IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 90

CA 32/1999

Between

Chew Kong Huat

… *Appellant*

And

Ricwil (Singapore) Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Damages — Assessment; Companies — Directors; Tort — Conspiracy

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Chew Kong Huat and Others v Ricwil (Singapore) Pte Ltd

[1999] SGCA 90

CA 32/1999
Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ
30 December 1999

1 (delivering the judgment of the court): ***Introduction***

2 At all material times, the first appellant, Mr Chew Kong Huat (`Mr Chew`) was the managing director, and his wife, the second appellant, Ms Aw Mui Kee (`Ms Aw`) a director of the respondent company, Ricwil (Singapore) Pte Ltd (`Ricwil`). The third appellant, Sintalow Hardware Pte Ltd (`Sintalow`) and the fourth appellant, Thermosel Engineering Pte Ltd (`Thermosel`) are companies owned and controlled by them. In the proceedings below, the trial judge found that Mr Chew and Ms Aw acted in breach of their fiduciary duties to Ricwil and granted various reliefs to Ricwil. The appellants now appeal against certain of those reliefs.

3 ***Background facts***

4 A Malaysian company by the name of Ricwil (Malaysia) Sdn Bhd (`Ricwil Malaysia`) is a manufacturer of pre-insulated pipes. `Ricwil` is a brand name of a method of pre-insulation originating from the United States. Between 1986 and 1990, Sintalow was a supplier of various types of pipes for the

purposes of air-conditioning, drainage and plumbing, and was the sole agent or distributor for Ricwil Malaysia`s products in Singapore.

5 Towards the end of 1990, Ricwil Malaysia and Mr Chew decided to enter into a joint venture and develop their joint business in Singapore. A joint venture agreement between Ricwil Malaysia and Mr Chew to set up a joint venture company to make pre-insulated pipes was signed in July 1990. Ricwil is the joint venture vehicle set up pursuant to their joint venture agreement in 1990. Ricwil deals in the installation of insulated water pipes for air conditioning systems and the sale of related products. The issued capital of Ricwil was $60,002 divided into 60,002 shares of $1 each. Mr Chew held 20,000 of those shares but Ms Aw did not hold any shares. The remaining shares were held by four other persons. These four shareholders, Mr Chew and Ms Aw were directors of Ricwil. Mr Chew was also the managing director and Ms Aw was the director in charge of the accounts of Ricwil. The company started operations soon after its incorporation.

6 Apart from their directorships in Ricwil, Mr Chew and Ms Aw were also directors of their own companies, Sintalow and Thermosel. Mr Chew and Ms Aw each held 250,000 shares of $1 each in the capital of Sintalow. None of the shareholders of Ricwil other than Mr Chew had any shares in the capital of Sintalow. As for Thermosel, it was set up only in 1995 to do business in air conditioning duct fabrication and had a paid up capital of only $2 made up of two shares of $1 each which were held, one each, by Mr Chew and Ms Aw. Again, Mr Chew was the managing director of Sintalow and Thermosel and Ms Aw was in charge of the accounts of these two companies. Ricwil, Sintalow and Thermosel occupied the same premises at No 8 Fan Yoong Road, until mid-June 1996 when Ricwil moved out of the premises. According to the appellants, Ricwil obtained its supply of carrier or bare steel pipes from Sintalow for its

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manufacture of pre-insulated pipes during this period. The trial judge below found that Mr Chew and Ms Aw managed the three companies, Ricwil, Sintalow and Thermosel, as though they were all companies in a group, and anyone dealing with them and the staff of any one of those companies would not be concerned to know which of the companies he was dealing with. Not surprisingly, disputes soon arose between, on the one hand, Mr Chew and Ms Aw and, on the other, the other shareholders of Ricwil. These disputes, which surfaced sometime in 1994 or 1995, came to a head in 1996. At a meeting of the board of directors of Ricwil held on 15 January 1996, Mr Chew and Ms Aw gave notice of their resignations as the managing director and director of Ricwil with effect three months from that date. But, effectively as from that date, one Mr Stanley Wong Syn Loy, a director of Ricwil, who was also at that time the general manager of Sintalow, took over the management of Ricwil and resigned as the general manager of Sintalow. Thenceforth, Mr Chew ceased to be involved in the day-to-day management of Ricwil and he eventually resigned as the managing director on 15 April 1996, but he remained a director. Ms Aw resigned as a director of Ricwil on 12 June 1996. In mid-June 1996 or thereabouts, Ricwil moved out of No 8 Fan Yoong Road and was relocated elsewhere.

7 ***Proceedings below***

8 On 26 November 1997, Ricwil instituted proceedings against the appellants in Suit 19/97. In this action, the company made several claims against Mr Chew and Ms Aw in relation to the affairs of Ricwil. First, it was claimed that they caused and procured Ricwil to use the letter of credit facilities of Sintalow and pay to Sintalow a commission of 10%. Secondly, it was claimed that Mr Chew and Ms Aw caused eight contracts for the sale of goods agreed to be supplied by Ricwil to its customer, Speed-Air Air-Conditioning Engineering

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Pte Ltd (`Speed-Air`), to be cancelled and transferred to Thermosel. Thirdly, it was claimed that Ricwil was invoiced twice for the same goods and services provided by Sintalow. It was said that the double invoicing was effected or authorised by Ms Aw who was responsible for the accounts of Ricwil. Fourthly, Ricwil claimed that Mr Chew deprived Ricwil of the ownership of the duct fabricating machinery, which had been agreed to be sold to Ricwil by Kailay (S) Pte Ltd (`Kailay`), by causing and procuring DBS Finance Ltd to sell it to Thermosel. Lastly, it was claimed that Mr Chew at the expense of Ricwil procured contracts for Sintalow to supply Nippon steel pipes to Kwang Wah Engineering Pte Ltd (`Kwang Wah`) and caused Ricwil to lose the benefit of those contracts. Alternatively, it was alleged that Mr Chew and Sintalow conspired to cause injury or damage to Ricwil. The trial judge found in favour of Ricwil on all the claims and made a series of orders against the appellants concerned.

9 ***Appeal***

10 The appellants appeal against only the following orders:

> 6 The first defendant [Mr Chew] do pay the plaintiffs [Ricwil] damages to be assessed for the plaintiffs being deprived of the ownership of a duct fabricating machine system, such damages being limited to the value of the machine as at the date of the breach, namely, 29 December 1995.
>
> 7 At the election of the plaintiffs:
>
> (a) the first defendant do pay the plaintiffs damages to be assessed in causing the plaintiffs the loss of contracts to supply Nippon steel pipes to Kwang Wah Engineering Pte Ltd for the Suntec City, Woodlands Seagate, and UIC projects, or
>
> (b) in the alternative to sub-para (a) hereof, an account of the profits made by the third defendants [Sintalow] in respect of the contracts for the supply of Nippon steel pipes to Kwang Wah

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> Engineering Pte Ltd for the Suntec City, Woodlands Seagate, and UIC projects.
>
> 8 The third defendants do make discovery of all documents relevant to its contracts for the supply of Nippon steel pipes to Kwang Wah Engineering Pte Ltd for the Suntec City, Woodlands Seagate and UIC projects within four weeks from the date of this order and the plaintiffs to make the election within four weeks of the said discovery.
>
> 9 The first and second defendants [Mr Chew and Ms Aw] do pay the plaintiffs damages to be assessed for causing the plaintiffs` contracts for the manufacture of ducts to be cancelled and transferred to the fourth defendants [Thermosel].
>
> 10 An account of the net profits before tax made by the fourth defendants in respect of the fourth defendants` use of the plaintiffs` duct fabricating machine system, raw materials, and labour for the fabrication of ducts and such profits to be paid to the plaintiffs.
>
> 11 The plaintiffs do recover against the first and third defendants damages to be assessed for the tort of conspiracy which will be assessed after the date of election under para 8 hereof.

11 These orders were made to give reliefs to Ricwil in respect of the following instances of breach of fiduciary duties as found by the trial judge: (i) the loss of the duct fabricating machinery which had been agreed to be sold by Kailay to Ricwil and which was eventually purchased by Thermosel; (ii) the cancellation of the contracts for the manufacture and supply of certain ducts by Ricwil to Speed-Air and the transfer of such contracts to Thermosel; (iii) the contracts for the supply of Nippon steel pipes to Kwang Wah; and (iv) the conspiracy to cause injury or damage to Ricwil in respect of such contracts. Essentially, the appellants appeal against the trial judge`s findings in relation to these breaches of fiduciary duties.

12 ***Duct fabricating machinery of Kailay***

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13 The first dispute relates to the duct fabricating machinery (`the machinery`) of Kailay and arose in the following circumstances. Kailay was the subcontractor of Kailay Engineering Co (S) Pte Ltd, which in turn was a nominated sub-contractor responsible for air conditioning and mechanical ventilation works for the two phases of the Suntec City project. Kailay had been obtaining its supplies of pre-insulated pipes from Ricwil. Sometime in 1994, Kailay ran into financial difficulties and was unable to pay its debts owing to various parties involved in the Suntec City project including Ricwil. By July 1994, Kailay owed Ricwil a sum of $742,958.75. As the chances of recovering the moneys owed by Kailay were remote and for the purpose of obtaining some payment from Kailay, Mr Chew, on behalf of Ricwil, decided to purchase from Kailay the machinery for the sum of $325,000 which was to be paid by setting it off against part of the amount owed by Kailay to Ricwil. An agreement in writing was made between Kailay and Ricwil on 12 June 1995, whereby Kailay would sell and Ricwil would purchase the machinery for the sum of $325,000 and this sum would be paid by Ricwil setting it off against part of the debt owed by Kailay to Ricwil. Further, one of the terms of the agreement was that the machinery would be `free from all encumbrances and/or liabilities such as hire purchase, leasing and/or likewise`.

14 Pursuant to the agreement, the machinery was delivered and installed in August 1995 at the premises, No 8 Fan Yoong Road, where the three companies, Ricwil, Sintalow and Thermosel, were carrying on their respective businesses. However, unknown to Mr Chew, the machinery was not really owned by Kailay but was on hire purchase from DBS Finance Ltd (`DBS Finance`) and there was still an outstanding amount of about $70,000 owing to DBS Finance under the hire purchase agreement. Kailay defaulted in payment of the hire purchase

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instalments in November 1995 and was unable to service the instalment payments further.

15 At that time, Kailay also owed Sintalow a considerable sum of money. That being the position, Mr Chew made another arrangement with Kailay. On 18 November 1995, on behalf of Sintalow he struck a deal with Kailay whereby Sintalow would pay DBS Finance the sum of $16,763 in consideration of Kailay providing Sintalow with certain equipment. That payment was, of course, not sufficient to discharge the remaining sum owing to DBS Finance. On 13 December 1995, another arrangement was made between Mr Chew on behalf of Sintalow and Kailay under which Sintalow agreed to buy certain pipes and fittings from Kailay for the sum of $100,000 and the payment of this sum was to be effected by Sintalow first paying on behalf of Kailay the sum of $70,268.42 direct to DBS Finance to discharge the remaining hire purchase instalments and secondly by setting off the balance of $29,731.58 against part of the amount owed by Kailay to Sintalow. However, subsequently Mr Chew had a change of heart and decided not to cause Sintalow to pay the remaining instalments to DBS Finance. According to Mr Chew, the second arrangement made with Kailay was later terminated orally and a new arrangement was then made by him on behalf of Ricwil with Kailay sometime after 13 December 1995, and this was evidenced by three undated letters. First, there was a letter from Kailay Engineering Co (S) Pte Ltd, the actual owner of the machinery, addressed to DBS Finance stating that the machinery was being transferred to Ricwil and that $70,268.42 would be paid to DBS Finance by Ricwil. The second letter was from Kailay Engineering Co (S) Pte Ltd to Ricwil which set out an agreement whereby Ricwil would pay the outstanding sum of $70,268.42 under the hire purchase directly to DBS Finance. The third letter was from Kailay to Ricwil stating that in consideration of Ricwil taking over certain

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surplus materials, Ricwil would effect the final outstanding payment of $70,268.42 to DBS Finance. These letters were purportedly issued on 29 December 1995.

16 The trial judge did not accept Mr Chew`s evidence. He found that there was an agreement in writing made on 13 December 1995 between Sintalow and Kailay whereby Sintalow undertook to pay the instalments to DBS Finance as part payment for the purchase price of certain pipes and fittings owned by Kailay and that the three letters were a sham and had no effect. He held that by failing to procure Sintalow to carry out its part of the agreement and to pay off the outstanding hire purchase instalments Mr Chew had allowed his interest in Sintalow to influence his actions as director of Ricwil. It prevented him from acting in accordance with his fiduciary duties and resulted in Ricwil being deprived of the ownership of the machinery.

17 The appellants challenge this conclusion of the trial judge. First, it is submitted on their behalf that in relation to Ricwil`s loss of the ownership of the machinery, the dominant or effective cause was not Mr Chew`s breach of fiduciary duties but Ricwil`s complete indifference to the fate of the machinery during the period between 15 January 1996 and 25 June 1996, when there were opportunities for Ricwil to acquire the machinery by making payment of the balance sum due to DBS Finance. As no payment was made by Ricwil the machinery was repossessed on 25 June 1996 by DBS Finance pursuant to the terms of the hire purchase agreement made between them and Kailay. Thermosel subsequently purchased the machinery only after it had been repossessed by DBS Finance. Secondly, Sintalow was under no obligation to Ricwil either to enter into the arrangement with Kailay on 13 December 1995 or to pay off the balance of the instalments due to DBS Finance. Nor was Mr Chew personally.

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18 We find some force in this argument. We think that the trial judge has misdirected himself on certain material facts in relation to the findings he made. It is clear to us that the transaction relating to the acquisition of the machinery from Kailay was arranged by Mr Chew on behalf of Ricwil with the intention of recovering in kind some moneys from Kailay. The purchase price of $325,000 for the machinery was to be paid by setting it off against part of the amount owed by Kailay to Ricwil. Under the agreement made with Kailay, the machinery was to be free from all encumbrances. However, unknown to Mr Chew the machinery was still under hire purchase from DBS Finance and there were outstanding payments to be made which Kailay was unable to pay. Mr Chew then proceeded to make further arrangements with Kailay, and this time he made use of Sintalow presumably because Kailay also owed Sintalow considerable sums of moneys. He made two arrangements, as we have narrated. Under the second arrangement made on or about 13 December 1995, Sintalow in return for certain pipes and fittings would, among other things, pay to DBS Finance the outstanding instalments under the hire purchase agreement. For reasons which the trial judge did not accept, this arrangement was not implemented by Sintalow; it did not pay the sum as agreed. The trial judge found (at [para] 49 of his grounds of judgment) that Ricwil was put in a disadvantageous position while Sintalow, which bought the materials from Kailay for $100,000 of which $70,268.42 was to be paid to DBS Finance, benefitted by being relieved of this obligation. The trial judge accepted the evidence of one Mr Chai Meng Shep, the then project manager of Kailay, and found that pursuant to the agreement of 13 December 1995 Sintalow did take delivery of the materials agreed to be sold by Kailay, and that Sintalow did not perform the agreement by making the payment to DBS Finance as agreed with Kailay. The trial judge was entitled to make this finding. However, he fell into error in concluding that Sintalow by not performing the agreement made with

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Kailay had put Ricwil in a disadvantageous position. As between Kailay and Sintalow, the latter was clearly in breach of the agreement made on 13 December 1995, as having taken the materials from Kailay it failed or refused to pay to DBS Finance the sum of $70,268.42. However, that obligation was owed to Kailay and not to Ricwil. Sintalow was under no obligation to Ricwil to pay that amount. Ricwil itself purchased the machinery from Kailay for $325,000 and under the agreement the machinery was to be free from all encumbrances, but as it turned out it was still on hire purchase from DBS Finance and there was a remaining sum of $70,268.42 to be paid to DBS Finance. In these circumstances, if Ricwil intended to retain the machinery, it would have to pay the sum to DBS Finance. If this sum was not paid, as it was not, DBS Finance would be entitled to repossess the machinery, which eventually they did. Mr Chew vis-.-vis Ricwil was under no obligation to use his or Sintalow`s funds to effect the payment to DBS Finance.

19 That was not all. A meeting of the board of directors of Ricwil was convened for 15 January 1996 and the first item on the agenda was `the takeover of machinery of Kailay (S) Limited`. At the meeting, the transaction of the acquisition of the duct fabricating machinery from Kailay was discussed. Mr Chew informed the board that in view of the huge amount owed by Kailay to Ricwil and `impending liquidity crisis` of Kailay, he had acted on his own and acquired from Kailay the machinery on behalf of Ricwil at the price of $325,000, and that the purchase was a bargain. This sum was to be paid by setting it off against part of the moneys owed by Kailay to Ricwil and there was still an outstanding sum of about $70,000 which Ricwil had to pay to DBS Finance. He further informed the board that should Ricwil decline to take the machinery, Sintalow would buy it. It appeared that the agreement made between Kailay and Ricwil was tabled at the meeting. The chairman of the board, Mr

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Low Chok Yin, commented that the purchase of the machinery costing $325,000 warranted the board`s approval, as that was specifically provided for in the joint venture agreement. Mr Chew defended the acquisition by saying that it was `only a contra of account, and not a purchase`. To this, another director, Ms Judy Kuan, responded that despite the fact that the price of the machinery was to be paid by way of a set-off against the moneys owed by Kailay, it was, nevertheless, a purchase and approval of the board was required. The board eventually decided to defer its decision on the machinery until it had obtained legal opinion on the documents.

20 Further, at that meeting, Mr Chew and Ms Aw tendered their resignations as managing director and director respectively, which were to take effect three months from that date. Effectively, as from 16 January 1996, the day-to-day running of Ricwil was taken over by another director, Mr Stanley Wong, who prior to that was the general manager of Sintalow from which position he resigned.

21 The trial judge found that Mr Chew did not disclose fully the circumstances surrounding the undated letters which he found were a sham. He said at [para] 58:

> *Mr Chew did not make a full disclosure of the circumstances surrounding the undated letters. The agreements evidenced by them were shams as I have found. Ricwil did not have to pay DBS Finance. If they were not shams then they were inconsistent with each other and could not have been valid all at the same time. An explanation was called for. None was given.*

22 We agree that Mr Chew did not make full disclosure at the meeting. However, with respect, we are unable to agree with the trial judge that Ricwil did not have to pay DBS Finance. The trial judge continued at [para] 58:

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> *No arrangements were made at any time after the directors` meeting or at all for DBS Finance to be paid and if such arrangements were made they were not carried out. Mr Chew allowed his interests in Sintalow to influence his actions as a director of Ricwil. He failed to act in the interest of Ricwil and Ricwil was deprived of the ownership of the machine.*

23 With respect, we are unable to agree with this conclusion of the trial judge. No arrangement was made at any time after the board meeting for DBS Finance to be paid, because the board, rightly or wrongly, had decided to defer its decision until after legal opinion on the documents was obtained. As we have recounted, after the board meeting Mr Chew was not effectively in control of the day-to-day management of Ricwil; thenceforth Mr Stanley Wong was in charge.

24 There were further significant events which occurred after the board meeting which appeared to have escaped the attention of the trial judge. First, on 11 April 1996, DBS Finance wrote a letter to Ricwil, marked for the attention of Mr Chew, offering to provide a hire purchase facility of $68,690.01 repayable over 24 months to enable Ricwil to pay off the outstanding amount still owing under the hire purchase agreement made with Kailay. On 23 April 1996, Mr Chew forwarded this letter to Ricwil, marked for the attention of Mr Stanley Wong. Nothing appeared to have been done in response to the offer of DBS Finance, and no action was taken by Mr Stanley Wong or anyone on behalf of Ricwil in relation to the payment of the sum outstanding in order to obtain the ownership of the machinery.

25 Secondly, in mid-June 1996, Ricwil moved out of the premises, No 8 Fan Yoong Road. However, the machinery was not taken along and no request then or subsequently was made by Ricwil to take the machinery. Those in charge of Ricwil appeared to be disinterested in acquiring the machinery.

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26 Lastly, on 19 June 1996, officers from DBS Finance showed up at No 8 Fan Yoong Road and gave notice of intention to repossess the machinery. On 25 June 1996, Chew again wrote to Mr Stanley Wong enclosing a letter from DBS Finance which stated that repossession was going to take place, and Mr Chew asked why the situation had been allowed to deteriorate to such an extent. Ricwil did not respond to the letters and did nothing whatsoever with respect to the acquisition of the machinery or the payment of the outstanding sum due to DBS Finance.

27 The machinery was subsequently repossessed by DBS Finance and was put up for sale in a public auction in July 1996. As the bids were low, DBS Finance did not accept any of them. DBS Finance subsequently sold the machinery to Thermosel on 8 July 1996 at the price of $60,000.

28 In all the circumstances, we do not see how Mr Chew could be held responsible for Ricwil`s loss of the ownership of the machinery. The failure to acquire the machinery was clearly not due to anything done or omitted to be done by Mr Chew. On the contrary, Mr Chew was interested in acquiring the machinery for Ricwil, but the decision taken by Ricwil`s board of directors on 15 January 1996 was that the acquisition should be deferred pending legal opinion on the documents. It is unclear whether or not any legal opinion was indeed sought on the documents but the fact remained that no action was taken with reference to the acquisition of the machinery or payment of the outstanding sum to DBS Finance. After the board meeting on 15 January 1996, Mr Chew was no longer effectively in control of Ricwil`s affairs. Even if he were still in control, he could not proceed further to pay the outstanding sum to DBS Finance or do anything towards acquiring the machinery, as the board had taken a clear stand that such acquisition required its approval, and the board had not given any approval; instead the board had decided to defer its decision on the

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machinery after legal advice was sought. The board or those in charge of the affairs of Ricwil, at the time, also took no action in relation to the offer of a new scheme of payments made by DBS Finance that was made on 23 April 1996. Ricwil also appeared not to assert any ownership over the machinery when it left the premises, No 8 Fan Yoong Road, in June 1996 and did not even respond to the notice of repossession sent by DBS Finance on 25 June 1996. In our view, Ricwil`s failure to acquire the machinery was not caused by and was not attributable in any way to any breach of duty on the part of Mr Chew as a director of Ricwil, but was due essentially to the indifference to or disinterestedness in the machinery on the part of the board or those in charge of the affairs of Ricwil at the material time. At any rate, it seems to us that the board did not, at any time, recognise or accept that Ricwil owned the machinery in the first place.

29 In our judgment, Mr Chew did not commit a breach of duty as a director of Ricwil in relation to the machinery and was not responsible for its loss as a result of the repossession thereof by DBS Finance. While it is true that Mr Chew did not, at the board meeting, make full disclosure of the entire circumstances relating to the arrangement whereby Sintalow would pay the sum of $70,268.42 to DBS Finance in return for certain materials from Kailay, this failure was not a breach of duty as regards the acquisition of the machinery. The two matters were not connected. As such, Ricwil could not be said to have been responsible for the loss of the machinery.

30 Ricwil`s claim for damages against Mr Chew for being deprived of the ownership of the machinery therefore fails. Accordingly, the order below awarding to Ricwil damages to be assessed for the loss of the ownership of the machinery cannot stand and must be set aside. For the same reasons, the claim against Thermosel for an account of profit for the use of the machinery also

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fails. In the circumstances that had transpired, Thermosel purchased the machinery from DBS Finance in an arm`s length transaction, free from any claim of Ricwil, and cannot be called upon to account to Ricwil for any profits derived from its use of the machinery. It follows that the order requiring Thermosel to give an account of the profits it made with respect to its use of the machinery must also be set aside.

31 ***Contract with Speed-Air***

32 The next area of contention relates to the contracts for the manufacture and supply of certain ducts to Speed-Air. The orders for these ducts were placed by Speed-Air with Ricwil sometime in September 1995. In these orders Ricwil`s stationery and order forms were used. It was claimed by Ricwil that these contracts were made with and were performed by Ricwil, and that subsequently Mr Chew and Ms Aw caused these contracts to be cancelled and transferred to Thermosel. As a result, these contracts had been diverted from Ricwil to Thermosel and Ricwil had thereby lost the benefit of these contracts.

33 The trial judge found that the orders for the manufacture of ducts were placed by Speed-Air with Ricwil, not Thermosel. The contract was performed by Ricwil using its materials and goods. After this had been done, Mr Chew and Ms Aw caused the contracts to be cancelled and transferred to Thermosel by issuing Thermosel`s delivery orders in place of Ricwil`s, thus enabling Thermosel to receive the profits of the contracts without providing the resources. The trial judge held at [para] 26-28:

> 26 … In August and September 1995 Thermosel had no employees of its own although it took on Mr Ding from Ricwil in September 1995. It had no inventory. It had no money. The

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> business with Speed-Air was business of the kind that Ricwil could undertake.
>
> 27 Ricwil`s forms of delivery order were used in each case but not because Thermosel had no stationery of its own. It had its own stationery for the purpose of the quotations. I see no reason why it did not have delivery order forms. I see no reason why Ricwil`s forms were not overstamped with Thermosel`s name if they were to have been for Thermosel`s use. I think Ricwil`s forms were used because the fabrication work was done by Ricwil. The materials used came from Ricwil. The goods were drawn from Ricwil`s inventory. The business with Speed-Air was undertaken by Ricwil.
>
> 28 I find that all the contracts particularised in para (19) of the particulars under para 10 of the statement of claim were contracts made by Ricwil with its customer Speed-Air. I find that after these contracts had been performed by delivery of the goods sold Mr Chew and Ms Aw caused them to be cancelled and transferred to Thermosel by issuing Thermosel`s delivery orders in place of Ricwil`s. I find that Mr Chew and Ms Aw have failed to act in the interest of Ricwil.

34 Counsel for the appellants argues that as the board of directors of Ricwil had never ratified the purchase of the machinery, Ricwil had not acquired the machinery and could not claim to be in the business of duct fabrication. Ricwil could therefore not have entered into the contracts with Speed-Air to supply the ducts. These contracts thus belonged to Thermosel even though the stationery used in relation to the placing of these orders was Ricwil`s. Furthermore, Thermosel had already been ordered to pay Ricwil $55,149.08 as expenses incurred by Ricwil on behalf of Thermosel in the course of and for the duct fabrication business. There was no appeal against this order. The appellants say that if Thermosel was ordered to reimburse Ricwil this sum of money, Ricwil could not at the same time claim the rights and benefits of the contracts with Speed-Air.

35 In our opinion, in relation to these contracts with Speed-Air, the question of the board`s approval for the purchase of the machinery has no relevance. It

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arose much later, namely, on 15 January 1996 at a board meeting of Ricwil when it was pointed out to Mr Chew that board`s approval was required for the acquisition of assets for Ricwil. It is true that neither at that meeting nor subsequently did the board approve or ratify the acquisition of the machinery. But, in relation to the contracts made with Speed-Air, such approval or the absence of it has no relevance. The contracts should be considered in the context of the prevailing circumstances in which they were made.

36 On 12 June 1995, Mr Chew on behalf of Ricwil entered into an agreement in writing with Kailey to purchase the latter`s machinery, and under the agreement the purchase price therefor was paid by setting it off against an equivalent amount of the debt owed by Kailey to Ricwil. As between Kailey and Ricwil, the machinery had been paid for, and it belonged to Ricwil as from that date. Pursuant to the agreement, the machinery was delivered to and installed at the premises at which Ricwil carried on business, No 8 Fan Yoong Road, in August 1995. Now, the orders for the manufacture and supply of the ducts were placed by Speed-Air with Ricwil sometime in September 1995 and the contracts were made between them and Ricwil at or about that time. Clearly, at that time Ricwil had possession of the machinery and were in a position to perform the contracts, and the contracts were performed by Ricwil. As the trial judge found, the ducts were manufactured and supplied to Speed-Air using Ricwil`s materials and there was no reason why those contracts should subsequently be cancelled and transferred to Thermosel. The decision of the trial judge on this issue is correct and we affirm it.

37 Related to the same issue is a subsidiary argument pertaining to the sum of $55,149.08 which, under [para] 4 and 5 of the judgment, was to be paid to Ricwil by Ms Aw and Thermosel as expenses incurred by Ricwil on behalf of Thermosel. Counsel for the appellants argues that this sum represented expenses

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incurred in the course of and for the duct fabrication business, and if this sum was to be paid to Ricwil, it would result in a double recovery, as there was already an order for damages to be paid to Ricwil for the loss of the benefits of the contracts made with Speed-Air for the manufacture and supply of ducts. The argument raised here relates to assessment of damages. There may or may not be a double recovery. It all depends on the purposes for which these expenses were incurred. If they were incurred in the course of or for the performance of the contracts, then they should be taken into account in the assessment of damages. These items of expenses should be best left to be dealt with in the assessment of damages. The order below on this item should not be disturbed.

38 ***Contract with Kwang Wah***

39 The third area of dispute between the parties concerns their dealings with Kwang Wah. On 6 October 1995, Ricwil submitted to Kwang Wah a quotation for the pre-insulation of carrier pipes for the Suntec City project. This quotation did not include the carrier pipes which were to be supplied by Kwang Wah itself. Kwang Wah requested for a discount of 30% on the quotation. Ricwil replied in a letter dated 20 October 1995 written by Mr Chew stating that Ricwil would give Kwang Wah a discount of 22.5% on the quotation on condition that Ricwil would supply Nippon steel pipes to Kwang Wah. The letter also stated that this condition would apply to the UIC Woodlands and Seagate projects of Kwang Wah for which Ricwil was also supposed to perform the pre-insulation works on behalf of Kwang Wah. This arrangement was confirmed by Kwang Wah on 30 October 1995 and reconfirmed by Ricwil on 2 November 1995. However, as it subsequently transpired, the supplier of the Nippon steel pipes for the Suntec City, UIC Woodlands and Seagate projects was Sintalow, not Ricwil, but the agreed discount for the pre-insulation works was given by Ricwil. Ricwil therefore claimed that Mr Chew had diverted the contracts for the supply of the

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Nippon steel pipes from Ricwil to Sintalow, thus causing Ricwil to lose the benefit of the contracts, while bearing the burden of giving the 22.5% discount to Kwang Wah for the pre-insulation works.

40 The trial judge agreed with Ricwil. He held that it was the duty of Mr Chew to see to it that the Nippon steel pipes were supplied by Ricwil. As it happened, it was Ricwil that bore the burden of providing the discount and Sintalow that reaped the benefit arising from the supply of the Nippon steel pipes. He found that in this respect, Mr Chew acted in breach of his duty to act in the best interests of Ricwil and in breach of s 157(1) of the Companies Act (Cap 50). He said at [para] 65 of his grounds of judgment:

> *The further discount was in a real sense the price paid by Ricwil for securing the supply of `Nippon` steel pipes to Kwang Wah Engineering. In my judgment Mr Chew was not only in breach of his duty to act in the interest of Ricwil but he was also in breach of s 157(1) of the Companies Act to act honestly in the discharge of his duties as a director of Ricwil. He had appropriated to Sintalow, a company all of whose issued shares were held beneficially by him and his wife, a business opportunity paid for by a discount given by him as a director of Ricwil. The discount was given by Ricwil. The pipes were supplied by Sintalow.*

41 The appellants contend that the true arrangement at the time of the negotiation was that in return for the 22.5% discount given by Ricwil for the pre-insulation works, Sintalow, not Ricwil, would supply Kwang Wah the Nippon steel pipes. It was never the intention of all the parties concerned that Ricwil would supply these pipes to Kwang Wah. In other words, Ricwil would perform the pre-insulation of the pipes for Kwang Wah and Sintalow would supply Kwang Wah the Nippon steel pipes. We have difficulty in accepting such an argument. It does not make any commercial sense to Ricwil. We can see no reason why Ricwil should not also be the party to supply the Nippon steel pipes. As procured by Mr Chew, Ricwil carried out the contract for the pre-insulation of the pipes incurring a loss, while the benefit for the supply of the pipes went

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to Sintalow. If the intended arrangement was as the appellants alleged, then Mr Chew still did not act in the best interests of Ricwil as he was bound to do in his capacity of director. It could not be in the best interests of Ricwil to sustain a loss in order to enable Sintalow, which is his own company, to make a profit. The discount given by Ricwil and procured by Mr Chew in effect gave Sintalow an opportunity to secure the lucrative contracts of supplying the Nippon pipes to Kwang Wah.

42 Turning to the letter of 20 October 1995, we find it clear that Ricwil would only give the 22.5% discount on its original quotation to Kwang Wah on condition that Kwang Wah would purchase the Nippon steel pipes from Ricwil in relation to the Suntec City project. This condition was also expressly stated to apply to the UIC Woodlands and Seagate projects. The contract made with Kwang Wah was that Ricwil would carry out the pre-insulation works for Kwang Wah at an agreed discount, and in part consideration of that discount would supply to them the Nippon steel pipes. This was also to be the case for the UIC Woodlands and Seagate projects of Kwang Wah. Therefore, by procuring Sintalow to supply to Kwang Wah the very pipes that were to be supplied by Ricwil, Mr Chew had purloined the business opportunity that belonged to Ricwil and allowed Sintalow to reap the benefit of this opportunity. He had so arranged the contracts that the burden was borne by Ricwil while the benefit was received by Sintalow. This was a classic example of a breach of duty of a director of a company. In our judgment, as the trial judge found, Mr Chew breached his fiduciary duty to act in the best interests of Ricwil as its director.

43 ***Conspiracy***

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44 Based on the same set of facts, the trial judge also found that Mr Chew and Sintalow were liable for the tort of conspiracy, that is, that they conspired by unlawful means with the intention of injuring or damaging Ricwil. The act by unlawful means was carried out and the intention was achieved. Mr Chew and Sintalow were thus liable in damages to Ricwil for this tort.

45 In **Quah Kay Tee v Ong & Co Pte Ltd** [1997] 1 SLR 390 , the Court of Appeal held that a conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of injuring or damaging the plaintiff, and the act is carried out and the intention achieved. The appellants argue that the elements of the tort have not been established even if it were found that Mr Chew was liable for having caused a loss to Ricwil by offering the 22.5% discount. The discount was not a breach of duty as it represented a bona fide attempt by Mr Chew to secure business from Kwang Wah. Furthermore, even if the tort was made out, the appellants say there was no basis to warrant a further order for the assessment of damages, as the earlier order for the assessment of damages resulting from Mr Chew`s breach of fiduciary duty in diverting the contract to supply the Nippon pipes from Ricwil to Sintalow was sufficient to cover Ricwil`s loss.

46 We are of the opinion that the trial judge was correct in holding that Chew and Sintalow had committed the tort of conspiracy by unlawful means. The unlawful act was Mr Chew`s breach of his fiduciary duty to Ricwil, and Mr Chew and Sintalow must have intended to injure or damage Ricwil, as Ricwil would obviously lose the benefit to supply the Nippon pipes, while shouldering the burden of giving the discount to Kwang Wah. The loss or damage to Ricwil was a necessary corollary of the profit accruing to Sintalow through the conspiracy. There was a direct nexus between these events. It might not have been the predominant intention of Mr Chew and Sintalow to damage Ricwil,

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but this is not a necessary element for the tort of conspiracy by unlawful means. It is only necessary when a conspiracy by lawful means is alleged: **Lonrho plc v Fayed** [1992] 1 AC 448. The tort of conspiracy was committed in this case.

47 The damages awarded to Ricwil in respect of its losses occasioned by this tort might well result in Ricwil obtaining a double recovery. In this respect, we have to bear in mind the observations made by Lord Nicholls in **Personal Representatives of Tang Man Sit v Capacious Investments Ltd** [1996] AC 514 at 522:

> *Faced with cumulative remedies a plaintiff is not required to choose. He may have both remedies. He may pursue one remedy or the other remedy or both remedies, just as he wishes. It is a matter for him. He may obtain judgment for both remedies and enforce both judgments … There are limitations to this freedom … A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss … [O]nce a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery.*

48 In the recent decision in **Lim Teck Cheng v Wyno Marine Pte Ltd (in liquidation)** [1999] 4 SLR 673 this court approved these principles. In addition, it held, inter alia, that where cumulative remedies were available to a plaintiff, the plaintiff cannot recover, in the aggregate, an amount in excess of his loss. The damage sustained by Ricwil as a result of the conspiracy committed by Mr Chew and Sintalow may be the same loss sustained by Ricwil arising from the diversion of the contracts to supply Kwang Wah with the Nippon steel pipes. We express no opinion on this issue and leave it to be dealt with on assessment. While we leave the order for damages to be assessed undisturbed, we would direct that in assessing damages the above principles should be borne in mind.

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49 ***Conclusion***

50 We now refer specifically to the terms of the judgment settled by the trial judge and make the following orders. We set aside [para] 6 and 10 of the judgment. We direct that there should be no double recovery in (1) assessing damages under [para] 7(a) or accounting for the profits under [para] 7(b) and (2) assessing damages under [para] 11 of the judgment. As for the costs of the appeal, the appellants have not succeeded wholly in the appeal. Accordingly, we order that the appellants be awarded only half the costs of the appeal. The order of costs in the court below will remain intact. To the extent of the orders we have made we allow the appeal. We make the usual consequential order for the refund to the appellants of the deposit in court as security for costs.

51 **Outcome:**

52 Appeal allowed in part.

Chao Hick Tin JA
L P Thean JA
Yong Pung How CJ

Jimmy Yim SC, Randolph Khoo and Rama S Tiwari (Drew & Napier) for the appellants
Leslie Chew, Lionel Tay and Ng Hweelon (Khattar Wong & Partners) for the respondents

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