Golden Village Multiplex Pte Ltd v Phoon Chiong Kit
[2006] SGHC 38

Case Number : Suit 557/2005

Decision Date : 28 February 2006

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Philip Ling and Ambrose Chia Heng Guan (Wong Tan and Molly Lim LLC) for the plaintiff; Chan Kia Pheng and Shaun Koh (KhattarWong) for the defendant

Parties : Golden Village Multiplex Pte Ltd — Phoon Chiong Kit

Companies – Directors – Duties – Breach of fiduciary duties – Defendant director of two companies engaged in litigation against each other – Defendant allegedly acting to detriment of plaintiff by exploiting position as director of plaintiff to benefit other company at plaintiff's detriment – Whether defendant breaching director's and fiduciary duties to plaintiff – Section 157 Companies Act (Cap 50, 1994 Rev Ed)

28 February 2006

Lai Siu Chiu J:

The background

1 The plaintiff, Golden Village Multiplex Pte Ltd, is a Singapore company which owns and operates cinema complexes under the "Golden Village" name. The defendant, Phoon Chiong Kit, is a director of the plaintiff. On 8 September 2005, the defendant applied to court by way of Summons in Chambers No 4593 of 2005 ("the defendant's application") for the following orders against the plaintiff:

> (1) a declaration that the warrant to act signed by Mr Kirk Senior purportedly for and on behalf of the Plaintiff to authorise Wong Tan & Molly Lim LLC ("WTML") to act for the Plaintiff in this action herein is invalid as Mr Kirk Senior was not authorised to sign the said warrant to act, and that consequently, WTML had not been validly and/or properly authorised to represent the Plaintiff in this action herein;
>
> (2) accordingly, an order that this action herein be struck out;
>
> (3) costs; ...

2 The plaintiff on its part applied by way of Summons in Chambers No 3983 of 2005 ("the plaintiff's application") for the following orders:

> 1. that the Defendant, whether by himself or by any of his agents or servants or otherwise howsoever be restrained until the conclusion and disposal of the trial of this action or until further Order from:-
>
> a. acting in breach of his fiduciary duties and other duties as director of the Plaintiff;
>
> b. acting against the interests or to the detriment and/or prejudice of the plaintiff, including in but not limited to all matters arising in or relating to Suit No. 413 of 2005/E [("Suit 413")]; and

c. exploiting or otherwise using any confidential information belonging to the Plaintiff or any part thereof against the interests or to the detriment and/or prejudice of the Plaintiff.

2. in furtherance of, but without limiting the generality of paragraph 1 above, that the Defendant, whether by himself or by any of his agents or servants or howsoever otherwise:-

a. take all necessary steps to withdraw the affidavit affirmed and filed by the Defendant on behalf of Golden Harvest Films Distribution (Pte) Ltd ("GHFD") on 5 July 2005 and any further or other affidavits filed by the Defendant on behalf of GHFD in support of GHFD's application in Summons in Chambers no. 3346/2005/N [("SIC 3346")] in [Suit 413]; and

b. be restrained until the conclusion and disposal of the trial of this action or until further Order from affirming and/or filing any further or other affidavits on behalf of GHFD in [Suit 413], including but not limited to any further or other affidavits in support of GHFD's application in [SIC 3346] in [Suit 413].

…

3 Both applications came up for hearing before me on the same day. I made the following orders on the defendant's application:

(a) No order on prayer (1) but the plaintiff was to obtain a resolution from its board of directors no later than 5 December 2005 ratifying the warrant to act signed by Mr Kirk Senior ("Senior") dated 5 August 2005 to proceed with this legal action against the defendant.

(b) For the purposes of the board resolution, the defendant, in view of his directorship of both the plaintiff and GHFD, was to abstain from voting as one of the nominee directors of GHFD.

(c) No order on prayer (2) pending the board resolution in order (a) above. However, the action would be struck out if the resolution was not obtained by 5 December 2005.

(d) Costs reserved.

(e) Liberty to apply on order (a) above.

4 I then made the following orders on the plaintiff's application:

(a) Pending the resolution of the board of directors of the plaintiff in the defendant's application, the defendant was to give a written undertaking not to act against the interests of the plaintiff as its director and not to participate in any manner in Suit 413 pending the outcome of SIC 3346 in that suit.

(b) The defendant's application was adjourned *sine die* with liberty to restore.

(c) Costs reserved.

5 The defendant has appealed in Civil Appeal Nos 119 and 120 of 2005 respectively against my decisions on the plaintiff's application and on the defendant's application.

The facts

6 Before I set out the facts relating to this suit, I need first to refer to Suit 413 (also referred to as "the earlier suit") in which the plaintiff is suing GHFD and Golden Harvest Entertainment (Holdings) Limited ("GHE") as the first and second defendants respectively. The plaintiff's action against GHFD in the earlier suit was for breach of an agreement for a lease that had been assigned to the plaintiff.

7 The plaintiff's application had referred to the earlier suit as well as SIC 3346. In SIC 3346 filed by GHFD, the defendant filed an affidavit as GHFD's director and prayed for reliefs similar to the prayers in the defendant's application, *viz* that the warrant to act (signed by the plaintiff's managing director, Kenneth Tan, authorising WTML to act for the plaintiff in the earlier suit) was invalid and that accordingly that action should be struck out.

8 SIC 3346 was heard by an assistant registrar on 2 December 2005 who made the following orders:

(a) The plaintiff was granted a final extension of time to 27 December 2005 to obtain a resolution of the board of directors of the plaintiff to ratify the commencement of the earlier action.

(b) The earlier action was stayed pending compliance with order (a);

(c) GHFD was at liberty to restore the hearing of SIC 3346 before Assistant Registrar Dorcas Quek ("AR Quek") for a final order for the earlier action to be struck out if the plaintiff failed to obtain the board resolution in order (a).

9 On 5 January 2006, Suit 413 was struck out by AR Quek. The plaintiff appealed by way of a registrar's appeal to a judge in chambers against her orders. Its appeal was allowed on 6 February 2006 when Andrew Ang J reversed the orders made by AR Quek, restored the suit and dismissed SIC 3346.

10 I turn now to the present case. In these proceedings, the plaintiff is suing the defendant for breach of his director's and fiduciary duties arising out of his conduct in the earlier suit. The affidavit in support of the plaintiff's application was filed by Senior. Senior set out the factual matrix which gave rise to the dispute here.

11 A shareholders' agreement dated 24 February 2000 ("the Shareholders' Agreement") was signed between the plaintiff; Village Cinemas Australia Pty Ltd ("Village"), an Australian company; a Hong Kong company called Golden Screen Limited ("Golden Harvest") and another Hong Kong company known as Dartina Development Limited ("Dartina"). Dartina owns all the issued and paid-up shares of the plaintiff through its wholly-owned subsidiary, Golden Village Holdings Pte Ltd ("GVH"). Village and Golden Harvest agreed to participate in a joint venture ("the JV"), *inter alia*, to acquire, hold, construct, develop, lease and operate cinema complexes in Singapore using the plaintiff as the JV vehicle.

12 The Shareholders' Agreement provided that Village and Golden Harvest would each have the right to nominate three directors for appointment to the board of directors of the plaintiff. Accordingly, Senior, Graham William Burke and Peter Edwin Foo were nominated and appointed by Village whilst Raymond Chow, Roberta Chin Chow and the defendant were the nominees and appointees of Golden Harvest. The defendant is also a director of GHFD (together with Raymond Chow and Roberta Chin Chow) and of GHE which is a Bermudan company. Both GHFD and GHE are part of the Golden Harvest group of companies headed by Raymond Chow.

13 IMAX Corporation ("IMAX"), a Canadian company, is in the business of leasing large-format projection systems and providing related services. By a letter dated 30 September 2002 ("the Letter of Intent") from IMAX and accepted by GHFD and Village Roadshow (Singapore) Pte Ltd ("VRS"), a subsidiary of Village, it was agreed that GHFD and VRS would lease from IMAX a large-format projection equipment and technology (collectively "the IMAX system") for installation in an IMAX theatre ("the IMAX theatre") to be located in the multiplex cinema complex owned and operated by the plaintiff at Great World City.

14 The Letter of Intent was followed by an agreement dated 23 December 2002 ("the Agreement for Lease") wherein IMAX agreed to lease to GHFD and VRS the IMAX system for use in the IMAX theatre at Great World City for 20 years commencing 23 December 2002.

15 In consideration of the Agreement for Lease, GVH and GHE executed a guarantee dated 23 December 2002. IMAX then delivered the IMAX system to, and it was installed at, the IMAX theatre and has, since 5 January 2005, been operated by the plaintiff.

16 With the express consent of IMAX, GVH and GHE, both GHFD and VRS assigned all their respective rights and obligations under the Agreement for Lease to the plaintiff by an assignment agreement dated 17 October 2003 ("the Assignment").

17 By a subsequent agreement dated 11 February 2004 ("the Transfer Agreement") made between Village, VRS, GHFD, GHE and GVH, the parties agreed that the plaintiff's rights and obligations would be transferred to GHFD (or to a company within the Golden Harvest group) while GHE would accept a transfer of the obligations under the guarantee dated 23 December 2002.

18 Under cl 1 of the Transfer Agreement, upon the happening of a specified event (*viz* the number of paid admissions to the IMAX theatre falling below 212,000 in any period of 12 consecutive months), the plaintiff was entitled (at Village's request) to call upon GHFD, by a notice of transfer, to accept a transfer of the plaintiff's rights and obligations under the Letter of Intent and the Agreement for Lease. Further, on the date of transfer, GHFD would pay the plaintiff a transfer sum equivalent to 50% of the amounts paid to IMAX by the plaintiff under the Letter of Intent or the Agreement for Lease.

19 The plaintiff took the view that the event under cl 1 of the Transfer Agreement had taken place. It therefore issued the transfer notice to GHFD on 23 November 2003 ("the Transfer Notice") to take over the lease from IMAX; GHFD disagrees with the plaintiff's position.

20 As a director of the plaintiff as well as of GHFD, the defendant had knowledge of the operations of the IMAX theatre at the Great World City cinema complex. The defendant was copied internal correspondence between the staff of the plaintiff on issues of marketing and performance, and he would give his input and ideas on certain issues. The performance of the IMAX theatre was also discussed at length at meetings of the plaintiff's board of directors on 6 October 2003 and 31 March 2004, which were attended by the defendant.

21 At a board meeting of the plaintiff held on 15 February 2005 and attended by the defendant, it was decided that the IMAX theatre at Great World City would cease operations. The defendant directed that:

(a) IMAX be informed of the plaintiff's decision and that GHE would identify the location to which the IMAX system would be transferred;

(b) the plaintiff continue to pay IMAX the fees payable under the Agreement for Lease but that the same should be recharged to GHFD with effect from 1 January 2005; and

(c) GHFD be billed a 50% share of the fixed rent payable to IMAX under the Agreement for Lease which amounted to $1.145m ("the Transfer Sum").

The plaintiff had paid a total sum of $2,290,680.08 to IMAX as at 1 January 2005.

22 GHFD did not respond to the Transfer Notice nor did it pay the plaintiff the Transfer Sum. The plaintiff sent a second letter on 25 April 2005 to GHFD reminding the company and GHE that they were in breach of the Agreement for Lease in failing to comply with the Transfer Notice and demanded compliance by 6 May 2005. Instead, by letters dated 26 April 2005 and 18 May 2005 to the plaintiff and the plaintiff's solicitors respectively, signed by the defendant, GHFD alleged that the plaintiff was in breach of its obligations under the Transfer Agreement in failing to properly promote and market the IMAX theatre in Singapore and that the Transfer Notice had not been properly given.

23 As a consequence of the non-payment by GHFD, the plaintiff commenced proceedings in the earlier suit (Suit 413) against GHFD and GHE claiming, *inter alia*, for specific performance and damages.

24 On 5 July 2005, GHFD filed SIC 3346 in the earlier suit, applying to strike out the plaintiff's action on the basis that the warrant to act given to WTML by the plaintiff's managing director, Kenneth Tan ("Tan"), was invalid and WMTL had not been validly appointed and authorised to represent the plaintiff. The defendant, in his capacity as a director of GHFD, filed an affidavit in support of SIC 3346 alleging, *inter alia*, that the plaintiff's board of directors had never authorised the commencement of the earlier suit and that Tan had no authority to engage WMTL to commence those proceedings.

25 In his capacity as a director of GHFD, the defendant executed the warrant to act of M/s KhattarWong, authorising the firm to act for GHFD in the earlier suit.

26 Senior alleged that even after the commencement of the earlier suit, the defendant continued to write to the plaintiff on behalf of GHFD, in his capacity as a director of GHFD, to assert the company's position with regards to the IMAX dispute, despite the conflict of interest in his position.

27 Senior accused the defendant of taking advantage of and exploiting his unique position as a director of the plaintiff and GHFD, to the benefit of GHFD but to the plaintiff's detriment. Senior alleged that the defendant's conduct demonstrated his total partiality towards GHFD and that he preferred to further its interests over those of the plaintiff, thereby acting against the plaintiff's interests in breach of his fiduciary duties as a director of the plaintiff.

28 As the defendant was involved in the decision-making process of the plaintiff relating to the operations and running of the IMAX theatre at Great World City, Senior deposed that if the defendant continued to have access to the documents and information belonging to the plaintiff, especially those of a confidential nature, he would be in a position to manipulate and exploit the documents and information unfairly to improperly benefit and assist GHFD and collude with GHFD in defending and seeking to defeat the plaintiff's claim in the earlier suit.

29 The plaintiff referred to extracts from the defendant's affidavit filed in this suit to support Senior's contention that the defendant's loyalty lay with GHFD. In his affidavit filed on 15 September

2005 to oppose the plaintiff's application, the defendant, in referring to the plaintiff's board meeting on 15 February 2005 and to the Transfer Agreement, deposed to the following[note: 1]:

> With respect to paragraph 21 of Kirk's Affidavit, I wish to inform this Honourable Court that I had said what I said at the board meeting of the Plaintiff on 15 February 2005 prior to learning about the performance of the IMAX theatre in Taiwan. It was only after I learnt of the admission numbers to the IMAX theatre in the Taiwan in March 2005 that I realised that the Plaintiff had failed to perform its implied obligation under the [Transfer] Agreement to properly promote and market the IMAX Theatre in Singapore. … In comparison, Kirk Senior has said in paragraph 18 of Kirk's Affidavit that the number of paid admissions to the IMAX Theatre for the period of 12 months from 1 November 2003 to 31 October 2004 is 108,541.
>
> Similarly, when Village Roadshow, VCA and the Plaintiff entered into the [Transfer] Agreement dated 11 February 2004 ... with the other parties thereto, two of which were again GHFD and GHE, it was known to the Plaintiff and the Village group that I was also a director in GHFD and GHE. Again, the Plaintiff and the Village group also knew that by entering into the [Transfer] Agreement dated 11 February 2004, rights and obligations were created between the parties to that agreement. For example, rights and obligations were created as between the Plaintiff and GHFD and as between the Plaintiff and GHE. By reason of such knowledge as aforesaid and the execution of the [Transfer] Agreement dated 11 February 2004, the Plaintiff (and also the Village group) cannot now complain that I cannot act in any way which would hinder the prosecution of Suit 413 by the Plaintiff against GHFD and GHE.

30 The defendant went on to say in his affidavit[note: 2]:

> I would also point out that correspondence passed between me, in my capacity as director of GHFD, and the Plaintiff as well as the Plaintiff's solicitors on the issue of the transfer which is the subject matter of Suit 413 before Suit 413 was commenced. … Neither the Plaintiff nor the Plaintiff's solicitors complained about me writing in my capacity as director of GHFD. They have surprisingly only complained about this at a most belated stage when GHFD's striking-out application was to be heard by an assistant registrar of the High Court of Singapore. Even during the exchange of the correspondence exhibited at "KS-13" of Kirk's Affidavit when I was writing to the Plaintiff, the Plaintiff did not object to me writing in my capacity as director of GHFD.

The defendant's comments above miss the point altogether for reasons which will be set out later in my decision.

31 In an earlier affidavit filed (on 8 September 2005) for the defendant's application, the defendant deposed to facts from either his personal knowledge or obtained from his perusal of papers, records and/or other documents in his possession. He referred to the request from the solicitors of GHFD to the plaintiff's solicitors for the resolution from the plaintiff's board of directors authorising Senior to sign the warrant to act of WTML which was still not provided as at the date his affidavit was filed.

32 The defendant filed almost the same affidavit (but with greater details) on 5 July 2005 in SIC 3346 by GHFD to similarly strike out the earlier suit (see [7] above). As with the defendant's application here, the defendant made copious reference to correspondence between the plaintiff's and GHFD's solicitors regarding the absence of a board resolution to justify the execution by Kenneth Tan (who was not even a board member but only an employee) of WTML's warrant to act, 20 days after the earlier suit was commenced on 7 June 2005.

33 It was the defendant's conduct, described in [32] above, that prompted the plaintiff's application. I shall first refer to the applicable law before giving my reasons why I granted the plaintiff's application but made no order on the defendant's application.

The decision

The plaintiff's application

34 The statutory duties of a director are to be found in s 157 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act"); it states:

> (1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
>
> (2) An officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.
>
> (3) An officer or agent who commits a breach of any of the provisions of this section shall be —
>
> > (*a*) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach of any of those provisions; and
> >
> > (*b*) guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding one year.
>
> (4) This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.
>
> …

35 The plaintiff cited a Court of Appeal decision on s 157 of the Act to support its application. In *Kea Holdings Pte Ltd v Gan Boon Hock* [2000] 3 SLR 129, Yong Pung How CJ had this to say (at [19]):

> Under s 157(4), the duties under s 157(1) are specifically stated not to be in derogation of any other rule of law relating to the duty or liability of directors or officers of a company, including the common law and equitable rules. There are two principles of conduct of relevance to the present case. First, that a director must act in what he honestly considers to be the company's interest, and not in the interests of some other person or body. Secondly, the equitable rule that a fiduciary must not place himself in a position where his duty to the company and his personal interests may conflict.

36 Where a director of a company is also a director of other companies within a group, his duties at common law are as follows (*per* Pennycuick J in *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62 ("*Charterbridge Corporation*" at 74):

> Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors. The proper test, I think,

> in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.

Pennycuick J's test in *Charterbridge Corporation* was applied by L P Thean JA in another Court of Appeal decision, namely, *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313 (at 324–325, [29]–[30]).

37 In openly siding with GHFD in its dispute with the plaintiff, the defendant, who wears two hats as a director of both companies (and of GHE who is the second defendant in the earlier suit), is clearly acting in conflict of his duties as the plaintiff's director.

38 Consequently, the defendant is completely misconceived in relying (see [30] above) on the fact that the plaintiff had not, before the defendant's application, objected to his corresponding with the plaintiff on behalf of GHFD. What was in issue was the defendant's conflict of duties in being a director of all three litigants in the earlier suit and siding with one litigant against another, *viz* the plaintiff.

39 In opposing the plaintiff's application, counsel for the defendant had argued that the plaintiff had failed to show what the confidential information was that the defendant had acquired from the plaintiff and which he had used in the earlier suit on GHFD's behalf. Counsel quoted from an Australian case, *Duke Group Limited v Pilmer* (1999) 73 SASR 64 ("*Duke*'s case"), *in extenso* to support his arguments.

40 *Duke*'s case concerned s 229(1) of the Companies Code (South Australia) which provision is *in pari materia* with s 157 of the Act. S was a director of two companies: Kia Ora Pty Ltd ("Kia Ora"), which subsequently became the Duke Group Ltd, and Western United Limited ("Western"). Kia Ora took over Western at a price that was termed "fair and reasonable" by accountants, NWP, in their report. The report was prepared incompetently as it overvalued Western to a considerable degree. S (and other directors of Western) knew the takeover price was excessive and was not in the interests of Kia Ora as Kia Ora's financial position was precarious. However S and the other defendant directors did not disclose this fact to Kia Ora because they held large holdings of shares in Western and they made large sums out of the sale of their shareholdings. The liquidator of Duke Group Ltd brought an action seeking damages, *inter alia*, against NWP, S and the other directors of Kia Ora.

41 I am only interested in the liquidator's action against S and the other directors for breach of fiduciary duties. The appeal on this aspect of the case turned on whether the conduct of S and the other directors of Kia Ora in preferring their own interests amounted to a failure to act honestly, contrary to s 229(1) of the Companies Code. The court at first instance held that S and the other defendant directors were all guilty of breach of their fiduciary duties and certain statutory duties in relation to the takeover.

42 On appeal, the Supreme Court of South Australia issued a unanimous and lengthy judgment affirming the judgment below. Doyle CJ, Duggan and Bleby JJ opined (at [665]) that the requirements of the duty of a director faced with a conflict of interest would depend very much on the circumstances of the particular case. Their Honours then continued (at [668]):

> The effect on the extent of a director's duty to one company by reason of a conflicting duty to another company was considered by the Western Australian Court of Criminal Appeal in *Fitzsimmons v The Queen* (1997) 23 ACSR 355. The applicant was convicted of offences

including failure to act honestly as a director in the aftermath of the takeover in the present case. He was a director of Duke Holdings Ltd and an employee of the Duke Group. The circumstances arose out of the reverse takeover. He knew that the Duke Group was in a precarious financial position when Kia Ora embarked upon the reverse takeover. He became a director of Kia Ora and participated in a board meeting of that company at which the directors resolved to enter into the transaction with the Duke Group. The essence of the charge of failing to act honestly as a director of Kia Ora was that he failed to disclose to the board his knowledge of the true financial position of Kia Ora.

43 After referring to an extract from Owen J's judgment below, their Honours continued (at [668]–[669]):

> His Honour then quoted from the judgment of Ipp J in *Permanent Building Society v Wheeler* (1994) 11 WAR 187.
>
> In the same case Parker J said (at 363):
>
> > When material conflict arises the circumstances will be important in determining what action is called for to discharge the duty of acting honestly. At the very least, and with respect to the submissions to the contrary, it seems to me the present circumstances would have required the applicant to disclose to the board that he was in a position of conflict in respect of the matter being considered by the Kia Ora board and that, as a consequence, he could neither participate in the deliberations nor vote. I have said 'at the very least' because I do not wish to be taken as suggesting that this would necessarily satisfy the duty of honesty created by s 229(1) in the circumstance that existed.

44 Counsel for the defendant submitted that, by parity of reasoning, if the defendant was possessed of information the withholding of which would be detrimental to the defences of GHFD and/or GHE in the earlier suit, he was not entitled to say that because he owed fiduciary duties to the plaintiff, GHFD and GHE, he should "remain above the fray" and not disclose such information to GHFD and/or GHE. If he had done so, he would be in breach of his fiduciary duties owed to GHFD and GHE.

45 The above submission is flawed. Counsel was proposing that the defendant should be allowed to *use for the benefit of GHFD to the detriment of the plaintiff* information (whether confidential or otherwise) gained from his attendance at meetings of the board of directors of the plaintiff and/or gleaned from the company's correspondence. The defendant's statutory duties under s 157(2) of the Act as well as his fiduciary duties at common law prohibit the defendant from doing what he had done, and if not restrained what he would continue to do. Counsel's submission on the defendant's behalf completely ignored the duties imposed by law on concurrent directorships which result in conflict, as seen in such cases as *Kea Holdings Pte Ltd v Gan Boon Hock* ([35] *supra*).

46 In that case, Yong CJ (at [27]) referred to the following extract from Upjohn LJ's judgment in *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 637 where he considered the relationship between the "no conflict of interests" rule and directors who hold posts in more than one company:

> Directors … may sometimes be placed in such a position that though their interest and duty conflict, they can properly and honestly give their services to both sides and serve two masters to the great advantage of both. If the person entitled to the benefit of the rule is content with that position and understands what are his rights in the matter, there is no reason why he should

not relax the rule. ...

To sum up the position, it is clear that the person entitled to the benefit of this positive rule is the person who is protected by it, but he, and he alone, can in proper circumstances relax it … It cannot be used as a shield by the person owing the duty …

47 The defendant had canvassed an alternative argument, *viz* that the plaintiff had assented to the defendant being in an alleged position of conflict as the plaintiff is the JV vehicle between Village and Golden Harvest. Therefore the plaintiff had agreed to the defendant being involved in the Shareholders' Agreement as well as in the Transfer Agreement and could not now do a *volte-face*.

48 I rejected the defendant's argument. First, the equitable defence of acquiescence has no application here. Next, I refer again to the judgment of Yong CJ in *Kea Holdings Pte Ltd v Gan Boon Hock* ([35] *supra* at [27]) where he went on to say, after quoting Upjohn LJ:

In other words, as long as the fact of this is disclosed to the company and approved, the holding of cross-directorships is not *per se* a breach of duty. In this case, the appellants knew that Gan was a director of Sinindo. *However, this does not mean that Gan could subordinate the interests of Kea Resources to Sinindo in a situation where their interests were in conflict*. [emphasis added]

Consequently, the defendant cannot subordinate the interests of the plaintiff (as he has done) to those of GHFD in a situation where their interests were in obvious conflict. He should have adopted a "remain above the fray" stance and refrained from acting for or against the interests of either the plaintiff or GHFD. As he failed to do so, the orders that I made on the plaintiff's (and the defendant's) application directed him to adopt a neutral position.

49 The two cases cited by the defendant to support his contention that the plaintiff had consented to his concurrent directorships are irrelevant as can be seen from their facts. In *Holder v Holder* [1968] Ch 353, the English Court of Appeal held that a beneficiary cannot be heard to complain about a trustee allegedly acting in breach of trust when he had full knowledge of the alleged breach and had affirmed the same.

50 *In re Duckwari Plc* [1998] Ch 253 involved an interpretation by the English Court of Appeal on s 320 of the UK Companies Act 1985 (c 6). The section prohibits a company from entering into an arrangement whereby a director of the company or its holding company acquires non-cash assets from the company or *vice versa* unless the arrangement is first approved by a resolution of the company obtained in a general meeting. The appeal pertained to the meaning of the word "arrangement" in s 320 of the said UK Act.

51 Finally, the defendant had also submitted that an injunction ought not to be granted based on the principles enunciated in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 since (a) the plaintiff's claim against the defendant disclosed no serious question to be tried; (b) there were no exceptional circumstances which warranted the granting of an injunction; and (c) on a balance of convenience, damages would be an adequate remedy.

52 Earlier at [27], I had set out the plaintiff's allegations against the defendant. Senior accused the defendant of taking advantage of, exploiting and abusing the unique situation he found himself in of being a director of the plaintiff and of GHFD, all to the benefit of GHFD to the ultimate detriment and prejudice of the plaintiff. Further, the defendant continued to write to the plaintiff in his capacity as director of GHFD to assert GHFD's position with regard to the IMAX dispute, even after the

commencement of the earlier suit. While the defendant continued to question (in his affidavit filed on 13 July 2005) the warrant to act given by Tan to the plaintiff's solicitors in the earlier suit, he had executed the warrant to act on behalf of GHFD to authorise GHFD's solicitors to defend the same.

53 I accepted the plaintiff's submission and agreed that damages would not be an adequate remedy for the plaintiff in lieu of an injunction. On the other hand, in restraining the defendant from continuing to engage in the "fray" between the litigants in the earlier suit, he suffered no personal loss or damage, even if the plaintiff was to ultimately lose its claim against GHFD and/or GHE in the earlier suit.

The defendant's application

54 I had dealt with the defendant's application first before I granted the plaintiff's application. Quite simply, the orders that I made on the defendant's application (see [3] above) were a stopgap measure to ensure that the plaintiff was given a fair and reasonable opportunity to obtain a board resolution to ratify the warrant to act that Senior had given to the plaintiff's solicitors.

55 To pre-empt the defendant's act of blocking the passing of the requisite resolution in his capacity as a nominee director of GHFD (which I was certain he would do if not prevented), I directed that he should not be allowed to vote on the resolution when it was presented to the board of directors. Otherwise, it would be unfair to the plaintiff, not to mention a flagrant breach on the defendant's part of his statutory and fiduciary duties as a director of the plaintiff.

[note: 1]In paras 6 and 23 of the defendant's affidavit filed on 15 September 2005.

[note: 2]At para 25.

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