Hengxin Technology Ltd v Jiang Wei and Another Suit
[2009] SGHC 259

Case Number : Suit 161/2008, 162/2008

Decision Date : 19 November 2009

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Anparasan s/o Kamachi and Haresh Kamdar (KhattarWong) for the plaintiff; Andrew Yeo Khirn Hin, Tham Hsu Hsien, Koh Bi'Na and Paul Ong (Allen & Gledhill LLP) for the defendants

Parties : Hengxin Technology Ltd — Jiang Wei

Contract

19 November 2009 Judgment Reserved

Lai Siu Chiu J:

1 This consolidated action was a claim by Hengxin Technology Ltd ("the Company") against its two former directors Jiang Wei ("Jiang") and Qian Lirong ("Qian") for breaches of their respective service agreements with the Company. Jiang and Qian will be referred to collectively as "the defendants" henceforth.

2 The Company was incorporated on 18 November 2004 and is a leading manufacturer of radio frequency ("RF") co-axial cables series for mobile communications and other communication equipment. It was listed on the Stock Exchange of Singapore Ltd ("SGX") on 11 May 2006. The Company has a subsidiary called Jiangsu Hengxin Technology Co Ltd ("the Jiangsu Company") located at Yixing, Jiangsu Province, China, which manufactures mobile telecommunication cables and other mobile telecommunications equipment.

3 Prior to the listing of the Company on SGX, the defendants had entered into service agreements with the Company dated 9 February 2006 ("the Service Agreement[s]"). Jiang and Qian were directors of the Company from 23 June 2005 and 29 November 2004 respectively, until their resignations on 17 January 2007. Qian was a shareholder of the Company, its executive chairman and chief executive officer ("CEO") as well as the general manager and legal representative of the Jiangsu Company. Jiang on his part was an executive director of the Company as well as head of sales at the Jiangsu Company of which division he was the deputy general manager.

4 It was Qian who founded the Jiangsu Company in June 2003 together with Jiang, one Cui Genxiang ("Cui") and a Madam Zhang Zhong ("Zhang"); all three persons were also shareholders of the Jiangsu Company while Zhang was also a director. Cui and Qian are related by marriage as Cui's elder brother Cui Genliang is married to Qian's sister. Prior to joining the Jiangsu Company, Qian was the general manager (for the period 1996 to 2003) of a company called Jiangsu Hengtong Cable Company Ltd ("Hengtong") that manufactured cables for fixed telephone lines. In court, Qian revealed that he purchased land, plant, cables and machinery from Hengtong in order to start the Jiangsu Company.

5 The resignations of the defendants as directors of the Company were prompted by the calling of an extraordinary general meeting ("EOGM") by Cui and a shareholder Roger Ng Yang Kwang ("Roger

Ng") on 18 December 2006, who proposed *inter alia* to remove Qian as a director together with two independent directors viz Lai Seng Kwoon ("Lai") and Raymond Ong ("Ong"). A day before the EOGM on 18 January 2007, the defendants, Messrs Lai and Ong as well as the Company's Secretary Loo Wen Lieh ('Loo") tendered their resignations with immediate effect.

6 At the EOGM, Cui and Zhang were appointed as directors together with Xu Guochen ("Xu"), Bernard Tay and Patrick Chee. (Messrs Tay and Chee were the independent directors). Other resolutions passed that day included removing Qian from his positions as director, general manager and legal representative of the Jiangsu Company. Cui and Xu were appointed directors of the Jiangsu Company. Cui was also appointed the non-executive chairman of the Company while Xu was appointed the general manager of the Jiangsu Company.

7 The EOGM further resolved that Qian and other former board members of the Jiangsu Company should complete all the handover procedures to the new board members by 23 January 2007.

8 According to the affidavit of evidence-in-chief ("the AEIC") of Cui, the Company had on 19 January 2007 notified Qian in a fax ("the fax notification") of the resolutions passed at the EOGM and instructed him to comply with the handover procedures on 23 January 2007 at 9.00am in the presence of Cui, Xu and other board members at the premises of the Jiangsu Company. Pending the handover, Qian was instructed to continue managing the production at Jiangsu Company but not to make any management decisions.

9 Qian had left for Jiangsu Province, China, on the morning of 19 January 2007. It was Qian's testimony that he received the fax notification on Sunday 20 January 2007 at the premises of the Jiangsu Company and he was shocked by the contents as, before seeing the fax notification, no one had told him that he would be replaced as director, chairman of the board, legal representative and general manager of the Jiangsu Company.

10 According to Cui, on 23 January 2007, he, Zhang and Xu (collectively referred to as the "trio") arrived at the premises/factory of the Jiangsu Company to effect the management handover in [8]. However, the trio was refused entry into the premises by the security guards, purportedly on the instructions of Qian. Despite enlisting the assistance of a senior employee of the Jiangsu Company, the trio was unable to persuade the security guards to allow them entry into the premises. The trio attempted to contact the defendants on their hand phones without avail. They finally managed to enter the premises after government authorities intervened.

11 Upon entering the premises, the trio discovered that the place was deserted and the factory closed; the only person on the premises was the vice/deputy general manager who had apparently volunteered to stay back to look after the factory.

12 The trio ascertained subsequently that Qian had issued a notice on 21 January 2007 ("the leave notice") ordering all staff/workers to go on leave as the factory would be closed between 22 January and 4 February 2007. The leave notice was issued without the prior approval of the board of directors of the Company or of the Jiangsu Company. The trio alleged that Qian in any case had no authority to issue the leave notice as he was no longer the general manager of the Jiangsu Company. Further, Chinese New Year in 2007 fell on 18 February and the traditional practice in China (including that of the Jiangsu Company) was to close the factory for about 9 days for the production staff and 11 days for the other staff, during the festive period. Consequently, there was no valid reason to close the factory for two weeks until 5 February 2007, reopen and then close it again for 9 to 11 days for the Chinese New Year break. In addition, the period prior to Chinese New Year was traditionally the busiest period for the Jiangsu Company with production at full capacity.

13 As the trio was unable to contact either defendant, they took steps to recall the employees to return to work over the next few days. The factory was able to resume production on 26 January 2007. A meeting was held at the factory in the afternoon of 23 January 2007 at which Xu's appointment as the new general manager was announced. Wang Xin Bin ("Wang") was also appointed as Assistant to Xu that day. Cui said he discovered that between December 2006 and January 2007, 133 employees had resigned from the Jiangsu Company. However, Qian did not inform the Company of these resignations.

14 Eventually, the trio managed to contact Qian through government officials. Despite being requested to do so, Cui claimed that Qian refused and did not return, to the factory to effect the handover. In fact, Qian never returned to the Jiangsu Company's office. Neither did Jiang, in spite of a written request by Wang dated 7 February 2007. The Company terminated Qian's employment by a notice put up at the Jiangsu Company and by a letter to him dated 15 February 2007 ("the termination letter") which full text is as follows:

> Dear Mr Qian,
>
> As the Company had entered into a service agreement with you on 9 February 2006, the Company hereby terminates such service agreement according to the Clause 2.2 therein with payment of service remuneration for half an years (sic) as a substitution of 6 months' notice. Please claim the amount in the Company from 24 March 2007 to 30 March 2007, and the service agreement between you and the Company is terminated today (15 February 2007).
>
> We wish you a better development in the future.
>
> Yours sincerely,
>
> Cui Gen Xiang
>
> On behalf of the Board of Directors

15 Cui alleged that the defendants had destroyed records of the Jiangsu Company by removing all information from the hard disks in their computers as well as those of other computers in the office. Even Qian's correspondence address had been deleted from the data in the hard disk.

16 Cui deposed that as Qian and Jiang were the only executive directors and therefore the highest ranking officials of the Company, they were privy to highly confidential information regarding the operations of the Company and the Jiangsu Company and in particular the latter's pricing strategy. Using such confidential information, Cui alleged that Qian and Jiang set up a direct competitor to the Company's business (of producing RF cables) by a company called Trigiant Group Pte Ltd ("Trigiant") which was incorporated on 15 February 2007. Trigiant had a subsidiary called Jiangsu Trigiant Technology Co Ltd ('Trigiant Technology") which was incorporated on 15 March 2007.

17 The Company subsequently discovered that many of the employees who had resigned from the Jiangsu Company (including Xia Jie and Sun Huxing and two supervisors) had joined Trigiant Technology. It further came to the Company's knowledge that Qian was appointed the chairman/general manager of Trigiant on or about 10 November 2007. Jiang became one of Trigiant's directors in November 2007 followed a month later by Qian. Cui alleged that Xia Jie and Sun Huxing (who were appointed directors of Trigiant Technology) were mere nominees of Qian and Jiang. He further alleged that Qian and Jiang had diverted business from four of the Company's long standing

and important customers (*viz* China Mobile, China Unicom, China Telecom and China Netcom) to Trigiant Technology.

18 Wang's written testimony corroborated Cui's account of events that transpired at the factory on 23 January 2007 at [11] and [12] above. Wang confirmed Jiang was nowhere to be found when the trio entered the premises of the Jiangsu Company on 23 January 2007 and despite repeated efforts on their part, they were unable to contact Jiang to have him return to work. Wang deposed that Jiang continued to be absent from work for the period 23 January- 8 February 2007. Jiang reported for work on Friday 9 February 2007 (until 12 February 2007) after receipt of Wang's letter dated 7 February 2007 written on behalf of the Jiangsu Company. When he took over Jiang's computer, Wang discovered that all important data had been removed from the hard disk.

19 As the new management was dissatisfied with Jiang's conduct, it decided to make changes to Jiang's appointment. By a memorandum dated Monday 12 February 2007, Jiang was notified by the Jiangsu Company that he was relieved of his position as the head of sales and his new job scope would be determined according to the company's needs.

20 Wang deposed that Jiang took half day's leave on 13 February 2007, medical leave on 14 February 2007 and tendered his resignation on 23 February 2007 ("Jiang's resignation letter") which Wang received on 26 February 2007. On 5 March 2007, Jiang returned to office and applied for 21 days' annual leave (until 26 March 2007). Wang questioned Jiang's entitlement to such leave. Jiang refused to accede to Wang's request for a copy of the Service Agreement claiming the company should have a copy. However, Xu as the new general manager approved Jiang's leave application. After his leave, Jiang took medical leave from 27 March until 11 April 2007 and again for two weeks from 11 April 2007, without prior approval from the management.

21 Exasperated by his conduct and long absences from work, the Company accepted Jiang's resignation letter by its letter dated 13 April 2007 (the "Company's acceptance letter") and agreed to pay him off in lieu of six months' notice. Jiang was told to collect the payment from the office one month from the date of the Company's acceptance letter.

22 On his part, Qian claimed that Loo Wen Lieh ("Loo") the Company's chief financial officer, had informed him on 6 February 2007 that if he resigned voluntarily, Qian would be paid six months' salary in lieu of notice. Qian wrote to the Company on 7 February 2007 indicating his willingness to resign provided the Company waived the restraint of trade and confidentiality clauses in the Service Agreement. The Company did not respond to Qian's queries but instead terminated his employment on 15 February 2007. This was followed by the Company's lawyers forwarding to Qian's lawyers, on 26 March 2007, a cheque for $75,500 as payment of his arrears of salary ($15,500) as well as six months' salary ($60,000) in lieu of notice.

23 On 28 March 2007, Qian's lawyers acknowledged receipt of the above cheque and requested details of the incentive bonus that would be payable to Qian once the Company's audited accounts were finalised. Qian's lawyers sent a reminder to the Company on 14 May 2007 after its board of directors had adopted the Company's accounts for the financial year 2006.

24 Despite his solicitors' second reminder dated 1 June 2007, Qian did not receive his incentive bonus. Consequently, on 19 September 2007, Qian's present solicitors wrote to the Company pointing out that its failure to pay his incentive bonus was a fundamental breach of the Service Agreement which (together with the wrongful termination of Qian's employment) amounted to a repudiation of the Service Agreement. Qian's lawyers gave notice that he had accepted the Company's repudiation of the Service Agreement and that Qian was thereby released from further performance of the

Service Agreement ("the notice letter").

25 The Company's solicitors replied to the notice letter on 9 October 2007 not only to dispute the same but also to allege (for the first time) that Qian had caused loss and damage to the Company due to the breach of his duties as a director as well as of his obligations under the Service Agreement as follows:

(a) authorising the closure of the manufacturing plant at Jiangsu Company for the period 22 January to 5 February 2007;

(b) not conducting a proper hand-over upon the Company's termination of his services;

(c) wilfully and maliciously inducing several management staff and key officers to resign from the Company's employment;

(d) unilaterally/improperly waiving the notice period of such resigning staff; and

(e) failing to deduct withholding tax from his remuneration.

26 Not surprisingly, Qian denied the Company's allegations and his solicitors replied to the Company's solicitors accordingly on 25 October 2007. Further exchanges of correspondence between the solicitors did not resolve the dispute and the differences between the parties. The Company filed the writs of summons in Suit No 161 of 2008 ("the first suit") and in Suit No 162 of 2008 ('the second suit") against Jiang and Qian respectively on 3 March 2008. The actions were subsequently consolidated by order of court dated 9 February 2009.

The pleadings

The first suit

27 In its statement of claim (Amendment No. 1), the Company alleged that as the deputy General Manager of sales in the Jiangsu Company, Jiang had access to highly confidential information which included information on the Jiangsu Company's pricing and production strategy, its list of customers and their contact information. As a director and senior employee of the Company, Jiang owed the Company fiduciary and or statutory duties at law and/or in equity including but not limited to the duties to:

(a) act *bona fide* in the best interests of the Company;

(b) not use his position or to act in a manner so as to obtain any unauthorised benefit for himself or for any third party;

(c) not act so as to place himself in a position where his personal interests conflicted with the interests of the Company.

The Company also relied on clause 3 of the Service Agreement to say the above duties were owed by Jiang. The Company then relied on clause 8 to say that Jiang was bound by certain restrictive covenants contained in the schedule to the Service Agreement.

28 The Company alleged that in breach of the Service Agreement and the duties that he owed to the Company, Jiang had failed to discharge his duties as the deputy general manager and head of

sales at the Jiangsu Company by absenting himself from work between 23 January 2007 and 9 February 2007, when he should have reported to the newly appointed general manager Xu on 23 January 2007. It was further alleged that Jiang failed to give notice of his whereabouts during that period. Subsequently, Jiang took medical and or annual leave as set out in [20] above. As Jiang failed to discharge his duties to the Company, it gave Jiang six months' notice of termination of the Service Agreement on 13 April 2007.

29 The Company further alleged that through his association with Trigiant/Trigiant Technology, Jiang had breached his duties (particularly clause 8) under the Service Agreement, when he became a director of the Trigiant group on 26 December 2007.

30 The Company averred that three of the four directors of Trigiant Technology were former employees of the Jiangsu Company including Jiang. Further, 133 of employees who had resigned from the Jiangsu Company joined Trigiant Techonlogy.

31 The Company alleged that Trigiant Technology had enticed away long standing customers of the Jiangsu Company and claimed *inter alia* against Jiang an injunction as well as damages (to be assessed) and an account of profits from business he had wrongfully diverted from the Jiangsu Company.

32 In the defence that he filed, Jiang averred that it was implied into the Service Agreement (to give it business efficacy) that the Company would enable him to carry out his duties under the Service Agreement and would not make a substantial change in his duties and status so as to constitute a fundamental breach of the Service Agreement.

33 Jiang averred that the Company effected a change in management by the board resolution dated 18 January 2007 after which (on 23 January 2007) he was removed without notice as the company secretary of the Jiangsu Company. On 12 February 2007, Jiang was further removed from his other positions. No duties were assigned to him thereafter despite his reporting for work on 9 February 2007.

34 Jiang denied he had breached the Service Agreement and alleged it was the Company that was in repudiatory breach of the same by removing him from his various positions without prior notice. The Company was in further breach of the Service Agreement by purporting to terminate his employment by the Company's acceptance letter in [21] when it had already accepted Jiang's resignation letter.

35 As the Company was in repudiatory breach of the Service Agreement, Jiang asserted that the Company was not entitled to enforce the terms under the Service Agreement including clause 8 read with the Schedule.

36 Jiang denied he had solicited employees of the Jiangsu Company Company to leave their employment and/or to join Trigiant Technology. He also denied having taken or misused highly confidential information even if such information was confidential. Jiang counterclaimed for his prorated bonus for 2007 of $1,693.15 for and the bonus he lost of $3,008.22 when the Company terminated his employment without giving him six months' notice.

The second suit

37 The Company similarly alleged that Qian had breached clause 3 of the Service Agreement and the fiduciary and/or statutory duties that he owed at law as its director/senior employee to:

(a) act bona fide in the interest of the Company;

(b) not use his position or to act in a manner so as to obtain any unauthorised benefit for himself or for any third party;

(c) not act so as to place himself in a position where his personal interests did or might conflict with the interests of the Company.

38 The Company alleged that Qian breached the Service Agreement and the duties he owed to the Company when he authorised the closure of the Jiangsu Company from 22 January 2007 to 4 February 2007 and when he failed to handover the management of the Jiangsu Company resulting in losses being suffered by the Jiangsu Company and ultimately by the Company.

39 As with Jiang, the Company similarly alleged that Qian had access to highly confidential information including information on the Jiangsu Company's pricing/production strategy, lists of the Jiangsu Company's customers and their contacts, information on the formulae of the Jiangsu Company's products, information from the Research and Development ("R&D") department of the Jiangsu Company which as of February 2006 had developed 27 new types of coaxial cables, information from the R&D collaboration between the Jiangsu Company, Shanghai Cable Research Institute, Zhejiang University and The Electronic Information and System Analysis Institute.

40 The Company further alleged that Qian wilfully and negligently failed to deduct withholding tax from his remuneration for the period January 2006 to February 2007 resulting in the Company paying a sum of $75,000 (including penalties) to the Inland Revenue Authority of Singapore.

41 The Company then alleged that Qian breached clause 8 of the Service Agreement through his association with Trigiant Technology to which Qian was appointed chairman/general manager (on or about 10 November 2007) and director (on or about 26 December 2007).

42 The allegations made against Jiang in [30] and [31] were also levelled against Qian.

43 The Company claimed against Qian an injunction as well as losses suffered by the plant closure amounting to RMB960,022.39 and RMB105,457.22, or alternatively damages.

44 In his defence, Qian averred that he commenced his employment with the Company under the Service Agreement earlier, *viz* on 1 January 2006. Qian pointed out that under clause 4.1 of the Service Agreement, he was paid a monthly salary of $10,000 ("the Singapore salary") and RMB40,000 ("the China salary"). Pursuant to clause 4.2(a), he was entitled to a bonus on the Singapore salary equivalent to $10,000 for each financial year payable before 31 December of each year, which was to be prorated according to the number of days he had worked if his employment was less that a full year. Pursuant to clause 4.2(b) and 4.3, Qian contended he was entitled to an annual incentive bonus ("the incentive bonus") for each financial year payable in one lump sum by 31 May of the following year, which calculation was based on the consolidated profit after tax of the Company and the Jiangsu Company, for both the Singapore and China salaries. Qian was entitled to a prorated incentive bonus should his employment be for less than a full year. Under clauses 2.2 and 7.1, Qian averred that not less than six months' written notice was required to be given by either party to the other to terminate his employment.

45 Qian alleged that in breach of clause 2.2 of the Service Agreement, the Company terminated his employment as CEO with immediate effect by way of a public notice dated 15 February 2007 issued

by the board of directors. The Company wrongfully refused to pay Qian his prorated bonus and incentive bonus for the period 1 January 2006 to 15 February 2007.

46 Qian denied he was in breach of his duties as a director and of the Service Agreement as alleged by the Company. He averred that he decided to temporarily cease production operations at the factory of the Jiangsu Company because of the low supply of production materials (which he was unable to replenish) and to ensure that the staff did not damage the machinery.

47 Qian claimed he was unable to enter the premises of the Jiangsu Company on or about 23 January 2007 and contended that he did not receive any telephone calls or correspondence from the Company regarding the handover of his duties. There was also no request from the Company to him to handover any documents or management of the Jiangsu Company to the new management.

48 Qian averred that he handed over the Company car to Jiangsu Company on or about 15 March 2007 but he did not receive any notification from the Company to handover any documents or information thereafter.

49 Qian denied he had failed to deduct withholding tax from his remuneration as alleged by the Company.

50 Qian asserted it was the Company that had repudiated the Service Agreement which breach he had accepted (via his solicitors' letter dated 19 September 2007) by accepting the Company's payment of $60,000 and RMB227,375 as salary in lieu of six months' notice.

51 By reason of the Company's repudiation of the Service Agreement which he had accepted, Qian contended that the Company was not entitled to enforce clause 8 of the Service Agreement and the attendant schedule. Qian averred that the covenants contained in clause 8 and the schedule were unreasonable, unnecessary restraints of trade and were wider than was reasonably necessary for the protection of the Company's interests or those of the public.

52 Consequently, Qian counterclaimed for a declaration that the covenants were void and of no effect, for payment of his unpaid bonuses ($1,260.28, RMB1,101,900.49 and RMB378,574.36) plus interest and in the alternative, damages.

53 The Company filed similar replies and defences in both suits. Essentially, the Company denied the defendants' allegations and averred that it was an implied term of the Service Agreement that payment of outstanding bonuses to the defendants would not be made in circumstances where the defendants were guilty of neglect in the proper discharge of their duties and which had caused substantial loss to the Company. In the alternative, the Company pleaded the defence of equitable set-off against the defendants' claims.

The evidence

(i) The Company's case

54 The main facts set out earlier at [2] to [21] were extracted from the AEICs of Cui and Wang, the two witnesses of fact who testified for the Company. Consequently, there is no necessity to refer again to their AEICs. I should point out at this stage that in addition to Cui and Wang, the Company had an expert witness in one Dr Lei Jianshe whose role was to address the testimony of the defendants' expert Chen Yi Xin.

55 I turn first to look at testimony of the two factual witnesses adduced in cross-examination before moving on to consider the evidence of the defendants and the parties' experts.

56 Wang was the Company's first witness. He revealed he first met Jiang when the latter reported for work on 9 February 2007. In Xu's presence, Wang questioned Jiang on his absence from the office since 23 January 2007. Jiang gave him two answers: first, he claimed he was at the office. Subsequently, when it was pointed out that no-one had seen him at the factory on 23 January 2007, Jiang claimed that it was because the Jiangsu Company was closed for holidays so he did not report for work.

57 Apart from his first meeting with Jiang and his letter dated 7 February 2007 at [18] written on behalf of the Jiangsu Company, Wang's knowledge of events was (by his own admission) derived mainly from documents that he had uncovered at Jiang's office on 23 January 2007. Prior thereto, Wang had worked for another company. He discovered employees' records had been deleted from the hard disk of Jiang's computer. Wang contended that Jiang was dismissed because of his continued absenteeism and not because Jiang was a close ally of Qian.

58 I turn next to Cui's testimony adduced in cross-examination. Cui explained that the Company wanted Qian to resign and was prepared to pay him six months' salary in lieu of notice because the management was concerned that Qian would cause more harm to the Company and/or Jiangsu Company if he was to serve out his six months' notice. The management gave Qian a choice – resign with effect from 1 January 2007 or his services would be terminated. Qian agreed to resign by his letter dated 7 February 2007 which the Company accepted by the termination letter at [14]. However, the Company did not accede to Qian's request to waive clause 8 of the Service Agreement.

59 It was adduced from Cui that he (together with Roger Ng who had jointly requisitioned the EOGM in [5]) had commenced proceedings in their capacity as shareholders against the Company in Suit No 851 of 2006 (the 2006 suit") to restrain the Company from calling an EOGM to approve the issue of placement shares that would dilute their existing shareholdings. Cross-examined, Cui explained that he filed the 2006 suit (not long after the Company's listing) because he wanted to change the unfavourable policies that were being adopted by the Company.

60 Cui's attention was drawn to the letter from the Company's solicitors at [22] to Qian's solicitors which contained an attachment showing the breakdown for the cheque of $75,500 that was paid to Qian. The attachment contained these words:

> **Incentive bonus**
>
> This amount is outstanding subject to the finalisation of the financial statements by the auditors.

61 Counsel for the defendants pointed out the above words suggested that the Company would pay Qian his incentive bonus once the financial statements were finalised by the auditors. Indeed, that was confirmed in an email from Loo to one Kitty Ho on 28 May 2007 instructing her to write out a cheque for Qian's incentive bonus for 2006, after the payment was approved at an earlier board meeting. Cui said the Company had agreed to pay the incentive bonus to Qian because as of May 2007, the Company had only been listed for one year. The management decided to be generous with Qian as it was not in the Company's/public's interest to incur any bad publicity not to mention that it would be a loss of face for Qian.

62 Cui admitted that the Company decided not to pay Qian when it discovered at end-May 2007 (from Yixing government officials), after its board had approved Qian's bonus payment, that he had

set up Trigiant Technology to compete with the Jiangsu Company. Further investigations by the Company revealed that the defendants were directors of, while other ex-employees of the Jiangsu Company held senior positions in, Trigiant Technology. It was after the Company discovered in November-December 2007 that the defendants were part of Trigiant's management that it decided to sue the defendants in addition to not paying their bonuses.

63 It was put to Cui (who disagreed) that if indeed the breaches were true, the Company would have raised the same with Qian from the outset instead of waiting until 9 October 2007 to do so by its solicitors' letter (at [25]).

64 It was further brought to Cui's attention that not only was the issue of Qian's destruction of the Company's records not raised with Qian by the Company or by its solicitors in their letter dated 9 October 2007, it was not even pleaded in the statement of claim (original and amended).

65 Although Cui deposed in his AEIC that he and others in the Jiangsu Company were unable to contact Qian, the Company's reply and defence to Qian's counterclaim pleaded (at para 8) that Cui telephoned Qian on the morning of 23 January 2007, spoke to him and asked Qian to attend at the premises of Jiangsu Company for the handover. Cui explained the glaring inconsistency by explaining that had he been able to contact Qian, that was what he would have asked Qian to do. He denied he had engaged new security guards who kept Qian out of the premises of the Jiangsu Company.

66 Counsel for the defendants took Cui through the minutes of a board meeting on 30 October 2006 of the Company to support Qian's contention that Cui (who had asked for a special audit of the Company) was motivated by his own agenda in wanting to remove Qian. Cui not surprisingly denied this accusation, claiming his actions were motivated by the interests of the Company. He alleged that he had entertained doubts on some key management staff of the Company (including Qian) as he had heard of a claim being lodged against such staff by Hengtong (see [4]). The minutes of that meeting recorded that the independent directors Lai and Ong (see [5]) had disagreed with and questioned Cui's request for a special audit and they had asked for evidence of the Hengtong action (which Cui did not/could not furnish).

67 Apparently, the decision to remove the defendants and the independent directors Lai and Ong was not well received by the market – counsel for the defendants drew Cui's attention to one Dow Jones news clipping dated 20 December 2006 stating that a securities firm had downgraded the Company's share on news of the impending EOGM for the three directors' removal.

68 As for the EOGM itself on 18 January 2007, Cui claimed his reasons for wanting Qian's removal were not personal and not because he wanted to take over the chairmanship from Qian – purportedly it was because of Qian's habit of travelling first class (although it was approved at the board meeting on 31 July 2006 by majority vote). Cui said he wanted Lai and Ong (and Jiang) to be removed because they were "unfair" in not supporting him when he proposed policies that were for the good of the expansion of the Company. He denied he was unhappy with them because they voted against the resolutions he/Zhang had proposed at the board meeting on 30 October 2006 at [66].

69 Indeed, the minutes of the board meeting on 30 October 2006 (see AB721–726) were quite telling – it showed that Lai, Ong and Jiang voted differently from Cui and/or Zhang as follows:

(a) they voted against the appointment of Cui as chairman in place of Qian and against the separation of the roles of chairman and CEO;

(b) they approved the financial statement announcements and

(c) they approved the appointment of a lead independent director.

70 Item 9 of the minutes is illuminating (in reference to [66] on the Hengtong claim); it stated:

> Mr Lai expressed the view that that (sic) the aforesaid legal action against the key management staff should be left to the individual to settle as he felt the case was directed against them in their personal capacity and did not concern the Company. He reminded the directors and management that if there are any issues and matters to be settled at their personal level, they should all be done outside the Company and not to drag the Company into the process. He is concerned that personal feud amongst individuals would disrupt the Company's business and interfere with the corporate governance process of the Company. As independent director, he would rigorously resist any attempts to bring such feud into the Company's arena and let the Company's performance be affected in the process.

71 Cui defended his request for a special audit in [66] on the ground that it was to check on how Qian ran the Company – because Qian's family members, relatives and friends all had businesses that were in direct conflict with that of the Company. He revealed that the Company engaged KPMG in 2007 (after Qian's departure) with a view to carrying out a special audit although it was not done eventually. He denied the intent was to find fault with Qian's management of the Company.

72 In regard to the Company's complaint that Qian had confidential information on pricing structure and pricing strategy (at [39]) which he took with him to Trigiant Technology and used to divert business away from the Company/the Jiangsu Company, Cui was unable to furnish any details. He was not able to explain the factors that the Jiangsu Company took into consideration when it submitted bids for contracts. He excused himself on the basis that he was the non-executive chairman of the Company.

73 Further cross-examination of Cui revealed that he/the Company had simply assumed that the defendants (especially Jiang) would have such confidential information by virtue of the positions they held. Similarly, notwithstanding his disagreement with counsel for the defendants, it was clear Cui had assumed that he could not gain entry into the premises of the Jiangsu Company initially because Qian (according to what was told to the trio by the security guards) did not allow anyone to enter. Equally, Cui did not know for a fact that Qian had actually destroyed the company's records/documents or that Qian had removed data belonging to the Jiangsu Company from Qian's computer.

74 Finally, on the issue of withholding tax, Cui agreed with counsel for the defendants that it was the Company's responsibility to ensure that such tax was deducted from Qian's salary for January and February 2007 (which was paid late).

(ii) The defendants' case

(a) The second suit

75 As Qian's testimony is more important in my determination of these claims, I shall deal with the evidence in the second suit first.

76 According to Qian's version of the facts, he received a call on 6 February 2007 from Loo who said that he (Loo) had been directed by the board of directors to inform Qian that the latter would be

paid six months' salary in lieu of notice if Qian agreed to resign as the Company's CEO. When Qian inquired about his incentive bonus for 2006 which he was contractually entitled to, Loo informed him that the new board of directors had agreed that the incentive bonus for 2006 would be paid when the 2006 accounts were finalised.

77 On the following day, Qian wrote to the Company's board of directors to confirm the Company's offer in [76] and he stated he would accept the same if the Company would agreed to remove the restraint of trade and confidentiality obligations under the Service Agreement, in view of the fact that his employment with the Company lasted only one year.

78 In his AEIC, Qian complained that the Company had stopped payment on a cheque for $20,000 which was his salary for December 2006 and it had failed to pay his salary for January 2007. Accordingly, his lawyers wrote to the Company's lawyers on 14 February 2007 to inquire as to the reasons.

79 On 15 February 2007, the Company issued the termination letter to Qian with immediate effect.

80 On 28 February 2007, Qian replied to the termination letter to say he did not take any files or records of the Company which information and/or records were with the Secretary of the board. However, he had the use of and wanted to return the Company's car no. BU7000 ("the Company car"). Qian requested to be notified without delay if he was required to hand over anything else. Qian did not receive a response to his inquiry but he returned the Company car on 15 March 2007 for which he obtained an acknowledgement.

81 It would not be necessary to repeat the other events pertaining to Qian as they were set out earlier in [23] to [26] above. Instead, I turn to Qian's cross-examination for the additional evidence that was adduced from him.

82 Qian rebutted Cui's accusation that he habitually travelled first class. First, first class travel for him as the CEO was approved by the board of directors on 31 July 2006 despite Cui's (and Zhang's) objections; other directors as well as the CFO were allowed business class travel. However, save for one occasion when he was unable to obtain a business class ticket from Shanghai to Singapore because the flight was full, Qian testified he had never travelled first class.

83 Counsel for the Company subsequently produced counterfoils of air-tickets to prove that Qian had travelled first class on at least three other occasions. Qian claimed he could not recall those flights at all as he did not have the documents to verify those trips, unlike the flight in [82].

84 In cross-examination, counsel for the Company sought to disprove Qian's complaint (at para 10 of his AEIC) that Cui and Zhang obstructed his work at the Company/the Jiangsu Company. Counsel referred to minutes of numerous meetings of board of directors where Cui and Zhang were consistently outvoted on matters they had raised.

85 As for the closure of the factory operations from 22 January to 4 February 2007 at the Jiangsu Company, Qian testified that the decision was made at a management meeting at the premises on Sunday 21 January 2007 after his staff had checked that the factory had only sufficient quantities of raw materials left to fulfil existing orders of customers. He no longer had the authority to borrow money from the bank to purchase new raw materials after he received the fax notification in [8]. Qian said he left it to the factory supervisors to inform their subordinates of the closure. He denied he had made the closure decision unilaterally. Qian further denied he issued the leave notice in [12] above. He claimed he only saw the document in these proceedings and had not authorised the issuance of

the leave notice which was not signed.

86 Qian explained that his other reason for closing the factory operations (see [46] above) was based on his previous experience at Hengtong in 1997. Hengtong had taken over a local company Guoco Optic Cable Company ("Guoco") and Qian became the general manager of the merged entity. Guoco's equipment was damaged subsequently and Qian surmised it could be because the staff was unhappy with the merger. Police investigated the incident but never found the culprits. Qian said he was afraid the same fate would befall the equipment of the Jiangsu Company when the staff became aware of the change in management including his removal. He claimed some of the management staff of Jiangsu Company used to work at Hengtong so they remembered what had happened and they decided to avoid a repeat of the incident by closing the factory temporarily. Qian denied he had closed the factory as an act of sabotage because he was angry with the Company for removing him from his positions and terminating his employment.

87 Qian revealed that besides Cui, he was also told to resign by Zhang's younger brother Zhang Chi in several telephone conversations that took place between 19 December 2006 and 17 January 2007. He had the impression his stepping down as the chairman of the board of directors would placate Cui while he continued to be the CEO. Qian felt the issue of his removal as chairman/director was taking up too much of his time/energy, it was bad publicity for the Company and it affected his concentration in expanding the Company. Consequently, he decided to resign on 17 January 2007 as a director, thinking he would retain his other positions. As events turned out, his surmise was wrong.

88 Questioned why his letter dated 7 February 2007 at [77] asked for the removal of the restrictive covenants, Qian explained it was unfair to bind him to the covenants for another two years when he had worked for only one year under the Service Agreement.

89 Qian explained that he was stopped at the gates on the morning of 23 January 2007 when he arrived at the Jiangsu Company to do the hand over to the new management. The security guards neither recognised him nor the Company car; they refused to let him enter even after he identified himself as the CEO. Consequently, he had no alternative but to leave. Qian claimed he did not attempt to contact Cui because the security guards refused to disclose whether Cui was or was not on the premises.

90 It was Qian's contention (as well as his closing submission) that Cui was motivated by personal grievances when he engineered Qian's removal first as a director and subsequently from all Qian's posts in the Company. Qian's sister (Cui's sister-in-law) had had a serious quarrel with her husband Cui Genliang back in February 2006. Qian had attempted to mediate in their dispute during which process he almost came to blows with Cui Genliang, worsening the situation. I should add that Qian's testimony in this regard was not disputed by Cui.

91 In the course of his oral testimony, when he was shown the searches the Company's solicitors had conducted in the Hongkong register of companies, Qian confirmed the existence of Asia Fullway Group Limited ("Asia Fullway") which had been incorporated on 17 September 2004. Asia Fullway manufactures copper tubes which are used in the production of RF cables. The founding directors/shareholders were Qian Jindi (Qian's wife), Qian Jin'e (Qian Jindi's sister), Zhu Ronghua and Zhang Rongming both of whom are related to Qian.

92 Subsequently, on 9 December 2004, a company called Fullway Technology Co (Wujiang) Ltd ("Fullway") was incorporated in China with 90% of its shares being held by Asia Fullway. Fullway's directors were Zhu Ronghua and Zhang Rongming and one Sun Jianxin (who is also related to Qian). Fullway was/is in the business of developing and manufacturing metal straps, metal tubes,

refrigeration and air-conditioning equipment and components.

93 On 9 June 2005, Qian Jindi and Qian Jin'e resigned as directors from Asia Fullway. Subsequently, they transferred their shares in the company to Zhang Rongming and Zhu Ronghua on 23 July 2005.

94 Cross-examined, Qian explained that initially he was not aware of his wife's involvement with Asia Fullway. He only found out during the Chinese New Year period in 2005. Qian testified he had objected to his wife's involvement with Asia Fullway (and her association with Zhu Ronghua) on the basis that she had little management experience. He apparently had frequent quarrels with her until she tendered her resignation on 9 June 2005.

(b) The first suit

95 I turn my attention now to the first suit.

96 In his AEIC, Jiang corroborated Qian's AEIC. Jiang deposed that after the Company was listed, there was increasing conflict between the majority shareholders (Cui and Zhang) on the one hand and Qian on the other. He alleged that the two majority shareholders made it difficult for Qian to run the Company as well as the Jiangsu Company. They opposed Qian's business plans for expansion, raised the issue of Qian's travel in first class, would not approve the third quarter financial statements of the Company and wanted Qian's roles as chairman and CEO to be separated.

97 However, Jiang said he was not interested in getting involved in the conflict between Qian and the majority shareholders. He deposed his health had become increasingly poor due to diabetes (diagnosed since 2005) and his workload. He claimed he was taken ill on 12 January 2007 and when he visited a doctor, he was advised to rest until 26 January 2007. However, he could not as he had to fly to Singapore to attend the EOGM on 18 January 2007. Jiang claimed he tendered his resignation as a director on 17 January 2007 on medical grounds.

98 Jiang returned to Jiangsu on 19 January 2007. Although his doctor had advised him to rest, Jiang deposed he went to his office at the Jiangsu Company to finish some work on the weekend of 20-21 January 2007. In the afternoon of 21 January 2007, Qian showed Jiang the fax notification in [8]; Jiang deposed he was shocked by the contents even though it did not involve him.

99 On 23 January 2007, a notice was issued by the Jiangsu Company to all its staff stating that documents such as applications, reports, approvals, bills, vouchers etc that had previously been signed by Jiang would henceforth be signed by Jiang's assistant Di Hai. The notice came as a surprise to Jiang and effectively removed him from his position as the company secretary. Jiang deposed he was not assigned any duties on 23 January 2007 nor was he informed of or asked to attend, a meeting held for staff members that afternoon.

100 Jiang felt he was being sidelined by the new management and there was no further role in the Jiangsu Company for him. As he was uncertain of his position, Jiang wrote to the Company's board of directors on 6 February 2007 to request for clear and definite instructions so that he could discharge his duties properly. Jiang received a reply from the Company on the following day stating he would be assigned work and requesting him to report for work before 9am on 9 February 2007.

101 On 9 February 2007, Jiang approached Xu for instructions. Despite the assurance in the Company's letter from Wang dated 7 February 2007 at [18], he was not assigned any tasks.

102 On 12 February 2007, a further public notice ("the 12 February notice") was issued by the

Jiangsu Company stating that Jiang was removed with immediate effect from his position as deputy head of sales of the Jiangsu Company. The 12 February notice added that Jiang was to hand over his duties to the relevant personnel appointed by the Jiangsu Company. Thenceforth, Jiang was mainly involved in handing over his work to others. Although the 12 February notice stated his new position and job scope would be re-determined according to the needs of the Jiangsu Company, no roles or responsibilities were assigned to him. Jiang was asked to vacate his office and was relegated to a smaller room. His former colleagues avoided him; Jiang felt humiliated.

103 Although Jiang reported for work to the Jiangsu Company between 13 and 15 February 2007, no duties were assigned to him. He applied for medical leave for half a day on 13 February 2007. Jiang's resignation letter was then submitted to the Company. Jiang returned to work on 26 February 2007 and continued to report for work up to 5 March 2007. It was Jiang's evidence however that no work was assigned to him and he spent his time looking at the computer the whole day and/or reading the newspapers.

104 On 5 March 2007, Jiang applied for annual leave for the period 6 to 26 March 2007.On his return to office on 27 March 2007, Jiang applied for and took medical leave for the period 27 March – 10 April 2007.

105 On or about 18 April 2007, Jiang received the Company's letter dated 13 April 2007 accepting Jiang's resignation letter. The Company subsequently informed the Chinese authorities of Jiang's departure from the Company. However, notwithstanding the Company's letter dated 18 April 2007, Jiang was not paid his prorated bonus for the period 1 January to 13 April 2007 amounting to $1,693.15.

106 In May or June 2007, Jiang was contacted by Qian who informed Jiang that he (Qian) had been invited to join Fullway. Qian asked Jiang whether he would be interested to join Fullway if Qian joined. Jiang said he would think about it.

107 Eventually, neither Qian nor Jiang joined Fullway. Instead, Jiang joined Trigiant Technology on 10 November 2007 followed by Qian in December 2007. Since 28 November 2007, Fullway has been a wholly owned subsidiary of the Trigiant group.

108 In their closing submissions, the Company made much of Qian's involvement (and that of his family and relatives) in Asia Fullway and Fullway to contend he had breached his fiduciary duties at law and under the Service Agreement to the Company. However, no details were furnished nor was evidence adduced on how the involvement not of Qian but of Qian's wife in the two Fullway companies amounted to breach by Qian of his duties to the Company as set out at [14] above.

The issue

109 The only issue for the court's determination is, who was in breach of the Service Agreement(s). Was it the defendants as the Company contended or was it the Company as the defendants asserted in their respective counterclaims?

The Service Agreement

110 It would be appropriate at this juncture to set out the relevant clauses in the Service Agreement central to the Company's claims and the defendants' counterclaims. I start with clause 2.2 which was the provision the Company relied on in the termination letter (at [14]); it states:

The appointment shall deem to have commenced on the Commencement Date and shall continue for a term of three (3) years ("the Initial Term" subject to earlier termination as provided in this Agreement) but may be terminated by either party giving to the other not less than 6 months' written notice.

111 Next, I set out clause 3; it states:

3. The Executive shall keep secret and shall not at any time (whether during the Appointment or after the termination of the Appointment for whatever reason) use for his own or another's advantage or reveal to any person, firm or company, any of the trade secrets, business methods or information which the Executive knew or ought reasonably to have known to be confidential concerning the business or affairs of the Company or any Related Company so far as they shall have come to his knowledge during the Appointment. The restrictions contained in notes this paragraph 3 shall not apply:

(a) to any disclosure or use authorised by the Directors or required by law, best practices, practice notes, guidelines, codes, ordinances or any such other forms of regulation analogous in purpose or effect, issued by any governmental statutory or regulatory body, which governs or relates to the affairs and business of the Company or by the Appointment; or

(b) so as to prevent the Executive from using his own personal skills in any business in which he may be lawfully engaged (subject to paragraph 2 of this Schedule) after the Appointment has ended; or

(c) to any trade secrets, business methods or information which may lawfully and without breach of the provision of this paragraph 3 have come into the public domain;

(d) any disclosure required by an order issued by a court of competent jurisdiction.

I shall adopt the defendants' definition and refer to clause 3 henceforth as "the Confidentiality clause".

112 Then there is clause 4.2 which is the basis of the defendants' counterclaim for bonus. I shall refer to it as the "bonus clause" henceforth. It reads:

In addition to the foregoing, the Company shall pay to the Executive in respect of each Financial Year

(a) a bonus of an amount equivalent to 1 month of the Executive's monthly Singapore dollar salary component payable before the end of December each year, and

(b) an annual incentive bonus calculated in accordance with clause 4.3 (below ("the Incentive Bonus").

If the appointment is for less than a full financial year of the Company, the annual bonus for that financial year shall be apportioned in respect of the actual number of days of the Appointment on the basis of a 365 day financial year. The Company shall pay the annual incentive bonus for the relevant financial year to the Executive in one lump sum no later than five (5) months from the end of such financial year.

113 Clause 8 of the Service Agreement states:

The Executive shall observe and be subject to the terms, conditions and restrictions relating to his activities set out in the Schedule.

while the schedule to clause 8 reads as follows:

Terms, Conditions and Restrictions on Activities

1. During the period of the Appointment, the Executive shall not (without the Company's prior written consent) be directly or indirectly engaged or interested in any capacity in any other business, trade or occupation, except as disclosed or declared to the Company in writing prior to the date of this Agreement provided that this provision shall not prohibit the holding whether directly or through nominees of quoted investments.

2. Except as disclosed or declared to the Company in writing prior to the date of this Agreement, the Executive shall not, until two (2) years after the termination of the Appointment:

(a) within any jurisdiction or marketing area, in particular the PRC, in which the Company or any Related Company is doing business, directly or indirectly own, manage, operate, control, be employed by or participate in the ownership, management, operation or control of, or be connected in any manner with, any business of the type and character engaged in and competitive with that conducted by the Company or any Related Company. For these purposes, ownership of securities not exceeding 5 per cent, of any class of securities of a public company listed on a stock exchange shall not be considered to be competition with the Company or any Related Company, or

(b) persuade or attempt to persuade any potential customer or client to which the Company or any Related Company has made a presentation, or with which the Company or any Related Company has been in negotiations or having discussions, not to deal with or hire the Company or any Related Company or to deal with or hire another company; or

(c) solicit for himself or any person other than the Company or any Related Company the business of any supplier, customer or client of the Company or any related Company, or was its supplier, customer or client within two (2) years prior to the date of termination of the Appointment; or

(d) persuade or attempt to persuade any employee of the Company or any Related Company, or any individual who was an employee during the two (2) years prior to the date of termination of the Appointment, to leave the Company's or any Related Company's employ, or to become employed by any person other than the Company or any Related Company.

Henceforth I shall refer to clause 8 and the schedule thereto collectively as "the Non-Competition clause". At law, such covenants are more commonly referred to "restraint of trade" clauses.

114 The Company's closing submissions placed great emphasis on the defendants' breach of the Non-Competition clause due to their involvement with and subsequent employment by Trigiant Technology after they left the Company/Jiangsu Company. Qian's/his wife's involvement with Asia Fullway/Fullway was also ammunition for the Company. Qian on the other hand submitted that the Non-Competition clause did not protect any legitimate interest of the Company, it only sought to stifle competition, was unreasonably wide and was therefore void and unenforceable. In any case Qian argued, he was discharged from the Non-Competition clause by reason of his acceptance of the Company's repudiatory breach of the Service Agreement. The same arguments were canvassed by

Jiang.

The law

115 I now turn to consider the law. In brief, the general principle is that in order to be enforceable, restraint of trade or non-competition clauses must not be unreasonably wide in scope as *prima facie* they are contrary to public policy. Consequently, the Company must show that it had a legitimate proprietary interest to protect by enforcing the Non-Competition clause against the defendants especially for a period of two years after their departure from the Company.

116 The test of reasonableness of covenants in restraint of trade was spelt out by the House of Lords in the *locus classicus* of *Thorsen Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Company Limited* [1894] AC 535. There, Lord Macnaghten held [at p 565] that the test of reasonableness is twofold: (a) it must be in the interests of the parties and (b) it must be in the interests of the public. The burden of proof to show reasonableness is on the party seeking to rely on the covenant *viz* the Company in this case.

117 It is equally well established law (see *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR 663) that trade secrets and trade connections are legitimate proprietary interests that can be protected by non-competition clauses. However, the court will not uphold clauses that inhibit competition or protect the plaintiff from competition from a former employee (see *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 3 SLR 333. *Stratech Systems Ltd v Nyam Chiu Shin & Others* [2005] 2 SLR 579 and *Faccenda Chicken Ltd v Fowler* [1987] 1 Ch 117). Neither will the courts uphold a covenant pertaining to the skill, experience, know-how and general knowledge acquired by an employee during his course of employment even though it might equip him as a competitor of his employer (see *FSS Travel & Leisure Systems Ltd v Johnson* [1999] FSR 505).

118 As for repudiatory breach of contract, Qian's counsel relied on the following extracts from *Chitty on Contracts* (Sweet & Maxwell: 29th Ed vol. 1) in his closing submissions:

Para 24–021 at p 1383:

> If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part, this constitutes an "anticipatory breach" of the contract and entitles the other party to take one of two courses. He may "accept" the renunciation, treat it as discharging him from further performance, and sue for damages forthwith, or he may wait till the time for performance arrives and then sue…

Para 24–023 at p 1385:

> If the breach is accepted, the innocent party is relieved from further performance of his obligations under the contract.

His counsel also cited the Scottish case of *Morrish v NTL Group Ltd* [CSIH] 56 for his submission that the court should reject the Company's argument that a term should be implied into the Service Agreement that the Company was entitled to terminate Qian's employment by giving him six months' salary in lieu of notice. Such compensation was wholly inadequate for Qian's loss arising from the termination of his employment.

119 The Company not surprisingly adopted an opposite stand and denied it was in repudiatory breach of the Service Agreement. The Company argued that payment of salary in lieu of notice in employment contracts was a well established practice at common law which in the local context was recognised under ss 10 and 11 of the Employment Act (Cap 91, 2009 Rev Ed) although admittedly the legislation did not apply in this case. Reliance was also placed on the following passage from *Halsbury's Laws of Singapore* on Employment (2007 Reissue, vol 9) at pp 208–209:

> If the breach is accepted, the innocent party is relieved from further performance of his obligations under the contract.

120 The Company cited an old English case *Konski v Peet* [1915] 530 to reinforce its argument that payment of salary in lieu of notice did not amount to repudiatory breach even though the contract of employment did not contain a provision for termination by payment of salary in lieu of notice. *Konski v Peet* distinguished the House of Lords decision in *General Billposting Company Limited v Atkinson* [1909] AC 118 ("*General Billposting*") which the defendants relied upon (see [150] *infra*) for its argument that the Company repudiated the Service Agreement by its termination of Qian's employment.

121 The Company's case was that after the termination letter in [14], it decided not to pay Qian his prorated annual and incentive bonuses because of his breaches set out at [25] above. The defendants submitted on the other hand that the law did not allow an employer to rely *retrospectively* on an employee's misconduct as a defence to an employee's *prior* claim for compensation or bonus (citing this court's decision in *Shepherd Andrew v BIL International Ltd* [2003] SGHC 145).

The findings

122 Looking at the evidence as a whole, I have no doubt that the removal of Qian (and subsequently Jiang) from the Company by Cui was not due to altruistic reasons. It had everything to do with Qian's sister's marital problems with Cui's brother Cui Genliang and nothing to do with Cui's professed concerns over Qian's management of the Company. Cui's motives for getting rid of Qian were purely personal. Cui was getting back at Qian on his elder brother's behalf because Qian sided with Qian's sister against Cui Genliang. When the independent directors Lai and Ong did not support his removal of Qian, Cui also removed them. His actions were in complete disregard of the Company's interests.

123 By the same token, Qian's closure of the Jiangsu Company after his resignation and attendance at the Company's EGM on 19 January 2007 was also not for altruistic reasons. I disbelieve his claim that the factory was short of raw materials for production. Equally, I doubt the closure was to pre-empt damage to the factory's machinery and equipment as Qian claimed. I am quite certain that the closure of the Jiangsu Company was Qian's form of retaliation against the Company, and Cui in particular, for removing him from all the posts Qian held both in the Company and in the Jiangsu Company. However, I do not believe that Qian refused to perform the handover to the new management as the Company alleged. He was unable to enter the premises of the Jiangsu Company on 23 January 2007 to effect the handover because he was stopped at the main gate by security guards at the behest of Cui/the trio. I very much doubt Cui and Wang made the efforts they claimed they did to get Qian to report for work.

124 As for Jiang, his sympathies were clearly with Qian over the latter's shabby treatment and dismissal by the Company. Jiang and Qian had worked together since their days in Hengtong. Jiang's loyalties were obviously with his colleague and immediate superior from those early days. However he

reported for work on 9 February 2007 in accordance with the Company's letter to him dated 7 February 2007 but no duties were assigned to him thereafter. Jiang was not only sidelined by the Jiangsu Company but effectively demoted when he was removed from his post as the deputy general manager in charge of sales. Hence, Jiang refused to cooperate with the new management and after the latter took over on 23 January 2007, Jiang took medical/sick leave and alternated it with annual leave until the Company finally accepted Jiang's resignation letter on 13 April 2007.

(a) The claim

125 I turn now to consider the Non-Competition clause. I start with clause 2 of the schedule set out in [113] above. It is to be noted therefrom (as was pointed out in the defendants' closing submissions) that clause 2(a) of the schedule contained no territorial limitations – the words used were "within any jurisdiction". That being the case, I accept the defendants' argument (relying on Alexandra Kamerling & Christopher Osman's *Restrictive Covenants under Common and Competition Law* (Sweet & Maxwell: 2004 at p 136) that if no space limit is expressed in the covenant, it would be construed to impose a worldwide ban. Potentially, the Non-Competition clause was a worldwide restraint; being so wide, it was less likely to be reasonable.

126 Additionally, the word "business" in clause 2(a) was not defined either in the schedule to or in, the Service Agreement itself. The Company's statement of claim did not specify what "business" or legitimate interest was protected by clause 2(a) nor did Cui explain it in his AEIC. Neither was evidence adduced on the nature of the Company's "business". Consequently, the defendants were put in an invidious position. Unless they knew the exact "business" that the Company or any Related Company operated, they would not know for a fact what activities they were prohibited from engaging in for two years after leaving the Company's employment.

127 Based on the wide/general wording of clause 2(a), it appeared that Qian and Jiang were restrained (directly or indirectly) from owning, managing, operating, controlling or being so employed or being connected in any manner in any business of the type and character engaged in by and competing with that of, the Company or any Related Company. The restriction was unnecessarily wide in scope and the clause is therefore unenforceable.

128 Nothing turns on clause 2(b) of the schedule for the reason that apart from the bare assertion in para 52 of Cui's AEIC (that the defendants had diverted the business of China Netcom, China Unicom, China Mobile and China Telecom from the Company), there was no evidence that the defendants had attempted to entice and/or had enticed to Trigiant Technology, customers of the Company/the Jiangsu Company. It was also not part of the Company's pleaded case against Qian. Nothing turns on clause 2(c) either as the breach of this clause was not specifically pleaded nor was evidence adduced that Qian and/or Jiang had solicited the "business of any supplier,customer or client of the Company or any Related Company [the Jiangsu Company]…within two (2) years prior to the date of termination of the Appointment". In any case, I accept the defendants' submission that as with clause 2(a), this clause was unreasonably wide in scope and should not/cannot be enforceable.

129 As for clause 2(d), it was also not the Company's pleaded case that Qian had personally persuaded or attempted to persuade any employees of the Jiangsu Company to leave or to join Trigiant Technology. What was pleaded in para 10(v) of the Company's statement of claim against Qian was that 133 employees of the Jiangsu Company who had left its employment between December 2006 and May 2008 had joined Trigiant Technology. No particulars were furnished as to the positions occupied by these 133 employees in the Jiangsu Company. Paragraph 10(iv) of the same statement of claim alleged that prior to November 2007 three out of the four directors of Trigiant Technology were former employees of the Jiangsu Company. To succeed on clause 2(d) against Qian,

the Company must prove that some or all of the 133 employees left the services of the Jiangsu Company between the date of Qian's termination (15 February 2007) and 15 February 2009 (two years later) at the behest of Qian. The Company failed to discharge the burden of proof in this regard.

130 It was Qian's evidence in any case that he was not involved in the recruitment exercise of employees for the Jiangsu Company. Moreover, between 2004 and 2007, about 200 of its employees would leave the Jiangsu Company every year and join another one in the same industry, especially if it was also located in Jiangsu province. As an aside, it should be noted that if the employees had originally followed Qian and/or Jiang from Hengtong to the Jiangsu Company, it would not be surprising if they voluntarily left to follow Qian to Trigiant Technology as Jiang did. The employees' loyalty was to Qian, not to their employer.

131 Granted, trade secrets are a legitimate proprietary interest that merits protection. Did the Company or the Jiangsu Company possess any such trade secrets? I refer to the pleadings again. What the Company pleaded in the second suit was that Qian had access to highly confidential information *vis a vis* the Jiangsu Company such as pricing, its list of customers/contacts, information on the formulae of its products etc (at [39]) but no particulars were provided. Further, not one iota of evidence was adduced to support the wide ranging allegations relating to Qian's access to highly confidential information on the R&D of the product formulae let alone the 27 types of coaxial cables produced by, the Jiangsu Company. There was a quantum leap from the allegations pleaded at paras 10(iv) and (v) of the Company's statement of claim against Qian to the particulars of its alleged loss and damage set out in para 10(vi)(i) to (v). I can see no causal link between the two.

132 Moreover, the alleged confidential information must be viewed against the background of the defendants. Qian and Jiang were experienced in the manufacture of RF and communication cables by reason of their previous employment with Hengtong. Qian's working experience/background in particular was cross-examined at length when he first went into the witness box. As stated earlier at [117], *FSS Travel & Leisure Systems Ltd v Johnson* [1999] FSR 505 (cited by the Company) held that protection cannot be legitimately claimed in respect of the skill, experience, know-how and general knowledge acquired by the employee as part of his job during his course of employment. The Company's submission (para 221) that being the top man at Jiangsu Company, Qian was on good terms with the three biggest telecommunication companies in China and was therefore able to procure their approval for Trigiant Technology to be their approved supplier completely ignored Qian's (and Jiang's) background in the industry from their days with Hengtong. The Company gave too much credit to itself and to its Jiangsu subsidiary.

133 What could the defendants learn from the Jiangsu Company which they did not gain from their previous employment and their own expertise acquired over the years? The manufacture of RF and telecommunication cables is not rocket science. Would pricing strategy be highly confidential information? Not according to the defendants' evidence (see below). Competitors in the same line of business as the Jiangsu Company (including Hengtong) would likely have similar pricing strategies. In any event, the Company offered no evidence in Cui's AEIC on the alleged confidential pricing strategy.

134 To elaborate, it was the testimony of the defendants that China Mobile, China Telecom and China Unicom purchased RF cables from suppliers based on an open tender system. There was no secret to the pricing. At the end of a tender exercise, the prices that each manufacturer bid and the quantity awarded to each manufacturer would be revealed. The defendants added that there was no fixed strategy or formula by which the Company fixed its pricing for various bids as pricing could change on a day to day basis. In this regard, when he was cross-examined on the issue of the Jiangsu Company's tender process, Cui was unable to offer any useful evidence, stating he was the

non-executive chairman of the Company, notwithstanding the fact that he was the Company's key witness.

135 I therefore find that the Company had failed to show any legitimate proprietary interest that required protection under the Non-Competition clause. I would add that the Company's allegation in [62] that Qian set up Trigiant Technology to compete with the Jiangsu Company was based on pure hearsay evidence since it failed to produce any witness from the Yixing provincial government to substantiate the allegation.

136 I turn now to review some of the cases relied on by the parties at [117] to reinforce my observations. *Man Financial (S) Pte Ltd v Wong Bark Chuan David* was a case cited by both parties. There, the defendant/respondent was the managing-director and CEO of the plaintiff/appellant brokerage company. The defendant signed a termination agreement ("the termination agreement") with the plaintiff wherein he agreed not to solicit the employment of certain employees of the plaintiff for seven months ("the prohibited period") from the termination of his employment. The defendant would receive compensation from the plaintiff provided he did not breach the termination agreement. The defendant breached the termination agreement as he solicited the employment of at least two of the plaintiff's employment during the prohibited period. The plaintiff refused to pay the defendant compensation and he sued.

137 The trial judge found in favour of the plaintiff and held that the defendant had indeed solicited the employment of the plaintiff's employees. Nevertheless, he held that the defendant was entitled to compensation. The plaintiff appealed successfully to the Court of Appeal. The appellate court *inter alia* held that apart from trade secrets and trade connection, other legitimate proprietary interests that the employer was entitled to protect via a non-solicitation clause would include the maintenance of a stable trained workforce, provided the clause passed muster under the twin tests of reasonableness enunciated by Lord Macnaghten in *Thorsen Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Company Limited* (see [116] above). The prohibited period was held to be a reasonable restraint in the interests of the parties. Any breach thereof would entitle the innocent party to terminate the terminate agreement. It followed therefore the defendant could not enforce his claim for compensation.

138 *Stratech Systems Ltd v Nyam Chiu Shin*, (*supra* [117]), is particularly instructive for our case. There, the defendants who were ex-employees of the plaintiff/appellant resigned and went to work for the plaintiff's main contractor Guthrie who had been awarded a contract by the Land Transport Authority of Singapore ("the LTA") for the design, supply, installation and commissioning of a vehicle-entry permit system ("the VEP"). Pursuant to an *Anton Pillar* order, the plaintiff seized computers from Guthrie's premises that contained numerous files belonging to the plaintiff. The plaintiff sued the defendants alleging that they had cloned four hard disks from the plaintiff's computers with LTA and that they had breached the confidentiality clause in their employment contracts. The plaintiffs sued Guthrie for inducing breach of contract in offering the defendants employment. The trial judge dismissed the plaintiff's claim against the defendants for breach of confidentiality (under clause 8.1) and for breach of the restraint of trade covenant (clause 9.4) in the employment contract (which prohibited the defendants within nine months of leaving their employment from working with anyone who dealt with the plaintiff). Guthrie was found liable for inducement of breach of contract.

139 The plaintiff's appeal was dismissed by the Court of Appeal whilst Guthrie's cross-appeal was allowed. The appellate court held that it failed to plead with specificity and to produce evidence that showed the defendants had taken confidential information from its computers. As the plaintiff already had the benefit of confidentiality under clause 8.1 and it was unable to demonstrate any other legitimate business interest that required protection, the main function of clause 9.4 was to inhibit

competition in business. As such clause 9.4 was not binding on the defendants and Guthrie could not be guilty of inducing them to breach their contract with the plaintiff.

140 Like the plaintiff in *Stratech*, the Company has failed to produce any evidence to support its claim that the defendants had breached the Confidentiality clause at [111] above not to mention its lack of specificity in its pleadings. The Company was in effect attempting to stifle competition from Qian and Jiang by invoking the Confidentiality and the Non-competition clauses to prevent them from working for the Trigiant group/Trigiant Technology.

141 As for the Company's claim against him for withholding tax, Qian did not contest the claim in court. His contention (and which the Company's counsel conceded in court) was that it was the Company's responsibility to deduct such tax from his earnings and account to the tax authorities for the same. Questioned by the court, Qian confirmed he did not take issue with the Company's claim for withholding tax save that he disputed the interest penalty levied on the Company by the tax authorities for late payment and which in turn the Company charged to him.

142 Before I move on to address the experts' evidence, there is one observation that I wish to make. The Company was unable to corroborate one of its main allegations. The Company had accused the defendants (see [15]) of deleting files from their computers and from other computers in the office of Jiangsu Company. There was no evidence from the Company to support this allegation by way of a witness who had actually seen Qian or Jiang making the deletions. Neither did the termination letter nor the Company' acceptance letter allude to the same. However, Qian's letter dated 28 February 2007 (at [80]) in reply to the termination letter specifically addressed the issue, he wrote:

> I am writing in reply of the letter with regard to the Termination of Service Contract signed by Cui Genxiang, who represented the Board of Directors of your company. As the Chief Executive Officer of the company, I do not take care of the files and records of the company. All information and records are taken care of by the Secretary of the Board of Directors and the Secretarial Agency engaged by our company…

If the Company disagreed with the above assertion and if indeed he had deleted files from his/the Company's computer(s), it was reasonable to assume that the Company would have/should have responded to rebut Qian's statement. The Company's allegation in this respect was therefore a non-starter. It was also not for Qian or Jiang to disprove the allegation.

The expert testimony

143 Earlier at [54], I had alluded to the fact that each side called an expert witness. Unfortunately, the testimony of the Company's expert did little to advance its case that it had proprietary interest to protect.

144 The defendants' expert Chen Yi-Xin ("Chen") was/is a professor from Shanghai Jiao Tong University's department of Physics and Institute of Optics and Photonics. His impressive credentials included being a principal consultant to JFS-Uniphase (Shenzhen) between 2000–2002 where he established a research and development team and a two-year stint as an engineering manager with E-Tek Dynamics, San Jose, America, where he designed new products that included an optical switch and other optical devices. Chen's brief from the defendants was to provide an opinion on the process by which RF coaxial cables are manufactured in China and in particular, the nature of the standards, equipment and information used in the manufacturing process. Chen's opinion also explained the factors which affected the quality of manufactured RF cables.

145 The Company's expert Lei Jianshe ("Lei") is a senior engineer with Alcatel-Lucent Shanghai Bell Company (China) where he is in charge of research and development. In court, Lei described himself as an expert in the RF and telecom industry. However, his experience/expertise did not extend to setting-up a line for RF cable manufacture, the manufacture of RF cables or the management of such a facility.

146 Lei's report was criticised by the defendants as exceeding the parameters laid down by the court below (on 26 March 2009). Lei had been directed by the Deputy Registrar to confine his report to addressing the issues raised in Chen's expert report. Lei exceeded his mandate (which he admitted in cross-examination [at N/E 236]) by offering his opinion that the pricing, production and research data of the Jiangsu Company were confidential information. Lei also dealt with the subject of competition. Consequently, the defendants submitted that Lei's testimony as an expert should be disregarded.

147 The Company on the other hand submitted that Lei's testimony showed that the Company had trade secrets and information/know how which were not in the public domain and which were entitled to protection. The Company's closing submissions argued that Chen had no expertise in the area of RF cables and his evidence should be disregarded – Chen had never worked for or managed operations in any RF cable manufacturer unlike Lei, who had worked for Alcatel-Lucent which uses RF cables extensively for its communication network. Neither had Chen worked in any capacity for China Mobile, China Telecom or China Unicom. He was described by the Company as an academic whose expertise was in the field of optical fibres and optical communications. The Company added that Chen had admitted in court that he was not an expert (at N/E 357). I should state here that Chen's admission had been taken out of context; he was being modest. In re-examination (at N/E 359), Chen had explained that although he did not regard himself as an expert, he was certainly so regarded by the Optical and Electrical Subcommittee of China Electric Components Association. Further, Chen felt the term 'expert' was rather vague. He was first and foremost a professor/a scholar and although he did not have that much practical experience, he did have a wealth of experience which was why he could teach his students.

148 As for the (undisputed) fact that Lei's report exceeded the parameters set by the court, the Company submitted that as the defendants did not apply to this court to expunge the offending portion relating to competition, it remained in Lei's report and should be admitted as part of the evidence. I reject this submission – allowing the offending portion to remain as part of Lei's evidence is tantamount to condoning his conduct in flouting a court's specific direction.

149 Undoubtedly, both experts had shortcomings in their reports, in their oral testimony as well as in their expertise. However, that did not mean the court should reject the experts' testimony outright as the parties sought to persuade the court to do.

150 What can be distilled from the experts' testimony in brief is:

(a) (According to Chen), technological requirements for and the method of production for RF cables are comprehensively contained in manuals that are available in the public domain as well as in the manuals provided by suppliers/ manufacturers of RF equipment which equipment in any case is highly automated;

(b) Lei disagreed with Chen's view in (a) in that for a start-up manufacturer of RF cables, he said the requisite information cannot be totally obtained from suppliers or the public domain. However, he conceded that a new start-up could produce RF cables of a quality that met the national standards, using information from the public domain and from suppliers of RF

manufacturing equipment.

151 On the whole Chen's opinion is to be preferred as being more objective than Lei's. What is common ground in the testimony of the two experts is that information on RF cables can be obtained from the suppliers of RF equipment and even from the public domain. It was only the extent to which such information can be obtained that was the subject of disagreement between Chen and Lei. However, Lei's concession in (b) above undermined the Company's case on alleged breach of confidentiality set out in [131] above in its contention that the information on RF was highly confidential as to amount to a legitimate proprietary interest that required the court's protection.

(b) The counterclaims

152 In *General Billposting* (*supra* [120]), the House of Lords had held that a manager who was wrongfully dismissed without notice was entitled to treat the dismissal as a repudiation of the contract, sue for damages for breach and he was no longer bound by the covenant on restriction of trade. In *Konski v Peet*, the plaintiff was the former employer of the defendant saleswoman whose services were discharged by payment of one week's salary in lieu of notice, which notice period for termination was that provided by an agreement signed between the parties. The defendant entered into employment with a rival of the plaintiff. The plaintiff brought an action for an injunction to restrain the defendant from breaking the agreement. The defendant raised a preliminary objection that her dismissal by payment of wages in lieu of notice was a wrongful dismissal amounting to a repudiation of the agreement by the plaintiff.

153 In finding for the plaintiff, Neville J distinguished *General Billposting* (of which coincidentally he was the first instance judge, and had ruled in the employer's favour). In *General Billposting* Neville J held that notwithstanding that it had wrongfully dismissed the manager, the plaintiff (assignees of the employer) could nevertheless sue the manager for damages for breach of contract, when he started his own business as a billposter in competition with the plaintiff. Neville J's decision was reversed by the Court of Appeal whose decision was affirmed by the House of Lords. In *Konski v Peet*, Neville J held (at p 538) that unlike *General Billposting* (where the plaintiff was in breach) Konski the plaintiff had no agreement with the saleswoman that he must provide her with employment in exchange for payment of salary. Therefore, the plaintiff was not in breach when it paid the saleswoman one week's wages in lieu of office without having to give her employment.

154 The defendants' submissions cited *Morrish v NTL Group Ltd* [2007] SC 805, a decision of the Scottish Court of Appeal. There, the plaintiff was dismissed as the financial director and company secretary of the defendants. The plaintiff's contract of employment was for a period of three years terminable by either party giving not less than twelve months' notice to the other. The plaintiff was dismissed without being given the requisite twelve months' notice when his position was made redundant. He claimed damages for breach of contract. The defendants offered the plaintiff salary in lieu of notice which he rejected on the ground that the damages awarded would be more. The defendants argued that it was not in breach because the contract was subject to an implied term giving them the right lawfully to terminate the plaintiff's employment by paying him a proportion of his salary and emoluments corresponding to the stipulated period of notice. The court refused to imply such a term as it would contradict the express notice clause and business efficacy did not require the implication of such a term. Further, there was no reason for holding that a term should be implied when such implied term would have the effect of depriving the employee of the normal remedy of damages for breach of contract, the purpose of which would be to put him in no worse financial position than that in which he would have been had the employers fulfilled their contractual obligations to him.

155 Consequently, the defendants submitted, the Company's argument that Qian's services could be terminated by payment of salary in lieu of notice did not adequately compensate him and must fail in the light of *Morrish v NTL Group Ltd*.

156 The Company however argued that *Morrish v NTL Group Ltd* can be distinguished as the Scottish judges had taken pains to emphasise that their decision applied to the employment contract in question and to the special facts of the case. It was also pointed out that the plaintiff's termination clause there stated:

> The company shall employ the Appointee and the Appointee shall serve the company as Financial Director and Company Secretary and subject to the provisions for determination of this Agreement hereinafter contained…unless and until terminated by either party giving to the other not less than twelve months written notice thereof expiring on or at any time after Thirty first May, Nineteen hundred and eighty seven.

157 The Company contrasted the words "unless and until" in the above termination clause with clause 2.2 of the Service Agreement at [110] where the words used were "but may be terminated by either party…" The Company argued that the word "may' was prescriptive and gave it the right to exercise other options in lieu of providing notice when it came to terminating Qian's employment. It was the Company's closing submission (at para 136) that *Morrish v NTL Group Ltd* was a decision based on s 86 of the Scottish Employment Rights Act 1996 which meant that the common law was not considered.

158 With respect, the Company's submissions on the purported distinguishing features between *Morrish v NTL Group Ltd* and this case is a misreading of the *ratio decidendi* of the case. The Scottish court made no reference to s 86 of Scotland's Employment Rights Act whatsoever in its judgment. The aforesaid section was mentioned only in passing (at p 812 para 15) by Lord Nimmo Smith when he referred to the following submissions presented by the solicitor-advocate (acting for the plaintiff):

> ...As he pointed out, the 19th century cases may now be of little more than historical interest. Section 86 of the Employment Rights Act 1996 gives a statutory entitlement to employees under contracts of employment to which the section applies to a minimum period of notice. As Lord Hoffman said, under reference to this provision, in *Johnson v Unisys Ltd* (para 37):
>
> > [A]ny terms which the courts imply into a contract must be consistent with the express terms. Implied terms may supplement the express terms of the contract but cannot contradict them. Only Parliament may actually override what the parties have agreed.

159 Consequently, I reject the difference in interpretation that the Company sought to draw between the termination clause in Mr Morrish's employment contract and clause 2.2 in this case. I am of the view that where a contract as in this case has a clause which sets out the mechanics of termination for either contracting party, there is no room for implied terms as the "officious bystander" test propounded in *The Moorcock* (1889) 14 PD 64 would not apply – it is not necessary to import an implied term that the Company can terminate with payment of salary in lieu of notice in order to give business efficacy to the Service Agreement.

160 The defendants' reply submissions had also cited *Dalkia Utilities Services PLC v Celtech International Ltd* [2006] 1 Lloyd's LR 599 for their contention that the Company cannot rely on any subsequent alleged misconduct on the part of Qian as a defence to his earlier claim for bonus. It

bears remembering that the termination letter was given based on clause 2.2 *viz* without cause as seen in the full text set out at [14] above. Consequently, the Company's reliance on *Shepherd v Felt & Textiles of Australia Ltd* [1931] 45 CLR 359 (citing *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 does not assist its case. The Company did not wrongfully dismiss Qian and subsequently discovered it could have had grounds to dismiss him with cause.

161 In this regard I refer to another case cited by the Company, that of *Rock Refrigeration Limited v Jones & Anor* [1997] 1 All ER 1. That decision did not stand for the proposition set out in para 242 of the Company's closing submissions where Phillips LJ was quoted – that it was not unreasonable for an employer to seek to impose restraints on his employee that will subsist, even should the employment come to an end as a consequence of repudiation by the employer. The Company has again misread the *ratio decidendi* of the case. There the UK appellate court applied *General Billposting*. The relevant extract from the holding of the case reads as follows:

> …where an employer repudiated a contract of employment and that repudiation was accepted by the employee, the employee was thereupon released from his obligations under the contract and restrictive covenants otherwise valid against him could not be enforced.

It was also Qian's case (relying on *Parfums Rochas SA v Davidson Singapore Pte Ltd* [2000] 2 SLR 148) that once the Company had affirmed the Service Agreement (by its reference to clause 2.2 in the termination notice), it could not rely on his alleged breaches *known at the time*, to justify termination ex-post facto.

162 The Company then made an alternative argument, that Qian's repudiatory breaches came within clause 7.3 and 7.4 of the Service Agreement and the Company could have dismissed him on those grounds. Unfortunately, this avenue was not open to the Company either as that was not its pleaded case. Further, on the second day of trial (22 April 2009), this court had dismissed the Company's application (in summons no. 1868 of 2009) to further amend its statement of claim.

163 I find that the scope of the Non-competition clause was too wide to be considered reasonable. Moreover, despite the valiant efforts of its solicitors in court as well as in making its closing submissions, the Company did not discharge its burden to prove it had trade secrets, formulae and/or R&D knowledge of which the defendants acquired in the course of their employment and that needed to be protected. By the same token, the defendants did not acquire any confidential information from the Company/the Jiangsu Company that required the court to enforce the Confidentiality clause at [111] either. In any case, there was considerable overlapping between the Confidentiality and the Non-competition clauses in the Service Agreements.

164 It seems to me that the Company was bent on ensuring that neither Qian nor Jiang would be a threat to the business of the Company/the Jiangsu Company once they left. Their motive in suing the defendants was to stifle competition even though Qian's successor, Xu, (according to the Company's own annual report for 2007) was more than competent to take over and had impressive credentials which included working experience at Hentong and at Lucent Technologies (China) Co. Ltd.

Conclusion

165 Consequently, the Company fails in its action against the defendants and I dismiss both suits with costs to the defendants.

166 On the other hand, the Company failed to disprove it was not in repudiatory breach of the Service Agreement when it terminated the defendants' employment without the requisite six months'

notice. In the light of the decisions in *General Billposting* and *Morrish v NTL Group* at [150] and [154] respectively and reinforced by *Rock Refrigeration Limited v Jones & Anor* at [161], the Company's defences to the defendants' counterclaim also fail. Consequently, the defendants succeed on their counterclaims.

167 Notwithstanding my negative comments on Qian's and Jiang's conduct in [123] and [124] above, the fact remains, and I repeat, that the Company chose to terminate their employment *without cause* under clause 2.2 of the Service Agreement. Allegations levelled against the defendants by Cui and Wang (and similarly cross-allegations made by the defendants against the former) were never raised immediately after the events that took place at the premises of the Jiangsu Company on 23 January 2007. Indeed, the Company's allegation of breaches by Qian of the Service Agreement were raised for the first time in its letter dated 9 October 2007 at [25] after it gave every indication by its conduct at [61] in May 2007 that it intended to pay Qian his bonus. This court therefore had to assess the credibility of the parties' witnesses and despite some shortcomings in their case, I was of the view that the defendants were far more convincing in their testimony than Cui, on a balance of probabilities.

168 The defendants' entitlement to bonus was clearly spelt out in the bonus clause of the Service Agreement at [112]. No proviso to the bonus clause or to any other clause in the Service Agreement qualified and/or denied the defendants' right to annual and incentive bonus (prorated in this case) once earned. For completeness I would add that the defence of equitable setoff is not available to the Company as it has not put up any valid cross claims.

169 I am also unable to accept the Company's submission that Qian failed to plead estoppel or waiver in regard to the Company's conduct after 15 February 2007 (set out at [167]) as that was not its pleaded case. The Company had argued that estoppel can only be raised in respect of facts that took place in the period before, not after, termination, relying on *Brown Noel Trading Pte Ltd v Donald & McCarthy* [1997] 1 SLR 1. The Company cannot rely on this authority for its proposition as that was not the *ratio decidendi* of the case.

170 The Company then argued (see paras 162 and 163 of its submissions) that by his conduct after 15 February 2007, Qian had elected to affirm the Service Agreement even if there was then a repudiatory breach by the Company – he did not act in any manner to suggest that he thought the Company was in breach of the Service Agreement. In fact it was submitted, Qian accepted payment of six months' salary in lieu of notice under clause 2.2, he returned the Company car and he did not return to work. Unfortunately, this was also not the Company's pleaded case. Indeed, this plea was the subject matter of the Company's application at [162] to further amend its Reply and Defence to Qian's Counterclaim (besides its Statement of Claim) which the court had dismissed on 22 April 2009.

171 Consequently, I award Qian judgment in the second suit in the sums of $1,260.28, RMB1,101,900.49 and RMB378,574.36 with interest. The Company is entitled to setoff and deduct from Qian's judgment sums the actual withholding tax (without interest or penalty) paid to the tax authorities on his behalf. Qian is also awarded interlocutory judgment with damages to be assessed for the Company's repudiation of the Service Agreement with the costs of assessment reserved to the Registrar.

172 Similarly, I award Jiang final judgment in the first suit for the sums of $1,693.15 and $3,008.22 together with interest. Jiang is further awarded interlocutory judgment for the Company's repudiation of the Service Agreement. Damages for the Company's breach shall be assessed by the Registrar with the issue of costs for the assessment reserved to the Registrar.

173 Finally, I declare that the Non-Competition clause inclusive of the schedule (viz clause 8 of the Service Agreement) is void and unenforceable against the defendants. Jiang and Qian shall have the costs of their counterclaims.