

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(CIVIL DIVISION)
[CIVIL ACTION NO: S2-22-367-2001]**

BETWEEN

**REPCO (MALAYSIA) SDN BHD
[NO. SYARIKAT: 26331-W]**

... PLAINTIFF

AND

- 1. TAN TOH FATT**
- 2. TAN HAH SING**
- 3. SIEW CHOON WAH**
- 4. OON EAN SENG**
- 5. ELLY SAW**
- 6. TAN THO LIN**
- 7. TAN TOH SENG**
- 8. EPIC ADVENTURES SDN BHD
[NO. SYARIKAT: 298786-D]**
- 9. E.V. SPARK PLUGS SDN BHD
[NO. SYARIKAT: 366184-M]**

10. NG SIEW KENG

11. TAN LI HOE

12. TAN HOCK AUN

13. TAN LI LIAN

... DEFENDANTS

GROUND OF JUDGMENT

INTRODUCTION

1. The Plaintiff, Repco (Malaysia) Sdn Bhd is a company dealing with the distribution and sale of automotive spare parts for after sale market. The 1st to the 7th Defendants were all former employees of the Plaintiff. The 1st to the 4th Defendants were at all material times prior to their departure from the Plaintiff, senior employees of the Plaintiff. The 8th Defendant was incorporated on 5th May 1994. Between April to July 1996 the 1st to the 4th Defendants became the Directors of the 8th Defendant. The 9th Defendant, a wholly owned company by the 8th Defendant was incorporated on 8th November 1995.
2. The Plaintiff commenced this action against all the Defendants for alleged breach of confidentiality, breach of good faith and fidelity, conspiracy to injure, false allegations, unlawful interference,

“poaching” of employees, “poaching” of suppliers for product lines and economic sabotage.

3. After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by all the learned Counsels for the respective parties I find that the Plaintiff had failed to prove its claim on the standard required by the law pertaining to each of the Plaintiff’s pleaded case as stated in its Statement of Claim (“SOC”). Accordingly I dismissed the Plaintiffs’ claims against the Defendants with costs.
4. The Plaintiffs being dissatisfied with the said decision appealed to the Court of Appeal against the whole of the said decision.

BACKGROUND FACTS

(Established after a full trial and are not in dispute)

Plaintiffs

5. The Plaintiff is in the business of distribution and sale of automotive spare parts and has the presence in the automotive spare parts distribution industry for over forty three years.

The Defendants

6. The 1st Defendant commenced his employment with the Plaintiff as a store keeper in July 1975 and over the years he was promoted several times. In or about 1994 the 1st Defendant was appointed as a General Sales Manager and had held that position until his resignation and or release on 30th May 1995. The 1st Defendant joined the 8th Defendant on 1st July 1995. On 3rd June 1996 he became a shareholder of the 8th Defendant. On or about October 2002 the 1st Defendant sold off all his shareholding in the 8th Defendant and resigned from all positions. The 1st Defendant is currently a General Manager of a company dealing with automotive parts known as JM Patent (M) Sdn Bhd. The 1st Defendant is the nephew of the 2nd Defendant.

7. The 2nd Defendant (**now deceased**) joined the Plaintiff in 1969 and held several posts such as Area Sales Supervisor and Branch Manager until his appointment as Managing Director of the Plaintiff in 1985. The 2nd Defendant held this post until his resignation from the Plaintiff on 16th September 1995. The 2nd Defendant passed away on 26th May 2009 and had been substituted by the 10th to the 13th Defendants who are the Executors and Administrators of the Estate of 2nd Defendant. The 2nd Defendant is the uncle of the 1st Defendant.

8. The 3rd Defendant commenced his employment with the Plaintiff in 1983 as an Accountant/ Administrator. In 1989 the 3rd Defendant was appointed as Financial Controller/Administrator of the Plaintiff and held that post until his resignation from the Plaintiff on 15th May 1995. The 3rd Defendant joined the 8th Defendant on 16th January 1995 and is now the General Manager of the 8th Defendant.
9. The 4th Defendant joined the Plaintiff in 1972 as a storekeeper. He held the post of a Sales Representative in 1976 and was promoted to a Sales Executive in 1984. His last post prior to his resignation from the Plaintiff on 5th May 1995 was as a Branch Manager of Sales.
10. The 5th Defendant is the wife of the 1st Defendant started her employment with the Plaintiff in July 1991 as an Account Supervisor and resigned from the Plaintiff on 12th September 1994. The 5th Defendant joined the 8th Defendant around December 1994 and became its shareholder on 19th May 1997. In October 2002 the 5th Defendant had relinquished all her positions in the 8th Defendant and sold all shares in the said company.
11. The 6th Defendant who is the brother of the 1st Defendant started his employment with the Plaintiff on 8th April 1985 as a Store Assistant and was promoted to the post of a Sales Representative on 1st May 1990 followed by the post of Warehouse Supervisor in 1994. The 6th Defendant resigned from the Plaintiff on 1st July 1995. On 10th of July 1995 the 6th Defendant became the shareholder of the 8th Defendant. The 6th Defendant had relinquished all his positions in the 8th

Defendant and sold all his shareholdings in the 8th Defendant around March 2002.

12. The 7th Defendant is also the brother of the 1st Defendant commenced his employment with the Plaintiff in May 1984 as a Store man. He was appointed as a Sales representative in January 1990 and in June 1993 he was appointed as a Sales Executive. On 30th July 1995 the 7th Defendant resigned from the Plaintiff. He became a shareholder of the 8th Defendant on 19th May 1997 and relinquished from all positions and sold of his shareholding in the 8th Defendant around October 2002.
13. The 8th Defendant was incorporated on 5th May 1994. Between April/July 1996 1st to 4th Defendant became its Directors. The 3rd Defendant is the General Manager from January 1995 and was also a company secretary from June 1996.
14. The 9th Defendant a wholly owned company by the 8th Defendant was incorporated on 8th November 1995.

DOCUMENTS

15. At the outset of the trial parties have agreed for the following documents to be used:
 - i. Bundle of Pleadings - “A”
 - ii. Agreed Bundle of Documents (Section A) - “A1”

iii.	Non Agreed Bundle (Section B)	-	“B1”
iv.	Non Agreed Bundle (Section B)	-	“B2”
v.	Non Agreed Bundle (Section B)	-	“B3”
vi.	Non Agreed Bundle (Section B)	-	“B4”
vii.	Non Agreed Bundle (Section B)	-	“B5”
viii.	Non Agreed Bundle (Section C)	-	“C1”
ix.	Non Agreed Bundle (Section C)	-	“C2”
x.	Non Agreed Bundle (Section C)	-	“C3”
xi.	Non Agreed Bundle (Section C)	-	“C4”
xii.	Non Agreed Bundle (Section C)	-	“C5”
xiii.	Non Agreed Bundle (Section C)	-	“C6”
xiv.	Plaintiff’s Additional Bundle of Document	-	“D”
xv.	Statement of Agreed Facts	-	“E”
xvi.	Issues To Be Tried	-	“F”
xvii.	Opening Statement of the Plaintiff	-	“G”

THE ISSUES RAISED

16. The parties raised numerous issues to be tried as stated in Document “F”. The broad issues are summarised as follows:

- (a) Whether at the material times, the 1st to 7th Defendant owed a duty of good faith and fidelity to the Plaintiff and whether they had breached their respective duty of good faith and fidelity;
- (b) Whether there was an express or implied term which continue to bind the 1st to the 7th Defendants even after the 1st to 7th

Defendants left and or resigned from the Plaintiff and whether the 1st to the 7th Defendants jointly owed a duty not to utilise, disclose and or remove any document and or confidential information and or trade secret to any other person which would prejudice Plaintiff;

- (c) If the answer to Issue (b) above is in the affirmative, whether the express and or implied terms are against public policy and or are restrictions in trade and unenforceable pursuant to section 24 and or 28 of the Contracts act 1950;
- (d) Whether at the material times the 1st to the 7th Defendants are entitled to take and or make copies of the documents and or the confidential information and or the trade secret and or to utilise and or disclose and or remove any documents and or confidential information and or trade secret to any other person without the prior permission of the Plaintiff;
- (e) Whether the 1st to the 7th Defendants had taken and or made copies of the information and or the documents pertaining to:
 - i. List of names, phone numbers and addresses of the suppliers and customers of the Plaintiff and the particulars of the relevant contact persons;
 - ii. List of price quotations of various equipment and automotive parts delivered to the customers;

- iii. List of the cost and sale prices of the Plaintiff's equipment and automotive parts;
 - iv. Confidential information pertaining to specific request of Plaintiff's customers;
 - v. Suppliers' prices, discounts and confidential information;
 - vi. Customers' credit worthiness and manner and or mode of payment; and
 - vii. List of Plaintiff's employees.
- (f) Whether the 1st to the 7th Defendants prior to their departure and or retirement had jointly and or severally sold the Plaintiff's goods below cost and or at cost and or with low profit margin and or sold at a price which was prejudicial to the Plaintiff.
- (g) Whether the 1st to the 7th Defendants and or any combination of these Defendants were involved in the setting up of the 8th Defendant and or 9th Defendant with the main purpose to compete with the Plaintiff.
- (h) Whether the 1st to 7th Defendants were "poaching" the employees of the Plaintiff for these employees to work for the 8th Defendant.

- (i) Whether the 8th and 9th Defendants were utilising the Plaintiff's confidential and or trade secrets for the benefit their businesses.
- (j) Whether the 1st to the 7th Defendants were "poaching" the Plaintiff's customers and or suppliers and or influencing them to deal with the 8th and 9th Defendants instead of the Plaintiff.
- (k) Whether the Defendants were making false and serious allegations against the Plaintiff which are prejudicial to the Plaintiff.
- (l) Whether the Defendants and or a combination of them had conspired to injure the Plaintiff.
- (m) Whether the Defendants were jointly and or severally liable to the Plaintiff.
- (n) Whether the Plaintiff's claim is speculative and barred by the Statute of Limitation.

THE PLAINTIFF'S CLAIM IN A NUTSHELL

17. The Plaintiff's claim against the Defendants can be summarised as follows:

- (a) The Plaintiff alleged that Defendants were using the Plaintiff's confidential information to deal with the Plaintiff's customers and induce them to place orders with the 8th Defendant instead of dealing with the Plaintiff (**paragraph 26 of the SOC**).
- (b) The 1st to the 7th Defendants obtained confidential information and or trade secrets belonging to the Plaintiff for the benefit of the 8th Defendant (**paragraph 27 of SOC**).
- (c) All the Defendants were using the Plaintiff's confidential information to destroy the Plaintiff's reputation and business (**paragraph 29 of SOC**).
- (d) The 1st to the 7th Defendants had breached their duty of good faith and fidelity owed to the Plaintiff (**paragraph 30 of SOC**).
- (e) All the Defendants had conspired with the aim to defraud the Plaintiff (**paragraph 31 SOC**).
- (f) All the Defendants had approached the employees of the Plaintiff and persuaded them to leave the Plaintiff to join the 8th Defendant and 9th Defendants (**paragraph 32.3 of SOC**).
- (g) All the Defendants had persuaded or influenced the customers of the Plaintiff to stop their dealings with the Plaintiff and to deal with the 8th and 9th Defendant (**paragraph 32.3 of SOC**).

- (h) The 1st to 7th Defendants whilst still in the employment of the Plaintiff and prior to their resignation or retirement had sold the Plaintiff's goods at below cost and or at cost and or with low profit margin with the object to give a good name in preparation to compete with the Plaintiff (**paragraph 32.6 of SOC**).
- (i) The Defendants had made false and serious allegations against the Plaintiff that the Plaintiff was no longer active in the automotive parts business (**paragraph 34 of SOC**) and or had ceased operation of its business.
- (j) The Plaintiff claimed aggravated, exemplary and punitive damages against all the Defendants and also for loss of profit (**paragraph 38 (f) and (8) of SOC**).

THE DEFENDANTS' DEFENCE

18. The Defendants pleaded the following:

- (a) The Plaintiff's claim did not disclose a cause of action in law.
- (b) The Plaintiff had changed its corporate direction and business and such change had resulted in a shift from the Plaintiff's original business operation.

- (c) The 2nd Defendant had resigned from the Plaintiff in September 1995 and had not until his demise in 2009 taken on employment with any company.
- (d) The 1st to 7th Defendants denied the existence of any terms whether express or implied which relate to the duty of good faith and fidelity for all confidential information as pleaded by the Plaintiff. Even if there were such terms, which were denied, they were vague and ambiguous.
- (e) The 1st to 7th Defendants denied having received any confidential information and or any trade secrets other than what in law is in fact part of the Defendants' general skill, knowledge and or experience.
- (f) The Plaintiff had failed to provide particulars of the alleged confidential documents and information and or trade secret.
- (g) Further the matters which the Plaintiff claimed to be confidential information and or trade secret are generally known to public at large and or the industry concern and are not objectively confidential.
- (h) At the material time the Plaintiff was not the exclusive agent of any suppliers for the distribution of automotive spare parts and or exclusive supplier for the customer.

- (i) The main supplier of the NGK Spark Plugs was NGK Spark Plugs Malaysia is responsible in fixing the cost and sale price of these products and had the authority to appoint several dealers in Malaysia including the 8th and 9th Defendants.
- (j) The 2nd Defendant was a non executive director of the 8th Defendant from 1st July 1996 to 20th September 1997 and was never a director of the 9th Defendant.
- (k) The 8th Defendant was a manufacturer of exhaust systems, brake lining, plug cables and horns and there are several businesses dealing with similar business.
- (l) The Plaintiff's claim is barred by the Limitation Act 1953.

THE EVIDENCE

19. The law on the burden of proof is governed by the provisions found in Chapter VII of Part IN of the Evidence Act 1950. Pursuant to section 101 of the Act, the legal burden of establishing the facts pleaded against the Defendants is on the Plaintiff. At the conclusion of the case this Court has a duty to determine whether sufficient evidence had been adduced by the Plaintiff to prove its case on the balance of probabilities and or beyond reasonable doubt, depending on what is appropriate and applicable to the Plaintiff's pleaded case.

- 20.** Pursuant to section 106 of the Evidence Act 1950 the burden to prove any facts which is especially within the knowledge of the Plaintiff lies on the Plaintiff.
- 21.** With this principle in mind I would now evaluate the Plaintiff's evidence in order to ascertain if the Plaintiff had met with the standard of proof envisaged by the law.
- 22.** The Plaintiff had called a sum of ten witnesses to prove its case against all the Defendants. They were:
1. Yeow Ewe Chuan
Chief Executive Officer of the Plaintiff (PW1)
 2. Chai Foo Seng
Plant Manager NGK Spark Plug (PW2)
 3. Tan Leong Chuan (PW3)
NGK Spark Plug Distributor
 4. Siti Salwa Binti Ibrahim (PW4)
Sales Clerk of the Plaintiff
 5. Tazlinda binti Tajuddin (PW5)
Receptionist of the Plaintiff

6. Ho Kim Yen (PW6)
Store Manager of the Plaintiff
7. Tuan Haji Abd Razak bin Harun (PW7)
8. Soo Siew Keen (PW8)
Assistant Business Manager (Development)
9. Tu Siam Fee (PW9)
Founding Director of 8th Defendant
10. Kok Choo Swee (PW10)

23. The 1st, 5th, 7th, 6th, 3rd and 4th (DW1 to DW 6 respectively) took the stand to defend their case against the Plaintiff.

24. It is pertinent at this juncture for me to begin by stating my assessment and evaluation of the evidence of the Plaintiff's main witnesses first and will deal with the rest of the witnesses' evidence when discussing the issues connected to them. The Plaintiff had relied heavily on the evidence of one Mr Yeow Ewe Chuan (PW1) to prove its claim against all the Defendants. PW1 who was the Plaintiff's key witness was and is still the Plaintiff's Chief Executive Officer. PW1 joined the Plaintiff in 1995 after the 1st to the 7th Defendants had resigned and or retired from the Plaintiff. From PW1's testimony it is obvious that PW1 had no personal knowledge of the affairs of the Plaintiff. PW1 too did not have any idea of how

the Plaintiff was run during the management of the 1st and 2nd Defendant. PW1 too did not know how the employees of the Plaintiff were trained and also their modus operandi in the Plaintiff. PW1 too did not know who were authorised by the management to have access to the Plaintiff's customers' list and all particulars pertaining to business dealings. PW1 too admitted both the 1st and the 2nd Defendants were recognised by the Plaintiff as valuable employees.

25. PW1 had stated in evidence that he had uncovered the many wrong doings of the 1st to the 7th Defendants through his own investigations after he had taken office in the Plaintiff around November 1995. At his point in time all the 1st to the 7th Defendants had already left the Plaintiff. It was also in evidence that after the 1st to 7th Defendants left the Plaintiff, for a certain period the Plaintiff was run and or managed by different team of management headed by one David Ling who was not called as a witness in this proceeding.
26. PW1 informed the Court that he had conducted an investigation pertaining to the 1st to the 7th Defendants' wrong doings with the assistance of one Derrick Ong, Ho Kim Yen (PW6) and one Mr Yip. It was also in evidence that PW1's investigation were mainly based on the interviews of three persons namely Mr Ho Kim Yen, Derrick Ong and one Miss Wong from the accounts section. Out of these three persons only Mr Ho Kim Yen (PW6) took the stand. The remaining two employees of the Plaintiff who were involved in the interviews were not called to corroborate the testimony of PW1 even though these persons were available.

27. PW1 had stated in evidence that he had prepared a report on his investigations and presented the same to the Board of Directors of the Plaintiff. However when challenged to produce the said report for the purpose of the trial no attempts were made by the Plaintiff to produce the same in court.
28. The Plaintiff had called One Mr Ho Kim Yen (PW6) to corroborate the evidence of PW1 on PW1's alleged discovery of the many wrong doings committed by the 1st to the 7th Defendants before these Defendants resigned and or retired from the Plaintiff. PW6 has been with the Plaintiff since 1984 and is currently working as a Store Manager of the Plaintiff. After the 1st Defendant left the Plaintiff PW6 was promoted as the Sales Manager. PW6 informed the Court that he had made a Statutory Declaration ("**SD**") on 31st May 2001 (**pages 752-753 of Bundle "B2"**) and stated that some time after the 1st Defendant had left the Plaintiff and on the instruction of one David Ling who was in charge of the new management of the Plaintiff, PW6 had inspected the filing cabinet which contained files for overseas' suppliers and found about twenty to thirty files missing from the filing cabinet. PW6 reported his discovery about the missing files to one Mr Ling. During the cross examination of PW6 by the learned Counsel for the 1st, 2nd, 5th, 6th and 7th Defendants PW6 could not tell for sure whether it was the 1st Defendant who took the these files. PW6 too confirmed that he did not know what were in the filing room. It is obvious PW6 did not have direct evidence to support his allegations in the SD.

29. Neither PW1 nor one David Ling lodged a report pertaining to the alleged missing files.

30. In my assessment of PW1's evidence I have considered the provision of section 60 of the Evidence Act 1950 and decided cases on the law with regards to hearsay evidence discussed below.

31. In *Teper v. R* [1952] AC at page 480 Lord Norman said:

“The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost”.

32. In *Malaysia National Insurance Sdn Bhd v. Malaysia Rubber Development Corp* [1986] CLJ 185 (Rep); [1986] 2 CLJ 285; [1986] 2 MLJ 124 the Federal Court had held that:

“In our view the material part of the evidence of DW1 was clearly hearsay evidence. His evidence was derived from interviews and not from his own knowledge. The learned Judge was perfectly right to hold that such evidence was hearsay. Objection should have taken to the evidence of DW1. Hearsay evidence which ought to have been rejected does not become admissible merely because no objection was taken earlier. The authorities are clear on this, it is

only necessary to cite Sarkar, Laws of Evidence, 13th Edition, page 51 which reads:

“An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the Court to exclude all irrelevant and inadmissible evidence even if no objection is taken to its admissibility by the parties....” ”

FINDINGS OF THE COURT

Alleged breach of confidentiality and or trade secret

The Law

33. For the Defendants to be liable to the Plaintiff for breach of confidentiality the following ingredients must be established:

- (a) The information sought to be protected is confidential in nature;
- (b) Such information had been communicated in circumstances importing an obligation of confidence; and
- (c) Such information was used in an unauthorised way and to the Plaintiff's detriment.

(Coco v. AN Clark (Engineers) Ltd (No. 2) [1969] RFC 41 page 5 and 6)

34. In order to determine whether the information was a trade secret the following factors would have to be considered:

- (a) The nature of employment;
- (b) The nature of information received;
- (c) Whether the employer had stressed the confidentiality of the information to the Plaintiff; and
- (d) Whether such information could be isolated from other non-confidential information within the same package of information.

(Medic AC International Management Pte Ltd v. John walter Moore [1988] 1 MLJ 5)

35. The particulars of the alleged confidential information and trade secrets are as stated in paragraph 16 (e) (i) to (vii) above. From the evidence adduced during the trial the Plaintiff had failed to meet the requirements that I have illustrated above as:

- (a) It is in evidence that the list of the customers in the automotive spare parts industry is freely available in the market as such the information is not confidential as claimed but is also in the public domain.

- (b) The 1st, 2nd, 3rd and 4th Defendants were senior employees of the Plaintiff with extensive experience in the automotive industry, having served the Plaintiff for a considerable number of years and for most part of their career in the automotive industry. In view of their length of experience in the industry dealing solely with the distribution and sale of automotive spare parts these Defendants would have undoubtedly acquired the information and knowledge about the customers through their years of dealings with these customers as part and parcel of their scope of duties in the Plaintiff. In short the 1st, 2nd, 3rd and 4th Defendants could not help acquiring the knowledge of some of the matters in the course of their employment with the Plaintiff. So long as the Defendant did not obtain the information and or acquire the knowledge surreptitiously it could not be said that it constitute a trade secret. Knowledge on the part of the Defendants of the information do not constitute trade secrets which are considered proprietary rights which warrants protection by this Court (*VSL Prestressing Australia Ltd v. DJ Mulholland* [1971] 2 MLJ 89).
- (c) Such information was not acquired through illegal and or unauthorised manner and or was outside their normal scope of their duties with the Plaintiff.
- (b) What constitutes confidential information and trade secret varies from industry to industry. One cannot equate an industry dealing with design and or trade formulae and or manufacturing

and or processing of certain products where some secret chemical formulae and or certain secret design which involved trade setting and intellectual property to an industry which merely deals with the sales of ready automotive parts and spare parts like the Plaintiff's business.

- (e) It was disclosed during the trial all sales representatives have access to the customers' lists and the information pertaining to the customers (**admitted by PW6 during cross examination by the learned Counsel for the 1st, 2nd, 5th, 6th, 7,10th to 13th Defendant**). PW6 admitted the list of the Plaintiff's customers and particulars pertaining to customers' requirement were distributed to the Plaintiff's sales representatives. Further these particulars were readily available to the public through Membership Directory for Engineering and Motor Parts Traders Association (EMPTA) (see **cross examination of PW1 dated 16th February 2011 Q and A 58 and 59**) which provided contact details of its members in every States in Malaysia.
- (f) PW1 had admitted in evidence (**page 34 and 36 of Notes of Evidence dated 17th February 2011**) that the Plaintiff did not incorporate a clause in the individual Defendants' contract of employment to restrict these Defendants' from doing business with the customers of the Plaintiff. The Plaintiff had also not shown that one of the crucial terms for the employment of the 1st to the 7th Defendants was a term pertaining to confidentiality of information and or trade secret (see **3rd Defendant and 4th**

Defendant Letters of Offer at page 28 and 29 and page 12 and 13 of the same Document).

- (g) Both DW5 and DW6 testified that the Plaintiff's customers list as at 31 January 1996 could be accessed by all employees in the Accounts Department, the Executive Officers and the Invoicing staff. The particulars of the Membership Directory for Engineering and Motor Parts Traders Association too could be accessed by the public (see **Q and A 23 and 24 of WS-DW5; Q and A 23 to 28 of WS-DW6**) It is also in evidence that the identity of the main suppliers and manufacturers were known to the public.
- (h) The evidence before me clearly showed that none of the information and or training the 1st to 7th Defendants received during their stint with the Plaintiff was confidential or trade secrets as claimed by the Plaintiff. Neither were the 1st to 7th Defendants notified of the confidentiality nature of the information and or trade secrets that they received whilst in the employment of the Plaintiff. None of these employees were told that the information they received during their employment could not be used once they resigned and or retired from the Plaintiff. Neither were these Defendants told that they could not compete with the Plaintiff in the event they resigned or retired from the Plaintiff. Unless there was an express provisions in the contract for employment that certain information or training received during their employment with the Plaintiff was

confidential then the Defendants could be liable for breach of confidentiality in the event such information and or trade secrets were used to the detriment of the Plaintiff (see *Worldwide Rota Dies Sdn Bhd v. Ronald Ong Cheow Joon* [2010] 8 MLJ 297; *Svenson Hair Center Sdn Bhd v. Irene Chin Zee Ling* [2008] 7 MLJ 903).

- (i) Both PW1 and PW6 admitted in evidence that in dealing with the business such as this one will become familiar with the customers and their specific requirements and would not require the list. In any event the Plaintiff had failed to give the particulars and or show the “specific needs and requirements of the customers” which could be termed as “confidential information” and or “trade secret” in the instant case.

- (j) At paragraph 26 of the SOC the Plaintiff had alleged that the 8th Defendant had utilised the confidential information and or the trade secret obtained by the 1st to 7th Defendant and with the said information it was able to approach and persuade Meress Yap Swee Leong Sdn Bhd, Leng Fong Trading Sdn Bhd and Terus Jaya Auto (M) Sdn Bhd who were customers of the Plaintiff to place their new orders from the 8th Defendant. Despite such facts having been pleaded against the Defendants the Plaintiff had not called any of these witnesses to testify in Court to prove its claim against the Defendants. These are material witnesses who would be able to support the Plaintiff’s claim under this head. The failure on the part of the

Plaintiff to call these witnesses would definitely attract the presumption of adverse inference pursuant to section 114 (g) of the Evidence Act 1950 against the Plaintiff (see *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492, 494 SC; *Subry Hamid v. Husaini Tan Sri Ikhwan & Anor* [2006] 4 CLJ 50 at page 58).

- (k) The Plaintiff could not contend that the 1st to the 7th Defendants were not entitled to join another company and compete with the Plaintiff as the evidence had shown that it was not part of the term of the 1st to 7th Defendants' employment that they could not compete with the Plaintiff should they decide to resign and or retire from the Plaintiff. Any clause which restrict the Defendants to join another company with similar trade tantamount to restraint of trade and is void pursuant to section 29 of the Contracts Act 1950.
- (l) The Plaintiff had not adduced evidence that the 1st to the 7th Defendant had stolen and or taken the information mentioned in paragraph 16(e)(i) to (vii) above. Neither PW1 nor PW6 could positively identify the person or persons who had stolen or taken this information from the Plaintiff's possession. Further if it was true as alleged by the Plaintiff that the Defendants had committed these serious acts with the aim to sabotage the Plaintiffs business the most reasonable action for any person to do is to lodge a police report, which was not done in this case. It is obvious that the claim against the Plaintiff were

based on suspicion, a bare assertion and unsupported by hard evidence.

(cases of *Worldwide Rota Dies Sdn Bhd v. Ronald Ong Cheow Joon* [2010] 8 MLJ 297 and *Svenson Hair Center Sdn Bhd v. Irene Chin Zee Ling* [2008] 7 MLJ 903 are distinguishable as in these cases there were express terms provided in the employment contract that information received and or obtained during the employee's employment were confidential).

- 36.** From my assessment of the evidence both testimonial and documentary I am satisfied that the Plaintiff had failed to prove their pleaded case of breach of confidentiality or trade secret against the Defendants. The Plaintiff's entire case is founded on speculations and conjunctures.

Alleged Breach Of Good Faith And Fidelity

- 37.** An employer is justified in insisting that all its employees remain loyal and shall at all times act in the best interest of the employer. In the case of the Plaintiff the duty of good faith and fidelity would require the 1st to 7th Defendants not to abuse and or use confidential information which they have acquired during their employment with the Plaintiff for their own benefit and to the detriment of the Plaintiff. As I have discussed above under Claim 1 the Plaintiff had failed to prove that the Defendants had utilised confidential information or

trade secrets belonging to the Plaintiff for their personal gains and or advantage. Notwithstanding what I have stated above I will now proceed to examine the Plaintiff's allegation of incidences which supported its claim of breach of good faith and fidelity against the 1st to the 7th Defendants.

- 38.** According to the Plaintiff the various actions of the 1st to 7th Defendants among others were that the 1st to 7th Defendants had approached and coaxed the Plaintiff's employees to leave the Plaintiff and work for the 8th Defendant, the 1st to the 7th Defendants had approached the Plaintiff's suppliers and persuaded them to cease their businesses with the Plaintiff and to deal with the 8th Defendant instead and or that these Defendants had approached and persuaded the Plaintiff's suppliers to reduce the supply of their products to the Plaintiff, that these Defendants had spread words that the Plaintiff was no longer active in the business of automotive parts but had instead diverted its business to the gaming industry.

Pinching of Plaintiff's suppliers NGK Spark Plugs Malaysia Sdn Bhd

- 39.** Despite the Plaintiff's assertion that the Defendants had orchestrated the economic sabotage on the Plaintiff by setting up the 8th and the 9th Defendants to compete with the Plaintiff the Plaintiff's own witness (PW2) had testified that NGK Spark Plug Malaysia, a company dealing with spark plugs had the prerogative to appoint whichever company it had faith in to market its products. PW2 had also confirmed that the Plaintiff was never appointed as the exclusive

distributor of NGK Spark Plugs Malaysia Berhad. The Plaintiff could not produce documents to show that it had been vested with the exclusive right to be the distributor of NGK Spark Plugs.

40. Both PW2 and PW3 who were the Plaintiff's witnesses testified that none of the 1st to 7th Defendants had approached NGK to ask NGK to grant NGK distributorship rights to the 8th Defendant whilst they were in the Plaintiff. Neither had any of these Defendants approached NGK to limit its supply of goods to the Plaintiff.
41. It was also in evidence that the distributorship of the NGK spark plugs for the 8th Defendant was not secured by 1st and 2nd Defendants. Instead it was secured by the 3rd Defendant and 1st Defendant merely became a witness to the signatory of the agreement (see **Q and A 98, 102,106,109,110 of PW2 dated 18th February 2011; Q and A 171, 172 of PW3 dated 18th February 2011; Q and A 191 to 195, 200 of PW1 dated 17th and 18th February 2011; Q and A 135 to 141, 158 to 161 of PW9 dated 14th March 2011; please also see Q and A 1 of WS-DW5, Q and A 2 of WS-DW6**).
42. According to PW2 it was the top management of NGK Spark Plugs in Japan who had the ultimate authority and power to appoint any distributor of its products in Malaysia.
43. The fact remained that NGK Spark Plugs Malaysia had never granted the Plaintiff any exclusive rights of distributorship. The Plaintiff's assertions of breach of good faith and fidelity pertaining to its NGK

Spark Plugs were merely bare allegations unsupported by reliable and credible evidence.

44. This Court have no choice but to accept the evidence of the NGK Spark Plugs representatives (PW2 and PW3) as these witnesses were neutral and independent witnesses.
45. On the whole I am satisfied that Plaintiff's claim that the 1st to 7th Defendants were approached and persuaded by the Plaintiff to cease their business and or reduce their supply to the Plaintiff was without merits and ought to be rejected by this Court.

Allegations of "poaching" the Plaintiff's employees

46. The Plaintiff had also alleged that the 1st to the 7th Defendants had approached its employees and persuaded these employees to leave the Plaintiff and work for the 8th Defendant. None of the Plaintiff's employees testified (PW4, PW5, PW6 and PW8) that the 1st to 7th Defendants had approached them to coaxed them to leave the Plaintiff and work for the 8th Defendant.
47. PW4 testified that the 3rd Defendant had not made any offer to her for her to leave the Plaintiff and worked for the 8th Defendant. PW4 did say that the 3rd Defendant had telephoned her and told her if she was not satisfied with the environment in the Plaintiff PW4 could call the 3rd Defendant. However PW4 could not remember when the phone call was made. During the cross-examination of PW4 by the learned

counsel for the 1st, 2nd, 5th, 6th, 7th, 10th to 13th Defendants, PW4 candidly told the Court that it was PW1 who had requested her to make the SD (**page 750 of Volume B2**) which was made after this suit was filed.

48. Despite what was stated in her SD (**page 751 Volume B2**) PW5 testified that she had no proof that the 1st Defendant had employed the employees of the Plaintiff to work for the 8th Defendant. PW5 had also confirmed that the SD was made at the request of PW1. Further PW5 had also confirmed that the SD was not prepared by her but by a lawyer and that she merely attested the SD. To most of the questions asked by the learned Counsel for the 3rd Defendant to PW5 in her cross-examination PW5 took the easiest way by saying that she could not remember anything.
49. PW6 had also confirmed that no one had offered him a post in the 8th Defendant. The SD (**page 752 and 753 of Volume B2**) was also made after this action was filed against the Defendant.
50. PW7 had also attested a SD (**page 757-758 of Volume B2**) at the request of PW1 and that the SD was prepared by a lawyer only for him to sign.
51. None of the witnesses who attested the SD said that the 1st, 2nd, 4th, 5th, 6th, and 7th Defendants had approached or coaxed them to leave the Plaintiff and work for the 8th or 9th Defendants as claimed by the Plaintiff.

- 52.** The Plaintiff could not provide the statistics to show the number of its employees who had left the Plaintiff to join the 8th Defendant and or identify who are the Plaintiff's employees who are currently working for the 8th Defendant.
- 53.** In view of the above the Plaintiff's claim that the 1st to 7th Defendants had approached the Plaintiff's employees and coaxed them to work for the 8th Defendant was merely bare assertion unsupported by evidence either testimonial and or documentaries. It was obvious to this Court that these SDs were prepared by the Plaintiff's solicitor to be signed by PW4, PW5, PW6 and PW7 and these SDs were made at the insistence of PW1 after this action had been filed with the purpose for the same to be used in this trial. These SDs were mere afterthought and or made for the purpose of assisting the Plaintiff in its case against the Defendants.

“Poaching” of the Plaintiff’s Supplier

- 54.** The Plaintiff in this case had not adduced credible evidence to demonstrate to this Court that the Defendants had caused the Plaintiff's other suppliers to terminate the Plaintiff's distributorship rights and grant the 8th Defendant those rights instead. The Plaintiff was not able to prove that it had exclusive rights over any particular products. As I have indicated in the earlier portion of my judgment this Court could not rely on the evidence of PW1 as his evidence was tainted with hearsay evidence and therefore inadmissible.

55. Pertaining to the Plaintiff's allegations that the Defendants had approached suppliers such as PBR Automotive Pty Ltd, Baisei Corporation Sdn Bhd, Petrochem (UK), with the intention to persuade these suppliers to appoint the 8th Defendant as agents for their products these allegations remained a bare assertion. No representative from any of these suppliers was called to support the allegation. The failure to call one Mr David Ng and Mr Phil Mason mentioned by PW1 in his cross-examination (see **Q and A 134 to 142 and Q and A 26 to 31, 130, 172 to 175, 176 to 178 dated 17th February 2011**) to corroborate PW1's evidence would definitely attract the presumption of adverse inference pursuant to the provision of section 114 (g) of the Evidence Act 1950. As the evidence of PW1 remained inadmissible in this Court there is nothing before this Court to prove the Plaintiff's allegation against the Defendants (**Section 60 of the Evidence Act 1950; *Juahir Sadikon v. Perbadanan Kemajuan* [1996] 3 MLJ 627**).

False allegation that the Plaintiff was no longer in the automotive parts business

56. The Plaintiff alleged that the 1st Defendant to the 7th Defendants had made false statements and spreading words that the Plaintiff was no longer active in the automotive business but had instead diverted its business to gaming. According to PW1, PW6 and PW8 they were informed by their customers that the 1st to the 7th Defendants had told

them this. However the Plaintiff made no attempts to call its customers who were its material witnesses to support its claim.

- 57.** The Plaintiff's own witness (PW7) who had also attested a prepared SD at the request of the PW1 had also said during his cross-examination by the learned Counsel for the 1st, 2nd, 5th, 6th and 7th Defendants (see **evidence of PW7 dated 28th February 2011 during cross-examination Q and A 34 and 35**) that the 1st Defendant did not tell him that the Plaintiff was no longer dealing with the automotive parts business. However the 1st Defendant had told him that he had left the Plaintiff and now he was dealing with the automotive parts business. PW7 further told this Court that it was common knowledge that the Plaintiff was diverting its business and focusing on the gaming industry and that it was in the news. This was supported by the Annual Reports of Repco Holding Berhad (**Exhibit "P18"**), a parent company of the Plaintiff which disclosed that the Plaintiff was moving from its automotive parts business to gaming and timber industry (see **cross-examination of PW1 dated 16th February 2011, Q and Q A 166 to 169**).
- 58.** The Plaintiff's claim that the 1st to the 8th Defendants had caused words to be circulated to the effect that the Plaintiff was no longer dealing with automotive parts business remained a bare assertion. Further it was also disclosed during trial that after the 1st to 7th Defendants resigned and or retired from the Plaintiff, the Plaintiff was under the new management headed by one Mr David Ling who would be in a better position to elaborate on the Plaintiff's main focus of

business at that material time. The Plaintiff opted not to call this crucial witness to support the assertion.

Allegations of Conspiracy to Injure

- 59.** The allegations of conspiracy to defraud with the intention to injure were as stated in paragraph 31 and 32 of the SOC. In order to establish a conspiracy to defraud with the intention to injure, the Plaintiff must establish that “*there must be an agreement or ‘combination’ of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means resulting in damage to the Plaintiff* (see *Beverages Holdings Sdn Bhd & Ors v. Kickapoo (Malaysia) Sdn Bhd* [2008] 4 CLJ 20 and *Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits* [2001] 8 CLJ 262). The Plaintiff must not only prove that there was an agreement but must also prove the overt acts which had been alleged to have been done by the parties to the conspiracy which had caused injury and damage to the Plaintiff (see *Seah Siang Mong v. Ong Ban Chai* [1998] 1 CLJ Supp 295).
- 60.** As the regards to allegation of fraud, the law on fraud is well settled. This had been well illustrated in the case of *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* 1 LNS 55; [1980] 2 MLJ 136 which states:

“Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean “actual fraud, ie, dishonesty of some sort” for which the registered proprietor is a party or privy. Fraud implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of whatever he is entitled.... Thus....it was said that, if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent...”

- 61.** The case of *Hock Hua Bank (Sabah) Berhad v. Lam Tat Ming & Ors* [1995] 1 LNS 80 states as follows:

“To sum up, fraud implies some base conduct and moral turpitude and a person is taken to have acted fraudulently or with intent to defraud if he acts with the intention that some person be deceived and by means of such deception that either an advantage should accrue to him or injury, loss or detriment should befall some other person. That is what is known, as “fraud” or fraudulently. Further we agree that fraud whether in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion or conjecture.”

- 62.** The Supreme Court case of *Chu Choon Moi v. Nga Siew Tin* [1985] 1 LNS 134; [1986] 1 MLJ 34 at page 38 states as follows:

“We agree that fraud whether made in civil or criminal proceeding must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need

not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the Court or a prudent man considers its existence probable in the circumstances of the case.”

(see *Saminathan v. Papa* [1981] 1 MLJ 121; [1980] 1 LNS 174; *Narayanan v. Official Assignee, Rangoon* AIR [1941] PC 93; *Hock Hua Bank (Sabah) Berhad v. Lam Tat Ming & Ors* [1995] 1 LNS 80; *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229; *Chong Song v. Uma Devi a/p Kandiah* [2011] 2 MLJ 585.

- 63.** From the evidence adduced before me during the trial the Plaintiff had failed miserably to meet with the standard of proof to establish any allegation of conspiracy to defraud beyond reasonable doubt.

- 64.** For the sake of completeness I would like to stress here that the Plaintiff had failed to properly plead the particulars to support its case of conspiracy to injure especially pertaining to matters relating Ernst mufflers, Catalytic converters and sales of Repco Autoparts which evidence were attempted to be introduced by the Plaintiff to prove the conspiracy theory against the Defendants. This line of questioning was objected to as the same had not been pleaded by the Plaintiff in its pleadings. It is settled law that the assertion of conspiracy requires the strictest pleading and must be supported by full particulars. It is also settled law that parties are bound by their pleadings and shall not adduce any evidence for issues which had not been pleaded. It is trite that unless particulars of conspiracy are specifically pleaded, no

evidence can be led on them (*YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd* [1997 2 MLJ 621]).

65. In order to prove the tort of conspiracy, the Plaintiff had to show the conspiratorial agreement followed by overt acts of causing damage (see *Marrinan v. Vibart* [162] 1 All ER at page 869). A charge of conspiracy is a serious one. Therefore the Plaintiff must plead the facts of this tort sufficiently in its pleadings by giving full particulars of the assertion pertaining to the conspiracy theory.

Sale of Repco Autoparts

66. The Plaintiff's allegation that the 1st and 2nd Defendant had engineered the sale of Repco Autoparts in order to secure their position before joining the 8th Defendant was not consistent with its evidence in Court. PW1 had in fact told this Court that Repco Autoparts was sold because "it was making heavy losses in 1994". That was the reason why Koperasi Pekerja Kerajaan Sabah" the shareholders of Repco Autoparts decided to dispose Repco Autoparts at that material time. The Plaintiff however switched its story by alleging that the 1st and 2nd Defendants had engineered the sale of Repco Autoparts to secure their position before joining the 8th Defendant.
67. It was in evidence through the Plaintiff's own witnesses (PW9) and (PW10) that it was one Mr Yip who had approached PW10 to propose the sale of Repco Autoparts to the 8th Defendant (see **Q and**

A 293 and 301 of PW10 dated 15th March 2011). PW10 told this Court that neither the 1st nor the 2nd Defendants were involved with the negotiations to purchase Repco Autoparts and or helped finance its purchase. The Plaintiff did not prove that there were overt acts on the part of the 1st and 2nd Defendants which had resulted in the loss suffered by the Plaintiff, an essential ingredient in the tort of conspiracy which needed to be proved by the Plaintiff.

Setting up of the 8th Defendant

68. It was the contention of the Plaintiff that PW9 and PW10 had set up the 8th Defendant for 1st to 4th Defendants and that the PW9 and PW10 were nominees of the 1st to 4th Defendants. Despite being repeatedly cross-examined by the learned Counsel for the 1st, 2nd, 5th, 6th and 7th Defendants PW9 still maintained that he was the person who invested in the 8th Defendant. PW9 further stated that notwithstanding the fact that he had little knowledge in the business he was confident to invest as he had PW10 to assist him with the business. Both PW9 and PW10 confirmed that they were running the 8th Defendant from its inception until prior to 1995. PW9 had also testified that even though he did not have the experience in the industry one Patrick Tan Teong Ghee who had the experience in autoparts business had helped PW9 and PW10 to run the 8th Defendant.

69. Based on the evidence of PW9 and PW10 who were the Plaintiff's witnesses this Court is satisfied that the 8th Defendant was in fact set up by PW9 with the help of PW10 for themselves and not for the benefit of the 1st, 2nd, 5th, 6th and 7th Defendants as claimed by the Plaintiff.
70. On the whole I am satisfied that the Plaintiff had failed to adduce evidence to support its case of conspiracy against the Defendants on the standard required by the law, which is, beyond reasonable doubt.

Assertions of Economic Sabotage

71. It was the Plaintiff's claim that the 1st to 7th Defendants had orchestrated economic sabotage against the Plaintiff whilst these Defendants were still in the employment of the Plaintiff. The Defendants were alleged to make payment of commission upon sales and not upon collection, sales of goods at price below cost and or at cost and or at a low profit, orders placed with Repco allegedly supplied by the 8th Defendant, purchase of brake fluids from the 8th Defendant and purchases of Ernst Mufflers and Catalytic converters.

Payment of commissions upon sales and not upon collection

72. The Plaintiff had alleged that 1st Defendant had purposely paid commission upon sales and not upon collection with the sole aim to injure the Plaintiff and this was done in preparation for the 1st

Defendant to resign the Plaintiff and to set up a competing company in the form of the 8th Defendant.

- 73.** However the Plaintiff had not proved by way of documentary evidence the pattern for the payment of commission upon sales and not upon collection as claimed by them. The Plaintiff merely produced records for the commission paid in April 1995 to June 1995 to support its contention of payment of commission upon sales and not upon collection. Despite being challenged by the learned Counsel for the 1st 2nd, 5th, 6th, 7th, 10th to 13th Defendants the Plaintiff did nothing to prove its allegation (**see cross examination of PW1 dated 17th February 2011 Q and A 117**).
- 74.** All the Defendants who testified confirmed that that was the practice adopted by the Plaintiff for the last twenty years and prior to the 1st Defendant's resignation and or 2nd Defendant's retirement from the Plaintiff to pay commission upon sales and not upon collection. The 1st to 7th Defendants remained consistent despite being severely cross-examined by the learned Counsel for the Plaintiff.
- 75.** It was also in evidence that even after the 1st Defendant resigned from the Plaintiff, the Plaintiff through one Thomas Cornwell, a Senior purchasing executive had adopted similar practise (**see Q and A 59 to 83, 88 to 106 of PWTs testimony dated 17th February 2011 during cross-examination of PW1**). The Plaintiff however opted not to include Thomas Cornwell in this suit but decided to pursue its claim only against the Defendants.

Orders placed with Plaintiff allegedly supplied by the 8th Defendant

76. The Plaintiff had failed to prove this allegation against the Defendants. The Plaintiff attempted to adduce hearsay evidence as such this claim was not supported by credible evidence in this Court.

Purchase of break fluids from the 8th Defendant, Purchase of Ernst Mufflers, Catalytic converters

77. The Plaintiff merely showed one instant where the Plaintiff had purchased break fluids and Ernst Mufflers from the 8th Defendant **(PW1's Examination In Chief in Supplementary Q and As 20 to 23)** by way of purchase order dated 28th March 1995 and purchase order dated 13th July 1994 respectively. In respect of the rights of the distributorship of Ernst Mufflers PW10 had testified that he was the person responsible to secure the distributorship of Ernst Mufflers for the 8th Defendant and not the 1st to the 7th Defendants.

78. The Plaintiff had not pleaded the issue of Catalytic Converters in its pleadings. Therefore I will not elaborate on this issue in this judgment for obvious reason.

CONCLUSION

79. On the totality of evidence both testimonial and documentary I am satisfied that the Plaintiff had failed to discharge the onus placed on it by the law to prove its case against all the Defendants on the balance of probabilities and or beyond reasonable doubt whichever is applicable to the Plaintiff's pleaded case. For the reasons stated above the Plaintiff's claim is hereby dismissed with costs of RM100,000.00 to be paid by the Plaintiff to the 1st, 2nd, 5th, 6th, 7th, 10th to 13th Defendants and RM100,000.00 to be paid by the Plaintiff to the 3rd, 4th, 8th and 9th Defendants respectively.

(DATO' ASMABI BINTI MOHAMAD)
JUDICIAL COMMISSIONER
HIGH COURT CIVIL (4)
KUALA LUMPUR

Dated: 18 JANUARY 2012

Date of Decision: 30 SEPTEMBER 2011

Date of Notice of Appeal: 28 OCTOBER 2011

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