IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 332

Suit 2274/1993

Between

Wyno Marine Pte Ltd (In Liquidation)

… *Plaintiff*

And

Lim Teck Cheng
Hong Lam Marine Pte Ltd
Ong Hock Hoe trading as Lee & Kong Engineering Work
Kong Fook Peng trading as Lee & Kong Engineering Work
Lee Beng Chong trading as Lee & Kong Engineering Work
Kok Lee Seng trading as Lea Seng Sub-Contractor

… *Defendant*

And

Koh Chye Heng
Ong Ah Yeo Yenna
Foong Ah Pang

… *Third Party*

GROUNDS OF DECISION

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Wyno Marine Pte Ltd (In Liquidation) v Lim Teck Cheng and Others (Koh Chye Heng and Others, Third Parties)

[1998] SGHC 332

Suit 2274/1993
Choo Han Teck JC
01 October 1998

Judgment :

Cur Adv Vult

THE PRINCIPAL PARTIES

Lim Teck Cheng and Hong Lam Marine Pte Ltd

1. Lim Teck Cheng ("Lim") who is the 1st Defendant, is the adopted son of one Lim Bok Lai. The elder Lim was the patriarch of the Hong Lam group of companies. One of these companies was the 2nd Defendant, Hong Lam Marine Pte Ltd ("Hong Lam") which was incorporated on 9 July 1981. Initially, Lim and his father owned 50% of the shareholding. The remaining shares were held by Lim's siblings. In 1987 Lim's relationship with his siblings soured and in 1988 his father gave him two alternatives. He had to sell his interest in Hong Lam or relinguish control of it to his brother. He refused either option. After some negotiations it was agreed among the family that Lim would take over all the shares in Hong Lam. Lim, however, was to surrender his shares in the

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subsidiary companies and companies on joint venture with Nedlloyds EAC and Chemoil Inc. Lim thus became the sole owner of Hong Lam. He held all but one share which was held by his nominee Wang Chong Lin.

2. The business of Hong Lam was principally that of a ship owner. It was also in the business of hiring and chartering of vessels, and the provision of services in respect of ship management and bunkering. Lim was also the main shareholder and managing director of a group of companies under the Hong Lam umbrella. These companies include Hong Lam Shipbuilding Pte Ltd. He was also the majority shareholder of the plaintiff company, Wyno Marine Pte Ltd.

Koh Chye Heng

3. After his GCE "O" Level examinations Koh Chye Heng ("Koh") took a one year course at the Singapore Vocational Institute in 1970 after which he signed up as an apprentice with Singapore Shipbuilding and Engineering Pte Ltd. He did not complete his apprenticeship because his father’s death brought about some financial hardship. His mother had to carry on his father’s coffeeshop stall. He curtailed his apprenticeship to help his mother at the stall until 1976. He then went to work as a mold-lofter. His job was to draw out the actual size of vessels on uncut steel plates. He worked with various companies (including Laminates Singapore Pte Ltd) thereafter. All those companies carried on business related to the ship building industry. Just before 1986 Koh was promoted from the post of yard supervisor to Senior Yard Supervisor in Pan United Shipping Pte Ltd. In 1986 he formed Yuta Engineering Services with some friends. This firm was subsequently incorporated as a private limited company ("Yuta") of which Koh held 30% shares. Lim’s sister Lim Bee Yong held some 50% of the shares. Yuta

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was a subcontractor in the ship repairing business and its principal client was the Hong Lam group of companies. In 1988, after Yuta was in financial difficulties Koh started a sole proprietorship called Sin Tai Marine Services with the intention of providing ship repair and ship building services to Hong Lam and Pan United. He left Sin Tai Marine Services to join Wyno Marine Pte Ltd and was appointed its managing director.

Wyno Marine Pte Ltd

4. Wyno Marine Pte Ltd ("Wyno"), the Plaintiff, was incorporated on 12 June 1989. It had a paid up share capital of only $40,000. The shareholding was initially as follows:

Lim Teck Cheng 16,800 shares
Tan Siew Kiang ("Tan") 16,000 shares
Poh Fu Teck ("Poh") 4,800 shares
Choo Eng Hua ("Choo") 2,400 shares

5. Tan is the wife of Koh. Poh was an employee of a company in the Hong Lam group. Choo was also an employee of a subsidiary in the Hong Lam group and also a cousin of Lim. Poh and Choo subsequently left Wyno and transferred their shares to Lim. This resulted in Lim holding 24,000 shares and Koh’s wife holding 16,000 shares.

6. Wyno was incorporated with the object of carrying on the business of ship repairer and builder. In its short history this company had only completed four projects, namely, the jumboisation of "Hong Lam Freedom" and the construction of "WM101", "WM102", and "WM103". It was explained at the trial that "jumboisation" meant the enlargement of existing vessels.

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Foong Ah Pang

7. Foong Ah Pang ("Foong") is a naval architect by profession. He is currently a marine consultant. He left Jurong Shipyard about 1980 and joined Laminates Singapore Pte Ltd as a yard manager and was the person in charge of Koh who was at that time an employee of Laminates. His career also took him to Pan United Shipping Pte Ltd and Atlantis Engineering and Construction as a business development manager. Atlantis was a subsidiary of Neptune Orient Lines.

8. In September 1989 Koh invited Foong to join Wyno. Foong accepted and became a director. He also became a shareholder by buying over 8,000 shares from Koh’s wife. Foong resigned as a director of Wyno in May 1990. He sold his shares to Koh when he resigned.

Yenna Ong Ah Yeo

9. Yenna Ong Ah Yeo ("Yenna") was a director and the accounts manager of Hong Lam. When Wyno was incorporated she became a director of Wyno and was in charge of Wyno’s accounts. It was admitted by Lim that Yenna was "more than a girl friend" of his. Her place in his heart and companies was taken over by one Caroline Yang sometime from the middle of 1991. Even so, Lim ensured that Yenna was paid her salary from February 1991 (when she resigned) to September 1991. Yenna Ong was named as a Third Party in this suit but the Third Party action against her was subsequently withdrawn.

Ong Hock Hoe, Kong Fook Peng and Lee Beng Chong

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10. These were the partners of a firm of sub-contractors carrying on business under the name of Lee Kong Engineering Work. They carried out sub-contract work for Wyno and were sued as constructive trustees of a sum of $332,000.00 paid by Wyno to them. They are the 3rd, 4th and 5th Defendants respectively.

Kok Lee Seng

11. He was the sole proprietor of Lea Seng Sub-Contractor and was sued as a constructive trustee of a sum of $100,000 paid by Wyno to him. He is the 6th Defendant in this action.

Wyno's Claims

12. Wyno's claims against Lim were based on breaches of the latter's common law and statutory duties as a director to Wyno. These claims included a breach of fiduciary duty, negligence, acting in conflict of interest, making secret profits for himself at the expense of Wyno, and misappropriation of company funds.

13. The foundation of the claim against Lim is that he was at all relevant times a director and majority shareholder of Wyno and was thus, obliged, at common law and the provisions of the Companies Act, to discharge his duties as director honestly and diligently.

14. Another important fact upon which Wyno rests its claims is that Lim was at the same time a director and virtual sole owner of the shares in Hong Lam. It is axiomatic that in modern commerce, gifted entrepreneurs are much sought after, and their presence are often requested in multiple boardrooms. Their duty is to give their best to the demands of their position in each and every board in which they sit. When a person sits on the board of two different companies he may

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often find himself in a position of conflict of interest; but that is an acceptable risk, to which a reasonable and honest director will, in such circumstances, take steps to ensure that no harm is caused to either company. What steps are required depends on the circumstances of each case.

15. In the instant case, Wyno's basic claim, essentially, was that Lim failed to act honestly and in good faith to its needs because he served his interest in Hong Lam at the expense of Wyno. That was the general allegation against Lim. The particulars of this allegation are set out in four specific situations. The first concerned the construction and sale of three vessels (called WM102, WM103 and WM108 respectively). The second related to a sum of $533,500 which were paid out of Wyno's account for the benefit of Lim personally. The third concerned the payment of $140,000 by a vendor to Lim as a secret commission. The fourth concerned the failure to honour Hong Lam's agreement to cover Wyno's expenses amounting to $98,086.59 in respect of the aborted construction of WM108. Lim denied all the allegations.

The Claims Relating to WM102 and WM103

16. It was not disputed that Wyno had only a paid up capital of $40,000. It had, prior to the construction of WM102 and WM103 constructed one other vessel and re-constructed another ("WM101" and "Hong Lam Freedom"). The rest of the evidence was very much in dispute.

17. Sometime in March 1990, representatives of an Indonesian company called PT Bumi discussed with Koh and Foong the prospects of Wyno building two vessels for them. PT Bumi subsequently used another company to carry on the project. That company was Asian Eternal Shipping Pte Ltd ("AES"). According

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to Koh, Yenna was present in some of the discussions. Neither Yenna nor anyone from AES gave evidence. Lim's position was that he was uninvolved as he left the business of Wyno to Koh and Foong in so far as it concerned shipbuilding, and to Yenna in so far as accounts and finance were concerned. It was submitted on Lim's behalf that AES was introduced to Foong through one Okamoto a friend of Foong's. However, the evidence showed that the business venture was eventually pursued only by Lim. The emphasis by Lim's counsel in respect of Foong's involvement ended with the cost estimate prepared by Foong on 30 March 1990. Thereafter, AES dealt with Lim directly.

18. Foong's evidence of the events at this time (early 1990) was that Wyno sought International Factors Marine (S) Pte Ltd ("IFM") as potential financiers because it had no financial means to build the vessels by itself. Lim and Yenna participated in the discussions, but subsequently, AES declined to award the contract to Wyno and preferred to give it to Hong Lam. IFM, also indicated that it would prefer to finance Hong Lam. According to Foong, Lim thereafter took over the negotiations with AES in the premises of Hong Lam.

19. On 3 April 1990, Hong Lam signed a letter of intent with AES to build WM102 for S$9,750,000 and WM103 for S$9,450,000. These prices were amended by a letter dated 5 April 1990 to S$9,900,000 and $9,600,000 respectively.

20. Sometime towards the end of April 1990 Lim told Koh and Foong that Hong Lam would be signing contracts with AES (to build and sell WM102 and WM103) and proposed that Wyno in turn contract with Hong Lam to build the vessels "at cost". Lim believed that Hong Lam's profit from the sale to AES would be about S$600,000 of which he proposed to let Hong Lam retain the

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first $400,000 and Wyno the subsequent $200,000. If the profits proved to be greater that $600,000 the balance would be shared among the shareholders of Wyno according to their shareholding.

21. Foong was not in favour of this proposal because he felt that it was not a fair deal for Wyno, and leaned too much in favour of Lim who was the majority shareholder of Wyno and owner of Hong Lam. Foong also felt that Lim's estimation of profit based on the cost estimates did not sufficiently take into account costs overrun which would expose Wyno to little or no profit.

22. When Foong found Lim to be intransigent, he resigned from Wyno on 7 May 1990 and thereafter had no further part to play in the company's affairs. I have no hesitation in accepting Foong's evidence. He impressed me as a honest witness, and a professional who had sought to discharge his duties diligently. After 7 May 1990 he had washed his hands of Wyno and seemed glad to have done so. However, unlike Koh whose bitterness towards Lim was thinly disguised, Foong gave his evidence with no hint of malice to Lim or any party.

23. Lim, on the other hand, testified that he had no part to play in the cost estimation in the construction of WM102 and WM103. He downplayed his personal involvement with AES, and his case was that Koh was the man who was the person responsible for Wyno's losses.

24. Construction of the vessel began about May 1990. On 7 June 1990 Hong Lam signed a provisional contract with AES to build and sell the vessel for S$10,140,000. On 14 June 1990 Hong Lam and AES signed a shipbuilding contract to build the said vessel for S$9,990,000. On 5 October 1990 Wyno signed a shipbuilding contract with Hong Lam for the construction of WM102

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for S$9,400,000. The vessel was completed by Wyno and delivered to Hong Lam in June 1991. The timing of these contracts is significant. It showed that at the very least, Lim knew what Hong Lam was getting from AES when Hong Lam signed its contract with Wyno. The additional twist was that Lim had sanctioned the commencement of work way back in May even before Hong Lam's contract with AES. In the circumstances, the timing of the events sits better with the evidence of Foong and Koh, and not at all with Lim's.

25. I accept the evidence of Seng Hwee Cheng that Wyno incurred an actual cost of S$9,790,825.97. The contract price with Hong Lam was S$9,400,000. Wyno maintained that by reason of Lim's manipulation and control of the two companies (Hong Lam and Wyno) the sale price of S$9,400,000 was a gross undervalue and thus, when a director procured the sale of a company's assets at an undervalue, it amounts to a misapplication of the company's assets and thereby breached his duties of fidelity. Secondly, Wyno alleged that Lim acted negligently and in breach of his duties as director in, inter alia, failing to obtain any reliable estimate of the cost involved in building the vessels, or take steps to ensure that each contract price was not only greater than the corresponding construction cost but would also give Wyno a reasonable profit.

26. I revert to the evidence of Seng Hwee Cheng. She was the accounts clerk of Wyno who reported to Yenna Ong. She swore an affidavit of evidence-in-chief on behalf of Wyno but was not called as a witness. Lim decided to call her as his witness but his counsel, Mr Thillagaratnam refused to use her affidavit on the ground that it was not prepared by him. Leave was granted for Mr Thillagaratnam to adduce evidence-in-chief orally. When she was cross-examined by Wyno's counsel, she was asked to affirm that what she had stated in her affidavit was true. Mr Thillagaratnam objected and argued that he be

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allowed to cross-examine her on her affidavit. I disallowed the application. She was called as a defence witness. She had not turned hostile during her examination-in-chief. She was being cross-examined on a previous statement made by her which her own counsel was privy to but declined to use. Counsel for the plaintiffs was, therefore, entitled to admit the affidavit of that witness, and Mr Thillagaratnam was certainly not entitled to cross-examine her on it. He could, of course, re-examine her.

27. Much of Lim's evidence was directed towards showing that it was Koh and Foong who prepared the costing of the two vessels. He said that he had neither the skill or knowledge for this exercise. He thus relied entirely on Koh and Foong. Koh's evidence was that his main contribution related to the cost of labour. Foong's evidence was that after 7 May 1990 had no further part to play and that the cost estimates produced and used after that date bore no resemblance to the one that he was working on. For example, the vessel Foong worked on was designed by GB Marine. The one that was eventually constructed was designed by Kenton Marine. I find that the evidence justified Foong's stand that these were two different vessels. It would be impractical and unwise if Lim were to rely on any cost estimate based on the GB design. On the evidence, I find that the initial cost estimates were prepared with contributions from Koh, Foong, Lim and probably Yenna. These estimates were based on GB Marine's design. By the time Foong left, Lim had already seen the prospects of making big profits for himself through Hong Lam and he decided on the contract price of S$9,400,000 with Wyno with no consideration of any realistic cost estimates. I find that in this regard, he took a figure which was close enough to give a semblance of a genuine market price, but was not based on a proper evaluation of the elements of cost and profit. I find that this was a wilful act on the part of Lim, and not a case of mere negligence. He may not have carried out

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the exercise of costing the vessel personally, but he took the initial estimates of Foong and Koh because it was convenient and suitably below Hong Lam's contract price with AES. The sole object was to ensure that Hong Lam made a profit from its contracts with AES. Lim protracted the trial in his effort to draw attention away from this fact, but it is an inescapable fact.

28. A comparison of the respective contracts between Wyno and Hong Lam, and Hong Lam and AES will show that Hong Lam had made a profit of over S$3,000,000. Lim maintained throughout his cross-examination that Hong Lam did not make such a huge profit. He testified that although the contract for WM103 specified the contract price of S$13,120,000 Hong Lam only received about $10,000,000. There was no record of the variation in price and at one point, Lim explained the reduction as having arisen from various changes to the construction of the vessel. I find his account to be totally unbelievable and can only conclude that Hong Lam received the contract price for WM102 and WM103 in full from AES. All documents were in the possession of Hong Lam and it would have been within their means to produce a proper audit of their accounts concerning the contract payments. This was not done. On another instance, under cross-examination, Lim stated that the contract price with AES was inflated in order to deceive IFM. That might well be so, and it underlines the difficulty the court had in finding the truth in this witness.

29. The evidence indicates very clearly that Lim had used his position to reap a windfall profit for Hong Lam (and thus himself personally) at the expense of Wyno to which he owed a duty as its director to act honestly and in good faith in respect of the construction of WM102 and WM103 and their sale by Wyno to Hong Lam. There was no evidence that Lim had openly declared to Koh or Foong the profit Hong Lam was making from AES. I am inclined to accept

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Koh's evidence that he did not have any knowledge of the AES contracts. He might have believed that AES was the end-buyer, but there was inadequate evidence to suggest that he knew the true nature of the AES contracts. There was certainly no evidence that he had consented to Hong Lam making the profits that it did. This was underlined by the complete omission of any written documentation or resolution from the directors of Wyno. In circumstances such as those which Lim found himself in, any reasonable director ought to have made a full disclosure of the AES contracts.

30. Koh's wife was a minority shareholder in Wyno. I do not think that there would be any reason for Koh to accept a situation where Wyno would build vessels to be sold to Hong Lam at cost so that Hong Lam could resell them to a third party with huge profits to itself - profits in which Koh had no share at all. Koh's evidence-in-chief was that even though Wyno was to build the vessel WM102 at cost, there would still be a profit of $200,000 to it. This was, in my view, a lure by Lim for Koh. Koh believed that he could still make some money on the construction of WM102 based on the cost estimates. On hindsight he was wrong. Lim, however, kept the contracts between Hong Lam and AES to himself. Although Koh was obviously bitter over his experience with Lim, I found him to be a much more reliable witness than Lim.

31. What was more telling was the evidence of Foong in paragraph 25 to 27 of his affidavit of evidence-in-chief which very likely carried the true version. Foong's evidence was that sometime in late April or early May 1990, Lim told Koh and himself that Hong Lam proposed to sign a shipbuilding contract with AES and Wyno would in turn sign a shipbuilding contract with Hong Lam to build the vessel at cost. However, the first $400,000 profit would go to Hong Lam and the next $200,000 to Wyno. If there were any left thereafter it would

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be shared among the directors based on their shareholding. Foong was not happy with these proposals and consulted Koh, who appeared from his own evidence, to be content to accept the chance of a $200,000 profit to Wyno.

32. The evidence showed that Lim had full control of the two companies (Wyno and Hong Lam) and he used Wyno as a means to his personal enrichment. Koh was no doubt a shareholder and co-director, but like Wyno, he was dependent on Lim. Lim, it is fair to say, was not dependent on Koh or Wyno for a livelihood. He had the on-going business of his Hong Lam group of companies. Koh and Foong left their jobs with the hope of making it with Wyno. It was all they had at that time. Foong eventually saw the direction Lim was herding Wyno and sensibly left the company. Koh stayed on with hope only to rue subsequently, the folly of his decision. Lim's conduct in respect of the claims relating to the sum of $533,500 and secret commission of $140,000 was relevant in determining whether he had acted bona fide as a director to Wyno. In both instances he had been found wanting.

33. A director is not obliged to acquire any particular business for the company. That is not the law. The law as set out in the various speeches of the Law Lords in *Regal Hastings Ltd v Gulliver [1942] 1 All ER 378*, is simply that a director of a company is a fiduciary to that company and must account to the latter for any profit which he made by virtue of his fiduciary position. This case before me was a classic *Regal Hastings* situation. The buyer (AES) did not want to deal with a small company (Wyno). IFM did not want to finance the same small company. Lim, a director of Wyno saw the opportunity for himself and purchased the vessels to re-sell to AES. Lim was therefore obliged to account for any profit he makes out of the sale of the vessels even though the profit was made ostensibly by Hong Lam. This is a case in which I have no difficulty

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looking behind the corporate veil of Hong Lam. Lim owned every share beneficially in Hong Lam and made all its decisions. The corporate veil in this case was so thin that it was virtually transparent.

34. For the foregoing reasons, I grant an order in terms of prayer 1(a)(ii) and (iii) of the plaintiffs' claim.

The Misappropriation of $533,500

35. This part of Wyno's claim concerned several instances in which money belonging to Wyno were deposited into Hong Lam's bank account and recorded in its books as a loan to it (Hong Lam) from Lim. This was not denied by Lim. Lim was prosecuted in relation to two of the instances involving the sums of $282,000 and $101,500. He pleaded guilty to the former and the latter was taken into account. The statement of facts relating to the charge in respect of the $282,000 was admitted into evidence in the trial before me. There were some references to Koh and Yenna in the said Statement of Facts, but I am mindful that Koh and Yenna were not privy to the drafting of that document and did not have the opportunity of rebuttal.

36. The importance of that statement lies in Lim's admission that in order to deceive IFM into believing that he had fulfilled his obligations to them, namely his personal obligation to inject $500,000 capital into Hong Lam, he paid the sums in question into Hong Lam's account and recorded the payment as a loan by him to the company.

37. The $533,500 comprised of transactions involving $282,000, $50,000, $101,500 and $100,000. I shall refer to these transactions briefly. On 20 June 1990 Yenna issued two purchase orders to Lee & Kong Engineering Work ("Lee

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& Kong") (firm name of the 3rd, 4th and 5th Defendants). On the same day Lee & Kong issued invoices for a 20% downpayment in confirmation of the purchase orders. This came to a sum of $282,000. On 22 June 1990 Yenna raised a payment voucher for this amount and a cheque was subsequently issued by Wyno to Lee & Kong. The transaction was falsely recorded in Wyno's books as payment towards the construction costs of WM102. Lee & Kong issued a cash cheque on 27 June for the same amount and handed it to Yenna who deposited the cheque into Hong Lam's account at the Jurong Branch of the DBS Bank. The evidence of Ong Hock Hoe ("Ong")(3rd Defendant) which I accept was that Lim was present when Yenna deposited the cheque. Lim also admitted under cross-examination that he was present at the bank. The payment into Hong Lam's account was recorded as a loan by Lim to Hong Lam.

38. On 8 May 1990, Wyno issued a purchase order to Lee & Kong for the purchase of a flowboom including a pedestal for $50,000. The equipment was not delivered but payment of $50,000 was made on 16 May 1990 but subsequently repaid by cheque which Yenna deposited into Hong Lam's account and credited it as a loan by Lim to Hong Lam.

39. On 20 June 1990 a purchase order was issued to Lea Seng Sub-contractor ("Lea Seng" - the 6th Defendant) to paint a vessel for $1,015,000. A sum of $101,500 being 10% was payable upon confirmation of the contract. Lea Seng issued an invoice for this 10% on the same day and Wyno paid them the said amount on 22 June 1990. This sum of $101,500 was refunded by Lea Seng in two cheques dated 25 June and 26 June 1990 for $50,000 and $51,500 respectively but the money was not paid into Wyno's account. It was again credited to Hong Lam and recorded as a loan by Lim.

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40. Finally, on 27 February 1990 a purchase order was issued to Lea Seng to carry out certain works on WM101. The total cost of the work came to $213,000. However, in November 1990 Lim signed a letter on behalf of Wyno to Lea Seng stating that some of the materials in the said purchase order had in fact been supplied by Wyno itself and, Lea Seng was therefore, asked to issue a credit note for $100,000 in respect of those materials. Five days after Lim's letter, Lea Seng issued the credit note as requested. This credit note was subsequently cancelled by Lea Seng and it transpired that they had earlier on in May, issued three cash cheques for $25,000, $35,000 and $40,000 respectively and given to Yenna to reimburse Wyno, but the money went into Hong Lam's account and again recorded as a loan from Lim.

41. Lim was clearly caught out by the documentary evidence and his position was consequently untenable. His effort in court to deflect the indictment of these transactions was based simply on denial, evasion, and laying blame on Koh and Yenna. It all began quite simply from his personal obligation to IFM when the latter granted Hong Lam financing up to $4.2m. He was required to inject up to $500,000 personally into Hong Lam as one of the contractual requirements of the financing facility. The "inflated invoices" as he and his counsel referred to were the means whereby he injected the $500,000 into Hong Lam, but these monies did not belong to him. They belonged to Wyno and were wilfully siphoned out for a wrongful purpose.

42. In one of his desperate answers under cross-examination, Lim said in response to the question, "You sign whatever agreements put in front of you?"

> A: "No. Only if it was put by my accountant. If it is a contract then I ask whoever is in charge of the contract. If he says everything is all right I will sign."

43. Lim ignored the fact that his accountant was Yenna. She was a young, inexperienced accountant who was also at that time his girlfriend. He went on to say that: "Yenna Ong tells me, "Today we are going to go to a lawyer's office to sign the loan agreement with IFM. Everything is in order." She says all the terms have been agreed and I will just sign the documents. I cannot answer the question directly. That's how I sign a loan agreement. Not only this agreement - all my agreements." It is impossible to believe that Lim did not know how he was to discharge the IFM condition of capital injection.

44. In respect of the deposit of Lee & Kong's cheque for $282,000 (for fictitious invoices of $240,000 and $42,000 respectively) Lim denied that he was aware what that money was for, even though he was present at the bank when the cheque was deposited.

45. To counsel's pertinent question whether he knew that all these monies were credited into Hong Lam's account, Lim vacillated to the extent that it is impossible to ascertain what his stand was. At times he denied that he knew that the money went into Hong Lam. At times he said that he probably knew (page 1000 of Notes of Evidence).

46. The final submission of his counsel on his behalf recited as follows:

> "Lim was also not aware, however, that Yenna had credited these amounts as his loan to Hong Lam in the account books of Hong Lam. Lim could not have known how it was returned because firstly, Lim did not even know about the mechanics of these "inflated invoices" to be able to check on it. Secondly, cheques for large sums were being signed by Lim at those material times for payment to Wyno for the purpose of assets and payment of progressive payments for the projects at hand."

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This contradicted Lim's own evidence (page 969 of the Notes of Evidence) that he was told by Yenna that the scheme for the transfer of funds would be as they had done for WM101, namely "using Koh's contractors to inflate the invoices and then somehow give the money back to Hong Lam and Hong Lam to pay to Wyno" (page 966 of the Notes of Evidence). Apart from the contradiction, I find that the above submission by Lim's counsel to be too incredible to accept. If it was true, then Yenna must be the real mastermind; but who was she, other tan Lim's paramour and assistant? It was obvious that Yenna would act only on Lim's instructions.

47. The expert accountant, Mr Kaka Singh, called on behalf of Lim was obliged to agree that those transactions were improper. He said that the simple and honest way to endorse them was to record in Wyno's books a loan to Lim, and correspondingly in Hong Lam's books as a loan by Lim to Hong Lam. I agree with Wyno's counsel that even this would not have truly satisfied the conditions of the contract with IFM. The records were extremely relevant to the issue of whether Lim had acted honestly in the discharge of his duties as a director of Wyno. The failure to record his debt to Wyno, *ipso facto*, concealed Wyno's rights to the money.

48. It was disingenuous to claim, when the game was up, that the transactions were really loans by Wyno to Hong Lam. None of the evidence supported this argument. I find Lim's credibility as a witness to be extremely poor, and I cannot put it any milder than that. In so far as the actual participation in obtaining the money from the sub-contractors was concerned, the evidence implicated Yenna who issued the purchase orders. Her conduct was tantamount to having the thumbprint of Lim himself on the transaction.

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49. The 6th defendant, Kok Lee Seng ("Kok"), was represented at the trial by counsel representing Lim and Hong Lam. Kok filed an affidavit of evidence-in-chief to say that it was Koh and Yenna who asked him to pay the $101,500 to Wyno. Assessing Kok's evidence in the light of the other evidence, including those of the 3rd, 4th and 5th defendants, I am very hesitant in accepting his evidence. I am not able to rely on this witness.

50. In contrast, I find Ong to be more forthright. His evidence concerning the moment when he handed the cheque for $282,000 to Lim at the Jurong branch of the DBS Bank is extremely telling. He recalled that when he arrived at the bank he saw Poh Fu Teck, Yenna Ong, Choo Eng Hua, Lim and the driver there. This entourage was at the material times the henchmen of Lim.

51. For the foregoing reasons I grant an order in terms of prayers 3 and 4 of the plaintiffs' claim.

Secret Commission of $140,000

52. This arose from the purchase of the engines for WM102 and WM103 by Hong Lam on behalf of Wyno. The vendor was a Japanese company called Iwatani. The total cost of the engines was 12,000,000. Lim received a sum of 6,000,000 from Iwatani. Lim claimed that this was a commission due to him personally. 6,000,000 was about S$154,800 at the material time. However, the plaintiffs have chosen an exchange rate which gives the figure in their claim as S$140,000.

53. Lim said that he gave S$78,000 from it to Wang Chong Lin as payment for a loan from Wang to him. The commission from the second engine amounting to S$76,800 was paid to Caroline Yang for her education in London. She was

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reading law. Caroline was subsequently to replace Yenna in the dual roles of paramour and financial controller to Lim.

54. The undisputed facts were that Lim took the two sums amounting to S$154,000 from Iwatani and used them for his personal affairs. These monies came from Iwatani from whom Hong Lam had purchased two engines on behalf of Wyno. No one else in Wyno was aware of those payments to Lim.

55. Lim's defence was simply that Hong Lam paid for the engines and since Iwatani decided to give a discount on the price by way of a rebate, the money refunded should rightly belong to Hong Lam and it was of no concern to Wyno that Lim used the money to pay Wang and Caroline. If that was the case, it did not explain the absence of any accounting record between Hong Lam and Wyno in respect of the purchase price of the engines. The truth was painfully extracted from Lim under cross-examination when it should have been painlessly and faithfully documented in the account books.

56. In the course of the trial, Lim's defence had not been clear as to the nature of the Iwatani payment. When the court sought clarification from Lim's counsel as to whether it was a discount or rebate counsel evaded the question and twice declined to render any assistance (pages 743 to 744, Notes of Evidence). To an earlier question by the court whether the defendant was departing from his earlier position that it was a commission, counsel replied, "No, we do not say it was a commission". The matter was subsequently adjourned, part-heard, and when it resumed about ten months later, Lim, under cross-examination was asked: "So to give a discount they have to keep the quoted price and call the payment a commission?" Lim replied, "Not for this case. In this case it is a commission".

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57. The nature of the payment was important only because it had a bearing on the legitimacy of Lim's claim to it. If it was a discount or rebate, the benefit must be credited to Wyno. Hence, Lim saw that it was best to call it a commission so that it could sit better with his argument that it was a personal payment which did not concern Wyno.

58. One important fact which Lim admitted was that the money went directly from Iwatani to Wang and Caroline. Wang who filed an affidavit to say that he had loaned about $120,000 to Lim and it was repaid with the Iwatani commission. Lim, under cross-examination said that it was he who borrowed about $40,000 to $50,000 from Wang. To account for the difference between $78,000 and the $40,000 to $50,000 Lim said that it was loaned by him to Wang to enable Wang to purchase a car. Wang was not called to be cross-examined. The cross-examination of Lim on the $140,000 payment from Iwatani underlined Lim's performance as an evasive and unreliable witness. I am unable to accept his evidence at all. Lim said that he asked Iwatani to pay directly to Wang and Caroline because at that time Hong Lam was tight for cash and he was afraid that if the money was paid into Hong Lam he might not get it out. I find this proposition to be incredible. If that was true, then I find it inexplicable that Lim would lend money from a cash-strapped Hong Lam to his friend Wang to buy a car. There was no record of such a loan anywhere in Hong Lam's books. It was submitted on Lim's behalf that Wyno had no claim to these commissions because it was not the purchaser and thus no right to any commission. That submission missed the point by a wide margin. The issue was the conduct of Lim as a director of Wyno in the negotiation for the purchase of the engines. His non-disclosure of the personal gain from the two payments were clear breaches of his fiduciary duty to Wyno. Even if it was true that the engines were purchased by Hong Lam and the commission was a rebate, the benefit of that

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ought to be given to Wyno on whose behalf Hong Lam purportedly bought the engines.

59. For the foregoing reasons I grant an order in terms of prayer 1(c) of the plaintiffs' claim.

Expenses of $98,086.59

60. The plaintiffs' claim for $98,086.59 is based on the averment that Lim and/or the plaintiffs had agreed to bear all the expenses incurred in respect of the construction of WM108 and WM109. The plaintiffs claim that they had to pay Kenton-Marine a sum of $32,000 as design fees, and a sum of $66,086.59 to various suppliers for the initial work done in respect of WM108.

61. It was subsequently conceded by counsel that the Kenton-Marine bill was not in fact paid. In respect of the $66,086.59, the plaintiffs were unable to produce supporting documents to satisfy me that the items set out in PT Hong's affidavit were incurred. Consequently, this part of the plaintiffs' claim must fail.

Hong Lam's Counter-claim

62. Hong Lam was the 2nd defendant in this suit but the plaintiffs discontinued its claim, but Hong Lam's counter-claim remained. It was a claim based on the same items filed by it in its proof of debt in Motion No. 35 of 1995. The claim is for $1,178,825.00. These claims were based on debit notes issued by Hong Lam in November 1991.

63. The only witness from Hong Lam was Lim. However, he admitted under cross-examination that he knew nothing about the proof of debt because he left

it to his accountant. He said that he had his accountant available to answer the questions. The accountant, presumably Caroline Yang, was not called to give evidence. Caroline Yang took over as Hong Lam's accountant in place of Yenna Ong in mid 1991. It is not established how much of the evidence she was able to prove. In a counter-claim, the onus of proof is on the defendant as if he was the plaintiff. In this respect, Hong Lam offered no evidence and the counter-claim cannot possibly succeed.

64. Mr Shanmugam SC, however, submitted that even on the merits, the claims were insupportable. I agree with that submission. The debit notes were issued after Wyno had become insolvent and some of these notes sought to recover financing charges imposed by IFM on Hong Lam. This was an attempt to foist Hong Lam's liabilities onto a sinking Wyno. Lim's own accounts clerk Tay Lay Keng testified that the financing costs were originally taken up in Hong Lam's books as costs to Hong Lam. She was unable to say why he entries were reversed some ten months later. There was no basis for Wyno to bear financing charges incurred by Hong Lam. No such agreement was pleaded nor evidence adduced to establish that there was such an agreement whether express or implied.

65. So far as Hong Lam's claim in respect of $90,000 being the alleged liquidated damages is concerned, it was clearly without basis since the liquidated damages relate to an alleged late delivery of WM101. There was no evidence of late delivery and this item was not proved.

66. Similarly, I find no evidence in support of the claim that Hong Lam paid $65,125.93 on behalf of Wyno in the construction of WM101.

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67. The culmination of the wanton claims lay in the claim for $4,000 advanced by a third party company called Hong Lam Bunkering Pte Ltd. Hong Lam now claims that its books had been adjusted vis--vis Hong Lam Bunkering so that it is duly acknowledged in its books as a loan by Hong Lam to Wyno. This hardly gives Hong Lam Marine Pte Ltd any right to the money. If Hong Lam had directed Hong Lam Bunkering to make the loan it can direct it to recover the same.

68. In the premises the 2nd defendants' counter-claim against the plaintiffs is dismissed.

The Third Party Claims

69. Lim and Hong Lam took out Third Party proceedings against Koh and Foong on the ground that if they were found liable to the plaintiffs then Koh and Foong were obliged to indemnify them to the extent that they are found liable.

70. I have found that the plaintiffs had succeeded in its claims against Lim on the ground of Lim's wilful breach of duty as a director. I have also found that Lim orchestrated every move in the various means he used Wyno to enrich himself. I have found that neither Koh nor Foong had gained any benefit at the expense of Wyno. I also find that Foong was totally unblemished in his conduct so far as Wyno's affairs were concerned. Koh's only blemish was his participation in the transfer of the $533,500 into Hong Lam's account, but I do not think that he was the mastermind and I do not think that he knew that it was intended to enrich Lim personally. I am prepared to accept his evidence that he believed that the money would be returned to Wyno. I should add here, that

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though the accounting entries were "rectified" much later it was obviously done by Lim to save himself from being exposed to a serious criminal charge.

71. Hence, on the evidence that I have found, there is no basis to allow the Third Party claim. Lim was the sole beneficiary of his breaches of duty as a director. To allow his Third Party claim would result in Lim retaining his unjust enrichment at the expense of Koh and Foong, who did not benefit from Lim's misconduct, and thus make two innocent persons pay for the sins of the real transgressor. Counsel for Hong Lam submitted a vigorous argument in respect of what he thought was an issue in illegality. It was not. It was far simpler and straight-forward. A court of equity will not lend its hand to help a delinquent director recover from a third party, damages or costs which he was obliged to pay as a result of his own breach of duty. The Third Party claim is, therefore dismissed.

- Sgd -

Choo Han Teck

Judicial Commissioner

Choo Han Teck JC

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K Shanmugam SC and Ashok Kumar [Allen & Gledhill] for the plaintiffs

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