SeaCAD Technologies Pte Ltd v Tan Siew Meng Aaron and Another [2007] SGHC 192

Case Number : Suit 250/2006

Decision Date : 09 November 2007

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Godwin Campos (Godwin Campos & Co) for the plaintiff; Peter Low (Peter Low Partnership) for the defendants

Parties : SeaCAD Technologies Pte Ltd — Tan Siew Meng Aaron; Engineering Computer Services (S) Pte Ltd

Tort – Confidence – Misappropriation of confidential information – Whether employee misappropriated employer's confidential information before resignation

Contract – Breach – Whether former employee breached non-competition clause in employment contract

Contract – Illegality and public policy – Restraint of trade – Whether non-competition clause is void for being in wrongful restraint of trade

9 November 2007 Judgment reserved.

Kan Ting Chiu J:

1 The plaintiff company, Seacad Technologies Pte Ltd, deals in computer hardware, computer software and accessories. The first defendant, Aaron Tan Siew Meng, was an employee of the plaintiff. The second defendant, Engineering Computer Services (S) Pte Ltd, is the current employer of the first defendant.

2 The first defendant was employed by the plaintiff as an account manager. The letter of appointment dated 23 February 2002 set out the terms of employment. Clause 8 thereof stipulated that:

> You shall not, during the continuance of the Contract of Employment, or after its termination disclose, divulge, impart or reveal to any person or company any of the trade secrets or confidential operations, processes, dealings or any information concerning the organization, business, finance, transactions or affairs of the Company or any of its subsidiaries which may come to your knowledge during your employment thereunder and shall not use or attempt to use any such information in any manner which may injure or cause loss either directly or indirectly to the Company or its business or may be likely to do so. This restriction shall continue to apply after the termination of this Contract of Employment without being limited to a point of time but shall cease to apply to information or knowledge which may come into the public domain.

3 There was an Invention, Non-Competition and Confidentiality Agreement attached to the letter of appointment which the first defendant also signed. Clause 6(a) of this agreement states that:

> As long as I am employed by the Company and for a period of one year after termination of such employment for any reason, I shall not, on my own behalf or as owner, manager, stockholder, consultant, director, officer, in any business or activity which is in direct or indirect competition

with the Company, including competitors such as Autodesk, Parametric Technology, Structural Dynamics Research Corporation, Hewlett Packard, and Intergraph, and their dealers or distributors, which intends to compete directly or indirectly with the Corporation or which otherwise provides any products or services similar to any products or services provided or proposed to be offered by the Company at the time of such termination in the Republic of Singapore or Malaysia.

(This clause shall be referred to as the non-competition clause.)

4 The first defendant's employment with the plaintiff had started well. His performance was good and he became a significant member of the plaintiff's management. Over time, he became disillusioned, and tendered his resignation on 11 November 2005, only to ask to retract it three days later, on 14 November 2005. The plaintiff agreed to his request, but the first defendant, having retracted the first letter of resignation, tendered another letter of resignation again on 9 January 2006, wherein he gave one month's notice of resignation, this time for good. It transpired that he had in the intervening period accepted an offer of employment from the second defendant, Engineering Computer Services (S) Pte Ltd. He joined the second defendant with effect from 13 January 2006 as a Regional Channel Manager, an important position in the development of the second defendant's business. It is common ground that the plaintiff and the second defendant are business competitors.

5 The plaintiff's Statement of Claim was not particularly well structured. In para 6, the plaintiff claimed that the first defendant had breached the express and implied terms of the employment because he:

> … had in November and/or December 2005 prior to the termination of his employment downloaded and/or made copies of the Plaintiffs' confidential information including business models, financial proposals from the Plaintiffs' computerised database and had sometime thereafter without the consent of the Plaintiffs either intended to disclose or had disclosed and/or provided copies of the said information to the 2nd Defendant.

6 In para 7, the plaintiff alleged that the second defendant:

> should have known at all material times and in all the circumstances, that the material provided by the 1st Defendant including the customer list was information confidential to and belonging to the Plaintiffs and had been unlawfully procured by the 1st Defendant. The 2nd Defendants are competitors of the Plaintiffs in the same business and they service the same industries.

7 In para 9, the plaintiff claimed that:

> The 1st and 2nd Defendants have wrongfully made use of the Plaintiffs' abovementioned confidential information for the purposes of the 2nd Defendant's business and have on the basis of the confidential information and said customer list, made approaches to some of the Plaintiffs' customers and persuaded the said customers to give their business to the 2nd Defendants instead of the Plaintiffs. The Plaintiffs are unable to give further particulars of the Defendants' breaches until after discovery herein.

The plaintiff subsequently named the customers it had referred to simply as "Vibrapower" and "Metalplas".

8 In para 12, the plaintiff pleaded that the first defendant was in breach of the non-competition

clause when it joined the second defendant.

9 In para 16, it claimed that:

> In further breach of the Employment Contract, the 1st Defendant has wrongfully endeavoured directly or indirectly to induce a customer or customers of the Plaintiffs to cease from dealing with the Plaintiffs and the 1st Defendant has persuaded or tried to persuade such customer or customers to deal with the 2nd Defendant instead. The Plaintiffs are unable to give further particulars of the 1st Defendant's breaches until after discovery herein.

10 The presentation of the plaintiff's case left much to be desired. There was little evidence adduced to support its case of the misappropriation and misuse of its confidential information through the downloading from the plaintiff's computer database.

11 The whole of the plaintiff's case rested on the evidence of two witnesses. The principal witness was its managing director, Conrad Alvin Montgomery ("Montgomery"). After the first defendant left the plaintiff, Montgomery sent a hard disk (inferentially from the workstation used by the first defendant, although that was not made clear) to IBAS Singapore Pte Ltd ("IBAS"), a company which undertakes forensic examination of hard disks.

12 The other witness was Kelvin Sim Chor Leng ("Sim"), a technician of IBAS. Sim did not profess to be a computer forensic expert[note: 1] (and the plaintiff did not present him as an expert witness). Sim holds a diploma in computer technology and worked for IBAS for a year as a technician where he received on-the-job training in data recovery and computer forensic operations. Sim used a proprietary software known as Encase to examine the hard disk.

13 By using the Encase software and some key words supplied by Montgomery, Sim identified ten files and folders which had been deleted from the hard disk.[note: 2] However, he did not examine the contents of those files and folders because IBAS's instructions were to search for the deleted files, but the instructions did not extend to reading or checking the contents of the deleted files.[note: 3]

14 Beside Sim, no one from IBAS or the suppliers of the Encase software came to court to state whether the deleted files and folders had been copied before they were deleted.

15 After Montgomery and Sim had given their evidence, the glossary to the operation manual of the Encase software was produced, but it really did not bring any clarity on the identification of the deleted files and its significance.

Evaluation of the claims

The claims under paras 6 and 7 of the Statement of Claim

16 The plaintiff may truly believe that the first defendant had misappropriated the plaintiff's confidential information stored in the plaintiff's computer database, but it had failed to prepare and present its case properly.

17 The evidence presented in court was the unproven conclusions of Montgomery based on IBAS's report on the examination of the hard disk. The report from IBAS was the findings Sim had obtained from the examination of the hard disk with the Encase software. Sim did not read the deleted files and folders and basically said no more than he carried out the examination, identified the deleted files, and

presented those findings to the plaintiff. It is hard to understand that the plaintiff thought that it can prove its case without having someone, whether from IBAS, the plaintiff, or elsewhere, read the files and ascertain whether the contents had been copied before the files were deleted.

18 Montgomery did present some views on this, but as I have stated, he did not read the deleted files, and he neither claimed nor proved that he had the knowledge to attest that any parts of the deleted files were copied. He deposed in paras 25 and 26 of his affidavit of evidence-in-chief:

> 25. In breach of the above express and implied provisions of his employment Contract, the 1st Defendant had in November and/or December 2005 prior to the termination of his employment downloaded and/or made copies of the Plaintiffs' confidential information including business models, financial proposals from the Plaintiffs' computerised database and had sometime thereafter without the consent of the Plaintiffs either intended to disclose or had disclosed and/or provided copies of the said information to the 2nd Defendants.
>
> 26. Shortly after the 1st Defendant's resignation on 9 January 2006, it became apparent to the Plaintiffs that their confidential pricing, positioning, customer lists as well as prospect lists were in the hands of their competitor, namely the 2nd Defendants. This was evident due to a number of reasons including the sudden appearance of the 2nd Defendants and their resellers in the Plaintiffs' existing customer accounts, last-minute deep price undercutting in competitive situations (even as far back as December 2005) resulting in abrupt changes in customer purchasing decisions, as well as an aggressive and sudden shift in marketplace approach and the 2nd Defendants' overall positioning. This is further corroborated by the forensic recovery of information and files conducted by IBAS that the 1st Defendant was proven to have copied through electronic fingerprinting.

19 It will be noted that Montgomery did not refer to any basis to support his allegation that the first defendant had downloaded or made copies of the information. He acknowledged that he was not as technically conversant in the forensic examination of hard disks and had drawn his conclusions that the first defendant had made copies of files in the hard disk from the report put up by IBAS.[note: 4] He alluded to the so-called corroboration from the IBAS report, which did not go beyond finding that ten files and folders have been deleted.

20 During the hearing, Montgomery had the opportunity to explain his allegation of downloading and copying. With regard to one instance of alleged copying, his evidence was:

Witness: … as you can see here on this page, er, it's also the same date at which it was accessed by and downloaded by Mr Tan, the 1st defendant, on the 28th of November at 1.17pm.

Court: Downloaded into what?

Witness: Onto his hard drive --- accessed by his hard drive from the server.

Court: Yes, so it's not just accessed in the --- is it accessed by the way of just reading it or he actually retained it. And that he --- he downloaded it into a --- into a form that can be transferred?

Witness: Uh, yes.

…

Court: Now can you please explain? When you say downloaded, what does that mean?

Witness: Er, that the file actually resides, sits at, er, the server---

Court: Right.

Witness: --- the company's server, this large machine at---and---and, er, his machine is plugged into a network of computers that accesses that server.

Court: Okay.

Witness: That file actually sits on the server, er, and it is accessed and---and I'll show you in just a second where it's accessed, er, by him and it---at that point---at the point it's being accessed, it can be saved to the hard disk---

Court: Yes.

Witness: ---it can be emailed out---

Court: Yes.

Witness: ---it can be compressed and removed on an external device, anything.

…

Court: Would this indicate more than his reading that submission?

Witness: Er, that---that in it's---yah.

Court: I mean, would this be the---would this record be there if he had just accessed to read the submission, done nothing more than to read.

Witness: Er, yah, it---it may, yes.

Court: It may be just to read?

Witness: It may be.

Court: It may be nothing more than to read?

Witness: *It may be nothing more than to read and---yes*.[note: 5]

(Emphasis added)

and on another file, his evidence went as follows:

Court: … Does it show that he has read it or he has done more than reading it?

Witness: It would indicate that he has---it would not indicate that he has indeed definitely done more than that.

Court: It would not indicate---

Wintess: No---

Court: ---that he has done more than that. Is that what you say? I'm just writing down the---is that what you have said?

Witness: Er, yes.

Court: *Not necessarily more than just reading*?

Witness: *Not necessarily*.[note: 6]

(Emphasis added)

21 As for Sim, the following exchange revealed the scope and depth of his investigations:

Court: … For these 10 deleted files and folders, were you able to get in---recover the contents of all 10, some of the 10, none of the 10?

Witness: Some of the 10.

Court: You were able to retrieve the—to get to the contents of some of those files?

Witness: Yes.

Court: Hold on. Now, which are they?

Witness: Which are they?

Court: Yes. I mean---

Witness: I can't---I can't---

Court: ---you say you've done it and then you say some but not all, then what is it that you got?

Witness: I can't identify which are they, Sir.

Court: Did you tell your client?

Witness: This---because, er, for us, once we recover, we will randomly check. We will not check all and we will hand it over to the client to do a thorough check from there because---

Court: Sorry, sorry, you randomly check what?

Witness: The files that we have, er, recovered.

Court: All right. These are recovered, that means you have the contents? When the term "recovered" means just identification or you got to the contents?

Witness: Recover doesn't mean that you can have the---all the contents. Some recovered can be corrupted.

Court: All right.

Witness: Yah, because of certain parts of the data has been overwrite and is not complete.

Court: All right. So when you say you report to the client, then what is it that you report to the client about the contents, about the contents?

Witness: About the files that---file---*the files that we have found. We will hand over to the client. The client there will check by themselves*.[note: 7]

(Emphasis added)

22 In answer to this claim, the first defendant denied that he had taken any confidential information of the plaintiff when he left. His current employer also asserted that the first defendant had not disclosed to it any of the plaintiff's confidential information.

23 I find that the plaintiff had not proved that the first defendant had downloaded and/or made copies of the plaintiff's confidential information including business models, financial proposals from the plaintiff's computer database.

The claim under para 12 of the Statement of Claim

24 The second issue of the claim against the first defendant was whether he had breached the non-competition clause, which I shall set out again:

> As long as I am employed by the Company and for a period of one year after termination of such employment for any reason, I shall not, on my own behalf or as owner, manager, stockholder, consultant, director, officer, [**missing word/s**] in any business or activity which is in direct or indirect competition with the Company, including competitors such as Autodesk, Parametric Technology, Structural Dynamics Research Corporation, Hewlett Packard, and Intergraph, and their dealers or distributors, which intends to compete directly or indirectly with the Corporation or which otherwise provides any products or services similar to any products or services provided or proposed to be offered by the Company at the time of such termination in the Republic of Singapore or Malaysia.

25 It is apparent from a reading of this clause that some word or words are missing at the place indicated above. The missing word or words could have imposed restraints of differing severity on the first defendant. They could, for example, prohibit the first defendant from working for, doing business with or investing in the plaintiff's competitors. When the word or words are missing, does their absence render the non-competition clause ineffectual on the ground that it was lacking in certainty? This is a question which must be examined against the background of the facts.

26 There is no doubt that both parties understood it to impose some form of restraint. When the first defendant was asked in cross-examination how he understood the clause when he signed the Invention, Non-Competition and Confidentiality Agreement, he said:

> Basically in summary is, er, *restricting me to join any competitor*, competitor companies, er, to solicit or take any information that will cause any loss to the plaintiff --- to --- to Seacad Technology.[note: 8]
>
> (Emphasis added)

27 On the plaintiff's part, para 12 of the Statement of Claim which alleges that:

> In breach of the Employment Contract, the 1st Defendant has wrongfully been, and is still *engaged in the employ of the 2nd Defendant* which is engaging in business identical to and in direct competition with the Plaintiffs.
>
> (Emphasis added)

shows that the plaintiff gave the same effect to the clause. There was no uncertainty between themselves on the form of the restraint, although it was not clearly spelt out in the clause.

28 It should be pointed out that uncertainty was not pleaded in the defence. The closing submissions of the defendants accepted that:

> The 1st Defendant had agreed under the Agreement that he would not compete with the Plaintiffs for a period of one year after termination of his employment pursuant to [the non-competition clause].[note: 9]

but went on to state that:

> Be that as it may, [the non-competition clause] should be void based on the contra proferentum rule of construction as the operative word in the clause is omitted.[note: 10]

29 The facts present an interesting situation. On the one hand, the non-competition clause is on its face uncertain. On the other hand, the first defendant and the plaintiff who agreed to the clause were unaware of or untroubled by the missing word/s. They understood the clause to prohibit the first defendant from joining a competitor of the plaintiff during the effective period.

30 If the first defendant had protested that he had not agreed not to join a competitor during the effective period, it is necessary to apply the rules for the construction of contracts to determine the proper effect of the clause. But when the first defendant confirms that he understood at the time he signed the agreement that the clause prohibited him from joining a competitor, and the plaintiff shares his understanding, should the contra proferentum rule intervene and displace the common understanding?

31 Justice is not served by releasing the first defendant from the common understanding as the poorly-drafted clause was not intended to vary the common understanding. The situation is analogous to an estoppel by convention, and the clause should be construed and applied consistently with the common understanding of the parties.

32 The first defendant also challenged the validity of the clause on another ground, that it is void for being in wrongful restraint of trade. The law on wrongful restraint of trade against former employees is quite well settled. As stated in *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 3 SLR 333 at [21]:

> It is well-known that an employer who wishes to enforce a restraint of trade provision in a contract with an ex-employee must show that it was intended to protect the employer's legitimate interests and that it was reasonable in all the circumstances. In ascertaining the validity of such a clause, the first step is to determine what those interests are and the second is to consider whether the clause as drafted is no wider than is necessary to protect such

interests. The court will not give effect to a clause if its main function is to inhibit competition in business.

33 The undisputed facts are that the first defendant was a significant member of the management of the plaintiff. He was an account manager, and also general manager at one time. He had access to the plaintiff's confidential information that the plaintiff is justified in seeking to protect. The post-employment period of restraint of one year cannot be said to be excessive, and he had not argued that it was excessive. The main force of his submissions was that the clause constituted wrongful restraint of trade when it purported to extend to Malaysia because the plaintiff had not asserted that it had customers in Malaysia.[note: 11]

34 The plaintiff did not respond to this argument in its submissions. In these circumstances, the restraint in respect of Malaysia was unjustified and invalid and is to be severed from the non-competition clause. But even with the excision, the first defendant had breached cl 6(a) when he joined the second defendant, a competitor of the plaintiff in Singapore, within a year after leaving the plaintiff.

The claim under para 16 of the Statement of Claim

35 The plaintiff alleged that as a result of the defendants' misdeeds, it lost the business of Vibrapower and Metalplas.

36 With regard to Vibrapower, Montgomery conceded under cross-examination that the plaintiff had secured the business of Vibrapower on that occasion,[note: 12] thereby effectively withdrawing that part of its claim.

37 With regard to alleged loss of the business of Metalplas, the defendants adduced evidence that the business did not go to the second defendant, but had gone to a company named GiM Solutions Pte Ltd ("GS"). This was corroborated by the evidence of a director of GS. When counsel for the plaintiff cross-examined the representative of GS, he did not dispute that the business was secured by GS. He did not put to the representative that GS had secured the business on behalf of the second defendant, or that it secured the business with the assistance of the defendants. In the circumstances, the plaintiff had admitted the defence to this part of the claim.

38 The plaintiff had complained of the loss of business from a third company. In his evidence-in-chief, Montgomery named a third previously-undisclosed company, Singapore Epson, which business it had lost. Montgomery alleged that the plaintiff lost the business of Singapore Epson to the second defendant after a visit from the first defendant,[note: 13] an allegation the first defendant denied.[note: 14] The source of the information on the visit was not disclosed in Montgomery's affidavit. In cross-examination, Montgomery revealed that the information came from the plaintiff's account managers and engineer. No account manager or engineer or any representative from Singapore Epson was called to give evidence. This last allegation, based entirely on inadmissible hearsay evidence, was therefore unproven.

Conclusion

39 The plaintiff failed to prove its claim that the first defendant had downloaded or made copies of its confidential information. It also failed to prove its claim that the first defendant and the second defendant had wrongfully made use of its confidential information to divert business away from the plaintiff. These claims are dismissed with costs.

40 With regard to the claim against the first defendant for breaching the non-competition clause, the plaintiff has proved its case against him. For this claim, the first defendant shall pay the plaintiff damages which are to be assessed by the Registrar, and costs.

[note: 1] Notes of Evidence page 113

[note: 2] Notes of Evidence page 96

[note: 3] Notes of Evidence pages 101, 104

[note: 4] Notes of Evidence pages 61, 153

[note: 5]Notes of Evidence pages 55-57

[note: 6] Notes of Evidence page 60

[note: 7] Notes of Evidence pages 100-101

[note: 8] Notes of Evidence page 211

[note: 9] 1st and 2nd Defendants' Closing Submissions para 61

[note: 10]1st and 2nd Defendants' Closing Submissions para 68

[note: 11]1st and 2nd Defendants' Closing Submissions para 79

[note: 12]Notes of Evidence page 47

[note: 13]Affidavit of evidence-in-chief of Conrad Alvin Montgomery para 54

[note: 14]Notes of Evidence page 290

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