Personal Automation Mart Pte Ltd v Tan Swe Sang
[2000] SGHC 55

Case Number : Suit 777/1999
Decision Date : 06 April 2000
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Wong Soo Chih with Jason Toh (Ho Wong & Partners) for the plaintiff; A Rajandran (A Rajandran Joseph & Nayar) for the defendant
Parties : Personal Automation Mart Pte Ltd — Tan Swe Sang

JUDGMENT:

Cur Adv Vult

Background

1. Mr Ray Cheng is the founder of a number of companies including Besta International Pte Ltd ('Besta') and the plaintiff. He is also the main investor in these companies. Up to the end of 1998, the defendant was a director of the plaintiff company and a shareholder. As far as I know, she still holds shares in the plaintiff company.

2. The defendant first worked with Mr Cheng in Besta in 1991 and when he established the sole proprietorship that preceded the plaintiff, for the purpose of specialising in the retail of computer notebooks, the defendant was appointed its general manager. When the plaintiff was incorporated in 1994, the defendant became one of the promoters and initial directors and she continued to work in the company until her resignation became effective in January 1999.

3. This action relates to the defendant's conduct in 1997 and 1998 while she was still employed by the plaintiff and also to things she has done since leaving its employment. The plaintiff's suit is three pronged. First, it accuses the defendant of breach of fiduciary duty in relation to a particular notebook retailing project undertaken by the plaintiff while in the plaintiff's employ that since January 1999 has been taken over by another business, Newstead Technologies ('Newstead'), for which she now works. Secondly, the defendant is alleged to have been negligent in her handling of the affairs of the plaintiff such that it suffered trading and stock losses. Thirdly, the plaintiff has various financial claims against the defendant involving an alleged car loan and overpayment of salary. The defendant denies all the plaintiff's allegations and has in turn put in a counterclaim for unconsumed leave for which she has not been paid and arrears of salary.

4. I will deal with the relevant facts in conjunction with each of the claims. At the outset it is necessary to identify the various persons who played a part in the various events. Grouped by organisation these are:

(1) PERSONAL AUTOMATION MART PTE LTD (plaintiff)

(a) Cheng Dar Aur @ Ray DA Cheng – promoter, shareholder and current managing director of the plaintiff.

(b) Mindy Tan Swe Sang – promoter and initial director of the plaintiff, officially appointed managing director in March 1998 and held this post until her resignation; currently consultant to Newstead.

(c) Frankie Tan Soon Foo – the defendant's nephew, he was employed by the plaintiff in March 1998 as a technician and left their employment in February 1999; currently a manager in Newstead.

(d) Derrick Sho Seng Han – employed by the plaintiff in July 1996 as a sales executive, subsequently promoted to manager, he left its employment in February 1999; currently sales manager of Newstead.

(e) Desmond Ong Chee Eng – employed by the plaintiff in June 1997 as a sales executive, subsequently promoted to senior sales executive and then to manager, he left the plaintiff's employ in early April 1999; currently manager of Newstead's Sim Lim Square showroom.

(f) Jason Phee Nae Haur – employed by the plaintiff in February 1995 as a sales executive, subsequently promoted to assistant manager, operations manager, purchasing manager and retail operations manager and, in 1998 to director; he left the plaintiff's employ in May 1999; currently employed by Newstead.

(g) Patrick Lau Lee Woo – employed as a sales executive in June 1997 by PDA Junction Pte Ltd, a company related to the plaintiff, in May 1998 on its closing transferred to the plaintiff as a showroom manager, left the plaintiff in January 1999; joined Newstead the following month as a sales executive.

(h) Ms Chiew Pei San – employed by the plaintiff in February 1998 as administrative assistant working in the accounts department.

(i) Ms Connie Lai Yean Hui – in November 1995 she joined the plaintiff as an accounts assistant/executive and left them in February 1999; currently working with Newstead in charge of accounts.

(j) Ms Mavis Toh Bee Ling – from August 1995 was Besta's accounts executive and in that capacity helped in the accounts department of the plaintiff; from 1997 was employed on a full time basis as financial controller of the plaintiff until February 1998.

(k) Ng Boon Kwan (BK Ng) – the plaintiff's financial controller from December 1997 to October 1998.

(l) Ms Sandra Puah Sai Pui – the plaintiff's accountant from October 1998 to February 1999.

(m) Kelvin Ng Mee Chee – employed by the plaintiff as a corporate sales executive between October 1997 and August 1998, he is currently serving time for having committed criminal breach of trust of the plaintiff's goods.

(n) Patrick Ong – employed by the plaintiff as its Corporate Sales Manager in 1997, he sold computers on credit to a company called KNE Asia Pte Ltd ('KNE') which subsequently failed to pay for them.

(2) NEWSTEAD TECHNOLOGIES

(a) Ms Joey Liao Chyea Yue – 21 years old, the registered sole proprietor of Newstead; currently working in a hotel.

(b) Sebastian Sim Chye Hock – the self-proclaimed beneficial owner of Newstead and various other businesses.

(3) COMPAQ COMPUTER ASIA PTE LTD ('Compaq')

Raymond Wah Jun Jack – sales manager for the Singapore-Indonesia Consumer Business Unit of Compaq.

(4) GREAT EASTERN LIFE ASSURANCE CO LTD ('GEL')

Ms Jennifer Low Su Ying – marketing officer with GEL and main project co-ordinator for the Great

Eastern Life Mobile Systems ('GEMS') project since August 1998.

First claim – breach of fiduciary duty

5. The essence of this claim is contained in paras 3 to 12 of the statement of claim. They commence with an allegation that in breach of her duties, and whilst she was still employed by the plaintiff, the defendant wrongfully set up Newstead on 29 December 1998. Para 4 goes on to state that Newstead deals in computer hardware, computer software and accessories and is in direct competition with the plaintiff. The next allegation made is that the defendant is the general manager of Newstead.

6. According to paras 6 and 7, in mid 1998, the defendant, on behalf of the plaintiff entered into negotiations with Compaq for the GEMS project. The plaintiff was subsequently awarded the contract and appointed the sole back-up service dealer to supply Compaq notebooks to GEL insurance agents and to install the GEMS software in those computers. Pursuant to this agreement also, the plaintiff sent its employees for special training on GEMS between September and October 1998. Subsequently, in breach of her duties, the defendant wrongfully solicited five of these employees away from the plaintiff and employed them at Newstead. These were Patrick Lau, Derrick Sho, Connie Lai, Desmond Ong and Frankie Tan. Alternatively, the plaintiff pleads that these five persons agreed with the defendant to intentionally injure the plaintiff by soliciting the GEMS project from Compaq.

7. Further, in breach of her duties, the defendant wrongfully solicited the GEMS project away from the plaintiff when Compaq had already awarded it to the plaintiff and thereby induced Compaq to commit a breach of contract. Consequently, the defendant caused the GEMS project to be awarded to Newstead instead. Alternatively, the defendant wrongfully and improperly made use of knowledge about the GEMS project, acquired by her by reason of her position as a director of the plaintiff and diverted the project to Newstead to make a profit for herself. In the further alternative, the plaintiff alleges that the defendant wrongfully usurped the corporate opportunity of the plaintiff for which it had been negotiating by inducing Compaq to divert the GEMS project from the plaintiff to Newstead.

(i) Relevant facts

8. The material events commenced in about mid 1998. At that time, the defendant officially held the position of managing director of the plaintiff having been so appointed pursuant to a resolution dated 30 March 1998 though the plaintiff's stand is that she had been acting as managing director since its incorporation. The defendant's position is that Mr Cheng, who also held a directorship, was the real boss and that she deferred to him in everything.

9. By mid 1998, the plaintiff's operations had expanded considerably. It had four showrooms (or shops) in all: one in Sim Lim Square and three in Funan Centre. The third unit in Funan Centre, unit 03-34, had been occupied by PDA Junction Pte Ltd until it ceased trading some time in May 1998 whereupon the plaintiff had taken over the unit. The plaintiff had five separate departments comprising the retails operations department headed by Jason Phee, the corporate sales department, the engineering/technical department, the accounts department headed by BK Ng (and earlier by Mavis Toh) and the head office which originally had premises at Peninsula Plaza. Sometime in 1998 in a cost-cutting exercise, the head office was moved to Yong Da Building where other companies belonging to Mr Cheng were also located.

10. There is some dispute about the scope of the defendant's duties but she did agree that these included taking care of the plaintiff's overall management, purchasing, marketing, human resources and dealing with suppliers. Purchasing was her speciality. The defendant was generally recognised to have excellent relationships with the suppliers of computers, both the manufacturers themselves and their authorised distributors. One of these suppliers was Compaq.

11. Prior to June 1998, the plaintiff company was not allowed to purchase computers directly from Compaq. The marketing

scheme adopted by Compaq was to sell its computers on a wholesale basis to only a few exclusive distributors or direct dealers. Those distributors in turn would supply the retail outlets like the plaintiff company and Newstead. In June 1998, however, the plaintiff and Compaq entered into a direct dealership. This involved the plaintiff furnishing Compaq with a bank guarantee for US$130,000 to secure Compaq in respect of the price of computers purchased from it. That bank guarantee covered all purchases by the plaintiff for the period from June to end December 1998. The advantage of being a direct dealer were that the plaintiff enjoyed good discounts for bulk purchases from Compaq and received good credit terms from Compaq.

12. Some time in 1998, GEL initiated the GEMS project. It commissioned the design of a software programme to enable its insurance agents to access on-line information from GEL relating to insurance policies sold or to be sold by the agents through the use of a computer notebook. It was also envisaged that the agents would be able to use the GEMS programme as an organiser for their database, contacts and appointments as well as the business presentation kit. GEL had almost 3,000 life insurance agents and it was its intention to encourage all of them to acquire a computer notebook for installation and use of the GEMS software.

13. In order to implement the GEMS project, GEL needed a reliable notebook supplier who would also provide installation and back-up services to its agents. Some time in the second half of 1998, GEL asked major computer manufacturers to tender for the supply of computer notebooks to GEL's agents. Compaq submitted its tender for GEMS on 21 August 1998 and was awarded the project two or three weeks later. In its tender documents, Compaq named the plaintiff as its fulfilment house. The function of the fulfilment house was to be the retail outlet which would sell the Compaq notebooks to the GEL agents, install the GEMS software in those notebooks and provide the agents with training in the use of GEMS. The fulfilment house would also maintain a hotline for the agents to call if they encountered any problems in operating GEMS. The tender specifically stated that helpdesk support would be provided for GEL agents from three PA Mart locations viz for agents based in Changi Centre, support would come from the plaintiff's Yong Da building office in Aljunied and manager-in-charge Frankie Tan; agents based in Beach Road could look to the plaintiff's Funan Centre #03-15 outlet and manager-in-charge Derrick Sho; and additional support could be obtained from the Sim Lim Square outlet and its manager, Mr Wilson Chew.

14. Mr Wah of Compaq told me that he had chosen the plaintiff to be Compaq's fulfilment house for the purposes of GEMS for three reasons. First, because the plaintiff was a well-known notebook reseller. Secondly, because he thought that with the staff that it had then, ie the likes of the defendant and her team, the plaintiff would be able to provide the services required and meet the needs of the client ie GEL and its agents. His third reason was that the plaintiff company was willing to provide the banker's guarantee that Compaq required all its direct dealers to furnish. Mr Wah was at pains to stress that there was no contractual relationship between the plaintiff and Compaq despite the latter's nomination of the plaintiff as a fulfilment house, because the GEMS project was a trial only and, during the second half of 1998, the plaintiff's performance as a fulfilment house was being assessed by Compaq. As the project was a trial, the plaintiff's involvement could be terminated at any time. It should be noted that there is no document between the plaintiff and Compaq whereby Compaq formally appoints the plaintiff to the position of fulfilment house or to any other position in relation to its supply of notebooks in connection with GEMS. Mr Cheng's evidence was that the defendant had told him sometime in November or December 1998 that Compaq had appointed the plaintiff as the sole service dealer for GEMS. The defendant, however, denied having made any such statement.

15. The negotiations between the plaintiff and Compaq regarding the GEMS project were handled directly between the defendant and Mr Wah. There were also discussions between GEL and Compaq and the plaintiff. Ms Jennifer Low, the GEL officer in charge of GEMS, recalled meeting the defendant on at least ten occasions and was aware in 1998 that the defendant was the managing director of the plaintiff. She also met Frankie Tan about five times.

16. Ms Low's testimony was that according to GEL's understanding with Compaq, their agents would be able to purchase Compaq notebooks at a specially discounted price if they purchased them from Compaq's appointed agent which in this case was the plaintiff. This testimony was supported by the minutes of a meeting that took place at GEL's premises on 1 October 1998. Among the persons present were Ms Low, Mr Wah and Frankie Tan. The minutes, prepared by Frankie Tan for the plaintiff, noted that five parties, among them GEL, the plaintiff and Compaq, would be involved in the GEMS project. It also noted that Mr Wah tried to persuade GEL to ask its policy holders to buy Compaq notebooks from the plaintiff and that Ms Low had said that the procedure for selling Compaq notebooks would be as follows:

(a) agents from GEL would purchase notebooks from the plaintiff who would thereupon immediately install the GEMS software in the notebooks;

(b) the agents would simultaneously sign up for a training course in the use of GEMS;

(c) the plaintiff would then train the agents and on completion of the training, would issue a certification.

It was agreed that the plaintiff would additionally provide GEMS installation services for agents who already owned notebooks of a different brand and wanted to use the programme. The charges for the plaintiff's various services were agreed at $110 per agent for installation and help-desk services and $190 per agent for the training classes. These fees would be paid to the plaintiff by GEL.

17. Between September and October 1998 the plaintiffs sent several employees to seminars and training sessions on GEMS organised by GEL. Frankie Tan, the plaintiff's technical officer, received training in the installation of GEMS and attended other meetings and seminars relating to GEMS. In addition, Desmond Ong and Derrick Sho attended seminars on GEMS though they were at pains to testify that these sessions were a waste of time.

18. GEL organised an official launch of the GEMS project on 11 November 1998. The defendant attended the launch as a director of the plaintiff. On the same day GEL issued a notice to all of their agents informing them that Compaq was offering GEL staff and agents a special price on their Presario series notebooks in conjunction with GEMS. The notice stated that these notebooks were available for purchase at the plaintiff's outlets at Funan Centre #03-15 and Sim Lim Square #04-53. Thereafter, some GEL agents did in fact purchase Compaq notebooks from the plaintiff and made use of the GEMS software installation service provided by the plaintiff.

19. On November 17 1998 a three-quarter page advertisement was placed by Compaq in The Straits Times. There were photographs of three GEL agents and the copy on the advertisement stated that these persons depended on the Compaq Presario notebook to access real time on-line information and thus ensured faster and better services to their customers through GEMS, an innovative new software programme. There was also a photograph of the Presario notebook and underneath it appeared the words 'Presario 1650 at only $4,199*'. The price '$4,199*' was printed in red ink and at the bottom of the advertisement the following words, also printed in red ink, appeared '*Call PA Mart at 333 0577/336 0003. Further discounts for GE Life Agents'. At some stage, the exact date is not clear, the plaintiff set up a telephone hotline for enquiries on GEMS and the number allocated to this hotline was 339 8239 which was one of the telephone lines connected to the plaintiff's premises at unit 03-34 Funan Centre.

20. On 22 December 1998, the defendant tendered her resignation to the plaintiff. I will go into the details of this in a later part of this judgment. In the meantime, Compaq's financial controller had been pressing the plaintiff, through the defendant, to extend the banker's guarantee beyond 31 December 1998. The defendant had passed on these messages to Mr Cheng but he was not inclined to renew the guarantee at that stage. She told Mr Cheng that the plaintiff's participation in the GEMS project might be endangered if the guarantee was not renewed. Mr Cheng was not willing to renew the guarantee because of the expense and was not convinced that participation in GEMS depended on the existence of the guarantee. He called Mr Wah in December to arrange to see the latter on the issue but was only able to get an appointment on 9 January 1999.

21. Sometime in late 1998, the plaintiff decided to close down its outlet at 03-34 Funan Centre. As the lease had some time to run, it looked around for someone to take over these premises from it. In December 1998, the defendant introduced Sebastian Sim to Mr Cheng as a person who was interested in renting the unit. According to Mr Cheng, Mr Sim said that he was in the business of exporting computers and that his business was different from that of the plaintiff. He explained that for that reason he did not want to pay for the fittings and furniture of the unit. Eventually, he agreed to buy the plaintiff's fax machine, copier and countertop for $5,000. The rest of the furniture was returned to the plaintiff. At this first meeting, Mr Sim did not give the name of his proposed business to Mr Cheng but both men agreed that Mr Sim would take over the tenancy of unit 03-34 with effect from February 1999. Mr Sim agreed during cross-examination that he had not told Mr Cheng that the company taking over the

unit would be called Newstead Technologies and that it would be selling personal computers and notebooks. It was only after he had paid the plaintiff $500 on 5 January 1999, as a part payment for the items being taken over, that he told Mr Phee that the name of the new tenant of the premises would be Newstead.

22. On 9 January 1999, Mr Cheng had his appointed meeting with Mr Wah to clarify the issue of the GEMS appointment and the furnishing of the guarantee. Mr Cheng informed Mr Wah that the plaintiff would furnish a fresh banker's guarantee if required and that from his point of view the guarantee had been originally given so that the plaintiff could be Compaq's direct account dealer rather than for GEMS. Further the GEMS project would only take full effect on March 1999 upon launch of the software installation. Hence there was no urgency for the banker's guarantee. Mr Wah's reply was that the GEMS project could not be awarded to the plaintiff because the banker's guarantee had not been renewed. Mr Cheng then reiterated that the plaintiff was still interested in the project and would re-issue the guarantee if it was necessary. Mr Wah, however, did not give any reply on this nor did he assure the plaintiff that it would get the project back as soon as the new guarantee was received. Instead, at the end of the meeting, he said that Compaq would be choosing another agent for the project.

23. Mr Wah's evidence was that at that same meeting the plaintiff had made a request that Compaq re-consider its position on its agents for GEMS. His response was to tell the plaintiff that Compaq would re-consider and this was a sincere response. Mr Wah was aware at this point that the plaintiff was willing to renew the banker's guarantee. At that time Mr Wah thought that there was a chance that he might re-appoint the plaintiff as Compaq's fulfilment house though he was concerned about staffing. He knew by then that the defendant had resigned and that it would not be very long before Frankie Tan would join her. The defendant's resignation played a part in Compaq's final decision to terminate their dealings with the plaintiff on GEMS because, as he put it, the defendant and Frankie Tan had attended many sessions at GEL and understood the complexities of the project. He considered them the key people to drive the project.

24. About two weeks later Mr Cheng telephoned Mr Wah and asked him again to re-consider Compaq's position. During this call, Mr Wah said it was unlikely that Compaq would carry on with the plaintiff. Mr Cheng would not take no for an answer and said that Mr Wah should continue to try. Mr Wah told him that he needed to get GEL's consent. Over the telephone, he did not give Mr Cheng the reasons why Compaq was unlikely to continue with the plaintiff.

25. In the meantime, on 14 January 1999, the defendant signed an application form to Singapore Telecom asking for the five existing telephone lines registered in the name of PDA Junction Pte Ltd at unit 03-34, Funan Centre, to be transferred on the basis that another customer was taking over PDA Junction Pte Ltd's telephone lines. On the same day, Ms Liao signed an application to Singapore Telecom for new telephone lines for Newstead and both application forms were submitted to the telephone company by Jason Phee. As a result, all existing telephone and fax lines at unit 03-34 Funan Centre, including the GEMS hotline, were transferred to Newstead.

26. The defendant's last working day with the plaintiff was on 21 January 1999. On 27 January Mr Wah sent an e-mail to, among others, Ms Jennifer Low, the defendant and Jason Phee, suggesting a meeting on GEMS on Thursday, 29 January. The defendant duly attended this meeting and it was noted in the minutes that she had agreed that Newstead would continue to service both hardware and software enquiries/problems relating to GEMS. Newstead's services would also be provided to all notebooks bought by agents from the plaintiff prior to Newstead's inception. Ms Low also briefed the defendant on the administrative duties that Newstead would have to undertake in relation to GEMS. It was confirmed that Newstead would be paid $160 per agent trained. Newstead was officially appointed by Compaq as its new fulfilment house for GEMS on 1 February 1999.

27. Newstead started operations in unit 03-34 Funan Centre on schedule and in that same month, February, Ms Low dealt with the defendant and Frankie Tan on GEMS on the basis that they were representing Newstead. The defendant and Frankie Tan, as Newstead's representatives, ran training classes on GEMS for GEL agents from February onwards. On 12 February, Patrick Lau joined Newstead as its marketing manager and, shortly thereafter, Derrick Sho was appointed a manager of the business. The defendant herself did not, however, obtain a letter of appointment from Newstead until 1 April 1999 when she was issued with a short letter, signed by Derrick Sho, appointing her as a consultant. At some stage, however, she was given a name card designating her as Newstead's general manager. Frankie Tan's letter of appointment was also dated much later viz 3 May 1999

although Newstead had applied for a work permit for him as early as 16 March 1999.

28. On 11 February 1999, there was another launch by GEL of the GEMS project. This was a launch after completion of the pilot testing of the project. A registration form for GEMS was prepared by Ms Low for distribution to GEL agents at the launch. Agents who wanted to acquire GEMS had to fill up this form and it also gave them information about the hardware and software required for GEMS. The form stated that GEMS users would have access to a helpdesk free of charge if they called the Newstead hotline where a technical service engineer would be at hand to assist. They would also be able to take their notebooks down to Newstead's premises at #03-34 Funan Centre for attention if necessary.

29. In March 1999, the plaintiff learnt that Newstead had become the fulfilment house for GEMS. Mr Cheng sought a further meeting with Mr Wah to discuss this. Mr Wah then told him that the plaintiff could not be appointed as the GEMS agent as it lacked staff with suitable training.

(ii) Findings of fact

30. The collective stand of the defendant and her witnesses was that there was no contract between the plaintiff and Compaq relating to the GEMS project. As the project was only a trial, there was nothing wrong in it being transferred to Newstead and the plaintiff had nothing which it could justifiably complain about. In any case, the defendant says, the reason why whatever relationship the plaintiff had with Compaq on GEMS ended was the plaintiff's stubborn refusal to renew the bank guarantee. It therefore cannot complain that Compaq chose someone else to carry on with GEMS.

31. Before I discuss the issues, I should state that having heard and considered all the evidence, I am convinced that the defendant and several of the persons who gave evidence on her behalf, in particular Mr Sho, Mr Sim, Mr Frankie Tan and Mr Wah were not being truthful in their accounts of the GEMS project, the establishment of Newstead and the transfer of GEMS from the plaintiff to Newstead. There were many inconsistencies, evasions, omissions and downright lies in their evidence. One glaring example was the failure by the defendant to say anything in her first affidavit of evidence-in-chief of the circumstances in which she came to join Newstead. It was only after Ms Low had appeared in court and testified that she had dealt with the defendant and Frankie Tan as representatives of Newstead from as early as February 1999 that the defendant deigned to deal with that matter by filing a supplementary affidavit. She then asserted that she had joined Newstead on a freelance/part time basis only some time in January 1999 on being approached to do so by Mr Sho (her former subordinate at the plaintiff) who had resigned from the plaintiff but was then clearing his leave before the expiration of his notice period. Her subsequent testimony and that of Mr Wah and Mr Sim, however, showed that she was very far from being peripheral to Newstead's handling of the GEMS project and that she was considered the main contact person and main driver of this project in Newstead by both Compaq and GEL.

32. The first factual issue is whether there was any contractual relationship between the plaintiff and Compaq relating to GEMS up to the time that Newstead became involved or, perhaps, up to 9 January 1999 when Mr Wah told the plaintiff that he was going to look for another agent to handle GEMS. I am satisfied that Compaq did, albeit verbally, appoint the plaintiff to act as its sole fulfilment house/service agent in relation to GEMS and that such appointment must have been mooted by Compaq and agreed to by the defendant on the plaintiff's behalf before Compaq submitted its tender for GEMS to GEL on 21 August 1998, although of course the appointment would not have been confirmed until after GEL had accepted Compaq's tender and awarded the project to it.

33. The terms of the tender document are compelling evidence to this effect. A company tendering to supply notebooks on a mass basis and needing both a retail outlet and a service agent to support its tender does not specify another entity as that outlet/agent in its tender document unless it is very sure that it can rely on the latter to provide the service required. In the very first page of Mr Wah's tender, he highlighted three areas that he believed made his offer attractive to GEL. Of these, the second read:

> '**Providing exceptional technical support and meeting GE's Life's agents demanding schedules** would be PA Mart, our trusted channel partner. Given that they are conveniently located in 3 areas : Sim Lim Square, Funan Centre and Aljunied, (these will facilitate technical support for both your Changi and Beach Road based agents), and that they are available 7 days a week – yes, even on a SUNDAY – to meet your agents' requirements, your agents can have the peace of mind as far as technical support is concerned.' (Emphasis his)

On the second page of the offer, Mr Wah went into the details of the other vendor support that would be given by the plaintiff to GEL agents. These included the addresses and telephone numbers of three of the plaintiff's offices and the names of the persons who could be approached for help. The proposed operating hours and helpdesk system were detailed together with the training to be provided to agents on the use of GEMS by the plaintiff. It is also significant that this tender offer did not mention that the vendor support would also be given by any other computer retailer. Bearing in mind the training that would be required and the effort necessary to set up and maintain a helpdesk and hotline, it must have been recognised by Compaq that it would be difficult to find a retailer willing to be the fulfilment house if it was only going to get part of the business rather than all of it.

34. When GEL accepted Compaq's tender therefore, it must have done so in the full expectation that all support services which Compaq needed would be supplied by its appointed agent, the plaintiff. Nothing that happened thereafter would have changed that impression. The plaintiff's representatives, mostly the defendant, but sometimes other persons as well, attended meetings on the GEMS project together with Mr Wah. The plaintiff also sent its representatives to seminars on GEMS and Frankie Tan, its technical specialist, for training in the installation of GEMS. The plaintiff attended the pilot launch of GEMS in November 1998 and concurrently with that launch Compaq published an advertisement advertising GEMS and the fact that its notebooks were available at a special price at the plaintiff's outlets. The plaintiff also set up its GEMS hotline. Further, as the defendant had to concede in cross-examination, between August and December 1998, no other retailer of notebooks provided Compaq with any support services in relation to GEMS. All these matters confirm, to my mind, that if it had not done so prior to making its tender, Compaq definitely confirmed the plaintiff's appointment as its sole fulfilment house/service agent after its tender was accepted and before the pilot launch in November 1998.

35. I consider that all the statements made by the defendant and Mr Wah to the effect that the plaintiff's appointment was only on a trial basis and did not impute any contractual relationship were made to try and disguise the true position. Obviously, Mr Wah did not want to accept the possibility of a legal action against Compaq on the basis of a breach of contract. I should state here that even though there was a contract, there is no evidence that that contract was for any fixed period of time and therefore either party would have been free to terminate it by giving the other reasonable notice of termination.

36. The next issue relates to the way in which the relationship between the plaintiff and Compaq on GEMS ended and whether the consequent appointment by Compaq of Newstead as its new fulfilment house was induced or procured in any way by the defendant. I am satisfied that Compaq ceased to deal with the plaintiff and transferred GEMS to Newstead because the defendant deliberately procured this result.

37. I think that the defendant became unhappy with the plaintiff in the aftermath of the losses caused by Kelvin Ng's fraudulent actions and Mr Cheng's attitude that she bore a major part of the blame for such losses. The situation worsened when she endeavoured to give up the responsibility of a managing director in order to concentrate on purchasing and Mr Cheng in turn decided unilaterally to reduce her pay. I believe that the defendant then decided that she would go out and start her own business and would take with her the staff who were loyal to her and who were able to handle GEMS. She was confident, due to her good relationship with Mr Wah who had had no prior contact with Mr Cheng at all, that she could persuade him to move GEMS with her.

38. The various stories that the defendant and the other ex-employees of the plaintiff, in particular Frankie Tan and Derrick Sho, endeavoured to put forward about how Newstead came about and how it acquired GEMS were completely scuttled by an e-mail which Ms Low produced in the course of her testimony. In fact so damaging were the contents of both that e-mail and the testimony of Ms Low overall that all these persons had to file a supplementary affidavits of evidence-in-chief in order to try and mitigate the effects of the same.

39. The e-mail in question was written by Mr Wah to various people at GEL with a copy to Ms Low on 12 January 1999. The material part of it reads:

'Agreement Memo and PA Mart

> I probably should call, meet and discuss this with you but I would be outstationed *[sic*] 12-15 Jan and 19-22 Jan and am afraid could not catch you on time. This latest development in PA Mart happened not too long ago too.
>
> The reason why I could not complete the agreement memo is because due to personal reasons, Mindy *[ie the defendant]* has resigned as managing director from PA Mart (despite 7 years in PA Mart).
>
> All is under control as she will be setting up her own retail company, called Newstead that will open shop in Funan on 01 Feb 1999. A Sim Lim outlet will also be up soon. Most of her trusted deputies would be with her, Frankie *[Tan*] and Derek *[Derrick Sho]* etc (trainer and shop manager), so there would be no interruption to the GE Life program. The only thing that I would request from you (Jennifer can help) is that on the communication front, we need to inform your agents on the change of company name, location to go to etc as regards to our channel partner. The people who are familiar with this project will remain, albeit under a different retail company. I will personally see that your agents are not inconvenienced in any way.
>
> Also, the agreements that we had made, help desk, training, installation etc stays. That is Compaq's guarantee to GE Life, as it is our aspiration to ensure that our valued customers, your agents are well supported.'

40. This message conveys the clear impression that the defendant had not simply decided to leave in a huff without any clear idea as to what she was going to do (which was the picture she sought to give me while in the witness box) but that she had carefully planned her departure to ensure that she would be able to take GEMS along with her. Throughout his evidence Mr Wah was clear that the two vital persons as far as GEMS was concerned were the defendant herself and Frankie Tan. Without them, the plaintiff was not qualified to carry on with GEMS as Mr Wah explained to Mr Cheng in March 1999. Frankie Tan must have been a part of the defendant's plan from the very beginning. He was her nephew and although he blustered in court that he was over 21 and past the stage of being advised by his aunt or even informing her of what he was going to do, he told so many lies in relation to his resignation from the plaintiff and the timing of his subsequent decision to join Newstead, that his involvement in the scheme was obvious.

41. The picture which the defendant sought to paint was that Newstead was the brain child of Mr Sim and that he was the one who recruited Derrick Sho who in turn recruited her and other former employees of the plaintiff. The odd thing about this picture was that Mr Sim turned out not even to be the registered owner of Newstead. Instead, the business was registered in the name of Joey Liao, a 21 year old lady who had formerly worked as an accounts clerk in a computer retail outlet at Funan Centre owned by Boden International Pte Ltd at which Mr Sim had also worked. Ms Liao left Boden some time in 1998 and at the time of the trial she was working full time in a hotel. According to Mr Sim she had invested $10,000 in Newstead and had a 20% share in the business whilst he had the remaining 80% until about March 1999 when he gave 10% to Mr Sho in return for an investment of $3,000.

42. Mr Sim left Boden towards the end of 1998 and, according to him, set up Newstead entirely of his own volition. He recruited Ms Liao because he thought she could assist him. When asked what she did to assist him, his reply was that she signed cheques. The evidence was that Ms Liao had nothing to do with the running of Newstead and hardly even visited the premises. Mr Sim said that his plans for Newstead were to sell computer products and have a retail outlet. He did not register the business in his own name because he had a lot of business in the computer industry. He owned a company called GNE Trading that traded in accessories for computers. The registered owner was his relative, one Mrs Koh, but actually the company belonged entirely to him. He also had a share in Boden and in a renovation company called Pin Teck. The latter company was registered

under the name of one Goh Hong Ping who ran the business and got a share of the profits. Mr Sim was the owner because he put up all the capital for the business. I asked him what would be the problem if he had registered himself as the owner of Newstead and his answer was 'because people will check how come you have so many computer companies'. I could not understand that answer because on the record he was not the owner of GNE Trading and, at most, had a very small share holding in Boden.

43. It was significant that Ms Liao who was apparently happy to lend her name to Mr Sim and to front for him in the Newstead business did not come to court to testify on oath that she was fronting for him and not for the defendant. Instead, Mr Sim who officially did not have any interest in Newstead came forward to say that he was its actual owner though cross-examination showed him to be unclear on the expenses and earnings of the business and even mistaken as to its registration date. I found one statement that Mr Sim made to be particularly revealing. When it was pointed out to him that he was not even sure of the number of staff employed by Newstead at the time of the trial, he coolly replied 'I will never remember anything because I have to care of *[sic]* so many companies. My key thing is money. As long as company gives me income this is what I want to see. That is why I have so many assistants to help me'. Obviously, for money Mr Sim was prepared to go a long way and probably, even to the extent of fronting for the defendant in relation to Newstead.

44. It was also interesting that Mr Sim, a young man who claimed to have invested $40,000 of his 'key thing' in Newstead, spent very little time managing the business and looking after his investment. By his own account, after he had acquired outlets in Funan Centre and Sim Lim Square for Newstead's operations, he left the running of the business to, ostensibly, Derrick Sho whose substantive position with the plaintiff had been that of branch manager reporting to Jason Phee who in turn reported to the defendant. Derrick Sho's appointment in Newstead was, officially, sales manager though Mr Sim told the court that Derrick Sho was in effect the general manager and that he was assisted by the defendant (his previous boss) whose name card printed by Newstead showed her to be the general manager of Newstead. Mr Sim's explanation was that the title on the card was to give the defendant credibility with the suppliers with whom she dealt and did not reflect her true position in the business, that of a subordinate to Derrick Sho. I find all these explanations very difficult to credit. It appears to me that the witnesses were doing their best to disguise the defendant's true role in Newstead.

45. Ms Connie Lai, the former accounts clerk of the plaintiff company who is now handling the accounts of Newstead, testified that Mr Sim was only involved in Newstead's business for the first few months and that she hardly saw him after she joined Newstead in February 1999. She asserted that the business was run by Derrick Sho. She also asserted that she was aware that the capital investment in the business had amounted to $50,000 and that the partners were Mr Sim, Ms Liao and Derrick Sho. She was not, however, aware how much each of these persons had invested in the business and although she said that the full investment had been paid into Newstead's account, the only evidence that she had of this (not shown to me) had been a bank-in slip given to her which did not indicate who had provided which portions of the capital. No documents were produced before me to show that the $50,000 emanated from Ms Liao, Mr Sim or Mr Sho together or any of them singly or that any one of them had even provided a single cent as capital for Newstead.

46. One other interesting point is that when she was asked how she would compute the profit share of each partner if she did not know what their respective investments were, Ms Lai replied that she had an agreement with Mr Sho that at the time the profits had been ascertained, the partners would tell her how to distribute them. It escapes me how proper accounts of a partnership business can be kept by an accountant who does not even know what each partner has contributed to it and is entitled to receive from it.

47. It appears to me that the defendant must have been the moving spirit behind Newstead. She either owns it fully or is the majority owner. Apart from everything else pointing to this conclusion, there is the statement in Mr Wah's e-mail of 12 January 1999:

> 'All is under control as she *[ie the defendant*] will be setting up her own retail company, called Newstead that will open shop in Funan on 01 Feb 1999.'

He could only have made such a statement because the defendant had told him that Newstead was her own business. It is

significant that he made no attempt thereafter to check on the registration of Newstead which is a step one would expect a prudent businessman to take before embarking on a long term relationship with a new entity. It is probable that he did not do so because of his close relationship with the defendant and his belief in her assurance that the business belonged to her.

48. Mr Wah did try in court to explain away the line quoted above when he was asked how he knew that the defendant would be setting up her own retail company. His reply was that that was a wrong assumption that he had made. This was a feeble answer and I cannot accept it as true since he also admitted that it was the defendant who gave him the other pertinent information about Newstead which was included in his e-mail ie that it would open its outlet at Funan Centre on 1 February 1999 and that another outlet at Sim Lim Square was in the pipeline. She also assured him that it was perfectly feasible for Newstead to conduct the GEMS project as Frankie Tan and Derrick Sho would have no problem in joining her at Newstead.

49. The defendant's explanation that she had nothing to do with the termination of the plaintiff's contract with Compaq on GEMS and that it resulted from the plaintiff's failure to renew the bank guarantee does not stand up upon examination of the facts. First, there was the allegation that the banker's guarantee which was dated 1 June 1998 was furnished by the plaintiff solely for the purpose of the GEMS project. This is difficult to accept as being true since Compaq only tendered for that project on 21 August 1998. Why would the plaintiff furnish a guarantee for US$130,000 at the beginning of June when negotiations had then not even begun on GEMS? As the defendant herself admitted these negotiations only started in the later half of 1998. It appears to me that the true reason for the supply of the bank guarantee was to enable the plaintiff to become a direct account dealer of Compaq and to secure its bulk purchases made on credit. The plaintiff did in fact make such bulk purchases from Compaq between June and December 1998. The defendant herself in her first affidavit of evidence-in-chief explained that the bank guarantee was required to qualify the plaintiff as a direct purchaser. She did not at that stage state that it was needed for GEMS.

50. Secondly, the plaintiff made it quite clear to Mr Wah at the meeting of 9 January 1999 that it would furnish the bank guarantee if that was all that was needed to ensure the continuation of its appointment with respect to the GEMS project. Mr Wah failed to give any positive reply on this. He did not say that with the bank guarantee the plaintiff would get GEMS back. Neither did he say that it was too late and that Compaq had lost faith in the plaintiff and would not deal with it on GEMS even if the guarantee appeared immediately. It would have been difficult for him to have made any such statement since, at the time of that meeting, all outstanding amounts due from the plaintiff on its bulk purchases had been paid to Compaq. Neither was there any basis for any allegation that the plaintiff had defaulted in due payment of Compaq's invoices. Instead, Mr Wah's response was to say that Compaq would reconsider the position. As his later actions showed, that was a lie. He had no intention of reconsidering the position because he knew at that meeting that the defendant was leaving and his view, as expressed in court, was that the best way to carry on the GEMS project without interruption was to have the defendant champion it. Also his confidence in the plaintiff had been shattered by her resignation.

51. That the bank guarantee was not the sticking point is conclusively shown by the fact that Compaq never required Newstead to issue such a guarantee. This was despite the fact that Newstead was a new business without any track record and without any accounts to show what its capital resources were. Contrast that with the plaintiff which had a paid up capital of $500,000, had dealt satisfactorily with Compaq from 1996 to 1998 and which had promised to renew the guarantee.

52. Mr Wah's explanation as to why he never asked Newstead for a guarantee when, as he maintained, he had told the defendant in December 1998 that if the plaintiff did not renew its guarantee it was 'bye-bye', was that there was a change in GEL's policy in early 1999 that it decided that its agents would not be required to buy Compaq notebooks but could purchase any make of notebook they chose. This explanation did not sit easily with Ms Low's testimony that it was never mandatory for GEL's agents to purchase Compaq notebooks although it was recommended that they do so and as an incentive they were given special discounts on such notebooks. Mr Wah's own evidence confirmed this fact.

53. It appears probable that, as submitted by the plaintiff, Mr Wah was fully aware of the defendant's decision to resign on 22 December 1998. Knowing that the bank guarantee would be expiring and that Mr Cheng was then not willing to renew it, Mr Wah then pressured the plaintiff to renew it as a condition for continuing with GEMS. When Mr Cheng asked to see him on this, he fixed a meeting for 9 January 1999 which was after the expiry date of the guarantee and immediately after that meeting wherein

he told Mr Cheng that he was looking for another agent for GEMS, he e-mailed GEL informing them that Newstead was taking over. These events occurred in such close proximity that they suggest that Mr Wah had agreed with the defendant that on her departure from the plaintiff GEMS would go with her and he then used the bank guarantee as a pretext to terminate the plaintiff's appointment. Mr Wah did say that the plaintiff's refusal to renew the bank guarantee gave him a big headache in December as he was left with the prospect of being unable to provide the back-up service he needed for GEMS. His evidence under cross-examination, however, revealed that he did not make much effort that month to look for a replacement fulfilment house to continue with the project. All he did was to mention the possibility of an appointment to two other computer retailers in the course of a meeting on other matters. He failed to take any follow up action.

54. Other circumstances that have influenced my findings on fact include the take over of the GEMS hotline by Newstead. This was accomplished by the defendant signing the necessary form on behalf of PDA Junction Pte Ltd, the original owner of the line, and Jason Phee submitting this form and Newstead's application for the line to the telephone company. Although Jason Phee did not join Newstead until May 1999, he was probably aware in January of what was happening and sympathetic towards the defendant's effort to take over the GEMS project from the plaintiff. Mr Wah and GEL sent e-mail messages to both the defendant and Jason Phee on 26 and 27 January 1999. By then the defendant had already left the plaintiff's employment and the purpose of the messages was to convene a meeting to discuss the transfer of the GEMS project to Newstead. Mr Wah said he had sent the message to Jason Phee at his Yahoo e-mail address by mistake and Jason Phee himself avoided the issue by saying that he had lost his password for that address which he had not used for a long time and had never received the message. That was not a convincing reply as neither Mr Wah or GEL would have had his e-mail address if he had not given it to them and he would not conveyed it if he was not using it. Also, it is difficult to believe that a person in the computer industry who must have been used to communicating by e-mail would not have applied for a new password so that he could continue to use the free e-mail service provided by Yahoo.

(iii) Legal consequences of findings of fact on this issue

55. To paraphrase a passage from *The Companies Act of Singapore, An Annotation* by Hicks and Woon (leaving out the citations) in their commentary on section 157 of the Companies Act (Cap 50), it is established law that a director may not obtain for himself any property or business advantage that properly belongs to his company or for which it has been negotiating. It is a clear breach of duty for a person to set up a competing firm to take advantage of contracts that should have gone to the company of which he is a director. This obligation persists even after the director concerned has resigned, at least where the resignation can be said to have been prompted by the wish to obtain the property or business advantage for himself. The fact that the company could not itself have succeeded in getting the property or business opportunity is irrelevant.

56. Some of the propositions recited above are based on the Supreme Court of Canada decision of *Canadian Aero Service Ltd v O'Malley et al*. [1973] 40 DLR (3d) 371. There it was held that persons who stand in a fiduciary relationship with a company are precluded from obtaining for themselves, either secretly or without the approval of the company, any property or business advantage belonging to the company or for which it has been negotiating. This is particularly true where the officers are participants in the negotiations on behalf of the company. They are disqualified from usurping for themselves or diverting to another person or company with whom or with which they are associated a maturing business opportunity which the first company is actively pursuing. When these propositions are set against the defendant's conduct in this case as I have found it to have been, it is clear that she did breach her fiduciary duties to the plaintiff.

57. As noted by Hutchison J in *Island Export Finance Ltd v Umunna* [1986] BCLC 460, a case cited by the defendant for the submission that the propositions in *O'Malley* had been too widely stated and did not represent English law, *O'Malley's* was a case in which the two defendants had for some years been working up a detailed and complex project which had almost come to fruition, of which they had a particular knowledge and which clearly they had planned while still employed by the plaintiff there to make away with if possible. It was clear that apart from the work they had done and the knowledge they had acquired while employed, they would not have been able in the name of their new company and their associates to submit a tender only a month after the new company was incorporated. Hutchison J opined (at p 481) that in these circumstances the judges in the

O'Malley case were absolutely right to conclude on the facts of that case there had been a breach of fiduciary duty by the defendant. His only small quarrel with the propositions of law expressed in the case was that the last three lines of one of them could have been interpreted to mean that former directors would be accountable to their previous company for profits wherever information acquired by them in their position as such directors led them to the source from which they subsequently, perhaps as a result of prolonged fresh initiative, acquired business. His Lordship did not believe either that such an interpretation represented the law or even that that was the interpretation intended by the Canadian court. He went on in (at p 482) to emphasise that where directors acquire a general fund of knowledge and expertise in the course of their work it is in the public interest that they should be free to exploit it in a new position and that they cannot be held accountable 'whenever they exploit for their own or new employer's benefit information which, while they may have come by it solely because of their position as directors of the plaintiff company, in truth forms part of their general fund of knowledge and their stock-in-trade'.

58. In my judgment, the present case is not a case of the permitted and encouraged exploitation of a general fund of knowledge which a person has acquired by reason of her previous employment. The facts of this case are far more akin to those in *O'Malley* than they are to the facts of *Umunna*. The defendant here was the principal person who negotiated with Compaq on behalf of the plaintiff in order to bring the GEMS project home to the plaintiff and she was the one who similarly exploited her relationship with Compaq and the skills imparted to other employees of the plaintiff in the course of the GEMS project in order to push the plaintiff out of the picture and take over the GEMS project.

59. If the defendant and the other employees whom she recruited for Newstead had not been intimately involved with GEMS on behalf of the plaintiff, they would not have been able to take the business away with them to Newstead. It is not a question of her using her general skills in purchasing and marketing computers that is involved here. The plaintiff could not complain about her resigning and then joining another retail outlet and using the skills and general knowledge and contacts acquired during her years with it in order to compete with it. If that were all that she had intended to do when she set up Newstead this particular claim would be a non starter.

60. As the findings I have made earlier indicate, however, the defendant's conduct went far beyond the exploitation of her stock-in-trade. She resigned from the plaintiff company and took over the plaintiff's premises, staff and telephone lines with the intention of founding her new business on a valuable business asset of the plaintiff ie the GEMS contract. She did so surreptitiously by using Joey Liao and Sebastian Sim to front for her. Even if I am wrong in my finding that there was a contract between Compaq and the plaintiff in December 1998, the plaintiff enjoyed the position of front runner and, in fact, only candidate, for appointment as Compaq's fulfilment house when the project was eventually fully launched since it was the only company that had tried out for the position and there were no substantial complaints about its performance or competence. In those circumstances, there was a definite business opportunity available to the plaintiff which Mr Cheng made active efforts to pursue (unlike in the *Umunna* case where the judge found no maturing business opportunity to exist nor any active interest by the plaintiff in the same) and the defendant should have left it for exploitation by the plaintiff. Even if after her resignation Compaq had had doubts about continuing with the plaintiff, the defendant should have steered clear of the whole business.

61. The defendant made a submission that she was constructively dismissed from her position when her salary was reduced unilaterally by Mr Cheng in December 1998. I will make a finding on that later. Even if that submission is well founded, however, I do not think that it excuses the deliberate diversion by the defendant of the plaintiff's business. Several cases were cited by the defendant to establish that once an employee is wrongfully dismissed by her employer she is no longer bound by the terms of her employment. Those cases, however, related to situations where what was sought to be enforced by the employers concerned was a restrictive covenant contained in the contract of employment. None of those cases went so far as to say that an employee who is wrongfully dismissed is thereafter free to steal her employer's property. They could not do so since, as many mothers tell their children as part of their basic moral education, two wrongs do not make a right.

62. In the circumstances, I am satisfied that in relation to the first issue, the plaintiff has established its case and the defendant must be ordered to pay damages, as assessed, for breach of fiduciary duty in relation to the GEMS project.

Second claim – negligent conduct of the plaintiff's affairs

63. The plaintiff founded its second claim on the assertion that the defendant failed to exercise reasonable diligence in the management of the plaintiff's operation in that she:

> (a) failed to ensure that the plaintiff's business was run in an efficient and proper manner;
>
> (b) failed to supervise the work of the Corporate Sales Department executives properly or at all;
>
> (c) failed to exercise any control over the credit terms extended by the Corporate Sales Department to its customers (in the statement of claim this particular was phrased as failure on the defendant's part to take any or any adequate steps to ensure that payment was received from debtors within the credit period for goods sold and delivered); and
>
> (d) failed to provide any proper or sufficient controls or means to prevent the sales executives from raising false invoices and taking goods from the company without proper authority.

64. The law regarding the circumstances in which a director may be liable in negligence to his company is succinctly set out in the following passage from *The Companies Act of Singapore, An Annotation* by Hicks & Woon:

> '**Negligence** The classic statement of the standard of care expected of a director is found in *Re City Equitable Fire Insurance Co* [1924] All ER Rep 485, where it was held that a person need not display a greater degree of skill than may reasonably be expected of a person of his knowledge and experience. The common law duty of care is preserved by sub-s (4).
>
> It can hardly be doubted that there is sufficient proximity between a director and his company to give rise to a duty of care not to cause loss to the company by negligence. The extent of that duty and the standard expected vary according to the type of director being considered. For example, a non-executive director does not pay constant attention to the affairs of his company, nor is he expected to do so: see *AWA Ltd v Daniels* [1992] 7 ACSR 759 for a useful exposition of the position of non-executive directors (affirmed by the Court of Appeal in *Daniels v Andersons* [1995] 16 ACSR 607). Similarly, to expect an alternate or substitute director to show the same degree of care as a full-time executive director would probably be unreasonable.
>
> In determining whether or not a person has acted reasonably, the court will consider whether he has acted in the affairs of the company as he would have done in relation to his own affairs: *Re Duomatic Ltd* [1969] 2 Ch 365, 377; *Chng Joo Tuan Neoh v Khoo Tek Keong* [1932] SSLR 100, 108 per Whitley J . …' (at section 1221)

It can be seen therefore, that in order to ascertain whether or not a particular director has conducted himself negligently in relation the affairs of his company one must first determine the actual position held by the director in the company and the scope of his duties.

(i) What were the defendant's responsibilities?

65. The events leading to this negligence claim occurred over the space of about two years. The first problem arose in 1997 over what the parties referred to as the KNE case and the second one arose during the period of about February to June or July 1998 when Kelvin Ng systematically defrauded the plaintiff. The question is what position the defendant held in the plaintiff company at the material times.

66. The plaintiff's position is that from its inception up to her resignation in December 1998, the defendant was its managing director. The defendant, however, claims that the company was always run by Mr Cheng and that continued even after she was officially given the title of managing director in March 1998.

67. It was the plaintiff's obligation to prove that the defendant was its managing director from the time of its incorporation. If she had been formally so appointed, it should easily have been able to prove this by producing the relevant directors' resolutions. The only resolution that was produced, however, was one dated 30 March 1998 which stated that the defendant had been appointed managing director of the company for the year 1998. I can only conclude that there was no such formal appointment prior to March 1998.

68. That is not the end of the matter, however. What has to be established is the scope of the defendant's responsibility and not just the title which she held at any particular time. If she was exercising all the usual powers of a managing director, she would have had the concomitant responsibilities and duties. Even if her position was not equivalent to that of a managing director, if she had broad executive powers, she would have to exercise the same responsibly and could be held to a higher duty of care than a non-executive director.

69. There is evidence that although the formal appointment did not take place until March 1998, the plaintiff held the defendant out as its managing director to the public from at least July 1997. There were various name cards printed for the defendant on which her designation was stated to be managing director. Secondly, when the plaintiff produced a corporate brochure in 1997, it contained a message from the defendant who was described as its managing director. Thirdly, Mavis Toh, then the plaintiff's financial controller, issued two certificates in July 1997 certifying 'To whom it may concern' that the defendant was the managing director of the plaintiff. When asked why she had done this although the defendant had not been formally appointed to that position, Ms Toh said that it was all right to describe the defendant as managing director as the defendant was in charge of operations of the plaintiff and Ms Toh considered that it was the function of a managing director to be in charge of a company's operations.

70. Further, various witnesses, confirmed that they considered the defendant to be the managing director of the plaintiff and had dealt with her as such. Mr Wah testified that he had dealt with the defendant as managing director since 1997. Kelvin Ng confirmed that when the defendant interviewed him for a job in August 1997, he had the impression that she was managing director. BK Ng also had the view that the defendant had been acting as managing director prior to 30 March 1998.

71. The defendant herself took rather inconsistent positions. At one stage, she confirmed that she had built the plaintiff company up from scratch. At another time, she said that she had run the plaintiff's business from the very beginning though she was simply a director. She also agreed that Mr Cheng had entrusted the entire operations and management of the plaintiff to her. On the other hand, she asserted that the description of her as managing director in the corporate profile was simply for corporate image purposes and all her staff knew that she was just a director of the company. Further, before March 1998 all the rules for the company had been set by Mr Cheng and she had simply followed his instructions. In re-examination, she withdrew her earlier statement that Mr Cheng had entrusted the entire operations and management to her and said that she had made a mistake and that all decisions had been made by him and she just carried out his instructions to perform the day-to-day affairs.

72. The evidence was, however, that it was the defendant who was the visible person in charge of the plaintiff's affairs as far as most of the staff was concerned. It was she who organised and ran regular management meetings for the branch managers and sales staff. The branch managers reported to her. She signed cheques. She approved payment vouchers. She interviewed prospective staff and confirmed their employment terms and even promoted them. Mr Cheng was a shadowy figure whom many salesmen were not aware of until the second half of 1998. He spent much of his time out of Singapore running the businesses of his other companies and, when he was in Singapore, he was usually at the head office in Yong Da Building. He did not go down to the branches except incognito from time to time to check on sales. It was the defendant who was the public face of the company and who dealt with its major suppliers and for that reason it was she who delivered the managing director's message in the corporate profile rather than Mr Cheng. I am satisfied that, on the balance of probabilities, it was the defendant who ran the day-to-day affairs and general management of the plaintiff company and that Mr Cheng, although the ultimate arbiter and financier, in fact played only a small role in operations and management.

(ii) Was the defendant negligent in relation to the KNE case?

73. The following facts relating to KNE case have been abstracted from the defendant's account in her affidavit of evidence-in-chief. In 1997, Patrick Ong was the plaintiff's Corporate Sales Manager in charge of the Corporate Sales Department. KNE was one of the plaintiff's several corporate customers and the Corporate Sales Manager was entitled to extend credit for the sale of goods. The usual credit terms were for payment to be made within 30 to 60 days, but in the case of regular corporate customers sometimes payment would arrive after the expiry of the credit period.

74. As the Corporate Sales Department transacted with large corporations and companies, its customers often made substantial purchases. Mr Ong was empowered by the plaintiff to allow transactions on credit terms depending on his discretion and there were no hard and fast rules in this respect. Mr Ong was the person who handled KNE's transactions. It frequently bought computer notebooks from him and, initially, its payments were made promptly and regularly. Subsequently payments were delayed, however, and KNE asked Mr Ong for credit.

75. It subsequently transpired that Mr Ong, on his own assessment of its credit worthiness, had not only allowed KNE to delay its payment to the plaintiff when it made representations of being in financial difficulty but he also allowed them to transact further on credit terms. The debts snowballed and when the accounts department pressed him to recover the receivables, he told them not to worry, KNE would pay. When no payment was received, the defendant was informed of the position by the accounts department. By that time, the amount due exceeded $100,000.

76. The defendant then contacted the person in charge of KNE and asked for immediate payment. The company was given two days to settle its indebtedness but no payment was forthcoming. A formal demand was then made and subsequently solicitors were instructed. On 23 April 1997, a writ was issued by the plaintiff against KNE claiming the sum of $110,849.01 being the total amount due in respect of goods sold and delivered to KNE between 30 December 1996 and 6 March 1997. Judgment for the amount claimed was obtained on 14 July 1997 after order 14 proceedings had been issued but the judgment was not satisfied thereafter.

77. The plaintiff submitted that it was evident from the defendant's testimony that she did not impose any controls over the Corporate Department managers on matters relating to credit terms. She had admitted that it all depended on the discretion of the manager concerned and that there were no hard and fast rules. She even admitted that Patrick Ong could continue to extend credit to a customer who had defaulted in payment and he was also able to continue to give credit to KNE without her knowledge. When the KNE issue was brought up during a sales meeting, the only advice the defendant gave Patrick Ong on the granting of credit was that if he wanted to do this, he must check all requirements. This showed, the plaintiff submitted, that she did not exercise any control over the sales staff or ensure that the credit limits were observed and that she had failed to exercise diligence to supervise the Corporate Sales Department.

78. In considering whether in this instance the defendant was negligent, I remind myself that I have to consider whether she had acted in the affairs of the company as she would have done in relation to her own affairs and secondly, that as held in *Re National Bank of Wales* [1895-9] All ER Rep 715, a director acting honestly is not to be held liable for negligence because he trusts the officers of the company, regarding whom he knows no reason why they should be distrusted, not to conceal from him what they ought to report.

79. As submitted by the defendant, the following facts are material in this connection. First, that the dealings conducted by Patrick Ong on behalf of the plaintiff with KNE were legitimate business transactions. Second, that he was acting within the scope of his authority when he transacted with KNE and that he had the power to transact on credit terms. Third, that the transactions occurred within a period of less than three months namely from 30 December 1996 to 6 March 1997. Fourth, that the plaintiff's accounts department was fully aware of the transactions and the receivables outstanding from KNE. Fifth, that at one point in time, according to Ms Toh, the accounts department had advised Mr Ong not to release further goods to KNE without collecting money on their previous liability which advice was not heeded. Sixth, that there was no suggestion that the accounts

department had at this stage notified the defendant of its advice to Mr Ong or the outstanding indebtedness of KNE. By the time the defendant was informed of the position, all the transactions had been completed. Seventh, Mr Ong had assured the defendant that payment would be received and that he would assume liability for its collection. And finally, the main reason why no money was received from KNE was that it was in financial difficulties.

80. It should also be noted that once the gravity of the situation was drawn to the defendant's attention, she took immediate action to try and recover the debts. She personally contacted the relevant officer of KNE and obtained some promise of payment. When payment did not materialise, legal action was taken and the writ against KNE was filed on 23 April 1997. The time lapse between the defendant's learning of the problem and the filing of the action could not have been more than six weeks. This contrasts with the facts in *Kie Hock Shipping (1971) Pte Ltd* [1985] 1 MLJ 411 where a company director was found to be grossly negligent in the management of the company because he took no active steps to collect the company's debts but rather stood by and allowed his uncle to dispose of the assets of the debtor and thereafter gave further credit to the debtor so that by the time his own company was wound up, it was owed more than $11 million by the debtor.

81. There were, in my view, two causes for the loss sustained by the plaintiff in KNE's case. One was KNE's own difficult financial position and the other was the misjudgment of Patrick Ong in continuing to extend credit to KNE despite its failure to pay the plaintiff's earlier invoices. The defendant could not be faulted for relying on Mr Ong's judgment as she had no reason not to trust him and in any case, was not warned of the position in time by the accounts department. It should be noted that Mr Ong was not just an ordinary salesman but the manager of the department. Mr Ong himself appears to have been nave rather than negligent in that having had successful dealings with KNE prior to the transactions in question he was too willing to accept their assurances of payment being made soon and to extend them further credit beyond the time when their failure to pay should have sounded an alarm bell. Perhaps the defendant should have imposed stricter credit controls but this is speaking from hindsight and in the competitive world of computer retailing imposing very strict credit terms might result in a lower turnover. I cannot in the circumstances ascribe the plaintiff's loss to any negligence on the part of the defendant.

(iii) Was the defendant negligent in relation to Kelvin Ng's case?

82. Kelvin Ng was employed by the plaintiff as a salesman in the Corporate Sales Department in October 1997. His initial employment was on a probationary basis and in the letter of appointment, he was informed that he was only authorised to give each customer credit up to the amount of $8,000. On 1 December 1997, Kelvin Ng's appointment was confirmed and another letter of employment was issued. This again emphasised the credit limit per customer as being $8,000.

83. During the course of Kelvin Ng's employment, he was stationed at the plaintiff's head office in Peninsula Plaza. The defendant was also stationed there. At that time, there were three sales executives in the Corporate Sales Department. When Kelvin Ng started work, the department did not have a manager and he reported directly to the defendant. About two or three months later, however, Andy Chew was employed as manager in charge of corporate sales and thereafter Kelvin Ng reported to Mr Chew who in turn reported to the defendant.

84. According to Kelvin Ng himself, he started committing criminal breach of trust in respect of the plaintiff's goods in February 1998. His modus operandi was to issue an invoice in respect of a certain consignment of goods in the name of one of the plaintiff's usual corporate customers. The invoice would provide that the customer was given credit for a period of 90 days. Kelvin Ng would then go to the stock room and take possession of the goods for purported delivery to the customer. Instead of delivering the goods to the named customer, he would, however, deliver them to his own customer, presumably a fence, collect cash payment for the goods and pocket the money. He carried on in this way up to July 1998. In order to make his depredations less evident, he would from time to time pay to the plaintiff money he had purportedly collected from its customers towards satisfaction of their outstanding invoices. By the time Kelvin Ng's fraud was detected in late July/early August 1998, he had stolen more than $200,000 worth of goods.

85. The plaintiff's submission is that the defendant did not exercise reasonable diligence in checking the sales transactions

conducted by the Corporate Sales Department. It accepted that the fraud could have been committed even with strict supervision but said that the loss would have been contained or reduced as the fraud would have been discovered earlier if she had exercised such due diligence. The plaintiff further submitted that its monthly accounts and its monthly accounts receivable list were furnished to the defendant, albeit, one to two months late, but she failed to check whether payment had been collected by the Corporate Sales Department within the credit period. Further, in May 1998, knowing that Kelvin Ng had exceeded the credit limit, all that the defendant did was to stop him from taking goods directly for a while until he had reduced his receivables by about $10,000 when the total amount due was about $80,000. Again, in July 1998, when the company was facing severe cash-flow problems and having seen the accounts receivable list, she merely directed Kelvin Ng to see Connie Lai to explain the position and did not follow up on the matter. Further, the defendant's main interest was the gross sales figure furnished by the branch managers and she evaluated the performance of the staff and branches based solely on these figures without ascertaining the actual net profit of these transactions or the accounts receivables for them.

86. The problem which the plaintiff has with this claim is that as, it had admitted, the defendant could not be expected to give continuous attention to the daily affairs of the plaintiff. As I have stated earlier, she was also entitled to rely on the due diligence of her supporting and subordinate staff and to expect that matters requiring her attention would be notified to her by them. This proposition is particularly apposite in respect of the accounting department. The defendant was not an accountant and was not expected to do the job of the accounts department personally. It was for the accounts department to keep track of the plaintiff's financial affairs and especially its cash-flow position and the status of its trade debtors. The branch/department managers also had responsibility for transactions effected by their subordinates and had the primary duty of monitoring these and reporting to the defendant if there were any problems.

87. There is ample evidence that in the second half of 1997 and the first half of 1998, the accounts department of the plaintiff company was way behind in its work. Up to about mid 1997 matters were under control. At that point, however, the plaintiff opened two new shops and PDA Junction Pte Ltd was also set up with its own retail outlet. The plaintiff's accounts department had to look after the accounts of PDA Junction Pte Ltd as well as those of the existing and new branches and therefore its workload increased tremendously. It was not able to cope and fell behind in production of the accounts.

88. It was due to the problems that the accounts department was encountering that Mr Cheng decided to employ a group financial controller in the person of BK Ng to bring the department up to scratch. Mr Ng joined the plaintiff in November 1997. At that time, the accounts were substantially in arrears. By January 1998, the accounts had not been brought up to date and the accounts department was in the midst of closing the accounts for the last three months of 1997. Around mid February 1998, Mr Ng provided the defendant with a revised plan for the production of the plaintiff's accounting reports. According to this plan, the 1997 accounts would be closed by 12 March 1998, the computerised stock system would be completed by 24 February 1998, January 1998 accounts would be closed by 12 March 1998 whilst the February and March 1998 accounts would be closed by 26 March and 9 April 1998 respectively. Mr Ng was not, however, able to keep to this schedule.

89. The defendant's testimony was that no list of accounts receivable or accounting reports were furnished to her between January and June 1998. There was some evidence that this statement was not completely true in that the defendant disclosed in her list of documents the plaintiff's accounting reports printed on 22 April 1998. She must have had those documents at least by the end of April 1998. They would not, however, have been of much help in alerting her as to the state of Kelvin Ng's transactions. The documents given to her comprised a profit and loss account, analysis of expenses and a balance sheet for the month ended 31 January 1998 which did not indicate how the trade debtor figure was divided amongst the various salesmen/branches. There was no accounts receivable list.

90. There is no evidence that the defendant received any other accounting documents until, at the earliest, the end of June 1998 when the accounts department produced the following for the period January to April 1998:

> (a) separate profit and loss accounts for the Sim Lim Square outlet, the two Funan Centre outlets, the Corporate Sales Department and the head office;
>
> (b) a group profit and loss account; and

(c) a document entitled 'average sales and expenses'.

Even then, the profit and loss account for the Corporate Sales Department did not indicate the trade debtor figure let alone contain a breakdown of how this figure had been contributed to by the various salesmen in the department. The plaintiff was not able to produce any accounts receivable list which had been prepared prior to August 1998. It was only on 1 August 1998 that the balance sheet of the plaintiff company as at 31 June 1998 was issued. This showed the total amount of trade debts owing to the company and gave a breakdown of that indebtedness by department. The Corporate Sales Department had $224,480 in outstanding receivables but there was no trade debtor list for the various departments until around 4 August 1998 which was about the same time as Kelvin Ng's crimes were discovered.

91. I accept the defendant's submission that the accounts department did not furnish her with the accounting documents which could have alerted her to the high levels of receivables associated with Kelvin Ng's transactions. Further, as her counsel submitted, having regard to the amount of the losses reflecting the substantial value of the goods misappropriated by Kelvin Ng, if at all the accounting reports have been prepared and furnished in a timely fashion as alleged by the plaintiff, it would have been obvious to anyone and not least of all to Mr BK Ng himself that something was seriously amiss in respect of Kelvin Ng's transactions. The fact that the accounts department itself was not aware of this serious irregularity indicates that the reports had not been prepared in time to enable anyone to detect Kelvin Ng's crimes.

92. Apart from the fact that the accounts were late at the material time, the accounts department which was in control of the plaintiff's inventory system was in the course of revising that system. The evidence was that at the time the system was to a certain extent deficient in that the physical stocks would not be tallied against sales and/or receivables. This was the job of the accounts department and not the defendant.

93. I have come to the conclusion that it was not lack of reasonable diligence on the part of the defendant which led to the late detection of Kelvin Ng's crimes. She relied on the accounts department to keep track of the receivables as they had done up to that time and it was not wrong of her to do so. Mr Cheng had deliberately employed a highly qualified accountant to bring the accounts department back up to scratch and the defendant knew this. She also made efforts to obtain accounting documents from Mr Ng. Her assertion to this effect is supported by his memorandum setting out a schedule for preparation of the various accounts. She cannot be held responsible for deficiency in the accounts department and it was those deficiencies and some inadequacies in the inventory system which prevented the problems from being recognised earlier. It is also worth mentioning that at the time the whole situation blew up Mr Cheng laid the blame squarely on the accounts department and subsequently terminated Mr BK Ng's employment for this reason.

Third, the monetary claims

(i) Money paid for the defendant's car

94. The plaintiff's original statement of claim contained only one paragraph relating to the purchase of the defendant's car. This was paragraph 16 which read:

> 'Further, in breach of her duties, the Defendant wrongfully utilised the plaintiff's funds amounting to $49,943.61 towards the purchase of a vehicle for her own use.'

This pleading implied that the defendant had, without the knowledge of the other directors of the plaintiff company and without proper authority, procured the use of the plaintiff's funds to assist her in her purchase.

95. The defendant's pleaded response to the plaintiff's allegation was that in April 1997, the plaintiff wished to purchase a car for the use of the defendant as she needed to travel extensively in the course of her work. The plaintiff consequently paid $40,551.88 as the downpayment for the car and subsequently paid the monthly hire-purchase instalments. The car belonged to

the plaintiff but was registered in the name of the defendant in order to save the plaintiff money. The sum of $40,551.88 was not a loan to the defendant but in March 1998, when the relationship between the defendant and Mr Cheng became increasing strained, the plaintiff sought to convert the ownership of the car to the defendant and insisted that the sum of $40,551.88 be converted into a loan repayable by the defendant who would also thenceforth be liable for the expenses of the car.

96. The defendant went on to plead that she was persuaded to accept the plaintiff's proposal by Mr Cheng's assurance that upon her appointment as managing director, she would have an increased salary from which she would be able to repay the $40,551.88 as well as the outstanding instalments in respect of the vehicle and would ultimately be able to own it. In November 1998, the plaintiff repudiated its agreement with the defendant by withholding her salary for November 1998 and subsequently reducing it to a fixed sum of $2,000. The plaintiff also compelled her to sell the car in November 1998. The defendant ended by pleading that by reason of the repudiation of the agreement, she could no longer be held liable in respect of the payment of the $40,551.88 or for any sum at all in respect of the car and she also counterclaimed the sums previously paid by her to the plaintiff on account of the car as money had and received for a consideration which had totally failed. The plaintiff filed a reply in which it denied that the car belonged to it or that it had purchased the car to enable the defendant to carry out her duties.

97. When the trial took place, the evidence adduced showed that the original payment of $40,551.88 as downpayment for the car had been authorised by a resolution of the plaintiff which was passed on 15 April 1997 and which read 'That the amount of $40,551.88 being downpayment for the purchase of a car for Tan Swe Sang, a director of the company for the purpose of work hereby be approved and paid'. Mr Cheng's evidence was that at all material times the intention of the plaintiff was to extend the defendant a loan to assist her in the purchase of the car. The defendant was aware of this and instructions were given in Mandarin to Ms Toh to prepare the necessary company minutes. In doing so, she used the wrong language by stating that the money was 'given' to the defendant. Subsequently Mr Cheng discovered this mistake and on 30 March 1998 a resolution was passed to clarify that the money had been intended as a loan to the defendant. She was present at the meeting and did not raise any objections. The defendant, however, dishonestly utilised company funds for the monthly hire-purchase instalments without the approval of the plaintiff and in November 1998, she sold the car without the plaintiff's knowledge. She kept the proceeds of sale and did not account for the same to the plaintiff. In the plaintiff's closing submissions, it characterised this issue as being whether the defendant had failed to account to the plaintiff for the sum of $49,943.61 being monies loaned by the plaintiff to her towards purchase of a vehicle for her own use. The sum of $49,943.61 was made up of the initial advance of $40,551.88 plus the monthly instalments paid by the plaintiff less certain payments received from the defendant.

98. As it was clear that the evidence and the closing submissions did not accord with the plaintiff's pleaded case, I called the parties in and invited the plaintiff to amend its pleading to accord with the evidence adduced. I took this course because I did not think that the defendant had been prejudiced by the initial erroneous pleading since her case in her pleading of an initial gift subsequently converted into a loan had been maintained at the trial and had been dealt with in detail by her counsel when cross-examining the plaintiff's witnesses. The plaintiff's counsel had also cross-examined the defendant and her witnesses on the basis of the plaintiff's position as contained in Mr Cheng's affidavit that the car payments were always loans and that the defendant's agreement to repay these loans had nothing to do with her salary increase when she became managing director. The plaintiff accepted my invitation to amend and the amended paragraph 16 reads:

> 'Further, on or about 15 April 1997, the plaintiff passed a resolution to approve the advancement of the sum of $40,551.88 to assist the defendant in the payment of a downpayment of a car. On 30 March 1998, another resolution was passed to clarify that the said sum was advanced to the defendant by way of a loan for the purchase of a vehicle. The defendant used the said sum of $40,551.88 to pay for the downpayment and 1997 insurance coverage for the car. The defendant also continued to, dishonestly and without the approval of the company, utilise the plaintiff's funds amounting to $31,634.35 to pay the monthly instalments, road tax and miscellaneous expenses for the car.
>
> Particulars
>
> S/No. Description
>
> Amount

1.	Insurance for 1998	$1,749.19
2.	Monthly instalment ($1,256 x 13 months)	$16,328.00
3.	Monthly instalment ($1,395 x 5 months)	$6,975.00
4.	Road tax	$371.50
5.	Transport claim	$4,580.89
6.	Expenses for November 1998	$1,629.77
Total		**$31,634.35**

> The defendant has repaid a total $22,242.62 comprising $10,061.09 repaid in cash and $12,181.53 through deductions from her salary. In the premises, the defendant had wrongfully failed to repay or account to the plaintiff the balance sum of $49,943.61 that the plaintiff had advanced to the defendant by way of a loan for the purchase of a vehicle for her own use.'

99. The issues that arise therefore are whether the initial payment for the car was a gift to the defendant and if so whether the initial gift was only converted into a loan on the basis that the defendant would become and remain managing director of the plaintiff with a certain income that would enable her to repay both the initial downpayment and the car instalments.

100. The only document which supports the defendant's stand that the initial payment for the car was a gift to her is the resolution of 15 April 1997. Even so, the resolution does not state directly that the amount is a gift but may be interpreted as implying that. The implication of the wording of that resolution is, however, contradicted by the entries in the plaintiff's accounts which were made contemporaneously with the payment for the car. The sum of $40,551.88 was not paid as a lump sum. Instead, it comprises three payments: the sum of $15,450 paid on 3 April 1997; the sum of $23,250 paid on 23 April 1997 and the sum of $1,851.88 also paid on 23 April 1997. The first two sums together comprised the downpayment whilst the third sum was the insurance premium for the car. These three amounts were recorded in the plaintiff's general ledger under the item 'Current account – Mindy Tan' and each amount was debited to her account so that as of 23 April 1997, the general ledger showed that the defendant owed the plaintiff $40,551.88. Subsequently, in May and June 1997, two sums of $1,256 were also debited to the defendant's current account. These amounts represented the May and June hire-purchase instalments for the car.

101. These entries in the plaintiff's accounts show that from the beginning the car was intended to be the defendant's and any money paid for it was considered an advance to her. Further documentary evidence in support of the plaintiff's position came from the payment vouchers drawn up by Ms Toh and Mr BK Ng in 1997 and 1998 which show that the car instalments were paid on behalf of the defendant and were intended to be debited against her current account.

102. I also accept Mr Cheng's explanation that since matters were discussed in Mandarin and instructions for the minutes were also given in that language, there was a translation difficulty when the minutes were drafted in English which he did not recognise until 1998 and that upon recognising the error, he immediately procured a correction. The correction itself was not worded very well as it referred to the amount 'formerly … given to [the defendant] to purchase a car is now treated as a loan to her'. I accept, however, that the intention was to record that the advance was a loan not a gift.

103. The defendant herself was completely unbelievable on the subject of the car. Her evidence swung from one position to another within the course of her cross-examination and I obtained a clear impression that she did not know what she was saying. Her pleaded stand was that the car, although registered in her name, was intended to be the plaintiff's property. In cross-examination, however, her attitude was not so clear. The first question she was asked was whether she agreed that it was at her request made in April 1997 that Mr Cheng agreed to assist her to purchase the car by making a loan of $40,000. She replied that it was a grant not a loan. She then maintained that although the car was registered in her name officially it actually belonged to the plaintiff. She was then asked why she had said that $40,000 was a grant to her if the car was not meant to be owned by her. Her answer was not clear. It was put to her that if, as she alleged, the sum of $40,000 was a grant to her for the downpayment of the car but the understanding was that it belonged to the plaintiff, the minute of 15 April 1997 did not reflect the position accurately. Her response was 'I have mixed-up something in the beginning and would like to clarify. The $40,000 was the downpayment for the car. It's a given *[sic]* and using on my name. So the car belongs to me'. I then asked her whether she was saying that the $40,000 was a gift to her to help her buy the car herself. Her reply was that the gift was not for her. She

used the car but it belonged to the company. Being pressed further, she then decided that she should as she put it 'rephrase the whole thing. The $40,000 was a downpayment for the car. I did not have to pay it back to the company. The car belonged to me for the purpose of working for the plaintiff'. The next day she was asked again who the car belonged to when it was acquired in April 1997. She repeated that it belonged to the plaintiff.

104. On the other hand, Ms Toh who prepared the resolution of 15 April 1997 testified that the defendant had told her that the amount had been given to the defendant for the purchase of the car. She denied that Mr Cheng had told her that the sum of $40,000 was intended as a loan to the defendant to assist the latter in paying for the car. The impression Ms Toh had was that the money was being put in the defendant's name as a gift. She also agreed, however, that the monthly instalments for the car were the defendant's responsibility and that a current account in the name of the defendant was opened in the ledgers of the plaintiff company in April 1997 after the resolution was passed. When Ms Toh was asked whether she agreed that the sum of $40,551.88 was reflected in the defendant's current account upon its being opened, her answer was a rather evasive 'It should not be there'. She did agree, however, that the various amounts paid for the car had been debited against that current account as and when payments had been made. I should state here that I found Ms Toh to be rather evasive on the issue of the initial payments. She appeared to be trying to avoid the implication of the documents and protested that she had no knowledge of the entries in the ledger even though she had been the plaintiff's financial controller at that time. This disclaimer did not ring true since she had to admit having an overview and ensuring that the figures in the general ledger were fairly accurate based on her judgment of what they should have been. The May 1997 balance sheet showed the defendant to be owing the plaintiff $85,000 and, if Ms Toh's evidence is to be believed, at that time, the defendant would only have owed the company $50,000 for the shares which she had subscribed for. Ms Toh, however, did nothing to correct the ledger to reflect what she said was the true position, and I therefore must infer that at that time she was satisfied with the entries in the defendant's current account because she knew that the defendant had been given a loan and had to pay for the car.

105. BK Ng testified that when Mr Cheng wanted to rectify the position in March 1998, the defendant agreed to the new resolution which read:

> 'The amount S$40,551.88 which formerly given to Ms Tan Swe Sang to purchase a car is now treated as a loan to her and all related expenses to the car will not be paid by the company.'

This resolution was passed after the defendant was given two alternatives: the first was to surrender the car to the company which would sell it and absorb the loss. The second was that she could keep the car but the downpayment would be treated as a loan and all the expenses would be borne by the defendant rather than the company. The defendant chose the second alternative. I accept this evidence.

106. In my judgment, the evidence supports the plaintiff's position. Any monies advanced by the plaintiff in relation to the purchase or expenses to the car were advances to the defendant from the very beginning and the defendant knew this. It was never the plaintiff's intention to purchase the car as its own asset. It was the defendant who wanted the car. The plaintiff had no need of it but was willing to assist the defendant in her acquisition. When Mr Cheng became aware of the mistake that had been made, he did offer to take over the car but the defendant wanted to retain it. I do not accept her evidence that she only took on the loan because she was being given an increase in salary. It was not a condition of her acceptance of the loan that she should be paid an increased salary and employed by the plaintiff until the loan was paid off. The increase in her salary was to help her pay off her car loan but it was not given to her because she had agreed to take over a liability that would otherwise have been the plaintiff's. Further, the car was sold on 12 November 1998. This must have been a voluntary act on the defendant's part. It was before the defendant's salary was reduced to $2,000 and there is no evidence to support the defendant's contention that she was pressured into selling it by Mr Cheng. The defendant was a most unreliable witness when it came to this issue.

107. The plaintiff produced accounting documents showing how the claimed amount of $49,943.61 was computed. This was the balance due after all payments made on account of the car had been totalled and all payments made by the defendant to the plaintiff to her current account had been debited. The defendant did not dispute the details of the claimed amount. Her dispute was on liability only. No questions were raised or submissions made on quantum. Accordingly I find the defendant liable to pay the plaintiff the said sum of $49,943.61.

(ii) Did the defendant draw excess amounts in respect of salary?

108. This issue arises from the defendant's appointment as managing director on 1 April 1998. The question is whether the defendant's salary package with effect from that date was fixed at one percent of the gross sales as she alleges or whether it was one percent of the gross sales provided that a gross profit margin of 6.5% was achieved, as alleged by the plaintiff. If the plaintiff's position is the correct one, then since the plaintiff did not achieve the 6.5% per annum gross profit margin from June to December 1998, the defendant's salary for 1998 should have been $65,361.15 and not the $82,512.77 that she, as managing director, authorised to be paid to her.

109. The plaintiff relies on the resolution of 30 March 1998. That states:

> '**APPOINTMENT OF MANAGING DIRECTOR AND ITS' REMUNERATION FOR YEAR 1998**
>
> Tan Swe Sang has been appointed as managing director of the company for year 1998 and her remuneration will take effect from 1 April 1998 with the following conditions:
>
> **Scheme 1**
>
> 1% of gross sales, but with a guarantee of GP margin not less than 6.50% (with sales rebate). When her total monthly remuneration calculated with this scheme accumulates to S$129,000 then it will automatically switch to Scheme 2
>
> **Scheme 2**
>
> Basic salary of S$2,000 and 0.5% of gross sales (on portion > S$100,000)'

That minute was signed by Mr Cheng as chairman of the meeting. It was not signed by the defendant.

110. It was the evidence of BK Ng that the defendant's salary package was not finalised at the meeting on 30 March 1998 itself. He prepared the minutes and was the go-between during negotiations between the defendant and Mr Cheng about the gross profit margin relating to the defendant's salary package. He said that the defendant was happy to accept the scheme that was eventually reflected in the signed minute because a 6.5% profit margin was easily achievable. The defendant on the other hand testified that she never agreed to have her salary depend on the plaintiff achieving a minimum gross profit of 6.5% and that this margin was not raised at the meeting on 30 March 1998 nor agreed to by her thereafter. She also testified that she had not seen the minute containing her salary scheme until her departure.

111. Both BK Ng and Ms Puah gave evidence that the defendant was fully aware of the 6.5% margin attached to her salary. Mr Ng said that this issue was discussed during meetings on 30 and 31 March 1998. Further, the defendant produced a draft of the minutes of the 30 March 1998 meeting. This draft, also prepared by BK Ng, showed various gross profit margins being proposed of which 6.5% was the lowest. The defendant who had this draft in her possession must therefore have been aware that the level of her remuneration was going to be subject to one or another profit margin and that she was not simply going to receive one per cent of the gross earnings as her salary.

112. When Ms Puah joined the plaintiff in October 1998, she asked the defendant whether the 6.5% gross profit margin was to be calculated on a monthly or yearly basis and the defendant confirmed that it was calculated on a per annum basis. Ms Puah also testified that at a meeting in January 1999 between the defendant, Mr Cheng, herself and some others, one of the issues discussed was the defendant's salary. During the meeting Mr Cheng asked the defendant to choose whether the 6.5% should be computed on a monthly or yearly basis and at that point the defendant said it was not fair to make her to choose one or the other since the 1998 accounts had not been finalised. The defendant did not say that the 6.5% figure was irrelevant to the

computation of her salary. I found Ms Puah to be an honest and convincing witness. She had no interest in the proceedings at all and in any area where her evidence conflicted with that of the defendant, I would accept her version rather than that of the defendant who, as I noted earlier, was often contradictory, evasive and untruthful.

113. I therefore find in favour of the plaintiff on this issue. The defendant must account to the plaintiff for the amount of salary overdrawn. It should be noted that at all material times it was the defendant who approved her own salary vouchers.

114. In this connection, I should discuss the issue of the defendant's resignation and the reduction of her salary in December 1998 to $2,000 per month. The defendant's position was that although she put in a letter of resignation, in fact, the plaintiff had constructively dismissed her by unilaterally reducing her salary to $2,000, by withholding her November salary for two weeks and by forcing her to sell the car. I have already found that the plaintiff did not force the defendant to sell the car. There was no reason for the plaintiff to do that since the car was the defendant's property and it could not gain anything from such a sale. On the next point, the documentary evidence does not support the defendant's claim that her November 1998 salary was withheld for any significant period. The plaintiff company usually paid salaries on the 25th of each calendar month and in this case the defendant's salary cheque was cleared on 28 November 1998 so the delay in payment, if any, was minimal.

115. There is, however, an issue about the reduction of the defendant's salary. The defendant's stand is that it was a unilateral decision made by Mr Cheng and amounted to a constructive dismissal. Mr Cheng testified that he had reduced the defendant's salary because she had informed him that she no longer wished to be managing director. The defendant admitted that she had told Mr Cheng that she no longer wished to be managing director since he had often expressed his unhappiness with her management skills and blamed her for the losses incurred by Kelvin Ng's actions. She had told him that she wanted to concentrate on purchasing and marketing and let someone else handle the management.

116. Although the defendant might have indicated her desire for a change in job scope that did not justify a unilateral deduction in her salary especially since at that stage there was no indication that she was not carrying out her usual responsibilities. The plaintiff had the option of agreeing to such a change at the same salary or of giving her notice to terminate her employment since she no longer wished to carry on as managing director. It was not entitled to make a sudden change in her salary package and therefore when the defendant's salary entitlement is calculated in order to estimate the amount by which she overdrew salary, she must be treated as being entitled to her full salary package up to the date when she left the plaintiff's employ. Since after the reduction of her salary the defendant stayed on and worked out her notice period for which (as I have held) she is entitled to be paid in full, whether the reduction amounted to a constructive dismissal is irrelevant. The plaintiff may have been entitled to claim that it was not liable to pay her salary in December 1998 and January 1999 on the basis that during that period the defendant was in breach of duty because she was actively working to take GEMS away with her. That, however, has not been pleaded and therefore need not be considered.

The defendant's counterclaims

117. The first item of the defendant's counterclaim is for monies paid by her to the plaintiff towards payments in respect of the car on the basis that she is entitled to the return of these sums because the plaintiff had repudiated the contract relating to her employment on which her agreement to pay for the car was based. I have found against the defendant on this issue in relation to the plaintiff's claim and therefore her counterclaim has no basis either.

118. The defendant also claims arrears of salary for December 1998 and January 1999. She should be given full credit for the amounts that should have been paid to her during these two months on the basis that the original salary package stood and the plaintiff could not change the terms of the defendant's employment contract unilaterally.

119. The third claim made by the defendant is for sums due to her on account of her unutilised annual leave and off-days. According to the defendant's pay list dated 24 December 1998, as of that date she was owed 61 days leave. The plaintiff gave her credit for ten days leave only and refused to pay for the remaining 51 days. The plaintiff submitted that the evidence showed

that the defendant had taken leave in December 1998 but she did not file any leave application form. The defendant said that she verbally informed either Mr Cheng, Mr Phee, the accounts department or her secretary and they would file the leave form for her. But her secretary Ms Chew testified that she did not remember the defendant filing any leave form and also confirmed that leave was not computed by the accounts department.

120. All I have to go on are the defendant's pay slips which show that as at 24 December 1998, she had 61 days accumulated leave. She admitted taking a few days leave in December so if five days were to be deducted from the 61 that would give her 56 days leave. Even when the plaintiff was aware that she was resigning and that someone else had to take over her position no attempt was made to keep track of the defendant's movements and therefore I do not think that it would be right to go even further behind the pay slip. According I hold that the defendant is entitled to be paid for the 46 days leave for which the plaintiff has not so far given her credit and that the amount due to her in this respect should be set off against the amount recoverable from her for overpaid salary.

Conclusion

121. In the event, the plaintiff is entitled to judgment as follows:

> (1) for damages to be assessed in respect of the defendant's breach of fiduciary duty in relation to the GEMS project;
>
> (2) for the sum of $49,943.16; and
>
> (3) for the amount of salary by which the defendant has been overpaid less the full salary due to her for December 1998 and January 1999 and the unpaid leave of 46 days.

As regards costs, the plaintiff is entitled to the costs of this action save on the Kelvin Ng and KNE claims which it has not succeeded on. The defendant is entitled to her costs of defending those claims. I make no separate order on the costs of the counterclaim as it was intertwined with the claim.

JUDITH PRAKASH

JUDGE

SINGAPORE

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