Tokuhon (Pte) Ltd v Seow Kang Hong and Others (No 2)
[2003] SGCA 39

Case Number : CA 133/2002

Decision Date : 07 October 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Kan Ting Chiu J; Yong Pung How CJ

Counsel Name(s) : Roderick E Martin (Martin and Partners) for appellant; Ms Indranee Rajah SC, Sham Sabnani and Justin Yip (Drew and Napier LLC) for respondents

Parties : Tokuhon (Pte) Ltd — Seow Kang Hong; Wong Kah Joo; Gamma 2000 (S) Pte Ltd

Companies – Directors – Duties – Breach of duties – Relief under Companies Act (Cap 50, 1994 Rev Ed) s 391(1)

Companies – Directors – Duties – Breach of fiduciary duties – Director sending letters to business associate – Letters detailing internal conflicts among management – Other directors in habit of disclosing such information to said associate – Whether sending of letters constituted breach of fiduciary duties

Companies – Directors – Duties – Cessation of directorship – Scope of duty still owed to company – Company's distributorship terminated and subsequently awarded to ex-director – Whether ex-director in breach of any duty – Correct test to determine whether duty breached

Delivered by Chao Hick Tin JA

1 This appeal is against the dismissal by MPH Rubin J of an action instituted by the appellant company, Tokuhon (Pte) Ltd ("TPL"), against the first two respondents who were the directors of TPL, and who are also husband and wife, for breach of fiduciary duties. These two respondents will hereinafter be referred to as "Seow" and "Mrs Seow" respectively.

2 There is also a third respondent to this appeal, Gamma 2000 (S) Pte Ltd ("Gamma"). Its role was purely accessory and this will be apparent later.

The background

3 As the issues raised relate largely to facts, there is a need for us to go into some detail. Before 1962, the Tokuhon medicated plasters (the products) were concurrently imported into Singapore by three family business entities, namely, Nan Tat & Co (owned by the Chang family), Continental Trading Co (then owned by the Thong family and later the Seow family) and Weng Seng Heng Medical Hall (owned by the Ooi or Ng family). Hereinafter these three business entities will be referred to as the three "entities", "families" or "partners" as may be appropriate.

4 The Japanese manufacturer of the products, Tokuhon Corporation (TC), felt that the then arrangement for the importation of the plasters through the three entities was not desirable. Following its suggestion, in February 1962, the three families incorporated the appellant, TPL, with Nan Tat owning 35,000 of its shares, Continental 35,000 shares and Weng Seng Heng 30,000 shares. It was agreed that each family would have one representative on the board of directors of the company. The first board consisted of Chang Chiow Hee from Nan Tat, Thong Giok from Continental and Ooi Choon Sian from Weng Seng Heng.

5 As at the date immediately prior to the dispute giving rise to the action, representing Nan Tat on the board was Dr Chang Jin Aye ("Dr Chang"), representing Continental were Seow and Mrs Seow and

representing Weng Seng Heng was Ooi Choon Sian, with Ng Choon Heng ("Ng") as his alternate.

6 Following its incorporation, TPL was appointed by TC as the sole distributor of the products in Singapore, Malaysia and Brunei. But as far as the actual distribution of the products on the ground was concerned, it was, as before, marketed and sold by the three entities independently, although TPL also did some direct sales of its own. Each of the partners would buy the products from TPL at a price slightly higher than cost and would sell them to their respective retailers/consumers at a mark-up. In 1987, Continental ceased to carry on business, and TPL took over those retailers with whom Continental had had dealings with.

7 During the early stages, this working arrangement posed no problems as there was rapport between the patriachs of the three families. However, much later, in the nineties, problems began to surface, with complaints of various sorts being levelled by one partner against another or others, e.g., allegations that Nan Tat and Weng Seng Heng were always late in settling their outstandings to TPL; Nan Tat publishing printed materials which stated that it was the sole distributor of the products; a partner selling a competing brand of medicated plasters of German origin; and the dumping by Weng Seng Heng of Tokuhon plasters it imported into Malaysia onto the Singapore market.

8 In 1994, TC appointed China Merchants Import & Exports Co Ltd (China Merchants) of Hong Kong as its agents with the authority to appoint authorised distributors of the products in, *inter alia*, Singapore, Malaysia and Brunei. China Merchants is in the charge of Mr Michael Chien ("Chien"). The internal squabbles of TPL were matters which Chien was well aware of from day one.

9 In November 1994, Dr Chang of Nan Tat complained to Chien that Tokuhon products were being dumped into the Singapore market from Malaysia and Weng Seng Heng (and thus Ng) was suspected to be the culprit. This was because Weng Seng Heng was appointed by TPL as the agent to import and distribute the products in Malaysia and there were complaints by retailers here that similar products were being sold in Singapore at lower prices. On 9 December 1994, China Merchants wrote to Dr Chang stating that they were well aware of the difficulties in TPL, as the three partners' interests in the business were not always the same.

10 On 20 December 1994, Dr Chang wrote to China Merchant, proposing that a more direct sales method be used. He also pointed out that the three partners were not of the same mind and asked that the responsibility of undertaking marketing and sales be entrusted wholly to Nan Tat although the profits of TPL would still be shared among the three partners.

11 In 1995, Dr Chang paid Chien a visit in Hong Kong and again complained about the problems in TPL, including the dumping by Ng of the products from Malaysia. The impression created in Chien's mind was that Dr Chang was making a pitch to have Nan Tat substituted as distributor in place of TPL.

12 In August 1996, with TC's blessings, Chien flew to Singapore. The object of that trip was to assess the position on the ground, speak to the directors of TPL and determine which of the three partners should be appointed, in place of TPL, as the sole distributor of the products. Eventually, he was prevailed upon by the partners to allow them time to sort out their differences. He set a time frame of three years for them to do so.

13 However, soon after this visit by Chien, Weng Seng Heng wrote to him on 14 October 1996 complaining that the directors were unable to cooperate and sought sole distributorship of the products. The relevant parts of the letter read:-

"As regards the shareholders of Singapore Tokuhon (Private) Limited not being able to co-operate, and so frequently having diverse views during meetings and hindering business progress, we are afraid that these may have an adverse effect on sales if this situation were to persist.

Taking into consideration that my company has been in the medical business in Singapore and Malaysia for some 10 years while enjoying good reputation and having many customers, I would like to propose that you appoint my company to be the sole agent (of your product). Not only will there be a definite increase in sales volume, but the markets in both Singapore and Malaysia can also be controlled easily."

14 Chien did not follow up on the suggestion by Weng Seng Heng that the latter be given the sole distributorship. But the partners never managed to resolve their differences, although sales of the products in the year 1999 improved. The dumping problem was, however, resolved in 1999 by the incorporation of an associate company in Malaysia to take over the importation and distribution of the products there.

15 In February 2000, matters came to a head when Mrs Seow learned from Chien, who called her for an update, that Dr Chang had in January 2000 gone to Japan and presented an advertising and promotional plan to TC. Chien was not told beforehand by Dr Chang of the latter's proposed presentation to TC but learnt of it later. Chien was displeased by this slight, as it might give the impression that Chien was not able to control his sub-distributors. Mrs Seow was upset too and wrote to Dr Chang on 15 February 2000 voicing her disapproval of his surreptitious move. She said "You went ahead to present your plans to Japan though you are aware that our company presently lack a competent marketing and sales staff to implement our advertisement plan." The letter ended with this paragraph:-

"In view of the above, I am agreeable to your suggestion ... to break-off the partnership of Tokuhon (Pte) Ltd. Your request to end the partnership is therefore accepted. I will proceed to inform Japan about the decision." (Emphasis added).

It was also copied to Weng Seng Heng.

16 A few days later, upon Chien's inquiry over the telephone, Mrs Seow told him of the state of affairs in the appellant. Upon his request, Mrs Seow sent to Chien a copy of her letter of 15 February 2000. Mrs Seow explained that the notation on the copy of the letter "bcc Mr Michael Chien …" was added by her staff after she gave instructions to the staff to forward a copy to Chien.

17 In early March 2000, Dr Chang offered to sell his shares in TPL to the other two partners. Mrs Seow discussed this with Ng. They could not agree on how Dr Chang's shares should be apportioned between the two of them. She also did not want to get committed to a 50-50 partnership with Ng as they often could not see eye-to-eye on matters relating to the business. Instead, Mrs Seow wrote to Dr Chang and Ng offering to sell them her shares (including those of her husband) at the price of $7.00 per share. However, this price was considered by the other two partners to be too high and thus the offer was not accepted.

18 On 17 March 2000, Mrs Seow wrote to Chien to inform him of her intention to withdraw from TPL. The letter also touched on various disagreements between the partners of TPL including, *inter alia*, Dr Chang's proposed withdrawal from TPL, Dr Chang's refusal to sign cheques relating to the company's business (and his later about-turn), Mrs Seow and Ng's inability to agree on how Dr Chang's shares should be divided between them and the directors' inability to agree whether to wind up TPL. The letter also enclosed minutes of some directors' meetings.

19 In early April 2000, TC expressed, through China Merchants, its dissatisfaction over the low number of orders received. Mrs Seow checked and found that there was an overstock situation. She wrote to inform China Merchants of the same and also stated that the directors of TPL were still unable to resolve their differences resulting in the marketing and promotional plans for the products being put on hold.

20 At end April 2000, Chien went over to Japan to discuss with TC the question of terminating the distributorship of TPL. On 15 May 2000 China Merchants issued the termination letter.

21 Barely a week after the termination, on 21 May 2000, Ng arrived in Tokyo making a pitch with TC, hoping to obtain the distributorship for his own firm, Weng Seng Heng. He explained that the object of this trip was to get the distributorship for TPL. This assertion was not accepted by the trial judge.

22 On 6 June 2000, TPL held its annual general meeting. Seow failed to get re-elected to the Board. Because of that, Mrs Seow tendered her resignation from the Board. There was a dispute as to the date on which she resigned. Though her notice of resignation was dated 6 June 2000, there was evidence indicating that she did not tender it until 15 June 2000. The trial judge accepted this latter date to be the operative date.

23 In the meantime, on 11 June 2000, Dr Chang and Ng arrived in Tokyo and made a joint attempt to persuade TC to give the distributorship to Nan Tat and Weng Seng Heng. Again a similar assertion was made that the object of this visit by Dr Chang and Ng was to seek the restoration of the distributorship for TPL. This explanation was again not accepted by the trial judge.

24 Sometime in the third week of June 2000, Chien called Mrs Seow inviting her to come over to Japan as Chien and TC were considering appointing her to be the new distributor of the products in this region. Mrs Seow said that it was upon much persuasion by Chien that she flew to Tokyo on 23 June 2000 to talk to him and TC. On 29 June 2000, Chien telephoned Mrs Seow to inform her that she had been selected to be the new distributor.

25 We now come to that part of the evidence of Mrs Seow which was not accepted by the trial judge. She claimed that as at the time she was offered the distributorship she did not own a suitable company to be used as the vehicle for the distributorship, she approached her sister-in-law, Chong Hui Chee ("Chong"), and her friend, Koh Yan Lee ("Koh"), who were then the shareholders of Gamma, the third respondent, to use Gamma as the vehicle. Chong and Koh agreed. Gamma was incorporated only four months earlier on 4 February 2000 by the Seows for the purposes of selling cosmetics and other beauty products. Yet on 6 June 2000 they transferred their shareholdings in Gamma to Chong and Koh for no consideration. They even lent a substantial sum to Gamma.

26 It was really too much of a coincidence that the shares in Gamma were transferred by the Seows on 6 June 2000, which was also the time at which TC and/or Chien were considering appointing a new distributor for the products. All these did not escape the keen eye of the trial judge who held that there was no real transfer of shares in Gamma to Chong and Koh. These two ladies were in truth holding Gamma in trust for the Seows.

27 While in this appeal, the Seows also challenged this finding of the judge, we do not think this finding can be faulted, much less that it was reached against the weight of the evidence. It seems to us fair to infer that by early June 2000 Mrs Seow was anticipating that she could be appointed as the distributor in place of TPL, and in order to avoid any questions being asked, rightly or wrongly, she decided to transfer Gamma to Chong and Koh.

Decision below

28 In the action instituted, TPL sought damages for the loss of the distributorship. In addition, it also claimed an account of the profits made by Gamma from the distributorship. Before us, TPL has abandoned the claim for an account of profits.

29 The judge below, at the outset, dismissed TPL's claim against Seow on the ground that he was never involved in the management of TPL; and neither was there any evidence to link him to the actions of his wife. Before us, TPL made a limited submission that Seow, like his wife, being a former director, was nevertheless precluded from accepting the appointment as a distributor of the products.

30 Besides the finding that the Seows were, in fact, the beneficial owners of Gamma, the trial judge also found that –

(i) Wong's letters of March and April 2000 did not cause TPL to lose the distributorship. The cause was really the fact that the three partners could no longer work together under the umbrella of TPL. He further held that, in sending out the letters, Wong was not in breach of her fiduciary duties as a director and that she was justified in so doing.

(ii) The Seows had not breached any fiduciary duties by accepting the distributorship. He was of the opinion that Mrs Seow's actions were entirely above-board and had not been motivated wholly by a desire to gain the distributorships for herself. In this regard, the judge noted that after the termination of TPL's distributorship, Dr Chang and Ng had in June 2000 jointly approached TC in an attempt to get the distributorship for themselves even though they were still directors of TPL.

Was Mrs Seow in breach in sending out letters?

31 Before us, the same issues are canvassed as were in the court below. We have already indicated why we think the finding of the judge that the Seows are the beneficial owners of Gamma should not be disturbed. We do not propose to say anything more on that issue.

32 What remain are the two issues enumerated in ¶30 above and we will consider each in turn. To recap, the first issue is, whether the letters written by Mrs Seow in February to April 2000, in particular that of 17 March 2000, caused the termination of the distributorship of TPL by TC/China Merchants? Before answering this question, we think it necessary to consider whether, in sending the letters to Chien, Mrs Seow was in breach of her fiduciary duties to TPL.

33 It is common ground that for some years before the termination of TPL's distributorship, the relationship between the three partners in TPL was clearly unsatisfactory. Each partner pursued his own objectives and there was no real effort to cooperate in the interest of TPL. They could not work together for the good of the company. The fact that there was internal strife among the three partners was a matter known only too well to both TC and Chien.

34 It would be recalled that in 1996, Chien came to Singapore with a view to resolving the stalemate by appointing one of the three partners as the sole distributor in place of TPL. At the time, the three partners somehow managed to close ranks and collectively asked Chien not to proceed as he had planned. So Chien gave them a period of three years to work things out. As indicated above, barely had Chien returned to Hong Kong, the apparent unity among them cracked. Although the issue concerning the dumping of the products from Malaysia was resolved through the setting-up of

Tokuhon Malaysian (Sdn) Bhd, the other problems besetting TPL still remained.

35 By the time Dr Chang unilaterally made his presentation to TC in January 2000, it would have been clear to TC, as well as to Chien, that things among the partners were not getting any better. Because of this knowledge, Chien had been closely monitoring the situation at TPL and thus called Mrs Seow from time to time.

36 Mrs Seow did not, on her own volition, forward to Chien her letter of 15 February 2000 which she wrote to Dr Chang. It was Chien who called Mrs Seow to ascertain what was happening in TPL. She mentioned to him about Dr Chang wanting to leave the company and of her letter of 15 February 2000. Upon Chien's request, Mrs Seow instructed her staff to despatch a copy of the letter to him. It is pertinent to note that in this letter Mrs Seow did expressly state that she would inform TC about the partners' intention to wind up TPL.

37 Then there is the letter of 17 March 2000 from Mrs Seow to Chien informing the latter of her intention to withdraw from TPL and where she also alluded to the problems that plagued the company and enclosed the minutes of some of the directors' meetings. This letter was copied to both Dr Chang and Ng. She acted openly. No objection was taken by them. As for Mrs Seow's letter of 11 April 2000 to Chien, this was written in response to his request.

38 In determining whether Mrs Seow had breached her fiduciary duties to TPL in writing those letters to Chien, we must view them in the light of the conduct of the partners. In ordinary circumstances, what Mrs Seow did, in communicating with Chien, would constitute a breach of her fiduciary duties as a director of TPL (whether it is under general equitable principles or under s 157 of the Companies Act was not a point taken by the parties in their arguments). Clearly the letter of 17 March, which set out in detail the various conflicts between the shareholders, did not put TPL in a good light. But the fact that there were conflicts among the shareholders was always known to TC and Chien.

39 Dr Chang and Ng had always brought internal problems of TPL to the attention of TC and Chien. They had regarded Chien as a confidante, a peace-maker and a referee for the contending partners. They had similarly divulged confidential information to Chien. The partners, as shareholders of TPL, regarded themselves as free to act in their own interest. So what Mrs Seow did, including divulging the minutes of board of directors' meetings, was in substance no different from what the other partners had done. All these demonstrated that each of the partners regarded such conduct as being fair game and acceptable. That was the norm set by the shareholder-partners for TPL. As the judge perceptively found, TPL was no more than a device of expediency. He said (at ¶94 of his judgment):-

> "From the manner in which these individuals were seen to be reacting to each other since the incorporation of the plaintiffs and the way in which the business of the plaintiffs was being carried out over the years, it was apparent that the plaintiffs were being operated, not like any traditional private limited company but more like three self-seeking groups plying their wares, sheltering nominally under a single corporate tent, but with scant regard for any corporate discipline or mutual regard."

40 The argument was also made that even if Dr Chang and Ng had done wrong, those wrongs would not justify Mrs Seow in doing another wrong: two wrongs do not make a right. But we think that the doings of all the directors in the present case must be viewed in perspective. It must be emphasised that the three directors represented the interests of all the shareholders of TPL. None of the directors, and thus the three partners, viewed that there was a separate independent interest of the company. In their capacities as shareholders, the directors were advancing the interest of their own families and were talking freely to Chien. That was the norm set by the shareholders of the company,

though not minuted as such in the minutes of the Company. The shareholder-partners had impliedly accepted such conduct.

41 It is in the light of these very exceptional circumstances that we hold, and thus concur with the trial judge, that in communicating with Chien, Mrs Seow was not acting out of turn and was not in breach of any duty.

Cause of the termination

42 In any event, even if the correct view to take of the situation is that Mrs Seow had technically committed a breach of fiduciary duty towards TPL, we shall next have to consider whether the breach in fact caused the loss of the distributorship. On this question, the judge held that the real cause for the termination of the distributorship was the fact that notwithstanding the considerable time given to the partners to work things out for the common good, they were unable to do so. He accepted what Chien stated in his affidavit of evidence-in-chief:-

> "My decision to terminate the Plaintiffs' distributorship rights was essentially because it was obvious to me that the instability of the internal structure of the Plaintiffs caused the Plaintiffs not to perform well. The directors had been quarelling amongst themselves since 1994, Chang and Ng had informed me about the conflicts and were trying to obtain the Plaintiffs' distributorships for themselves. This was despite the chance I had given to the Plaintiffs in 1996. It finally dawned on me that there was no way the Plaintiffs' directors could work together."
>
> "For these reasons, I felt that it was unwise to continue with the Plaintiffs as sole distributors of Tokuhon products and decided that it would be better to terminate the Plaintiffs' distributorship rights and to look for another distributor which was more stable. My decision was supported and approved by Tokuhon Japan."

43 In this regard, the appellant sought to rely upon an affidavit of Chien of 22 January 2000 filed in a company winding-up proceeding where Chien said that because of what were set out in the letters, namely, that the directors were thinking of winding-up TPL and Mrs Seow intended to withdraw from TPL, he decided to terminate the distributorship of TPL. The appellant submitted that that affidavit amounted to an admission, which Chien should not be allowed to retract.

44 It is vital to bear in mind that in the winding-up proceeding the winding-up of TPL was premised on the ground that it was just and equitable, due to the loss of the substratum, i.e., the loss by TPL of the distributorship of the products. There was no more reason for TPL to carry on. In that proceeding, the important fact was the termination of the distributorship, not the details as to what brought about Chien's decision to terminate the distributorship. However, in this action, Chien has amplified what was stated briefly in the 22 January 2000 affidavit and given further details of the reasons for his decision to terminate the distributorship. Chien was cross-examined on his earlier affidavit as well as on his affidavit of evidence-in-chief in this action and he has emerged unscathed. The trial judge had heard Chien's explanation in the witness box and had accepted it.

45 Counsel for TPL argued that Chien should not be allowed to contradict what he had stated in his earlier affidavit. We do not think the rules of evidence are so rigid as to prevent a witness from explaining or clarifying what was stated in an earlier affidavit, or for that matter, his affidavit of evidence-in-chief. It is for the trial judge to assess the evidence in all the circumstances and determine the weight to be given to it. Here, the judge found Chien to be a credible witness.

46 It is true that the three letters from Mrs Seow informed Chien of the then state of affairs within TPL and that had, in a sense, hastened Chien's review of the question relating to the appointment of a new distributor for the products, and in that limited sense it could be said that she had caused a chain reaction leading to the termination of the distributorship. That approach would, in our view, be viewing the situation with blinkers. It would be like treating a symptom as the cause of an illness. It seems to us that if it is a trigger-point that we are looking for, then that would really be the visit by Dr Chang to TC in January 2000, prompting Chien to wanting to find out more from Mrs Seow. But at the end, what really caused the termination was a total breakdown in cooperation between the three partners.

47 Accordingly, we agree with the trial judge that the real cause of the distributorship being terminated was the fact that the partners/directors of TPL could not work in concert for the good of TPL. The termination was inevitable. We do not see how this finding of the trial judge could be disturbed.

Were the respondents precluded from accepting distributorship

48 We now turn to the second issue of whether the Seows had breached any fiduciary duties in accepting the appointment as distributors of the products through the instrumentality of Gamma.

49 Counsel contended that the Seows continued to owe a duty to TPL even after they had ceased to be its directors. We would observe that it seems strange to us that Dr Chang and Ng should so contend when they themselves had on 11 June 2000, before TC/Chien made up their mind as to whom to appoint as distributor of the products, made presentation to TC urging the latter to appoint them as distributors and not TPL.

50 The appellant relied upon the Canadian Supreme Court case of *Canadian Aero Services v O'Malley* 4 OD.L.R. 371 to contend that the Seows were precluded from accepting the distributorship offered to them. But it is vitally important not to lose sight of the fact situation in that case. There, former directors of the company usurped for themselves a maturing business opportunity relating to a complex project which they had been working on for some years while they were directors. Laskin J, delivering the judgment of the Court said (at 382):-

> "An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired."

51 It seems to us to be in accord with good sense to hold that a director's duties to the company do not necessarily end with his ceasing to be such a director. Otherwise great mischief could be caused, of which what happened in *Canadian Aero Services* is an example. This principle was followed in the English case of *Island Export Finance Ltd v Umunna & Anor* [1986] BCLC 460 and the local case of *Personal Automation Mart Pte Ltd v Tan Swe Sang* (S 777/1999, unreported judgment dated 6 April 2000).

52 However, the circumstances in the present case are entirely different. There was no question of

a maturing business. Business was already in hand. The problem laid in the fact that the shareholders could not work together for the good of TPL. For many years TPL, as well as all its shareholders and directors, knew that its internal squabbles could cost the company the distributorship. An equally important feature of the present case is that, also for as many years, the other partners were, as enumerated above, trying their best to obtain the distributorship for themselves. Clearly, after Chien had terminated the distributorship of TPL, each of the partners realized that each must fend for himself. They would also have known that Chien would have to choose a new distributor from either one of them or such other suitable candidates. The playing field was level, with the ultimate choice to be made entirely by Chien, in consultation with TC.

53 The appellant next relied upon the case of *IDC v Cooley* [1972] 2 All ER 162 to substantiate its contention that the Seows had breached their fiduciary duties in accepting the appointment as distributors of the products. But again the facts in *Cooley* are entirely different. There the defendant, an architect, was employed as the managing director of the plaintiffs. In that capacity the defendant negotiated with the Eastern Gas Board for a project. The Board did not like the plaintiffs' set-up and so the plaintiffs were not offered the job. Some seven months' later, the Board decided to revive the project and this was made known to the defendant by the newly appointed Deputy Chairman of the Board. The defendant did not convey this information to the plaintiff and instead, under the pretext of ill-health, left the plaintiffs' employment. Thereafter, he joined the Board as project manager. The work was in substance the same work which the plaintiffs were trying to obtain. The court held that while the defendant was employed he owed a fiduciary duty to disclose all information which he had received in the course of his dealings with the Board. The information was of interest to the plaintiffs and by keeping it to himself and using it for his own personal purposes, he had thereby breached his fiduciary duty to the plaintiffs.

54 In our case here, all the partners knew, after TPL received the notification of termination, that TC/Chien would be appointing a new distributor. Ng even made a pitch to TC in May 2000 and together with Dr Chang made a joint pitch in June 2000.

55 As we have mentioned earlier, the trial judge made the specific finding that over the years, the three partners had conducted themselves as though they were three separate units and the incorporation of TPL was nothing but a vehicle of convenience. Each partner had always treated his own interest as paramount.

56 In our judgment, the test of "the interest of the company" would not be the appropriate test to be applied in the present case. To all intents and purposes, TPL was dead after the termination of the distributorship. What we should be looking at is whether Mrs Seow had obtained any unfair advantage vis-à-vis the other two partners. We could see none. Moreover, we do not think that the fact that she took the unnecessary step of transferring ownership of Gamma to Chong and Koh is of any real consequence. After the receipt of the notice of termination, each partner knew that the field was open. Ng made an overture to TC in May 2002. Dr Chang and Ng made a joint overture in June 2000 without even informing Chien who, understandably, again felt slighted.

57 Various arguments have been raised as to the date on which Mrs Seow was informed by Chien that she or her company would be appointed the new distributor. The trial judge found this to be on 29 June 2000. It has not been shown that this finding is clearly wrong. It might well be that before this date Chien could have indicated to her that she stood a fair chance of being selected. That is neither here nor there.

Relief under section 391(1)

58 Finally, we should refer to s 391(1) of the Companies Act which provides that in any proceedings for breach of duty against a person and it appears that he may be liable in respect thereof "but that he has acted honestly and reasonably and that, having regard to all the circumstances … he ought fairly to be excused … the court may relieve him either wholly or partly from his liability …"

59 All we wish to add here is that if we had found that Mrs Seow had technically committed any breach of duty and that breach could be said to have caused loss to TPL, we would have been inclined to grant her relief under the said s 391(1). On the facts of this case, there was really a free and even contest between the three partners. Mrs Seow had acted openly and fairly. The judge below found her actions reasonable in all the circumstances. TPL's loss of distributorship was inevitable. If fault is to be attributed, all three partners must bear it. The choice was made by Chien and he preferred Mrs Seow. Dr Chang and Ng should not be entitled to any remedy and as TPL is now wholly owned by both of them, it would be an injustice to grant any remedy to TPL which would eventually benefit them.

Judgment

60 In the premises, the appeal is dismissed with costs. For the same reason given by the court below, the respondents shall only be entitled to 80% of the costs of this appeal. However, as the appeal is effectively pursued by Dr Chang and Ng for their own benefit, though in the name of TPL, we would be inclined to order that the costs be borne by them personally in equal share. But before doing so, we would like to invite submission which should reach us within seven days.

61 The security for costs, together with any accrued interest, shall be released to the respondents to account of their costs. Lest there be any misunderstanding, we order that there shall only be one set of costs for all the three respondents.

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