Ascorp Technology Pte Ltd *v* Chew Youn Chong and another (Ryan Patrick Joseph, third party)
[2011] SGHC 118

Case Number : Suit No 699 of 2006

Decision Date : 12 May 2011

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Godwin Gilbert Campos (Godwin Campos LLC) for the plaintiff and third party; Andrew J Hanam (Andrew LLC) for the first and second defendant.

Parties : Ascorp Technology Pte Ltd — Chew Youn Chong and another (Ryan Patrick Joseph, third party)

Companies

12 May 2011 Judgment reserved.

Chan Seng Onn J:

Background

1 The plaintiff, Ascorp Technology Pte Ltd ("Ascorp"), is a Singapore company with a paid up capital comprising 80,000 shares. The third party, Patrick Joseph Ryan ("PJR"), and his wife, Ng Seok Lay ("NSL"), are directors and shareholders of Ascorp. At all material times, NSL was PJR's nominee. She did not take an active role or participate in decisions involving Ascorp or its business.

2 In 2002, Ascorp's business mainly revolved around the supply of MQ64L contactors ("MQ64L cartridges") to its predominant customer, Infineon Technologies Pte Ltd ("Infineon"). Infineon mounted these MQ64L cartridges on its test machines to test its MQ64L integrated circuit chips ("MQ64L chips"). The 64 socket pins ("pins") within each MQ64L cartridge had to make good electrical contact with the corresponding 64 leads of each MQ64L chip to establish the necessary electrical connections before the chip could be tested. Accordingly, the pins within each cartridge had to be robust enough to withstand several hundred thousand cycles of insertion and removal of leads without damage during the testing of these chips. Ascorp had developed the MQ64L cartridges in cooperation with Infineon. However, as Ascorp was experiencing difficulties in getting the MQ64L cartridges to fully meet Infineon's requirements, PJR brought on board the first defendant, Chew Youn Chong ("CYC"), to work on improving the device. CYC had technical experience in contactor technology.

3 As a result of discussions between parties, a Shareholders Agreement was entered into on 8 April 2003 between PJR and CYC ("Shareholders Agreement"). Pursuant to clause 1, shareholding in Ascorp was initially structured as follows:

(a) PJR : 74.99%

(b) NSL : 0.01%

(c) CYC : 25%

However, on 3 February 2005 and 13 July 2005 respectively, CYC exercised purchase options granted to him by virtue of clause 8 of the Shareholders Agreement. As a result, the shareholding in Ascorp was adjusted to:

(a) PJR : 49.99%

(b) NSL : 0.01%

(c) CYC : 50.00%

The Shareholders Agreement also provided that the Board of Directors ("the Board") would comprise the said three shareholders (cl 4), that CYC would be appointed Managing Director (cl 4.4), and that CYC would be paid a monthly salary (cl 4.5). As Managing Director, CYC was "responsible for implementing on a day to day basis the policies formulated by the [Board] and within such framework he [had] free and unfettered discretion" (cl 4.4(a)). The Board, which had to convene at least twice a year (cl 4.7.(a)), retained "the right to appoint and/or remove the Managing Director" (cl 4.4(b)).

Early sources of discord

Infineon's forecasts and orders

4 The relationship between CYC and PJR was initially rosy. However, it later deteriorated over a series of incidents, one of which involved Infineon's forecasted usage of Ascorp's MQ64L cartridges.

5 On 15 October 2004, Infineon forecasted to Ascorp that it would order at least 2 sets of MQ64L cartridges per month for 2005. Taking into account that forecast, CYC computed Ascorp's projected profits for 2005 to be at least $12,000, on the basis that at least 18 MQ64L cartridges would be sold. These figures were presented to PJR at an Accounts and Business Review Meeting held on 22 November 2004 ("the 22 November 2004 meeting"). Against the backdrop of these projected profits, a revision of CYC's remuneration was also considered. PJR agreed, and accordingly, the Board resolved to pay CYC 30% of Ascorp's net profits for 2005.

6 Later, on 22 December 2004, Infineon revised its forecast in an email to two sets a week, *ie* 104 sets per year. On 1 January 2005, CYC also entered into a Consignment Stock Agreement with Infineon on behalf of Ascorp, pursuant to which the latter was obliged to deliver, *inter alia*, contractor cartridges to Infineon's Parts Procurement Center within two days of being giving notice each time (cl 4). This agreement was renewed on 21 October 2005.

7 By 31 March 2005, Ascorp had sold Infineon 19 sets of MQ64L cartridges. It was likely that sales for 2005 would far exceed the figures projected at the 22 November 2004 meeting. PJR became unhappy that the Board's resolution to pay CYC 30% of Ascorp's net profits had been based on inaccurate projections.

CYC's signing of multiple cheques

8 Another source of unhappiness between parties was CYC's issuing of multiple cheques, each not exceeding $5,000:

(a) On 30 June 2005, CYC signed six cheques to himself as payment of his salary and allowances totalling $28,320.

(b) CYC issued three cheques for $5000 (20 July 2005), $5,000 (30 July 2005) and $2,480 (4 August 2005) respectively, in relation to a single invoice issued for renovation works carried out by a company known as Ruxing Renovations Company.

(c) On 8 November 2005, CYC signed 5 cheques to himself totalling $19,170.

9 PJR took the view that such actions violated the spirit, if not the letter, of the Shareholders Agreement, which provided:

5. **Matters Requiring Consent of Both Parties**

The parties shall exercise such powers as may be within their control in relation to the Company to ensure that, save with the prior unanimous approval of the parties in writing or at a general meeting, the Company or BOARD shall not do any of the following actions –

…

(e) give any guarantee or indemnity or create any other form of contingent liability for any amount exceeding $5,000,

(f) sell, transfer, lease, assign or otherwise dispose of its undertaking property (movable or immovable) and/or assets of the company (or any interest therein) or contract to do so for any amount exceeding $5,000,

(g) enter into any contract, arrangement or commitment involving expenditure on capital account exceeding $5,000 or the realisation of capital assets exceeding $5,000,

(h) acquire, purchase or subscribe for any shares, debentures, mortgages or securities (or any interest therein) in any company, trust or body for any amount exceeding $5,000

…

6. **BANK FACILITIES AND CHEQUE SIGNATORIES**

…

6.2 The bank accounts of the Company shall be jointly operated by PJR and CYC or in such other manner as the BOARD may decide.

Lack of visibility of accounts

10 On 4 October 2005, PJR emailed CYC asking to be advised of the monthly net profit from January to June 2005. CYC refused to provide those records. His email response on the same day

stated:

> The net profit from each month are clearly stated from Ascorp monthly account balance sheet, [sic] It's my responsibility on managing it and also part of my duty to kept it confidentially [sic] until the year end account closing.
>
> Understand that there was no previous discussion or agreed [sic] from me you need to be alert or reported on the monthly account activities. therefore [sic], I think you should not ask for visibility unless I think you need to be updated, for this case, Definitely [sic] you will be showed when you come.

Following a meeting on 8 October 2005 when CYC and PJR met so that the latter could countersign cheques for CYC's allowance for April to June 2005, some records were however disclosed by CYC to PJR on the figures of Ascorp's sales and monthly net profits from January to June 2005.

18 November 2005 meeting

11 Given the mounting tensions, a meeting was arranged between CYC and PJR at Raffles Town Club on 18 November 2005. No official minutes were taken, although on 6 December 2005, PJR sent CYC an email purportedly setting out what happened during that meeting. On the evidence of CYC and PJR, it was clear that both parties expressed unhappiness with each other at that meeting. PJR indicated that he wished to draw director's fees from Ascorp. CYC was not agreeable. PJR also indicated that he wanted to replace CYC as Managing Director. For his part, CYC suggested buying out all the shares held by PJR and NSL for $40,000. CYC also wanted the Shareholders Agreement to be amended to allow for a single signatory for sums of more than $5,000. These were not agreed to either.

Removal of CYC as Managing Director

12 Matters between CYC and PJR did not improve. On 21 November 2005, CYC emailed PJR suggesting a "share purchase option or winding up [Ascorp]". By 27 December 2005, CYC had engaged legal representation and through his solicitors informed PJR and NSL that in light of the circumstances, "the most equitable solution is to wind up [Ascorp]". At a Board meeting held on 28 December 2005, CYC's suggestion of winding up Ascorp and the question whether CYC would continue to work for Ascorp were discussed but no satisfactory conclusion was reached.

13 Following more correspondence from CYC's solicitors and an aborted attempt to convene an EGM, PJR sent out a notice on 28 January 2006 calling for a Board meeting. This meeting was held on 13 February 2006. CYC refused to attend. When PJR and NSL arrived at Ascorp's premises, they found the office locked and no one was present. Unknown to them, their three staff had all resigned. This will be further discussed below. The meeting had to take place in the corridor of the office. However, as the required quorum of two directors was fulfilled by the presence of PJR and NSL, the Board went ahead to pass the resolution that CYC be removed as the Managing Director of Ascorp.

Problems surfacing after CYC's removal

14 Even after the removal of CYC as Managing Director, problems continued to surface.

Staff resignation

15 Unknown to PJR and NSL, on 26 January 2006, all of Ascorp's employees had tendered their

resignation. Allegedly, they were clearing leave while serving their notice period at the time when the Board meeting on 13 February 2006 took place. Consequently, between 13 February 2006 and 16 February 2006, Ascorp was shut down. It only restarted operations following PJR's forcible entry into the premises. PJR took the view that the mass resignation by all of Ascorp's staff had been instigated by CYC.

1300 Technology's refusal to continue working with Ascorp

16 PJR also attributed the refusal of a supplier, 1300 Technology, to continue working with Ascorp to the influence of CYC. 1300 Technology was a business entity based in Malaysia that assembled the MQ64L cartridges which Ascorp sold to Infinion. Ricky Peng was the owner of this business. On 21 November 2005, three days after the 18 November 2005 meeting between CYC and PJR, CYC emailed Ricky Peng informing him of problems between himself and PJR:

> Ascorp now having the internal issues need to be addressed between me and my partner Mr. Patrick [PJR], The company might come to the deadlock because I not agreed to let him or third party to run the business.
>
> I will give you the official update again once I have finalized what would be the next situation. Thanks!

Ricky Peng replied the same day as follows:

> I'm sadden by this news
>
> You are my most treasured customer.
>
> It will be a great lost to my company if we are not able to work with you.
>
> I salute and respect your abilities, dedication and talent on the job and working on problems although at times, it is not so pleasant and I do not agree with you.
>
> Anyway I rank you top, to work with.
>
> I have the confidence to work with you to expand our business
>
> I hope your 'internal issues' will not interrupt the dealing of our business.
>
> I want to continue working with you, even if you are not with ASCORP

Subsequently, after CYC's removal as Managing Director, Ricky Peng refused to continue supplying its goods and services to Ascorp. When PJR sent him a purchase order on behalf of Ascorp, he replied on 17 February 2006 without further explanation:

> My company is not able to accept your Purchase Order

Infineon's orders

17 On 15 February 2006, Infineon sent Ascorp an email requesting MQ64L cartridges to be delivered. On the next day, CYC and PJR met with Infineon to explain that the former was no longer in charge of Ascorp's management. On 22 February 2006, Ascorp delivered only one MQ64L cartridge. No further cartridges were delivered. In the evening of 23 February 2006, Ascorp received a letter from

Infineon stating that Ascorp was in breach of the Consignment Stock Agreement. Following a meeting between Infineon and PJR on 24 February 2006, Ascorp agreed with Infineon to work out a "road map strategy" and observe the terms of the Consignment Stock Agreement without further penalty.

18 According to PJR, Ascorp had difficulty meeting Infineon's orders for various reasons. As mentioned above, Ricky Peng refused to supply products to Ascorp following CYC's removal as Managing Director. PJR was also unaware of the stock of MQ64L cartridges that CYC had stored in the drawer of one of Ascorp's former staff, Ms Kelley Teo. Even when these were found, the MQ64L cartridges were in a semi-finished state and required a test report to be put together before delivery could be effected. As all the staff had resigned, there was no qualified personnel at the time to do the report. CYC did not respond to PJR's text message asking if he would come back to help with the test report. Ascorp also realised that a purchase order issued to a company known as CLT Technologies ("CLT") for contactor pins (a component of the MQ64L cartridges) had been put on hold.

19 Despite the difficulties, Ascorp eventually met Infineon's orders. However, even after Ascorp fulfilled the orders from Infineon, the Consignment Stock Agreement was not renewed. After this incident, Infineon ceased to do business with Ascorp.

HQ64L cartridges

20 Earlier, in October 2004, PJR and CYC had met a Mr Sansui of ST Microelectronic (Muar) ("STM"). The purpose of the meeting was to discuss the development of HQ64L contactors ("HQ64L cartridges") tailored for the use of STM. Just as MQ64L cartridges had been developed for Infineon's customised use, so too were the HQ64L cartridges to be developed to meet STM's requirements. The function of the HQ64L cartridges was similar to the function of the MQ64L cartridges customised for Infineon's use – STM's integrated circuit chips would be inserted into the HQ64L cartridges for testing by STM's test machines.

21 After the meeting with STM, CYC also worked with Ricky Peng to develop the HQ64L cartridge. Initially, the project appeared to have gone well. Email exchanges on 27 October 2004 between CYC and a Mr Kirk of STM attested to that. PJR was not copied on these emails. However, subsequently, technical issues arose with regard to the pins of the HQ64L cartridge. Apparently, the pins tended to split before the requisite number of cycles of insertion and removal of the integrated circuit chips into the HQ64L cartridge was attained ("the split pins problem"). On 2 December 2005, CYC emailed Ricky Peng regarding the split pins problem, asking whether it could be solved. For the first time, PJR was copied on the emails. Ricky Peng emailed in reply on the same day that he was unable to get rid of the problem and that as a result, his company had decided to abandon the project. On 6 December 2006, PJR responded to the email exchanges to encourage Ricky Peng not to give up on the project. Ricky Peng, however, did not continue with the development of the HQ64L cartridge.

22 Unknown to PJR, on 28 November 2005, CYC incorporated the second defendant, Adtronic Technologies Pte Ltd ("Adtronic"). This company was wholly owned by CYC. After CYC was removed as Managing Director, Adtronic sent quotations to STM between 26 and 28 February 2006 to supply items with similar functions as the HQ64L cartridge. On 17 July 2006, when PJR met with a Mr Tay of STM, he was informed that STM was doing business with Adtronic. He also found out that CYC was the Managing Director of Adtronic. PJR became convinced that CYC had not been truthful when he said there were technical problems with the HQ64L cartridge that could not be resolved.

Events leading to the present dispute

23 On 22 May 2006, CYC resigned as director of Ascorp. Acting through PJR, Ascorp brought the present action against CYC and Adtronic. PJR was subsequently joined as a third party. While the pleadings in this case are somewhat convoluted, essentially:

(a) Ascorp claims, *inter alia*, an account of sales and profits earned by Adtronic, an order for payment by Adtronic to Ascorp of all sums found due to the latter, and damages.

(b) CYC counterclaims against Ascorp for outstanding salary and profit shares that he alleges were due to him but remain unpaid.

(c) CYC claims against PJR an indemnity or contribution in the event that Ascorp succeeds in any claim that CYC is not entitled to the moneys that he received in respect of their profit sharing arrangement or that his departure from Ascorp has caused any loss to Ascorp.

My decision

Ascorp's claims

24 In its closing submissions, Ascorp essentially characterised its complaint against CYC in the form of alleged breaches of fiduciary duty on his part. In the Statement of Claim (Amendment No 2) filed on 5 January 2009, the specific acts complained of were:

(a) misrepresentation of the forecasted profits for 2005 (para 8);

(b) overpayment of profit allowance due to misrepresentation to PJR (para 10);

(c) signing of multiple cheques to himself in mid-2005 to circumvent the requirement for amounts above $5,000 (para 11) and again in November 2005 (para 12);

(d) not informing Ascorp that Infineon had increased its orders for the period October 2005 to September 2006 and deliberately cancelling orders from Ascorp's suppliers (para 16) to cause damage to Ascorp's goodwill and reputation with its customers (para 13 and 17);

(e) resigning without notice as Managing Director of Ascorp on 9 November 2005 thus seriously affecting Ascorp's operations (para 18 and 20);

(f) breaching clause 13 of the Shareholders Agreement by incorporating the second defendant on 28 November 2005 (para 21 and 22) and having the second defendant do business with STM (para 23);

(g) creation of contingent liability without proper protection for Ascorp (para 32); and

(h) making double claims for petrol, car repairs, road tax, insurance, taxi and other transport expenses when he was already paid a transport allowance of $800 a month (para 34).

I will deal with each of these in turn.

(a) Misrepresentation of forecasted profits for 2005

25 The only forecast given by Infineon prior to the 22 November 2004 meeting was an email dated 15 October 2004 which stated that its usage was "about 2 sets/month". There was no evidence that Infineon's usage would have gone above this figure. CYC had given evidence that he took a conservative approach and projected 1.5 sets per month to reach his forecast of 18 sets for 2005. Although PJR took the position that CYC should have forecasted 24 sets, he admitted that the forecast of 18 sets was not far from 24 sets. In any event, whether the forecast was 18 or 24 sets, it would not have amounted to the number of orders that Infineon eventually placed. I am not able to find that CYC had misrepresented the number of sets likely to be ordered for 2005. It was fortuitous that Infineon later decided to increase its orders. It is regrettable that Ascorp did not see fit to count its blessings but instead took issue with CYC's 30% share of Ascorp's net profits.

26 While it was not specifically pleaded in the Statement of Claim (Amendment No 2), PJR took issue at the trial with CYC's costing in his preparation of the forecast. On the evidence, I find that CYC had not misrepresented the cost of producing the MQ64L cartridges. CYC had produced the figures he used in computing the profit forecast and I accept that those figures were reasonable. CYC did not misrepresent Ascorp's outlook for 2005. There was no breach of fiduciary duty on the part of CYC in respect of his presentation of the forecasted profits for 2005 at the 22 November 2004 meeting.

(b) Overpayment of profit allowance due to misrepresentation

27 As I have found that there was no misrepresentation, this allegation can be dealt with shortly. CYC did not pay himself more than 30% of Ascorp's net profits for 2005. As this percentage had been agreed to by the Board at the 22 November 2004 meeting, there was no overpayment.

(c) Signing of multiple cheques to himself

28 In alleging that CYC was in breach of his fiduciary duty by signing multiple cheques (each not exceeding $5,000) to himself, Ascorp relied on the terms of the Shareholders Agreement. CYC challenged Ascorp's *locus standi* to rely on those terms as it was not privy to the Shareholders Agreement. On its part, Ascorp contended that it could rely on those terms because the Shareholders Agreement was a hybrid employment-cum-shareholders agreement, *ie*, PJR entered into the Shareholders Agreement on behalf of himself and Ascorp. Alternatively, pursuant to the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) ("CRTPA"), Ascorp had standing to enforce the terms of the Shareholders Agreement.

29 In my judgment, Ascorp is precluded from enforcing the terms through the CRTPA as that has been expressly excluded by clause 17 of the Shareholders Agreement. When PJR signed the Shareholders Agreement, he also did not indicate that he was doing so on behalf of Ascorp. The company's stamp was not affixed anywhere on the Shareholders Agreement. I find that Ascorp was not a party to the Shareholders Agreement. As a Managing Director that was drawing a salary, CYC was certainly an employee of Ascorp. Where then, was his contract of employment contained? In my view, clause 4.1 of the Shareholders Agreement created an obligation on the part of PJR to ensure that Ascorp engaged CYC on the terms set out in the Shareholders Agreement:

4.1 Establishment of BOARD

As at the date of this Agreement PJR is a Director of the company. Following the due performance of the provisions of clauses 2 and 3 above *CYC shall be appointed as a Director of the Company. PJR and CYC shall exercise their voting rights to ensure the establishment of a BOARD upon the terms and conditions as set out in this Clause*.

…

4.4 Managing Director

(a) The Managing Director of the Company shall be CYC…

[emphasis added]

PJR duly ensured that CYC was appointed as a director of Ascorp, and pursuant to Article 101 of Ascorp's Memorandum of Association, the directors further appointed CYC as Managing Director. The fact that CYC was an employee of Ascorp engaged on the terms encapsulated in the Shareholders Agreement is evidenced by the fact that Ascorp paid CYC an initial salary commensurate with the amount set out in clause 4.5(a) of the Shareholders Agreement. Ascorp subsequently even increased that sum. CYC also admitted that he was an employee of Ascorp and that the terms of his employment incorporated terms set out in the Shareholder's Agreement:

Q: Can you turn to page 49 of AB1. Is this where you believed you were employed as a managing director? Page 49, Clause 4.4(a).

A: Yes.

Q: Can you turn to page 50? On the top of page 50 Mr. Chew, is this where you believed that you were entitled to $3,500 a month for the said first 6 months at least?

A: Yes.

30 While Ascorp cannot enforce the Shareholders Agreement *per se*, it can enforce the terms of CYC's employment contract. Clause 5 of the Shareholders Agreement sets out actions that Ascorp and the Board may not engage in without the consent of both PJR and CYC (see above at [9]). These would have been incorporated as part of CYC's contract of employment with Ascorp. On the evidence before me, it is clear that CYC was in breach of sub-clauses 5(f) and (g) of the Shareholders Agreement when he issued several cheques each not exceeding $5000 to himself for payment of an amount greater than $5000. That was a breach of the spirit, if not the letter of the terms of his employment. CYC was clearly aware of this, as borne out by his evasiveness when questioned on this point:

Court: I just say in a scenario where you have to pay to yourself above 5,000, you need [PJR's] signature right?

Witness: Yes, if you want come out one cheque.

Court: I'm saying one cheque. But below 5,000, you can pay to yourself and he would never know because you don't need to tell him and the cheque will also clear, correct?

Witness: Yes.

Court: Okay. So if you need to pay yourself 15,000 in one go, it's the proper way to write one cheque of 15,000 so that he will know, or is it the proper way is to split into three cheques of 5,000 each?

Witness: He's not in then I --- then I will issue the three cheque to me.

…

Court: So therefore, in that sense, you try to get around it by issuing three cheques where you don't need his signature.

Witness: Yes.

31 It is trite law that a director should act honestly in the discharge of the duties of his office (see s 157, Companies Act (Cap 50, 2006 Rev Ed)). On the evidence, CYC knew that PJR disputed his entitlement to 30% of Ascorp's net profits and was likely to object to signing the cheques. Clearly, CYC was trying to avoid getting PJR's signature by issuing multiple cheques instead of one. By doing so, he was in breach of the duty of honesty that he owed to Ascorp by virtue of being its Managing Director.

(d) Damaging Ascorp's goodwill and reputation with its customers

32 Infineon was Ascorp's main customer. Ascorp alleged that CYC had acted to cause damage to Ascorp's goodwill and reputation with Infineon. In its Statement of Claim (Amendment No 2) and closing submissions, Ascorp pointed to specific acts allegedly committed by CYC:

(a) not informing the Board about the Consignment Stock Agreement entered into in December 2004 with Infineon;

(b) not informing Ascorp that Infineon had increased its orders for the period between October 2005 to September 2006;

(b) cancelling purchase orders made with CLT when supplies were needed to make MQ64L cartridges;

(c) causing Ricky Peng to refuse to continue working with Ascorp; and

(d) causing the mass resignation of Ascorp's staff so it would not be able to meet orders.

33 I accept that there was sufficient reason for CYC's cancellation of its purchase order to CLT. Ascorp was only required to hold an inventory of three sets of the MQ64L cartridges at all times in the event that Infineon placed an order. I accept that in December 2005, there were no orders from Infineon and Ascorp already had six sets of the MQ64L cartridges on standby for any orders received. As such, there was adequate reason to put the order to CLT on hold, to be activated if necessary.

34 I do not accept, however, that on the whole, CYC had acted in the best interests of Ascorp. It is clear that pursuant to clause 5 of the Shareholders Agreement, which would have also been incorporated into CYC's employment contract, CYC was not to enter into contracts "involving expenditure on capital account exceeding $5,000" without PJR's consent. No such prior consent was obtained. Also, while with the infighting between PJR and CYC it was not surprising that the staff would want to leave, it is rather unusual that all three staff would have resigned on the same day. That suggests a degree of orchestration on the part of CYC. It was also unexplainable why CYC did not take action to rehire staff or at least inform the Board that the company would be facing a labour crisis. Further, it was likely that CYC was in some way responsible for Ricky Peng's defection. Ricky Peng had been working with Ascorp. There was no reason why he ought not to have continued working with Ascorp while it remained profitable for him to do so. I find it telling that in his email, Ricky Peng stated that "I want to continue working with you [CYC], *even if you are not with ASCORP*". The statement suggested that Ricky Peng was aware that CYC would leave Ascorp shortly but engage in similar business that could require his services. On the whole, I find that Ascorp had proven on the balance of probabilities that CYC had acted to cause damage to Ascorp's goodwill and reputation with Infineon, and was as such in breach of his fiduciary duty to act in the best interest of Ascorp.

(e) Resigning without notice as Managing Director of Ascorp on 9 November 2005

35 While it was alleged in the Statement of Claim (Amendment No 2) that with effect from 9 November 2005, CYC had resigned as Managing Director, that line of inquiry was not seriously pursued at trial or addressed in closing submissions. I do not find that CYC had resigned as alleged by Ascorp. On the contrary, he would have had to be acting as Managing Director to have been able to accept the resignation of Ascorp's staff on 26 January 2006. It was also in that capacity that he would have put the purchase order issued to CLT on hold on 14 December 2005.

(f) Incorporation of Adtronic and its business with STM

36 It is not disputed that in late 2004, CYC and PJR met with Mr Sansui from STM to discuss Ascorp's development of the HQ64L cartridge. By the time CYC was removed as Managing Director, a prototype of the product had come into existence. The prototype, however, had problems which caused the pins to split and require cleaning. As already mentioned above at [21], Ricky Peng stated that he could not resolve the problem and would be abandoning the project. STM subsequently contacted CYC in February 2006 to explore the possibility of reviving the product.

37 CYC maintained that when he issued quotations in respect of a device known as the "Synex Handler" to STM, he did not breach his fiduciary duty not to put himself in a position of a conflict of interest. This is because Ascorp did not in fact have any business opportunity vis-à-vis STM given its failure to resolve the split pin problem. In any event, CYC submitted that the Synex Handler was a contactor with far more sophisticated functions and thus, was not in the same class of devices as the HQ64L such that his promotion of the Synex Handler would constitute a conflict of interest. Further, he argued no conflict eventuated as STM did not place any orders with Adtronic in response to its quotations.

38 Ascorp relied on clause 13 of the Shareholders Agreement to argue that CYC was prohibited from engaging in businesses similarly concerned with the production and supply of contactors. As mentioned above at [28], CYC's position was that Ascorp has no *locus standi* to enforce any term in the Shareholders Agreement. Yet, even putting aside that point, it is trite law that a director must not put himself in a position of a conflict of interest and he cannot appropriate the company's maturing business opportunities for his own gain. In *Swiss Butchery Pte Ltd v Huber Ernst* [2010]

3 SLR 813, it was held at [12] that:

> …a director is not allowed to make use of information obtained while he was a director of the company in question or to exploit a maturing business opportunity of the company for his own personal purposes and profit. Any profit so obtained will be subject to a constructive trust in favour of the company.

In *Walter Woon on Company Law* (Sweet & Maxwell Asia, 3rd Ed, 2005) (Tan Cheng Han gen ed) at paragraph 8.63, it was explained that:

> whether a director is proscribed from appropriating to himself a business opportunity probably depends on whether the opportunity falls within the company's scope of business… a director should not take up an opportunity for profit if it is within the scope of the business of the company as currently carried out and as planned to be carried out.

39 While Ricky Peng had abandoned the project, there was no indication that Ascorp had similarly given up. The maturing business opportunity with STM still existed. PJR's email to Ricky Peng asking him to continue trying to resolve the problem would indicate that Ascorp remained interested in developing the HQ64L cartridge for STM's use. There was no reason why, given time, Ascorp could not have found an alternative party to work on the cartridge, just as CYC had been invited to join Ascorp to develop the MQ64L cartridges. I also reject the defence that the Synex Handler which Adtronic had quoted to STM was a different business opportunity than the HQ64L. CYC had given evidence that the new contactor was a different mechanism as it had different springs, levers and pivots, and was designed to allow for replaceable parts within the cartridge rather than having to throw away the whole cartridge once its constituent parts were worn out. While it incorporated different mechanisms, the function the Synex Handler served was similar to the HQ64L cartridge – it was a contactor as well. CYC was thus in breach of the "no conflict" rule when he submitted quotations to STM through Adtronic. Whether or not STM eventually placed orders with Adtronic is irrelevant to the fact of CYC's breach of the no conflict rule. It merely goes towards damages.

(g) Creation of contingent liability with improper protection for Ascorp

40 Ascorp alleges that if CYC had been acting in the best interests of Ascorp, he ought to have taken steps after signing the Consignment Stock Agreement to ensure that Ascorp would not be caught in breach of its terms, especially in light of how onerous they were to Ascorp. It alleges that one such step could have been to secure back-to-back suppliers' contracts with 1300 Technology and CLT to ensure there would be adequate supplies of the materials required to produce the MQ64L cartridges. CYC's answer was essentially that he saw no need for such measures as he was in the company to take charge that there would be sufficient supplies.

41 It is trite law that in reviewing the directors' exercise of discretion, the court should not substitute its own judgment for that of the directors (see *ECRC Land Pte Ltd v Wing On Ho Christopher* [2004] 1 SLR(R) 105 at [49] and *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 at [16]). The inquiry is whether the discretion was exercised in good faith for the company's interests. On the evidence, I am not convinced that the lack of back-to-back contracts meant that CYC had not acted in the best interest of Ascorp. I accept that he did not see a need for such arrangements and had made a business decision that there would be necessary supplies even without such arrangements.

(h) Double claims for transport expenses

42 In the Statement of Claim (Amendment No 2), Ascorp alleged that CYC had made double claims for petrol, car repairs, road tax, insurance, taxi and other transport expenses when he was already paid a transport allowance of $800 a month. However, as Ascorp did not appear to be pursuing its claim in respect of these in its closing submissions and its reply submissions, I make no finding of fact on the same.

Conclusion on Ascorp's claim

43 In light of the above, I find that CYC had breached his fiduciary duties to act honestly and in the best interest of Ascorp by placing himself in a position of conflict of interest.

CYC's counterclaim

44 CYC's counterclaim is for three months' salary in lieu of notice of termination, and for unpaid profit allowances for October and November 2005. As PJR conceded that CYC had not been paid his profit allowance for that period, and as it was agreed that CYC would be entitled to 30% of Ascorp's net profits for 2005, his claim for those sums must succeed. However, as CYC has not adduced any evidence that Ascorp has to give him notice before termination, his counterclaim for salary in lieu of notice cannot succeed.

CYC's claim against PJR

45 No submissions were made in CYC's closing submissions in respect of his claim against PJR save the following:

> [CYC's] total counterclaim comes to $29.528.24 ($16.272 + $13,256.24). As [Ascorp] is now insolvent … an order for [Ascorp] to pay this sum would be of no use. Further, [PJR] has depleted the assets of [Ascorp] by using all the retained earnings to pay for his legal fees for an unmeritorious law suit. We therefore seek an order for [PJR] to pay the Judgment sum on the counterclaim of $29,528.24 with interest and costs.

46 As I have already found that there are claims against CYC for breach of fiduciary duty that can be sustained, the suit cannot be deemed unmeritorious. Further, Ascorp is a separate legal entity from PJR. CYC has not proffered any compelling reason for me to lift the corporate veil to find PJR personally liable in respect of any sum. CYC also claims an indemnity against PJR in the event that his departure from Ascorp has caused any loss to the company. Presumably this is because it was PJR who instigated his removal as Managing Director of Ascorp. However, as CYC's breach of fiduciary duty preceded his removal as Managing Director, I find no impropriety in the Board's removal of CYC from his position and see no reason why PJR should indemnify CYC in this regard.

Conclusion

47 In light of the above:

(a) I grant Ascorp an account of sales and profits earned by Adtronic, and an order for payment by Adtronic to Ascorp of all such sums found to be due from Adtronic to Ascorp on the taking of the account by the Registrar. Damages are to be assessed by the Registrar generally in respect of Ascorp's loss of reputation and goodwill with its customers as caused by CYC, and specifically in respect of losses caused by CYC and Adtronic's appropriation of Ascorp's business opportunities with STM.

(b) I grant CYC's counterclaim against Ascorp in part for unpaid share of the profits due to him.

(c) I dismiss CYC's claim against PJR.

I will hear parties on costs.

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