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Adinop Co Ltd
v
Rovithai Ltd and another

[2018] SGHC 129

High Court — Suit No 1267 of 2015
George Wei J
18–22 September 2017; 6 November 2017

Contract — Breach — Confidentiality agreement

Equity — Obligation of confidentiality

30 May 2018 Judgment reserved.

George Wei J:

Introduction

1 This is an action brought by the plaintiff, Adinop Co Ltd ("the Plaintiff"), for breach of confidence by the defendants, Rovithai Limited ("the 1st Defendant") and DSM Singapore Industrial Pte Ltd ("the 2nd Defendant") (collectively, "the Defendants").

2 For more than 20 years, the Plaintiff was the distributor of ingredient products manufactured by the 1st Defendant.[1] During this time, the parties

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[1] Statement of Claim (Amendment No 2) ("SOC 2"), para 4; Defence (Amendment No 2) ("Defence 2"), para 5.

exchanged a substantial amount of information regarding customers who purchased the Defendants' ingredient products through the Plaintiff.[2] Following the termination of the distributorship arrangement in 2014, the 1st Defendant issued a notice ("the Notice") to a number of key customers to inform them of the change in distributorship, setting out its own contact details as well as those of its new distributor.[3]

3 The Plaintiff essentially contends that the post-termination conduct of the Defendants amounted to a misuse of confidential information that the Plaintiff had given to the Defendants during the course of their business relationship.[4] The Defendants deny that the customer information was confidential, and further argue that their post-termination conduct did not amount to unauthorised use of such information.[5] Having considered the parties' evidence and submissions, I now deliver my judgment.

Background

The parties

4 The Plaintiff is a company incorporated in Thailand. It is in the business of importing, distributing and manufacturing food, cosmetic and pharmaceutical ingredients.[6]

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2 SOC 2, pp 6–16.

3 SOC 2, paras 32–34; Defence 2, paras 24–26.

4 Plaintiff's Closing Submissions ("PCS"), para 1.

5 See Defendants' Closing Submissions ("DCS"), pp 50, 69 and 76 generally.

6 SOC 2, para 2; Defence 2, para 3.

5 The 1st Defendant is also a company incorporated in Thailand, and is in the business of importing and selling ingredients for food products, cosmetics and the manufacturing of animal feed ingredients.[7]

6 The 2nd Defendant is a company incorporated in Singapore and is in the business of, *inter alia*, wholesale supply of chemical products, savoury ingredients and polyethylene materials.[8]

7 The Defendants are part of the DSM Group of companies, a multi-national group active in research, development, manufacture and sale of ingredients for feed, food, pharmaceutics and cosmetics.[9]

Events leading up to the present action

8 The Plaintiff and the Defendants (in particular, the 1st Defendant) had a business relationship going back over 20 years to the 1990s, where the Plaintiff acted as a distributor of certain DSM ingredient products in Thailand.[10] These DSM ingredient products were acquired by the Plaintiff through periodic bulk purchase orders placed with the 1st Defendant, and were in turn sourced from the 2nd Defendant. The Plaintiff then sold these products onwards to food, beverage and nutritional product ("FB&N") manufacturers in Thailand for use in production of a variety of products such as sauces, health drinks and

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7 SOC 2, para 3; Defence 2, para 4.

8 SOC 2, para 5; Defence 2, para 6.

9 SOC 2, para 6; Defence 2, para 7.

10 SOC 2, para 4; Defence 2, para 5.

noodles,[11] at a mark-up determined by the Plaintiff.[12] The Defendants set annual sales targets premised on the total value and quantity of purchase orders placed with the 1st Defendant, the total number of the Plaintiff's customers, and the number of planned projects.[13]

9 The DSM ingredient products distributed by the Plaintiff were often in the form of standard single-component ingredients (for example, vitamins, food colouring and functional ingredients such as fish oils)[14] and premixes often used in the manufacture of a wide variety of FB&N products.[15] Many Thai FB&N customers were only interested in using standard DSM ingredients (whether single ingredient products or standard premixes), whilst others required the production and supply of bespoke or customised premixed ingredients for their products. In some cases, the development of bespoke premixes required the assistance and help of "experts" or food technologists.[16] Whilst the Plaintiff claimed to have a research and development ("R&D") department,[17] the evidence on the scale of these activities is rather thin. On the whole, it appears more likely that the development of bespoke premixes for Thai FB&N

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11 2AB, p 855 *et seq*.

12 PCS, para 21 (citing notes of evidence ("NOE") of 22 September 2017, pp 64–65 and 71).

13 PCS, para 21 (citing notes of evidence ("NOE") of 22 September 2017, pp 64–65 and 71).

14 Affidavit of evidence-in-chief ("AEIC") of Ms Chaitharatip, pp 4, 214–215; NOE of 20 September 2017, p 39.

15 NOE of 22 September 2017, pp 102–103.

16 See NOE of 18 September 2017, pp 56–59.

17 NOE of 18 September 2017, p 44.

customers frequently involved the help of the 2nd Defendant.[18] This is an area of evidence that I shall return to later.

10 The FB&N products/ingredients market in Thailand appears to be highly competitive. In particular, there are many Thai FB&N suppliers of FB&N ingredients (such as the Plaintiff) to Thai FB&N customers. In addition, there are different producers, developers and manufacturers of FB&N ingredients such as the Defendants and the DSM Group.[19]

11 It is clear that the Plaintiff and Defendants had a joint interest to facilitate the penetration of the Thai market by DSM ingredients. The Plaintiff, as a Thai company, was directly concerned with finding, maintaining and developing relationships with Thai FB&N customers. The Defendants, on the other hand, were naturally concerned and interested in the development of the Plaintiff's customer base for DSM ingredients. The Defendants participated at FB&N ingredient exhibitions in Thailand together with the Plaintiff as part of efforts to attract customers for DSM ingredients.[20] The Defendants also required the Plaintiff to produce regular quarterly reports on the sales performance of DSM ingredients, problems or difficulties that had been encountered, and efforts made to expand the customer base for DSM ingredients.[21]

12 On 22 October 2013, more than a decade after the commencement of the business relationship, the parties entered into a confidentiality agreement ("the

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18 See NOE of 18 September 2017, p 59.

19 See NOE of 21 September 2017, p 21.

20 NOE of 22 September 2017, p 110.

21 SOC 2, para 17A; Defence 2, para 12A.

Confidentiality Agreement").[22] I will describe the relevant provisions of the Confidentiality Agreement in greater detail later.

13 On 10 June 2014, the 1st Defendant notified the Plaintiff of its intention to terminate the distribution arrangement.[23] Thereafter, the Defendants made alternative arrangements to supply DSM ingredients to Thai FB&N manufacturers using DSM ingredients in their products.

The present action and the parties' cases

14 The Plaintiff brought this action against the Defendants for misuse of confidential information provided by or obtained from the Plaintiff under or in connection with the distributorship arrangement between the parties. To this end, the Plaintiff relies on the Confidentiality Agreement.[24] It also asserts and relies on confidentiality obligations arising in common law or equity.[25]

15 The information said to be confidential and to have been misused by the Defendants includes: (a) the list of the Plaintiff's key Thai FB&N customers for DSM ingredients ("the Key Customers List") that was provided to the 1st Defendant on 9 May 2014, shortly before the termination of the distributorship arrangement; and (b) a list of ongoing projects for the Defendants, which was provided to the 1st Defendant on 4 April 2014 ("the Ongoing Projects List").[26] I will generally refer to the customer information shared by the Plaintiff with

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22 SOC 2, para 7; Defence 2, para 8.

23 SOC 2, para 30; Defence 2, para 24.

24 SOC 2, para 7.

25 SOC 2, para 37.

26 PCS, para 2.

the Defendants as "the Customer Information". The Plaintiff essentially alleges that the Defendants used the Customer Information to contact Thai FB&N customers to purchase DSM FB&N ingredients, thereby causing loss to the Plaintiff.[27] The Defendants deny any misuse or breach of any confidentiality obligation.[28]

16 Shortly before the trial commenced, the Plaintiff applied to amend their statement of claim, *inter alia*, to make clear that the claim against the Defendants was for breach of the contractual obligations of confidentiality set out in the Confidentiality Agreement, as well as for breach of obligations of confidence arising outside of the Confidentiality Agreement under common law and/or equity. The key amendment was to add the phrase "and/or their duty of confidence" each time the Defendants' breach of the Confidentiality Agreement was pleaded. These amendments essentially concerned the prayers for relief at the end of the original statement of claim.[29]

17 The Defendants objected to the proposed amendment on the basis that a new cause of action (breach of an equitable obligation of confidence) was being added shortly before trial, and also because the proper forum for the action for misuse of confidential information outside of the Confidentiality Agreement (for example, in equity) had not been established to be that of Singapore law. The Defendants contended it had not been established that Singapore was the proper forum for a claim based in tort or equity as opposed to the Confidentiality Agreement. After hearing counsel, this Court allowed the proposed

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27 SOC 2, paras 34–37.

28 Defence 2, paras 26–27.

29 Summons No 3744 of 2017 ("SUM 3744").

amendments to the statement of claim.[30] Given that the existing statement of claim had already pleaded breach of confidence at common law and in equity[31] and the fact that the Defendants had never objected to the action for breach of confidence being heard in Singapore, this Court allowed the proposed amendments. Whether or not the Court would need to apply or consider Thai law when determining liability outside of the Confidentiality Agreement was something to be addressed at the trial itself. That said, for reasons which will become clear, nothing turns on the amendment. Indeed, no issue arose at trial on Thai law and breach of confidence outside of the Confidentiality Agreement.

18 Under the amended statement of claim dated 31 August 2017 ("SOC 2"), the Plaintiff, after setting out the obligations of confidentiality under the Confidentiality Agreement and/or common law and equity, as well as the nature of the confidential information disclosed to the Defendants, pleads the specific breach alleged against the Defendants in SOC 2. The core complaint set out in SOC 2 was that on 1 July 2014, despite the Plaintiff's contention that the termination of the distributorship arrangement had not yet been resolved, the 1st Defendant issued the Notice to the Plaintiff's customers informing them of the change of distributorship and providing its contact details. The Plaintiff asserts that the Defendants were only able to contact the Plaintiff's customers as quickly and easily as they do because of the confidential Customer Information that had been disclosed to them.[32]

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30 Minute sheet of hearing on 30 August 2017 in respect of SUM 3744.

31 SOC 1, para 37.

32 SOC 2, paras 32–35.

19 The Plaintiff further pleads that but for the Customer Information, the Defendants would have had to expend significant time and effort to obtain contact details of the customers, establishing a contact point and building the relationship with these customers and developing projects involving DSM nutritional products with these customers in order to sell DSM nutritional products to them.[33]

20 It follows that the unauthorised use complained of is directed at the Notice that was sent to the Thai FB&N producers who were customers for DSM ingredients obtained from the Plaintiff. The downstream consequence of the Notice as alleged was that the Defendants managed to effect the change of distributorship much more quickly and easily than would otherwise have been the case.

21 I note that the Plaintiff also complains that the Defendants' termination of the distributorship arrangement was abrupt.[34] The present action, however, does not concern any alleged termination breach in that the claim is not for wrongful termination as such.[35] Instead, this action is solely concerned with the allegations over misuse of confidential information post-termination. Nevertheless, it will be necessary to refer to the events leading up to the termination as well as the consequences of the termination of the distribution arrangement in order to reach a decision on the complaint of misuse of confidential information.

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33 SOC 2, para 36.

34 SOC 2, para 30.

35 Plaintiff's Opening Statement, p 6, fn 15.

Issues

22 The core issues before the Court can be summarised by reference to the following questions:

(a) Does the Customer Information qualify as confidential information by reference to the Confidentiality Agreement and/or common law and equity, and the purpose for which it was supplied to the 1st Defendant?

(b) If so, did the 1st Defendant and/or the 2nd Defendant misuse the confidential information in the Key Customers List or any other Customer Information after the termination of the distributorship arrangement?

(c) If so, is there any basis for finding the 2nd Defendant liable for the misuse of confidential information by the 1st Defendant?

(d) If (b) and/or (c) is answered in the affirmative, bearing in mind that the trial has been bifurcated, has the Plaintiff established any detriment arising from any breach (misuse of confidential information)?

23 I pause to underscore that the Plaintiff is not claiming any right to prevent the Defendants selling DSM products/ingredients in the Thai market whether directly by the 1st Defendant or through another Thai FB&N ingredient supplier/dealer. The Plaintiff's position is that the Defendants should not use any confidential information towards that end. The Plaintiff's complaint, at its heart, is that the Defendants were able to reach out to Thai FB&N producers/customers who were using DSM ingredients sourced through the Plaintiff, far more quickly than it would otherwise have been able to do so, because of the use of the Customer Information provided to the 1st Defendant.

The evidence at trial

The witnesses

24 The sole witness for the Plaintiff was Ms Siriporn Chaitharatip. She joined the Plaintiff in August 2012 as a product advisor with a degree in food technology. This was her first job after graduation.[36] In 2014, Ms Chaitharatip was promoted to the position of a product supervisor dealing with nutritional and health product ingredients.[37] Ms Chaitharatip's responsibility was to provide technical advice to customers.[38] It is not disputed that she is not part of the sales or marketing team, but it is apparent that she did on occasions provide support to and accompany members of the sales team on visits to customers and so forth.[39] It appears that she also assisted the Plaintiff's participation at FB&N ingredient exhibitions held in Thailand.[40]

25 Ms Chaitharatip was a relatively new employee at the time when the key events such as the termination of the distributorship arrangement between the Plaintiff and 1st Defendant occurred. Whilst she discussed matters from time to time with Dr Nont Akepanyaskul,[41] the present Managing Director and son of the founder of the Plaintiff,[42] it is clear that her direct knowledge of the history and details of the relationship between the Plaintiff's management and dealings

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36 AEIC of Ms Chaitharatip, para 8; NOE of 18 September 2017, p 53.

37 AEIC of Ms Chaitharatip, para 8.

38 NOE of 18 September 2017, p 39.

39 NOE of 18 September 2017, p 40.

40 NOE of 18 September 2017, p 53.

41 NOE of 20 September 2017, p 89.

42 See NOE of 18 September 2017, pp 67 and 82; NOE of 19 September 2017, p 16; AEIC of Ms Chaitharatip, p 212.

with the Defendants was somewhat limited. That said, Ms Chaitharatip did assist in preparing material (such as reports and presentation slides) for use at some of the quarterly meetings between the Plaintiff's management and the Defendants between 2012 and 2014.[43]

26 Two witnesses testified for the Defendants. The first was Mr Robert Gordon Harcourt Redman who joined the 1st Defendant in 2002 as its General Manager, a position which he still held at the time of the hearing.[44] Mr Redman is also a director of the 1st Defendant.[45] As the General Manager of the 1st Defendant, Mr Redman was responsible for the running of the office premises although he did not handle the day-to-day operations of the 1st Defendant's individual business units.[46] He also oversaw the animal feed ingredient sector of the 1st Defendant's business, which was his area of product specialty.[47] Mr Redman did not handle personal care product ingredients or the food and nutritional sector of 1st Defendant's business.[48]

27 The principal employee responsible for the FB&N ingredient line of business of the 1st Defendant, including dealings with the Plaintiff, was Ms Sawarsporn "Jean" Jaklerdchai.[49] Ms Jaklerdchai reported to Mr Redman as well as to the 2nd Defendant's management.[50] Mr Redman reported to the 2nd

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43 See NOE of 20 September 2017, p 26; AEIC of Ms Chaitharatip, para 36.

44 AEIC of Mr Redman, para 1; see also NOE of 21 September 2017, p 35.

45 AEIC of Mr Redman, para 4.

46 NOE of 21 September 2017, p 35.

47 NOE of 22 September 2017, p 41; NOE of 21 September 2017, p 19.

48 See NOE of 22 September 2017, p 74.

49 See AEIC of Mr Redman, paras 9-10; NOE of 19 September 2017, p 9.

50 AEIC of Mr Redman, para 9; NOE of 21 September 2017, p 19.

Defendant's head or manager of the Animal Nutrition and Health Division.[51] Unfortunately, Ms Jaklerdchai had left the 1st Defendant sometime towards the end of 2014 and she could not be contacted to give evidence.[52] Mr Redman's belief was that she had left Thailand.[53] Attempts were made by the 1st Defendant to retrieve documents from Ms Jaklerdchai's computer, but there were difficulties because the 1st Defendant had changed its computer and record system during the course of which some records were lost or could no longer be retrieved.[54]

28 The second witness for the Defendants was Mr Pieter Nuboer, a director and Vice-President (Human Nutrition and Health Products) of the 2nd Defendant. He has held this position since 2009 and his responsibility is to oversee the operations of the DSM Group within the Asia Pacific region in so far as they concerned DSM-manufactured human nutrition and health products.[55]

29 I pause to make the general observation that the oral evidence from both sides "suffered" from the fact that witnesses with more detailed and direct knowledge of the events and relationship between the Plaintiff and the 1st Defendant did not give evidence. The Plaintiff did not call evidence from the sales staff handling FB&N product ingredients. Instead, they relied on Ms Chaitharatip for evidence as to how the Plaintiff developed, maintained and serviced its Thai F&B customers for these ingredients. Dr Nont, who was

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51 NOE of 21 September 2017, p 19.

52 NOE of 21 September 2017, pp 25–26.

53 AEIC of Mr Redman at paras 9–10; NOE of 21 September 2017, pp 25–26.

54 DCS, para 21; NOE of 22 September 2017, pp 33–34.

55 AEIC of Mr Nuboer, paras 1–2.

actively involved in the Plaintiff's business and dealings with the 1st Defendant (often through Ms Jaklerdchai), also did not give evidence. On the other hand, the Defendants did not call sales staff who were directly involved in developing the 1st Defendant's business in FB&N ingredient products in general and with the Plaintiff, in particular. Unfortunately, the key staff members at that time, such as Ms Jaklerdchai, were no longer employed by the Defendants. I shall return to this point below when evaluating the evidence in greater detail.

Documentary material

30 Apart from the witnesses' testimony, the evidence at trial included documentary material such as the Confidentiality Agreement; standard terms and conditions for the orders placed by the Plaintiff with the 1st Defendant for DSM ingredients; e-mails and communications between the Plaintiff and the Defendants; minutes of meetings reporting on and discussing quarterly performance of the Plaintiff; and documents and material such as Powerpoint slides presented at the meetings. In addition, invoices or orders placed by Thai FB&N customers directly with the 1st Defendant prior to the termination were also placed before the Court.[56] I will discuss some of the key documents in greater detail here.

The distributorship arrangement

31 There was no formal over-arching distributorship agreement signed by the Plaintiff with either the 1st Defendant or the 2nd Defendant. Instead, what was in evidence was a letter dated 31 January 2005 from the 1st Defendant to the Plaintiff confirming that the Plaintiff "is our appointed distributor for DSM

[56] Defendants' supplemental bundle ("DSB"), generally.

Nutritional Products in Thailand" and that the Plaintiff "can [sell] all DSM products which are under [the DSM Nutritional Products] department to his target customers throughout this kingdom."[57] The only documentary evidence relating to the orders placed by the Plaintiff with the 1st Defendant under the distributorship arrangement consisted of some purchase orders and invoices as well as the 1st Defendant's general terms and conditions.[58] These terms and conditions will be discussed in greater detail later.

32 I pause to note that the Plaintiff first became a distributor for the 1st Defendant in the 1990s. At that time, the 1st Defendant was part of the Roche Group of companies. According to Ms Chaitharatip, the Plaintiff was the "sole distributor" for the 1st Defendant.[59] Sometime in 2003, the DSM Group of companies took over Roche Group's health and nutrition ingredients business. The 1st Defendant then became a part of the DSM Group. The Plaintiff continued to distribute DSM products in Thailand and the distributorship arrangement was confirmed by the letter dated 31 July 2005.

33 In these circumstances, I make the observation that there is some vagueness or lack of clarity on the core terms that governed the distributorship arrangement between the Plaintiff and 1st Defendant such as whether the Plaintiff was an exclusive distributor (and, if so, what exclusive distributor meant); reporting obligations; duties imposed on the Plaintiff to develop the Thai market; duties imposed on the 1st Defendant to assist the Plaintiff; and

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57 Agreed Bundle of Documents vol 1 ("1AB", other volumes denoted "xAB" accordingly), p 37; AEIC of Ms Chaitharatip, para 7.

58 1AB, p 2, pp 520 and 532–534.

59 AEIC of Ms Chaitharatip, para 6.

termination provisions including notice periods, rights of parties post-termination and so on.

34 Take, for example, the basic question of whether the Plaintiff was appointed as an exclusive or sole distributor and in respect of what range of DSM products. Whilst the Plaintiff takes the view that it was appointed as the exclusive distributor,[60] it appears that this was not, in fact, the case. At the very least, it is unclear what is meant by "exclusive distributor" in this context. It is evident that the Defendants from time to time made decisions on which DSM products would be made available to any given appointed distributor for a given market. For example, the Plaintiff was in earlier years also a distributor for DSM personal care products in Thailand. As will be seen, towards the end of 2010, the decision was made to transfer that product range to another Thai distributor.[61] Further, even within the FB&N range of products/ingredients, different distributors could be appointed for different DSM FB&N products/ingredients.[62] Whilst Ms Chaitharatip expressed the view that the 1st Defendant was not permitted to appoint or supply another distributor for the same DSM product it was supplying to the Plaintiff, it is far from clear what the basis for this view was.[63] It appeared that the Plaintiff was the "exclusive distributor" for DSM products only in the sense that it would not sell or distribute ingredients produced by another manufacturer which were the same as those that were supplied by the 1st Defendant.[64]

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60 PCS, para 18.

61 NOE of 18 September 2017, pp 66–67.

62 NOE of 18 September 2017, pp 83–84.

63 DCS, para 51–55, quoting NOE of 18 September 2017, pp 84–86.

64 PCS, para 18; NOE of 18 September 2017, p 47.

35 Although there is a lack of documentation on the terms of the distributorship arrangement, it is clear that the Defendants did impose annual quota targets to be met and that there were regular meetings to assess the Plaintiff's performance, to review problems in the market and to generally discuss new product lines.[65] The parties do not dispute the fact that regular quarterly meetings, at the request of the 1st Defendant, were held for many years prior to 2014. The Plaintiff indeed pleads in SOC 2 that "[t]he quarterly reports are intended to update the 1st and/or 2nd Defendants on the Plaintiff's sales of DSM nutritional products in furtherance of the distribution arrangement."[66] It is further stated that the reports "would include the identity of the Plaintiff's customers, the respective DSM nutritional products which are purchased by the Plaintiff's customers and in some cases the customers' products which the purchased DSM nutritional products are intended to be applied to."[67]

36 The quarterly reports were presented and discussed at meetings between the staff of the Plaintiff and 1st Defendant. Prior to the parties entering into the Confidentiality Agreement in 2013, it seems that the papers or materials presented at the quarterly meetings were not usually stamped or marked as confidential.[68] Unfortunately, the Plaintiff and 1st Defendant were not able to produce complete records of the quarterly meetings and reports (because of retrieval issues due to computerisation of records and loss of records, and due to floods in the Plaintiff's case).[69] But this does not ultimately matter – the general point the Defendants make is that long before the Confidentiality

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65 DCS, para 29, citing SOC 2, para 17A.

66 SOC 2, para 17A(a).

67 SOC 2, para 17A(c).

68 See 3AB, p 1522 *et seq*.

69 NOE on 19 September 2017, pp 51–52.

Agreement, the Plaintiff had been supplying the 1st Defendant with information on the Thai market, its customers and matters relating to or affecting the Plaintiff's own quarterly performances. The 1st Defendant accordingly, over the years, became familiar with many FB&N manufacturers in the Thai market. Not only did they acquire information at the quarterly meetings, the 1st Defendant (itself a Thai company) also participated on occasions at ingredient exhibitions or conferences in Thailand where they met FB&N manufacturers.[70]

37 The 1st Defendant also had direct dealings with some Thai FB&N producers.[71] To this end, the 1st Defendant exhibited certain invoices showing that, on occasion, the 1st Defendant supplied certain DSM products directly to Thai FB&N producers.[72] The Plaintiff disputes the authenticity of these invoices.[73] Indeed, the question arose at trial as to why the exhibited invoices were dated 2002 when they bore DSM's new name and its new logo which was launched only in 2011.[74] I am, however, satisfied with Mr Redman's explanation that the invoices were stored electronically, and the headers on these invoices were automatically replaced by its "SAP system" or software after DSM's change in name and logo, to reflect the changes.[75]

38 I note again that the Plaintiff is not suing the 1st Defendant for breach of the distributorship agreement through wrongful termination in the present action. It appears that the Plaintiff's position is that any question of breach and

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70 DCS, para 30.

71 NOE on 19 September 2017, pp 4–5; 1AB, pp 42–43.

72 DSB, generally; NOE of 19 September 2017, p 8.

73 PCS, para 29.

74 NOE on 21 September 2017, pp 18 and 97–106; NOE on 22 September 2017, pp 8–9.

75 NOE on 22 September 2017, pp 9–10.

wrongful termination by the 1st Defendant is a matter best litigated in Thailand. For this reason, I shall not examine in detail the contractual position of the Plaintiff and 1st Defendant under the distributorship arrangement unless the point is necessary to decide an issue concerning the allegation of misuse of confidential information.

39 The position under the Confidentiality Agreement is different from the distributorship arrangement in that the Confidentiality Agreement was a formal written agreement between the parties. There is also an express choice of law clause in the Confidentiality Agreement for Singapore law to apply, as well as an exclusive jurisdiction clause (in favour of Singapore).[76]

40 The Plaintiff's position is that over the course of the parties' long business relationship, many items of confidential information had been disclosed to the Defendants, such as the identities of the Plaintiff's Thai FB&N customers, identities of new or prospective customers, performance figures, bespoke mixes, and quantities ordered by particular Thai FB&N customers. Whilst many of these items were disclosed or arose prior to the Confidentiality Agreement, the Plaintiff argues that these items are nonetheless covered by an obligation of confidentiality under the distributorship arrangement. Hence, even if these items fell outside of the scope of the Confidentiality Agreement, the Plaintiff claimed to be entitled to rely on implied or equitable obligations of confidentiality.

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[76] 1AB, pp 38–40.

The Confidentiality Agreement

41 I shall set out a brief overview of the provisions in the Confidentiality Agreement.[77] Its preamble states that the Defendants and the Plaintiff were willing to disclose to each other confidential information for the purposes of the "distribution arrangement" between them. In the case of the Defendants, the confidential information concerned "certain proprietary information relating to its products". In the case of the Plaintiff, the confidential information was defined as "certain proprietary information relating to its business".

42 The Confidentiality Agreement applies to confidential information in "written, oral and/or visual form". If the information is oral or visual, the confidential information would fall under the Confidentiality Agreement if reduced to writing, marked confidential and sent to the receiving party. The Confidentiality Agreement expressly excludes confidential information which, *inter alia*, at the time of disclosure is in the public domain; which becomes part of the public domain after disclosure other than through breach by the receiving party; or which is developed by the receiving party independently from the confidential information received.

43 Duties imposed on the receiving party include the obligation to keep the confidential information confidential, as well as a duty not to use the confidential information for any other purpose.

44 Clause 8 of the Confidentiality Agreement deals with the duration of the agreement. It provides that "[t]his Agreement shall enter into force on 1st June 2013 and shall remain in force until 30th June 2014, unless extended by the

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77 See 1AB, pp 38–40.

Parties in writing." Parties were permitted to terminate earlier by giving written notice at any time. No notice period is specified, but cl 8 goes on to state that "[t]he confidentiality and non-use obligations of the receiving Party shall survive termination or expiration of the Agreement for five (5) years."

45 Clause 9 provides that the Confidentiality Agreement sets out the entire agreement between the parties as to "the subject matter hereof." The subject matter of the Confidentiality Agreement is the disclosure of confidential information by the parties to each other for the purposes of the distribution arrangement. Clauses 10 and 11 set out the Singapore choice of law clause as well as the Singapore exclusive jurisdiction clause.

46 The circumstances under which the Confidentiality Agreement was entered into was the subject of considerable cross-examination. Neither Dr Nont nor Ms Jaklerdchai gave evidence on what had transpired, but what is clear based on the documentary evidence (e-mails between Dr Nont and the Defendants)[78] and the evidence of Mr Nuboer[79] is that it was the 2nd Defendant who had taken the initiative to require a confidentiality agreement between the parties.

47 It is clear that by 2012, a considerable amount of information must have passed between the Plaintiff and the 1st Defendant in connection with orders for DSM products, customers, production issues, sales targets, market development and the like. A lot of information would have been disclosed at quarterly meetings between the Plaintiff and 1st Defendant. In addition, it is likely that the parties would have had specific discussions and communications on bespoke

78 1 AB, p 541.

79 AEIC of Mr Nuboer, para 5.

premix requests for some customers such as the formulation of the bespoke premixes as well as regulatory and other matters. It goes without saying that the 2nd Defendant, in particular, would have been concerned to safeguard any confidential information that it might disclose in relation to product formulations and production methods, whether these related to standard ingredients/premixes or bespoke premixes. This explains why the preamble to the Confidentiality Agreement states that DSM has developed and possesses certain proprietary information relating to *its products* whilst the Plaintiff has developed certain proprietary information relating to *its business*.

48 This is the context in which the Confidentiality Agreement was raised, discussed, negotiated and eventually signed on 22 October 2013.[80] The evidence supports the view that it was the Defendants who were keen on executing the Confidentiality Agreement and that any delays in reaching the agreement were largely due to slow responses from Dr Nont. However, I note that Mr Redman accepted that the parties needed reasonable time to formalise the Confidentiality Agreement and that the Plaintiff was not dragging its feet unnecessarily.[81] But I also note that there is nothing in the e-mail communications between the parties which raised the issue of the identities of the Plaintiff's FB&N customers as being confidential information.

The standard terms and conditions for orders placed with the 1st Defendant

49 The 1st Defendant made several DSM products available to the Plaintiff to purchase and sell onwards to downstream Thai FB&N producers. Each order placed by the Plaintiff was on the 1st Defendant's General Terms and

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80 SOC 2, para 7.

81 NOE of 21 September 2017, p 65.

Conditions of Sale ("the GTC").[82] When cross-examined on the GTC, Ms Chaitharatip's evidence was that she was not familiar at all with the terms and conditions of sale as she was not involved or working in "the purchasing area".[83] Nonetheless, it does not appear that the Plaintiff disputes the fact that orders placed by the Plaintiff were subject to the GTC.

50 Briefly, the GTC's terms include the following:

(a) Clause 1 deals with general provisions, including one stating that the GTC governs the offer, sale and delivery of all goods and services from the 1st Defendant to the Plaintiff.

(b) Clause 2.1 deals with quotations, orders and confirmation, and includes a provision that "[o]rders shall be deemed to be an offer by [the Plaintiff] to purchase the Products from DSM and are not binding until accepted by DSM in writing", and that "DSM shall be entitled to refuse an order without indicating the reasons."

(c) Clause 3 deals with prices. It provides that prices are as set out in the confirmed order, and that unless prices are indicated as firm in the confirmed order, DSM is entitled in certain stated circumstances to increase the price of products yet to be delivered.

(d) Clause 4 deals with payment and customer's credit. It provides that unless otherwise stated in the confirmed order, payment is to be paid on the basis of net cash within 30 days following DSM's invoice.

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82 AEIC of Mr Redman, para 8 and pp 13–14.

83 NOE of 18 September 2017, pp 61–62.

(e) Clause 22 deals with intellectual property and provides, *inter alia*, that "[a]ll intellectual property rights arising out of or in connection with the Products shall be the exclusive property of DSM."

51 Clause 19.1 of the GTC also provides an express choice for the laws of Thailand to govern the rights and obligations arising out of a confirmed order. In addition, cl 19.2 provides that the "any suits, actions or proceedings that may be instituted by any party shall be initiated exclusively before the competent courts of Bangkok … without prejudice to DSM's right to submit the matter to any other competent court." Unlike the Confidentiality Agreement which is governed by Singapore law and subject to the exclusive jurisdiction of the Singapore courts, the confirmed purchase orders between the Plaintiff and 1st Defendant are subject to the laws of Thailand.

52 I note that there is nothing in the GTC which imposes on the 1st Defendant any obligation to accept an order placed by the Plaintiff. This is a point which was accepted by Ms Chaitharatip under cross-examination.[84] The GTC merely governs specific orders placed by the Plaintiff and accepted by the 1st Defendant for DSM products. The GTC does not speak to the broader relationship between the Plaintiff and the 1st Defendant with regard to the Plaintiff's appointment as a local distributor in Thailand.

The applicable legal principles

53 The basic principles of the law on confidence as set out in the seminal English cases of *Saltman Engineering Co v Campbell Engineering Co* (1948) 65 RPC 203 and *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 ("*Coco v*

[84] NOE of 18 September 2017, pp 63–64.

Clark"), which have been followed and applied in numerous Singapore cases including *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd and another* [2012] 4 SLR 36 at [55], and *Invenpro (M) Sdn Bd v JCS Automation Pte Ltd and another* [2014] 2 SLR 1045 ("*Invenpro*") at [129].

54 The three basic elements to be satisfied are as follows:

(a) the information must possess the necessary quality of confidentiality;

(b) the information must have been imparted or received in circumstances such as to give rise to an obligation of confidentiality; and

(c) there must have been unauthorised use and detriment.

55 The obligation of confidentiality, whilst often arising as a term of a contract (express or implied), can also arise in circumstances where there is no contractual relationship between the parties. Take, for example, a case where confidential information is imparted by X to Y under a contract and Y, in breach, discloses the information to Z. In such circumstances, Z may be subject to an equitable obligation of confidentiality even though he is not a party to the contract. There are, of course, many other cases where equity's intervention is relied on to protect confidential information in the hands of a recipient or taker of confidential information (see *Invenpro* at [131]), but it is not necessary in the present case to examine this area in detail. The general point is that it is common for disputes over confidential information to be brought in both contract and equity. In many cases, the basic facts are the same or closely related. In some cases, the claimant is able to succeed both on the contractual claim for breach

of confidence and also in equity. It is worth bearing in mind that whilst there can be no double recovery by the Plaintiff, the fact that the breach of duty is founded in both contract and equity can be significant for determining the available or appropriate remedies. This is perhaps especially so if there is a claim for an account of profits, a remedy readily available in equity but much less so for a straight breach of contract.

56 In the present case, reference has been made to the point that the parties entered into the Confidentiality Agreement a considerable time after they had established their distributorship arrangement. Long before the Confidentiality Agreement, the parties had been cooperating in the development of the Thai market for DSM products. There was a long-standing practice (if not a requirement) for quarterly meetings at which the Plaintiff would present reports on its performance, market developments and market/customer issues. The Defendants would also from time to time participate at exhibitions in Thailand with the Plaintiff at which they would meet Thai FB&N producers. It is clear that even if there was no express confidentiality agreement between the parties prior to the Confidentiality Agreement, confidential information imparted to the 1st Defendant during meetings and discussions might be covered by implied contractual obligations or equitable obligations under the well-established principles elucidated in *Coco v Clark*. I will go into these principles in more detail where necessary to decide an issue before the Court.

Whether the Customer Information constitutes confidential information

57 The first question before this Court is whether the Customer Information constitutes confidential information with reference to the Confidentiality Agreement and the Defendants' common law or equitable obligations. This lies

at the heart of the Plaintiff's claim and must be addressed bearing in mind the context and background of the relationship between the parties.

Relationships between the parties and Thai FB&N customers

58 I have emphasised the point that the parties had a long commercial relationship which stretched back more than two decades prior to the termination of the distributorship arrangement in 2014. But as I noted above at [33], there is a distinct lack of documentary material on the contractual terms of the distributorship such as reporting obligations, duties imposed on the Plaintiff to develop the Thai market, duties imposed on the 1st Defendant, parties' right of termination, and so on. The Defendants have made the point that there were occasions when Thai FB&N producers would approach the 1st Defendant directly for supplies of DSM ingredients.[85] It appears that in some cases, the 1st Defendant satisfied the request directly if there was a special reason to do so, such as a request for bespoke premixes.[86] In other words, the fact that the Defendants on occasion interacted directly with Thai FB&N producers supports the Defendants' position that they had their own direct knowledge of Thai FB&N producers. Indeed, the point can fairly be made that the Defendants had a real interest in becoming familiar with the Thai market and to have interaction with Thai FB&N producers. Thai FB&N producers who were using or wanted to use DSM ingredients in their products were just as much the Defendants' customers as the Plaintiff's, and the Plaintiff was not in a position to object to this direct contact.

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85 DSB, generally; NOE of 19 September 2017, p 8.

86 See NOE of 21 September 2017, p 93.

59 I am satisfied that whilst the Plaintiff had the front-line position in developing the market for DSM ingredients in Thailand, the Defendants also played a real role in supporting the Plaintiff's efforts. Whilst the Plaintiff's position is that the 1st Defendant was not concerned with the identities of the Plaintiff's FB&N customers who required DSM ingredients, I am satisfied that the 1st Defendant (also a Thai company), in carrying out its supportive role, would become aware of the main (or at least some) Thai FB&N producers who were using or might be interested in using DSM ingredients. The information and knowledge could be acquired from discussions with the Plaintiff (such as at the quarterly meetings), by attending conferences and exhibitions in Thailand, and as a result of direct approaches by some Thai FB&N producers (even if infrequent). There may also have been other ways whereby the 1st Defendant legitimately accumulated information on Thai FB&N producers and their needs over the years, including through presentations on DSM products by the Defendants' staff (for example, from the business development division) to Thai FB&N producers.[87]

60 A substantial part of the evidence concerned bespoke or customised premixes that were sometimes requested by Thai FB&N producers. Ms Chaitharatip testified that they had a R&D team involved in the development of new products for the Plaintiff such as food colouring and seasonings.[88] It appears that the Plaintiff also assisted Thai FB&N customers to develop bespoke ingredient mixes. However, the Plaintiff's evidence on this was thin. No supporting or corroborating evidence was provided from any other source, and it is unclear exactly what work the Plaintiff would undertake in terms of developing or testing the premix formulation, *etc*. In cases where the customer

87 NOE 20 September 2017 pp 40–42 and 49.

88 NOE 18 September 2017, pp 44–45.

needed a bespoke premix, Ms Chaitharatip stated in her evidence that the Plaintiff's products department would work closely with the Defendants to meet the requirements of the Thai FB&N customer.[89]

61 The evidence, as a whole, strongly supports the view that the 2nd Defendant was heavily involved in working with Thai FB&N customers in developing bespoke premixes. There is no doubt that the Plaintiff, and with no disrespect, largely acted as a "conduit" to convey customers' needs and requests for bespoke formulations to the Defendants. It is unclear if there was any more to this, such as the formulation of ingredients, testing or evaluation approvals. In all likelihood, the 2nd Defendant would also have carried out substantial R&D and technical work on requested bespoke premixes. After all, it is not in dispute that the 2nd Defendant carries out R&D on FB&N products and ingredients,[90] which is a major part of its business and expertise. The Defendants rely on the evidence of their work on bespoke premixes to bolster their general case that the knowledge they had acquired as to the Thai FB&N market was as much the Defendants' as the Plaintiff's.

62 I make a passing observation that if the Plaintiff intends to mount a claim to the formulation of the bespoke premixes, much more evidence would be needed on their involvement, the work done and the relationships between the Plaintiff and the Thai FB&N customers, and between the Thai FB&N customers and the 2nd Defendant. It stands to reason that a newly developed bespoke premix for a food product which has obtained approval from the relevant food and drug authority can be very valuable in its own right. There was no evidence put before the Court by reference to which a determination could be made as to

89 AEIC of Ms Chaitharatip, para 25(c).

90 NOE of 22 September 2017, pp 24–25 and 106–107.

whether the intellectual property rights (if any) in the bespoke formulations belonged to the Thai FB&N customers, the 2nd Defendant, the Plaintiff or some other party, but this is not a matter that arises for decision in the case before me.

The Key Customers List

63 I will now turn to take a closer look at the documents containing the Customer Information which the Plaintiff alleges to be confidential information, starting with the Key Customers List. This a list of "existing customers who consume DSM's products" that was prepared by the Plaintiff for and at the request of the Defendants.[91] The Key Customers List was initially requested at a quarterly meeting between the Plaintiff and 1st Defendant on 27 February 2014.[92] The minutes of the meeting record that the 1st Defendant asked for customer information and "win projects" (referring to new sales of DSM ingredients)[93] in past years for reference. The Plaintiff responded on 4 April 2014 with the list of "win projects" and ongoing projects for the first quarter of 2014. This was followed by another e-mail request from the 1st Defendant for "the existing customers who consume DSM's products for [the 1st Defendant's] reference" on 11 April 2014. The Key Customers List was sent to the 1st Defendant on 9 May 2014 together with the Plaintiff's report for the first quarter of 2014.[94]

64 The Key Customers List comprises six printed pages with a confidentiality statement marked at the bottom of each page in Thai script. A

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91 2 AB, p 852.

92 2AB, p 823.

93 AEIC of Ms Chaitharatip, para 35.

94 AEIC of Ms Chaitharatip, paras 55–58.

total of 42 customers were listed. Information provided for each key customer concerned: (a) the DSM product(s) (*eg*, lycopene, Vitamin B-12, premixes); (b) the application of each product (*eg*, functional drinks, noodles); and (c) the estimated volume of each product ordered per quarter in kilogrammes.[95]

65 Whilst the 1st Defendant had made its request for the Key Customers List simply for reference purposes, what was provided purports to be a selection of the major customers who "buy a lot of DSM manufactured products" from the Plaintiff.[96] The Key Customers List does not set out the contact details or addresses of the customers listed.

66 The Plaintiff's position is that the Key Customers List was provided to the Defendants only because of the trust and longstanding relationship between the parties.[97] Further, the Confidentiality Agreement had been signed by this time and it was the Plaintiff's understanding that the Key Customers List would have been kept confidential and not misused.[98]

The On-going Projects List and other information and reports

67 It is clear that the Plaintiff and 1st Defendant had regular quarterly meetings for many years during which the Plaintiff would present reports on performance, problems, new or prospective Thai F&B products and potential FB&N customers for DSM products.[99] By way of illustration:

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95 2AB, p 855 *et seq*.

96 DCS, para 108, citing NOE of 20 September 2017, p 64.

97 PCS, para 32.

98 AEIC of Ms Chaitharatip, paras 57 and 62.

99 AEIC of Ms Chaitharatip, para 35 *et seq*.

(a) The On-going Projects List on pending projects and customers for the first quarter of 2014 was sent to the 1st Defendant on 4 April 2014.[100] For example, in the case of one Thai FB&N producer, it reported that there was an ongoing project for "Premix Vegetable" to be used for "RTD fruit juice".[101] The report also identified DSM products which were "at risk". For example, a Thai FB&N producer who was a customer for "Dry Vitamin A Acetate 325 CWS/A" had requested a lower price as it was able to import the same product from Indonesia.[102]

(b) A report on "Launched products in 2013–2014" was provided by the Plaintiff to the 1st Defendant on 17 March 2014 in connection with an earlier meeting on 27 February 2014 regarding performance in the fourth quarter of 2013.[103] The report included information on products launched in 2013 and 2014 such as a new tomato-based functional beverage made by a Thai FB&N producer.[104] Whilst it is unclear whether DSM ingredients were already used for this new product, it appears that this product was in any case identified as suitable for the DSM lycopene ingredient. Another report for the same meeting presented information on "Success stories in 2013" such as a Thai FB&N producer's UHT (ultra-high temperature-processed) fruit juice with high vitamin content for children and which used the DSM ingredient known as "Dry Vitamin A Acetate 325 CWS/A".[105]

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100 AEIC of Ms Chaitharatip, p 643.

101 AEIC of Ms Chaitharatip, p 647.

102 AEIC of Ms Chaitharatip, p 648.

103 2AB, p 756.

104 2AB, p 759.

105 2AB, p 796.

(c) The minutes of the meeting held on 27 February 2014 regarding performance in the fourth quarter of 2013 noted that sales volume for "D-Biotin" had decreased. The Plaintiff was asked to provide the reason for the decrease. In addition, the 1st Defendant suggested that there should be planning for meetings with customers together with the Plaintiff for the purpose of providing more support.[106] The minutes recorded that the Plaintiff was asked to supply customer information and "win projects" in past years for reference, and this information was provided on 4 April 2014.[107] Thereafter, information on the Plaintiff's existing customers for DSM products (the Key Customers List) was requested on 11 April 2014 and provided on 9 May 2014 (see [63] above).

68 According to the Plaintiff, a good deal of the information (on matters such as "win projects" and the sale of DSM products in Thailand) was provided so that the Defendants would learn of new potential applications of DSM products for creating and developing demand in other countries' markets. The Plaintiff accepts that the information provided could also assist the Defendants to help the Plaintiff identify other potential applications of DSM products for new Thai customers.[108] I am satisfied that the quarterly report meetings were held for the benefit of both the Plaintiff and the Defendants, such as by identifying new FB&N products for which DSM ingredients may be suitable for use in, as well as helping to resolve problems over supplies and/or pricing of ingredients that the Plaintiff may have encountered. Ms Chaitharatip

106 2AB, p 824.

107 2AB, pp 824 and 827.

108 Ms Chaitharatip AEIC at [37].

similarly accepted that information such as the report meeting for the fourth quarter of 2013 could be used by the Defendants to support the Plaintiff's business in Thailand.[109]

69 Parenthetically, I note that the Plaintiff's earlier performance in 2012 was a matter of some concern, which resulted in the Defendants seeking more information in an effort to help the Plaintiff meet its sale targets and to develop the Thai market in 2013.[110] The assistance provided by the Defendants included meetings and presentations with Thai FB&N producers on DSM products.[111] For example, on 20 June 2013, the 2nd Defendant made a presentation in Thailand on DSM products to a Thai FB&N producer. The email sent by the 2nd Defendant to the Thai producer on the day after the presentation attached a copy of the presentation slides, noted the problems raised regarding service, and concluded with the response that it was DSM's goal to delight and exceed customers' expectations and to "increase our DSM contribution to your business." A copy of the presentation was sent to the Plaintiff on 22 June 2013.[112] The assistance provided by the Defendants in 2013 also included support at FB&N exhibitions in Thailand and some meetings between the 2nd Defendant and Thai FB&N producers.[113]

70 I note as well that whilst the Plaintiff's sales performance did improve in 2013, there were further communications between Dr Nont and the Defendants in September and November 2013 on sales figures and the Thai

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109 DCS, para 60, quoting NOE of 19 September 2017, p 50.

110 1AB, p 235.

111 See 1AB, pp 236, 396, 421, 504 and 505.

112 1AB, p 421 *et seq*.

113 1AB, p 605; NOE of 20 September 2017, p 68.

market. For example, on 6 September 2013, Dr Nont sent an email to the 1st Defendant in response to information that the Plaintiff was approximately 2% behind budget as at August 2013, and in that same e-mail, he requested advice and support to achieve the budget for "this challenging year". That said, it seems that by the end of 2013, the Plaintiff's sales figures had improved such that there was discussion to bring forward January 2014 orders for delivery in December 2013.[114]

Relevance of the Confidentiality Agreement and confidentiality markings

71 The provisions in the Confidentiality Agreement defining confidential information are set out in broad or loose terms, such as references to "certain proprietary information" (see [41] above). Nothing is said as to what the proprietary business information relates to, and there is no mention of customer lists, customer requirements and so on.

72 The Confidentiality Agreement goes on to explain that the parties are willing to disclose to each other the confidential information for the purpose of the distribution arrangement between them. To this end, cl 1 provides that oral and visual disclosures fall under the agreement if they are reduced to writing and marked "Confidential".[115] I pause here to comment that the Confidentiality Agreement does not state or purport to have the effect that any information in writing and marked "Confidential" is confidential under the agreement or principles of common law and equity. The Confidentiality Agreement does not mean that *anything* marked "confidential" is confidential as a matter of law (whether by agreement or otherwise), only that confidential information falls

114 1AB, pp 605, 658 and 659.

115 1AB, pp 38–40.

under the agreement *only if* it is reduced to writing and marked "Confidential". For example, if a party states in writing in a document marked "Confidential" that the formula for water is "H_2O", this does not make the formula of water confidential as such. Indeed, cl 3 goes on to state that "[t]he receiving Party's obligations set forth hereunder shall not extend to any Confidential Information … which at the time of disclosure is in the public domain".

73 Whilst cl 3 is framed as an exclusion of the Party's obligation of confidentiality, the more fundamental objection that the information is not confidential in any case remains. It is not necessary for this Court to come to a firm landing on when the "marking" of a document as "Confidential" or "Secret" will have the effect of placing obligations on the receiving party whether under a contract or by virtue of general principles of common law and equity. Much will depend on the precise wording of the marking, any relevant contractual provision on the effect of marking, and the overall circumstances and facts. As Peter Smith J observed in *Sports Direct International Plc v Rangers International Football Club Plc* [2016] EWHC 85 (Ch) ("*Sports Direct*") at [25], just "because the parties label matters as being confidential does not necessarily make it so. The principles of confidentiality are more restrictive than that." For example, whilst a contract of employment may define confidential information in broad terms, issues of restraint of trade and public policy may arise especially post-termination which affect the enforceability of such a contractual provision. There are cases holding that where the parties have specified the information to be treated as confidential and the duration and nature of the duties imposed, the court will not ordinarily impose additional or more extensive equitable obligations: see *Duncan Edward Vercoe and others v Rutland Fund Management Ltd and others* [2010] EWHC 424 (Ch) at [329]. On the other hand, equitable obligations of confidentiality may arise in appropriate

cases where the contractual obligations and definitions are less clear: see *Sports Direct* at [25].

74 In the present case, many of the documents after November 2013 such as quarterly slide presentations on "win projects" and the Key Customers List are marked with confidentiality claims in the Thai language.[116] The markings are generally clear and visible but only start appearing on quarterly reports after the Confidentiality Agreement. The question that remains is whether the information disclosed in each report, document or presentation is, in fact and law, confidential information.

75 The Plaintiff's view is that the fact of a Thai FB&N producer's use of DSM ingredients sourced through the Plaintiff qualifies as confidential information. Ms Chaitharatip referred to some sample invoices issued by the Plaintiff to a Thai FB&N producer for "earlier purchases of DSM Nutritional Products (with a watermark containing a confidentiality statement subsequently added by [the Plaintiff] to emphasise the confidentiality of the information contained therein)".[117] It is not clear, however, what Ms Chaitharatip meant when she stated that the confidentiality watermark was subsequently added. The watermark in the sample invoice appears to have been added by the Plaintiff to the invoice specifically for the purposes of the use of the invoice for the current litigation. The watermark states that "[t]he details of customers and any other information which [the Plaintiff] has submitted to the court are the trade secret of the company" and mentions the present suit between the parties.[118] Moreover, the invoice exhibited was from the Plaintiff to its Thai FB&N

116 DCS, para 101, citing 2AB, p 852.

117 Ms Chaitharatip AEIC at [44].

118 See, for example, AEIC of Ms Chaitharatip, p 300.

producer/customer. It was not a document provided to the 1st Defendant at or around the time when the invoice was issued. Further, whilst the Plaintiff suggests that some of its FB&N customers did not want the fact that they obtained DSM ingredients to be made publicly known, there is no supporting evidence for this at all.[119]

Findings on confidentiality

76 The legal principles relating to the quality of confidentiality with regard to commercial and industrial information are well-settled and summarised in the *Invenpro* case at [130] as follows:

> … (a) Information will possess the quality of confidence so long as it remains relatively secret or relatively inaccessible to the public as compared to information already in the public domain. This is primarily a question of public accessibility. Absolute novelty or secrecy is not the touchstone. In deciding whether information is readily accessible, the court will have regard to the degree of exposure … as well as the extent to which that exposure makes the information readily accessible to interested members of the public. Ultimately, the question is one of fact and degree.
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> …
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> (c) Information does not have to be inventive to possess the necessary quality of confidence. That said, in order for the claimant to be able to assert its rights, it will usually be necessary to prove that the information was a product of some amount of labour and effort such that any other member of the public will have to go through a similar process of effort and labour to reach the same destination.
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> …
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> (e) Information can be confidential as a whole even though the component parts are in the public domain … In these cases, the fact that the individual features or elements are already known does not mean that the end result does not possess the necessary quality of confidence. It may be a case where the end result is more than just the sum of the parts. Nevertheless, in

119 See DCS, para 195, quoting NOE of 19 September 2017, p 26.

> these instances, the plea that the individual elements have been combined together in a way so as to produce something which is new in itself, is a plea that requires careful analysis and must be supported by the evidence.
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> (f) To succeed, the claimant will have to show that the information alleged to be confidential is sufficiently well developed … Factors relevant to whether the information is sufficiently well developed include: whether the information (if said to embody a new idea) is realisable in actuality and whether it has been developed to the point where it acquires some commercial attractiveness. Ultimately, it is suggested that what is needed is for the claimant to show that the information has been developed to the point where it can be defined with sufficient objective certainty such that the defendant can understand the case being put to him …

77 In the present case, there is little doubt that the information disclosed on the formulation of standard as well as bespoke premixes can easily be found to possess the necessary quality of confidence by reference to the principles summarised above. Indeed, there may well have been other items of information that had been disclosed between the parties on specific issues such as solutions to quality or manufacturing issues that possess the necessary quality of confidence. New marketing plans, details on emerging food fads or strategies for future business development might also qualify as confidential information in the appropriate circumstances. It is not, however, necessary for this court to come to a firm landing on these points; the heart of the dispute concerns the information on the Customer Information such as the identities of the Plaintiff's key customers that was supplied to the 1st Defendant by way of the Key Customers List.

78 It may well be that the 1st Defendant would have been able to derive its own version of the Key Customers List with the aid of independent third-party FB&N market researchers, Internet resources as well as the 1st Defendant's own internal records built up over the history of their relationship with the Plaintiff. Indeed, the 1st Defendant suggested that many of the Plaintiff's competitors

(suppliers of ingredients to FB&N producers) in Thailand would have their own lists of FB&N producers including information on ingredients used. Mr Redman, however, quite properly accepted that whilst the 1st Defendant's list of key customers might be similar, the lists would not be identical.[120]

79 Looking at the evidence as a whole, I am satisfied that whilst some of the 1st Defendant's internal records on Thai FB&N producers who use DSM ingredients were derived from information supplied by the Plaintiff at quarterly meetings, *etc* (including meetings held prior to the parties entering into the Confidentiality Agreement), there are other records whose informational content would have been due to the 1st Defendant's own contacts with Thai FB&N producers whether at exhibitions, meetings to discuss needs and requirements, and so on. Given the long history of the commercial relationship between the parties it is unsurprising how difficult it is to determine the provenance of all the information in the Defendants' possession. The fact that some records including those relating to minutes of quarterly meetings between the 1st Defendant and Plaintiff in earlier years were misplaced or lost by both the 1st Defendant and the Plaintiff heightens the problem. The difficulties which the 1st Defendant asserts it encountered in locating more records to bolster its claim that Thai FB&N producers had sometimes contacted or placed orders directly with the 1st Defendant (because of lapse of time and the digitisation of records)[121] was not helpful. Even though I am satisfied that the 1st Defendant did have some direct dealings with Thai FB&N producers for DSM ingredients over the years, what remains unclear is how often and how many Thai FB&N producers would have acquired DSM ingredients in this manner.

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120 NOE of 22 September 2017, pp 28–29.

121 See NOE of 22 September 2017, pp 8–15.

80 For completeness, this Court accepts that there are independent businesses offering market analysis research, such as Mintel Global Market Research, and who are able to provide various types of market intelligence reports in the area of FB&N products. These include reports on developing market trends and new products in Thailand. Indeed, whilst the matter was not examined in any detail, it appears likely that bespoke reports could be commissioned. Indeed, the point was made that the Plaintiff had even asked the 1st Defendant for a copy of a Mintel market trend report for 2014 that the 1st Defendant had acquired.[122]

81 But even though the 1st Defendant would have been able to (and apparently did) engage the services of market researchers, I am still satisfied that the Plaintiff's Key Customers List report constituted confidential information at the time when it was produced and disclosed to the 1st Defendant. At the very least, it would have taken some time and effort to construct a similar list with substantially the same information, from independent sources.

82 The immediate utility of the Key Customers List was not just information as to who the key FB&N producers in Thailand were, but more significantly, who the Plaintiff's key customers for DSM ingredients were, the types of ingredients they ordered, the applications made of such ingredients and the estimated quantities thereof (see [64] above). I am satisfied that even if the 1st Defendant had been able to construct its own list of key FB&N producers in Thailand who were using DSM ingredients, there is no doubting the time and effort that would have been required. It is also unlikely that any list produced

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122 NOE of 20 September 2017, pp 3 and 10–13.

by the 1st Defendant simply from its internal records (such as purchase orders and quarterly reports) would be as comprehensive as the Key Customers List.

83 In *Personal Management Solutions Ltd and another v Brakes Bros Ltd and others* [2014] EWHC 3495 (QB) ("*Personal Management Solutions*"), two associated claimant companies brought claims in respect of the defendants' misuse of their group's confidential information. The claimants carried on business of providing employee benefit packages to other companies. The first defendant was a company that contracted with the claimants to provide insurance for its employees. It subsequently provided to the other defendants the list of all of its employees who had policies with the claimants, together with those employees' gross premiums. Those defendants then used the information in the list to compete with the claimants for the provision of employee benefit packages to the first defendant's employees.

84 The English High Court in *Personal Management Solutions* found that the list had come into existence as a direct result of the claimants' performance of the contract with the first defendant by arranging insurance policies for its employees. The list was not widely available and included "refined information" which showed who was willing to take insurance and at what price. Whilst the 1st Defendant would have been able to construct a similar list by asking each employee for the information, this would have taken time and depended on the cooperation of each employee. In these circumstances, the English High Court found that the information amounted to commercial intelligence which was of value to competitors.

85 *Personal Management Solutions* subsequently proceeded to the assessment of damages hearing, and an issue arising over the scope of the assessment of damages resulted in an appeal to a differently-constituted High

Court in *Personal Management Solutions Ltd and another vs Brakes Bros Ltd and others* [2017] EWHC 383 (QB). The High Court, when reviewing the judgment on liability, reiterated at [25] that what was confidential about the information contained in the list was the *combination* of names of the first defendant's policyholder employees together with the premiums they paid. It appears to me that the Key Customers List was similar in this regard.

86 Mr Redman essentially accepted that the Key Customers List did, as a whole, contain confidential information. In his answer to a question from the Court on confidentiality and the Key Customers List, Mr Redman's response was that whilst the information was available from outside sources, such information was "fragmented" and that "it would take [a] long time … to get that information together."[123] This concession was fairly made by the witness. For example, it does not appear that the 1st Defendant would have been able to determine who the Plaintiff's FB&N customers were simply by looking at purchase orders which simply indicated the quantity of ingredients and did not reveal the identity of the FB&N producers unless the order was unusual in some respect (such as quantity).[124] It must follow that any list that the 1st Defendant compiled from its own records (even if the records were complete and available) would not likely have been as comprehensive as the Key Customers List was.

87 In coming to my decision that the Key Customers List as a whole contains confidential information, I stress that the confidentiality resides in the collation of information as a whole: the names of the key customers, the types of products, and the DSM ingredients (and quantity) ordered. This point must be borne in mind when considering the later question of breach or unauthorised

123 NOE of 22 September 2017, p 23.

124 See NOE of 22 September 2017, pp 69–71; PCS at para 22.

use. Where, for example, the defendant is only shown to have misused part of the information, it will ordinarily be necessary to show that the misuse relates to a "material part" of the information: see Tanya Aplin *et al*, *Gurry on Breach of Confidence* (Oxford University Press, 2nd Ed, 2012) at paras 15.10–15.13. This point is considered in greater detail below.

88 I note as well that this part of my reasoning regarding the confidentiality of the Key Customers List does not extend to the other documents, correspondence and information received by the Defendants. The rest of the Customer Information was generally accumulated over the years in a piecemeal fashion and was not collated in the same way as the Key Customers List was. However, Mr Redman accepted that information in the Ongoing Projects List and the reports on new products provided in April 2014 contained useful information for securing orders from new FB&N producers and persuading existing FB&N customers to extend their orders to other DSM ingredients,[125] and it does not appear to me that all of this information was in the public domain. The main difficulty here (as I have noted at [79] above) is that the provenance of this information is difficult to prove and pinpoint. I am prepared to accept that there may have been confidential information in the other exchanges of Customer Information between the parties, but as I will soon explain, there is no evidence that any of this information was used (and how) by the Defendants, be it for the purposes of the Notice or otherwise. My analysis of whether the Defendants made unauthorised use of any confidential information will, therefore, focus on the Defendants' use of the *Key Customers List*.

125 NOE of 21 September 2017, pp 75–76, 89–91 and 96.

Whether the Defendants made unauthorised use of the Customer Information

The termination of the distributorship arrangement

89 On 10 June 2014, the 1st Defendant, by teleconference and letter addressed to Dr Nont, gave one month's notice of termination of its distribution arrangement with the Plaintiff.[126] The termination letter stated that the effective date of termination was 10 July 2014, and proposed certain "transitional" arrangements including the following:

(a) The 1st Defendant could choose to not accept new orders from the Plaintiff after 10 June 2014.

(b) The 1st Defendant reserved the right during the termination notice period to review and cancel some or all pending orders from the Plaintiff.

(c) The 1st Defendant would continue to supply products to the Plaintiff for customers with whom the Plaintiff had long-term binding supply commitments, provided the Plaintiff could provide the 1st Defendant documentary proof of such commitments. Where the Plaintiff had such long-term binding supply commitments, the 1st Defendant would continue to supply products to the Plaintiff for a maximum of two months from 10 June 2014 until 10 August 2014.

90 The Plaintiff's substantive response to the termination letter, including the proposed transitional arrangements, is set out in a letter from its lawyers

126 2AB, p 1092

dated 21 July 2014.[127] In brief, the Plaintiff expressed shock at the abrupt termination which was said to be "unreasonable, without justification, and in bad faith".[128] The Plaintiff rejected the 1st Defendant's one month's notice of termination as being wholly inadequate and instead countered with a proposal of a 15-month notice period.[129] It also rejected the proposed transitional arrangements regarding customers with whom the Plaintiff had long-term binding commitments.[130]

91 The Plaintiff complains that the Defendants never raised the possibility of termination of the distributorship during the quarterly meetings in 2013 and 2014, even though the parties had been discussing developments in the Thai market and how the Defendants might best assist the Plaintiff develop its customer base and orders. Indeed, the Plaintiff's sales performance in 2013 had improved and the Plaintiff was provided with a quota target for 2014 before the termination letter was sent.[131] According to Mr Redman, the reason for the decision to terminate the Plaintiff's distributorship was because of the Plaintiff's recent difficulties in meeting sales targets and the need to improve market penetration for DSM products.[132] Mr Redman, however, candidly acknowledged that he only became involved with the 1st Defendant's relationship with the Plaintiff sometime toward the end of May 2014[133] and that he did not know if Ms Jaklerdchai had warned Dr Nont of the extent of the Defendants'

127 AEIC of Mr Redman, pp 23–27.

128 AEIC of Mr Redman, p 24.

129 AEIC of Mr Redman, p 24.

130 AEIC of Mr Redman, pp 25–26.

131 2AB, p 895.

132 NOE of 21 September 2017, pp 22–23.

133 NOE of 21 September 2017, p 38.

unhappiness.[134] Whilst Mr Redman accepted that the 1st Defendant had been given a quota target for 2014, he postulated that the decision to terminate the distributorship might not have been made at that time.[135] The long and short of the evidence is that it is not clear when the Defendants decided to: (a) start looking for an alternative distributor to replace the Plaintiff; and (b) when the decision was actually made to terminate the Plaintiff's distributorship.[136]

92 Prior to the substantive response from the Plaintiff (through its lawyers) on 21 July 2014, the Plaintiff on 13 June 2014 had rejected the terms proposed by the 1st Defendant in its termination notice.[137] The 2nd Defendant (through its corporate counsel) immediately requested Dr Nont's substantive comments on the proposals (in particular, on the proposed notice period).[138] Dr Nont's response on 20 June 2014 was that the Plaintiff disagreed with the termination and had put the matter into the hands of its lawyers.[139]

93 Having had its attempts for direct discussions rebuffed by Dr Nont, the Defendants submit that it was all the more important for steps to have been taken to bring about an "orderly winding down" of the distributorship.[140] It was in this context that on 1 July 2014, the 1st Defendant issued the Notice directly to the Plaintiff's FB&N customers stating that it was in the process of changing the distributorship of DSM products in Thailand to Rama Production Co Ltd

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134 NOE of 21 September 2017, p 44.

135 NOE of 21 September 2017, p 47.

136 AEIC of Mr Redman, para 12; NOE of 21 September 2017, p 34.

137 2AB, p 1012.

138 2AB, p 1011.

139 2AB, p 1035.

140 See DCS, para 122.

("Rama"), and notifying them that their requirements for DSM products would be met by either the Plaintiff or the 1st Defendant in the interim period and thereafter by Rama after their distributorship was established. The Notice provided the names of contact persons at the 1st Defendant, and stated that Ms Jaklerdchai and/or another of its representatives named Kanokorn Jeimjitt would arrange to meet the customers soon so as to address their needs properly. The details of contact persons at Rama were also provided.[141]

Findings on whether there was unauthorised use

94 The Plaintiff asserts that as a result of the Notice, many of its customers terminated or cancelled existing orders with the Plaintiff for DSM products.[142] The Plaintiff asserts that it is likely that these customers acquired DSM products directly from the Defendants or from Rama following their receipt of the Notice. On this basis, the Plaintiff claims that the 1st Defendant breached the Confidentiality Agreement and misused confidential information to the Plaintiff's detriment.

95 The Confidentiality Agreement does not impose any restriction on the Defendants, post-termination, to market DSM products in Thailand or to compete in the business of supplying ingredients for FB&N products in Thailand. Nor does the Plaintiff claim the right to prevent the Defendants from marketing DSM products (whether directly or through a new distributor) to Thai FB&N producers. The Plaintiff's position is that the Defendants should have found the existing customers of DSM FB&N products through their own effort

141 AEIC of Mr Redman, p 21.

142 SOC 2, para 38.

and without use of confidential information provided by the Plaintiff over the years, and in particular, as set out in the Key Customers List.[143]

96 The Defendants submit that the new distributor whom the 1st Defendant was in the process of appointing at the time was itself an established supplier of FB&N ingredients in Thailand. There is no doubt that Rama had participated in some (if not, many) of the same FB&N product exhibitions in Thailand over the years as the Plaintiff had.[144] Rama would have had its own list of Thai FB&N producers and the type of ingredients of interest to them.[145] Indeed, Rama was well-established and had been in business in Thailand for at least 25 years.[146] Whilst no witness from Rama gave evidence, it appears that there would likely have been overlaps between the Plaintiff's list and Rama's own list of Thai FB&N producers. The Defendants submit that the e-mail addresses and other contact information were obtained by the 1st Defendant from its own internal records or from Rama, who had been asked to send over their customer lists to the 1st Defendant.[147] On this basis, the Defendants submit that they did not use the collated information as set out in the Key Customers List. The difficulty, however, is that Mr Redman did not appear to have much direct knowledge of the dealings between the 1st Defendant and Rama, including how the 1st Defendant identified the Plaintiff's key customers for the purposes of sending out the Notice.

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143 See NOE of 22 September 2017, pp 27–28.

144 See DCS, para 34.

145 See DCS, para 35.

146 See DCS, para 11; 3AB, p 1633.

147 DCS, para 130; 2AB, p 1038.

97 In any event, the Defendants argue that the only information from the Key Customers List that would have been used in the Notice was limited to the identification of the names of the key customers. Looking at the Notice, I observe that it is simply addressed to "Dear Valued Customer".[148] It appears that the Notice was sent as an e-mail attachment to the addressees.[149] The contact details of the customers are, however, not set out in the Key Customers List provided by the Plaintiff, and the Defendants did not ask the Plaintiff for them.[150] It bears repeating that the value of the Key Customers List lies in the collection as a whole, including what ingredients were required by the customer. By contrast, the Notice is in general form and does not refer to the specific type of DSM products or the quantities ordered or required by any customer.

98 I note that Mr Redman, in an answer to a question from the Court, stated that it would have been wrong for the 1st Defendant to simply give the Key Customers List to Rama for the latter's use.[151] This answer was given in response to a question directed at whether the Key Customers List could be used for any purpose other than assisting the Plaintiff with developing its market share. Mr Redman's response that it would not be right to simply give the list to Rama should be read in this context. To put the point in a different way: the question of whether handing over the Key Customers List to a competitor of the Plaintiff for purposes unconnected with the Defendants' need to engage and appoint a new distributor constitutes unauthorised use, is quite different from the question of whether handing over the list (or using the information) for the purpose of effecting a transition to a new distributor is an unauthorised use. This is

148 AEIC of Mr Redman, p 21.

149 See DCS, paras 128–130; 2AB, p 1040; NOE of 20 September 2017, p 69.

150 NOE of 20 September 2017, p 69.

151 NOE of 22 September 2017, p 27.

especially if the only use made of the Key Customers List was to reference the names of the Thai FB&N customers for DSM products and nothing more.

99 Looking at the evidence as a whole, I find that the 1st Defendant only used the information in the Key Customers List so as to identify the Thai FB&N producers who were key customers of DSM products and to send them the Notice. The evidence does not establish what (if any) further use was made of the Key Customers List by the Defendants, including whether a copy was passed to Rama or used by Rama to facilitate implementation of the new distributorship arrangements. Once the recipients of the Notice became aware of the change of distributorship, they would have had to obtain DSM products directly from the Defendants or from Rama if they desired them. Thereafter, it was unlikely that the 1st Defendant would have had any difficulties ascertaining the needs of the respective FB&N producers for DSM ingredients. If a FB&N producer wished to continue using DSM ingredients for its products, it would have provided information as to its requirements directly to the 1st Defendant or Rama. I note as well that Rama's appointment was short-lived and terminated after just several months.[152]

100 The issue is whether such use of the Key Customers List constitutes an unauthorised use. The Plaintiff asserts that after the Notice was sent, many of its Thai FB&N customers cancelled orders for DSM products placed with the Plaintiff.[153] It is of course not surprising at all that Thai FB&N producers who wanted to use DSM ingredients in their products decided to deal directly with the Defendants, Rama or whomever was appointed as the new distributor for DSM products in Thailand. With the termination of the distributorship

152 NOE of 22 September 2017, p 33.

153 SOC 2, para 38(a).

arrangement (transitional arrangements aside), the Plaintiff would no longer be able to supply DSM products to its FB&N customers in the same way. The Plaintiff's "loss" of all of its customers for DSM products was the inevitable consequence of the loss of its distributorship rights, and it bears repeating that it is not the Plaintiff's case in the present action that the Defendants were prohibited from selling their products in Thailand or appointing a new distributor.

101 In deciding whether the use made of the information in the Key Customers List was unauthorised, I reiterate the following points:

(a) The Plaintiff and Defendants had a long-standing relationship and shared interest in the Thai FB&N market. Whilst the Plaintiff had invested much time, effort and financial resources in developing the market for DSM products, there is no doubt that the Defendants supported the Plaintiff's efforts. The products being marketed by the Plaintiff were DSM products and were not marketed (in the sense of being branded) as the Plaintiff's products.

(b) The Key Customers List was originally requested by the 1st Defendant for "reference purposes", albeit in connection with assisting the Plaintiff develop the Thai market for DSM products.

(c) There were no express terms on the termination of the distributorship arrangement, such as terms on the notice period, transitional arrangements for stock in trade, and so on. The Plaintiff could well have contracted for obligations to supply DSM ingredients to some of its key customers beyond the 10 July 2014 termination date. The 1st Defendant had proposed transitional provisions to the effect that where the Plaintiff had long-term binding supply commitments, the 1st

> Defendant would continue to supply products to the Plaintiff for up to two months. Other transitional arrangements proposed by the 1st Defendant included matters relating to the transfer and delivery up of authorisations/licences to import DSM products; the return of samples, sales promotion literature, training materials; and the sale-back of stocks already acquired by the Plaintiff.

102 The Plaintiff's case is that the use of the Key Customers List for the purpose of notifying key customers of the impending termination of the distributorship arrangement went outside the purpose for which it was provided and is accordingly unauthorised. The difficulty with this is that the question of whether the use is unauthorised must be considered in light of the circumstances as a whole, including the relationships between the parties and their respective interests in the Thai market for DSM products. It stands to reason that where the parties have had a long manufacturer-distributorship relationship, the manufacturer would have a legitimate interest in wanting to inform the market and its customers of the change of distributorship. For example, if the Defendants had simply taken out a series of newspaper advertisements in Thailand announcing the termination of the distributorship and setting out information on new sources of supply for DSM products, the Plaintiff on the case as presented would have no reason for any complaint at all.

103 In the present case, the 1st Defendant informed the key customers of DSM products by way of the Notice. Whilst I accept the 1st Defendant was able to do this because of the Key Customers List, in my judgment, the use of the Key Customers List for this purpose was not unauthorised. Looking at the manufacturer-distributor relationship between the Plaintiff and 1st Defendant for DSM products in Thailand, I am satisfied that the 1st Defendant was implicitly authorised to use its knowledge of the key customers so as to inform

them of the termination of the distributorship. The Key Customers List provided by the Plaintiff was not a general list of FB&N producers in Thailand or a list of all the FB&N producers which the Plaintiff had dealings with. It was a list of FB&N producers who were supplied with DSM products by the Plaintiff.

104 In reaching this conclusion, I note the point expressed in *Gurry on Breach of Confidence* at para 15.05 that the question is whether a reasonable person standing in the shoes of the recipient would understand that the use made was not permitted. This depends on the facts and circumstances as a whole, including whether there was a limited purpose behind the disclosure. The weight to be attached to that limited purpose must of course depend on all the facts. Cases such as *R v Department of Health Ex Parte Source Informatics* [2001] QB 424 at [31] tend to the view (at least where the action is in equity) that a touchstone of liability and misuse is whether the defendant's conscience should be troubled: see R G Toulson & C M Phipps, *Confidentiality* (Sweet & Maxwell, 3rd Ed, 2012) at para 3-173 which further states that there may be circumstances in which the confidant has a real need to use the confidential information, such as where the disclosure or use is fairly required for the protection of the party's legitimate interests.

105 The decision of the English Court of Appeal in *Personnel Hygiene Services Ltd and another v Rentokil Initial UK Ltd (t/a Initial Medical Services) and another* [2014] EWCA Civ 29 ("*Personnel Hygiene Services*") provides a helpful contrast. In this case, the claimant was in the business of providing clinical waste bins for hazardous waste material which involved collecting the waste bins and replacing them at regular intervals as well as disposal of the waste. To this end, rental agreements were entered into with the claimant's customers. Servicing of the bins was done by sub-contractors. During negotiations over the appointment of the defendant in 2007 as sub-contractors,

the claimant and defendant agreed to exchange information on their businesses under a confidentiality agreement, and the defendant was subsequently appointed as a sub-contractor. In 2012, the claimant gave notice of termination. The defendant accessed information of the claimant's customers (names, addresses, contact numbers, service requirements, *etc*) to contact the customers and make untrue and misleading statements about the claimant: at [7]–[16].

106 On these facts, it is not surprising that the court in *Personnel Hygiene Services* found that the customer information was confidential and that the duty of confidentiality continued during and after the sub-contract had come to an end: see [20] and [47]. Even though the express confidentiality obligation was for the purposes of covering the negotiations and the parties' evaluation of each other's businesses, the court found that the reasonable man would have regarded it clear that the information provided in relation to existing customers was intended to remain confidential under the sub-contract: at [25]. A non-user injunction was granted as there was a real risk that the defendant would re-launch its campaign targeting the claimant's customers: at [52]. The non-user injunction did not amount to an unjustified restraint on competition as it did not have the effect of preventing the defendant from approaching the customers, provided it did not use any confidential information when making the approach. The injunction was limited to a specified period which was based on the court's estimate of the latest date by which the defendant could have been expected to discover the identity of the claimant's customers through publicly available sources: see [27] and [28].

107 *Personnel Hygiene Services* can be distinguished from the present case. The defendant in *Personnel Hygiene Services* was essentially using the customer information to contact the claimant's customers in an effort to divert the servicing of the claimant's waste bins back to itself. There was also nothing

to suggest that the defendant had worked with the claimant to develop and expand the claimant's business of supplying waste bins.

108 The Defendants in the present case rightly submit that the Thai FB&N producers had been purchasing products from the Plaintiff because they wanted to use DSM products to manufacture their FB&N products.[154] If the Plaintiff was not the local distributor, it would not have been in the position of conducting any business in respect of DSM products with those Thai FB&N producers in the first place. It follows that after termination of the distribution arrangement, the Plaintiff did not have any legitimate interest in stopping the 1st Defendant from informing the FB&N producers of the change of distributorship and where they should go if they wished to continue to use DSM products.

109 I pause to note that the Plaintiff's submissions referred the Court to several foreign decisions where liability arose in connection with the copying and/or unauthorised use of customer information. These include *Robb v Green* [1895] 2 QB 1; *Personal Management Solutions*; and *DC Payments Pty Ltd v Next Payments Pty Ltd* [2016] VSC 315 ("*DC Payments*"). This Court does not doubt (and has indeed found) that customer lists can and have been held to constitute confidential information. Indeed, there are Singapore cases such as *Tang Siew Choy v Certact Pte Ltd* [1993] 1 SLR(R) 835 ("*Tang Siew Choy*") in which customer lists or customer information were found to be confidential on the facts, but these cases do not assist the Plaintiff for the reasons briefly set out below.

154 DCS, para 206.

(a) In *Robb v Green*, the English High Court found that the names of the employer's customers (over the length and breadth of Great Britain) and set out in an order-book was confidential information. The defendant employee was held liable for copying the list of names while he was still an employee, with the intent of using the list to compete with the employer post-employment. The defendant, by making the copy, was already acting in breach of his duty of fidelity to his employer even if he had not yet started to use the list to compete with his employer. He had no right to copy his employer's list of customers for the purpose of competing with him at a time when he was still an employee. But this is clearly a rather different case as compared to the present one. The Defendants had a shared interest in developing the Thai market for DSM products together with the Plaintiff. The recipients of the Notice were customers for the DSM products which the Defendants had a legitimate interest in. By using the Key Customers List to obtain the names of those customers for the purpose of informing them of the change of distributorship, the 1st Defendant could not be said to have made an unauthorised use of the names such as to constitute misuse of the confidential information encapsulated in the Key Customers List.

(b) The facts and issues in *Personal Management Solutions* can be distinguished as well. The English High Court found that the information in the list had been misused as a result of the first defendant sending a copy to the other defendants, and because of the use of the information in discussions on alternative insurance packages and premiums. The "interest" of the first defendant was in essence nothing more than the fact that the insured persons were its employees. In the present case, the Defendants' interest arises from the fact they are the "owners" of the DSM ingredient products. The Defendants have the

right to decide who they wish to appoint as their distributor and on what terms. Once a distributorship was terminated, the Thai FB&N producers who wished to continue using DSM ingredients would naturally need to either contact the Defendants directly or their new distributor. The Plaintiff would not be able to offer those Thai FB&N producers DSM products after the termination of the distributorship arrangement and the expiration of any transitional arrangements. The Plaintiff could not compete with the Defendants for the supply of *DSM* products in the Thai FB&N market; it could only find alternative manufacturers of FB&N ingredients and persuade customers to switch from DSM products to alternative products distributed by the Plaintiff.

(c) Similarly, the other cases cited by the Plaintiff such as *DC Payments* and *Tang Siew Choy* are distinguishable from the present facts. Those cases involved situations where the respective plaintiffs' confidential customer information was sent – either inadvertently or wilfully by former employees – to the defendants, who were each competitors of the respective plaintiffs and made use of the customer information for a business advantage.

110 Each case must depend on its own facts and circumstances. In the present case, it is clear that the Defendants had a legitimate and longstanding concern with developing the Thai market which included helping the Plaintiff develop its penetration of the market for DSM products. The Defendants, over many years of engagement with the Plaintiff as the distributor of DSM products, naturally had a legitimate reason for wanting and needing to inform those Thai FB&N producers of the change of distributor. It would also not be reasonable to expect the 1st Defendant to have deliberately ignored the Key Customers List that it already had on hand, and to have instead proceeded to spend time and

resources figuring out the identities of the customers to whom they would send the Notice.

111 Whilst this Court accepts that the Key Customers List amounts to confidential information as a whole, the use established by the evidence was nothing more than use of the names of the FB&N customers for DSM products for the purpose of notifying them of the change in distributor. There is no evidence showing that the Defendants revealed or used information as to what prices the Plaintiff may have charged those customers (the mark-up) for DSM products. Indeed, there is no information in the Key Customers List on the Plaintiff's mark-up and prices.

112 I note also that this was not the first time that the 1st Defendant had reached out to the Plaintiff's customers for DSM products. The evidence establishes that the Plaintiff in earlier years was also the 1st Defendant's appointed local distributor for DSM "personal care products". In October 2010, the 1st Defendant notified the Plaintiff of its decision to appoint a new local distributor for these DSM products effective from 1 January 2011. The Plaintiff was requested to transfer back all related documents so that a "smooth transition" could be arranged for customers who needed a continued supply. This was followed by a notice sent on 1 January 2011 to Thai retailers and businesses who had purchased DSM personal care products. This notice was also addressed to "Dear Valued Customer" and set out information on the new distributor and the relevant contact persons.[155] There is nothing to suggest that the Plaintiff took any issue at the time of this change of distributorship with the 1st Defendant sending the notice to its customers for DSM personal care

[155] AEIC of Mr Redman, para 21 and pp 29 and 31.

products. It does not appear that any complaint was made, or that any legal action was instituted for misuse of confidential information.[156]

113 The Plaintiff's general position is that the Defendants had acted "unfairly" in terminating the Distributorship arrangement on short notice, and it makes reference to the effort expended over many years in developing the market in Thailand for DSM products and the history of its performance. The Defendants, in the notice to the Thai FB&N customers, accepted that the Plaintiff had been a good partner and that the change of distributorship was because of a change in company directions.

114 Whilst the decision of Tan Lee Meng J in *Citrus World Inc v Neotrade Marketing Pte Ltd* [2000] SGHC 283 is not on all fours with the present facts, his general observation at [45] bears setting out:

> [w]hatever expectations the defendants may have had in the past about their long-term relationship with the plaintiffs, it is common ground that … the defendants were appointed as distributors for only one year. As such, unless the agreement had been renewed, the plaintiffs were entitled to appoint a new distributor in place of the defendants. Whether or not the plaintiffs had been fair … is not relevant to the plaintiffs['] right to appoint a new distributor …

Likewise, in the present case, the question as to whether the Defendants had acted fairly in deciding to change distributors is beside the point. This action is not for wrongful termination of the distributorship. Whilst the Plaintiff may assert that a one-month notice together with a further two-month transitional period for orders and long-standing customers of the Plaintiff was too short, it is clear that they do not (and indeed cannot) take the position that the distributorship arrangement could not be terminated.

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156 See DCS, paras 45–46; NOE of 18 September 2017, p 80.

Summary of findings and conclusions

115 For clarity, I now set out a summary of the key findings of facts and conclusions that have been addressed in the preceding paragraphs.

116 The key findings of fact relevant to the issues as pleaded and presented to the Court are as follows:

(a) The distributorship arrangement between the parties that was acknowledged in a letter dated 31 July 2005 was not an exclusive distributorship. Under the distributorship arrangement, the 1st Defendant determined which DSM products the Plaintiff had rights to sell as the local distributor in Thailand. Whilst the Plaintiff had rights to sell a broad range of DSM FB&N ingredients, there were some which were assigned to other distributors. The Defendants could and did re-allocate DSM products to different distributors from time to time. Orders placed by the Plaintiff for DSM products were subject to the 1st Defendant's standard terms and conditions. There were no express terms on the termination of the distributorship arrangement.

(b) Throughout the history of the relationship between the parties, there were regular meetings during which quarterly reports were presented and discussions held regarding matters such as the Plaintiff's performance, problems that had been encountered, developments in the Thai market and new products or entrants into the Thai FB&N market. The 1st Defendant set annual performance targets for the Plaintiff.

(c) Whilst the Plaintiff was the local distributor and had incurred considerable expenses and put in sustained effort over the years to develop its business and the market for DSM products in Thailand, the

Defendants also committed time and resources to work with the Plaintiff towards this end. Apart from its involvement in discussions on market developments including problems with supply and costs, the Defendants also participated at some FB&N product exhibitions and made presentations to specific Thai FB&N producers. The Defendants had a legitimate and sustained interest in monitoring (both in general terms and specifically in respect of the Plaintiff's performance), understanding and interacting with the Thai market.

(d) The 1st Defendant acquired a good deal of knowledge on the Thai market including the identities of the main Thai FB&N producers who were customers for DSM ingredients. This information was acquired over a period of time from a variety of sources, including: (a) quarterly reports; (b) quarterly meetings and discussions with the Plaintiff; (c) attendance at FB&N ingredient exhibitions in Thailand; (d) meetings/presentations with FB&N producers; (e) meetings with FB&N producers and requests for bespoke premixes; and (f) market intelligence reports.

(e) Prior to the parties entering into the Confidentiality Agreement, at or around end-October 2013, the parties did not have a written confidentiality agreement. Exchanges of information at quarterly meetings and reports provided by the Plaintiff were not marked as confidential.

(f) At the time that the Key Customers List was prepared and handed to the 1st Defendant, the Confidentiality Agreement was operative and in force. The Key Customers List bore a confidentiality mark when it was sent to the 1st Defendant.

(g) The Key Customers List set out the names of 42 key customers, and the types, applications and quantities of products they ordered per quarter. The Key Customers List did not set out the addresses or contact details of the customers, or the names of contact persons. The Key Customers List (as well as the Ongoing Projects List) does not set out any information on the prices or mark-ups charged by the Plaintiff.

(h) Whilst the 1st Defendant (together with the 2nd Defendant) would have been able to construct a list of the Plaintiff's customers for DSM products in Thailand through the sources of information set out in (d) above, time and effort would have been required to do this. There were many other Thai distributors of FB&N ingredients such as Rama, with their own lists of key customers of FB&N ingredients, and whilst there may have been overlaps between the lists, the lists of key customers for the different distributors were unlikely to be the same.

(i) The 1st Defendant may have used the names of the customers in the Key Customers List to identify the Thai producers to whom the notice of change of distributorship was to be sent to, but the information on the contact persons and addresses (or e-mail addresses) was likely to have been taken from other sources including the records of the 1st Defendant and Rama. Whilst there was no evidence on this point, I note that trade directories and the Internet are also possible sources for detailed addressing information. There is no evidence suggesting that the 1st Defendant used any other information in the Key Customers List, such as the estimated quantities of products ordered by each customer. Whilst it was intended for Rama to replace the Plaintiff as the local distributor of DSM ingredients, Rama's appointment was short-lived and terminated after several months.

117 On the basis of the factual findings as summarised above, the conclusions I have arrived at in respect of the Plaintiff's claim for unauthorised use of confidential information can be summarised as follows:

(a) The mere fact that there was no written agreement or express term of confidentiality imposed under the distributorship arrangement does not mean that no implied term of confidentiality or equitable obligations of confidentiality existed. Whether any information provided was confidential and caught by an implied or equitable duty of confidentiality depends on the facts and the general principles on the law of confidence as summarised earlier.

(b) Whilst many of the component items of information in the Key Customers List were available from public sources or from the 1st Defendant's own sources, the information contained therein as a whole was not readily available to the public. The Key Customers List as a whole contained useful information of some commercial value. The 1st Defendant may have been able to produce a similar list, but this would have taken some time bearing in mind that the list was not just a simple list of the names of the FB&N customers. On balance, I accept that the Key Customers List was a product of work, time and effort sufficient to make the list confidential as a whole, even though some or many of the component parts were in the public domain.

(c) Given the above factors, as well as the fact that the Key Customers List bore a confidentiality mark (which, while not dispositive, is an indication of the parties' intention to treat the information as confidential), I find that the Key Customers List constituted confidential information that was covered by the

Confidentiality Agreement and relevant principles of equity. To use the language of equity, the Key Customers List as a whole possessed the necessary quality of confidence.

(d) The question as to whether the Defendants made an unauthorised *use* of the confidential information requires that the Court bear in mind the nature, scope and reason why the Key Customers List is confidential. This is important since the only information used from the Key Customers List (or, for that matter, any other documents containing Customer Information) in sending out the Notice was the names of the customers. Where information is confidential only because of its collocation or compilation as a whole, it stands to reason that misuse only occurs if the defendant is shown to have used that collocation or compilation as a whole. Further, even if the Defendant is shown to have made use of a relevant part of the confidential information, it must still be shown that the use was unauthorised.

(e) Any use of the Key Customers List made by the Plaintiff was not *unauthorised*. Under the Confidentiality Agreement, confidential information provided was to be used only for the purposes of "the distribution arrangement". In my view, the use of the customer names for the purposes of notifying them of the change of distributorship is in connection with and falls within the purposes of the said distribution arrangement.

(f) It follows that the Plaintiff's claim against the Defendants for unauthorised use of confidential information in respect of the Notice fails.

(g) Although it is not necessary for me to decide, I nonetheless express the view that there is no basis for finding the 2nd Defendant liable for any misuse of confidential information by the 1st Defendant. The Notice was sent out by the 1st Defendant and not by the 2nd Defendant. There is insufficient evidence to establish that the Key Customers List was handed to the 2nd Defendant, or if that had taken place, whether the 2nd Defendant had any role in the use of the Key Customers List or other Customer Information to send out the Notice. I acknowledge the fact the 1st Defendant is under the corporate control of the 2nd Defendant, as well as the role played by DSM Group's corporate legal counsel in the termination of the distributorship,[157] but this is not sufficient in my opinion. The main point, of course, is that the 1st Defendant's use of the Key Customers List did not in any event amount to an unauthorised use.

Conclusion

118 This is a case where the parties enjoyed a long commercial relationship, during which they shared the common interest and goal of supplying DSM ingredients in the Thai FB&N market. The more FB&N customers the Plaintiff was able to obtain orders from for DSM ingredients, the more orders it was able to place in turn with the 1st Defendant. Developing the market depended on a host of factors including: (i) the reputation and quality of DSM products; (ii) the marketing efforts of the Plaintiff; (iii) the reliability of the supply chain (deliveries, *etc*); (iv) the cost and price of DSM ingredients; and (v) the general support of the Defendants in the marketing efforts.

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157 PCS, paras 106–107; NOE of 22 September 2017, p 115.

119 The core finding of this Court is that whilst the Key Customers List constituted or contained confidential information, the Plaintiff's claim fails on the ground that the Defendants did not make any *unauthorised* use of the confidential information. Given the nature of the distributorship arrangement and the dealings between the parties, the Plaintiff must have contemplated and understood that upon termination, the 1st Defendant would have a genuine need to inform Thai FB&N customers of DSM ingredients of the change in distributorship by way of the Notice. There is insufficient basis to find that the Defendants used any other confidential information.

120 For these reasons, I dismiss the Plaintiff's action. I also order that the costs of the proceedings be agreed or taxed, and paid by the Plaintiff to the Defendants.

121 Finally, whilst this case was fought hard, I take this opportunity to record the Court's gratitude to learned counsel for the overall manner of conduct of the trial and for their helpful submissions.

George Wei
Judge

Lin Weiqi Wendy, Liu Zhao Xiang and Mehaerun Simaa
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