Stratech Systems Ltd v Nyam Chiu Shin (alias Yan Qiuxin) and Others
[2005] SGCA 17

Case Number : CA 78/2004, 98/2004

Decision Date : 28 March 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Woo Bih Li J; Yong Pung How CJ

Counsel Name(s) : N Sreenivasan and Collin Choo (Straits Law Practice LLC) for the appellant in CA 78/2004 and the respondent in CA 98/2004; S Suressh and Merissa Quek (Harry Elias Partnership) for the first and second respondents in CA 78/2004; Goh Phai Cheng SC and Melvin Lum (Ang and Partners) for the third respondent in CA 78/2004 and the appellant in CA 98/2004

Parties : Stratech Systems Ltd — Nyam Chiu Shin (alias Yan Qiuxin); Wong Leh Hung; Guthrie Engineering (S) Pte Ltd

Employment Law – Contract of service – Breach – Company employees cloning hard disks of company's computers without company's knowledge or permission – Whether information taken constituting confidential information or trade secrets – Whether actions of employees amounting to breach of confidentiality undertaking in employment contract

Employment Law – Contract of service – Restrictive covenants – Whether restraint of trade clause in company's employment contract protecting any legitimate interest of company – Whether clause binding on and applicable to company employees – Whether company employees breaching clause

Tort – Inducement of breach of contract – Whether company inducing another company's employees to breach confidentiality and restraint of trade clauses in employment contracts

28 March 2005

Woo Bih Li J (delivering the judgment of the court):

Background

1 In late 1997, the Land Transport Authority ("LTA") invited tenders for the award of a contract for the design, supply, installation and commissioning of a Vehicle Entry Permit/Toll System ("VEPS"). VEPS is an automated electronic system which allows drivers at the Woodlands, Tuas and Changi Ferry Terminal checkpoints to pay the toll fee by way of their cash cards. Guthrie Engineering (S) Pte Ltd ("Guthrie") and Stratech Systems Limited ("Stratech") collaborated to obtain this contract from LTA. LTA eventually awarded the contract to Guthrie in March 1999. LTA also awarded Guthrie a contract for the post-warranty maintenance of VEPS.

2 In April 1999, Guthrie awarded a sub-contract to Stratech to supply part of the hardware and the entire software for VEPS ("the VEPS sub-contract").

3 VEPS was commissioned by LTA on 9 May 2000. Over the years, Stratech developed many versions of the VEPS software, each of which was a slightly modified and improved version of the previous one. It was not disputed that LTA owns the title and intellectual property rights to VEPS up to version 115 ("V115").

4 Stratech and Guthrie did not sign a sub-contract for the post-warranty maintenance due to disagreement over a payment term. Despite the lack of a formal agreement, Stratech carried out post-warranty maintenance works and occasional enhancement works on VEPS after the warranty

period for the system expired on 9 May 2001.

5 In February 2003, LTA asked Guthrie to integrate VEPS with Singapore's Electronic Road Pricing System ("ERP" system). Under this system, foreign motorists would be able to pay a fixed ERP charge at the same time that they paid their toll charges, and so be able to enter ERP zones in Singapore without having to install an in-vehicle unit. Guthrie instructed Stratech to modify the VEPS software for compatibility with the ERP system (the "VEPS-ERP link").

6 Stratech began work on the VEPS-ERP link and saved its work in a file named version 116 ("V116"). The V116 file was stored in one of five computers which Stratech kept in LTA's office. Stratech's principal engineer working on V116 was a person by the name of Armin Budiman ("Armin"). Two other persons, Nyam Chiu Shin ("Nyam") and Wong Leh Hung ("Wong), also featured.

7 Stratech alleged that Nyam was the database administrator for VEPS and was involved in much of the back-end operations to develop software for VEPS and for V116. On the other hand, Nyam's position was that she was employed by Stratech as Database Administrator in July 2000. In June 2002, she was appointed as Project Leader of VEPS. Nyam alleged that notwithstanding her title, she did not do database administration work and was mainly engaged in the maintenance of back-end application software for VEPS and worked on software enhancements to VEPS. She was in no way involved in the design, development or installation of VEPS which was already installed and running at the Causeway and Second Link when she commenced her employment with Stratech.

8 Stratech also alleged that it had employed Wong as Software Engineer between January 2001 and April 2003 and he was heavily involved in much of the research and development of the software for VEPS. Although Wong accepted he was employed by Stratech as Software Engineer, he too alleged that he was in no way involved in the design, development or installation of VEPS. Like Nyam, he alleged that VEPS was already installed and running at the Causeway and Second Link when he commenced his employment with Stratech. He said his primary job function was to maintain the front-end application software of VEPS and he did work on enhancements to the software.

9 On 24 March 2003, Stratech demanded payment from Guthrie in respect of certain claims under the VEPS sub-contract and post-warranty maintenance works. It also asked Guthrie to sign a formal sub-contract with it for the post-warranty maintenance of VEPS. It warned Guthrie that it would stop all work on V116 the next day, and halt all post-warranty maintenance work on VEPS by 28 March 2003, if Guthrie did not accede to Stratech's demands. As Guthrie did not comply with Stratech's conditions, Stratech terminated its work on V116 on 25 March 2003, and ceased all post-warranty maintenance services for VEPS on 28 March 2003. Armin was instructed to remove his computer from LTA's office and bring it back to Stratech's office. Once in Stratech's office, he was told to copy his work on V116 onto Stratech's server as well as onto a compact disk ("the CD"). Armin then deleted V116 from the computer but left the other files and data intact before returning the computer to LTA's office.

10 When Stratech pulled out, Guthrie approached National Computer Systems Pte Ltd ("NCS") to take over the post-warranty maintenance of VEPS. NCS quoted a price of $1.6m for 15 months of maintenance which was roughly $106,666 per month, in contrast to Stratech's significantly lower charges of $59,000 to $61,000 per month. Although Guthrie sub-contracted the work on the VEPS-ERP link to NCS, it chose not to sub-contract the post-warranty maintenance work to NCS. Instead, Foong Siew Peng ("Foong"), a manager at Guthrie, contacted Nyam to ask if she and her team members (including Wong and Armin) would like to work for Guthrie. After some discussion, Nyam and Wong agreed to Foong's proposal. Eventually they were employed by Electrical Product International Pte Ltd ("EPI").

11 On 25 April 2003, Nyam terminated her employment with Stratech and later paid two months' salary in lieu of notice. After Nyam left, Stratech realised that one CD containing V116 was missing. Internal investigations were carried out on the same day whereupon Armin claimed that he had taken the CD home, broken it and thrown it away. Wong did not turn up for work on 28 April 2003. He terminated his employment with Stratech by a letter of resignation dated 25 April 2003 and subsequently tendered a payment in lieu of notice as demanded by Stratech's solicitors. Armin terminated his employment with Stratech on 28 April 2003 but did not join Guthrie or EPI until more than nine months later. Soon after, Stratech employed private investigators and determined that Nyam and Wong had been employed by EPI.

12 On 30 April 2003, Guthrie was put on notice that Stratech's employees were bound by confidentiality, non-solicitation and non-competition clauses and Stratech would take action against any party who induced a breach of such obligations.

13 Foong admitted that Nyam and Wong were formally employed by EPI in order to "put more distance" between them and Guthrie. However, their "true and effective" employer was Guthrie, as evinced by the secondment of both Nyam and Wong to Guthrie to carry out post-warranty maintenance work on VEPS. Guthrie paid their salaries in lieu of notice, promised them a 20% pay increase and full indemnity for any legal costs and damages which might arise.

14 Stratech applied for and obtained an Anton Piller order, which was executed in May 2003. It seized five computers from Guthrie's premises. The computers were found to contain numerous files belonging to Stratech. Guthrie admitted that it had cloned the contents of four hard disks from Stratech's computers in LTA's office in order to facilitate post-warranty maintenance works on VEPS.

15 On 19 May 2003, Stratech filed the present action, *ie*, Suit No 505 of 2003, in the High Court against Nyam, Wong and Guthrie as the first, second and third defendants respectively. Nyam and Wong were represented by different solicitors from those representing Guthrie. The present action is the second of two actions between Stratech and Guthrie involving VEPS.

16 Stratech's claims in the present action rested on two provisions in its employment contract with each of Nyam and Wong, that is, cll 8.1 and 9.4. These provisions state:

> **8. *Confidentiality***
>
> 8.1 You shall not either during the continuance of your employment hereunder or after termination of your employment except in the proper course of your duties with the Company divulge to any person and/or outside party any information as to the practice, business dealings or affairs of the Company or any of its customers or any company in the habit of dealing with the Company and shall use your best endeavours to prevent the publication or disclosure of any trade secret or any information concerning the business technology or finances of the Company or any of its dealings, transactions or affairs which may come to your knowledge during or in the course of your employment.
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> **9. *Termination***
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> ...
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> 9.4 You shall not, during the continuance of your employment with the Company and for a period of nine (9) months after the termination of your employment with the Company, and whether on your own account or as employee, partner or otherwise, directly or indirectly engage

or be concerned in any business in direct competition with the Company or be employed by any person or entity who shall at any time during the continuance of your employment hereunder have been in the employment of or in the habit of dealing with the Company in Singapore.

17 Stratech also alleged that Nyam and Wong had the following implied duties:

(a) a duty of good faith and fidelity to Stratech;

(b) a duty, so long as the contract of employment subsisted, not to misuse any information confidential to Stratech or to disclose such information to any third party;

(c) a duty, following the termination of the contract of employment, not to use or disclose any trade secrets or other highly confidential information of Stratech to any third party.

However, these duties did not enhance Stratech's case against Nyam, Wong and Guthrie and Stratech's appeal focused on cll 8.1 and 9.4.

18 Stratech alleged that Nyam and Wong had breached cl 8.1 because they had divulged to Guthrie confidential information and trade secrets of Stratech which came to Nyam's and Wong's knowledge during or in the course of their employment with Stratech.

19 Stratech also alleged that Nyam and Wong had breached cl 9.4 because they were employed by Guthrie within nine months of the termination of their employment with Stratech and Guthrie was in direct competition with Stratech or, alternatively, Guthrie was in the habit of dealing with Stratech in Singapore.

20 Stratech's claim against Guthrie was for the tort of inducing Nyam and Wong to breach their contract with Stratech by knowingly receiving confidential information and trade secrets and by employing Nyam and Wong knowingly in breach of cl 9.4.

The decision below

21 The judge below (see [2004] SGHC 168) dismissed Stratech's claim under cl 8.1 in respect of trade secrets and confidential information. As for Stratech's claim under cl 9.4, the judge dismissed the claim against Nyam and Wong. However, he found Guthrie liable for inducing Nyam and Wong to breach cl 9.4. The trial judge awarded Stratech nominal damages of $1,000 as he was of the view that Stratech had not suffered any real or substantial damage.

22 Stratech then appealed in Civil Appeal No 78 of 2004 ("CA 78/2004"), and Guthrie cross-appealed in Civil Appeal No 98 of 2004 ("CA 98/2004"), against various aspects of the decision below. After hearing submissions, we dismissed Stratech's appeal and allowed Guthrie's cross-appeal. We now set out our reasons.

Summary of issues in both appeals

23 The issues raised in the appeal and cross-appeal can be conveniently summarised under three broad headings:

(a) Clause 8.1: Whether trade secrets or confidential information was taken from Stratech.

(b) Clause 9.4:

(i) Whether cl 9 was binding and applicable;

(ii) Whether Nyam and Wong had breached cl 9;

(iii) Whether Guthrie induced Nyam and Wong to breach cl 9.

(c) Damages: Whether Stratech was entitled to more than nominal damages.

Clause 8.1

24 Stratech's submission before us focused not on trade secrets but on whether confidential information had been taken from Stratech.

25 As regards the V116 file which had been copied onto the CD, the judge below accepted the evidence of Armin that he had taken the CD home, broken it and thrown it away. As this was a finding of fact based on the judge's assessment of Armin's evidence, Stratech acknowledged in para 14 of its Appellant's Case that it could not really take this point further on appeal even though it still considered Armin's evidence as implausible.

26 In Stratech's appeal, it focused instead on the fact that Guthrie had, with the help of Nyam and Wong, cloned four hard disks from Stratech's computers at LTA's office and copied files from them. It was Stratech's case that these hard disks contained confidential information which Nyam and Wong used to meet Guthrie's post-warranty maintenance obligations to LTA.

27 Stratech did not specify in its pleadings or in its evidence the confidential information which had been allegedly taken. For example, in response to a request for further and better particulars of Stratech's Amended Statement of Claim, Stratech answered:

C. <u>Paragraph 17</u>

Of: "The Plaintiff further avers that the 1st and 2nd Defendants did disclose and/or use confidential information …"

Please:

1. Identify the confidential information that the 1st and 2nd Defendants are alleged to have disclosed and/or used.

Ans: The 1st and 2nd Defendant disclosed all the Plaintiffs' information contained in the 5 computers at LTA as well as confidential information acquired by them in the course of employment.

28 Instead, Stratech sought to establish its case under cl 8.1 by various arguments. Before we come to those arguments, it is appropriate to refer to *Tang Siew Choy v Certact Pte* Ltd [1993] 3 SLR 44.

29 In that case, the first appellant had joined the Industrial Machine Tools & Chemical Department ("IMTC") of the respondent, Certact Pte Ltd ("Certact"), as a technical sales executive. In 1986 he was promoted to Sales Manager and Head of IMTC. The second appellant joined Certact on 9 February 1987 as a sales engineer in IMTC. The first and second appellants resigned from Certact on 28 and 27 February 1991 respectively and subsequently joined a company which was

referred to as Axiom. The second appellant was a director and shareholder of Axiom. On 6 March 1991, Certact sued the first and second appellants for damages for breach of contract and/or fiduciary and/or statutory obligations. It also sought injunctions against the two appellants and Axiom, which was the third appellant, restraining them from disclosing, divulging and/or making use of any confidential information or trade secrets which the first and second appellants had acquired while they were employed by Certact, and for other interlocutory reliefs. On 7 March 1991, Certact obtained the interlocutory injunctions as sought, as well as Anton Piller relief and orders for discovery, against the appellants. The appellants appealed to discharge the injunctions. They were unsuccessful. Their appeal to the Court of Appeal was dismissed. In his judgment for the Court of Appeal, Lai Kew Chai J said, at 46, [2]:

> The context of the appeal was the familiar one of an employer seeking to restrain former employees from using allegedly confidential information acquired during their employment in competition with the company. It was pertinent in such a context to bear in mind the observations which Hoffman J (as he then was) made in *Lock International plc v Beswick & Ors*. Although the observations were made in the context of Anton Piller relief, they are, in our view, of a wider importance. The learned judge said (at p 383):
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> > …
> >
> > Some employers seem to regard competition from former employees as presumptive evidence of dishonesty. Many have great difficulty in understanding the distinction between genuine trade secrets and knowledge which the employee may take away with him. In cases in which the plaintiff alleges misuse of trade secrets or confidential information concerning a manufacturing process, a lack of particularity about the precise nature of the trade secrets is usually a symptom of an attempt to prevent the employee from making legitimate use of the knowledge and skills gained in the plaintiff's service. …

30 At 53, [23], Lai J said:

> It follows from the foregoing that an employer must particularize the confidential information which he seeks to protect. It is oppressive for him to rely on a general statement that the information is confidential or to delay the giving of particulars until after discovery.

31 After referring to a judgment of Graham J in *Diamond Stylus Co Ltd v Bauden Precision Diamonds Ltd* [1973] RPC 675, Lai J continued, at 54, [24]:

> The same point was rather more forcefully made by Templeman J in [*John Zink Company Limited v Lloyds Bank Limited* [1975] RPC 675 ("*John Zink*")] where he was dealing with an application, in an action for breach of confidence, to strike out a statement of claim for lack of particularity. The learned judge said (at p 392):
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> > It is a longish statement of claim. It pleads in the widest terms — so wide that the Court of Appeal decided that there ought to be particulars — trade secrets belonging to the plaintiffs and it does not make one specific complaint against Mr Wilkinson. It says that Mr Wilkinson breached the relationship of confidence and the defendants, well knowing, procured the breach, over the whole field of the trade secrets. That looks wholly fishing and speculative, because, if the plaintiffs had any information at all about a breach, if they had any grounds other than speculative grounds, one would have thought they would have pleaded 'In the erection or construction of a particular flare stack, you did this, that or the other'. They might have had to make a few intelligent guesses, I do not know; but at least one would

have thought that they would have put something down. If it is permissible for a plaintiff to put in this form of statement of claim, then life for an ex-employee becomes intolerable. All an employer has to do is to allege, and perhaps he ought to do so once a year, that he has trade secrets of the broadest character, to allege that the employee learned them, that he joined a competitor and that he has broken the trade secrets. That seems to me speculative and would lead in this case to oppression and in any case would lead to oppression.

32 Stratech's first argument was that the information taken was password-protected and the fact that the information was protected by a password clearly showed that it was confidential.

33 Secondly, Stratech argued that Nyam had admitted that the data from the computers was needed to carry out maintenance work and this also suggested that the information taken was confidential.

34 Thirdly, Stratech argued that the defendants did not produce any evidence that what they took was available elsewhere. Stratech's position was that the fact that cloning was done suggested that the information was not available elsewhere, otherwise, why was there a need to clone? This was countered by the defendants that there was some evidence from Nyam that the information was available elsewhere.

35 It was obvious to us that Stratech was doing what the plaintiffs in *John Zink* had done. There was no specificity in Stratech's pleadings or evidence, as we have said. Stratech sought to cure this omission by its arguments which failed to move us.

36 As regards Stratech's first argument, we were of the view that it was too sweeping to say that information which was protected by a password must be confidential information.

37 As regards its second argument, the fact that data in the computer was needed to carry out maintenance work was neither here nor there. It did not establish that such data was necessarily confidential.

38 As regards the third argument, we noted that after Stratech had ceased to provide post-warranty maintenance, it caused only V116 to be removed from the computers at LTA's office but not other information. This went against its contention that the remaining information was confidential information. In any event, the burden was not on the defendants to prove that what was taken was not confidential. It was for Stratech to prove that what was taken was confidential information.

39 Although Stratech's case on the issue of confidential information was hampered by the fact that Nyam, Wong and Armin had crossed over effectively to Guthrie, Stratech had the benefit of an expert at the time when the Anton Piller was executed or soon thereafter. With its remaining staff and the benefit of the expert's assistance, Stratech ought to have been able to establish its case with specificity, if its allegation were true. Furthermore, the fact that Nyam, Wong and Armin had crossed over effectively to Guthrie was not a valid reason to excuse Stratech from its burden of proof. In the circumstances, Stratech failed to discharge its burden of proof.

40 As Stratech had failed to establish that the cloned information was confidential information, it is not necessary for us to deal with the defendants' contentions that in any event the information in Stratech's computers at LTA's office belonged to LTA pursuant to various contractual provisions.

Clause 9.4

41 It was not disputed that cl 9.4 was a restraint of trade provision. Before deciding whether cl 9.4 was binding on Nyam and Wong, the judge below concluded that Guthrie had been in the habit of dealing with Stratech in Singapore even though there was only one contract between Guthrie and Stratech. He also found that Guthrie had induced Nyam and Wong to join Guthrie. Indeed, as we have mentioned, this was admitted by Foong. Thus, if cl 9.4 were binding on Nyam and Wong, it would follow from the judge's conclusion that Guthrie was guilty of the tort of inducement of breach of contract.

42 As regards the question whether cl 9.4 was binding on Nyam and Wong, the judge below was of the view that it was binding because the restricting period of nine months was not unreasonably long. With respect, we were of the view that the duration of the prohibition was only one factor to be considered. On the facts before us, it was not the most important factor.

43 In *FSS Travel and Leisure Systems Ltd v Johnson* [1999] FSR 505, the respondent was a computer software programmer with the appellant company, which produced computer programs for the travel industry. The restrictive covenant in the respondent's employment contract stipulated that for a year after the termination of his employment, he should not carry on any business in the UK that competed with the business of the appellant company. When the respondent joined a company in direct competition with the appellant company before the one-year period had expired, the appellant company sought to enforce the restrictive covenant against him.

44 The English Court of Appeal expounded well-settled legal propositions affecting restrictive covenants in employment contracts at 512–513. They were:

(1) The court will never uphold a covenant taken by an employer merely to protect himself from competition by a former employee.

(2) There must be some subject matter which an employer can legitimately protect by a restrictive covenant. As was said by Lord Wilberforce in *Stenhouse Ltd v. Phillips* [1974] A.C. 391 at 400E … :

> The employer's claim for protection must be based upon the *identification* of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation.

(3) Protection can be legitimately claimed for identifiable objective knowledge constituting the employer's trade secrets with which the employee has become acquainted during his employment.

(4) Protection cannot be legitimately claimed in respect of the skill, experience, know-how and general knowledge acquired by an employee as part of his job during his employment, even though that will equip him as a competitor, or potential employee of a competitor, of the employer.

(5) The critical question is whether the employer has trade secrets which can be fairly regarded as his property, as distinct from the skill, experience, know-how, and general knowledge which can fairly be regarded as the property of the employee to use without restraint for his own benefit or in the service of a competitor. This distinction necessitates examination of all the evidence relating to the nature of the employment, the character of the information, the restrictions imposed on its dissemination, the extent of use in the public domain and the damage

likely to be caused by its use and disclosure in competition to the employer.

(6) … It must be possible to identify information used in the relevant business, the use and dissemination of which is likely to harm the employer, and establish that the employer has limited dissemination and not, for example, encouraged or permitted its widespread publication. In each case it is a question of examining closely the detailed evidence relating to the employer's claim for secrecy of information and deciding, as a matter of act, on which side of the boundary line it falls. Lack of precision in pleading and absence of solid evidence in proof of trade secrets are frequently fatal to enforcement of a restrictive covenant. …

45 Stratech relied on *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at 137–138 where Neill LJ said:

In our view the circumstances in which a restrictive covenant would be appropriate and could be successfully invoked emerge very clearly from the words used by Cross J. in *Printers & Finishers Ltd. v. Holloway* [1965] 1 W.L.R. 1, 6 (in a passage quoted later in his judgment by Goulding J. [1984] I.C.R. 589, 601):

"If the managing director is right in thinking that there are features in the plaintiffs' process which can fairly be regarded as trade secrets and which their employees will inevitably carry away with them in their heads, then the proper way for the plaintiffs to protect themselves would be by exacting covenants from their employees restricting their field of activity after they have left their employment, not by asking the court to extend the general equitable doctrine to prevent breaking confidence beyond all reasonable bounds."

46 It seemed to us that this passage did not assist Stratech as it was still for Stratech to demonstrate that cl 9.4 was to protect some legitimate interest belonging to it. In *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 3 SLR 333, Judith Prakash J said at [21]:

It is well-known that an employer who wishes to enforce a restraint of trade provision in a contract with an ex-employee must show that it was intended to protect the employer's legitimate interests and that it was reasonable in all the circumstances. In ascertaining the validity of such a clause, the first step is to determine what those interests are and the second is to consider whether the clause as drafted is no wider than is necessary to protect such interests. The court will not give effect to a clause if its main function is to inhibit competition in business.

47 It was significant that while Stratech argued that "legitimate interests" went beyond just the protection of confidential information, it did not say just what those legitimate interests were. It relied on the evidence of its witness, Leong Sook Ching, who said:

The Plaintiff is a technology company. The software developed by the Plaintiff is a result of much work and staff time. Returns on the efforts and overheads incurred during development stage are recovered by the delivery of the software on completion and commissioning and from recurrent income from maintenance and variations. To this end, the confidentiality of the process through which the software is developed and the source code is paramount.

48 However, we were of the view that this evidence did not demonstrate any legitimate interest over and above the protection of confidential information. Also, para 54 of Stratech's Appellant's Case demonstrates that its concern was actually the protection of confidential information and not some other legitimate interest. Paragraph 54 states:

> The Appellant is a technology company. The knowledge based economy today is one where developers of information technology products guard and protect their knowledge and tools. There is no dispute that the Appellant was in the best position to carry out post-warranty maintenance works on the VEPS System as it was the developer of the software. A restrictive covenant in the employment contracts would ensure that their commercial position, as developers who are in the best position to maintain and develop the software is not jeopardized.

49 Bearing in mind that Stratech already had the benefit of cl 8.1 and as Stratech was unable to demonstrate any other legitimate interest that required protection by a restraint of trade clause, we were of the view that the main function of cl 9.4 was indeed to inhibit competition in business. This view is reinforced by a Freudian slip made by Stratech in para 45 of its Appellant's Case which states:

> The prohibition allows employees to work for non-direct competitors and the entire market except for ex-fellow employees and those whom the Appellant habitually dealt with. The nine (9) months' limit meant that after a short period where the employees' involvement was no longer "current"; there was no prohibition at all. *Indeed, the clause was crafted to prevent ex-employees, suppliers, clients and sub-contractors from poaching staff, to the detriment of the Appellant.* [emphasis added]

50 Accordingly, we were of the view that cl 9.4 was not binding on Nyam and Wong. Hence Guthrie could not be guilty of inducing Nyam and Wong to breach their contracts with Stratech, see *De Francesco v Barnum* (1890) LR 45 Ch D 430, *Northern Messenger (Calgary) Limited v Frost* (1966) 57 DLR (2d) 456. This conclusion was not disputed by Stratech should we find, as we did, that cl 9.4 was not binding. Accordingly, the judge's decision against Guthrie on this point was reversed when we allowed Guthrie's appeal.

51 In the circumstances, it is not necessary for us to venture a view as to whether Guthrie was in direct competition with Stratech or "in the habit of dealing" with Stratech in Singapore which was the alternative limb under cl 9.4 that Stratech was relying on.

52 However, we would mention that we agree with Stratech's proposition, which was not seriously contested by the defendants, that if we had concluded that cl 9.4 was binding and that Guthrie was in direct competition with Stratech or in the habit of dealing with Stratech in Singapore, then Nyam and Wong would be liable for breach of contract and Guthrie would have been liable for the tort of inducing a breach of contract as well. In that respect, the judge below had erred in concluding that Guthrie was liable for the tort when he did not find Nyam and Wong liable for breach of contract in the first place.

Damages

53 As Stratech had failed to establish liability under cll 8.1 or 9.4, the issue of the quantum of damages to be awarded to it was academic.

Summary

54 Accordingly, Stratech's appeal was dismissed and Guthrie's cross-appeal was allowed.

Appeal in CA 78/2004 dismissed. Appeal in CA 98/2004 allowed.