Centaurus Enterprises (S) Pte Ltd v Foong Yew Eong Christopher and Others [2008] SGHC 195

Case Number : Suit 607/2006

Decision Date : 04 November 2008

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Liew Teck Huat (Niru & Co) for the plaintiff; Lee Chiat Jin Jeffrey and Joseph Chai (Lee Chai & Boon) for the third defendant

Parties : Centaurus Enterprises (S) Pte Ltd — Foong Yew Eong Christopher; Paminco Enterprise Sdn Bhd; Lam Kim Moy

Equity

4 November 2008 Judgment reserved.

Lai Siu Chiu J:

1 This is a claim by a Singapore company Centaurus Enterprises (S) Pte Ltd ("the plaintiff") against its former employee Christopher Foong Yew Eong ("the first defendant") for substantial sums of money that the first defendant had misappropriated and passed onto Paminco Enterprise Sdn Bhd ("the second defendant"). The plaintiff joined the first defendant's wife Lam Kim Moy ("the third defendant") to the action as his co-conspirator. The first and third defendants are the only directors and shareholders of the second defendant.

Facts

2 The plaintiff was incorporated on 6 January 1993 under its former name PT Timur Megah Steel Pte Ltd ("Megah Steel"). Its shareholders who are members of the Agusalim family, hail from Indonesia. The plaintiff was initially involved in trading, but changed its activities after the Asian 1997 financial crisis to that of a purchasing agent for Indonesian companies belonging to the Agusalim family. The Agusalim family used the plaintiff to obtain alternative facilities from Singapore banks for the purchase and import into Indonesia of raw materials for their manufacturing businesses, when Indonesian banks were unable to provide such facilities following the financial crisis.

3 The second defendant was incorporated in Malaysia on 4 December 2003 with a paid-up capital of RM2.00 and has its registered office in Penang. It was the plaintiff's case that the first defendant deliberately chose Paminco for the company's name as it was very close to the name of an Australian company called Pasminco Metals Pty Ltd ("the Australian company") with whom the plaintiff had business dealings.

4 Megah Steel was one of many Indonesian companies started and owned by Budi Agusalim ('BA") who is its President-Director and one of its shareholders. BA is also a director and shareholder of the plaintiff. BA has five children one of whom is his second son called Lukito Agusalim ("LA").

5 Because of the nature of its business in supporting Indonesian companies in trading and importing materials [3], the plaintiff's operations only required a small office manned by one or two responsible and trustworthy staff. In its early days, the plaintiff employed a China national to manage and operate its business. He left after a few years and from his departure until 2001, several other people were employed including a Mr Tan, who for a period, was assisted by BA's daughter-in-law.

6 The first defendant was employed in February 2001 as an administrative assistant. By then, BA's daughter-in-law had already left while Mr Tan had tendered his resignation. After Mr Tan's departure at end February 2001, the first defendant essentially ran the plaintiff's operations single-handedly. Until he absconded (on 18 August 2006), the first defendant was responsible for all operational matters of the plaintiff including: the preparation of purchase orders, invoices, payment vouchers, attending to banking matters, making payment of bills and general administrative matters. To enable it to perform its function as a paying agent for BA's Indonesian companies, the plaintiff maintained three bank accounts with United Overseas Bank Ltd ("UOB") *viz* one in Singapore dollars, the second in United States dollars and the last in the Euro dollar. (Hereinafter, the three UOB accounts of the plaintiff will be referred to collectively as "the plaintiff's UOB accounts").

7 A main task of the first defendant was to prepare documentation relating to purchase of supplies by the Indonesian companies of the Agusalim family. BA's staff in Indonesia would give the first defendant such instructions at regular intervals. Once a purchase order was concluded by BA's Indonesian office, his staff would instruct the first defendant to procure the letter of credit ("LC") and take all necessary steps to facilitate payment for the purchase. BA on his part would make 3-4 trips a year to Singapore to deal with such matters as meeting banks. In those trips, he would meet the first defendant to discuss work and the latter would then take his instructions.

8 Some time in 2002, the first defendant called BA to inform him that there was a technical problem in the first defendant's use of e-banking for the plaintiff's UOB accounts. The first defendant claimed he found it difficult to check on the status quo of the plaintiff's accounts. He informed BA that the plaintiff had to re-submit a fresh application to UOB for e-banking facilities. This was a matter of concern to BA who needed to know the status and credit balances of the plaintiff's UOB accounts at any time and/or every week because they were very active. Consequently, BA could not afford to have problems which may prevent the first defendant from checking the plaintiff's UOB accounts when BA required him to do so. BA would periodically transfer funds from Indonesia to the plaintiff's UOB accounts to pay for Trust Receipts ("TRs") as the credit balances were usually insufficient to pay for the TRs.

9 Consequently, accepting what the first defendant told him to be true, BA instructed the first defendant to re-submit a fresh application to UOB to apply for e-banking, which application BA signed (in blank) when his secretary received it from the first defendant. After signing, the document was returned to the first defendant in Singapore. In his affidavit of evidence-in-chief ("AEIC"), BA deposed that the scope of the first defendant's authority for e-banking was only to check the balances of the plaintiff's UOB accounts and to act on BA's instructions to transfer funds to pay for TRs, not to transfer funds to third parties. UOB was also aware from previous discussions held with BA, of the limits to the first defendant's authority on e-banking.

10 Some time in 2005, BA requested the first defendant to get the plaintiff's annual accounts prepared. BA needed the accounts so that he could approach UOB to apply for increased facilities for his expanding business. Although BA repeated his request to the first defendant, the latter delayed in getting the plaintiff's annual accounts for 2004 prepared by its accountant.

11 Subsequently, when BA approached UOB for an increase in facilities, not surprisingly, he was told to submit the plaintiff's latest annual audited accounts in order for the bank to consider the request favourably. Consequently, BA again renewed his request to the first defendant to get the plaintiff's accounts for 2004 audited. In the event, the plaintiff's 2004 accounts were not prepared until late 2005 and early 2006. In that interval, BA repeatedly pressed the first defendant to provide the necessary documents to the accountant while on his part, the first defendant gave several excuses for not providing the documents requested. The first defendant went to the extent of

claiming (which was untrue) that the Singapore tax authorities intended to carry out investigations on the plaintiff's accounts and dealings and needed to inspect the accounting documents. On another occasion, the first defendant claimed that the documents had been handed to the accountant, which again was untrue.

12 BA became increasingly exasperated by the long period of delay. He finally decided to take matters into his own hands by checking with the auditor himself. He discovered that the auditor was never given the accounting documents by the first defendant. At about the same time, the plaintiff's (part-time) accountant telephoned BA and informed him that she needed the accounting documents to prepare the plaintiff's accounts and she had repeatedly asked for them from the first defendant to no avail. She said the first defendant gave her some but not all the documents she needed.

13 BA was deeply concerned by what he learnt from the plaintiff's auditor and accountant. He visited Singapore in July 2006 and instructed the first defendant to follow him to UOB. Again, when he broached the issue of an increase in the bank's facilities to the plaintiff, he was advised by UOB's representatives to submit the plaintiff's latest audited accounts. BA then put pressure on the first defendant and told him in no uncertain terms that the necessary documents must be submitted to the plaintiff's accountant to prepare the accounts for auditing purposes. The first defendant purportedly complied by compiling documents which included payment vouchers and purchase orders. As he was beginning to entertain grave doubts about the first defendant's honesty, BA further instructed the first defendant to fax to him a set of the plaintiff's UOB bank statements ("the bank statements").

14 In compliance with his instructions, the first defendant couriered or faxed copies of the bank statements to BA on several occasions. BA discovered therefrom that the first defendant had tampered with the documents by pasting code numbers cut from entries in other bank statements onto the entries in those bank statements which showed he had fraudulently transferred money. Because the documents were so voluminous, BA was unable at the time of his receipt, to discover the extent of the first defendant's tampering.

15 Nevertheless BA's suspicions were aroused. In August 2006, BA attempted to contact the first defendant without success, both at the plaintiff's office and on the first defendant's mobile telephone. Greatly concerned by that stage, BA contacted UOB directly and requested the bank to fax to him statements from the plaintiff's US$ account no. 101-XXX-XXX-X ("the US$ account"). UOB obliged although it was only for the statements of the preceding two months. Upon his receipt of those statements, BA's suspicion of the first defendant's fraud was confirmed. BA discovered that the first defendant had misappropriated US$405,105.08 from the US$ account in July-August 2006 by way of four transfer instructions to UOB, once in July and thrice in August. All four transfers were to the second defendant with whom the plaintiff had no business dealings at all. BA sent his son LA to Singapore to investigate.

16 LA came to Singapore on 24 August 2006 and visited UOB immediately after he arrived. LA met two vice-presidents of the bank who gave him more bank records after which he lodged a police report (see PB 48-50) the same evening. LA was informed by the police authorities subsequently (after they had checked in turn with the immigration authorities) that the first defendant left Singapore and returned to Malaysia on 18 August 2006.

17 LA visited the plaintiff's office the following day. To be expected, he found no one there but on the front desk, he saw an envelope addressed to his father, a mobile telephone and some keys. On opening the envelope, LA found it contained a letter of resignation from the first defendant dated 15 August 2006 together with cash amounting to $2,000. LA called his father to inform him of the discovery which he also notified to the police.

18 LA searched the plaintiff's office and discovered further bank statements for 2004 for the plaintiff's UOB accounts. These showed that the first defendant had made unauthorised payments and cash withdrawals in 2004. Many of the payments were for purported purchases for phantom transactions the plaintiff never entered into. The phantom transactions were supported by fabricated purchase orders and vouchers including those purportedly issued by an enterprise called Seng Heng Engineering ("Seng Heng").

19 LA contacted the accountant who informed him that she had wanted to prepare the 2004 accounts but could not because she encountered problems in obtaining documents from the first defendant. Subsequently, when she received the documents from the first defendant, she was able to prepare the 2004 accounts within a week. The accountant and LA went through the documents that were in the office and which went as far back as 2002. It was discovered therefrom that there were additional documents that had been fabricated by the first defendant. Both the bank statements and the documents showed that the amounts the plaintiff purportedly paid for purchases were too substantial; they were for purchase of finished goods, not raw materials. LA who personally handled the purchases was aware that only a few thousand dollars were involved for each transaction.

20 LA spent three weeks in Singapore for his investigations and visited Kuala Lumpur on 7 September 2006 where he also lodged a police report (see PB 51-52). After going through the documents in the plaintiff's office, the additional bank statements he received from UOB and making inquiries, LA discovered that the first defendant had misappropriated US$925,000 from the US$ account. LA returned to Indonesia and reported his findings to his father BA.

21 LA returned to Singapore subsequently where he received more statements from UOB. He also found more documents at the plaintiff's office. After perusing the documents and bank statements, LA discovered that the first defendant had commenced his misappropriation of the plaintiff's money from as early as 2002. Apart from the four unauthorised transfer of funds from the US$ account in [15], LA discovered that the first defendant had also embezzled funds from the Euro account no. 101-XXX-XXX-X ("the Euro account") by way of unauthorised transfers in 2005-2006 to the second defendant. All transfers to the second defendant from the US$ and Euro accounts were to an account the second defendant maintained with the Kuala Lumpur head office of Public Bank Berhad under account no. XXXXXXXXXX ("the Public Bank account"). Further, the first defendant made cash withdrawals from the plaintiff's S$ account no.-XXX-XXX-X ("the S$ account") purportedly as cash advances to BA, by forging BA's signature on payment vouchers. The withdrawals were done almost monthly and almost every withdrawal was S$10,000 although sometimes it was more.

22 It was from the S$ account that it was discovered that a transfer of $18,600 was made by the first defendant to someone by the name of Lam Wai Kit in August 2006. There was also one transfer from this account to the second defendant on 27 February 2006 and an unaccounted cheque payment of $25,800 on 30 June 2006.

23 Through searches conducted by the plaintiff's solicitors at the Registry of Marriages, it was discovered that the first and third defendants were married on 21 August 2004 and that the third defendant was subsequently appointed a director of the second defendant (according to company search done in Malaysia). By the time the trial came on, the third defendant had delivered her first child of the marriage.

24 Altogether, LA discovered that the first defendant had pilfered S$708,903.25, US$450,526.14 and 292,354.77 respectively from the S$, US$ and Euro accounts.

25 The plaintiff filed this suit on 18 September 2006 and on the same day applied and obtained

(*exparte*) a *Mareva* injunction against all three defendants which is still in force, pending the outcome of this suit. The plaintiff subsequently discovered from affidavits filed by the third defendant disclosing her assets, that she and the first defendant jointly acquired a property at Lakeshore Condominium in November 2004 at a price of S$507,620.00. Further, the third defendant had jointly acquired with the first defendant's sister Christina Foong ("Christina") a semidetached house in Ipoh, Perak, for RM398,000 in April 2006.

26 On 9 October 2006, LA received an email from the first defendant wherein the first defendant *inter alia* admitted his misdeeds. Although he promised in the email to repay the plaintiff by remitting US$50,000 that month, LA deposed he never heard further from the first defendant.

The pleadings

27 In the statement of claim, the plaintiff alleged that the first defendant owed it a duty to act in good faith and in its best interest as well as a duty not to access or otherwise use the plaintiff's UOB accounts and assets for a purpose other than as stipulated by the plaintiff. The plaintiff alleged that the first defendant misappropriated its assets for himself and/or his nominees and or for the second and/or the third defendants.

28 In the alternative, the plaintiff alleged that from December 2003 onwards, the defendants and each of them unlawfully conspired to injure the plaintiff by unlawful means, to obtain the proceeds of the transfer of money from the plaintiff's accounts. The plaintiff contended that the first and third defendants caused the second defendant to be incorporated with the object of receiving the funds or money transferred unlawfully and without authority by the first defendant from the plaintiff's accounts. Further, the second defendant was given a name which was deceptively similar to that of the Australian company in [3]. In addition, the numerous transfers from the US$ and Euro accounts were carried out by the first defendant in Singapore with the third defendant ensuring receipt of funds by the second defendant in Malaysia. The proceeds of transfers were misappropriated at the instance of the first and /or third defendants. The plaintiff accused the defendants of misappropriating and wrongfully/fraudulently receiving the plaintiff's money.

29 The plaintiff claimed from all three defendants the three sums set out at [24], alternatively damages and in the further alternative, an account of the total amounts transferred and/or paid out from the plaintiff's UOB accounts, upon a taking of an account coupled with a tracing order.

30 Neither the first nor the second defendants entered an appearance to the writ of summons with the result that on the first day of trial, the plaintiff applied to court and obtained judgment in default of appearance against them. The only claim outstanding that was tried therefore was the plaintiff's claim against the third defendant.

31 In her defence, the third defendant essentially denied all the allegations of the plaintiff in the statement of claim. She denied that the second defendant received the transfers of funds from the plaintiff's accounts. She contended that if the second defendant did receive the amounts, she had no knowledge of nor did she knowingly assist and facilitate such, transfers. The third defendant averred she was unable to admit or deny whether the first defendant wrongfully misappropriated the plaintiff's assets. She denied she was in any way involved in the misappropriation or in ensuring the receipt of funds by the second defendant. She further denied she had unlawfully conspired with the first defendant and/or the second defendant to injure the plaintiff or was a party to the conspiracy.

The evidence

(i) The plaintiff's case

32 I have in [2] to [25] essentially set out the plaintiff's case according to the written testimony of its two witnesses BA (PW2) and LA (PW1). I turn now to their evidence adduced in cross-examination.

33 Counsel for the third defendant attempted to suggest to LA that he and his staff in Megah Steel would be aware of the state of the plaintiff's finances from the plaintiff's UOB bank statements. They should have been able to verify therefrom whether the third defendant did or did not make payment to its suppliers. LA disagreed pointing out that the plaintiff's suppliers were usually paid by way of LCs and TRs. In any case, it was not the responsibility of Megah Steel to monitor the state of the plaintiff's finances as that was the responsibility of the plaintiff's accountant. Further, the first defendant did not report to him. Hence, LA disagreed that the plaintiff approved of the unauthorised transfers of money from the plaintiff's UOB accounts.

34 LA testified he would not be aware of big orders that BA placed for the plaintiff through the first defendant, unless his father informed him of the prices so that he could in turn fix the selling prices of those items. There were occasions when Megah Steel had insufficient materials and LA would then approach his father to inquire whether BA planned to import the materials to cover the shortage. If his father did, LA would be told.

35 In re-examination, LA explained that the plaintiff's last audited accounts when he came to Singapore to investigate the first defendant's wrongdoing was for 2003. The first defendant had failed to compile documents to enable the plaintiff's accountant to audit the company's accounts from 2004 onwards and that made it difficult for him/BA to detect the extent of the first defendant's misappropriation.

36 Counsel for the third defendant took the position that the plaintiff's two witnesses had failed to discharge the burden of proving fraud had been committed by the first defendant leaving aside the question of whether his client was a party to or conspired in, such dishonest acts. I reminded counsel that judgment (albeit in default) had been entered against the first and second defendants and it was not for him but for the first defendant or the first defendant's counsel (if one was appointed which was not the case) to adopt the stand of putting the plaintiff to strict proof of fraud *vis a vis* the first defendant.

37 In any case, when BA testified, the court took him through the plaintiff's payment vouchers contained in the plaintiff's bundle of documents. BA recognised the first defendant's handwriting on all the vouchers and testified that he was the recipient of small advances evidenced in the vouchers but not large sums of $10,000 or more. In two vouchers (at 1AB 354-355) dated 13 June 2002 and 29 June 2002 respectively, BA testified that he received and signed for $2,000 on each occasion. Thereafter the first defendant added the numeral "1" in front of the figure "2" and thereby misappropriated $20,000 from the plaintiff. BA testified he did not sign those payment vouchers which showed $10,000 as advances to him so presumably the first defendant must have forged his signatures thereon. The third defendant did not/could not challenge BA's testimony since she claimed to be ignorant of the first defendant's wrongdoings.

The third defendant's case

38 The third defendant (3DW1) testified for her case together with her sister-in-law Christina (3DW2) as well as her friend Sam Mun Yee ("Sam" who was also the first defendant's friend.

39 I should first observe that the third defendant's AEIC set out in *extenso* her relationship with the first defendant both before and after their marriage. The couple met when both were working at Overseas Union Bank in Chinatown in 1999-2000. From the third defendant's lengthy narration, it appeared that the couple did not have a happy marriage; they quarrelled frequently so much so that the third defendant on one occasion left the first defendant (in mid-2003) and lived apart from him for six months.

40 As with her defence, the third defendant deposed that she knew nothing about the first defendant's business dealings or occupation save that he was employed by an Indonesian company. She was unaware until the police informed her, that he had resigned from the plaintiff's employment in August 2006. Earlier that month, the first defendant had told her that he was going to China on a business trip, his first trip to China on behalf of the plaintiff. He had told her he was not sure how long his trip would take.

41 When the first defendant did not return to Singapore by September 2006 and the lease of their rented flat at Clementi expired, the third defendant moved back to Christina's flat. The third defendant was in contact by telephone with the first defendant between mid-August and mid-September 2006 but there was no indication from the first defendant that he would disappear or had taken any money from the plaintiff.

42 The third defendant deposed she had no knowledge of the first defendant's misdeeds as particularised in the statement of claim; neither did she benefit from his misdeeds. She did not help the first defendant in any way or knowingly assist him to carry out the alleged misdeeds nor did she conspire with him to carry out the acts alleged by the plaintiff. While he was a selfish and imperfect husband, she said the first defendant did not mistreat her and she did not know him to be a thief and an embezzler.

43 The third defendant deposed she was unaware of who Lam Wai Kit was [22] and only learnt of the name and Seng Heng in the pleadings.

44 The third defendant explained the source of the funding for the three properties she owned in the following paragraphs.

45 In relation to No 31, Jurong West Street 41 #04-32, The Lakeshore, Singapore ("the Lakeshore property"), she explained that it was purchased jointly with the first defendant on 7 October 2004 for $570,620. The couple paid 5% deposit amounting to $28,531 on obtaining the option from the developers and paid the balance 15% of $85,593 when the option was exercised making a total cash payment of $114,124. The third defendant paid most of the 20% down payment, by issuing cheques from his personal account. She did not find that unusual as the first defendant had told her he had won $75,000 from Singapore Pools in September 2004 which he said had been deposited into his UOB account. Further, Christina had agreed to lend him $15,000. The third defendant contributed a few thousand dollars towards the purchase and she assumed that the first defendant had his own savings to make up the balance of the 20% cash payment.

46 The couple obtained a 30 year term loan of $400,000 from UOB on 26 October 2004 and utilised $56,496 from their Central Provident Fund savings, to fund the balance purchase price of the Lakeshore property as well. Consequently, there was nothing suspicious about the manner of funding of the Lakeshore property. However, she was not aware of when the progress payments were due or paid nor did she find out from the first defendant.

47 As for the property located at Taman Bakti Gamas, Negri Sembilan, Malaysia ("the Negri

Sembilan property"), this was purchased by the third defendant jointly with her sister Lam Kam Nyok ("the fourth sister") in July 2004 for RM130,000 with a loan of RM112,000 from Public Bank Bhd ("Public Bank") and for which an account was opened with Public Bank. The fourth sister and the fourth sister's husband Lim Chai Huat made cash deposits into the Public Bank account to service the loan. Cross-examined why the fourth sister would use her name to purchase the Negri Sembilan property, the third defendant explained it was because she was younger and working and could therefore obtain a higher bank loan.

48 The third property of the third defendant was located at Block E Lot 60, Noble Crest, Ipoh, Perak ("the Ipoh property") which was purchased jointly with Christina at the purchase price of RM398,880 in April 2006. The first 10% of the purchase price amounting to RM39,888 was paid by Christina's uncle Leong Kok Wai ("Leong") in April 2006. Subsequently, Leong paid another RM8,992 in August 2006. The third defendant and Christina obtained a loan of RM350,000 from Public Bank in April 2006 to fund the balance purchase price. The third defendant testified that the Ipoh property was meant for Christina's parents to live in because their house was old and leaky. However, due to similar proceedings instituted by the plaintiff in Malaysia against the same three defendants as well as a *Mareva* injunction that the plaintiff obtained subsequent thereto, Public Bank refused to release further funds towards progress claims made by the developers. Consequently, the purchase was aborted but in order to avoid the forfeiture of the 10% deposit (amounting to RM39,888) that she had paid the developers in April 2006, Christina testified that she bought a (cheaper) shop lot instead and repaired her parents' existing house where they continued to reside.

49 The third defendant deposed that the first defendant made no cash contribution towards the purchase of either the Negri Sembilan or Ipoh properties. She produced the sale and purchase and loan documentation relating to the Negri Sembilan property (see exhibits D10 to D11).

50 In cross-examination, the third defendant revealed that in 2004, her monthly salary as a customer service coordinator was $2,000 but would be more if she worked overtime. She also took on part-time employment to supplement her income. She believed the first defendant similarly earned $2,000 a month. She revealed that although they could not afford to buy a public housing flat, yet she and the first defendant bought the Lakeshore property apparently because he won $75,000 from a lottery. (There was evidence produced of the Singapore Pools win in the form of a cheque issued in September 2004).

51 Upon further questioning by counsel for the plaintiff as well as by the court (see N/E 90-93), it appeared that she and the first defendant could ill afford the Lakeshore property. The monthly mortgage instalment and service charges alone would have swallowed up one of their salaries. In addition, the first defendant owned a car (which he lied was provided by the plaintiff) for which he spent large sums for the accessories. The first defendant also enjoyed eating out at restaurants. At another part of her cross-examination, the third defendant testified she had been told by the first defendant that he bought his car on hire-purchase arrangements. Documents exhibited to her AEIC showed that the first defendant made a down payment of $30,000 on 15 January 2004 for the car and the monthly hire-purchase instalments were $1,038 deducted from the couple's bank account. (The car was repossessed by the finance company/bank after the first defendant absconded). In addition, the third defendant's passport entries (see exhibit D1) showed that the couple went for holidays in Korea, Australia, Bali, Bangkok, Paris and London. Yet it never occurred to the third defendant to question the first defendant on the source of funds for his lifestyle, which was impossible to sustain on his modest salary. She merely accepted in good faith whatever he told her.

52 The third defendant explained that in 2003, prior to the second defendant's incorporation, the first defendant had already approached her to help set up a Malaysian company, using their names as

nominee shareholders and directors. The first defendant told her it was to be a dormant company until the first defendant's boss replaced them with other parties. As the third defendant did not wish to prejudice the first defendant's career by refusing to help him, she acceded to his request and the second defendant was set up with Sam's advice and assistance. Subsequently he handed her a stack of papers to sign which she did (at Christina's flat) without reading.

53 Although minutes of the first meeting of the second defendant held on 15 December 2003 at an address in Penang recorded her attendance as well as that of the first defendant, the third defendant testified that she did not attend that or any meeting of the second defendant either in Singapore or in Penang. She insisted she had never visited Penang. When shown a statutory declaration she had made in Penang on 17 November 2003, the third defendant initially claimed she was not in Penang that day but on being pressed by counsel for the plaintiff, admitted she was uncertain. After she produced her passport, it appeared she had made two trips to Malaysia in 2003, the first returning to Singapore on 26 November 2003 and the second departing Singapore on 6 December 2003. Even so, she maintained the trips were not to Penang.

54 The third defendant had signed two resolutions of the second defendant to open bank accounts at Public Bank and Malayan Banking ("Maybank"). Cross-examined on why there was a need to open bank accounts if the second defendant was supposed to be a dormant company until the first defendant's boss replaced them as shareholders and directors, the third defendant said she was told by the first defendant that to set up a company, a bank account must also be opened.

55 The third defendant had opened a personal account with Maybank herself in Segamat, Negri Sembilan. She had disclosed in her affidavit of her assets that the account was actually that of her sister Lam Kam Hing ("the third sister") who was a bankrupt. Counsel as well as the court pointed out to the third defendant that it did not make sense for her to open an account with Maybank in Malaysia for the third sister when she did not reside in Malaysia. Her mother or her fourth sister or other relatives would have been more appropriate as the account holder since they resided in Segamat. The third defendant's unsatisfactory response was she merely acceded to the third sister's request on one occasion when she went back to her hometown.

56 In the course of cross-examination (at N/E 152-155), counsel for the plaintiff drew the third defendant's attention to numerous entries in the couple's joint OCBC account no. 564-X-XXXXXX ("the OCBC account") which showed the first defendant had withdrawn money from the UOB S$ account and deposited them into their joint account. The OCBC account statements were in fact exhibited in the third defendant's AEIC (certified by OCBC). By way of illustrations, I refer to a deposit of $38,042.12 into the OCBC account on 14 January 2004. The third defendant had exhibited the cheque image which showed that it was the plaintiff's UOB cheque no. 681940 dated 10 January 2004 while the reverse of the cheque showed that it was indeed deposited into the OCBC account. Similarly, the OCBC account showed a deposit of $39,900 on 29 November 2004 which cash cheque no. 080436 dated 28 November 2004 came from the UOB S$ account while the reverse of the cheque had the OCBC account written as the account to be credited with the name of the third defendant as the account holder. The OCBC account showed a withdrawal of $35,000 on 19 October 2004 which was deposited into the couple's joint UOB account no. 201-XXX-XXX-X ("the UOB joint account"); this was their housing loan account for the Lakeshore property. The source of the $35,000 was a deposit of $37,725.06 into the OCBC account on 18 June 2004 which money came from UOB cheque no. 080414 dated 17 June 2004 drawn on the UOB S$ account. There was another withdrawal of $38,000 by a cashier's order on 1 December 2004 from the OCBC account which was deposited into the UOB joint account. The plaintiff's name appeared on all the cheques that the first defendant encashed and deposited or on cheques credited directly to the OCBC account.

57 The first defendant's *modus operandi* was to withdraw moneys from the UOB S$ account, deposit the sums into the OCBC account before withdrawing and depositing the same into the UOB joint account. Questioned by the court (at N/E 157) after counsel for the plaintiff had taken her through the above bank account entries, the third defendant agreed that the first defendant had used the plaintiff's money to pay for the Lakeshore property. When she was questioned further, the third defendant admitted she did not check the OCBC account – she had contributed $3,000 to $5,000 towards the Lakeshore property but stopped putting money into the OCBC account when she found out the first defendant was using that account to pay for his car loan.

58 The third defendant produced documents (in exhibit D12 and D13) which showed she had dabbled in trading on the Hang Seng Index of the Hong Kong stock exchange. During cross-examination however, it became apparent that she was persuaded by the people in a company known as Master United-Traders Pte Ltd (to whom she applied for a part-time job to key-in data entries) to open an investment account with the promise that her investment would be profitable. Instead, the company lost her $6,000 investment in no time at all, prompting her to close her account with them.

59 Sam (3DW3) who worked in a local corporate secretarial firm had recommended a corporate secretarial agency in Penang to the first defendant to do the incorporation of the second defendant. For the paperwork to incorporate the second defendant, Sam dealt only with the first and not the third, defendant. At the time, Sam's office was located at International Plaza where the plaintiff's office was situated, so it was very easy for her to pass documents to or obtain them from, the first defendant.

60 Nothing material turns on Christina's evidence. Her AEIC supported the third defendant's testimony on the latter's unhappy marriage with her younger sibling. Christina also corroborated the third defendant's testimony on the first defendant's reticence in regard to his employment, the first defendant's behaviour outside working hours (either spent on watching football on television or playing computer games) and the first defendant's general lack of communication with both his wife and his sister. She confirmed she had contributed $15,000 towards the 20 % deposit ($114,000) of the Lakeshore and revealed she handed the first defendant another sum of $8,800 at a later stage. Adding her total contribution of $23,800 to the first defendant's lottery winning of $75,000 meant that the first defendant was short of $15,200 ($114,000 - $75,000 - $23,800) for the deposit. Questioned, Christina maintained her brother was able to meet the shortfall. She found nothing suspicious in the fact that he was able to afford a private flat in a condominium when the first defendant (by her own estimate) was earning $2,000-$3,000 per month and he was looking to buy a public housing flat (HDB) initially. She confirmed that she had intended to contribute towards the purchase of the Lakeshore property as she intended to sell her own HDB (where the first and third defendants lived after their marriage) and move in with the couple when the Lakeshore property was ready for occupation.

61 Just like the third defendant, Christina said she was shocked when the police told her that the first defendant had embezzled money from the plaintiff.

The submissions

62 In the closing submissions tendered on the third defendant's behalf, her counsel argued in *extenso* that the plaintiff had failed to discharge the burden of proving the first defendant had committed fraud against the company. The third defendant's submissions started off with the statement that "the standard of proof of fraud and forgery is on a balance of probabilities" although more evidence is required than would be the situation in an ordinary civil case (per Andrew Phang J in *Chua Kwee Chen, Lim Kah Nee and Lim Chah In v Koh Choon Chin* [2006] 3 SLR 469. It was further

submitted that every alleged fraudulent transaction must be proven separately.

63 Counsel for the third defendant disputed the purchase orders that LA had exhibited in his AEIC (in LA-10), *viz* those issued to Seng Heng. Counsel further took issue with the fact that LA's AEIC deposed that some, not all the original documents that supposedly evidenced the first defendant's fraudulent conduct had been handed to the police. He therefore contended that the plaintiff had failed to prove its case by the production of all original documents as LA had not clarified the whereabouts of *all* the original documents in the plaintiff's bundle of documents (PB1-174) produced in court. It was submitted that the plaintiff had not complied with s 66 of the Evidence Act (Cap 97) 1997 Rev Ed ("the Evidence Act").

64 It was argued that because the third defendant had put the plaintiff to strict proof of its claim, it meant that the plaintiff had not discharged its burden to prove fraud against the first defendant. It was further submitted that key inconsistencies in the evidence would be fatal to the plaintiff's case especially since no cross-examination was allowed by the court on the issue of fraud by the first defendant.

65 I had indeed stopped counsel's attempts at cross-examining LA on the issue of the first defendant's fraudulent acts (see N/E 47, 49, 55) although I indicated he could make it a point in his submissions which he did.

66 At the outset [30] before trial commenced, I had awarded judgment in default of appearance against the first and second defendant. Consequently, it was not for the third defendant or her counsel to take up the cudgels for the first defendant and fight his case when the latter failed to turn up in court or appoint solicitors to contest the plaintiff's claim. The third defendant's submissions in that regard were therefore misconceived. I would add that the Malaysian authorities *Veetak Enterprise Sdn Bhd v The Kuala Lumpur Finance Bhd* [1987] 1 MLJ 407, *Madam Loh Sai Nyah v American International Assurance Co Ltd* [1998] 2 MLJ 310 and *AMDB Factoring Sdn Bhd v Iszajaya Sdn Bhd & Ors* [1997] 5 MLJ 402 cited by her counsel were of no relevance in this regard.

67 More significantly, the first defendant had absconded the moment he realized his dishonesty was going to be uncovered by the Agusalim family. He had then sent an email to LA (at [26]) that *inter alia*: accused the Agusalim family of using the plaintiff to issue fake invoices to deceive the Indonesian tax authorities and he did not wish to be a party to such acts, claimed he kept the original invoices and bills of lading of the plaintiff since 2000 to protect himself and said he was leaving town with his mainland Chinese girlfriend through whose father he had invested all his money in China (although he hoped to recover his investment soon). The first defendant then offered to pay US$50,000 that month (October 2006) to the plaintiff and make further remittances. The court was entitled to take into account such conduct under s 8(2) of the Evidence Act read with the first defendant's confession by his email (under s 17(2) of the Evidence Act), to draw a reasonable inference that the plaintiff's case of fraud had been made out.

68 Moreover, it was the third defendant's own documents exhibited in her AEIC (see [56] above which bank statements also appeared in the agreed bundle of documents) that clearly showed that the first defendant had indeed misappropriated the plaintiff's money since 2002. As the first defendant was the plaintiff's only employee in Singapore, who else could have perpetrated the fraud? On the premise that an innocent man would not abscond and remain incommunicado after fleeing the country, I was satisfied that the evidence before the court more than proved on a balance of probabilities, that the first defendant was indeed guilty of the dishonest acts the plaintiff alleged in its statement of claim. In this regard, I accept the plaintiff's submission that one cannot expect to have direct evidence of fraud and very often victims of fraud who bring their cases to court are driven to

rely on circumstantial evidence (which in this case was very strong). I would add that until and unless the default judgements are set aside by the first and or second defendants, they are valid judgments and cannot be impugned.

69 Counsel for the third defendant had cited s 66 of the Evidence Act [62]. The section states:

> Documents must be proved by primary evidence except in the cases mentioned in section 67.

while s 67 of the Evidence Act states:

> (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:
>
> (a) where the original is shown or appears to be in the possession or power of —
>
> (i) the person against whom the document is sought to be proved;
>
> (ii) any person out of reach of or not subject to the process of the court; or
>
> (iii) any person legally bound to produce it;
>
> and when, after the notice mentioned in section 68, such person does not produce it; ...

The requisite notice is dispensed with under s 68(2)(f) when it appears that the person in possession of the document is out of reach of or not subject to the process of the court. In this regard, it is to be noted that the first defendant's email in [26] to LA stated (see [67]) that he had kept all the original invoices of the plaintiff since 2000 to protect himself. Under those circumstances, the plaintiff was perfectly entitled to adduce secondary evidence of the invoices by producing photocopies.

70 Additionally, as the plaintiff pointed out in its closing submissions, the third defendant's case was one of bare denial (see [31] *supra*) to all the plaintiff's allegations. Further, she had pleaded (in paras 4(a) and 5(a) of her amended defence) that she was unable to admit or deny whether the first defendant carried out the acts alleged to be breaches of trust and/or had wrongfully misappropriated the plaintiff's assets. It therefore did not lie in the third defendant's mouth nor was it within her province or that of her counsel, to submit that she was entitled to put the plaintiff to strict proof of its case of fraud against the first defendant. She was confined to her own pleaded case – the plaintiff must prove she was aware of and/or was a party to the first defendant's fraud.

71 It was absurd of the third defendant to contend in her submissions that the plaintiff's representatives were aware of the first defendant's fraudulent transactions and had authorised them. It was even more absurd for her to suggest in her submissions that the court should accept the testimony of the third defendant and Sam – that the second defendant was set up on the instructions of BA/LA and that the plaintiff was aware of the existence of the second defendant. The fact that the third defendant and Sam both believed what the first defendant told them did not make their (unfounded) belief a fact.

72 I turn therefore to the real issues in this case:

> (a) Did the third defendant conspire with the first and/or second defendants to cause loss to the plaintiff?
>
> (b) Did the third defendant knowingly receive the benefits from the first defendant's

misappropriation?

The findings

73 On the evidence, it is more likely than not that the third defendant was unaware of the first defendant's dishonest acts and consequently, it cannot be said that she conspired with the first defendant to injure the plaintiff. She was the first defendant's wife but not his confidante. The first defendant had to be pushed into holding the customary wedding after the couple's registry marriage and the marriage was rocky. The third defendant came across as naive and foolish. She knew very little of the first defendant's employment and she did not pry into his affairs. She accepted whatever he told her at face value, however improbable it would have seemed to other people. I refer in this regard to the fact that she knew they could not afford a HDB flat and yet it did not occur to her to question the first defendant on how he could then afford a private flat (the Lakeshore property). She pestered him to have her replaced as a director in the second defendant but after she had asked him a few times and he did nothing, she no longer cared (see N/E 116).

74 In her closing submissions, her counsel sought to show (in para 19.3.2) that the shortfall of $15,324 in the 20% down payment [59] by his calculation was not an astounding figure and not a sum that a reasonable person would think a husband could not afford without resorting to illegal sources. Her counsel took great pains to explain that the couple (with Christina's assistance) could afford the Lakeshore property based on their income and CPF contributions. What her counsel conveniently overlooked however was the fact that besides the Lakeshore property, the first defendant had another fixed monthly expense, that of servicing his car loan of $1,038 [50]. In addition, the first defendant enjoyed eating-out with a fondness for Japanese food and he took the third defendant on various trips overseas (albeit with some 'contribution' by her to expenses in certain trips).

75 Even if the first defendant earned $3,000 a month (as Christina thought which he did not), how could he afford to service the UOB loan (which monthly instalments were $1,392.19 to $1,600) for the Lakeshore property on top of his other expenses? Further, there were maintenance charges of $192 per month (see exhibit D2). Yet the third defendant never once questioned the first defendant's source of funds for his spending which included car accessories, bearing in mind he was a Malaysian and came from a humble background. As the plaintiff submitted, the third defendant turned the proverbial blind eye. The third defendant's blithe explanation (at para 22.9 of her closing submissions) that luxury goods are not the exclusive domain of the veritably rich and if the first defendant led an extravagant lifestyle, it was reasonable for the spouse to conclude that he may be living on credit, completely ignored the facts – that the first defendant did not have the family background or earning capacity to afford such a lifestyle. Even if he was living on credit, the good life would have been short-lived when the first defendant failed to pay his credit card debts as and when they fell due. But the first defendant's good life lasted for two or more years until he bolted on 18 August 2006.

76 It was even more absurd of the third defendant's counsel to suggest that Christina could have helped out in the funding of the Lakeshore property. As the court indicated to the third defendant in the course of her cross-examination (at N/E 206-207), this suggestion was unrealistic since no reasonable person would want to contribute towards the purchase of any property (unless it was a properly documented loan) if his/her name was not inserted as a purchaser. Christina herself testified (at N/E 266) that she would add her name into the Lakeshore property's title if she sold her Choa Chu Kang flat, put the sale proceeds into the Lakeshore property and moved in with the couple.

77 I am therefore of the view, supported by the many bank documents produced in court especially those in [56], that the first defendant utilised the plaintiff's money for the purchase of the

Lakeshore property. It was for the third defendant, when confronted with such damning evidence, to disprove the plaintiff's case and offer a reasonable explanation of the entries in the statements of the OCBC account as to why the exact same sums of money withdrawn from the UOB S$ account ended up in the OCBC account. She failed to do so.

The law

78 The plaintiff relied on *Seagate Technology (S) Pte Ltd v Heng Eng Li* [1994]1SLR 534 ("*Seagate*"), for the required elements of conspiracy (at [51]) as spelt out in *Halsbury's Laws of England* vol 45 4th edition at para 1527 *viz:*-

> In order to make out a case of conspiracy, the plaintiffs must establish
>
> (1) an agreement between two or more persons;
>
> (2) an agreement for the purpose of injuring the plaintiffs and
>
> (3) that acts done in execution of that agreement resulted in damage to the plaintiffs.

79 The plaintiff submitted that as this case involved conspiracy to do something by unlawful means, it was not necessary to prove that the defendants' sole and predominant motive was to injure the plaintiff, relying again on *Seagate* at [53]. There, the court followed the House of Lords decision in *Lonrho plc v Fayed and Others* [1991] 3 All ER 303 which so held. The intention to injure need not be the predominant motive was repeated in *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co Ltd* [2006] 4 SLR 451 (at [92]).

80 The plaintiff further submitted that dishonesty was sufficient to found the third defendant liable and there was no need to show separately that she knew. For this proposition, the plaintiff relied on the following passage [60] from Lai Kew Chai J's judgment in *Malaysian International Trading Corp Sdn Bhd v Interamerica Pte Ltd and Others* [2002] 4 SLR 537 where he quoted Millet J in *Agip (Africa) v Jackson* [1990] Ch 265 ("*Agip's case"*) at p 295:

> In my judgment, however, it is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that he thought that it was "only' a breach of exchange control, or 'only' a case of tax evasion. It is not necessary that he should have been aware of the precise nature of the fraud or even of the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from a third party, takes the risk that they are part of a fraud practised on that party....[the defendants] never made any inquiries of the plaintiffs or took any steps to satisfy themselves that the arrangements had the plaintiffs' knowledge and approval… I am led to the conclusion that [the defendants] were at best indifferent to the possibility of fraud. They made no inquiries of the plaintiffs because they thought that it was none of their business. That is not honest behaviour…In my judgment it is quite enough to make them liable as constructive trustees.

81 Another passage from *Agip's* case was also relied on (at p 293):

> If a man does not draw the obvious inferences or make the obvious inquiries, the question is: why not? If it is because, however foolishly, he did not suspect wrongdoing or, having suspected it, had his suspicions allayed, however unreasonably, that is one thing. But if he did suspect wrongdoing yet failed to make inquiries because 'he did not want to know'….or because he

> regarded it as 'none of his business'....that is quite another. Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge,

The plaintiff submitted that if there is dishonesty, knowledge need not be shown and it must necessarily follow that harm was intended.

82 It was also submitted by the plaintiff that it did not matter if the third defendant as a co-conspirator, did not benefit equally (*Asian Corporate Services (SEA) Pte Ltd v Eastwood Management Ltd (Singapore branch)* [2006] 1 SLR 901 at [23] to [25]). Further, the same case held that the liability of a co-conspirator extended to all the losses suffered by the victim.

83 Turning now to the evidence before the court, it was noted from the third defendant's passport entries that she had indeed visited Malaysia in the period when her statutory declaration relating to the incorporation of the second defendant was made (17 November 2003) and when the first meeting of its board of directors was held (15 December 2003). Despite her protestations to the contrary, I am of the view that the third (and first) defendant must have been in Malaysia on those dates. There is no dispute that the third defendant willingly assisted the first defendant to incorporate the second defendant albeit he lied to her over the purpose. She was also aware that a directorship in the second defendant carried certain responsibilities; that was the very reason for her initial reluctance to become a director and for her repeated requests to the first defendant to have her replaced. She was party to the two resolutions to open bank accounts for the second defendant. Consequently, the third defendant cannot be excused from liability on the basis of her ignorance of the state of affairs in the second defendant and/or because the first defendant did not inform her or kept information from her.

84 Save for a denial, no positive defence was put forward by the third defendant to the plaintiff's claim (in para 22 of the statement of claim) to trace all the money in the hands of the defendants. In her closing submissions (at para 24) all that the third defendant said was:

> The plaintiff has not come with clean hands in the matter, they are not entitled to tracing in equity.

The plaintiff's witnesses were not cross-examined on this issue, nor was any evidence produced by the third defendant to support the above submission.

The decision

85 On the evidence, I am satisfied that the third defendant did not consciously conspire with the first defendant to injure the plaintiff by unlawful means nor knowingly assist him to him to do so. However, she deliberately turned a blind eye to his acts and should have but failed to question his source of funding for the Lakeshore property and his lavish lifestyle on his comparatively modest earnings. Based on the observations of Millet J in *Agip's case* (in [80] and [81] *supra*), the third defendant was at best indifferent to the possibility of fraud on the part of the first defendant. Her attitude of "it is none of my business where he gets his money from so long as he doesn't use my money" is tantamount to dishonesty and for the purpose of this civil claim, she is treated as having actual knowledge. The third defendant undoubtedly benefited from the first defendant's misappropriation of the plaintiff's funds as the money went into the Lakeshore property.

86 Although the third defendant had raised reasonable doubts that the Ipoh property purchased by her jointly with Christina did not belong to her beneficially, I found (as observed earlier in [55]) that

her explanations on the opening of the Maybank account in Segamat purportedly on behalf of the third sister less than convincing. I further entertained considerable doubts on whether she did/did not have a beneficial interest in the Negri Sembilan property bought by her jointly with her fourth sister. The third defendant must therefore account to the plaintiff for those assets. Needless to say, in the light of my observation in [85], the third defendant must account as a constructive trustee for the plaintiff's money that went into the Lakeshore property.

Conclusion

87 Consequently, there will be interlocutory judgment with costs in favour of the plaintiff against the third defendant. An account and/or inquiry shall be taken/held by the Registrar to determine the sums misappropriated by the first defendant from the plaintiff's UOB accounts and whether and to what extent, the plaintiff's moneys went into: the Lakeshore property, the OCBC and UOB accounts of the first and third defendants in Singapore, the Maybank and Public Bank accounts of the second and third defendants in Malaysia and the Negri Sembilan property. The costs of such taking of accounts and/or inquiry shall be reserved to the Registrar.