ.
- I [81] Continuing further at p 917 (MLJ); p 400 (CLJ), this was what His Lordship said:
- (b) the plaintiff's right in law to protection of its confidential information is premised on cl 7.02 above, which does not have any time limit.

[82] Chao Hick Tin J, of the Singapore High Court in *Certact Pte Ltd v Tang Siew Choy & Ors* [1991] 4 CLJ (Rep) 716, explained what would constitute trade secrets and confidential information. At p 717 of the report, it was held that: A

A list of names of suppliers and customers and the individual contracts of the plaintiffs could be trade secrets and confidential information. So could a list of prices negotiated with and quoted to various customers, contents of various agreements, records of sales, requirements of customers. B

Even if these information were in fact compiled and recorded by D1 and D2 when they were employed by the plaintiffs, they were still the property of the plaintiffs. C

An employee is not at liberty, when he leaves the employment, to take these things away in order to harm his employer or to establish his own business in competition with his former employer. On the evidence, it was clear that the defendants had used the plaintiffs' trade secrets and confidential information for their own personal interest. Therefore, they would continue to do so even after their employment ceased. The restraining interim injunction is therefore justified. D

[83] All these authorities serve as good guidelines in adjudicating this case. It must be borne in mind that confidential information would also cover information relating to customers, cost prices together with the specific needs and requirements of customers. In the present case, the defendant had access to all these and he did not deny them. The irresistible inference can be drawn that the defendant was guilty of revealing and utilising the confidential secrets of the plaintiff when the defendant joined Alpha. What the defendant did would certainly amount to breaching cl 8 and 9 of the letter of offer in exh P1. E

[84] That the defendant was in breach of contract cannot be doubted. Using PW3 to spy on the plaintiff and to provide the defendant with valuable information about the plaintiff were the last straws that broke the camel's back, so to speak. It was quite despicable, to say the least. F

[85] It must be recalled that during the course of his employment with the plaintiff, the defendant made misrepresentations to the plaintiff's customers for the purpose of damaging the plaintiff's reputation in the business world. G

[86] It was argued by the defendant that the plaintiff failed to call Mr Yong of Yong Brothers, Mr Wong of Muda Holdings, Mr Chew of KYM Bhd and Ms Anna Tan of Sime Rengo and an ex-employer of the defendant in Columbia Laser Singapore to testify in court in order to corroborate and support PW1's testimony. Flowing from that, it was argued that this court should invoke s 114(g) of the Evidence Act 1950 against the plaintiff. H

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- A** [87] *ABN-AMRO Bank Bhd v Ismail bin Mydinsah (trading as Ismy Classic)* [2004] 7 MLJ 30, was a case where the plaintiff's claim was for a sum of RM319,192.72 together with interest and costs in respect of banking facilities granted to the defendant for which securities had not been perfected until the writ of summons was served. No plausible reason was given to the court by the bank as to why it did not secure the two properties pledged to it. The defendant admitted that he had defaulted in the payment towards the facilities but raised in defence that a scam was perpetrated by the plaintiff's officer, one Mr Vega, who had the defendant's properties transferred to himself for a nominal purchase price which was below the market rate in exchange for him getting the facilities approved by the plaintiff. Mr Vega was not called by the plaintiff as a witness. The court invoked s 114(g) of the Evidence Act 1950 against the plaintiff and held that if the plaintiff had called Mr Vega, his evidence would have been unfavourable to the plaintiff.
- B**
- C**
- D** [88] The defendant heavily relied on *ABN-AMRO Bank Bhd v Ismail bin Mydinsah (trading as Ismy Classic)*. With respect, in that case the failure to call Mr Vega was raised as a defence. In the present case before me, the defendant did not raise the failure to call those witnesses in his statement of defence. It was raised by way of a submission. Having considered the submissions, I cannot accede to the defendant's request to invoke s 114(g) of the Evidence Act 1950 against the plaintiff. The presumption will not arise for not calling those witnesses because there is exh D23 that will support PW1's evidence that the defendant pinched the plaintiff's customers. Exhibit D23 is a letter dated 25 September 1997 from Alpha showing Alpha's list of customers, namely:
- E**
- F**
- (a) Interstate Packages (Central) Sdn Bhd;
- (b) Corrugated Offset Packaging (M) Sdn Bhd;
- G** (c) Goulene Paper Products Sdn Bhd (Kluang Branch);
- (d) Clean Paper Products Sdn Bhd;
- (e) Box Pak (M) Bhd;
- H** (f) Cheong Meng Paper Boxes Mfg (M) Sdn Bhd;
- (g) Shine Technology (M) Sdn Bhd;
- (h) Sime Rengo Packaging (M) Sdn Bhd;
- I** (i) Ornapaper Industry (M) Sdn Bhd;
- (j) Muda Holdings Bhd;
- (k) Formstec Marketing;
- (l) SAP System Industries Sdn Bhd; and

(m) Muda Pasific Sdn Bhd.

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[89] It must be recalled that the defendant had admitted under cross-examination that he had secured 12 of the plaintiff's customers as reflected in exh D23. That admission put an end to the 114(g) submission.

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[90] The presumption too will not arise for the following reasons:

- (a) PW4 gave evidence of the attempts by the defendant to divert business from the plaintiff to the defendant; and
- (b) PW3 too confirmed that the pricing had been slashed by Alpha in order to undermine and undercut the plaintiff's business.

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[91] Mohamad Hamidi bin Hamid ('DW2') testified that he knew the defendant when he was working with the plaintiff and that he was offered a higher salary to work with Alpha. Yussaimi bin Shuid ('DW3'), a former employee of the plaintiff, testified that he was offered a higher salary at Alpha. Both DW2 and DW3 were former employees of the plaintiff and they were offered higher salaries at Alpha.

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[92] The defendant said that the workers were attracted to the defendant's company through advertisements in the newspaper. But such a claim was unsubstantiated. Neither DW2 and DW3 testified to that effect. And the defendant failed to call witnesses to support his assertion.

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[93] This was a classic case of a breach of contract. The defendant left the plaintiff's employment on 15 August 1997 and joined the employment of Alpha five days later on 20 August 1997. The defendant was certainly in breach of cl 10 of the letter of offer. This was my judgment and I so hold accordingly.

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[94] Reading the letter of offer together with the relevant facts surrounding the whole case, an objective assessment of the evidence showed that the defendant had breached the contract and he must be held accountable. That would be the correct approach to adopt. As Lord Bingham of Cornhill in *Bank of Credit and Commerce International SA v Ali & Ors* [2002] 1 AC 251 (HL), at p 259 aptly said:

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To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.

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A BREACH OF CONFIDENCE

[95] It is in the field of commercial relationships that confidential information actions are concerned with. The express duty imposed by a contract of employment to maintain confidence is at its peak while the employment is continuing (*Normalec Ltd v Britton*). But that does not give the employee the right to disseminate confidential information belonging to the employer after the employee has left the employment. A host of confidential information in the possession of the recalcitrant employees have been protected so long as the confidential information have the necessary quality of confidentiality about them. It must not be something which is said to be trivial (*Faccenda Chicken Ltd v Fowler & Ors*; *Fowler v Faccenda Chicken Ltd* [1987] 1 Ch 117 (CA); and *Stephens v Avery & Ors* [1988] 2 WLR 1280) or within the domain of public property or public knowledge (*Lord Advocate v The Scotsman Publications Ltd & Ors* [1990] 1 AC 812 (HL); *O Mustad & Son v S Allcock & Co, Ltd And Dosen* [1963] 3 All ER 416 (HL); *Stevenson Jordan and Harrison, Ltd v MacDonald And Evans* [1952] 1 TLR 101; *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1964] 1 WLR 96; *Franchi v Franchi* [1967] RPC 149; and *Lennon v News Group Newspapers Ltd And Twist* [1978] FSR 573).

[96] In *Attorney-General v Observer Ltd & Ors*; *Attorney-General v Times Newspapers Ltd & Anor* [1990] 1 AC 109 (HL), at pp 281–282, Lord Goff of Chieveley, writing a separate judgment, lucidly laid down the following principles of law:

I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word ‘notice’ advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary; though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious. The existence of this broad general principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection.

I realise that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties — often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions ‘confider’ and ‘confidant’ are perhaps most aptly employed. But it is well settled that a duty of confidence may arise in equity independently of such cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information

from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers — where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passerby. I also have in mind the situations where secrets of importance to national security come into the possession of members of the public — a point to which I shall refer in a moment. I have however deliberately avoided the fundamental question whether, contract apart, the duty lies simply ‘in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained’ (see *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, at p 438, per Deane J, and see also *Seager v Copydex Ltd* [1967] 1 WLR 923, at p 931, per Lord Denning MR), or whether confidential information may also be regarded as property (as to which see Dr Francis Gurry’s valuable monograph on *Breach of Confidence* [1984], pp 46–56 and Professor Birks’ *An Introduction to the Law of Restitution* [1985], pp 343–344). I would also, like Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, at p 48, wish to keep open the question whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence. Obviously, detriment or potential detriment to the plaintiff will nearly always form part of his case; but this may not always be necessary. Some possible cases where there need be no detriment are mentioned in the judgment of Megarry J to which I have just referred (at p 48), and in Gurry, *Breach of Confidence*, at pp 407–408. In the present case the point is immaterial, since it is established that in cases of government secrets the Crown has to establish not only that the information is confidential, but also that publication would be to its ‘detriment’ in the sense that the public interest requires that it should not be published. That the word ‘detriment’ should be extended so far as to include such a case perhaps indicates that everything depends upon how wide a meaning can be given to the word ‘detriment’ in this context.

To this broad general principle, there are three limiting principles to which I wish to refer. The first limiting principle (which is rather an expression of the scope of the duty) is highly relevant to this appeal. It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. I shall revert to this limiting principle at a later stage.

The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. There is no need for me to develop this point.

The third limiting principle is of far greater importance. It is that, although the basis of the law’s protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require

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A a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

B [97] I gratefully adopt the speech of Lord Goff of *Chieveley* and I categorically hold that the defendant, on the facts as alluded to above, had committed a breach of confidence. The plaintiff, by virtue of this breach, had suffered losses and damages.

C UNLAWFUL INTERFERENCE WITH THE PLAINTIFF'S TRADE

[98] According to Lord Denning MR in *Ex parte Island Records Ltd & Ors; Sub nom Island Records Ltd & Ors v Corkindale* [1978] Ch 122, at p 136:

D A man who is carrying on a lawful trade or calling has a right to be protected from any unlawful interference with it: see *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 1 WLR 1676.

E [99] According to Henry J, in *Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants* [1987] IRLR 3, the essence of the tort was deliberate interference with the plaintiff's interests by unlawful means. And at p 10, His Lordship said that the intention to injure must be a contributing cause of the plaintiff's loss.

F [100] I will now refer to the case of *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354, (CA). That case concerned an unlawful interference with business interests. The facts may be stated as follows. An Australian company, Europe, had marketed health food bars containing fruits or nuts in transparent packages attractively exposing the ingredients in their natural state to visual inspection. A New Zealand company, ABC, had unsuccessfully attempted to produce similar bars. The two companies had discussed the possibility of a licensing agreement so that ABC could produce Europe's food bars in New Zealand. After ABC discontinued the negotiations, it began to manufacture food bars in transparent packages. In an earlier action vide
G [1978] 2 NZLR 515, it was found that during the negotiations Europe had disclosed confidential information or know-how regarding the manufacturing process, and that ABC had manufactured food bars in New Zealand making
H use of that confidential information. Europe was granted a permanent injunction and an account of profits against ABC.

I [101] Europe had licensed a New Zealand company *Van Camp* to manufacture the food bars. *Van Camp* sued *Aulsebrooks*, as legal successor to ABC, for damages for unlawful interference with its economic interests. It alleged that, although utilising the know-how, ABC had manufactured bars

which were of a poor and inferior quality. *Van Camp* claimed damages for \$207,500 for, inter alia, lost sales and damage to trade reputation. The damages claimed related to the period for which Europe had already obtained an account of profits from ABC. A preliminary question of law was argued before the trial. In the High Court, the judge decided that assuming the allegations in the statement of claim were true, *Aulsebrooks* was not as a matter of law liable to *Van Camp* for damages. *Van Camp* appealed. The court dismissed the appeal. It was held that there is a common law tort in New Zealand of interfering with the trade or business of another person by doing unlawful acts. The essence of the tort is deliberate interference with the plaintiff's interests by unlawful means. But it would stretch the tort too far to impose liability in the situation where the reasons which actuated the defendant to use unlawful means were wholly independent of a wish to interfere with the plaintiff's business, such interference being no more than an incidental consequence foreseen by and gratifying the defendant. Here the fair inference from the findings in the earlier action was that, if ABC had any intention of causing economic loss to *Van Camp* or any licensee of Europe, such an intention was not a contributing cause of ABC's conduct.

[102] Cooke J, delivering the judgment of the Court of Appeal aptly said at pp 358–359 of the existence of the tort of unlawful interference. This was what His Lordship said:

Mr Wilson for *Aulsebrooks* told us that in the High Court he did not dispute the existence of the tort of unlawful interference with business interests. Vautier J nevertheless appears to have held that it does not now exist, and in this court Mr Wilson supported that view in the first part of his argument.

As long ago as 1914 the tort was recognised in this court in *Fairbairn, Wright & Co v Levin & Co Ltd* 34 NZLR 1. In that respect the court of three was unanimous, although one member, Stout CJ, went further than the others in holding that in that case there was also a cause of action for breach of statutory duty. While rejecting the latter view, Sim J delivering the judgment of Edwards J and himself said at pp 29–30 that '... if, for the purpose of advancing his own interests, a trader uses against a rival weapons that are unlawful and thereby causes him injury, the latter has a good cause of action for damages'; and again that the plaintiffs had 'a right to carry on their business freely without interference by the use by rival traders of unlawful means'. In so far as the decision treats a breach of statute as unlawful means for the purposes of the tort it may require reconsideration in the light of *Lonrho Ltd v Shell Petroleum (No 2)* [1982] AC 173, but that qualification does not affect the present case.

During the argument of the present appeal it was ascertained that a decision of the House of Lords was expected before long in the case now reported as *Merkur Island Shipping Corp v Laughton & Ors* [1983] 2 All ER 189. As arranged counsel made written submissions on that decision when it came to hand. In his speech,

A concurred in by the other members of the House, Lord Diplock accepted (p 196) that there is a common law tort of interfering with the trade or business of another person by doing unlawful acts.

B In the light of those two authorities, we will not embark on a discussion of the 40 and more other cases and references by which counsel for the appellant supported the existence of the tort. It is a recognised tort in New Zealand, although its boundaries will receive closer definition as cases emerge, and we see insufficient reason for discarding a judicial remedy which from time to time may be useful to prevent injustice.

C In each of those two authorities an essential aim or purpose of the unlawful actions of the defendant was interference in the trade of the plaintiff — procuring refusal of sugar supply to the plaintiff in *Fairbairn, Wright*, blacking the plaintiff's ship in *Merkur Island*. Almost without exception the same is true of other cases accepting the existence of the tort. A notable exception is *Beaudesert Shire Council v Smith* [1966] 120 CLR 145, but that decision of the High Court of Australia has not been followed anywhere and was disapproved in *Lourho*. This court was not willing to follow it in *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314: see the observations of Richardson J at pp 339–340, with which the other members of the court agreed.

D In the present case Vautier J said that the defendant's activities were not aimed at the plaintiff. And 'the defendant was seeking simply to make a profit for itself by the sale of the food bars using the information which it had acquired'. In view of the allegations in the amended statement of claim, assumed to be true for the purposes of the argument, that goes a little too far. At least an additional intention of causing economic loss to the plaintiff has to be postulated, however improbable it may seem on the surface.

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F But it is apparent from the findings of Somers J, pleaded by the plaintiff to be true, that any such intention could have been no more than super-added and inessential. His judgment of 3 February 1978 contains several passages making it clear that from 1974 the defendant had sought to produce a food bar but had found by its own experiments that it could not overcome the problem of incorporating the fruit or nuts or other contents in natural size or in a way visually attractive — and so ultimately descended to plagiarising Europe's confidential process. The object become similarity of product, and Somers J, who had to examine the history fully, accepted in both his judgments that the royalties accruing to Europe from *Van Camp* were likely to be diminished by ABC's competition; but nowhere did he suggest that harming Europe's licensee was one of ABC's actuating purposes.
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H Consistently with this, Mr Thomas accepted in argument that an intent to harm *Van Camp* (or any other New Zealand licensee) was not a causative element in the defendant's conduct. He argued that the mere presence of such an intent is enough for the tort even though the intent has no practical effect.

I [103] Continuing at p 360 of the report, His Lordship had this to say:

In principle, as we see it, an intent to harm a plaintiff's economic interests should not transmute the defendant's conduct into a tort actionable by the plaintiff unless that intent is a cause of his conduct. If the defendant would have used the unlawful

means in question without that intent and if that intent alone would not have led him to act as he did, the mere existence of the purely collateral and extraneous malicious motive should not make all the difference. The essence of the tort is deliberate interference with the plaintiff's interests by unlawful means. If the reasons which actuate the defendant to use unlawful means are wholly independent of a wish to interfere with the plaintiff's business, such interference being no more than an incidental consequence foreseen by and gratifying to the defendant, we think that to impose liability would be to stretch the tort too far. Moreover it would entail minute and refined exploration of the defendant's precise state of mind — an inquiry of a kind with the law should not call for when a more practicable rule can be adopted.

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The present case can therefore be disposed of on the short ground that the fair inference from the findings in the earlier action is that, if ABC had any intention of causing economic loss to *Van Camp* or any other licensee of Europe, such an intention was not a contributing cause of ABC's conduct.

On that view it is unnecessary to deal with other questions as to the ambit of the tort of unlawful interference. In particular we reserve our opinion on whether misuse of confidential information in breach of the defendant's duty to a party other than the plaintiff can constitute unlawful means for the purposes of this tort. The other party will have his remedy under the principles relating to breach of confidence. It is very arguable that if any remedy is to be given to a person in the plaintiff's position, it should be by way of a direct extension of the breach-of-confidence principles rather than by the circuitous route of the tort of unlawful interference.

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[104] The next case to refer to would be the case of *Lonrho Plc v Fayed & Ors* [1990] 2 QB 479 (CA). The plaintiff in that case wished to acquire control over another company but was prevented from increasing its stake of the share capital by an undertaking given to the secretary of state pending the outcome of a reference to the Monopolies and Mergers Commission. The first three defendants, through the medium of the fourth defendant, made a rival bid for 100 per cent of the share capital of the company. That offer was approved by the directors of the company was not referred to the commission and the defendants gained control of the company. The plaintiff issued a writ against the defendants and by its statement of claim alleged, inter alia, that the first three defendants, by false statements about their financial capacity to acquire the share capital and develop the company's business, had persuaded the board of directors to accept their bid and the secretary of state not to refer their bid to the commission; that, by such action the defendants had tortiously interfered with the plaintiff's right to bid for shares, alternatively, had conspired against the plaintiff. It was alleged against the fifth and sixth defendants, merchant bankers to the other defendants, that they were fraudulent in that they were reckless as to the truth of the representations and against the sixth defendants that they acted negligently and in breach of the duty of care owed to the plaintiff. The defendants applied for an order striking out the statement of claim on the ground that it disclosed no cause

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A of action. The application was rejected by the master but was granted by the judge in chambers and the action was dismissed. No appeal was pursued in respect of the claims in conspiracy and negligence. On appeal by the plaintiff in respect only of the allegation of wrongful interference with trade or business, it was held, allowing the appeal, that it was not a requirement of the tort of interfering with business that the predominant purpose of the tortfeasor should be to injure the plaintiff rather than to further his own ends, whether the wrongful act was interference with a third party to the detriment of the plaintiff or the practice of fraud on a third party aimed at the plaintiff; that, in the latter case there did not have to be a completed tort as against the third party to the extent that the third party had himself to have suffered damage; that the precise limits of the tort had not been defined and the process of refining the law should be carried out on the actual facts as found on the evidence rather than on a set of hypotheses based on the pleadings; and that, accordingly, since on the case as pleaded the defendants had a case to meet on causation and it was not right to try complicated issues of causation on a striking out application, it was not a proper case for striking out. Dillon LJ delivering a separate judgment had this to say at pp 487–489:

E The third cause of action alleged in the statement of claim is the common law tort of wrongful interference with trade or business. The existence of such a tort is conceded by the defendants. Reference can be made to the speech of Lord Diplock in *Merkur Island Shipping Corp v Laughton & Ors* [1983] 2 AC 570 where he said, at p 609:

F In anticipation of an argument that was addressed to Your Lordships on the stage three point, I should mention that the evidence also establishes a prima facie case of the common law tort, referred to in s 13(2) and (3) of the (Trade Union and Labour Relations Act) 1974, of interfering with the trade or business of another person by doing unlawful acts. To fall within this genus of torts the unlawful act need not involve procuring another person to break a subsisting contract or to interfere with the performance of a subsisting contract. The immunity granted by s 13(2) and (3) I will call the ‘genus immunity’. Where, however, the procuring of another person to break a subsisting contract is the unlawful act involved, as it is in s 13(1), this is but one species of the wider genus of tort. This I will call the ‘species immunity’.

H There are also references to this tort in *JT Stratford & Son Ltd v Lindley* [1965] AC 269. Lord Reid said, at p 324:

I In addition to interfering with existing contracts the respondents’ action made it practically impossible for the appellants to do any new business with the barge hirers. It was not disputed that such interference with business is tortious if any unlawful means are employed.

Viscount Radcliffe said, at p 328:

The case comes before us as one in which the defendants have inflicted injury on the plaintiffs in the conduct of their business and have resorted to unlawful means to bring this about.

But, although those statements indicate that the tort is a recognised tort, they cannot be taken as comprehensive definitions of what constitutes that tort.

There are several what may be called established exceptions to the generality of those definitions. In particular, although it is not relevant on the facts of the present case, the speech of Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, at p 187 establishes that the mere fact that a person has suffered injury in his business by an act of the defendant which is illegal in the sense of being in breach of a statutory prohibition does not automatically entitle the injured person to bring an action within this tort to recover damages for the injury. The complainant still has to show that on its true construction the statute which imposed the prohibition gave rise to a civil remedy. That has to be considered in the light of the principles examined in *Cutler v Wandsworth Stadium Ltd* [1949] AC 398. Furthermore, in *RCA Corp v Pollard* [1983] Ch 135 at p 153c, Oliver LJ sets out cogently that the action does not lie where the damage complained of is merely economic damage as an incidental result of the breach of a prohibition in a statute not designed to protect the interests of a class to which the plaintiff belongs.

It is submitted to us that, even with this tort, it must, as with the tort of conspiracy, have been the predominant purpose of the tortfeasor to injure the victim rather than to further the tortfeasor's own financial ends. I do not accept that. It would be inconsistent with the way Lord Diplock treated this tort and the tort of conspiracy differently in his speech in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* and in *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191, at pp 228–229. No predominant purpose to injure is required where the tortious act relied on is injury by wrongful interference with a third party's contract with the victim or by intimidation of a third party to the detriment of the victim, nor should it in my view be required where the wrongful interference has been by the practice of fraud on a third party, aimed specifically at the plaintiff, as it was put by Oliver LJ in *RCA Corp v Pollard* [1983] Ch 135, at p 151E–F.

It is also submitted for the defendants that for this tort of wrongful interference with business to apply there must have been a complete tort as between the alleged wrong-doer and the third party against whom the wrong was practised to the detriment of the plaintiff in the action. It is said that that is not the case here, because through fraud was practised, if the allegations of *Lonrho* are correct, on the secretary of state to achieve the end that the secretary of state did not refer Holdings' bid to the Monopolies and Mergers Commission, the tort of deceit requires that the plaintiff should have suffered damage, and the secretary of state suffered, it is said, no actionable damage. I for my part can see no valid reason why the tort should need, as against the third party, to have been complete to the extent that the third party had himself suffered damage. The distinction drawn by Lord Diplock elsewhere between primary and secondary obligations may be relevant. Apart from that, the need to show that the injured party had suffered damage, as opposed to the plaintiff having suffered damage, was not a factor in the decision of the majority of this court in

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A *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335. Causation has of course to be proved, but that is a different matter.

It also has to be proved by a plaintiff who seeks to rely on this tort, as Mr Beveridge conceded for *Lonrho*, that the unlawful act was in some sense directed against the plaintiff or intended to harm the plaintiff.

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[105] The tort of unlawful interference arises when one person using unlawful means with the object of causing damage to another (*Mercur Island Shipping Corp v Laughton & Ors* [1983] 2 AC 570 (HL)). Thus, in a situation where the defendant commits an actionable wrong, like inducing a breach of contract (*Hadmor Productions Ltd & Ors v Hamilton & Anor* [1983] 1 AC 191 (HL), at pp 228–229; *Thomas Francis Allen v William Cridge Flood And Walter Taylor* [1898] AC 1, at p 138; *Acrow (Automation) Ltd v Rex Chainbelt Inc & Anor* [1971] 1 WLR 1676, at p 1683; *Ex parte Island Records Ltd & Ors*; *Sub nom Island Records Ltd & Ors v Corkindale* at p 136; and *Associated Newspapers Group Ltd & Ors v Wade* [1979] 1 WLR 697; *Westminster Press Ltd v Wade* [1979] 1 WLR 697; *W & J Linney Ltd v Wade* [1979] 1 WLR 697; *Newark Advertiser Co Ltd v Wade & Anor* [1979] 1 WLR 697; *Grantham Journal Co Ltd v Wade* [1979] 1 WLR 697; *BPM Holdings Ltd & Anor v Wade* [1979] 1 WLR 697; *Midland News Association Ltd & Ors v Wade* [1979] 1 WLR 697, CA; *IPC Magazines Ltd & Anor v Wade* [1979] 1 WLR 697; *Boots Co Ltd & Ors v Wade & Anor* [1979] 1 WLR 697, CA; *Trust Houses Forte Ltd v Wade & Anor* [1979] 1 WLR 697; *Walker Watton Hanson (A Firm) v Wade & Anor* [1979] 1 WLR 697; *ALP (Plant-Hire) Ltd (In Liquidation) v Wade & Anor* [1979] 1 WLR 697; *Severn Trent Water Authority v National Graphical Association & Ors* [1979] 1 WLR 697; *Nottinghamshire Area Health Authority (Teaching) v Wade & Ors* [1979] 1 WLR 697 (CA)), or where the defendant authorises or procures a breach of copyright for purpose of harming the plaintiff (*CBS Songs Ltd & Ors v Amstrad Consumer Electronics Plc & Anor* [1988] 1 AC 1013 (HL)), the defendant is said to commit the tort of unlawful interference.

H [106] It is part and parcel of my judgment that the defendant had committed the tort of unlawful interference with the plaintiff's trade for the following reasons:

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- (a) the defendant had encouraged and/or influenced the plaintiff's employees to leave the employment of the plaintiff;
 - (b) the defendant had failed to keep all information learned or obtained in the course of his employment with the plaintiff confidential;
 - (c) the defendant had also divulged the plaintiff's confidential information to the plaintiff's competitor; and

- (d) the defendant made misrepresentations to the plaintiff's customers with the sole aim of damaging the plaintiff's reputation and/or business. A

[107] For these reasons, the plaintiff had suffered losses and damages.

RESTRAINT OF TRADE B

[108] Clause 10 of the letter of offer, agreed to by the defendant, restrained the defendant from engaging 'in work or own the same trade as the company in Malaysia, Singapore, Thailand, Indonesia, Philippines and Taiwan for an immediate period of three years from the date of resignation'. Five days after the defendant left the employment of the plaintiff, the defendant joined Alpha. Yet learned counsel for the defendant argued that the restraint of trade clause was draconian and in breach of the rules of natural justice and it contravened s 28 of the Contracts Act 1950. C D

[109] It must be borne in mind that the defendant agreed that after leaving his employment with the plaintiff, he will not compete against his former employer either to work or own the same trade as the employer in specified countries for a period of three years from the date of his resignation. Authorities like *Hagg v Darley* (1878) 47 LJ Ch 567; *Caribonum Co Ltd v Le Couch* (1913) 109 LT 587; and *Haynes v Doman* [1899] 2 Ch 13 laid down one singular principle of law. It is this. That restraint against competition is justifiable if its object is to prevent the exploitation of trade secrets learned by the servant in the course of his employment. Here, the defendant acquired knowledge of that trade secrets and used it for the benefit of Alpha to the detriment of the plaintiff. E F

[110] By way of an analogy, the case of *Forster & Sons (Ltd) v Suggett* (1918) 35 TLR 87 should be referred to. There the works manager of the plaintiffs, who were chiefly engaged in making glass and glass bottles, was instructed in certain confidential methods concerning, inter alia, the correct mixture of gas and air in the furnaces. He agreed that during the five years following the determination of his employment he would not carry on in the United Kingdom, or be interested in glass bottle manufacture or any other business connected with glass making as conducted by the plaintiffs. The court held that the plaintiffs were entitled to protection and that the restraint was reasonable. G H

[111] In his position as a marketing manager of the plaintiff, the defendant certainly had acquired some general knowledge of the plaintiff's trade otherwise he could not market the plaintiff's products. Thus, general knowledge derived from secret information which has taught an employee to solve certain problems as they arise may properly be the subject matter of I

A protection (*Commercial Plastics Ltd v Vincent* [1965] 1 QB 623; [1964] 3 All ER 546 (CA)). The costing sheet which the defendant obtained from PW1 was utilised by the defendant to start a price war with the plaintiff when the defendant left the plaintiff. That cannot be condoned.

B [112] There was evidence to show that the plaintiff was the pioneer in South East Asia in producing rotary cut dies. Not only that, the plaintiff had cultivated a group of customers to use the rotary cut dies. Heavy financial investments were made by the plaintiff in the rotary cut dies business. Thus, it was not surprising that PW1 incorporated the restraint of trade clause in
C the letter of offer.

[113] Clause 10 of the letter of offer must be read with cll 8 and 9. And when so read, we will have the situation where the employer is entitled to protect his trade connexion in the sense of preventing his customers from being enticed away from him by his employee who was formerly in his employ. This was the kind of situation that happened in this case. The nature of the plaintiff's business and the nature of the defendant's employment with the plaintiff are relevant considerations to determine whether the protection was called for. In *Gilford Motor Co Ltd v Horne & Anor* [1933] Ch 935, at p 966, Romer LJ advanced the following test to determine whether the protection ought to be given to the employer:
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It has, however, been frequently recognised in these courts and is, in my opinion, established law, that where an employee is being offered employment which will probably result in his coming into direct contact with his employer's customers, or which will enable him to obtain knowledge of the names of his employer's customers, then the covenant against solicitation is reasonably necessary for the protection of the employer.
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G [114] There is another test propounded by Lord Parker of Waddington in the case of *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688. There at p 709, His Lordship moulded the test in this way:

H It is quite different in the case of an employer taking such a covenant from his employee or apprentice. The goodwill of his business is, under the conditions in which we live, necessarily subject to the competition of all persons (including the servant or apprentice) who choose to engage in a similar trade. The employer in such a case is not endeavouring to protect what he has, but to gain a special advantage which he could not otherwise secure. I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his
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employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilise information confidentially obtained.

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[115] What Lord Parker of Waddington was trying to say was this. That before any restraint is justifiable, the servant must be the one who will acquire not merely knowledge of the customers but be able to wield influence over them.

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[116] It is my judgment that a restraint is permissible if it is fashioned in such a way as to prevent a misuse of trade secrets or business connexion. Here, the restriction extended to Singapore, Thailand, Indonesia, Philippines and Taiwan including Malaysia. In *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300, the restriction extended throughout the United Kingdom and it was allowed. In *Lamson Pneumatic Tube Co v Phillips* (1904) 91 LT 363, the restriction to the Eastern Hemisphere was regarded as reasonable.

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[117] In what form the restraint of trade is to be incorporated is irrelevant. What is relevant is the contents of that restraint. The restraint may be contained in an agreement or in a letter. Whatever form it takes the court has to consider them. Here, the restraint is contained in the letter of offer. I must give effect to it accordingly.

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[118] The defendant was put in a position of acquiring special intimate knowledge of the clients of the plaintiff thereby allowing the defendant the opportunity of exercising influence over them, and surely in such a situation the plaintiff was entitled to obtain the court's protection. I share the sentiments of Evershed J, in *Routh & Anor v Jones* [1947] 1 All ER 179, at p 181, to the effect that:

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... the master would be exposed to unfair competition on the part of his former servant — competition flowing not so much from the personal skill of the assistant as from the intimacies and knowledge of the master's business acquired by the servant from the circumstances of his employment.

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[119] The geographical area of the restraint must be viewed in the context of the ease of travel and the character of the business that is under scrutiny. And in the world where companies operate globally, it would be reasonable to extend the restraint across the globe. Here, the plaintiff's pioneering status has gone across South East Asia and the restraint to those countries mentioned in cl 10 of the letter of offer would be reasonable bearing in mind the scale of the investments enumerated by PW1.

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A [120] In *Days Medical Aids Ltd v (1) Pihsiang Machinery Manufacturing Co Ltd (2) Pihsiang Wu (Also Known As Donald PH Wu) (3) Chiang Ching-Ming Wu (Also Known As Jenny Wu)* [2004] EWHC 44 (QBD (Comm)), the court had to consider the duration of an exclusive distribution agreement which was expressed to be for 'the initial period' of a 'five year term commencing on the date of signing' but subject to a right of renewal in the following manner:

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DMA will endeavour to increase sales year on year. On the expiry of the first five year term of this agreement provided that DMA has discharged its obligations under the agreement and is maintaining a sales level of not less than 5000 units pa, DMA shall have the right to renew the agreement for another five years on the same basis as herein, except that the amount payable each year under cl 2 shall be US\$20,000. This right of renewal shall extend to all subsequent five year periods on the same basis for as long as permitted by law.

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D [121] Langley J, said that there were two possible outcomes, namely:

(a) that the whole of the last sentence to be treated as ineffective, with the result that the court will consider all the issues on the footing that the agreement were for a period of ten years; or

E (b) that after ignoring certain offending words in the agreement, the result would be that the agreement was renewable every five years indefinitely.

[122] And since both parties supported the second outcome, Langley J, held that the clause should be read to limit to one five-year renewal and no more.

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[123] In my judgment, the restraint of trade clause in this case as agreed by the defendant was not draconian and was not in breach of the rules of natural justice. Based on the facts of this case, the restraint of trade clause must be held to be reasonable.

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[124] The challenge that the restraint of trade clause contravened s 28 of the Contracts Act 1950 will now be considered. That section enacts as follows:

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28 Agreement in restraint of trade void

Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.

I [125] There are three exceptions to s 28 of the Contracts Act 1950, namely:

Saving of agreement not to carry on business of which goodwill is sold;

Exception 1 — One who sells the goodwill of a business may agree with the buyer to refrain carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein: **A**

Provided that such limits appear to the court reasonable, regard being had to the nature of the business. **B**

of agreement between partners prior to dissolution;

Exception 2 — Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in exception 1. **C**

or during continuance of partnership

Exception 3 — partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership. **D**

[126] In considering s 28 of the Contracts Act 1950, there must be some measure of flexibility. The commercial reality of the matter dictates this kind of approach. Regard must always be had to the nature of the business conducted by the employer. The test of reasonableness must be applied in construing a restraint of trade clause. All that s 1(2) of the Contracts Act 1950 says is that the legal consequences of a contract which ensue at common law are to continue to apply unless some different legal consequences are spelt out in the Act. Section 1(2) of the Contracts Act 1950 enacts as follows: **E**

1(2) Nothing herein contained shall affect any written law or any usage or custom of trade, or any incident of any contract, not inconsistent with this Act. **F**

[127] Judges in Malaysia have generously applied the common law in construing the Contracts Act 1950. In *The Hua Khiow Steamship Co Ltd v Chop Guan Hin* [1930] 1 MC 175; [1930] 1 JLR 33, the court applied the common law. In that case, the plaintiffs sued to recover twice the amount of freight. Under the terms of the agreement, the defendant had agreed that if he shipped his goods by another line rather than the plaintiffs', he would not only forgo the rebate on freight but also become liable to pay three times the amount originally agreed upon. The court had to consider the issue of whether or not the covenant was void as being in restraint of trade within the meaning of s 28. The court held that that section was not applicable on the facts. **G**

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- A [128] When you apply the test of reasonableness to the facts of the present case, you must also consider the reasonableness of the restraint of trade in the context of the interests of the parties as well as the public.
- B [129] In considering what is said to be reasonable between the parties, reference to the case of *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 (HL), should be made. In that case, Lord Reid remarked that where a party, who is in no way at a disadvantage in bargaining, chooses to take a calculated risk, then His Lordship could see no reason as to why the court should say that he had acted against his own interests. In that case too,
- C Lord Hodson remarked that in the case of agreements between commercial companies in regulating their trade relations, the parties are usually the best judges of what is reasonable.
- D [130] Lord Haldane LC in *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461, at p 471, (HL), aptly said that the law 'still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves'. In the present case before me, both the parties had equal bargaining power to enter into the contract of employment. The defendant agreed to the contents of the letter of offer which incorporated cll 7, 8, 9 and 10 and he, just like the plaintiff, must be bound by it.
- E
- F [131] In determining the importance of public interest in the restraint of trade doctrine, tribute must be paid to the sanctity of the contract between two parties. It is in the interests of the public policy not to interfere with the freedom of contract of the parties.
- G [132] Notwithstanding the presence of s 1(2) of the Contracts Act 1950, there is an urgent need for legislative intervention in reviewing the necessity of having s 28 in the Contracts Act 1950. If both parties mutually agree to incorporate the restraint of trade clauses in their commercial transactions bearing in mind the nature of their businesses, the courts must give effect to them. The sanctity of the contract must be upheld.
- H
- I [133] Here, just like the case of *The Hua Khiow Steamship Co Ltd v Chop Guan Hin*, it is my judgment that on the facts of the present case, s 28 of the Contracts Act 1950 do not apply. I will apply generously the common law regime in construing the restraint of trade in this case. In the face of globalisation, Malaysia should not be left behind and should move forward in tandem with the rest of the common law countries. The doctrine of restraint of trade is here to stay.

RELIEFS SOUGHT BY THE PLAINTIFF

A

[134] The plaintiff claimed for general damages, aggravated damages, exemplary damages, injunctive order, costs, and any other reliefs deemed fit by the court.

B

[135] The definition of damages advanced by Lord Hailsham of St Marylebone LC in *Cassell & Co Ltd v Broome & Anor* [1972] AC 1027 (HL), at p 1070E, merits reproduction:

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Of all the various remedies available at common law, damages are the remedy of most general application at the present day, and they remain the prime remedy in actions for breach of contract and tort. They have been defined as 'the pecuniary compensation obtainable by success in an action for a wrong which is either a tort or a breach of contract'. They must normally be expressed in a single sum to take account of all the factors applicable to each cause of action and must of course be expressed in English currency: *Mayne and MacGregor on Damages*, (12th Ed) (1961), para 1.

D

[136] The purpose of awarding damages is to compensate the claimant for loss and at the same time to attempt to put him in the position in which he would have been had the contract or duty not been breached. It is not easy and it is usually impossible to determine with precision what the claimant has lost and what his compensation should be. In order to achieve justice, the court will endeavour to assess damages without fear or favour (*Sanders v Parry* [1967] 1 WLR 753).

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[137] General damages are non-pecuniary losses which cannot be calculated in terms of money. While aggravated damages will be assessed by looking at the motives or wilfulness or malice of the defendant and also by looking at the good character and good reputation of the plaintiff.

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[138] And whenever the defendant's conduct is sufficiently outrageous to merit punishment in situations where the defendant's conduct discloses malice, fraud, cruelty, insolence or the like, then exemplary damages would be granted. Lord Devlin in *Rookes v Barnard & Ors* [1964] AC 1129, at p 1226, aptly said that:

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... an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal.

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[139] Continuing at p 1227, Lord Devlin in *Rookes v Barnard & Ors* said that:

- A Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object — perhaps some property which he covets — which either he could not obtain at all or not obtain except at a price greater than he wants to put down.

- C [140] The facts have been set out at great length in this judgment. The plaintiff's causes of action were grounded in contract and in tort. The plaintiff's employees were enticed to work with Alpha and the plaintiff's customers too were induced to divert their businesses to Alpha. The plaintiff's trade secrets were taken by the defendant for the benefit of Alpha. The defendant profited from these breaches. In assessing damages, I am guided by what Neville J, said in *Goldsoll v Goldman* [1914] 2 Ch 603, at pp 615–616:

- E Now comes a very much more difficult question, and a question with which the courts have much less often to deal, about damages in such a case for breach of contract. It is said that Mr Sessel incited and procured Mr Goldman to break the contract that I have referred to, with the contents of which Mr Sessel was aware. In my opinion, Mr Sessel was fully aware of the terms of the contract made between Mr Goldsoll and Mr Goldman, and I also think that in obtaining from Mr Goldman the names of the customers, the name cards and the register, he was inducing Mr Goldman to do what he perfectly well knew Mr Goldman was not entitled to do, and therefore I think he has committed an actionable wrong to the plaintiffs subject to one question, and that is the question of damages. I must say the cases are not very clear upon the point, but in my opinion it is one of those cases in which damages are essential to the right of action by the covenantee against one who has induced his covenantor to break the contract with him. But in this case there is evidence of damage which I think sufficient, and in addition to that I think authorities which bind me — notably the case of *Exchange Telegraph Co v Gregory & Co* [1896] 1 QB 147 — shew that in such a case the damage may be inferred, that is to say, that if the breach which has been procured by the defendant has been such as must in the ordinary course of business inflict damage upon the plaintiff, then the plaintiff may succeed without proof of any particular damage which has been occasioned him.

- H Now in the present case it seems to me clear that there must have been damage done to the plaintiffs by the carrying on of this rival business of precisely the same nature in the immediate proximity of the plaintiffs' place of business. How many orders were lost to the plaintiffs, or whether all the orders obtained by the defendant Sessel were orders which were going or which ultimately would have gone to Tecla, it is impossible of course for anybody to say, but here the main object of the plaintiffs was to put an end to the rivalry of a similar establishment in their vicinity, and that object has been certainly to some extent and probably to a considerable extent defeated by the fact that the names of the customers of the rival firm and orders received in the rival firm have been communicated to a new

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rival establishment, which, I think, certainly with the connivance of Mr Goldman and in full knowledge that such connivance was a breach of Mr Goldman's covenant, has been started by the defendant Sessel. It does not seem to me necessary at the present time to decide who are the owners of the business at 14, New Bond Street, but I will say this, that I am far from satisfied that Mrs Sassel is any more than a mere nominee of the defendant Joseph Sessel.

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[141] Muhammad Kamil Awang J, in *Taha bin Ali v Haji Abdul Waheed* [1997] MLJU 263; [1997] 1 LNS 306, had this to say:

Hence, in actions of inducement of breach of contract, it has been said, as by Neville J in *Goldsoll v Goldman* [1914] 2 Ch 603 that damage generally by way of loss of profits, may be inferred (see *McGregor on Damages*, (15th Ed, p 1136 para 1785).

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[142] In *Tan Bok Seong @ Tan Leong Tian v Sin Bee Seng & Co (Port Weld) Sdn Bhd & Ors* [1995] MLJU 384; [1995] 4 BLJ 362, at p 376, I too vigorously applied the case of *Goldsoll v Goldman* in assessing loss of profit and the damages sustained by the plaintiff there.

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[143] In *Jones v Fabbi et al, Jones v Fleck et al* (1973) 37 DLR (3d) 27, at pp 33–34, Hinkson J, in relation to the tort of inducing a breach of contract, measured damages in this way:

Turning to a consideration of the damages flowing from the tort committed by the dairy, the plaintiff seeks to have the matter considered upon the basis that the damages are damages at large: *Lumley v Gye* [1853] 2 El & Bl 216, 118 ER 749; *Exchange Telegraph Co Ltd v Gregory & Co* [1896] 1 QB 147. Upon the basis of the latter decision, the plaintiff contended that it was not necessary to give proof of specific damage and that therefore it was not necessary to call the Cranbrook producers. Once the plaintiff established that he has suffered damage, counsel contended I should award an appropriate sum for the damages flowing from the wrongful act of the defendants. In the present case the plaintiff said, upon the basis of the decision in *Pratt et al v British Medical Association et al* [1919] 1 KB 244; and *Posluns v Toronto Stock Exchange and Gardiner* (1965) 46 DLR (2d) 210; [1964] 2 OR 547; affirmed 53 DLR (2d) 193; [1966] 1 OR 285; affirmed 67 DLR (2d) 165; [1968] SCR 330, that the damages should take into consideration the humiliation suffered by the plaintiff and the sum awarded must be based upon this consideration. As well, counsel for the plaintiff cited *Rookes v Barnard et al* [1964] AC 1129; *Cassel & Co Ltd v Broome et al* [1972] AC 1027; *Bahner v Marwest Hotel Co Ltd et al* (1969) 6 DLR (3d) 322; 69 WWR 462; affirmed 12 DLR (3d) 646; 75 WWR 729.

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The law on this subject appears to be aptly summarised by the author of *McGregor on Damages*, 13th Ed (1972), at p 893, s 1339, as follows:

- A** The primary protection afforded by the tort ushered in by *Lumley v Gye* [1853] 2 E & B 216, is against business losses; business men cannot complain of injured feelings alone. If however pecuniary loss is shown, then *Pratt v British Medical Association* [1919] 1 KB 244 is authority for allowing, in addition, damages for non-pecuniary loss.
- B** In the present case I have concluded that the plaintiff suffered pecuniary loss as a result of the wrongful act of the dairy. It is necessary therefore to consider whether, in addition to the damages for pecuniary loss, the plaintiff is entitled to damages for non-pecuniary loss.
- C** [144] Continuing at p 36 of the report, Hinkson J, had this to say:
Likewise, the dairy knew and intended, in committing the tort, that the plaintiff would suffer the loss of the business of the Cranbrook producers. Therefore, these are matters to be taken into consideration in assessing his damages.
- D** *McGregor on Damages*, (13th Ed), at pp 891–892, states:
The type of damage that is likely to be inferred by the court is loss of profits. This may be the profit that the plaintiff would have made on the contract the breach of which the defendant has induced. Alternatively, it may be the profit that the plaintiff is prevented from making on other contracts.
- E** In the present case it appears on the evidence that the plaintiff suffered a loss of profits on the producers' contracts, on the back-haul contract and of the profit he would have made on the Cranbrook producers' shipments. Thus I conclude these are all matters to be taken into consideration in assessing damages against the dairy.
- F**
- G** [145] For interfering with contractual rights, damages were awarded in favour of the plaintiff in the case of *GWK Ltd & Ors v Dunlop Rubber Co Ltd* (1926) 42 TLR 376, at p 377, where Lord Hewart CJ, said:
With regard to the law, it was not necessary to refer to more than two cases. In *Quinn v Leathem* (17 TLR 749; [1901] AC 495), Lord Macnaghten said, at p 510:
Speaking for myself, I have no hesitation in saying that I think the decision (ie in *Lumley v Gye*, 2 E and B, 216) was right, not on the ground of malicious intention — that was not, I think, the gist of the action — but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference.
- H**
- I** Lord Lindley, at p 535 of the same case, said:
But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact — in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified — the whole aspect of the case is

changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances ... The principle which underlies the decision (ie, in *Lumley v Gye*) reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him.

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In *National Phonograph Co, Ltd v Edison-Bell Consolidated Phonograph Co, Ltd* 24 TLR 201; [1908] 1 Ch 335 the Court of Appeal held that the principles laid down in the foregoing passages were not confined to cases of conspiracy, and applied them to a case in which, it was true, the facts were different from those in the present case, but in which, in his opinion, there was not, with reference to the application of the principles of law involved, any essential distinction in the facts.

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In his opinion the defendants had knowingly committed a violation of the ARM company's legal rights by interfering, without any justification whatever, with the contractual relations existing between them and the GWK company, and he thought that the defendants so interfered with the intention of damaging the ARM company, and that that company had been thereby damnified.

D

[146] It was held in the case of *Bents Brewery Co Ltd & Ors v Luke Hogan* [1945] 2 All ER 570, that the giving of information obtained in the course of service by an employee in reply to a questionnaire by a trade union official was a breach of contract induced by the trade union because the union's letter promising improved conditions of service as a result of the questionnaire amounted to an inducement. There was sufficient proof of potential damage to justify the granting of a declaration restraining the union from seeking the information since the improved conditions must be at the expense of the employer. Such acts were not protected by the Trade Disputes Act 1906 since nothing in the nature of a trade dispute was 'imminent or existing' within the test laid down by Lord Loreburn LC, in *Conway (Pauper) v Wade* [1909] AC 506 (HL).

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[147] At p 579 of the case of *Bents Brewery Co, Ltd & Ors v Luke Hogan*, Lynskey J, had this to say:

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If a defendant attempts to induce a servant to disclose confidential information in breach of his contract with or his duty to his employer, and the defendant is determined to continue such attempts which, if successful, will result in damage to the employer, I take the view that, even although such attempts have for the time being proved unsuccessful, the employer is entitled to a declaration that such action on the part of the defendant is wrongful. In a proper case the employer is also entitled to an injunction to restrain the defendant from continuing his efforts to obtain such information and so infringing the plaintiff's common law rights. In my view the plaintiffs are entitled to a declaration against the defendant.

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A [148] The headnote to the case of *Sanders v Parry* [1967] 1 WLR 753, carries this write-up:

B In an action for damages for breach of the implied term of the contract that the defendant would serve the plaintiff with good faith and fidelity, the defendant admitted the term but contended that he was not in breach thereof since the agreement between him and T had been initiated by T and he had merely accepted an offer made by T:

C Held, that, even if the agreement had not been initiated by him, the defendant, in accepting T's offer during the subsistence of his agreement with the plaintiff, and in not informing the plaintiff of T's offer, was acting contrary to the interests of the plaintiff and was accordingly in breach of the implied term of the agreement that he would serve the plaintiff with good faith and fidelity.

D [149] In her affidavit which was marked as exh P10 and was agreed to by the defendant, PW1 quantified the damages and losses sustained by the plaintiff in this way:

E As a result of the Defendant's acts or omissions directed towards the Plaintiff, its customers and staff, the Plaintiff suffered serious damages and losses. To appreciate the damages and losses suffered by the Plaintiff, it is necessary to appreciate the nature of the Plaintiff's business, its track record and its projected sales then.

A *The Nature of the Plaintiff's business*

F The cutting die industry in 1997 was restricted to a very small number of players. The Plaintiff was the 1st company or among the first to introduce laser cutting technology to produce rotary dies. This new technology was expected to give the Plaintiff a distinct and clear advantage over other competitors.

The cutting die being a small industry was unaffected by the recession of 1997/1998 as the demand for moulds for packaging is a necessity.

G B *Track Record of the Plaintiff*

The 4th quarter sales of 1997 was greatly affected by the detrimental acts of the Defendant in luring away the Plaintiff's customers and staff members.

H I refer to Exhibit P6 (page 25 of Bundle C) wherein I have summarised in my letter to my solicitors, the loss in sales of RM313,742 as compared to the sales in the 4th quarter of the preceding year.

I I refer to the Bundles C1, C2, C3 and C4 (referring to exhibit 'P7') and refer to the proof of sales with 8 of the Plaintiff's major customers, ie Muda Holdings Berhad, Sime Rengo (JB) Sdn Bhd, Sime Rengo Packaging (M) Sdn Bhd, KYM Industries (M) Sdn Bhd, Amcor Fibre Packaging Sdn Bhd, Harta Packaging Industries (M) Sdn Bhd, KYM Industries (M) Sdn Bhd (Johor) and Box-Pax (M) Sdn Bhd. The sales generated from these major customers represent a substantial portion of the total sales generated in a year.

The Defendant has actively lured these customers away from the Plaintiff or caused sales to be diverted to his new company whereby the Plaintiff suffered a significant drop in sales from these major customers.

I refer to Bundle C5 and to page 11 and 32 for the Profit and Loss Account for the years ended 1998 (see exhibit 'P8') and 1999 (see exhibit 'P9') respectively. It can be seen for the year 1998, the devastating effect of the Defendant's action is translated to a turnover of RM3,448,507 compared to a turnover of RM3,705,711. Similarly in 1999, the turnover was almost stagnant with a total turnover of RM3,448,079.

C Forecast Turnover of the Plaintiff

The Plaintiff was expected to have a sales turnover of minimum RM6 million in 1998 and a minimum RM8 million in 1999. This is predicated on the following factors:

- (a) the introduction of new technology i.e laser cutting technology for rotary dies not introduced by other competitors. The Plaintiff was committed to invest RM1.3 million for another laser machine and RM600,000 for 3 auto benders;
- (b) competitive pricing which allowed for a good profit margin; and
- (c) operating expenses were set for a target sales of RM6 million.

However, the Defendant caused and or lured customers away from the Plaintiff by:

- (a) setting up a rival company while in the employment of the Plaintiff with the same laser technology; and
- (b) undercutting prices offered by the Plaintiff which in effect resulted in the Plaintiff reducing its prices by almost half. The undercutting by the Defendant's company shattered the confidence of the Plaintiff's customers in the Plaintiff's pricing. The net effect is that, with operating expenses already set for a target of sales of RM6 million, profits were significantly reduced as the operating expenses became heavy expenditure outlay.

D Expected Profits

In 1996, the Plaintiff's profits before taxation was RM119,604 and in 1997, the Plaintiff had stagnated profits before taxation of RM125,235.

With the expected sales of a minimum RM6 million and with diminishing or marginal operational returns, the expected pre-tax profits was RM500,000 for 1997 and RM1.0 million for 1998 and RM1.5 million for 1999.

However, what was in reality were pre-tax profits of RM125,235 for 1997, RM194,264 for 1998 and losses of RM415,279 for 1999 (for a cumulative loss of RM95,780).

It can be noted from the statement of accounts lodged with the Registrar of Companies that the Defendant's company, Alpha Laser RotaMould Sdn Bhd sales' turnover of RM1,350,843 for 1998 and RM1,569,529 for 1999 (based on undercut prices) are wholly attributable to the sales diverted or lured away from the Plaintiff as this Company was set up by the Defendant acting in collusion or upon the instigation of Yap Tian Tion who himself is a director of another die cutting mould company, namely Sharp Die Cutting Mould Sdn

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- A** Bhd. The purpose of setting up Alpha Laser RotaMould Sdn Bhd was to run the Plaintiff to the ground. Sharp Die Cutting Mould Sdn Bhd generated pre-tax profits of RM1,385,164 in 1999 and RM1,425,016 in the year 2000. The damages and losses that the Plaintiff is seeking is RM2,095,780.
- B** [150] Under cross-examination, PW1 was asked about her affidavit in exh P10. The exchanges went like this:
- P10 — witness affidavit shown to witness (see page 4 to page 5).
- C** Put: Your forecast turn over and expected profit could not be achieved because of the recession in end of 1997, 1998 and 1999. Do you agree?
- A: I disagree. Talking about the sale forecasts of RM6 million and RM8 million is very possible if you were to take the defendant's sales that I mentioned earlier. For year 1998 the defendant achieved the sales figure of RM1,350,843.00 and in 1998 RM1,569,529.00 and if you multiply that by two that would come to RM3 million because the sales achieved by the defendant were based on undercut prices and these undercut prices as low as half of even lower of what plaintiff used to fetch.
- D** To the question of the recession we are serving the packaging industry whereby packaging is a necessity be it recession or non-recession they have to use it. And at the time 1997, 1998 1999 we still have many multi-national companies in Malaysia especially from the electronic industry require the packaging for their export.
- E** This is why the plaintiff have decided to go to USA to invest further in new technology of laser cut machine as well as committed to purchase 3 auto-benders machines in anticipation to cope with the increase in sales turnover with good profit margins.
- F** Put: That your allegation of defendant undercutting price is merely your opinion. Do you agree with me?
- A: I disagree. Defendant is so well versed of our pricing whereby when he set up on his own he quoted such a low price at half or even less than half that I would have customers speaking to me in a dissatisfaction tone, sarcastic way that 'Oh, you Miss Tan used to have made big profits from that your probably have so much money that you would have a big building now' and that I have to defend by explaining to customers that 'Yes, it is true we have big profit margin in order to be viable and feasible for us to invest in million of dollars with a very little market share available despite of our big profit margin our customers still find our pricing affordable as it is a very minor costs to their manufacturing costs in total. That is why I have never had any trouble fetching good pricing until the defendant set up and enticed our staff and set up his own.
- H**
- I** Q: Is it true you are claiming damages because you fear rivalry from the defendant?
- A: Disagree. He is a newcomer, new rivalry, who does not have access to our pricing, to our customers machines and formulas who does not have skilled workers and the establishment of relationship and that we have with the customers and I am sure that they need at least 3 years to catch up with us as what we had gone through the learning curve.

I repeat our product is a very specialised and niche product that our customers were reluctant to deal with newcomers as they can't afford to deal with trial and error.

A

[151] PW1 was cross-examined further in regard to the quantification of the damages and losses sustained by the plaintiff. The notes of evidence showed the following exchanges:

B

Refer to bundle C5 at page 20 and page 41 and witness is asked this question:

Q: Can you tell the court what way the plaintiff's turn over for 1997, 1998 and 1999 and whether the company made any profit or loss?

C

A: In 1997 the sales turnover was RM3,709.77 million with a profit of RM125,235.00. In 1998 the sales turnover was RM3,448.07 million with a profit of RM194,264.00. In 1999 the sales turnover was RM3,448.09 million with a loss of RM415,279.00.

D

Q: Does a high turnover means profit for the company?

A: Yes and no. Yes, because if the high turnover with the high anticipated profit that plaintiff used to enjoy as high as 30 to 40% net profit of the sales turnover but if the high sales turnover has little profit margin then it would not have as much profit compared to the high profit margin and high sales turnover.

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In my statement I have mentioned re-anticipated year 1998 sales to be RM6 million and year 1999 to have sales turnover of RM8 million but it was impossible due to the defendant's ill intention to cripple the plaintiff by enticing all ranks of staff to work with him which caused margin disruption to manufacturing, delivering and administration. What was even worse was that the defendant has bad mouthed the plaintiff to the customers which shattered the confidence of the customers of buying from us for he had told our customers that the plaintiff's staff have left and has joined him and that there is no more staff with plaintiff. And that is how the defendant could capture in his first year of operation 1998 having RM1,358.43 of sales turnover. In year 1999 having RM1,695.29 sales over which is rarely possible from a new rival, a newcomer to achieve.

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My Lord, in 1998 and 1999 that sales figures shown in the defendant's account is actually the undercut prices. If we take the 1998 and 1999 defendant's sales turnover which comes out to be average RM3 million a year under normal pricing. If we add this average of RM3 million sales turnover achieved by the defendant add to plaintiff's actual sales turnover of 1998 and 1999 average out to be RM3.5 million per year. This RM3.5 million is the undercutting price and it should be RM7 million at the normal pricing. Anyway if we add RM7 million of the normal pricing plus the defendant's normal pricing of RM3 million it adds up to a total of RM10 million and our forecast is very accurate. And that forecasted sales turnover with the net profit margin of 30% to 40% that would result to be RM3 million to RM4 million profit for the plaintiff if the defendant had not set up a rival company while in the employment of the plaintiff. Undercutting prices and enticing staff almost half of the staff turnover to join

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A him and damaging the plaintiff's reputation due to the defendant's ill intention and wanting to cripple the plaintiff and plaintiff had almost closed down its business in 1999.

B [152] The defendant would certainly be liable in damages for breach of the duty of confidence arising out of the breach of contract.

C [153] The available evidence showed that the plaintiff's trade secrets have been utilised by the defendant to the detriment of the plaintiff. These trade secrets possess commercial value. It would certainly be very difficult to erase from the memory of the defendant the trade secrets and the client lists of the plaintiff that had been passed to the defendant. There would always be this notion of 'sub-conscious use' similar to that of 'sub-conscious copying' recognised in the copyright law (*Seager v Copydex Ltd* [1967] 1 WLR 923 (CA)). Whichever way you see it, the plaintiff will be the loser.

D [154] In cases of trade secrets and confidential information, damages will not be an adequate remedy because it is always difficult to quantify them. And if damages can be easily quantified and if the plaintiff can show that there exists a real risk of future injury, the plaintiff would be granted a permanent injunction. But, sad to say, the court order dated 6 October 1997 was not obeyed by the defendant. He thumbed at this court order with impunity.

E [155] For the reasons adumbrated above, I made the following orders.

F [156] I allow the plaintiff's claim with costs and that costs to be taxed unless agreed by the parties. I too order the defendant to pay the plaintiff the sum of RM2,095,780 as damages and losses with interest at 8%pa from December 2000 to the date of this judgment.

G [157] By way of prayer 16(f) of the statement of claim, I grant the stay pending appeal to the Court of Appeal.

H *Plaintiff's claim allowed with costs.*

Reported by Kanesh Sundrum

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