

John While Springs (S) Pte Ltd and Another v Goh Sai Chuah Justin and Others
[2004] SGHC 150

Case Number : Suit 848/2000, RA 103/2004
Decision Date : 16 July 2004
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Lee Eng Beng and Mark Cheng (Rajah and Tann) for plaintiffs; N Screenivasan and Collin Choo (Straits Law Practice LLC) for first, second and sixth defendants
Parties : John While Springs (S) Pte Ltd; Segno Precision Pte Ltd — Goh Sai Chuah Justin; Cheong Shze Fun; Aligent Precision Pte Ltd; Lee Choon Boy; Lit Yoke Seng; Ng Wan Hwa Eddy; Tan Lay Chon Michelle; Lim Poh Gok Sharon; Chew Kean Guan; Koh Kok Eng

Damages – Assessment – Whether assistant registrar accurately assessed damages with regards to bonuses

Damages – Assessment – Whether plaintiffs successful in proving loss with regards to investigation expenses

16 July 2004

Choo Han Teck J:

1 The first and second plaintiffs are related companies and were at all material times in the business of manufacturing precision spring mechanisms. The first defendant was a director of the first and second plaintiffs until 27 October 2000. The second defendant was a director and manager of the second plaintiff up to 27 October 2000. The sixth defendant was the production manager of the second plaintiff up to 5 September 2000. The third defendant was a company incorporated with the purpose of carrying on business in competition with the plaintiff. The action in this suit was commenced by the plaintiffs against their former employees and directors for damages for breach of fiduciary duty as well as for restraining orders against them. The first, second, third and sixth defendants consented to judgment on the second day of the trial. The plaintiffs had decided not to proceed against the other defendants. The consent judgment of 21 March 2001 directed that damages were to be assessed and to be paid by the first and second defendants to the plaintiffs. The interim injunction against the first and second defendants was discharged but was continued as a permanent injunction insofar as the third defendant was concerned. The abovementioned defendants also admitted a statement of facts accepting that they had acted in breach of their duty of good faith as directors. The facts admitted were particularised in the statement of facts as follows:

PARTICULARS

- (a) The 1st Defendant and the 2nd Defendant have been actively involved in the business of the 3rd Defendant which is in direct and/or is intended to be in direct competition with the business of the Plaintiffs.
- (b) The 1st Defendant and the 2nd Defendants have induced Eddy an ex-employee of the 2nd Plaintiffs to leave the employment of the 2nd Plaintiffs and to seek employment with the 3rd Defendants.
- (c) The 1st Defendant and the 2nd Defendant have misappropriated the Plaintiff's goodwill,

customer base and corporate opportunities for the benefit of themselves and the 3rd Defendant by procuring or attempting to procure, both directly and through the 3rd Defendant, certain of the Plaintiffs' existing customers, including the following customers of the Plaintiffs:

- (i) Texas Instruments Malaysia Sdn Bhd;
- (ii) Hewlett Packard Singapore Pte Ltd; and
- (iii) Shimano (S) Pte Ltd

(d) The 1st Defendant has misused the Plaintiffs' premises and property for the purpose of advancing the interests of the 3rd Defendant including, misusing the Plaintiffs' premises and property for the purposes of ordering machinery and/or goods and for soliciting business for the benefit of the 3rd Defendant, and misusing the Plaintiffs' computers for the purpose of sending electronic mail and the preparation of documents for the benefit of the 3rd Defendant.

2 The parties proceeded to have damages assessed before the assistant registrar in January 2004. The assistant registrar assessed the damages under four heads and her orders were as follows:

| | | |
|-----|--|-------------------|
| (a) | expenses incurred for investigations | \$0.00 |
| (b) | salaries and bonuses | \$6,890.00 |
| (c) | loss of sales and profits | \$13,347.72 |
| (d) | lost chance to continue supplying former customers | <u>\$2,000.00</u> |

Total:
\$22,237.72

The plaintiffs were dissatisfied with the award and appealed. The crucial point arising in this appeal concerned the question of proof. This was an important point because the plaintiffs did not adduce evidence from several key witnesses. They included the private investigators who conducted what was said to be a difficult and thorough investigation, and who also provided bodyguard services to one Rhonda Wilson, a director of the plaintiffs. Rhonda Wilson had stated that she feared for her life when the investigations exposed the defendants' wrongdoings. The assistant registrar made no award in respect of those expenses on the ground that there was no evidence before her that the expenses were incurred. I shall revert to this shortly. Save for a small amount (\$6,890), the assistant registrar also disallowed a large claim for the refund of salary and bonuses on the same ground.

3 It may be convenient to deal first with Mr Lee Eng Beng's submission on behalf of the plaintiffs regarding the application of *Re Dawson (deceased)* [1966] 2 NSW 211. The judgment of Street J in this case was relied upon by the court in *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [2000] 2 SLR 501. Mr Lee first submitted that these two cases illustrate that the courts would apply remedies in equity (which inclines towards actual restoration), rather than remedies at common law (which inclines towards damages as compensation), where recovery against a fraudulent or wrongdoing trustee or employee is concerned. The apparent difference in approach is described in the *Dawson* case, at 216, as follows:

Moreover the distinction between common law damages and relief against a defaulting trustee is strikingly demonstrated by reference to the actual form of relief granted in equity in respect of breaches of trust. The form of relief is couched in terms appropriate to require the defaulting trustee to restore to the estate the assets of which he deprived it. Increases in market values between the date of breach and the date of recoupment are for the trustee's account: the effect of such increases would, at common law, be excluded from the computation of damages; but in equity, a defaulting trustee must make good the loss by restoring to the estate the assets of which he deprived it notwithstanding that market values may have increased in the meantime. The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of the restoration and not at the date of deprivation. In this sense the obligation is a continuing one and ordinarily, if the assets are for some reason not restored *in specie*, it will fall for quantification at the date when recoupment is to be effected, and not before.

4 In the *Kumagai-Zenecon Construction Pte Ltd* case, the court attempted to restate some broad principles concerning the liability of a fiduciary in breach at [35]:

1 If a breach of a fiduciary obligation has been committed then the fiduciary is liable to make restitution – that is restore the wronged person in the same position as he would have been if no breach had been committed. Consideration of causation, foreseeability and remoteness do not readily enter into the matter.

2 The test of liability is whether the loss would have been if there had been no breach. In other words, the fiduciary can escape liability only if he can demonstrate that the loss or suffering would have happened even if there been no breach.

3 The right to restitution and compensation of a beneficiary or sufferer which the Court of Equity have imposed on an errant fiduciary is more of an absolute nature than the common law of obligation to pay damages for tort or breach of contract.

4 The beneficiary or sufferer under the concept of restitution or equitable compensation is entitled to full indemnity and equity will award such interest as may be necessary to create full restitution and compensation.

5 Mr Lee further relied on *Canson Enterprises v Boughton & Co* (1991) 85 DLR (4th) 129 as espousing the above principles. However, the above passage from *Kumagai-Zenecon*, although only a brief and general summary of principles governing liability for breach of fiduciary duty, made it plain that the burden was on the plaintiffs to prove that their losses and/or damages suffered, were caused by or linked to the defendants' breaches of fiduciary duties. After that, the burden shifted to the defendants to show that the plaintiffs would have incurred those losses even if there had been no breach by the defendants. I accept that once liability is proved, the wrongdoer has to compensate the principal for such loss as was occasioned by the breach. It is in this sense that the reference by those authorities to the irrelevance of foreseeability and remoteness apply. That does not mean that the burden of proof has changed. Those authorities reinforced the principle that the innocent employer had to prove that his loss arose from the wrongful act. It is axiomatic in this context, that the employer must first prove that he had suffered loss. Only after that would the question whether the loss might be attributed to the wrongful act become relevant.

6 Hence, so far as the law was concerned, the assistant registrar, in citing Lord Browne-Wilkinson's judgment in *Target Holdings v Redferns* [1996] 1 AC 421 at 432 clearly understood

that while the detailed rules of evidence between the common law and equity were different, the fundamental principles of the burden of proof remained the same. The same emphasis was made by our Court of Appeal in *Ohm Pacific Sdn Bhd v Ng Hwee Cheng Doreen* [1994] 2 SLR 576. Thus, when a plaintiff seeks to prove that a defendant is in breach of a fiduciary duty, the burden of proof lies with the plaintiff, but equity may accept a lower standard of proof sufficient to require a shifting of the evidential burden to the defendant. This is nothing more than stating the plain application of the court's discretion as to when it thinks that sufficient evidence had been led so as to require a rebuttal or reply. When all the shifting is done, the court will assess the evidence in its entirety. That is to say that it will look at the nature of the evidence; to all that had been written or said, and all that had not been said, and determine the weight to be given to the sum and its parts. Thereafter, the big question, "Has the plaintiff or defendant as the case may be, proved his case on a balance of probabilities?" may be answered.

7 Applying the above principles, the assistant registrar proceeded to make her findings of fact. I find no grounds whatsoever to interfere with her findings save for the question of bonuses paid to the defendants. The assistant registrar had ordered a repayment of one third of the first defendant's salary because she accepted the evidence of Loh Chee Khun, the erstwhile production manager of the first plaintiff, that during the last ten days or so, the first defendant had not been attentive to his job. This part of her order could not be faulted. However, the question of bonuses was not addressed. It is this aspect that requires some attention now. A bonus is generally a payment fashioned as a reward as well as an incentive. No reasonable employer would have offered a bonus to a cheating employee, or one who was in breach of his fiduciary duty as was the case here. This would be a fair inference of fact from the admitted facts at trial and is not dependent on any assessment of the reliability of witnesses. The bonus payments of \$56,250, \$14,600, and \$16,933 to the first, second and sixth defendants must, therefore, be repaid to the plaintiffs with interest at 6% from dates of notice of assessment.

8 In the appeal before me, Mr Lee applied to have affidavits of two of the investigators employed by the plaintiffs admitted to prove the expenses of investigation. He submitted that the two affidavits were filed for the trial but the witnesses were not called. I disallowed the affidavits to be used for the appeal because the makers had to be present for cross-examination. If they were available for the trial then they must also be available for the assessment. The only evidence available was the oral evidence of Rhonda Wilson and the invoices from the investigators. Rhonda Wilson was found not to have precise knowledge as to how the plaintiffs were charged, and she also admitted that the investigators did work that was not directly relevant to the defendants. This left the assistant registrar with insufficient evidence to determine the costs of the investigation expenses, or any portion of it with any degree of reliability. Consequently, she dismissed the plaintiff's claim for the costs of investigation. A finding of fact of this nature should not be disturbed.

9 For the reasons above, save for the repayment of bonuses, the appeal is dismissed. Although the plaintiffs had only a limited success in this appeal, I am of the view that overall, some costs should be awarded to them. After hearing submissions of counsel, I fixed costs at \$1,200 and awarded reasonable disbursements to each of the plaintiffs.