Dayco Products Singapore Pte Ltd (in liquidation) v Ong Cheng Aik
[2004] SGHC 192

Case Number : Suit 1463/2001

Decision Date : 02 September 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Ashok Kumar and Eugene Thuraisingam (Allen and Gledhill) for plaintiff; Francis Goh (Ari Goh and Partners) for defendant

Parties : Dayco Products Singapore Pte Ltd (in liquidation) — Ong Cheng Aik

Companies – Directors – Duties – Breach of fiduciary duties – Whether director breached fiduciary duties by failing to disclose personal interest in transactions of company – s 156(1) Companies Act (Cap 50, 1994 Rev Ed)

Companies – Directors – Liabilities – Whether director liable to account for unauthorised profits made as a result of failure to disclose personal interest in transactions of company – Whether director liable to compensate company in damages

2 September 2004

Belinda Ang Saw Ean J:

1 This action raises the questions whether the defendant, Ong Cheng Aik, as managing director of the plaintiff, failed to disclose his personal interest in some transactions with the plaintiff and, if so, is he liable to account to the plaintiff for the unauthorised profits made by him? Alternatively, did the failure to disclose his interest render him liable to compensate the plaintiff in damages?

2 The plaintiff, Dayco Products Singapore Pte Ltd, a company in voluntary liquidation, was at all material times a trading company engaged in the business of supplying aftermarket automotive belts and hoses in Asia. It is the plaintiff's case that the defendant, without the knowledge and approval of the board or shareholders, caused the plaintiff to enter into various transactions for the sale of the plaintiff's goods to the defendant's own companies, Mark IV Singapore Pte Ltd ("Mark IV Singapore") and Asia Pacific Automotive Pte Ltd ("APA"). The pleadings assert a positive duty to act in good faith and in the best interests of the plaintiff. The pleadings also assert the negative fiduciary duty of avoiding a position of conflict between personal interest and duty. It was argued that the defendant breached his fiduciary duties as he failed to make adequate and frank disclosure of his personal interest in the sale transactions on account of his directorships and shareholdings in Mark IV Singapore and APA. The defendant does not dispute his interest in Mark IV Singapore and APA, but denies that he is liable on the grounds alleged.

3 The trial was conducted over several days. A total of nine witnesses testified at the trial. In the first tranche, Mr Michael Khoo SC represented the defendant. Mr Francis Goh came into the matter for the defendant after the hearing was restored. Mr Ashok Kumar, assisted by Mr Eugene Thuraisingam, represents the plaintiff.

4 I should mention that the defendant made an unmeritorious attempt in his Closing Submissions to resuscitate the failed preliminary argument that questioned the liquidator's authority to bring this action. That preliminary point was concluded at the early stages in favour of the plaintiff and it was on that footing that the trial proceeded on the substantive issues.

5 I begin with a narration of some of the background facts. The plaintiff was, at all material times, the wholly owned subsidiary of Dayco Products Inc, a company incorporated in Delaware, USA. The ultimate holding company was Mark IV Industries Inc, a company incorporated in Buffalo, USA. The subsidiaries of Mark IV Industries Inc were arranged into two separate divisions, the industrial division and the automotive division. Dayco Europe SRL ("Dayco Europe"), Dayco Products Inc and the plaintiff, all of whom were involved in the automotive business, were grouped in the automotive division. Dayco Products Inc changed its name to Dayco Products LLC on 13 September 2000.

6 At the relevant times, John Purden ("Purden") was the vice president and general manager of Dayco Europe for the geographical area of Europe, South America, Asia and Australia. The defendant was in charge of the day-to-day management of the plaintiff. The defendant reported directly to Purden, who in turn reported to Kurt Johansson. Kurt Johansson was the head of the Mark IV automotive division. He was a director of Dayco Europe and an officer of Mark IV Industries Inc, and he reported to the board of directors of Mark IV Industries Inc on the affairs of the plaintiff.

7 The board of the plaintiff comprised the defendant, Tan Meow Kheng (the defendant's wife), William P Montague, Sal H Alfiero and Gerald S Lippes. It is not disputed that Tan Meow Kheng was a director in name for "administrative reasons". The other three foreign directors were not resident in Singapore. Purden explained in his Supplemental Affidavit of Evidence-in-Chief, that Dayco Product Inc did not have its own board of directors and was controlled by Mark IV Industries Inc.

8 It is common ground that on 28 June 1999, the defendant was told that the plaintiff's operations would be closed down by 31 December 1999 and the company would thereafter be voluntarily liquidated. In its place, a sales representative office of Dayco Europe would be set up. The defendant was to stay on after 31 October 1999 on a full-time basis to close down the company and transfer the existing business to the sales representative office to be headed by Josephine Yap ("Yap") who was the sales administration manager of the plaintiff. The sales representative office was set up in January 2000. In April or May 2001, the sales representative office changed its name to Dayco Aftermarket SRL.

9 The parties had referred to the transactions in question as the sale of "Returned Goods", the "Bonded Warehouse Stock" and finally, the "Excess Singapore Stock". It is not disputed that by 26 July 1999, the plaintiff and the defendant agreed to the following:

(a) To sell the Returned Goods and Bonded Warehouse Stock at a lump sum price of US$150,000 to the plaintiff's Hong Kong and/or Singapore distributors.

(b) To sell the Singapore inventory, *ie* Excess Singapore Stock, "at a maximum discount of 50% of inter-company costs".

(c) Any offers other than (a) and (b) would have to be approved by the plaintiff.

10 The Returned Goods represented stock previously sold to the plaintiff's distributor in Seoul, South Korea, Shin Young Trading, whose sole proprietor was An Wea Don ("AWD"). AWD was a casualty of the Asian financial crisis and, with the devaluation of the Korean won, he had difficulties paying the plaintiff for the stock he had bought. There was still an outstanding sum of US$599,032 due and owing to the plaintiff. The plaintiff agreed in a letter dated 18 August 1999, to take back the stock and to refund him his earlier payment of US$144,344. The Bonded Warehouse Stock, on the other hand, represented stock warehoused in Singapore pending shipment to AWD.

11 The plaintiff alleged that the defendant knowingly misrepresented the true value of the Returned Goods and Bonded Warehouse Stock, and induced the plaintiff to sell them to Tong Chieh Trading (Hong Kong) Co Ltd ("Tong Chieh"). The sale to Tong Chieh, evidenced by the plaintiff's invoice no 903621 dated 31 August 1999, was a "sham" arranged by the defendant to conceal the true nature of the sale from the plaintiff so that the defendant could deal with the goods for his own benefit. The defendant used APA's name and dealt with these goods through Mark IV Singapore. The Returned Goods remained in South Korea and were treated as part of Mark IV Singapore's initial capital injection for an 80% shareholding in a new Korean company that was subsequently renamed Shin Young Trading Co Ltd. In the case of the Bonded Warehouse Stock, Mark IV Singapore, in reality, sold the stock to Shin Young Trading Co Ltd for a profit.

12 The Excess Singapore Stock was from the plaintiff's inventory in Singapore. The allegation was that the defendant arranged for the Excess Singapore Stock to be sold to APA, without disclosing his directorship and shareholding in APA. Mark IV Singapore paid for the goods and later sold them at a profit to the plaintiff's distributors in the Philippines and Singapore.

13 There is no difficulty here with the formulation of the law on this topic and in the analysis of the facts. A director, being a fiduciary, cannot exercise his powers for his own benefit or gain without clearly disclosing his interest and obtaining the necessary consent. The English Court of Appeal in *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 131 at [65] said:

> The requirement of the general law is that, although disclosure does not have to be made formally to the board, a company director must make full disclosure to all the shareholders of all the material facts. The shareholders in the company, to which he owes the fiduciary duty not to make an unauthorised profit from his position, must approve of, or acquiesce in, his profit. Disclosure requirements are not confined to the nature of the director's interest: they extend to disclosure of its extent, including the source and scale of the profit made from his position, so as to ensure that the shareholders are 'fully informed of the real state of things', as Lord Radcliffe said in *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1 at 14.

14 Separately, s 156(1) of the Companies Act (Cap 50, 1994 Rev Ed) and sometimes the articles of a company, permit a director who is interested in a proposed transaction to take the benefit of the transaction if he discloses his interest to the board and takes no part in the decision of the board on the transaction. If the director makes that disclosure and abstains from taking part in the decision, the validity of the transaction is not impaired.

15 A failure to adequately disclose will render the director accountable to the company for the profits made from the transaction. The law governing the liability to account by one in a special fiduciary relationship with another has been authoritatively declared by the House of Lords in *Boardman v Phipps* [1967] 2 AC 46. The plaintiff must, on the facts, demonstrate a "real sensible possibility of conflict": *Queensland Mines Ltd v Hudson* (1978) 3 ACLR 176.

16 The defendant submits that there can be no breach of fiduciary duties as alleged because Purden had acquiesced in the sales as he was aware of the defendant's interest in APA and Mark IV Singapore. Purden was the person whom the defendant primarily looked to for information, advice and instructions relating to the conduct of the affairs and business of the plaintiff. The defendant had talked to Purden about his plans after the closure of the plaintiff's Singapore office, and the reasons for the incorporation of APA and Mark IV Singapore. As such, Purden was under a duty to communicate to the plaintiff's overseas management what he knew about APA and Mark IV Singapore.

Where an agent has a duty to communicate certain facts to the principal, the principal is imputed with knowledge of these facts.

17 In short, can the knowledge and acquiescence of Purden be attributed to the plaintiff in the present case? The short answer to the defendant's contention on this question is that the law requires disclosure to and the consent of a fully independent board under s 156(1) of the Companies Act or the shareholders under general law before it will regard the fiduciary as absolved. As the essential fiduciary obligation is to avoid conflict between personal interest and duty to the plaintiff, it is necessary for the defendant to actually disclose that his companies were buying the plaintiff's goods and to seek its approval for the sales. As counsel for the plaintiff rightly submits, there was factually no disclosure, as such, in the present case, leading to informed consent that would absolve a fiduciary from what would otherwise have been a breach of duty. It was never suggested that the defendant had formally informed the board of directors of the plaintiff or its shareholders or that they had given their consent to sell the respective stocks in question to APA and Mark IV Singapore.

18 Specifically on the question posed in [17], which is about whether informal disclosure or knowledge informally acquired is sufficient to satisfy the disclosure requirements, I am of the view that it is unsustainable in law or fact. The defendant has not established on a balance of probabilities, that Purden knew or was aware of, or even acquiesced in the respective sales of the Returned Goods, Bonded Warehouse Stock and Excess Singapore Stock to the defendant's companies, APA and Mark IV Singapore. The evidence before me is limited and cannot constitute a "vicarious" attribution of knowledge sufficient to satisfy the requirement of disclosure to the board or shareholders. I shall now elaborate on my decision.

19 The defendant's pleaded case is that he wanted to take over the business operations of the plaintiff upon its cessation and he was in discussion with management of the automotive division between June and September 1999 about this. He also discussed the setting up of a joint investment in a regional factory to manufacture Dayco products at a low cost. His vision was for the distributors of Dayco products in Asia to form a "partnership" venture. The "partnership" venture would involve the incorporation of a holding company for the various regional distributors of Dayco products. The holding company would own substantial shareholdings in the distributors and the distributors would, in turn, own a stake in the holding company.

20 The defendant testified that this "partnership" venture was discussed with Purden in late June or early July 1999. Purden was supportive of the defendant's ideas and had assured him of his belief that management of the automotive division would be receptive to the idea. With that assurance, the defendant incorporated Mark IV Singapore and APA on 23 July 1999 and 31 July 1999 respectively.

21 Mark IV Singapore was intended to be the vehicle for the "partnership" venture to set up the factory as well as to take over the distribution management in Asia. APA was to assume the business of distributing Dayco products in Singapore and Indonesia. The shareholders of Mark IV Singapore were to comprise of distributors in Singapore, Hong Kong, South Korea and the Philippines. Both Purden and Yap were each to be 5% shareholders and their shares were to be held in trust by the defendant. They were described in the list of shareholders as "JP Nominees".

22 The plaintiff denies any discussions of a venture as alleged. Purden testified that the defendant approached him about taking over the plaintiff's operations only in October 1999. He wrote to his management on 1 November 1999 about the proposal. However, management was not in favour of the defendant taking over the business of the plaintiff as Dayco Europe, through its sales

representative office, could continue to supply the plaintiff's existing customers directly from Europe. Purden orally communicated management's decision to the defendant on or around the first week of November 1999.

23 Both Yap and Purden deny acquiring a stake in Mark IV Singapore. Yap said she declined the offer for two reasons: she was still an employee of the plaintiff and later of Dayco Europe, and she did not have the money to subscribe to the shares. Purden's evidence is that sometime around the first week of July 1999, the defendant approached him and orally offered him shares in a company to be set up by the defendant to engage in business relating to batteries, filters, brake pads and windshield wipers, none of which the plaintiff nor Dayco Europe dealt in. Purden said he was interested as the proposed business was to be complementary and not in competition with Dayco Europe. He was not aware of the name of the new company until September 1999 when he wrote out a cheque for his proposed shareholding. Purden later stopped payment on the cheque after he changed his mind about participation despite having told the defendant to change the company name "Mark IV Singapore".

24 According to the Defence, the Returned Goods and Bonded Warehouse Stock were sold to Tong Chieh, the plaintiff's distributor in Hong Kong, for a total price of US$150,000. Tong Chieh resold the Returned Goods and Bonded Warehouse Stock to the plaintiff's distributor, Shin Young Trading Co Ltd, in South Korea. APA paid for the goods on behalf of Tong Chieh who then repaid APA.

25 Subsequently, the defendant revealed in the Further and Better Particulars of the Defence, filed on 7 June 2002, that Tong Chieh was a nominee purchaser of the Returned Goods and Bonded Warehouse Stock. Tong Chieh did not actually pay for the Returned Goods and Bonded Warehouse Stock. APA paid the plaintiff. In April 2000, Mark IV Singapore paid APA for the goods.

26 Similarly, the defendant revealed that the Excess Singapore Stock was bought by APA as nominee purchaser and then resold to Mark IV Singapore on or about 19 August and 2 September 1999. The defendant said that APA was at that time, a distributor of the plaintiff and the Mark IV automotive division. Mark IV Singapore then sold the stock to DAV Commercial, Asia Pacific Rubber & Plastics Pte Ltd and Ultra Auto Trading Co Ltd. The defendant, however, agreed with Mr Kumar that APA at the material time, was not the plaintiff's distributor. The distributor in Singapore was Asia Pacific Rubber & Plastics Pte Ltd. In August 1999, APA was not yet appointed a distributor of Dayco products for Indonesia and Singapore. Purden's evidence is that he did not know about APA until he signed the distributorship agreement dated 8 November 1999. Mr Kumar made the point that on 26 July 1999, APA was yet to be incorporated. Therefore, there could have been no understanding that APA would purchase the Excess Singapore Stock.

27 The defendant alleges that Purden knew about APA much earlier than he would care to admit. The defendant produced documents from BTS Renovation and called its sole proprietor, Tay Ming Wah, to testify that the signage of APA was already in full view at the plaintiff's premises at the time of the transaction in August 1999 and argued that Purden who frequently visited the office would have seen the name. It transpired that BTS Renovation was not registered at that time and Mr Kumar invited me to reject both the invoice and receipt issued by BTS Renovation and the evidence of Tay Ming Wah. I agree with Mr Kumar that the defendant's explanation that he asked BTS Renovation for the invoice and receipt for Mark IV Singapore's auditors is implausible as the audited accounts had already been filed for some time. Moreover, the plaintiff was able to provide countervailing evidence to show that the APA signage was ordered much later. The plaintiff disclosed an invoice dated 3 February 2000 from Universal Displays Pte Ltd for the supply of signage for APA dated 3 February 2000.

28 The use of nominee purchasers was not explained at all. In my judgment, the defendant tried to hoodwink the plaintiff into thinking that the sales were indeed to an existing distributor of the plaintiff in Asia. The defendant quite clearly had wanted to buy over the plaintiff's goods at the discounted price and he made use of nominee purchasers to circumvent the plaintiff's authorisation of 26 July 1999 to sell the goods to its current distributors. It bears repeating that the plaintiff was willing to sell the Returned Goods and Bonded Warehouse Stock at a lump sum price of US$150,000 to its then current distributors, Tong Chieh or Singapore distributor who at that time was Asia Pacific Rubber and Plastic Pte Ltd. Purden's fax dated 1 July 1999 discussed selling the Returned Goods to the current distributors. The defendant's fax of 26 July referred to the fax of 1 July and Purden's agreement and authorisation to the defendant to sell the Returned Goods and Bonded Warehouse Stock at US$150,000 to "our Hong Kong/ Singapore distributors".

29 Originally, Purden had wanted to sell the goods at US$250,000 even though they were worth US$743,000, as it was economically and commercially unattractive to ship the goods back to Europe. The defendant had informed Purden that the Bonded Warehouse Stock was not worth very much and it should be sold to one of the plaintiff's Asian distributors. The defendant suggested selling the Bonded Warehouse Stock together with the Returned Goods at US$150,000 to Tong Chieh. Purden agreed to the suggestion thinking that it was the best price that the stock could fetch. Whatever the arguments for either side, the point is that the defendant, as fiduciary, should have told the plaintiff that the Returned Goods would remain in South Korea.

30 The motive for backdating the Distributorship Agreement, signed on 8 November 1999 between the plaintiff and APA, to 1 July 1999 is fairly obvious. In my view, it is an excuse to enable the defendant to claim that the August/ September 1999 sale was to a Singapore distributor. In any event, the buyer of the Excess Singapore Stock as admitted by the defendant was, in reality, Mark IV Singapore. The defendant conceded during cross-examination that he did not tell the plaintiff about this buyer. Mark IV Singapore on-sold the stock at a profit and the defendant also did not tell the plaintiff about it.

31 Significantly, it is not the defendant's case that Purden knew of the use of the nominee purchasers. The use of nominee purchasers such as Tong Chieh and APA undermines the defendant's contention that Purden knew and acquiesced in the matters relevant to the breach of fiduciary duties.

32 In my judgment, the defendant did not disclose that the sales were to his companies, APA and Mark IV Singapore. I am satisfied that on the evidence, the defendant breached his fiduciary duty as a director of the company by placing his personal interest in making and completing the sales of the Returned Goods, Bonded Warehouse Stock and Excess Singapore Stock above his duty to act in good faith for the benefit of the plaintiff. The transactions in question took place whilst the defendant's relationship as director with the plaintiff subsisted. Whether the plaintiff would have acquiesced in the sale to the defendant's companies had the board known about the defendant's interest in APA and Mark IV Singapore and the circumstances for their incorporation, is not the point. The plaintiff had wanted to sell the goods to its current distributors at a discounted price and the defendant was to have sought authorisation from the plaintiff if the offers received were from different entities or in monetary terms. It was relevant for the plaintiff to know that the sales were a departure from its authorisation and it followed that the defendant was under a duty to communicate such developments to the plaintiff. The defendant had, in the circumstances, acted in conflict between his fiduciary duty and his personal interest.

33 Mr Goh argues that management had committed to a course of action on 26 July 1999 and

the prevailing concern had been to reduce costs and to effect a "quick sale". The defendant saw to that and, in fact, assisted the plaintiff by taking the goods off its hands. To illustrate, the Excess Singapore Stock comprised of slow moving items that, in the usual course of events, would have taken a long time to sell. Some of the items were also obsolete. The defendant further argues that the plaintiff is estopped from asserting the true value of the goods against the defendant who had all the while acted on the plaintiff's decision of 26 July 1999 and sold the goods at the agreed discount. The defendant maintains that it cannot be liable to account to the plaintiff for the difference in value or at all. None of these matters assist the defendant.

34 The liability to account arises from the fiduciary's breach of duty. Having improperly profited or gained from his position, the defendant has to account to the plaintiff for the profits or gains he has obtained. It is no defence that the plaintiff was unlikely or unable to make the profits for which an account is to be taken. It also does not depend upon detriment to the plaintiff. Gibbs J in *Consul Development Pty Limited v DPC Estates Pty Limited* (1975) 132 CLR 373 at 394 stated:

> Where the rule applies, the liability of the person in a fiduciary position does not depend on the fact that the person to whom the duty is owed has suffered an injury or loss.

35 On the evidence, the profit the defendant made on the sale of Excess Singapore Stock was US$44,321. That is the amount the defendant has to account to the plaintiff.

36 The defendant said Mark IV Singapore sold the Bonded Warehouse Stock to Shin Young Trading Co at US$165,574.25. The defendant's testimony is that the stock was not worth much. Yap testified that in the books, the value of the stock was written down to zero. The defendant stated in his written testimony that the Bonded Warehouse Stock was only sold off completely some eight months after it was sold to Tong Chieh. The defendant stated that the so-called "profits" were used to offset the expenses incurred by Mark IV Singapore in setting up Shin Young Trading Co Ltd. These contentions are irrelevant, as I have explained in [34]. In my judgment, the defendant has to account to the plaintiff the sum of US$165,574.25

37 Mr Kumar submits that the discovered documents do not show that Mark IV Singapore put APA into funds before 13 September 1999 when APA paid US$150,000 to the plaintiff. In a letter from AWD dated 11 August 1999, AWD authorised the defendant to accept the plaintiff's payment on his behalf pursuant to the Return Stock agreement. In that letter, AWD also confirmed that the money due to him from the plaintiff was to be paid to APA. The plaintiff made out to APA two cheques dated 17 August 1999 for the total sum of US$150,000. It was from this money that US$150,000 was used to pay the plaintiff for the Returned Goods and Bonded Warehouse Stock. In calculating the gains made by the defendant, I am nonetheless prepared to give credit of US$150,000 to the defendant, as the plaintiff had not said anything about having to pay AWD twice over.

38 In the case of the Returned Goods, the defendant's gain is his acquisition of an 80% shareholding in Shin Young Trading Co Ltd. The defendant testified that the 80% shareholding in the new company was acquired by way of Returned Goods with a value of US$743,376.63 together with a sum of US$50,000 and a loan of US$25,000. The loan of US$25,000, in my view, cannot be counted towards acquisition cost. However, AWD who was the other 20% shareholder in Shin Young Trading Co Ltd said that the Returned Goods was valued at US$500,00 and represented Mark IV Singapore's capital injection in kind into the Shin Young Trading Co Ltd in exchange for an 80% shareholding in the company. Moreover, AWD, who testified for the plaintiff, did not accept that the initial paid up capital of the new company was US$1m. Purden, in his written testimony, mentioned a figure of US$600,000 based on information from AWD and it was for 80% of AWD's business. He understood from AWD that

US$600,000 represented approximately 80% of the total worth of the Returned Goods. In the light of the conflicting evidence, the best available evidence is the cost price of the Returned Goods, which is indisputably US$538,800.12. The defendant has to account to the plaintiff for the benefit obtained or compensate the plaintiff's loss, in the sum of US$388,800.12 (US$538,800.12 - US$150,000).

39 Mr Goh, in his Closing Submissions, invited the court to apply s 391 of the Companies Act to absolve the defendant of the consequences of the breach of duty. This is not a point the defendant is entitled to take in the absence of such a plea in his Defence. Anyhow, in the circumstances of the case, I am unable to see how the conduct of the defendant merits the assistance of the court. The defendant's steady conviction of his own innocence is misplaced.

40 For these reasons, there be judgment for the plaintiff in the total sum of US$598,695.37 together with interest thereon at the rate of 6% per annum from the date of the Writ of Summons until judgment. The plaintiff is entitled to costs of this action.