DM Divers Technics Pte Ltd v Tee Chin Hock
[2004] SGHC 191

Case Number : Suit 459/2003

Decision Date : 31 August 2004

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Suresh Divyanathan (Drew and Napier LLC) for plaintiff; Leonard Loo and Edwin Loo (Leonard Loo and Co) for defendant

Parties : DM Divers Technics Pte Ltd — Tee Chin Hock

Civil Procedure – Limitation – Defendant raising defence of time bar against plaintiff's claim – Whether defendant's fraud discoverable earlier – Whether "reasonable diligence" exercised – Section 29(1) Limitation Act (Cap 163, 1999 Rev Ed)

Civil Procedure – Limitation – Whether defendant's admission letters amounting to acknowledgment of debt – Whether acknowledgment of debt stopped time bar from running – Section 26(2) Limitation Act (Cap 163, 1999 Rev Ed)

Companies – Directors – Duties – Nature of fiduciary duties owed by director to company – Director misappropriated and misused company's moneys – Whether director in breach of fiduciary duties owed to company – Whether director liable to compensate company

31 August 2004 Judgment reserved.

Lai Siu Chiu J:

The facts

1 DM Diver Technics Pte Ltd ("the plaintiff") was incorporated in Singapore on 24 January 1991 and its registered address is at no 14, Pioneer Road, Singapore 628425 ("Pioneer Road"). Its main business is commercial diving and carrying out underwater tasks for oil refineries and the marine industry (including shipyards). According to the defendant, the plaintiff also repaired, rented and/or sold diving equipment excluding diving tanks, compressors and/or underwater cameras. Prior to its incorporation, the plaintiff was a sole-proprietorship of the defendant under the name DM Divers.

2 The two current directors of the plaintiff are Tan Siam Weng ("Tan") and Tee Chin Hock ("the defendant"). The defendant (who calls himself Simon Tee) was the managing director of the plaintiff from its incorporation until the year 2000. Tan was not involved in the day-to-day business and operations of the plaintiff as he was busy running his shipyard at Pioneer Road called Dundee Marine & Industrial Services Pte Ltd ("Dundee"), of which he is the managing director and which business he started off as a sole-proprietorship in 1977. Besides the defendant and Tan, the third shareholder of the plaintiff at the material time was Tay Chin Huat ("Tay"), who is the defendant's brother, despite the difference in their surnames.

3 Prior to working for the plaintiff, the defendant also used to be the sole proprietor of Technics Underwater Services ("TUS") between 8 November 1984 and 4 November 1985. After 4 November 1985, his wife, Tan Geok Keng ("TGK"), took over his sole-proprietorship. The business address of TUS was at no 184, Tanjong Katong Road ("the Tanjong Katong address"). The Tanjong Katong address was also the registered office of ST Divers Technics Pte Ltd ("ST Divers") of which

the defendant was both a director and shareholder. The principal activity of ST Divers is also commercial diving. Before the plaintiff's incorporation, TUS undertook underwater assignments for Dundee as the company's subcontractor. Unbeknownst to Tan, the defendant put TGK on the payroll of the plaintiff, as a clerk, from January 1991 onwards.

4 The plaintiff was incorporated after the defendant approached Tan in mid-1990 to help him to set up a company as the defendant had said he intended to close down TUS. The defendant persuaded Tan that the new company would be profitable. Tan agreed to the defendant's proposal and the plaintiff was incorporated as a result. The defendant's version, however, was that the plaintiff was incorporated so that it could carry out Dundee's underwater jobs at a cheaper rate than if the jobs were subcontracted to TUS. At that time, Dundee was expanding its business and was building a new slipway. According to Tan, the defendant said he did not have sufficient funds to expand the business of TUS and he wanted to use Dundee's name, as well as its expertise, contacts and goodwill in the marine industry. However, when he was cross-examined, the opposite was suggested to Tan *viz* that Dundee wanted to tap the contacts and expertise of TUS, to which Tan disagreed, pointing out that in 1988 and 1989, Dundee passed to the defendant jobs worth over $20,000 and $33,000 respectively.

5 Tan trusted the defendant and left the running of the plaintiff from its incorporation, entirely to the defendant. Consequently, he did not question the defendant on expenses the latter incurred on the plaintiff's behalf, and he would sign whatever accounts that were presented to him by the defendant. Tan trusted the defendant to the extent that he pre-signed blank cheques on the plaintiff's behalf, a mistake he came to regret later.

6 From the outset, Tan was told that the plaintiff was not making money, despite the increase in job orders. Believing what the defendant told him to be true, Tan decided in late 2000 to close down the plaintiff. He therefore requested the defendant to draw up the accounts of the plaintiff for purposes of liquidation and disposal of its assets. Despite Tan's requests over a span of several months however, the defendant failed to comply.

7 In late 2000, when the defendant requested Tan to sign the plaintiff's accounts and the directors' report for filing the annual returns of the company, Tan noticed that there were errors; he refused to sign. Similarly, when the defendant approached him in August 2001 to sign the accounts for the plaintiff and directors' report for the years 1999 and 2000, Tan refused for the same reason. Instead, Tan requested the defendant to bring the plaintiff's books of accounts to Dundee for Tan's inspection.

8 The defendant brought the books of accounts to Dundee in September 2001. Tan, together with his sister-in-law Agnes Lee ("Agnes") who works in Dundee's accounts department, examined the books in October 2001. They discovered that the defendant had been misappropriating the plaintiff's moneys and assets since its incorporation. The defendant had fraudulently concealed his transgressions over the years from Tan. Tan confronted the defendant in early November 2001 in the presence of Agnes and Tan's wife. Apparently, the defendant not only did not deny the misappropriations pointed out by Agnes but confessed to the same.

9 At another meeting on 10 December 2001 between Tan and the defendant where Agnes was also present, the misappropriation was again not denied by the defendant. Indeed, the defendant signed three letters that day ("the admission letters") drafted by Agnes, addressed to Tan as director of the plaintiff, taking full responsibility for the accounts of the company for the years ending 31 December 1991 to 31 December 2000. The defendant further agreed to return moneys owing to the company on or before completion of the audited accounts for the years ended 31 December 1999

and 2000. The defendant also signed separately, a Declaration of Trust ("the Declaration of Trust") on the same day stating he was the registered owner of three motor vehicles and three vessels which purchase moneys came from the plaintiff, for which he held the eight items on trust. He further agreed to transfer the motor vehicles to whomever the plaintiff directed or appointed, and also when he ceased to be employed by the company.

10 In the third of the admission letters ("letter D"), the defendant agreed that the expenses charged to the company were not wholly and exclusively incurred for the purpose of the plaintiff's trade. He admitted that there were material errors and misstatements in the audited accounts for the years 31 December 1991 to 31 December 2000. He agreed that relevant transactions and accounts had to be adjusted accordingly for items set out in the letter. Subsequently, by another letter dated 21 March 2002 ("the fourth admission letter"), the defendant agreed with Tan that two of the plaintiff's vessels which he had disposed of, together with some used equipment and tools, would be valued at $45,000 which sum he agreed to repay the plaintiffs.

11 On 17 May 2002, the defendant agreed to go to Tan's office at Dundee to sign the plaintiff's revised accounts for the years ended 1999 and 2000; he did not turn up. Tan could not contact the defendant as the latter did not return telephone calls or respond to letters and reminders sent to his residence. It was only in late 2002 that Tan discovered the defendant's change of residential address. In the result, the plaintiff's revised accounts for the years ended 1999 and 2000 could not be signed and filed with the authorities. The plaintiff consequently received summonses from the Registry of Companies ("ROC") as well as from the Inland Revenue Authority of Singapore ("IRAS").

12 Tan's attempt to hold an annual general meeting ("AGM") of the plaintiff on 11 October 2002 was also thwarted as the defendant ignored his letter dated 19 September 2002, giving notice of the AGM. Hence, there was no quorum. When Tan approached Tay for assistance, the latter said he had to check with the defendant but did not revert to Tan.

13 Tan subsequently issued Originating Summons No 1588 of 2002 ("the first OS") against the defendant, Tay and the plaintiff under ss 182 and 399 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act") for, *inter alia*, the following orders:

(a) leave to convene an AGM of the plaintiff for the year 2000 to:

(i) receive the accounts and directors' report for the years ended 1999 and 2000;

(ii) appoint a third director;

(iii) transfer one share from Tan to a newly appointed third director;

(b) that the presence of Tan as a single shareholder be sufficient to constitute a quorum at the aforesaid meeting;

(c) that the defendant be required to sign the accounts and/or other documents required under s 201 of the Act for the financial years ending 1999 and 2000 for the plaintiffs.

14 Subsequently, Tan filed Originating Summons No 400 of 2003 ("the second OS") under s 216A of the Act (read with O 88 r 2(1) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed)) for leave to bring an action on the plaintiff's behalf against the defendant. Leave was granted to him on 28 April 2003 with an additional order that the first OS should be dealt with simultaneously or immediately after the action. On 8 May 2003, Tan commenced this action.

The pleadings

15 In the Statement of Claim, Tan averred, *inter alia*, that the defendant owed a duty to the plaintiff to act *bona fides* in the company's best interests to account for all profits generated from its business and moneys and/or assets due and owing to the plaintiffs. He alleged that the defendant breached those duties by wrongfully misappropriating the plaintiff's moneys and had admitted his transgressions by his admission letters, the Declaration of Trust and the fourth admission letter.

16 Tan averred that Agnes had adjusted the plaintiff's accounts in accordance with the agreement reached with the defendant, on transactions which were not incurred for the purposes of the plaintiff's business. The defendant had also failed to abide by the agreement reached in the three admission letters and the fourth admission letter to pay the plaintiffs $5,000 for vehicle no YH7155C; $200 as scrap value for vehicle no YG7878E; $850 to buy one lot of office equipment; $1,500 for computers, printers, and miscellaneous accessories; and $45,000.

17 Tan further alleged that on or about 16 January 2001, the defendant withdrew $38,000 from the plaintiff's bank account *vide* United Overseas Bank Ltd ("UOB") cheque no 566783 and had failed to account for this withdrawal.

18 Arising from the above breaches, Tan alleged a sum of $767,322.50 was due and owing to the plaintiff by the defendant. He averred that the defendant's own special accountant had filed two affidavits in the first OS stating that the defendant owed at least $200,970.28 to the plaintiff.

19 Tan also averred that due to the defendant's transgressions, the plaintiff was unable to file its income tax returns for year of assessment 2000, with the result that the Inland Revenue Authority of Singapore ("IRAS") issued a summons (no 12110/2001) against the plaintiff and on 21 March 2003, the plaintiff was fined $250 by the courts. Hence, the plaintiff also claimed reimbursement of the fine from the defendant.

20 The defendant filed a Defence, prolix to the extreme, setting out irrelevant facts and/or evidence. In essence, he denied the allegations in the Statement of Claim and contended that the plaintiff's books of accounts for the years 1991 to 1998 were audited and approved by the plaintiff's auditors. He asserted that all directors of the plaintiff including Tan, had full access at all material times, and reasonable opportunity, to inspect the plaintiff's accounts, the company's audited accounts as well as the plaintiff's records relating to bills, bookkeeping entries, payments and receipts, for the years 1991 to 1998.

21 The defendant asserted that since 1991, it had not been the plaintiff's practice to hold meetings of the board of directors. Instead, the practice was to circulate resolutions for signature by the directors after which a date for a meeting would be chosen, when all directors were present in Singapore, for passing of the resolutions.

22 The defendant averred that as an experienced businessman, Tan would have an understanding of the plaintiff's trade and business. Tan would know that as the plaintiff's "informal" managing director, the defendant had to reimburse or pay the plaintiff's employees and/or go-between and/or agent, and/or main contractor/subcontractor, for expenses incurred or work done or undertaken on the company's behalf. The defendant also had to ensure that the plaintiff honoured all contracts, written and/or oral and contracted with clients and suppliers.

23 The defendant alleged that Tan wanted to prepare his own revised accounts for the plaintiff for the years 1991 to 2000. The defendant alleged it was orally agreed between Tan and himself, in or

about September 2001, that he would be given an opportunity by Tan to verify Tan's revised accounts for the years 1991 to 2000 as well as the audited reports for years 1999 and 2000, before the latter documents were submitted and filed with the Registry of Companies. However, on or about 16 May 2002, Tan only gave to the defendant the revised accounts of the plaintiffs for 1991 to 1998, not the audited reports for the years 1999 to 2000. Due to Tan's breach of the oral agreement, the defendant asserted that he did not agree to go to Tan's office at the premises of Dundee on 17 May 2002 to sign Tan's revised accounts and/or the audited reports for the years 1999 to 2000. Tan only gave the defendant the revised accounts and/or the plaintiff's audited reports on or about 31 January 2003, after the first OS had been filed.

24 The defendant denied he had wrongly appropriated the plaintiff's moneys and denied he had admitted liability in the admission letters, the fourth admission letter or in the Declaration of Trust. The allegation that he had fraudulently concealed his transgressions was also denied as was Tan's allegation of fraud, for which no particulars were furnished. In the alternative, the defendant contended that the admission letters, the fourth admission letter and the Declaration of Trust were signed under duress and/or under protest and/or without his examining the plaintiff's accounts and or the plaintiff's records. In the further alternative, the defendant contended that letter D was not and is not a sale and purchase agreement on his part to buy some of the plaintiff's assets. Neither was the fourth admission letter an acknowledgment that he owed $45,000 to the plaintiff. In the yet further alternative, the defendant contended that no consideration had been provided for any of the admission letters.

25 The defendant also asserted that there were errors in the plaintiff's accounts or the audited reports for the years 1999 and 2000, highlighting certain items in letter D to support his contention. The defendant contended that Agnes was not the appointed auditor or accountant for the plaintiff. As such, she was not qualified to act as the plaintiff's accountant or auditor. Tan's special accountant Lai Seng Kwoon ("Lai") did not verify or examine whether the transactions Agnes looked into, were incurred for the business of the plaintiff.

26 The defendant averred that he himself had appointed Chung Siang Joon ("Chung") as his special accountant and court expert in the first OS. Chung had examined the plaintiff's records and audited the company's accounts for the years 1991 to 2000. Chung found that Tan's list of transactions and expenditure by the defendant, purportedly not incurred on the plaintiff's behalf, totalling $676,772.50, was erroneously prepared by Agnes. Chung had corrected the errors in Tan's list of transactions. The defendant asserted he had paid the plaintiff in cash for vehicles nos YH 7155C and YG7878E, two vessels and one lot of used equipment and/or tools.

27 As for the cash cheque for $38,000 dated 16 January 2001, the defendant asserted that this sum was not amongst the sums the plaintiff claimed from him. In the alternative, the defendant alleged that the amount was to reimburse the defendant for expenses he had paid on the plaintiff's behalf in the year 2000.

28 The defendant also alleged that between 24 January 1991 and 31 December 2000, TUS was an employee or go-between and/or agent and/or main contractor of the plaintiff. He further alleged that the plaintiff did not pay TUS any referral charges or fees for helping the plaintiff in the company's day-to-day operations, for introducing customers to the plaintiff and for the hiring of equipment including diving tanks, compressors and/or underwater cameras to help the plaintiff's business.

29 The defendant alleged that arising out of Chung's investigations, it was found that the plaintiff owed TUS a sum of $1,126,153.59. He counterclaimed the amount from the plaintiff based on an assignment of the debt dated 28 April 2003 made between himself and TUS. The defendant

averred he had given notice of the assignment to the plaintiff on or about 5 or 6 May 2003. He alleged he had made a written demand on 21 May 2003 on the plaintiff for payment of the debt but had not been paid. The defendant further alleged the plaintiff owed him another sum of $99,900 for his capital injection into the company, made on or about 20 July 1994, which the plaintiff was liable to refund to him in view of its impending liquidation.

The evidence

The plaintiff's case

30 Tan (PW1) was the principal witness for the plaintiff. His evidence in chief has essentially been set out in [4] to [12] above. When he took the stand, he referred to the defendant's written testimony and pointed out either untruths or inaccuracies in the defendant's affidavit evidence.

31 Tan disputed the defendant's claim that the plaintiff carried out work for Dundee but did not bill, nor was it paid, for such services; Dundee was invoiced for work done by the plaintiff on its behalf. Tan disagreed with the defendant's claim that he wanted to make use of the expertise, contacts and clientele of TUS for the plaintiff's benefit, pointing out it was the defendant who approached him, not *vice versa*. In fact, setting up the plaintiff reduced Dundee's income. Tan pointed out that all jobs previously handled by Dundee were taken over by the plaintiff. Previously, Dundee would subcontract out diving jobs and when billed for the work done, he would mark up the invoices by 20% when Dundee billed its own customers in turn. After the plaintiff was incorporated, Tan referred all diving jobs to the company, causing Dundee to lose a source of income. Unless underwater jobs involved class survey, Tan revealed that Dundee had its own divers who could carry out the work. He further disputed the defendant's assertion that TUS had been a related company of the plaintiff since its incorporation. As far as Tan was concerned, TUS no longer existed after the plaintiff's incorporation as he believed what was told to him by the defendant. Consequently, there was no basis for the defendant to say he was fully aware of TUS's role in the plaintiff. He only found out that TUS was still carrying on business, when told by the defendant in October 2000.

32 Tan testified that as a diving company, the plaintiff would/should have diving equipment. There was no necessity to rent diving equipment from other companies, let alone from TUS. He pointed out that when the defendant applied for a class licence[1] for the plaintiff, it was clearly stated that the plaintiff owned all diving equipment including underwater cameras, unless the defendant was lying in his application. Further, the plaintiff had sold diving tanks and compressors to Dundee although Tan acknowledged he did not know whether it was done in the defendant's or plaintiff's name. Tan observed that if the plaintiff could afford to buy an underwater camera costing around $15,400 in 1992, there was no reason why it could not afford to buy compressors, which in the year 2000 cost $5,500 for two[2] and had to rent them from TUS. If the plaintiff could afford to buy, it made no economic sense to rent basic diving equipment like diving tanks and compressors from TUS, save to benefit the defendant's wife. In support of his contention, Tan produced quotations he had obtained for the purchase of underwater cameras, compressors and diving tanks.[3] He highlighted the difference between buying a compressor for $4,500 or $7,700 and renting one for $50 per day, and between buying a diving tank for $260 and renting one for $10 per day.

33 While he agreed that the defendant would have incurred expenses on the plaintiff's behalf, Tan testified that the defendant abused his trust by either inflating his claims for expenses or making altogether false claims against the company. Tan only discovered the defendant's misdeeds when the latter approached him to sign the accounts for 1999.

34 Tan said he decided to look at the accounts in August 2001 because he felt that the expense

for "sampan" fees was too high. He explained that in the 1998 accounts (exhibited in Lai's affidavit filed in the first OS), the sampan fee was only $4,018. In the 1999 accounts which the defendant asked him to sign, Tan noticed the figure had increased fivefold to $21,964. The figure could not be right as the plaintiff's boats were moored at West Coast Park and, to get to the boats from the shore by sampan cost $5 per trip. Even if trips were made 365 days of that year, the cost would only approximate $1,825 (365 x $5). $21,964 would be equivalent to making 4,392 trips at $5 each. Tan testified that the 1999 sampan fee was even less credible as the plaintiff's business was reduced by $300,000 that year, not to mention that the defendant had repeatedly told him that the company was losing money. For his investment in the plaintiff, Tan received a one time director's fee of $3,000 from the defendant. When Agnes testified, she revealed that she found no supporting documents and no recipients stated on the payment vouchers for the sampan fees.

35 Although the defendant repeatedly stated that the plaintiff was unprofitable, Tan recalled that in June to July 2000, when he telephoned the defendant to pass on a job from a customer, the defendant turned him down using the excuse that the plaintiff's workers were busy. Tan was forced to engage a third party (Underwater Contractors Pte Ltd) to do the job for $2,937.50.[4] As the job involved less than a day's work, the plaintiff forwent a profit it could otherwise have earned. Even if the plaintiff's workers were busy, Tan opined that the defendant should have accepted his customer's assignment and subcontracted the work out.

36 Although he suspected the defendant of misfeasance, Tan still wanted to give the defendant an opportunity to explain the accounts and himself. He had also asked the defendant to redo the accounts, which the defendant did not do. Hence, he did not go to the police or to the Commercial Affairs Division of the Criminal Investigation Department. He did not expect the defendant to "disappear" after signing the admission letters. A police report was later lodged by Tan on 28 May 2003,[5] contradicting the defendant's challenge that no police report was lodged because the defendant had done nothing wrong.

37 Tan denied that the defendant was coerced into signing the three, as well as the fourth, admission letters. They contained terms which the defendant had agreed to. Contrary to the defendant's allegation, Tan's daughter (Tricia Tan) was not present when the defendant signed the letters. She handed the letters to the defendant and left before he signed the documents.

38 Tan dealt with the plaintiff's purchase of a Phosmarine Brush Kart machine in 1992, bought at the defendant's suggestion. The machine was required by the plaintiff for hull cleaning of vessels. The defendant sourced for the machine and told Tan the price. As the plaintiff did not have sufficient funds to purchase the machine, the defendant wanted to borrow from Dundee. Unfortunately, Dundee had utilised all its banking credit facilities at that time. Tan, therefore, used another of his companies, Twin Wheels Engineering ("Twin Wheels"), to buy the machine on the plaintiff's behalf by establishing a letter of credit in the seller's favour. He was unaware of the sales commission the defendant claimed the plaintiff paid to Twin Wheels. Twin Wheels bought the machine by establishing a letter of credit in favour of the seller and sold it, in turn, to the plaintiff at the same price. Documentary evidence[6] was produced by Tan's wife Lee Khiok Fong ("Lee"), who had applied on Dundee's behalf to UOB on 11 November 1992 for a letter of credit in the seller's favour. Lee's sister, Agnes, explained the said documentary evidence when she testified. Agnes confirmed there was no sale commission involved. In fact, when she took the court through the documentary evidence, it appeared that Twin Wheels had refunded $20,000 to the plaintiff, which sum was credited into the plaintiff's account on 13 March 1993. However, the sum was withdrawn in cash on 20 March 1993 and Agnes could not determine by whom or for what purpose.

39 Tan rebutted the defendant's claim that the plaintiff carried out work for Dundee without

payment. He produced a stack of invoices[7] which showed that the plaintiff's invoices to Dundee totalling $11,885 (less a credit note of $200) were squared off against storage charges of $11,885, due to Dundee for the period from January 1997 to December 1999. He recalled the storage charges were incurred from January 1991 and the year 1997 in Dundee's invoice DM/0375/10/01, dated 25 October 2001,[8] was a typographical error. Further, from the time of its incorporation, the plaintiff had been provided with a rent-free office at Pioneer Road by Dundee. In fact, it was the defendant who requested Tan to issue an invoice to set off what Dundee owed to the plaintiff. When Agnes testified, she referred randomly to the plaintiff's telex bills for May 1991 and October 1993, and its telephone bill for May 1993 billed to Pioneer Road, to disprove the defendant's claim that the plaintiff never operated from Dundee's premises.

40 Tan disagreed with the defendant's claim for return of share capital of $99,900. He himself contributed $50,000 towards the plaintiff's share capital, through loans he periodically extended to the plaintiff at the defendant's request. Tan said he was unaware if the defendant used those loans for his own expenses. However, he was able to produce a statement of account[9] dated 30 June 1992 (which the defendant did not dispute he signed), in which the defendant recorded he had taken loans totalling $77,318.65 from Dundee between January to May 1991, had repaid or set off $53,290.00 against those loans and that there was a balance outstanding of $24,028.65. Lee (PW2) confirmed the sums which she or Dundee advanced to the defendant on her husband's behalf. I shall return to this issue later as, when she testified, Agnes asserted that the defendant never contributed at all to the plaintiff's share capital.

41 In cross-examination, it was put to Tan that, as he was not and was never the managing director of the plaintiff, he was in no position to know or determine the expenses of the plaintiff or the extent of its business. This argument is misconceived for reasons which I shall set out later in my findings. It was also suggested to Tan (who disagreed) that the plaintiff and Dundee were affiliated companies. Tan denied that the plaintiff and TUS had a "commercial relationship" after the former was incorporated. It was illogical for the plaintiff to subcontract diving jobs out to TUS as that defeated the very purpose for which the company was established. It was also tantamount to cheating the plaintiff. In any case, in his application on the plaintiff's behalf for a class survey licence, the defendant had stated that the company could do everything

42 As it was the defendant who prepared the plaintiff's accounts throughout the years until Tan's suspicions were aroused, Tan pointed out that the defendant could put whatever he liked into the accounts, including items such as "director related company" meaning TUS, whose continued existence Tan had been unaware of, until October 2000.

43 Agnes (PW3), who is a qualified accountant, testified that when she and Tan looked through the books of accounts of the plaintiff, she was shocked to find that the defendant used the company's moneys for his own expenses as well as for the expenses of other entities, and he had siphoned off the plaintiff's moneys to other parties such as ST Divers.

44 Agnes highlighted examples of the defendant's transgressions. One instance was a cash payment voucher belonging to the plaintiff, signed by the defendant on 6 November 1992, approving payment of $14,423.50 to a company called Tean Chay Earthwork Pte Ltd even though the corresponding invoice (a photocopy not original) from that company, dated 17 November 1992, was made out to Jurong Engineering Ltd. Next, she discovered an invoice from the plaintiff dated 21 December 2000 to Power Senoko Ltd for $2,100. There was a corresponding invoice for $2,100 from ST Divers to the plaintiffs dated 26 January 2001, signed by the defendant. A Registry of Companies search on ST Divers revealed it was registered on the same day as its invoice to the plaintiff. Consequently, the sum of $2,100 due from Senoko Power Ltd was siphoned off to ST Divers.

45 Rent for the Tanjong Katong address was paid by the plaintiff to one Song Yew Chee. However, Agnes discovered that the defendant was carrying on other businesses (including ST Divers, TUS and SS Scubaworld) at the same premises without bearing any part of the rent. Consequently, it was subsequently agreed between the defendant and both Agnes and Tan that the defendant would bear 35% of the rental charges, as evidenced in letter D.

46 Agnes testified she had questioned the defendant on the plaintiff's payment of expenses of non-employees. One example was the plaintiff's payment voucher dated 31 March 1995 for the paging charges amounting to $49.44 of one Miss Rosnani bte Abdul Salam. She said the defendant could not give an answer. However, in para 259 of his written testimony, the defendant sought to justify the payment on the basis that Miss Rosnani is the wife of the plaintiff's boatman and "his wife handled all matters on his behalf". Another example of an unfounded expense was the defendant's payment for the LCCI course ($545.90) on 27 April 1995 of one Tan Bee Shin (the girlfriend of the defendant's son) who was also not the plaintiff's employee. This was conceded by counsel for the defendant in the course of trial. Similarly, Agnes questioned why a grant of $343 from the Skills Development Fund to the plaintiff should be used for TGK's (the defendant's wife) benefit and be deducted from the entire course fee of $490 which she and the defendant incurred even though she was not an employee of the plaintiff. The plaintiff quite correctly only agreed to absorb the defendant's course fee, *viz* half of $490.

47 The defendant had throughout the years made excessive petrol claims according to the plaintiff's books of accounts. In his written testimony, the defendant alleged that his work for the plaintiff required him to travel and at times, he used vehicles which did not belong to the plaintiff. He claimed that from the time of its incorporation, the plaintiff had accepted and paid his submission of petrol claims. He added that between 1999 and 2000, the plaintiff paid flat monthly transport charges to him of about $1,000 per month. He complained that the plaintiff subsequently reneged on its agreement and refused to reimburse his petrol claims from 1991 to 1998 totalling $96,000 ($1,000 x 12 x 8) even though it was a company expense. Agnes had seen numerous books of parking coupons being charged to the plaintiff in a month, when the proper procedure would be to submit used parking coupons to the company for reimbursement so as to avoid abuse.

48 The defendant had also made excessive claims for meals for workers. At his request, Agnes said she and Lee agreed not to pursue this claim. He had also charged personal expenses to the company, including his groceries, expenses at various stores and his home telephone charges (telephone no 7880253). On top of his transport claims, he made the plaintiff pay for the expenses of his motor vehicle no SBN 5527S. He had even charged his wife's personal expenses (medical and dental charges) to the company.

49 Agnes took issue with the defendant's transport claims. She explained that when she checked the company's records, she discovered that a majority of the claims related to non-Q-plated motor vehicles, which claims are disallowed under the Income Tax Act (Cap 134, 2004 Rev Ed). As for the defendant's claim of $1,000 for transport allowance, Agnes testified that not only the defendant but a number of other employees of the plaintiff, made similar claims ranging from $500 to $1,000 per month. She acknowledged that the company owned several vehicles including lorries and pick-ups, which run on diesel for which expenses could be claimed. However, the defendant and other employees were not claiming against the plaintiff's vehicles but making transport claims. She contrasted that with the practice in Dundee where the maximum transport allowance employees could claim was $100 per month. She therefore viewed the defendant's monthly claim of $1,000 (which moneys he had already taken) as excessive. The defendant also made claims on the plaintiff for traffic summonses he received.

50 Yet another item in the accounts which caused Agnes to criticise the defendant, was the sum of $65,441.22 which payment voucher was dated 4 August 1994. She explained that the plaintiff had done work for Wattyl Dimet (S) Pte Ltd ("Wattyl-Dimet"). Wattyl-Dimet had also done work for the plaintiff, referring to their statement dated 31 May 1994, in the amount of $65,441.22, for coating which they supplied to the plaintiff for the Public Utilities Board contract the plaintiff carried out. The plaintiff's invoice dated 21 April 1994 was for $114,345.86 against which Wattyl-Dimet set off their claim of $65,441.22; they paid the difference of $48,904.64 which was deposited into the plaintiff's bank account on 4 Aug 1994. Entries in the 1994 general ledgers of the company were consistent with Wattyl-Dimet's set off and payment. Yet, the defendant had issued the aforesaid payment voucher purportedly to pay $65,441.22 in cash to Wattyl-Dimet; that was a wrong payment out for which the defendant was accountable.

51 The defendant's claim for entertainment expenses was yet another item which Agnes objected to. One was for a bill for $1,200 from D & P Hampers & Florists Pte Ltd dated 5 February 1996 for an order for eight hampers. Agnes found out that the hampers were delivered to the plaintiff, not to any customers. There were similar other orders which she uncovered when she checked the plaintiff's accounts. Further, the defendant charged to the plaintiff's account newspapers delivered to his house. Even expenses incurred by TUS (on 23 and 24 January 1991), before the incorporation of the plaintiffs, were charged by him to the company.

52 As for the defendant's alleged contribution of, and counterclaim for, $99,900 towards the plaintiff's share capital, Agnes testified she had seen a deposit for that amount on 20 July 1994 in the plaintiff's statement of account for July 1994[10] from UOB. She noted therefrom that on 12 July 1994, a cheque for $60,000 was deposited into the account; it was payment received from Wattyl-Dimet for invoice no 94-57. As at that date, the plaintiffs' bank account showed a credit balance of $81,614.82. However, on 18 July 1994, the defendant withdrew $75,967.94 from the account. He then deposited $99,900 into the account on 20 July 1994 and withdrew $60,000 therefrom on 25 July 1994. The defendant's two withdrawals totalled $135,967.94 against his alleged deposit of $99,900. Therefore, not only did he not make any capital contribution, he owed the plaintiff $36,067.94. Agnes said she had verified from the company's general ledger entries for year ended 31 December 1994, that there were entries dated 18 and 25 July 1994 in the sums of $75,967.94 and $60,000 respectively, "for repayments to directors" with no documents to support such debts owed presumably to the defendant, as Tan was not involved.

53 Agnes explained that the terms in the three as well as the fourth, admission letters were all agreed to by the defendant before she left the meeting room to type out the letters; Lee had also left. The defendant was alone in the meeting room until Tan's daughter, Tricia, returned with the admission letters (and Declaration of Trust) for him to sign. She denied he was under any coercion when he signed the same. It was after the meeting with the defendant on 10 December 2001, that Agnes combed through the plaintiff's books of accounts to do the necessary adjustments, based on what the defendant had admitted and/or agreed to.

54 To support her assertion that the defendant had not been forced into signing the admission letters, Agnes revealed that after Tan had confronted the defendant in November 2001 and the latter had agreed that the 1999 and 2000 accounts should be revised, the defendant had sent a fax to Tricia on 26 November 2001 to confirm the date and time when he should go to the office of Joy Management (the company's bookkeepers) in order to prepare revised draft accounts. The defendant met with Joy Management on 21 March 2001 and followed up with a letter on the plaintiff's behalf to the bookkeepers on 22 March 2002 requesting the latter to visit Pioneer Road to discuss matters relating to the accounts and audit of the plaintiff's books for the years ended December 1999 and 2002. When Joy Management, in their reply dated 22 March 2002 asked for confirmation of their fees

of $100 per hour for one Jessie Choo's attendance, the defendant faxed back his confirmation on their letter the same day.

55 Agnes testified that in regard to the fourth admission letter dated 21 March 2002, the defendant in any case made a payment of $15,000 on 17 May 2002 towards the agreed sum of $45,000, as reflected in an entry in the plaintiff's UOB bank statement for May 2002.[11] She revealed that after she had prepared the Appendix D[12] to show all the adjustments she had made to the 1999 accounts based on the defendant's four admission letters and discussions with him, Agnes handed him a set which he took away to study.

The defendant's case

56 Counsel for the defendant had repeatedly suggested to Tan that it was the defendant not Tan who managed and ran the plaintiff. Therefore, the best person to decide how to run the company was the defendant. That argument is misconceived as it suggested that the defendant has a *carte blanche* to do as he pleased, which is not the position at law. Counsel had also suggested to Agnes that the defendant's periodic withdrawals from the plaintiff's UOB bank account were not on an item to item basis but were lump sums meant to be disbursed. These suggestions did not advance very far when Agnes testified as the defendant could not prove such alleged lump sum withdrawals. Both the defendant and his counsel made much of the fact that the defendant was only informally but never properly appointed as the plaintiff's managing director. The short answer to that argument is that it made little difference as the defendant, by his own admission and on the facts, acted as the company's *de facto* managing director and held himself out as such to third parties.

57 In his lengthy written testimony, the defendant:

(a) claimed he was not formally but only informally appointed as the plaintiff's managing director. When, in fact, his name cards only described him as a diver superintendent and/or supervisor;

(b) asserted that as the informal managing director of the plaintiff, he took care of the day-to-day running of the company from 1991 to 2000;

(c) claimed that as a "one-man show", he was entitled to and he did,appoint clerical support in the person of his wife TGK who, since January 1991 did such work as typing and preparing payment vouchers on TUS's behalf for the plaintiff;

(d) claimed TUS was a related company of the plaintiff since 1991 which Tan was fully aware of and which was reflected in the plaintiff's audited accounts: TUS would bill the customer for work done by the plaintiff and the bills of TUS were consolidated under the profit and loss accounts of the plaintiff;

(e) asserted that TUS assisted the plaintiff in many other ways and that he orally appointed TUS on or about 24 January 1991 as the company's agent, gobetween and/or its main contractor;

(f) claimed that for working for the plaintiff, TUS would be paid a referral fee of 10% of the value of each of the plaintiff's invoices;

(g) claimed further that the plaintiff would pay TUS rental charges or reimbursement of rental equipment amounting to 7.5% of each of the plaintiff's invoices as the company did not

have diving tanks, compressors and or underwater cameras;

(h) complained that between 1993 to 30 November 2000, the plaintiff had failed to pay TUS for the hiring of equipment, neither had the plaintiff paid TUS for administration work carried out between 24 January 1991 to 31 December 2000 nor for referral charges during the period.

58 The defendant denied that he had fraudulently concealed the plaintiff's accounts, pointing out that Tan always had full access to the company's books of accounts throughout the years 1991 to 2000. If he was dishonest, he would have destroyed much of the plaintiff's records not required to be kept by law and the plaintiffs would have reported him to the police and/or to the Commercial Affairs Department. The defendant's surmise is incorrect as Tan and/or the plaintiff have lodged a police report against him. The defendant deposed that the plaintiff's bookkeeping was done by a firm called Ideal Commercial and later by Joy Management. The company also had two sets of auditors (*ie* R Chan (1991 to 1994) and Richard Lim. Consequently, he could not be faulted for the state of the plaintiff's books of accounts as he was neither the plaintiff's auditor nor bookkeeper. It was also not his fault that the plaintiff was prosecuted for delaying the submission of its audited accounts for the years 1999 to 2000. It was Tan who wanted to hold back and revise the accounts he had prepared, and then did not afford the defendant an opportunity to check the revised accounts on 16 May 2002 when he was asked to sign the same.

59 The defendant had his own interpretation of the four admission letters. He claimed that by signing, it did not mean that he had wrongfully misappropriated moneys and/or assets of the plaintiff. Those words or similar words did not appear in any of the admission letters or in the Declaration of Trust. By signing the letters, the defendant said he intended to show that he had honestly run the plaintiff's business and if there were mistakes in the accounts of the plaintiff, the company's auditors could adjust or redo the accounts. In any case, when he signed the letters and Declaration of Trust, he did not have the plaintiff's accounts or records with him. Significantly, the defendant made no mention of the fact that he had, on 17 May 2002, paid $15,000 towards the agreed figure of $45,000 stated in the fourth admission letter.

60 The defendant also claimed that in addition to getting him to sign the admission letters, Tan wanted him to waive the plaintiff's invoices issued to Dundee. Further, Dundee billed the plaintiff for storage space which the plaintiff did not use. These allegations were found to be unsustainable when the defendant took the stand.

61 The defendant relied heavily on the report/findings of his own special accountant, Chung, to support his defence. It would therefore be appropriate at this juncture to look at Chung's report and affidavit. I should point out that neither the plaintiff's accountant, Lai, nor Chung were called to testify as at the outset, I had informed the parties that I would only be determining the issue of liability for this trial. Quantum would be relevant and would be assessed by the Registrar only if I found in favour of the plaintiff's claim, and/or the defendant's counterclaim, as the case may be.

62 What then of Chung's report?[13] Interestingly, on the issue of liability there was no denial by Chung that the defendant was not liable. On the contrary,[14] the following comments formed part of Chung's conclusions:

From the claim of S$676,840.45 by the plaintiff, the sum of S$366,317.50 are to be treated as company's expenses.

From 1991 to 2000, Tee [the defendant] would accordingly owe the plaintiffs $19,560.00

From 7.5.1997 to 2000, the plaintiffs would accordingly owe Tee S$54,339.00.

The extract would seem to suggest that the defendant owed the company $275,743.95 ($676,840.45 less $366,317.50 less $54,339 plus $19,560) at the very least.

63 I noted that Chung arrived at his conclusions by making the following assumptions:

(a) TUS is a sole-proprietor whose existence is solely to carry out the day to day operation[s] and business of … [Dundee];

(b) [Dundee] would raise invoices to TUS for the full amount of the invoices that TUS raised to the customer for services rendered and in so doing, TUS [did] not benefit in any way;

(c) TUS merely [carried] out the work similar to that of an employee of [Dundee];

(d) TUS, in carrying out the day-to-day operation[s]/business of [Dundee], may times need to incur expenses such as transport, loading and unloading of equipment, purchase of parts and tool[s] …;

(e) expenses were determined by looking at the substance, nature and purpose from the angle of needs and who had benefited therefrom;

(f) no adjustments were made for transactions for which there was no and/ or sufficient evidence;

(g) expenses allocation can be reallocated after ten years' operation with accounts to be finalised at a later date.

64 Chung also based his report on a random review of transactions charged to the defendant's and or TUS's account in Appendix D, photocopies of documents of the plaintiff, invoices of Dundee and TUS for the years 1991 to 2000, and meetings and discussions with the defendant who clarified the nature, purpose and necessity of some of the expenses incurred in carrying out the business.

The findings

65 Unlike the testimonies of Tan and Agnes, I found the defendant to be an unreliable witness whose answers under cross-examination were either unsatisfactory or wholly inconsistent with his case. At other times, he did not and/or could not answer questions put by counsel for the plaintiff or the court. I shall now elaborate on my observations.

66 When he was cross-examined on why the plaintiff rented from TUS instead of buying diving equipment, the defendant said it was more *convenient*. His answer was to be contrasted with Tan's testimony (not challenged under cross-examination) that it would have been cheaper for the plaintiff to have purchased diving equipment (including tanks, underwater cameras and compressors) than to rent from TUS. Based on the price list,[15] renting made no commercial sense. The defendant's other explanation (that the plaintiff did not have the capital to purchase equipment) is even less convincing. It bears remembering that Tan had testified that he was persuaded to start and invest in the plaintiff by the defendant, who told Tan he lacked the capital to do so. If indeed the plaintiff did not have the means to invest in equipment, the defendant need only have asked Tan who would have readily provided the funds. After all, Tan had provided all the initial funding for the company. The defendant's third explanation, that it did not occur to him to buy rather than to rent equipment, is too

absurd to merit any consideration. My belief is that the renting of equipment was another ruse on the part of the defendant to enrich TUS and himself at the plaintiff's expense.

67 The defendant had, in his defence, alleged that he had signed the four admission letters under duress. Cross-examined why he did not lodge a police report or seek legal advice to disavow what he had signed (which would be a natural reaction by someone who had been coerced into signing), the defendant lamely said he did not know how to do things. This statement is patently untrue given that he had challenged Tan to lodge a police report against him. A person who is capable of finding ingenious ways to siphon moneys from the plaintiff would most certainly know how to lodge a police report. This defence is even more implausible when seen in the light of the defendant's part-payment of $15,000 on 17 May 2002 (which he did not challenge) towards the sum of $45,000 he had agreed to pay in the fourth admission letter. Why would he pay so willingly if he had been forced to sign the fourth or the earlier three admission letters? In any case, on the last day of trial, his counsel withdrew the defence of duress when the defendant was on the witness stand.

68 Not only did the plaintiff rebut the defendant's allegation that the plaintiff were paid a $20,000 commission for the purchase of the Phosmarine Brush Kart machine (funded by Twin Wheels) but the plaintiff was able to prove[16] that Twin Wheels had refunded $20,000 to the plaintiff's UOB bank account on 13 March 1993, only to have the defendant withdraw the amount as cash on 30 March 1993. Cross-examined, the defendant did not deny he may have withdrawn the sum and gave an unconvincing explanation that it was for expenses. However, when requested by the court, he could not furnish any documentary proof to support his answer.

69 In this regard the plaintiff also proved that the defendant had misappropriated hire-purchase instalments for the same machine. Their counsel had referred the defendant to the plaintiff's bank statements which showed that between January and December 1995, an inter-bank GIRO deduction of $2,121 was made for monthly instalments paid to Orix Leasing from whom the machine was leased. Yet, sometime in December 1995[17] the defendant's wife (whose signature he identified) made out a cash voucher for $25,452.80 ($2,121 x 12) for the annual instalments. No recipient signed the voucher. Confronted with this voucher, the defendant's feeble explanation was that *it was a mistake*. As the defendant, by his own admission, was in full control of the plaintiff assisted by his wife, it was for him to prove, which he failed to do, what that mistake was. Contrary to his denial, I find that the defendant misappropriated this sum of money from the plaintiff. It is significant that (according to Agnes) the defendant failed to provide the plaintiff's 1995 general ledgers to her and/or Tan. I draw an adverse inference against him for the omission and I conclude he must have had something to hide. $25,452.80 was not the only amount of money from the plaintiff which the defendant dishonestly pocketed.

70 Other examples of the defendant's misappropriation and or misuse of the plaintiff's moneys were highlighted in the plaintiff's closing submissions (para 22) and these included the following:

(a) spending $55.00 on beer on 30 March 1991;

(b) spending $49.90 on groceries at a supermarket on 30 April 1991;

(c) spending $29.00 at the departmental store, Yaohan, on 30 May 2001;

(d) charging the plaintiff $17.00 for newspapers delivered to a residential address (presumably his home) on 30 September 1991; and

(e) charging the plaintiff $3,500 for entertainment from January to December 1991, without

supporting documents.

71 Larger amounts of money which the defendant misappropriated from the plaintiffs included $65,441.22 for the Wattyl-Dimet contract (*supra* at [50]); withdrawals of $75, 967.94 and $60,000 from the plaintiff's bank account in July and August 1994 respectively (*supra* at [52]); and $14,423.50 purportedly paid to Tean Chay Earthwork Pte Ltd on 6 November 1992 on an invoice issued in favour of Jurong Engineering Ltd. The defendant had also wrongfully converted gift hampers charged to the plaintiff some of which (by his own admission) were ordered by TUS but all of which were delivered to the Tanjong Katong address. As mentioned earlier (*supra* at [66), the defendant misappropriated $20,000 from the plaintiff on 30 March 1993. This list is by no means exhaustive, bearing in mind that Appendix D, prepared by Agnes, comprises hundreds of items on which she found that the defendant made either unjustified and/or excessive and/or dishonest claims against the plaintiff.

72 I next address the defendant's contention that TUS played a multitudinous role. The absurdity of his claim can be seen from the following illustration which was set out in para 55 of the plaintiff's submissions (based on the assumption that the plaintiff billed its customer $1,000 for a diving job):

(a) 10% thereof would be paid to TUS as its employee;

(b) another 10% would be paid to TUS as a go-between;

(c) a third 10% would be paid to TUS as an agent;

(d) a fourth 10% would be paid to TUS as the plaintiff's main contractor;

(e) 10% more would be paid to TUS for administration work done for the plaintiff;

(f) 10% would be paid to TUS as referral fee.

The net result was that TUS would be credited with $675 leaving the plaintiff with $325 of the invoice value. I accept the submission of the plaintiff that even if TUS did play a "role" in the plaintiff, that "role" was engineered by the defendant because of his full control of both entities and in breach of his fiduciary duties as a director of the plaintiffs.

73 It is little wonder that the plaintiff (according to the defendant) failed to make profits throughout the years he was in control. By charging every conceivable expense he could think of (personal and otherwise) to the plaintiff's account in the years 1991 to 2003, it is not surprising that the defendant, who initially resided at a public housing (HDB) flat at Block 933, Tampines Street 91, #07-385, was able to upgrade therefrom to a private property at no 1A Haig Avenue and from thence, to his current private flat at no 10 Lorong 14 #08-05, Geylang, Singapore 398922.

74 On the evidence before the court, I find that the defendant committed over the years beaches of trust of, and misused the plaintiff's moneys. His misfeasance was widespread and systematic, commencing from the very start of the plaintiff's operations – the evidence is overwhelming. Even after his defalcations were unmasked, the defendant had the audacity to withdraw $38,000 in cash from the plaintiff's account, as evidenced in the plaintiff's Industrial Commercial Bank bank statement for January 2001.[18] Cross-examined, the defendant had alleged the sum was to reimburse him for expenses incurred for the year 2000. However, no evidence was produced to support this claim. Although he disagreed with counsel's suggestion, I believe the

defendant made the withdrawal knowing full well that it would be the last time he could milk the plaintiff of its funds.

75 Foolishly, the defendant had challenged Tan to report him to the authorities on his conduct. He did not realise that his offences fall within the ambit of s 405 and possibly s 408 of the Penal Code (Cap 224, 1985 Rev Ed) and which now calls for police investigation. There is no time bar for criminal prosecution even if the defendant succeeds in his defence that the plaintiff's claim is statute barred.

76 Turning again to Chung's report, I am of the view that his findings were flawed as his conclusions were not based on his own independent examination and assessment of the records but based on incorrect and/or false assumptions and on what the defendant told him (*supra* at [61]). Chung's report does not exonerate the defendant from liability. Indeed, if anything, Chung's report serves to confirm that the defendant helped himself liberally and unlawfully, to the plaintiff's funds since 1991. Chung, by his own admission, had made a cursory and superficial examination of the books of accounts of the plaintiff. This is to be contrasted with the painstaking and thorough examination of all the books of the accounts of the plaintiff by Agnes, who is a qualified accountant.

77 I do not accept that Tan needed the defendant's alleged expertise or contacts or those of TUS as the reasons for the setting up of the plaintiff; rather it was the other way round. By 1991, Tan's company, Dundee, was an established business and he was expanding with a new shipyard. The defendant admitted in cross-examination that he put Tan's name as chairman (with himself as managing director) in his application form for a class survey *to help to impress class surveyors.* Dundee was in a position to make referrals to the plaintiff for diving jobs which it could not handle itself, not *vice versa*.

78 The next issue to be dealt with is the defendant's counterclaim. The counterclaim comprises of two items. Evidence which discredited the defendant's alleged capital contribution of $99,900 which formed part of his counterclaim has already been referred to (*supra* at [52]). The defendant had also claimed in the witness stand that the plaintiff owed him $215,060.80 as at 30 June 1994, as entered in the general ledgers of the company for that year. He was cross-examined on the source of those funds, bearing in mind that his gross monthly salary in June 1994 was only $1,570 and his annual earnings were $54,144 for 1991, $51,864 for 1992 and $62,318 for 1993.[19] The defendant explained that the funds came from his own pocket and that he won $70,000 in a 4D lottery in 1992. As not one iota of evidence was produced to support this incredible claim, I am of the view that the ledger entry was fictitious and was another devious scheme concocted by the defendant to milk the plaintiff of funds. The defendant is not the sort of person to lend his money (even if he had the means) to the plaintiff; his sole intention was to get as much money out of the company as he could.

79 The second item of the defendant's counterclaim related to the alleged debt of $1,126,153.59 which the plaintiffs owed to TUS and which TUS had purportedly assigned to him. In their submissions, the plaintiffs pointed out that on 9 July 2003, the deputy registrar had ordered para 31 of the defendant's Counterclaim (on this item) to be struck out as the alleged claim was time barred. Counsel added that the defendant had since failed to re-quantify how much of that original claim remained claimable. Consequently, this claim is dismissed for lack of merit and proof.

The law

Breach of fiduciary duties

80 It is trite law that directors owe fiduciary duties to their companies. At common law, the duties of directors are owed to shareholders. In the case of the defendant, that would mean he owed

duties to Tan since both of them are the only shareholders of the plaintiff. At law, the fiduciary duties owed by directors would include the duty to act honestly and in good faith in the best interests of their company; not to exercise their powers for an improper purpose such as feathering their own nests; and not to place themselves in a position in which there is a conflict between their duties to the company and their personal interests or duties to others. These common law duties are now incorporated as statutory duties in ss 156 and 157 of the Companies Act (Cap 50, 1994 Rev Ed) the breach of which attracts penal consequences.

81 The defendant breached all the fiduciary duties set out above. To recapitulate, he siphoned the plaintiff's funds either directly from the plaintiff's bank accounts or indirectly by making false, excessive and/or unjustified claims. He put himself in a situation of conflict (concealed from Tan) by employing his wife from his own diving company, TUS, to work for the plaintiff, charging every expense of TUS to the plaintiff's account. He failed to disclose to Tan (contrary to his earlier representation that he would close down TUS) that TUS continued to exist and purportedly carried out diving jobs meant to be done by the plaintiff. The defendant then surreptitiously incorporated ST Divers on 26 January 2001 to take over the plaintiff's contract with Power Senoko Ltd, without informing Tan that the plaintiff had the outstanding contract, when Tan decided to cease operations and wind up the plaintiffs in November 2000, based wholly on the defendant's false information that the plaintiff's operations were unprofitable.

Time bar under the Limitation Act

82 The defendant had raised the defence that the plaintiff's claim was time barred under ss 6(1) (2) and (7) of the Limitation Act (Cap 163, 1996 Rev Ed) ("the Act") on the basis that it arose more than six years before the commencement of this action.

83 The plaintiff, however, relied on s 29(1) of the Act which states:

> 29(1) Where, in the case of any action for which a period of limitation is prescribed by this Act —
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

In its submissions, the plaintiff also relied on s 29(1) to say s 6 of the Act was inapplicable as the defendant had concealed his fraud throughout the years from Tan.

84 Reliance was placed by the plaintiff on an extract from *Halsbury's Laws of England* vol 28 (4th Ed, Reissue, 1997) para 1122 commenting on s 32(1) of the UK Limitation Act 1980, which provision is *in pari materia* with our 29(1). The passage reads:

> **Diligence in discovery of fraud, deliberate concealment or mistake.**
>
> The standard of diligence which the plaintiff needs to prove is high, except where he is entitled

> to rely on the other person; however, the meaning of 'reasonable diligence' varies according to the particular context. In order to prove that a person might have discovered a fraud, deliberate concealment or mistake with reasonable diligence at a particular time, it is not, it seems, sufficient to show that he might have discovered the fraud by pursuing an inquiry in some collateral matter; it must be shown that there has been something to put him on inquiry in respect of the matter itself and that if inquiry had been made it would have led to the discovery of the real facts.

The plaintiff submitted that Tan should be excused for not discovering the defendant's fraud earlier than 2001.

85 Another relevant provision of the Act is s 26(2), which counsel for the defendant had submitted was not applicable, so as to negate the time bar. That section states:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment.

86 Section 26(2) is to be viewed in the context of the admission letters signed by the defendant. Earlier (*supra* at [67]), I had said the defence of duress was withdrawn by the defendant at the eleventh hour. Consequently, the only other question which now arises in connection therewith is, do the four admission letters amount to an acknowledgment of debt by the defendant so as to stop the time bar from running since 1991?

87 I address the issue by considering the admission letters in reverse order, starting with the fourth admission letter. In that letter dated 21 March 2002, the defendant clearly and unequivocally stated:

> I, Tee Chin Hock … the managing-director/shareholder of DM Divers Technics Pte Ltd, confirm that the following transactions and the value of the assets are to be recognised in the accounts of Divers Technics Pte Ltd in accordance with generally recognised accounting principles …
>
> I hereby confirm that the total sale proceeds of all the above listed assets is S$45,000 …
>
> I will return the sum of monies owing to the company on or before the completion of the audited accounts for the year ended 31.12.99 and 31.12.00 …

It is crystal clear from the letter that the defendant confirmed he would pay the plaintiff $45,000 and followed up by making a part payment of $15,000 on 17 May 2002 to the plaintiff's bank account. Even if the fourth admission letter cannot be construed as his acknowledgment of the plaintiff's debt of $45,000, it is undeniable that his conduct of making the part payment comes with in the ambit of the second limb of s 29(1) of the Act.

88 What then of the admission letters all dated 10 December 2001? In all three letters the defendant merely said:

> I will return the sum of monies owing to the company on or before the completion of the audited accounts for the year ended 31.12.99 and 31.12.00. And I will bear full responsibility to the Inland Revenue Authority of Singapore and Registrar of Companies, including any penalties and

fines which may be imposed as a result of my preparation of the accounts for the company.

save that letter D contained expenses and or disposal proceeds of assets which Agnes testified she had agreed with the defendant should be apportioned and/or adjusted between the plaintiff and the defendant's own businesses.

89 Looking at the wording, it is my view that the defendant acknowledged liability to the plaintiff although no figures were stated in the admission letters. Consequently, I hold that the acknowledgment of liability precludes the defendant from raising the defence of time bar. Even if I am wrong and the admission letters cannot be construed as acknowledgments of the plaintiff's many claims, it is my view that the plaintiff is entitled to rely on s 29(1) of the Act. I am satisfied that Tan could not have discovered the defendant's fraud earlier, before his suspicions were aroused in August 2001, by the exorbitant sampan fees stated in the 1999 accounts. He could not be faulted either for relying on the defendant to manage the plaintiff's operations, as that was the understanding from the very beginning – that the defendant would run the company while Tan's role was that of an investor only. Tan had no reason to distrust the defendant either, before the latter's misdeeds came to light *via* the sampan fees.

Conclusion

90 Accordingly, I find the defendant liable for the plaintiff's claim. There will be final judgment for the plaintiff in the sums of $25,452.80, $65,441.22, $75,967.94, $60,000, $14,423.50, $20,000 and $38,000 set out in [69], [71] and [74] above. The evidence proving the defendant's misappropriation of these moneys is overwhelming. The plaintiff is entitled to an indemnity from the defendant for any and all fines resulting from summonses issued by the ROC and IRAS, arising out of the defendant's failure and/or refusal to sign accounts and/or tax returns for submission to the authorities.

91 There will also be interlocutory judgment for the plaintiff for an account of all other moneys due and owing by the defendant, including profits which he made directly or indirectly (through ST Divers and TUS) at the plaintiff's expense. The Registrar shall take such accounts and the costs thereof are reserved to the Registrar. The plaintiff is awarded the costs of the action. The defendant's counterclaim is dismissed with costs.

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[1]See 2 AB 12718-12720

[2]See 1 AB6

[3]See Exhs P3 to P5

[4]See Exh P1

[5]See Exh P2

[6]See Exh P6

[7]See 1 AB 266-287

[8]See 1 AB 266

[9]See 1 AB 288

[10]See 2 AB 5728

[11]See Exh P7

[12]See 1 AB 100-220

[13]Exhibited as CSJ-1 to his affidavit evidence

[14]See p 4 of his report

[15]See Exh P4

[16]Via Agnes' testimony on Exh P6

[17]See 2 AB 7185

[18]See Exh P9

[19]See Exh P8