

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 242

Suit 2217/1993

Between

Universal Westech (S) Pte Ltd

... Plaintiff

And

Ng Thiam Kiat

... Defendant

GROUND OF DECISION

Civil Procedure — Costs; Civil Procedure — Injunctions; Contract —
Illegality and public policy — Restraint of trade; Employment Law —
Contract of service — Restrictive covenants; Employment Law — Contract of
service — Restrictive covenants

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Universal Westech (S) Pte Ltd v Ng Thiam Kiat and Others

[1996] SGHC 242

Suit 2217/1993
Kan Ting Chiu J
23 October 1996

1 This is an action by the plaintiff company against the first and second defendants, its former employees. The first defendant was employed as its marketing manager till his resignation on 14 September 1993 and the second defendant was employed as a sales manager till his resignation on 7 October 1993. The two defendants are the shareholders and directors of Optim Application (S) Pte Ltd (hereinafter referred to as Optim Application).

2 On 19 November 1993, the plaintiff obtained an interlocutory injunction against the first and second defendants in an ex parte application restraining them from persuading the plaintiff's principals to switch their distributorships from the plaintiff to them or Optim Application, from using confidential information and trade connections obtained during their employment, and from soliciting orders from the plaintiff's customers. The order was set aside by Lai Kew Chai J on 3 December 1993 on the application of the two defendants and on 15 August 1994, with the questions of costs and whether the plaintiffs' undertaking as to damages should be enforced referred to the trial judge. On 15 August 1994 Optim Application was joined as the third defendant in the action on its own application.

3 The plaintiff alleged that the first defendant had acted in breach of his fiduciary duties as an employee and former employee and that the second defendant was in breach of his fiduciary duties as an employee.

4 With regard to the first defendant two forms of such wrongdoing as an employee were pleaded. The first related to his conduct with the plaintiff's American principals, Metcal and Westbond. It was pleaded that while he was still employed by the plaintiffs he approached its principals to instigate and persuade them to terminate distributorship rights of the plaintiff and award them to him when he set up his own business or company. In the particulars pleaded, it was alleged that he did that with Metcal and Westbond when he was sent to America to the Boston Cleanroom Show in March/April 1993 and that he did that again in August 1993 with representatives of the same principals when he was in Kuala Lumpur at another trade show known as the Nepcon Show. He was also accused of telling the representatives of the two principals that the plaintiff had not treated him well or fairly and that he was the person responsible for developing the plaintiff's business.

5 The second form of misconduct alleged was that he approached the plaintiff's customers to obtain orders for his new business venture or company. In particular, it was alleged that in August 1993, he agreed to team up with Mok Chit Kuan (hereinafter referred to as Mok), the marketing manager of the plaintiff's associate company in Malaysia, Uniwes Technology Sdn Bhd (hereinafter referred to as Uniwes Technology) to set up their own company to deal in goods and competition with the plaintiff in Singapore and with Uniwes Technology in Malaysia. It was further alleged that Mok had pursuant to the scheme diverted two orders placed with Uniwes Technology to a company known as Kimic Technologies (M) Sdn Bhd, a company belonging to one Lum Ooi Lin when the plaintiff asserted to be a business partner of the first defendant.

6 Two instances of the first defendant's alleged wrongdoing as a former employee were pleaded. Firstly it was claimed that on 15 October 1993 he had informed another principal of the plaintiff, Corpane, that the plaintiff was engaged in fabricating cleaning equipment on their own and that the plaintiff had sent an engineer to spy on Corpane. The plaintiff claimed that in fact it was engaged in the design and manufacture of cleaning equipment using CFC-free solvents on the suggestion of Du Pont and that this was a part of the plaintiff's trade secrets and business strategy that the first defendant had disclosed to Corpane.

7 Secondly, the plaintiff alleged that after he left its employ, the first defendant had made use of the plaintiff's confidential information regarding its pricing policy and had informed the plaintiff's customers that the plaintiff had been unfairly profiteering in the dealings with them. It was not pleaded that the confidential information was of a nature as to amount to a trade secret.

8 As particulars, it was pleaded that the first defendant represented to Seagate Technology in October/November 1993 and General Motors at an unspecified time that the plaintiff was no longer authorised to sell Metcal products and that the third defendant was the authorised distributor, and that the plaintiff had been unfairly profiteering from them in their previous dealings.

9 The plaintiff's complaint against the second defendant was that he breached his fiduciary duty as an employee by becoming a director of the third defendant, a competitor of the plaintiff, when he was still in the plaintiff's employ.

10 I have referred to the matters that the plaintiff complained of and the particulars set out in the statement of claim because complaints of other alleged

misdeeds not pleaded in the statement of claim were made, explained and refuted at the trial, which I do not take into account in coming to my decision.

11 There was nothing in their contracts of employment that prohibited the first and second defendants from competing with the plaintiff after their employment. They were required to make a declaration and undertaking to the plaintiff in the following terms:

I hereby declare that other than my employment with you, I am not holding any other position or employment or job of whatever nature with any other third party, whether paid or unpaid.

In consideration of your continuing to employ me, I hereby undertake that I shall not, during my employment with you, accept any form of employment or work or job of whatever nature from any third party during or after office hours or during off days or on weekends or public holidays.

I hereby acknowledge that in the event that my declaration herein is shown to be false or that I breach my undertaking, then you shall have the right to terminate my employment with you forthwith without having to give me any notice or to give me any form of payment whatsoever.

12 On an employee's fiduciary duties, counsel for the plaintiff referred to Neill LJ's ruling in **Faccenda Chicken Ltd v Fowler** [1987] Ch 117 at p 135 that:

While the employee remains in the employment of the employer the obligations are included in the implied term which imposes a duty of good faith or fidelity on the employee.

13 which was cited with approval by the Court of Appeal in **Tang Siew Choy & Ors v Certact Pte Ltd** [1993] 3 SLR 44.

14 Counsel also cited Tang's case as authority that an ex-employee is precluded from using confidential information he obtained from his ex-employer, overlooking the qualification that the class of affected confidential

information is narrower after his resignation. Lai Kew Chai J who wrote the judgment quoted Neill LJ that:

*The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes a general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae (see **Amber Size and Chemical Co Ltd v Menzel** [1913] 2 Ch 239), or designs or special methods of construction (see **Reid Sigrist Ltd v Moss Mechanism Ltd** (1932) 49 RPC 461), and **other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret.** [Emphasis added.]*

15 The first defendant joined the plaintiff in 1983 as a sales executive. He worked hard and rose to be the sales and marketing manager of the plaintiff's electronics division, and was groomed by the general group manager Randall Oliveiro to take over as general manager eventually. However the relationship with Oliveiro suffered during the last stage of his employment. He had differences with Oliveiro over the development of the division. He made and submitted a Marketing and Business Development Plan dated 30 September 1992 which was rejected and returned to him by Oliveiro in mid-August 1993. Their relationship was strained further when Oliveiro arranged for a former employee, Steven Lake, to return to work for the plaintiff on 1 September 1993. The first defendant did not have a good relationship with Lake and felt slighted and threatened by his return. By late August/early September he had decided to leave. He tendered his resignation on 14 September and left the company on the same day.

16 The second defendant was also unhappy in his job. He felt that too many duties were placed on him and that he did not have sufficient support from the plaintiff. He was thinking of leaving the plaintiff in early September 1993.

17 The second defendant tendered his letter of resignation on 8 September 1993 and his resignation was effective on 7 October 1993. The first defendant tendered his letter of resignation on 14 September and his resignation took place with immediate effect.

18 The third defendant was incorporated on 18 September 1993. Neither the first nor second defendants were involved with its incorporation, but they became its directors on 27 September 1993 (while the second defendant was still an employee of the plaintiff) and they are shareholders of the company.

19 Evidence of the first and second defendants' alleged misdeeds was adduced from Oliveiro, Mok and Lake. A large part of their evidence on what they claimed to have learnt from the plaintiff's customers and principals about the activities of the defendants was hearsay evidence disputed by the defendants, and other allegations were made which went beyond the wrongdoings pleaded in the statement of claim.

20 In his affidavit of evidence-in-chief, Oliveiro explained the plaintiff's grievance was that:

All this (the plaintiff's relationship with its principals) has been the fruition of hard work and dedication over many long years. What the defendants have attempted to do is to circumvent the hard work and meticulous attention to detail by appropriating the plaintiffs' goodwill and thereby procuring the plaintiffs' principals and customers. This appropriation of the plaintiffs' goodwill is wrongful and it is the purpose of this action to stop it.

21 He went into the substance of the complaints. He said that the first defendant had confidential information that the main income of the plaintiff is not derived from the sale of electronic or cleaning equipments/machines but in the continuous supplies of parts and solvents. He went on to say: 'Further, the defendants also acquired information about the price structures of the plaintiffs

for the various products ... they are able to quote prices to plaintiffs' customers at such levels that they would be able to divert the plaintiffs' business to themselves. Additionally, and even more crucial, is the fact that the plaintiffs have different pricing policies in respect of different customers. The defendants have information of all these pricing policies.' He also alleged that 'the first defendant also acquired knowledge and information about technical specification of certain machine which the plaintiffs have designed such as the low costs semi aqueous machine'. He did not, however, say that the first defendant had made use of the knowledge and information, or that the knowledge and information were not only confidential information, but were trade secrets. The omission is significant because a former employee can use confidential information that he has acquired, but not trade secrets.

22 Oliveira referred to the loss of the Westbond distributorship. The distributorship was terminated by the principals without warning. The first defendant had visited them in March/April 1993 when he went to America, and had reported that they were happy and supportive. However, when the first defendant met with Westbond's representative Ken Biggs in Kuala Lumpur in August, a letter of termination was handed to him terminating the distributorship with immediate effect. On these facts, Oliveira contended that, 'The first defendant failed to perform his fiduciary duties while employed by the plaintiffs because he was intentionally making the plaintiffs look bad so that he could subsequently appropriate their principals.' He did not specify what the first defendant had done to make the plaintiff look bad.

23 Oliveira narrated the contest between the plaintiff and the third defendant for the Metcal distributorship. The first indication of that came in a fax from Tim Stewart of Metcal dated 30 September 1993 giving notice that he

would visit Singapore in November to assess the distributorship in Singapore and Malaysia.

24 Oliveiro deposed that through investigations conducted by him, he discovered that the first defendant had during his employment attempted to discredit the plaintiff to its American principals with a view to persuading them to divert their business to his new company. Specifically, he alleged that the first defendant informed Corpane that the plaintiff was fabricating cleaning equipment and would in the near future be acting to the detriment and in competition with Corpane which also manufactured such equipment. He complained that the information was untrue, mischievous, disparaging of the plaintiff and was a misappropriation of the plaintiff's trade secret.

25 He referred to a letter dated 15 October 1993 that the first defendant sent to Corpane. The portions complained of read:

Uniwes Engineering, where Randall (Oliveiro) is the managing director, is fabricating cleaning equipment.

They have sold one to Kenmore which took them more than one year to deliver. Terrence Boey and Uniwes Engineering Project Manager was in the US this year to learn from Du Pont on the design of semi-aqueous cleaner. Terrence pay you a short visit, right? Check with Du Pont if they want to tell you. Dr Victor Wang is very close to Randall. Be tactful.

26 The first defendant was not referring to the plaintiff, but to its associate company, Uniwes Engineering. Oliveiro agreed that Uniwes Engineering was designing and manufacturing the equipment. It is not wrong to say that it was fabricating them. That information cannot be a trade secret because the cleaners were marketed in 1993/4, and in addition to the unit sold to Kenmore, four others were sold to Seagate.

27 Oliveira also complained that the first defendant was insinuating that the engineering team was spying on Corpane. I do not read in the statement that Terrence Boey had visited Du Pont and Corpane an insinuation that he was there to spy on Corpane.

28 The plaintiff's most-prized principal connected with the action is Metcal. The plaintiff is an authorised distributor of Metcal under a distributorship agreement dated 1 March 1989 which appointed the plaintiff as a non-exclusive distributor of Metcal products for Singapore, Malaysia and Thailand.

29 The plaintiff was upset when Metcal appointed the third defendant as its sole distributor in Singapore from 7 November 1993 for the accounts of five customers. Metcal informed the plaintiff of this and put up a proposal for the representation of Metcal by the two companies. Under this proposal there was to be a trial period of six months, after which the performance of the plaintiff and the third defendant would be assessed. If the plaintiff did not perform satisfactorily during the trial period, the third defendant will be the distributor, but if it performed satisfactorily, it will be the sole distributor.

30 Oliveira complained that:

The first defendant had admitted that he specifically asked for the Metcal distributorship after he resigned. From the matters deposed to herein, it is highly probable that he had already laid the groundwork to approach Metcal even before he left. He was able to do that because it is abundantly clear that being in the position as marketing manager of the plaintiffs, he had all the information and opportunities to do so because of the trust reposed in him.

31 Oliveira may be justified in thinking that the first defendant had done some groundwork before he left his job. He was not prohibited from competing

with the plaintiff after leaving his employment. An employee has the right to plan his future before his departure. He should be able to weigh the chances of being able to succeed if he is to resign. If the first defendant thought about principals that he will approach, when, where and how he would make his approaches, and the prospects of success while he contemplated his resignation, that is neither unreasonable nor improper. Oliveiro did not say what wrongful preparatory work the first defendant is supposed to have done with regard to Metcal.

32 The plaintiff's position on the developments over the Metcal distributorship also reflects its over-possessiveness. It claimed that Metcal was prohibited from offering the distributorship to any ex-employee of the plaintiff for 18 months after his resignation because s 7.5 of the distributorship agreement stipulated that:

Metcal will not hire without the distributor's written consent, a distributor employee less than 18 months after termination.

33 Oliveiro asserted that:

On the abovesaid premise, Metcal could not have offered any distributorship agreement to the defendants and/or third defendants without being in serious breach of its contractual obligation with the plaintiffs.

34 That contention is not tenable. Section 7.5 does not relate to the appointment of distributors. It restricts the right of Metcal to hire former employees of distributors, ie employ them. The distributors are not hired. Metcal appoints them, as it appointed the plaintiff under the distributorship agreement and reserved the right to appoint others under s 8.7 thereof. Nothing in the agreement prohibits Metcal from appointing as distributors former employees of distributors, or companies that they form or join.

35 Oliveiro referred to three other principals, Westbond, Smartsonic and Tech Spray, of which only first-named of the three was referred in the statement of claim. The plaintiff lost its distributorship with Westbond by a letter dated 11 August 1993 which was handed over to the first defendant by Ken Biggs of Westbond at the Nepcon Show in Kuala Lumpur. Oliveiro deposed that: I verily believe and it is conceivable that the first defendant approached Ken Biggs in Kuala Lumpur on 12 August 1993 and persuaded Biggs to give him the distributorship of Westbond in Singapore ...

36 When Oliveiro was examined by defence counsel it transpired that he had received a report from Mok dated 25 October 1993 on the latter's alleged attempts with the first defendant to get the Westbond distributorship. Mok wrote `... regarding Westbond, I do not really know what Raymond (the first defendant) had spoken to Ken or others. All I know is Raymond will do his best to discredit Universal Westech especially Randall (Oliveiro). How he does it - I really don't know`, and he went on to say, `I don't think Raymond had done anything drastic to secure Westbond agency.` There was no evidence that the defendants either sought or secured it.

37 Oliveiro elaborated on the confidential information that the defendants were alleged to have misused. This included (a) the plaintiff's strategy of selling equipment at a minimum profit and making profits from the solvents that the equipment will use and (b) its sales staff's knowledge of the use of the equipment and chemicals.

38 The first and second defendants may well have acquired the knowledge. The policy of selling equipment cheaply and making profits from the sale of the related consumables is not novel or exceptional. Former employees who start their own businesses cannot be prevented from applying the policy to their

businesses because their previous employees use the same approach. Employees who acquire knowledge of the products that they deal with do not have to abandon the knowledge when they resign. They are entitled to make the best use of their experience and knowledge in their subsequent employment or ventures, even if that involve their former employers' confidential information - so long as they do not steal and use their trade secrets or information of such high confidentiality as to amount to a trade secret. This is established in *Faccenda Chicken* and adopted and affirmed in *Tang Siew Choy's* case which I have referred to. Neither the policy of looking to the sale of consumables for profits, or the knowledge of the equipment and chemicals is a trade secret in either sense.

39 Mok Chit Kuan was the other main witness for the plaintiff. He is not a model witness or employee. His standard of ethics was, to say the least, unsatisfactory.

40 He was the sales manager of Uniwes Technology Sdn Bhd (hereinafter referred to as Uniwes Technology), a Malaysian associate of the plaintiff. He was unhappy with his working conditions and had tendered his notice of resignation on 4 August 1993, which was to be effective on 14 or 15 August. He was to stay on, elevated to the position of marketing manager with an enhanced salary with effect from 1 October 1993, after he confessed to the wrongdoings that I will be referring to. After giving his evidence in this action, he left the company on 1 April 1996 to start his own business.

41 He admitted to several improper, dishonest and possibly criminal acts. He tried to take lines from Uniwes Technology when he was still in its employ. He claimed that during the Nepcon Show in Kuala Lumpur in August 1993, he and the first defendant met with the representatives of Metcal and Westbond

and asked that they transfer the distributorships to them and he kept up those efforts with Metcal over the telephone.

42 He also admitted that he diverted an order from Uniwes Technology. He did not have a ready company for that purpose and he diverted it to Kimic Technology (M) Sdn Bhd, which was not incorporated yet at that time. He claimed that it was done with the knowledge and authority of Lum Ooi Lin, the promoter of the company, but she denied it. To divert the order, he sent out a quotation under the name of Kimic in July 1993, and signed it in the name of his cousin CJ Foo, whose signature he forged without permission.

43 His performance in the witness stand did not give any assurance that he was being more honest than he had been before. I was not prepared to accept his testimony against the first defendant unless it was confirmed or corroborated by other evidence, and very little of it was.

44 Insofar as the plaintiff's case relied on the evidence of Oliveiro, Mok and Lake, I found that its cause was not greatly furthered because Oliveiro's evidence was based upon his own views of the plaintiff's rights and the defendants' obligations, unsupported inferences he drew and his reliance on hearsay evidence, Mok was not a reliable witness and Lake's evidence was almost entirely hearsay and conjecture.

45 Three days before the hearing, the defendants gave discovery of a Marketing and Business Development Plan dated 30 September 1992 that he had prepared for the plaintiff which he kept when he resigned. His evidence was that his proposals in the report were rejected and the report was returned to him by Oliveiro in August 1993, one month before his resignation on 14 September. He said that he had taken it home to work on it, and had not given discovery

earlier because he did not look for it. He agreed that it was a document which a company would not allow to fall into the hands of a competitor.

46 He took steps to get distributorship from the plaintiff's principals immediately after he resigned. He asked for the Metcal distributorship on 16 September 1993 - two days after his resignation and put in hard work to secure it. He also made similar approaches to Tech Spray on 16 September and to Corpane, which was followed up by a letter of 15 October 1993.

47 When the first defendant made his approaches to the principals, he would have made plans for marketing their products. The marketing and business development report he prepared for the plaintiff contained useful information for drawing market plans. When he resigned, the report had only been returned to him in the month before. He could not have forgotten his disappointment, and must have remembered that it contained facts and figures such as the three-year sales forecasts and costs/sale forecasts. It was more probable than not that he referred to the report for information at that time.

48 The case against the second defendant was that he was a director of the third defendant while he was still in the employ of the plaintiff. He was employed as the plaintiff's sales manager working under the first defendant who he admired and respected. He tendered his resignation on 8 September 1993 and left on 7 October. He became a director of the third defendant on 27 September and a shareholder of the company on 8 October at the invitation of the first defendant.

49 He explained that he became a director because the first defendant told him that two directors were required for the company, but he did not take part in the business which he knew was in competition with the plaintiff until after

he left the plaintiff's employ, and he felt that he had not done anything wrong by becoming a director. He claimed that the first defendant had not consulted him before writing to Tech Spray on 16 September 1996.

50 In that letter the first defendant informed Tech Spray that:

... There have been many changes within Universal Westech. John (the second defendant) and myself have resigned from Universal Westech. CK Mok has also resigned from our sister company, Uniwes. The three of us have decided on a venture among ourselves in the same industries where we are so familiar with. We have been instrumental in the development of most products within Singapore and Malaysia and our belief is that more can be achieved for Tech Spray. Limitations currently faced will not be repeated in our set-up. As such, I hope that you can support us with the Tech Spray distributorship for Singapore and Malaysia.

51 Evidently the second defendant had committed himself to the first defendant and was prepared to follow his lead, which led to the representation to Tech Spray that he had resigned and was already a part of the new venture. Although he did not write or authorise the letter, he cannot dissociate himself from it because it was done in furtherance of the new undertaking which he was a part.

52 After reviewing all the evidence, I found that the plaintiff had failed to prove any of its complaints against the first defendant. It had not shown that while he was still an employee, he had tried to persuade Metcal and Westbond to terminate their distributorship and to transfer them to his company, or that he tried to get the plaintiff's customers to place their orders with his company. The complaints about his alleged misconduct after his resignation also failed because its construction of the letter to Corpane was unjustified and its complaint of his use of its confidential information was based on Steven Lake's

hearsay evidence, even if the use of confidential information at that stage is wrongful, which is not the case.

53 Nevertheless the first defendant's conduct was not blameless. He had kept the Marketing and Business Development Plan which was the property of the plaintiff, and had probably used it for himself and his new company. He had also induced the second defendant to be a director of the company when he was still working for the plaintiff, and had used his name in trying to secure business from Tech Spray.

54 In the case of the second defendant, although he did not participate directly in the business of the third defendant, he had engaged in competition with the plaintiff before he resigned. He did that when he became director of the company so that he and the first defendant can make up the minimum two directors and when his name was used in the effort to secure business for the third defendant from the plaintiff's principals.

55 His counsel argued that he had not breached his fiduciary duties as an employee by so doing. Several cases were cited, and I refer to three of them. In ***Balston Ltd & Anor v Headline Filters Ltd & Anor*** [1987] FSR 330 the defendant Head was a director and employee of the plaintiff. Head tendered his resignation as employee on 17 March with effect from 11 July. He followed that up on 16 April when he resigned his directorship, whereupon it was agreed that he would not attend work for the remainder of the notice period. On 25 April Head bought a company off the shelf, leased premises, ordered material and hired employees in preparation to start business in manufacturing filter tubes on 11 July in competition with the plaintiff company. The plaintiff applied for an interlocutory injunction against Head and his company. Scott J dismissed the

application. Referring to Head's activities between 16 April and 11 July the learned judge said (at p 340):

I am unimpressed by the `springboard` argument. Why in the period 16 April to 11 July the second defendant (Head) should not have established the first defendant (the company), arranged premises for it and ordered materials preparatory to the first defendant's intended commencement of business on 11 July I do not understand.

56 In **Laughton & Anor v BAPP Industrial Supplies Ltd** [1986] ICR 634, Peter Gibson J held that the appellants who were the respondent's employees had not acted in breach of their duties as employees by writing to their employer's suppliers to inform them that they intended to start up their own business and asking the suppliers for their product lists, price lists and the terms on which their products could be supplied. The learned judge held at p 638 that:

The crucial question ... is whether it is a breach of the term of loyalty for an employee whilst still in the employment of his employer to indicate an intention to set up in competition with the employer in the future. The employers and the industrial tribunal have assumed that it is. In our view, the tribunal fell into error in accepting that the indication of such intention was in itself sufficient.

57 Counsel also cited an American decision, **Metal & Salvage Association Inc v Michael Siegel** 503 NYS 2d 26. The defendant Siegel was the president of the plaintiff company. While he was in that office, he secretly incorporated a company in July 1984. In February 1985, he left the plaintiff company with another employee and competed against it with the plaintiff. The Supreme Court Appellate Division held (at p 27) that:

[S]o long as the defendants did not use plaintiff's time, facilities or proprietary secrets to build a competing business, there was no illegality in the secret incorporation of (the company) prior to their departure.

58 A common feature in these cases is that the employees took steps to prepare to compete with their employers, but did not compete with them before they left. The present defendants had progressed beyond the preparatory stage. They crossed the divide when they competed against the plaintiff to represent the same principals.

59 I find that the second defendant had been in breach of his fiduciary duty as an employee for ten days between 27 September and 7 October. It is difficult to quantify the loss that the plaintiff suffered as a result of that. I do not think that it is necessary to have a separate hearing to assess that, and I fix the damages at \$1000.

60 I will now deal with the issue of costs. Lai Kew Chai J had found that the interlocutory injunction against the first and second defendants could not stand. The plaintiff must pay their costs for setting it aside.

61 With regard to the costs of the action, though the plaintiff failed in its claim against the first defendant, his conduct towards the plaintiff was not beyond reproach. He held a senior position in the plaintiff's set-up, and had enjoyed its recognition and trust. Nevertheless he kept the Marketing and Business Development Plan when he left, and probably used it to compete against the plaintiff, and he led the second defendant into breaching his fiduciary duty as an employee of the plaintiff. While the second defendant had breached his duty, his conduct was less culpable because he was the first defendant's subordinate and had left matters to him during the transition between jobs.

62 Taking these matters into consideration, I award the first defendant half the costs of the action against him, and I order that the second defendant pay the

plaintiff costs of \$3,000 as there was just the issue of his directorship in the claim against him.

63 I need also to address the question of the damages arising out of the interlocutory injunction that was obtained against the first and second defendants on 19 November 1993 and discharged on 3 December 1993. The plaintiff gave an undertaking when it applied for the interlocutory injunction that if it is set aside, it would pay to the defendants damages for the losses they suffer. The undertaking did not extend to the third defendant as it was not a party in the proceedings at that stage.

64 The first and second defendants were not carrying on business in their personal capacities and did not refer to any personal losses in their affidavits of evidence-in-chief. I will therefore not make any order for damages in their favour.

65 The business was carried on by the third defendant, and any loss of profits or damages would be suffered by it. That was the basis on which the third defendant applied to be added as a defendant to the proceedings. In his affidavit in support of the application, the first defendant deposed that

4 The second defendant and I were at the material time and still are the only persons running Optim Application. Accordingly, the effect of the injunction severely crippled the business and operation of the said Optim Application. 5 Optim Application should have been joined as defendants in the proceedings especially since the effect of the injunction obtained by the plaintiffs clearly affected the said company. 6 I would add that **Optim Application suffered heavy losses** despite the efforts made by the second defendant and myself to discharge the injunction and to arrest the damage done by the plaintiffs. I verily believe that **Optim Application is entitled to claim against the plaintiffs in respect of such losses**. [Emphasis added.]

66 But the third defendant did nothing in the action after it became a party. It did not file any pleadings or make any claim for damages or costs. It remained a bare party, neither facing nor making any claims for damages or other reliefs or costs. In the circumstances, I will make no order on those matters.

67 ***Claim against first and third defendants dismissed; claim against second defendant allowed in part .***

Kan Ting Chiu J

Liew Teck Huat and Ravindra Samuel (Niru & Co) for the plaintiff
Thio Ying Ying and Lim Tanguy Yuteck (Chor Pee & Co) for the
defendants
