Kogen Singapore Pte Ltd *v* Chang Li Chieh
[2010] SGHC 303

Case Number : Suit No 213 of 2008

Decision Date : 13 October 2010

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Philip Ling and June Hong (Wong Tan & Molly Lim LLC) for the plaintiff; The defendant in-person.

Parties : Kogen Singapore Pte Ltd — Chang Li Chieh

Companies

13 October 2010

Lai Siu Chiu J:

Introduction

1 Kogen Singapore Pte Ltd ("the plaintiff") commenced this action against its former managing-director Chang Li Chieh also known as Herman Chang ("the defendant"), for breach of director's duties owed to the plaintiff. The plaintiff claimed against the defendant *inter alia* for:

(a) Drawing two cheques totalling S$153,249.05 on the plaintiff's bank account;

(b) Retaining S$7,251.00 being sale proceeds of the plaintiff's products received by the defendant on behalf of the plaintiff;

(c) Converting the plaintiff's goods worth US$57,400.00;

(d) Carrying on business in competition with the plaintiff through a company called Chain Wise Pte Ltd ("Chain Wise");

(e) Causing the plaintiff to pay S$30,000.00 to a third party service provider on behalf of Chain Wise; and

(f) Wrongfully removing the plaintiff's statutory records.

2 The defendant counterclaimed against the plaintiff for the return of various sums of money allegedly owed by the plaintiff to him, *viz*:

(a) US$193,998.00 and NT2,374,848.00 for payments the defendant made on behalf of the plaintiff to its suppliers; and

(b) RM1,626.50, RP5,423,900.00, S$767.73 and US$800.00 for expenses incurred on the plaintiff's behalf.

3 The defendant was initially represented but just before commencement of the trial, his solicitors discharged themselves and the defendant acted in-person. However, most of the court documents relied upon by the defendant at the trial were prepared and filed by his former solicitors.

4 After hearing the testimony of the parties' witnesses, I allowed the plaintiff's claim, save for the claim for damages in respect of the wrongful removal of the plaintiff's statutory records in [1(f)] above. I dismissed the defendant's counterclaim. As the defendant has filed a Notice of Appeal (in Civil Appeal No 131 of 2010) against my judgment, I shall now set out my reasons.

5 The plaintiff is in the business of importing and exporting electronic components and products. At the material time, the defendant was its managing- director.

6 The plaintiff is 92.5% owned by a company known as Koryo Electronics Co. Ltd ("Koryo") which is listed on the Taiwan Stock Exchange. The defendant's late father was the founder and chairman of Koryo. The defendant's late father had resigned as chairman of Koryo sometime in the year 2006 due to ill health.

7 According to the plaintiff, Koryo instructed its Taiwan auditor, Deloitte & Touche, to conduct regular auditing checks on its subsidiaries including Kogen in accordance with Taiwan listing requirements. During the 2007 and 2008 inspections of the plaintiff's operations, Koryo discovered the defendant's alleged misconduct of, *inter alia*, misappropriating the plaintiff's money, converting the plaintiff's goods, setting-up a competing business and conducting the plaintiff's business in a manner contrary to the plaintiff's interests. The plaintiff terminated the defendant's position as managing-director on 30 June 2007 and commenced this action on 26 March 2008.

The law

8 A director owes fiduciary duties to the company to act in the company's best interest and not to put himself in a position where his duty to the company and his interest might conflict, unless with the consent of the company. The plaintiff referred me to cases such as *Townsing Henry George v Jenton Overseas Investment Ptd Ltd (in liquidation)* [2007] 2 SLR(R) 597 and *Golden Village Multiplex Pte Ltd v Phoon Chiong Kit* [2006] 2 SLR(R) 307 as authorities. As the law regarding this area is straightforward, it would not be necessary to discuss it further. Instead, I will focus on the events that led to the plaintiff's claims and on the evidence.

The removal and retention of the plaintiff's statutory records

9 I will address the issue regarding the removal of the plaintiff's statutory records first, as the plaintiff did not succeed in this respect of its claim.

10 It was not disputed that the defendant removed the plaintiff's statutory records on 22 October 2007 and continued to retain them despite the plaintiff's repeated requests for their return. The defendant only returned the records on 9 April 2007. The plaintiff claimed damages in respect of the removal and retention.

11 The defendant explained that he had removed the plaintiff's statutory records as he wanted to update the records (which had not been done) in relation to some share transfers he had made. However, shortly after he removed them, his father passed away and he had no time to attend to the matter.

12 While I sympathise with the defendant on the demise of his father, the fact remained that the defendant had no legal right to remove the statutory records in the first place. Under the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act"), only members of a company have the right to inspect the records but not to retain them. The defendant's action exposed the plaintiff and its agents to the risk of being fined under s 191 of the Companies Act.

13 That being said, it was fortunate that the plaintiff was not fined. However, the plaintiff did not show that the defendant's removal and retention of the statutory records had caused the plaintiff any damage. Hence, the plaintiff's claim in this regard was disallowed.

The business of Chain Wise

14 The contention regarding the true purpose of Chain Wise was an important element in this case. By way of background, Chain Wise was incorporated by the defendant on 18 April 2006. The defendant was a director of Chain Wise, and was also its majority shareholder. The business of Chain Wise was stated to be "general wholesale trade (including general importers and exporters)". As the plaintiff was also in the import-export business, Chain Wise was prima facie, a competitor of the plaintiff.

Whether the defendant disclosed the incorporation of Chain Wise to the plaintiff

15 The defendant claimed that he had set up Chain Wise to act in the plaintiff's interests. As stated in his AEIC:

> The only reason I incorporated Chain Wise was to facilitate the business of the plaintiffs. For example, I used Chain Wise as a vehicle to enter into a directorship agreement with a Taiwanese company known as Luxpro Comporation...[the Luxpro Distributorship Agreement]. The advantage of doing so was that the Plaintiffs could then order Luxpro MP3 players without risking liability towards Luxpro Corporation under the [the Luxpro Distributorship Agreement].

16 The defendant went on to state:

> To be honest, I also did this to circumvent the need to go through the decision of the board of directors of Koryo for the Plaintiffs to enter into [the Luxpro Distributorship Agreement].

17 Based on his own testimony, the defendant knew that there was a need to consult the board of directors of Koryo but he deliberately chose not to do so. The question that called for an answer was, why did the defendant not want to consult Koryo if as he claimed, Chain Wise was incorporated for the benefit of the plaintiff?

18 When he was cross-examined by counsel for the plaintiff, the defendant did a volte face and claimed that he had disclosed the incorporation Chain Wise to Koryo even though this was never stated in his AEIC. He said:

> Of course we have [disclosed] – I go back to the annual meeting...and I reported to them the annual report... You can see that the profit has increased.

19 The evidence according to the defendant therefore was that the disclosure could be found in Koryo's annual report. However, when the court looked at the annual reports, there was no such mention. Pressed further by counsel for the plaintiff, the defendant's evidence was as follows:

Q: Where is the disclosure that you claim is found in this report here that you incorporated Chain Wise –

A: Okay. I have not finished. After the report we will continue the discussion, I would speak to the general manager, Lew Chuan Foo, general manager. I mentioned to him, I told him that we would be doing end products business in Singapore, so the profit before tax would had increased so much.

20 The long and the short of the defendant's testimony was that the increase in profits as reflected in Koryo's annual report was attributable to the defendant's decision to start business for end products. The defendant's response was no answer to the question whether he had disclosed the incorporation of Chain Wise to Koryo.

21 The defendant prevaricated and was evasive. It was clear that he had not made the necessary disclosure about the incorporation of Chain Wise and following from that, had not obtained the necessary consent to set up a competing company. This was a breach of the defendant's fiduciary duties owed to the plaintiff.

Chain Wise's transactions with Luxpro

22 As mentioned earlier (see [15]), the defendant said that Chain Wise entered into the Luxpro Distributorship Agreement on behalf of the plaintiff so that the plaintiff could then order Luxpro MP3 players without risking liability. However, it was noted that in an earlier affidavit filed on 9 October 2008, the defendant gave a different reason for the arrangement:

> It was not practicable or convenient for [the plaintiff] to sign a distributorship agreement with Luxpro MP3 players because [the plaintiff's] shareholders were a company in Taiwan.

His earlier explanation was based on practicability and convenience. There was no mention that the intention was to enable the plaintiff to avoid liability.

23 When he was cross-examined, the defendant retracted his earlier statement and stood by his AEIC evidence that Chain Wise entered into the Luxpro Distributorship Agreement to prevent the plaintiff from incurring liability. The inconsistency in the defendant's evidence on such an important issue cast grave doubts on his credibility.

24 Even assuming that Chain Wise entered into the Luxpro Distributorship Agreement to enable the plaintiff to avoid liability, this explanation was inherently unbelievable because contrary to the defendant's claim, it was evident that the defendant had actually exposed the plaintiff to liability.

25 First, the plaintiff was the party who paid for the Luxpro MP3 players. The invoices of the Luxpro MP3 players showed that Luxpro was invoicing the plaintiff and the plaintiff ultimately paid for the goods. There was even an instance where an invoice was originally issued by Luxpro to Chain Wise, but the defendant deleted Chain Wise's name and replaced it with the plaintiff's name. The defendant's explanation was that it was the plaintiff who was purchasing the goods, and hence it was only right that it paid for the goods. As for the amendment, the defendant claimed that Luxpro erroneously invoiced Chain Wise when it should have been the plaintiff. Hence, he was simply correcting Luxpro's mistake.

26 The defendant's explanations once again evaded the real issue. The defendant was unable to explain why the plaintiff was paying for the goods when it was Chain Wise who had the obligation to

do so under the Luxpro Distributorship Agreement. In my view, the amendments to the invoices showed that Luxpro intended to bill Chain Wise because the latter was the contracting party under the Luxpro Distributorship Agreement and not the plaintiff. However, for his own selfish reasons despite his being the managing director of the plaintiff, the defendant caused the plaintiff to make payments to Luxpro on behalf of Chain Wise.

The reasons behind the plaintiff's purchase of the Luxpro MP3 players

27 The plaintiff put forth a simple reason why the defendant had wanted the plaintiff to purchase and pay for the Luxpro MP3 players. As it turned out, the transactions with Luxpro were not profitable. It was not disputed that the sales of the Luxpro MP3 players were very poor according to the plaintiff's witness Chong Wey Fong ("Adrian") who was the plaintiff's former accountant. Adrian (PW3) recalled there was a "long stock holding for those MP3 [players]".

28 Chain Wise had an obligation under the Luxpro Distributorship Agreement to purchase a minimum US$300,000.00 worth of Luxpro MP3 players per year. The Luxpro Distributorship Agreement also provided that should Chain Wise fail to perform its obligations under the agreement, Chain Wise would be held responsible for any loss suffered by Luxpro as a result. The plaintiff's case was that the defendant thus made use of the plaintiff to make the purchases. The proposition was ultimately accepted by the defendant as can be seen from the evidence below:

Q: To meet this minimum requirement order [under the Luxpro Distributorship Agreement], which is an obligation assumed by Chain Wise, you didn't use Chain Wise to make these purchases; you used [the plaintiff] instead to do so; agree?

A: I agree.

Q: Even though [the plaintiff] itself is not under any contractual obligation; right?

A: Yes, that's correct.

29 There were also problems with the quality of Luxpro's MP3 players, which, at the time of this trial, was the subject matter of a suit in Taiwan between the plaintiff and Luxpro. So not only did the defendant cause the plaintiff to buy over Luxpro MP3 players to fulfil the minimum order requirement which was Chain Wise's obligation, the defendant also caused the plaintiff to be straddled with defective goods causing the plaintiff to become embroiled in legal proceedings against Luxpro in Taiwan. I could not see how the defendant's claim that Chain Wise entered the Luxpro Distributorship Agreement to shield the plaintiff from liability could stand. In fact, the defendant made use of the plaintiff to shield Chain Wise from liability, again breaching his fiduciary duties to the plaintiff.

The defendant acted in his own personal interest

30 It was the plaintiff's case that it had never wanted to purchase the Luxpro MP3 players in the first place but the defendant, in his capacity of managing director, made the plaintiff do so for his own personal interests. When this proposition was put to the defendant, he conceded that the intention for the plaintiff to enter into business with Luxpro was indeed his personal intention:

A: Actually, I wish that for [the plaintiff] to enter business with Luxpro. This is the intention.

Q: This is your personal intention, right? Agree?

A: Agree.

31 Adrian also testified that the defendant had instructed him via email to arrange for the plaintiff to make payment of US$30,300.00 to Luxpro on his personal behalf. The email stated:

> Please help to arrange T/T USD$30.3k to below bank account as a payment to my **personal** for partial Xing 400 sets payment.
>
> ...
>
> Beneficiary: Luxpro Corp. Account: XXX
>
> Note: From CHANG LI CHIEH [the defendant]
>
> Please arrange T/T for me to sign form ASAP.
>
> [emphasis added in bold]

32 It was revealing that the defendant himself had described payment to Luxpro as personal. This supported the plaintiff's case that the plaintiff's transactions with Luxpro were not meant to be for the plaintiff's benefit.

33 Unfortunately for the plaintiff, the troubles did not end there. There was evidence that the defendant had tried to put in place a profit-sharing arrangement between the plaintiff and Chain Wise on terms which were unfavourable to the plaintiff. On 19 December 2006, the defendant sent Adrian an email with the following contents:

> To make our GST tax and inventory records correct, please create purchase orders for all end products shipped under [the plaintiff's] name. But payment will be settled with Chain Wise instead of original supplier. ...
>
> Then Chain Wise will buy from [the plaintiff] (+5% GST) to reduce [the plaintiff's] inventory in 30 days. ...
>
> After [the plaintiff] received orders or payments from customers, then [the plaintiff] will need to buy from Chain Wise before goods delivery and share 50% gross profit.

34 The plaintiff understood the above arrangement to mean that the plaintiff would purchase the products from the supplier, and then Chain Wise would purchase the same from the plaintiff and on-sell them to the end users; however if the plaintiff itself received orders for those products, the plaintiff would repurchase some of the products from the Chain Wise. In that event, Chain Wise would be entitled to 50% of the plaintiff's profits when the plaintiff itself on-sold the products to the end-users. When he was cross-examined on this, the defendant admitted this was the arrangement but that it was never carried out:

> Q: ...Do you agree that what I have summarised is the overall meaning and intent of your instructions in this email?
>
> A: I agree but this has never been carried out.

Later, the defendant elaborated:

A: ...What is mentioned in the email has not been carried out, because Adrian feels that this is not correct and did not carry it out. Anna also says she does not want to carry it all out.

35 The point the plaintiff wanted to make was that the defendant intended to have an arrangement which favoured Chain Wise's interests over those of the plaintiff's. This was revealing as to the defendant's state of mind.

36 The arrangement was obviously unfavourable to the plaintiff because there was no reason why the plaintiff should split its proceeds of sale with Chain Wise. On the face of the arrangement, Chain Wise added no value to the transaction. Second, the arrangement omitted to state what would happen should Chain Wise be the one who on-sold the products. The inference drawn was that there would be no need for Chain Wise to split its proceeds with the plaintiff.

37 With the weight of the evidence against the defendant, I agreed with the plaintiff that contrary to what the defendant professed to be a noble and altruistic intention of using his company Chain Wise to facilitate the business of the plaintiff and to shield the plaintiff from liability, the arrangement which he had in fact engineered was to enable the plaintiff to facilitate the business of Chain Wise and for the plaintiff to shield Chain Wise from liability. The defendant was clearly in breach of his fiduciary duty to the plaintiff as he did not act in the best interests of the plaintiff. He had put his own interests and those of Chain Wise before the interests of the plaintiff.

Chain Wise was in competition with the plaintiff

38 The defendant asserted that Chain Wise was a mere "paper company" and that apart from selling some samples, it had not engaged in any sales. However, there was evidence that Luxpro addressed an invoice to Chain Wise for the purchase of 1,000 units of MP3 players; this could hardly be deemed a sample size. Chain Wise's financial report as of 31 March 2007 also showed that the company operated and had trade and other receivables indicating that Chain Wise was conducting business of its own.

39 In addition, Adrian testified that the defendant had told him on various occasions that certain goods stored in the plaintiff's warehouse belonged to Chain Wise. The defendant had kept the plaintiff's warehouse locked and only he had the keys. Adrian testified that during the plaintiff's physical stock take, the defendant would not allow the staff of the plaintiff to check on those goods which the defendant claimed belonged to him. It therefore appeared to me that Chain Wise possessed goods which meant that it must have been involved in transactions of its own.

40 The plaintiff also referred the court to evidence which surfaced in the Taiwanese proceedings which I found highly relevant. In the Taiwanese proceedings, the chairman of Luxpro, one Mr Wu, was asked whether there were any transactions made with Chain Wise based on the Luxpro Distributorship Agreement, and his answer was:

Yes, there were three transactions [and] [w]e have the orders, bank bills, delivery orders and declaration forms

When he was confronted with this evidence, the defendant ultimately accepted that there were three occasions where Chain Wise bought goods directly from Luxpro.

41 Apart from Luxpro, it seemed that Chain Wise was also transacting with other parties and on the face of the evidence, was even diverting business from the plaintiff to Chain Wise. The plaintiff adduced an invoice which showed that on 4 December 2006, one of the plaintiff's customer, Westek

Limited ("Westek") placed an order for goods with a total value of US$10,936.00.00 with the plaintiff. Subsequently, for some reason, Westek reissued the purchase order to Chain Wise and made payment to Chain Wise for the goods. When questioned on this transaction, the defendant could only assert that the plaintiff did not understand the true nature of Chain Wise's business:

> Q: Yes, but isn't that business carried on by Chain Wise..
>
> A: ...this business is actually carried out by [the plaintiff].
>
> Q: ...money was in fact paid to Chain Wise, and ... as a matter of fact, [the plaintiff] is complaining that you took this business away from them.
>
> A: That's true enough, the money is deposited into Chain Wise's account. I also agree with Mr Ling's second point that [the plaintiff] is complaining, it is because they do not understand the business, the true situation of the business.

42 I was unable to accept the defendant's explanation as he could not explain to my satisfaction what the supposedly "true situation of the business" was. As highlighted above, there was overwhelming evidence that Chain Wise was not incorporated for the plaintiff's interests, and the defendant had failed to show the court why it should regard otherwise. On the evidence, I found that Chain Wise was involved in actual competition with the plaintiff.

Summary on the business of Chain Wise

43 With all the evidence that was adduced against the defendant, the conclusion was that Chain Wise was incorporated as a competing company to the plaintiff. It explained why the defendant never disclosed the incorporation to the plaintiff's board of directors, or to Koryo's board of directors. The defendant had not acted in the plaintiff's best interests when he caused the plaintiff to buy Luxpro MP3 players which he knew or reasonably ought to know, could be and was a loss-making venture. It was evidently also a self-preservation step as he wanted to shield his own company, Chain Wise, from the losses.

44 With the above evidence in mind, I now proceed to examine the transactions which formed the other limbs of the plaintiff's claim against the defendant.

The drawing of two cheques amounting to S$153,249.05 by the defendant

45 As the plaintiff's managing director, the defendant was the sole signatory of all the bank accounts of the plaintiff. It was not disputed that the defendant drew two cheques (cheque no 822867 dated 12 March 2007 for the sum of S$53,486.30 and cheque no 259938 dated 23 May 2007 for the sum of S$99,762.75) from the plaintiff's bank account with himself as the payee. The collective value of the two cheques is S$153,249.05. The defendant then deposited the two cheques into his personal bank account and retained the amount.

46 The defendant's defence was that he was entitled to those payments because they were partial repayments of the plaintiff's indebtedness to him. According to the defendant, during his tenure as the managing director of the plaintiff, he had personally made payments to the plaintiff's suppliers on behalf of the plaintiff whenever the plaintiff's cashflow was tight. After he made those payments, the defendant claimed that he would inform Adrian about the transactions and instruct Adrian o record the same as interest-free director loans. However, he did not know if Adrian did in fact record those transactions in the plaintiff's books of accounts.

47 In support of his defence, the defendant compiled a list of payments allegedly made by him or Chain Wise on behalf of the plaintiff. Each payment was supported by a remittance document ("TT document") and/or bank statement of account ("SOA") showing a remittance or withdrawal of the corresponding amount. The list given by the defendant was as follows:

	Date	Amount	Beneficiary	Evidence
(a)	16.06.2006	US$21,540.00	Ring Line Corp	TT document Taiwan SOA
(b)	14.08.2006	US$4,200.00	PC Home Online Inc	TT document
(c)	14.08.2006	US$15,018.00	Ring Line Corp	TT document
(d)	04.09.2006	US$20,000.00	Luxpro Corp	OCBC SOA
(e)	05.10.2006	NT989,690.00	Ring Line Corp	TT document Taiwan SOA
(f)	05.10.2006	US$23,000.00	Luxpro Corp	TT document Taiwan SOA
(g)	05.10.2006	US$14,788.00	PC Home Online Inc	TT document Taiwan SOA
(h)	10.11.2006	NT927,861.00	PC Home Online Inc	TT document
(i)	10.11.2006	NT457,297.00	Huasum Technology Corp	TT document
(j)	22.11.2006	US$1,912.00	Ring Line Corp	OCBC SOA
(k)	22.11.2006	US$2,970.00	PC Home Online Inc	OCBC SOA
(l)	27.11.2006	US$21,400.00	Luxpro Corp	OCBC SOA
(m)	04.12.2006	US$5,795.00	Ring Line Corp	OCBC SOA
(n)	04.12.2006	US$18,750.00	PC Home Online Inc	TT document OCBC SOA
(o)	06.12.2006	US$12,125.00	Huasum Technology Corp	TT document DBS SOA
(p)	22.12.2006	US$11,750.00	Luxpro Corp	OCBC SOA
(q)	18.01.2007	US$20,750.00	Luxpro Corp	TT document DBS SOA

48 The defendant then adduced six invoices which were issued by the plaintiff's suppliers to the plaintiff. He then sought to account for the payment of each invoice by matching them to payments in the list, *viz*, that he had helped the plaintiff to make payment under the invoices.

49 It should be noted that in the course of trial, the defendant asked to delete invoices (d), (e)

and (f) below, and also the corresponding payments (n), (p) and (q) at [46] above. However, by the close of the trial, the defendant had changed his mind and reinstated all three items. The evidence was as follows:

	Invoice	Amount	Comments
(a)	Luxpro IV061016001	US$43,000.00	Payment accounted for by (d) and (f).
(b)	Luxpro IV061204001	US$21,400.00	Payment accounted for by (l)
(c)	Huasum No 951030	US$26,050.00	Payment accounted for by (i) and (o). Note that NT457,297= USD13,925.0.0
(d)	PC Home Online PH200612071-R	US$37,500.00	50% payment accounted for by (n).
(e)	Luxpro IV070122001	US$23,500.00	Payment accounted for by (p) and (q).
(f)	Luxpro IV070205001	US$9,000.00	Payment accounted for by (p) and (q).

50 The total amount of the 17 payments as listed in [47] was US$193,998.00 and NT2,374,848.00. This amount of course, exceeded S$153,249.05 as claimed by the plaintiff, and as argued by the defendant, entitled him to retain S$153,249.05 to offset the debt. The alleged payments also constituted the basis of the defendant's counterclaim which I will discuss later.

Assessment of the defendant's defence

51 As the defendant had admitted that he had taken the money, the onus then fell on the defendant to prove his counterclaim. I did not think that the defendant had discharged his onus as the evidence he adduced to the court did not support his counterclaim.

No records of such loans

52 First and foremost, Adrian denied that the defendant had asked him to record any such "director loans" or that the defendant had made payments on behalf of the plaintiff. The plaintiff's audited financial statements did not reflect any such loans.

53 The defendant did not challenge Adrian on his evidence. When the defendant was asked why he had never queried or challenged the plaintiff's statement of accounts, his excuse was that he did not concern himself with accounting matters. I found it hard to believe that as a managing-director, the defendant could take such a nonchalant attitude towards the accounts of the company, and even more so towards the recording of his personal loans to the company.

No records of reimbursement claims

54 In any case, the plaintiff adduced uncontested evidence that on 25 May 2007, the defendant

filled out a claim for reimbursement of expenses incurred on behalf of the plaintiff in the sum of S$22,870.71. It was strange therefore why the defendant could not file a similar record before he drew the second cheque (cheque no 259938) two days earlier on 23 May 2007 for the sum of S$99,762.75. When he was questioned, the defendant recanted his position and said that he did fill out a form for the claim of S$99,762.75 but that he had handed it over to the plaintiff and did not know where it was. This important fact was not mentioned in his AEIC which cast doubt that the defendant had indeed filled out such a form and on his credibility.

Payments made by Chain Wise

55 According to the defendant, 10 of the 17 payments were made by Chain Wise to the various suppliers. They were payments listed as (a) – (d), (j) - (n) and (p) at [47]. However, upon perusal of the list and the corresponding documents, it was clear to me that payment (g) was also connected to Chain Wise. Under the corresponding TT document for payment (g), Chain Wise's name was stated under "Message for Payee". Therefore, at least 11 of the 17 payments listed by the defendant were made by Chain Wise and not only 10 as stated by the defendant.

56 This point was important because payments by Chain Wise should not be attributed to the defendant. If Chain Wise had indeed made payments on behalf of the plaintiff, then Chain Wise was the proper party to be counterclaiming the debt from the plaintiff. Whatever money which the defendant claimed was owing to him by Chain Wise should be claimed directly from Chain Wise and not offset against the alleged debt owed by the plaintiff to Chain Wise.

57 In any case, notwithstanding the above observation, I did not think that the defendant had shown that payments made by Chain Wise to the various suppliers equated to him or Chain Wise making payment on behalf of the plaintiff. To do so, the defendant needed to satisfy the court that Chain Wise was incorporated with the purpose of facilitating the plaintiff's business. Otherwise I saw no reason why Chain Wise would pay for the plaintiff. As discussed earlier (at [37]), I did not think that Chain Wise was incorporated for the purpose of facilitating the plaintiff's business.

58 Moreover, although the plaintiff accepted that the rest of the suppliers in the list, namely Ring Line Corp, PC Home Online Inc and Huasum Technology Corp were its suppliers, it was also possible that the same suppliers were also serving Chain Wise and Chain Wise was simply making payment for itself and/or that the defendant was making payment on behalf of Chain Wise. This was all the more so since Chain Wise's business was the same as the plaintiff's, and the defendant was familiar with those suppliers as he had worked with them as the plaintiff's managing-director. The possibilities were numerous and I did not want to speculate, save to say that the casual link between Chain Wise and the defendant paying those suppliers and equating these payments to those on behalf of the plaintiff was too remote. It should be noted that other than the six invoices adduced at [49], the defendant did not adduce other invoices which supported the rest of the payments allegedly made on behalf of the plaintiff.

Further reasons to doubt the defendant's evidence

59 It was the plaintiff's case that it had made all the payments listed in the six invoices in [49]. In support, the plaintiff produced the plaintiff's bank statement which showed that an amount of US$23,500.00 was debited from the plaintiff's bank account and paid to Luxpro on 12 March 2007 (for payment towards invoice (e) at [49] above). Similarly, the plaintiff adduced to the court the plaintiff's bank statement which showed that an amount of US$9,000.00 was debited from the plaintiff's bank account and paid to Luxpro on 3 April 2007 (towards payment of (f) at [49] above). Notwithstanding that, the receipts of those payments did not mean that they were payments towards those specific

invoices (unless as an example, the payments made reference to the invoice number). I therefore did not find the evidence conclusive in the plaintiff's favour either. However, they raised doubts on the defendant's claim that he was the person who had made the payments.

60 The plaintiff also referred to evidence that showed that the payment made by the defendant and Chain Wise was really payment towards Chain Wise's own debt owed to Luxpro. As stated in [40], the defendant had accepted that Chain Wise entered into three transactions with Luxpro. Of the three transactions, one was for an order of goods worth US$20,000 on 31 August 2006. Therefore the defendant's payment of US$20,000 to Luxpro on 4 September 2006 set out in [47(d)] above, could be payment towards Chain Wise's transaction as the dates of the order and payment were very close. The defendant ultimately conceded that it was possible that the payment could be for Chain Wise's order with Luxpro on 31 August 2006.

61 As for the invoice issued by Huasum Technology to the plaintiff for US$26,050.00, the defendant claimed he made two partial payments towards that performa invoice, namely payment referred to as (i) of NT457,297 and (o) of US$12,125 (at [47]). He explained that NT457,297 converted to US currency equated to US$13,925. Hence, US$13,925 and US$12,125 totalled US$26,050.00 as invoiced. Even assuming that the exchange rate used by the defendant was accurate, that still left a perplexing question – Why would the defendant make payment of an invoice issued in US dollars in Taiwan currency? It did not make business or accounting sense.

62 In my view, the inconclusive evidence revealed how the defendant "mixed and matched" the invoices to the payments to achieve the results he desired. The defendant himself admitted that he did so which meant that his defence was largely based on unsubstantiated and/or speculative evidence. It must be remembered that the defendant had the burden of proving the positive defence he asserted.

Plaintiff had no cash flow problem

63 Lastly, according to the defendant, he had personally made the payments on behalf of the plaintiff because the plaintiff encountered cash flow problems. However, when one looked at the plaintiff's financial statements for 2006, which was the period the defendant claimed to have made the payments, the plaintiff's cash flow was in fact very healthy: as of 31 December 2005, the plaintiff had cash and bank balance of S$1.9m, and in the year ended 2006, the figure was around S$1.45m. There was no need for the defendant to advance payment on the plaintiff's behalf.

Summary

64 For all the reasons stated earlier, I did not accept the defendant's defence that he had made loans to the plaintiff, and/or that he made payments on behalf of the plaintiff. There was therefore no justification for the defendant to pay himself the amounts in the two cheques.

The retention of S$7,251.00 by the defendant

65 I move now to the next issue – the retention of S$7,251.00. By way of background, on 8 March 2007, the plaintiff had participated in the computer and related accessories exhibition known as Comex. The sum of S$7,251.00 represented the sale proceeds of the plaintiff's electronic products that day. It was not disputed that the defendant retained this sum of money and did not account for it to the plaintiff.

66 Once again, the onus was on the defendant to prove that he had a legitimate reason for taking

and keeping the money. The defendant's initial position was that he had taken the sum as none of the other staff wanted to bring the monies back to the office. Hence, as a matter of convenience, he kept the money to offset travelling expenses that he had already incurred, as well as to offset travelling expenses he would incur in the future. The defendant claimed in his AEIC that he told his staff, one Shih Ai Ai Ivy ("Shih") and one Low Teow Bee Anna ("Low") about the arrangement.

67 Shih (PW4) testified that the defendant had not told her about such an arrangement. This was the same for Low (PW2). During cross-examination, the defendant changed his stance and claimed that he did not tell Low about taking the money, but that he had told Adrian. This was not the first time the defendant had changed his evidence mid-stream and cast doubt on his credibility.

68 It was also not disputed that the defendant had not filed any claim for reimbursement of his alleged travelling expenses prior to and after the taking the money. The defendant's AEIC only stated that the plaintiff owed him the various travelling expenses after the suit was commenced. The expenses as stated by the defendant were as follows:

1.	G Hotel expenses 9.5.07 – 10.5.07	RM247.25
2.	Evergreen Laurel Hotel expenses 7.12.06- 8.12.06	RM170.00
3.	Evergreen Laurel Hotel expenses 29.01.07-30.01.07	RM200.00
4.	Sheraton Penang Hotel expenses 28.01.07 – 29.01.07	RM113.25
5.	The Sultan Hotel expenses 2.05.07 – 6.5.07	RP2,405,000
6.	The Sultan Hotel expenses 2.05.07 – 6.5.07	RP2,540,000
7.	Grand Mercure Roxy Hotel expenses 15.6.07 – 17.6.07	S$293.73
8.	Singapore Airlines expenses 16.10.06	RM896.00
9.	Toko Sepatu Swiss expenses 5.05.07	RP478,900
10.	Malaysia Airline expenses 26.01.07	S$474.00
11.	Airfare from Singapore to Taiwan for the Defendant's wife and 2 children which was about S$500.00 per person	US$800.00

He produced all the invoices in court save for item 11 which he claimed to have misplaced.

69 In the first place, the explanation that he wanted to use the money to offset future travelling expenses was unacceptable. Out of the 11 items, only five were incurred before the Comex exhibition. The rest bore dates after the Comex exhibition. I saw no reason for the defendant to retain money to offset future travelling expenses which had yet to be incurred at the time he took the money.

70 It bears remembering that the defendant had submitted a very detailed reimbursement claim form on 25 May 2007 for an amount of S$22,870.71 (see [54]). Save for items no 7 and 11, all the other items were incurred before 25 May 2007. The pertinent question to ask was, why had the defendant not given credit for the S$7,251.00 in his hands when he made his reimbursement claim? Afterall, it was the defendant's own case that he had intended to offset those monies against future travelling expenses. When questioned, the defendant told the court that he had told Adrian to offset the moneys, but Adrian had failed to do so. This point was again not stated in any of the defendant's prior affidavits or in his AEIC. I therefore disregarded the excuse as it was an afterthought.

71 From the claim form of 25 May 2007, it was evident that the defendant knew the proper procedure to claim reimbursement of expenses. It was therefore odd that the defendant had not filled out such a form for claims after 25 May 2007 if they were really legitimate. If he had not done so before he took the money, then he should have done so after taking the money and/or as soon as his expenses were incurred.

72 Even if the court proceeded on the basis that the expenses were legitimate, the 11 items amounted to no more than S$3,700.00 (after taking into account the relevant exchange rates). It did not justify the defendant retaining S$7,251.00.

73 In any case, a closer inspection of the receipts revealed further cracks in the defendant's case. First, the receipt for item 1 in the sum of RM247.25 for expenses at G Hotel stated that the hotel reservation was made by one Hikali Corporation Sdn Bhd. When he was cross-examined, the defendant claimed Hikali Corporation Sdn Bhd was a subsidiary of the plaintiff of which he was also the managing director. This, however, was hardly a valid reason. The defendant could not make a claim against the plaintiff when Hikali was the party liable as the two companies were separate entities even if Hikali was a subsidiary if the plaintiff.

74 Second, looking at the two receipts from Sultan Hotel (at items no 5 and 6), one receipt (ie. item 5) was addressed to one Brian Wang. The defendant claimed that he paid for Brian Wang, who was the plaintiff's staff. However, on the face of the receipt, it was not evident that the defendant had made payment for Brian Wang. The defendant should have submitted better evidence to substantiate his claim. It was unsafe to rely on the defendant's bare assertion.

75 Third, the receipt of Grand Mercure Roxy Hotel (item no. 7 on the list) was addressed to one Tsai Shih Tser ("Tsai"). This time, the defendant did adduce a credit card statement in his name to show that he had paid for this item. However, the plaintiff stated that it did not know the gentleman. Although the defendant claimed that Tsai was engaged by the plaintiff to help in maintenance of the plaintiff's computers, he was unable to substantiate his bare assertion.

76 Fourth, the receipt of Toko Sepatu Swiss (item no. 9), was an item relating to two pairs of shoes bought in Indonesia. The plaintiff questioned the defendant's claim for this item. The defendant replied that this was a receipt passed on to him by an ex-employee of the plaintiff, one Victor. He had made the payment on behalf of Victor, but he did not know it was for shoes as he could not read Bahasa Indonesia, the language in which the receipt was issued. As with the receipt of Grand Mercure Roxy Hotel, the court was unable to rely on the defendant's bare assertion that the expense for shoes was incurred on behalf of the plaintiff. On the face of the receipt, it certainly looked like a personal expense item.

77 As for item 11 on the expense relating to the relocation of the defendant's family back to Taiwan, the defendant submitted an email written by the plaintiff to the defendant stating, *inter alia*, that the defendant was entitled to a maximum reimbursement of US$800 relating to the relocation of the defendant's family. However, as was also clearly stated in the email, the claim must be based on actual spending with legalised receipts. It was not disputed that the defendant had not submitted any receipts relating to this claim. Therefore, the defendant's claim could not be accepted.

78 As for the remaining items, the defendant did not explain how and for what purpose those expenses had been incurred. The defendant failed to discharge his burden of proof.

79 At the conclusion of the trial, the defendant, in his closing submissions, conceded that he "did wrongly take the money but not intentionally" and that he was "willing to return it by deducting the

amount from [his] claim". The defendant was not entitled to retain the S$7,251.00.

The payment to Jetstar

80 I move next to the payment of US$30,000.00 made by the plaintiff to Jetstar Asia Airways Pte Ltd ("Jetstar"). The plaintiff's case was that the defendant caused the plaintiff to make this payment for the benefit of Chain Wise.

81 The undisputed evidence was that Chain Wise and Jetstar had entered into an agreement wherein Jetstar was to provide in-flight sales and advertising for Chain Wise (the "Jetstar agreement"). On 4 May 2006, Jetstar issued Chain Wise an invoice for services rendered for the sum of S$50,000.00. After repeated reminders for payment, the defendant finally requested Jetstar to reissue the invoice to the plaintiff in an email which read:

> Please re-issue the invoice of SDG$40,000 [sic] to Kogen Singapore PTE LTD [the plaintiff]...
>
> I will arrange payment once received your invoice.

82 Subsequently the representative of Jetstar wrote back stating:

> I would appreciate if your company could issue us a formal letter with a Kogen letterhead saying that Kogen will settle the outstanding balance of the Invoice's which is $40,000 instead of Chain Wise.
>
> We need this letter to support the contract between Jetstar Asia Pte Ltd & Chain Wise.

83 From Jetstar's reply, it was evident that Jetstar knew its contracting party was Chain Wise and not the plaintiff; it was not comfortable addressing its invoice to the plaintiff without other supporting documents. Subsequently, Jetstar did issue the invoice to the plaintiff as instructed by the defendant. The plaintiff then made partial payment of S$30,000 to Jetstar under that invoice.

84 The defendant's explanation was that the said invoice related to the advertisement and exclusive in-flight sale of the plaintiff's products, therefore the plaintiff was the proper party to make the payment. This was incredible as if that was the case, the proper party to enter into the Jetstar agreement would have been the plaintiff and not Chain Wise. The defendant would also have asked Jetstar to address its invoice to the plaintiff at the first instance and not only after repeated reminders for payments. On the other hand, the defendant was unable to prove that Jetstar was advertising and selling the plaintiff's products.

85 The defendant ultimately conceded under cross examination that he had no basis to make the plaintiff pay Jetstar on behalf of Chain Wise:

> Q ...you had no basis and you were wrong to make Kogen pay for these services provided by Jetstar under a contract which Chain Wise had entered into and hence you were in breach of your fiduciary duties to Kogen. Do you agree with me?
>
> A: Agree.

86 In his closing submissions, the defendant stated that he was "willing to deduct S$30,000.00 from [his] claim to show [his] promised support to [the plaintiff's] end product sales in 2006". Notwithstanding what the defendant stated about showing support, I was of the view that the defendant had no right to make the plaintiff pay the US$30,000.00 to Jetstar in the first place.

Conversion of goods by the defendant

87 The last of the plaintiff's claims against the defendant was for the conversion of goods. The plaintiff claimed that the defendant, in his capacity as the managing-director of the plaintiff, took delivery of the following goods on behalf of the plaintiff:

(a) US$40,000.00 worth of Jammers from supplier, Winpower Electronic Co Ltd;

(b) US$10,000.00 worth of DVD players from supplier, Protop Technology Co Ltd; and

(c) US$7,400.00 worth of Jammers from supplier, Ring Line Corporation.

The defendant failed to account to the plaintiff for those goods (henceforth collectively referred to as the "Unaccounted Goods"). The total value of the Unaccounted Goods was US$57,400.00.

88 Adrian testified that the plaintiff had not received the Unaccounted Goods despite having paid for them on the defendant's instructions. Basically, the Unaccounted Goods did not form part of the plaintiff's inventory, and it was the plaintiff's case that they remained missing to-date.

89 The defendant's defence was that he knew nothing about the Unaccounted Goods, and that while he might have authorised purchases from suppliers on behalf of the plaintiff, he was never in charge of taking delivery of goods.

90 The defendant's claim that he knew nothing about the delivery of goods was discredited under cross-examination. The plaintiff adduced email correspondence to show that the defendant had consistently been kept in the loop with regard to the delivery of goods. In particular, he was kept informed of the delivery of Protop goods (item no (b) on the list at [87]). The courier was also asked to call the defendant's handphone before he arrived at the plaintiff's warehouse at Pan Tech (the "Pan Tech" warehouse) to make delivery. This supported the plaintiff's contention that only the defendant had the key and access to the Pan Tech warehouse and hence he was very much involved in the delivery of the Unaccounted Goods.

91 The defendant conceded subsequently that he controlled the movement of the goods as can be seen from the following extracts from the notes of evidence:

Q: Essentially you are the one controlling the movement of goods arriving, right?

A: Yes, I already know. I already state here that I control the warehouse key.

Q: By virtue of that, you control the goods arriving and where they are to be stored?

A: After the goods arrive, I just lock it, that's it.

This was a far cry from the defendant's initial position that he knew nothing about the goods and that he was not in charge of delivery.

92 On a balance of probabilities, the plaintiff had proven that the defendant took delivery of the goods as he was the man who handled all three deliveries. While the plaintiff had Adrian as a witness to affirm that the plaintiff had never received those goods, the defendant had no evidence whatsoever to prove that he had not taken the goods. The defendant's unsatisfactory testimony on taking delivery of the goods also indicated that he had something to hide. I therefore allowed the plaintiff's claim.

The defendant's counterclaim

93 The defendant's counterclaim involved the payments he claimed were made on behalf of the plaintiff (see [47] above) and the reimbursements to which he claimed he was entitled (see [68] above). As pointed out earlier (at [73] to [78]), I entertained doubts that the payments were really made on behalf of the plaintiff and that the expenses were legitimate. The defendant was unable to substantiate his claim with cogent evidence, relying only on his bare assertions. I therefore dismissed the defendant's counterclaim.

Conclusion

94 Consequently, I awarded the plaintiff judgment as claimed (save for damages in respect of the statutory records). The defendant was in breach of his fiduciary duties to the plaintiff and I held him liable to account to the plaintiff for the sums of S$153,249.05 (being the total amount wrongfully withdrawn by the defendant from the plaintiff's bank account), and S$7,251.00 (being the proceeds of sale at the Comex exhibition received by the defendant for and on behalf of the plaintiff). I further ordered the defendant to refund the plaintiff S$30,000 that was paid to Jetstar. In addition, the defendant was ordered to deliver up the Unaccounted Goods or he had to pay to the plaintiff the sum of US$57,400.00 for the total value of the Unaccounted Goods. Alternatively, at the plaintiff's election, the defendant was to pay damages to the plaintiff for conversion of the Unaccounted Goods, which damages were to be assessed by the Registrar at a later date with the costs of such assessment reserved to the Registrar. Interest on the judgment sums of S$153,249.05 and S$7,251.00 was also awarded to the plaintiff together with costs of the plaintiff's claim and the defendant's counterclaim which are to be taxed unless otherwise agreed.

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