IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 67

Civil Appeal No 108 of 2018

Between

Adinop Co, Ltd

… *Appellant*

And

(1) Rovithai Limited
(2) DSM Singapore Industrial Pte Ltd

… *Respondent*

JUDGMENT

[Contract] — [Confidence] — [breach of confidence]

[Equity] — [Confidence] — [breach of confidence]

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v
Rovithai Ltd and another

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Steven Chong JA, Belinda Ang Saw Ean J and Quentin Loh J
17 May 2019

15 November 2019 Judgment reserved.

Belinda Ang Saw Ean J (delivering the judgment of the court):

Introduction

1 This appeal is brought by Adinop Co Ltd ("Adinop"), a company incorporated in Thailand against the two respondents for misuse of confidential information. Rovithai Limited ("Rovithai"), a company incorporated in Thailand, and DSM Singapore Industrial Pte Ltd ("DSM Singapore"), a company incorporated in Singapore, are the first and second respondents, respectively. Rovithai and DSM Singapore are part of the DSM Group of companies ("DSM Group"), a multi-national group active in research, development, manufacture and sale of ingredients for feed, food, pharmaceutics and cosmetics. DSM Singapore serves as the head office for the DSM Group's operations in the Asia Pacific region and oversees DSM Group's business in this region. From sometime around the 1990s until mid-2014, Adinop was Rovithai's distributor in Thailand for "standard DSM products". In this case,

standard DSM products are essentially the respondents' human nutrition and health ingredients for the food and beverage industry in Thailand. The standard DSM nutritional products are single ingredient products or standard premixes.

2 The information at issue in this appeal relates to two documents that contained, amongst other things, the identities of Adinop's customers who were purchasing or were intending to purchase standard DSM products. The two documents in question are called the "Key Customers List" and the "Ongoing Projects List". We will explain these documents in the course of this judgment.

3 For the purposes of this appeal, we will adopt the shorthand of "Customer Information" to refer to the customer information contained in the two documents (*ie*, the Key Customers List and the Ongoing Projects List) that Adinop shared with Rovithai. We will also refer to the two documents collectively as "the Lists", for convenience.

4 Adinop sued the respondents for breach of a Confidentiality Agreement signed between them on 22 October 2013. The complaint is that the respondents had misused the Customer Information in the Lists to notify Adinop's customers of the change of distributor from Adinop to a new distributor, Rama Production Co Ltd ("Rama") on 1 July 2014 ("the Notice"). On the same complaint, Adinop sued the respondents, in the alternative, for breach of their obligations of confidentiality arising in equity in relation to the misuse of the Customer Information.

5 As part of the distributorship arrangement between Adinop and Rovithai, Adinop was required to produce regular quarterly reports on the sales performance of DSM Products, problems or difficulties that had been

encountered and efforts made to expand the customer base for DSM Products.[1] Prior to the Confidentiality Agreement, and pursuant to the distributorship arrangement, Adinop had disclosed customer information to the respondents in its regular quarterly reports ("Quarterly Customer Information"). On this, Adinop also sued the respondents for breach of confidentiality arising from common law or equity in relation to the respondents' misuse of the Quarterly Customer Information.[2]

6 Adinop was unsuccessful in its claims against both respondents in the High Court. The High Court's written judgment is available on Lawnet under the case name and neutral citation *Adinop Co Ltd v Rovithai Limited and DSM Singapore Industrial Pte Ltd* [2018] SGHC 129 (the "*HC Judgment*").

7 In this appeal, Adinop only focuses on the Judge's findings as to breaches of the Confidentiality Agreement and the respondents' equitable duty of confidence. Adinop's oral arguments in the appeal concerned only the Key Customers List and the Ongoing Projects List. It is therefore unnecessary for us to concern ourselves with a claim for misuse of the Quarterly Customer Information.

8 Having carefully considered the written as well as oral submissions of the parties, we allow the appeal in part for the reasons set out in this judgment. We begin by examining the background facts and the Judge's reasoning.

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1 See [8] to [11] of *Adinop Co Ltd v Rovithai Limited and DSM Singapore Industrial Pte Ltd* [2018] SGHC 129 ("*HC Judgment*").

2 Record of Appeal ("ROA") Vol II p 10 (Statement of Claim (Amendment No 2) paras 17 and 17A).

Background facts

The distributorship arrangement

9 The background facts are concisely narrated in the Judge's decision and it is not necessary for us to repeat them save for some salient facts. The business relationship between Adinop and Rovithai began in the 1990s and this business relationship ended in 2014. Adinop did not have a formal distributorship agreement with Rovithai at the beginning of their relationship. The distributorship arrangement to distribute DSM products in Thailand was only formalised and confirmed in writing much later in a letter dated 31 January 2005 from Rovithai to Adinop.[3] Even then, the core terms that governed the distributorship arrangement between Adinop and Rovithai were vague or lacked clarity as to whether Adinop was an exclusive distributor.[4] In fact, the state of affairs was that Rovithai could make decisions on which DSM products would be made available to any given appointed distributor for a given market, and within the food, beverage and nutrition ("FB&N") range of products/ingredients, different distributors could be appointed for different ranges of DSM FB&N products/ingredients. If anything, the Judge found that Adinop was the "exclusive distributor" for DSM products only in the sense that it would not sell or distribute ingredients produced by another manufacturer which were the same as those that were supplied by Rovithai. There is no appeal against the Judge's finding that Adinop was not Rovithai's exclusive distributor.

10 Pursuant to the distributorship arrangement, Adinop would place periodic bulk orders of DSM nutritional products with Rovithai who would

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3 ROA Vol V (Part A) p 35.

4 *HC Judgment* at [33].

source the purchases from DSM Singapore. Adinop would sell these products to FB&N manufacturers in Thailand at a mark-up and price determined by Adinop. The Judge noted that Rovithai would set annual sales targets premised on the total value and quantity of purchase orders placed with Rovithai, the total number of Adinop's customers and the number of planned projects. Adinop was required to attend quarterly meetings and Adinop would produce quarterly reports on the sales performance of DSM Products, problems or difficulties that had been encountered and efforts made to expand the customer base for DSM Products (see [8]–[11] of the *HC Judgment*). The Quarterly Customer Information were disclosed to Rovithai at the latter's request during these quarterly meetings.

11 Naturally, Adinop and the respondents were interested in the development of Adinop's customer base for DSM products. Adinop's profits were dependent on the number of customers who purchased the DSM Products. As for the respondents, the more customers Adinop had, the more DSM products Adinop would purchase from Rovithai thereby increasing its revenues. To this end, Adinop and the respondents had worked together on several occasions to increase Adinop's market reach. For instance, the parties had participated in a number of FB&N exhibitions in Thailand in an effort to attract more customers.

12 Rovithai issued its notice of termination to terminate the distributorship arrangement with Adinop on 10 June 2014. This notice had a month-long notice period that expired on 10 July 2014. The notification of the termination to Adinop's customers *(ie*, the Notice) was sent on 1 July 2014 well before the notice period expired. The parties accept that the termination of the distributorship arrangement was not an issue before the Judge.

The Confidentiality Agreement

13 As mentioned, Adinop and the respondents are parties to the Confidentiality Agreement. Both Rovithai and DSM Singapore are collectively referred to in the Confidentiality Agreement as DSM. The parties signed the Confidentiality Agreement on 22 October 2013. The Confidentiality Agreement was for a period of one year commencing from 1 June 2013 to 30 June 2014. It is common ground that the Confidentiality Agreement was not extended.

14 The two "whereas clauses" recited at the beginning of the Confidentiality Agreement are crucial to appreciating the scope of the parties' obligations to safeguard what the agreement defined as "Confidential Information". We reproduce them here[5]:

> WHEREAS, DSM has developed and possesses certain proprietary information relating to its products; while Adinop has developed and possesses certain proprietary information relating to its business (collectively referred to as "Confidential Information").
>
> WHEREAS, the Parties are willing to disclose to each other the Confidential Information for the purpose of the distribution arrangement between the parties (the "Purpose").

15 It is apparent from the first whereas clause (hereafter, the "first recital") that what is considered as Confidential Information captures information, on the one hand disclosed by both the respondents, being "certain proprietary information relating to its products" and, on the other hand disclosed by Adinop, being "certain proprietary information relating to its business." The second whereas clause (hereafter, the "second recital") contemplates disclosure of each party's confidential information to the other parties, but only insofar as the

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5 Appellant's Core Bundle ("ACB") Vol II at p 164.

disclosure is made for "the purpose of the distribution arrangement between the parties" (the "Purpose").

16 However, not all that is defined as Confidential Information in the Confidentiality Agreement is subject to the restrictions of the Confidentiality Agreement. Clause 1 of the Confidentiality Agreement indicates that disclosures of Confidential Information are subject to the Agreement only if they are reduced to writing, bear a "Confidential" marking, and are sent to the receiving party. Clause 1 provides as follows:

> NOW THEREFORE, the Parties agree as follows:
>
> 1. Subject to the terms and conditions of this Agreement, either Party is prepared to disclose to the other Party the Confidential Information in written, oral and/or visual form. Oral or visual disclosures of Confidential Information will fall under the terms of this Agreement if they are reduced to writing, marked "Confidential" and sent to the receiving Party.

We will discuss the other clauses of the Confidentiality Agreement, where relevant, later in this judgment.

The Lists

17 The Key Customers List is a list of Adinop's key customers, who are Thai FB&N manufacturers, to whom Adinop had sold standard DSM ingredient products. The Key Customers List comprises six printed pages with a confidentiality statement marked at the bottom of each page in Thai script. A total of 42 customers were listed. Information provided for each customer concerned: (a) the DSM product(s) the customer purchased; (b) the application of each product; and (c) the estimated volume of each product ordered per quarter in kilograms. The Key Customers List does not set out the contact details or addresses of the customers listed and does not contain the list of *all* of Adinop's customers who purchase DSM Products but only the major

customers.[6] Adinop provided the Key Customers List to Rovithai on 9 May 2014, shortly before 10 June 2014 being the date on which Rovithai informed Adinop of its decision to terminate their distributorship arrangement. The Key Customers List was provided at Rovithai's request.

18 The Ongoing Projects List is a list of ongoing projects for the first quarter of 2014. The Ongoing Projects List comprises: (a) a list of pending projects being new business pursued; (b) a list of "risk" projects being existing business that may be lost; and (c) a list of "win projects" being new business secured for DSM nutritional products. In addition, the Ongoing Projects Lists contained 18 other customers not mentioned in the Key Customers List. The Ongoing Projects List was provided to Rovithai, at the latter's request, on 4 April 2014.

The Judge's decision

19 Before the Judge, Adinop contended, amongst other things, that the information in the Lists fell within the meaning of "Confidential Information" under the Confidentiality Agreement. Alternatively, Adinop relied on equitable obligations of confidentiality on the basis that the Customer Information possessed the necessary quality of confidence and that the Customer Information was imparted to the respondents in circumstances imposing an equitable duty of confidence upon them. The respondents, on the other hand, disputed Adinop's contentions and put Adinop to strict proof on the allegations. In addition to rejecting the confidential nature of the information and pointing to the absence of evidence to support a duty of confidentiality in equity, the respondents denied using the names of the customers disclosed by Adinop in

6 ACB Vol II pp 160 – 163.

the Lists for the Notice. The respondents claimed to have their own list of customers compiled from various sources and made used of this list for the issuance of the Notice. The sources relied upon for the compilation of customers included the numerous meetings the respondents had with Adinop and the customers they met at the many road shows on food ingredient products they had attended alongside Adinop in Thailand.

20 The Judge noted the difficulties with the evidence from both sides. As the Judge observed, "witnesses with more detailed and direct knowledge of the events and relationship between [Adinop] and [Rovithai] did not give evidence" (at [29] of the *HC Judgment*). In addition, Adinop and Rovithai could not produce complete records of the quarterly meetings and reports. Adinop's records were lost due to floods and in the case of Rovithai, records were lost during the time their records were digitalised (at [36] of the *HC Judgment*).

21 We will return to the Judge's reasoning and analysis but for present purposes, it is sufficient to mention the Judge's overall conclusions after considering the evidence as a whole.

22 First, the Judge held that the Key Customers List constituted confidential information that was covered by the Confidentiality Agreement and relevant principles of equity on the basis that the Key Customers List as a whole possessed the necessary quality of confidence (at [117(c)] of the *HC Judgment*). The Judge explained that confidentiality attached to the collation of information as a whole: the names of the key customers, the types of products, and the DSM ingredients (and quantity) ordered (at [87] of the *HC Judgment*). The Judge also took into account the testimony of Mr Gordon Harcourt Redman, the General Manager of Rovithai, who testified on behalf of the respondents. Mr Redman accepted that although the information was available from outside sources, such

information was nevertheless "fragmented" and "it would take [a] long time … to get that information together" (at [86] of the *HC Judgment*). Thus, any list compiled by Rovithai would likely not be as comprehensive as the Key Customers List. Mr Redman also properly accepted that whilst Rovithai's own list of key customers might be similar, its list would not be identical (at [78] of the *HC Judgment*).

23 The Judge made several findings of fact in respect of the Key Customers List. They are as follows:

> (a) at the time the Key Customers List was produced and disclosed to Rovithai, the latter did not have a similar list;
>
> (b) Rovithai would need some time and would have to expend effort to construct a similar list with substantially the same information from independent sources; and
>
> (c) if Rovithai were depending on its internal records (which were incomplete), the list would not be as comprehensive as the Key Customers List (at [82] of the *HC Judgment*).

24 Consequently, the Judge held that the Key Customers List was a product of work, time and effort sufficient to make the list confidential as a whole even though some or many of the components were in the public domain (at [117(b) of the *HC Judgment*).

25 As regards the Ongoing Projects List, the Judge said the confidentiality point was arguable. On the evidence, the Judge noted that Mr Redman had accepted that the information in the Ongoing Projects List and the reports on

new products provided in April 2014 contained useful information for securing orders from new FB&N customers and persuading existing FB&N customers to extend their orders to other DSM ingredients. The Judge agreed that none of that information was in the public domain. He was willing to accept that the Ongoing Projects List contained information of a confidential nature even though there "would still be uncertainty as to the provenance of the information given the long history of the commercial relationship between the parties" and "some could be information in the respondents' possession" (see [88] of the *HC Judgment*). In any event, however, a finding that the Ongoing Projects List contained confidential information would not carry the day because there was ultimately no evidence of use of the Ongoing Projects Lists by the respondents (at [88] of the *HC Judgment*). On that note, the Judge then said he needed only to consider whether the use of the information in the Key Customers List to send out the Notice was an authorised use. The rest of the High Court Judgment, as is apparent, focussed on the allegation of misuse of the Key Customers List.

26 The Judge dismissed Adinop's claim for breach of confidence, whether in contract or in equity. Other than the use of names from the Key Customers List, the Judge found that there was no evidence showing that Rovithai revealed or used the other information in the Key Customers List (at [99] and [111] of the *HC Judgment*). In other words, there was no misuse of confidential information in that Rovithai did not use the collated information (at [117 (d) of the *HC Judgment*). The overall effect of the Judge's decision is that Rovithai bears no liability for the losses Adinop contends that it has suffered due to the notification.

27 The Judge gave three reasons why the use of the names, which was only one component of the information contained in the Key Customers List, for the Notice was not a misuse of the Key Customers List. First, the Judge considered

that pursuant to the manufacturer-distributor relationship between Adinop and Rovithai, Rovithai was "implicitly authorised to use its knowledge of Adinop's key customers so as to inform them of the termination of the distributorship" (at [103] of the *HC Judgment*).

28 Secondly, bearing in mind their long manufacturer-distributor relationship, the Judge found that Rovithai would have a legitimate interest and genuine need to inform Thai FB&N customers of DSM ingredients of the change in distributorship by way of the Notice (see [102] & [119] of the *HC Judgment*). The Judge accepted Rovithai's submissions that after the termination of the distributorship arrangement, Adinop did not have any legitimate interest in stopping Rovithai from informing the FB&N producers of the change of distributorship and where they should go if they wished to continue to use DSM products (at [108] of the *HC Judgment*).

29 The third reason the Judge gave was that the use of the Key Customers List was authorised under the Confidentiality Agreement. Confidential Information as described in the first recital could be and was disclosed by Adinop to Rovithai for the purposes of "the distribution arrangement". The Judge opined that the use of the customer names for the purpose of notifying Adinop's customers of the change of distributor was in connection with and fell within the ambit of the distribution arrangement (at [117(e)] of the *HC Judgment*). The Notice served to ensure the smooth transition of the change of distributorship from Adinop to Rama. Thus, the handing over of the Key Customers List for purposes of effecting a transition to a new distributor was not an unauthorised use under the Confidentiality Agreement.

30 Finally, the Judge found that there was insufficient evidence to show that the second respondent, DSM Singapore, was involved in the sending out of

the Notice. The Judge therefore dismissed Adinop's case against DSM Singapore (at [119] of the *HC Judgment*).

Parties' arguments in the appeal

31 Adinop's main complaints in the appeal are summarised here. First, Adinop contends that the Judge was wrong to find that Rovithai's use of the names from the Key Customers List for the purpose of the Notice was an authorised use of confidential information. Second, the Judge was also wrong to have found that there was no evidence of use of the Ongoing Projects List in respect of the Notice. Third, Adinop argues that it is also likely that the respondents had shared confidential information with Rama and so breached their duty of confidentiality in relation to the Ongoing Projects List. Fourth, Adinop points out that the customers listed in the two Lists are different and the respondents have not produced evidence that they had used Rama's list of customers or their own list in sending out the Notice.

32 Adinop also argues that the Judge was wrong to find that DSM Singapore was not involved in the sending out of the Notice. Since DSM Singapore oversees the DSM Group's business in this region, it must have been involved in the sending out of the Notice.

33 For their part, the respondents argue that the Judge erred in finding that the shared Customer Information was confidential information under the Confidentiality Agreement and in equity. The respondents also argue that, in any event, they did not use the names of Adinop's customers in the Key Customers List when they sent out the Notice. Finally, the respondents argue that even if the shared Customer Information were used for the purpose of the Notice, such use did not constitute unauthorised use under the Confidentiality

Agreement and in equity. As regards DSM Singapore, the Judge was right to dismiss Adinop's claim against DSM Singapore.

Preliminary observations

34 Before we turn to the appeal proper, we wish to make two broad observations.

35 First, one of Adinop's complaints in this appeal is that the Judge was wrong to find against Adinop on the issue of authorised use given the main thrust of the defence mounted by the respondents below. Adinop points out that the respondents had only challenged the confidential nature of the Key Customers List and the Ongoing Projects List, and had not, in their defence, averred to the use of confidential information as authorised.[7] We consider this argument to be ill-founded. The respondents, in their defence, had clearly put Adinop to strict proof of the alleged duty of confidentiality and breach of that duty. The legal burden was on Adinop to identify the nature and scope of the information alleged to be confidential, and further, establish that the respondents had misused that confidential information. This would inevitably require Adinop to show that the respondents' use of the Customer Information was unauthorised.

36 Second, Adinop's position in the appeal is that the parties' duty of confidentiality in equity mirrors the parties' duty of confidentiality under the Confidentiality Agreement. Adinop, therefore, argues that it is sufficient for the determination of this appeal that this court only consider whether the

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7 Appellant's Case at paras 65 and 66.

respondents had breached their confidentiality obligations under the Confidentiality Agreement.

37 We disagree with Adinop's position if the impression intended to be conveyed is that, on the same or related facts, a finding and outcome on one cause of action (breach of confidentiality arising in contract) would invariably lead to the same finding and outcome on the other cause of action (breach of equitable duty of confidence). We caution against such a sweeping statement simply because the legal framework within which the duty of confidence falls to be decided is distinct in each case. It is important not to conflate the two types of duty of confidence at the outset. Confidentiality obligations arising out of a contract do not *necessarily* bear the same contours as obligations of confidentiality in equity. However, in circumstances where it is determined that the scope of the confidentiality obligation owed in contract and in equity are the same, liability in both contact and in equity may be established.

38 When there is a confidentiality agreement between the parties, as in this case, the confidentiality provisions as expressed in that agreement will primarily determine the existence and scope of the contractual obligations owed by the parties. The court will construe the express terms of the confidentiality agreement, applying the usual principles of contractual interpretation, to determine the extent of the confidentiality obligations.

39 In *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415 ("*Coco v Clark*"), Megarry J, commenting on two different situations — one where the duty of confidentiality is based on a contract between the parties and the other where there is no contract between them but a duty of confidentiality between the parties nonetheless exists — said:

> … In cases of contract, the primary question is no doubt that of construing the contract and any terms implied in it. Where there is no contract, however, the question must be one of what it is that suffices to bring the obligation into being; and there is the further question of what amounts to a breach of that obligation.

40 Plainly, by the express terms in a confidentiality agreement, the parties may simply agree that certain information disclosed between them are not to be used. In this situation, the parties would have agreed to treat that information as confidential even though, on an analysis of equitable principles, the information may not have the necessary quality of confidentiality. Where there is a stipulated contractual duty of confidence, the court will not, ordinarily, impose additional or more extensive obligation of confidentiality in equity (see [73] of the *HC Judgment* citing *Duncan Edward Vercoe and others v Rutland Fund Management Ltd and others* [2010] EWHC (Ch) at [329]). However, there are occasions when equity may step in to impose a duty of confidence, where, for instance, "the contract does not necessarily assuage conscience, and equity may yet give force to conscience" (see *CP Partners (UK) LLP v Barclays Bank Plc and another* [2014] EWHC 3049 at [132] & [133]).

41 On the other hand, a duty of confidence can also arise in the absence of a contractual relationship or if there is no express contractual stipulation of confidentiality. Equity may impose a duty of confidence whenever a person receives information in circumstances importing an obligation of confidentiality. To establish this equitable duty, three basic elements must be satisfied: (a) the information must possess the necessary quality of confidence; (b) the information must have been imparted or received in circumstances such as to give rise to an obligation of confidentiality; and (c) there must have been unauthorised use and detriment on the party who disclosed the information to the recipient who misused it. This was the legal position adopted in *Coco v*

Clark which was followed in *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Constructions Pte Ltd* [2012] 4 SLR 36 at [55] to establish a breach of confidentiality in the absence of a contractual relationship.

Analysis and decision

42 Turning now to the issues on appeal, as we mentioned at [4] above, Adinop pursued two causes of action for breach of confidence. The first is that the respondents breached the Confidentiality Agreement in their use of the Customer Information in the Lists. The second is that the respondents had breached their equitable obligations of confidentiality in relation to the Customer Information.

43 We will consider each of the causes of action in turn, and will begin with the claims in contract first.

Breach of the Confidentiality Agreement

44 The Confidentiality Agreement provides a framework for determining whether information disclosed between Adinop and Rovithai during the confidentiality period constitutes confidential information. If it constitutes confidential information, the Confidentiality Agreement limits Adinop's and Rovithai's use and treatment of that information except in certain prescribed circumstances.

45 Confidential Information is defined in the Confidentiality Agreement to mean "certain proprietary information" of either DSM or Adinop. The Judge perceived this language to be in "broad or loose terms" that made it difficult to define what would constitute confidential information under the Confidentiality Agreement (*HC Judgment* at [71]). He considered that the term "certain

proprietary information" was not referable to any proprietary business information. Plainly, the Judge could not decide on what would constitute confidential information because the language used in the Confidentiality Agreement was vague. Having expressed his difficulties with the contractual language, the Judge segued into a consideration of equitable principles of confidentiality, as is apparent from the cases cited by the Judge. Many paragraphs later in the Judge's Summary of findings and conclusions, however, the Judge then found that the Key Customers List as a whole amounted to confidential information under the Confidentiality Agreement and in equity. The Judge said (at [117 (c)] of the *HC Judgment*) said:

> Given the above factors, as well as the fact that the Key Customers List bore a confidentiality mark (which, while not dispositive, is an indication of the parties' intention to treat the information as confidential), I find that the Key Customers List constituted confidential information that was covered by the Confidentiality Agreement and relevant principles of equity. To use the language of equity, the Key Customers List as a whole possessed the necessary quality of confidence.

46 We find this reasoning somewhat puzzling. The Confidentiality Agreement was not engaged at all in the Judge's analysis after finding that the definition of Confidential Information in the first recital lacked clarity.

47 The finding at [117(e)] of the *HC Judgment* on authorised use falling within the meaning of Purpose under the Confidentiality Agreement is similarly puzzling. The finding at [117(e)] of the HC Judgment reads:

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

48 With respect, the Judge's ruling in [117(e)] is akin to putting the cart before the horse. There appears to be a disconnect in his determination on the authorised use with reference to contractual interpretation of the second recital since the Judge did not construe the meaning of "proprietary information" in the first place.

49 We will therefore examine the Confidentiality Agreement anew, having had the benefit of parties' submissions as to how the agreement is to be construed.

Confidential Information under the Confidentiality Agreement

50 The relevant provisions on what constitutes Confidential Information under the Confidentiality Agreement have been reproduced in [14] above. Even though the definition of "Confidential Information" and "Purpose" are in the recitals, the parties' position, and we agree, is that the recitals may properly be used in interpreting the Confidentiality Agreement.

51 Before the Judge, Adinop explained that when the Confidentiality Agreement was entered into, it was both Adinop's and the respondents' intention that the agreement would protect both Adinop's and the respondents' proprietary information.[8] Against the backdrop of this explanation, Counsel for Adinop, Ms Wendy Lin ("Ms Lin"), argues in the appeal that the "proprietary information" referred to in the first recital would cover customer information relating to Adinop's business as a distributor of DSM products and hence be treated as "Confidential Information" under the Confidentiality Agreement.

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[8] ROA Vol III (I) pp 80 to 82 (Plaintiff's Closing Submissions at paras 40 and 41).

52 Ms Lin points out that a distinction must be made between the types of information each side would disclose to the other party in the course of their relationship as manufacturer and distributor. In relation to information disclosed by the respondents, the expectation and understanding between the parties was that the respondents would share information concerning their products *(ie,* the DSM products). For Adinop, the expectation and understanding between the parties was that information shared by it would concern Adinop's business as Rovithai's distributor of DSM products in Thailand. Therefore, information that Adinop had developed and possessed by virtue of its business as a distributor would constitute "proprietary information" and hence would constitute "Confidential Information" under the Confidentiality Agreement.

53 The Lists disclosed to Rovithai were a curated snapshot of Adinop's achievements at the time of disclosure in 2014. The Lists set out who Adinop had managed to secure as customers, how much Adinop had been selling to these customers, the types of DSM products the customers had purchased or were intending to purchase, as well as the applications of the DSM products by these customers. The Lists were a result of Adinop's efforts in collating and curating the list of names of the customers it had secured over the years. Adinop argues that the respondents would not have been able to compile a list of customers identical to the Lists, whether through publicly available information, information already in the respondents' possession or information developed independently.[9]

54 Counsel for the respondents, Mr Ramesh Kumar ("Mr Kumar"), on the other hand, argues that what constitutes "proprietary information" under the

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9 Appellant's Case at 69.

Confidentiality Agreement must be information that Adinop developed *independently* of Rovithai and its relationship with Rovithai. Mr Kumar gave two examples of "proprietary information" covered under the Confidentiality Agreement: a set of unique training manuals on marketing developed by Adinop and a formula for food colouring developed by Adinop.[10]

55 In addition, the respondents submit that the following factors show that the Customer Information in the Lists is not "proprietary information":

(a) First, the Customer Information was not collated by Adinop so that it could exploit or utilise such information for its own commercial interests. They were collated at Rovithai's request so that Rovithai could assist in marketing efforts to maintain and/or grow the customer base for DSM products.[11]

(b) Second, the evidence shows that it was the industry norm amongst distributors of food ingredients in Thailand to share such marketing related information as those contained in the Lists with suppliers. The respondents referred to Rama's website whereby Rama advertised that sharing technical and marketing information with its counterparts is one of its usual practices to offer solid support.[12]

(c) Third, the respondents argue that they were involved in the marketing efforts to develop the customer base for DSM products. As such, it would be incorrect to characterise as "proprietary information"

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10 Respondent's Case at para 45.

11 Respondent's Case at paras 47 to 54.

12 Respondent's Case at para 55.

the names and related information of FB&N manufacturers who purchased DSM products through Adinop and, in addition, as "proprietary information" that was "developed" by Adinop.[13]

(d) Fourth, clause 8 of the Confidentiality Agreement prohibits the use of Confidential Information for a period of five years. To the respondents, information requiring protection for such a lengthy period must be readily discernible as "proprietary information", for example, product formulas. In support of this argument, the respondents rely on the fact that it was the DSM Group that required its distributors and partners to sign confidentiality agreements to protect the confidentiality of the DSM product formulas and details.[14]

(e) Finally, clause 8 of the Confidentiality Agreement may constitute an unreasonably long restraint of trade covenant and thereby render the Confidentiality Agreement unlawful.[15]

56 For convenience, clause 8 on post-termination reads as follows:

> This Agreement shall enter into force on 1st June 2013 and shall remain in force until 30 June 2014, unless extended by the Parties in writing. Either Party may terminate this Agreement at any time by giving the other Party written notice. Upon termination or expiration of the Agreement, all Confidential Information shall be returned to the disclosing Party or destroyed, if so requested by that Party, provided, however, that the receiving Party may retain one (1) copy in a confidential file for the sole purpose of verifying compliance with its obligations under this Agreement. *The confidentiality and non-use obligations of the receiving Party shall survive*

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13 Respondent's Case at paras 56 and 57.

14 Respondent's Case at paras 58 to 64.

15 Respondent's Case at paras 65 and 66.

> *termination or expiration of the Agreement for five (5) years.* [Emphasis added]

57 We agree with Ms Lin that the list of customers in the Lists were a result of Adinop identifying selected customers based on specific information gathered from its own records. For a distributor like Adinop, its list of customers matched against detailed information derived from business dealings with these customers is a core aspect of its business and is without doubt of value to a distributor like Adinop. It represents the distributor's market reach and important clientele. We also agree with Ms Lin that the Lists created in this way would constitute "proprietary information" that was "developed" by Adinop and that such information possessed by Adinop related to Adinop's business. Adinop was Rovithai's distributor and it was in the context of this relationship that the parties signed the Confidentiality Agreement. As such, "proprietary information" developed and possessed by Adinop as stated in the first recital must be read in that commercial context.

58 The Key Customers List comprised a selection of key customers and to make it to the list of top 42 customers, or to qualify as top customers, the 42 customers would have to satisfy or meet certain criteria such as the volume of products purchased per quarter and the application of the product (see [17] above).

59 As regards the Ongoing Projects List, the Judge accepted that the latter contained confidential information. We agree that the Ongoing Projects List contained additional names of customers with whom new business might be pursued, names of customers with whom existing business that might be lost, and names of customers with whom new business had been secured for DSM nutritional products. As the Judge found, information in the Ongoing Projects List was not in the public domain (at [88] of the *HC Judgment*). It is true that

clause 3 of the Confidentiality Agreement carves out an exception to the strictures of confidentiality, in providing that "[t]he receiving Party's obligations set forth hereunder shall not extend to any Confidential Information … which at the time of disclosure is in the public domain" (see [71] below for the full text of clause 3). However, the Judge found, and we agree, that the information disclosed was not in the public domain, which excludes the application of clause 3 in the present case.

60 Even though the respondents had assisted Adinop in developing the market for DSM products in Thailand, it is clear from the evidence that the respondents did not have the same information necessary to reproduce the Customer Information provided by Adinop.[16] As the Judge found on the evidence, Rovithai's records were incomplete, being "fragmented" and "it would take [a] long time … to get that information together" (at [86] of the *HC Judgment*). We agree with the Judge that it was unlikely that any list produced by Rovithai from its internal records (such as purchase orders and quarterly reports) would be as comprehensive as the Key Customers List.

61 Finally, the Lists came with confidential markings consistent with the requirement of clause 1 of the Confidentiality Agreement. As the Judge intimated, although the confidential markings are not dispositive, they indicate the parties' intention to treat the information in the Lists as confidential (at [117(c)] of the *HC Judgment*). We accept Ms Lin's argument that the parties agreed to recognise documents with confidential markings as Confidential Information under the Confidentiality Agreement if so provided by one party to the other during the currency of the distributorship arrangement.

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16 ROA Vol III (Part H), Transcript of 21 September 2017, p 80 line 31 to p 85 line 27.

62 Turning now to address the arguments raised by the respondents at [55] above, we find that the arguments are without merit.

63 First, we disagree with Mr Kumar that "proprietary information" referred to unique information on products that Adinop must develop on its own, such as a unique training manual on marketing or formulas for food products. There is no evidence that Adinop was required to produce such materials and share such information with Rovithai in their long relationship as distributor and manufacturer. It is therefore unlikely that the parties contemplated "proprietary information" developed by Adinop to mean unique training manual on marketing or formulas for food products. Since Rovithai left the business of marketing DSM products to Adinop on sales targets set by Rovithai, the parties must have contemplated "proprietary information" to refer to that commercial relationship which we have explained above at [57].

64 Further, clause 1 of the Confidentiality Agreement provides that written documents shared with the other party must have confidential markings on them in order to be covered by the Confidentiality Agreement. As such, there is no reason to adopt a narrow reading of "Confidential Information" under the agreement and confine it to only unique training manuals on marketing or formulas for food products.

65 Second, Mr Kumar argues that Adinop did not collate the Customer Information to exploit or utilise the same for its own commercial interests. The collation was at the request of Rovithai so that it could assist Adinop in the marketing of DSM products. This contention is untenable having no bearing whatsoever in the determination of whether the information was "proprietary information" under the Confidentiality Agreement.

66 Third, we also do not find any merit in Mr Kumar's argument that it was the industry norm amongst distributors of food ingredients in Thailand to share such marketing related information as those contained in the Lists with suppliers. The only evidence supporting this assertion is a reference to Rama's website. This can hardly serve as evidence of an industrial norm. Even if it did, we are concerned here with what Adinop and Rovithai intended when they executed the Confidentiality Agreement and there is no evidence that this "industry norm" was in their minds at the time when the Confidentiality Agreement was executed.

67 Finally, we doubt that the prohibition in clause 8 of the Confidentiality Agreement can properly be used to aid in the interpretation of "proprietary information" in the first recital of the Confidentiality Agreement. The question whether clause 8 amounts to an unenforceable restraint of trade involves an entirely different inquiry because that engages the enforceability of the contractual provision post-termination, instead of addressing the anterior question of the confidentiality of the information.

68 In light of the foregoing, we find that the Customer Information constitutes "proprietary information" developed by Adinop and is, therefore, Confidential Information under the Confidentiality Agreement. Since the Lists contained confidentiality markings, the use of the information in these documents (*ie.,* the Customer Information) are subjected to the restrictions under the Confidentiality Agreement. This leads us to the next issue, which is the respondents' alleged use of the Customer Information and whether the Notice contravened the terms of the Confidentiality Agreement.

Misuse of the Customer Information

69 We accept that Rovithai's issuance of the Notice is *prima facie* evidence of use and breach of the Confidentiality Agreement and we begin our analysis from this premise. Clause 2 of the Confidentiality Agreement is relevant to the question of the parties' use of Confidential Information (as defined under the Confidentiality Agreement):

> Subject to the provisions of Clause 3, the receiving Party shall:
>
> (i) keep confidential such Confidential Information;
>
> (ii) not use such Confidential Information for any purpose other than the Purpose;
>
> (iii) maintain, use, disclose and otherwise handle the Confidential Information in accordance with the policies and procedures that a receiving Party employs to protect its confidential information of a similar nature but no less than a reasonable degree of care; and
>
> (iv) not disclose to any third party the fact that Confidential Information of the disclosing Party has been made available to the receiving Party and the fact that discussions or negotiations are taking place concerning the Purpose, or any of the terms, conditions or other facts with respect thereto (including the status thereof).

70 "Purpose" as described in the second recital to the Confidentiality Agreement is "for the purpose of the distributorship arrangement between the Parties" (see [15] above).

71 Clause 3 sets out the exceptions to the Confidentiality Agreement:

> The receiving Party's obligations set forth here under shall not extend to any Confidential Information:
>
> (i) which at the time of disclosure is in the public domain;
>
> (ii) which after disclosure becomes part of the public domain other than through breach of this Agreement by the receiving Party;

> (iii) which, as the receiving Party can establish by competent proof, was in its possession at the time of the disclosure by disclosing Party and had not been received directly or indirectly from the disclosing Party;
>
> (iv) which the receiving Party received from a third party who is not in breach of an obligation of confidentiality to the disclosing Party; and
>
> (v) which is developed by the receiving Party independently from the Confidential Information received.

(1) Rovithai used the Customer Information

72 We begin with Adinop's contention that the Judge erred in finding that Rovithai had only used the Key Customers List and *no*t the Ongoing Projects List to send out the Notice. The Ongoing Projects List contained identities of other customers of Adinop that were not in the Key Customers List (see above at [18].

73 In addition, Rovithai and DSM Singapore were not aware of certain information in the Key Customers List until its disclosure. The parties agreed that out of the 42 customers disclosed in the Key Customers List, 10 customers were disclosed for the first time by Adinop to Rovithai in the Key Customers List. Further, information concerning products obtained by an additional 22 customers (on top of the 10 mentioned) were disclosed to Rovithai for the first time.[17]

74 The respondents dispute Adinop's contentions and deny using any of the Customer Information. Mr Kumar suggests that the sequence and timing of events do not allow for any finding that Rovithai had used the Customer Information for the purpose of issuing the Notice.

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17 Appellant's Case at paras 53 to 55.

75 In our view, there can be no doubt that Rovithai had used *both* the Key Customers List and the Ongoing Projects List to send out the Notice. First, it is pertinent that at the trial below, Mr Kumar took the position in the "Defendants' Lead Counsel Statement" that the Notice was sent out to Adinop's customers, including those identified in the Lists[18]:

> On 1 July 2014, the 1st Defendant caused a notice to be issued to the Plaintiff's customers (the "Notice"), including those in the Customer List, the Ongoing Projects List as well as Wan Thai, AJE, Lactasoy, TC Union, and Boonrawd. …

76 Second, Mr Redman admitted in cross-examination that Rovithai used the Lists to ascertain the names of Adinop's customers, after which it did its own searches to obtain the contact details of those customers to send out the Notice[19]:

> Q: Okay. Just help me understand this. What, essentially, you or someone on your instruction did, was to carry out the Google search of all the customers that were disclosed by Adinop to the defendants. Correct?
>
> A: Yes.
>
> Q: And then print from that Google search, the available contact details of that client.
>
> A: Yah.
>
> …
>
> Q: No. Alright, so what happened here is someone in --- someone did a Google search of the whole list of customers and printed out from their respective website the contact details that are placed up on the website. Correct?
>
> A: Yah, yah.
>
> [Emphasis added]

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18 ROA Vol III (Part I) p 13.

19 ROA Vol III (Part H) p 138 line 18 to p 139 line 13.

77 The respondents submit that in the absence of direct evidence of use, the appropriate finding is that the use of the Key Customer List and /or the Ongoing Project List to send out the Notice is not proved.[20] We disagree with the submissions on the state of the evidence. Given the *prima facie* evidence of use as stated in [69] above, the evidential burden shifted to Rovithai who failed to discharge it. We are satisfied that evidence of (a) the existence of the Lists (they were the only two lists setting out Adinop's customers of DSM products that was disclosed to Rovithai), (b) Mr Kumar's position at trial (*i.e.,* that the Notice was sent out to Adinop's customers, including those identified in the Lists (see [75] above)), and (c) the admission by Mr Redman in cross-examination (see [76] above), altogether show, on the balance of probabilities, that Rovithai had used the identities of the customers in the Lists to send out the Notice.

78 In addition, the respondents did not call one of Rovithai's principal employees at the material time who was responsible for Rovithai's FB&N ingredient line of business, including dealings with Adinop, Sawasporn Jaklerdchai ("Jean"), as a witness. Jean could have, as the respondents admitted, given direct evidence about whether the Lists were used. Further, no officer from Rama was called as a witness. As such, there was no one to prove Rovithai's assertion that Rama provided Jean with Rama's own customer lists and email addresses which were used to send out the Notice. The contents of Jean's email dated 2 July 2014 to Rama asking Rama to send her "all [of Rama's] customer lists" and stating that she "[could not] thank [you (Rama)] enough" is ambiguous and is insufficient to prove that Rama did send to Jean

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20 Respondents' Skeletal Arguments, para 51.

its list of customers.[21] Besides, Rovithai had also not disclosed any customer lists emanating from Rama.

79 Finally, as for the contention that Rovithai made use of its own list of customers which it had collated over the years for the purpose of issuing the Notice, we note that Rovithai did not adduce evidence of the existence of any such list at the trial. In the absence of Rovithai's own list or a list from Rama, and given Mr Kumar's position at trial (see [75] above) and the admission by Mr Redman in cross-examination (see [76] above), our view is that Rovithai made use of *both* the Key Customers List and the Ongoing Project List to obtain the names of Adinop's customers for the Notice.

(2) Rovithai breached the Confidentiality Agreement

80 We agree with Adinop that the Judge was wrong in the way he interpreted "Purpose" under the Confidentiality Agreement. "[F]or the purpose of the distributorship arrangement between the Parties" in the second recital could only mean a purpose which would *advance* the distributorship arrangement, not one which involved or would facilitate the change to a new distributor.

81 Furthermore, we agree with Adinop that the terms of clause 6 of the Confidentiality Agreement supports our reading of the definition of Purpose. The relevant portion of clause 6 provides:

> Each party may furnish Confidential Information to the other Party as it deems, in its sole discretion, necessary or helpful for the accomplishment of the Purpose. …

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21 Respondents' Skeletal Arguments, para 54(c).

We find that the phrase "necessary or helpful for the accomplishment of the Purpose" could only mean that any information disclosed pursuant to the Confidentiality Agreement should be for the mutual benefit of the parties under a continuing distributorship arrangement and not otherwise.

82 In the present case, the Lists were requested at a meeting between Rovithai and Adinop on 27 February 2014 and Rovithai's reason for the request was to "assist [Adinop] in marketing efforts to maintain and/or grow the customer base". We have no doubt that this request made during the currency of the distributorship arrangement would be in keeping with the business model of the distributorship arrangement where Adinop would develop and grow the customer base through the promotion and sales of DSM ingredients in Thailand and Rovithai's role was to support Adinop's efforts. We accept the Judge's view that it was a joint effort to develop a market for DSM products (at [118] of *HC Judgment*). In the context of the joint effort to maintain and grow the customer base for DSM products, the request for the Lists must be premised on the distributorship arrangement continuing, and not for post-termination use for the benefit of the respondents alone and/or for the new distributor.

83 In light of the foregoing, the use of the Lists to notify Adinop's customers of the termination of the distributorship arrangement with Adinop was not a Purpose for which Confidential Information was disclosed pursuant to the Confidentiality Agreement. We also find that Rovithai's use of the Customer Information does not fall under the exceptions enumerated under clause 3 of the Confidentiality Agreement (see [71] above). It was also used before the expiry of the five-year prohibition under clause 8 of the Confidentiality Agreement (see [56] above). Rovithai's use of the Customer Information was therefore in breach of the Confidentiality Agreement.

Breach of equitable obligations

84 Notwithstanding the conclusions reached on the Confidentiality Agreement, we will deal with Adinop's alternative cause of action since the Judge covered this substantially in his judgment and the parties make substantial arguments addressing this duty of confidence in equity in the appeal.

85 The Judge set out the legal principles for establishing a claim for breach of confidence under equity in his decision (at [53] – [54] of the *HC Judgment*) and we have stated these principles at [41] above.

86 On this alternative cause of action, the parties' arguments are essentially the same as the arguments based on contract (*ie*, the Confidentiality Agreement above). The arguments in contract are relevant to the first two requirements of *Coco v Clark* (cited above at [41]). We will begin with the first two requirements before dealing with the third requirement on unauthorised use of confidential information.

Quality of Confidence and duty of confidence in equity

87 On whether the Customer Information possess the necessary quality of confidence, given our discussion above at [57]–[61], the Judge rightly addressed the question of the confidential nature of the Customer Information (*ie,* that the Customer Information possess the necessary quality of confidence).

88 As regards the question whether Rovithai is bound by a duty of confidence in equity, we accept that in non-contractual situations, an obligation of confidence in equity may arise by applying principles of good faith and conscience. The High Court in *Invenpro(M) Sdn Bhd v JCS Automation Pte Ltd and another* [2014] 2 SLR 1045 at [131] held that in the case of parties dealing

directly (as where the defendant directly receives confidential information from the plaintiff), an objective test is the preferred basis for determining whether good faith and conscience supports the imposition of a duty of confidence. The test is whether any reasonable person in the shoes of the recipient would have known on reasonable grounds that the information was confidential and given to him in confidence. Megarry J's italicised remarks in *Coco v Clark* are apposite:

> The second requirement is that the information must have been communicated in circumstances importing an obligation of confidence. However secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential. … *It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence*: see the Saltman case at page 216. … [Emphasis added]

89 The intervention of equity ultimately depends on conscience. Rovithai knew that the information in the Key Customers List and the Ongoing Project List was confidential and the circumstances of Rovithai's receipt were part of the context affecting its conscience. Here, the Lists were disclosed by Adinop at the request of Rovithai. Rovithai had informed Adinop that the documents would be used in order for Rovithai to support Adinop as distributor under the distributorship arrangement. Rovithai's conscience was therefore bound in that it could not use the Customer Information for purposes other than the stated purpose for which it was requested in the first place.

Unauthorised use of the Customer Information

90 We now turn to the third requirement set out in *Coco v Clark.* To establish breach of confidence in equity, the recipient of the confidential information must have used the information in an unauthorised way to the detriment of the person communicating it (see [54] of the *HC Judgment*).

91 As stated earlier, the Judge found that there was no evidence that Rovithai had used the information in the Ongoing Projects List. As for the Key Customers List, the Judge found that Rovithai's use of the said list for the purpose of issuing the Notice was *not* an unauthorised use of the information. The Judge's reasons can be distilled to three main grounds:

(a) First, Rovithai did not use the collated information as a whole but merely used the names of the customers in the Key Customers List. The Judge held that where, for example, the defendant is only shown to have misused part of the information, it will ordinarily be necessary to show that the misuse relates to a "material part" of the information. On this, the Judge found that the names of the customers in the Key Customers List was not a material part of the Key Customers List (at [87] and [117(d)] of the *HC Judgment*).

(b) Second, even if the names in the Key Customers List constituted a relevant part of the confidential information, the use of the names for the purpose of issuing the Notice was authorised in light of the manufacturer-distributor relationship between Adinop and Rovithai. By virtue of that relationship, Rovithai was "implicitly authorised to use its knowledge of Adinop's key customers so as to inform them of the termination of the distributorship" (at [103] of the *HC Judgment*).

(c) Third, given the manufacturer-distributor relationship between Adinop and Rovithai, Rovithai would have a legitimate interest and genuine need to inform Thai FB&N customers of DSM products of the change in distributorship by way of the Notice (see [102] & [119] of the *HC Judgment*). The Judge accepted Rovithai's submissions that after termination of the distributorship arrangement, Adinop did not have any legitimate interest in stopping Rovithai from informing the FB&N producers of the change of distributorship and where they should go if they wished to continue to use DSM products (at [108] of the *HC Judgment*).

92 As the Judge found that there was no unauthorised use, there was no need for the Judge to examine the question of detriment.

93 We respectfully disagree with the Judge's reasoning. First, as discussed at [75]–[79] above, we concluded that Rovithai did use the Customer Information in the Lists to send out the Notice.

94 Second, and as stated at [58] and [59] above, contrary to the Judge's findings, the identities of Adinop's customers in the Lists formed the most material part of the documents having regard to the make-up and purpose of the Lists, which was to, *inter alia*, profile Adinop's key customers. The customers selected to be part of the Lists were, amongst other things, those who were making the largest and most significant purchases of DSM products. The Judge in fact acknowledged this at [82] of the *HC Judgment*:

> *The immediate utility of the Key Customers List was not just information as to who the key FB&N producers in Thailand were, but more significantly,* ***who the Plaintiff's key customers for DSM ingredients were****, the types of ingredients they ordered, the applications made of such ingredients and the estimated quantities thereof (see [64] above). I am satisfied that even if the*

> 1st Defendant had been able to construct its own list of key FB&N producers in Thailand who were using DSM ingredients, there is no doubting the time and effort that would have been required. It is also unlikely that any list produced by the 1st Defendant simply from its internal records (such as purchase orders and quarterly reports) would be as comprehensive as the Key Customers List. [Emphasis added in italics and bold, italics and underlined]

95 Without the names, there was no way for Rovithai to know who Adinop's key customers were and what products those customers purchased in order to grow DSM's market share. The Notice was targeted at important customers to retain their business.

96 Third, unauthorised use can be properly inferred from Rovithai having used the Customer Information in the Lists for a different purpose than that for which it had been provided. Rovithai had used the Customer Information for issuing the Notice and that was a use of the information not contemplated by Adinop when it disclosed that information to Rovithai pursuant to the Confidentiality Agreement. At the time when Adinop disclosed the Lists to Rovithai, Adinop had no inkling that the termination of the distributorship arrangement was coming.

97 Fourth, we respectfully disagree with the Judge that by virtue of the manufacturer-distributor relationship between Adinop and Rovithai, Rovithai was "implicitly authorised to use its knowledge of Adinop's key customers so as to inform them of the termination of the distributorship". On the facts, we agree with Adinop that when Adinop disclosed the Customer Information to Rovithai, it was for the clearly stated purpose of assisting and supporting Adinop to develop the market for DSM products. The request for the Lists was premised on the continuation of the distributorship arrangement which premise was valid and reasonable. At the relevant times, Adinop had no inkling that the

distributorship arrangement would be terminated. Therefore, there is no factual basis to argue that Adinop implicitly authorised Rovithai to use the Customer Information to facilitate the termination of their distributorship arrangement and that Adinop agreed to suffer the attendant loss of sale as a result.

98 Fifth, we agree with Adinop that Rovithai's use of the Customer Information was not justified on the evidence. Although we agree with the Judge that Rovithai had every right to inform the market of its decision to terminate its distributorship arrangement with Adinop, we find that there is no legitimate interest to do so using the Customer Information *before* the expiry of the one-month notice period for the effective termination of the distributorship arrangement between them. The Notice was sent out on 1 July 2014, less than one month after the notice of termination was given on 10 June and before the notice period expired on 10 July 2014. It was wrong of Rovithai to send out the Notice using the Customer Information from the Lists before the effective date of termination. Rovithai's wrongdoing would also survive the effective termination of the distributorship arrangement by virtue of the prohibition under clause 8 of the Confidentiality Agreement (see [56] above). The Judge's analysis on Rovithai's legitimate interest did not take into account both the effective termination date and Rovithai's obligations under clause 8 of the Confidentiality Agreement.

99 The Judge also took the view that "after termination of the distribution arrangement, Adinop did not have any legitimate interest in stopping Rovithai from informing the FB&N producers of the change of distributorship and where they should go if they wished to continue to use DSM products (at [108] of the *HC Judgment*). As we had explained above, we respectfully disagree with the Judge's views on this point and find that Rovithai had misused the Customer Information for the purpose of sending out the Notice. We accept that the Notice

would have affected Adinop's ability to sell its existing stock of DSM products. There were in fact cancellations of orders following the Notice.

100 Finally, and following from the above, the Notice was to Adinop's detriment. Following the issuance of the Notice, five of Adinop's customers who had placed orders for DSM products prior to the Notice were cancelled.[22] These five customers were listed in the Key Customers List. Adinop said it had not received further purchase orders for DSM products from other customers whose information was disclosed in the Customer Information. Hence, the Notice deprived Adinop of the opportunity to continue servicing its customers using its buffer stock of DSM products that it had earlier purchased in bulk and maintained. On Adinop's allegation that it lost the opportunity to persuade its customers to switch to products of other competing manufacturers distributed by Adinop, and that this was something it could have done given the goodwill it had established with these customers,[23]we note that Adinop had not identified any occasion of lost opportunity. In our view, there is no good reason why Adinop could not have taken steps to persuade their customers to switch to alternative products notwithstanding the Notice.

No evidence of DSM Singapore's involvement

101 Finally, we agree with the Judge that DSM Singapore was not involved in the unauthorised use of the Customer Information. There was insufficient evidence to show that DSM Singapore was involved in the sending out of the Notice. On appeal, Adinop argues that since DSM Singapore manages the health

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22 ROA Vol II pp 27 to 30 (Statement of Claim (Amendment No 2) at para 38). See also ROA Vol III (C) at pp 44 to 46 (Affidavit of Evidence in Chief of Siriporn Chaitharatip dated 10 August 2017 at para 72) and ROA Vol III (D) at pp 81 to 103.

23 Appellant's Case at paras 86 and 87.

and nutrition business in Asia-Pacific, and that the Notice included the reference to Rovithai being a part of the DSM Group, it is likely that DSM Singapore would have been involved in the decision to use the Key Customers List to issue the Notice.[24] We find Adinop's arguments to be highly speculative and unpersuasive. Without proper evidence of DSM Singapore's involvement, we see no reason to disturb the Judge's findings.

Conclusion

102 To conclude, we find that Adinop has established that Rovithai breached its obligations of confidentiality under the Confidentiality Agreement. The Customer Information constitutes "Confidential Information" under the Confidentiality Agreement and Rovithai's use of that information for the purpose of issuing the Notice fell outside what was permitted under the Confidentiality Agreement. In addition, Adinop has established its alternative case that Rovithai had breached its duty of confidence in equity in relation to the Customer Information. The Customer Information possesses the necessary quality of confidence and was imparted in circumstances that gave rise to an equitable duty of confidence on the part of Rovithai. Rovithai then breached that equitable duty when it used that information for the purpose of issuing the Notice. This was an unauthorised use to the detriment of Adinop.

103 We accordingly allow Adinop's appeal in part. That is to say, we allow Adinop's appeal only against the Judge's findings that Rovithai did not breach its confidentiality obligations under the Confidentiality Agreement as well as in equity in relation to the Customer Information. However, we dismiss Adinop's

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[24] Appellant's Case at para 94.

appeal against the Judge's findings against DSM Singapore's liability for the same breach.

104 Adinop has asked, amongst other things, for damages to be assessed. As the trial was bifurcated between liability and damages, we direct that damages for breach of confidentiality be assessed by the Registrar. The scope of the assessment should be limited to Adinop's alleged loss arising from the cancellation of orders placed by Adinop's five customers prior to the Notice. Adinop is to prove the quantum of their loss. As for the cancellation of the purchase order placed by Kovic Kate International (Thailand) Co Ltd on 10 October 2014 and subsequently cancelled on 24 November 2014, we allow this cancellation to be included in the assessment but Adinop will have to show the necessary causal link to the Notice. Finally, we also allow Adinop to include a claim for losses arising from unsold or unutilised buffer stock of DSM products that Adinop had purchased or ordered in bulk pursuant to the distributorship arrangement prior to the Notice. Any such claim is subject to the same proof of causation.

105 On costs, given Adinop's partial success in this appeal, Rovithai is to pay to Adinop 75 % of the party and party costs in the court below to be taxed, if not agreed. Further, Rovithai is to pay Adinop costs of the appeal fixed at $30,000 inclusive of disbursements. The usual consequential orders would apply.

Steven Chong	Belinda Ang Saw Ean	Quentin Loh
Judge of Appeal	Judge	Judge

Lin Weiqi Wendy, Daniel Liu and Zoe Kok (WongPartnership LLP) for the appellant;
Ramesh Kumar s/o Ramasamy, Sean Douglas Tseng Zhi Cheng and Lim Min Li Amanda (Allen & Gledhill LLP) for the first and second respondents.
