IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 148

Suit 770/1997

Between

Takayama (Asia) Pte Ltd
(formerly known as DSK
(Singapore) Pte Ltd)

… *Plaintiff*

And

Tomohisa Mizoguchi
Nihon Den-Netsu Keiki Co
Ltd
Sensbey Corporation
Singapore Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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Takayama (Asia) Pte Ltd (formerly known as DSK (Singapore) Pte Ltd) v Tomohisa Mizoguchi and Others

[1998] SGHC 148

Suit 770/1997
Choo Han Teck JC
30 April 1998

Judgment:

GROUNDS OF DECISION

1. The plaintiffs (Takayama (Asia) Pte Ltd) is a company incorporated in Singapore and is owned by Takashi Yamada ("Yamada") (85%) and his son Hiroshi (15%). Hiroshi's shares were purchased from Tomohisa Mizoguchi

(the 1st defendant) for $15,000. Mizoguchi was the executive director of Takayama (Asia) Pte Ltd, which was formerly known as DSK (S'pore) Pte Ltd. He earned a monthly salary of $4,900 and was in charge of a staff of five employees.

2. The 2nd defendant, Nihon Den-Netsu Keiki Co Ltd ("NDK") is a company incorporated in Japan. It is the principal of Takayama Japan, a company wholly owned by Takashi Yamada.

3. Takayama Japan had been distributing NDK's products for about 20 years. On 20 August 1988 Takayama Asia was incorporated and took over the business of distributing NDK's products in Singapore and the region. It obtained NDK's products through Takayama Japan. The profits made by Takayama Asia were divided in the proportion of 70% to Takayama Asia and 30% to Takayama Japan.

4. This suit arose from events beginning about June 1996. Yamada received a telephone call in early June from Matsumoto of NDK asking for a meeting to discuss the credit terms which NDK gave Takayama Japan.

5. Yamada asked Mizoguchi to attend the meeting with him because he felt that the outcome of the meeting would also affect Takayama Asia. The meeting was held on 11 June 1996 in Japan. At that meeting Matsumoto raised the concern of NDK over the insolvency of two companies in Japan which, it was alleged that Yamada was a director of one of them, namely Tokohu. Yamada claimed that he was only a sleeping director and had no interest or knowledge of the affairs of these companies. The upshot of the meeting was that NDK informed Yamada that they would reduce the 120 days credit given to Takayama Japan to 60 days. On 12 June, as a follow-up, NDK wrote to confirm this change by letter of the same date. That letter cited adverse economic conditions and a change of sales strategy as part of the reasons for the reduction of credit.

6. Yamada sought the advice of Mizoguchi who advised him in writing that given Takayama Asia's credit terms with its own customers being 30 to 60 days it would be impossible to accept NDK's revised terms. On 20 June Yamada sent a letter to NDK setting out various reasons why the terms should not be changed. On 25 June NDK replied citing the insolvencies of the two companies in which

Version No 1: 20 Nov 2026 (00:35 hrs)

Yamada was a director, and raising a query over Takayama Japan's dealings with a rival product ("Nitto"). Yamada stated in his evidence that he understood the contents of this letter to mean that if he did not accede to the request by NDK to vary the credit terms they, NDK, would terminate the contract between them. It was not disputed that the commercial relationship between NDK and Takayama Japan was governed by a written contract called the "Basic Agreement" which is the subject of a suit and counter-suit in Japan. The allegations of conspiracy in this action are also part of the litigation in Japan. The defendants have elected not to apply for a stay of proceedings.

7. On 30 June 1996 Yamada heard from the staff of Takayama Asia that Mizoguchi was planning to set up his own company, possibly with NDK. Khairil Adam, an employee gave evidence that Mizoguchi had asked if he would join his new company. Poh Keh Teck also gave evidence that Mizoguchi made a similar proposition to him in July 1996.

8. The day before, on 29 June, Yamada had called a meeting of the staff of Takayama Asia and spoke to them through Mizoguchi about the crisis created by NDK's demand for a revision of credit terms. The staff were asked to give their views of the matter in writing. Mizoguchi also gave his views. This was the written advice referred to above in which he said that Takayama Asia cannot accept the reduction of credit.

9. Yamada gave evidence that he was told by a friend and customer, Fujinuma that Mizoguchi had told him that he was setting up his own company. Fujinuma was not called to give evidence.

Version No 1: 20 Nov 2026 (00:35 hrs)

10. On 19 July 1996 Yamada told the staff at Takayama Asia that he intended to ask Mizoguchi to leave the company. On 26 July he told Mizoguchi to leave because he had heard from the staff that Mizoguchi was "setting up a new company and doing something new with NDK". Mizoguchi denied the accusation but said that he would resign nonetheless. Yamada spent the next month attempting to dissuade NDK from revising the credit terms.

11. On 16 August Yamada discussed the terms of Mizoguchi's departure from the company. On 23 August Yamada wrote to Mizoguchi to say that his last day of service would be 23 August 1996. Mizoguchi left on that day and officially ceased to be a director of Takayama Asia on 30 September 1996.

12. To complete the narrative of the story, the 3rd defendants Sensbey Corporation (S) Pte Ltd was incorporated on 30 August 1996 with Mizoguchi and Hafidzah being the initial directors and shareholders. Mizoguchi subsequently transferred his share to NDK or its nominee and is currently, only a paid employee earning $34 more a month than he used to at Takayama Asia.

13. Takayama Asia thus sued Mizoguchi and NDK for "[conspiring] to injure [Takayama Asia] by taking over [Takayama Asia's] business of distributing NDK's products and [setting] up [Sensbey Corporation]". Secondly, they sued Mizoguchi for breach of his fiduciary duties as a director of Takayama Asia. They also sued NDK and Sensbey Corporation for procuring or assisting Mizoguchi in the breaches of his duty as director.

14. The particulars of the two causes of action, namely the tort of conspiracy to cause economic damage and the breach of fiduciary duty by Mizoguchi over-lap to a large extent. Takayama Asia anchored its claim on the duty of a director

Version No 1: 20 Nov 2026 (00:35 hrs)

of a company to act *bona fide* and honestly in the affairs of his company. It was alleged that Mizoguchi breached this duty when he communicated with Matsumoto of NDK from June 1996 to September 1996 with the view of setting up Sensbey in competition with Takayama Asia.

15. Takayama Asia's main witness, Yamada gave evidence of what he perceived to be NDK's *mala fide* reasons for terminating the distributorship contract (the "Basic Agreement") with Takayama Japan, through which Takayama Asia gets its business. Yamada said that he was told by Matsumoto that NDK wanted to revise its credit terms from 120 days to 60 days because two companies in Japan which had become insolvent. The evidence from Yamada was that the revised terms were economically unacceptable to Takayama Japan and Takayama Asia. When they did not accept the proposed revision NDK terminated the contract. He said that the reduction of credit was a veneer of NDK's real purpose in setting up Sensbey Corporation.

16. Matsumoto denied this. It was, however, not disputed that the two companies concerned were insolvent by Japanese law, nor that Yamada was a director of these companies although he claimed to be a sleeping director.

17. I am prepared to accept that the real motive in terminating the Basic Agreement was that NDK felt that they would be financially better off without a middleman, albeit one who had served it well for 20 years. But, so long as the termination was proper NDK was perfectly entitled to do so. The legality of the termination is being litigated in Japan and I will express no further comment on it. The decision by NDK to terminate the Basic Agreement obviously required Matsumoto to be discreet in what he says to Yamada, although the latter probably feels that the word "deceitful" to be a more apt description. However,

Version No 1: 20 Nov 2026 (00:35 hrs)

the ostensible reasons and drama which Matsumoto played while ending the long relationship between NDK and Takayama Japan are not by themselves evidence of conspiracy.

18. The tort of conspiracy to cause economic damage is not one of the easiest causes of action to prove. In my view, conspiracy was wrongly pleaded in this case. Even accepting that NDK had ulterior motives in terminating its contract with Takayama Japan, there was nothing to restrain them from incorporating a subsidiary in Singapore and transferring its business to that subsidiary. Whether they may do so or not would be governed by the terms of the Basic Agreement. There can be no conspiracy unless there are at least two parties. In this case, NDK was merely asserting its right to end a bilateral contractual relationship with Takayama Japan. Mizoguchi had no significant role in NDK's decision. Indeed, it appears to me that by the time Matsumoto called for the meeting in June the decision had already been made to end the NDK-Takayama relationship. To that extent, I agree that all the reasons and concerns raised by Matsumoto to Yamada were a veneer to the real purpose.

19. As there was no proof of any contractual restraint against NDK's incorporation of Sensbey Corporation, NDK was entitled to offer Mizoguchi a job in Sensbey. Such offers are a commercial reality. There was nothing wrong with that offer. The only caveat was that Mizoguchi must not act in breach of his duties as a director of Takayama Asia. The allegations of Mizoguchi's breaches of his duties were particularized in very loose and general form and consequently, evidence was vague and inadequately adduced. Takayama Asia essentially alleged that Mizoguchi breached his duties by assisting NDK to set up Sensbey Corporation in competition with it, inducing employees and

Version No 1: 20 Nov 2026 (00:35 hrs)

customers to leave Takayama Asia and feeding NDK with confidential information.

20. It seems reasonably probable that on 13 June 1996 Matsumoto made some overtures to Mizoguchi to help NDK set up their own subsidiary in Singapore. The evidence from the plaintiffs do not permit any greater inference to be drawn. NDK was entitled to reconsider its own relationship with Takayama Japan in the same way Mizoguchi was entitled to review his employment by Takayama Asia. Any discussion merely with the view of setting up a subsidiary for NDK in Singapore in which Mizoguchi would be employed, by itself, would not sustain any of the causes of action pleaded by Takayama Asia. Mrs Thio, counsel for Takayama Asia referred extensively in her submission and reply to the 13 June meeting which she cited as "the secret meeting". No evidence was adduced as to what was discussed save the versions given by Matsumoto and Mizoguchi. Counsel submitted that they lied. Even if they did, it cannot be left to the court to then infer a specific conversation in place of their version. Such then is an example of the plaintiffs' difficulty in this case.

21. Khairil gave evidence that he saw Mizoguchi leaving the office more frequently during the June - August period, and that he saw Mizoguchi photocopying some documents but he was not sure what they were. I think that it would be wrong and unfair to draw the inferences from such vague evidence as counsel for the plaintiffs urged me to draw.

22. The only piece of evidence which need to be considered in some detail is the telefax dated 6 August 1996 by Mizoguchi to NDK. This was a three-page note prepared by Mizoguchi setting out what needed to be done to incorporate Sensbey Corporation. It dealt entirely with the setting up of that company. In

Version No 1: 20 Nov 2026 (00:35 hrs)

one sense, to discuss the setting up of a company for a third party is inconsistent with one's duty as a director. A director of a company does not normally incorporate companies for a third party. However, on the facts of this case, it appears that by the time this telefax was sent, Mizoguchi had already been given notice by Yamada that he had to leave the company. The telefax was to assist his new employer-to-be in setting up their subsidiary. This act was done in the last hours of his term as director of Takayama Asia, so although he was still a director his conduct in this instance was really to facilitate his future employer and not so much as to injure his company.

23. The decision by NDK to terminate its contract with Takayama Japan was its own and not encouraged by Mizoguchi. There can be no doubt that Mizoguchi's agreement to join them was a comfort to NDK but this falls far short of evidence of conspiracy. On the evidence, I do not think that it was Mizoguchi who initiated NDK's move to set up Sensbey Corporation. I find that the telefax of 6 August 1996 in the context of the overall evidence, to be insufficient proof of a breach of duty on the part of Mizoguchi. Even if there was a breach in that he assisted NDK in the preparation to set up Sensbey Corporation, I cannot see what damage Takayama Asia had suffered. The evidence does not support Mrs Thio's submission that Mizoguchi's conduct was not only "preparatory" but had crossed the line because he had actively competed with Takayama Asia.

24. The loss of NDK's business cannot be attributed to Mizoguchi. It was the natural consequence of NDK's termination of the Basic Agreement. If that termination was wrong, no doubt Takayama Japan would be duly compensated through its action in the Japanese court. I note that in the telefax of 6 August, Mizoguchi revealed Takayama's rental and office size to NDK, but it was done by way of giving NDK an indication of what would be required for Sensbey

Version No 1: 20 Nov 2026 (00:35 hrs)

Corporation. I cannot see what damage that information would cause to Takayama Asia.

25. There was some evidence of Mizoguchi asking some of his colleagues if they would join him in Sensbey Corporation. In some instances, the act of inducing his company's employees to leave the company is sufficient to constitute a breach of a director's duties to his company. In this case, the enquiry was not pursued with any vigour and appears to be no more than placing an offer before those employees. The role of Mizoguchi appears to have been magnified not only by counsel for the plaintiffs but also counsel for NDK and Sensbey. He submitted that it was because of Mizoguchi's dismissal from Takayama Asia that Sensbey was incorporated. It was the same token that had Mrs Thio submitting that it was because of Mizoguchi that NDK terminated its 20 years relationship with Takayama Japan. Mizoguchi was only a director earning $4,900 a month and was, no doubt, useful but not indispensable to either Takayama Asia or NDK. There was no evidence that he was such a nova star whose brilliance ignited NDK and burned out Takayama Asia.

26. Counsel for Takayama Asia submitted at length that the insolvencies of Shizouka and Tohoku and Takayama Asia's selling of Nitto products were not the real reasons for NDK's termination of its contract with Takayama Japan. That may be so, but the issue of NDK's reasons for termination is only relevant, if at all, in the litigation over the breach of the contract. For the purposes of this action before me, NDK's reasons for terminating Takayama Japan and setting up its own subsidiary in Singapore were irrelevant. I find that Takayama Asia had failed to prove that NDK and Mizoguchi acted with the predominant purpose of injuring it. I also find that there were inadequate evidence that the defendants had resorted to unlawful means to achieve the stated purpose, which

Version No 1: 20 Nov 2026 (00:35 hrs)

in this case, was the termination of the Basic Agreement and transferring the distribution rights to Sensbey Corporation. I will emphasize that the stated purpose itself was not proved to be unlawful, but the plaintiffs ought at least to show some credible evidence of unlawful means to achieve that goal.

27. For the reasons above, I find that the plaintiffs have failed to discharge the burden of proof and their claim must be dismissed.

28. Counsel for the plaintiffs applied (after submissions had been filed) to amend the statement of claim to include a claim for special damages. The statement of claim had been amended several times. The last was just after the close of the defendants' case, but before submissions were made. Counsel submitted that since damages would have to be assessed in the event that the plaintiffs succeed, the defendants would not be prejudiced by the amendment. Counsel cited the instance of the transfer of some orders which were originally placed with Takayama Asia to Sensbey Corporation. The alleged transfer took place after Mizoguchi had left Takayama Asia. The orders were placed by the customers with Takayama whilst Mizoguchi was still there. This allegation goes not only towards damage but also breach of duty. It would be wrong to allow an amendment of this nature to take place at this stage. The amendments relating to the telephone and telefax charges similarly involve the issue of liability.

29. Any party is entitled to apply at any time before judgment for an amendment of his pleadings. The absence of prejudice to the other parties concerned is a paramount consideration. If the proposed amendment would prejudice any other party the application will certainly not be allowed. If no prejudice will ensue, then the court will consider if the omission was reasonable and that it would be

Version No 1: 20 Nov 2026 (00:35 hrs)

equitable to the applicant to allow it. In this case, there is in my view, some prejudice to the defendants.

30. Furthermore, the proposed amendments are of such a nature that there was no reason why the application was not made sooner, at the latest, when the trial commenced. I would discourage the practice of making such amendments after final submissions had been made. The proposed amendments would not have affected my decision in the suit and thus, I see no compellable reason to allow it. The application to amend is accordingly dismissed.

- Sgd -

Choo Han Teck

Judicial Commissioner

Choo Han Teck JC

Thio Ying Ying, Chris Wong Wai Chong and Lim Yee Ming [Kelvin Chia Partnership] for the plaintiffs
Chelliah Ravindran and Tang Hang Wu [Cooma Lau & Loh] for the 1st defendant
Timothy Kho Thong Teck [David Lim & Partners] for the 2nd and 3rd defendants

Version No 1: 20 Nov 2026 (00:35 hrs)