John While Springs (S) Pte Ltd and Another v Goh Sai Chuah Justin and Others [2004] SGHC 76

Case Number : Suit 848/2000, NA 81/2003

Decision Date : 12 April 2004

Tribunal/Court : High Court

Coram : Joyce Low Wei Lin AR

Counsel Name(s) : Sim Kwan Kiat and Mark Cheng (Rajah and Tann) for plaintiffs; N Sreenivasan and Collin Choo (Straits Law Practice LLC) for defendants

Parties : John While Springs (S) Pte Ltd; Segno Precision Pte Ltd — Goh Sai Chuah Justin; Cheong Shze Fun; Aligent Precision Pte Ltd; Lee Choon Boy; Lit Yoke Seng; Ng Wan Wha Eddy; Tan Lay Chon Michelle; Lim Poh Gok Sharon; Chew Kean Guan; Koh Kok Eng

12 April 2004

Grounds of Decision.

Assistant Registrar Joyce Low:

Background Facts

1 The first plaintiff, John While Springs (S) Pte Ltd ('JWS'), manufactures springs for consumer equipment. The second plaintiff, Segno Precision Pte Ltd ('Segno'), a subsidiary of JWS was formed in 1992 to complement JWS's business. It is in the business of metal stamping and multi-slide production for professional, precision and scientific equipment. Prior to their suspension from duties, Goh Sai Chuah Justin ('Goh'), the first defendant and Cheong Shze Fun ('Cheong'), the second defendant were the *de facto* managing director of JWS and the general manager of Segno respectively. Both were key personnel that had been entrusted with running the plaintiffs.

2 In the beginning of 2000, Rhonda Willson ('Rhonda') became the new shareholder of a company that had an interest in the Minstar Singapore Pte Ltd ('Minstar'), the majority shareholder of JWS. There were clashes between her and Goh and Cheong due to personality differences. Sometime in May or June 2000, Goh and Cheong concluded that they no longer had secure futures in JWS and Segno respectively. In June 2000, they set up the third defendant, Aligent Precision Pte Ltd ('Aligent'), a competing business, while still in the employ of the plaintiffs. They also induced the sixth defendant, Ng Wan Wha Eddy ('Ng'), who was then a production manager with Segno to join Aligent. Ng resigned from Segno on 5 July 2000 and joined Aligent as their production manager. None of these activities were publicised until September 2000 after Rhonda hired Kroll Asia (S) Pte Ltd ('Kroll') to investigate the affairs of the plaintiffs pursuant to a tip-off that she received.

3 The plaintiffs commenced the present proceedings against Goh and Cheong for breach of fiduciary duties. They also sued Aligent, Ng and six other defendants, concurrently, for knowingly or intentionally assisting Goh and Cheong in the breaches of their fiduciary duties. On 14 March 2001, a consent judgment was entered into against Goh, Cheong, Aligent and Ng (collectively referred to as 'the defendants'). Goh and Cheong admitted, in the Statement of Facts annexed to the judgment, that they breached their fiduciary duties to the plaintiffs by: first, being actively involved in Aligent which was intended to be in direct competition with the plaintiffs; secondly, inducing Ng to join Aligent; thirdly, procuring or attempting to procure certain of the plaintiffs' existing customers for the benefit of themselves and Aligent; and lastly, using the plaintiffs' premises and equipment to advance

Aligent's interests. They were ordered to pay damages to be assessed to the plaintiffs for all damages caused by their breaches of fiduciary duties. Similarly, Aligent and Ng were ordered to pay damages to be assessed to the plaintiffs for all damages caused by their knowing or intentional assistance of Goh and Cheong's breaches of fiduciary duties. The plaintiffs discontinued their action against the rest of the other six defendants.

4 At the hearing for the assessment of damages, the plaintiffs made the following claims for:

(a) expenses incurred for investigations;

(b) salaries and bonuses that were allegedly wrongly paid out to Goh, Cheong and Ng;

(c) loss of sales and profits from October 2000 to March 2001; and

(d) loss of corporate opportunities.

Principles governing assessment of damages for breach of fiduciary duties

5 At the outset, it is necessary to clarify the principles governing the assessment of damages for breach of fiduciary duties. The defendants contended that it is trite law that the burden of proof lies on the claimant to prove his damages as in any other claim for damages. On the other hand, the plaintiffs submitted that the burden of proof on a plaintiff is simply to prove that his loss is linked to the defendant's breach of fiduciary duties whereupon the burden then shifts to the defendant to show that the plaintiff would have suffered the loss even if he had not breached his duties. They relied on the decision of Singapore High Court in *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [2000] 2 SLR 501 at 509, where Selvam J quoted the following judgment of Street J in *Re Dawson* [1966] NSWLR 211:

> The test of liability is whether the loss would have been if there had been no breach. In other words, the fiduciary can escape liability only if he can demonstrate that the loss or suffering would have happened even if there had been no breach.

6 I disagree with the plaintiffs that this statement represents the law in Singapore because such an approach had been expressly rejected by the Court of Appeal of Singapore in the case of *Ohm Pacific Sdn Bhd v Ng Jwee Cheng Doreen* [1994] 2 SLR 576 which had not been cited in *Kumagai-Zenecon*. In *Ohm Pacific*, LP Thean JA stated, at p 586, that there was no such principle that the burden of proof shifts to a defaulting fiduciary to show that the loss did not result from the breach and that it was necessary for the claimant to prove a causal connection between the breach of duty and the alleged loss.

7 The plaintiffs have attempted to draw a distinction between the assessment of damages at common law and in equity by submitting that the usual inquiries into the issues of causation and remoteness are not applicable in a Court of Equity. This approach is not consistent with the judgment in *Ohm Pacific* where it was held that the claimant must prove causation. In addition, I do not think that it is useful to over-emphasize the differences at common law and in equity in assessing damages and disregard the applicable common principles. I can do no better than to reproduce Lord Browne-Wilkinson's treatment of this issue in *Target Holdings Ltd v Redfern* [1996] 1 AC 421 at 432:

> At common law, there are two principles fundamental to the award of damages. First that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to

be put "in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation": *Livingstone v Rawyard Coal Co* (1880) 5 AC 25 39 *per* Lord Blackburn. Although, as will appear, in many ways equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as at common law. Under both systems, liability is fault-based. The defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damages caused by such wrong. He is not responsible for damages not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, as least ostensibly, from those applicable at common law. But the principles underlying both systems are the same.

8 In assessing the various heads of claim below, I bear in mind that the plaintiffs had to prove the causal connection between the breach of fiduciary duties by the defendants and their alleged losses.

Expenses incurred for investigations

9 Under this head of claim, the plaintiffs contended that they are entitled to a sum of $271,004.71, being the amount they spent hiring Kroll to investigate the defendants' misdeeds. The plaintiffs' witness, Rhonda, gave evidence that she hired Kroll to conduct a forensic audit of the computer workstations located in the office of JWS's factory. Through Kroll, she also instructed Gideon Network & Investigation Services Pte Ltd ('Gideon') to conduct surveillance on Aligent's premises. As a result of these investigations, the plaintiffs obtained evidence of the defendants' misdeeds. Rhonda produced five invoices by Kroll which were charged to Minstar. She testified that Minstar paid on those invoices on behalf of the plaintiffs and the sum incurred was treated as a long-term loan from Minstar to the plaintiffs. Rhonda relied on JWS's audited financial statements for the year ending 30 June 2002 which evidenced that there was a long term loan of $742,000 payable by JWS to Minstar.

10 The defendants raised a preliminary objection that the plaintiffs are estopped from claiming these expenses. This was because the plaintiffs did not claim them as disbursements during taxation although investigation expenses formed a proper head of claim of disbursement. This argument was not pursued seriously by the defendants who did not cite any authorities to support their contention that investigation expenses *must* be claimed as disbursements during taxation. In addition, they made only a bare assertion of estoppel but did not establish that any of the elements of estoppel have been made out in the present case. Costs incurred by plaintiffs in investigating defendants have previously been awarded to plaintiffs as damages (see *Alberta Inv Faraci* 2000 Alta DJ LEXIS 166 and *British Motor Trade Association v Salvadori and Others* [1949] 1 Ch 556). Such expenses result from the defendants' breach of fiduciary duties and accordingly, if proven, they are claimable as damages.

11 I turn to consider the crux of the defendants' argument, *ie* that there was insufficient evidence to prove that the plaintiffs suffered losses through hiring Kroll. The defendants took issue with Kroll's invoices on two grounds. First, that the invoices did not provide a breakdown of the work done to prove that the costs incurred were due to the investigations into the defendants' misdeeds. Secondly, that the invoices were not addressed to the plaintiffs but Minstar.

12 During her cross-examination, Rhonda testified that she had "no idea" how she was charged by Kroll. She admitted that Kroll was asked to do other work that was unrelated to the investigation of the defendants, *ie* for providing bodyguards for her and investigating other employees in JWS. It was not disputed that Kroll charged on a lump sum basis and that their invoices would have included such other services. At the hearing, Mr Sreenivasan, counsel for the defendants, raised the issue that

the invoices do not contain any particulars as to the breakdown of the work done and there was no proof as to the amount incurred by the plaintiffs for the investigations of the defendants. The plaintiffs were, however, contented to rely only on Rhonda's evidence and Kroll's invoices. They did not adduce Kroll's letter of engagement, any of their reports or call anyone from Kroll to evidence their claim that all of Kroll's charges were incurred to investigate the defendants. In the circumstances, I find that there was insufficient evidence as to the amount that Kroll charged for the investigation of the defendants and the losses suffered by the plaintiffs for such investigations. Accordingly, the plaintiffs' claim under this head must fail.

Claim for the disgorgement of salaries and bonuses

13 The plaintiffs contended that they were entitled to be reimbursed for the salaries and bonuses paid out to Goh and Cheong from March 2000 to October 2000. This amounted to a sum of $177,600 for Goh and $65,372 for Cheong. As for Ng, the plaintiffs claimed a sum of $31,632 being the sum he was paid when he was serving out his notice period from July 2000 to September 2000. The plaintiffs have two separate but related bases for their claim for reimbursement. First, that during the material times, the defendants had diverted their time and allegiance to Aligent and had therefore neglected their duties as employees of the plaintiffs. Secondly, the plaintiffs claimed that they would not have paid the defendants had they known that they were in breach of their fiduciary duties and consequently, they should be entitled to be reimbursed for the sums paid out.

14 Aligent was registered in June 2000. Goh testified that he did not actively start procuring business for Aligent until September or October 2000 after Rhonda came to know about the company. Both Goh and Cheong admitted to discussing the business of Aligent from May 2000. However, they denied that they neglected their duties with the plaintiffs as a result of their breaches of fiduciary duties. They pointed to the record sales that the plaintiffs enjoyed during the material period and contended that such results were impossible if they, as key personnel of the plaintiffs, had neglected their duties.

15 The plaintiffs did not dispute that they enjoyed record sales during the period of January to October 2000 and that all their sales orders were fulfilled. Their case was that they could have enjoyed an even larger profit had their employees not been distracted by Aligent. I accept the argument that the mere fact that plaintiffs were enjoying record sales and fulfilling all their production orders did not automatically mean that the defendants put in their all as employees of the plaintiffs. Nevertheless, the burden was on the plaintiffs to establish that there had been such a neglect of duties by Goh, Cheong and Ng.

16 In my judgment, the plaintiffs failed to prove such neglect. They relied on the surveillance reports by Gideon which showed Goh, Cheong and Ng at Aligent's premises sometime in August 2000. The reports had been exhibited in the AEIC filed by Chan Yew Wah for the main action on liability. I did not rely on this evidence as the plaintiffs have refused to call Chan as a witness at the assessment hearing. His evidence was untested as the parties settled the main action. There was no other evidence to prove that Cheong and Ng had neglected their duties as employees of the plaintiffs. The only other evidence that the plaintiffs adduced was that of Loh Chee Khun ('Loh'), the then production manager of JWS. Loh testified that he observed that Goh was seldom in his office about a month prior to his resignation on 27 October 2000. However, he also admitted, under cross-examination, that for 17 days out of that month, Goh's conduct could probably be explained by the fact that he was suspended from duties on 10 October 2000. There was no other evidence that Goh neglected his duties prior to the month before his resignation.

17 Loh's evidence does establish that, for a much shorter period between end September and

10 October 2000, Goh had not been concentrating on his job with JWS. This was consistent with Goh's own testimony that he took active steps to promote Aligent's business sometime in September 2000, since he knew that Rhonda had already found out about Aligent. In my view, the plaintiffs were entitled to a reimbursement of 1/3 of Goh's monthly salary as a compensation for the losses caused to them due to the diversion of Goh's energies from JWS to Aligent, *ie* [$18,750 + $1,920(CPF component)] X 1/3 = **$6,890**.

18 For completeness, I will deal with plaintiffs' other basis for claiming reimbursement which I do not accept, *ie* they suffered a loss as they would not have made the material payments if they had known about the defendants' breaches. In the absence of any proof that the defendants had neglected their duties, save for the limited period that Goh diverted his attention; and Rhonda's admission that the plaintiffs continued to enjoy record sales during the material period, such a claim is at best speculative and suffered from *ex post facto* reasoning.

Loss of sales and profits for October 2000 to March 2001

19 In the Statement Of Facts, Goh and Cheong admitted that they had:

> … misappropriated the Plaintiffs' goodwill, customer base and corporate opportunities for the benefit of themselves and the 3rd Defendant by procuring or attempting to procure, both directly and through the 3rd Defendant, certain of the Plaintiffs' existing customers including the following customers of the Plaintiffs: (i) Texas Instrument Malaysia Sdn Bhd; Hewlett Packard Singapore Pte Ltd; and (iii) Shimano (S) Pte Ltd.

20 The plaintiffs sought compensation for their loss of profits due to the diversion of their customers by Goh and Cheong. JWS claimed a sum of $700,000. Rhonda testified that she arrived at this figure in the following manner: the total sales for October 1999 to March 2000 amounted to $4,787,441 which was a 46% increase from the same period from October 1998 to March 1999. Rhonda expected a 43% increase in sales for the period of October 2000 to March 2001 after a 3% drop in sales due to the poor economic conditions was factored in. On that basis, the expected sales for that period would be $6,846,041. As the actual sales for that period was only $4,108,797, there was a loss of $2,737,244 worth of sales which she rounded up to $2,750,000. The average profit for the last five years was 34%. Based on these figures, she estimated that the loss in profits attributable to the defendants was around $700,000.

21 As for Segno, the plaintiffs claimed a sum of $170,000. A comparison of the sales figures from October 1998 to March 1999 and that of October 1999 to March 2000, showed a 79.9% increase. Rhonda felt that such an increase was not sustainable and calculated her projected sales in October 2000 to March 2001 on the basis of a 53% year-on-year increase. As the average net profit of the preceding five years fluctuated from –44% to 25%, she used 10% as a net profit figure which she thought was achievable.

22 The defendants' case was that they were not liable for any losses suffered by the plaintiffs after their resignation as they had not admitted to breaching any fiduciary duties as ex-directors. In my judgment, this argument is flawed. While the defendants did not admit to breaching their duties as ex-directors, they had admitted to breaching their fiduciary duties as directors by misappropriating the plaintiffs' corporate opportunities. Consequently, they were liable for all damages flowing from such a breach whether such damages surfaced during the time of their employment or after their

resignation.

23 The main issue is whether the plaintiffs had proven that the losses of profits they suffered was a result of the defendants' breach of fiduciary duties as directors of the plaintiffs. The defendants contended that the plaintiffs failed to do so but had, instead, made the simplistic and erroneous assumption that all their losses in profits were due solely to the defendants' breach of fiduciary duties. They submitted that the losses could have been due to other factors: in particular, the departure of key personnel and the inexperience of the new management team led by Rhonda, who had no business experience.

24 I am not satisfied that the plaintiffs' calculation of their losses of profits reflected the damages attributable to the defendants' acts for two reasons. First, in those calculations, a heavy reliance was placed on Rhonda's estimate as to what was the achievable projected percentage increase in sales that could have been attained during the material period. In the case of JWS, she factored in a 3% discount for the poor economic climate but in Segno's case, there was no other explanation for arriving at a 10% increase apart from her assertion that it was probably achievable. While the projection of future sales will always contain an element of estimation, Rhonda's estimates were without any basis apart from her subjective assessment that such figures were achievable.

25 Secondly, and more fundamentally, in their calculations, the plaintiffs had attributed the whole difference between the projected sales and actual sales to the defendants' breach of fiduciary duties without adducing evidence as to how the defendants' breaches had caused all the losses in sales. In support of their claim, they cited specific customers such as Texas Instruments Malaysia ('TIM') and Shimano (S) Pte Ltd, *etc*, that were lost to Aligent due to the defendants' breaches. Even if the plaintiffs had proven that those specific customers had indeed been procured by Goh and Cheong, the fact that *some* of the plaintiffs' customers had been procured by them does not mean that *all* the losses in sales were attributable to them. There were also other potential causes of the losses in sales such as the departure of key personnel and the poor economic climate. The plaintiffs failed to establish that the loss of customers due to the defendants' breaches was the sole reason for a drop in sales.

26 While I reject the plaintiffs' calculations of damages under this head, I am also of the opinion that the defendants were liable for some of the plaintiffs' losses in sales and profits. Goh and Cheong had admitted to procuring and attempting to procure the plaintiffs' customers while they were in the employ of the plaintiffs. The plaintiffs had served interrogatories on them requesting for particulars of all the customers which they had procured or caused Aligent to procure. In their answer, Goh and Cheong affirmed the contents of the following table showing the customers that they had in common with the plaintiffs and the volume of sales resulting from those customers for the material period, *ie* October 2000 to March 2001:

Customers	Oct 00	Nov 00	Dec 00	Jan 01	Feb 01	Mar 01
Shimano (S)	0	0	S$3131	S$36127	0	0
Delta Switchgear	0	S$945	0	S$823	0	0
Fullmark	0	S$1390	S$180	S$513	0	0

Dorma	0	S$630	S$4945	S$3126	0	0
Timken	0	S$16113	S$27725	S$32706	0	0
Delta Switchgear	0	0	S$6569	S$52203	(S$8505)	0

27 Shimano was a customer of JWS while the other four companies listed were customers of Segno. The total volume of sales that Aligent had with the former customers of JWS and Segno were $39,258 and $139,363 respectively during the material period. In my view, a corresponding drop in sales in the plaintiffs could be attributed directly to the defendants' breach of fiduciary duties by procuring these customers from the plaintiffs for Aligent. The average net profit of JWS for the past five years preceding was 34%. A fair estimate of the loss of profits for JWS due to the defendants' breach was 34% of $39,258 = $13,347.72. As for Segno, it suffered a net loss of 1.942% in the preceding five years. There was no proof that the drop in sales volume that it suffered would translate to a loss in net profits for which the defendants should be liable for. Accordingly, I found that the plaintiffs were entitled to a sum of **$13,347.72** under this head of claim.

Loss of corporate opportunities

28 In addition to their claim for loss of profits for six months, the plaintiffs also claimed for the loss of corporate opportunities to do business with their former clients for a further period of two years. They contended that the difficulties in quantifying the value of such a "lost chance" did not preclude them from obtaining a remedy in law and that a figure of $2,400,000 was reasonable bearing in mind that the estimated loss of profits for a six-month period of October 2000 to March 2001 was already $870,000.

29 It is trite law that a "loss of chance" may sound in an award for damages despite the difficulties in quantifying such losses. In the well-known case of *Chaplin v Hicks* [1911] 2 KB 786, Vaugham Williams LJ remarked that '…it may be that the amount (of damages)…will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages...".

3 0 *Chaplin v Hicks* has been repeatedly cited with approval in many local decisions, including *Straits Engineering Contracting Pte Ltd v Mertek Pte Ltd* [1996] 1 SLR 227, the latest decision of the Court of Appeal on the issue of loss chance. In that case, the parties had entered into an agreement for the defendants to sell all the issued shares in their subsidiary to the plaintiffs. In breach of the agreement, the defendants sold the shares to a third party. In assessing the quantum of damages, the trial judge found that there was a real chance of the plaintiffs making a profit if they had been successful in their acquisition. However, he declined to make an award for loss of profits amounting to $9,572,415 on the ground that the projected profits submitted by the plaintiffs were highly speculative and instead awarded damages on loss chance to make a profit by taking 15% of the projected profits as representing the value of the loss chance. On appeal, the approach of the trial judge was affirmed but the court reduced the quantum awarded to take into account contingencies that had not been brought to the attention of the trial judge. LP Thean JA, in affirming C*haplin v Hicks*, stated that 'under this head of damages, the amount awarded is unavoidably a lump sum which, in the opinion of the judge, is fair and reasonable, after taking into account various contingencies.'

31 Although both *Chaplin v Hicks* and *Straits Engineering Contracting* were cases on breach of

contract, it is my view that the principles enunciated as to the quantification of damages resulting from the loss of chance are principles of general application and are equally relevant to the present case involving a breach of fiduciary duties.

32 I agree with the plaintiffs that they had lost a real chance to continue to supply the customers which Goh and Cheong had wrongfully procured for Aligent. To my mind, the following considerations were relevant for quantifying of the value of that chance. First, in respect of the lost chance to continue to supply Segno's former customers, the plaintiffs had not shown that the loss of these customers will translate into a loss in profits. *A fortiori*, there was no proof that a loss of the chance to service such customers will result in any damages. Secondly, there were uncertainties as to whether the plaintiffs would have been able to continue retaining their customers. They were faced with the departure of key personnel, inexperienced management and a new competitor in the market. These uncertainties were exacerbated because the plaintiffs have claimed for the loss of a chance to service their former customers for a relatively long period of some six months to 2.5 years after the breach. In the circumstances, I am of the view that a figure of 15% of $13,347.72 (their award for loss of profits from October 2000 to March 2001), *ie* approximately $2,000, represented a fair estimation of the value of the chance they lost.

Conclusion

33 In summary, I make the following awards of damages:

(a)	expenses incurred for investigations	$0.00
(b)	salaries and bonuses	$6,890.00
(c)	loss of sales and profits	$13,347.72
(d)	lost chance to continue supplying former customers	$2,000.00
	Total:	**$22,237.72**

34 I will hear the parties on the questions of interest and costs.