Mona Computer Systems (S) Pte Ltd *v* Chandran Meenakumari and another [2010] SGHC 275

Case Number	: Suit No 265 of 2009
Decision Date	: 16 September 2010
Tribunal/Court	: High Court
Coram	: Belinda Ang Saw Ean J
Counsel Name(s)	: R Kalamohan (Kalamohan & Co) for the plaintiff; Cheong Yuen Hee (instructed counsel) (Y H Cheong) and Cheong Aik Chye (A C Cheong & Co) for the first defendant and second defendant.
Parties	: Mona Computer Systems (S) Pte Ltd — Chandran Meenakumari and another

Companies

Employment Law

16 September 2010 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 The plaintiff, Mona Computer Systems (S) Pte Ltd, commenced this action against the first and the second defendants for alleged breaches of various duties to the plaintiff. It is said that the first defendant, Chandran Meenakumari (hereafter referred to as "D1"), committed a serious breach of her fiduciary duty as director by forming a new company to compete with the plaintiff. In the case of the second defendant, Singaravelu Murugan, (hereafter referred to as "D2"), it is said that he committed breaches of duty as a shadow director and/or as an officer of the plaintiff by diverting from the plaintiff to a newly formed company business opportunities that were available to him by reason of his position of fiduciary and employment with the plaintiff. In addition, the plaintiff also claims against D2 for the return of commissions received by D2 since June 2006. [note: 1] In this action, D2 has filed his counterclaim for a sum of $114,660.50 being balance commissions allegedly due to him up to September 2010.

Background facts

2 The plaintiff was incorporated in Singapore on 13 May 1997 by one Chandran Dharani ("Dharani") who was, at all material times, the majority shareholder and the managing director. His mother, Chandran Leelavathi ("Leelavathi"), held one share. The directors of the plaintiff are Dharani's family members. His mother was appointed director on 22 September 1998. His wife, Isaac Rathi ("Rathi"), was made a director on 18 December 2001 soon after her marriage to Dharani. D1 was appointed director on 6 October 2003. There is apparently a fifth director, one Dr K G Suresh (Dr Suresh) who resides in India. The ACRA company search results of the plaintiff showed that he was a director of the plaintiff in year 2001 and year 2008. In year 2009, his name was no longer reflected in the ACRA search results. More importantly, the parties did not mention Dr Suresh at all in their pleadings, evidence or submissions. I will, therefore, proceed on the basis that Dr Suresh is not material to this case.

3 D2 is Dharani's brother-in-law by marriage to his sister, D1. Basically, Dharani was to D1 and D2, the owner of the plaintiff, a small company comprising family members.

4 The plaintiff is in the business of software and IT consultancy and development. However, it is not disputed that the plaintiff's principal activity is to provide software engineers to its clients who are typically the third party end users. The contractual relationship between the plaintiff and the client (*ie*, third party end user), essentially requires the plaintiff to provide IT personnel like software engineers to the client who will be responsible for the day-to-day instructions relating to the services required. The client will pay the plaintiff for the IT personnel provided to it. As between the plaintiff and the IT personnel, the latter are recorded as the plaintiff's employees, and they are provided to the third party end user for its IT needs or requirements. Most of the IT personnel are Indian and Philippine nationals. I am told that these employees sign contracts with the plaintiff, and they are paid monthly and deductions are made from their salaries for various expenses. The plaintiff's clients include the Housing Development Board ("HDB") and Central Provident Fund Board ("CPF Board").

5 On 2 September 2000, Dharani employed D1's husband (*viz*, D2) as its Systems Manager. It is common ground that there was no written employment contract between the plaintiff and D2. As with a company as small as the plaintiff and given the nature of its principal business as a provider of IT personnel to clients, it is not surprising to find that D2 was the sole full time employee tasked with the day-to-day business operations of the plaintiff. D2 managed the plaintiff's contracts with third party end users as well as the contracts between the IT personnel and the plaintiff. D2 soon became Dharani's right hand man. Even so, Dharani did not make D2 a director. Instead and as mentioned, he appointed D1 a director of the company on 6 October 2003. The plaintiff did well and on 11 October 2005, became an ISO 9001:2001 certified company.

6 Dharani passed away suddenly on 10 November 2006. It was undisputed that Rathi became the majority shareholder of the plaintiff through her husband's estate. As owner of the business, Rathi said she knew she had to play a more active role in the plaintiff and she started going to the office on 21 November 2006. She also formally took over as the managing director of the plaintiff. However, as she herself admits, she was not familiar with the business operations of the plaintiff and was dependent on D2's experience and knowledge. To all intents and purposes, after Dharini's demise, D2 saw Rathi as the "boss" of the plaintiff. [note: 2]

The defendants' activities whilst still director and in employment of the plaintiff

7 D1 and D2 formed a new company, MN Computer Systems (S) Pte Ltd ("MN Computer") on 22 November 2007. D1 and D2 are directors and each hold 50% of the shares of MN Computer. D1 is also the company secretary of MN Computer. The principal business of MN Computer is said to be the same as the plaintiff's. At that time of the incorporation of MN Computer, D1 was still a director of the plaintiff, and D2 was still its employee. MN Computer operates a new business from rented premises situated in the same commercial building as the plaintiff. D2 explained that MN Computer was a shell company until end June/July 2008 when it hired its first employee and obtained its first business. [note: 3]

8 D2 resigned as Systems Manager from the plaintiff on 20 February 2009 after a serious quarrel with Rathi. He admits that whilst employed by the plaintiff, he secured contracts to provide IT personnel to third party end users for their needs or requirements. The third party end users in question were clients of the plaintiff, and they are: [note: 4]

(a) Bossard Pte Ltd

(b) Wincor Nixdorf Pte Ltd

(c) Jurong Town Corporation;

(d) Singapore Press Holdings Ltd

(e) Housing & Development Board ("HDB")

(f) DHL Supplychain Singapore Pte Ltd

One other addition to this list is the CPF Board. During cross-examination, D2 admitted that in January 2009, he submitted a bid to the CPF Board to provide IT personnel to the latter as third party end user.

The plaintiff's claims

9 At trial, counsel for the plaintiff, Mr R Kalamohan ("Mr Kalamohan"), confirmed that the water downed pleaded case against D2, which he repeated in his closing submissions, is confined to claims for breaches of duties in relation to diverting business away from the plaintiff to MN Computer and wrongful competition with the plaintiff, and for the return of unauthorised commissions. [note: 5]

10 The plaintiff's pleaded case against D1 is particularly limited. Paragraph 4 of the Statement of Claim contains the plea that D1 as director of the plaintiff owes the company various duties. The pleaded duties are as follows:

(a) To act honestly and use reasonable diligence in the discharge of her duties.

(b) Not to make improper use of information acquired by reason of her office to gain directly or indirectly an advantage for herself or another or to cause detriment to the company.

(c) To act in the company's best interest at all times.

(d) To avoid conflict of interest with the company at all times.

(e) To declare at a meeting of the directors of the company the fact and the nature, character and extent of the conflict where D1 holds any office creating duties or interests that may come into conflict directly or indirectly with the duties created in relation to the plaintiff.

11 D1's breach as particularised in paragraph 40 of the Statement of Claim is limited to the incorporation of MN Computer, a competing company, without the knowledge of the plaintiff. Other than the complaint of incorporating a rival company, no other particulars of breach(es) of duties listed in (a) to (e) above have been given in the pleadings. This is not surprising as the plaintiff acknowledges and accepts that D1 was simply a director in name; that she had no role at all in the

management and business of the plaintiff. It is not the plaintiff's case that D1 had been very lax about the affairs of the plaintiff. It is quite self-evident that the complaints in the present action are directed at D2. For this reason, I propose to deal in detail with the claims against D2 before returning to the claim against D1.

12 The plaintiff is alleging that D2 was a shadow director which D2 denies but he admits that, at all material times, he was an officer of the company and owed the following duties:

(a) To act honestly and use reasonable diligence in the discharge of his duties.

(b) Not to make improper use of information acquired by reason of his office to gain directly or indirectly an advantage for himself or another or to cause detriment to the company.

(c) To act in the company's best interest at all times.

(d) To avoid conflict of interest with the company at all times.

13 In that regard, counsel for the defendants, Mr Cheong Yuen Hee ("Mr Cheong") (instructed by M/s AC Cheong & Co) in paragraph 40 of his closing submissions candidly said:

> The 2nd Defendant openly admits having secured the contracts set out in Exhibit D-1 whilst he was still an officer of the [plaintiff] he would be liable to account to the [plaintiff] unless as he alleges and testified that the [plaintiff](through PW1) agreed to it.

14 I make two observations in respect of Mr Cheong's submissions. First, I take Mr Cheong's reference to an obligation to account as acceptance, inferentially, that by reason of the seniority of D2's employment or by virtue of his senior position he owed the plaintiff a fiduciary duty. This concession is right. The clearest indication as to whether or not an employee was also a fiduciary is to be found in *University of Nottingham v Fishel* [2000] IRLR 471 approved by Moses LJ in *Helmet Integrated Systems Ltd v Tunnard* [2007] FSR 16 at paragraph 37 where he recited Elias J's statement of principle:

> ... in determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether the fiduciary duty has been breached.

15 Applying the *Nottingham University* case (which was accepted in *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2007] 3 SLR(R) 265), I conclude that D2 was a fiduciary. D2 was the only employee in the plaintiff (the others were the IT personnel provided to third party end users) and his job scope, at least after Dharani's demise, included that of Sales Manager. [note: 6] In 2007, on behalf of the plaintiff, he tendered for both the CPF Board and HDB contracts, but did not do so in 2008 and January 2009. As Sales Manager, he was expected to obtain business for the plaintiff. This responsibility was not seriously disputed by D2. It cannot also be disputed that D2 was the person responsible for negotiating the plaintiff's contracts with third party end users of IT personnel provided by the plaintiff, and he was the primary contact person on behalf of the plaintiff. My conclusion on these matters is consistent with D2's admission that he was an officer of the plaintiff. Section 4 of the Companies Act (Cap 50, 2006 Rev Ed) defines "officer" as including any director, company secretary; or a person employed in an executive capacity. As D2 denies he was a director, and he was never the company secretary, the admission that he was an "officer" of the plaintiff relates only

to his admission that he was employed in an executive capacity.

16 Analysing D2's admission as to the duties set out in [12] above in the context of his responsibility to obtain business for the plaintiff, it is reasonable to conclude that D2 was a fiduciary entrusted with senior tasks because he could be trusted. As such, I would say he was under a duty to act in good faith, not to act so as to place himself in a position of conflict between his personal interests and those of the plaintiff; in particular, he was under a duty not to use or cause to be used any opportunity available to him by reason of his employment and his position as a fiduciary for any purpose other than furthering the interest of the plaintiff.

17 Second, the general thrust of the plaintiff's allegations in [7] and [8] above is not disputed by D2. D2's case is that what he did was not actionable. Simply put, there was no breach of fiduciary obligation at all because the plaintiff, through Rathi, had consented to D2 obtaining business like securing the contracts in question for MN Computer whilst employed by the plaintiff, and, at the same time, servicing the plaintiff's existing contracts with third party end users. With these observations there is, logically, no necessity to deal with the allegation of D2's status as shadow director, which in any case, is a misconception and a mischaracterisation of the real issue before the court. The primary issue for consideration of this court is whether Rathi as the owner of the plaintiff had agreed to D2 securing for MN Computer the contracts (listed in Exhibit D1) from clients who were with the plaintiff. In any case, factually, Dharani had never wanted D2 to become a director of the plaintiff. This is evident from the way Dharani systematically placed only his immediate family members as directors of the plaintiff, and preferred to add his new wife Rathi as a director even when at that time, D2 was already working for at the plaintiff. In addition, according to D1, her appointment as director was Dharani's way of retaining D2's services. [note: 7] Notably, the plaintiff permitted D2 to carry a business card which held him out to the public as its Systems Manger. Whilst D2 played an active part in the day-to-day business operations of D2, control and management of the plaintiff nonetheless resided with Rathi as owner of the plaintiff. (Leelavathi left Singapore for India after Dharani's death, and they both continued to be on not speaking terms.) One telling piece of evidence that showed Rathi to be in control of the business strategy and direction of the plaintiff was from her unilateral decision to explore the feasibility of a joint-venture between the plaintiff and Triumphsys, an Indian company in the same line of business as the plaintiff. D2 was not a shareholder and was not a signatory of the plaintiff's bank account. Rathi had signing rights and thus controlled the plaintiff's bank account. D2 did not have the kind of authority the defendant in of *Heap Huat Rubber Company Sdn Bhd and Others v Kong Choot Sian and Others* [2003] SGHC 133 ("*Heap Huat Rubber*") had due to his family connection and his previous position as a director. There is evidence that Rathi expected D2 to follow her instructions and to report to her. Rathi formally stepped into the shoes of managing director after Dharani's demise, [note: 8] and there is evidence that she had on many occasions pressed D2 to update her on the plaintiff's operations. The fact that her requests were ignored would not militate against the point made here.

The claims against D2

(a) Diverted business and competition

18 Both heads of complaint overlapped. First, I should, at the outset, state that there is no written agreement restraining D2 from competing with the plaintiff after termination of employment. Second, this is *not* a case where the acts done in setting up a business and operating that business was *after* D2's resignation. Third, as I said earlier, most of the details of the plaintiff's complaints in this area are not disputed. The only defence is that Rathi had agreed to D2 obtaining business for MN Computer whilst employed by the plaintiff.

19 D2 said that he told Rathi that he would not tender for new contracts for the plaintiff as he was going to submit tenders for his own company. This was well before his resigned from the plaintiff almost a year later in February 2009. Rathi was unhappy with what she heard but did not think she could do anything to stop D2 doing what he intended to do. It is not disputed that Rathi kept her unhappiness to herself. Her silence had been interpreted as acquiescence on Rathi's part. At this point, I can make my finding as to whether Rathi, and hence the plaintiff, had consented to or acquiesced in D2 taking with him to MN Computer the benefit of any renewals or new contracts with the plaintiff's existing clients as listed in [8] above. In my judgment, it is inherently unlikely seeing that the consequence of such consent or acquiescence would have a direct and adverse impact on Rathi's source of livelihood. I digress here a little to mention that whilst Dharani was alive, Rathi was paid $500 a month by the plaintiff. After his death, she received, apart from director's fees, $6,000/- a month from the plaintiff, a figure which she fixed for herself. [note: 9] D2's plans would inevitably lead to the closure of the plaintiff's business once the existing contracts expired and with no new contracts in the pipeline. Rathi said in re-examination: [note: 10]

Q: Now during this period ...

A: Mm-hm

Q: ... after he had formed his company ...

A: Mm-hm

Q: ... did he continue to bring in business for the company?

A: No.

Q: Right. So he managed whatever there was for the...

A: Existing ,,,

Q: ... company?

A: Yes.

Q: And would you say the ...managing whatever there was enough for the company to progress?

A: No, no, because the contracts all were ending very soon.

Q: And ...

A: And I ...

Q: ... did he get any new contracts?

A: No, not got my company.

Q: Are you aware that he got new contracts for his company?

A: Yes.

Q: What ...

A: ... one ... he has one, the HDB tender, the CPF tender and of course, all my clients,

20 In my judgment, it is inherently unlikely that Rathi would have given her consent as argued for by D2. It must be remembered that not any consent will do. For D2's defence to succeed, Rathi on behalf of the plaintiff must be shown to have given an informed consent to D2's conduct. As stated with no new contracts in the pipeline, the demise of the plaintiff's business was inevitable once the existing contracts expired. It is therefore inherently unlikely that Rathi, at risk of her jeopardising her own interests, which were synonymous with that of the plaintiff, would have been content to give up any renewals or new contracts to D2. If D2 decides to leave the plaintiff at some point or decides not to get new business for the plaintiff there was nothing that Rathi could do about it immediately as she was, at the material time, entirely dependent on his services. But that is a long way from Rathi being told fully that whilst employed by the plaintiff, D2 would be taking away from the plaintiff for his own company business opportunities that would be available to him by reason of his position in the plaintiff, or that he would be soliciting the existing clients of the plaintiff, his employer, for his own competing business. Nothing short of informed consent would suffice at law. Indeed, I will construe her subsequent attempt to interest Triumphsys, in a "planned tie-up" [note: 11] with the plaintiff as indicative of her disapproval of D2's intentions and conduct. In the end, the inherent improbabilities and the fact that I cannot rely sufficiently upon D2's own evidence on this subject leads me to the conclusion that Rathi did not consent or acquiesce in D2's intention to take the benefit of contracts and business opportunities from the plaintiff to his company. In the circumstances, D2 can only put an end to his fiduciary obligation by resigning, something he did not do until 20 February 2009. I cannot see how D2 can possibly have any legitimate argument that what he did was not the plainest breach of his duty as an employee and his duty as a fiduciary. D2 has admitted to obtaining various contracts for MN Computer during his employment and that is, and I so hold, a breach of D2's fiduciary duty and duty as an employee having diverted some business opportunities to MN Computer, a company he set up as a rival business.

21 There is the other allegation that whilst still employed by the plaintiff, D2 had made use of the resources of the plaintiff in breach of his duty of fidelity as an employee. There is evidence that D2 had used the plaintiff's resources such as its handphone and office phone to build up the business of MN Computer. [note: 12] The fact that he had used the plaintiff's office telephone number for the business of MN Computer also reveals that D2 had conducted the business of MN Computer whilst at the plaintiff's office, meaning that he had used the time he was supposed to be working on the plaintiff's business on MN Computer. In my view, the use of the resources is probably of little significance beyond showing that D2 simply looked to his own needs and saw nothing wrong in helping himself to the plaintiff's resources if it suited his needs.

22 In my judgment, D2 is liable to account for any profits he personally made from the contracts referred to in [8] above. The inquiry as to profits that has to be brought into account would be profits that D2 had received as shareholder of MN Computer. MN Computer is not a party to the proceedings and it is *not* the plaintiff's pleaded case that MN Computer is the alter ego of D2 in order to treat the profits made by MN Computer as the personal profits of D2. In relation to the plaintiff's claim for an injunction, there is no written contract dealing with post-termination restraints. As such, there is no legal basis for an order sought by the plaintiff to restrain the defendants from competing with the plaintiff for, at least, five years.

(b) Commissions

23 On the first day of the trial, the plaintiff was granted leave to amend paragraph 36 of the Statement of Claim to include the averment that:

> The commissions taken by the second defendant were without approval or authority of the plaintiff either from [Dharani] or by way of board meetings or resolutions.

24 With the amendment, the plaintiff seeks the return of commissions paid to D2 arguing that the commissions were unauthorised. D2 has, on the other hand, counterclaims for unpaid commissions.

25 According to D2, in June 2006, Dharani and he had agreed to a revision of D2's remuneration whereby D2 would be paid on a profit/loss sharing basis. D2 would be paid $500 per month as basic pay, and the profit sharing on a monthly basis would be based on the net profit each IT employee brought to the plaintiff. If the net profit was below $500, D2 would receive 30% of it. If the net profit was between $500 and $1000, D2 would receive 35% of it, and if the net profit was over $1000, he would receive 40%. Losses would also be borne by D2 in the same percentages. [note: 13]

26 In support of his claim, D2 referred the court to an e-mail which he sent to Dharani on 24 June 2006, which purportedly sets out the agreement as claimed by D2. The email states: [note: 14]

> **Commission**
>
> **Contract Position**
>
> 0 to 500 = 30% on the net (Salary – CPF – leave – referral fee)
>
> 501 to 999 + 35% on the net (Salary – CPF – leave – referral fee)
>
> 1000 and above = 40% (Salary – CPF – leave – referral fee)
>
> **Permanent Position** :
>
> 40% on the billing.
>
> Please confirm so that I can prepare my Jun 2006 statement for cheque.

27 According to D2's testimony, Dharani wanted the net profits to be computed after deducting two more items, namely airfare and immigration and medical expenses, which D2 agreed to. The changes were taken up and reflected in the statement of commission which he prepared for the month of June 2006. [note: 15] This statement for $19,728.16 was adduced to the court. [note: 16] The commission amount of $19,728.16 was paid out *via* a series of six cheques, all of which were paid out before Dharani died.

28 After Dharani's death in November 2006, Rathi signed for the cheques issued in payment of commissions to D2 based on the formula agreed with Dharani. D2 in turned had paid income tax on commissions received based on yearly IR8A forms signed by Rathi on behalf of the plaintiff. The plaintiff called Mr Muhammad Feroz Khan, the plaintiff's auditor to testify. His testimony was not helpful to the plaintiff. He confirmed that the commissions were supported by the plaintiff's documentation, and hence there was no reason to question the commission payments during the yearly audits.

29 Significantly, the plaintiff could not adduce any evidence to support its averment that the

commissions were unauthorised. Rathi admitted that she herself could not say for sure that D2 was not entitled to the commissions. [note: 17] The fact remains that she signed IR8A forms as managing director of the company for D2's income and was aware that D2 was paid commission. The principle governing this type of situation is that the person who signed the documents like the cheques and IR8A forms is normally bound by his/her signature. To vitiate the signatures, Rathi would have to show that she acted under a mistake of fact to be afforded the defence of *non est factum*, or that the signatures were procured by fraud or misrepresentation. No vitiating factors of such a kind were raised by the plaintiff. Accordingly, the plaintiff's claim for return of commissions received by D2 is not made out and is therefore dismissed.

The claim against D1 as director of the plaintiff

30 According to the plaintiff, D1 breached her duty as director by incorporating MN Computer, a competing company, without the knowledge of the plaintiff. Section 156(5) of the Companies Act states that "(e)very director of a company who holds any office or possesses any property whereby whether directly or indirectly duties or interests might be created in conflict with his duties or interests as director shall declare at a meeting of the directors of the company the fact and the nature, character and extent of the conflict."

31 In the closing submissions filed on behalf of D1, Mr Cheong wrote in paragraph 11 that:

> It is settled law that there is no law preventing a person from being a director of two competing companies. Indeed the authors of Walter Woon on Company Law (3rd edition) state:-
>
> > "The phenomenon of a person holding directorships in several companies is commonly observed. The holding of cross directorships is not per se a breach of a director's duty of loyalty; indeed, there is no rule that a person cannot be a director of two competing companies."

32 Mr Cheong's paragraph 11 is misleading. The latest edition of the same textbook (Walter Woon on Company Law (Rev Third Edition, 2009) reads:

> **8.55** The phenomenon of a person holding directorships in several companies is commonly observed. The holding of cross- directorships is not per se a breach of a director's duty of loyalty. However, a person who is a director of two competing companies risks breaching the 'double employment rule'; the prudent course of conduct is to disclose to the competing companies in order to obtain their consent, whether express or implied. Under s 156(5) [of the Companies Act], a director who holds an office 'whereby ... duties or interests might be created in conflict with his duties or interests as director' must declare to the company the fact and nature of the conflict, as well as the character and extent of the conflict.

33 The next two paragraphs are equally relevant and they read:

> **8.56** Importantly, the director stands at risk of breaching his duty of loyalty to one (if not multiple) companies if he is required to decide on matters where the interests of one company is not aligned with that of another. ...
>
> **8.57** The common law allowance for holding cross-directorship does not affect the director's duty under general law not to subordinate the interest of his principal to that of another. If he is called to participate in a decision that involves competing loyalties, he must at least disclose the conflict. ...

34 In this case, the relevant question is how much was D1 aware of the business of the plaintiff and MN Computer. I will come to this point shortly. But first I turn to D1's defence that she had disclosed her intention to incorporate MN Computer to her mother who is a shareholder and a director of the plaintiff, and her mother had consented to her doing so.

35 D1's evidence is that the arrangement between herself and D2 was for D1 to speak to her mother and that D2 would notify Rathi of their intention. It is common ground that, at all material times, Rathi was not on speaking terms with D1 and Leelavathi. I note that the plaintiff had also not tried to discredit the general thrust of this evidence and seemed to accept that this was what happened.

36 In addition, Rathi does not dispute that she had knowledge of the existence of MN Computer. The dispute in the evidence is confined to how and when she came to learn that D2 had formed MN Computer. She said that on or about March 2008, she discovered that D2 had leased an office space for a company in the same commercial building as the plaintiff. Subsequently, she found out that D2 had incorporated MN Computer sometime in November 2007. Rathi confronted D2 about MN Computer, and he then told her that he had incorporated MN Computer to secure a future for himself. According to Rathi, she did not pursue the matter further as she did not want to offend him in fear that he might leave the plaintiff. In contrast, D2 said he had informed her of the incorporation of MN Computer in December 2007 and that she had no comments or objections about it. [note: 18] The fact remains that Rathi, as managing director and major shareholder of the plaintiff, had knowledge of the incorporation of MN Computer before it started business. MN Computer was only a shell company in that it had no business or staff in March 2008. In March 2008, D2 said he informed Rathi, (and she does not deny this) that he would no longer work on tenders for the plaintiff as he needed to work on tenders for MN Computer instead. He claims that Rathi did not object to this. Having obtained her consent, D2 proceeded to rent office space for MN Computer in the same building as the plaintiff as it was more convenient for him to work for both the plaintiff and MN Computer from the same building. [note: 19]

37 In an ideal world, D1 should have personally informed Rathi about the incorporation of MN Computer, at a directors' meeting. However, it is not disputed that D1 and Rathi were not on speaking terms at the material time due to some family dispute. In addition, the plaintiff, being a small family run business, has never formally held a directors' meeting. I can therefore accept that D1 had disclosed the incorporation of MN Computer to the company by first, informing her mother who is a shareholder and director of the plaintiff, and second, informing Rathi *via* her husband, D2, whereby Rathi is both the director and the majority shareholder of the plaintiff.

38 Significantly for D1, Rathi acknowledges and accepts that D1 was never involved in the plaintiff's business and like her, D1 has no idea of the nature and extent of the plaintiff's business. D1 has little formal education and was primarily a homemaker. She speaks Tamil and hardly any English. [note: 20] She testified that she and her husband formed MN Computer and only knew that it was an IT company. Being illiterate, the affairs of MN Computer were left entirely in the hands of her husband. [note: 21] There is no reason for me not to accept the truth of her evidence on these matters. In the circumstances, with her lack of knowledge of the business and affairs of the plaintiff and likewise of MN Computer, she was in no position to disclose "the fact and the nature, character and extent of the conflict" (see s 156(5) of the Companies Act at [30] above).

39 Accordingly, the plaintiff's case that D1 had breached her duty to the plaintiff by incorporating MN Computer without the knowledge of the plaintiff is therefore not made out and the plaintiff's claim

against D1 is dismissed.

D2's counterclaim for commission in the sum of $114,660.50

40 I now turn to D2's counterclaim for commission up to September 2010 in the total sum of $114,660.50. Even though the commissions are calculated on a recurring basis, I do not think D2 should be entitled to the commissions coming after he resigned from the plaintiff. I consider it implicit in the agreement between Dharani and D2 that the latter would only be entitled to the commission if he continued to work in the plaintiff and serviced the plaintiff's contracts with its clients responsible for the recurring profit. Accordingly, the agreement to pay commissions would cease once D2 left the plaintiff. Indeed, if the agreement was to subsist, any losses incurred by the plaintiff after D2's resignation would likewise be partly borne by D2. That cannot be right as a matter of logic and business sense.

41 Therefore, D2's counterclaim is successful up to the month of March 2006. According to D2's computation, the amount left outstanding up to March 2006 is $19,402.41. [note: 22]

Result

42 To summarise, the conclusions I reached are as follows:

(a) The plaintiff's claim against D1 is dismissed with costs to be taxed on a standard basis if not agreed between the parties.

(b) The plaintiff succeeds in its claim against D2 for breach of fiduciary duty committed whilst in the plaintiff's employment by diverting some business opportunities to MN Computer, a company set up as a rival business. Accordingly, I order the taking of accounts of all such profits received by or due to D2 and the making of all necessary inquiries before the Registrar in respect of the seven contracts referred to in [8] of this judgment (as listed in (a) to (f) and the contract with CPF Board).

(c) D2's counterclaim is allowed only up to the amount of commission payable until March 2006 being the sum of $$19,402.41 with interest thereon at the rate of 5.33% per annum from the date of the writ to the date of judgment but the payment thereof together with interest is deferred for the money is potentially subject to a set off once the accounts have been taken and the making of all necessary inquiries.

(d) As for costs in relation to the water downed claims against D2 and D2's counterclaim against the plaintiff, taking everything in the round, D2 is to pay 60% of the plaintiff's costs of the action to be taxed on a standard basis if not agreed between the parties.

[note: 1] Defence to Counterclaim at para 20.

[note: 2] Transcripts of Evidence dated 20 January 2010 p 92.

[note: 3] Transcripts of Evidence dated 20 January 2010 p 77.

[note: 4] Exhibit D1.

[note: 5] Plaintiff's closing submissions para 3.

[note: 6] 1PB 80.

[note: 7] D1's AEIC at para 9.

[note: 8] D2's AEIC at para 46(b) and exhibit marked "SM-20".

[note: 9] Transcripts of Evidence dated 19 January 2010 pp 57-58.

[note: 10] Transcripts of Evidence dated 19 January 2010 pp 90-91.

[note: 11] Transcripts of Evidence dated 19 January 2010 p 55.

[note: 12] Transcripts of Evidence dated 20 January 2010 pp 79-81.

[note: 13] D2's AEIC para 26.

[note: 14] D2's AEIC exhibit "SM-16".

[note: 15] D2's AEIC exhibit marked "SM-16"; Transcripts of Evidence dated 20 January 2010 at p 45.

[note: 16] D2's AEIC exhibit "SM-16".

[note: 17] Transcripts of Evidence dated 19 January 2010 p 36 line 22.

[note: 18] D2's AEIC dated 6 November 2009, para 55.

[note: 19] Ibid, para 59.

[note: 20] Transcripts of Evidence dated 20 January 2010 p 5.

[note: 21] Transcripts of Evidence dated 20 January 2010 p 14.

[note: 22] D2's AEIC at para 105.

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