Asiawerks Global Investment Group Pte Ltd v Ismail bin Syed Ahmad and Another [2003] SGHC 269

Case Number : Suit 873/2002

Decision Date : 30 October 2003

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Navinder Singh (Navin and Co) for plaintiff; Mohan Das Naidu (Mohan Das Naidu and Partners) for first defendant; Palakrishnan SC and MP Kanisan (Palakrishnan and Partners) for second defendant

Parties : Asiawerks Global Investment Group Pte Ltd — Ismail bin Syed Ahmad; William Esplin Stewart

Employment Law – Employees' duties – Employees' use of information gathered in course of employment – Whether employer suffered loss of opportunity as a result of such use

Employment Law – Employees' duties – Whether employees engaging in other business during working hours constitutes breach of their duties

Employment Law – Employees' duties – Whether employees obliged to make good losses resulting from inability to meet employer's targets

Introduction

1 The plaintiff's claim against the defendants, two of its former employees, was for breach of their respective contracts of employment. The first defendant was employed on 6 September 2001 as a project manager pursuant to a written contract while the second defendant was employed as an associate in sales and marketing in early February 2002 via an oral contract. The plaintiff alleged that both defendants failed to serve the company with good faith and fidelity and that they conducted themselves dishonestly. A claim in defamation against the first defendant was abandoned at the commencement of the trial.

The plaintiff's case

2 The plaintiff's evidence was adduced essentially through its directors, Syed Abdel Nasser bin Syed Hassan Al-Junied ('Nasser') and James Stephen Johnson ('Johnson', nicknamed 'Chief'). The plaintiff, a company incorporated in Singapore, was established in 1999 with the intention of researching, surveying and exploiting the commodities available in South Sulawesi. The two directors were successful leaders of the banking industry when they left it to set up the plaintiff, Nasser having been a director of Credit Suisse First Boston and Johnson having been the managing director of Union Bank of Switzerland. In 1999 and 2000, the two of them spent a considerable amount of time, effort and money in South Sulawesi doing the groundwork. They met with high ranking government officials in the area to negotiate concessions and trading rights relating to various commodities. Their particular focus was on pine resin, cocoa beans, vanilla and asphalt.

3 They were aware they had to raise investment funds for the projects and that it was not feasible to engage in all the projects at once. They therefore decided that the first project would be that of tapping and exporting pine resin to be followed subsequently by cocoa and then asphalt. In keeping with the company's name (Asiawerks), it was decided that the pine project would be called Pinewerks.

4 Universiti Muslim Indonesia ('UMI'), an agricultural university based in Makassar, the capital of Sulawesi, controlled a bank called BMT, a co-operative bank used by the farmers in that region. It

was virtually impossible for any foreign entity to enter the market there without securing the co-operation and assistance of UMI. The plaintiff's liaison in UMI was a director called Professor Abdur Rahman Basalamah.

5 In July 2001, the feasibility studies for the pine project were completed and the plaintiff started making arrangements for the launch of the project. The company employed one Darryl Tang who dealt with UMI and with investor relations. While progress was made, it became clear that the project manager to oversee Pinewerks had to be someone conversant in Bahasa Indonesia.

6 The first defendant, then a remisier, was one such person. He had been pressing Nasser for a job since early 2000 and was invited to travel to Makassar together with the potential investors to assess the investment potential of the various projects the plaintiff was contemplating. On 11 April 2000, he met Nasser to discuss the question of his employment. That night, he emailed Nasser to propose his starting salary but was not offered a job then.

7 On 6 September 2001, the plaintiff offered him the position of project manager of Pinewerks with an annual salary of S$72,000 plus bonuses. The first defendant accepted the offer. His duties were to report to the Board of Directors of Pinewerks and to devote all his time, attention and abilities to the plaintiff and not to undertake, directly or otherwise, any other work. He was not allowed to undertake any business which was connected to or competed with that of the plaintiff. He was to exercise due care and diligence to prevent disclosure of information of a confidential nature belonging to the plaintiff or its associated companies to any third party and was not to use such information for his own purposes. All notes, records and writings made by him in relation to the business of the plaintiff and its associated companies remained the property of the said companies. The plaintiff could from time to time appoint any other person to act jointly with the first defendant. He was to perform his duties faithfully and diligently and obey all lawful and reasonable directions. He was not to engage in any business in competition with the plaintiff for a period of six months after termination of his employment, including being engaged with any client or trading partner of the plaintiff. He could not deal with any person who was in the habit of dealing with the plaintiff or its subsidiaries or associated companies during the six months prior to the termination of his employment. Within the first six months after termination of his employment, he was not to solicit or approach anyone who was negotiating with the plaintiff for the provision of services.

8 The first defendant remained in the employ of the plaintiff until 17 June 2002 when he resigned.

9 In December 2002, the plaintiff employed the second defendant. When the application for an employment pass for him and two appeals therefrom failed, the plaintiff decided to post him to work with the first defendant in Indonesia. Both of them had to work together to ensure that the pine project deliver the targeted 20 tons of pine resin a day. Although the contract in respect of the second defendant was an oral one, the plaintiff averred that the duties spelt out in the first defendant's written contract applied to him by way of implied terms.

10 Although the second defendant claimed he was a potential investor helping out in the company and not an employee, the plaintiff averred that the evidence showed otherwise. In his email dated 22 October 2001 to Johnson, the second defendant stated he really wanted to be part of Asiawerks and was willing to make sacrifices by accepting the salary of S$2,500 per month together with accommodation. He was an intelligence officer in the Royal Air Force and then a manager in a health club in the United Kingdom. The email also mentioned 'salary negotiations'. The plaintiff applied for an employment pass for him. In that application, his designation as an associate in sales and marketing was mentioned. The second defendant confirmed the truth of the information in the application by way of statutory declaration. He signed a letter of employment issued by the plaintiff but claimed that the letter was retracted once his application for an employment pass was rejected.

11 In letters from the plaintiff to the Ministry of Manpower, the second defendant's duties as an employee relating to the pine forest concession were set out. He was dealing with the sales details of the plaintiff's buyers. On 31 January 2002, consistent with the plaintiff's assertion that he was to be posted to Indonesia to work, the second defendant sent a fax to a buyer explaining that he would be in Indonesia the following week, i.e. the beginning of February 2002. In an email to a friend, he said he was going to be off to Jakarta for two weeks, having 'landed a job as an Associate for an investment company' and 'will also be heading up a project for resourcing some commodities – it's a very new company and got in at number 4 – could do well'. He also mentioned that he 'got the afternoon off' as it was the eve of Chinese New Year.

12 Various payment vouchers between February and July 2002 indicated payment of a salary to the second defendant, with some signed by him. In June 2002, he drew an increased salary of S$3,200. By a letter dated 26 June 2002, his salary was increased to S$6,600 per month after the resignation of the first defendant on 17 June 2002. He emailed the plaintiff's accounts clerk on 8 July 2002 to give his girlfriend cash so that their rent could be paid. He also emailed his friend to say he was having problems achieving the daily target of 20 tons a day, that his 'boss' (the first defendant) had left the company, that he had to travel to Makassar to have a look at the operational side of things and sort them out and the plaintiff had 'over doubled my salary'.

13 The second defendant was dismissed by the plaintiff on 18 August 2002.

14 Where the first defendant was concerned, he knew and accepted that he had a target of achieving 20 tons of pine resin production per day. In September 2001, he made his first report to the plaintiff via email indicating that target and what was necessary to achieve it. As admitted by him, his job was basically one of coaxing people on the ground to work harder and to eradicate inefficiencies in the collection of the pine resin. He had to spend half his time in Singapore and half his time in Makassar. In his second report in October 2001, he revised his projected production levels downward on account of the monsoon season and stated that most of the major problems had been solved. During a conference call on 30 November 2001 with the investors in the project, the first defendant again mentioned the target of 20 tons a day.

15 By 25 February 2002, Johnson was disturbed by the seeming lack of progress in pine resin yield. With the monsoon season petering out by end February, production remained at 150 tons for the month, the same level as that projected for December 2001 at the height of the monsoon season. He expressed his concerns in an email to the first defendant. The plaintiff denied that the first defendant sent daily production reports to the company. When Nasser went to Makassar in June 2002 to study the situation, he witnessed neglect and abandonment of the pine project. The workers complained of a lack of direction with drums of resin left uncollected.

16 The plaintiff was not actively trading in cocoa when the focus was on pine resin. However, cocoa was very much its business and it was awaiting UMI's proposal on the research study. Much of the groundwork pertaining to cocoa had been undertaken. In its business plan prepared in October 2001 for its investors, the plaintiff outlined the direction it was going to take in relation to cocoa. Its subsidiary, AsianXports, would expand its operations and acquire concessions. It would expand its range of commodities for export. Investments were being sought to launch the cocoa project. It intended to set up three warehouses with drying, cleaning and sorting facilities in Sulawesi province, the main centre for cocoa production in Indonesia.

17 When UMI's proposal was ready on 5 March 2002, the first defendant kept it from the plaintiff and informed UMI falsely that the plaintiff was not interested in cocoa any more. It transpired that from the beginning of March 2002, both defendants were already collaborating on their own cocoa venture and had prepared a business plan for cocoa. A MSN conversation between the defendants on 22 March 2002 showed that they were planning a big venture at the expense of the plaintiff and that

they had the intention to damage the plaintiff's business. Research materials in Bahasa Indonesia were downloaded from the Internet in April 2002 although the first defendant denied he did any work relating to cocoa before he left the plaintiff on 17 June 2002. The research could not have been done in the United Kingdom by the second defendant's brother, Malcolm, as claimed because Malcolm would be looking at websites in the English language, not in Bahasa Indonesia. Malcolm was not called to be a witness for the defendants in any case.

18 In April 2002, the first defendant was already asking the second defendant to source for funds. The plaintiff did not state that it had no interest in cocoa. It merely reiterated to the first defendant that until the pine resin production was on track, it should not get too far into new businesses. The priority then was on pine resin.

19 In May 2002, the first defendant wrote an email to one Usamah meant to be passed on to UMI. In that email, he stated that he had made a comprehensive business plan for the cocoa project in the form of a long-term partnership between a new company and UMI. It also set out proposals on commissions payable to UMI and requested, on behalf of his investors, a letter from UMI indicating willingness to sign a memorandum of understanding on the project and a profile of UMI. It concluded by asking for reply email to be sent to a private email address by 28 May 'because this is highly CONFIDENTIAL'. The defendants' business plan on cocoa was similar to that of the plaintiff.

20 On 13 June 2002, the defendants were at a consultancy firm to sign the memorandum and articles of association of a new company formed by them called Capricorn International Pte Ltd ('Capricorn'). Both of them were directors in Capricorn.

21 The first defendant claimed he had resolved to resign in mid-May 2002 but did so only in June 2002 so as to be able to join his family during the school holidays. The plaintiff alleged this was because he wanted to have continued access to the information and dealings with UMI. The first defendant told the plaintiff he did not know what he was going to do after his resignation. That was a lie as he had already spent a lot of time prior to his resignation exploiting the plaintiff's confidential information. Both defendants were damaging the plaintiff's business interests since March 2002 and had no concern for their duties to their employer, particularly in the pine project. The first defendant was not released from the one-month notice required for his resignation. The plaintiff agreed to release him with effect from 21 June 2002 on condition that all necessary documentation pertaining to a shipment be finalised. However, he disappeared from the plaintiff's office after 17 June 2002 without clearing up the said paperwork.

22 In its letter dated 29 August 2002, UMI informed the plaintiff that several cocoa proposals were given to the first defendant in his capacity as one of the heads of the plaintiff. UMI was surprised at the revelation that the first defendant had intended to do business separately from the plaintiff. UMI had informed the first defendant it would continue its good relationship with the plaintiff. It also affirmed that the plaintiff's proposal would still be discussed by the UMI Council and 'in fact it has been long and diligently thought about by the council, to decide not to cooperate with parties other than (the plaintiff)'. UMI did not wish to be involved in any dispute between the plaintiff and the first defendant.

23 In further breach of his employment contract, the first defendant also attempted to entice Usamah out of the plaintiff's employ by offering him a salary of S$3,500 per month.

24 On 24 July 2002, the plaintiff commenced this action against the first defendant and applied for an injunction against him. The injunction prevented him from dealing in cocoa for six months from the date of his resignation from the plaintiff on 17 June 2002. On 8 August 2002, the second defendant approached Johnson in the office and asked whether he had time for a chat. Johnson agreed as he was leaving for the United States the next day and would be gone for quite some time.

It was during that conversation that Johnson became aware of the involvement of the second defendant. The second defendant falsely claimed that his role was limited to arranging funds for the first defendant's business. Johnson informed him that the injunction against the first defendant prohibited him from having contact with personnel of the plaintiff and its subsidiaries. He asked the second defendant when was the last time he had contact with the first defendant and was told it was just a few days ago. The second defendant did not disclose that he was a director of Capricorn, the company set up by the first defendant, or even the fact that such a company existed. He claimed instead that he had no direct involvement in the venture and offered Johnson the money he had raised for the first defendant.

25 The second defendant then proposed to Johnson that Nasser and Johnson team up with a company he called 'NewCo' to take a percentage of the profits from the new venture, effectively shutting out and double-crossing the first defendant and Capricorn. Johnson refused the suggestion and said he was making all those things known to Nasser. The second defendant said that he would try to convince the investors to deal with the plaintiff.

26 Johnson only became aware of Capricorn through Nasser. When he confronted the second defendant about this, the latter claimed he put his name as one of its directors in order to get his employment pass approved. He had no answer when asked why his directorship was not disclosed earlier.

27 Both defendants admitted having deleted their personal email. The plaintiff alleged that was done deliberately to destroy the evidence linking them to their unlawful activities. A firm of professional forensic investigators, Tecbiz Frisman Pte Ltd, had to be engaged to glean whatever it could from the sanitised computers used by the defendants. The expert's report was admitted with the consent of all the parties after disputed portions therein were deleted. The report showed, on a balance of probabilities, that it was the second defendant who effected a deletion of the plaintiff's computer files. The second defendant was a former intelligence officer familiar with the use of computers. He had used 'clean up' software before. He also worked on the plaintiff's website while in its employ. When asked whether he had installed the 'clean up' software in the plaintiff's computers, all he could say was that he could not confirm.

28 The second defendant admitted he paid the legal costs of the first defendant. This was further evidence that they were acting in concert against the plaintiff.

29 The plaintiff claimed damages from both defendants for the loss of output in the pine project and the loss of opportunity in the cocoa project. It used financial projections used in its presentation to the Overseas Private Investment Committee, a US government agency in Washington, for funding in respect of expansion of its pine project to come up with an estimated loss of almost US$1 million for its pine project. It estimated the loss in opportunity caused by the delay in cocoa bean operations to be about US$3.15 million. Its loss of goodwill and other intangible losses were estimated at US$4.6 million. Together with other miscellaneous items, the plaintiff computed the total damages as being slightly more than US$9 million.

The defendant's case

30 The first defendant agreed that he was employed as a project manager pursuant to the written contract dated 6 September 2001. The first defendant resigned on 17 June 2002 but was released from his employment on 21 June 2002 and was not required to work until the expiry of the one-month notice period.

31 The plaintiff was not the owner of the pine concession in Makassar, Sulawesi. The concession belonged to an Indonesian company called P T Ogi, with which the plaintiff had no direct contractual

relationship. The company entrusted with managing the pine project was Pinewerks Pte Ltd, a company incorporated in Singapore, whose board of directors the first defendant was to report to. The company overseeing the pine operations in Makassar was P T AsianXports, an Indonesian company. PT Ogi had an arrangement with a British Virgin Islands company known as Applenet Limited whereby P T Ogi was to receive a fee of 5% from Applenet Limited from the sale of pine resin. UMI was engaged by the plaintiff to disburse money to the project on its behalf. In return, a charitable foundation in UMI received donations from the plaintiff. The plaintiff was never engaged in the cocoa business.

32 The first defendant was a remisier and trader in a bank before being employed by the plaintiff. The plaintiff knew he had no experience whatsoever in the sort of work for which he was engaged. The target of 20 tons per day was not a term of his employment contract but was a figure used by the plaintiff to lure investors. He denied mentioning the target to the investors during the conference call of 30 November 2001. It was Nasser who mentioned it.

33 Before he took over the pine project, it was in disarray with production of pine resin at around two tons per month. The resources needed were not there. There were only 204 active tappers out of the 3,000 who were supposed to be working in the pine project. Despite the incentives offered, there were simply not enough local people interested in doing the tapping of the pine resin. The plaintiff had done its business plan based on a few articles in the report put up by the United Nations Food and Agricultural Organisation without doing a proper feasibility study or understanding the problems on the ground. The target of 20 tons a day was an impossible one to meet as it was still not achieved by the plaintiff almost a year after the departure of the first defendant.

34 The plaintiff was involved only in pine and the defendants had not used any confidential information to compete with the plaintiff in its pine business.

35 In early March 2002, Nasser asked the first defendant to put up a presentation on cocoa to the plaintiff and he did so in the middle of that month. He had gathered the necessary information and used a three-page proposal from UMI which was not addressed to the plaintiff but to P T AsianXports. The information in the UMI proposal was not confidential as it was available over the Internet and in other publications. The information on cocoa was certainly no trade secret.

36 However, both Nasser and Johnson were not interested in the presentation. Nasser told the first defendant that the plaintiff was not interested in the capital-intensive cocoa business as the company did not have the funds available. Johnson sent an email to the first defendant on 20 March 2002 stating that 'we don't have the time nor the funding right now to be going too far into new business so it's imperative that we secure the income stream from Pine 1 and Pine 2'. The plaintiff was still not in the cocoa business to date.

37 The restrictive covenant in clause 23 of the contract of employment, which prohibited the first defendant from competing with the plaintiffs business in Singapore and Indonesia for six months after termination of employment, was *prima facie* void as a covenant in restraint of trade and it was up to the plaintiff to prove otherwise. In any case, the 'business carried on by the company' meant the actual business already undertaken.

38 The plaintiff must have been pleased with the first defendant's performance as he was promoted to General Manager of AsianXports Pte Ltd with effect from 1 April 2002. He did not neglect his duties in the pine business and had not harmed or sabotaged the plaintiff's operations.

39 Although he intimated to Usamah his intention to go into the cocoa business, it would not have taken him long to put the idea together as he was already familiar with the facts and the figures which were neither technical nor secret. He was not in any business relationship with any of the plaintiff's business partners or associates. It was at best a desire which was stopped by the

injunction granted against him.

40 The damages claimed were grossly exaggerated in any event. The first defendant did not pilfer the pine resin to sell to others. The plaintiff was not producing anywhere near 20 tons a day when he was employed and he could not therefore be blamed for the failure to meet the target. It was not shown that the pine project was operating profitably before and after his employment. There were no profits gained by him in the cocoa business and the plaintiff had lost nothing.

The second defendant's case

41 The second defendant arrived here from the United Kingdom in November 2001 with the intention of joining the plaintiff as an employee. He arrived here as a tourist with a social visit pass. It was not disputed that he required an employment pass before he could work here.

42 After the application for an employment pass and the appeals failed, he remained in Singapore, doing whatever duties were assigned to him. He made trips to Batam, Johor and Jakarta either socially to renew his social visit pass or for business purposes. He visited Makassar on two occasions, once with the first defendant on 28 February 2002 when he stayed for three days repairing bridges and another time between 9 and 17 July 2002 with Nasser after the departure of the first defendant. It was not in dispute that most of his time (between January and August 2002) was spent in Singapore. He stayed in either Nasser's or Johnson's apartment between December 2001 and July 2002.It was therefore not true that he was transferred to Indonesia to work with the first defendant there.

43 The second defendant did several assignments for the plaintiff. He assisted in the design of its website and sold the plaintiff's pine resin to buyers in India through Applenet Limited, a company which the plaintiff had an interest in. The last sale was dated 10 June 2002.

44 He was not under the supervision of the first defendant while the latter was in the plaintiff's employ. The second defendant was paid consultancy fees amounting to S$2,500 per month for February and March 2002 as indicated in the payment vouchers. He was paid S$4,363 in July 2002 despite the plaintiff's assertion of a promotion with an increased salary of S$6,600 per month. There was no proof that the difference between the two amounts was paid by Nasser from his own salary although that was what Nasser testified in Court. There was no evidence to show that he received payments from April to June 2002.

45 The second defendant could not have been an employee of the plaintiff as that would have been a contravention of the Immigration Act and the Employment of Foreign Workers Act. If a contract of employment did exist, it could not be enforced because it would be an illegal contract. The defence of illegality could be raised notwithstanding the refusal of leave to amend the Defence in the course of trial to include such a defence.

46 The factors evidencing an employer-employee relationship were also missing. He was not under the control or management of the plaintiff and neither was he integrated or assimilated into the plaintiff's business. He could walk in and out of the office in Singapore at any time, was dressed casually in shorts and sneakers while in office and did not need to apply for leave when he went to Europe between 24 May and 4 June 2002. By contrast, the first defendant was formally dressed while in Singapore and had to keep regular office hours. The first defendant confirmed in Court that the second defendant did not report to him.

47 The second defendant was only a potential investor to the plaintiff and was allowed free access to the office to see how the business functioned. The plaintiff also suggested that he visit Indonesia to observe the pine operations there. In the end, after assessing the investment potential, he decided not to invest in the plaintiff's business. He was in Singapore looking for business

opportunities. The second defendant's family was wealthy. His father invested in Capricorn.

48 Even if he was employed as an associate in marketing and sales, his duties did not include the production of pine resin. He had not looked at the pine project between February and July 2002 and could not therefore have been 'expressly engaged to ensure a profitable output' for the plaintiff in the pine project, contrary to the plaintiff's Statement of Claim. He was under no obligation to disclose to Johnson his dealings with Capricorn as he was not an employee of the plaintiff.

49 The UMI proposal was given to AsianXports and not the plaintiff. It basically proposed that AsianXports procure cocoa from the locals and then export it. It was made for the purpose of study, the result of which would be used as the basis of collaboration. The information contained therein could be obtained from external sources and could not be regarded as confidential material. In any case, the plaintiff never intended to use the information on cocoa. Even if it was confidential information, the second defendant did not use it while allegedly in the plaintiff's employ.

50 The plaintiff suffered no damages in any event. It was submitted that 'awarding damages to the tune of the plaintiff's claim is a gateway for employers to engage rich idiots as employees, and sue them for breaches to get the damages of the kind claimed'.

51 Despite Nasser's police report lodged in March 2003 concerning the alleged tampering with the plaintiff's computers, the police did not proceed with criminal action against the defendants. All that the defendants did was to delete their personal email. There was no direct or inferential evidence from the plaintiff's expert's report to show that it was the second defendant who effected the deletion of the plaintiff's files. The computers used by the defendants were also accessed by other staff when the defendants were not in the office.

The decision of the court

52 It was plain from the documentary and oral evidence adduced by the plaintiff that the second defendant came to Singapore to seek employment and not to source for investment opportunities despite his family being a wealthy one. When his application for an employment pass and the appeals failed, the plaintiff took him on as an employee nonetheless for the purpose of doing work outside Singapore. The agreement to employ him for work outside Singapore was therefore not illegal.

53 Nasser and Johnson were apparently very friendly and indulgent towards him. The oral agreement to employ him was on very loose terms, with the plaintiff seemingly regarding the S$2,500 per month payable as small change or as a worthwhile investment at that time. Perhaps Nasser and Johnson were harbouring hopes that the second defendant's connections with potential investors might become useful to the plaintiff one day. Hence the total absence of formalities, the housing of the second defendant in their respective apartments and the general *laissez faire* attitude towards him. Clearly, the second defendant was at the material time employed by the plaintiff although he might have the ambition to be an entrepreneur or an investor in the future.

54 The evidence also showed that the first defendant and, subsequently, the second defendant were made aware of the target of 20 tons of pine resin a day. It was a very ambitious goal but it was obvious that Nasser and Johnson were business adventurers who aimed for the stars and who expected, perhaps rather too optimistically, that their employees would be astronauts.

55 Having high goals and business targets is laudable. However, this philosophy cannot translate into a 'perform or pay' obligation for employees, in any case not without the clearest of contractual terms specifying the same. Employees are often required to meet certain production or sales targets for the purpose of incentive remuneration or simply for the purpose of remaining on the payroll. Under-performers are not rewarded beyond their basic remuneration or, worse, have their services terminated. It would be an utter shock for the under-performing or even non-performing employee to

learn that he has in fact undertaken to guarantee a level of profits for his employer and that any shortfall in profits due to failure to meet the production or sales numbers would have to be compensated by him. Such a proposition is completely untenable in law in the absence of an unequivocal undertaking by the employee.

56 The plaintiff here was effectively asking the Court to impose such an obligation on its employees, the defendants. Since they did not devote their time and attention to the pine project, the plaintiff argued, the losses arising from that project should be made good by them. I could find no term in the first defendant's agreement remotely suggesting such an onerous burden. It would be confounding if such an obligation were to be implied into a contract of employment.

57 It made no difference whether the failure to meet the target was caused by sheer incompetence or indolence. This was not a case of the defendants deliberately diverting pine resin business away from their employer or destroying stock or storage, for which they might be held liable. The plaintiff could withhold bonuses or salary increments or even terminate their employment for their failure to meet the set target. It could not, by their failure, make them guarantors of the company's profitability.

58 The plaintiff relied on the case of *EbbwVale Steel, Iron & Coal Co. v Tew* (1935) 79 Sol J 593 where the English Court of Appeal held that the employer plaintiff there must be placed, so far as money can do it, in as good a situation as if the contract had been performed. It was also submitted, on the authority of *Schilling v Kidd Garrett Ltd* [1977] NZLR 243, a decision of the New Zealand Court of Appeal, that the loss or impairment of an opportunity to obtain or retain some profitable connection, where the plaintiff is entitled to that opportunity by his contract, is a proper head of damages for breach of that contract. The plaintiff in the present case argued that 'the malicious and dishonest acts of the first and second defendants impaired the ability of the plaintiffs to obtain the realistic output of pine in the months of March to June, and further caused the plaintiffs damage in that their ability to progress with the cocoa project in their own right was heavily impaired'.

59 Although the defendants were distracted from their duties, it was not shown that they, particularly the first defendant, did nothing on the pine project from March 2002 onwards. It was also not shown that the target could have been achieved with diligence anyway. Even Nasser, who took charge of the pine project after the departure of the first defendant, could not achieve the company's target. There was also no evidence that the target was achieved at any time before the first defendant joined the company. I shall make my comments on the cocoa project subsequently.

60 The defendants appeared frustrated about their work and were obviously thinking of moving on to setting up their own business. This was where they ran afoul of their contractual obligations to the plaintiff.

61 There can be no denying that all employees are expected to serve their employers diligently, honestly and loyally. What this duty translates into factually depends on the circumstances such as the nature of the work. Employees should not be engaged in other business or employment during their working hours without the approval of their employers. They should certainly not be diverting business opportunities that they got wind of only because of their employment status and during the subsistence of the employment, whether or not such information amounted to confidential information within the meaning of the law.

62 On the facts, it was clear to me that the first defendant would not have got the idea nor the information about the cocoa business except by virtue of his employment in the plaintiff. That business was not in the immediate future plans of the plaintiff but it certainly featured on the horizon. The plaintiff was not interested in the cocoa business in March 2002 because it had to get the pine project into gear first. It did not abandon its plans to go into cocoa. It intended to move into cocoa

in due season, after its pine project was flowing smoothly and new funding became available.

63 The first defendant was obviously trying to hijack the cocoa project from the plaintiff. The business plan on cocoa was built on UMI's proposals. It could not have been prepared by the second defendant's brother who was in the United Kingdom. At any rate, Malcolm could not have done so without the first defendant providing him the information and background, whether directly or through the second defendant. Even if UMI's proposals were sent to AsianXports, the first defendant clearly knew they were meant for the plaintiff as he made the presentation on cocoa to the plaintiff.

64 The first defendant could not have dared to attempt to hijack the cocoa business if, like the plaintiff, he had no funding at that time. That was why he brought the second defendant into his devious scheme. Together, they were planning their own business venture through their company, Capricorn, even while working in the plaintiff, using information meant for the plaintiff and which they got sight of by virtue of their employment. The first defendant was to assemble the cocoa vehicle while the second defendant was to obtain the funds to run it. Both of them were therefore in breach of their duties as employees.

65 However, it was clear that the defendants' cocoa scheme never took off. They made no profits whatsoever from their attempt to divert the business away from the plaintiff to themselves. Similarly, the plaintiff suffered no loss as a result of their actions. It was not prepared to go into cocoa at that stage or in the immediate future. In any event, UMI was not going to deal with anyone else in the cocoa business as was evident from its letter to the plaintiff in August 2002. There could therefore be no valid assertion that the plaintiff had lost out on any opportunity or that its ability to progress had been heavily impaired.

66 Accordingly, while the plaintiff succeeded in showing the attempted diversion of the cocoa business by the defendants, it failed in its claim against them because no profits were made and no loss was occasioned.

67 Where the damage to the plaintiff's computer files was concerned, I noted that the police did not proceed with any criminal action against the second defendant. Of course, criminal action would have entailed a higher standard of proof than civil proceedings. Nevertheless, since the computers were accessible and were used by others in the plaintiff, I was not satisfied on a balance of probabilities that it had been proved that the culprit was the second defendant.

68 The plaintiff's case against both defendants failed for the reasons I have set out above and was accordingly dismissed. However, I departed from the general rule that costs should follow the event in the light of my findings regarding the breaches by the defendants. I thought it fair that all parties should bear their own costs for the proceedings. The plaintiff has appealed against my decision.

Plaintiff's claim against the defendants dismissed.

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