# Zim Integrated Shipping Services Ltd and others *v* Dafni Igal and others [2010] SGHC 8

**Case Number** : Suit No 755 of 2007

**Decision Date** : 11 January 2010

**Tribunal/Court** : High Court

**Coram** : Lai Siu Chiu J

**Counsel Name(s)** : Goh Phai Cheng SC (as counsel) with Mark Goh Aik Leng (M/s Mark Goh & Co) for the plaintiffs; Benny Jude Philomen, K Muraitherapany and Pey Yin Jie (M/s Joseph Tan Jude Benny) for the 1st defendant; Lee Hwee Khiam Anthony, Audrey Thng and Marina Chua (M/s Bih Li & Lee) for the 2nd to 6th defendants.

**Parties** : Zim Integrated Shipping Services Ltd and others — Dafni Igal and others

*Companies*

*Tort*

11 January 2010 Judgment reserved.

**Lai Siu Chiu J:**

**Introduction**

1 This was an action by the plaintiffs against the first defendant, Dafni Igal ("Captain Dafni"), an ex-employee of the first plaintiff, Zim Integrated Shipping Services Ltd ("Zim Shipping"). After Captain Dafni resigned from Zim Shipping, the company claimed it discovered that Captain Dafni had breached his fiduciary duties owed to the plaintiffs and/or his obligations under his employment contract with Zim Shipping and brought the present action against him. Zim Shipping is also suing Benedict Ng Koo Kay ("Benedict") and Rajathurai Suppiah ("Suppiah"), who is known to some as "Benny", for procuring Captain Dafni to breach his employment contract and/or fiduciary duties. The plaintiffs raised six distinct incidents which they alleged were breaches of such obligations.

**The facts**

2 Zim Shipping, the first plaintiff, is an Israeli company in the container shipping business with operations worldwide. As an Israeli company, Zim Shipping was, at the material time, unable to conduct its business directly in Malaysia. The second plaintiff, Gold Star Line Ltd ("GSL"), is a company incorporated in Hong Kong. The third plaintiff, Seth Shipping Ltd ("Seth Shipping"), is a company incorporated in the Republic of Mauritius. The fourth plaintiff, Star Shipping Agencies (Singapore) Pte Ltd ("Star Shipping Agencies") is a company incorporated in Singapore. GSL and Seth Shipping are owned (ultimately) by Zim Shipping. Star Shipping Agencies is a joint venture between Zim Shipping and some other partners. Henceforth, all four plaintiffs will be referred to collectively as the "plaintiffs" while Zim Shipping and Seth Shipping will be referred to jointly as the "Principals".

3 Captain Dafni joined Zim Shipping as a seaman in 1966 and gradually rose through the ranks. With time, Captain Dafni came to hold important positions within the organisation. His following appointments are material for the purpose of the present action:

(a) Managing Director of GSL (30 November 1995 – 1 December 2004);

(b) President of Zim Shipping for Asia region (1 December 2004 – mid-November 2006);

(c) Director of Star Shippings Agencies (4 January 2005 – 30 June 2006).

4 Under an employment contract dated 24 May 2000 made with Zim Shipping (the "Employment Agreement"), Captain Dafni was appointed as a director of GSL with effect from 1 January 1999. Although there was no prior agreement in relation to Captain Dafni's appointment as a director of GSL, it is not disputed that Captain Dafni had been so appointed since 30 November 1995, as reflected in the minutes of a GSL directors' meeting held on 16 August 1995. The salient terms of the Employment Agreement, which was translated from the Hebrew language, are the following:

> 3. You will perform your job with dedication and loyalty and exercise the best of your knowledge, experience and expertise.
>
> …
>
> 5. Throughout your employment with [Zim Shipping], you may not work in any other job or business, whether for a remuneration or free of charge, except subject to written authorization from [Zim Shipping's] CEO, and provided that no real or apparent conflict of interest may arise between [Zim Shipping's] interests and such other occupation, and that such additional occupation shall not interrupt the performance of your duties.
>
> …
>
> 27. (a) During and after your employment with [Zim Shipping], you shall not transfer or make use of any information about [Zim Shipping] or information you have received through your employment with [Zim Shipping] in connection with [Zim Shipping] and which is not in the public domain, you shall maintain the confidentiality of all matters concerning [Zim Shipping's] business and affairs, and shall not in any way adversely affect [Zim Shipping's] goodwill.
>
> (b) In the event that your employment with [Zim Shipping] is terminated, and regardless of the reason for such termination, you shall not, during one year from the end of your employment with [Zim Shipping], engage in any occupation or provide any service that is liable to create direct competition or a conflict of interest between you and [Zim Shipping], except subject to [Zim Shipping's] prior consent; with regard to an occupation or provision of service that are liable to create indirect competition or a conflict of interest between you and [Zim Shipping], your above obligation shall be limited to six months from the termination of your employment with [Zim Shipping]. The determination whether competition or a conflict of interest exist shall be made exclusively by [Zim Shipping].
>
> (c) For the purposes of this Section, "[Zim Shipping]" shall be construed as including any subsidiary or affiliate thereof.
>
> 29 Any conflict arising between you and [Zim Shipping[ regarding the performance of the agreement contemplated herein, shall be submitted to a single arbitrator on whom you and the [Zim Shipping] shall agree, and if you fail to reach an agreement regarding the arbitrator, one will

be appointed by the president of the Israel Bar Association at such time.

This Section shall, for all intents and purposes, be deemed an arbitration agreement between you and the [Zim Shipping].

5 Captain Dafni resigned from Zim Shipping on 16 May 2006 as a result of differences with the management. He was placed on garden leave until November 2006. Thereafter, Captain Dafni joined Cheng Lie Navigation Co ("Cheng Lie"), which was a competitor of the plaintiffs. At the time of the trial, Captain Dafni was unemployed.

6 Starship Agencies Sdn Bhd ("Starship Agencies"), the fourth defendant, is a company incorporated in Malaysia that carries on the business of a shipping agent. Benedict, the second defendant, was the managing director and owned 55% of the share capital of Starship Agencies. Suppiah, the third defendant, was also one of the directors and shareholders of Starship Agencies. Starship Agencies was incorporated after Benedict had secured the rights to act as Zim Shipping's shipping agent in Malaysia. At that time, Starship Agencies was managed by Johnny Lim ("Johnny"), who took care of the company's day to day operations until he passed away on 14 December 2005. Starship Agencies entered into an agreement with Star Shipping Agencies to act as its sub-agent for all the shipping services of Seth Shipping Corporation (which is not to be confused with the third plaintiff). The agreement was formalised under a Standard Agency Agreement dated 1 September 1997 (but executed on 19 February 1998). Starship Agencies also had an agreement with GSL made sometime in 1998, under which Starship Agencies was appointed as GSL's shipping agent in Malaysia.

7 In April 1999, GSL started a service between various ports in South East Asia via Port Klang (Malaysia) to Colombo (Sri Lanka). The operator of Port Klang at that time was Westports Malaysia Sdn Bhd ("Westports"). There is considerable dispute between the parties over the tariffs imposed by Westports for the services it provided to Starship Agencies between 2000 and 2005. GSL alleged that Starship Agencies had failed to disclose and/or account for certain waivers and rebates which Westports had allegedly given to Starship Agencies.

8 As shipping agents for GSL and Star Shipping Agencies, Starship Agencies was also responsible for sourcing transport operators within West Malaysia to provide trucking and depot services for containers shipped onboard the vessels of GSL or Star Shipping Agencies and calling at Port Klang. The plaintiffs alleged that Starship Agencies had failed to secure the most competitive market rates for such depot and trucking charges, and claimed that they managed to negotiate substantially lower rates after Starship Agencies' services were terminated sometime in 2006.

9 Starship Carriers Agencies Pte Ltd ("Starship Carriers") is a company incorporated in Singapore on 1 September 2004 and is a shipping line providing ship management services. It deals (*inter alia*) with exporting used vehicles from Singapore. Both Benedict and Suppiah are the only two directors and shareholders of Starship Carriers. Star Shipping Agencies (the fourth plaintiff) has a subsidiary known as Zim Logistics S.E.A. Pte Ltd ("Zim Logistics"), which is not a party to the present action. Zim Logistics was formally incorporated on 23 February 2005 and is also in the business of providing used-car freight forwarding services. None of the plaintiffs provide such a service. The plaintiffs claimed that Starship Carriers had passed off its business as being that originating from the plaintiffs.

10 Sometime in August or September 2005, Starship Carriers transferred US$80,000 to Maxwin International Development Ltd ("Maxwin"), a company incorporated in Hong Kong. Captain Dafni holds approximately 60% of the share capital of Maxwin. Another company, Interlink Development Limited, holds the remaining shares in Maxwin. According to the plaintiffs, this US$80,000 was transferred by Starship Carriers under Benedict's instructions to procure Captain Dafni to breach his employment

contract with GSL.

11 Charter Shipping Agencies (S) Pte Ltd ("Charter Shipping"), the sixth defendant, is a company incorporated in Singapore on 30 January 2002 and is a shipping agency (freight) that provides ship-management services. Benedict is currently the only shareholder of this company, while he and Suppiah are the (only) directors. Suppiah used to be a shareholder of Charter Shipping and became a director with effect from 15 June 2005. Between 2003 and 2006, Charter Shipping employed Captain Dafni as a consultant in respect of certain break-bulk services which the company was interested in providing. Charter Shipping paid for Captain Dafni's CPF contributions and income tax while he was its employee. There was considerable dispute as to whether Captain Dafni had in fact, accepted a salary from Charter Shipping during the period in question. While employed by Charter Shipping, Captain Dafni, with the company's assistance, managed to obtain permanent residence and, later, citizenship in Singapore. The plaintiffs alleged that Captain Dafni was in breach of his Employment Agreement and/or fiduciary duties owed to them in accepting the appointment and/or a salary from the company.

12 Additionally, it was the plaintiffs' case that they discovered the following planned purchases by Captain Dafni, Benedict and Suppiah:

(a) International Freight Logistics LLC ("IFL"), a company incorporated in the United States of America, on or around 15 March 2005; and

(b) a vessel known as MV Pancon Diamond (the "Vessel") sometime on or around 17 June 2005.

It was further alleged that the three persons intended to compete with the plaintiffs' business through the above purchases.

13 After the present action was started, Captain Dafni commenced Summons No 537 of 2008 in which he sought (*inter alia*) a stay of proceedings under the International Arbitration Act (Cap 143A, 2002 Rev Ed) in favour of arbitration in Israel, pursuant to cl 29 of the Employment Agreement (see above at [4]). The Assistant Registrar held that cl 29 was wide enough to cover the disputes arising from the claim between Zim Shipping and Captain Dafni and therefore granted a stay of all proceedings between Zim Shipping and Captain Dafni in favour of arbitration. Zim Shipping did not appeal against the stay order.

***Issues to be determined***

14 Based on the brief facts set out above, the following issues arose for the court's determination:

(a) Did Starship Agencies fail to disclose and/or to account to GSL for the rebates and waivers from Westports?

(b) Did Starship Agencies fail to secure the best rates available in the market for GSL and/or Seth?

(c) Did Starship Carriers pass itself off as being a member of the plaintiffs' group of companies in starting and carrying on the business of freight forwarding of used cars?

(d) Was Captain Dafni in breach of any of his fiduciary duties in accepting employment from Charter Shipping?

(e) Was Captain Dafni in breach of any fiduciary duties in planning to purchase IFL or the Vessel?

(f) Had Captain Dafni failed to disclose his close relationship with Benedict and Suppiah to the plaintiffs?

(g) Were Starship Agencies, Starship Carriers and/or Charter Shipping the *alter egos* of Benedict and/or Suppiah?

***The applicable law***

15 Before I turn to elaborate upon each of the plaintiffs' claims, it would be apposite for me to briefly set out the applicable law. There are two levels to the plaintiffs' case. First, they are claiming against the main parties who had allegedly breached their duties and/or obligations owed to the plaintiffs. I will deal with such primary duties and obligations when they arise later.

16 Secondly, the plaintiffs are also claiming against those who they claim are accessories to the various breaches. For example, the plaintiffs are claiming (*inter alia*) against Benedict and Suppiah for allegedly procuring Captain Dafni to breach his employment agreement with GSL by using Charter Shipping to employ him as a consultant and by using Starship Carriers to pay US$80,000 to Maxwin. Starship Carriers is also being sued for "wrongfully [inducing] and [procuring] Captain Dafni's breach of fiduciary duty with Star Shipping Agencies by paying the sum of USD 80,000". In addition, there appeared to be a claim made by the plaintiffs that Benedict and Suppiah had procured Captain Dafni to breach his statutory duties as a director under the Companies Act (Cap 50, 2008 Rev Ed) ("the CA").

17 I will now set out the law on: (i) the tort of inducing a breach of contract as well as on (ii) inducing a breach of fiduciary duties and statutory duties under the CA.

***(i) The tort of inducing a breach of contract***

18 In order to make out a claim for the tort of inducing a breach of contract, the plaintiff must show that the procurer (a) acted with the requisite knowledge of the existence of the contract (although knowledge of the precise terms is unnecessary) and (b) *intended* to interfere with the plaintiff's contractual rights, with such intention to be objectively ascertained (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405 ("*Tribune Investment Trust*") at [17]). The act of inducement *per se* is not actionable (*id*). As to the first element, the Court of Appeal clarified (in *Tribune Investment Trust* at [18]) that:

> It is sufficient if the defendant *knows of the existence of the contract* or *turns a blind eye to its existence* or is *reckless as to the consequence of his actions* in the sense of being indifferent whether or not a breach happens.
>
> [Emphasis added]

19 Useful clarification as to what the second element of intention relates to can be found in the following observations of Lord Hoffman in *OBG v Allan* [2008] 1 AC 1 ("*OBG*") at [39]:

> To be liable for inducing breach of contract *, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this*

*effect. Nor does it matter that you ought reasonably to have done so* . This proposition is most strikingly illustrated by the decision of this House in *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479, in which the plaintiff's former employee offered the defendant information about one of the plaintiff's secret processes which he, as an employee, had invented. The defendant knew that the employee had a contractual obligation not to reveal trade secrets but held the eccentric opinion that if the process was patentable, it would be the exclusive property of the employee. He took the information in the honest belief that the employee would not be in breach of contract. In the Court of Appeal [1938] 4 All ER 504, 513, MacKinnon LJ observed tartly that in accepting this evidence the judge had "vindicated his honesty … at the expense of his intelligence" but he and the House of Lords agreed that he could not be held liable for inducing a breach of contract.

[Emphasis added]

It is therefore clear that the plaintiffs must show that the defendant(s) in question knew that it was procuring a breach of Captain Dafni's Employment Agreement. It would not be sufficient merely to show that the acts committed by the defendant had the effect of doing so.

***(ii) The tort of inducing a breach of fiduciary duties and statutory duties***

20 The plaintiffs also sought to hold Starship Carriers liable as an accessory for Captain Dafni's breach of fiduciary duties. They did not cite any authorities that expressly recognised the existence of such a tort. Instead, they relied on an article by Lee Eng Beng, "*A Perspective on the Economic Torts*" [1996] SJLS 482 at 482–483 (the "Article"), whereby the learned author argued:

> While detailed rules have evolved with regard to each of the economic torts, that is, interference with contract, intimidation, conspiracy and unlawful interference with trade or business, the same cannot be said with respect to the founding of a logical structure for the area as a whole. Still less has there been any judicial consideration of the relationship between these torts and the incidence of liability in analogous situations in other areas of the law.
>
> It is tempting to conclude that the economic torts are nothing more than disparate miscellany which are usually grouped together for reasons of convenience or neatness. Indeed, such a conclusion is not difficult to justify on the existing state of the authorities. *The adoption of such a compartmentalised approach, however, ignores the undeniable congruence of policy concerns underlying the purpose and operation of this group of torts, which are admittedly sometimes obscured by inconsistent and anomalous rules*. The factual similarities in the contexts in which they are usually invoked are also too obvious to brush away.
>
> [Emphasis added]

21 The learned author went on to opine (at p 499):

> 5. Knowing implication in breach of trust or fiduciary duty
>
> In equity, certain principles of liability bear a strong resemblance to the tort of interference with contractual and other rights and ***the question of whether these principles should be amalgamated with the corresponding tortious principles merits attention*** . The equitable wrong of being knowingly implicated in a breach of trust or fiduciary duty is one example. A defendant who has dishonestly assisted in a breach of trust or fiduciary duty is liable to account to the beneficiary for his loss, irrespective of whether the assisted person also acted dishonestly

or fraudulently. ***The position should be the same if he takes the initiative and knowingly induces the breach of trust or fiduciary duty*** . Similarly, a defendant is liable for procuring a breach of an equitable obligation to account owed to the plaintiff by his agent. ***Putting aside the distinctive terminology of the equitable jurisdiction, it is evident that the principle of liability in all these equitable wrongs is fundamentally the same as in the tort of interference with rights*** .

The similarity between the content of the two principles as well as the context in which their application would usually arise is well-illustrated i n *Watson v Dolmark Industries Ltd*. The defendant in this case was the substantial proprietor of a company which had been granted manufacturing and marketing rights by the plaintiff for a certain type of plastic storage tray, in consideration for royalties calculated by reference to the number of trays manufactured. The defendant, acting on behalf of the company, dishonestly under-declared to the plaintiff the number of trays produced by the company in order to avoid paying the full royalties to which the plaintiff would have been entitled. The company then used the money saved to manufacture and sell a similar product. On facts such as these, it is probable that an action for interference with rights would have succeeded against the defendant for the amount of royalties which had been lost by the plaintiff. As it turned out, however, the defendant's liability was argued and decided on the basis of knowing implication in a breach of fiduciary duty.

***Keeping the two principles artificially apart by labelling them tortious and equitable cannot be good for the development of the law. The concept of interference in the tort is, by now, probably wide enough to encompass all forms knowing implication in a breach of trust or fiduciary duty*** . Further, a person's rights under a trust or pursuant to a fiduciary duty owed to him are clearly capable of being protected under the tortious principles. As Lord Hoffman, writing extra-judicially, points out, ***fiduciary obligations and contractual obligations are merely species of obligations and it should be possible to assimilate or at least to reconcile the two forms of liability. The proposition that there is no tort known as inducing a breach of trust or, presumably, also a breach of fiduciary duty, may have to be re-considered in the not-too-distant future*** .

[Emphasis added in bold italics]

22 The learned author's argument that there is no reason for the distinction in accessory liability between equity and tort law is, on its face, attractive. After all, given that both forms of accessory liability really stem generally from the law of obligations, albeit developed under very different circumstances (as one developed in the realm of equity and the other under the common law), one may argue that there is no good reason for maintaining such a distinction (see Philip Sales, *The Tort of Conspiracy and Civil Secondary Liability* 49 (1990) CLJ 491 at 508).

23 From a policy perspective, it would be necessary to consider whether the current forms of accessory liability that have developed in equity, *viz*, dishonest assistance and knowing receipt, are sufficient to maintain the sanctity of fiduciary relationships vis-à-vis third parties, or whether it is necessary for the law to expand its protection for these vulnerable beneficiaries. Even if such an expansion is necessary or warranted, a question will then arise as to whether such an expansion should take place by relaxing the requirements for knowing receipt and/or dishonest assistance, or by introducing tortious liability for accessory assistance (see, in this respect, the decision of the UK Court of Appeal in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at p 481).

24 From a legal perspective, there may also be conceptual difficulties that would require

adjustments into other areas of law: see *Clerk & Lindsell on Tort* (Sweet & Maxwell, 19th Ed, 2006 at para 25–39). Further, there may be a possible issue relating to remedies. For the tort of inducing a breach of contract, it is said that the claimant may recover in respect of *loss of business* caused by non-performance of the contract, subject to the rules of remoteness (*id*). However, a breach of fiduciary duty does not necessarily result in a loss (see the facts of *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134). In addition, it is said that the tort of inducing a breach of contract arises because contractual rights are treated as a species of property deserving of special protection by the imposition of secondary liability on the person who procures the party that breaks the contract to do so (*OBG* at [32]). It is not clear whether fiduciary rights belong within the same class of property and are deserving of the same special protection as a result.

25 The Court of Appeal in *Canadian Pacific (Bermuda) Ltd v Nederkoorn Pte Ltd* [1999] 2 SLR 18 considered an argument raised by the appellants that the tort of interference with contractual relations had been extended to procuring or inducing a fiduciary duty, citing *The Prudential Assurance Co Ltd v Lorenz* (1971) 11 KIR 78 in support. The Court of Appeal dismissed that argument on the ground that the case did not stand for the proposition stated, but did not authoritatively decide whether or not such a tort existed.

26 On the facts of this case, I find that no breach of the primary fiduciary duties as alleged by the plaintiffs have been proven. As such, it is not necessary for me to decide whether the law of tort should be expanded to recognise the inducement of a breach of fiduciary duty as being actionable.

27 As for the tort of inducing a breach of statutory duty, this tort appears to be recognised by the UK courts: see *Clerk & Lindsell on Torts* (above at [24]) at para 25–36. However, it must be shown that the provision in question gives rise to a civil remedy (*id*). Here, the provision in question is s 157 of the CA and s 157(2) entitles the company to bring an action against the director for any profit made by him or damage suffered by the company as a result of any breach of the section. It would therefore appear that the plaintiffs' can proceed based on the tort of inducing a breach of statutory duty. I will now turn to consider the individual allegations levelled by the plaintiffs against the defendants.

**The Issues**

***(i) The Rebates and Waivers***

28 The plaintiffs' pleaded case was that Starship Agencies had breached its duty as agent in failing to account for the monies which it had received from Westports belonging to Seth Shipping. It was alleged that Captain Dafni, as managing director of GSL and Area President of Asia for Zim Shipping, had negotiated and entered into an agreement with Westports in relation to the tariffs to be paid by the Zim Shipping or GSL for Zim Shipping's container ships. The plaintiffs alleged that Westports had agreed to grant the following concessions to the Principals or GSL:

(a) a yearly incentive rebate of 5% on port tariffs paid by the Principals or GSL for all outbound containers exported from Westports from 2000 to the first half of 2005 ("Outbound Rebates");

(b) a yearly incentive rebate on port tariffs paid by the Principals or GSL for all containers transhipped through Westports from 2000 to 2001 ("Transhipment Rebates");

(c) waivers and refunds on the yearly charges paid by the Principals or GSL for storage charges and special request charges from 2003 to 2005 ("Charge Waivers").

29 According to the plaintiffs, the above Outbound Rebates (totalling RM 1,477,474), Transhipment Rebates (totalling RM 2,921,935) and Charge Waivers (totalling RM 1,231,239) (together, the "rebates and waivers") were received by Starship Agencies but not passed on to GSL. Further, it was pleaded that Captain Dafni was in breach of his fiduciary duties when, as managing director of GSL and Area President of the Principals, he failed to disclose the rebates and waivers to the management of the Principals or GSL, or to ensure that the rebates and waivers were paid to and received by the Principals or GSL. Further, it was alleged that Captain Dafni had breached his fiduciary duties as the Area President of the Principals in Asia, in failing to take action to terminate Starship Agencies as sub-agent of the Principals when he discovered that Starship Agencies had wrongfully retained the rebates and waivers.

30 Two main issues arose for consideration pursuant to the plaintiffs' allegations:

(a) Whether the rebates and waivers were disclosed to the Principals or GSL and

(b) Whether the rebates and waivers were received by Starship Agencies but not passed onto GSL.

31 Dan Hoffman ("Hoffman") who took over as Area President for Asia of Zim Shipping in May 2006, testified that Captain Dafni had overall responsibility for the negotiations of port charges for the vessels of Zim Shipping and Seth Shipping vessels calling at Port Klang, and did so negotiate with Westports. The plaintiffs relied on a letter dated 4 February 1999 from Westports to Johnny of Star Shipping Agencies informing them of the rates and tariffs for the various services offered by Westports. In addition, on 23 February 1999, Westports had written to Johnny as follow:

> I refer to recent meetings, our confidential letter dated February 4th and several telephone conversations.
>
> In addition to the terms and conditions as contained in the official tariff and in letter dated February 04th we can extend the following:
>
> 1. Gold Star to enjoy exemption from service charges for a stock of 100 teus of MT equipment for the initial six months of operation
>
> 2 We reaffirm that transhipment cargo charges as per our fax dated February 04th are already discounted by 50 percent.
>
> 3. Gold Star to enjoy a 5 percent discount on the Terminal Handling & Stevedorage charges for local cargo.
>
> 4. Gold Star line to confirm that they remain committed to the exclusive use of the WestPort terminal within Port Kelang for the service for an initial period of 18 months.

32 Hoffman alleged that neither of these two letters sent by Westport (the "1999 letters") or the terms thereof was disclosed to Zim Shipping or GSL. Therefore, Zim Shipping, GSL and Seth Shipping paid full standard rates for all transhipment cargo, outbound cargo and storage charges. Hoffman also testified that Captain Dafni was involved in subsequent negotiations with Westports between 2001 and 2005. In 2001, there were a number of letters exchanged between Captain Dafni and representatives of Westports with respect to the tariffs payable by GSL for Westports' services. These 2001 letters were not copied to Zim Shipping or to anyone else in GSL. Eventually, on 6 December 2001, Captain Dafni (writing on GSL's letterhead) wrote to Westports to confirm that GSL

had accepted Westports' proposal. Westports' proposal included a term that they would continue to bill GSL as per the tariffs and would, from January 2001 onwards, pay the difference in the rates in the form of a rebate.

33 Further, on 31 October 2002, Captain Dafni wrote to Westports (without copying anyone else) seeking to reduce the rate for handling of MT containers to match the rates offered by PSA, though Westports did not agree to Captain Dafni's proposal.

34 Schmuel Yoskovitz ("Yoskovitz"), who is the current managing-director of GSL and the previous financial controller for Zim Shipping in the Asia Pacific region (between 2006 and 2008), also testified for the plaintiffs. He stated that he was instructed by Hoffman to account for the transactions entered into by GSL and Seth Shipping with Westports. He received a reply from Ms Chan Chu Wei ("Ms Chan") of Westports on 30 April 2007 confirming that GSL had "been enjoying a 5% incentive rebate yearly for all its local containers (laden and empty) since its inception with us in 1999". Upon investigation, Yoskovitz discovered that GSL, Seth Shipping or Star Shipping Agencies did not have copies of the 1999 letters and that they did not have any record of the rebates or discounts referred to in Ms Chan's letter dated 30 April 2007. Hoffman therefore contacted Westports for a statement of accounts for all rebates, discounts and benefits to Seth Shipping and/or GSL and received an email from Lee Mun Tat ("Lee") who was a manager of Westports, setting out the rebates and waivers that had allegedly been paid to Starship Agencies. Yoskovitz claimed that GSL did not receive the rebates and waivers.

35 Lee was a witness for the plaintiffs. He provided a record of the relevant documentation purportedly relating to the rebates and waivers, including a long list of credit notes prepared between 2000 and 2005 which purportedly reflected the Transhipment Rebates and Charge Waivers given during the period.

36 The plaintiffs argued that Captain Dafni and Benedict knew about the 1999 letters sent by Westports (see above at [31]) and had failed to disclose them to any of the plaintiffs, a fact which Captain Dafni denied. The defendants raised a preliminary objection that the 1999 letters were inadmissible as evidence as the makers were not called as witnesses. In response, the plaintiffs argued that s 32(b) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") was applicable. The provision states:

> **Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**
>
> 32. Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> …
>
> or is made in course of business;
>
> (b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty, or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce, written or signed by him, or of the date of a letter or other

document usually dated, written or signed by him;

37 However, in order to rely on s 32(b) of the EA, it is incumbent on the plaintiffs to show that the 1999 letters came within the scope of the section and in particular, that it was made in the ordinary course of business (*Syarikat Jenka Sdn Bhd v Abdul Rashid bin Harun* [1981] 1 MLJ 201). The plaintiffs adduced no evidence whatsoever to show that the 1999 letters had been written in Westports' ordinary course of business.

38 Even if the 1999 letters were admissible, I do not think they assist the plaintiffs' case. The plaintiffs had argued that Captain Dafni and Benedict knew about the 1999 letters at the material time. They relied on three planks to support this contention. First, the plaintiffs pointed out that Captain Dafni had the authority to negotiate the port charges. They highlighted that Captain Dafni had, in his defence, "bragged" about negotiating with the Malaysian Ministry of Transport and stated how GSL had expanded *under his leadership*. Further, during the 2001 negotiations, Captain Dafni, did not copy the letters to anyone else and indeed, the first letter was initiated by Captain Dafni himself. Second, the plaintiffs highlighted that in a letter dated 30 August 2001, Captain Dafni had rejected the "unnegotiable proposal" and stated he would instruct his agents to pay all bills in accordance with the "current tariff", indicating that Captain Dafni was in full control of the negotiations and had full authority over the agents in Malaysia. Third, the plaintiffs argued that the defendant's contention that there were no negotiations of any rates in 1999 was untenable. In a letter dated 18 October 2001 from Westports, it was stated that Westports would "maintain… the agreement to hold the RM 70/105 until 31 December 2001", making it clear that the negotiations were for the purpose of resisting an increase in the transhipment tariffs. It was highly unlikely that the commencement of services to GSL was based solely on an oral assurance given to Johnny Lim without any quotations or documentations. The plaintiffs also highlighted that Captain Dafni had, in his Further and Better Particulars filed on 18 December 2008, stated that he could not remember what the government subsidised rates were but could, during cross-examination, state that a 50% rebate was given for all transhipment tariffs to all users. While Benedict claimed there was a published discount rate, he was unable to produce the document even though he said that he had possession of the same.

39 Although the 1999 letters referred to meetings and telephone conversations, they did not state the parties who had taken part in such discussions. The letters were addressed only to Johnny and were neither addressed nor copied to Captain Dafni. Neither did the letters allude to Captain Dafni's participation in such discussions. Hoffman had admitted that he did not have personal knowledge as to whether Captain Dafni had conducted the negotiations himself in 1999 (without informing any other staff member in Zim Shipping and/or GSL) or whether the 1999 letters had in fact, been sent to Johnny. Captain Dafni resolutely denied being aware of the 1999 letters at the material time and the plaintiffs did not and could not produce any evidence to contradict him.

40 There was also nothing in the evidence which showed that Star Shipping Agencies had accepted the offer stated in the 1999 letters. In order to enjoy the discounts stated, GSL had to use Westports' facilities exclusively for 18 months but there was no evidence that GSL had done so. Hoffman did not know whether GSL had accepted the condition imposed or used Westports' facilities exclusively for the first 18 months and neither did Yoskovitz. On the other hand, it was Benedict's unchallenged evidence that GSL had also used North Ports on many occasions. There was therefore no evidence that the terms of the 1999 letters were binding on the parties involved.

41 Further, the 1999 letters only mentioned the giving of discounts and did not speak of providing the *rebates* which the plaintiffs are now claiming. As such, even assuming that the 1999 letters were made in the ordinary course of business, they did not help to advance the plaintiffs' case.

42 The plaintiffs also sought to rely on Ms Chan's letter of 30 April 2007 (see above at [34]). A similar objection was raised by the defendants that this letter was inadmissible as Ms Chan was not called to testify. The plaintiffs likewise relied on s 32(b) of the EA (see above at [36]) to contend that the letter was admissible evidence. Again, the plaintiffs did not adduce any evidence to show that such a letter was made in the ordinary course of business. Even if the letter had been made in the ordinary course of business, I note that there was considerable doubt as to its accuracy. Lee himself believed that there was a mistake in the letter, as the 5% incentive rebate was not meant for empty containers. Hoffman similarly opined that based on the 1999 letter, the discount for local cargo (at item 3 in [31] above) was not applicable to empty containers. Also, Ms Chan did not provide any evidence to back up the assertions in her letter. Therefore, even if it was admissible, I would have given little weight to Ms Chan's letter said letter.

43 As for the negotiations in 2001, it was not in dispute that Captain Dafni was indeed involved in the negotiations, as was clearly borne out by the correspondence between the parties during that period. Captain Dafni had clearly informed Zim Shipping and GSL about the new rates that he had negotiated and agreed to with Westports. On 7 December 2001, Captain Dafni sent a handwritten fax to various senior personnel of Zim Shipping and GSL in Hong Kong, as follow:

> Please be advised that we have concluded our negotiation with Westport [Management] with new term as follows:
>
> - Current Tariff will remain in force till [31/1/02]
>
> - New [transhipment] rate will be applicable as of 1/1/2002,
>
> Laden RM 100/20 RM 150/40
>
> MTY RM 85/20 RM 128/40
>
> - This tariff will be applicable for 3 years but will be subject to review at each year end and will be adjusted by mutual agreement only if Intra-Asia F/R show drastic recovery
>
> - GSL will pay according to official tariff, i.e
>
> Laden RM 140/20 RM 210/40
>
> MTY RM 140/20 RM 210/40
>
> **<u>But</u> the difference between the official tariff and our new agreed rate will be off set from each monthly debit note by the way of a rebate**.
>
> [Emphasis in underline original, emphasis in bold added]

44 Hoffman himself agreed during cross-examination that Captain Dafni had informed GSL and Zim Shipping about the new rates in 2001. As such, the plaintiffs' claims that Captain Dafni had been in breach of his fiduciary duties by not disclosing the rebates and waivers to Zim Shipping and/or GSL is clearly not made out.

45 I turn now to consider whether Starship Agencies had received the rebates and waivers from Westports as alleged by the plaintiffs. The plaintiffs' evidence on this point came from Yoskovitz and Lee. Lee had, in his affidavit of evidence-in-chief ("AEIC"), provided a computation of the Outbound

Rebates, Transhipment Rebates and Charge Waivers purportedly received by Starship Agencies while Yoskovitz testified that the rebates and waivers had not been received by GSL.

46 I will first deal with the Transhipment Rebates and the Charge Waivers. On the face of the documents which Lee provided, it was not clear who had prepared the credit notes purportedly evidencing the Transhipment Rebates and Charge Waivers, but it is clear that it was not made by any of the witnesses at trial. The plaintiffs again sought to rely on s 32(b) of the EA to admit these documents into the evidence and argued that Lee had given unchallenged evidence that those documents were made in the ordinary course of business. However, I could find nothing in the evidence to support the plaintiffs' assertion.

47 Be that as it may, even if those documents were made in the ordinary course of business, I would not have accorded any weight to them. None of these credit notes were signed and as I mentioned earlier, there was no indication as to who the maker of those credit notes was. Apart from the credit notes, the plaintiffs did not produce any other document to show that Starship Agencies had received the Transhipment Rebates or the Charge Waivers to the exclusion of GSL. The plaintiffs therefore fail in their claim for the Transhipment Rebates and Charge Waivers.

48 I will next deal with the Outbound Rebates. Benedict did not deny that Starship Agencies received cheque payments from Westports between 2000 and 2006. He appeared to accept that the amounts received corresponded to those pleaded by the plaintiffs. His evidence was that the payments were gratuitous incentive payments given to Starship Agencies for its support and patronage and that it had not solicited for such payments. As Starship Agencies did not think that the monies were meant for the plaintiffs, the amounts were not paid over to them.

49 Although Benedict admitted that Starship Agencies had received the monies from Westports amounting to RM 1,477,474, he did not admit that the payments were in respect of the Outbound Rebates. The plaintiffs bore the burden of proving that those payments received were the Outbound Rebates as pleaded. I find that the plaintiffs have not discharged their burden of proof in this respect. The only evidence adduced by the plaintiffs came from the exhibits in Lee's AEIC comprising of payment vouchers, tables purportedly showing the volume of FCL cargo within the specified time period that were either signed by Ms Chan or one Datuk Tan or unsigned; there were also photocopies of cheques that were made out to Starship Agencies. Lee had admitted that he became involved in the rebate calculation process only from mid-2004 onwards. Therefore, the rebates tables and payment vouchers prepared before June 2004 were inadmissible as Lee was not the maker. No evidence was adduced to show that the documents were prepared in the ordinary course of business. Indeed, given that Lee had admitted that such rebates were highly confidential, it did not seem to me that such tables and vouchers had been prepared in the ordinary course of business. I did not get the impression that it would not be possible to procure the makers of those documents to attend court without unreasonable delay and expense as both Ms Chan and Datuk Tan were still involved in Westports' business at the time of the trial. As for the rebates tables and payment vouchers prepared after June 2004, Lee had admitted during cross-examination that he did not have any personal knowledge about the rebates to GSL and/or Zim Shipping as these matters were highly confidential. Further, I noted that the payment vouchers and tables that were prepared by Westports were internal documents that had not been provided to Starship Agencies for its verification. Apart from those documents, the plaintiffs did not produce any other documents to show that Starship Agencies had indeed received the Outbound Rebates as pleaded. Accordingly, the plaintiffs fail in their claim for the rebates and waivers.

***(ii)Were the depot and trucking charges competitive or inflated?***

50 The plaintiffs alleged that Starship Agencies, as agent for GSL and Star Shipping Agencies, had failed to ensure that they would secure the most competitive rates for depot and trucking charges available at the market, for freight that was carried on board the vessels of Zim Shipping calling at Port Klang, for the period between 2002 and 2005. The plaintiffs alleged that the rates paid by GSL were substantially inflated. They also pleaded that Captain Dafni had breached his fiduciary duty as managing-director of GSL by failing to ensure that GSL would obtain the most competitive rates for depot and trucking charges for freight carried on board Zim Shipping's vessels calling at Port Klang between 2002 and 2005. The plaintiffs also alleged that Captain Dafni was in breach of his fiduciary duties when, as Area President of the Principals, he did not take any action to terminate Starship Agencies as a sub-agent of the Principals, when he knew that Starship Agencies had wrongfully charged GSL or the Principals inflated depot and trucking rates.

51 To support their claims, the plaintiffs relied primarily on a comparison chart prepared by Simon Whitelaw ('Whitelaw") the managing-director of CMA CGM ("CMA") and ANL Malaysia. The chart showed the following:

| | | **CMA CGM's rate before June 2006** | **ZIM's rates before June 2006** |
|---|---|---|---|
| **Port Klang** | | | |
| Trucking Westport to Wesport depot | RM/20' | 35 | 80 |
| | RM/40' | 70 | 160 |
| Trucking Westport to Northport depot | RM/20' | 65 | 80 |
| | RM/40' | 130 | 160 |
| Lif on lift off | RM/20' | 10 | 17 |
| | RM/40' | 20 | 34 |
| Storage Daily charge | RM/20' | 1 | 1.7 |
| | RM/40' | 2 | 3.4 |
| Storage Free Days | | 10 | 3 |

The chart also provided a similar comparison in respect of services at Penang and Pasir Gudang. In addition, the plaintiffs also relied on Ayal Anat's evidence that when GSL and Seth Shipping renegotiated the rates on their own after 2006, they managed to get significantly lower rates even without much bargaining. Ayal Anat is the Logistics Director for Zim Shipping in the Asia Pacific region and has held on to this position since February 2004. The plaintiffs further contended that Starship Agencies' claim that it had given all the quotations in this respect to GSL for approval and that GSL's staff had made regular visits and audits were untenable, especially since no quotations had been provided.

52 The plaintiffs' claim was that inflated trucking and depot charges had been paid for freight carried on board Zim Shipping's *vessels* calling at Port Klang *between 2002 and 2005*. However, Hoffman himself had admitted that Zim Shipping's vessels did not call at Port Klang during this period. In addition, although the plaintiffs' claim related to the period between 2002 and 2005, none of the

witnesses gave evidence on what the prevailing market rates were during that period. Hoffman and Ayal Anat agreed that they did not have any personal knowledge on this issue. As for Whitelaw's chart, it only related to the rates payable in the first six months of 2006. In addition, there was no evidence that the rates CMA paid in 2006 were the prevailing market rates at the material time. Indeed, given the differences in the size of the two companies and the volume of their respective operations at Port Klang, it is questionable whether the rates obtained by CMA (the world's third largest container shipping company) as reflected in the chart could have been obtained by other smaller players in the same market. Whitelaw himself admitted that there were substantial differences between the size of the operations of CMA and Zim Shipping and added that the rates obtained by CMA were "probably the best rates available in the market". Additionally, Whitelaw did not provide any documentation to substantiate the rates that CMA was purportedly paying as shown in the chart. Neither did Zim Shipping provide any proof to substantiate its claim that the rates it obtained thereafter were substantially lower.

53 Further, it appeared to me that the contracts for such trucking and depot services had to be approved by Zim Shipping before Starship Agencies could accept them. During cross-examination, Ayal Anat stated that the procedure for entering into such a contract and reviewing claims thereafter was as follow:

> Q: …Are you saying that the agency can enter into contracts with the vendors without the approval of you or Zim?
>
> A: It's against our policy but he can.
>
> Q: Of course, but would you recognise it… I give you an example… If the agency goes into a contract, enters into a contract with a vendor, without your approval, would you recognise it? Would it be binding on you?
>
> A: If you are asking---
>
> Q: Would you pay it?
>
> A: If you are asking if I will find out, yes, I will.
>
> *Q: Yes. So when you find out, no way you are going to make that payment, no way were you going to honour that contract right, Ms Anat? Logical?*
>
> *A: Logical.*
>
> Q: Yes, then in fact that means that they have no power to enter into any contracts on behalf of… [GSL] or [Seth Shipping Ltd]. It follows.
>
> *A: As I said, our policy is that we are reviewing the contracts before signing.*
>
> Q: Okay. What do you mean by review the contracts before signing? What does it entail? What do you check? Tell us. Explain to us.
>
> A: As I explained before… if we are working --- moving to a new depot, for example, we will ask a photo of the facility of the depot. We will ask a photo of their repairs to see their repair has quality. We will ask to have some information about the depot, like the size of the yard, how many workers are working there. How many of the workers have IICL certificate in order to see

the performance or the quality of their repairs. Afterwards, we would review the tariff itself.

[Emphasis in italics and underlining added]

54 As such, I find that the plaintiffs have not satisfied their burden of proving that the depot and trucking charges between 2002 and 2005 were substantially inflated. There was no basis for the plaintiffs' claims against Starship Agencies in agency or against Captain Dafni for breach of fiduciary duties. Accordingly, I dismiss these claims.

### *(iii) The claim in passing-off*

55 It is not immediately clear which parties amongst the plaintiff(s) were claiming under the tort of passing off. While Starship Carrier's business most closely resembled Zim Logistics' business, the latter is not a party to the present action. The plaintiffs' Statement of Claim (Amendment No 3) simply states:

> **The Principals' claim against Starship Carriers**
>
> 55. The Principals were also engaged in the business of providing freight forwarding of used cars in Singapore…
>
> 56. Sometime in or about 30th September 2005, the Fourth Plaintiffs discovered that [Benedict] and Suppiah had set up and were operating Starship Carriers to carry out a similar business of providing freight forwarding of used cars in Singapore…
>
> 57. Starship Carriers used a name which closely resembled name [sic] of the Fourth Plaintiffs. It was also discovered that Starship Carriers were also competing with the Principals' used car forwarding business in Singapore.
>
> 58. Starship Carriers had passed itself off as being part of the Plaintiffs' group of companies and in so doing competed with the used cars freight forwarding business of the Principals in Singapore and unless prevented to do so will continue to pass off as one of the Plaintiffs' group of companies.

56 During cross examination, Vincent Chew ("Vincent"), the director of Zim Logistics and the general manager of Star Shipping Agencies, gave evidence that neither Zim Shipping nor Seth Shipping were in the business of providing freight-forwarding of used cars in Singapore, contradicting the Plaintiffs' pleaded case at paras 55 and 58. The plaintiffs clarified that the "Plaintiffs' group of companies" in the Statement of Claim (Amendment No 3) referred to Star Shipping Agencies only, and that the goodwill referred to in para 58 thereof was "in the name "Star Shipping" and the business that was associated with the name "Star Shipping"" (in providing all kinds of freight services). Further, Vincent agreed during cross-examination that the action for passing-off was being brought by Star Shipping Agencies. As such, I will proceed on the basis that Star Shipping Agencies is the party claiming under the tort of passing-off.

57 The plaintiffs pleaded that Captain Dafni had breached his fiduciary duty and statutory duty owed under s 157 of the CA when, as Area President of the Principals in Asia, he failed to stop Benedict and Suppiah from incorporating Starship Carriers to compete with the Principals' business. It is also pleaded that Benedict and Dafni had induced Captain Dafni to breach his statutory duty in so doing.

58 In order to succeed in their claim for passing-off, the plaintiff bears the burden of proving (a) the presence of goodwill; (b) misrepresentation; and (c) damage to goodwill (*Novelty Pte Ltd v Amanresorts Ltd* [2009] 3 SLR 216 ("*Amanresorts (CA)*") at [37]).

59 The two essential features of goodwill are: (a) the association of a good, service or business on which the plaintiff's get-up (its mark, name, labelling, *etc*) has been applied with a particular source; and (b) this association being an attractive force which brings in custom (*Amanresorts (CA)* at [38]). Such goodwill can be limited to particular sections of the public, however small so long as they are not negligible (*id* at [44]).

60 Vincent's evidence was that Zim Logistics had entered into the used car freight forwarding business sometime in 2004. When Benedict and Suppiah came to know about Zim Logistics' lucrative business, they decided to compete for a share in the market. Vincent claimed his sales staff told him that Benedict's staff had approached their customers, and that the customers were confused and believed that Starship Carriers belonged to the Zim group of companies, especially Star Shipping Agencies. Vincent also noted that Starship Carriers' website mistakenly indicated that it was incorporated since 1997, which coincided with the time Zim Logistics started the used car freight forwarding business. Vincent also highlighted that he had sent an email to Benedict (copied to Captain Dafni) to complain about how Starship Carriers had aggressively entered the market, undercut rates and was taking away Zim Logistics' clients through the confusion. Hoffman's evidence was to the effect that Star Shipping Agencies carried on business as Zim Shipping's exclusive agent for Singapore and its function was to monitor, supervise and manage all the sub-agents around South East Asia, including Starship Agencies.

61 However, the plaintiffs did not provide any evidence of goodwill associated with the "Star Shipping" name. In addition, it seems to me that any goodwill that may be associated with the "Star Shipping" name would not be in relation to the used car freight forwarding business, as Vincent agreed that Star Shipping Agencies did not carry on such a business. The plaintiffs therefore have not satisfied their burden of proving that there was any goodwill associated with the "Star Shipping" name.

62 In any case, even assuming that there was goodwill associated with the "Star Shipping" name, the plaintiffs did not show or explain how Starship Agencies had made a misrepresentation to the relevant sector of the public or how such misrepresentation resulted in actual or probable damage to Star Shipping Agencies' goodwill. The plaintiffs relied on the phonetic and visual similarities between the two names and the fact that Starship Agencies had represented that they had been in the business since 1997 and used the same Export Processing Zone as Zim Logistics. While there may be some visual and phonetic similarities between the two names involved, there was however no evidence that the name "Star Shipping" had become distinctive of its services, especially since the name consisted of ordinary descriptive words. In any case, it is clear that any misrepresentation for passing-off would be actionable only if it caused actual or likely confusion (*Amanresorts (CA)* at [77]). Vincent's assertions that he "received news *from [his] sales staff*" [emphasis added] that Star Shipping Agencies' customers were confused and believed that Starship Carriers belonged to the Zim group of companies (particularly Star Shipping Agencies) was hearsay and inadmissible as evidence. The plaintiffs produced no evidence of any confusion over the "Star Shipping" name.

63 As such, I would dismiss the plaintiffs' claims for passing-off. I also reject the plaintiffs' claim that Captain Dafni was in breach of his fiduciary duties in allowing Starship Carriers to be incorporated to compete with the business of the Principals' carriers in this respect. Vincent admitted that within the Zim group, only Zim Logistics was involved in the used car freight forwarding business. It was therefore not possible for Starship Carriers to compete with the business of the Principals in

Singapore.

### *(iv) Captain Dafni's employment by Charter Shipping*

64 The plaintiffs pleaded that Captain Dafni had breached his fiduciary duty and statutory duty under s 157 of the CA when, as Area President for the Principals in Asia, he had worked for and received remuneration from Charter Shipping, and that Benedict and Suppiah had procured Captain Dafni to breach his statutory duty. They further pleaded that Benedict, Suppiah and Charter Shipping had wrongfully induced and procured Captain Dafni to breach his employment contract with GSL by using Charter Shipping to employ and pay (in Benedict and Suppiah's case) or in employing and paying (in Charter Shipping's case) Captain Dafni a salary and CPF contributions.

65 Hoffman's evidence on this point was that he came to find out about Captain Dafni's employment by Charter Shipping after Captain Dafni had resigned from Zim Shipping. It is not in dispute that Captain Dafni was employed by Charter Shipping between January 2003 to November 2006, and had received CPF contributions and income tax payments from the company. In January 2003, Charter Shipping assisted Captain Dafni to apply for an employment pass to work in Singapore, and approval was obtained shortly after for Captain Dafni to work as the chief operating officer of Charter Shipping. Hoffman highlighted that in Captain Dafni's application for permanent residence in September 2003, both Captain Dafni and Charter Shipping stated that he was employed as an executive director and drew a gross salary of $15,000 per month since March 2003. When the application was rejected, Charter Shipping wrote to the authorities to state that Captain Dafni was still drawing a salary of $15,000 as executive director and was stationed overseas. His application for permanent residence was later approved.

66 Subsequently, in September 2005, Captain Dafni wanted to apply for Singapore citizenship and was informed that the main issue to his application would be his physical presence in Singapore. Captain Dafni was told to obtain a letter from his company stating that his job required him to spend time outside Singapore. Captain Dafni sought Benedict's assistance on this matter. Thereafter, Captain Dafni successfully obtained Singapore citizenship.

67 According to Captain Dafni, he had taken up employment with Charter Shipping as a consultant to facilitate his application for Singapore citizenship and to assist it in its business in project cargo and oversized conventional break bulk cargo, a business which GSL and Zim Shipping were not and did not intend to be involved in. The Singaporean passport was of importance to him as his job required him to travel regularly to Muslim countries, which was not permissible with an Israeli passport. Captain Dafni proposed to the management of Zim Shipping that he obtain a Singapore passport as there were plans to move and list GSL in Singapore, but the move did not materialise due to the economic downturn in 2002. When Charter Shipping sought his advice on its business, he saw an opportunity to use this consultancy to obtain Singapore citizenship. Captain Dafni claimed he verbally informed Mr Strammer, who was Zim Shipping's vice-president based in Israel, about this arrangement and that Mr Strammer had approved it. Captain Dafni also stated that he waived the monthly salary of $15,000 as he was already receiving a salary from Zim Shipping.

68 The plaintiffs submitted that Captain Dafni had lied about his employment by Charter Shipping as a consultant and waiving his salary. They relied heavily on the documents submitted by Charter Shipping and Captain Dafni in support of his application for permanent residence (above at [65]). Further, the plaintiffs argued that Mr Strammer's approval had not been obtained as there was nothing in writing. In addition, if Mr Strammer's approval had been obtained, the plaintiffs would have arranged for Star Shipping Agencies (rather than a third party) to assist Captain Dafni in obtaining an employment pass or permanent residence. Also, Captain Dafni's employment contract expressly

prohibited him from working for any other party. Given that Captain Dafni had worked for Charter Shipping (and had declared the same to the ICA and the IRAS), the plaintiffs argued that the burden of proof shifted onto Captain Dafni to show that he had obtained Zim Shipping's approval, under s 108 of the EA. In addition, the plaintiffs relied on the fact that Captain Dafni, when questioned by Zim Shipping in 2006 about his ties with Benedict, did not mention about his employment by Charter Shipping.

69 I believe Captain Dafni's evidence that he had informed Mr Strammer about his employment by Charter Shipping in order to obtain Singapore citizenship and that Mr Strammer had consented to such. The fact that Captain Dafni wanted to obtain Singapore citizenship did not appear to be a secret to me. David Malkoff, another of the plaintiffs' witnesses, gave evidence that Captain Dafni had told him about his desire to become a Singapore citizen, and how he "tried…for a long time to become a Singapore citizen". Further, David Malkoff also recounted that Captain Dafni had, during a meeting with him, discussed the possibility of his (Captain Dafni's) obtaining permanent residency in Singapore during negotiations about relocating GSL's offices to Singapore for GSL to enjoy certain tax benefits and to conduct an initial public offer. The plaintiffs do not dispute this part of David Malkoff's evidence. Since Captain Dafni had previously attempted to become a Singapore citizen, he would have required Zim Shipping's or GSL's support to do so and would therefore have informed his superiors about his plans.

70 In addition, I accept Captain Dafni's explanations that it was not possible to be employed by Star Shipping Agencies in order to obtain his Singapore citizenship. Star Shipping Agencies was the agent of GSL (of which Captain Dafni was the managing-director) and that would have created a conflict of interest. Further, Star Shipping Agencies was owned partly owned by Indonesian parties with political or military links and Captain Dafni did not want them to be aware of his reason for becoming an employee. The plaintiffs did not challenge that part of his evidence. Further, Captain Dafni gave evidence that he had waived the $15,000 salary from Charter Shipping. His evidence was corroborated by Benedict, whom I found to be a truthful witness from observing his demeanour in court. Hoffman himself admitted during cross-examination that he did not know whether Charter Shipping had, *in fact*, paid Captain Dafni his $15,000 salary.

71 Whatever had been stated on the respective forms from Captain Dafni or Charter Shipping to the relevant authorities, to the effect that Captain Dafni was drawing a salary of $15,000 per month was, in my view, not conclusive of the issue of whether Captain Dafni did, *in fact*, draw a salary from Charter Shipping in the present circumstances. At most, it would indicate that the makers of those statements had been less than honest (a finding which I do not need to make), and in any case, this would be a matter between them and the relevant authorities.

72 Given that Captain Dafni had informed Mr Strammer about his employment by Charter Shipping, I do not think that Captain Dafni was in breach of his fiduciary duties. The plaintiffs did not meaningfully dispute Captain Dafni's evidence that Charter Shipping's business was not in competition with that of the plaintiffs. In this light, it is difficult to see how any breach of fiduciary duty arising out of a conflict of interest or otherwise can arise. As for the issue as to whether Captain Dafni was thereby in breach of the Employment Agreement, I would observe that the proceedings between Zim Shipping and Captain Dafni have been stayed in favour of arbitration in Israel (see above at [13]) and it is therefore not necessary to decide the issue here.

73 Assuming Captain Dafni was in breach of the Employment Agreement (a finding which I need not make), in my view, neither Benedict nor Suppiah would have been liable for inducing Captain Dafni to breach the Employment Agreement. The plaintiffs have not discharged their burden with respect to proving the requisite elements of knowledge and intention (see above at [18]-[19]). There was no

evidence that Benedict and/or Suppiah were aware about the Employment Agreement. Further, Benedict had given evidence that he honestly thought Captain Dafni had obtained the requisite approval and therefore would not be in breach of any agreement. As I have indicated earlier (at [70]), I found Benedict to be a truthful witness. Suppiah, on the other hand, only became a director of Charter Shipping in 2005 and therefore could not have procured or intended for Captain Dafni to breach the Employment Agreement.

### *(v) The US$80,000 transfer from Starship Carriers to Maxwin*

74 The plaintiffs alleged that Benedict and Suppiah had wrongfully induced and procured Captain Dafni to breach his employment contract with or fiduciary duties owed to GSL by using Starship Carriers to pay US$80,000 to Maxwin, a company controlled and owned by Captain Dafni, purportedly to cause Captain Dafni to favour Starship Carriers over the interests of Star Shipping Agencies and its used car freight forwarding business. It was also claimed that Starship Carriers had wrongfully induced and procured Captain Dafni to breach his fiduciary duty with Star Shipping Agencies by paying him US$80,000 and by causing Starship Carriers to pass itself off as being part of the plaintiffs' group of companies.

75 In his affidavit, Hoffman stated that Starship Carriers, a company controlled and owned by Benedict and Suppiah, had caused US$80,000 to be transferred into Maxwin, which he alleged was Captain Dafni's "private company". However, during cross-examination, Hoffman admitted that Maxwin was not a company "controlled and owned by Captain Dafni" as pleaded in the plaintiffs' Statement of Claim (Amendment No 3). Hoffman also admitted that he had no evidence as to how the alleged US$80,000 inducement had led to any of the breaches alleged by the plaintiffs or that Starship Carriers had procured Captain Dafni to breach his fiduciary duties with Star Shipping Agencies by paying this US$80,000 sum to Maxwin. The plaintiffs plainly had no evidence to show how this transfer of US$80,000 caused Captain Dafni to be in breach of the Employment Agreement or his fiduciary duties. There was also no evidence on how Benedict, Suppiah or Starship Carriers had the requisite knowledge or intention (see above at [18]-[19]) to support the plaintiffs' claims for accessory liability. I would accordingly dismiss the plaintiffs' claim.

### *(vi) The planned purchase of IFL and the Vessel*

76 The plaintiffs pleaded that Captain Dafni was in breach of his fiduciary duty when, as Area President for the Principals in Asia, he (together with Benedict and Suppiah) had planned to purchase IFL (on or around 15 March 2005) and the Vessel (on or around 17 June 2005) to compete with the plaintiffs' business. In respect of the planned purchase of the Vessel, it was further pleaded that Captain Dafni had also breached his statutory duties under s 157 of the CA in so doing which breach was procured by Benedict and Suppiah.

77 With regard to the planned purchase of IFL, Hoffman relied on an email sent by one Carmelita Yulo ("Ms Yulo") to Captain Dafni dated 16 March 2005 in which Ms Yulo sought a response from Captain Dafni as to whether Suppiah was the sole decision-maker in relation to the proposed purchase, and whether Captain Dafni would support the venture. Hoffman also relied on a separate chain of emails dated 15 March 2005 that Suppiah wrote to Benedict and Captain Dafni, recommending against entering into the IFL purchase.

78 As for the planned purchase of the Vessel, Hoffman relied on an email dated 17 June 2005 sent by Benedict to Captain Dafni to assert that they had intended to purchase the same to compete with the plaintiffs' business. The email stated:

Hi Igal

Vincent Lim of Excel Shipping proposed us to purchase this ship.

[An attachment containing the Vessel's particulars was attached]

The price of this ship is about USD5.5 million.

The proposed deployment routes will be Singapore, Pasir Gudan, Port Klang, Penang & Belawan.

As I do not know the ship's price, kind advise whether the price is acceptable.

Best Regards

Ben Ng

79 The defendants contended that they did not plan to purchase IFL or the Vessel to compete with any of the plaintiffs' business. Benedict and Suppiah gave unchallenged evidence that neither IFL nor the Vessel competed with the plaintiffs' business. Hoffman admitted during cross-examination that he did not know whether those transactions were undertaken or completed, and, that he had no evidence to show that Captain Dafni, Benedict and Suppiah were business partners.

80 It is true that in an email sent by Captain Dafni to Ms Yulo on 19 March 2005, he had said:

*The biz in the states is a biz that is supposed to be done under a private company owned by me and ben, mr, benny suppiah is the [financial] controller of this company, and as long as he is not satisfied with the figures he can not [recommend] to me and ben to commence the biz*.

You have to understand that no biz. Is being done for charity, biz is being done if it is a win win deal…

Carmi, you have to understand that we will not invest usd250000 in this deal just to support you, we will do it gladly if this biz can yield profit to us…

I do not have the chance to come currently to the states, and in any case I will not run the biz.

Therefore the people responsible on my behalf as owner to do the biz, have to be satisfied that they can run the biz profitably.

If we are under pressure to just take a chance [without] proper evaluation and [without] satisfaction that we are happy with the deal, thence we will not go for it as we can invest this money in some other biz that can yield better return on our investment…

[Emphasis added]

81 I am of the view that the email is on its own, insufficient to substantiate the plaintiffs' claim. I accept Captain Dafni's explanation that he had given the impression that he was a part of the deal in order to pacify Ms Yulos, who was dealing with Suppiah and Benedict for the first time. The email has to be seen in the light of Ms Yulos' earlier email where she was asking questions about Suppiah (at [77]). The plaintiffs could not show any evidence of any company which was owned by both Captain Dafni and Suppiah.

82 With respect to the email on the Vessel (at [78]), Captain Dafni's evidence that Benedict had asked him for his opinion about the Vessel was borne by the text of the email. Hoffman agreed this was the case during cross-examination. Further, it is noteworthy that Captain Dafni had sent an email to Zim Shipping's office to ask for advice on the value of the Vessel. It is therefore difficult to see how it could be said that Captain Dafni was in breach of his fiduciary duties owed to the Principals in such a case.

83 There was therefore no evidence that either IFL or the Vessel was in competition with the plaintiffs' business. Neither was there any evidence that Captain Dafni was interested in those business opportunities, or that either purchase had taken place. Indeed, if Captain Dafni had intended to purchase the Vessel and such act amounted to a breach of his fiduciary duties, it would make no sense for him to seek a valuation from Zim Shipping. I would therefore dismiss the plainiffs' claim that Captain Dafni was in breach of his common law fiduciary duties or his statutory duties under the CA.

***(vii) Did Captain Dafni fail to disclose his relationship with Benedict and Suppiah?***

84 The plaintiffs pleaded that Captain Dafni was in breach of his fiduciary duties by failing to disclose to the Principals about his close relationship and/or cooperation with Benedict and Suppiah, who controlled Charter Shipping at that time. Charter Shipping, the plaintiffs highlighted, was a shipping agent of Cheng Lie.

85 The plaintiffs relied on an email dated 19 March 2005 at [80] (wherein Captain Dafni had stated that he owned a company with Benedict and Suppiah, the emails sent in June 2005 in relation to the Vessel (at [78]) and how Captain Dafni came to be employed by Cheng Lie after resigning from Zim Shipping. Consequently they argued that Captain Dafni, by failing to disclose his relationship and cooperation with Benedict and Suppiah, was put in a conflict of interest and therefore was in breach of his fiduciary duties. However, as I explained earlier, the emails that the plaintiffs relied on did not establish that Captain Dafni had agreed to do business with Benedict or Suppiah. Neither do I see how Captain Dafni, by joining Cheng Lie after being placed on garden leave for six months, could thereby be in breach of his fiduciary duties. I would accordingly dismiss this item of the plaintiffs' claim.

***(viii) Were Starship Agencies, Starship Carriers and/or Charter Shipping alter egos of Benedict and/or Suppiah?***

86 The plaintiffs pleaded that Starship Agencies, Starship Carriers and Charter Shipping were likewise accessories to the tort of inducing the breach of Captain Dafni's Employment Agreement, together with Benedict and Suppiah. They relied on the fact that Benedict and Suppiah held the majority and controlling interest in the respective companies, the roles that each company played in respect of the alleged breaches and the fact that those companies had benefitted from the alleged breaches.

87 I understood the plaintiffs' position, from its submissions, to be that the corporate veil for Starship Agencies, Starship Carriers and Charter Shipping should be lifted and these companies should likewise be liable for the tort of inducing a breach of contract. However, I do not think that the plaintiffs can succeed. The plaintiffs, in its submissions, relied on the following matters to support their claim that the corporate veil should be lifted. For Charter Shipping, the plaintiffs highlighted that the declarations it made to the various statutory authorities (*e g* the IRAS and CPF) were "pure fabrication" that created a false impression that Captain Dafni was being "paid" for consultancy work. For Starship Carriers, the plaintiffs highlighted how the company's website had wrongly stated that it had been in the used car freight forwarding business since 1997, that it had paid US$80,000 to Maxwin (controlled by Captain Dafni) and had used confidential information to compete directly with

Zim Logistics, and argued that the company had been used to create a false picture that there was a separate and distinct business from Star Shipping Agencies when, in fact, it had paid Captain Dafni for a share of the pie. For Starship Agencies, it highlighted how the company, by not disclosing the 1999 letters, enjoyed the retained monies and inflated charges and could not have done so without Captain Dafni agreeing to stay silent. It also highlighted that Benedict and Suppiah were the majority and controlling shareholders of the three companies.

88 In my view, the fact that Charter Shipping had wrongly made declarations to the authorities or that Starship Carriers had wrongly stated when it commenced its used car freight forwarding business do not justify the lifting of the corporate veil. As for the remaining allegations, I have already found that they had not been made out based on the plaintiffs' own evidence. In addition, I would point out that Starship Agencies was managed by Johnny until he passed away in 2005. In any case, the plaintiffs accepted that the fact that Benedict and/or Suppiah were the controlling or majority shareholders of the defendant companies, without more, would not be enough to lift the corporate veil. I would accordingly dismiss this last head of the plaintiffs' claims as well.

**Conclusion**

89 For all the reasons set out earlier, I dismiss the plaintiffs' eight heads of claim with costs to the defendants to be taxed on a standard basis unless otherwise agreed.

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