

Flairis Technology Corporation Limited & Anor v Gan Huan Kee & Ors
[2002] SGHC 116

Case Number : Suit No 723 of 2001/A

Decision Date : 29 May 2002

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : —

Parties : —

Judgment

GROUND OF DECISION

The facts

1. Flairis Technology Corporation Limited (the first plaintiffs) are a public company listed on the secondary board of the Stock Exchange of Singapore (SGX); they were previously known as Allied Components International Limited. The main business of the first plaintiffs is the manufacture of printed circuit board assemblies (PCBA), product design and plastic moulds for audio telecommunication multi-media products and engineering plastic parts. Flairis Advanced Manufacturing Pte Ltd (the second plaintiffs) are a wholly owned subsidiary of the first plaintiffs and were incorporated on 22 December 1999; the company was formerly known as Allied Advanced Manufacturing Pte Ltd and changed to its present name on 26 March 2001.

2. Gan Huan Kee (the first defendant) was appointed the managing-director of the second plaintiffs in January 2000; he tendered his resignation on 4 May 2001 and left the services of the second plaintiffs on 28 May 2001. Chan Tien Seng (the second defendant) was the Vice-President (Operations) of the second plaintiffs until he tendered his resignation on 20 April 2001 and left on 4 May 2001. Khong Soo Har (the third defendant) joined the second plaintiffs as the Vice-President (Logistics) on 17 January 2000 from which position he resigned on 23 April 2001 and left, on 4 May 2001. Wong Kwok Ping (the fourth defendant) joined the second plaintiffs on 17 January 2000 as the Director of Design Engineering, from which position he resigned on 25 April 2001.

3. Prior to their employment by the second plaintiffs, the first, second and third defendants were parties to a joint-venture agreement with the first plaintiffs dated 9 December 1999 (the JVA), which the first plaintiffs said was based on a business plan initiated by the first defendant. Under the JVA, the parties agreed inter alia, to research and develop PCBA and products based thereon, for a subsidiary to be established by the first plaintiffs (namely the second plaintiffs). The terms of the JVA stated that the three (3) defendants would provide technical expertise for the business activities of the second plaintiffs which in essence was, to set up and operate a manufacturing facility in Singapore for PCBA with Advanced Surface Mount Technology. In turn, the first plaintiffs would provide the necessary funding of about \$12m for the acquisition of special manufacturing facilities and skilled personnel for the second plaintiffs. As at 31 May 2001, the first plaintiffs claimed they provided funding in excess of \$15m to the second plaintiffs, excluding banking facilities of another \$15m or thereabouts. The first plaintiffs also hired employees for the second plaintiffs which numbered 239 as at 29 May 2001.

4. Besides setting out the obligations of each party to the agreement, the JVA also included (under cl 4.3) a management team share performance scheme whereby certain number of shares in the second

plaintiffs would be issued to the first, second and third defendants, based on a formula pegged to performance targets/profitability of the second plaintiffs. It was envisaged that the second plaintiffs would ultimately be listed on SGX.

5. The second plaintiffs also established a design centre for purposes of designing the sequence, layout and the type of components to be mounted on printed circuit boards.

6. The first to third defendants entered into service contracts with the second plaintiffs, all dated 29 December 1999; effectively they were the senior management of the second plaintiffs. The fourth defendant's employment contract with the second plaintiffs came later (dated 16 February 2001); he was one of the initial employees (about 22) hired by the first, second and third defendants and was specifically tasked with developing the designs for the PCBA (and products to be developed by the second plaintiffs) as well as to manage and supervise the personnel employed in the design centre.

7. The second plaintiffs commenced operations in the first quarter of 2000. According to the first plaintiffs, as at May 2001, the second plaintiffs had designed and manufactured various products for a number of reputable (local and foreign) customers which included Hewlett-Packard, Ericsson, Philips Electronics Singapore Pte Ltd (Philips), Serial System Ltd (Serial System), Eagle Wireless, Plexus etc; the second plaintiffs also manufactured products designed by their own customers.

8. In January 2001, the Finance Manager (Keith Ong) of the second plaintiffs left the company and his position was temporarily taken over by Mark Tan, who was seconded from the first plaintiffs. After reviewing the accounts of the second plaintiffs, Mark Tan reported to the Chief Financial Officer (Tan Zing Yuen) of the first plaintiffs that certain items were not accounted for. As a result, Tan Zing Yuen assigned the first plaintiffs' then financial controller Shieh Ping to conduct an internal audit of the accounts of the second plaintiffs, which was completed on 2 March 2001. Shieh Ping found that the profits of the second plaintiffs for the period July 2000 to January 2001 were overstated (by \$1.5m) due to the omission of certain purchases and expenses and, the recognition as sales of the advanced billings made to certain customers of the second plaintiffs even before the products were delivered to the customers; the net effect was that there should be a loss of \$2.9m instead of a profit of \$235,000.

9. The first plaintiffs decided to appoint an international accounting firm (KPMG) to verify the findings of the internal audit. KPMG were appointed and their report dated 11 September 2001 showed that for the period July-December 2000, there was a loss of \$4.423m instead of a profit of \$545,000. The accounts (and the inaccuracies) of the second plaintiffs had an impact on the first plaintiffs as the same were included in the consolidated accounts of the first plaintiffs reported to the SGX.

10. In the last quarter of 2000, the first, second and third defendants informed the first plaintiffs that the second plaintiffs could not be publicly listed because of rules imposed by SGX against chain listings. Consequently, in January 2001, the first, second and third defendants commenced negotiations with the first plaintiffs on the shares entitlement under cl 4.3 of the JVA, pointing out that shares allotted to them in the second plaintiffs would be illiquid. It was agreed between the parties that instead of shares in the second plaintiffs, the three (3) defendants would be given share options in the first plaintiffs; as a result, the first defendant received options for 1.43 million shares while the second and third defendants received options for 1.19 million shares each. It was also agreed that the JVA should be terminated as well as the service contracts of all defendants; however, the management team and business of the second plaintiffs would remain unchanged. The terms reached between the parties were evidenced in a Memorandum of Understanding and Joint Venture Termination Agreement both dated 9 February 2001 and SGX was duly notified the same day. In consequence, the first, second and third defendants entered into fresh agreements with the

second plaintiffs all dated 13 February 2001.

11. The plaintiffs alleged that it was around this time that the first, second and third defendants offered their services to a competitor of the second plaintiffs namely, Tri-M Technologies (Singapore) Limited (Tri-M), a public company listed on the main board of SGX. According to the plaintiffs, the three (3) defendants approached Tri-M with a business plan dated 12 March 2001 (the business plan) wherein they offered: their design services for products similar to those they had designed for the second plaintiffs, existing employees and customer base of the second plaintiffs and, they advised Tri-M there was a 'window' for the period April to June 2001 for business opportunities. The first plaintiffs alleged that the first three (3) defendants used confidential information belonging to the second plaintiffs to prepare the business plan whilst still in the latter's employment.

12. When the second, third and fourth defendants tendered their resignations on 20th, 23rd and 25th April 2001 respectively, the plaintiffs attempted to persuade the first defendant to stay on by offering him (on 27 April 2001) an incentive of an additional 1.43m share options in the first plaintiffs; the first defendant declined. Coincidentally, many of the employees (39) recruited by the defendants resigned at the same time.

13. A day after the first defendant's departure (28 May 2001), the plaintiffs decided to check his computer system. They discovered a copy of the business plan and, that information, electronic mails and documents (for the period February to 28 May 2001) had been removed by the first defendant. Similarly, when they checked the computer of the third defendant, the plaintiffs found a copy of the business plan whilst an examination of the second defendant's computer revealed that he had removed therefrom all data/information relating to his work.

14. Subsequently, through an announcement made by Tri-M to SGX, the plaintiffs discovered that the first, second, third (and later) the fourth defendants had all joined Tri-M together with a number of their former employees.

The claim

15. On 11 June 2001, the plaintiffs commenced this action claiming damages for breach of the JVA (as well as for conspiracy) and, an injunction to restrain the defendants inter alia from:

- a. taking up employment with Tri-M;
- b. soliciting, interfering with or enticing away from the second plaintiffs any person who was or had been, a client, customer or employee;
- c. carrying on or being engaged in business similar to or in competition with that undertaken by the second plaintiffs, either alone or jointly with others, directly or indirectly;
- d. acting as a director or otherwise of any person, firm or company engaging directly or indirectly in any business which was in competition with the business undertaken by the second plaintiffs;
- e. using confidential information of the plaintiffs or any part thereof otherwise than for the purpose for which it was supplied.

There was also a claim against the first and second defendants for damages for breach of directors' duties owed to the second plaintiffs.

16. Based on the above endorsement of claim, the plaintiffs obtained (ex-parte) on 12 June 2001, an interim injunction in terms similar to para 15 (b), (c), (d) and (e). The defendants were also restrained from dealing with potential customers in a list they had provided to the court and, from revealing trade secrets also in a list provided to the court. However, on the defendants' application, the injunction was set aside with costs on 5 July 2001 by Judicial Commissioner Tay Yong Kwang. On 7 August 2001, JC Tay varied the earlier order of court and granted:

a. an injunction restraining the first defendant from soliciting/enticing away the second plaintiffs' employees, limited to one year from 28 May 2001;

b. an injunction restraining all four (4) defendants from using the second plaintiffs' schematic designs, Gerber files and bills of materials set out in a list provided by the plaintiffs, excluding those wholly supplied by the defendants' customers and or the defendants' customers' agents.

17. The plaintiffs filed a (lengthy) statement of claim detailing the defendants' breach of their fiduciary duties and contracts of employment. The plaintiffs pleaded that the third defendant attempted (on or about 4 May 2001) to copy/remove data belonging to the second plaintiffs from the office computer system he used.

18. The plaintiffs alleged that the accounts rendered by the first, second and third defendants for the period July to December 2000 misrepresented the financial state of the second plaintiffs. They particularised one instance as advanced billing of customers like Ericsson and Advent Electronics Pte Ltd (Advent) before actual completion and delivery of goods by the second plaintiffs.

19. Additionally, the plaintiffs alleged that the defendants sought to divert existing contracts and projects undertaken by the second plaintiffs for their own benefit and or for the benefit of the defendants' prospective employer. By a consent order made in December 2001, the plaintiffs deleted this allegation from their statement of claim together with their claim for damages based on conspiracy.

20. In the common defence which they filed, the defendants denied they prepared the accounts -- they averred that the financial manager of the second plaintiffs (who reported to the chief financial officer of the first plaintiffs) was responsible for managing the working capital, the cash flow requirements as well as the preparation and maintenance of the second plaintiffs' accounts.

21. While admitting the second and third defendants had prepared the business plan which referred to some of the existing customers of the second plaintiffs, the defendants averred that information relating to the then existing customer base of the second plaintiffs was readily available to the public.

22. The first, second and third defendants denied they had attempted to copy/remove data belonging to the second plaintiffs; they had only deleted certain personal e-mails as part of the handing-over process before they left the second plaintiffs' services. The third defendant pleaded that the second plaintiffs' representative Chau Tar Wee also deleted the third defendant's e-mails on 4 May 2001 (apart from those deleted personally by the third defendant himself).

23. The defendants denied that advanced billing of Advent and Ericsson was against the practice of the second plaintiffs. In any case, Advent was billed in December 2000 and in January 2001 pursuant

to their request while Ericsson was invoiced in January 2001 for work already completed at that point in time. The defendants denied that information relating to the second plaintiffs' products, schematic designs and Gerber files constituted trade secrets.

24. Finally, the defendants denied they owed a duty to the second plaintiffs not to use or disclose confidential information not amounting to trade secrets, following the termination of their employment.

25. I shall not refer to the Reply filed by the plaintiffs as essentially, it reiterated the allegations pleaded in the statement of claim and joined issue with the defendants' pleadings.

The evidence

(i) the plaintiffs' case

26. The plaintiffs called (6) witnesses for their case, including a former employee (Lau Chor Boon) who was subpoenaed due to his reluctance to attend court. The written testimony of the first plaintiffs' director (of special projects) Chiam Kia Tiam (Chiam) has been set out in paras 1 to 14 above.

27. In his cross-examination, Chiam (PW1) revealed he joined the first plaintiffs' employment on 1 September 2001, well after the four defendants had resigned and left the second plaintiffs' employment. Consequently, Chiam had no personal knowledge (which he confirmed) of events which took place in the two (2) companies at the material time, including the negotiations leading to and, the JVA. Chiam did not meet any of the defendants until their appearance at this trial. Chiam testified that he was hired as a consultant by the first plaintiffs to advise them on restructuring as well as on the errors discovered in the accounts of the second plaintiffs. He had been the audit manager at the accounting firm which was in charge of the first plaintiffs' initial public offering. During that time he was very involved with the first plaintiffs as the company had to provide two years' forecasts to SGX and, he was aware of the setting up of the second plaintiffs.

28. In his affidavit of evidence, Chiam had, in relation to the inaccurate accounts of the second plaintiffs deposed as follows (at para 35):

the discovery of such large inaccuracies in accounts of [the second plaintiffs] for the period 1 July 2000 to 31 December 2000 had a very drastic impact on [the first plaintiffs]. The accounts submitted by Gan [the first defendant] for the same period were consolidated into the group accounts for the purpose of its half year financial statement announcement to the Stock Exchange of Singapore Ltd on 8 February 2001. Apart from the obvious and immediate loss of reputation and credibility suffered by the [the first plaintiffs] group, such results may have also caused loss to the general investors in the share market and other indirect losses to [the first plaintiffs].....

I shall revert to the above passage later in my findings.

29. Another representative from the first plaintiffs who testified was Tan Zing Yuen (Zing), who has since left the first plaintiffs' employment (on 17 September 2001) after having joined them in May 2000. In his affidavit, Zing (PW4) deposed that his duties as Chief Financial Officer included, overseeing the preparation of the group's consolidated budget for the first plaintiffs and its subsidiaries and, funding for its operations. He said the preparation of the accounts of the subsidiaries, including the second plaintiffs', was the responsibility of the managing-director of each

subsidiary and the person's finance team. Zing also relied on cl 4.1(c) of the JVA to say that responsibility for the second plaintiffs' accounts rest with the first, second and third defendants. The relevant extracts of that clause states:

Role of the Management Team

The Management Team acknowledges and undertakes that it shall have the principal responsibility for prompting the business of the company as well as the smooth and efficient administration and operations thereof, subject to the overriding supervision of [the first plaintiffs]. Without limiting the generality of the foregoing, the Management Team shall as a joint and several liability undertake the following responsibilities:

c. (ii) prepare and provide to [the first plaintiffs] on a monthly basis management reports and accounts of the affairs of the [second plaintiffs].

30. Although he acknowledged that the second plaintiffs' accounts were indeed prepared by the Finance Manager Keith Ong, Zing maintained that overall responsibility lay with the first three (3) defendants as Keith Ong would have to submit such accounts to them for approval. On advanced invoicing, Zing deposed that the first plaintiffs' chief executive officer KY Wong (the CEO) had expressed concern at a weekly management meeting of the first plaintiffs held on 26 March 2001, which the first defendant attended. He said that although the CEO sought clarification from the first defendant (who presented the accounts of the second plaintiffs at such meetings), the latter did not explain. The subject was raised at subsequent management meetings (including one held on 9 April 2001 at which the first defendant was absent) but was never addressed by the first defendant, even until his resignation.

31. Cross-examined, Zing;

(i) testified he had interviewed Keith Ong for the post of Finance Manager in or about May 2000 first, before a second interview was conducted by the first defendant; at the time he had noted that Keith Ong had about 13 years' relevant experience in addition to a degree in business studies (with accounting major) from Middlesex University;

(ii) disagreed it was Keith Ong's sole responsibility to carry out book-keeping and accounting functions for the second plaintiffs, he considered the duties a joint responsibility of all the senior management staff of the company, in particular of the first and second defendants, as they were in charge of the day-to-day operations (notwithstanding they had no accounting qualifications);

(iii) testified there were two (2) signatories for the second plaintiffs' cheques; for amounts of \$5,000 and below, any two (2) members of the board of directors could sign but, for amounts above \$5,000, one signatory could be either the first or second defendant whilst the other signatory must come from the first plaintiffs (including himself). The practice applied to all subsidiaries of the first plaintiffs and not only to the second plaintiffs;

(iv) confirmed that the first plaintiffs (and he) would receive copies (on a monthly basis) of accounting reports from the second plaintiffs, including profit & loss accounts/forecasts and balance sheets, prepared by Keith Ong. If not for

the accounting error of \$545,000, the second plaintiffs' accounts would have shown an operating loss for the second half of 2000 not a profit. Although they picked up the accounting error, the plaintiffs overlooked the discrepancy of \$3.75m for material purchases until the internal audit was carried out;

(v) confirmed that the first plaintiffs' announcement to the SGX (on 8 February 2001) of the company's half year financial statement for the period ended 31 December 2000 (3AB141-148) clearly stated that the figures had not yet been audited.

(vi) admitted that the plaintiffs wanted to introduce a computerised materials management system to link up with their accounting system and, it was implemented with the installation of the AXAPTA system in August 2000. However, he disagreed that an earlier implementation of the AXAPTA system would have avoided the accounting errors experienced by the second plaintiffs;

(vii) said although he was unaware of the reasons why Advent wanted advanced billing, the request was in any event not agreeable to the first plaintiffs.

(viii) he agreed that based on the second plaintiffs' sales figure of \$19,760,000 for the first half of 2001, a profit of \$545,000 or 2.75% was within the industry's norm.

32. One witness called by the plaintiffs was the accountant from KPMG who had verified the factual accuracy and description of the accounting errors found by the plaintiffs in their internal audit. KPMG's partner Phuoc Tran (Tran) confirmed in his report dated 11 September 2001 that sales to customers (including Advent) were overstated by \$3,329,000 whilst costs were understated by \$1,639,000; the net result was a loss before tax of \$4,423,000 instead of a profit of \$545,000.

33. Cross-examined, Tran (PW5) clarified that the procedures he conducted to arrive at his report were less than those prescribed for a proper audit as, he did not look at all, but only selective accounting records; these included documents compiled by the plaintiffs' management as well as suppliers' documents. I should emphasise however, that Tran was given full access to the records of the second plaintiffs.

34. Another witness was Yap Choon Ming (Yap) the second plaintiffs' director of the design centre. As Yap's employment with the second plaintiffs commenced on 19 May 2001, he was in the same position as Chiam – he had no personal knowledge of what transpired in the first or second plaintiffs during the tenure of the defendants' employment. Yap's testimony centred on what was purportedly told to him by Lau Chor Boon (Lau) the plaintiffs' reluctant witness. In his written testimony, Yap (PW2) deposed that he had met Lau in early December 2001 and, was handed documents which Lau had taken from Tri-M's office as well as other documents which Yap subsequently ascertained came from the second plaintiffs.

35. Lau (PW6) was specifically subpoenaed by the plaintiffs to testify on the documents he had handed to Yap. Lau had been in the second plaintiffs' employment as an assistant design engineer from 2 January 2001 until he left on 16 June 2001. His uncle Teo Kang Wee (the second plaintiffs' design mechanical engineer) was instrumental in his obtaining a job with the second plaintiffs. Lau was later employed by Tri-M (between 20 June and 28 November 2001) in the same capacity. He testified he left the second plaintiffs' services together with about 30 other employees (including his uncle) who left (at the behest of the first defendant) in batches. These ex-employees subsequently

joined Tri-M and were his colleagues at Tri-M's design centre.

36. Lau had visited the premises of Tri-M even before he left the second plaintiffs' employment. On or about 16 May 2001, he accompanied his uncle and the second plaintiffs' project manager (Wong Shu Fen) to Tri-M's office. He met the fourth defendant at Tri-M's warehouse where measurements were taken for the layout of a design centre, on the instructions of his uncle. He had also met the second defendant at Tri-M's premises in April 2001. Lau incorrectly identified the first defendant in court, mistaking the third for the first, defendant.

37. Lau confirmed the documents he had handed to Yap came from Tri-M's office. They consisted of quotations from the second plaintiffs, one (1) of which he had inadvertently seen on the computer screen of Wong Shu Fen. While he was with Tri-M, the fourth defendant (who was in charge of the design centre) had instructed Lau (sometime in June 2001) to delete information from the computer system relating to files of the second plaintiffs. He understood from the fourth defendant that it was after the second plaintiffs had lost their case against the defendants. Lau explained that he was unwilling to testify (although he had initially indicated he would affirm an affidavit of evidence for the plaintiffs) because the fourth defendant had threatened him in December 2001 over a forged medical certificate which Lau had tendered to Tri-M during his employment with the company. I should point out that this allegation was denied when the fourth defendant testified, along with Lau's allegation that the fourth defendant had instructed him to delete the second plaintiffs' files in Tri-M's possession. The fourth defendant added that he would not have given Lau a job at all on merit. It was Lau's uncle Teo Kang Wee who approached Tri-M's human resources department for a position for his nephew.

38. Cross-examined, Lau admitted he had confessed to the fourth defendant while with Tri-M, that he had used a false medical certificate and was asked to resign. Until told by counsel, Lau was unaware that Tri-M had lodged a police report on 20 December 2001 relating to what he told the fourth defendant. Lau also agreed that he would not know whether the first defendant did or did not entice other employees of the second plaintiffs to join Tri-M. Indeed, he agreed he was in no position to say whether any of the defendants approached any employee of the second plaintiffs to leave and join Tri-M's services; he confirmed none of them approached him.

39. A witness called by the plaintiffs was Ong Siew Ching (Ong), the first plaintiffs' information technology manager. She (PW3) testified that on 4 May 2001, together with her colleague Chau Tar Wee (Chau), she had visited the premises of the second plaintiffs to conduct an inventory of the office computers. She and Chau split the work and went their separate ways. At one stage, she was requested to find Chau by the personal assistant (Ms Yong) to the first plaintiffs' chairman. When she located him, Chau was at the third defendant's computer system and when questioned, Chau told her he was copying all the third defendant's files onto diskettes as per the latter's request. Ong informed Ms Yong who said the files were the company's data and should not be copied. Ong then told Chau to stop copying the files, which he did. Chau indicated he had already completed copying and had passed the diskettes to the third defendant. Told by Chau that he could not take out the diskettes from the company, the third defendant bent the diskettes, handed them to Chau and left the premises; the plaintiffs did not call Chau to testify nor explain his absence as a witness.

(ii) the defendants' case

(a) the expert testimony

40. In addition to the four (4) defendants, there were two (2) experts called by them as witnesses,

one was Lee Chin Tat and the other Leslie Lee Teck Hai. It would be more expedient for me to deal with the expert testimony first before I review the evidence of the defendants.

41. Lee Chin Tat Roger (Roger) is the sole-proprietor of Innotech Electronics, which inter alia, markets electronic components (manufactured in Asia) to foreign electronics companies including subcontractors and manufacturers. He was requested by the defendants to render his opinion on whether the second plaintiffs would have any confidential information or trade secrets in respect of the designs of printed circuit boards (PCB) which they carried out for their customers. Lee (DW5) answered the question in the negative, for the following reasons:

(i) as an electronics contract manufacturer, the second plaintiffs have no proprietary rights of their own but provide design, manufacturing and other services to their customers who would include original equipment manufacturers (OEM) and others;

(ii) in respect of design services carried out by contract manufacturers, the intellectual property rights of a particular design and product would belong to the customer. At the conclusion of an assignment, all documents are returned to the customer;

(iii) design services are offered by all major electronics contract manufacturers;

(iv) the designing process involves making use of computer-aided design to generate the Gerber files and the Bills of Materials. The Bills of Materials are later passed onto the purchasing department to obtain the cost of individual components listed, the prices of which are easily available in the open market;

(v) once a product is launched in the market, it would be possible for any competitor to reverse engineer and copy the product's functionality.

I would add that Roger is a remarkable person as he secured almost all of his (professional) qualifications by part-time studies/correspondence courses including his master's degree (in business administration) from the University of Strathclyde. Of the four (4) defendants, he is only acquainted with the first through their contact at the Singapore Institute of Materials Management (the Institute) of which Roger is the professional development director. Apparently, Roger did a case study on Tri-M last year (for his co-authorship of a book on world class logistics published by the Institute) on what made a successful contract manufacturer; case studies were also done on companies such as Dell and those in the Singapore Technologies group. Roger's experiences (approximating 20 years) included working for American multinationals such as Fairchild and Singapore's (most well-known contract manufacturer) Venture Manufacturing (S) Ltd; indeed, he was part of the team which co-founded Venture Manufacturing (S) Ltd.

42. The defendants' other expert witness Leslie Lee Teck Hai (Leslie) is a director and technical consultant of Meds Technologies Pte Ltd. His twelve years' working experience included a stint (one year) with Motorola and four (4) years with a local company, as a PCB design engineer. He testified he had worked as a PCB designer for companies such as Hewlett-Packard, Intel and Agilent. Leslie was approached by the fourth defendant to be a witness; they knew each other from business dealings whilst employed by different companies previously. He does not know the other defendants at all. He worked in Motorola when Yap (PW2) was also employed by the multinational; the latter was senior to him. Leslie (DW6) confirmed Roger's opinion that information leading to and, the design of PCB itself belongs a customer; he said:

(i) in addition to the second plaintiffs, other public companies which are contract manufacturers are Natsteel Electronics Ltd, Omni Industries Ltd and Venture Manufacturing (S) Ltd;

(ii) a customer is free to go to any contract manufacturer to design his product. Due to the nature of the designer's job, he may often be engaged to design printed circuit boards (PCB) for different customers who are competitors in the market. Recognising this fact, customers are very careful in protecting their intellectual property rights in the design specifications and in the final product. The customer would therefore release to the designer only sufficient information for the designing of a particular PCB;

(iii) the design process involves obtaining the customer's specifications and then producing a schematic design (using computer-aided designs software tools [CAD]) that includes the outline drawing of all components that are mounted on the PCB. The designer would need to be familiar with the components that he is working with. Various types of CAD software are easily available in the market. Such design assignments are usually customised and one-off tailored for a specific product and model. It cannot be reused for a different model of the same product; designs for older models would in most cases also be obsolete, due to rapid advancement in technology in the industry itself;

(iv) consequently, the second plaintiffs' Gerber files, Bill of Materials and schematic designs would not constitute trade secrets or confidential information, which, in any event belong to the customer.

43. The plaintiffs had pegged their case (on the defendants' breach of confidential information) on the second plaintiffs' non-disclosure agreements (NDA) with their customers (see 1AB104-110) which included one with Serial System Ltd (another listed company, see 1AB667). The second plaintiffs even had a mutual NDA with one of their customers Union-Tech Limited (see 1AB106-108). According to Roger and Leslie, NDAs are a common practice in the contract manufacturing industry although mutual NDAs are rare. Even in the latter case, confidential information belongs not to the designer but to the customer. Indeed, the agreement with Serial System Ltd (dated 3 July 2000) stipulated [in cl 9.1] that all copyright and intellectual property rights in respect of the deliverables (defined to mean prototypes and other items set out in annex D to the agreement) shall belong solely and entirely to the former.

44. Roger said it made no sense for a contract manufacturer to own the design of a product produced for a client. It would deter customers from going to such contract manufacturers as multinationals do not just rely on one but, a number of contract manufacturers, to produce/design their PCBs.

45. Before I consider the testimony of the four (4) defendants, some mention should be made of the process known as reverse engineering, on which Roger (and the fourth defendant) was cross-examined at some length. Roger testified that reverse engineering can produce a product similar (in terms of characteristics) but not identical to, the original. However, the reverse engineering process may result in a product which could be better than the original and he cited as one example the floppy diskette — although it was designed by the United States of America, Japan had developed a better design. Watches were another example where the Japanese had improved on the original design (presumably) of the Swiss. Generic products (such as local area networks) are easy to reverse engineer but perhaps not items like Intel's chips or CPUs (central processing units). He estimated that it would take 2-2 weeks to reverse engineer a PCB.

46. In so far as pricing was concerned, Roger opined that it was not difficult for a contract manufacturer to obtain prices of components comprise in a Bill of Materials. The more sophisticated a product, the greater the number of components – a monitor could have as many as 300 components. As a contract manufacturer must, (in order to remain competitive) be able to quote a price to a customer soon after (within 24 hours) being approached by a potential customer, Roger said it cannot be a time-consuming process as counsel for the plaintiffs suggested. From practice, contract manufacturers would know which suppliers to approach to obtain prices of components. The suppliers' names are also readily available from catalogues and increasingly so, from the internet. Moreover, the customer would furnish a list of the required components to the contract manufacturer and, it would identify the suppliers concerned.

47. Cross-examination of Leslie revealed that last year, he had supplied a particular software (of which he was then the exclusive distributor) to Tri-M but it was a one-off transaction.

(b) the defendants' testimony

48. Prior to joining the second plaintiffs' employment, the first defendant had had 24 years' experience in the electronics industry. He had also worked as a test engineering manager at SCI Manufacturing Singapore Pte Ltd (SCI) for about six (6) years; SCI's business is similar to the second plaintiffs' in that it designs and manufactures electronic products for original equipment manufacturers (OEM) which included Eagle Wireless, Hewlett-Packard and Philips. As the managing director of the second plaintiffs, the first defendant said his duties and responsibilities were purely managerial in nature; he was never involved in product designing processes, unlike the fourth defendant.

49. The first defendant pointed out that even before the JVA, the first plaintiffs already had three (3) factories (within its group) in Malaysia which manufactured PCBA, using Advanced Surface Mount Technology (SMT) and machinery which were comparable to those used by the second plaintiffs. When the second plaintiffs commenced operations in mid-January 2001, it was with two (2) SMT lines to which four (4) more were added in May 2001. Currently, the first plaintiffs have four (4) plants in Malaysia and three (3) in Indonesia manufacturing PCBA using SMT.

50. The first defendant refuted the plaintiffs' claim that the JVA was terminated because the second plaintiffs did not get a listing. Indeed, the JVA provided for that eventuality (clause 10.2) by a share swap provision should the second plaintiffs fail to be listed on either the SGX or Nasdaq Exchange in the United States. The JVA was terminated because the first plaintiffs recruited the CEO (KY Wong) from Compaq Computers who brought in a whole team (35) of new staff including senior managers and set up a corporate department. The CEO and his team not only duplicated the activities of the second plaintiffs but also went into direct competition with the second plaintiffs in the areas of marketing, program management and materials procurement. Serious marketing conflicts resulted causing confusion amongst customers some of whom called up the second plaintiffs to inquire who they should actually deal with. The CEO referred business procured in Singapore to the first plaintiffs' plants in Malaysia and Indonesia.

51. The first and third defendants had made a trip to the United States in October 2000 to meet potential customers and to identify suitable marketing representatives. During their trip, they had also identified a potential site to start a pilot run line to build prototypes. After their return to Singapore, the two (2) defendants put forward the proposal to a meeting of the board of directors of the second plaintiffs only to have it vetoed by the CEO who indicated that, the first plaintiffs intended to have such an operation in the United States. Further, the CEO instructed the two defendants not to pursue anymore business opportunities in the United States or make any overseas trips (save for

Batam and Penang) without his prior approval.

52. From about July/August 2000 onwards, the second plaintiffs started experiencing cash flow problems because of the first plaintiffs' failure to provide funding. The problem became so serious that suppliers refused to supply parts to the second plaintiffs in the last quarter of 2000, causing delays in production and resulting in an erosion of customers' confidence.

53. A letter dated 23 October 2000 from the first plaintiffs was sent to the first, second and third defendants, threatening to oust the management control of the plaintiffs after 31 December 2000, should the second plaintiffs fail to achieve a pre-tax profit of \$1.5m for the second half of 2000. This threat was made despite the fact that the JVA did not stipulate any minimum performance targets. The first defendant had signed but, subsequently cancelled his signature on, the letter; he was unhappy with the contents and his feelings were shared by the second and third defendants.

54. At end December 2000 or early January 2001, the CEO approached the first defendant and suggested the termination of the JVA. After discussing the proposal with the second and third defendants, the first defendant reluctantly agreed. The CEO then arranged for the necessary documentation to be drawn up and signed on 9 February 2001. Three (3) days later, the CEO informed the first and second defendants that functions of the second plaintiffs in materials procurement, program management and marketing would be taken out of their hands (as well as from the third defendant) and handed over to the corporate department of the first plaintiffs with immediate effect. The defendants were further instructed to outsource the second plaintiffs' warehousing function to a third party.

55. The changes implemented by the CEO meant that effectively the third defendant no longer had any working responsibilities and it was redundant for the second plaintiffs to have the services of both the first and second defendants. Consequently, the first, second and third defendants found their positions untenable and eventually all three (3), together with the fourth defendant, tendered their resignations.

56. The first defendant denied he had removed all data from his computer covering the period February to May, 2001. He deleted all e-mails from his computer prior to leaving the second plaintiffs, as part of the handing over process. Indeed, it was his practice to delete e-mails/documents periodically in the course of his work. Where the e-mails were relevant to the operations of the company, the first defendant said copies had already been printed out and filed in the respective files in the second plaintiffs' office. Chau's assistant had checked his computer one day before his departure from the company to make sure that he had deleted all the data.

57. The first defendant also refuted the plaintiffs' allegation that he had (together with the second and third defendants) prepared and provided to the second plaintiffs the accounts for the period July 2000 to January 2001. The accounting system was set up by the then general manager of the first plaintiffs (one Yong Poh Choo) who employed an accounts clerk and both were responsible for the preparation and management of the second plaintiffs' accounts until June 2000, when the Finance Manager Keith Ong took over. For such accounting support from the first plaintiffs, the second plaintiffs had to pay the former \$5,000 per month under cl 4.2 of the JVA.

58. The first defendant referred to the second plaintiffs' cheque signatories as another form of monitoring by the first of the second plaintiffs, on which Zing's testimony has already been set out (para 31[iii] *supra*).

59. The first defendant pointed out that neither he nor the second or the third defendants, had

accounting training or background. They relied on the accounting information provided by Keith Ong to keep track of the performance of the second plaintiffs. He revealed that in December 2000, Ong Ah Whatt, the chairman of the first plaintiffs had expressed dissatisfaction over the performance of Keith Ong and indicated that the latter's services should be terminated. Keith Ong left in January 2001 and Mark Tan from the first plaintiffs' office took over his position. It was after Mark Tan took over and discovered errors in bookkeeping that, an internal audit was conducted and subsequently verified by KPMG.

60. The first defendant denied any wrongdoing as regards advanced billing and pointed out that the practice continued in the case of Advent, after he left the second plaintiffs. The principal reason behind Advent's request for advanced billing was to enable the company to capture the transaction in their financial records by a certain time-frame in order to close their books. In the case of Ericsson, the company was invoiced in January 2001 for work already completed at that point in time on PCBAs. Such advanced billing was only done for products which were very close to completion.

61. The second defendant also worked at SCI (for 6 years) before he joined the second plaintiffs. Like the first defendant, he was not involved in product design or the actual designing process nor did he have the expertise. He had prepared the business plan together with the third defendant. He said the plan comprised of a general business model adopted by major players in the industry including Soletron Corporation, SCI and, Celestica Incorporated. Many contract manufacturers such as Flextronics International Ltd, Omni Industries Ltd and Venture Manufacturing (S) Ltd utilised the business model. He, the third and fourth defendants were former colleagues at Thomson Consumer Electronics Pte Ltd (Thomson).

62. The second defendant denied the plaintiffs' allegation that the business plan made known to Tri-M the existing customer base of the second plaintiffs. Some customers of the second plaintiffs (such as Creative Technology and Ericsson) were not exclusive but, were common to other contract manufacturers while others (IBM, Matsushita) were not customers of the second plaintiffs at the material time.

63 The business plan also did not involve any proprietary or confidential information of the second plaintiffs. The second defendant pointed out that Tri-M had been in PCBA contract manufacturing since about 1987, utilising SMT.

64. Like the first defendant, the second defendant blamed Keith Ong for the accounting/book-keeping debacle. After the CEO was recruited, the CEO requested the second defendant to prepare a chart of budgeted and actual profits before tax (the plink-plink charts). The second defendant carried out the CEO's instructions based purely on information gleaned from monthly profit & loss statements prepared/provided by Keith Ong.

65. As for the third defendant, his testimony was not very different from the first or second defendant's, on the areas of his responsibilities and expertise. He was in the employment of Philips (for 13 years) before he went to SCI (for 6 years) and then joined the second plaintiffs. Prior to working for the second plaintiffs, the third defendant said he already had excellent working relationships with such companies as Matsushita, Philips, Wincor-Nixdorf Pte Ltd, BTC Power Inc, Hewlett-Packard and Allied Telesyn International (Asia) Pte Ltd, due to either his personal contacts or, the fact that he had classmates or ex-colleagues in those organisations.

66. The third defendant had a different version from the plaintiffs' of what transpired on 4 May 2001. He said Chau had approached him that afternoon to say some other user needed his computer urgently. The third defendant informed Chau he had personal data (in his e-mail) which he wished to

retain. Chau suggested that the third defendant 'zip' and 'unzip' his files which instructions the latter could not understand. Consequently, the third defendant asked for Chau's help to down-load the data (including some golf jokes) from his in-box to the third defendant's e-mail account; Chau agreed. However, Chau subsequently found the downloading process too time-consuming and suggested that the third defendant copy the data onto diskettes instead. Chau was in the midst of such copying when Ms Yong came. The diskettes were then handed to the third defendant who bent them in Chau's presence and handed them back to Chau.

67. The fourth defendant also came from SCI where he spent six (6) years as a design engineering manager. Prior thereto, he was with Thomson for six (6) years designing test equipment for television modules such as tuners and satellite decoders. He had also worked on 1394 'firewire' interface cards before joining the second plaintiffs. This item is a standard protocol which was conceived by Apple Computers in 1986. Yet, the plaintiffs had included it in their interim injunction as a product which the defendants were restrained from dealing with, in relation to 'generic' customers. The fourth defendant made similar comments on the POS (point of sale) printer board, relating again to 'generic' customers, included in the interim injunction. He pointed out that such printers are universally utilised by retailers and sales outlets to record sales/purchases, an evolution from the old cash register system.

68. The fourth defendant explained the process of SMT; the technology involved mounting various chip components onto the surface of a PCB, replacing the previous through-hole technology of the early 1980s. He also explained the designing process for PCB which confidential information and design he reiterated, is the property of the customer. The fourth defendant echoed Leslie's testimony that various types of CAD software are easily available from the market to assist in the design of PCBs.

69. A prayer in the plaintiffs' application for an interim injunction was to restrain the first, second and third defendants from soliciting, enticing or interfering with customers who dealt in set-up boxes (see annexure A to court order for interim injunction) namely, Union Tech and ViewInternet.com. In his affidavit, the fourth defendant deposed that set-up boxes are generic products readily available from the market and companies like Philips, Acer Computer International Ltd and General Instruments (S) Pte Ltd produce a multitude of set-up boxes. He himself had worked extensively on set-up boxes while he was with SCI.

70. The fourth defendant also pointed out that a number of other products covered by the plaintiffs' interim injunction were either not produced by the second plaintiffs at the material time for the customers they had identified or, were not unique to the second plaintiffs. One example of the first category was LCD TV display although, prior to the date of the interim injunction, the defendants had been approached by Philips in relation to a project called I-Conn, for the production, not design, of LCD display. Another example of this category was iJuke Box for Serial System relating to internet jukebox. He named Eagle Wireless, Plexus, Union Tech, ViewInternet.com and Hewlett-Packard as companies the defendants had no dealings with, from the time they left the second plaintiffs' services until the date of the interim injunction. I should point that in the course of cross-examining the first defendant, counsel for the plaintiffs produced a fresh list (see 1AB1443) of 25 'potential' customers of PCB contract manufacturers.

71. The fourth defendant criticised the description of some products covered by the interim injunction as 'vague' citing as an example home gateway product (also known as residential gateways); it refers to a broad range of devices that enables the interconnection of the internet with the home network.

72. The fourth defendant revealed that even before he tendered his resignation, the plaintiffs had found his replacement in the person of one Augustine Yap, an experienced designer, who was introduced to him on or about 2 March 2001 by a senior vice-president (Wee Tai Seng) of the first

plaintiffs; Augustine Yap joined the second plaintiffs before the fourth defendant departed from the second plaintiffs (on 24 May 2001). The fourth defendant felt his position was undermined especially when Augustine Yap's last drawn salary was higher than his. This, coupled together with constant harassment from vendors for payments which were overdue and disappointment over the failure to list the second plaintiffs on the SGX, prompted the fourth defendant to resign from the second plaintiffs. As far as he was concerned, it did not matter to him whether he secured a position with Tri-M after he left; he was prepared to take up any job.

73. One issue which cropped up during the cross-examination of the first and third defendants turned on the question of the defendants' supplementary list of documents (filed on 22 November 2001) which items inter alia comprised of the second plaintiffs' accounts, e-mails and the business plan. Questioned, the first defendant said he was told by the third defendant that the documents were received in early September 2001, in a parcel addressed to Tri-M's management. The third defendant testified he took the documents from the reception counter of Tri-M; he did not know how the documents were delivered nor who the sender was. He suspected that the sender could have been some disgruntled employee(s) of the second plaintiffs. After receiving the documents, the third defendant passed them to the fourth defendant for on-forwarding to their counsel.

74. Another issue on which the first, second and third defendants were cross-examined at length related to when and how the business plan came into fruition and, in the case of the third defendant, on whether there was a revised plan (which there was). In his written testimony, the first defendant had deposed that he had prepared the business plan jointly with the third defendant. However, in cross-examination it emerged that the second defendant was its brainchild and, that the third defendant consulted the first defendant, after the second defendant had prepared the business plan. The third defendant was then (in March 2001) looking for a job and he wanted the first defendant's comments on the business plan. The third defendant had approached the second defendant for help because the latter was very familiar with software. At the time, the third defendant made it clear to the first defendant that there was no vacancy for the latter in Tri-M. for whom (the third defendant had indicated) the business plan was prepared, to help turn the company around. It was only in mid-May 2001, that the first defendant received a call from Tri-M's management saying the company had an opening for him (after the then chief operating officer retired). However, this was after the first defendant had already tendered his resignation (on 4 May 2001) to the second plaintiffs.

75. Considerable time was also spent in cross-examining the first defendant on the substantial number of former employees of the second plaintiffs who had since joined Tri-M's services. The first defendant denied he had instigated these persons to leave the second plaintiffs. When the second defendant testified, he said some of the former staff of the second plaintiffs approached him for positions at Tri-M, after he had resigned. He believed the 35 odd employees who resigned were unhappy with the termination of the JVA; they were concerned when the second defendant resigned because they had worked with him previously for some seven (7) years. Hence, they opted to join Tri-M even though it was then a loss-making company. He pointed out that some 45 employees were originally from SCI, of which 30 eventually joined Tri-M. I should add that the plaintiffs' closing submissions (para 38) that the defendants negotiated contracts for over 30 employees of the second plaintiffs, is not supported by any evidence.

76. At this juncture, some mention should be made of the stock options offered to the defendants under the JVA. According to the first defendant, the exercise price of 0.3866 was higher than the market price at one time; the second defendant pointed out that it would have cost him \$400,000 to exercise his option to purchase 1.9 million shares at the relevant time when the market value was less than \$300,000. The current price of the first plaintiffs' shares is about 13.

77. Counsel for the plaintiffs at one stage requested the court to draw an adverse inference against the defendants for their failure to call one MH Chai from Tri-M to testify on an e-mail MH Chai had sent to Philips (see 1AB723) on the I-Conn project, which document was included in the Agreed Bundle. I agreed with the defendants' submissions that an adverse inference cannot and should not be drawn under s 116(g) of the Evidence Act Cap 97 as, MH Chai was an employee of Tri-M who was not a party to these proceedings. Moreover, there is no proprietary right in any witness and, if the defendants decline to have MH Chai testify, there was nothing to prevent the plaintiffs from calling him and if he was a reluctant witness, by way of a subpoena. A document which was/is incorporated in the Agreed Bundle merely dispensed with formal proof — unless stipulated, the contents were/are not agreed.

The findings

(i) the JVA

78. I start with the JVA. It is significant that the termination was not initiated by any of the defendants but by the plaintiffs in particular by the CEO of the first plaintiffs. The first defendant's testimony on this point was not challenged. Consequently, this immediately contradicts the plaintiffs' allegation that the defendants wanted a termination of the agreement when the second plaintiffs failed to obtain a public listing. It was only the fourth defendant who testified (under cross-examination) that he felt 'cheated' when the second plaintiffs failed to be listed because of his own high expectations.

79. The issue for determination is whether the plaintiffs' pleaded case (paras 23 to 25 and 55 of the statement of claim) against the first, second and third defendants for breach of the terminated JVA is sustainable. Not surprisingly, the defendants in their closing submissions argued that this claim was entirely misconceived as, there would be no obligations owed to the first plaintiffs after termination of the JVA, citing *Chiarapurk Jack & Ors v Haw Par Brothers International Ltd [1993] 3 SLR 285* in support (per Yong Pung How CJ at p 293). It is noteworthy that the plaintiffs did not address this head of claim at all in their closing submissions; I can only assume they have wisely abandoned the same. I accept the defendants' submissions; this claim fails *in limine*. The fourth defendant was not even a party to the JVA so as to entitle the first plaintiffs to mount this claim against him. This head of claim is accordingly dismissed.

(ii) inaccurate accounts of the second plaintiffs

80. Earlier (para 28), I had referred to an extract (para 35) from Chiam's written testimony wherein he had deposed to the first defendant's submission of the inaccurate accounts of the second plaintiffs, for the second half of year 2000. Submission is one thing, preparation is another. The plaintiffs alleged that those accounts were prepared and provided by the first three (3) defendants and based their claim (para 25[ii] of the statement of claim) on an implied term in the JVA.

81. It is trite law that where there is (as in this case) a comprehensive document in the form of the JVA setting out the contracting parties' rights and liabilities, there is no room for the importation of implied terms. Zing (PW4) had relied on cl 4.1(c)(ii) thereof to place the responsibility for the preparation of the accounts squaring on the three (3) defendants. However, this was against the evidence adduced not from the defendants, but from the plaintiffs' own witnesses and in particular from Zing himself.

82. It was common ground that Keith Ong (hired by Zing) was the second plaintiffs' Finance Manager who prepared the accounts. Based upon Keith Ong's figures, the first defendant presented the accounts of the second plaintiffs at weekly management meetings. Why should the responsibility for the wrong figures be laid at the door of the three (3) defendants and not Keith Ong? None of the defendants had qualifications or training in accounting (which evidence was not challenged), they were basically engineers, while Keith Ong was a qualified accountant. More importantly, the first plaintiffs charged the second \$5,000 per month for providing *corporate services*. It would be most unreasonable for the first plaintiffs to be paid handsomely for such services and yet escape responsibility for what they did. I would add that the ultimate responsibility for the accuracy of the second plaintiffs' accounts must rest with Zing, who was in overall charge of the group's accounts as the first plaintiffs' Chief Financial Officer and to whom Keith Ong reported, bearing in mind that under cl 4.1 of the JVA, the first plaintiffs had overriding supervision of the second plaintiffs. It is telling that Keith Ong's performance was found to be unsatisfactory by the first plaintiffs' chairman so much so the chairman wanted the first defendant to terminate his services.

83. Even if I am wrong in my finding and the first, second and third defendants were indeed responsible for the preparation of the second plaintiffs' accounts generally and for the second half of 2000 in particular, what is the loss suffered by the plaintiffs as a result which justifies their claim? In their closing submissions, the defendants submitted that as neither plaintiffs suffered any loss as a result, this claim should also be dismissed. I agree that it is significant no censure of or any action was taken against, the three (3) defendants when the accounting errors were discovered by the plaintiffs.

84. The plaintiffs made an undue fuss about advanced billing which was in any way limited to two (2) customers, namely Ericsson and Advent. Apart from Zing's cryptic comment that the practice was not agreeable to the plaintiffs, no cogent reasons were given by the plaintiffs to explain why this practice was wrong, when it was done at the said customers' specific requests.

85. Procedurally, it was insufficient for the plaintiffs to merely claim for general damages (to be assessed) in their statement of claim (para 55). This head of claim relating to inaccurate accounts if well founded, was capable of quantification and should have been claimed by way of special damages.

(iii) breach of confidential information and or trade secrets

86. The plaintiffs had alleged that in the course of designing and contract manufacturing PCBs, the second plaintiffs either generated or came into possession (from their customers) of information of a confidential nature.

87. In order to succeed on this item of their claim, the second (not the first) plaintiffs have to first prove that the confidential information amounted to trade secrets, in accordance with the principle enunciated in *Faccenda Chicken v Fowler* [1986] 1 All ER 617, namely the duty of fidelity owed by an employee to a former employer is less than that implied in an employee's contract of employment. Accordingly, confidential information concerning an employer's business acquired by an employee in the course of his service could be used by the employee after his employment had ceased unless the information was classed as a trade secret or was so confidential that it required the same protection as a trade secret (emphasis added).

88. The second plaintiffs must also prove they, not their customers, own those trade secrets. Finally, they have to show that the defendants made use of those trade secrets for their own purposes.

89. The plaintiffs did not particularise in their pleadings what trade secrets the defendants had used. It has to be borne in mind that the four (4) defendants have between them, more than fifty (50) years' experience in the electronics industry. They all came from SCI, a competitor of the second plaintiffs, who had almost the same or similar customer base. They had their own contacts before they joined the second plaintiffs. What was/is so unique about the second plaintiffs' PCB design that could amount to a trade secret? One should not overlook the fact that the fourth defendant is a design engineer who had, prior to joining the second plaintiffs, twelve (12) years' experience altogether first in Thomson and then in SCI, designing various types of equipment including PCBs and set-up boxes. The second plaintiffs are only one (1) of a number of local contract manufacturers (including Tri-M), used by OEM companies for the supply of PCBs and other products listed in annexure A of the interim injunction order. I therefore answer that question in the negative. Even if the defendants did not work for the second plaintiffs, they could have easily reverse-engineered to ascertain what components went into the assembly of the second plaintiffs' PCB or other products. In this regard, I accept the testimony of the defendants' expert witnesses that schematic designs and Gerber files are easily generated from commercially available CAD software. In any case, the plaintiffs did not call any evidence to refute what Roger and or Leslie said. It also bears mentioning that the NDAs produced by the plaintiffs contradict their stand that they, not their customers, own the copyright and intellectual property rights to the customers' designs.

90. The defendants had included in their bundle of documents (2AB104-129) documents printed from the first plaintiffs' website. It contained a wealth of information including, the locations of the company's plants/facilities, its customer base, its new customers and its financial health. Consequently, information so readily available cannot be classified as confidential information.

91. What of the plaintiffs' customers? From the evidence adduced, it would appear that the second plaintiffs' customers or potential customers are common to other contract manufacturers, some of which are also publicly listed. It is not enough for the plaintiffs without more, to produce a list of 25 companies (in 1AB1443) and assert they were 'potential' customers of the second plaintiffs. The same assertion can no doubt be made by other competitors of the second plaintiffs.

(iv) breach of fiduciary duties

92. The plaintiffs made much of the business plan prepared by the second and third defendants for Tri-M. Looked at in its proper perspective, what confidential information of the plaintiffs did the two (2) defendants use in the preparation? The business plan previously prepared for the first plaintiffs was not exclusive to them. The second defendant had explained that it was a general business model used by many companies in the industry. The information contained in the business plan did not come from confidential sources but was either available from public documents or named companies which were not/not yet, customers of the plaintiffs. It also bears mentioning in this regard that no customer in the industry utilises just one contract manufacturer, orders are placed by OEM with a number of contract manufacturers at any one time. Consequently, I find that the plaintiffs have not made out their case that the first and second defendants breached their fiduciary duties to the second plaintiffs as directors nor, that the first, second and third defendants breached their duties of good faith and fidelity as the second plaintiffs' employees. The first, second and third defendants cannot be said to have breached their fiduciary duties to the first plaintiffs when they owe no such duties, after the JVA was terminated.

(v) other allegations of the plaintiffs

93. The plaintiffs had alleged that the first, second and third defendants were instrumental in the departure of many employees to join the services of Tri-M. I find that this allegation has not been proven at all. I have reservations on the veracity of Lau's testimony in this regard; he could not even tell the first from the third defendants never mind the fact that he was found to have submitted a false medical certificate to Tri-M. In this connection, the defendants have, in their closing submissions highlighted some of the inconsistencies in Lau's evidence.

94. As for the deletion by the first, second and third defendants of their e-mail, again I cannot comprehend the fuss the plaintiffs made over the incident. It is not unusual for personal e-mails to be deleted periodically by a recipient after they have been read as otherwise the inbox would be full and would not be able to receive any more messages. Contrary to the plaintiffs' suspicions, there was nothing untoward or sinister in the defendants' acts. If indeed the data which the third defendant copied into diskettes was company property, he did not in any event take away the data as the diskettes were returned to Chau after the diskettes had been bent as a means of destroying the data contained therein.

95. In their closing submissions, the plaintiffs had emphasised that they were not seeking to stop the defendants from working for Tri-M much less, restrain them from earning a living. That however, appears to be precisely what they attempted to do, when they first applied for and obtained the interim injunction, on 12 June 2001; the terms were so wide (not to mention vague) as to stifle the defendants completely.

Conclusion

96. I find that the plaintiffs have failed to discharge the burden of proof for their case. Accordingly I dismiss their claim with costs to the defendants to be taxed unless otherwise agreed. The order of court dated 7 August 2001 varying the interim injunction is hereby discharged. There shall be an inquiry on the damages if any, the defendants have suffered as a result of the interim injunction obtained by the plaintiffs on 12 June 2001, with the costs of such inquiry reserved to the Registrar.

Sgd:

LAI SIU CHIU
JUDGE

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