IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 313

OS 62/1996

Between

Kumagai-Zenecon
Construction Pte Ltd
Another

… Plaintiff

And

Low Hua Kin

… Defendant

GROUNDS OF DECISION

Companies — Directors; Restitution — Restitutio in integrum

Version No 1: 29 Oct 2026 (23:45 hrs)

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Kumagai-Zenecon Construction Pte Ltd and Another v Low Hua Kin

[1999] SGHC 313

OS 62/1996
G P Selvam J
30 November 1999

1 : ***Introduction***

2 The defendant, Low Hua Kin @ Loo Wah Kim, has two reported cases to his name: **Re Kumagai-Zenecon Construction Pte Ltd; Kumagai Gumi Co Ltd v Kumagai-Zenecon Construction Pte Ltd & Ors** [1994] 3 SLR 552 (Warren LH Khoo J) and **Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors** [1995] 2 SLR 297 (Court of Appeal). The latter was an appeal from the former

3 The facts of the case read like a scaled-down version of a Greek tragedy. It has the essentials: the passion, the hubris, the hamartia and the nemesis. It is a complicated saga with several dimensions. Warren LH Khoo J heard it for more than three weeks and decided against Low. Low appealed to the Court of appeal. The present case is a sequel to decision of the Court of Appeal and deals with one of the several aspects.

4 The decision of Warren Khoo J was in OP 9/92. It was an oppression petition under s 216 of the Companies Act (Cap 50). Low was one of seven defendants. Kumagai Gumi Co Ltd (`Kumagi-J`) a well-known Japanese

construction company was the petitioner. Kumagai-J asked for the dissolution of two Singapore companies: Kumagai-Zencon Construction Pte Ltd and Kumagai Investment Pte Ltd (`Kumagai Investment`) which when incorporated was called Kumagai Property Development Pte Ltd. Warren LH Khoo J ordered both companies to be wound up. The judge further ordered Low to pay $2,982,517.17 to Kumagai Investment. On appeal the Court of Appeal upheld the winding-up orders but set aside the monetary award on the ground that it was not supported by evidence.

5 The Court of Appeal, nonetheless, advised the liquidators to investigate the alleged loss and then take out a misfeasance summons under s 341 of the Companies Act or proceed against Low as they thought fit. In the event, the liquidators took out the summons before me (OS 62/96). Both companies, Kumagai Zencon and Kumagai Investments, are the plaintiffs before me. It is apt now to tease out the essential facts.

6 ***The passion***

7

8 In 1972 Low was a lecturer in the University of Singapore. Later, with the consent of his employers, he became a consultant to Kumagai-J. Obviously Low must have impressed Kumagai immeasurably for in 1976 he became Kumagai-J`s fulltime employee as an adviser. This gave him opportunity to acquire an appetite for the power and pelf of the corporate world. So in 1979 his wife and one Low Woon Hock procured the incorporation of a company called Zenecon Pte Ltd (`Zenecon`). Its purpose was to do business with Kumagai-J. Kumagai-J awarded at least two contracts to Zenecon.

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9 In 1983, Kumagai-J and Low entered into a joint venture agreement. Pursuant to that, a joint venture company was formed, namely, Kumagai-Zenecon Construction Pte Ltd (`the JV company`). The principal object of the JV company, as one would expect, was to carry on the business of building and general construction, civil and structural engineers, and construction and management of public works. Zenecon held a majority of the shares in the joint venture company, that is 51% of 3 million shares of $1 each. Kumagai-J held the rest. The reason why Zenecon held a majority interest, apparently, was that it entitled the JV company to be classified as `local`. On that basis it would enjoy preferential treatment and receive financial assistance from Singapore government and statutory bodies. As it is usual in joint venture companies, there was a shareholders` agreement stipulating the rights and obligations of the parties. Kumagai-J was to provide technical expertise and working capital. Low and Zenecon assumed responsibility for management of the joint venture. Zenecon was to cease undertaking construction projects of its own other than those already in hand. Low was appointed the managing director of the JV company. He had three other directors on his side. Kumagai-J too had an equal number of directors. The arrangement was such that Low was in the saddle as regards the day-to-day affairs of the JV company

10 ***The hubris***

11

12 One year later, Low came up with the idea of forming another company to market the housing development projects undertaken by the JV company. Kumagai-J agreed. In the result, Kumagai Property Marketing Pte Ltd was formed. For the moment I shall call it the marketing company. The original

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subscribers of the marketing company were Low`s wife, Teo Yit Bee (`Teo`), and one Low Woon Hock, who was also a shareholder in Zenecon. Later the JV company was allotted 9,000 shares. Low`s brother-in-law Lim Thye San was, with the approval of Kumagai-J, allotted 1,000 shares. Later, however, Low acquired the 1,000 shares from his brother-in-law. All the officers of the marketing company came from Low`s camp. He was the executive supremo of the marketing company.

13 In the result, therefore, Low was in virtual control of three companies - that is to say Zenecon, the JV company and marketing company. His appetite was not satiated with this position. He wanted more terrain under his control. So he made a bid for control of two other Singapore companies: Guthrie GTS Ltd (`Guthrie`) and Pac Can Investments Holdings Ltd (`Pac Can`). In June and July the marketing company, which was under Low`s effective control, acquired some 12.57% of the shares of Guthrie. At about the same time Low personally acquired 7.9% shares in Guthrie. Using the combined commanding power of the shareholding Low first became a director of Guthrie and subsequently its executive supremo.

14 The predominant spirit of a joint venture is that the actions of its participants must be for the advancement of the joint venture. Further, unless otherwise agreed, a joint venture presupposes that in all important matters there will be joint consultation and decision making. This applies to a limited company as well. The Companies Act gives expression to this fundamental precept by providing for shareholders` and directors` meetings. This precept unfortunately was not at all times alive in the consciousness of Low. On a number of matters affecting the JV company and the marketing company Low acted without any prior consultation with Kumagai-J. One such act was the

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change of the name of the marketing company from Kumagai Property Development Pte Ltd to Kumagai Investment Pte Ltd. The new name, of course, had the attraction power of an internationally known corporation. The purchase of the Guthrie shares by the marketing company and himself was not known to Kumagai-J until well after the event. He was working on his own and for his own advancement without consulting his joint-venture partners.

15 ***The hamartia***

16

17 The marketing company now called Kumagai Investment Pte Ltd (and I shall from now on call it the investment company) purchased 7,321,000 Pac Can shares in May 1991. Kumagai-J knew nothing about it until news of it appeared in the news-paper. It was only then that Kumagai-J discovered that Kumagai Investments was a new name of the marketing company. LP Thean JA delivering the judgment of the Court of Appeal said at pp 304-305:

> *In May 1991, Kano learnt from the newspapers that a company known as Kumagai Investment Pte Ltd had bought 7.321 million shares in Pacific Can Investments Holdings Ltd (Pac Can). Upon investigation, Kano discovered that the company was actually KPM, whose name had been changed on the authority of a special resolution passed at a general meeting of KPM held on 23 April 1991. On the authority of another resolution passed at a general meeting held on 1 July 1991, the objects clause of KPM`s memorandum of association was altered to allow investment in shares as part of its businesses. Kumagai, however, knew nothing of these changes. In August 1991, 278,000 more Pac Can shares were purchased by KPM, again without Kumagai`s knowledge.*

18 Low admitted in his affidavits filed in OP 9/92 and also when giving evidence before Warren LH Khoo J that he as director of the marketing company made the decision to purchase the Pac Can shares. Warren LH Khoo

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J found that the Pac Can share purchases were meant to support Low`s own ambitions in the board room of Pac Can.

19 Like Warren LH Khoo J, I am of the view that the purchase of Pac Can share was an improper act. It was a grave error on his part. It was a hamartia as the Greek drama would call it. More importantly and relevantly it was wrong in law. To explain why I shall first state the law.

20 ***The position of a fiduciary***

21

22 The standard of duty imposed by law on a fiduciary is the highest standard known to the law. It is a duty to act for someone else`s benefit by sacrificing one`s own personal interest to that of the other. If the fiduciary is not prepared to make such sacrifice he will never be able to protect and advance the interest of the other. Selfishness is the antithesis of selflessness. The office of a fiduciary is founded on selflessness. Selfishness is absolutely prohibited.

23 This subtle point was settled almost three centuries ago by **Keech v Sandford** [1726] 25 ER 273. In that case a trustee held a leasehold for the benefit of an infant. Before the expiration of the lease the trustee applied to the lessor for a renewal for the benefit of the infant. The lessor refused. There was clear proof of the lessor`s refusal to renew for the benefit of the infant. Then the trustee got the lease made to him. The infant brought an action to have the lease assigned to him and for an account of the profits. Lord King LC gave judgment in favour of the infant. The ratio of the decision is contained in this passage:

> *If a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to cestui que use;*

> *though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to cestui que use.*

24 Even before ***Keech v Sandford*** there was a basic duty governing a fiduciary: a fiduciary must not in general make a profit for himself out of his position. ***Keech v Sandford*** raised the standard to the highest level: a fiduciary cannot have the liberty allowed to all other men. The object of the rule is to prevent misuse of delegated power.

25 In **Hospital Products Ltd v United States Surgical Corporation & Ors** [1984] 156 CLR 41 Mason J stated at pp 96-97:

> *The fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.*

26 A fiduciary relationship at times may be superimposed on a prior contractual relationship such as employer-employee, solicitor-client and partnership. A company director, by reason of his fiduciary position subjects himself to the above responsibilities vis-Ã -vis the source of his power. He cannot use his position for his own advantage. Low was not entitled to except himself from this basic rule. He was in a worse position because he acted furtively vis-Ã -vis Kumagai-J. Low was in blatant breach of the basic as well as the higher equitable obligation.

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27 In these circumstances, Kumagai-J having filed OP 9/92 obtained a court order on 11 February 1952 appointing provisional liquidators of the JV company. Originating Petition 9/92 named nine respondents. The JV company, the investment company and Low were three of the nine respondents. It is now necessary to advert to certain important events that happened after the appointment of provisional liquidators.

28 ***Investment company is in trouble***

29

30 The investment company at that time was indebted to Arab Bank plc in the sum of well over $3m. The Pac Can shares were pledged as security. In April 1992 the value of the Pac Can shares was low. In these circumstances, Arab Bank made a margin call for $30,000. As the margin call had not been met the bank threatened to sell part of the Pac Can shares which had been pledged to it. This was, however, averted. Later the Bank made another margin call for $150,000 by 6 May 1992.

31 The investment company clearly was in deep financial trouble. The misdeeds of the defendant were the direct cause of it.

32 On 12 June 1992 Low, his wife Madam Teo Yit Bee and Loo Yong Ling were removed as directors of the investment company.

33 Later, on 10 July 1992 an extraordinary general meeting of the members of the investment company was held. One Jason Lim Cheng Tiong was present at the meeting as the proxy for Low and his wife Teo Yit Bee. The following resolution was passed at the meeting.

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> *That the directors or any one of the directors of the company be authorised to dispose the whole or substantially the whole of the company`s undertaking in Pacific Can Investments Ltd, shares pursuant to s 160 of the Companies Act (Cap 50).*

34 Jason Lim abstained from voting. Thus the decision to dispose of the Pac Can shares was made by the JV company without any protest from Low.

35 In late June, after Low and his band had been removed as directors of the investment company, Arab Bank made a demand for the repayment of $3,074,040.37. The investment company was not in a position to meet the demand. The defendant was made aware of the demand. As it was a direct result of his misdeeds Low should have offered assistance. He should have paid the bank. He failed. He left the investment company to fend for itself.

36 The provisional liquidator, on behalf of the investment company, asked the bank to agree to an arranged en bloc sale. The bank agreed and gave till 3 July 1992 to effect a married deal.

37 The defendant was not averse to the shares being sold. In fact he wanted a first right of refusal. The investment company was prepared to negotiate with him. It wrote to him stating that after redeeming the loan from the bank, the surplus would be deposited in an interest bearing account and that that the company would be liquidated after disposal of the assets.

38 On 15 July 1992, the bank extended the time to effect the en bloc private sale to the following day. Later the time was further extended to 20 July 1992 and subsequently to 21 July 1992.

39 In these circumstances the investment company authorised brokers to `source for a married deal for en block of 7,599,000 shares in Pacific Can

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Investment Holdings Ltd for a price at a premium above the prevailing quoted market rates bearing in mind this parcel of shares constitutes a strategic block for an interested party`.

40 On 17 July 1992 through his lawyers Low stated that he did not intend to make a first offer to purchase the Pac Can shares but liked `to have the first right of refusal before the investment company or Arab Bank entered into an agreement to sell the shares.`

41 Then came the D-Day: 21 July 1992. On that day there was an offer to purchase the shares en bloc at 70 cents per share. This was notified to the defendant. He was asked if he was interested to pay a higher price and was asked to respond by 5pm the same day. The next day the investment company sold the shares at 70 cents.

42 ***The defendant`s offer***

43

44 Then there was a letter from the defendant dated 21 July 1991. By this letter the defendant made an offer to purchase the shares at 70.25 cents per share and wanted 14 days to complete the sale.

45 These were the implications of the defendant`s offer: he would not make a first offer but he wanted his own terms to override an offer from another person. For an increased price by one-quarter of a cent which would yield less than $20,000 he wanted to finalise the deal in his own good time of 14 days. The pressure from the bank which was directly due to his misdeeds was of no concern to him.

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46 The provisional liquidator who was also director of the investment company said that he saw the letter after lunch on 22 July 1992 although his office had received it shortly before lunch time. It would be a futile exercise to delve into the defendant`s offer because it was not an offer for immediate cash-sale. The investment company was in a situation of agonising urgency to effect an immediate sale because of the bank`s ultimatum. No sane person placed in that position could have accepted Low`s offer. The investment company was not a supplicant to him nor was it under a duty to sell the shares to him.

47 The shares sold yielded a net amount of $5,237,890. The loss suffered by the investment company was calculated as $2,982,517.17. This was arrived at as follows:

Cost as purchased	$	8,220,407.17
Less: Net sales proceeds	$	5,237,890.00
Loss on investments	$	2,982,517.17

48 These figures were not challenged by Low. Nor did he challenge the principle of calculation of loss.

49 This was the amount the liquidators of the investment company sought to recover from the defendants in the present proceedings.

50 It is to be noted that the plaintiffs had asked the investment company be wound up and eventually succeeded. Given that circumstance there was no reason to continue to maintain the investment company as a going concern in the hope that the price of the Pac Can shares would rise. The company had no executive staff to look after its ill-conceived investments. The investment company had to get these shares out of its system and was fully justified in doing so. This act was authorised by the shareholders at the EGM.

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51 ***Consequence of breach of fiduciary duties***

52

53 I now set out the relevant law regarding breach of fiduciary duties. The following equitable concepts can be culled from the judgment of Street J, in **Re Dawson; Pattisson v Bathurst** [1915] 1 Ch 626 and **Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd** [1966] 2 NSWR 211:

> 1 If a breach of a fiduciary obligation has been committed then the fiduciary is liable to make restitution - that is restore the wronged person in the same position as he would have been if no breach had been committed. Consideration of causation, foreseeability and remoteness do not readily enter into the matter.
>
> 2 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 been no breach.
>
> 3 The right to restitution and compensation of a beneficiary or sufferer which the Court of Equity have imposed on an errant fiduciary is more of an absolute nature than the common law of obligation to pay damages for tort or breach of contract.
>
> 4 The beneficiary or sufferer under the concept of restitution or equitable compensation is entitled to full indemnity and equity will award such interest as may be necessary to create full restitution and compensation.

54 The facts and decision in the ***Re Dawson*** case are of particular salutory interest. In 1939, one of the executors and trustees of the New Zealand assets of a deceased estate (`PSD`) in which he was also a beneficiary, improperly paid away Â£NZ4700 of the trust moneys which were lost to the trust estate. He was under an admitted duty to restore a proper amount to the trust estate. In 1939 there was parity between the Australian pound and the New Zealand pound. At

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the time of enforcing PSD`s liability to make restoration the sum of Â£NZ4700 was worth in Australian currency the sum of Â£A5829 8s 3d. In an action by the beneficiaries of the head estate against the estate of the defaulting trustee. It was held that: The estate of PSD ought to repay to the head estate a sum calculated at the rate of exchange prevailing at the time when the restoration took place and not at the time when the breach of trust occurred. The estate of PSD was therefore liable to repay the capital sum of Â£A5829 8s 3d with interest. The rate of interest payable by the estate PSD should be the mercantile rate of five per cent and not the lower rate of four per cent.

55 ***The decision***

56

57 In my judgment the en bloc sale by the investment company was entirely proper for the following reasons:

58 (i) It was the duty of the investment company to put an end to the investment because it was an improper investment and it had already had suffered a huge loss. Buying shares on borrowed money was a foolhardy investment. Continuing a foolish and foolhardy investment itself would be a foolish and foolhardy act. The future was not for anyone to tell. The loss might have become worse. The sale of the shares therefore was an imperative.

59 (ii) The company had already defaulted vis-Ã -vis the bank and the bank had issued an ultimatum. Defying or ignoring the ultimatum would have been disastrous. An immediate sale therefore was an imperative.

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60 (iii) If the bank or the company had gone into the market and sold the shares, that would have inexorably depressed the price even more. An en bloc sale therefore was an imperative.

61 While accepting the finding that he was in fiduciary duty, Low sought to exonerate himself by saying that the loss was not caused by his errancy. The loss, he said, was caused by the provisional liquidators since they sold the shares. He pushed this argument further by saying that the provisional liquidators acted ultra vires in that they were appointed to preserve the status quo and not sell the Pac Can shares. The shares ought not to have been sold when they were sold. This, he said, broke the chain of events.

62 All these arguments are void of any substance or merit. It was not the provisional liquidators who sold the shares. The provisional liquidators were appointed in respect of the JV company and not the investment company. They had no power to deal with the assets of the investment company. It was the investment company which sold the shares. It did so pursuant to resolution passed at an EGM. The defendant was given notice of the EGM. The defendant was fully aware that the shares could be sold only by the investment company or the bank. On 16 July 1992 Low wrote a letter addressed, not to the provisional liquidators, but Kumagai Marketing Pte Ltd. In that letter he said: `... by letter dated 8 July 1992 made it quite clear that I was requesting for the right of first refusal to the Pac Can shares in the event you or Arab Bank plc decide to sell the same. This however does not mean that I am prepared to make a first offer to purchase these shares at the junction.` Low`s letter of 21 July 1992 making an offer to purchase the shares at 70.25 cents was made to the directors of Kumagai Investments Pte Ltd. His injecting the provisional liquidators into the

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equation was, therefore an insincere and ill-founded attempt to intellectualize his improper act.

63 The loss was incurred because he purchased on borrowed money shares and the price of which had taken a plunge. This was the proximate and effective cause of the loss. It was this circumstance which made the bank threaten a forced sale. This illegitimate act on Low`s part was worsened by another factor: He made the purchase in a company in which he had a personal interest. By his act he perverted the basic rules of equity. In these circumstances it was an inevitable consequence that he would be made accountable. The en bloc sale by the company instead of allowing the bank to force-sell them was in all circumstances the most appropriate thing to do. Accordingly the claim of Kumagai Investments Pte Ltd on $2,982,517.17 succeeds.

64 From time out of mind Courts of Equity have awarded interest whenever they held fiduciaries liable for breach of duty. In doing so it was the higher commercial rate that was imposed and from the time the loss was crystallized. In this case I imposed a lower rate for a shorter time.

65 **Outcome:**

66 Plaintiffs` claim allowed.

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Anthony Lee and Lye Kah Cheong (Bih Li & Lee) for the plaintiffs
Alvin Yeo and Lawrence Tan (Wong Partnership) for the defendant

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