Pacific Autocom Enterprise Pte Ltd v Chia Wah Siang
[2004] SGHC 89

Case Number : Suit 1209/2002

Decision Date : 05 May 2004

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Thio Ying Ying and Alan Loh (Kelvin Chia Partnership) for plaintiff; Tan Yew Fai (Y F Tan and Co) for defendant

Parties : Pacific Autocom Enterprise Pte Ltd — Chia Wah Siang

Contract – Contractual terms – Express terms – Interpretation of extension clause in indemnity agreement

Employment Law – Contract of service – Termination without notice – Clause in employment contract requiring notice of resignation – Whether employee in breach of clause

Employment Law – Employees' duties – Express and implied obligations under contract of employment – Whether employee in breach of duty of good faith and fidelity towards employer

5 May 2004	*Judgment reserved.*

Judith Prakash J:

Introduction

1 The plaintiff, whom I shall refer to as PAE, is a Singapore company that has, since 1976, been in the business of trading and distributing automotive spare parts, industrial chemicals and brake fluids. In 1998, PAE wanted to diversify its business and maximise the use of its infrastructure and resources. In the last quarter of that year, PAE held discussions with one Richard Lim and the defendant, Chia Wah Siang (also known as Johnny Chia). As a result, in December 1998, PAE signed an agreement with a Swiss company, Blaser Swisslube AG ("Blaser"), to become the distributor of Blaser's products in Singapore and Malaysia. At the same time, PAE employed Mr Chia as manager of its newly created Industrial Materials & Products Division. His main responsibility was to manage the distribution and sale of Blaser products.

2 On 26 June 2002, Blaser terminated the distributorship agreement with immediate effect. On the same day, Mr Chia tendered his letter of resignation to PAE. Subsequently, Mr Chia went to work for a company called Blaser Swisslube (S) Pte Ltd ("Blaser Singapore") that had been incorporated by Blaser to distribute its products in Singapore and Malaysia.

3 This action was commenced in October 2002. Various claims against Mr Chia have been made. The first is that he is liable under an indemnity agreement to pay PAE the sum of $23,224.44 being the amount of its losses for the financial year 2001. The second is for the sum of $6,496 being salary in lieu of notice of termination. The third is for damages quantified at $585,388.70 or alternatively $151,200 or damages as assessed arising out of the alleged breach by Mr Chia of his duties of good faith and fidelity to PAE. Mr Chia has denied liability for all these claims and has counterclaimed one month's salary on the basis that PAE has wrongfully failed to pay him his salary for June 2002.

The facts

The formation of the relationship

4 Blaser is a manufacturer of various types of oil used in industrial processes. In Singapore and Malaysia, its main business relates to the sale of water miscible cutting oils (also called coolants) to manufacturers employing precision metal cutting machines. For many years, the person who was actually handling such sales in these two territories was Mr Chia, although he was not himself the official distributor appointed by Blaser. Instead, he was employed by Blaser's official distributor. From 1981 to 1996, the distributor was a company called Universal Machine Tools Pte Ltd. In 1996, Mr Chia moved to a company called Taiyo Kikai (S E Asia) Pte Ltd ("Taiyo Kikai") and so did the Blaser distributorship.

5 From 1996, one Hans Niederhäuser was employed by Blaser as its executive sales manager in charge of the sale of Blaser products in the Asia Pacific region, including Singapore and Malaysia. He testified that some time in the second half of 1998, Blaser was dissatisfied with Taiyo Kikai's performance due to falling sales and for other commercial reasons.

6 Sometime in September or October 1998, Laurent Lee Yong Chong, the director of business development of PAE and the son of PAE's managing director, Lee Meng Eng, met one Richard Lim, a manager of a company associated with Taiyo Kikai. Mr Lim wanted to know whether PAE was interested in becoming Blaser's distributor in place of Taiyo Kikai. Subsequently, Laurent Lee and his father met Mr Lim and Mr Chia to discuss the distributorship business in more detail. At this meeting, the PAE representatives were shown a list of Blaser's customers and the monthly orders of coolants. They were told that the annual turnover of the business was $1.5m (including direct sales by Blaser itself of some $200,000) and that the profit margin was between 30% and 40% of the sale prices of the coolants. According to Mr Laurent Lee, Mr Chia told him that the annual sales revenue for Blaser coolants could be increased to $3m within the next five years, as Mr Chia would be actively marketing these products to other potential customers in the disk drive industry and would also tap into other industries. It should be noted that in his testimony, Mr Chia denied that he had met PAE's representatives before 1 December 1998. Instead, he said that Mr Lim acted as the liaison man with PAE and that his own role had been to relay to Blaser the terms PAE wanted as communicated to him by Mr Lim. Mr Chia also asserted that he himself played no part in Blaser's decision to end its relationship with Taiyo Kikai and to work with PAE instead.

7 According to Mr Lee, it was agreed that both Mr Lim and Mr Chia would be employed by PAE and that PAE would set up an Industrial Materials & Products Division ("the Division") to handle Blaser products and other products which Mr Lim was intending to bring to PAE. It was agreed that Mr Lim and Mr Chia would each be paid a salary of $6,000 and each of them would also be entitled to 20% of the net profits of the Division. Laurent Lee was to take charge of the operational activities of the Division and the Division was to bear a portion of the monthly salaries of Mr Lee and his father. Mr Chia was to be responsible for the profitability of the Division and was required to come up with plans for the growth of the Division. Laurent Lee would then work with Mr Chia to execute the growth plans. Mr Lee also testified that the parties' agreement on the remuneration terms was not based only on the current annual sales revenue of $1.2m but also on Mr Chia's projections of future sales of up to $3m per year within five years.

8 In early November 1998, there was a brief meeting between Mr Lee and Mr Niederhäuser at which the latter asked about PAE's financial capability. He also gave PAE a copy of the standard form Blaser distributorship agreement. During a subsequent meeting, Mr Niederhäuser refused to make any substantial changes to the agreement as he stated that it was Blaser's standard agreement

worldwide. On 11 November, PAE sent Blaser its first purchase order for Blaser coolants. This was for two container-loads of 160 drums of coolants worth 112,672.80 Swiss Francs paid for *via* a letter of credit established by PAE on 19 December 1998. The order was prepared by Mr Chia.

9 The distribution agreement between PAE and Blaser was signed on 14 December 1998. It made PAE the sole distributor in Malaysia and Singapore of Blaser coolants, auxiliary devices and certain specified auxiliary products (collectively "Blaser products"). The duration of the agreement was unlimited. Either party was entitled to terminate it by three months' notice. Additionally, immediate notice of termination was permitted if "an extraordinary circumstance" existed. One such extraordinary circumstance was stated to be if Mr Johnny Chia left the employment of PAE. The agreement contained a non-competition clause (Art 4) that prevented PAE from selling "competing products which are identical with or similar to" the Blaser products. It also provided that if PAE wished to act as distributor for other products it would have to inform Blaser of this fact.

10 The next day, 15 December 1998, Blaser served notice of immediate termination of distributorship on Taiyo Kikai. On the same day, PAE made Mr Chia a written offer of employment. In the letter, the commencement date of Mr Chia's employment was stated to be 15 December but subsequently, at Mr Chia's request, this date was amended to 1 December 1998. There was also an indemnity agreement. By this document, Mr Chia agreed to indemnify PAE from various expenses and losses incurred in relation to the Division. I will discuss the terms of this document in more detail later. In the offer of employment, it was stated that Mr Chia's overall job responsibility was to provide sales, marketing and product support functions to the Division in relation to the products that were assigned to his job function and territory. He was also to be accountable for the Division's "profit and loss functions and long term growth objectives". According to Mr Chia, he signed the employment contract on 15 December itself but only signed the indemnity agreement a week later on 22 December. It is PAE's position, however, that the employment contract and the indemnity agreement were both signed on the same day, around 29 December 1998.

11 Richard Lim joined PAE at the same time as Mr Chia. He remained with the company for only five months. After he resigned in April 1999, PAE revised Mr Chia's profit-sharing bonus to 30% of the net profits arising from the sales of Blaser's coolants and related equipment accessories. Mr Chia benefited from this profit-sharing arrangement in the financial years 1999 and 2000. In 1999 he received a profit share of $12,431.61 and in 2000, his share of the profit was $15,104.03. In the financial year 2001, however, the Division suffered a net loss of $23,224.44. Mr Lee asked Mr Chia to indemnify PAE against the loss but Mr Chia was not happy about this. After some discussion, it was agreed that the loss of the Division was to be brought forward from 2001 to 2002 and that PAE would review the situation subsequently. On 10 January 2002, Mr Chia signed a letter agreeing to cancel the profit-sharing arrangement. He says PAE required him to do this but PAE asserts that it was his own idea.

12 At first, the Division functioned well. Mr Chia generated a sales revenue of $1.081m in 1999 and this figure was close to the annual sales revenue of $1.2m that PAE was expecting. According to Mr Lee, however, after 1999, he began to realise that Mr Chia was laid-back and did very little marketing to potential customers. When Mr Chia joined PAE he brought with him a customer base of five major accounts each of which purchased an average quantity of two drums per month. Mr Chia also had about 45 other customers who ordered much smaller quantities that amounted to less than 20% of the total revenue from the Division. During the three and a half years that Mr Chia was in PAE's employ, the number of major customers remained at five as Mr Chia secured only one new major customer and that account was lost within 11 months. In 2000, sales revenue fell to $883,159.92 and in 2001, it declined further to $743,944.59.

13 Mr Lee's complaints about Mr Chia were that he was ill-disciplined, unproductive and uncommitted. His work habits were unsatisfactory. He was habitually late for work and for meetings. He often left the office after two or three hours and very seldom returned to the office in the afternoon. Sometime in 2000, Mr Lee instituted a daily sales report for Mr Chia to fill up each day. Mr Chia was not happy about this requirement. Mr Lee remained unhappy, as to him, the reports showed that Mr Chia was unable to account for the length of time he spent away from the office. Mr Lee considered that the reports confirmed his suspicion that Mr Chia was doing very little to develop new major accounts.

14 Mr Chia, on the other hand, considered that PAE treated him as a salesman rather than as the manager of the Division. He complained that he was not given a personal computer and without e-mail communication with his customers or others or a computer to do his paperwork on, he could not function properly in his job. As a salesman, his daily work included visiting customers at their premises, answering their queries and overseeing delivery of goods and providing after-sales service. He also had to provide Blaser with feedback and look after Mr Niederhäuser when the latter was in town. The demands of his job, he said, meant that he could not be in the office all the time and much time needed to be spent with customers outside the office.

Working relationship with Blaser

15 Mr Lee asserted that throughout the years, PAE was fully committed to the promotion of Blaser's products and interests. PAE sent Mr Lee for product training at Blaser's office in Switzerland at its own expense. It also participated in important annual trade shows in Singapore and Malaysia in 2000 and 2001. PAE purchased and implemented a web-based online ordering software solution for Blaser's products called the Virtual Store Management ("VSM") software. This cost it $59,008.70. PAE also made plans to open an office in Kuala Lumpur and this was due to take place in the third quarter of 2002.

16 In view of PAE's commitment to the Blaser distributorship, it was concerned about Art 24.3 of the distributorship agreement which made the distributorship subject to the continued employment of Mr Chia by PAE. In December 1999, Laurent Lee asked Mr Niederhäuser to reconsider Art 24.3. At that stage, Mr Niederhäuser was not willing to delete the article as he thought that PAE did not have the technical resources to support Blaser's customers by itself. As time passed, Mr Lee became more concerned about what he viewed as Mr Chia's lack of enthusiasm and commitment to increase Blaser's sales. In November 2001, he met Mr Niederhäuser and again raised the issue of deleting Art 24.3. According to Mr Lee, Mr Niederhäuser asserted that Blaser would not leave PAE high and dry without the distributorship and agreed to look into a modification of the article at the appropriate time.

The Conoco distributorship

17 From early 2000 onwards, PAE began to explore the possibility of bringing in other products and/or services. In July 2000, PAE had discussions with one Jason Wong, the sales development manager of a company called Conoco International Inc ("Conoco"). Conoco is a manufacturer of industrial lubricants. Its core products are general or maintenance lubricants such as greases for heavy vehicles and equipment. These lubricants, produced by a base oil blending technique known as the hydrocracking process, were touted as being capable of performing like synthetic lubricants. Conoco also produces a water-miscible oil known as "Conoco Soluble Oil". In 2000, Conoco had only two distributors, one for its automotive products and the other for its commercial products. It was looking for a third distributor to market lubricants for industrial use.

18 After several meetings, PAE signed a distributorship agreement with Conoco in November

2001. PAE was appointed as distributor for "Conoco lubricant products" which were defined as being Conoco's full range of lubricant and grease products listed in a specific price list. PAE was to distribute the products in Singapore, Johor and Batam Island. After the agreement was signed, PAE ordered a container load of Conoco products. It was intended that there would be a soft launch of the Conoco products in April 2002. In February 2002, PAE employed one James Choo to market Conoco's products.

19 According to Mr Lee, PAE's objective in entering into the Conoco distributorship was to enhance its sales by providing customers with a one-stop solution to their lubricant needs, *ie* with Blaser's coolants and Conoco's lubricants. Conoco's core products were not used for the same purposes as Blaser's coolants and PAE had no intention of selling any products which competed with Blaser's coolants. Although Conoco did produce coolants these were low-end products which came in one grade and were not competitors of Blaser products. PAE never sold any of Conoco's coolants although sometime in February 2002, Mr Lee did purchase some pails of Conoco coolants. He did this in order to placate Jason Wong for the lack of action on the launch of the Conoco lubricants.

20 According to Mr Niederhäuser, in March 2002 he discovered from the envelope of a letter from PAE that PAE was a Conoco distributor. He was alarmed by this discovery as Conoco was a manufacturer of a number of products that were similar to those made by Blaser and he considered Conoco to be one of Blaser's competitors. On 20 March 2002, Mr Niederhäuser sent Mr Lee an e-mail asking for details of its engagement with Conoco. Mr Lee replied two days later and gave details of the Conoco products PAE was distributing. He assured Mr Niederhäuser that Conoco products were complementary to Blaser's metalworking fluids and that PAE did not see any conflict of interest or cause for confusion for the customers. Mr Niederhäuser was still upset because he considered that one of the products mentioned was a cutting oil which fell squarely within Blaser's distribution agreement. Also this was the first time that PAE had mentioned anything about dealing in new products including Conoco's and the explanation was given only upon Mr Niederhäuser's questioning. PAE had failed to inform Blaser of the distribution agreement with Conoco before it had been concluded. Further correspondence followed between Mr Niederhäuser and Mr Lee. Mr Niederhäuser informed Mr Lee that since PAE was dealing with coolants and cutting oils as well as greases for Conoco, Blaser saw a potential for conflict. Mr Lee sought to reassure Blaser by stating that the coolant was a radiator coolant and not a metalworking coolant. Further, as regards the cutting oils, Blaser's cutting oils were not for export and were not covered by the distributorship agreement with PAE and therefore not part of the non-competition clause. Mr Lee stated that PAE had no problems dropping the Conoco cutting oils if Blaser wanted PAE to distribute Blaser cutting oils.

21 Mr Niederhäuser's concerns were not assuaged by Mr Lee's explanations. He considered that discipline in the exclusivity of Blaser's distributorships had to be maintained in its various markets, especially an important one like Singapore. He stated that the management of Blaser could not tolerate PAE being given exclusive rights to distribute Blaser products in the region while at the same time it was distributing products made by competitors. If PAE was not sincere about observing this fundamental principle while acting as Blaser's distributor, somebody else would be. Blaser's management decided to terminate the distributorship agreement and issued a letter to this effect on 14 June 2002. This letter was brought to Singapore by Mr Niederhäuser when he arrived here on 25 June 2002.

22 According to Mr Chia, sometime in April 2002, Mr Niederhäuser informed him that the Blaser board had decided to end their relationship with PAE. They had also decided to start a Blaser branch in Singapore and to ask Mr Chia to run the new operation. Blaser wanted to serve its customers directly as it had found it difficult to rely on third parties. Mr Chia knew that his job with PAE would come to an end once the Blaser distributorship was terminated. If he did not accept Blaser's offer, he

would still have to look for another job. Several days later, he accepted Blaser's offer. In early May 2002, Mr Niederhäuser came to Singapore to set up the new company. He asked Mr Chia to be the local director of Blaser Singapore. The latter agreed.

23 In the meantime, blissfully ignorant of these developments, PAE had been exploring the possibility of selling Blaser's neat cutting oils. These were not covered by the distributorship agreement. In January 2002, Mr Lee was told that Blaser was coming up with a wider range of neat cutting oils to be sold at competitive prices. PAE then conducted a survey among customers and discovered that these prices were competitive. James Choo talked to prospective clients about the Blaser neat oils and by May/June 2002, he reported to Mr Lee that there was a big market potential for these items. Various customers had agreed to try them out. If the trials were successful, at least 136 drums of oil would be sold. Mr Lee planned to present the demand for neat cutting oils which PAE had created in the market to Mr Niederhäuser when they next met. On 10 June 2002, Mr Niederhäuser informed PAE that he would be arriving in Singapore on 24 June and would like to have a meeting on 26 June to discuss various topics including a review of the first half of 2002, the outlook for the second half of the year and strategies of PAE and Blaser.

Events of 26 June 2002

24 On 26 June, Mr Chia picked Mr Niederhäuser up at his hotel and they arrived together at PAE's office at about 9.45am where they met Mr Lee and James Choo. To the consternation of Laurent Lee, Mr Niederhäuser announced that Blaser was terminating the distributorship agreement and handed the 14 June letter to him. It stated that the distributorship was terminated with immediate effect based on Art 24 of the agreement. This article had been violated and Blaser was terminating the agreement based on "extraordinary circumstances". According to Mr Lee, Mr Niederhäuser told PAE that the reasons for Blaser's decision were that PAE was not happy working with Mr Chia, the sales were dropping each year and PAE was now carrying Conoco which was Blaser's competitor. Mr Niederhäuser was adamant about terminating the distributorship and refused to go into further discussions. PAE was informed that Blaser was setting up its own Singapore office and that Mr Chia would be working for Blaser Singapore. Mr Niederhäuser then asked PAE to return all Blaser stock-in-hand to him. He wanted a further meeting in the afternoon to ascertain the value of the remaining stock. At 11.45am, Mr Niederhäuser and Mr Chia left PAE's office together. Before leaving the office, Mr Chia handed Mr Lee his letter of resignation dated 26 June 2002.

25 After they left, Mr Lee checked Blaser's website and discovered the distributors for Singapore and Malaysia had been changed to a company known as Blaser Swisslube (S) Pte Ltd. He saw that this company had been incorporated on 9 May 2002 and that Mr Chia and Mr Niederhäuser were its two directors. He also found out that various files relating to the sale of Blaser products had been removed from Mr Chia's cabinet in the office. At 4.00pm that afternoon, Mr Chia returned with Mr Niederhäuser. Mr Lee asked Mr Chia to clear his desk, to return PAE's mobile phone and pager and to wait downstairs while Mr Lee spoke with Mr Niederhäuser. Mr Niederhäuser was informed that the stock would be released to him in exchange for payment. The release took place the next day in the afternoon.

The claim

26 This action was started in October 2002. The amended statement of claim contains three discrete causes of action. The first arises under the indemnity agreement signed by Mr Chia. It is averred that he is responsible to indemnify PAE in the sum of $23,224.44 being the amount of the net loss incurred by the Division in the financial year from January to December 2001. The second is for breach of cl J of Mr Chia's contract of employment which required him to give four weeks' notice of

termination of employment. The allegation is that he failed to give such notice and, accordingly, is liable to PAE for his salary in lieu of such notice. This claim is for $6,496. The third cause of action is the most substantial one. It is asserted that Mr Chia breached his express and implied obligations under his contract of employment including his duty of good faith and fidelity towards PAE and that as a result, PAE has suffered loss and damage and/ or loss of opportunity.

27 Mr Chia denied that he is liable to PAE as alleged on various grounds. He asserted that the distributorship agreement was terminated because PAE had marketed a competitor's products without informing Blaser as it was required to do by the agreement. He asserted also, that he had always acted in the best interests of PAE. Mr Chia also stated that he had been willing at all times to serve out his notice period and that he had only stopped work on 26 June 2002 because he had been asked to do so by PAE. He counterclaimed for his salary for June 2002 which he averred had not been paid by PAE.

The issues

Claim under the indemnity agreement

28 PAE's case is that by the indemnity agreement of 29 December 1998, Mr Chia agreed to indemnify PAE for all losses and expenses incurred by PAE in the setting up of, and the ongoing operational costs and expenses of, the Division for a period of 18 months from 1 December 1998 in the event that:

(a) Mr Chia resigned or had his employment terminated during the 18 months;

(b) Blaser terminated the distributor agreement; or

(c) the Division suffered "a loss after operation for a period of 18 months from setting up".

PAE maintains that this indemnity was, at the expiry of the first 18 months after the Division was set up, automatically extended for a further 18 months and it therefore covers the loss of $23,224 that the Division sustained in the financial year 2001.

29 Mr Chia's position is two-fold. First, the clause that purports to extend the validity period of the indemnity is obscure and incapable of any definite or precise meaning. The court cannot attribute to the parties any particular contractual intention or even impute that the contracting parties had the same intention. The performance to be rendered by each party was not reasonably certain and the indemnity is too vague to be enforced. Secondly, even if the court was able to sever the meaningless portion of the indemnity from the rest of the document, the indemnity itself would only be valid for a period of 18 months and Mr Chia could not be made liable for the losses sustained by the Division in 2001.

30 The material portions of the indemnity agreement are as follows:

> … I, Chia Wah Siang (Singapore NRIC No: S1364376H) hereby AGREE AND WARRANT to PAE that in consideration of PAE incurring such sums and costs in starting up and maintaining the Division (such sums including my salary drawn from the Division's accounts), *I shall hold PAE fully indemnified* from all losses and expenses incurred in the setting up, and on-going operational costs and expenses including but not limited to legal costs on an indemnity basis, to the Division *for a period of 18 months (the said period) from 1st December 1998* (the date of setting up) should the following arise:-

(a) my resignation or termination of my employment services from PAE during the said period;

(b) the termination or withdrawal of the exclusive distributorship agreements by the Principals;

(c) the Division and/or overseas subsidiary company(s) suffers a loss after operation for a period of 18 months from setting up.

…

I also agree to the interest costs charged to the Division for the start-up costs and monthly overheads incurred. The agreed interest rate used in the computation will be Singapore banks prime rate plus two (2) percent.

It is further agreed that this indemnity shall take effect from the start up date of the Division and shall automatically be renewed for the similar duration after 18 months unless terminated, varied or extended by both parties in writing.

[emphasis added]

31 The first issue is what the duration of the indemnity agreement is. There are two portions of the document which are relevant to this issue. I have emphasised them in the excerpt quoted above. There is no difficulty about the first portion. It is clear from the wording "I shall hold PAE fully indemnified … for a period of 18 months … from 1st December 1998" that the indemnity was intended to cover the 18-month period from 1 December 1998 until 31 May 2000. The difficulty arises with the second portion, the last paragraph of the excerpt from the indemnity. This is what has been referred to as the "extension clause". Mr Chia contends that it is totally vague because on the one hand, it seems to state that the "renewal" of the indemnity is automatic whilst on the other hand, it says that the indemnity is to be extended "by both parties in writing". Mr Chia said in evidence that he was under the impression that for the indemnity to be extended beyond the initial 18 months, such extension had to be agreed to by both parties in writing. That evidence is not, in my view, relevant to the issue of the interpretation of the agreement. The indemnity agreement was signed by Mr Chia and it was clear from his testimony that he was aware of the presence of the extension clause. His subjective understanding of the clause is not determinative of the issue. It has long been established that in construing contractual provisions, the court takes an objective view based on the language used and is not guided by the subjective understanding of either party unless there is clear evidence that the agreement was to be interpreted in accordance with a particular subjective intention.

32 PAE's position is that the extension clause is clear. Under the first half of that clause, the indemnity is to take effect from the start-up date of the Division for a period of 18 months and under the second portion of the clause, after 18 months, the indemnity is to be automatically renewed for another period of similar duration. The total duration of the indemnity is therefore 36 months. The words "unless [the indemnity is] terminated, varied or extended by both parties in writing" do not cut down the certainty of the clause. They simply state the obvious *ie* that the parties may bring to an end any agreement, fixed term or otherwise, by mutual consent in writing. PAE sought support from *Parfums Rochas SA v Davidson Singapore Pte Ltd* [2000] 2 SLR 148. There the question arose as to the duration of a distribution agreement appointing the respondents as distributors for an initial period of three years plus an "automatic renewal for a period of two years". It was held that the agreement was for a period of five years. Tan Lee Meng J who delivered the judgment of the Court of Appeal, explained (at [40]):

> Much turns on the meaning of "automatic renewal". The appellants contended that the phrase "automatic renewal", as used in the correspondence, must be taken as meaning that the distribution agreement would be renewed for a further two-year period if the respondents substantially complied with their other contractual obligations in the first three years. However, the correspondence does not establish such an intention. If the appellants had wanted the contract to run for only three years unless the respondents fulfilled their obligations in the first three years, they should have made this clear in their correspondence with the respondents. In view of this, the appellants' argument, which contradicts the plain meaning of "automatic", cannot be countenanced. It follows that the learned trial judge was correct in assuming that the distribution agreement was for a period of five years.

PAE argued that in the same way, the phrase "automatically be renewed" in the indemnity agreement meant that the actual duration of the agreement was 36 months as it operated to ensure that on the expiry of the first 18 months, the agreement continued, without pause and without the need for any action by either party, for a further 18 months.

33 Whilst the indemnity agreement has not been drafted as well as it could have been, I do not think that it is so badly worded as to be meaningless or unintelligible. On the contrary, the meaning of the extension clause is clear. I accept PAE's submissions that the agreement was for a duration of 36 months because the automatic renewal provision in the extension clause had the effect of extending the initial duration without the need for any further agreement or action by either party. I do not consider that the words "unless [the indemnity is] terminated, varied or extended by both parties in writing" cut down the certainty of the clause. What they mean is that whilst the indemnity is to last for 36 months, the parties are free to terminate it early or to change its terms or to even extend its duration beyond the 36th month. In a commercial situation, the court does its best to give a meaning to the words used by the parties as it endeavours to uphold rather than to cut down commercial arrangements. In this case, it does not require any straining of the language to give meaning to the extension clause.

34 Having found that the agreement was to last 36 months, does this help PAE? That period started on 1 December 1998 and ended on 30 November 2001. PAE has claimed the sum of $23,224.44 as being the net loss incurred by the Division between 1 January 2001 and 31 December 2001. There are two points to be considered here. First, the indemnity does not stretch beyond 30 November 2001. On the face of it therefore, Mr Chia cannot have agreed to indemnify PAE for the full amount of $23,224.44 as some part of this amount must relate to losses incurred in December 2001. PAE has not given me any figures which I can use to calculate what its loss, if any, was for the first 11 months of 2001. On that basis alone, PAE cannot get judgment for $23,224.44. But it has a bigger problem.

35 The second issue is whether Mr Chia, in fact, undertook to indemnify PAE for losses incurred after the first 18 months. To answer this question, one must go back to the beginning of the agreement where his obligations were set out. There, he agreed to hold PAE indemnified from first, "all losses and expenses incurred in the setting up" of the Division and secondly, "on-going operational costs and expenses" of the Division, if, during the specified period, one of three events occurred. The first was his resignation from PAE. The second was the termination of the distributor agreement by Blaser. The third was if "the Division … suffers a loss after operation for a period of 18 months from setting up". The triggering event in this case can only be the third one. My problem here is that I do not understand the meaning of "suffers a loss after operation for a period of 18 months from setting up". Does it mean that the Division must suffer a loss for the first 18 months of its operation? Alternatively, does it mean that the loss is only relevant if it was incurred more than 18 months after the Division was set up? If the first interpretation is given to the provision, then, since the Division

not only incurred no losses during its first 18 months but instead made profits for both 1999 and 2000, no claim is maintainable. It is only if the second interpretation is the correct one that the claim is maintainable. Since the provision is capable of being interpreted in two ways, it is ambiguous. The established rule is that where there is an ambiguity in a contractual provision, it is construed in the manner that is less favourable to the person who drafted it. In this case, the provision was drafted by PAE. Giving it the *contra proferentem* treatment, I construe it as meaning that the losses claimed for had to be incurred during the first 18 months of operation. As the loss of $23,224.44 was incurred during the period that began after the Division had operated profitably for 25 months, in my view, it is not covered by the indemnity given by Mr Chia. Accordingly, the claim under the indemnity must be dismissed.

Claim for breaches of duty

36 In its final submission, PAE asserts that Mr Chia was in breach of the following obligations which he owed them:

(a) an obligation to grow the business and increase revenue;

(b) an obligation to work diligently, adhere to working hours and serve PAE exclusively; and

(c) a fiduciary duty and a duty to serve PAE faithfully.

I will consider the first two together and then the third.

Obligations to grow the business and increase revenue and to work diligently and exclusively for PAE

37 It was an express term of the contract of employment that Mr Chia would provide sales, marketing and product support functions to the Division in respect of Blaser products. It was also stated that he was accountable for the Division's profit and loss functions and its long-term growth objective. In the contract, Mr Chia's working hours were stated to be from 8.30am to 5.30pm from Monday to Friday with a one-hour lunch break and on Saturday from 8.30am to 1.00pm. He was also prohibited from being employed in any capacity by any other person, firm, organisation or government department without the prior written approval of PAE. PAE also submitted that it was an implied term of the employment contract that Mr Chia would work diligently and serve PAE faithfully.

38 PAE asserted that at the end of 1998, Mr Chia and his ex-colleague, Richard Lim, were unhappy with Taiyo Kikai and made plans to leave together taking with them the Blaser distributorship. In October 1998, both met Mr Lee and his father, Mr Lee senior, and persuaded them to enter into a business venture by taking up the Blaser distributorship. During that meeting, the remuneration packages of Mr Lim and Mr Chia were discussed and agreed upon based on the existing cost of Blaser products and their selling prices as well as the current and anticipated business volume. PAE averred that Mr Chia represented to it that at that stage, he could achieve an annual turnover of $1.5m and that he was working towards increasing the turnover to $3m within the next five years. After the meeting, a core business plan on the proposed distribution of Blaser coolants was sent by Mr Lim to PAE. This business plan stated that the 1999 turnover would be $1.6m. Subsequently, during a meeting of the Division held in January 1999, Mr Chia commented that the sales performance of $130,000 for one month was an average turnover and could be improved. This showed that he considered that yearly sales of at least $1.56m ($130,000 x 12) were achievable.

39 PAE further asserted that Mr Chia and Mr Lim had represented that they would work to increase revenue by developing major customers. PAE pointed out that it would not have entered the

venture on the basis of what it believed to be the then current annual turnover alone. This was because an annual turnover of $1.5m would give PAE net annual profits of only $42,000 (a return of 4.3%) bearing in mind the agreed remuneration packages of Mr Chia and Mr Lim and the agreed overheads of the Division. Blaser itself also expected new customers to be developed once PAE took over the distributorship. Mr Niederhäuser indicated in his letter to PAE that the strategy to be employed to achieve its targets would be to concentrate on potential customers and enlarge Blaser's market share in Singapore and Malaysia. However, the development of new customers required substantial marketing efforts to be made. Mr Chia himself admitted this during cross-examination. PAE complained that Mr Chia failed to make diligent efforts to develop new customers.

40 Mr Chia's position was that he had not made any representations to PAE. He said that while he was in Taiyo Kikai, he had to report to Mr Lim who was working in a related company. Mr Lim had access to documents relating to the Blaser distributorship. Any representations would have been made by Mr Lim. Mr Lee had himself admitted that during his first meeting with Mr Lim, the latter had mentioned that the distributorship sold 60 to 80 drums of Blaser products per month, that the average sale price per drum was $1,300 to $2,000, that the profit margin was 30% to 40% and the turnover was $1.5m. PAE also admitted that the sales forecast was produced by Mr Lim and not by Mr Chia.

41 Mr Chia asserted that he did not make any representations to PAE. When he met PAE in November 1998, he only discussed his remuneration. He had no involvement in the distribution of Blaser products by PAE as he was then only an employee-to-be and the ultimate decision had to be made by the management of Blaser. He submitted that PAE had not proven that he had made any of the alleged representations in relation to the volume of Blaser transactions and the expected profit margin. All that had happened was that he had been asked about the prices of Blaser products and the estimated usage by customers. PAE had indulged its own fantasies by working out the estimated current and future turnover. PAE had admitted that during the meetings in November/December 1998 with Mr Niederhäuser, it had not discussed payment terms, the volume of stock to be kept on hand, the purchase price of the products or the estimated sales volume.

42 Mr Chia also submitted that the evidence showed that PAE did not have detailed discussions on sales volume or prices. Had he made the alleged representations and PAE had considered the same important in its decision to enter into the distributorship agreement, it would have obtained more information from Mr Niederhäuser. PAE's explanation for not discussing anything substantial with Mr Niederhäuser was not credible. That explanation was that since it had already obtained an agreement from Mr Lim and Mr Chia that the two of them would indemnify PAE against any loss, PAE did not need to discuss anything substantial with Mr Niederhäuser. Mr Chia argued that the indemnity agreement was a secondary agreement from a secondary source and it would be more believable to expect PAE to be interested in getting the sales figures from Blaser itself than to fall back on an indemnity. All this went to show that PAE did not rely on the alleged representations even if the same were made and that PAE had no valid cause of action against Mr Chia in relation to the representations.

43 Having considered the evidence, I accept PAE's version rather than Mr Chia's in respect of what occurred during the preliminary meetings before the distributorship agreement was entered into. In my view, Mr Chia was an active participant in the negotiations with PAE. He was seeking a new distributor for Blaser products and he was not simply a would-be employee who had no say in what was going to be done. It is clear that, since 1981, Mr Chia had been the person who had distributed Blaser products in the region although the official distributorship had been held by two different companies in succession. Mr Lim did not work for the then current official distributor, Taiyo Kikai. The person who knew Blaser's customers, Blaser's prices, the selling prices to the customers and the turnover in the region was Mr Chia. Mr Chia lied in his evidence about not having met PAE prior to

November 1998. He was forced to admit under cross-examination that he had met PAE in October 1998. He also had to admit that he had given Mr Lee the average consumption of coolants of each major customer and the unit prices of such coolants. Mr Chia had asserted that it was Mr Lim who contacted him and suggested PAE as the potential replacement distributor for Blaser products and that his role was only to liaise between Blaser and PAE. In his affidavit, he gave the impression that he knew nothing of the discussions between Mr Lim and PAE except what Mr Lim had told him. In court, however, he had to admit that he was present at the meeting at which various figures on sales and turnover were given to PAE. He subsequently agreed that at that meeting of 14 October 1998, PAE had been told that the annual turnover of Blaser products was $1.5m. He also had to admit that even if all the representations had been made by Mr Lim, as he asserted, he had not spoken up to contradict Mr Lim.

44 I accept, therefore, that when PAE took on the distributorship and employed Mr Lim and Mr Chia, the latter were intended to be more than simple employees. From the beginning, both of them were entitled to a share in the profits of the Division. Once Mr Lim left, Mr Chia's share of profits was increased. PAE had gone into the agreement with Blaser on the basis of the figures and projections supplied by Mr Chia and Mr Lim. The remuneration packages given to each of them were also influenced by such figures. On the other hand, the representations did not become terms of the contract. There was no express sales target set out in the contract which Mr Chia was supposed to meet. Whilst Mr Chia did not have a duty to ensure a specific level of sales, it was an express term of the contract that he would develop the business of the Division and be accountable for its long-term growth. Therefore, he was under an obligation to make diligent efforts to achieve these aims. I also note here that PAE has not framed its case as one based on misrepresentation. Accordingly, the finding on the representations does not, in itself, lead directly to a finding of damages simply because the forecast figures were not met.

45 PAE asserted that Mr Chia had failed to make diligent efforts to develop major new customers. In court, it was evident that Mr Chia was aware that substantial effort was required to obtain new customers because they had to be persuaded to change from the existing products used to Blaser products. Mr Chia had explained that in order to develop a new customer, the first step would be to do a presentation to the potential customer to determine whether Blaser's products were useful in the customer's business. Once that was established, the customer had to be persuaded to give Blaser's product a try. In this connection, the salesman had to be familiar with the machines used by the customer and the manufacturer's recommendation for such machines. Much time therefore had to be spent obtaining this information. For a customer to agree to a trial of a Blaser product, the customer would have to be prepared to drain off the competitor's soluble oil from the machines allocated for the trial and then fill those machines with Blaser coolant. Personnel would have to be assigned to monitor the trial process.

46 PAE's submission was that given the amount of effort that was required to develop new customers, Mr Chia had fallen far short of the standard required. He had not come up with sales strategies and growth plans for the Division despite repeated requests from PAE. Further, the daily sales activity reports which he had completed from January 2001 onwards showed that he had not approached some companies which he himself had listed as major potential customers. Further, out of his 315 recorded visits to customers only six were to potential clients and these appeared to be half-baked efforts with no proper follow-up. PAE complained that the drop in revenue of the Division was caused by Mr Chia's failure to increase major customers. In his first year (1999), Mr Chia generated sales revenue of approximately $1.16m from the sale of Blaser's coolants. More than 90% of this revenue came from five major customers. Revenue declined thereafter. In 2000, the gross revenue was $883,159.92 and in 2001, it was $743,944.59. Mr Chia agreed in court that the turnover fell in 2000 and 2001 because no new major customers were added.

47 There was also a litany of complaints about Mr Chia's working habits. He was said to be laid-back. He was habitually late for work. He spent only a few hours in the office in the morning and even then much of his time was spent in the warehouse. He rarely returned to the office in the afternoon to catch up on paperwork after making his customer visits. He was often distracted. He apparently carried on other business. He often received telephone calls which he would rush out of the office to answer. PAE asserts that Mr Chia behaved this way because his rice bowl was secure. He had been the sole Blaser representative for coolants in Singapore and Malaysia since 1981 and if he left PAE's employ, the distributorship would be terminated. After he left PAE's employ, it was discovered that in breach of his contract of employment, Mr Chia had been a shareholder and a director of a company known as Quantum Canary Pte Ltd while still an employee of PAE.

48 Mr Chia submitted that his behaviour had not fallen below the standard required of a reasonable employee and therefore it could not be said that he had breached the duty that he owed his employer. His job was to sell metalworking fluids to industrial customers in Singapore and Malaysia and three out of the five major customers he serviced were in Malaysia. It was a requirement of his job that he visited customers' factories frequently not only to keep in contact with them but also to attend to their queries and any difficulties that they might be experiencing with their machines. He had therefore had to make frequent visits to Johor and very often he had only been able to return to Singapore at night due to the evening jam at the Causeway. His job had not allowed him to spend a great deal of time in the office. In fact, less than half his time could be spent in the office. PAE was taking inconsistent positions. On the one hand, it stated that it expected Mr Chia to make customer visits and to increase sales and on the other hand, it went to the extent of timing Mr Chia when he made visits to Malaysian customers. PAE was holding him to too high a standard as it was inherently difficult for a person in a sales job to predict and plan his time as the length of time taken to have meetings and conversations with customers and to troubleshoot the problems experienced by the machines was unpredictable.

49 Mr Chia contended that he was not asked specifically to formulate strategies and plans to increase the Division's sales. In January 1999, Mr Lee senior had stated that PAE should focus on existing customers due to weak market conditions. Mr Chia also denied being involved in another business in breach of his contract of employment. He had been only a nominal shareholder and director of Quantum Canary and had taken these positions at the request of Mr Richard Lim who wanted to run a business but could not do so openly as he was an undischarged bankrupt. The company had ceased operations six months after Mr Chia's name was used and no prejudice or loss had been caused to PAE as Mr Chia had not been involved in the operations of Quantum Canary.

50 As for the earnings of the Division, Mr Chia pointed out that he had made gross profits for the Division of between $417,000 and $260,000 during the years from 1999 to 2001. The economic conditions in the region were not bright during this period and most firms' profit margins were adversely affected by poor economic conditions. PAE had not proved that the fall in its profits had been caused by the alleged misbehaviour of Mr Chia. Whilst PAE consistently alleged that Mr Chia had not made sufficient effort to develop new customers, it had failed to mention that Mr Lee had not assisted Mr Chia in his marketing efforts as he was supposed to have done. Mr Lee had admitted in court that after the first year, his visits to customers fell substantially. This fall affected Mr Chia because he then had to attend both to existing customers and do sales presentations without support.

51 Except in one particular instance, the evidence adduced by PAE does not, I think, establish that Mr Chia fell below the reasonable standards of diligence which an employer can expect from an employee. Whilst there were many complaints about him being laid-back and involved in other matters, I note that much of the evidence for this came from the testimony of James Choo. Mr Choo

joined the company only in February 2002 and by that time, if I accept PAE's case, Mr Chia was disaffected and actively planning his exit from PAE. The complaints made about his behaviour before that time were not documented. The only evidence of dissatisfaction, apart from a comment in an e-mail that in discussions between them, Mr Niederhäuser and Mr Lee had agreed that Mr Chia was not aggressive and lacked general discipline, was the institution of the requirement that Mr Chia fill up the daily activity reports. Mr Chia was not, however, warned that he was ill-disciplined or that he was required to keep strictly to office hours. There was much force in Mr Chia's argument that the nature of his job required him to be out of the office for long periods of time and that his marketing efforts required a flexible schedule.

52 The one area where I consider PAE has proved its case is the area of development of new business. It is clear from the activity reports filed by Mr Chia that he did not put the effort needed into developing new clients. He seems to have preferred focusing his efforts on maintaining the relationship he had with the existing clientele. Mr Chia could have divided his efforts more evenly. He also could have asked for more help if he required it. He was not aggressive enough. When he entered PAE's employment, he came with a list of potential customers that Blaser itself wanted him to target. Yet, he made little or no effort to develop a relationship with these companies. No doubt it would not be easy to win over any of them to Blaser products, but Mr Chia had an obligation to do his best in that regard and not only did he not do his best, the evidence shows that he did hardly anything to discharge that obligation. That was a significant breach of his duty as an employee. As regards the alleged involvement in other businesses, the only hard evidence of that was the search report showing that he was an officer or shareholder of Quantum Canary. There was no evidence, however, that he was actively involved in that company's business. It was a breach of his contract to be an officer of that company but, unless such involvement can be shown to have had an adverse impact on his work for PAE, that breach would be only a technical one.

Breach of the employee's duty of fidelity

53 It was PAE's case that from 2001, a year before he actually tendered his resignation, it was Mr Chia's plan to leave PAE. At that time, PAE was beginning to put pressure on him to perform better. It was chasing him to produce market strategies which would increase revenue. It made him account for his time by filling up the sales activity reports. He was aware that PAE had, on several occasions, tried to persuade Blaser to delete Art 24.3 from the distributorship agreement. Mr Chia must have been unhappy in 2001. This dissatisfaction could only have increased when in early 2002 he was refused his request for a thirteenth-month bonus and was informed that PAE wanted him to indemnify it against the loss of $23,224.44 that the Division had sustained in 2001. PAE submitted that Mr Chia had carefully planned to leave PAE taking the distributorship agreement with him. PAE considered that Mr Chia had persuaded Blaser to leave PAE and to set up its own subsidiary company in Singapore to handle the distribution of its products in the region. In this connection, Mr Chia had plotted with Blaser so as to keep PAE in the dark until everything was ready for the new company to take over the business. He had been in breach of his duty of fidelity to PAE by persuading Blaser to move and by planning and implementing the move while he was still working for PAE.

54 Mr Chia's position was that PAE had breached the distributorship agreement with Blaser by distributing the products of a competitor. That was the cause of the termination of the Blaser distributorship. He further submitted that PAE had not proved, on the balance of probabilities, that it was Mr Chia who planned and engineered the termination in breach of his duties as an employee.

55 Mr Chia's submission is that the evidence should be interpreted as follows. The evidence was that the distributorship agreement between Blaser and PAE was primarily for the purpose of distributing coolants or metalworking fluids. In January 2002, PAE had bought a substantial quantity of

Conoco's metalworking fluids. In March 2002, Mr Niederhäuser discovered that PAE was distributing Conoco products and demanded that Mr Lee explain why PAE had not informed Blaser of this earlier. He also asked for more details of the Conoco distribution. When confronted, PAE admitted that cutting oils were distributed. Mr Chia submitted that this was clearly a breach of the distributorship agreement. PAE went on to extend the "trial period" of Conoco products to the end of 2002 despite Mr Niederhäuser telling Mr Lee on 2 April 2002 that Blaser saw a "potential conflict". While, technically, PAE did not need to obtain permission from Blaser to sell products that were not similar to those sold for Blaser, PAE had a contractual obligation to inform Blaser of the new distributorship so that Blaser could make an informed assessment about the relationship. PAE had failed to abide by this term. Further in reply to Mr Niederhäuser's e-mail of 2 April 2002, Mr Lee stated that PAE would drop the Conoco products if Blaser would sell its neat oils through PAE but "the decision must come from Blaser first". This was commercial blackmail. In any event, it was a challenge to Blaser and if Blaser did not respond to it appropriately, Blaser would lose its credibility in relation to PAE.

56 Mr Chia submitted that the foregoing constituted a fundamental breach of the distributorship agreement which Blaser took very seriously. Blaser's board came to a collective decision to terminate the agreement with PAE and to distribute Blaser products through Blaser's own subsidiary in Singapore and to engage Mr Chia to do this. PAE itself had admitted through the evidence of Mr Lee that Mr Niederhäuser had specifically cited the distribution of Conoco products as a reason for the termination of the distributorship.

57 There is no doubt that technically PAE was in breach of the distributorship agreement when, in November 2001, it signed an agreement with Conoco to distribute Conoco products even though the products to be distributed did not include Conoco's cutting oils. Under Art 4.1 of the Blaser distributorship agreement, PAE undertook not to act as a distributor for third parties which produced or distributed products that were similar or identical to those made by Blaser. Under Art 4.5, PAE had to inform Blaser if it wanted to act as a dealer for other products made by third parties even though such products were not similar or identical to the Blaser products. PAE did not inform Blaser of its intentions prior to signing the Conoco agreement nor even thereafter. However, it is not clear from the distributorship agreement that a breach of Art 4 by PAE would entitle Blaser to terminate the agreement. Article 4.4 stated that if there was a violation of the non-competition provisions of Art 4, PAE would owe Blaser liquidated damages. The formula for calculation of liquidated damages was also stated in Art 4.4. As far as termination of the agreement was concerned, this was provided for in Arts 23 and 24. Article 23 provided for termination by three months' written notice to be given at the end of any month. Under Art 24 the agreement could be terminated with immediate effect if what was called "an extraordinary circumstance" existed. Articles 24.2 and 24.3 defined the situations which would be considered to fall within the term "extraordinary circumstance". Violation of the non-competition clause was not one of those circumstances. Thus, even if there was a breach of Art 4, Blaser would not be entitled to put an immediate end to the distributorship agreement. Therefore, was the existence of the Conoco distribution agreement merely a pretext for the sudden termination of the distributorship agreement? PAE's submission was that it was.

58 First, as PAE pointed out, Mr Niederhäuser admitted in cross-examination that neither he nor Blaser was aware that PAE had bought Conoco's coolants when Blaser terminated the distributorship on 26 June 2002. This was therefore not the real reason for Blaser's termination. Mr Niederhäuser's subsequent explanation to the court that PAE's distribution of Conoco products was a "short step" from a breach of the Blaser distributorship since Conoco manufactured coolants was also untenable given his failure to issue an ultimatum to PAE to drop Conoco products. PAE had responded promptly to each e-mail from Mr Niederhäuser in order to address Blaser's concerns and had indicated on two occasions that it was willing to drop the Conoco line. Mr Niederhäuser had claimed in his affidavit of evidence-in-chief that he had requested PAE to stop distributing Conoco's products but during cross-

examination he admitted that he had not made such a request. When he was asked how he had responded to what he called PAE's "blackmail" in stating that it would drop Conoco's line if it could sell Blaser neat oils at competitive prices, he was evasive. He said that he could not remember whether he mentioned that Blaser could not reduce the price of its neat oils. When asked specifically whether he had told Mr Lee that PAE was in the wrong, that it should not give Blaser conditions, and that it should drop Conoco, his answer was he had not.

59 Second, there was Mr Chia's own conduct in relation to Conoco. It should first be noted that in his affidavit evidence, Mr Chia gave the impression that he had very little to do with the Conoco distributorship. He said that when Conoco's representative had called him to discuss the possibility of a working relationship, he had redirected Jason Wong to Mr Lee. In April 2001, Mr Lee arranged for a meeting with Jason Wong and requested Mr Chia to attend it. The discussion centred on distributing Conoco products. Mr Chia was not comfortable with this proposal as implementing it would be contrary to the Blaser distributorship agreement. Mr Lee then asked Mr Chia to do a market survey on the viability of selling Conoco's products. About a week later, Mr Chia told Mr Lee that the Conoco distributorship had little market potential and would lead to trouble with Blaser. Mr Lee brushed aside his concerns and Mr Chia heard nothing further about the Conoco project thereafter. It was kept secret from him. In November 2001, he learnt for the first time that PAE had commenced selling Conoco products and that this was being done by Mr Lee with the assistance of James Choo. Mr Chia knew even then that PAE was heading for trouble with Blaser. As an employee who had already told Mr Lee in no uncertain terms that dealing in Conoco products was not worth the risk, however, there was nothing more that he could do when PAE's management insisted on selling them. At no point did he tell anyone in Blaser that Conoco's products were being sold by PAE as he was aware of the sensitivity of the issue.

60 PAE's position, however, was that Mr Lee and Mr Chia had been in discussions with Jason Wong from the second quarter of 2000 onwards. PAE wanted to provide a one-stop solution to its existing Blaser customers' lubricant needs by distributing Blaser coolants alongside Conoco's lubricants. Mr Chia was to use his experience and goodwill with his existing customers to market Conoco's lubricants. This plan would benefit Blaser by enabling it to compete more effectively with competitors like Castrol who offered a full range of products to their customers. According to PAE, in May 2001, Mr Chia arranged for a sales visit by Jason Wong, Mr Lee and himself to one of his existing Blaser customers in order to present Conoco's lubricants to the latter. Mr Chia on his own also promoted Conoco products to at least three Blaser customers between April 2001 and January 2002. These promotional visits were recorded in his daily sales activity reports. PAE relied on testimony from Jason Wong to the effect that Mr Chia not only knew about the Conoco distributorship but was also seemingly enthusiastic about it and was fully involved in the discussions with Conoco. On balance, I prefer the evidence of Mr Lee and Mr Wong on this point to that of Mr Chia. If Mr Chia did indeed have reservations about the effect of the Conoco distributorship on the relationship with Blaser, he kept them to himself. As far as PAE was concerned, he professed to support the idea of doing business with Conoco even though his marketing efforts proved to be disappointing to PAE.

61 After Mr Niederhäuser informed PAE that he had found out about its relationship with Conoco, the parties exchanged several messages. PAE endeavoured to reassure Mr Niederhäuser that the Conoco products were complementary to Blaser's products and were not in competition with the latter. This correspondence went on from April to 6 May 2002. Mr Niederhäuser admitted that at no time during that period did he warn Mr Lee that PAE was in danger of losing the distributorship. When pressed on this matter, Mr Niederhäuser said that Mr Lee had been the one to say that if Blaser was not happy with PAE, it could leave. That evidence was only given in court. It did not appear in his affidavit and I do not accept it as being true as, if such a thing had been said, it would have been trotted out at a much earlier stage as further justification for the termination of the distributorship.

Mr Niederhäuser remained silent after PAE offered on 6 May 2002 to drop the Conoco line altogether and in his e-mail of 20 May 2002, he asked PAE about its sales experience in respect of Conoco's hydrocracked oil. He then went on to say that Blaser was restructuring its neat oils, and prices and leaflets would not be available until the end of June. In the meantime, PAE could carry out its marketing study and report to Blaser on the same. That e-mail certainly gave PAE a misleading impression. There was nothing in it to indicate that Blaser was still upset and was intending to terminate the distributorship. Yet, according to the testimony Mr Niederhäuser gave me, the board of Blaser had decided to take this course around 22 April 2002. Mr Niederhäuser was therefore being consciously insincere and misleading in his subsequent message of 20 May 2002.

62 If Mr Niederhäuser is to be believed, he first spoke to Mr Chia about the Conoco distributorship only in April 2002. He stated that it was after he could not get satisfactory answers from Mr Lee about Conoco that he called Mr Chia and asked what was going on with Conoco. Mr Chia told him that Conoco products were in PAE's warehouse but that he himself was not in charge of them and he was simply doing his job in relation to Blaser coolants. Mr Chia agreed with Mr Niederhäuser that the sale of the Conoco products was a breach of the Blaser agreement. He did not explain that the sales were to be of lubricants (the hydrocracked oil) so that PAE could provide a one-stop shop to customers of Blaser soluble oil. PAE submitted that Mr Niederhäuser must have spoken to Mr Chia much earlier than April 2002. I agree. Mr Niederhäuser's version that he only found out about Conoco around 20 March was not plausible. There was no doubt that he and Mr Chia were close. They had been in constant contact about marketing of Blaser products in the region since 1996. Mr Chia had handled Blaser products since 1981 and Blaser must have relied on him since it followed him from one company to another. Thus, it is reasonable to infer that as soon as Mr Niederhäuser found out about an action that he believed to be in breach of contract, he would have immediately called Mr Chia. He would not have waited two weeks to discuss such an important matter with the person he relied on.

63 If Mr Niederhäuser was telling the truth and he did not speak to Mr Chia in March 2002 when he saw the Conoco name on PAE's letterhead, it would have been because he was not upset by this. The only reason he would not have been upset was that he already knew about the relationship between Conoco and PAE and, with Mr Chia, was working on this to effect a termination of the distributorship. In any case, Mr Chia's ready agreement with Mr Niederhäuser's assertion that PAE had breached the distributorship agreement was in itself a breach of his own duty of fidelity to PAE. He knew that PAE wished to complement Blaser products and did not intend to offer competing products. He should have told this to Mr Niederhäuser. He should also have gone straight back to Mr Lee and told him that Blaser considered PAE to be in breach of contract. Instead, Mr Chia kept entirely quiet about Blaser's unhappiness. He accepted a job offer from Blaser in April 2002 and worked with Blaser not only to set up the new office in Singapore but also to keep PAE under the impression that everything was proceeding normally and no nasty surprises were in store. In this, he was wholly successful. He even remarked on how happy Mr Laurent Lee was at the beginning of the 26 June 2002 meeting.

64 PAE submitted that Blaser would not have terminated the distributorship had it not been for Mr Chia asking Mr Niederhäuser to cause this to happen. Blaser had no real issues with PAE and the complaints which were put in evidence by Mr Chia and Mr Niederhäuser were normal issues that would arise in such relationships and were in each case resolved by PAE who gave in to Blaser.

65 There was definitely something underhand about the way in which the distributorship was terminated. As mentioned above, no hint of the impending disaster was contained in the messages sent by Mr Niederhäuser in May 2002. He went out of his way to make everything seem as normal as possible going so far as to suggest (by his e-mail of 10 June 2002) an agenda for the meeting on 26 June which included discussion of the business outlook for the second half of 2002.

Mr Niederhäuser knew that no such topic would be discussed since it was his plan to hand over the termination letter at the meeting. The question is why did Blaser terminate the distributorship in this way? Under the agreement, it could terminate PAE's appointment at any time by giving it three months' notice of termination. Alternatively, if Mr Chia wanted to move, he could resign from PAE, giving it one month's notice and Blaser could then invoke the provisions of Art 24.3 of the agreement in order to terminate the distributorship. Instead of taking either of these courses, Blaser issued a notice purporting to effect an immediate termination based on "extraordinary circumstances". PAE's submission was that Mr Chia worked over a period of time to achieve such a notice as he may have been concerned that unless PAE was shown to be in breach of its agreement with Blaser, the Blaser board might not have wanted to change distributor again such a short time after making the change from Taiyo Kikai.

66 On the evidence, it does appear to me that Mr Chia did take steps to bring the distributorship to an end. He was unhappy with PAE. He wanted to move. Perhaps he had reason to believe that Blaser would not be sanguine about following him away from PAE just because of his personal unhappiness there. It is clear that he contributed to the development of the relationship between Conoco and PAE. Subsequently, he exploited that relationship with Conoco for his own ends. He did nothing to assuage any concern that Blaser had in relation to it. Mr Chia was the one who was initially marketing Conoco products. He did not make much effort in this regard and at the time Blaser purportedly found out about the relationship, PAE had not sold any Conoco products. Mr Chia could well have told Blaser that and at the same time made it quite clear to Mr Lee that the Conoco relationship had to end. He did not do so. His explanation was that his protests had been disregarded once and he did not see any purpose in making further protests. I do not believe him. I found Mr Chia to be an unsatisfactory witness in many respects. I believe that he exploited the situation and worked with Mr Niederhäuser in order to bring the Blaser distributorship agreement to an end in such a way that PAE could be blamed for the termination. It is clear also that once Blaser took the decision to leave PAE, Mr Chia actively participated in the setting up of its new Singapore subsidiary and the intended transfer of the customers and products from PAE to the new outfit.

67 Mr Chia submitted that his actions during the period from April to June 2002 were not in any way contrary to the interests of PAE. During that time, he continued with his duties for PAE by servicing Blaser's customers and supplying them with Blaser products. In addition, certain actions were taken relating to Blaser Singapore. At the most, these actions were preparatory in nature and primarily involved setting up the Blaser branch. Mr Chia did not commence working for Blaser Singapore before his complete departure from PAE. The letters from Blaser Singapore informing Blaser customers of the change of distributor were not sent out until the termination of the distributorship agreement and no sale or marketing of products by Blaser Singapore took place before 26 June 2002. Therefore, Mr Chia asserted, he did not in any way assist Blaser Singapore to compete with PAE whilst he was still in PAE's employ.

68 Mr Chia further submitted that an employee who, whilst still in the employment of his employer, merely plans to leave to work for a competitor or to set up business in competition with his employer, is not, in the absence of improper conduct, in breach of his duty as an employee. His counsel pointed out that in the English case of *Laughton v Bapp Industrial Supplies Ltd* [1986] ICR 634, it was held that employees who wrote to ten of their employer's suppliers stating that they intended to set up business on their own and asking for prices and other details of the supplier's products had not acted in breach of their duty of good faith. It was stated that an intention to compete in the future was not a breach of employee's duties. On the authority of *Balston Ltd v Headline Filters Ltd* [1987] FSR 330 and *Metal Salvage Association Inc v Michael Siegel* 503 NYS 2d 26 (1986), Mr Chia's counsel argued that such preparatory steps could include incorporating a company, leasing premises or hiring staff. There would be a breach only if the

employee went beyond preparatory steps, for example, by using his name to try and secure business for the new company whilst he was still in the employment of the old: see *Universal Westech (S) Pte Ltd v Ng Thiam Kiat* [1997] 2 SLR 139.

69 To summarise Mr Chia's position, it was that he had not caused or contributed to the termination of the distributorship in any way. Blaser had acted as it did solely because of PAE's breach of contract in relation to Conoco. Mr Chia himself was faced with the prospect of losing his job in PAE and it was reasonable for him to accept the alternative offer from Blaser. After he accepted the offer, all he did was to make preparations for his new employment. While working for PAE, he did not do anything that amounted to competing with PAE's business. He had not been in breach of any duty to PAE.

70 I have carefully considered the arguments made on behalf of Mr Chia. I do not accept, however, that there was no breach of duty by him in this case. His actions went far beyond those of the employees involved in the cases which his counsel cited. I have held that he played an active part in the breakdown of the relationship between PAE and Blaser. That in itself was a breach of duty. Secondly, he was aware, at the least, of Mr Niederhäuser's dissatisfaction with PAE over the Conoco issue. His duty then (even if he had not instigated such dissatisfaction) was to draw the issue to PAE's attention so that PAE could try and rectify the situation. In this respect, I adopt the following passage from the judgment of Havers J in *Sanders v Parry* [1967] 2 All ER 803 at 806–807:

> In my view, there was a duty on the defendant, when Mrs Stanford told him that she was dissatisfied, to have reported that to his principal and so to have given him an opportunity of seeing what he could do to meet any complaint that Mrs Stanford had, so that she could remain with him. … Instead of forwarding his principal's interests [the defendant] was concerned only in promoting his own. He made this alternative offer to Mrs Stanford which she accepted and it was as a result of that alone that she left the plaintiff and joined the defendant. That was, in my view, a breach of contract …

Whilst the fact situation there was slightly different, the principle applicable is identical. Thirdly, Mr Chia was in breach because he made no effort to retain Blaser as PAE's principal. Instead, he accepted an offer of employment from Blaser knowing that by doing so, he was assisting Blaser to make a smooth and successful transition of its business from PAE to its new Singapore subsidiary. Again, the observations of Havers J in relation to a similar situation in *Sanders v Parry* are apposite. He said (at 807–808):

> In my view, there was a duty at all times during the subsistence of that agreement on the defendant to protect his master's interests, especially to do his best to retain Mr Tully as a client of his master ... In accepting this offer [to do all Mr Tully's legal work] the defendant was not protecting his master's interests, for he made no effort to try and retain Mr Tully as a client of his master. The defendant was placing himself in a position in which there was a conflict of interests between him and his principal, and he was looking after his own interests to the detriment of his master's interests. … [I]f Mr Tully had expressed any dissatisfaction as to the position, the defendant should have found out any grievance which Mr Tully thought he had and should have gone to the plaintiff, who was the defendant's principal. … [I]f the defendant had gone to the plaintiff about this, there might well have been an opportunity for him and Mr Tully to have sorted it out and to have cleared up the misunderstanding. … It apparently never occurred to the defendant that, while he was still employed by the plaintiff, he could not discuss any offer Mr Tully made; he could not possibly do that until his agreement with the plaintiff was terminated. I am satisfied that, in accepting the offer, by such conduct the defendant was guilty of breach of duty … [to] serve the plaintiff with good faith and fidelity.

Breach of the notice provision

71 The employment contract between PAE and Mr Chia required the latter to give PAE four weeks' notice of his resignation or pay four weeks' salary in lieu of notice. On 26 June 2002, Mr Chia handed Mr Lee a letter stating that he was tendering his resignation with effect from 27 June and that as he had three days' leave owing to him, his last day of duty would be 23 July. PAE contended that despite what the letter stated, Mr Chia had never intended to serve out his notice and that he was in breach of the notice provision. Mr Chia, on the other hand, claimed that PAE had waived the notice period by its behaviour on the fatal day and therefore had no basis to claim breach on his part.

72 This issue is clearly a question of fact and it is whether Mr Chia refused and/or failed to serve out his notice period. On the face of the letter, Mr Chia was willing to work right up to 23 July. It was pointed out on behalf of Mr Chia that he had not said anything to contradict the statements in the letter at the time he served the letter on PAE. In court, Mr Lee had admitted that when the letter was handed over to him, Mr Chia had not said a single word. Further, when Mr Chia returned to PAE's office in the afternoon, PAE had changed the pin number of its door, had asked for the return of his pager and handphone and had also asked him to wait outside the premises while Mr Lee talked to Mr Niederhäuser. This behaviour indicated that PAE did not want Mr Chia to serve his notice. Whilst PAE had alleged that Mr Niederhäuser had told PAE that Mr Chia would join Blaser Singapore with immediate effect, Mr Chia and Mr Niederhäuser had denied that any such thing had been said.

73 PAE relied on the following to establish Mr Chia's intentions:

(a) Blaser's *modus operandi* was an immediate termination so as to prevent sabotage by a disgruntled ex-distributor and this meant that Mr Chia would have nothing to do in PAE's office during the one month period after his resignation as all the Blaser stocks would have been transferred on termination.

(b) Mr Chia's conduct during the termination meeting showed his intentions. He came and left with Mr Niederhäuser, sat at the latter's right hand and only handed in his termination letter after the meeting ended around noon. Then, Mr Chia left with Mr Niederhäuser instead of remaining behind in PAE's office. When he returned with Mr Niederhäuser at 4.00pm, he had erased all telephone numbers from the mobile phone supplied by PAE. He returned that instrument to PAE and was observed to be wearing a gleaming new phone on his belt.

(c) PAE noted that all papers, documents and files containing quotations, sales invoices, customer purchase orders, delivery orders, stock inventory lists, customer reports and hard copies of e-mail correspondence had been removed from Mr Chia's cabinet in PAE's office.

(d) Mr Niederhäuser made it quite clear during the meeting of 26 June 2002 that Blaser Singapore would take over the distributorship at once and that Mr Chia would join it with immediate effect.

(e) Despite Mr Niederhäuser stating that the plan was for him to look after Blaser Singapore while Mr Chia served out his notice, Mr Niederhäuser was in Bangkok on 28 June 2002 to meet his wife and return with her to Switzerland. He left Mr Chia to arrange the transfer of stocks to Blaser Singapore including those in the Penang warehouse and it was clear that he had made no plans to stay in Singapore beyond 27 June which had been his original departure date as indicated in his e-mail to PAE on 10 June.

(f) Mr Chia had never made a claim for one month's salary in lieu of notice to be paid by

PAE as he would be entitled to do had his employment been summarily terminated by PAE, wrongfully preventing him from working between 27 June and 23 July 2002. His salary claim in his counterclaim is for the month of June 2002.

74 In my judgment, the evidence has established that Mr Chia had no intention of working for PAE after 26 June 2002. Prior to that date, he had taken all the steps necessary to effect a transfer of all business and stock from PAE to Blaser Singapore upon termination of PAE's appointment as distributor. He was an essential component of Blaser Singapore. He knew the clients. He knew their needs. He knew how to organise the taking of orders and the delivery of goods. On 26 June 2002, Blaser Singapore had no employees. The only Singaporean who knew anything about how to do its business was Mr Chia. Mr Niederhäuser had made plans to come to Singapore for a short visit and although he asserted in court that he was willing to stay here and conduct Blaser Singapore's business until Mr Chia had served out his notice period, I do not believe that that was the intended course of action. It was all along anticipated that Mr Chia would join Blaser Singapore immediately in the same manner as he had immediately joined PAE when it was appointed distributor in place of Taiyo Kikai. Whilst Mr Niederhäuser was in charge of Blaser's business in this region, he had not worked locally and thus had no experience of how to get things done on a day-to-day basis. It would have been very difficult for Blaser Singapore to conduct its business without the assistance of Mr Chia. I therefore find for PAE on this issue.

Damages

75 PAE has claimed damages as compensation for the various breaches by Mr Chia of his fiduciary duty of good faith and fidelity. Whilst Mr Chia denied that he was liable to PAE at all for any damages, he did not dispute that in principle, damages would be the appropriate remedy for any breach that he had been found to have committed. He did, however, take issue with what would be the appropriate measure of any damages to be awarded.

76 The 1993 Canadian case of *Sure-Grip Fasteners Ltd v Allgrade Bolt & Chain Inc* (1993) 46 CPR (3d) 443 held that damages for breach of fiduciary duty may be measured either by quantifying the profit gained by the wrongdoer and ordering him to account for it as a trustee, or by quantifying the plaintiff's loss of profit and awarding damages to compensate for it. In this case, PAE based part of its damage calculation on a method followed in *Sure-Grip*. It submitted that as a result of Mr Chia's breaches it had lost the Blaser distributorship overnight and had suffered loss of opportunity. It quantified its damages as follows:

(a)	Loss of opportunity for coolant sales	$466,230.00
(b)	Loss of opportunity for Blaser's neat cutting oil sales	$ 49,950.00
(c)	Salary in lieu of notice	$6,496.00
(d)	Cost of VSM	$ 59,008.70
	Less: apportioned salary up to 26 June 2002	$ 6,960.00
		$574,724.70

77 In calculating the loss of opportunity for coolant sales to be worth $466,230, PAE relied, to

an extent, on the formula employed in *Sure-Grip*. In that case, the defendants were found to have breached their fiduciary duties to their employer by soliciting the latter's clients. Damages were calculated by multiplying the plaintiff's gross revenue by its gross profit margin (ratio of gross profit to sales) and then subtracting the plaintiff's overheads in order to obtain a figure representing the revenue lost by the defendants' actions. The formula requires three figures: gross revenue, gross profit margin and overheads. To get to $466,230, PAE used a gross revenue of $1.5m, multiplied it by 36.65% (the average profit margin enjoyed over three and a half years) and then subtracted from the product the sum of $83,520 being Mr Chia's annual remuneration. PAE did not follow the formula strictly because it did not subtract all overheads from the product but chose to use only Mr Chia's salary. PAE has not, in my opinion, justified its departure from the formula used in *Sure-Grip*. If PAE wanted to use that formula, it should use it consistently which means that it must deduct all its overheads and not only Mr Chia's annual salary. As I do not have the figures for all other overheads that would have been incurred, I cannot use this formula.

78 On the other hand, counsel for Mr Chia submitted that the method of calculating damages would be to take the average figure derived from the actual profit and loss of PAE for the three and a half years of the distributorship and use that to calculate what PAE would have earned as profit over a period of three months. Using figures obtained from the profit and loss accounts of PAE from 1999 to 2002, counsel submitted that the average profit per year of the distributorship was $4,633.24 and therefore the profit earned over a three-month period would be $1,158.31. He submitted that this basis of assessing damages was least speculative as it was based on the actual performance of PAE and the fact that the distributorship could have been terminated by three months' notice at any time. Since the information of the sales revenue and various expenses incurred in obtaining that revenue were available, Mr Chia submitted that there was no basis to adopt the calculation put forward by PAE, *ie* gross profit margin multiplied by gross revenue. He submitted that this method of calculation should only be adopted in situations where the profit and/or the actual operating cost is uncertain, which is not the case here.

79 I do not agree that the average actual profit earned by PAE should, by itself, be used as the basis of the assessment of damages. Using the net profit figure alone would mean that one has not taken account of the amount that had to be expended in order to earn that profit. In order to do business, a company has to incur certain costs. To calculate the profit from the business done, one takes the income of the business and subtracts the costs of earning it. When the income of the business is abruptly cut off, that does not mean that the costs of earning the income cease immediately as well. It will take a company some time to readjust its operations so as to trim the costs relating to the business that has ceased. Following Mr Chia's formula would mean disregarding expenses that PAE had to meet even though the distributorship had terminated and it would result in under-compensating PAE for Mr Chia's breach of contract.

80 If the distributorship had continued, there would have been income which PAE could have used to defray its expenses. The operational costs of the Division (excluding Mr Chia's salary) had been fixed at $12,600 a month. Mr Chia himself had agreed to this figure as operational costs and those costs had consistently, save in 2001, been fully covered by income from the Division. Once the distributorship was terminated, PAE had to bear these expenses while looking for a new source of income. I think that any award of damages to PAE must cover these costs. The first question is for what period these costs should be covered. The distribution agreement was terminable at any time with three months' notice. That being the case, should the compensation be limited to three months? PAE submitted that it should not because Blaser would not have terminated the distributorship had it not been for Mr Chia's persuading it to do so. I agree that it would not be fair to limit the assessment of loss for a period of three months as the evidence pointed strongly to the fact that in early 2002, Blaser had no intention of terminating the distributorship. In November 2001, the parties had

discussed expansion plans in Malaysia and in February 2002, Blaser was looking forward to receiving these plans. At the same time, Blaser stated it was trying to deal with PAE's concerns. That was not the language of a company that was going to give notice of termination. If Mr Chia had not instigated the move, Blaser might well have stayed with PAE for some time after June 2002. On the other hand, the distributorship agreement did not give PAE much security of tenure. Apart from Blaser's right to terminate on three months' notice, it could come to a quick end if Mr Chia had resigned. PAE was well aware that Mr Chia was unhappy. It knew from Blaser's track history that Blaser followed Mr Chia wherever he went. Its efforts to have Art 24.3 of the distributorship agreement deleted had been unsuccessful. PAE was therefore in a situation where it could not really depend on the distributorship continuing indefinitely. In those circumstances, I think that to compensate PAE for one year's loss would be too much. PAE would be entitled to some time for it to try and obtain an alternative source of income and, if it was not able to do so, to reduce its expenses so as to mitigate its loss. In the circumstances of this case, I think it would be fair to calculate PAE's damages on the basis of a six-month period, that length of time being twice the length of the notice period required under the agreement. On this basis, in respect of the coolant sales, PAE should be awarded $75,600 ($12,600 per month for six months) to compensate it for the operational expenses it had to bear as a result of the termination.

81 The second issue is whether, in addition, PAE should be compensated by an award which would recognise at least some part of the profit that it lost by reason of the termination. In this connection, it is relevant that Mr Chia had not been diligent. If he had made efforts to promote the products to new customers, he may well have succeeded in keeping the Division profitable despite the poor economic times. Before joining PAE, he told it that Blaser had a turnover of approximately $1.2m per year. He never achieved that figure but profits were made in 1999 ($41,438.61) and 2000 ($50,466.76). I think that it would be fair to say that had Mr Chia kept up his efforts, he should have been able to earn $45,000 profit a year (that being the approximate average of the profits earned in 1999 and 2000). I therefore award PAE $22,500 as damages for half a year's loss of profit by reason of Mr Chia's breach of duty.

82 The next component of the damages claimed is the sum of $49,950 in respect of the loss of opportunity to sell neat cutting oils. PAE submitted that from March to June 2002, it had, through James Choo, carried out research and prepared the Singapore and Malaysian markets for the sale of Blaser's neat cutting oils. This became a real opportunity when customers agreed to try out these oils. PAE started ordering neat oils in April and May 2002. It had placed orders in June too. Mr Choo's evidence was that Blaser's neat oils were premium products available at lower prices. He said that once a customer had agreed to a trial, there was a 90% chance of that customer committing its other machines to using Blaser neat oils since it was an established and premium brand. PAE cited the case of Stamford Precision Tools as an example. That customer had agreed to try Blaser neat oils on one machine in May 2002. Subsequently, it had gone on to order this oil for its second machine and that second purchase had been made from Blaser Singapore as, by then, PAE had lost the distributorship. After termination, Blaser cancelled the May and June orders (24 drums in total). Only five drums were actually delivered for the April order and two drums were sold to Stamford Precision Tools, one by PAE and one by Blaser Singapore. PAE was unable to follow-up with the customers who had agreed to trials.

83 PAE submitted that it had lost the opportunity to make the following profits from one year's sales to the customers specified:

(a) $17,550 from Innovalues Precision Ltd;

(b) $5,400 from Wong Engineering Sdn Bhd;

(c) $2,025 from Giken Sakata (S) Ltd;

(d) $16,875 from Integrated Precision Engineering Ltd; and

(e) $8,100 from Yangbum Engineering Pte Ltd.

It pointed out that those figures were based on Mr Choo's market research and Mr Lee's calculations worked out on the basis of Blaser's costs and prices. These figures were not speculative and had not been challenged by Mr Chia.

84 It was submitted on behalf of Mr Chia that this head of damages was inherently and wholly speculative and should be dismissed in its entirety. The fact was that only two drums of neat oil had been purchased by Stamford Precision Tools. Neat oils had been sold by PAE throughout the Blaser distributorship and the sales figures for neat oils formed part of PAE's overall profit and loss figures. The sale of two drums would not justify damages quantified at $49,950 which was gross profit without deducting other expenses. There was no evidence that all the listed potential customers had actually conducted trials before termination and much less how many would buy Blaser neat oils eventually.

85 It does appear to me from the evidence that PAE had succeeded in creating more interest in Blaser neat oils in the market than had existed before Mr Choo came on the scene. It is very difficult, however, to estimate what profits could have been made from his efforts as, at the time of termination, only one drum had been bought as a result of his efforts. The other customers had indicated that they were interested in conducting trials but these had not yet been scheduled. Whether the trials would have been successful is also speculative. PAE's calculations were based on the customers named ordering one year's supply of oil for all of their machines. There was no evidence from these customers that they would have done so. PAE's case was based on the hopes of its staff. Further, as with the case of the cutting oils, considering loss on the basis of a one-year period would not be justified. In the circumstances, I can only make a general award of $5,000 for loss of opportunity to sell neat oils to the new customers cultivated by Mr Lee and Mr Choo.

86 The third item of damages is a special damages claim. As I have found that Mr Chia had no intention of working out his notice period, this claim must succeed.

87 The fourth item of damages is for the cost of the VSM. It was PAE's case that it spent $59,008.70 investing in the creation and implementation of this Internet-based online ordering system in a protected, encrypted environment for the clients of Blaser products. The VSM software enabled existing Blaser customers to make online orders of Blaser products and also updated PAE's inventory and accounting systems automatically. In the later stages of implementation, the VSM would have allowed PAE's inventory systems to be linked and integrated with the Blaser central computer to forecast and replenish stock automatically. When the distributorship was suddenly terminated, the cost of the VSM was wasted. The new accounting system which was tied-in with the VSM was also rendered redundant as it did not fit into PAE's other business, as the business model and customer profiles of the other business were completely different from that of the Blaser business.

88 It was submitted on behalf of Mr Chia that neither he nor Blaser had been told of the implementation of the VSM system or that this software system was brought in for the benefit of Blaser products. It was only after implementation that Mr Chia discovered its existence. Mr Niederhäuser had testified that VSM was not suitable for Blaser products and it had not been implemented by Blaser's head office. He explained that Blaser's products could not be sold by electronic means as Blaser salesmen had to visit the customer's workshop and be familiar with the

manufacturing side of the customer's business. Otherwise there was a great danger that the customer would switch to other products.

89 In my view, PAE cannot recover from Mr Chia the cost of implementing the VSM system. He was not involved in its development or implementation. PAE invested in the system for its own business needs. As a distributor knowing that its tenure was not certain, it chose to take a calculated risk by developing such software. As Mr Chia did not encourage the development and was not aware of it, I do not think it would be correct to make him bear its cost.

Conclusion

90 In the premises, there will be judgment for the plaintiff. The plaintiff is awarded damages in the sum of $102,636 made up as follows:

(a) $75,600;

(b) $22,500;

(c) $5,000; and

(d) $6,496;

less: the defendant's salary for June 2002 of $6,960.

The counterclaim is dismissed. The defendant shall pay the plaintiff's costs. There shall be one set of costs for the claim and the counterclaim.