Zim Integrated Shipping Services Ltd and others *v* Dafni Igal and others [2010] SGCA 45

Case Number	: Civil Appeal No 15 of 2010
Decision Date	: 02 December 2010
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Philip Jeyaretnam SC, Terence Tan, Goh Sue Lyn (Rodyk & Davidson LLP) and Goh Aik Leng Mark (Mark Goh & Co) for the appellants; Benny Jude Philomen, K Muraitherapany and Pey Yin Jie (Joseph Tan Jude Benny LLP) for the first respondent; Lee Hwee Khiam Anthony, Thng Tze Ern Audrey and Chua Marina (Bih Li & Lee) for the second to sixth respondents.
Parties	: Zim Integrated Shipping Services Ltd and others — Dafni Igal and others

Agency

Equity

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 2 SLR 426.]

2 December 2010 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision rendered in Suit 755 of 2007 wherein the appellants brought several claims centring on, *inter alia*, alleged fiduciary breaches by the respondents (collectively referred to as "the Respondents"). The trial judge ("the Judge") found that the appellants had not proved their claims and their claims were accordingly dismissed (see *Zim Integrated Shipping Services Ltd and others v Dafni Igal and others* [2010] 2 SLR 426). On appeal, the appellants limited their challenge to two findings made by the Judge – the failure of the Fourth Respondent to account for rebate monies it received as the appellants' agent ("the Rebates issue"), and the First Respondent's employment with the Sixth Respondent while he was a director of the Second Appellant ("the Conflict issue"). It should be noted that the appeal is limited to the Fourth Respondent and the First Respondent with respect to the Rebates issue and the Conflict issue, respectively (with the Rebates issue being pursued by the First and Second Appellants (hereafter referred to as "the Appellants") and the Conflict issue being pursued by the Second Appellant). [note: 1] After carefully considering the submissions made, we find that the Appellants have made out their case on the Rebates issue and we accordingly allow this appeal in part.

The parties and the background

2 The First Appellant is Zim Integrated Shipping Services Ltd. It is a company incorporated in Israel and is in the container shipping business with operations that extend globally. These operations are facilitated by a network of shipping agents and every party in this appeal was connected in one way or another to the First Appellant's network. The Second Appellant, Gold Star Line Ltd, is a company incorporated in Hong Kong and is the First Appellant's dedicated feeder company. The Third

Appellant, Seth Shipping Ltd, is a company incorporated in the Republic of Mauritius and is the First Appellant's nominee in South East Asia. The Second and Third Appellants are owned (ultimately) by the First Appellant. The Fourth Appellant, Star Shipping Agencies (Singapore) Pte Limited, is a company incorporated in Singapore and is a joint venture between the First Appellant and some other partners. It acts as the First Appellant's exclusive shipping agent in Singapore.

3 The Respondents were all connected to the First Appellant's operations in Port Klang, Malaysia. The First Respondent, Dafni Igal, was an employee and director of several of the appellants at various times. The Fourth Respondent, Starship Agencies Sdn Bhd, is a company incorporated in Malaysia that carries on the business of a shipping agent. The Fifth Respondent, Starship Carriers Pte Ltd, is a company incorporated in Singapore that carries on business as a shipping line providing ship management services. The Sixth Respondent, Charter Shipping Agencies (S) Pte Ltd, is a company incorporated in Singapore that carries on business as a shipping agency (freight) that provides ship-management services. The Second and Third Respondents (Ng Koo Kay Benedict and Rajathurai Suppiah, respectively) are directors and/or shareholders in the Fourth, Fifth and Sixth Respondents.

4 The relationship between the appellants and Respondents formed the context of the disputes. The First Appellant operated globally through the use of an extensive network of agents, and its operations in Malaysia were facilitated by multiple agency agreements between various appellants and Respondents. In 1995, the Fourth Respondent was incorporated after the Second Respondent had secured the rights to act as the First Appellant's shipping agent in Malaysia. In 1997, the Fourth Respondent further entered into an agreement with the Fourth Appellant to act as its sub-agent for all shipping services of Seth Shipping Corporation (which is *not* the Third Appellant). This agreement was formalised under a Standard Agency Agreement dated 1 September 1997 and executed on 19 February 1998. Sometime in 1998, the Fourth Respondent entered into an agreement with the Second Appellant wherein the former was appointed as the latter's shipping agent in Malaysia.

5 The First Respondent is the central figure in this appeal. He had served in the First Appellant's employ and network since 1966. He began his career as a seaman in 1966, and, in time, served in various leadership positions within the First Appellant's network. Between 30 November 1995 and 1 December 2004, he was the Managing Director of the Second Appellant (he continued being an ordinary director until 13 July 2006). Between 1 December 2004 and mid-November 2006, he was the President of the First Appellant for the Asian Region. Lastly, between 4 January 2005 and 30 June 2006, he was the Director of the Fourth Appellant. At all material times, the First Respondent was employed under an employment contract with the First Appellant dated 24 May 2000 (the "Employment Agreement"). The First Respondent resigned from the First Appellant on 16 May 2006 as a result of differences with the management, and was subsequently placed on garden leave until November 2006. Thereafter, the First Respondent joined Cheng Lie Navigation Co ("Cheng Lie"), which is a competitor of the Appellants. By the time the case was heard in the High Court, the First Respondent had also left the employ of Cheng Lie.

6 The broad nature of the appellants' claim below centred (as noted at the outset of this judgment) on the alleged breaches of fiduciary duties as well as contractual obligations owed to them by the Respondents. The allegations can be grouped into four categories, *viz*, (a) breaches of fiduciary duties owed by the First Respondent, (b) breaches of fiduciary duties owed by the Fourth Respondent, (c) allegations against the Second to Sixth Respondents for inducing the First Respondent's breaches of fiduciary duties and (d) a passing off claim against the Fifth Respondent. In so far as the contractual claims that were connected to the First Respondent's Employment Agreement with the First Appellant are concerned, they were stayed in favour of arbitration pursuant to the decision in Summons No 537 of 2008. At the conclusion of the trial, the Judge found that the appellants failed to prove their claims and their claims were dismissed.

The issues

Rebates issue

7 In April 1999, the Second Appellant started a service between various ports in South East Asia *via* Port Klang, Malaysia, to Colombo, Sri Lanka. Westports Malaysia Sdn Bhd ("Westports"), who was the operator of Port Klang at that time, charged the Second Appellant several tariffs for the use of the port. One of these tariffs (that is an issue in this appeal) was a tariff paid for all outbound containers exported from the port. It was alleged that the Fourth Respondent had negotiated an agreement with Westports for certain waivers and rebates to be made in favour of the Fourth Respondent. One of these alleged rebates was a yearly incentive rebate of 5% on part tariffs paid by the First, Second and Third Appellants for all outbound containers exported from the port from 2000 to the first half of 2005 ("the Rebates"). It is the Appellants' case that these Rebates were received by the Fourth Respondent but were not subsequently accounted for to the Appellants.

8 The Judge held that the appellants had failed to meet their burden in proving that the monies received by the Fourth Respondent *were the Rebates* as the appellants claimed, and this was regardless of the evidence adduced by the Second Respondent. The Second Respondent did not deny that the Fourth Respondent had received cheque payments from Westports between 2000 and 2006, and he even went so far as to accept that the amounts received corresponded, in fact, to the RM1,477,474 ("the monies" that constituted the amount of the Rebates) the appellants had claimed (in their pleadings) that the Fourth Respondent had received. The Second Respondent submitted, however, that these payments were gratuitous incentive payments given to the Fourth Respondent for its support and patronage and that it had not solicited such payments from Westports. As the Fourth Respondent did not think that the monies were meant for the appellants, the amounts were not paid over to them. The Judge found that the only evidence adduced by the appellants came from the exhibits in Lee Mun Tat's ("Lee") affidavit of evidence-in-chief ("AEIC") (Lee was a manager of Westports). Enclosed in that particular AEIC were copies of payment vouchers as well as tables purportedly showing the volume of FCL (Full Container Load) containers within the specified time period that were either signed for by one Ms Chan or one Datuk Tan, or were unsigned. Additionally, there were also photocopies of cheques that were made out to the Fourth Respondent.

9 The Judge held, however, that these documents were inadmissible. Lee admitted that he only became involved in the rebate calculation process from mid-2004 onwards and did not have personal knowledge about these Rebates, given their highly confidential nature. Documents therefore prepared *before June 2004* were inadmissible. As for the remaining documents, the Judge also held that they were inadmissible, albeit on the basis that these documents were not prepared in the ordinary course of business since, for the same reason above, such rebates were highly confidential in nature. Further, the Judge held that Ms Chan and Datuk Tan were both still involved in Westports' business at the time of trial, and that it was not the case that it was impossible to procure them to attend court without unreasonable delay and expense. Finally, these documents were prepared by Westports internally and had not been provided to the Fourth Respondent for its verification.

10 On appeal, the Appellants sought to overturn this finding of fact, arguing that the Judge had failed to consider the totality of the evidence. Counsel for the Appellants did not significantly challenge the Judge's finding on the inadmissibility of the documents contained in Lee's AEIC and submitted, instead, that there was sufficient admissible evidence in the record to justify the Appellants' case. We agree.

11 First, there is a strong inference that the Fourth Respondent received monies in the course of their agency with the Appellants. As already noted above (at [4]), the Fourth Respondent was

incorporated in 1995, *after* the Second Respondent had secured the rights to act as the First Appellant's shipping agent in Malaysia. The Fourth Respondent also had an agreement with the Second Appellant which was entered into sometime in 1998 wherein the former was appointed as the latter's shipping agent in Malaysia. The monies were received during the period of 2000 to 2006, and it could not be disputed that the Fourth Respondent was indeed acting as the Appellants' agent at the time of receipt of the monies. Importantly, when the Fourth Respondent lost its agency with the Appellants in 2006, the payment of monies from Westports ceased. Given the preceding factual matrix, the natural inference to be made was that the monies which the Fourth Respondent received were inextricably linked to the Appellants' business and that there was, in our view, a strong inference that these monies *were the Rebates* as claimed. We are therefore of the view that the Appellants had discharged their evidential burden of proving that these monies were received in connection with the Fourth Respondent's role as the Appellants' agent.

12 In our view, although the Appellants bore the *legal* burden throughout of proving that the monies were received in connection with the Fourth Respondent's role as the Appellants' agent (and, hence, establishing their legal entitlement to the Rebates), they had (as noted in the preceding paragraph) in fact discharged the (initial) *evidential* burden that this was the case. The *evidential* burden then *shifted*, at this point, to the *Fourth Respondent* to demonstrate that the monies had *not* been received in that capacity (see also, in relation to the distinction between the legal burden and the evidential burden, the decision of this court in *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 (at [14])). Indeed, one might go *further* in the context of the present appeal. In particular, in, for example, the English decision of *Dunne v English* (1874) LR 18 Eq 524 ("*Dunne*"), Sir G Jessel MR observed thus (at 533):

> It is not enough for an agent to tell the principal that he is going to have an interest in the purchase, or to have a part in the purchase. He must tell him all the material facts. He must make a full disclosure.

Indeed, the principle enunciated in *Dunne* was endorsed and applied by this court in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 in the more general context of *the duty of full disclosure*, and where V K Rajah JA, delivering the judgment of the court, observed as follows (at [148]):

> In an adversarial trial, the burden of proving full disclosure lies on the fiduciary (*Dunne v English* (1874) LR 18 Eq 524). Mere disclosure that he has an interest or the informal making of statements that might put a principal on enquiry is not sufficient. It is also not enough to prove that had the fiduciary asked for permission, it would have been given (*Murad v Al-Saraj* [2005] EWCA Civ 959).

In our view, the principles set out above would apply in the context of the present appeal inasmuch as it having been proven that payments had been made by a third party (Westports) to the agent (here, the Fourth Respondent), the agent has the burden of explaining as well as justifying its receipt and retention of the payment concerned. More importantly, perhaps, it could be argued that the burden thus placed on the fiduciary (in this appeal, the Fourth Respondent) is not merely an evidential one but a *legal* one. The Fourth Respondent had the burden of proving that full disclosure was made to the Appellants, and that their consent was subsequently given.

13 Be that as it may, it is clear, in our view, that the Fourth Respondent has satisfied neither the evidential burden nor the legal burden placed upon it. Turning to the relevant facts, the Second Respondent submitted that the Appellants were not entitled to the monies it received from Westports on the basis that these monies were gratuitous incentive payments that had their source in the

various pieces of business it (the Fourth Respondent) had brought to Westports. The Second Respondent also asserted that they represented a few other principals in Westports and impliedly asserted that the monies could have been attributable to the business of these principals. However, when asked about these other principals during oral submissions and whether they were identified in the Record of Appeal, counsel for the Respondents admitted that they were not. Similarly, the Second Respondent was also unable to point to any documentary evidence to suggest that these monies arose out of business other than that of the Appellants.

14 In the circumstances, we are satisfied that the Fourth Respondent was obliged to account to the Appellants the sum of RM1,477,474 that it received in the capacity of the Appellants' agent. We therefore allow the appeal on this particular issue.

Conflict issue

15 It was pleaded that the First Respondent had breached his fiduciary duty when he worked for, and received remuneration from, the Sixth Respondent. While being a director of the Second Appellant, and during the period of January 2003 to November 2006, the First Respondent was employed as either a consultant (as claimed by the First Respondent) or was appointed as an executive director (as claimed by the Second Appellant). Documentary evidence showed that the First Respondent was hired by the Sixth Respondent at a monthly salary of $15,000. This salary was declared in the First Respondent's application for Singapore permanent residency (and later citizenship), in returns to the Inland Revenue Authority of Singapore, and for the purposes of Central Provident Fund ("CPF") contributions. While the First Respondent did not dispute that he had received income tax payments and CPF contributions from the Sixth Respondent, he claimed that he had waived the payment of his $15,000 monthly salary. The Second Appellant argued that the First Respondent was a director of the Second Appellant during that material time and the employment with the Sixth Respondent thus amounted to a breach of fiduciary duties owed to the Second Appellant. On this basis, the Second Appellant claimed against the First Respondent for all monies received by him in the course of his employment with the Sixth Respondent.

16 In the court below, the First Respondent explained that his employment with the Sixth Respondent was primarily to facilitate his application for Singapore permanent residency and citizenship. In the process, he assisted the Sixth Respondent in its business of project cargo and oversized conventional break bulk cargo. The First Respondent stated that the Sixth Respondent's business was something in which the Second Appellant was not – and did not intend – to be involved in, and thus did not amount to a conflict of interests. The First Respondent also explained that the Singapore passport was of importance to him given his frequent travels to certain countries. Prior to being so "employed" by the Sixth Respondent, the First Respondent claimed that he impressed upon the management of the First Appellant (which had control over the Second Appellant) his desire for Singapore citizenship when the Second Appellant had plans to move and list in Singapore (which did not materialise owing to the 2002 economic downturn). In any event, the First Respondent claimed that Mr Strammer, the First Appellant's vice-president who is now deceased, had orally approved the First Respondent's employment with the Sixth Respondent. There were, allegedly, two conditions attached to this approval – that he would not receive any cash benefit (thus the waiver of the $15,000 monthly salary) and that he would not engage in any activity that was in competition with the business of the Appellants. In response, the Second Appellant disputed the existence or validity of Mr Strammer's approval, the waiver of the $15,000 monthly salary, and further averred that the First Respondent's application for citizenship could have been facilitated by the Fourth Appellant instead.

17 The Judge held that the First Respondent did not breach his fiduciary duties owed to the

Second Appellant. First, the Judge found that the First Respondent did, in fact, inform Mr Strammer of his proposed employment with the Sixth Respondent in order to facilitate his citizenship application and obtained his approval for the same. The Judge noted that David Malkoff, a witness for the appellants, had corroborated the fact that the FirstRespondent did in fact voice his desires in obtaining Singapore citizenship. Further, the Judge accepted the First Respondent's explanation that he could not utilise the Fourth Appellant, given the fact that the Fourth Appellant was partly owned by parties with political or military links. Secondly, the Judge found the First Respondent's account to the effect that he had waived his monthly $15,000 salary was corroborated by the evidence of the Second Respondent. Thirdly, the Judge found that the Sixth Respondent's business did not compete with those of the Appellants.

18 In our view, the Second Appellant did not adduce any sufficient basis to overturn the trial judge's findings. On appeal, the only significant challenge the Second Appellant could muster was to challenge the factual finding that Mr Strammer approved the First Respondent's employment with the Sixth Respondent. We see no reason to interfere with the Judge's reasoning as well as conclusion on this particular issue. We observe that neither party could point to any documentary evidence on record that could positively prove their respective positions as to whether approval was or was not given. It is thus unsurprising that the parties resorted to questioning the plausibility of the circumstances surrounding the need for the Sixth Respondent's assistance and the plausibility of such approval being granted. In our view, the cases advanced by the Second Appellant and First Respondent were equally balanced and the dispute could only be resolved on the Judge's assessment of the credibility of the witnesses concerned. The Judge had the opportunity to assess the First Respondent on the stand and she was of the view that his explanation was credible and, to some limited extent, corroborated by the evidence of others. We thus defer to her finding of fact and accordingly dismiss the appeal in so far as this particular issue is concerned.

Conclusion

19 For the reasons set out above, we allow the appeal in part. We will hear the parties on the issue of costs. The usual consequential orders will apply.

[note: 1] See the Appellants' Case (Amendment No 1) at para 29.

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