Seaspan Agencies Pte Ltd *v* Chin Siew Seng (Ho Syn Ngan Joanne and another, third parties) and another suit
[2010] SGHC 38

Case Number : Suit No 373 of 2008/J and Suit No 859 of 2008/G

Decision Date : 02 February 2010

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Prakash P Mulani (M &A Law Corporation) for the plaintiff in Suit 373 of 2008 and for the defendant in Suit 859 of 2008; K Muralitherapany (Joseph Tan Jude Benny LLP) for the defendant in Suit 373 of 2008 and for the plaintiff in Suit 859 of 2008; Oon Thian Seng and Poonaam Bai (TS Oon & Bazul) for the First Third Party in Suit 373 of 2008Nanda Kumar and Qin Zhiqian (Rajah & Tann LLP) for the Second Third Party in Suit 373 of 2008.

Parties : Seaspan Agencies Pte Ltd — Chin Siew Seng (Ho Syn Ngan Joanne and another, third parties)

Companies

2 February 2010 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 Seaspan Agencies Pte Ltd ("the plaintiff") instituted Suit 373 of 2008 ("Suit 373") against Chin Siew Seng ("Chin") for breach of his duties as a director by allegedly (1) diverting payment of commissions due to the plaintiff and certain business opportunities to his own company and (2) procuring the payment of commissions by the plaintiff to a third party without the knowledge of the other directors.

2 Chin joined Joanne Ho Syn Ngan ("Ho") who was one of the plaintiff's other directors, as the First Third Party in the present proceedings, taking the stand that she was equally liable for the loss caused to the plaintiff by his alleged breach. The plaintiff had initially also sought to claim from Chin certain "cash surplus" payouts which had been made to one Francis Quah Hun Kok ("Quah"), Chin, Ho and Theresa Leong Mui Ling ("Leong") but had withdrawn the claim. Quah was a director and shareholder of the plaintiff and its representative and witness for Suit 373, while Leong was one of the plaintiff's other shareholders. Following the plaintiff's withdrawal of its claim for "cash surplus" payouts, Chin, who had joined Leong as the Second Third Party to Suit 373, similarly withdrew his claim against her.

The Facts

3 In 1991, Quah, Chin and two other persons founded the plaintiff as well as Seaspan Chartering Pte Ltd ("Seaspan Chartering"). The plaintiff was in the ship agency business which required it to act as agents of ship-owners to tend to the needs of vessels and crew when they called at Singapore and for which service the plaintiff was paid agency fees. The plaintiff was managed primarily by Quah. While the plaintiff had other directors, they did not actively manage the company.

4 As for Seaspan Chartering, it was in the ship-brokering business which required the plaintiff to act as a broker and to arrange fixtures between shipowners, charterers and/or cargo owners for which service the plaintiff was paid a commission. Seaspan Chartering was managed by Chin and two other directors. While Quah was also a director of Seaspan Chartering, he did not actively manage the company although he would carry out operations for the ship-brokering business, in particular, post-fixture operations for which he received consultancy fees. In 2002, Quah resigned as a director of Seaspan Chartering.

5 At the end of 2003, Seaspan Chartering ceased to do business and Chin shifted the ship-brokering business to the plaintiff. At the same time, Ho and Leong also joined the plaintiff. Ho was appointed a director while Leong was employed as an accounts and administrative manager. Quah, Chin and Ho received remuneration for their services as directors and also salaries as employees. Chin was primarily in charge of the ship-brokering business while Quah remained primarily in charge of the ship-agency business. Quah, however, also provided operational support for the ship-brokering business. Pursuant to this change in management, in addition to Quah, Chin and Ho were made authorised signatories to the bank accounts of the plaintiff with any two of their signatures required for the company's cheques to be issued.

6 With regard to shareholding status, Quah, who originally held 75% of the shares in the plaintiff sold shares to Chin, Ho and Leong so that at the end of 2004, of the 100,000 paid-up shares in the plaintiff, Quah, Chin and Ho held 32,000 shares each while Leong held 4,000 shares. This was the status up to 9 February 2006. Leong, who merely played an administrative role in the plaintiff, was sold the 4,000 shares as an incentive.

7 In the later half of 2005, the relationship between Quah and Chin deteriorated when Quah noticed that the transactions handled by Chin pertaining to the ship-brokering business had led to high payouts of "Address Commissions". For each ship-brokering transaction, the plaintiff would be paid a commission by the ship-owner or carrier. Of the commissions received, the accounts revealed that the plaintiff had in turn paid out Address Commissions to certain third parties. When he was queried by Quah, Chin explained that the Address Commissions were a form of goodwill discount or refund to the shipowner or carrier or charterer. By August 2005, Chin was handling transactions for which the plaintiff earned gross commissions of up to 5% but for which it was paying Address Commissions of as much as 3.75%. Quah began to question Chin about the large amounts of Address Commissions disbursed.

8 On 11 October 2005, Chin orally informed Quah that he would be resigning as a director with effect from 11 October 2005 and would be incorporating a new company to carry on the ship-brokering business. Chin also informed Quah that Ho and Leong would leave the plaintiff to join Chin in his new company. In response, Quah sent Chin three letters on 12 October 2005 to notify him that he should not make any withdrawals of funds from then on without the approval of all the shareholders, as he had purportedly resigned. Quah separately informed Chin that the plaintiff would engage an independent auditor to examine its accounts. Quah also informed the plaintiff's company secretary by fax on 12 October 2005, copied to Chin, to take the necessary steps to file all documents with the Accounting and Corporate Regulatory Authority to, *inter alia*, remove Chin's name as director and shareholder of the plaintiff. This was so even though Chin still held shares in the plaintiff.

9 On 13 October 2005, Chin replied to Quah to state his disagreement with the position taken by Quah in his letters sent a day earlier. In particular, Chin stated that no changes were to be made to the management of the plaintiff pending a formal shareholders' meeting. Chin also wrote to the plaintiff's company secretary on the same day and directed that his resignation as director and removal as co-signatory to the bank accounts were not to be recorded until further notice. Despite

Chin's intimation of his intention to resign on 11 October 2005, Chin accepted at the trial that he had continued to act as a director of the plaintiff until 9 February 2006. Indeed, it would have been difficult for Chin to take a contrary position for he had continued to sign payment vouchers and cheques up to 9 February 2006 in such capacity. He had also authorised payment of his own salary of $4,000 for October 2005. When Chin eventually tendered his resignation by letter to the plaintiff's company secretary on 9 February 2006, Chin dated the letter 12 October 2005. Ho similarly tendered her resignation letter (which she had also dated 12 October 2005) to the company secretary on 9 February 2006.

10 Chin took the position that he had had a meeting with Quah on 11 October 2005 where they had reached an agreement that:

(a) any fixtures concluded by Chin on or before 11 October 2005 would belong to the plaintiff while any fixtures concluded by Chin after that date would belong to his new company;

(b) the cash surplus of the plaintiff as at 12 October 2005 would be distributed to the shareholders in proportion to their respective shareholdings; and

(c) the directors of the plaintiff would be paid their respective remuneration for the month of October 2005.

11 However, I dismiss Chin's claim of such an agreement. With regards to the alleged arrangement concerning the fixtures, this would have been an extremely important agreement for it would entail the plaintiff giving up a substantial part of its ship-brokering business. It was inconceivable that there was not a single document to record this agreement if it existed. Quah, whom I found to be far more credible than Chin in the witness stand, was resolute in his denial of any such arrangement. Indeed, there could be no reason why Quah, whose relationship with Chin had broken down, would agree to such an arrangement which would be wholly beneficial to Chin and of no benefit to Quah.

12 As for the alleged second arrangement pertaining to the cash surplus which was paid out in proportion to the shareholdings of Quah, Chin, Ho and Leong, I do not find the fact that such payment had been made to be evidence corroborative of Chin's allegation of an agreement between Quah and himself. Although Quah had been evasive in his answers on this point, this was because the cash surplus distribution was falsely classified in the payment vouchers as "director's fees" (with regard to the payments to Quah, Chin and Ho) and "taxi claim" (with regard to the payment to Leong). Eventually, Quah had admitted that he was aware that this payment was a cash surplus but that he had taken the money since Chin, Ho and Leong were also receiving payments. Quah understood the payment to be his entitlement since the other shareholders had also received their respective payments.

13 As for the third arrangement pertaining to director's fees to be paid to Chin for October 2005, I note that Chin had authorised payment of this amount to himself. Therefore, the fact that he was paid his fees for October 2005 was also no evidence of the alleged agreement between Quah and himself. It was simply evidence that he had continued to act as a director of the plaintiff. Hence, I reject Chin's allegation that an agreement had been reached between Quah and himself on 11 October 2005.

14 On 13 October 2005, Chin incorporated Seaspan Singapore Pte Ltd ("Seaspan Singapore") to carry on the business of ship-brokering. Chin continued to operate out of the plaintiff's premises at No. 10 Anson Road #14-08A International Plaza ("the old premises") while sourcing for new premises for his company. Ho joined Seaspan Singapore on 19 October 2005 as a director and shareholder,

taking up 6,000 of Seaspan Singapore's 20,000 issued shares; Chin held the remaining 14,000 shares. At around the same time, Leong also joined Seaspan Singapore as an administration and accounts manager. Nonetheless, Leong continued to perform her duties with the plaintiff. Likewise, Ho and Chin remained authorised signatories for the plaintiff's bank accounts.

15 In November 2005, the plaintiff's lease for the old premises expired. Because Chin, Ho and Leong had indicated that they would leave the plaintiff, Quah was reluctant to renew the lease of the premises for the plaintiff as the company would have no need for such a large office since he would be the only remaining staff. By this time, Chin had leased office space at No. 90 Cecil Street ("the new premises"). Chin offered to sublet part of the new premises to the plaintiff. Quah agreed because he did not have sufficient time to source for alternative premises. Hence, the plaintiff rented part of the new premises from Seaspan Singapore in December 2005.

16 In mid-December 2005, Chin, Ho and Leong agreed to transfer their shares in the plaintiff to Quah for $30,000. In mid-January 2006, Chin arranged for his solicitors to prepare a deed to effect this transfer. However, the draft deed dated 23 January 2006 contained various other clauses, *viz* that Quah would agree to allow Chin to use the name "Seaspan" for his new company. Quah, not surprisingly, refused to sign the deed.

17 In any event, Chin eventually transferred his shares to Quah on 9 February 2006. Chin also signed a resolution to remove himself as an authorised signatory to the plaintiff's bank accounts and tendered his resignation as a director. Ho and Leong also transferred their shares to Quah. In March 2006, a month or so after the shares were transferred, Quah moved the operations of the plaintiff to other premises.

18 In 2008, the plaintiff brought Suit 373 against Chin for breach of his director's duties by allegedly (1) diverting commission due to the plaintiff and the ship-brokering business to Seaspan Singapore; (2) paying out Address Commissions to third parties without the knowledge of the other directors. An alternative claim was also brought for recovery of sums paid to or for the benefit of Chin as a director in the event that the court found that Chin had effectively resigned as at 11 October 2005. Since Chin accepted that he had continued to act as a director up to 9 February 2006 and that his resignation was not effective as at 11 October 2005 (and indeed his actions after 11 October 2005 were incontrovertible evidence of this), it was not necessary to consider this alternative claim. The plaintiff had also brought another claim for recovery of the "cash surplus" paid out but as stated earlier (see [2] above) this was withdrawn at the trial.

19 In his defence, Chin argued that the plaintiff's directors and shareholders had knowledge of his acts and had consented to the acts with the result that the acts were not wrongful. In the alternative, Chin argued that he was entitled to relief from liability for breach of directors' duties under s 391 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") because he had acted honestly and reasonably at all times. Chin added Ho as the First Third Party to the proceedings taking the position that Ho should be equally liable for the diversion of the commission due to the plaintiff, diversion of the ship-brokering business to Seaspan Singapore and the wrongful payment of Address Commissions. Chin included Leong as the Second Third Party on the ground that Leong should also be liable for the payment by the plaintiff of the "cash surplus". As stated in [2] above, Chin dropped his claim against Leong after the plaintiff withdrew this item of claim against him.

20 After he was sued in Suit 373, Chin brought Suit 859 of 2008 ("Suit 859") against Quah for the price of the shares transferred by him to Quah on 9 February 2006. Chin did not claim for the price stipulated in the deed but sought a reasonable price of what the shares were worth at the material time.

The issues

21 The issues raised in both suits are:

(a) Did Chin breach his director's duties by diverting commission due to the plaintiff and the ship-brokering business to Seaspan Singapore?

(b) Did Chin breach his director's duties by paying out Address Commissions to certain third parties?

(c) If Chin did breach his director's duties, was Ho equally liable for the breaches?

(d) Was Chin entitled to claim from Quah a reasonable price for his shares transferred to the latter?

The decision

Did Chin breach his director's duties by diverting commission due to the plaintiff and the ship-brokering business to Seaspan Singapore?

22 The crux of the plaintiff's case on this issue was that Chin had from 6 October 2005 to 9 February 2006 (while he was still a director of the plaintiff) caused to be wrongly diverted to Seaspan Singapore (1) commissions in respect of various contracts entered into by the plaintiff when such commissions ought to have been paid to the plaintiff, and (2) the ship-brokering business. On the diversion of the commissions, the plaintiff provided the following details:

(a) Charter party dated 30 July 2004 arranged by the plaintiff in respect of MT "Bahagia" Voyage 06/04, for which commission for demurrage was paid to Seaspan Singapore.

(b) Charter party dated 24 August 2004 arranged by the plaintiff in respect of MT "Eburna" Voyage 06/04, for which commission for demurrage was paid to Seaspan Singapore.

(c) Charter party dated 28 June 2005 arranged by the plaintiff in respect of MT "Sonata" Voyage 06/05, for which commission for demurrage was paid to Seaspan Singapore.

(d) Charter party dated 6 October 2005 in respect of MT Istana VI, which contract was arranged in the name of the plaintiff but for which commission was paid to Seaspan Singapore.

(e) Charter party dated 12 October 2005 in respect of MT Sonata, which contract was arranged in the name of the plaintiff but for which commission was paid to Seaspan Singapore.

(f) Charter party dated 12 October 2005 in respect of MT "Southern York" Voyage 18/05 for which commission was paid to Seaspan Singapore.

(g) Charter party dated 13 October 2005 in respect of MT "Docomo" Voyage 07/05, which contract was arranged in the name of the plaintiff but for which commission was paid to Seaspan Singapore.

(h) Charter party dated 13 October 2005 in respect of MT "Entalina" Voyage 07A/05 for which commission was paid to Seaspan Singapore.

(i) Charter party dated 20 October 2005 in respect of MT "Docomo" Voyage 07/05, which contract was arranged in the name of the plaintiff but for which commission was paid to Seaspan Singapore.

(j) Charter party dated 20 October 2005 in respect of MT "Entalina" Voyage 07C/05 for which commission was paid to Seaspan Singapore.

(k) Charter party dated 24 October 2005 in respect of MT "Soechi Chemical III" for which commission was paid to Seaspan Singapore.

(l) Charter party dated 26 October 2005 in respect of MT "Victory Prima" Voyage 37 which contract was arranged in the name of the plaintiff but for which commission was paid to Seaspan Singapore.

(m) Charter party dated 26 October 2005 in respect of MT Istana, which contract was arranged in the name of the plaintiff but for which commission was paid to Seaspan Singapore.

(n) Charter party dated 28 October 2005 in respect of MT "Istana VI" Voyage 2511B, which contract was arranged in the name of the plaintiff but for which commission was paid to Seaspan Singapore.

(o) Charter party dated 28 October 2005 in respect of MT Padang Halaban, which contract was arranged in the name of the plaintiff but for which commission was paid to Seaspan Singapore.

(p) Charter party dated 28 October 2005 in respect of MT "Madura" Voyage 01/05, which contract was arranged in the name of the plaintiff but for which commission was paid to Seaspan Singapore.

23 As for the ship-brokering business diverted to Seaspan Singapore, the plaintiff provided the following details:

(a) Charter party dated 28 October 2005 in respect of MT "Rose Marine" Voyage 30/05 for which commission was paid to Seaspan Singapore.

(b) Charter party dated 9 November 2005 in respect of MT "Eburna" Voyage 08/05 for which commission was paid to Seaspan Singapore.

(c) Charter party dated 9 November 2005 in respect of MT "Rengganis" Voyage 44/05 for which commission was paid to Seaspan Singapore.

(d) Charter party dated 15 November 2005 in respect of MT "Southern Seal" Voyage 17A05 for which commission was paid to Seaspan Singapore.

(e) Charter party dated 16 November 2005 in respect of MT "Victory Prima" Voyage 38 for which commission was paid to Seaspan Singapore.

(f) Charter party dated 18 November 2005 in respect of MT "Marine Champion" Voyage 42 for which commission was paid to Seaspan Singapore.

(g) Charter party dated 5 December 2005 in respect of MT "Docomo" Voyage 08/05 for which

commission was paid to Seaspan Singapore.

(h) Charter party dated 5 December 2005 in respect of MT "Rengganis" Voyage 46/05 for which commission was paid to Seaspan Singapore.

(i) Charter party dated 6 December 2005 in respect of MT "Gemini" Voyage 10C/05 for which commission was paid to Seaspan Singapore.

(j) Charter party dated 7 December 2005 in respect of MT "Olympic" Voyage 06B/05 for which commission was paid to Seaspan Singapore.

(k) Charter party dated 8 December 2005 in respect of MT "Dewi Madrim" Voyage 67/05 for which commission was paid to Seaspan Singapore.

(l) Charter party dated 13 December 2005 in respect of MT "Victory Prima" Voyage 39 for which commission was paid to Seaspan Singapore.

(m) Charter party dated 13 December 2005 in respect of MT "Gemini" Voyage 01/06 for which commission was paid to Seaspan Singapore.

(n) Charter party dated 13 December 2005 in respect of MT "Eburna" Voyage 09/05 for which commission was paid to Seaspan Singapore.

(o) Charter party dated 13 December 2005 in respect of MT "Ace 1" Voyage 42 for which commission was paid to Seaspan Singapore.

(p) Charter party dated 20 December 2005 in respect of MT "Southern Orchis" Voyage 17A/05 for which commission was paid to Seaspan Singapore.

(q) Charter party dated 21 December 2005 in respect of MT "Padang Halaban" Voyage 2601B for which commission was paid to Seaspan Singapore.

(r) Charter party dated 22 December 2005 in respect of MT "Siam Suchada" V.SC008F/05 for which commission was paid to Seaspan Singapore.

(s) Charter party dated 23 December 2005 in respect of MT "Cedar Galaxy" Voyage 006 for which commission was paid to Seaspan Singapore.

(t) Charter party dated 23 December 2005 in respect of MT "Bum Ik" Voyage 322 for which commission was paid to Seaspan Singapore.

(u) Charter party dated 28 December 2005 in respect of MT "Siam Suchada" V.SC001F/06 for which commission was paid to Seaspan Singapore.

(v) Charter party dated 28 December 2005 in respect of MT "Siam Suchada" V.SC003F/06 for which commission was paid to Seaspan Singapore.

(w) Charter party dated 28 December 2005 in respect of MT "Siam Suchada" V.SC004F/06 for which commission was paid to Seaspan Singapore.

(x) Charter party dated 28 December 2005 in respect of MT "Siam Suchada" V.SC005F/06 for which commission was paid to Seaspan Singapore.

(y) Charter party dated 28 December 2005 in respect of MT "Siam Suchada" V.SC006F/06 for which commission was paid to Seaspan Singapore.

(z) Charter party dated 30 December 2005 in respect of MT "Ace 1" Voyage 43 for which commission was paid to Seaspan Singapore.

(aa) Charter party dated 4 January 2006 in respect of MT "Siam Suchada" V.SC002F/06 for which commission was paid to Seaspan Singapore.

(bb) Charter party dated 4 January 2006 in respect of MT "Trans Rayong" Voyage 005/06 for which commission was paid to Seaspan Singapore.

(cc) Charter party dated 7 January 2006 in respect of MT "Victory Prima" Voyage 40 for which commission was paid to Seaspan Singapore.

(dd) Charter party dated 7 January 2006 in respect of MT "Ginga Eagle" Voyage 36 for which commission was paid to Seaspan Singapore.

(ee) Charter party dated 9 January 2006 in respect of MT "NCC Madinah" Voyage 200601 for which commission was paid to Seaspan Singapore.

(ff) Charter party dated 18 January 2006 in respect of MT "Docomo" Voyage 02/06 for which commission was paid to Seaspan Singapore.

(gg) Charter party dated 20 January 2006 in respect of MT "Siam Suchada" V.SC007F/06 for which commission was paid to Seaspan Singapore.

(hh) Charter party dated 20 January 2006 in respect of MT "Sakura" Voyage 01/06 for which commission was paid to Seaspan Singapore.

(ii) Charter party dated 23 January 2006 in respect of MT "Rose Marine" Voyage 05/06 for which commission was paid to Seaspan Singapore.

24 As a director of the plaintiff, Chin owed a duty at common law and under s 157(1) of the Companies Act, to act honestly in the best interests of the company and the duty not to place himself in a position where his duty to the company may conflict with his duty to another principal. Chin breached those twin duties by diverting commission due to the plaintiff to his own company Seaspan Singapore and by setting up Seaspan Singapore in direct competition with the plaintiff so as to divert business opportunities from the latter to Seaspan Singapore. Chin did not seek to argue the propriety of his actions but instead, sought to defend his otherwise unlawful acts by raising several (unmeritorious) arguments.

25 Chin had repeatedly emphasised in the course of the trial that it was he who had introduced the ship-brokering business to the plaintiff and that the plaintiff had ceased its ship-brokering business after 11 October 2005. This was true. Quah was only in charge of the operational aspects of the ship-brokering business while Ho and Chin were the ones who made contact with the clients and brought in the ship-brokering business. And indeed, Ho and Chin ceased to bring in any ship-brokering business to the plaintiff after 11 October 2005.

26 The question raised, however, is whether in diverting the ship-brokering business to Seaspan Singapore, Chin had acted in breach of his director's duties to the plaintiff. In my view, if Chin had

effectively resigned his directorship from the plaintiff on 11 October 2005, he would certainly be free to carry on the ship-brokering business in a new company that he had set up or in any other company he chose to join. He was, however, *not entitled* to continue to act as a director of the plaintiff and to concurrently set up a company to divert business away from the plaintiff. The fact that the plaintiff had ceased the ship-brokering business after 11 October 2005 did not absolve Chin from liability. It could not be argued that Chin had not put himself in a position of conflict of interest because the plaintiff (having ceased its ship-brokering business, leaving only the ship-agency business) and Seaspan Singapore were involved in different businesses. The very reason why the plaintiff had no ship-brokering business was due to Chin's diversion of the business to his own company even though he remained a director of the plaintiff.

27 Further, the fact that Chin had introduced the ship-brokering business to the plaintiff in the first place was an *irrelevant* consideration and did not discharge him from his duty to the plaintiff to act in its best interests by preserving and promoting its business. While Chin had giveth, he could not taketh away; at least not as long as he remained a director of the plaintiff. Chin had thus breached his director's duties by diverting the ship-brokering business to Seaspan Singapore. *A fortiori*, Chin was in breach of his director's duties by diverting the commission *due* to the plaintiff from contracts entered into in the name of the plaintiff, to Seaspan Singapore.

28 Chin had also sought to argue, in reliance on the decision in *Boardman v Phipps* [1967] 2 AC 46 ("*Boardman*") and the commentary in *Walter Woon on Company Law* (Singapore: Sweet & Maxwell, 3rd Ed, 2005) at pp 236-239 and 313-314, that because all the shareholders of the plaintiff (ie, Quah, Ho and Leong) were aware that he had been carrying on the ship-brokering business in Seaspan Singapore, he could not be held liable for so diverting the business from the plaintiff. In other words, Chin was arguing that there was knowledge of his activities and informal assent to such activities by the shareholders so as to absolve him from liability for his acts.

29 In support of the proposition that the informal assent of shareholders as to a wrongful act by a director is sufficient to absolve the director from liability, Chin relied on *Boardman* in which the House of Lords referred favourably (at 116) to the following observations of Lord Wright in *Regal (Hastings) Ltd v Gulliver* [1942] 2 AC 134 at 154:

> That question can be briefly stated to be whether an agent, a director, a trustee or other person in an analogous fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position, and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground *save that he made profits with the knowledge and assent of the other person*. The most usual and typical case of this nature is that of principal and agent. The rule in such case is compendiously expressed to be that an agent must account for net profit secretly (that is, without the knowledge of his principal) acquired by him in the course of his agency.
>
> [emphasis italicised]

30 The passage merely states the rule prohibiting the making of a *secret* profit by a fiduciary. In the present case, while Chin would likely have made a profit by diverting the commission due to the plaintiff and the ship-brokering business to Seaspan Singapore, the plaintiff's claim was not for the secret profit made by Chin but pertained to the position of conflict of interest Chin had placed himself in. That was why the plaintiff did not claim an account of the profits made *by Chin* but the loss suffered by the plaintiff due to the diversion of the commission and the ship-brokering business.

31 The broader question hence is, whether knowledge and informal assent by shareholders is sufficient to absolve a director from liability for breach of his director's duties. In this regard, *Walter Woon on Company Law* observed (at para 6.90):

> [I]t has been doubted whether the informal assent of the members of the company, even if unanimous, would be sufficient to release directors from breaches of their fiduciary duties or duty of care. Whether this will be held to be so in Singapore remains to be seen. It is suggested that there is no reason in principle why the unanimous consent principle should not apply in such cases.
>
> …
>
> [I]f all members agree to release a director from the consequences of his breach of fiduciary duty or negligence, why should this not be valid? To require a meeting to be held would be superfluous. However, it will be necessary to show that the members truly agreed with their eyes open; this is a matter of evidence in all cases.

32 This question of whether an informal assent of shareholders to release directors from breaches of their fiduciary duties or duty of care has yet to be determined by the courts. Although I could see no objection in principle to the position taken in *Walter Woon on Company Law* (as quoted above), it will not be necessary to make a definitive pronouncement on the question for this case. While Ho and Leong may have had knowledge of Chin's activities and may have assented to the same (for they were very much under his influence, having joined the plaintiff together with Chin after working with him for a number of years), Quah had not.

33 Quah certainly had knowledge that Chin was carrying on a ship-brokering business in his new company. In his letter dated 12 October 2005, Quah had stated to Chin that:

> YOU HAVE ALSO MENTIONED THAT YOU HAVE INCORPORATED ANOTHER COMPANY AND WILL CONTINUE TO DO THE SAME BUSINESS IN THE NEW COMPANY.

34 Quah must also have been aware that Chin's new company was named "Seaspan Singapore". This was so for they shared the same office in the new premises in which the name of Chin's new company was prominently displayed on signage.

35 Nonetheless, this knowledge on the part of Quah and his failure to take action until after 9 February 2006, did not meet the requisite standard of knowledge of Chin's breach of director's duties and did not constitute an assent to release Chin from his breach. In my view, *even if* the courts were to recognise that directors could be absolved from liability by the shareholders having knowledge of the breach and informally assenting to release a director from liability, such knowledge had to be very specific knowledge of the nature and extent of the breach and such assent had to be clear and unequivocal.

36 Quah may have had some knowledge that Chin was carrying out activities in his new company in conflict with his duties to the plaintiff but he could not have known the extent of the breach. Further, while it may have been a better course of action (in that the loss caused to the plaintiff could have been prevented) for Quah to have sought an injunction at the first instance when Quah learnt that Chin was going to continue his ship-brokering business in the new company, Quah's delay in having the plaintiff bring this action against Chin does not somehow constitute assent on his part to release Chin from his liability. If Chin's arguments as to the standard of knowledge and conduct so as to amount to an assent were accepted, it would effect an undesirable development in the law

pertaining to directors' duties by allowing some form of *inferred informal* assent to release directors from their liabilities and would lead to a greater lack of accountability by directors to shareholders. Hence, I find there to be no basis at law or policy to accept Chin's arguments.

37 Lastly, I note that Chin's counsel had sought to draw a distinction between the transactions referred to above (at [22] and [23]) on two grounds: first, that in some of the transactions the name of the plaintiff had been used by mistake in transacting with the client; and second, that the demurrage claims while concerning fixtures concluded by the plaintiff had been new events that had occurred well after the fixtures had been arranged and performed. These distinctions, in my view, were legal red herrings – regardless of whether Chin had diverted to Seaspan Singapore commissions due to the plaintiff for transactions entered into in the name of the plaintiff (although a more flagrant breach) or diverted new ship-brokering business to Seaspan Singapore, Chin had acted in conflict of interest as long as he remained a director of the plaintiff. Therefore, the distinctions raised were distinctions without a legal difference, at least for the purposes of this suit.

38 In the result, I find Chin liable to compensate the plaintiff for the loss suffered in diverting to Seaspan Singapore up to 9 February 2006, the commission due to the plaintiff and the ship-brokering business. Chin will have to pay the plaintiff damages to be assessed at a later date.

Did Chin breach his director's duties by paying out Address Commissions to certain third parties?

39 The plaintiff had alleged that Chin had breached his director's duties by paying out Address Commissions to certain third parties undisclosed to the plaintiff. The details of the payments are as follows:

Customer: Match Edible Oil Pte Ltd

Date Paid	**Amount (S$)**	**Vessel**
24 June 2005	7,047.60	MT Southern York V 09/05
16 August 2005	405.11	MT Siam Sriwatana
16 August 2005	830.95	MT Siam Supha
Customer: Glory Ship Management Pte Ltd		
29 August 2005	14,468.10	MT Gemini V 05/05
12 October 2005	38,193.08	MT Entalina V 06/05
12 October 2005	18,601.46	MT Sakura V 10/05
19 October 2005	37,597.08	MT Docomo V 06/05
31 October 2005	38,113.14	MT Eburna V 06/05
Customer: PT Permata Hijau Sawit		
29 March 2005	2,480	MT Dragonaria V 190/05
4 April 2005	23,049.72	MT Viscaya
24 June 2005	15,206.66	MT Bow Fraternity
27 July 2005	1,815	MT Sonata

12 August 2005	6,077.54	MT Marine Pioneer V 029
9 September 2005	13,623.34	MT Norwave V 18
23 September 2005	2,404.56	MT Istana VI V 2508B
27 September 2005	5,511	MT Marine Champion
18 November 2005	865.03	MT Siam Supha
30 November 2005	7,948.53	MT Padang Halaban
Customer: Felda Marketing Services Sdn Bhd		
13 June 2005	4,277.24	MT Docomo
7 July 2005	6,803.36	MT Bum Ju V 230
16 August 2005	3,341.07	MT Sakura V 09/05
19 August 2005	7,994.84	MT Bow Fertility V200504
7 September 2005	12,836.28	MT Docomo V05/05
23 September 2005	12,551.09	MT Eburna V05/05
13 October 2005	61,870.92	MT Bow Pride
20 October 2005	9,589.25	MT Bow Pride

40 Chin did not deny that the payments were made. He took the position that the payments were legitimately paid as Address Commissions to one Martin Charles Fernandez ("Martin Charles"). Chin had known Martin Charles since the mid-eighties. At the time, Martin Charles was with the Malaysian Federal Land Development Authority ("Felda"). Felda operated palm oil plantations and was also involved in the marketing, refining, producing, packaging and selling of palm-oil based products. Martin Charles left Felda to work as a commodities broker. Hence, he had many contacts among palm oil producers, traders, buyers and sellers and therefore had information on parties who needed to ship palm-oil related cargo. Chin made a deal with Martin Charles for the latter to recommend business to Chin in return for a share of the commission that would be earned from successful referrals.

41 On or about 22 September 2003, Chin entered into a written agreement with Martin Charles for Chin to pay the latter a commission for any referrals he had given Chin which led to business for the plaintiff. According to Chin, pursuant to this agreement, Martin Charles would verbally provide Chin with the contact details of cargo owners who were looking to ship cargo and Chin would contact these owners to arrange fixtures.

42 It was not uncommon for persons in the industry to provide referrals so as to receive commission in return if a successful transaction is concluded. This in of itself is not unlawful. What is unlawful, in the context of breach of directors' duties, however, was Chin's decision to lie about the identity of the recipient of the Address Commissions. On this point, I believed Quah's evidence that Chin had tried to conceal the identity of the recipient of the Address Commissions and had in fact lied that the Address Commissions were a form of a goodwill discount or refund to the vessel owner or carrier or charterer (see [7] above). At the trial, Chin had sought to justify his actions by explaining that he had some sort of confidentiality agreement with Martin Charles and thus could not reveal the identity of the recipient of the Address Commissions. This explanation, in my view, did not help Chin

and was in fact more incriminating. It demonstrated that Chin had failed to disclose that he had made a private deal with a third party which required him to use the plaintiff's funds to pay the third party. If Chin had revealed who this third party was and had the approval of the board, he would be applauded for securing more business for the plaintiff. But in failing to reveal who the third party was and in cutting a "confidential" deal with Martin Charles, Chin's actions were of an entirely different complexion: Chin had acted outside the bounds of accountability. He could not be said to have acted in the best interests of the plaintiff. In the result, I find that he had breached his director's duties in procuring the payment of the Address Commissions to Martin Charles and is liable to compensate the plaintiff for those payments.

43 As for Chin's reliance on s 391 of the Companies Act, in my view, the defence fails *in limine* for Chin simply could not be regarded as having acted honestly or reasonably in diverting the commissions due to the plaintiff and the ship-brokering business to his own company and in paying out the Address Commissions to Martin Charles.

Is Ho equally liable for the respective breaches?

44 I find Ho liable in part for the loss suffered by the plaintiff from the diversion of the commission and the ship-brokering business to Seaspan Singapore. Ho only played a minor role compared to Chin and in terms of *moral culpability* the latter is certainly more deplorable. However, in terms of legal liability, Ho, having joined Chin in Seaspan Singapore as a director and shareholder, must have known, if not actively taken part, in Chin's efforts to divert the commissions due to the plaintiff and the ship-brokering business to Seaspan Singapore. As both a director and shareholder of Seaspan Singapore, Ho stood to benefit from the profits earned by Seaspan Singapore resulting from the diversion. She had thus placed herself in a position of conflict of interest and in so doing, breached her duties to the plaintiff as a director.

45 Ho had tried to argue that she had merely taken instructions from Chin. This, in my view, was no defence at all. Ho should not have taken instructions from Chin blindly if those instructions led her to breach her duties to the plaintiff. Ho was a director of the plaintiff. She owed duties to the plaintiff and not to Chin. The plaintiff was her principal not Chin. If Chin had given her instructions to act in a manner in breach of her duties to the plaintiff, she should have resisted. In cases such as these, the abdication of a director's responsibilities could be as bad as the active commission of the wrongful act. As for the extent of Ho's liability, Chin had sought to argue that Ho was *equally liable* for the loss suffered by the plaintiff caused by all the transactions listed in [22] and [23] above. On this point, I accept Ho's argument that she was only responsible for some of the transactions *viz* [22(e), (j), (o)] and [23(a),(b),(f),(i),(n),(o),(z),(gg)]. I find her liable only for those transactions.

46 I do not find Ho to be liable in any way for the loss suffered by the plaintiff as a result of the payment of the Address Commissions. In my view, although Ho had been a co-signatory of the cheques made out to Martin Charles, she was equally ignorant about the nature of the payments and had been deceived by Chin who had kept his cards very close to his chest, ironically perhaps, out of a sense of loyalty to Martin Charles with whom he had a "confidentiality" agreement. Ho claimed to have been kept in the dark about the recipient of the payments and I believe her.

Is Chin entitled to claim from Quah a reasonable price for his transfer of shares to the latter?

47 Chin brought Suit 859 against Quah claiming the price of the shares in the plaintiff transferred by him to Quah in February 2006. Chin did not claim the price stipulated in the deed ($14,118.40) but sought a reasonable price for what the transfer of shares *ought to have been* in February 2006. In other words, Chin was asking the court to rewrite the terms of his agreement with Quah.

48 The deed expressly stated that the 32,000 shares were transferred to Chin for $14,118.40. At the trial, Chin had tried to argue that he had not noticed this amount stipulated in the deed when he signed the document. I reject this untruth. The deed was a simple one-page document with the sum of $14,118.40 stated plainly as the consideration for the transfer of shares. Likewise, Quah, Ho and Chin had signed a board resolution acknowledging the transfer of shares from Chin, Ho and Leong to Quah for a total sum of $30,000. Given the proportion of shares held by Chin, this meant he would receive $14,118.40 which was precisely the same figure stated in the deed. I am certain that Chin was aware that he was transferring his shares to Quah in return for $14,118.40. Further, by February 2006, Chin had already sought and received the benefit of legal advice (see [16] above), making more incredible his claim to have been ignorant of the terms of the transfer. For the foregoing reasons, there was simply no basis to rewrite the terms of the agreement between Quah and Chin and to substitute the consideration of $14,118.40 with a "reasonable price". This, in my view, was a frivolous claim.

49 The frivolity of Chin's claim was matched only by his absurd contention that the "reasonable price" for his shares had to take into account any gains made by the plaintiff if it succeeded in Suit 373 against him. In making this argument, Chin was seeking to undermine the plaintiff's success in Suit 373 by bringing Suit 859. I find no basis at law to accept such an argument.

Conclusion

50 Consequently, I find for the plaintiff in Suit 373 and I award the plaintiff interlocutory judgment against Chin for his breach of director's duties by diverting commission due to the plaintiff and the ship-brokering business to Seaspan Singapore. The plaintiff shall have final judgment against Chin in the sum of $353,501.95 for Address Commissions paid out to Martin Charles. I find that Ho was in breach of her director's duties and liable (to the extent set out in [45] above) for the loss caused to the plaintiff pertaining to the transactions for which she was responsible. Damages for the breach by Chin and Ho will be assessed by the Registrar with the costs of such assessment reserved to the Registrar.

51 I note that in Quah's AEIC, he had (in para 64) deposed that the plaintiff would be withdrawing its claim against Ho and Leong for refund of the cash surplus payouts. This was confirmed by Quah in the witness stand on 16 November 2009 (at N/E109). Chin similarly withdrew his Second Third Party claim against Leong on 17 November 2009 (at NE 207/208). That being the case the plaintiff will pay Chin his costs for the withdrawal of this claim and reimburse Chin the costs payable to Leong up to 16 November 2009, while Chin will have to pay Leong her costs for 17 November 2009.

52 What should have been done (but was not) was for counsel for Chin to obtain confirmation at the commencement of trial, of the plaintiff's withdrawal of its claim for cash surplus payouts against his client so that Chin could similarly withdraw his Third Party claim against Leong. Costs payable by the plaintiff and Chin would thereby have been reduced.

53 The plaintiff shall have the costs of Suit 373 from Chin save for the claim relating to "cash surplus" payouts. As Chin has succeeded in his Third Party proceedings against Ho, he is entitled to a contribution from Ho for the costs and damages payable to the plaintiff when assessed.

54 Finally, Chin's claim in Suit 859 is dismissed with costs to Quah.