Powerdrive Pte Ltd *v* Loh Kin Yong Philip and others
[2018] SGHC 224

Case Number	: Suit No 1015 of 2017 (Summonses Nos 605, 628 and 698 of 2018)
Decision Date	: 10 October 2018
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: Srinivasan s/o V Namasivayam and Vaishnavi Vivehgananden (Heng, Leong & Srinivasan LLC) for the plaintiff; Koh Kok Kwang (CTLC Law Corporation) for the first to fifth defendants; Adrian Wong and Sara Sim (Rajah & Tann Singapore LLP) for the sixth defendant.
Parties	: Powerdrive Pte Ltd — Loh Kin Yong Philip — Law Kok Keong — Ramiesh s/o Kalaichelvem — Suntharam s/o Satapha — Tan Weilin — Singapore Technologies Kinetics Ltd

Civil Procedure – Striking out

Contract – Illegality and public policy – Restraint of trade

10 October 2018

Woo Bih Li J:

Introduction

1 The plaintiff, Powerdrive Pte Ltd ("Powerdrive"), is in the business of training military armour vehicle drivers both on training simulators and on actual vehicles.

2 Powerdrive brought the present action against five of its former employees for being employed by the sixth defendant, Singapore Technologies Kinetics Ltd ("ST Kinetics"), a competitor of Powerdrive, in breach of a restraint of trade ("ROT") provision.

3 On 2 February 2018, ST Kinetics filed Summons No 605 of 2018 ("Summons 605") to strike out Powerdrive's claim against it.

4 On the same day, Powerdrive filed Summons 628 of 2018 ("Summons 628") to amend its Statement of Claim ("SOC").

5 On 7 February 2018, the first five defendants filed Summons 698 of 2018 ("Summons 698") to strike out certain paragraphs of the SOC. Further, or alternatively, they sought to strike out Powerdrive's claim against them.

6 By the time of the first hearing of all three applications before me on 13 July 2018, Powerdrive had proposed two more versions of the draft of the amendments to be made to the SOC, *ie*, for the SOC (Amendment No 1). In other words, three drafts of the SOC (Amendment No 1) had been prepared. The initial hearings were fixed before an Assistant Registrar. Eventually, after the third and last draft was prepared by Powerdrive, the three applications were fixed for hearing before me. The hearing before me on 13 July 2018 was part-heard and adjourned. It was fixed for further hearing on

13 August 2018. At that hearing, the first five defendants elected to proceed only with the application to strike out Powerdrive's claim against them.

7 After the further hearing, I made the following decisions:

(a) For Summons 628, I concluded that the ROT provision in question was too wide and not enforceable. This in turn meant that in so far as the proposed amendments were based on the validity of the ROT provision, they should not be allowed. I dismissed Summons 628 with some qualifications which I will elaborate below.

(b) For Summons 605, I granted the application of ST Kinetics for Powerdrive's claim against it to be struck out.

(c) For Summons 698, I granted the application of the first five defendants for Powerdrive's claim against them to be struck out.

8 I set out my reasons below. Costs orders were also made.

The court's reasons

9 The ROT provision which Powerdrive was relying on was found in the second paragraph of cl 5 of each of the letter of employment for the first four defendants. I set out the entirety of cl 5 below as the first paragraph of cl 5 was also considered in construing this ROT provision. Clause 5 states:

5. Confidentiality

You shall not, during the continuance of this Agreement or after its termination, disclose, divulge, impart or reveal to any person or company any of the Company's clients' information or confidential reports, processes, dealings or any information concerning the business, finance, transactions or affairs of the Company which may come to your knowledge during your employment hereunder and shall not use or attempt to use any such information in any manner which may injure or cause loss directly or indirectly to the Company or its business or may likely to do so.

Not withstanding the above, you cannot work for a rival company and/or direct competitor for two (2) years from your termination. Management reserves the right to pursue on legal grounds if there is a breach of this condition.

10 For the fifth defendant, Powerdrive said that he had been informed and had agreed to a similar ROT provision which was found in para 4 of an email dated 6 April 2010 which Powerdrive had allegedly sent to all employees. Paragraph 4 states:

4. For leaving employees, you are not allow [*sic*] to join a rival company and/or direct competitors within two-years of your last day of employment.

11 Parties proceeded on the basis that the substance of para 4 was the same as the ROT provision found in the second paragraph of cl 5 of the letter of employment for each of the first four defendants. I will henceforth refer to both of these provisions collectively as "the ROT Clause" for convenience.

12 In respect of Powerdrive's application to amend the SOC, Powerdrive's solicitors prepared a table of the proposed amendments in the latest draft of the SOC (Amendment No 1) ("the Table").

The Table is attached as Annex A to the present grounds of decision.

13 The main amendments which Powerdrive wanted to include were those in serial nos 3 to 5 and also serial no 6 of the Table.

Serial nos 4 and 5 of the Table

14 Serial nos 4 and 5 pertain to the proposed additions of new paras 63 to 68 and 69 to 93. The purpose was to elaborate on the particulars of confidentiality of Powerdrive's Induction Programme used to train the first five defendants and the particulars of confidentiality of Powerdrive's training methodologies and system.

15 These amendments were proposed in response to a point taken by all the defendants that Powerdrive could not rely on the ROT Clause to protect confidential information. Two arguments were advanced for this point.

16 The first argument arose from the undisputed proposition that an ROT provision is justifiable only if it protects the employer's legitimate interests and it is reasonable in the circumstances (see *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205 ("*Buckman*") at [21]). A possible legitimate interest is the protection of confidential information. However, in the present case, the first paragraph of cl 5 already protected Powerdrive against the disclosure of confidential information. Moreover, each of the first to fifth defendants had executed a separate confidentiality agreement with Powerdrive.

17 In *Stratech Systems Ltd v Nyam Chiu Shin (alias Yan Qiuxin) and others* [2005] 2 SLR(R) 579 ("*Stratech*"), the Court of Appeal held that if an employer has the benefit of a clause protecting against the disclosure of confidential information, then it could not use that same interest to justify the imposition of an ROT provision against its employee.

18 The second argument was that there must be more than just a vague or general reference to confidential information. Particulars of the confidential information had to be specified.

19 The problem for Powerdrive was that even if the proposed amendments provided sufficient particulars of confidentiality, which was disputed by all the defendants, these proposed amendments would address the second argument only.

20 As regards the first argument, Powerdrive submitted that, notwithstanding the decision in *Stratech*, the court should not at this stage conclude that Powerdrive was not entitled to rely on the protection of confidential information as a legitimate interest to justify the ROT Clause even though there was a separate provision or provisions protecting its confidential information. All the defendants argued that the court should so conclude and that in the absence of any other legitimate interest, the ROT Clause was not enforceable.

21 In *Centre for Creative Leadership (CCL) Pte Ltd v Byrne Roger Peter and others* [2013] 2 SLR 193, I had suggested, at [92], that the Court of Appeal may wish to review the decision in *Stratech* in the light of some English cases which recognised that an ROT provision can also protect trade secrets and confidential information even though there is already a confidentiality clause elsewhere in the contract of employment.

22 In *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27, Vinodh Coomaraswamy J was apparently of a similar view, at [71].

23 I was of the view that it was not necessary to decide whether to rule against the enforceability of the ROT Clause based on *Stratech*.

24 Even if Powerdrive could use the protection of confidential information as a legitimate interest to justify the ROT Clause, the question remained whether the ROT Clause was reasonable in the circumstances. On this point, Powerdrive had to satisfy the twin tests of reasonableness stated by Lord Macnaghten in *Thorsten Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] AC 535 and applied by the Court of Appeal in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*") at [70]. The twin tests are that each ROT provision must be reasonable in reference to the interests of the parties concerned and also in reference to the interests of the public. Therefore if the ROT Clause was too wide from either perspective, the proposed amendments to particularise the confidential information to be protected would be academic.

25 On the question of the width of the ROT Clause, various points were raised by the defendants but for present purposes, I need to refer to three arguments only, *ie*, that the ROT Clause was unreasonably wide: (a) in terms of the scope of employees it sought to restrain, (b) in terms of the scope of work it sought to restrain the first to fifth defendants from doing when employed by a rival, and (c) in terms of the duration of the prohibition.

26 The first point was that Powerdrive was using the ROT Clause against all its employees regardless of their seniority, nature of work or level of access to information. In *Buckman*, the court recognised, at [26], that such an indiscriminate application would suggest that the true purpose of the provision was to restrain competition rather than to protect a legitimate interest of an employer. If that was the true purpose it would be unenforceable.

27 In *Man Financial*, the Court of Appeal also noted, at [141], the argument that an ROT provision would be too wide if it covered too broad a category of employees, although on the facts there, the court construed the provision in question to exclude peripheral support staff and was of the view that it applied only to the employer's senior staff. It was therefore not too wide.

28 Powerdrive did not dispute the general proposition that if the ROT Clause applied to all its employees regardless of seniority, scope of work and access to confidential information, it would be too wide. However, it argued that the court should not embark on this assessment at this stage.

29 The defendants argued that there was clear evidence from Powerdrive itself that it was applying the ROT Clause to all its employees regardless of seniority, scope of work and access to confidential information.

30 As mentioned above (*supra* [10]), Powerdrive itself was relying on an email dated 6 April 2010 to its employees to argue that while the fifth defendant's contract of employment did not contain an ROT provision, he was bound by a similar provision nevertheless by virtue of para 4 of that email. In cl 10 of his employment contract, the management of Powerdrive reserved the right to change the terms of his employment at its sole discretion and hence Powerdrive submitted that it was entitled to unilaterally impose, by that email, para 4 on the fifth defendant.

31 That email was sent to the following email addresses: all@powerdrive.com.sg and all@elc.com.sg (see p 383 of Plaintiff's Bundle of Cause Papers). It started by saying, "Hi all, There are several T&C add-ons to the HR Guide w.e.f. from 1st April 2010. Please read carefully."

32 In arguments, Powerdrive suggested that perhaps that email was sent to only a select group of

employees since there was no evidence as to whether the email addresses to which the email was sent applied to all its employees or not.

33 However, Powerdrive was caught out when it made this suggestion. At para 46 of its SOC, *ie*, before the proposed amendments were raised, it stated that its email of 6 April 2010 was sent to "all of its employees including the 5th defendant". Paragraph 46 was repeated as para 49 of its latest draft of the SOC (Amendment No 1) without qualification.

34 Secondly, Chua Eng Wah William ("Chua"), a director of Powerdrive, had executed an affidavit on 12 March 2018 in response to the application (in Summons 698) of the first to fifth defendants to strike out the SOC. Paragraph 32 of his affidavit referred to the email dated 6 April 2010 and said, "It is clear that the email was sent to all employees of the Plaintiff, one of whom was the 5th Defendant."

35 Furthermore, para 36 of Chua's affidavit stated that as regards the prohibition from working for a rival for two years, "during all HR sessions and/or company retreats, the management makes it a point to stress and highlight this issue to all the employees". It then went on to refer to the email dated 6 April 2010.

36 Thirdly, at no time before the hearings did Powerdrive seek to suggest that it had sought to restrict the use of the ROT Clause to certain categories of employees. Neither did it say that by "all" in its email, it meant to refer to only all employees of a particular category.

37 In the circumstances, it was therefore clear to me that there was no point in waiting for a trial to see if Powerdrive had been applying the ROT Clause to all its employees.

38 I was of the view that such a wide scope of the ROT Clause was not reasonable in the interest of the public even if it could be argued that it was reasonable as between each of the first five defendants and Powerdrive. The ROT Clause was too wide on the first point.

39 I come now to the second point on the scope of the ROT Clause, *ie*, that it was unreasonably wide in terms of the scope of work it sought to restrain the first to fifth defendants from doing when employed by a rival.

40 On the face of the ROT Clause, each employee was prohibited from working for a rival regardless of the scope of his work with his new employer. The ROT Clause was not confined to working for a rival in the same or a similar capacity as that in which the employee was working when employed by Powerdrive. That was the construction raised by the defendants and hence they argued that the ROT Clause was too wide to be reasonable.

41 The first to fourth defendants were employed by Powerdrive as "trainers" to train armour vehicle drivers. The fifth defendant was employed as a "junior consultant", also with respect to the training of armour vehicle drivers. Powerdrive's Reply to the Defence of the first to fifth defendants was that each of these defendants was only prevented from being employed as an Armour Vehicle Driver Trainer ("AVDT"). He was not prevented from being employed as a driver trainer for any other type of vehicle. Chua deposed that the ROT Clause was not intended to prevent each defendant and/or any other employee from seeking employment as a driver trainer for any other type of vehicle. [note: 1] Thus Powerdrive was implicitly acknowledging that if the court were to conclude that the scope of the ROT Clause was as wide as construed by the defendants (*supra* [40]), then it would be unenforceable.

42 Powerdrive relied on *Turner v Commonwealth and British Minerals Ltd* [2000] IRLR 114 where

Lord Justice Waller said at [14] that, "[i]f a particular construction was to lead to the view that the clause was unenforceable, then an alternative view, which did not lead to the same result if legitimate, ought to be preferred".

43 In my view, this is a general proposition which applies only where there are two reasonable interpretations of an ROT provision, one of which would render it unenforceable and the other would allow it to be upheld. It does not mean that the court should bend backwards to come to some sort of interpretation that will save the provision from unenforceability. It has often been said that courts will not rewrite the contract for parties (see for example, *Man Financial* at [127]).

44 I accept that each ROT provision must be considered in context (see for example *Man Financial* at [141]). However, it was one thing for Powerdrive to say that its intention was to preclude the first to fifth defendants from being employed as an AVDT. It was another thing to say that that was the meaning of the ROT Clause. Moreover, since it appeared that the ROT Clause applied to all other employees of Powerdrive as well, what did the ROT Clause preclude each of them from doing? Even if Powerdrive's point was simply that each employee, regardless of seniority or the nature of the work, was not to be employed in a similar capacity by a rival, this would again suggest that the ROT Clause was a blanket prohibition being used indiscriminately.

45 In my view, there was no need to await a trial. The court could construe the ROT Clause at this stage, as Powerdrive did not suggest what other evidence was required to aid in the construction of the clause. Furthermore, it seemed to me that to construe the ROT Clause as prohibiting the first to fifth defendants from being employed as an AVDT only was to re-write the ROT Clause. This entailed more than just construing the ROT Clause in context. One has to be careful about applying the context argument liberally otherwise it will encourage employers to start with a widely worded ROT provision and then, only when challenged, to say that the provision should be construed narrowly in context so as to save its enforceability.

46 For reasons stated above, I did not agree with Powerdrive's narrow construction. Instead, I agreed with the defendants' argument. The ROT Clause was too wide on the second point too. It was not reasonable as between Powerdrive and the first to fifth defendants. Neither was it reasonable in the interest of the public.

47 I come now to the third point relating to the duration of the prohibition under the ROT Clause. The duration was two years. Each of the first to fourth defendants had entered into a two-year fixed term contract of employment with Powerdrive. There was no explanation by Powerdrive as to why it used two years as the prohibited duration even though it knew that the defendants were attacking the ROT Clause because of its width.

48 It appeared that the two-year duration was arbitrarily selected by Powerdrive. This is reinforced by the fact that the fifth defendant did not have a fixed term of employment. There was a six-month probation period for him. Thereafter, either side could terminate his employment by giving one month's notice of intention to terminate to the other side. It will be remembered that Powerdrive was alleging that the fifth defendant too was caught by the ROT Clause implemented through para 4 of the 6 April 2010 email, which also had a two-year prohibition. Again, there was no explanation why such an employee should be caught by a two-year ROT provision.

49 In my view, the duration of the ROT Clause was also unreasonably wide whether from the perspective of the parties or the public. The ROT Clause was too wide on the third point as well.

50 Accordingly, I was of the view that the ROT Clause was too wide to be enforceable.

Part of serial no 5 and serial no 3 of the Table

51 Some of the proposed amendments under serial no 5 of the Table also contained various allegations that the first to fifth defendants had, by having commenced employment with ST Kinetics, transferred their knowledge of certain training methodologies of Powerdrive and information gained therefrom and/or were in a position to transfer such knowledge and information to ST Kinetics. These allegations were raised in the proposed paras 74, 79, 83, 87 and 92.

52 Furthermore, for the fifth defendant, Powerdrive also attempted to introduce an allegation that he had disclosed confidential information on a specific occasion. This attempt is captured under serial no 3 of the Table and was made by the proposed inclusion of a new para 54.

53 As for the allegation of breaches relating to the disclosure of confidential information by the first to fifth defendants generally, as suggested in the proposed amendments for the SOC (Amendment No 1), these allegations were vague. Even the allegation of disclosure of confidential information by the fifth defendant on a specific occasion in the proposed para 54 was also vague because it did not identify specifically the confidential information that was allegedly disclosed by him.

54 Moreover, Powerdrive's counsel confirmed during arguments that there was in fact no allegation in any of the supporting affidavits of Powerdrive that any of the first to fifth defendants had in fact disclosed confidential information. His point was that the potential for breach was sufficient to justify the imposition of a general ROT via the ROT Clause. However, that was a different argument. If the ROT Clause was too wide to be enforceable in any event, as I concluded, then Powerdrive could not use the ROT Clause to restrain the first to fifth defendants from working for ST Kinetics.

55 The only remaining issue then would be whether Powerdrive could rely on the confidentiality provisions against the first to fifth defendants for a more limited cause of action, *ie*, against the disclosure of confidential information. Since no allegation had in fact been made in any of Powerdrive's affidavits of such disclosure, then even this cause of action was not available to it. Hence, any suggestion of disclosure of confidential information in the proposed amendments could not be allowed as well.

Serial no 6

56 Serial no 6 pertained to the proposed paras 94 and 95. These paragraphs were meant to allege that Powerdrive had a legitimate interest in maintaining a stable work force. The purpose of this allegation was to justify the use of the ROT Clause.

57 However, this allegation also suffered from the same fate as the allegation about the need to protect confidential information through an ROT provision. Even if there was a legitimate interest to protect, whether the interest be that of confidential information or a stable workforce, the width of the ROT Clause still had to be considered.

58 For the same reasons mentioned above, the ROT Clause was in my view too wide.

59 Moreover, there was another reason to reject these proposed amendments – they were proposed only in the latest draft of the SOC (Amendment No 1) after two earlier drafts of amendments had been proposed. It appeared that they were included as a last-ditch attempt by Powerdrive to justify the use of the ROT Clause. Perhaps because of this last-ditch attempt, there was no affidavit from Powerdrive to assert that the ROT Clause was to maintain a stable work force. The allegation was found only in the latest draft of the SOC (Amendment No 1).

60 As it was Powerdrive's application to amend its pleading, it was for Powerdrive to support the application by way of a supporting affidavit. Its initial application referred to an initial draft of the SOC (Amendment No 1) and was supported by an affidavit. When it proposed a second draft of the proposed pleading, it filed a supplementary affidavit later. However, when it proposed the third and latest draft, there was no supporting affidavit to assert that the ROT Clause was to maintain a stable work force.

61 Powerdrive had had more than one chance to get its act together. As it was, the attempt to include these amendments in its latest draft was the very first time Powerdrive was alleging, in a proposed pleading, that the ROT Clause was to maintain a stable work force. However, such an allegation was still not even supported by any affidavit. I was of the view that enough indulgence had been granted to Powerdrive and the absence of a supporting affidavit for these amendments was an additional reason to refuse them.

Serial no 7

62 I come now to serial no 7 of the Table. This pertained to the proposed paras 96 to 104. These proposed amendments were to introduce a new cause of action against ST Kinetics for the tort of inducement of breach of contract. Prior to these proposed amendments, no cause of action was pleaded against ST Kinetics. That was why ST Kinetics had filed Summons 605 to strike out Powerdrive's claim against it.

63 The alleged tort of inducing breach of contract pertained to the alleged breach by the first five defendants of the ROT Clause when they were employed by ST Kinetics. The proposed amendments were to allege that ST Kinetics had induced these five defendants to breach the ROT Clause. However, if the ROT Clause was not enforceable, then the tort would not be established.

64 In the light of my decision that the ROT Clause was not enforceable, Powerdrive could no longer sustain the alleged tort. Hence I refused the proposed amendments to include that tort.

Serial nos 1 and 2

65 Serial no 1 of the Table pertained to proposed paras 33 and 34 on a discrete claim against the third defendant in respect of salary that was allegedly overpaid to him. I was of the view that such a claim should not in any event be included in a claim against the various defendants for breach of the ROT Clause and/or for disclosing confidential information.

66 Serial no 2 of the Table pertained to the proposed para 46 which was also a discrete claim against the fourth defendant in respect of an early release penalty payment pursuant to cl 6 of his employment agreement. I was also of the view that such a claim should not be included in a claim against the various defendants for breach of the ROT Clause and/or for disclosing confidential information.

67 These two claims would have unnecessarily prolonged the trial for all the defendants, some of whom were not at all involved in the discrete claims. The defendants who were not involved were entitled not to be distracted by those additional claims.

The rest of the proposed amendments

68 Serial nos 8, 9 to 15 and 16 to 18 were proposed consequential amendments which had become academic since Powerdrive's claim for breach of the ROT Clause and for disclosure of confidential

information would fail.

Conclusion

69 Accordingly, I dismissed the application in Summons 628 in respect of the substantive amendments without prejudice to Powerdrive's right to file a fresh claim against the third and fourth defendants for the discrete claims. No order was made on the proposed consequential amendments.

70 In the light of my decision that the ROT Clause was not enforceable, I granted ST Kinetics an order to strike out the claim against it in Summons 605. For Summons 698, I also granted the first five defendants an order to strike out the claim against them.

Annex A

Table of Amendments in SOC (Amendment No 1) ("the Table")

Substantive Amendments

S/No.	Affected Party/Category	Paragraph No. in Proposed Amendments	Reference in Plaintiff's Bundle of Cause Papers	Description
1	3rd Defendant	33–34	Tab 16 Page 215	Inclusion of a claim of S$3,345.45 in respect of salaries that have been overpaid to the 3rd Defendant.
2	4th Defendant	46	Tab 16 Page 219	Inclusion of a claim of S$13,188 in respect of the early release penalty pursuant to Clause 6 of the Defendant's Employment Agreement.
3	5th Defendant	54	Tab 16, Page 221	Inclusion of the particulars of the 5th Defendant's breach of the Employment Agreement.
4	Confidentiality	63–68	Tab 16, Pages 224–226	Inclusion of the particulars of the confidentiality of the Plaintiff's internally run Induction Programme used to train 1st to 5thDefendants.

5	Confidentiality	69–93	Tab 16, Pages 227–234	Inclusion of the particulars of the confidentiality of the Plaintiff's training methodologies and systems.
6	Maintenance of Plaintiff's Work Force	94–95	Tab 16, Pages 234–235	Inclusion of the Plaintiff's legitimate interest in maintaining a stable work force.
7	6th Defendant	96–104	Tab 16, Pages 235–241	Inclusion of a new cause of action against the 6th Defendant for the tort of inducement of breach of contract.
8	Relief Claims	Prayers 2–4	Tab 16, Page 242	Inclusion of an injunction against the 6th Defendant, a claim of S$3,345.45 against the 3rd Defendant and a claim of S$13,188.00 against the 4th Defendant.
9	Numbering and grammar	1(a)–(b)	Tab 16, Page 207	
10		6	Tab 16, Pages 208–209	
11		10	Tab 16, Page 209	
12		17	Tab 16, Page 211	
13		28	Tab 16, Page 214	
14		40	Tab 16, Page 218	
15		52	Tab 16, Page 221	
16	Amendment of Defendant	18	Tab 16, Page 211	

17		53	Tab 16, Page 221	
18		61	Tab 16, Page 223	

[note: 1] Affidavit of Chua Eng Wah William (12 March 2018) at para 9.