Tai Kim San and Another v Lim Cher Kia
[2000] SGHC 269

Case Number : Suit 56/2000/H

Decision Date : 12 December 2000

Tribunal/Court : High Court

Coram : Amarjeet Singh JC

Counsel Name(s) : J Balachandran and S Selvam (Ramdas & Wong) for the plaintiffs; Chiah Kok Khun and Hui Choon Wai (Wee Swee Teow & Co) for the defendant

Parties : Tai Kim San; Another — Lim Cher Kia

Companies – Directors – Fiduciary duties – Breach – Whether managing director owes duty to other shareholders-cum-directors – Whether under duty to disclose future plans for company

Tort – Misrepresentation – Inducement – Reliance – Whether statements amount to misrepresentations – Whether plaintiffs induced by statements – Whether plaintiffs relied on statements

: ***The case***

The plaintiffs and the defendant, all businessmen and one other, Yeh Fu Kuo (`Yeh`), a Taiwanese businessman, were shareholders in Chosen Plastics Pte Ltd (`Chosen Plastics`) which was incorporated in Singapore in 1986 to manufacture plastic moulded components for the computer industry and sub-assembly services. It was not disputed that Chosen Plastics had basically one big customer, namely, Hewlett Packard which bought its manufactured components. The defendant was appointed the Managing Director of Chosen Plastics as he had technical experience. The plaintiffs assumed the office of directors.

By the end of 1997 or early 1998, the relevant period, Chosen Plastics had 2,020,000 million issued ordinary shares of $1 each of which 30% and 11% were owned respectively by the first and second plaintiffs, 40% by the defendant and 19% by Yeh.

Over the years, the business of Chosen Plastics had grown and the shareholders had acquired or formed new companies to carry out complementary businesses to that of Chosen Plastics.

In August 1988 Newtech Pte Ltd (`Newtech`) was incorporated and 500,000 ordinary shares were issued and paid up of $1 each. Chosen Plastics owned 42% of the shares, the defendant 30%, one Tang Ah Ah and one Wang Chew Hoon (`Wang`) 5% and 23% respectively. The directors of Newtech were the first plaintiff, the defendant and Wang.

In May 1992 Chosen Technologies Pte Ltd (`Chosen Tech`) was incorporated as a subsidiary of Chosen Plastic. Chosen Tech issued 150,000 ordinary shares of $1 each paid up. Chosen Plastics owned 55% of the shares, the defendant 15% and one Chow Kok Hwee 30%. The directors of Chosen Tech were the second plaintiff, the defendant and Chow Kok Hwee.

Chosen Plastics Malaysia Sdn Bhd (`Chosen Malaysia`) was incorporated in 1993. It had 1,000,000 ordinary issued shares of $1 each, of which the first and second plaintiffs owned 40% and 20% respectively, the defendant 20% and one Ang 20%. The plaintiffs and the defendant were appointed directors of Chosen Malaysia. The management and business affairs of Chosen Malaysia was also left solely to the defendant.

Subsequently, in May 1996 the defendant consulted the plaintiffs about Chosen Plastics expanding its business by setting up a factory in Shanghai, China. The plaintiffs consented and Chosen Investments Pte Ltd (`Chosen Investments`) was thereafter incorporated the same month. Chosen Investments issued 500,000 ordinary shares of $1 each paid up. Chosen Plastics subscribed to 40% of the shares, Newtech 48% and Wong Chew Hoon 12%.

Soon thereafter, Chosen Enterprise (Shanghai) Co Ltd (`Chosen Shanghai`) was incorporated in Shanghai as a 100% subsidiary of Chosen Investments.

The defendant was overall in charge and was the driving force of all the above businesses which I shall for convenience refer to as the `Chosen Group`.

The first plaintiff had signed personal guarantees for about $2m in favour of Overseas Union Bank (`OUB`) concerning the business operations of Chosen Plastics. Chosen Plastics was, amongst other things, using the overdraft funds for its Shanghai business, Chosen Shanghai, through Chosen Investments.

The defendant was also a guarantor to the bank overdraft. He had also given personal loans and the Chosen Group owed him about $2.1m.

In 1997 the Shanghai business was expanding and the defendants` business plan was to take advantage of that and continue to provide more funds and to further expand the Shanghai business. He put the plan to the plaintiffs.

The plaintiffs were reluctant to risk more money being spent in China as it was a difficult market requiring cash payments and as they were guarantors to the loans taken in Singapore. The accounts showed that up to June 1997, Chosen Shanghai had chalked up trade debts of $2,723,689. One other factor complicated matters: The Asian financial crisis had started to set in. The defendant, nevertheless, looking to the future, was insistent that expansion in Shanghai continue to take advantage of the growing demand for its plastic moulded components for future profitability.

The dialogue continued. Eventually, because of the defendant`s continued insistence to expand but because the parties could not see eye to eye on the matter. The first plaintiff then approached the defendant in about September 1997 to sell all his shares to the defendant. In his cross-examination, the first plaintiff was asked if he was `anxious` to sell his shares to which he answered `Yes` [NE 11]. The second plaintiff and Yeh who were close to the first and second plaintiffs, likewise wished to similarly sell their shares to the defendant. The trio started negotiating seriously on the valuation of the Chosen Group sometime from September 1999 and the negotiations continued into early March 2000.

Eventually after negotiating and making all the accounts of the Chosen Group available to the plaintiffs as requested by them up to or about 31 December 1997 the parties agreed to value the Chosen Group at $12,000,000. The defendant was not willing to buy the shares held by the first and second plaintiffs and Yeh on any higher valuation than that. It was not disputed that the first and second plaintiffs could have obtained an independent valuer to value the shares but did not do so. The first plaintiff in ***cross-examination*** in fact admitted that in February 1998 `it was a good price` [NE 14].

It was also not disputed that the defendant was willing to sell all his shares in the Chosen Group to the plaintiffs and Yeh based on the same valuation if they were not happy concerning the valuation (as he was also concerned about his own exposure and the problem of raising a loan to pay for the buy-out) but the plaintiffs and Yeh declined take up the defendant`s offer. In fact the first plaintiff when asked if initially the defendant was reluctant to buy the shares had stated `Maybe`. When asked by the court during which period, the first plaintiff answered, `Between end of 1997 and early 1998` [NE 31].

On or about 14 March 1998, the valuation of the Chosen Group was settled and on that date, the plaintiffs entered into two formal written agreements (`the agreements`) with the defendant in the presence of their respective solicitors to sell their respective shares to the defendant in the Chosen Group. The consideration to be paid to the first plaintiff and second plaintiff shares was $3,599,993.53 and $1,319,999.04 respectively (a total of $4,919,992.57). A similar agreement was entered between Yeh and the defendant in respect of his shareholdings. He was to be paid $2,280,007.50. The grand total consideration to be paid to the first and second plaintiffs and Yeh was $7,200,000. This was agreed to be paid by an initial immediate payment of $500,000 and additionally a sum of $500,000 to be put in escrow with solicitors with the balance to be paid on or before 6 July 2000. If the balance was not paid, 8% of the purchase price paid was to be forfeited. The payment of the balance was staggered in the agreements to allow the defendant to raise a bank loan and to make the payment on or before 6 July 2000.

From some time in December 1997 ***after*** the first and second plaintiffs and Yeh had offered to sell their shares to the defendant, the defendant enquired from DBS and OUB and one Henry Tan Song Kok, PW4, (`Henry Tan`) a Consultant from Tan & Sitoh, Accountants, about the possibility of the Chosen Group going public to raise funds for expansion in Shanghai and also for a loan to pay for the purchase of the plaintiffs` and Yeh`s shareholdings. The defendant had difficulties getting the loan from DBS. The defendant continued his inquiries with OUB as they were already Chosen Group`s bankers. Henry Tan was to liaise with OUB. After a meeting on 31 December 1998 with the defendant, OUB sent a letter to Chosen Plastics on 6 January 1998 requesting them to sign a Mandate Letter in favour of OUB as their Manager, Underwriter and Placement Agent for the proposed Initial Public Offering (IPO). The defendant in the initial discussion was told that there was a possibility of listing the company on the SES. It was a normal letter probably given to all applicants. However, OUB was not given the Mandate until June 1998 as the defendant still had some problems with OUB obtaining a personal loan to assist him to pay for the intended purchase of shares from the plaintiffs and Yeh. The Vice President and Head of Corporate Finance OUB confirmed this when he said: `The mandate was not signed because the defendant was looking for financing to pay existing shareholders ...` [NE 70].

In the meantime, completion of the sale and purchase of the shares under the agreements successfully took place on or about 6 July 1998 on which date the balance of the total sum due to the first and second plaintiffs and Yeh was paid off.

Subsequently, a loan to the defendant was approved by OUB on 10t June 1998 to finance the purchase of the plaintiffs and Yeh`s shares. The first working meeting was held on 25 June 1998 for getting the IPO underway and scheduling worked out for the same.

Thereafter, the defendant, in preparation of Chosen Group going public, having bought the shares from the plaintiffs and Yeh as set out earlier, injected the said shares into Chosen Holdings (`Chosen Holdings`) the vehicle for the IPO and issued the shareholders in the companies in the Chosen Group with Chosen Holding`s shares.

After further restructuring and completing all the preparatory work and representations by OUB, Chosen Holdings was able to secure permission from the SES to be listed. A public offering was made of ordinary shares at $0.29 which had a par value of $0.10, ie at a premium. Before the Invitation to the public to subscribe to the shares of Chosen Holdings, Chosen Holdings had issued 183,959,520 shares to its existing shareholders including the defendant and after the Invitation the total number of shares issued were approximately 238,549,520 with a paid up capital of about $23,845,000. The defendant himself held directly and indirectly 117,451,120 shares. After the IPO the listing of the shares on the SES took place on 26 February 1999.

One of the stated purposes in the prospectus of publicly listing Chosen Holdings according to the defendant was specifically to raise funds through the market for expansion in Shanghai as well as Malaysia.

The first and second plaintiffs commenced this action on 18 March 2000 about a year after the above listing of Chosen Holdings. They claimed that during the negotiations between the defendant and themselves to sell their shares to the defendant at the valuation of $12,000,000 more specifically between December 1997 and 14 March 1998 when the two agreements were signed, the defendant had intention and plans and was negotiating for a listing of the Chosen Group and his plans constituted material fa and circumstances which should have been disclosed to the plaintiffs as shareholders by the defendant because the defendant as a Managing Director had a fiduciary duty to them to do so and had such disclosures been made the plaintiffs would not have entered the two Agreements and sold their shares to him thereby occasioning a loss to them. The defendant had in the circumstances, breached his fiduciary duty to them for which wrongful conduct he was liable. The plaintiffs asked for rescission of the two agreements alternatively that the defendant make good their losses in respect of the sale of their shares.

The plaintiffs additionally had pleaded and contended that the defendant had also made ***misrepresentations*** concerning the Chosen Group to the effect that for the year 1998, the said companies were not doing well and their profits for 1998 would fall. Such representation the plaintiffs alleged were false and untrue or made recklessly and were made to ***induce*** the plaintiffs to sell their shares although the Chosen Group were doing well and the plaintiffs acting on the misrepresentations had sold their shares to the defendant. Further, alternatively, the plaintiffs pleaded that the representations were negligently made in breach of a duty of care owed by the defendant to the first and second plaintiffs.

However, to go on the affidavit of evidence-in-chief of Goh Thien Phong (PW3), had the first and second plaintiffs not sold their shares in the Chosen Group to the defendant, they would each have been issued and entitled to hold at the end of the restructuring and before going public the following number of ordinary shares against their values based on a price of $0.20 being currently quoted for the counter on the SES during the hearing:

first plaintiff	:	41,842,430 ordinary shares valued at $8,368,486
second plaintiff	:	16,405,720 ordinary shares valued at $3,281,144

In the circumstances, as the first and second plaintiffs had already been paid $3,599,993.53 and $1,319,999.94 respectively, they claimed that their loss in damages had therefore been $4,768,492.50 for the first plaintiff and $1,961,145 for the second plaintiff.

The first and second plaintiffs before me claimed damages/accounts of profits due to them in the above sums of $4,768,492.50 and $1,961,145 from the defendant due to his wrongful conduct as a result of his fiduciary breach of duties. The plaintiffs had also pleaded for a rescission of the two agreements with the defendant but it was submitted on their behalf that they would be satisfied if the ***alternative*** remedy of damages/accounts of profit (ie equitable monetary compensation) due to them was granted.

The defendant denied these claims. His case, on the other hand, was that the plaintiffs and Yeh were willing sellers of the shares because they wanted to cash out having spent a small sum on their investments and had feared potential losses in Shanghai and were therefore not willing to pump more money into the Shanghai operation. The Asian financial crisis had also impacted on their decision. The defendant`s case was that by 31 December 1997, Chosen Shanghai`s Accountants Report (exh D3) showed the equivalent of $5,219,249.77 owing to Chosen Plastics for trade debts through Chosen Investment. This sum had grown from the amount owed in June 1999 as previously stated. The defendant`s evidence was that up to 31 December 1997 the Shanghai Co was for the time being loosing money as the plaintiffs well knew although the defendant was confident and was banking on its future profitability through expansion. The plaintiffs, he said, were aware of the situation. He said they had offered to sell him all their shares. He had never approached them to sell their shares and it was they who wanted to abandon ship and cash out and leave him to continue the business and to expose him to potential risks in China. The defendant said he had sacrificed his family life all these years for the business. The defendant said he was willing to leave the business if they bought out his shares at the same valuation they had mutually arrived. He had agreed to purchase their shares at the agreed valuation reluctantly. He had provided the plaintiffs all the information they wanted or they independently could get. But they did not want to. The defendant said that in a very competitive field and with one major customer he could not dither. He had to plan forward from December 1999 by when he had agreed to accept their oral offer to purchase their shares after the plaintiffs and Yeh did not want to buy him out so that he could raise fresh capital to ensure his expansion plans and to ensure the future viability of the company. He had therefore begun enquiring immediately from December 1999 about a possible listing on the SES or SESDAQ to raise funds. He emphasised that there was no guarantee he could obtain listing to raise public funds and he was given none as banking funds were hard to obtain because of the financial crisis and as banks had become very cautious. Further, he had also been reminded at that time they had only one main customer to purchase their goods - a fact which was not considered to be good for public listing as the evidence of his advisers showed. He said he owed no fiduciary duty to the plaintiffs or Yeh to disclose what were nothing more than enquiries by him from banking advisers on the possibility of obtaining an IPO to raise funds following the plaintiffs` oral offer to sell him their shares which he had accepted. He had, on the other hand, a fiduciary duty to advance the interests of the Chosen Group of companies and also at the same time to preserve his own interests in view of the plaintiffs` decision to part company with him.

Decision

The short issues were whether:

(i) a fiduciary duty on the part of the defendant as Managing Director or special circumstances existed between the plaintiffs and the defendant requiring material disclosure by him;

(ii) there was misrepresentation by the defendant.

Law

The existence of fiduciary duty or special circumstances

The law generally treats a company director, being its trustee and agent as a fiduciary. He may not make a secret profit from holding his office. Consequently, he owes a fiduciary duty to the company. However, he is generally regarded as not owing any such duty to shareholders of the company since the company is a separate entity from its shareholders. The latter principle of law, long observed, was stated a hundred years ago in **Percival v Wright** (Unreported) . In that case, the directors bought certain shares from a number of shareholders. The shareholders had approached and had offered to sell the shares to the directors. The directors at that time had an offer from a third party to purchase the whole undertaking in the said company. The directors did not disclose this fact to the shareholders from whom they purchased the shares. Although the purchase by the third party failed to go through, the shareholders sued the directors for non-disclosure of the third party`s offer and asked for a rescission of the sale submitting that they would have obtained a higher price for their shares if that information which had deliberately been concealed from them had been revealed to them by the directors. Swinden Eady J held:

> *... the purchasing directors were under no obligation to disclose to their vendor shareholders the negotiations which ultimately proved abortive. The contrary view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the best interest of the company. I am of opinion that directors are not in that position.*
>
> *There is no question of unfair dealing in this case. The directors did not approach the shareholders with the view of obtaining their shares. The shareholders approached the directors and named the price at which they were desirous of selling. The plaintiffs` case wholly fails, and must be dismissed with costs.*

One of the difficulties postulated in ***Percival v Wright*** was as to what information should be released by directors to shareholders. Plaintiffs` counsel in that case conceded that not all information known to directors should be made available also to shareholders. Counsel accepted on plaintiffs` behalf that directors were, as to information acquired in the ordinary course of management, `tacitly released` from their duty of disclosure. Counsel for the plaintiffs went on to state:

> *The defendants, for instance, would not have been bound to disclose a large casual profit, the discovery of a new vein, or the prospect of a good dividend.*

In ***The Law Relating to Actionable Non-Disclosure and Other Breaches of Duty in Relations of Confidence, Influence and Advantage*** by GS Bower (2nd Ed, 1990, by Sir Alexander Kingcome Turner) the learned author explained the decision in ***Percival v Wright*** (at para.18.53):

> *In particular, the court did not hold that there might not be **particular circumstances**, going beyond those inherent in the ordinary relation of director and shareholder, in which the imposition of fiduciary duties of disclosure would be entirely appropriate. [Emphasis added.]*

Since ***Percival v Wright*** there have therefore been a number of cases both in the United Kingdom and overseas which recognise that in particular or special circumstances some duties arise between directors and shareholders either requiring disclosure because a special relationship exists between the directors and the shareholders or because matters arise where shareholders have to necessarily rely on what directors say or do. In the latter type of case there is a guarded departure if any from the general principle set out in ***Percival v Wright*** .

Thus, in **Coleman v Myers** [1977] 2 NZLR 225 in a transaction between directors and shareholders, the Court of Appeal in New Zealand held that special circumstances arose in the case giving rise to a fiduciary duty arising between the parties necessitating material disclosure by the directors because of the family character of the company, the position of the directors in the family and the company, their high degree of insider knowledge and the manner in which the directors had gone about persuading shareholders to sell their shares.

In **Glavanics v Brunninghausen** [1996] 19 ACSR 204, an Australian case, the court held that fiduciary relationship between a director and a shareholder who was also a director, (but an inactive one) existed. The brief facts were that the relationship between the two directors G & B, having deteriorated, G, the inactive director, agreed to sell his one-sixth shareholding to B. However, prior to the agreement B had received an offer for the purchase of the company business of which he did not inform G. B having bought G`s shares thereafter sold the company to the purchaser. The court was of the view that although there was no relationship of confidence and trust between G & B it nevertheless recognised several factors inherent in the case which gave rise to a fiduciary relationship between G and B, namely, a direct sale of shares by G to B; the fact of there being only the said two shareholders in the company which made it realistically impossible to distinguish between a fiduciary duty owed to a company and that owed to the shareholders and very importantly the evidence had gone on to show G`s complete dependence on B for information and advice and the prior offer of purchase of the business of the company by another in the circumstances was regarded as material factor which B ought to have disclosed to G as the information was sensitive to the pricing of the shares that G sold to B. On appeal the Court of Appeal of New South Wales affirmed the decision: **Brunninghausen v Glavanics** [1999] 32 ACSR 294. In so upholding the decision, the appellate court opined that whilst the general principle that a director`s fiduciary duties are owed to the company and not to the shareholders is correct, the nature of the transaction may give rise to a fiduciary duty owed by the directors to the shareholders. ***Ford`s Principles of Corporate Law*** sums up pithly the circumstances in which there is a fiduciary obligation to disclose:

> *In summary, pointers towards the existence of a fiduciary obligation include shareholders` dependence upon information and advice, the existence of a relationship of confidence, the significance of some particular transaction for the parties and the extent of any positive action taken by, or on behalf of the directors to promote the transaction and the structure of shareholdings in the company:* ***Coleman v Myers, Chan v Zacharia*** *[1984] 154 CLR 178 at 198; 53 ALR 417 per Deane J;* ***Glavanics v Brunninghausen****. Even if there is no relationship of trust and confidence, as was the case in* ***Brunninghausen****, a fiduciary relationship can still exist between a director and shareholder where the director occupies a position of particular advantage in relation to the shareholder and special circumstances, such as confidential negotiations to sell the company`s business, allow the director to use that advantage to the detriment of the shareholder:* ***Brunninghausen v Glanavics****.*

Misrepresentation

As to misrepresentation by the defendant, the law envisages the representation made to be one of fact and not just an expression of opinion. However, any opinion or belief must be shown to be expressed upon reasonable grounds. If it can be shown that a defendant possessing knowledge did not express his opinion honestly such expression of an opinion can amount to a misrepresentation for which relief lies. Thus in **Smith v Land & House Property Corp** [1884] 28 Ch D 7 at 15, per Bowen LJ stated:

> *It is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the fa are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion ... But if the facts are not equally well known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.*

Similarly, an opinion stated as a fact where for instance a company publish as a forecast of an expert as if it was a positive fact then such publication constitutes a representation.

However, a misrepresentation is considered to be harmless if amongst other things, if a plaintiff did not allow it to affect his judgment. In **JEB Fasteners Ltd v Marks Bloom & Co** [1983] 1 All ER 583 the plaintiffs who were negotiating to acquire a company were given inaccurate company accounts. The accounts were considered by the plaintiffs but did not in any material degree affect their judgment in deciding whether or not to acquire the company. The Court of Appeal held that on the facts the plaintiffs were not entitled to any relief. If a plaintiff equates an opinion as a statement of fact constituting a misrepresentation then the plaintiff must show that he reasonably relied on it and induced the plaintiff to act as he did.

Law and fact

Misrepresentation

I shall take the first and second plaintiffs` second submission - that of misrepresentation first. The misrepresentation pleaded and alleged by the first plaintiff in his affidavit of evidence-in-chief in paras 40 and 44 (1PAEC) and reiterated in evidence was that the defendant had stated:

(i) that for the year 1998 the Chosen Group was not doing well;

(ii) that profits of the aforesaid companies for 1998 would fall.

Briefly, the first plaintiff`s evidence as contained in his affidavit of evidence-in-chief was that in February 1998 when the first and second plaintiffs, Yeh and the defendant met to finalise the valuation of the Chosen Group (excluding Chosen Investments, Chosen Shanghai & Performance Plastic Sdn Bhd because they were not making money) at $12,000,000 they had not taken into account the ***prospective*** profits for the year 1998 because the defendant had told the others that Chosen Plastics and its related companies were not doing well and that their profit would fall. The first plaintiff testified the annual report of Chosen Plastics and its related companies (Exh. 3AB 771) subsequently showed a profit for the year ending June 1998 to be $4,579,868. This profit had not been considered in the valuation reached between the parties because the defendant had said 1998 was not profitable. Had he known of the potential for such profits he would not have agreed to the $12,000,000 valuation and would have negotiated further.

The defendant`s evidence, on the other hand, in cross-examination was that the statement attributed to him about the Chosen Group not doing well was made in about December 1997 in the midst of the Asian crisis and as an expression of opinion then, whilst the first and second plaintiffs were now looking at the account books with hindsight. He said he was being cautious. As far as the second allegation that profits for 1998 would fall, he had not made such a statement and that the first and second plaintiffs knew between July 1997 and November 1997 that four companies in the group had been doing well i.e. three in Singapore and Malaysia and that Newtech was doing particularly well in the same business. He had never induced them to sell their shares nor were they induced as such.

I noticed that whilst the first plaintiff alleged that the defendant had said that Chosen Plastics group was not doing well for 1998 and the profits for 1998 would fall, the second plaintiff`s evidence was that:

> *defendant said crisis would affect results [NE 34].*

The first plaintiff himself was asked and answered:

> *Q: Assuming it was made the defendant`s view was being expressed cautiously since it was difficult to predict profits ahead?*
>
> *A: Yes.*

I found that no accurate statement was recalled as to what words were exactly used by the defendant. In any event, I accepted the evidence of the defendant that he was apprehensive and was expressing a concern and a fair opinion in December 1997 about a possible lower earning for the year ended 1998 in view of the Asian crisis which was then getting worse and because they had only one client Hewlett Packard with whom the contra were all for a duration of a short period of three months each time. Hewlett Packard could reduce contra and dictate prices after giving a brief notice. I also accept the defendant`s evidence that the defendant did not say that for 1998 profits would be lower. The first plaintiff was recalling from memory what the defendant told him three years earlier. I also found the first plaintiff varied his evidence a number of times thereby affecting his credibility. For example, concerning the negotiations for sale of the shares, having said in his pleadings the negotiations started in September 1997, in court he changed the month to October 1997. In another part of his evidence he stated that negotiations had started in February 1998. When questioned again whether they had not started in September 1997, he said he meant `final` negotiations were in February 1998 although the word `final` had not been used by him earlier. When asked by the court when was the meeting to sell the shares he had simply replied `February 1998`.

In any event, I was satisfied that even assuming the statements as alleged by the first plaintiff and attributed to the defendant were made and the statements amounted to misrepresentations (which though I found they were not) they did not induce the first plaintiff or the second plaintiffs to sell their shares to the defendant. This is because the first plaintiff admitted so himself in his cross-examination:

Q: Are paras 40 and 44 [1PAEC] your only evidence in regard to your alleged misrepresentation?

A: Yes.

Q: Assuming such a statement was made - that statement did not make you sell your shares?

A: Yes. Not because of statements defendant made in paras 40 and 44.

I agreed with defence counsel that in the circumstances there was no evidence that the plaintiffs were induced by any such representations to sell their shares to him. The first plaintiff`s judgment was unaffected by the statements if made. The said plaintiffs also could not have relied on any such statements because they were experienced businessmen and had access to all the information concerning the companies.

There is one other allegation of the first plaintiff which I propose to deal under the heading of misrepresentation as a matter of convenience although not pleaded under such a heading but raised in the first plaintiff`s affidavit of evidence-in-chief and testimony in court. According to the first plaintiff`s oral testimony, he had been told in `1997` on `two` or `three` occasions when he asked the defendant whether `we can consider listing` (Chosen Plastics) the defendant had replied it was `not possible`. Questioned in ***cross-examination*** that the defendant had told him `it was difficult` and not `not possible`, his reply was `I cannot remember`. Although the first plaintiff orally recalled in court that he was told the above on two or three occasions in 1997, in his Affidavit, however, he had not recalled how many times he was told. In his interrogatories, however, he had answered it was once in early 1997. In court, he said it was in September 1997. With the first plaintiff contradicting his evidence I was satisfied on the consistent and unblemished evidence of the defendant that the first plaintiff had queried him only once and that too in early March 1997 when he told him it `was difficult` to list Chosen Plastics because of the dependency of the Chosen Group on one customer, a view which OUB shared. The defendant was expressing his opinion and made no wilful misrepresentation to the first plaintiff as such.

Fiduciary duty/special circumstances

I now come to the first issue canvassed on behalf of the plaintiffs, that of fiduciary duty owed to the plaintiffs by the defendant as alleged by the plaintiffs and its breach, if any, by him or the presence of special circumstances or relationship obliging the defendant to make the material disclosure.

I would point out at the outset that the existence of a fiduciary duty and the obligations it entails under it differ widely and will largely be dependent on the circumstances of the particular case, ie a situation specific approach has to be adopted to determine its existence. The issue therefore must be seen and understood and analysed against the working relationship and background of the plaintiffs and the defendant in the Chosen Group together and the reasons for the divestment by the plaintiffs of their shares to the defendant.

There was as was in the case of ***Glavanics v Brunninghausen*** no relationship of confidence and trust between the plaintiffs and the defendant. It was purely a business relationship. The first and second plaintiffs seldom met socially or went out together.

So what then were the factors inherent in the case that gave rise to a fiduciary relationship between the plaintiffs and the defendant, if any? I could discern none. Unlike in ***Glavanics v Brunninghausen*** where there were only two shareholders, (the plaintiff and the defendant) the judge could not differentiate the duty owed to the company and the shareholders as such there, in the present case apart from the defendant there were other shareholders in Chosen Plastics and the related companies. One of the more important considerations of establishing a fiduciary relationship between a director and at that a managing director, buying shares from shareholders (here the first and second plaintiffs) is to show that such a director misled them on the share price at which the shares were sold thereby depriving them of a higher price and/or misled them on some relevant fact which if disclosed to them would have resulted in their not selling the shares at all as they were completely dependent on the said director for information.

The facts of the instant case clearly show that the first and second plaintiffs were not dependent on the defendant for information concerning either the performance of the Chosen Group or its valuation. The plaintiffs themselves were active directors of the companies and suffered from no disadvantage. They conceded that they could get any information on the said companies as directors and the defendant had never refused to give them any information they wanted. They had all the relevant accounts as at the end of December 1999.

The plaintiffs as directors of the Chosen Group had themselves been involved in the decision making process of the Chosen Group through passing resolutions, signing cheques and annual reports. The plaintiffs had put in initially $40,000 and $10,000 as investment in Chosen Plastics and ploughed profits back into the company and it grew. They eventually volunteered to sell all their shareholdings to the defendant devoid of any persuasion by the defendant. The first plaintiff admitted in his ***cross-examination*** that he and the defendant met together to discuss business sometimes and at other times the defendant met with the second plaintiff and also with Yeh two or three times a year [NE 20]. The first plaintiff further admitted that management business plans were discussed with him and the second plaintiff and that the defendant also discussed all expansion plans involving raising and expenditure of money with him. The first plaintiff and the second plaintiffs were also co-signatories of cheques of Chosen Plastics and some of the related companies and signatories of annual reports of both Chosen Plastics and Chosen Malaysia. It was the second plaintiff who co-signed Chosen Plastics a cheque returning $2.1m loan moneys to the defendant upon completion of the sale and purchase of the shares in question. The second plaintiff was also Chosen Plastics` Secretary from 1986 to 1998 and resolutions of Chosen Plastics were signed by either one or both plaintiffs. The plaintiffs had also stood as personal guarantors to loans taken by Chosen Plastics part of which were used to fund the business in Shanghai.

It was plain to me from all these facts which were not in dispute that both plaintiffs had taken an active and informed interest in the Chosen Group. They were businessmen of long standing. They were actively pursuing at the same time other businesses they owned and they knew or must have known how the business of the Chosen Group was being run and what the revenues and profits were. I would also like to mention that the first plaintiff was also running a significant and successful separate business in Hiashya Machinery which sold injection moulding machinery and had sold many dozens of such machines each costing in the region of about $50,000 or more to the Chosen Group and was or had been a director in half a dozen other companies and that he had as late as 1995/6 gone on to start another business in China. The second plaintiff had been or was a shareholder and or director in also about half a dozen other companies.

Then again the defendant had no hand in the plaintiffs wanting to sell their shares to him. That the first plaintiff volunteered to sell all his shares in Chosen Plastics and its related companies is admitted to in his affidavit of evidence-in-chief after disagreeing with the defendant about his policy and plans to expand in China and articulating his lack of confidence about making it good there. Importantly, the first plaintiff`s challenging words to the defendant were that ***if he was so confident then he should take over the company and further responded that things could be discussed when the defendant told him that he did not have enough money to buy over the company*** . The first plaintiff in his cross-examination also admitted that he the first plaintiff thereafter approached the defendant to sell him his shares. The second plaintiff and Yeh had joined in to sell their shareholdings as the trio were in close touch with each other. Yeh no doubt wanted to sell out after he was unhappy because he wanted a personal loan from Chosen Plastics of $500,000 from its retained earnings. This request had been rightly rejected by the defendant. As for the second plaintiff, he had expressed his own reasons for selling his shareholdings to the defendant, namely, that he had lost track of the company`s business, that it was growing too fast and he could not keep track of it and he was afraid of the indirect liability for the Shanghai operations when the first phase of the expansion in Shanghai was implemented. The first and second plaintiffs were aware at all times that the Chosen Group as a whole were still making good money at the end of 1997. Results for the financial years of 1996 and 1997 of Chosen Plastics show a profit of $2,004,814 and $2,583,354. The letter account was co-signed by the second plaintiff. The unaudited balance sheet of Chosen Malaysia given to the defendant at the end of December 1997 and standing as at 31 December 1997 showed an accumulative profit of RM5,364,714.60.

In the circumstances, I agreed with defendant`s counsel`s submission and came to the conclusion that the first and second plaintiffs were eager to sell out and hold cash and had voluntarily offered to sell their shares to the defendant in September 1997 which offer he accepted as they were apprehensive about the defendant`s intended expansion of the Chosen Group in Shanghai China because as guarantors to bank loans to Chosen Plastic in Singapore which in turn was financing the Shanghai operations they felt exposed. After September to early March 2000 the parties were only concerned with accepting a valuation of the Chosen Group (save for the loss making companies as explained by the first plaintiff and stated earlier) and the purchase price of the shares to be paid by the defendant. All this was settled on 14 March 2000 by the two written agreements.

I was further satisfied that the plaintiffs and Yeh had prolonged discussions from September 1997 to early March 2000 on what the valuation should be as they regularly consulted Yeh on the valuation even to the extent of going to meet him in Taiwan. The first plaintiff in his affidavit of evidence-in-chief said that Yeh had felt the valuation was in the region of $20,000,000. Eventually, Yeh had come to Singapore in March and the plaintiffs and Yeh finalised the price at $12,000,000 as the defendant was not prepared to value Chosen Plastics and the related companies higher. The defendant had taken into consideration and quite rightly too that he was buying the shares during the economic crisis of which I took judicial notice, when most businesses felt uncertainty; that he was going to pay for the shares in cash with bank borrowings on which he had to pay interest; that quoted shares were illiquid and were always sold at a discount and the book value of a company may not always be realised on an asset sale. I bore in mind that the plaintiffs and Yeh had also decided not to buy out the defendant at the same valuation.

I may add that although the plaintiffs denied that the Asian crisis was a cause of their selling off their shares, it was a reasonable inference from all the evidence that the crisis in all probability also weighed on their minds and I drew such an inference. I was satisfied that the plaintiffs therefore did not want to take these risks and preferred to cash out with the considerable profit they were sitting on, namely, the first plaintiff on some $3.6m and the second plaintiff on some $1.3m and they did cash out after signing the two Agreements in March 1998 by agreeing to value the company at $12,000,000. Moreover, the first plaintiff cannot complain about the above valuation because he himself admitted ***that at that time it was a good price*** (NE 14). The first plaintiff`s financial input into the Chosen Group had been about $40,000 and the second plaintiff`s about $10,000 some 15 years earlier.

I now come to the first and second plaintiffs` main complaint that the defendant did not tell them that, he was making enquiries or conducting negotiations to publicly list the Chosen Plastics and its related companies on the SES and they would not have entered the written agreements and sold to the defendant their shares had he divulged this information to them and that as such he breached his fiduciary duty to them as a director. The defendant did not dispute that from December onwards he had started to inquire from OUB Bank and Henry Tan on the possibility of the Chosen Group going public by listing them on the stock exchange and that he did not disclosure this information to the plaintiffs. He believed he did not have to. He had explained why.

I am of the opinion that the defendant was not under a duty to so inform the plaintiffs. The plaintiffs had already indicated to the defendant that they wanted to divest themselves from the Chosen Group and sell their shares to him specifically because of a fear of potential future losses by the Shanghai branch of the Chosen Group. The defendant had already announced his plans to them that he wanted to expand in Shanghai. They had refused and wanted instead to sell all their holdings off. They had no confidence in his judgment. The defendant was, to my mind, entitled to buy the shares from the plaintiffs which they wanted to sell to him and make future plans immediately by attempting to raise funds in any manner he thought fit including from the public by a public listing of the Chosen Group through the newly incorporated vehicle Chosen Holdings so as to provide for the future of the Chosen Group and to raise a loan to pay for the shares he was buying from the defendant.

It is pertinent to note that during this period all the defendant had done was to consult with OUB (and DBS) about the possibility of listing his company to raise funds for expansion in China. Both OUB and DBS banks had given him a Mandate letter dated 6th January 1998 to sign. Any of the letters if signed would have given a Mandate to the selected bank to act for the Chosen Group to manage and procure the IPO. The defendant had only been told that a listing was possible. The defendant had left it `at that`. He had not signed on and returned the Mandate letter to either bank as the application of his loan to pay for the shares was facing difficulties. Eventually, he only signed the letter of Mandate in June 1998 in OUB`s favour when they agreed to give him a personal loan to help him pay for the shares bought from the first and second plaintiffs and Yeh. The approval for the loan had come only on 10th June 1998. Until then everything was uncertain and it was only after that, that OUB went ahead processing the application for a public listing. All this took place well after 14t March 1998 when the two agreements were signed formalising the sale of the shares of the plaintiffs to the defendant.

I found the defendant had pursued the possibility of listing the Chosen Group only after the plaintiffs had rebuffed his plans to expand the business operations in China by cutting off more funds going from Singapore to Shanghai and by offering to sell all their shares to the defendant which offer he had orally accepted pending settlement of the price to be paid for the shares. If I understood the first and second plaintiffs` contention rightly, it was this. With hindsight of over a year after the public listing of Chosen Holdings the plaintiffs were saying the defendant should have disclosed his ***future*** plans for the Chosen Group after they had orally agreed with him to withdraw from the said companies but before the two agreements were signed on 14 March 2000 so that they would have had the opportunity to change their minds about selling him the shares. I have said earlier that all the defendant had done was to make inquiries about listing up to the time when the two agreements to sell the shares were signed between the respective parties. There was as far as I could see, no duty imposed by the law on the defendant to so disclose his ***future*** plans for the Chosen Group which were only then conceptual and premature and which even if initiated may eventually have turned out to be abortive.

Finally, the law recognises that a shareholder is entitled to act in his own interests. In **Pender v Lushington** [1877] 6 Ch D 70 where the plaintiffs were registered shareholders and entitled to vote but their votes were rejected on the ground that their purpose in acquiring the shares was to vote for an improper motive, Jessel MR said:

> *... in all cases of this kind where men exercise their rights for some motive adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them whatever their motive may be for such exercise.*

The learned judge went on to hold that a shareholder has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interests. By parity of reasoning, I am therefore of the opinion that the defendant as a shareholder was entitled to consider his own interests as well. I hold on the facts found that there was neither a fiduciary relationship between him and the plaintiffs nor were there any special or exceptional circumstances warranting the defendant to make the disclosure the plaintiffs complained of as not being made. I further found that no issue therefore arose of any applicable relief being available to the plaintiffs. The defendant as a director had not acted unfairly or improperly in his relations with the plaintiffs in the divestment of the shares in question by them.

The plaintiffs having therefore failed to prove their case on a balance of probabilities, I dismissed the same with costs to be taxed or agreed.

Outcome:

Plaintiffs` claim dismissed.

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