

Viking Airtech Pte Ltd v Foo Teow Keng and Another
[2007] SGHC 176

Case Number : Suit 111/2006
Decision Date : 12 October 2007
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Liew Chen Mine (Aptus Law Corporation) for the plaintiff; Mimi Oh (Mimi Oh & Associates) for the defendants
Parties : Viking Airtech Pte Ltd — Foo Teow Keng; JL Marine & Engineering Pte Ltd (formerly known as Viking HVAC & Automation Pte Ltd)

Companies – Directors – Liabilities – Former director of company diverting business to competing company – Whether former director in breach of fiduciary duty – Whether competing company liable as accessory

Tort – Conversion – Former director of company taking over premises and equipment of company's overseas office on behalf of competing company – Whether former director and competing company liable for conversion

12 October 2007

Judgment reserved.

Judith Prakash J

Introduction

1 The plaintiff, Viking Airtech Pte Ltd, is a company incorporated in Singapore. Its main business is to design, supply, install and commission heating, ventilation and air-conditioning systems for marine vessels. The first defendant, Foo Teow Keng (also known as George Foo), was a shareholder of the plaintiff and, prior to his resignation on 6 November 2003, he held the posts of director and general manager of the plaintiff. The second defendant, JL Marine & Engineering Pte Ltd, is a company incorporated in Singapore in mid 2003 and it carries on the same business as the plaintiff does in competition with the plaintiff.

2 The plaintiff claims that Mr Foo acted in breach of his fiduciary and other duties to the plaintiff and diverted business from the plaintiff to the second defendant. It seeks damages to be assessed against both defendants in respect of the diverted business. Alternatively, it wants an account of profits made by the second defendant in relation to the business diverted to it and a consequential order for payment after the taking of the account. Further, the plaintiff seeks damages to be assessed against Mr Foo for conversion of the plaintiff's assets in Shanghai.

Background

3 In 1994, a company called Viking Engineering Pte Ltd ("Viking Engineering"), which is a ship repairer, procured the incorporation of the plaintiff company for the purpose of taking over its heating, ventilation and air-conditioning business (a business that is referred to as the "HVAC" business in the marine industry). Viking Engineering recruited Mr Foo to build up the HVAC business as he had experience in HVAC systems and Mr Foo then took up 30% of the initial issued and paid up capital of the plaintiff and was appointed a director of the plaintiff. The other directors of the plaintiff were one Mr Ong Choo Guan, one Mr Bo Johansson and one Mr Sune Andersson. Mr Ong had a

minority interest in the plaintiff whilst the majority shareholder was Viking Engineering (51%) which itself was owned by Mr Johansson and Mr Andersson.

4 Mr Foo was initially employed as a manager of the plaintiff and was promoted to general manager in about 1998. He held this post until his resignation in November 2003. As general manager, Mr Foo had overall charge of the plaintiff's operations. He dealt with its customers including two Indonesian shipyards called PT Pal Indonesia (Persero) ("PT Pal") and PT Dok Dan Perkapalan Surabaya (Persero) ("PT Dok").

5 In 1999, the plaintiff engaged a firm known as Jin Lian Marine Engineering & Trading ("Jin Lian") as its in-house sub-contractor for the purpose of supplying and supervising workers from China for the plaintiff's operations. The sole proprietor of Jin Lian was a lady named Yang Ling who was herself a Chinese national. Mr Foo and Mdm Yang were married in June 2003.

6 On 30 August 2003, Jin Lian's sub-contract with the plaintiff was terminated by Mr Ong. Mdm Yang, who had had an office in the plaintiff's premises, then moved to premises at Jurong West Avenue 1 occupied by two friends of Mr Foo, one Ho Fong Jun and one Ng Wei Lip. On 5 September 2003, the second defendant was incorporated. At the time of its incorporation, the second defendant was called "Viking HVAC & Automation Pte Ltd". Its original shareholders and directors were the said Ho Fong Jun and Ng Wei Lip and its registered office was at the premises occupied by Mdm Yang's firm, Jin Lian.

7 On 16 September 2003, a contract was signed between the second defendant and PT Dok whereby the second defendant undertook to sell and deliver an air-conditioning system and various other items which were required to be installed in an oil tanker which PT Dok was building for Pertamina, the Indonesian state oil company. The value of the contract was US\$149,000. The contract was signed on behalf of the second defendant by Mr Foo as its general manager although at that time Mr Foo still held his posts in the plaintiff.

8 On 23 September 2003, a contract was signed between the second defendant and PT Pal whereby the second defendant undertook to sell and deliver an air-conditioning system and various other items which were required to be installed in a oil tanker which PT Pal was building for Pertamina. The value of the contract was US\$198,000. The contract was signed on behalf of the second defendant by Mr Foo, as its general manager.

9 In the meantime, in early August 2003, PT Pal had given the plaintiff written confirmation of its order for a HVAC system for a tug boat called "Pelindo II". A formal purchase contract was signed between PT Pal and the plaintiff on 19 August 2003. Mr Foo was the person who signed the contract on the plaintiff's behalf. The contract provided that PT Pal was to establish an irrevocable letter of credit for the full amount of the purchase price of US\$29,900 and that payment could be drawn under the credit by presentation of the shipping documents for the equipment. In October 2003, PT Pal established a letter of credit but the name of the beneficiary was stated to be "Viking HVAC & Automation Pte Ltd" and the letter of credit was sent to the second defendant's office instead of to the plaintiff. In January 2004, the plaintiff discovered a complete HVAC system in its warehouse that had been constructed for the "Pelindo II" and was surprised that PT Pal had not asked it to make delivery of the equipment earlier. The plaintiff subsequently discovered from PT Pal that the HVAC system for "Pelindo II" was delivered to it on 19 January 2004 by the second defendant.

10 Mr Foo was not happy with the actions of Mr Ong whom he considered had, with the support of Mr Bo Johansson, been interfering in the plaintiff's business in order to marginalise and undermine Mr Foo's position in the plaintiff. In August 2003, Mr Ong employed one Mr Ng Seng Joo as an

assistant manager to assist Mr Foo. On 5 November 2003, Mr Ong sent Mr Foo an e-mail in which he suggested that Mr Foo concentrate on marketing while Mr Ong would take over the management of plaintiff. The next morning, Mr Foo tendered his resignation and left the plaintiff immediately. His position was taken over by Mr Ng Seng Joo.

11 On or about 2 December 2003, Mdm Yang and Mr Foo took over the second defendant from Mr Ho and Mr Ng. They became the sole directors and shareholders of the second defendant. No consideration was paid for their acquisition of the shares in the second defendant. According to Mr Foo, there was no sale and purchase agreement between them and Mr Ho and Mr Ng in relation of the takeover because at the time the second defendant had no assets. The couple increased the paid-up capital of the second defendant to \$200,000. In the result, Mdm Yang held 60% of the shares in the second defendant while Mr Foo held 40% thereof. In February 2004, the Registrar of Companies and Businesses, consequent upon a complaint made by the plaintiff, directed the second defendant to change its name to one that did not resemble the plaintiff's or Viking Engineering's name. After an unsuccessful appeal against this directive, the second defendant changed its name to JL Marine & Engineering Pte Ltd in May 2005.

12 Whilst working for the plaintiff, Mr Foo had set up an office for it in Shanghai. The office manager was one Mr Joseph Zhang who was the brother of Mdm Yang. According to Mr Ong, at the time, the plaintiff did not know of the relationship between the two. On 10 November 2003, Mr Ong flew to Shanghai to check on the plaintiff's office in Shanghai. He was unable to gain access to the premises. Mr Zhang did not return his repeated calls and goods which had been delivered to the Shanghai office were not sent from there to the customers. Subsequently, the plaintiff's signboard was taken down and the second defendant's signboard was put up and the Shanghai office became, practically overnight, the second defendant's office. The plaintiff had to open a new Shanghai office. It was not able to retrieve any of its equipment and other belongings from the original Shanghai office.

13 The disputes between Mr Foo and his former partners did not end there. Mr Foo started an action in the High Court (Suit 625/2004) against Mr Ong, Mr Johansson and Viking Engineering for relief on grounds of their oppressive conduct against him as a minority shareholder of the plaintiff herein. He was successful in this action and, in June 2005, an order was made for the compulsory purchase of his shares in the plaintiff herein. Subsequently, pursuant to a settlement agreement between the parties, Mr Foo was paid \$300,000 for his shares in the plaintiff.

The claims and the defence

14 The plaintiff originally made six separate claims against the defendants but by the time the trial started, these had been reduced to four. These were as follows:

(a) a claim for damages on the basis that the plaintiff had lost profits estimated at 30% of the contract value (US\$198,000) in respect of the contract between the second defendant and PT Pal relating to the Pertamina tanker;

(b) a claim for damages on the basis that the plaintiff had lost profits estimated at 30% of the contract value (US\$149,000) in respect of the contract between the second defendant and PT Dok relating to another Pertamina tanker;

(c) a claim for damages in respect of the supply of equipment to PT Pal for the tugboat "Pelindo II"; and

(d) damages for conversion of the furniture and fittings and equipment belonging to the plaintiff's Shanghai office.

15 The defendants denied liability. Mr Foo's defence was that:

(a) he had not acted in breach of his fiduciary duties to the plaintiff in allocating the PT Pal and PT Dok contracts to the second defendant in September 2003 because:

(i) the in-house sub-contractor Jin Lian had been terminated at the end of August 2003 and replaced by Viking Engineering;

(ii) Viking Engineering was not competent to supervise Chinese workers in the installation of HVAC systems;

(iii) as a result of the termination of Jin Lian and the consequent payment to that firm of S\$300,000, the plaintiff had cash flow problems;

(iv) Mr Foo had at that time the prospect of securing about \$7m worth of contracts for the plaintiff in the last quarter of 2003;

(v) in view of the plaintiff's limited resources and the fact that the PT Dok and PT Pal contracts were only capable of earning the plaintiff profits of ten percent of the contract price, Mr Foo decided to allocate these contracts to the second defendant and concentrate on securing the \$7m worth of new contracts.

(b) as regards the "Pelindo II" contract, Mr Foo did not cause or divert or procure the diversion of that contract to the second defendant in that PT Pal had issued a letter of credit in favour of the second defendant in October 2003 and wanted the second defendant to deal with the contract as it had no confidence in the delivery of the system by the plaintiff once Mr Ng Seng Joo took over Mr Foo's position in the plaintiff;

(c) the plaintiff was fully aware of PT Pal's breach of contract in relation to the "Pelindo II" contract but chose to place the blame on Mr Foo rather than on the plaintiff's inefficiency in servicing its customers. Therefore any prejudice to the plaintiff's interest was caused by its own incompetence in not being able to deliver and supply PT Pal as contractually required;

(d) Mr Foo denied that the assets which the plaintiff had claimed to be in its possession in its Shanghai office had actually existed and said that accordingly, there was no misappropriation of any assets purportedly belonging to the plaintiff save for an old handphone and a laptop computer which the plaintiff had given to Mr Foo for his use and which he intended to return to the plaintiff once it paid him certain salary and expenses.

16 In its defence, the second defendant averred that after it was taken over by Mr Foo and Mdm Yang in December 2003, it was carrying on the HVAC business in the marine industry in stiff competition with the plaintiff who was trying to outmanoeuvre or oust the second defendant by undercutting it whenever possible. The second defendant was a competitor of the plaintiff and was not the recipient or conduit of the assets, contracts or corporate opportunities of the plaintiff. The second defendant further denied that it acted in tandem with Mr Foo while he was purportedly acting in breach of his fiduciary duties to the plaintiff. It also averred that it was never the nominee acting at the behest of or on behalf of Mr Foo.

Analysis and decision

The PT Pal and PT Dok contracts

17 Mr Foo, as stated, forthrightly admitted from the beginning having given the PT Pal and PT Dok contracts to the second defendant at a time when he was still the general manager and director of the plaintiff. In court, he also admitted that he did not inform the other directors of the plaintiff or seek their consent at any time in respect of the passing over of these two contracts to the second defendant. It appears to me that in doing so, *prima facie*, Mr Foo acted in breach of his fiduciary duty as a director of the plaintiff to act honestly in its interest. He was also, *prima facie*, in breach of his duty as an employee of the plaintiff since as such he had to act diligently in the plaintiff's best interests and this was not achieved by passing a contract from the plaintiff's clients to a new competitor of the plaintiff. It was not disputed that Mr Foo had been negotiating for these two contracts on behalf of the plaintiff between April and August 2003. In these circumstances, the level of negotiations was such that the two contracts were ripening or maturing business opportunities for the plaintiff before they were diverted to the second defendant.

18 Mr Foo justified his decision to divert the two contracts as a business management decision based on the inability of the plaintiff to take on these contracts due to cash flow and low staff morale problems. Whilst perhaps a diversion of the contracts could be justified on that ground, that was a decision that could not be taken by Mr Foo alone, particularly since he was passing the contracts to a company which was a competitor even if there was no reason to suspect that it was actually a company belonging to him. Mr Foo had the duty to inform his fellow directors of the company's inability to perform the contracts offered to it by PT Dok and PT Pal and then allow them to make a consensual decision in consultation with him as to what was to be done with those contracts. He was in breach of duty when he acted unilaterally to pass the contracts on to a third party.

19 In any case, the plaintiff submitted that, in fact, Mr Foo was not acting *bona fide* in that the second defendant was, even in September 2003, a front for Mr Foo and his wife and was not an independent company owned by third parties. It substantiated this submission by reference to the following matters:

- (a) the second defendant was incorporated only five days after Mdm Yang's appointment as the in-house sub-contractor of the plaintiff was terminated;
- (b) the second defendant's first premises were at Blk 502 Jurong West Avenue 1 #04-819, Singapore which was an address it shared with Mdm Yang's company Jin Lian;
- (c) further, the original name of the second defendant included the words "Viking HVAC" and it was highly unlikely that Mr Ng and Mr Ho independently came up with these words;
- (d) in December 2003, Mr Foo and Mdm Yang obtained the transfer of all the shares in the second defendant from Mr Ng and Mr Ho without the need for any payment and this was despite the fact that by that time, the second defendant had assets in the form of the contracts with PT Pal and PT Dok;
- (e) Mr Foo asserted that Mr Ng and Mr Ho gave the second defendant away for free and did not even ask for reimbursement for the costs of setting up that company; all they were promised was a small cut of an indeterminate amount to be paid when the PT Pal and PT Dok contracts were completed;

(f) the reasons given by Mr Foo as to why he and his wife were allowed to take over the second defendant for nothing were ridiculous being:

(i) that Mr Ng and Mr Ho wanted out of the second defendant as they could not agree to Mr Foo and his wife taking more than a 50% stake in the company; and

(ii) that Mr Ng and Mr Ho were afraid that lawsuits would be taken by Mr Ong against them.

(g) Mr Foo had signed the contracts on behalf of the second defendant as its "general manager" only a few weeks after the incorporation of the latter and as he had no qualms acting as its general manager whilst he was still with the plaintiff, he must have had an interest in the second defendant; and

(h) until Mr Foo and Mdm Yang took over the second defendant, that company did not do anything substantial in relation to producing the equipment it had contracted to provide to PT Pal and PT Dok. The production only started in December 2003 after the change of management.

20 I accept the above submissions. Having listened to Mr Foo and Mdm Yang in court, I do not believe their protestations of innocence. I think that they carefully planned Mr Foo's departure from the plaintiff and they planned how to divert business from it to their own new business. I accept that the second defendant was at all times the creature of Mr Foo and Mdm Yang even when it appeared to be owned by third parties. Both Mr Foo and Mdm Yang were not able to give coherent and convincing evidence as to why the company should have been set up in the first place if Mr Foo was not to run it and as to why they were able to take it over without any payment. Mdm Yang in particular gave unconvincing reasons as to why she became the major shareholder of the second defendant. When Mr Foo diverted the contracts to the second defendant, his main motive was to profit himself and the second defendant and he did not take that decision because he genuinely considered that the plaintiff would not be able to carry out the contracts due to cash flow and staff morale problems. At that time, Mr Foo was at loggerheads with Mr Ong and was not happy about how he was being treated in the plaintiff company. Whilst he had grounds for complaint on that account, those grounds did not justify him acting dishonestly and in breach of his duties to the plaintiff.

21 The plaintiff submitted that on the evidence, there was no factual basis for alleging that it was facing severe cash flow problems and low staff morale. At the time when Mr Foo decided to divert the two contracts, *i.e.* in mid September 2003, the plaintiff had in excess of US\$400,000 and S\$138,000 in its bank accounts. This was in addition to the overdraft facility of \$350,000 available to the plaintiff which had not been utilised in September 2003. Further, Mr Foo himself had asserted that he was able to collect outstanding payments from the plaintiff's customers such that by the end of December 2003, there was almost S\$1m in the plaintiff's bank account. Since Mr Foo was confident of his ability to collect money from the plaintiff's customers due to his close rapport with them, it would not have been necessary for him to reject the two contracts in September 2003 due to alleged cash flow problems. He would have known that he would have been able to collect enough money to tide over such problems.

22 Further, Mr Foo himself had conceded that the two contracts did not require any initial outlay as no performance bond or banker's guarantee needed to be furnished. The lead time for the PT Pal project was ten months and that for the PT Dok project was six months and therefore capital expenditure on the two contracts would be spread over a substantial period. Thus, Mr Foo did not need to be concerned by any immediate cash flow problem resulting from the payment of \$300,000 to Mdm Yang when her contract was terminated.

23 Having looked into the evidence, it appears to me that while in the short term there may have been some cash flow problems in the plaintiff company, there was enough money in the bank and coming in through collection activities for the plaintiff to take on the two contracts. Mr Foo had admitted collecting a great deal of money for the plaintiff but he expressed the concern that it would not be sufficient for the plaintiff to perform these contracts as well as other contracts worth some \$7m which he was negotiating to bring in. I did not believe him. If there had really been a problem, he should have discussed it with the other directors so that they could decide whether to take the two Indonesian contracts which were at hand or whether to pass them over in favour of clinching the prospective bigger contracts. He did not have the right to pass these contracts over to another company much less one in which he was interested. I find that he was in breach of duty and that the second defendant aided and abetted that breach of duty and must be responsible for it as an accessory.

"Pelindo II"

24 The "Pelindo II" contract was directly between the plaintiff and PT Pal. The plaintiff fabricated the equipment required by the contract but did not deliver it to PT Pal. It only realised that it had failed to make delivery when Mr Ng Joo Seng who had taken over Mr Foo's position unexpectedly came across the equipment in the plaintiff's warehouse at the end of January 2004. Mr Ng said that he was surprised that PT Pal had not asked for delivery earlier as he then remembered that originally the equipment was supposed to be shipped in November 2003. He therefore contacted PT Pal and asked when it wanted the equipment to be shipped. As a consequence of the enquiry, the plaintiff was informed that the equipment had been received by PT Pal on 19 January 2004. The plaintiff subsequently discovered that the equipment had been sent to PT Pal by the second defendant and that it had been paid for by a letter of credit issued by PT Pal in October 2003 which named the second defendant as the beneficiary of the letter of credit.

25 There was no doubt that the second defendant received the letter of credit. Mr Foo said that he did not know that the letter of credit had named the second defendant as beneficiary when it was issued or that it had been sent to the second defendant's address. Nor did he know why the beneficiary was the second defendant rather than the plaintiff. He asserted that when he found out later about the letter of credit, he had called the representative of PT Pal and asked that company to change the name of the beneficiary. However, PT Pal did not do so. At that time, December 2003, PT Pal simply wanted Mr Foo to oversee the "Pelindo II" contract because it was uncomfortable and had no confidence in the plaintiff to deliver the equipment.

26 I do not believe the evidence of Mr Foo or Mdm Yang that they knew nothing about the original issue of the letter of credit in favour of the second defendant in October 2003. I do not believe Mdm Yang's evidence that she only found out about this in December 2003 when she "accidentally" found the letter of credit in the second defendant's office. In my judgment, the letter of credit must have been issued in favour of the second defendant and sent to that company because Mr Foo told PT Pal to issue it in the second defendant's name. At that time, it would be recalled, the second defendant's name was "Viking HVAC & Automation Pte Ltd", a name that was so similar to that of the plaintiff that one would expect the second defendant to be a company related to the plaintiff. Mr Foo was the general manager of the plaintiff. When he resigned, he had the duty of informing his successor of the plaintiff's ongoing projects and he should have reminded Mr Ng about the "Pelindo II" contract and told him to ensure that that contract was fulfilled. Instead, he proceeded to cause the second defendant to fabricate the equipment since he had the letter of credit in his hand and would receive payment when the equipment was delivered. In my judgment, he deliberately diverted this contract to the second defendant as well and deprived the plaintiff of the benefit of the contract.

Conversion of equipment in Shanghai

27 I find both the defendants liable for the conversion of the plaintiff's assets in its Shanghai office. Mr Foo simply took over that office on behalf of the second defendant with the assistance of the office manager, Mdm Yang's brother. He had no qualms in doing so. In my judgment, the act was akin to theft and the defendants cannot escape liability for damages by asserting that the items in the office were old and some of them were in bad condition. That is not an excuse. Any equipment that was taken away from the plaintiff would have to be replaced by it by buying new equipment and the plaintiff would accordingly incur loss. Mr Foo did not deny that the office equipment, fixtures and fittings in Shanghai were bought and paid for by the plaintiff. He admitted that despite demands having been made for the return of the items, he had not returned them to the plaintiff and also conceded that he and the second defendant had continued to use whatever was taken over without drawing any distinction between the plaintiff's items and those bought by the second defendant for its own use. Having taken over the office with everything in it and also the previous employee of the plaintiff, the second defendant would have to prove what items bought by the plaintiff were no longer there when the office was appropriated.

Conclusion

28 In the result, I find both the defendants liable to the plaintiff for damages for conversion. The first defendant, Mr Foo, is liable for damages for breach of duty and the second defendant is liable for damages as being an accessory to and abetting such breaches of duty. There will be judgment for the plaintiff against the defendants for damages to be assessed and costs.