KEA Holdings Pte Ltd and Another v Gan Boon Hock
[2000] SGHC 8

Case Number : Suit 259/1999

Decision Date : 14 January 2000

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Hee Theng Fong with Doris Damaris Lee & Marilyn Chia Lay Ling (Hee Theng Fong & Co) for the plaintiffs; Chia Boon Teck with Matthew Saw (Lee & Lee) for the defendant

Parties : KEA Holdings Pte Ltd; KEA Resources Pte Ltd — Gan Boon Hock

JUDGMENT:

GROUNDS OF DECISION

1. The two plaintiff companies are related companies. The first plaintiff, Kea Holdings Pte Ltd ("Kea Holdings") is a holding company, and the second plaintiff, Kea Resources Pte Ltd ("Kea Resources") is its wholly-owned subsidiary. The defendant joined Kea Resources as its general manager on 15 July 1993. He was subsequently a director and managing director of the company until those two appointments were terminated on 21 November 1998. He was neither a director nor an employee of Kea Holdings. The plaintiff companies made 16 claims against the defendant, and the defendant made a counter-claim against Kea Resources for losses arising from the termination of his office as general manager.

2. After hearing the action over 13 days, I allowed some claims and dismissed others, and I also gave judgment on parts of the counter-claim. The plaintiffs appeal against the dismissal of the claims and against my orders in the counter-claim against them. The defendant is not appealing against my decisions in the claim and counter-claim. As each decision under appeal was founded on its own facts and circumstances and raised distinct issues, I will treat each of them on its own.

Claim arising from purchases by Sinindo Pacific Pte Ltd ("Sinindo")

3. The defendant was a shareholder and director of Sinindo together with an Indonesian businessman Teddy Salim Liem ("Teddy Salim"). The defendant was with Kea Resources when he became involved with Sinindo and Teddy Salim. The defendant claimed that he had disclosed his involvement in Sinindo to the plaintiffs, but they said that he only informed them that he was lending his name to Teddy Salim to form a company.

4. Nothing turned on the scope of the disclosure. It was the defendant's role in Sinindo's purchase of five vessels from China from China Jiangsu Machinery & Equipment Import & Export (Group) Corporation ("SUMEC") that gave rise to this claim. The plaintiffs claimed that the defendant "caused and/or procured Sinindo to purchase five vessels directly from China, thereby diverting business away from the Second Plaintiffs".

5. The plaintiffs have to address a basic issue in this claim – the defendant's duty to Kea Resources in these purchases. If the defendant selected SUMEC as the suppliers of the vessels, that would have been done in his position as a director of Sinindo. In that capacity, his duty was to ensure that Sinindo bought from the best available source. Kea Resources cannot assert that because the

defendant was also a director of Kea Resources, he should place the orders with Kea Resources.

6. There were also difficulties in the factual basis of this claim. It was not disputed that Teddy Salim had provided the finances and assets of Sinindo, that the defendant did not inject any money or assets into the company, and that the shares registered in the defendant's name were held in trust for Teddy Salim.

7. Teddy Salim said of the defendant's role in Sinindo -

> … I left the operation of the company to the Defendant. He would consult me only when a decision is to be made regarding the purchase of vessels.

8. Since he was consulted, he must have been aware of the basic facts of the purchases, e.g. supplier, price, payment terms, specifications, and delivery terms.

9. Teddy Salim also deposed that

> (I)nitially I was under the impression that all vessels purchased by Sinindo or by my other companies, Trisakti Utama and PT Ersihan were from the Second Plaintiffs. I would have purchased all the vessels required by Sinindo from the Second Plaintiffs as I had previously used M/s Trisakti Utama and PT Ersihan to purchase vessels from the Second Plaintiffs. I did not know that there were 5 vessels purchased by Sinindo from China directly until after the delivery of the vessels.

10. He was being careful with his words. He did not say how the impression arose, and whether the defendant had anything to do with it. He did not complain that the defendant had failed to consult him, or had misled him on the purchases. He did not say that there was any agreement or understanding between him and Kea Resources that his companies would buy all their vessels from Kea Resources and did not reveal that his companies purchased vessels from other suppliers besides Kea Resources.

11. The defendant owed no duty to direct Sinindo's business to Kea Resources. He could not make any decisions to buy vessels for Sinindo without consulting Teddy Salim. 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 the defendant's intervention. The claim must fail on the evidence.

12. The plaintiffs relied on another ground for this claim, that the defendant acted in breach of confidence. However, they did not identify the information involved. That was a fatal omission in a claim of this nature. On the evidence, it may be inferred that the defendant may have learnt from being with Kea Resources that SUMEC sells barges as a part of its business. Such information must be available to would-be purchasers of barges from China, and cannot support an action of breach of confidence.

Claim in respect of three barges "Pacific 4", "Pacific 5" and "Pacific 7"

13. This claim was rather confused. The Statement of Claim reads

> <u>Wrongful cancellation of 3 barges ordered by the Plaintiffs</u>

19. The Second Plaintiffs had placed orders for 3 units of 270 foot barges with ZMEC and paid a sum of US$25,870.00 as deposit to ZMEC for each vessel, totalling US$77,610.00 for the 3 vessels.

20. These vessels, "Pacific 4", "Pacific 5" and "Pacific 7" were ready for delivery as early as end 1993 to May 1994.

21. In breach of his fiduciary duties to the Second Plaintiffs, the Defendant ordered another 3 units of 270 foot barges from SUMEC in 1995 and cancelled the Second Plaintiffs' orders for the 3 vessels from ZMEC on 22nd August 1996. This resulted in the forfeiture of 3 sets of deposits paid by the Second Plaintiffs to ZMEC, amounting to US$77,610.00.

22. The Second Plaintiffs have thereby suffered loss and damage in the sum of US$77,610.00.

14. Two misdeeds were alleged against the defendant in paragraph 21, placing orders for Sinindo for three barges with SUMEC in 1995 and cancelling Kea Resources' orders with ZMEC (Zhejiang Machinery & Equipment Import and Export Corporation) in 1996.

15. The substance of the claim was set out in paragraphs 52-57 of the affidavit of evidence-in-chief of Kea Meng Kwang, director and vice-chairman of Kea Holdings and director of Kea Resources –

52. It was discovered during the investigations that the Defendant had on behalf of Sinindo purchased 3 vessels directly from SUMEC instead of selling the vessels already constructed by ZMEC, on behalf of the Second Plaintiffs, to Sinindo. The vessels constructed by ZMEC were ready by May 1994.

53. The Defendant, in breach of his duties to the Second Plaintiffs, suggested to the Second Plaintiffs that the 3 barges constructed by ZMEC be cancelled and allow the deposits to be forfeited on the ground that there were no buyers for these barges and also to avoid paying a 5% export duty which would be imposed.

54. It was such selected information which the Defendant gave to the Chairman of the Second Plaintiffs, Mr Kea Meng Cheng, that led him to agree with the Defendant's decision to cancel the order and allow the deposits to be forfeited. If the facts be known to Mr Kea Meng Cheng that Sinindo was looking to purchase vessels of the same specifications, the situation would have been different.

55. The Defendant therefore cancelled the orders sometime in August 1996 on the 3 barges ("Pacific 4", "Pacific 5" and "Pacific 7") and the deposits paid by the Second Plaintiffs were forfeited by ZMEC. …

56. The Defendant then informed me in his Memorandum dated 9th September 1996 of the necessity to cancel the order for the 3 barges and to allow the deposits paid to be forfeited. Yet, he never informed me that there was a buyer in the form of Sinindo who was looking for vessels of the same specifications before he cancelled the same.

57. The deposit paid for each barge was US$25,870.00, therefore the total amount forfeited was US$77,610.00 since the orders for 3 barges were cancelled.

16. The complaint was not really over Kea Resources' purchases. The plaintiffs were not alleging that the defendant had acted improperly when the orders were placed with ZMEC. The defendant said the orders were made before he joined the company, and that was not refuted. The grievance was that the orders were cancelled in 1996 with the loss of the deposit paid.

17. The cancellations were made after a meeting between the defendant, Kea Meng Cheng and the representatives of ZMEC. The plaintiffs acknowledged in paragraphs 53 and 54 of Kea Meng Kwang's affidavit that Kea Meng Cheng agreed with the defendant's suggestion to the cancellation of the orders.

18. The gravaman of the complaint was that the defendant acted improperly by causing Sinindo to buy three barges from SUMEC when Kea Resources had three barges available and awaiting collection from ZMEC.

19. As I have stated earlier, any part that the defendant played in the placing of the Sinindo orders with SUMEC was done as a director of Sinindo acting in consultation with Teddy Salim. As a director of Sinindo he should see that the orders were placed in the best interests of Sinindo. He owed no duty to Kea Resources to place the orders with Kea Resources. 20. The complaint also assumed that the orders were interchangeable. There was no evidence that the barges ordered by Kea Resources from ZMEC were identical to those Sinindo ordered from SUMEC, or that Kea Resources could have matched the terms offered by SUMEC. Even if the defendant breached his fiduciary duties 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.

Claim for the cost of repairs to the "Regal 8"

21. In November 1995, the vessel "Regal 8" was sold by Kea Maritime Pte Ltd ("Kea Maritime") to Trisakti Utama Shipping Pte Ltd ("Trisakti Utama") a company controlled by Teddy Salim. Trisakti Utama was to pay the purchase price in 48 instalments and title was to be transferred upon the completion of the payments.

22. The defendant was the managing director of Kea Maritime and owned 20% of its shares, with Kea Holding holding the other 80%. The plaintiffs were interested in the sale because Kea Resources paid for the construction of the vessel.

23. The defendant was accused of acting *mala fide* and against the interests of Kea Resources in the sale of the vessels to Trisakti Utama. The vessel developed mechanical difficulties after it was delivered to Trisakti Utama. A dispute arose over whether that was caused by the equipment supplied, or by improper maintenance. On 13 February 1997 the vessel sailed back to Singapore, and Kea Resources eventually incurred $338,493.29 for the 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.

24. The complaints against the defendant were that he failed in his fiduciary duties to Kea Resources to ensure that the vessel was properly maintained by the purchaser and that he took the vessel back without the consent of Kea Resources.

25. Assuming that the repairs were necessitated by improper maintenance (that dispute was not resolved), the repair costs would be owed to Kea Maritime because if the buyer had a duty to maintain the vessel, it would be owed to the seller.

26. Before the vessel returned to Singapore, Kea Resources' marketing director informed Trisakti Utama that the costs of repairs would be for Trisakti Utama's account, but the position was not maintained. Neither Kea Resources nor Kea Maritime appears to have made any claim against Trisakti Utama after the repairs were carried out.

27. The plaintiffs did not show that Trisakti Utama was under a duty to maintain the vessel or that the defendant had a duty to ensure that the vessel was properly maintained, or that the duty was owed to Kea Resources. In the face of these substantial shortcomings, the claim must fail.

Claim for US$114,000 commission paid by Jiangdu Shipyard

28. The plaintiffs pleaded in paragraph 105 of the Statement of Claim that

> The Defendant was appointed by the First Plaintiffs as a Director and Managing Director in M/s First Pacific Maritime Pte Ltd ("FPM") which is a joint venture between the First Plaintiffs and a China company, M/s Shen Zhen Yuanzhou Science Technology Industry Company Limited ("SZYS"). As a Director and Managing Director appointed to sit on the Board of FPM, the Defendant owed to the First Plaintiffs fiduciary duties, including a duty to act bona fide in the interests of the First Plaintiffs, a duty not to put himself in a conflict of interest position and a duty to act for the proper purposes of the First Plaintiffs in relation to its affairs.

29. They alleged that the defendant received from Jiangdu Shipyard a commission of US$114,000 for arranging for FPM to commission the shipyard to construct two vessels. The shipyard's payment was documented. Its remittance application named FPM as the beneficiary, but instructed payment to be paid into the defendant's bank account. The defendant admitted receiving the money, but claimed to have paid the money over to some officers of PT Pertamina of Indonesia. He explained that Jiangdu Shipyard was unable to pay them directly because of Chinese regulatory controls, and Wang Yiling, a director of Jiangdu Shipyard sought his co-operation to route the payment through his bank account. He did not produce any evidence from Wang Yiling or anyone from Jiangdu Shipyard to corroborate him, nor did he identify the Pertamina officers, call them as his witnesses, or produce receipts for the payments made to them.

30. On the evidence, I found that the defendant had received the US$114,000 for his own account. However, I found that Kea Holdings was not the proper party to claim it from the defendant. Jiangdu Shipyard paid the defendant in connection with its dealings with FPM. As a director of FPM, the director owed it a duty not to enrich himself in that way. When Kea Holdings appointed the defendant as a director of FPM, it was implied that the defendant would discharge his duties to FPM faithfully and also to protect and promote Kea Holding's interests where they do not conflict with the company's. However it did not mean that in that office he owed the same duties to Kea Holdings as

he did to FPM.

31. Kea Holdings' position was that

> Even if he is deemed to have received this sum as a director of FPM, the law is clear that he, being a nominee director appointed by the First Plaintiffs, is a fiduciary of the First Plaintiffs,

implying that the fiduciary duties *qua* appointee are the same as those *qua* director. They cannot be because the first are owed to the appointor and the second to the company.

32. The defendant's duty was to perform his duties faithfully to FPM. If he did that, he would have paid the commission he received over to FPM. It would have been wrong for him to pay the money to Kea Holdings even if he was minded to do it, and Kea Holdings had no right to claim it from him.

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

33. This claim was related to the claim for the repair costs of the "Regal 8". The allegation was that the defendant produced two sale agreements of the "Regal 8" between Kea Maritime as seller and Trisakti Utama as buyer. The agreement in Kea Maritime's possession showed the price to be $1.2 million, while the agreement in Trisakti Utama's possession showed it as $1.3 million.

34. Teddy Salim confirmed that the contract that he signed on behalf of Trisakti Utama was for $1.3 million and that the agreement for the lower sum was a forgery.

35. Kea Resources proceed with this claim on the basis that $1.3 million had been paid for the vessel, but this was wrong. 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.

36. I found that the defendant had dishonestly caused there to be two agreements with the intention to retain the difference of $100,000. His scheme did not bear fruit because Trisakti Utama did not complete paying the instalment payments. It did not pay $1.2 million, much less $1.3 million. However, as Trisakti Utama acknowledged that the effective agreement was the $1.3 million agreement, whatever rights Kea Maritime had against Trisakti Utama under that agreement were not affected by the forged $1.2 million agreement. There was therefore no basis for the claim against the defendant.

37. In addition to that, any loss in the sale price would be a loss to the seller Kea Maritime. Any claim for the $100,000 should be made by Kea Maritime and not Kea Resources.

Claim arising from the sale of the "Orient VI"

38. The facts are somewhat similar to that of the sale of the "Regal 8". The sale was between Kea Maritime as vendor and PT Ersihan Satya Pratama ("Ersihan") a company controlled by Teddy Salim, as purchaser. Kea Resources had claimed that the "Orient VI" was its vessel, and this was admitted by the defendant.

39. Again there were two sale agreements, one for $685,000 in the possession of Ersihan and another

for $650,000 in the possession of Kea Maritime.

40. Teddy Salim acknowledged that the correct price was $685,000 and that it was paid by Ersihan, and that his signature on the $650,000 agreement was a forgery. I accepted his evidence that he had handed a cash cheque of $35,000 to the defendant as part of the purchase price. This sum was not paid over to Kea Maritime.

41. Kea Resources was the owner of the "Orient VI", but Kea Maritime sold it to Ersihan. Kea Maritime as the vendor, was the party entitled to receive the purchase price from the purchaser. The $35,000 was due to Kea Maritime.

42. However Kea Maritime was not the claimant. Kea Resources made the claim on the basis that it was the owner of the vessel and that it was induced by the defendant into believing that the sale price was $650,000.

43. In the sale of an asset the owner is not *ipso facto* entitled to the proceeds of its sale if it is not also the vendor, e.g. the proceeds of sales under writs of seizure and sale, sales under Distress Act, sales to enforce warehouse-keepers' liens do not go to the owners.

44. 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 its claim beyond ownership. Kea Resources had not established that in its claim.

Interest and costs

45. The plaintiffs should have interest on the judgment they obtained. In exercise of my discretion pursuant to s 12 of the Civil Law Act, I fixed the rate at 6% pa and that the interest shall run from 12 February 1999 when the writ was filed to the date of judgment. The plaintiffs are entitled to interest after the date of judgment under the Rules of Court. I also awarded costs to the plaintiffs, but as they have succeeded on five and failed on eleven claims, they should get half the costs.

The counter-claims

46. The defendant made counter-claims against Kea Resources for payments due under terms 4 and 5 of the letter of appointment as general manager of Kea Resources

> 4. Annual wage supplement equivalent to one month's basic salary will be given to you for the completion of a year's service, or pro-rated to the number of completed calendar month's service.
>
> 5. You will be also entitled to a guaranteed bonus payment of 3 months salary subject to the company's (Kea Resources Pte Ltd) net profit being sufficient to cover this payment.

47. He complained that he was not paid the annual wage supplement for 1998 and annual bonus from 1993 to 1998. He also claimed that Kea Resources should pay the employers' Central Provident Fund

contributions in respect of those payments.

48. Kea Resources' main defence was that the defendant's appointment as general manager was terminated by his appointments as director and managing director on 19 July 1993 and 11 August 1993 respectively. It was not alleged that the parties have agreed to the termination, or even that he was informed of the termination. Kea Resources' position appeared to be that the appointments as director and general director had the necessary effect of terminating the appointment as general manager.

49. There is no legal basis for this supposition. A person can be a director and a manager of a company at the same time. The facts also did not support that. Kea Holdings had written to the defendant to advise him on the revisions to his salary in 1994, 1995, 1996 and 1997 as well as his annual wage supplement and bonus payments for those years. It was not alleged that he was entitled to these payments under any appointment other than as general manager.

50. The defendant claimed that he was not paid the annual wage supplement for 1998. He had computed his entitlement on a basic salary of $9,800, which he worked out to be $8,166.67 for ten months' completed service, although there was evidence that his basic salary was $10,400. I allowed the claim in the sum quantified by him.

51. On the claim for bonus Kea Resources raised the further defences that except for 1993 and 1994 the company incurred net losses and that the defendant was paid a month's bonus for 1993 and 1994. Both these defences were supported by documentary evidence. He was therefore awarded the unpaid bonus for those two years in the aggregate sum of $34,000.

52. As Central Provident Fund contributions are payable on annual wage supplement and bonus payments, Kea Resources should also pay the employers' portion of the contributions, together with the interest that would have accrued thereon.

53. I awarded the defendant interest on the sum of $42,166.67 awarded with interest at 6% pa from 26 March 1999 (the date when the counter-claim was filed). I also awarded to the defendant half the costs of the counter-claim to be taxed on the Subordinate Courts scale. I did not award him full costs because he had not succeeded on the whole of his counter-claim.

Kan Ting Chiu

Judge