Fish & Co Restaurants Pte Ltd v MFM Restaurants Pte Ltd and Another [2009] SGHC 270

Case Number : Suit 670/2005, RA 152/2008, 153/2008

Decision Date : 26 November 2009

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Tony Yeo and Rosalynne Asmali (Drew & Napier LLC) for the plaintiffs; Daniel John and Marc Wang (Goodwins Law Corporation) for the defendants

Parties : Fish & Co Restaurants Pte Ltd — MFM Restaurants Pte Ltd; Low Theng Yong Dickson

Damages – Assessment

Damages – Remoteness

Damages – Rules in awarding – Ascertainment difficult or impossible

26 November 2009 Judgment reserved.

Belinda Ang Saw Ean J:

1 The appeal and cross-appeal in this case arose from the Assistant Registrar's assessment of damages in relation to a consent judgment dated 27 November 2006. RA 152/2008 is the plaintiff's appeal which is against part of the decision of the Assistant Registrar ("AR") delivered on 28 January 2008 and 4 April 2008. RA 153/2008 is the defendants' cross-appeal against the whole of the AR's decision.

Background

2 The plaintiff, Fish & Co Restaurants Pte Ltd (formerly know as O.B. Singapore Operations Pte Ltd), is the owner of a chain of seafood restaurants called "Fish & Co". The first defendant, MFM Restaurants Pte Ltd ("MFM") is the owner of seafood restaurants in Singapore called "The Manhattan Fish Market". The dispute relates to the first MFM restaurant which was opened on 20 May 2005 at Plaza Singapura. The second defendant, Low Theng Yong Dickson ("Dickson"), was a former employee of the plaintiff. Until his resignation, Dickson was the plaintiff's operations manager. On 30 March 2005, the plaintiff commenced Suit No 257 of 2004 ("Suit 257") against Dickson for taking, using and divulging confidential information represented by, *inter alia*, the plaintiff's guide to secret recipes, cooking tips and methods including kitchen operations unique to Fish & Co in an apparent attempt to use the confidential information for the establishment of "The Manhattan Fish Market" restaurants in Malaysia. In breach of the non-competition obligation in his contract of employment, Dickson set up and was actively running "The Manhattan Fish Market" chain of restaurants in Malaysia.

3 Suit 257 was eventually discontinued following a settlement of the dispute between the plaintiff and Dickson. Notably, MFM and three Malaysian companies agreed to be parties to the settlement even though they were not named as defendants in Suit 257. The terms of the settlement were recorded in a Settlement Deed dated 27 April 2005 ("the Deed"). Relevant to the present case are four specific undertakings given by the defendants under cl 3 of the Deed:

(i) [The defendants] undertake not to use, in the Manhattan Fish Market Restaurants around the world, within a period of four (4) months from the date of this Deed, serving pans identical and/or similar to those serving pans used in Fish & Co Restaurants.

(ii) [The defendants] undertake not to use any slogans and/or jingles identical to or confusingly similar to that used by [Fish & Co] in any way whatsoever, including but not limited to the use of such slogans/or jingles in their menus, websites, promotional materials and/or any other materials and/or documents in relation to the Manhattan Fish Market Restaurants.

…

(iv) [The defendants] undertake not to use the words and/or phrases more particularly described in Schedule 3, in any combination whatsoever, whether on their own and/or in combination with any word(s) and/or phrase(s), in their menus, websites, promotional materials and/or any other materials and/or documents including but not limited to those used for marketing and/or franchising in relation to the Manhattan Fish Market Restaurants. PROVIDED ALWAYS that [the plaintiff] shall not have exclusive rights to use the individual words "garlic", "lemon", "butter and/or "sauce".

(v) [The defendants] undertake, within a period of three (3) months from this Deed, to use a completely different garlic lemon butter sauce, sauce used in the dish known as "Garlic Lemon Mussels", creamy garlic lemon sauce, garlic lemon sauce, garlic butter sauce and lemon butter sauce (collectively known as "the MFM Sauces") in any or all their dishes in the Manhattan Fish Market Restaurants, or in any manner whatsoever, from the Garlic Lemon Butter Sauce and Lemon Butter Sauce used in Fish & Co Restaurants ("the O.B. Sauces"). The difference between the MFM Sauces and the O.B. Sauces shall be in relation to the taste and ingredients used.

4 Some five months after the Deed was signed, the plaintiff on 20 September 2005 filed Suit 670 of 2005 ("Suit 670") against MFM as first defendant and Dickson as second defendant for breach of cl 3 of the Deed. The plaintiff alleged that its sales continued to be affected by MFM's deliberate and calculated breach of the cl 3 undertakings. On the first day of trial, 27 November 2006, MFM and Dickson consented to (a) judgment on liability; (b) an injunction order similar to the undertakings in cl 3 (i),(ii),(iv) & (v) of the Deed; and (c) an order for damages to be assessed.

AR's decision

5 At the assessment stage, the plaintiff put forward two heads of claim for damages:

(a) Loss of profits during the breach period from August 2005 to January 2007 ("breach period"); and

(b) Loss of profits from February 2007 onwards ("post breach loss").

6 The AR awarded the plaintiff damages totalling $72,688 for both heads of damages together with interest thereon at the rate of 3% per annum from the date of commencement of Suit 670 (*ie*, 20 September 2005) to the date of judgment (*ie*, 4 April 2008) and costs on an indemnity basis.

7 In arriving at his decision, the AR rejected the report of the defendant's expert, Mr Sajjad

Ahmad Akhtar, a chartered accountant. The AR found his reasoning "simplistic" and his method of comparison of the performance of the outlet to be "faulty". Explaining his criticisms of the report, the AR said:

> For example, in the table generated by Mr Akhtar in page 43 of his Affidavit of Evidence-in-Chief, he sought to chart performance by simply charting whether there was a rise in sales or a fall in sales. Such a method, in my view, fails to take into account quantitatively the amount of rise or the fall. I also found his method of comparison of performance of the outlet by reference to month-on-month performance, *even during the breach period*, faulty. As a basis for comparison, it appears obvious to me that analysis using data from the pre-breach period would yield a more accurate result.

8 In addition, the AR found Mr Akhtar to be not an objective expert as he had in his testimony strayed into areas outside his field of expertise. The AR observed:

> Lastly, I regret to add that the Defendant's expert appears to have gone [out] on a limb of his own in passing judgments on areas which, by his own admission, he was not an expert on. By this, I am referring to his opinions on the effects of the use of serving pans, slogans, etc on customers.

9 The plaintiff's expert, Mr Tony Samuel, is a forensic accountant from Australia. Mr Samuel had worked out two alternative bases - Method A and Method B – to ascertain the loss suffered by the plaintiff as a result of the defendants' breach of the undertakings (see [12]-[13] below). Whilst agreeing with the plaintiff that Method A was the correct method to ascertain the loss of profits, the AR nonetheless changed the original parameters of Method A. The AR held that the Glass House outlet was the only affected restaurant and that the restaurants unaffected by the breach to which a comparison should be made with the Glass House outlet were the Fish & Co outlets located at Bugis Junction, Centrepoint and Suntec City. For convenience, I shall in this judgment refer to the new parameters as "the AR's parameters". Based on Method A as modified by the AR's parameters, the plaintiff was awarded damages based on a 60% loss in business profits for the breach period from August 2005 to January 2007; and a further 12 months of loss of profits being post breach damages from February 2007. The plaintiff had termed the post breach damages as "springboard losses".

The contentions

The plaintiff's arguments

10 Counsel for the plaintiff, Mr Tony Yeo, submits that the AR's assessment was too low. The proportion of loss during the breach period – August 2005 to January 2007 – which the AR found to be attributable to the defendants' breach, was determined at a figure of 60% based on Method A as modified by the AR's parameters. In addition, the AR assessed the effect of the breach as likely to last for another 12 months from February 2007, and using the same percentage figure of 60%, the AR awarded damages for post breach loss. In assessing the plaintiff's loss of profits, the proper approach would be to use Mr Samuel's Method A based on its original parameters (not the AR's parameters) and then discount the resulting total profits by a percentage to reflect various legitimate imponderables not attributable to the breach. Mr Yeo contends that the discount or allowance should not have been as much as 40% used by the AR. A fair and reasonable discount should be no more than 20%. In other words, the proportion of the plaintiff's loss of profits attributable to the defendants' breach should be at least 80%. As for post breach loss of profit, the plaintiff seeks the same proportion of 80% over a period of 18-24 months.

11 Mr Yeo made a number of specific points in support of a higher award. First, in breaching the four undertakings in the Deed, the defendants had caused "confusion" and that "resulted in the plaintiff's customers going to the MFM outlet because the customers thought they were going to the plaintiff's restaurant". The confusion arose from the defendants exploiting the Fish & Co concept which includes, *inter alia*, the use of slogans and/or jingles; use of selected phrases to describe the plaintiff's sauces; use of either black or stainless steel pans to serve its seafood dishes; and the use of particular recipes for its sauces. Second, the intention of the undertakings in cl 3 (i),(ii),(iv) & (v) was to create some differentiation between the Fish & Co restaurants and those operated by MFM. Third, during the period of the breach, the defendants gained an unfair "leg up" which allowed them to get into the seafood restaurant business from a more advantageous position. For instance, within three months (May 2005 to August 2005) of the opening to the Plaza Singapura outlet, MFM's sales reached the average level of the Fish & Co restaurants. Fourth, the confusion in the public's mind, so the argument continues, is a natural consequence of the blatant breach of the four undertakings. In *Draper v Trist and Tristbestos Brake Linings Ltd* [1939] 56 RPC 429 ("*Draper v Trist*"), the plaintiff there was permitted to recover substantial losses without the need to adduce evidence of confusion. The court accepted that it was impossible to adduce clear evidence to show what was in the public's mind, and as such the plaintiff was not required to adduce evidence of confusion in the market. Mr Yeo maintains that the AR was right in adopting the same approach in *Draper v Trist*. Finally, the plaintiff submits that the same measure of damages as in a passing-off action applies on the facts to the plaintiff's contractual claim. According to Mr Yeo the test is "what is the sum of money which would put the injured party in the position he would have been in if he had not sustained the wrong."

12 At this juncture, I interrupt the narration of the plaintiff's arguments to briefly describe Method A and Method B. In Method A, the approach is based on the revenue that the plaintiff would have made but for the defendants' breach. In order to determine the loss in revenue, Mr Samuel identified the affected restaurant outlets in the city and the monthly sales of the affected outlets were compared with those of the unaffected outlets, which were essentially the suburban restaurants outlets of the plaintiff. From the monthly sales data for the pre-breach period, Mr. Samuel was able to ascertain that there was a fairly consistent parallel trend between the sales of the affected restaurants and those of the unaffected outlets resulting in a 15% sales differential between the two groups. However, the correlation in sales between the two groups disappeared from August 2005 onwards *ie*, during the breach period. Mr. Samuel then applied the 15% premium on the monthly sales of the unaffected outlets during the breach period which is treated as the benchmark to obtain projected monthly sales of the affected restaurants. The resulting projected monthly sales would be what the affected restaurants would have achieved had it not been for the defendants' breach. The loss in revenue was then derived by subtracting the actual monthly sales of the affected restaurants from the respective projected monthly sales. The lost profit for the affected restaurants was computed by deducting the various cost components, namely, the food costs, other variable expenses and rent adjustments based on the plaintiff's operating structure. Mr Samuel was unable to say how much of the fall was attributable to the defendants' breach. He duly presented to the court in Table 1 of his report, a range of loss in five bands of 20% from 20% to 100% for the court to determine the percentage as appropriate (see paragraph 13 of his report under "Summary of My Conclusions" – Method A, Table 1 titled "Proportion of Affected Restaurants' revenue decline attributable to breach of Deed").

13 In Method B, Mr. Samuel sought to compute the plaintiff's loss of profit utilising the first defendant's sales based on the premise that part of the latter's sales were as a result of the breach. Using the first defendant's total revenue during the breach period as the base, Mr. Samuel provided a range of revenue in five bands of 10% from 10% to 50% and, as with Method A, he was unable to say how much of the revenue gained by MFM was attributable to the breach of the Deed (see paragraph 14 under "Summary of My Conclusions" – Method B, constructed Table 2 titled "Assumed share of

MFM revenue attributable to breach of Deed"). Similar to Method A, the lost profit was derived after deducting from the respective revenue band the corresponding cost components of food costs, other variable expenses and rent adjustments based on the plaintiff's monthly accounts.

14 Returning to the plaintiff's case, Mr Yeo urges me to follow the AR in rejecting Mr Akhtar's report which purportedly supported the defendants' position that no damages should be awarded as the plaintiff did not suffer any loss. Mr Yeo points out that Mr Akhtar did not suggest any method of calculation. The AR's reasons for rejecting Mr Akhtar's evidence are found in [7] and [8] above.

15 As between the two experts, the AR preferred Mr Samuel's approach and applied Method A as modified by the AR's parameters to assess the plaintiff's loss of profits. To recap, the AR's parameters were: (a) the Glass House outlet was the only affected restaurant as opposed to the inclusion of three additional city outlets located within a radius of 1.6km of the MFM restaurant at Plaza Singapura. The three city outlets used by Mr Samuel for Method A were those located at Centrepoint, Bugis Junction and Suntec City; and (b) the unaffected restaurants to which a comparison should be made with the Glass House outlet, according to the AR, were the Fish & Co restaurants at Bugis Junction, Centrepoint and Suntec City. Mr Samuel had initially selected as the unaffected restaurants those suburban restaurants located at Novena Square, Jurong Point, Tampines Mall and Parkway Parade.

16 The plaintiff's case is that the AR should have applied Method A with the original parameters unchanged, and that he was wrong to have introduced a different set of parameters. Mr Samuel had not supported the application of the AR's parameters to Method A. The application of the AR's parameters to the Method A approach threw up inconsistent trends in revenue movement of the AR's choice of unaffected restaurants during the breach period. Mr Samuel went on to explain that in using the AR's parameters, the new calculations showed that the Glass House outlet had made gains, rather than losses, and he concluded that the calculations were illogical. In contrast, Mr Akhtar's calculations applying the AR's parameters to Method A contained flawed assumptions, and as such Mr Akhtar's calculations showed no consistent trend between the restaurants picked by the AR during the breach period.

17 At the fifth tranche of the hearing on 18 February 2009, the plaintiff sought to amend RA 152/2008 to include in the appeal Method B as its fallback method of ascertaining the plaintiff's loss of profits. The second amendment was a prayer for indemnity costs pursuant to cl 12 of the Deed. The defendants did not resist the amendments sought and they were allowed. Mr Yeo submits that if damages are to be assessed using Method B, the appropriate proportion of profit attributable to the breach is 30% of Method B's calculation. For post breach loss, the plaintiff seeks the same percentage for a period of 18 months.

The defendants' arguments

18 As indicated, the defendants' appeal is against the whole of the AR's decision. Mr Daniel John and Mr Marc Wang appeared on behalf of the defendants. The submissions for RA 153/2008 were first advanced by Mr John. RA 152/2008 and the defendant's reply to RA 153/2008 were argued by Mr Wang. In brief, the defendants' case based on Mr Akthar's evidence is that the plaintiff is entitled, at best, to only nominal damages, and bearing in mind the $50,000 Offer to Settle of 8 February 2007, the AR should have awarded costs on the Subordinate Courts' scale of costs. Their alternative argument is that the percentage figure of 60% decided by the AR should be reduced to 5-10%.

19 Mr John's submission upon the cross-appeal was an attack upon the principle of the AR's assessment. He reminds the court that the plaintiff's claim in Suit 670 was for breach of contract and

was not a case of passing-off. As such, the AR was wrong in allowing damages "akin to passing-off" in a claim for breach of contract. If the AR had evaluated the effect of the defendants' breach of the four undertakings from a contractual point of view absent misrepresentation and deception, the claim for loss of profit would have failed because the plaintiff did not prove that the breach caused the particular loss and damage that was sought at the assessment hearing. This same point was reiterated by Mr Wang.

20 On the plaintiff's allegation of deception of the public by reason of the defendants' breach, the defendants' complaint is that the plaintiff had misapplied *Draper v Trist*. Distinguishing *Draper v Trist*, Mr John points out that some actual evidence of deception was led there whereas in the present case no such evidence was adduced and the requirement of causation was simply assumed, *ie*, the breach caused the plaintiff's loss in sales or custom. Mr John maintains that in passing-off cases, confusion alone is not enough; it has to be shown that it was caused by the defendants as opposed to indifference on the part of the consumer. The plaintiff's witnesses of fact (Adine Loh Tsu Lyn, the plaintiff's deputy corporate director and Joe Chiang Kok Kin, the plaintiff's chief financial officer), Mr John maintains, had simply and boldly asserted that because of the breach, there had to be confusion and hence loss suffered by the plaintiff. Moreover, it is a telling point that Mr Samuel's report stated that he was asked to assume that the plaintiff suffered loss directly as a result of the defendants' breach. In adopting the *Draper v Trist* approach, Mr Yeo wrongly concluded that the burden was not on the plaintiff to prove that the defendants' breach caused loss in sales. The plaintiff's response, at the hearing, was that the court could infer that confusion and misrepresentation in the market had resulted from the defendants' intentional and deliberate breach and that substantial damage was caused to the plaintiff.

21 In a press interview on 26 May 2006, the plaintiff's managing director, said that the plaintiff had experienced tough competition in the F&B market generally from as early as 2004 and had taken a strategic decision to start concentrating in other brands and the overseas market. The defendants' point there is that a significant proportion of the loss in sales could not be attributable to the defendants' breach. Apart from causation, the other issue raised by the defendants is that the post breach damages fell within the second rule of *Hadley v Baxendale* (1854) 9 Exch. 341 and evidentially, the plaintiff had not met the rule.

Discussions and decision

Damages akin to passing-off

22 Although the plaintiff stated in its closing submissions that the plaintiff's claim is for breach of contract, and that Suit 670 was not a passing-off case, Mr Yeo spent time at the hearing urging the court to infer on the balance of probabilities that the public was likely to be confused and deceived by the defendants' breaches, and the resultant loss in sales to the plaintiff should also be inferred as was the case in *Ductline Pty Ltd v Arcric Investments Pty Ltd* (1995) 32 IPR 419 ("*Ductline*"). Mr Yeo made the point before the AR, and again on appeal, that it was not necessary for the plaintiff to show that the public was actually deceived and confused, and as such there was no need to adduce independent evidence of that. He submits that unless a market surveyor stood outside the MFM restaurant at Plaza Singapura, it would be very difficult to collate any accurate and reliable evidence to show confusion in the public. Besides, the costs of such a market survey would be disproportionate to the amount involved in the proceedings. According to Mr Yeo, the damages suffered were akin to damages suffered in a passing-off case *ie*, confusion and misrepresentation in the market. Specifically, the damages the plaintiff suffered were a result of lack of differentiation in the market because of the defendants' refusal to comply with the four undertakings in the Deed. Agreeing with Mr Yeo that it was not necessary to show that the public was actually confused or deceived as such

an approach would be seeking the impossible, the AR went on to adopt the approach taken in *Draper v Trist* which he paraphrased as requiring him to consider:

> … all the facts and considerations on either side, to arrive at a proper sum to estimate the plaintiff's damage in this case. In doing so, I took a commonsense approach and excluded what I considered to be irrelevant or unproven factors.

23 I agree with Mr John that the plaintiff had wrongly relied on *Draper v Trist*, a passing-off case. In awarding compensation on principles analogous to those applicable in a passing-off case, the AR had, in my view, inadvertently conflated different legal principles. Notably, a passing-off action can lie without proof of damage. This is an important distinction that must be borne in mind. It is for this reason that a plaintiff in a passing-off action is not required to prove that the plaintiff has suffered damage as a result. Goddard LJ in *Draper v Trist* explains (at 442):

> But, in passing-off cases, the true basis of the action is that the passing-off by the defendant of his goods as the goods of the plaintiff injuries the right of property in the plaintiff, that right of property being his right to the goodwill of his business. *The law assumes, or presumes, that, if the goodwill of a man's business has been interfered with by the passing-off of goods, damage results therefrom. He need not wait to show that damage has resulted, he can bring his action as soon as he can prove the passing-off; because it is one of the class of cases in which the law presumes that the plaintiff has suffered damage*.
>
> [emphasis added]

24 Obviously, if the plaintiff has evidence of damage, he is not barred from leading evidence of damage in a passing-off action. This is clearly stated by Goddard LJ in the paragraph immediately following the passage quoted in [23] above:

> If a trader is slandered in the way of his business, *an action lies without proof of damage*. That does not mean that the plaintiff cannot give evidence showing that he has suffered damage in fact. *The more he can show that he has suffered damage in fact, the larger the damages he can recover. The more the defendant can show that he has suffered no damage in fact, the less he will recover*.
>
> [emphasis added]

25 Nominal damages, at the least, will be awarded, but the law does award something more than nominal damages if there is evidence of passing-off. Sir Wilfred Greene MR at 435 & 436 noted the position of an award of damages in a passing-off case:

> … a jury properly instructed, were entitled to award damages as for the violation of a right, and that *at the least the plaintiff would be entitled to nominal damages as he would always be entitled to nominal damages on the violation of a right*.
>
> …
>
> *The real problem is when all the facts are considered and all the considerations on either side are given fair weight, what is the proper sum at which to estimate the plaintiff's damage?* Now, that a jury would be entitled, *if it were shown that goods were sold under a deceptive appearance or description, to award something more than nominal damages in my opinion is the law*.
>
> [emphasis added]

26 From these pronouncements, Mr Yeo's reliance on *Draper v Trist* is misplaced. It must be remembered that general damage other than that which is inferred or presumed requires to be proved. It cannot be disputed that the plaintiff must prove its claim for damages since this case for breach of contract is *not* one of those cases where inferences of damage are presumed in law.

27 In my view, the principles for assessing damages in breach of contract cases are no different from the principles for assessing damages in breach of confidence cases. There are apparently two measures of damages in a breach of confidence case. One measure is the plaintiff's loss – normally of profits – as a result of the defendant's breach of confidence (see *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142). The other measure is that first stated by Lord Denning MR in *Seager v Copydex (No 2)* [1969] 1 WLR 809. Damages are to be assessed on the market value of the confidential information on a sale between a willing seller and a willing buyer. Of the two measures, one concerns the market value of the information; the other concerns the plaintiff's actual loss of profits. In *Dawson & Mason Ltd v Potter* [1986] 1 WLR 1419 at 1432 ("*Dawson*"), Sir Edward Eveleigh explained that the court should award the market value of the information only when the plaintiff would have sold the information; when the plaintiff intended to exploit the information by himself, damages should be measured by the plaintiff's loss of profits caused by the defendant's breach of confidence. Whether the two measures are distinct, related or they overlap depending on the set of facts, they are compensatory in nature and are consistent with the contractual measure. The measures follow from the same principle –that damages are assessed based on the amount needed to compensate the plaintiff for the loss of the contractual bargain.

Issue of proof of loss: damage and causation

The applicable principles

28 The principle governing the quantum of damages for breach of contract is straightforward. As indicated, the award should compensate the victim of the breach for the loss of his contractual bargain. On a contractual analysis, the plaintiff's claim for damages would be measured on a compensatory basis in order to put it in the same financial position as if the undertakings in the Deed had been performed. This is a factual inquiry and each case turns on its facts. In this case, loss of profit is arguably by reason of loss of general custom.

29 As indicated, the defendants have raised two reasons as to why the court should refuse recovery. First, there was no proof of loss for the breach period of August 2005 to January 2007, and if there was indeed a loss, there was no proof that it was caused by the defendants' breach of the

Deed. Second, in so far as the post breach loss was concerned (*ie*, from February 2007), the loss, if any, was too remote. I start on the rival contentions of the parties on the first issue of loss allegedly suffered by the plaintiff before looking at the AR's findings on causation. At this stage, it is worth mentioning that the evidence of the plaintiff's expert, whether one applies Method A or Method B, is only to assist the court to arrive at the *quantum* of the alleged damage, but not the fact that the alleged damage was in fact suffered by the plaintiff as a result of the breach.

30 I agree with the defendants that even though the defendants had allowed consent judgment to be entered against them for breach of *all* the four undertakings in the Deed, the plaintiff must establish, on a balance of probabilities, that the defendants' breach had caused the plaintiff to suffer loss so as to be entitled to damages. *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) provides succinctly for this requirement at para 8-001:

> A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; this situation is illustrated by *Dixon v Deveridge* and *Twyman v Knowles*.

31 The Court of Appeal in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [27] quoted with approval the same passage in [30] from *McGregor On Damages*, 17th Ed, para 8-001. Andrew Phang JA noted further that:

[27] ... [T]he proof of damage depends *wholly* on the factual *matrix* concerned. In the circumstances, it is impossible to lay down any *general* rules or principles as to what constitutes adequate proof of damage since the particular factual circumstances can take, literally, a myriad of forms.

[28] The law, however, does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered. Thus, the learned author of *McGregor on Damages* constitutes as follows (at para 8-002):

> [W]here it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in *Chaplin v Hicks*]1911] 2 KB 786], the leading case on the issue of certainty: "The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages." *Indeed if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss*. [emphasis added]
>
> …

[31] To summarise, a plaintiff cannot simply make a claim for damages without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages. On the other hand, where the plaintiff has attempted its level best to prove its loss *and* the evidence is cogent, the court should allow it to recover the damages claimed.

[emphasis in original]

32 Assessment of damages is a question of fact and in awarding compensatory damages, the court has to be satisfied on a balance of probabilities that the particular loss as proved is causally connected or linked to the breach of contract. On this question of causation, the law is conveniently set out in *Chitty on Contracts* (13th Ed, Sweet & Maxwell, 2008) at vol 1 para 26-032:

> The courts have avoided laying down any formal tests for causation: they have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the claimant's loss. The answer to whether the breach was the cause of the loss or merely the occasion for loss must "in the end" depend on "the court's commonsense" in interpreting the facts.

33 In *Galoo v Bright Grahame Murray* [1994] 1WLR 1360, the Court of Appeal said the approach to adopt on the question of how the court decided whether or not the breach of contract was the cause of the plaintiff's loss fell to be answered by the application of the court's common sense.

34 *Trietel, The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 20-095 commented as follows:

In all the above cases, the defendant is not liable for a loss which is not caused by the breach at all; but a claimant can often recover damages although the breach is not the *sole* cause of the loss. As Devlin J said in *Heskell v Continental Express Ltd* [1950] 1 All ER 1035 at 1048 "If a breach of contract is one of two causes, both co-operating and both of equal efficacy, … it is sufficient to carry a judgment for damage".

The evidence and findings

35 With the above principles in mind, I turn to the first question whether the plaintiff's loss as claimed was suffered, or had it come from an assumption or premised on a hypothesis because the plaintiff's expert was told to make it in his terms of reference. In a case like the present one, the consideration is really whether the facts in evidence lend support to the inference of loss in terms of loss of business during the breach period, and the loss was the result of the defendants' breach of the Deed. Looking at the relevant facts and matters in evidence, actual loss may properly be inferred.

36 First, it is a significant fact that the four undertakings in the Deed were closely related to the business operation of the plaintiff. In other words, given the circumstances of this case, the loss of business is the best evidence of loss. This view is fortified by Mr John's acknowledgment that the defendants in giving the undertakings agreed to refrain from "copying" the plaintiff in the four areas.

37 Second, the breach continued for 18 months despite the plaintiff's demands that the defendants desist. The Deed was a settlement made with the second defendant who was a party to Suit 257 as well as the first defendant who was not a party to Suit 257. Suit 257 was a breach of confidence case against the second defendant. The intention of the Deed was clear. One can reasonably deduce from the four undertakings that confidential information was taken, divulged to and used by the defendants who subsequently agreed to stop using them by a stipulated time. I interpose here to comment that the defendants were given a grace period to comply with two of the four undertakings in cl 3 of the Deed. In effect, the defendants were allowed to use the serving pans and the O.B. Sauces for a certain grace period. Within the grace period, MFM was further obliged by implication to phase out the use of the serving pans and the O.B. Sauces. Mr Yeo made the point that Mr Samuel's graphs show that within three short months (May 2005 to August 2005) of the opening of the first MFM restaurant at Plaza Singapura, it sales reached the average level of the plaintiff's restaurants. He submits that this "acceleration in the sales could only have been achieved as a result of the defendants' breaches of the undertakings. This is the 'springboard', or accelerated entry, which the [defendants] wanted to achieve through their deliberate and calculated breaches of the Deed." Not much can be made of Mr Yeo's last point. MFM did well in the first three months of its operation but that was during the grace period stipulated in the Deed. However, after the grace period, the breach of the Deed, particularly in respect of the O.B. Sauces, continued for 18 months. Eventually, as it turned out, and given the consent judgment, the defendants had done the very thing they had contracted not to do. Starting from August 2005, there can be no breach without inflicting at any rate some measure of damage on the plaintiff having regard to the evidence that the breach, though deliberate, took place in a commercial context, and the defendants acted as they did in the course of a business (the MFM outlet). The breach constituted a flagrant contravention of the defendants' undertakings with a view to their own financial gain or reward. No doubt deliberate breaches of contract occur in the commercial world, and it was only upon the defendants' consent to judgment being entered and the granting of the injunction that any unfair competitive advantage gained from the use of the O.B. Sauces ceased.

38 Third, evidence of the MFM's performance as a new entrant in the Singapore market in 2005 was exceedingly good. During the breach period (*ie*, August 2005 to January 2007), MFM's revenue

was $3,025,520 compared to the performance of the Glass House outlet of $4,057,000. I shall discuss further the performance of MFM below. For present purposes, Mr Samuel in answer to the AR's question opined that besides the close proximity between two restaurants, there was "a close co-relation between the falling revenue of the affected restaurants and the opening of the MFM restaurant". Mr Akhtar accepted that a direct competitor "can be expected to have some impact on the sales of the existing player's outlet that is in the vicinity".

39 Four, there was no cannibalisation (as "in the lowering or eating away") of the plaintiff's profit by opening of outlets of the same chain of restaurants in close proximity to each other. If anything, cannibalisation, on the evidence would as the AR held only reduce the plaintiff's claim substantially, not completely. The AR observed at p 4 of his grounds of decision:

> Whether by accident or design, however, in failing to establish his point regarding cannibalisation between the outlets, Defence Counsel has, in my view, succeeded on a crucial point. That is: if Fish & Co's Affected Outlets [*ie*, Bugis, Suntec, Glass House & Centrepoint] did not cannibalise each other (or cannibalised each other only minimally), then the Plaintiff also cannot argue that a clone of the Fish & Co outlet, placed in very close proximity to its Glass House outlet, can take away business from all 4 Affected outlets. It must naturally follow. On this score, I find that the efforts of the Plaintiff's witnesses (Ms Loh & Mr Chiang) in resisting any suggestion that there could be cannibalisation, have ironically, reduced their own claim substantially.

40 Five, the number of restaurants affected by the breach could not be as many as four. I agree with the AR's finding that Glass House was the only affected outlet given its very close proximity to the MFM outlet in Plaza Singapura. He reasoned as follows:

> However, I am of the view that the assumption (that 4 restaurants were affected adversely by the Defendant's Plaza Singapura outlet) simply cannot stand, given the fact that the 4 affected restaurants catered to different "market segments" – to use the words of the Plaintiff's witness, Chiang. While the assumption was reasonable to start with, it subsequently turned out to be an inaccurate assumption, given the testimonies of Ms Loh & Mr Chiang.

41 Six, MFM's arrival on the seafood restaurant scene had a negative impact on the Glass House outlet. Before commenting on the performance of the two outlets, I must point out that both the plaintiff and the first defendant have different financial year ends, and the breach period straddles their respective financial periods so much so that a simple comparison of the financial years of the two to determine the pre-breach and post breach performance is inadequate. A more meaningful and relevant comparison would be the computation of the average monthly sales figures for pre-breach and breach period respectively.

42 From the monthly sales data of the Glass House outlet provided by the plaintiff, average monthly sales of about $241,300 was computed for the pre-breach 18-month period from February 2004 to July 2005. Compared with the $225,400 average monthly sales for the breach period from August 2005 to January 2007, a 6.6% decline was shown. In the case of MFM, for the pre-breach period, there were no sales figures to be had from the first defendant as it had yet to commence operations. Nevertheless for the corresponding breach period, MFM achieved average monthly sales of $168,100. However, for the post breach period from February 2007 to August 2007 for which monthly sales data was provided, MFM's average monthly sales rose by 67.4% to $281,500. As stated, the figures tell a story that MFM's operations affected the performance of the plaintiff's Glass House

outlet.

43 It is worthwhile to note that the Department of Statistics, Singapore Press Release in relation to the Catering Trade Index for the 16-month period starting from October 2005 to January 2007, and in particular the percentage year on year change at current prices of the Catering Trade Index for Restaurants, indicated that the Glass House outlet's sales statistics were significantly underperforming the sector. In fact, nine months out of the 16-month period of the Glass House outlet's sales reflected negative percentages compared to a positive trend throughout for the sector, while the other months were well below the industry benchmark statistics during the period. Conversely, MFM's sales statistics for the period were the opposite of the plaintiff's; the first defendant was outperforming the industry. The statistical material is a helpful guide and it tells us that the Glass House outlet's monthly sales performance for the period was even below the industry's norm.

44 Seven, in so far as the claim for loss of profits during the breach period is concerned, the defendants are not saying (and rightly so) that such a head of claim is too remote. The plaintiff's claim for loss of custom, which may be translated into one for loss of profits, would in the ordinary course of things be of the type and kind which the defendants would expect as not unlikely if the undertakings in the Deed were not observed and complied with. As such, the claim is not too remote. Even if the claim for loss of profits arose from special circumstances, the defendants had been well aware of those circumstances, and hence the claim would not be too remote. The defendants, acting on legal advice, voluntarily gave the undertakings in the Deed. Therefore, the undertakings could not have been given lightly. In that regard, the contractual promise to observe the undertakings after the grace period was well within the knowledge and consent of the defendants. In addition, the terms of the settlement would certainly be a matter which parties may be held to have had in reasonable contemplation under the second rule in *Hadley v Baxendale* (*supra* [21]). In that regard, the defendants ought reasonably to have contemplated as the likely consequences of the breach at the time they made the Deed that they would have to pay damages and costs if the undertakings were breached. Therefore, the second rule in *Hadley v Baxendale* seems to me to be met. As for the defendants' other contention that the post breach loss (*ie*, from February 2007) is too remote, I will discuss this together with the post breach claim (see [60] – [68] below). Suffice it to say that my observations here equally apply to the claim for post breach loss.

45 For all the reasons stated above, I am satisfied, and I so find, that on a balance of probabilities, the plaintiff has sufficiently established by inference (a) its loss in terms of loss of custom during the breach period; and (b) the causal link between the breach of the Deed and the loss of custom. However, the extent of that loss is altogether another matter. In other words, the quantification of the loss is another thing. Suffice it to say at this stage that realistically not *all* sales by MFM constituted a loss of custom to the Glass House outlet. The plaintiff accepts that position and for that reason there is, for instance, using Method B, a need to select a percentage of the MFM sales which could be said to have been attributable to the breach.

Assessment of the quantum of damages

46 This part of the judgment examines the different approaches taken by the plaintiff to prove its claim for loss of profits. In this connection, the court has to decide firstly what approach it has to adopt in assessing damages in a case like this. Once that has been established, the next difficult part lies in evaluating the extent of the loss to determine the quantum of damages.

47 Generally, the principles for assessing damages in breach of confidence cases are not different from the principles for assessing damages in contract. As indicated in [27] above, a claim for loss of profits caused by a defendant's breach of confidence is made when a plaintiff intends to exploit the

information by himself (see Sir Edward Eveleigh in *Dawson*). In this respect, the American Restatement (3d) of Unfair Competition, Ch 4 § 45 at 516 on how to prove loss of profits from breach of confidence is instructive. The relevant paragraph is reproduced below:

> e . *Relief measured by plaintiff's loss*. A frequent element of loss resulting from the appropriation of a trade secret is the lost profit that the plaintiff would have earned in the absence of the use by the defendant. *The plaintiff may prove lost profits by identifying specific customers diverted to the defendant. The plaintiff may also prove lost profits through proof of a general decline in sales or a disruption of business growth following the commencement of use by the defendant, although the presence of other market factors that may affect the plaintiff's sales bears on the sufficiency of the plaintiff's proof. If the evidence justifies the conclusion that the sales made by the defendant would have instead been made by the plaintiff in the absence of the appropriation, the plaintiff may establish its lost profits by applying its own profit margin to the defendant's sales*.
>
> [emphasis added]

48 At the forefront of the plaintiff's case to ascertain a general decline in sales or a disruption of business growth during and after the breach of the Deed is Mr Samuel's Method A. Mr Yeo summarised the range of figures calculated under Method A in respect of the claim for loss of profits during the breach period as follows:

Percentage	20%	40%	60%	80%	100%
Profit lost	$114,600	$229,200	$338,500	$445,800	$553,100

49 I was invited to infer from the calculations in Method A that a drop in sales during the period of the breach was from a loss in market share and that should be attributed to the defendants' contravening conduct. In my view, Method A cannot support the particular inference I have been asked to draw. I have already explained that I agree with the AR's findings that the Glass House outlet was the only affected restaurant. The AR accepted the evidence led on behalf of the plaintiff that each Fish & Co restaurant serves different market sectors, and by logical deduction, the only affected restaurant was the Glass House outlet, a short distance away from Plaza Singapura. That said, I accept Mr Samuel's testimony that the AR's parameters distorted the methodology of Method A for the reasons stated in [16] above. Since there is only one affected restaurant, the methodology of Method A which is based on more than one affected restaurants is not helpful, and accepting Mr Samuel's criticisms of the AR's parameters, Method A is disregarded in this appeal.

50 The defendants rely on Mr Akthar's calculations to advance the untenable proposition that no loss at all was occasioned by the breach. I have already mentioned the AR's criticisms of Mr Akthar's evidence and I agree with his assessment and conclusion.

51 Method B is akin to the approach set out in the American Restatement (3d) of Unfair Competition Restatement at [47] above. It is based on the performance of the first defendant, utilising MFM's sales revenue and applying the profit margins and cost structure of the plaintiff's affected operations with some adjustments to compute the lost profits. In essence, Method B endeavours to recover the plaintiff's lost profits from the first defendant's actual sales on the basis that it would have been what the plaintiff would have earned but for the defendants' breach (*ie*, use of the O.B. Sauces etc during the breach period) and therefore the measure of the plaintiff's loss. In

my view, Method B is a sensible approach to ascertain the loss of profits suffered by the plaintiff.

(i) Loss of profit claim - during the breach period

52 Having decided that Method B is the most appropriate means of assessing damages in this case, I now come to the difficult part on evaluating the quantum of damages for the breach period. Although Mr. Samuel had quantified in his report the loss of profits based on various percentages of MFM's revenue during the breach period, he was unable to say how much of MFM's revenue was attributable to the breach of the Deed. This is by no means an easy task but nevertheless not an impossible one. The court will have to do its best to determine the loss of profits given the available material. Mr Yeo submits that the plaintiff is entitled to at least 30% of the defendant's sales under Method B but offers no basis for this percentage figure.

53 I have been provided with a plethora of information by both sides. However, the most crucial and relevant of these are the sales figures. The plaintiff has submitted monthly sales figures of the Glass House outlet from the period February 2004 to August 2007. Similarly, the first defendant has provided monthly sales data from its commencement of business in May 2005 to August 2007. From MFM's sales data, it is clear that the restaurant immediately generated respectable revenues as opposed to a gradual build up of custom typical of any new start-up operation. In evaluating the sales data, it must be remembered that May 2005 to July 2005 was the grace period granted to the defendants in the Deed. This is important because the figures used as the basis of calculating lost profits are taken after the expiry of the grace period *ie*, from August 2005 for a period of 18 months to January 2007 when the restaurant had a chance to settle down, so to speak, in the initial operation period. It is not an unreasonable inference that during the same 18-month period, at least O.B. Sauces were used during the breach period. The jingles and phrases were stopped on 8 November 2005; the serving pans changed by 28 December 2006. At this juncture, I make two points. First, since the plaintiff's damages would be measured on a compensatory basis, MFM's motives in breaching the Deed would not have a bearing on the quantum. Second, the number of breaches decreasing over the period need not necessarily result in the decrease in lost profits attributable to the breaches over the period. The decrease should not be material because the most significant breach as a matter of common experience and common sense must be the use of the O.B. Sauces which persisted throughout the 18-month period of the breach. Notably, the defendants had conceded that MFM's sauce was not different in taste and ingredients from that of Fish & Co during the breach period.

54 It is common knowledge that restaurants do not operate in a vacuum but are influenced and affected by market conditions. I therefore find helpful the statistics, in particular, the percentage year on year change at current prices in the Catering Trade Index for Restaurants for the period from October 2005 to January 2007. I have briefly mentioned these in [43]. In my view, these statistics offer independent evidence as to the general status of the relevant market in order to derive a common benchmark such that a comparison of the performance of each of the outlets can be made relative to its peers operating under prevailing market conditions. Except for the month of January 2007, the percentage year on year change at current prices in the Catering Trade Index for Restaurants exhibited a positive trend during the larger part of the breach period and are about **12%** during the period.

55 A review of the Glass House outlet's monthly sales percentage year on year change at current prices from October 2005 to January 2007 revealed negative deviations of about -**4%** in the same period from the sector's trend of **12%**. In the case of MFM, the available monthly sales percentage year on year change at current prices are from August 2006 to January 2007. This is because between January 2006 and April 2006 there were no comparative sales in the previous year since MFM

only commenced operations in May 2005. For the months from May 2006 to July 2006, the percentage year on year change at current prices are not meaningful since those months in the previous year were the initial operation period and inclusion of those percentage change would cause an aberration. Moreover, those months were the grace period under the Deed. Nevertheless, MFM's monthly sales percentage year on year change at current prices during the available period of August 2006 to January 2007 indicate a positive trend of about **19%** for the available period exceeding the restaurants sector's Catering Trade Index.

56 The plaintiff has as I have found for the reasons stated in [36] to [44] suffered loss as a result of a decline in sales due to the breach of the Deed. However, the plaintiff has not properly quantified the amount of the loss. A mere submission of a tabulation of a range of loss of profits will not suffice. It resulted in the defendants' asserting that the plaintiff had not led evidence to overcome the question of causation since the loss could be due to other factors like direct competition, pricing, tight competition in the food and beverage market and convenience. The plaintiff's claim for loss of profits, so the argument develops, should be reduced to take into account the probability of loss caused by factors other than the breach of the Deed. Cannibalisation as a factor has been discussed earlier in [39]. I agree that it would be unsafe in the circumstances to award the plaintiff's loss of profits based on all of MFM's sales during the breach period. However, it would be logical to infer that if the defendants had not committed the breach, the plaintiff's sales would be, at least, in line with the industry's trend of **12%** during the period. As the Glass House outlet's monthly sales percentage year on year change at current prices during the breach period is **-4%**, there is a **16%** gap between the former and the industry index. For the plaintiff to be in line with the industry, Glass House outlet's sales would have to increase by **16%**. Using the methodology of Method B, loss of profits calculation ought to be based on **16%** of MFM's sales during the period. In my view, the approach adopted is a rational basis for assessing loss profits for it will in some way alleviate the speculative element in the exercise. To award a percentage of sales higher than **16 %** of MFM's sales would introduce the influence of factors other than the breach that has a bearing on the loss of profits.

57 From Method B, Table 2 – "Assumed share of MFM's revenue attributable to breach of Deed" in Mr. Samuel's report dated 6 December 2007, I have interpolated the loss profits on 16% of MFM's total revenue to be $230,600 based on a linear relationship of loss of profit to sales.

58 Before I move on to the next head of damages, I must deal with the Singapore Department of Statistics - Retail Sales Index and Catering Trade Index of 2008 which the defendants provided under cover of their counsel's letter dated 24 February 2009 shortly after the 19 February 2009 hearing. The defendants referred to Table 6 Percentage Change in Catering Trade Index over the corresponding period of the previous year for the indices at constant prices and pointed out that although the restaurant trade improved by 4.6% in 2004 relative to 2003, the Glass House outlet did worse by 5.76%. The objective of this was to influence the court in its assessment of the quantum of the damages on the basis that since the performance of the Glass House outlet was negative no damages should be awarded. At best, the plaintiff is entitled to nominal damages.

59 I make the following observations on the 2008 statistics provided. First, the statistics are for the respective calendar years. The financial year of the Glass House outlet is not coterminous with that of the years for which the statistics were prepared for. In order for there to be an acceptable and meaningful comparison to demonstrate that there has been a real decline in the pre-breach periods as compared to the breach period, regard must be given to comparing like periods, that is, in 18-month tranches similar to the breach period of August 2005 to January 2007. No monthly Catering Trade Index statistics over the corresponding month of the previous year were given for the years 2003 and 2004 respectively. Therefore, a careful and detailed comparison based on similar 18-month periods is not possible. For the foregoing reasons, I disregarded the defendants' late submission of the

statistics. In arriving at this decision, I have taken on board the plaintiff's objections to the late submission of fresh evidence.

(ii) Post breach loss of profit

60 The AR awarded damages post breach on the basis that the effect of the contravening conduct was not spent. The defendants submit that there is no basis to award springboard losses post breach. Mr John complains that the plaintiff's reliance on the patent infringement case of *Gerber Garment Technology Inc v Lectra Systems Ltd* [1995] RPC 383 ("*Gerber*") to claim springboard losses is misplaced. I do not propose to touch on *Gerber* since Mr Samuel had not relied on the concept defined in *Gerber*. The claim for springboard losses arises from the "continuing" effect of the defendants' breach of the four undertakings. The defendants submit that this head of damages should properly be termed "momentum" loss. In any case, Mr Wang argues (and rightly so) that a key issue is whether this type of loss, referred to as either momentum loss or springboard loss, is too remote.

61 Mr Yeo argues that the AR was right in principle to award post breach loss of profit. His objection is that the duration of the loss should be more than 12 months. Mr Yeo relies on *Ductline* for the proposition that post breach loss is recoverable. In *Ductline* (at 428), the court agreed that loss of business profits suffered in consequence of the passing-off cannot be said to have ceased entirely as at the relevant time. However, in that case there were misleading fliers remaining in the hands of wholesalers and the court was not prepared to assume that the effect of the misleading information was entirely spent. In *Ductline*, a small sum was awarded to accommodate the lingering effect of the respondent's contravention. Accordingly, the court awarded a sum to accommodate this situation. The facts of this case are different.

62 It must be remembered that the injunction in the consent judgment would protect against any future breaches and in the absence of any proven loss, the financial remedy for the past breaches would be that sustained during the breach period, and that has been dealt with. The consent to the injunction order may also be interpreted as recognition by the defendants that as at the date of the injunction, the unfair competitive advantage still existed and would continue to have effect unless the injunction was granted.

63 In my view, recovery of post breach loss of profit is to be resolved through the usual principles of causation and remoteness rather than to introduce the springboard concept from intellectual property law. On the facts of this case, it was reasonably foreseeable that the effect of the MFM's breach would continue. Hence, it would not be unusual at all to award to the plaintiff, damages for its loss of profits *after* the injunction order. The cessation of the breach in January 2007 did not necessarily mean the end of the losses. The plaintiff argued, and the AR agreed, that there would be a gradual trailing off of the effect of the breach. I agree. However, it is difficult evidentially to say whether how long and to what extent customers will continue to patronise MFM's outlet after the defendants had begun using MFM sauces.

64 *McGregor on Damages* at para 6-191 cities passages from two authorities:

> … first, "the court will … assume that the parties as business men will have all reasonable acquaintance with the ordinary course of business" and secondly, "as reasonable businessmen each must be taken to understand the ordinary practices and exigencies of the other's trade or business".

Relying on the above quotes, the plaintiff submits that a reasonable man having the defendants' knowledge of the seafood restaurant business and industry would contemplate that the loss of

custom or market share which the plaintiff suffered during the breach period would continue to have an effect even after an injunction was imposed against the defendants.

65 I accept that a general loss of custom and business is the natural and direct result of the breach of the Deed. The four undertakings in the Deed were to stop attempts to use them for the establishment of the MFM restaurant and, in the event of contravention, the innocent party may recover the amount of business profits lost. Evidence of the loss of business which was not accounted for in any other way is the proper consideration in estimating damages. The evidence showed that the first defendant, during the breach period, was better off than the plaintiff, an established business. The first defendant was about to start the first MFM restaurant in Singapore, and the plaintiffs wanted the first defendant and the Malaysian companies to be parties to the Deed. The Deed was signed after one month of negotiations. It would have reasonably been contemplated by the defendants that plaintiff's loss of custom would continue to run after the defendants' breach had stopped. In that regard, there is no merit in the defendants' argument that post breach loss of profit is too remote as it falls within the first limb of Hadley v Baxendale. The post breach loss should not be categorised as consequential but flowed directly from the breach for the same reasons stated in [44]. Baron Alderson's famous dictum in Hadley v Baxendale and its treatment by Asquith LJ in his judgment in Victoria Laundry (Windsor Ltd) v Newman [1949] 2 KB 528 were considered by the House of Lords in The Heron II [1969] 1 AC 350. The effect of the speeches in that case is that a kind of loss falls within the first rule if it is one which the defendant when he made the contract, ought to have realised was not unlikely to result from the breach even though he was not given any express intimation to that effect by the plaintiff (see Lord Reid at 382-383 and 388 and at 405, 410-411, per Lord Morris, Lord Hodson and Lord Pearce respectively).

66 The AR projected a continuing loss of profit into 2008 for 12 months from February 2007 on the same basis. The difficulty about the AR's approach to the post January 2007 period is the absence of any findings by him as to why the trailing off effect should last for one year, not earlier or not more than one year. It is of course for the plaintiff to establish this loss, and the plaintiff did not made good a claim for loss of profits post January 2007 for the next 24 months. Given that inability, it is difficult to see how, consistently with that conclusion, the AR could have held the defendants responsible for continuing loss of profits post January 2007 into the next 12 months. On what basis could it be said that such losses have been caused by the defendants' past breaches committed between August 2005 and January 2007? Mr Yeo called it springboard losses. Mr Wang disagreed arguing that the proper terminology should be momentum loss. In a sense the AR treated the post breach claim as momentum loss. He adopted Mr Samuel's example of riding a bicycle down the hill. He said:

> In the present case, I do not think that it is too remote to see that losses would continue to accrue to the Plaintiff even after the Defendants have ceased their breach. On top of that, I find the explanation given by Mr Tony Samuel compelling – he testified that "unless MFM's customer knew immediately that the breaches had ceased, there would be a period of loss which continues after the breaches had ceased. If you ride a bicycle and stop peddling, it will take some time before it stops." Such reasoning is, to my mind sound.

67 As indicated, the correct analysis of this case is not one of continuing breach which had been remedied and an injunction ordered, but of whether or not the past breaches could have a trailing off effect which is also subject to unknown factors operating in relation to the acts of third parties or other events independent of the defendants' breach. As such an allowance for the uncertainties must be made in assessing loss of profits post breach. The problem facing the plaintiff is evidential. The evidence in support of the plaintiff's claim for an additional 18-24 months of damages is tenuous.

68 The plaintiff provided monthly management accounts of Glass House for the next seven months after the injunction order. I note from the accounts over the period of seven months that sales in the post breach period continued to decline. I agree that the effect of the breach was not entirely spent after the injunction order. Unlike the AR, I am only prepared to accommodate this with an additional six months of damages based on loss of profits on 16% of MFM's sales as reasonable compensation for the trailing effect of the breach. Using the methodology in Method B, Table 4 of Mr. Samuel's report dated 6 December 2007, the average monthly profit during the 18-month period on the above computed loss of profits of $230,600 would be about $12,800 per month. Having regard to the trailing off effect envisaged in Method B, an award of six months using a multiple of 3 will translate into an amount of $38,400 for post breach loss of profit.

Result

69 The total amount assessed as recoverable under both heads of damages is $269,000. Since the plaintiff has not appealed against the rate of interest ordered by the AR under s 12(1) of the Civil Law Act (Cap 43, Rev Ed, 1999), the defendants are to pay interest on the judgment sum of $269,000 at the rate of 3% per annum from the date the writ (ie, 20 September 2005) to the date of judgment (ie, 26 November 2009). I will hear parties on costs at a later date.

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