Baldor Electric (Asia) Pte Ltd *v* Liew Chin Choy and others
[2010] SGHC 32

Case Number : Suit No 439 of 2006

Decision Date : 28 January 2010

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Suresh Nair (Allen & Gledhill LLP), Ng Lip Chih (NLC Asia Law LLP) and Eunice Chew (Allen & Gledhill LLP) for the plaintiff; David Liew (DSH Law Corporation) for the first and second defendants; Joseph Tan and Corinne Taylor (Legal Solutions LLC) for the third defendant.

Parties : Baldor Electric (Asia) Pte Ltd — Liew Chin Choy and others

Employment law – Employees' duties

28 January 2010

Tay Yong Kwang J:

Introduction

1 The plaintiff, Baldor Electric (Asia) Pte Ltd ("Baldor") is suing the first defendant, Liew Chin Choy ("Liew") for alleged breaches of his fiduciary duties and/or duties of fidelity and good faith and duties of confidentiality owed to it as its Sales Manager. Baldor also claims against the second defendant, Neo Bee Hong ("Neo"), Liew's wife, as constructive trustee for moneys she received on behalf of Liew acting in breach of his duties. Baldor claims against the third defendant, WEG Export Adora S.A. ("WEG") for inducing Liew to breach his duties to Baldor and/or for unlawful interference in and as constructive trustee in respect of corporate opportunities diverted to WEG by Liew. Baldor has a further claim against Liew and WEG for conspiracy to defraud Baldor. Finally Liew counterclaims against Baldor for his loss of employment as a result of the commencement of this action.

2 The trial was on the question of liability only. At the conclusion of the evidence, parties requested time for written submissions to be exchanged. The final set of written submissions (the plaintiff's reply) was filed on 17 December 2009.

Background facts

3 Baldor's parent company Baldor Electric Company ("Baldor US") specialises in the marketing, designing and manufacturing of electric motors, drives and generators. Baldor is in charge of the sale of Baldor US's products to distributors, original equipment manufacturers and direct customers in Asia.

4 Liew was employed by Baldor as its Assistant Sales Manager on 1 October 1999. With effect from 1 January 2002, Liew was promoted to Sales Manager of Baldor. As Sales Manager, Liew was responsible for the sales and marketing of Baldor US's motors in Singapore, Malaysia, Indonesia, Brunei, Thailand and Vietnam, in various industries, in particular the oil and gas industry. He reported directly to Tan Peng Yong ("Tan"), the Managing Director of Baldor.

5 PT Kenvin Elektrika Makmur ("PT Kenvin") was incorporated on 7 August 2002 in Indonesia. Liew

became the second bank signatory for PT Kenvin's bank account before it was incorporated. Liew issued two letters under Baldor's letterhead dated 1 May 2003 and 4 May 2004 certifying that PT Kenvin was Baldor's authorised distributor/agent in Indonesia. Neo opened a DBS Bank US Dollar Account No 0023-XXXXXX-XX-X-XXX ("USD account") on 17 May 2003 and received into her USD account USD15,000 from PT Kenvin ("First Secret Payment") on 23 May 2003 and a further sum of USD5,000 into her USD account from PT Kenvin ("Second Secret Payment") on 25 May 2004. Around July 2005, Liew received USD9,000 ("Third Secret Payment") from PT Sarana Teknik Industri ("PT Sarana"), a customer of PT Kenvin and around August 2005, Liew received S$2,450 ("Fourth Secret Payment") from CV Surya Cipta Pratama ("CV Surya"), another customer of PT Kenvin. Collectively, I shall refer to the four payments as Secret Payments.

6 Liew resigned and left Baldor's employment on 30 September 2005. He commenced employment with WEG on 1 October 2005 as Managing Director of WEG Singapore Pte Ltd ("WEG Singapore") which was registered in Singapore on 17 October 2005. WEG was founded on 25 September 2001 with its headquarters in Brazil. WEG is in the business of providing solutions with electric machines, including the designing and manufacturing of electric motors and automation for industry and energy systems.

7 Liew's relationship with WEG begun after Liew initiated contact via email with WEG sometime in or around February 2005. There was no contact between WEG and Liew until Djalma Luis Wolf ("Wolf"), the Export Manager for Asian Markets for WEG (as he then was), spoke to Liew on 22 April 2005 over the telephone regarding Liew's proposal to assist WEG in opening a branch office in Singapore. Further communication between Liew and WEG representatives took place via email as well as via face-to-face meetings before Liew was employed by WEG. On or around 16 May 2005, Liew met Sergio Luiz Silva Schwartz ("Schwartz"), a director of WEG, in Nantong City, China. From 1 to 4 August 2005, Liew met several of the directors and managers of WEG in Brazil. Sometime in late August 2005, Wolf and Schwartz met Liew in Singapore before the three of them proceeded to Indonesia and Taiwan.

8 Between 8 August and 30 August 2005, Liew sent four sales enquiries he received in his capacity as employee of Baldor to Wolf. Wolf provided WEG quotations for the four sales enquiries to Liew.

9 On 6 September 2005, WEG sent the finalised employment contract to Liew, paving the way for his move to WEG Singapore on 1 October 2005.

10 Following a letter dated 17 October 2005 from one Mdm Hajjah Widyantari Darwin ("Mdm Widya") to Baldor, Baldor commenced investigations into Liew's conduct during the period he was working at Baldor. On 4 November 2005, Baldor's solicitors sent a letter of demand to Liew demanding, amongst other things, the repayment of USD29,000 (see [5] above) which Liew received from PT Kenvin for the sale of Baldor motors by PT Kenvin. Liew replied on 15 November 2005 agreeing to pay the USD29,000 in three instalments. On 23 November 2005, Liew confirmed "I did not receive any monies from any other organisation/companies in the territories nor monies from PT. Kenvin". On 3 December 2005, Baldor's solicitors wrote to Liew stating that in reliance on his express representation that apart from USD29,000, he did not receive any other sums from PT Kenvin, its customers or any other organisation in breach of his duties to Baldor, Baldor accepted his instalment plan and that upon receipt of full payment, Baldor stated that it shall cease to have further claims against Liew in relation to the matters set out in their earlier letter dated 4 November 2005. Liew paid Baldor a total of USD29,000 in three instalments on 5 December 2005, 23 December 2005 and 4 January 2006 using his personal savings as well as a loan of S$10,000 from Thiang Shiang Hiang ("Thiang"), his friend.

11 In or around late December 2005, Tan discovered that Liew had joined WEG. Further, in or around February 2006, Tan discovered that Liew had received a payment of S$2,450 from another of P T Kenvin's customers CV Surya in or around August 2005, contrary to Liew's confirmation on 23 November 2005 that he had not received money from any other company.

12 On 3 February 2006, TecBiz FRisMan Pte Ltd ("TechBiz") was engaged by Baldor to retrieve email messages from a Fujitsu laptop computer ("Fujitsu Laptop") which had been assigned to Liew during his employment with Baldor.

13 With effect from 1 November 2006, WEG terminated Liew's employment contract. Liew then started a new company, Motor Technology Asia and was appointed as WEG's agent in Singapore in December 2006. This appointment has since been terminated.

Baldor's case

14 I shall deal briefly with the interlocutory applications before going into the substance of the case. In SUM 5573 of 2009, Baldor sought leave for the first Affidavit of Evidence-in-Chief ("AEIC") of Mdm Widya dated 14 December 2007 ("First AEIC") on behalf of Baldor to be received in evidence notwithstanding her non-attendance at the trial for cross-examination. Subsequent to her First AEIC, Mdm Widya signed a supplementary AEIC on 5 February 2008 ("Supplementary AEIC") stating that she signed her First AEIC without properly understanding the contents therein. Mdm Widya then signed a second supplementary AEIC dated 4 September 2009 ("Second Supplementary AEIC") to reply to various allegations made by Baldor's witnesses against her in their AEICs, but leave for Liew to file Mdm Widya's Second Supplementary AEIC was refused by an Assistant Registrar (in SUM 4983 of 2009). Given that Mdm Widya was not giving evidence in court and she had substantially changed her evidence on affidavit, I disallowed the application in SUM 5573 of 2009 and ordered that all the AEICs of Mdm Widya not be admitted into evidence as I would not be in a position to assess the reliability of Mdm Widya's evidence since she was not going to testify in court.

15 In the light of my decision in relation to SUM 5573 of 2009, I disallowed Baldor's application in SUM 5420 of 2009 to call Chew Siang Tong to give evidence as to how Mdm Widya's Supplementary AEIC came about. I also refused leave to Baldor to call Maya Augustin, a translator who translated one Mr Indra Tjia's AEIC (see [26] below) to him, because the translation of Indra Tjia's AEIC was not in issue.

16 Moving to the substantive claims in this suit, Baldor claims against Liew for breaches of fiduciary duties and/or duties of fidelity and good faith and duties of confidentiality owed to it as its Sales Manager. Baldor alleges that Liew breached his duties by (see paragraphs 10 and 11 of the Statement of Claim (Amendment No 2)):

i) placing himself in a position where his interests conflicted with Baldor's interest and made secret profits and/or received secret payments;

ii) diverting corporate opportunities to PT Kenvin and WEG; and

iii) using or disclosing confidential information belonging to Baldor (or will use or disclose it).

17 The confidential information which Baldor alleges in its pleadings that Liew has used or disclosed or will use or disclose is the information obtained by Liew in:

i) the course materials for the one-on-one generator training in Oshkosh & Mukwonago from 8 March to 12 March 2005; and

ii) all the information set out in the course materials for the H2 Drive course from 14 March to 16 March 2005.

I shall refer to the alleged confidential information collectively as the Baldor Information ("Baldor Information"). Baldor also claims S$15,052.27 from Liew for the cost of the two Baldor courses which Liew attended in the US.

18 Baldor claims against Neo as constructive trustee for monies received by her on behalf of Liew, which Baldor alleges Liew received in breach of his duties to Baldor. Baldor further claims against WEG for inducing Liew to breach his duties to Baldor and/or for unlawful interference in and as constructive trustee in respect of the corporate opportunities diverted to it by Liew.

Liew's Defence and Counterclaim

19 Liew (in his Defence and Counterclaim (Amendment No 2)) denies that he owed fiduciary duties to Baldor. He denies having any interest in Baldor. He pleaded that he assisted PT Kenvin to further the interest of Baldor but not as consultant to PT Kenvin. He also pleaded that the receipt of the First and Second Secret Payments from PT Kenvin into Neo's USD account on 23 May 2003 and 25 May 2004 were in fact repayments of personal loans he had made to Mdm Widya.

20 Liew also denies that Baldor is entitled to a refund of the alleged costs and expenses for the Baldor courses in the sum of S$15,052.27 on the ground that he did not apply for the courses. Instead, it was Tan who wanted him to attend the training courses.

21 In relation to the Baldor Information, Liew pleaded that much of the information was available in the public domain and he had no intention to pass confidential information to WEG for the purposes of commercial profit or advantage. Further, no loss or damage has resulted to Baldor.

22 Neo (in her Defence (Amendment No 2)) denies that she was a nominee for Liew and that she had received money arising out of a breach of Liew's duties owed to Baldor.

23 In the light of the fact that Liew was asked to leave WEG's employment and has not been able to seek gainful employment that offered the same remuneration as his employment with WEG, Liew counterclaims against Baldor for losses and damages due to him as a result of Baldor's action against him.

24 Liew and WEG deny Baldor's claim of conspiracy to defraud Baldor and WEG denied all other alleged wrongdoing.

Issues raised in the present Suit

25 The main issues raised in this Suit are as follows:

a) Whether Liew has breached his duties of good faith and fidelity and fiduciary duties to Baldor as its Sales Manager;

b) Whether the Baldor Information was in fact confidential and if so, whether Liew has disclosed or will divulge such information to WEG;

c) Whether Neo is liable as constructive trustee of the receipt of secret profits from PT Kenvin;

d) Whether the alleged conspiracy between Liew and WEG to damage the interest of Baldor has been made out; and

e) Whether WEG had induced Liew to breach his duties owed to Baldor and was constructive trustee for corporate opportunities diverted from Baldor to WEG.

Summary of the evidence

PW1 Indra Tjia

26 Indra Tjia is the Managing Director of PT Sarana. PT Sarana had a joint venture with a Singapore company resulting in a joint venture company known as PT Sarana Sentral Industri ("PT Sarana Sentral"). PT Sarana Sentral accumulated debts owed to Baldor and PT Sarana undertook to repay PT Sarana Sentral's outstanding debt to Baldor in instalments. Indra Tjia's evidence was that during the period when PT Sarana was paying the said instalments to Baldor, Liew told him that instead of dealing directly with Baldor, he should deal with PT Kenvin instead. He assumed that it was because PT Sarana Sentral owed money to Baldor that Baldor did not want to deal directly with PT Sarana. Even after PT Sarana Sentral's debt had been repaid, Liew told him that it would not be possible for Baldor to deal with PT Sarana directly as Baldor US did not wish to sell Baldor products to PT Sarana (see paragraph 7 of Indra Tjia's affidavit).

27 In his early dealings with PT Kenvin, the monies due to PT Kenvin would be collected by Selfi Gloria, PT Kenvin's accountant, and after she left, one Ms Yani. On one occasion in or around 7 July 2005, Ms Yani telephoned him and told him that Liew would collect the money that was payable to PT Kenvin. According to Indra Tjia, Liew told him that it was necessary for Liew to collect the money because PT Kenvin had not paid Baldor the sums due to it.

PW2 Wilfred Adrian Nathan

28 Wilfred Adrian Nathan ("Nathan") is the senior manager of computer forensics of TechBiz. He was the one who retrieved the email messages from the Fujitsu Laptop.

29 His evidence was that not all documents contained in the hard disk of the Fujitsu Laptop had been retrieved (see NE 26 Oct pg 37, line 29). The data Nathan retrieved from the Fujitsu Laptop included data post-September 2005, which he agreed was not created by Liew as Liew had handed the Fujitsu Laptop to Baldor on 30 September 2005. However, he was of the view that although there were four months between the time Liew handed over the Fujitsu Laptop to Baldor and the time he conducted the retrieval exercise on 3 February 2006, there would have been no opportunity for

someone to plant information into the Fujitsu Laptop given that Windows XP on the Fujitsu Laptop maintained an events log which showed that the last time anyone accessed Liew's account on the Fujitsu Laptop was on 30 September 2005 at 4.40 pm.

PW3 Tan Peng Yong

30 Tan has been the Managing Director of Baldor since 1 October 1996. Tan's evidence is that he was the only person with the authority to appoint distributors for Baldor and that Liew acted outside his authority by issuing letters certifying that PT Kenvin was an authorised distributor of Baldor when Tan had not appointed PT Kenvin as one.

31 Tan was of the view that WEG was a direct competitor of Baldor given that WEG and Baldor sold NEMA (short form for National Electrical Manufacturers Association) and IEC (short form for International Electrotechnical Commission) dimension motors. In relation to the Baldor courses, Tan's evidence was that it was part and parcel of Baldor's policy that sales people like Liew be sent for training to obtain technical knowledge so that they knew the products that they were selling. He alleged that the Baldor Information was confidential because it contained details on Baldor's products that were not available to the public.

PW4 Roy Seah Poh Chieu

32 Roy Seah Poh Chieu ("Seah") is the Senior Regional Sales Manager of Baldor. He was in charge of safekeeping the Fujitsu Laptop after Liew left Baldor. In November 2005, he accessed the Fujitsu Laptop using the administrator user account, created a false ID and a test email address in order to find out who was behind the email address, baldor.jkt. Further, before the Fujitsu Laptop was sent to TechBiz for the recovery of deleted data, Seah used two types of software to extract data from the Fujitsu Laptop in softcopy.

33 Seah's evidence was that Liew had sold Baldor's motors to PT Kenvin at prices lower than those in the pricing guidelines set by Baldor. In relation to the four sales enquiries which Liew sent to WEG, Seah was of the opinion that Baldor had the capacity to quote for them.

DW1 Mr Sergio Luiz Silva Schwartz

34 Schwartz accepted that Baldor and WEG were competitors. However, his evidence was that he did not intend to compete with Baldor. Liew first contacted WEG via email in or around February 2005. Subsequently, Schwartz instructed Wolf to contact Liew. While Schwartz was in Nantong City, China, he met up with Liew on or around 16 May 2005 to have a face to face discussion with Liew regarding Liew's proposal to set up a branch office in Singapore. They conducted further communication via email regarding the proposed functions of a Singapore branch office as well as Liew's forecasts on the sales turnover and profit margins of the intended Singapore branch office. From 1 to 4 August 2005, Liew met several of the directors and managers of WEG at its headquarters in Brazil. Sometime in late August 2005, Wolf and Schwartz met up with Liew in Singapore before the three of them proceeded to Indonesia and Taiwan, where Liew was introduced to WEG's partners in Indonesia and Taiwan. On or about 6 September 2005, WEG sent the finalised employment contract as well as the letter of appointment dated 1 October 2005 to Liew for his signature.

35 Regarding WEG's termination of Liew's employment, Schwartz's evidence (at NE 2/11/2009 at pg 43) was that this action against Liew was one of several reasons for his termination. WEG was also dissatisfied with the performance of Liew as the Managing Director of WEG Singapore. WEG decided to send someone from its headquarters in Brazil to head WEG Singapore as part of a reorganisation and

restructuring exercise in the second half of 2006, thus making Liew redundant. As a result, Liew's employment with WEG was terminated and he became an agent for WEG Singapore in Malaysia, Vietnam, Laos and Cambodia with effect from December 2006.

DW2 Mr Djalma Luis Wolf

36 Wolf is the Managing Director of WEG Singapore. He first communicated with Liew on 22 April 2005 regarding Liew's proposal to set up a Singapore branch office. Subsequently, Wolf met Liew for the first time when Liew visited Brazil from 1 to 4 August 2005. He showed Liew around WEG's factories and assessed Liew's knowledge of motors during the tour. Wolf's evidence was that towards the end of the Brazil trip, Liew offered to refer sales enquiries to WEG. Wolf initially thought it was not proper for WEG to receive such sales enquiries as Liew had not served his resignation on Baldor at that point in time. However, he ultimately decided to accept the sales enquiries on the faith of Liew's assurance that they would be minor enquiries and that Baldor would not be able to provide quotations for the sales enquiries.

37 When Wolf received the four sales enquiries from Liew, he did not know they were bogus sales enquiries and referred them to his team of engineers who prepared the quotations which he then forwarded to Liew via email. However, he did not hear from Liew subsequently in relation to the four quotations and he did not follow up on the enquiries. He maintained that WEG was not a recipient of Baldor's corporate opportunities since it was his belief that Baldor manufactured mainly NEMA standard motors and on the basis of his belief, he cited IEC standard motors only, a different standard for motors. Furthermore, he was not aware in early 2005 that Baldor US had a presence in Asia.

38 Although he explained the lack of documents regarding the sales enquiries between WEG and Liew on the ground that there was an automatic feature in the software in WEG computers deleting emails every few months, he kept emails between Liew and himself (such as the one dated 16 September 2005 in relation to the lease of office space for WEG Singapore) which he thought were important enough to keep.

DW3 Liew Chin Choy

39 Contrary to Tan's evidence that he was part of the senior management of Baldor, Liew stated that he did not consider himself senior management in that he did not report to higher management in Baldor US.

40 Liew denied he had breached his duties by acquiring an interest in PT Kenvin on the basis that he never had an interest in PT Kenvin. He explained that he was invited to be a second signatory to PT Kenvin's bank account because he had lent Mdm Widya, his good friend since late 1994, a total of USD20,000 (substantially in cash in 13 different loans) between 15 July 2002 to 16 January 2004. His evidence was that he received the First and Second Secret Payments on or about 23 May 2003 and 25 May 2004 as repayments of the loans he had made to Mdm Widya.

41 His evidence was that Mdm Widya approached him for a further loan of S$14,400 which he extended to her on 14 October 2004 because PT Kenvin's business was not doing well and she was facing personal financial problems. Further, he did not think it necessary to inform Baldor that he had transferred money to PT Kenvin at the request of Mdm Widya. His explanation for his inability to produce documentary evidence of his personal loans to Widya was that the loans had been fully repaid and he had destroyed his own records of them (see NE 5 Nov pg 117).

42 In relation to the Third Secret Payment, Liew's evidence was that he was merely doing a favour

for his friend Indra Tjia by agreeing to carry USD9,000 in cash from Indra Tjia's office to PT Kenvin's office to pay PT Kenvin for goods ordered from PT Kenvin. Liew also agreed to carry S$2,450 from CV Surya in August 2005 from CV Surya's office to PT Kenvin's office, thereby explaining his receipt of the said sum from CV Surya. His evidence was that he forwarded the Third and Fourth Secret Payments to Mdm Widya before she disappeared around July or August 2005. However, he admitted that it was not part of his responsibilities as Baldor's Sales Manager to collect money from Baldor's distributors' customers.

43 His explanation for selling motors to PT Kenvin at a larger discount than what was set in the guidelines was that it was done with the approval of Tan (see NE 6 Nov pg 95).

44 As for his participation in the management of PT Kenvin (where Baldor produced documentary evidence that Liew was regularly provided with bank balances and profit and loss and balance sheets of PT Kenvin (paragraph 79 of the Plaintiff's Writ of Summons), Liew said that he asked Mdm Widya to prepare all the receipts and bills of PT Kenvin for his verification. Liew's consent was sought in respect of PT Kenvin's mundane operational matters such as mobile telephone line subscriptions, PT Kenvin's listing in the yellow pages and whether PT Kenvin could spend on entertainment for "employee recreation". Liew drafted an internal memo for PT Kenvin dated 1 December 2003 instructing all invoices to be sent to him and to prepare sales for him to sign), his explanation for his role in the management of PT Kenvin was that he was helping Mdm Widya tighten the internal working procedure of PT Kenvin.

45 Liew's evidence in relation to the four diverted sales enquiries from Baldor to WEG was that three out of four of the said enquiries were from Sittipong of Imechanics in Thailand, whom he had known since 1999. He received those enquiries in May or June 2005 and Sittipong told him orally that the motors had to be of IEC standard. Based on his experience as well as after checking with Baldor US, he knew that Baldor could not provide the products stated in the enquiries and informed Sittipong accordingly. In or around June or July 2005 when Liew was in Bangkok, Thailand, he informed Sittipong that he may be joining WEG. Sittipong wanted to find out WEG's capabilities and prices. Liew then sent the same four (then outdated) enquiries to WEG to impress WEG on the one hand and to cultivate a business partner for WEG on the other.

46 Liew's evidence was that he settled PT Kenvin's outstanding debt to Baldor (amounting to USD29,000) out of goodwill since he was in charge of PT Kenvin's account while he was employed by Baldor.

DW4 Neo Bee Hong

47 Neo's evidence was that the USD account was her account, not Liew's, and that it was her decision to open the USD account because she wanted to save money as she was planning a trip to the USA and also for possible investment in foreign exchange.

48 Neo's position on the First and Second Secret Payments was that the money was paid into her USD account as Liew did not have a USD bank account at the material time and Liew had asked her permission to use her USD account after telling her that the First and Second Secret Payments were repayment of loans he had lent to Mdm Widya. Her evidence was that at the material time, she knew that Liew was employed as a Sales Manager of Baldor but she was not aware of the responsibilities or duties he owed to Baldor. She also did not know the nature and repayment of the loans by Mdm Widya to Liew.

49 Her evidence was that she abandoned her plan of putting small monthly amounts into the USD

account because the amounts deposited into the USD account as loan repayment was sufficient for her US trip. However, she did not go on a trip to the USA subsequently as she required the money to pay for her condominium ("the Serangoon View property") which was completed ahead of time.

50 In relation to the Serangoon View property, which was Liew's and Neo's home, Neo's evidence in cross examination was that she had not sold the property. However, when confronted with a title search showing that the property had in fact been sold on 3 September 2009, Neo explained that she was not comfortable telling the court about the sale of the property because she and Liew were in debt and had to raise funds to return loans extended to them by their family and friends as well as to pay for the costs of the present legal proceedings.

DW5 Thiang Shiang Hiang

51 Thiang has been close friends with Liew since they met through a mutual friend in 2001 when Turbomak Asia Pte Ltd became a shareholder of PT Sarana. In 2004, he was approached by Mdm Widya, his colleague, for a loan. He then transferred 60 million rupiah into PT Kenvin's account on the basis that she would sell him a substantial share in PT Kenvin. Throughout his negotiations to buy into PT Kenvin, neither Mdm Widya nor Liew informed him that Liew had 80% share in PT Kenvin. Furthermore, his negotiations proceeded on the basis that Mdm Widya would sell her share and her husband's share in PT Kenvin to him. The shares in PT Kenvin were not transferred to him because Mdm Widya did not turn up for the signing of the documents for the transfer of shares before a notary public in early July 2005 and disappeared thereafter.

Decision of the Court

Whether Liew breached his duty of fidelity and fiduciary duties owed to Baldor as its Sales Manager

52 Baldor alleged that Liew was a fiduciary by virtue of his position as the Sales Manager of Baldor. It should be noted that not all contractual duties owed by employees to their employers are fiduciary duties. In *Nottingham University v Fishel and another* [2000] ICR 1462 (which was followed in *Nagase Singapore Pte Ltd v Ching Kai Huat and Ors* [2007] 3 SLR 265 at [26]), Elias J held that it was important to recognise that the mere fact that Dr Fishel was an employee did not mean that he owed a range of fiduciary duties to the employer. He said:

> [T]he essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. The employee's freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee's decision-making powers.

53 The relationship between an employee's fiduciary relationship and duty of good faith and fidelity was succinctly expressed by Mason J in the High Court of Australia in *Hospital Products Ltd v United States Surgical Corporation* [1984] 156 CLR as follows:

> That contractual and fiduciary relationships may coexist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the

> contractual foundation which is all-important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

54 Baldor sought to rely on *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 at pg 381 to argue that Liew was similarly in a fiduciary relationship with Baldor. There, Laskin J held that O'Malley and Zarzycki, the defendants in that case, as President and Executive Vice-President of the plaintiff company, were not mere servants. However, in contrast to *Canadian Aero Service Ltd v O'Malley*, Liew was only a Sales Manager at Baldor.

55 A more factually similar case to the present facts is *Mitchell v Paxton Forest Products Inc* [2002] BCCA 532 (referred to in *Nagase Singapore Pte Ltd v Ching Kai Huat* [2007] 3 SLR 265 at [31]), where the plaintiff was employed by the defendant as a mill manager and was later promoted to a sales manager. The plaintiff's responsibilities included developing and maintaining the defendant's customer base, marketing its products, setting prices, negotiating terms of sale and dealing with defendant's suppliers. The plaintiff reported to the general board and was not responsible for hiring and firing of employees. While not deciding whether a fiduciary duty applied to the plaintiff, Newbury JA said (at [6]):

> I would tend, if pressed, to say Mr. Mitchell was not "senior management", since he was not entrusted with powers and influence which could materially affect the company's interests. He had managerial responsibilities with regard to sales, but could not approve a purchase over $1,000, had only one clerk reporting to him and could not hire or fire employees. To this extent, his responsibility and authority were unlike those of the defendant in *Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd*., [1996] 7 W.W.R. 736 (Alta. C.A.), who was the manager of the plaintiff's Edmonton office and a director; or the defendants in *Canadian Aero Service Ltd v O'Malley* (1973), [1974] S.C.R. 592 (S.C.C.), who were directors and officers of the plaintiff company.

56 On the present facts, Liew did not attend Baldor's Board of Directors' meetings, had no say in the financial decisions of Baldor, did not have the authority to take decisions regarding the operations of Baldor (see NE 27 Oct pg 34 and 36) and he reported directly to Tan, not Baldor US. Further, there was no evidence that he had the power to hire or fire Baldor employees. He also did not have the authority to appoint distributors of Baldor. As a result, I am of the view that Liew was not a fiduciary in the circumstances of this case. However, there is still the duty of fidelity and good faith to consider.

57 In relation to the duty of fidelity and good faith, as the Court of Appeal in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR 663 at [193] noted, it is trite law that there is an implied term in the employer's favour that the employee will serve the employer with good faith and fidelity. In *Asiawerks Global Investment Group Pte Ltd v Ismail bin Syed Ahmad* [2004] 1 SLR 234 at [61], I held that "[t]here can be no denying that all employees are expected to serve their employers diligently, honestly and loyally. What this duty translates into factually depends on the circumstances such as the nature of the work".

58 In *Pacific Autocom Enterprise Pte Ltd v Chia Wah Siang* [2004] 3 SLR 73, the plaintiff signed an agreement with a Swiss company, Blaser Swisslube AG ("Blaser"), to become the distributor of its products in Singapore and Malaysia. The distribution agreement contained a non-competition clause which prevented the plaintiff from selling competing products. The defendant was a manager of a

division in the plaintiff company responsible for sales and marketing as well as provision of product support functions. Prakash J at [70] opined that the defendant was in breach of his duty of good faith and fidelity to the plaintiff as he played an active part in the breakdown of the relationship between the plaintiff and Blaser. She also held that the defendant was aware of Blaser's dissatisfaction with the plaintiff over its relationship with another company and that his duty then (even if he had not instigated such dissatisfaction) was to draw the issue to the plaintiff's attention so that it could try and rectify the situation.

59 This brings me to the question of whether Liew breached his duty of good faith and fidelity to Baldor. Baldor alleged Liew breached his duty by:

(i) acquiring an interest in PT Kenvin;

(ii) purporting to appoint PT Kenvin as Baldor's distributor in Indonesia without approval;

(iii) his conduct of Baldor's relationship with PT Kenvin; and

(iv) his receipt of Secret Payments from PT Kenvin or other entities in Indonesia.

60 In relation to Baldor's allegation that Liew had acquired an interest in PT Kenvin, the evidence regarding Liew's management of PT Kenvin suggests overwhelmingly that Liew had an interest in PT Kenvin. He had financial control over PT Kenvin as the second signatory of PT Kenvin's bank account. He set PT Kenvin's internal policies and decided the salaries of the employees. His consent was sought in respect of PT Kenvin's operational matters. Further, there is documentary evidence to suggest that Liew provided 80% of the paid up capital of PT Kenvin (1 ACB 94).

61 In relation to Baldor's allegation that Liew appointed PT Kenvin in breach of his duty of good faith and fidelity to Baldor, I accept Tan's evidence (at pg 9 27 October 2009) that it was the practice of Baldor for the Sales Manager of the territory to recommend to the management the appointment of authorised distributors and that the management would then visit the recommended company to determine whether it should be appointed as such distributor. If Tan takes the decision to appoint a distributor, a distribution agreement would be signed between Baldor and the distributor and subsequently, when requested by the distributor, a letter of appointment would be provided for it to show to its customers (see pg 7 of NE 27 Oct 09). PT Kenvin was not appointed by Tan as distributor for Baldor. I accept Tan's explanation that Baldor's website and CD-Rom reflected PT Kenvin as an authorised distributor because Liew provided him with the list of authorised distributors and Tan relied on Liew to verify that the information provided was accurate. Further, Tan was not aware of PT Kenvin's alleged appointment as authorised distributor given that he did not sign or go through the tax invoices from Baldor to PT Kenvin. In the result, I find that Liew breached his duty of good faith and fidelity to Baldor by acting outside his authority in issuing the two letters dated 1 May 2003 and 4 May 2004 certifying that PT Kenvin was Baldor's authorised distributor/agent in Indonesia.

62 Given my conclusion that PT Kenvin was not properly appointed as an authorised distributor for Baldor, Liew's conduct of Baldor's relationship with PT by instructing Indra Tjia to deal with PT Kenvin to obtain Baldor Motors was a further breach of his duty of fidelity to Baldor.

63 Even if PT Kenvin had been properly appointed, Liew's failure to inform Baldor that PT Kenvin's business was not doing well as it allegedly had problems with its internal controls and required financial assistance, was also a breach of his duty of fidelity to Baldor. Moreover, he sold motors to PT Kenvin at a larger discount than the pricing guidelines set by Baldor without Tan's approval (see pg 96 NE on 6 November 2009). Therefore, Liew has placed the interest of PT Kenvin over that of Baldor, his employer.

64 In relation to the Secret Payments received by Liew from PT Kenvin, I wish to stress at the outset that my decision is in no way based on Mdm Widya's allegations in any of her affidavits filed in court as I have already ordered that they would not be received into evidence (see [14] above).

65 I disbelieve Liew's evidence that the amounts paid to PT Kenvin were in fact personal loans made by him to Mdm Widya. Liew did not produce any documentary evidence of or acknowledgment of any such loans. His claim that he could remember the various amounts lent (some 12 occasions) and the approximate months of the loans over a period of time when he did not record them defied belief. There was also no stipulation as to when the loans would have to be repaid. Furthermore, Liew was not in a financial position to make substantial loans to others. Between 15 July 2002 and 16 January 2004, when Liew allegedly transferred sums totalling USD20,000 to Mdm Widya, he was the sole breadwinner of his family of five and was receiving a salary of S$4,000 or so a month with no other apparent source of income. Liew had to take a loan of S$40,000 from Baldor in March 2004 to be repaid over two years in order to pay for the purchase of his condominium when the completion came early. Yet in October 2004, Liew transferred a further S$14,400 to Mdm Widya, which he explained was money borrowed from a friend.

66 In addition, Liew's evidence on the purpose of the alleged loans was inconsistent, thereby suggesting that the transfer of money was not in fact loans to Mdm Widya. On the one hand, in his AEIC (at paragraph 23(viii) and (xii)), Liew stated that he extended loans to Mdm Widya to help her in her business and, as an assurance to him that his loans to her were in fact used for her business and as a guarantee for the repayment of the loans, she invited him to be a second signatory of PT Kenvin's bank account. On the other hand, under cross examination, he stated that the loans were personal and Mdm Widya was at liberty to use the money as she wished.

67 Furthermore, Liew failed to provide a satisfactory explanation as to why on one occasion on 27 December 2002, Liew sent S$4,200 to PT Kenvin instead of Mdm Widya's personal account (see CB pg 102) and even stated that the basis for the transfer of money was for "Purchase of Goods".

68 It is clear that Liew was deeply involved in the management of PT Kenvin as opposed to merely helping a good friend to tighten up the internal procedure in her company. This also explains why Liew did not inform Baldor of his payments to PT Kenvin or that PT Kenvin was looking for loans, even though Baldor was in a better financial position to lend money and provide assistance to PT Kenvin, its purported authorised distributor. It also explains why Liew received the Third and Fourth Secret Payments on behalf of PT Kenvin when Liew's own admission was that he was not in the habit of collecting payments from Baldor's distributors' customers on behalf of the distributors and it was not within his responsibility as the Sales Manager of Baldor to do so. Further, given that the offices of PT Sarana, CV Surya and PT Kenvin were within a 10 km radius of each other, there was no reason for Liew to perform a shuttle service to collect cash payments on behalf of PT Kenvin. Liew further defended himself by saying that he handed the payments over to Mdm Widya. However, this was not supported by the evidence. Instead, I accept Baldor's explanation that because Mdm Widya disappeared in July 2005, Liew had to collect cash payments as he did not want the money to be paid into PT Kenvin's bank account. Without Mdm Widya as a joint signatory, Liew could not withdraw the money if it was paid into the bank account.

69 In the result, Liew breached his duty of fidelity and good faith to Baldor by preferring his own interest over that of Baldor. He sold motors to PT Kenvin at prices below the pricing guidelines. He gave the appearance that PT Kenvin had been properly appointed as an authorised distributor when this was not the case. He diverted Indra Tjia, a customer of Baldor, to PT Kenvin. He collected money due to PT Kenvin without repaying the money due from PT Kenvin to Baldor. The four Secret Payments had to be the fruits of Liew's breaches of duty to Baldor.

70 Liew's diversion of sales enquiries to WEG is also a breach of his duty of good faith and fidelity to Baldor. Liew accepted that he transferred four sales enquiries which he had received in his capacity as Sales Manager for Baldor between 8 and 30 August 2005 to WEG in order to impress WEG, his future employer. I accept Tan's evidence that it was not common practice for Baldor to send out enquiries to business competitors and other companies supplying similar products in the industry to check their prices and obtain information in order to form a decision on the quotations to be given to sales enquires. In fact, Liew claimed to knew of only one other staff in Baldor who adopted such a practice. WEG's position was also that its salespersons were not allowed to refer sales enquiries to any other company.

71 In his defence, Liew gave evidence that the inquiries were genuine when they were first received by Baldor, but using his knowledge and experience of Baldor motors (see pg 26 NE on 5 November 2009) as well as after checking with Baldor US (see pg 30 NE on 5 November 2009) on one occasion, he formed the view that Baldor could not fulfil the enquiries and replied to the sales enquiries accordingly. Several months later, when he knew that Sittipong did not require the motors any longer, Liew sent the inquiries to WEG.

72 Liew's evidence is flawed in numerous respects. First, he failed to call Sittipong to confirm that the enquiries were in fact "bogus" at the time he sent them to WEG. Second, there is no evidence that he had in fact asked Baldor US whether it could fulfil the sales enquiries and the forensic recovery of deleted documents on the Fujitsu Laptop did not produce this alleged communication. Third, there is no evidence that Liew replied to the enquiries after Baldor received them to state that Baldor could not fulfil the enquiries. Fourth, Liew accepted that Baldor could satisfy the requirements in the sales enquiries to produce IEC motors if Baldor worked with another manufacturer and Baldor would be willing to do so as long as it was cost effective.

73 On the other hand, Tan admitted that based on Baldor's catalogue, a person would not be able to tell that Baldor could produce the motors required in the four enquiries. Even though motors could be custom-made, there was no evidence that it would have been cost effective for Baldor to do so in relation to the four sales enquiries.

74 On balance, I am of the view that the diversion of the enquiries from Baldor to WEG was a breach of Liew's duty of fidelity and good faith to Baldor. Nevertheless, the lack of evidence of any response from the customer or of any further communication between Liew and WEG regarding the enquiries (to prove that damage resulted from the diversion of the inquiries) is also evident. The claim fails on this score.

75 In relation to Baldor's claim for the course fees for the two Baldor courses Liew attended in the US several months before he left the employment of Baldor, I am of the view that Liew is under no obligation to repay the course fees as he did not breach any duty to Baldor in attending those courses. An employee is under no legal duty to inform his employer that he may or will be leaving the company soon after any upgrading course or even after some incentive (such as a paid holiday trip) is given to its employees. This is so even if the employee is the one who asked to be sent for the course. If the employer is so concerned about this, then it ought to have imposed a bond of some

sort on its employees who are sent for courses or for some incentive programme. Alternatively, the employer could make its employees undertake to repay the costs of the course/incentive programme if they should leave its employ within a certain period of time after the course/incentive programme.

76 On the issue of whether Baldor is estopped from bringing claims in respect of Secret Payments against Liew, I hold that Baldor is not so estopped. The acknowledgement that Baldor had no further claims against Liew was premised on Liew not having received any other secret payments apart from the first three Secret Payments and it has been shown that Liew did receive a further payment of S$2,450 from another of PT Kenvin's customers, CV Surya.

Whether the Baldor Information was in fact confidential and if so, whether there is evidence that it was or will be divulged to WEG

77 In *Asia Business Forum Pte Ltd v Long Ai Sin and Anor* [2003] 4 SLR 658 at [9], Kan J held that after an employee had left the employment of his employer, he could not use materials which were, in all the circumstances, of such a highly confidential nature as to require the same protection as a trade secret. In determining whether information was classified as a trade secret, some of the relevant factors were: whether the circulation of the information was restricted; whether the employee was instructed that the information was confidential; and whether the information was easily isolated from other non-trade secrets. However Kan J noted at [10] that these factors were not conclusive as the over-zealous characterisation and protection of information did not transform information of otherwise unexceptional confidentiality into trade secrets. In that case, the training manual was not regarded as a trade secret.

78 Turning to the present facts, Tan claimed that the Baldor Information was confidential but admitted under cross examination that he had never attended the course and did not know its contents (see NE 27 Oct pg 84, line 27-32). Furthermore, Tan agreed (at NE 28 Nov pg 79) that none of the documents he alleged contained confidential information did in fact have any. Viewed objectively, the information in question was nothing exceptional. Of course, training materials pertaining to a particular product or group of products would be peculiar to and geared towards such products but that does not automatically confer on them the attribute of confidentiality. Even if the Baldor Information was confidential, Tan's evidence (at NE 28 Nov pg 4) was that Liew had returned the Baldor Information to Baldor before he left the company. In the result, Baldor has failed to establish that the Baldor Information was in fact divulged to WEG or that there would be a risk that such information, assuming it was confidential, would be divulged. Therefore, Baldor's claim on this point fails. If Liew became more knowledgeable as a result of any courses he attended or any training he received as an employee, that is part of his person and no employer can hope to extricate or expunge such knowledge when the employee leaves for a competitor. It is a fact of life that some employees leave to join competitors or become competitors after they have gained experience and knowledge in the industry.

Whether Neo is liable as constructive trustee of the receipt of the secret payments from PT Kenvin

79 I disbelieve Neo's evidence that she opened the USD account for her own benefit six days before the receipt of the First Secret Payment from PT Kenvin. Her supposed purposes for opening the USD account (saving for a trip to USA and/or investment) were never carried out and nothing was deposited by her into the USD account. The only monies which were deposited into the account were those received from PT Kenvin. It was really much too coincidental that her husband would have USD to deposit a few days after the opening of the account.

80 To support her assertion that the USD account was hers and not her husband's, she claimed that she checked the bank statements for the USD account, knew the closing balance and when she issued the cheque on 5 December 2005 to Baldor, there were sufficient funds in her account. However, the documentary evidence showed that when Neo issued a cheque to Baldor on 5 December 2005, there were insufficient funds in her USD account.

81 Further, Neo was less than forthcoming with regard to the sale of the Serangoon View property that she and Liew were living in at the time of the trial. It was not a case of her seeking permission not to answer questions about her home. Instead, she gave a direct (false) answer almost immediately after the question was asked.

82 In order to establish that Neo was liable for knowing receipt of the First and the Second Secret Payments, Baldor has to show whether an honest person in her position knew or ought to have known that the amounts received were obtained in breach of duties of fidelity and good faith. Such knowledge is inferred from the evidence adduced (see generally *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 3 WLR 64 and *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd (in liquidation) and another appeal* [2002] 3 SLR 241).

83 As mentioned earlier, Liew did not appear to be a wealthy man when he allegedly made various loans totalling USD20,000 to Mdm Widya and Neo was not working at the material time (see [65] above). Liew had to take a loan from his employer in March 2004. As explained above, Liew was clearly in breach of his duties to Baldor and was receiving secret profits as a result of such breach. The difficult question is, did Neo, his wife, have actual or constructive knowledge of this?

84 Liew described his wife as a simple person. Nevertheless, the evidence shows that Neo had working experience and had also dabbled in a bakery business before. However, there was no evidence that she took an active interest in Liew's work. She did not even visit him while he was stationed in Indonesia. I am disturbed by the fact that she was not telling the truth about the opening of the USD account and whether the Serangoon View property had been sold. She was obviously not candid also about having been told by her husband about the alleged loans made to Mdm Widya. Surely she would have been concerned enough to ask Liew why he was constantly lending money (which was a large sum relative to their own income and savings) without any apparent benefit accruing to him especially since they had purchased an apartment. On the totality of the evidence however, I am inclined to hold that Neo was merely playing the role of a loyal (albeit misguided) wife to Liew, telling untruths taught or suggested to her by her husband to save their family from sinking in financial straits. On a balance, it was equally likely that she really did not question further when told to open the USD account in order for Liew to park the USD that he was going to receive from Indonesia. It was quite clear that she left the management of that account entirely to Liew. In other words, the lies that she told were somehow concocted by Liew, with or without her assistance, **after** the trouble with Baldor surfaced and she became aware of the true state of her husband's financial dealings. It is plain that her fortunes are tied to Liew's. For that reason, she was prepared to lie for her husband. I am not prepared to infer from these untruths that Neo must necessarily possess the knowledge at the material time that Liew was receiving secret payments as a result of his breach of duty to Baldor.

85 As a consequence, Baldor's claim against Neo fails. I will, however, reflect the views expressed above concerning her untruthful evidence in my orders as to costs.

Whether the alleged conspiracy between Liew and WEG to damage the interest of Baldor has been made out

86 In *Wu Yang Construction Group Ltd v Zhejian Jinyi Group Co., Ltd and Ors* [2006] SGHC 152 at [93] to [95], Phang J held that an allegation of fraud and/or conspiracy was an extremely serious one and entailed a high requirement with respect to proof. While still based on the civil standard of balance of probabilities, the amount of proof required is higher than that which would be required in a normal civil action. Mere assertion is insufficient.

87 On the present facts, Baldor has not clearly indicated which particular category of the tort of conspiracy it is relying on. As it has also alleged that Liew and WEG conspired to defraud them, it seems that Baldor is alleging conspiracy by unlawful means.

88 On the evidence, Baldor has failed to prove its case on this ground. Although there were communication and meetings between Liew and WEG during Liew's employment with Baldor, Baldor could not show that these were unlawful. It has failed to adduce any evidence from which could be inferred the existence of a conspiracy between Liew and WEG to damage the interest of Baldor. It is true that Liew was communicating with WEG with his vision to set up WEG Singapore, which would be a potential competitor to Baldor. However, he was doing so essentially on his own time. I do not think that the law forbids an employee from planning for his future employment and communicating with his prospective employer while still working for his current employer. As a prospective employer, WEG was entitled to interview Liew and to hear and assess his plans to see if Liew would be of value to WEG should he come into its employ. Naturally, Liew was not entitled to do anything that would undermine Baldor's plans and products while still in its employ. On the evidence, he had done nothing of this sort in his interaction with WEG, save for what I have said already about the diversion of the four sales enquiries which were not solicited by WEG. In my opinion, he had not gone to the extent the defendant did in *ABB Holdings Pte Ltd and Others v Sher Hock Guan Charles* [2009] SGHC 157.

Whether WEG induced Liew to breach his duties to Baldor and was constructive trustee for corporate opportunities diverted from Baldor to WEG

89 Baldor has not adduced any evidence to prove that WEG induced Liew to breach his duties to Baldor. On the contrary, it was Liew who made the first move to contact WEG as well as in taking the initiative to forward the four sales enquiries to WEG, in order to impress his future employer. Liew's assurance that Baldor was not able to quote for the said enquiries caused WEG to accept the enquiries despite its earlier misgivings. Moreover, even after WEG sent its sales quotations to Liew, there was no evidence of any follow-up action on the four sales enquiries. Baldor therefore fails on this point as well.

Counterclaim

90 It follows from my decision above (that Liew breached his duty of fidelity and good faith to Baldor) that Liew's counterclaim against Baldor must fail. In any event, WEG's position is that Liew was made redundant as a result of corporate re-organization and not because of the present action.

Conclusion

91 In summary, Baldor's claim against Liew succeeds to the extent that he breached his duty of fidelity and good faith owed to Baldor as its Sales Manager. There will therefore be judgment for Baldor as prayed for in paragraphs (1) to (9) at pages 25 to 27 of its Statement of Claim (Amendment No. 2)(subject to my findings set out earlier). The claims against Neo and WEG are dismissed. Liew's counterclaim against Baldor is also dismissed.

Costs

92 On the issue of costs, I award Baldor 85% of the costs of its claim against Liew, taking into account the issues which Baldor did not succeed on. Baldor should be entitled to the costs of the counterclaim as well but as that merely mirrors Liew's defence, no further order is made as to the costs of the counterclaim.

93 I order no costs in favour of Neo despite Baldor's unsuccessful claim against her (see [85] above). Baldor and Neo will therefore bear their own costs insofar as the proceedings concern Neo.

94 Baldor is to pay WEG's costs of its defence. However, as much of the trouble arose because of Liew's conduct and assurance to WEG, Baldor is entitled to claim from Liew 50% of the costs that it pays to WEG (that is to say, Baldor pays WEG 100% first and then claims 50% from Liew). Liew is entitled to participate in any assessment of costs between Baldor and WEG as he will be bearing 50% thereof.

95 All costs ordered are to be taxed or agreed among the parties.

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