Kea Holdings Pte Ltd and Another v Gan Boon Hock
[2000] SGCA 31

Case Number : CA 206/1999

Decision Date : 03 July 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Hee Theng Fong, Doris Damaris Lee and Marilyn Chia Lay Ling (Hee Theng Fong & Co) for the appellants; Oommen Mathew (Tan Peng Chin & Partners) for the respondent

Parties : Kea Holdings Pte Ltd; Another — Gan Boon Hock

Companies – Directors – Duties – Breach of fiduciary duties – Whether director receives secret commission – Whether director under duty to direct business to company

Companies – Directors – Duties – Breach of fiduciary duties – Conflict of interests – Holding cross-directorships – Breach of duty to act honestly – s 157 (1) Companies Act (Cap 50, 1994 Rev Ed)

Tort – Misrepresentation – Fraud and deceit – Elements of tort – Fraudulent misrepresentation – Whether victim of tort suffers any damage

Tort – Misrepresentation – Fraud and deceit – Whether basis of claim goes beyond ownership

: ***Introduction***

The appeal is brought against the decision of Kan Ting Chiu J concerning certain claims against the respondent, Gan Boon Hock (`Gan`), for breach of director`s duties and fraudulent misrepresentation. The appellants, Kea Holdings Pte Ltd (`Kea Holdings`) and Kea Resources Pte Ltd (`Kea Resources`) had brought 16 claims against Gan, pertaining, inter alia, to alleged breach of fiduciary duties owed to Kea Resources by Gan during his time as a managing director of Kea Resources. Gan counterclaimed against Kea Resources for annual wage supplements, various guaranteed bonuses and CPF contributions. The trial judge allowed five of the claims, but dismissed the remainder. He awarded the appellants S$101,536, US$60,000 and Rmb660,000, plus interest on these sums and half their costs. He also allowed the counterclaim and awarded Gan S$42,166.67 and CPF contributions on this amount, plus interest and half his costs to be taxed on the Subordinate Courts scale.

Background facts

Kea Holdings are a holding company. The second appellants, Kea Resources, are a wholly-owned subsidiary of Kea Holdings, and are in the business of shipbuilding and the sale and purchase of vessels. Gan joined Kea Resources on 15 July 1993 as a general manager and subsequently became the managing director, holding this position up till 21 November 1998. While in this post, he became a shareholder and director of Sinindo Pacific Pte Ltd (`Sinindo`) together with an Indonesian businessman, Teddy Salim Liem (`Teddy Salim`).

On 12 February 1999, the appellants commenced proceedings against Gan comprising 16 claims relating to alleged breaches of fiduciary duties, breach of confidence and fraudulent misrepresentation. The trial judge decided in their favour on five claims. The appellants initially brought this appeal on seven of the claims that had been decided against them. However, the appellants subsequently proceeded on only four of the seven claims during the course of the appeal.

These claims are:

(a) claim arising from purchases by Sinindo Pacific Pte Ltd (Sinindo);

(b) claim in respect of three barges `Pacific 4`, `Pacific 5` and `Pacific 7`;

(c) claim arising from the sale of the `Regal 8` to Kea Maritime; and

(d) claim arising from the sale of the `Orient VI`.

As was pointed out by the trial judge, each claim was founded on its own facts and circumstances. As such, it would be convenient to deal with each claim on its own.

The appeal

Claim arising from purchases by Sinindo Pacific Pte Ltd

Sometime in May 1995, whilst Gan was the managing director of Kea Resources, he became a majority shareholder and director of Sinindo. The other shareholder and director was one Teddy Salim Liem (`Teddy Salim`). The respondent claimed that he had disclosed his involvement in Sinindo to the appellants. However, they said that he only informed them that he was lending his name to Teddy Salim to form a company.

Between mid-1995 and mid-1996, Gan caused Sinindo to purchase five vessels from a company in China, China Jiangsu Machinery & Equipment Import & Export Corporation (`SUMEC`). The appellants claimed that, in doing that, Gan diverted business away from Kea Resources, and caused Kea Resources to suffer a loss of S$1,266,559, which represents profits they would have earned if they had sold the five vessels to Sinindo.

The trial judge held that in his capacity as director of Sinindo, Gan`s duty was to ensure that Sinindo bought the vessels from the best available source. He owed no duty to direct Sinindo`s business to Kea Resources. Kea Resources thus could not assert that, because Gan was also a director of Kea Resources, he should have placed the orders with Kea Resources. The judge therefore felt that nothing turned on the scope of Gan`s disclosure of his involvement with Sinindo to the appellants.

The trial judge further noted that Gan could not make any decisions to buy vessels for Sinindo without consulting Teddy Salim. Teddy Salim had not said in evidence that there was any agreement or understanding between him and Kea Resources that his companies would buy all their vessels from Kea Resources. There was no diversion of business from Kea Resources because there was no basis to suppose that the business would have gone to Kea Resources but for Gan`s intervention. The claim therefore failed.

On appeal, the appellants` main contention was that Gan had accepted a secret commission from SUMEC in return for his procuring Sinindo to purchase the vessels from SUMEC. The appellants tendered evidence purportedly relating to Gan`s receipt of the commission on the purchase of one of these vessels, `SP 2705`, by Sinindo. By doing this, the appellants said that he had placed his own interests above that of Kea Resources and had breached his fiduciary duties to Kea Resources.

Although the issue of the secret commission was not pleaded originally by the appellants, the argument was raised in the court below. In particular, the appellants tendered certain documents which formed the chief evidence in support of this allegation. The first document was a credit advice from the National Commercial Bank Ltd, Hong Kong, to Fuchuen Machinery & Equipment (`Fuchuen`) stating that the sum of US$780,303.40 had been remitted to Fuchuen`s account from DBS Finance Ltd, who are Sinindo`s bankers. On this document was a handwritten note stating the name of the vessel, the price of the vessel (US$606,000) and that US$173,303.40 had been credited into Gan`s account (A/c No 163118). The other relevant documents were a letter written in Chinese and its accompanying English translation certifying that, after that sum was remitted to their account, Fuchuen remitted the amount of US$173,303.40 to the respondent`s Citibank account No 163118. Gan, however, denied that the sum of US$173,303.40 had been deposited into his account, though he admitted that he had a Citibank account bearing the number 163118. When asked if he knew why Fuchuen would write the letter if no money had been remitted to him, he said he did not know. Gan refused to give discovery of his Citibank account on the basis that some of the assets in the account belonged to his relatives.

The trial judge did not make any finding as to whether Gan had indeed received the sum of US$173,303.40. Instead, as stated above, the decision was based on two reasons. First, that Gan had no duty to direct Sinindo`s business to Kea Resources and secondly, the fact that there was no diversion of business in this case as it had not been shown that Gan`s intervention had led to the series of events.

Now, the documents purportedly evidencing the fact that Gan had received a secret commission from SUMEC for procuring Sinindo to purchase the vessels, in particular, `SP 2705`, from SUMEC, were made by Fuchuen. The appellants explained that this was due to the fact that Fuchuen was the provider of letter of credit facilities for buyer companies like SUMEC. However, it was clear that the maker of these documents was not called upon by the appellants to give evidence. Instead, the appellants produced a witness, one Mr Yu Tian Lu, who was the manager of Zhejiang Machinery & Equipment Import & Export Corporation (ZMEC), as the representative of Fuchuen. He claimed to be authorised to give evidence on Fuchuen`s behalf by virtue of a letter from Fuchuen authorising him to be their witness.

In the circumstances, the documents purporting to evidence the payment of the secret commission by SUMEC to Gan amount to hearsay and are inadmissible as evidence. Counsel for the appellants pointed out to us that the authenticity of the documents had been admitted by Gan. However, such an agreement does not mean that Gan could not dispute the truth of the statements. It is this aspect of the documents that the hearsay principles apply to. The information in the documents were assertions of the fact that Gan had received a secret commission for the sale of `SP 2705`. In our view, this is a case where it would be highly unsafe to rely on the contents of these documents to prove the facts contained therein as the maker was not present in court. Counsel for Gan had no opportunity to cross-examine the maker and test the veracity of the assertions in the documents.

The presence of Mr Yu Tian Lu as Fuchuen`s representative and the fact that he may have had authorisation from Fuchuen to give evidence could not detract from the fact that the statements were hearsay. In any event, he did not claim to have any first-hand knowledge of the transaction between SUMEC, Fuchuen and Gan and said that he personally had nothing to do with Fuchuen himself. Furthermore, he did not even give any evidence, as the representative of Fuchuen, that Fuchuen had paid the secret commission to Gan. We also noted that apart from the letter of authorisation, there was apparently no other evidence that Mr Yu was indeed authorised to give evidence on behalf of Fuchuen. Quite apart from those concerns, no one from SUMEC was called to give evidence on the payment of the secret commission as well. That would have been the clearest

evidence that Gan had indeed entered into such a transaction. Instead, the only reference to these documents was made by Mr Goh Siew Hua, the Group Accountant of Kea Holdings. However, he clearly had no first-hand or personal knowledge of whether the secret commission was in fact paid to Gan.

As for Gan`s refusal under cross-examination to produce details of his Citibank account into which the secret commission had purportedly been paid, we did not think that his behaviour was sufficient for the court to draw an adverse inference that he had indeed received the money. He consistently denied having received the secret commission and said that he did not know why Fuchuen would have written the letter certifying that they had paid the sum of US$173,303.40 to him. While it may have been the case that producing the details would have put an end once and for all to the issue of whether the money had been paid into his account, it was nevertheless still the obligation of the appellants, as the plaintiffs, to prove their case against Gan. As the documents purportedly evidencing the payment of the secret commission should have been excluded as hearsay, the appellants had no other evidence to establish their claim that Gan had received a secret commission from SUMEC in respect of the purchase of `SP 2705` by Sinindo. In our judgment therefore, the appellants had not successfully proved that Fuchuen had paid a secret commission, on behalf of SUMEC, to Gan.

On this basis, we reject the appellants` claim that Gan had acted in breach of his fiduciary duties vis-.-vis Kea Resources. The appellants submitted that if Gan had received the secret commission, he would have been in a situation whereby his interests and that of Kea Resources would clash. In connection with this, the appellants cited **Industrial Development Consultants v Cooley** [1972] 2 All ER 162 to counter Gan`s argument that Sinindo would not have purchased the vessels from Kea Resources anyway. The appellants said that, applying ***Industrial Development Consultants v Cooley*** , Gan would nonetheless still be liable to Kea Resources for damages arising out of his breach of duty.

In Industrial Development Consultants v Cooley , the defendant, Cooley was the managing director of the plaintiff company. The company was interested in obtaining certain contracts from the Eastern Gas Board but the Board was not satisfied with its set-up and refused to award the contract to it. The Gas Board then approached Cooley personally and invited him to be their project manager. Cooley resigned from the company and accepted the Gas Board`s position. The company brought an action against Cooley for account of profits. Cooley argued that he had not breached the duty because the Gas Board would not have awarded the plaintiffs the contracts in any event. This argument failed. Roskill J (at p 175) said:

> *... It is said: `Well, even if there were that conflict of duty and interest, nonetheless, this was a contract with a third party in which the plaintiffs never could have had any interest because they would have never got it. That argument has been forcefully put before me by counsel for the defendant.*
>
> *The remarkable position then arises that if one applies the equitable doctrine on which the plaintiffs rely to oblige the defendant to account, they will receive a benefit which on Mr Smetton`s evidence at least it is unlikely that they would ever have got for themselves had the defendant complied with his duty to them. On the other hand, if the defendant is not required to account he will have made a large profit as a result of having deliberately put himself into a position in which his duty to the plaintiffs who were employing him and his personal interest conflicted ...*
>
> *If one looks at the way the cases have gone over the centuries it is plain that*

the question whether or not the benefit would have been obtained but for the breach of trust has always been treated as irrelevant ...

The appellants also relied on **Hytech Builders Pte Ltd v Tan Eng Leong & Anor** [1995] 2 SLR 795 . In this case, the plaintiff company claimed declarations that the defendants were trustees of profits made by the second defendants, a company substantially owned and controlled by the first defendants, from a construction contract known as `Contract 220`, and for an account of profits. The first defendant was a director of the plaintiff company at all times. Contract 220 had been awarded by tender to `Kung Sing`, a Taiwanese company, the second defendants, and `HLS`, a Singapore company. Kung Sing had originally approached the plaintiff company with a view to a joint tender for the project. However, the plaintiff company did not qualify to tender for the project, so the board of directors had decided to tender for the contract in the name of a joint venture company, Sinbelco, in which the plaintiff company held a 50% stake, and which did qualify to tender. The plaintiff company`s board of directors had appointed the plaintiff to manage the tender project, but the first defendant instead tendered for the project using the second defendant`s name.

Warren LH Khoo J allowed the plaintiff`s claim. He held that as a director of the plaintiffs, the first defendant owed a fiduciary duty to them not to divert the business opportunity for his own profit. He acted in breach of that duty when he procured the second defendants to tender for the contract. This was so even though the first defendants did not qualify to tender for the project.

Also relevant is s 157 of the Companies Act (Cap 50), which is a statutory statement of a director`s duties under Singapore law. The provision states:

As to the duty and liability of officers.		
157	(1)	A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.An officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.
	(2)	
	(3)	An officer or agent who commits a breach of any of the provisions of this section shall be -

		(a)	liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach of any of those provisions; and
		(b)	guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding one year.
	(4)	This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.	
	(5)	In this section -	
		`officer` includes a person who at any time has been an officer of the company;	
		`agent` includes a banker, solicitor or auditor of the company and any person who at any time has been a banker, solicitor or auditor of the company.	

Under s 157(4), the duties under s 157(1) are specifically stated not to be in derogation of any other rule of law relating to the duty or liability of directors or officers of a company, including the common law and equitable rules. There are two principles of conduct of relevance to the present case. First, that a director must act in what he honestly considers to be the company`s interest, and not in the interests of some other person or body. Secondly, the equitable rule that a fiduciary must not place himself in a position where his duty to the company and his personal interests may conflict.

In this case, the appellants alleged that Gan should have channelled the sale of the barges from

SUMEC to Sinindo through Kea Resources so that Kea Resources could have earned a profit on them. The trial judge held that there was no such duty on him to do this. His duty was to obtain the best prices for Sinindo.

We agreed with this conclusion. We have decided that the appellants had not proved their allegation that Gan had received a secret commission relating to Sinindo`s purchase of `SP 2705` from SUMEC. As such, no conflict of interests arose between his personal benefit and that of Kea Resources. The facts of this case were different from the cases of ***Cooley*** and ***Hytech*** relied on by the appellants. In those cases, the defendants had acquired information as directors of the plaintiff companies and had earned a personal profit from the information. The court therefore ordered that the directors had to account for the profits made. The situation was different in this case. Here, the appellants failed to show that Gan had earned a secret commission from the sale of the vessel. The claim was thus correctly dismissed by the trial judge.

Claim in respect of the barges `Pacific 4`, `Pacific 5` and `Pacific 7`

Some time prior to 1996, before Gan joined Kea Resources, Kea Resources had ordered three barges from ZMEC. Gan subsequently suggested to the Chairman of Kea Resources, Mr Kea Meng Cheng, that the orders for the barges be cancelled because there were no buyers for the barges and also to avoid paying the export duty of 5% which would be imposed on the purchase. Mr Kea Meng Cheng agreed and the orders were cancelled on 22 August 1996, which led to Kea Resources forfeiting the deposits paid on each barge totalling US$77,610.

In the court below, the appellants alleged that Gan had acted in breach of his fiduciary duties to Kea Resources because he knew that Sinindo was looking for barges at about the same time as the orders were cancelled, yet he recommended the cancellation. In this sense, this particular head of claim was connected to the issue above relating to the alleged diversion of business from the appellants to SUMEC. The appellants thus claimed the forfeited deposit from Gan.

The trial judge stated that the gravamen of the complaint was that Gan had acted improperly by causing Sinindo to buy three barges from SUMEC when Kea Resources had three barges available and awaiting collection from ZMEC. However, Gan had a duty to see that the orders placed by Sinindo were in the best interests of Sinindo. Gan owed no duty to Kea Resources to place the orders with them. The trial judge went on to say that in any event, there was no evidence that the barges from ZMEC and those ordered by Sinindo from SUMEC were interchangeable. Also, the trial judge added at [para] 20 of his judgment that:

> *... even if the defendant breached his fiduciary duty to Kea Resources in 1995 when Sinindo placed the orders with SUMEC, there is a leap in logic to conclude that he is accountable for the lost deposit payments following the cancellation of the orders from ZMEC in 1996, because Kea Resources did not order the three barges with the knowledge that Sinindo would be on the market for barges, and did not cancel the orders because Sinindo did not buy those barges from it.*

The appellants submitted that in fact the three barges ordered from ZMEC were all of the same length, ie 270 feet, as those which were ordered from SUMEC. They said that the length of the vessel is the most important dimension in relation to a barge, whereas the width and height are of less importance to the purchaser. The vessels should therefore be treated as interchangeable. Further,

they asserted that Kea Resources could have offered Sinindo similar terms for the three barges as Sinindo had paid to SUMEC.

Gan, on the other hand, contended that there was no evidence that the barges were identical, or interchangeable. The only available information was that the barges were of the same length, which is not the same as saying that they were interchangeable. Further, the appellants failed to prove that Gan was in control of Sinindo such that only he could have caused Sinindo to purchase vessels from SUMEC rather than from Kea Resources. It was Teddy Salim who was in fact controlling Sinindo.

Clearly, Gan was obliged both by his statutory duty under s 157(1) of the Companies Act and the general equitable principles governing the duties of fiduciaries to act in the best interests of Kea Resources. As stated above, this also encompasses a duty not to place himself in a position where his duty to Kea Resources and his own interests are in conflict. However, this does not mean that Gan was precluded from holding directorships in two companies. In **Boulting v Association of Cinematograph, Television and Allied Technicians** [1963] 2 QB 606, Upjohn LJ, as he then was, said in reference to the relationship between the `no conflict of interests` rule and directors who hold posts in more than one company that:

> *Directors ... may sometimes be placed in a position that, though their interest and duty conflict, they can properly and honestly give their services to both sides and serve two masters to the great advantage of both. If the person entitled to the benefit of the rule is content with that position and understands what are his rights in the matter, there is no reason why he should not relax the rule. ... To sum up the position, it is clear that the person entitled to the benefit of this positive rule is the person who is protected by it, but he, and he alone, can in proper circumstances relax it ... It cannot be used as a shield by the person owing the duty*

In other words, as long as the fact of this is disclosed to the company and approved, the holding of cross-directorships is not ***per se*** a breach of duty. In this case, the appellants knew that Gan was a director of Sinindo. However, this does not mean that Gan could then subordinate the interests of Kea Resources to Sinindo in a situation where their interests were in conflict.

In determining whether Gan had acted in breach of his duties to Kea Resources, we note that, although the facts of this claim were related to the claim above for diversion of business, the thrust of the claim was somewhat different. In this case, the complaint was that Gan did not tell Kea Resources that there was a willing buyer for the three barges in question in the form of Sinindo.

While we agree with the trial judge that Gan was under no duty to ensure that all orders from Sinindo should be placed with either one of the appellants, it is our view that the crucial fact in respect of this claim was Gan`s material misrepresentation which led to the forfeit of the deposit for the barges. This case was unlike the situation above where Gan made a decision not to procure Sinindo to purchase the vessels from the appellants. Here, Gan had misled the appellants, in particular Kea Resources, into believing that there was no buyer in the market when in fact Sinindo was interested in purchasing similar vessels. By doing so, he was not acting in the best interests of Kea Resources. As such, it was a breach of Gan`s duty to Kea Resources to act honestly in discharge of his duties as required by s 157 of the Companies Act. The forfeiture of the deposit was a real and proximate loss to Kea Resources caused by the respondent`s breach of duty and we order that Gan compensate Kea Resources for the loss of the deposits amounting to US$77,610.

Claim arising from the sale of the `Regal 8` to Kea Maritime

In November 1995, the vessel `Regal 8` was sold by Kea Maritime Pte Ltd (`Kea Maritime`), a company which is part of the same group as the appellants but was not a party to this action, to Trisakti Utama Shipping Pte Ltd (`Trisakti Utama`), another company in which Teddy Salim was involved. Gan was the managing director of Kea Maritime and owned 20% of its shares, with Kea Holdings owning the other 80%. However, the appellants were interested in the sale because Kea Resources had paid for the construction of the vessel. Payment for the vessel by Trisakti Utama was to be in 48 instalments and title was to be transferred upon the completion of the payments.

The vessel developed mechanical difficulties after it was delivered to Trisakti Utama. A dispute arose over whether the difficulties were caused by equipment failure or by improper maintenance. On 13 February 1997, the vessel sailed back to Singapore, and Kea Resources eventually incurred $338,493.29 for repairs. At that time, the instalment payments were in arrears. Kea Resources took the position that the agreement was terminated from that date, reasserted possession over the vessel, and forfeited the instalment payments made.

In the court below, the appellants had claimed the repair costs from Gan on the basis that he had failed in his fiduciary duties to Kea Resources to ensure that the vesel was properly maintained by the purchaser, and that he had taken the vessel back without the consent of Kea Resources. This claim was dismissed by the trial judge and there was no appeal against this decision.

However, the appellants also brought a related claim in respect of the sale of the `Regal 8` which was also dismissed by the trial judge, which the appellants appealed against. The allegation was that Gan procured two sale agreements of the vessel between Kea Maritime as seller and Trisakti Utama as buyer, which stated different sale prices. The agreement in Kea Maritime`s possession showed the price to be $1.2m, while the agreement in Trisakti Utama`s possession showed the price as $1.3m. Teddy Salim confirmed in evidence that the contract that he signed on behalf of Trisakti Utama was for $1.3m and that the agreement for the lower sum was a forgery.

The trial judge made a finding of fact that the defendant had dishonestly caused there to be two agreements with the intention of retaining the difference of $100,000. However, his scheme did not bear fruit because Trisakti Utama did not complete paying the instalment payments. The undisputed facts were that the instalments were in arrears when the vessel sailed back to Singapore and was subsequently repaired, chartered out, then resold by Kea Resources. Kea Resources had proceeded with the claim on the basis that $1.3m had been paid for the vessel, but this was wrong, and there was therefore no basis for the claim. In any event, any loss in the sale price would be a loss to the sellers, Kea Maritime. Any claim for the $100,000 should therefore have been made by Kea Maritime and not Kea Resources.

The appellants submitted that the trial judge was wrong to assume that the respondent would be enriched by $100,000 only upon full payment of the purchase price by Trisakti Utama. They asserted that the genuine sale agreement stipulating the $1.3m purchase price provided for a $100,000 deposit to be paid. This sum represented Gan`s secret `commission`. The appellants stated that:

> *When `Regal 8` was repossessed by the second appellants [Kea Resources] and all instalments forfeited by the second appellants, they suffered a loss of S$100,000 being the deposit which they would otherwise have forfeited if not for the respondent`s fraudulent misrepresentation that the price of `Regal 8` was S$1.2m instead of $1.3m. Had the respondent not dishonestly misled the second appellants, the S$100,000 deposit would have gone into the second appellants` account.*

> *Although there is no evidence that the respondent had himself taken the sum of $100,000, the second appellants submit that following the case of **Bradford Third Equitable Benefit Building Society v Borders** [1941] 2 All ER 205, it is sufficient to find that a tort of deceit had been committed by the respondent so long as the second appellants can show that they have suffered a loss. The second appellants have shown at para 175 above that they could not collect and forfeit the said sum due to the respondent`s fraudulent misrepresentation.*

In addition, the appellants said that the trial judge was wrong to think that the claim should have been brought by Kea Maritime, and not by Kea Resources. This is because Kea Maritime would pay any sums collected from the sale of the `Regal 8` to Kea Resources without any deductions. Kea Resources were thus the `ultimate beneficiary` under the contract of sale. In this respect, they rely on the English case of **Ross v Caunters (a firm)** [1980] Ch 297[1979] 3 All ER 580, a case involving solicitor`s negligence. In their view, that case is authority for the proposition that an action could be maintained against Gan because he was in sufficient `proximity` with Kea Resources, which were the real beneficiaries of the sale contract.

Like the trial judge, we did not disagree with the appellants that Gan had made a false representation of the price offered by Trisakti Utama for the vessel to Kea Maritime through his apparent forgeries of the two different contracts with the intention that Kea Maritime would act upon his fraudulent act. However, the elements of the tort of deceit, as set out in **Bradford Third Equitable Benefit Building Society v Borders** [1941] 2 All ER 205, require more than this. The tort of deceit consists of the wilful making of a false statement with the intent that the plaintiff shall act in reliance upon it and with the result that he does so act and suffers damage in consequence. This damage must be proved by the plaintiff; **Diamond v Bank of London and Montreal** [1979] QB 333.

It is in relation to the final requirement that the appellants` case failed. Neither Kea Resources nor Kea Maritime had actually suffered damage as a result of Gan`s actions. The appellants` basic point appeared to be that, since the deposit of $100,000 was not received by Kea Maritime, they were entitled to claim it from Gan. The difficulty with this was that there was no evidence that the $100,000 was ever paid to him or anyone else.

Furthermore, it is trite law that the person against whom a tort has been committed must prove that he has suffered actual damage. This proposition was encapsulated by Lord Diplock in **Albacruz (Cargo Owners) v Albazero (Owners)** [1977] AC 774 where he said the following:

> *The general rule in English law today as to the measure of damages recoverable for the invasion of a legal right, whether by breach of a contract or by commission of a tort, is that damages are compensatory. Their function is to put the person whose right has been invaded in the same position as if it had been respected so far as the award of a sum of money can do so. Such an award can readily do so in the case of mercantile contracts, since the purpose of the parties in entering into them is to make a money profit. So where the wrong for which suit is brought is the breach of a mercantile contract the measure of damages for the breach is generally the financial loss that the plaintiff has sustained by reason of the defendant`s failure to perform the contract according to its terms.*

Thus, even if the appellants successfully proved that Gan had made the fraudulent misrepresentation,

they failed to show that neither Kea Resources nor Kea Maritime suffered any loss, or that Gan gained a profit as a result, due to the fact that the transaction fell through for other reasons. There was nothing for Gan to compensate. Under the circumstances, any claim against him must fail and we dismiss the appeal on this issue.

Claim arising from the sale of the `Orient VI`

The facts from which this claim arose were somewhat similar to that of the sale of the `Regal 8`. The sale was between Kea Maritime as vendors and PT Ersihan Satya Pratama (`Ersihan`), a company controlled by Teddy Salim, as purchasers. Kea Resources had claimed that they were the owners of the `Orient VI`, and this was admitted by Gan.

Again, there were two sale agreements, one for $685,000 which was in the possession of Ersihan and another for $650,000 in the possession of Kea Maritime. Teddy Salim acknowledged that the correct price was $685,000, that it was paid by Ersihan, and that his signature on the $650,000 was a forgery.

The trial judge accepted Teddy Salim`s evidence that he had handed a cash cheque of $35,000 to Gan as part of the purchase price. This sum was not paid over to Kea Maritime. In this last respect, the evidence differed from the `Regal 8` claim. However, he dismissed this claim on the basis that, although Kea Resources were the owners of the vessel, they were not the vendors. Kea Maritime were the vendors and as such the party entitled to receive payment from the purchasers. The $35,000 was therefore due to Kea Maritime, but who were not the claimants. The trial judge observed that in the sale of an asset the owner is not ipso facto entitled to the proceeds of sale if it is not also the vendor. Where the vendor and the owner are separate parties, prima facie, the vendor is the party entitled to the proceeds. The owner may have a claim to the proceeds, e.g. if the vendor was selling as its agent, but there must be a basis for a claim beyond its ownership. Kea Resources had not established that in its claim.

The appellants argued that the trial judge erred in his view that Kea Resources could not bring the claim. They said that Kea Resources had established a basis for the claim beyond their ownership of the vessel:

> *The second appellants [Kea Resources] have more than one basis beyond ownership. Other than the fact that the second appellants were the owner, the second appellants were also the `ultimate beneficiary` in the sale of `Orient VI`. The loss of S$35,000 was therefore a loss to and suffered by the second appellants and not Kea Maritime. The trial judge had therefore erred by failing to take into account such evidence.*
>
> *The second basis is the duty owed by the respondent to the second appellants. Such duty stems from the close and proximate relationship between the respondent and as Managing Director of the second appellants. The respondent as managing director of the second appellants owed it a duty not to cause it to suffer loss. It is foreseeable by any reasonable man that the respondent, being in such a proximate relationship with the second appellants, would foresee that the second appellants would suffer loss as a result of his fraudulent scheme.*

The facts of this claim were different from the claim in respect of the `Regal 8` in that, in this case, the trial judge accepted that Gan had been paid $35,000 for the sale, which had not been paid over

to Kea Maritime. On appeal, Gan also did not seriously dispute this finding. Kea Maritime was clearly entitled to bring an action for recovery of the $35,000. The difficulty faced by the appellants, however, was that Kea Maritime were not a party to this action. The trial judge accepted that Kea Resources were the owners of the vessel, but held that this was not enough - something `beyond ownership` was required.

As stated above, the elements of the tort of deceit are the wilful making of a false statement with the intent that the plaintiff shall act in reliance upon it and with the result that he does so act and suffers damage in consequence: ***Bradford Third Equitable Benefit Building Society v Borders*** . It seems to us that the question of who the seller was in determining who the proper party to the suit should be is therefore not as crucial as the trial judge opined. We are unable to agree with the trial judge`s analysis of this issue. The facts show that Gan must have made the fraudulent misrepresentation of the selling price to Kea Maritime as well as Kea Resources. This is because there was a very close relationship between Kea Resources on the one hand, who expended the money and resources to build the vessels and Kea Maritime on the other, who sold these vessels.

The re-re-amended statement of claim gives details of the relationship between Kea Maritime and Kea Resources and these two transactions. The relevant portion of para 32 of the re-re-amended statement of claim reads:

> *32 On or about 15 November 1995, the defendant caused and/or procured the second plaintiffs [Kea Resources] to sell a vessel named `Regal 8` through M/s Kea Maritime Pte Ltd to Trisakti Utama at the price of S$1,200,000 plus 5% per annum contractual interest charges. The agreement provided that the payment for the vessel `Regal 8` was to be by way of 48 monthly instalments of S$30,000 inclusive of 5% per annum contractual interest charges, totalling S$1,440,000*
>
> *Particulars*
>
> *(a) M/s Kea Maritime Pte Ltd is a company formed on 28 September 1993 to carry on the business of selling vessels on an instalment basis where ownership of the vessels would be transferred to the buyer only upon full payment. This is different from the second plaintiffs` business which is the outright sale of vessels to buyers;*
>
> *(b) The defendant [Gan] holds 20% of the shares in M/s Kea Maritime Pte Ltd whilst the balance 80% of the shares is held by the first plaintiffs;*
>
> *...*
>
> *(d) The costs of construction of all vessels in China including the vessel `Regal 8` were borne by the second plaintiffs;*
>
> *(e) All other expenses, costs, disbursements for all vessels including the vessel `Regal 8` were also borne by the second plaintiffs;*
>
> *(f) The defendant, as a director and managing director of both the Second plaintiffs and M/s Kea Maritime Pte Ltd, knew or ought reasonably to know that all payments in connection with or related to the vessel `Regal 8` were or would be made by the second plaintiffs;*

...

Further, it is stated that Kea Maritime would be the legal owner of the vessels until the payment of the instalments was completed by the respective buyers. The amount of proceeds received by Kea Maritime would then be transferred to Kea Resources.

These circumstances show that Gan`s fraudulent misrepresentation must therefore also have been made to Kea Resources. He intended that they would act upon it by entering into the transaction, which they did, and they suffered damage as a result, viz the difference in the selling price that Ersihan paid and the amount of sale proceeds that they actually received. In our view, the trial judge erred in holding that the appellants had to prove something beyond ownership in order to be entitled to claim the proceeds. The facts showed that the elements of the tort that Kea Resources claimed had been perpetuated on them by Gan had been made out. Thus, they were entitled to bring the claim for the $35,000. We thus allow the appeal on this issue.

Conclusion

Out of the four issues on appeal, we allow the appeal on the second and fourth claims and dismiss the appeals relating to the first and third claims. Gan is thus ordered to pay over the sums of US$77,610 and $35,000 to the appellants. As the appellants are only partially successful, and in particular, lost the first issue which was by far the most hotly-contested claim, we award them one-third the costs in the appeal. We make the usual consequential order for the security deposit to be returned to the appellants or their solicitors.

Outcome:

Order accordingly.